

CIVIL COVER SHEET

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The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Emilio Castillo, et al.

(b) County of Residence of First Listed Plaintiff Scottsdale, AZ
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Joshua C. Ezrin, Audet & Partners, LLP
221 Main Street, Suite 1460, San Francisco, CA 94105
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DEFENDANTS
Warner Music Group Corp., a Delaware corporation

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) _____

MEJ **E-filing**

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question *(U.S. Government Not a Party)*

4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

ADR

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 170 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district *(specify)*

6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
28 U.S.C. §§ 1711-1715 and 28 U.S.C. §§ 1332(d)

Brief description of cause:
Breach of Contract

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):*

JUDGE Hon. Richard Seeborg DOCKET NUMBER 3:12-cv-00559-RS

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only)

SAN FRANCISCO/OAKLAND SAN JOSE EUREKA

DATE 03/27/2012 SIGNATURE OF ATTORNEY OF RECORD *[Handwritten Signature]*

Handwritten signature: OR 10/1/12

FILED
2012 MAR 27 P 3:00
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Handwritten signature]

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MEJ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 12 1531

19 EMILIO CASTILLO and STEPHEN KUPKA,
collectively and professionally known as
20 TOWER OF POWER, individually and on
21 behalf all those similarly situated,

CASE NO.:
CLASS ACTION COMPLAINT AND
JURY TRIAL DEMANDED

22 Plaintiffs,

23 vs.

24 WARNER MUSIC GROUP CORP., a Delaware
25 corporation,

26 Defendant.

1 NATURE OF THE ACTION

2 1. Plaintiffs, EMILIO CASTILLO and STEPHEN KUPKA, collectively and
3 professionally known as TOWER OF POWER, individually and on behalf all those similarly
4 situated, bring this nationwide class action for breach of contract and statutory violations of
5 California law against Defendant WARNER MUSIC GROUP CORP. (hereinafter "WMG"), for
6 past and continuing failure to pay Plaintiffs and the Class income owed for royalties relating to
7 the licensing of musical performances and/or recordings sold by "Music Download Providers"
8 or "Ringtone Providers" (i.e., "Digital Providers") under the terms of the standard WMG
9 Recording Agreement ("WMG Agreement").

10 2. WMG, in the normal course of business, enters into licensing agreements with
11 Digital Content Providers whereby those Providers are permitted to sell WMG's catalog of
12 master recordings (including those made and/or produced by Plaintiffs and the Class under the
13 terms of the standard WMG Agreement) to consumers via various forms of digital distribution.

14 3. On information and belief, under its licensing agreements with Music Download
15 Providers, WMG receives approximately seventy percent (70%) for every licensed, digital
16 download sold by the Music Download Provider to an end user. Under its licensing agreements
17 with Ringtone Providers, WMG receives approximately fifty percent (50%) of the retail sale
18 price of every licensed, digital Download sold by the Ringtone Provider to an end user.

19 4. Under the WMG Agreement at issue in this case, when WMG licenses master
20 recordings to third parties, WMG is required to pay Plaintiffs and the Class a royalty equivalent
21 to fifty percent (50%) of all net receipts received from these third party-licensees (hereinafter
22 "Royalty Provisions"). The Royalty Provisions apply to any and all master recordings licensed
23 by Defendant to Digital Content Providers for their sale through digital distribution.

24 5. WMG improperly treats each Digital Download as a "sale" of a physical product
25 (i.e., CD or LP) through its "normal retail channels," which are governed by much lower royalty
26 provisions in the WMG Agreement. In doing so, WMG has: (i) failed to properly account for
27 and pay Plaintiffs and the other Class members moneys owed from the licensing of master
28

1 recordings to Digital Content Providers; and (ii) underreported the actual number of digital
2 downloads that occur by treating downloads as sales of physical product that might be returned;

3 6. During the applicable Class Period, WMG has, in a wide-spread and calculated
4 effort to compensate for the loss of revenue caused by the proliferation of free music file-
5 sharing services, violated the royalties provision of the WMG Agreement with Plaintiffs and the
6 other Class members by: (i) failing to make proper royalty payments to Plaintiffs and Class
7 members and/or failing to properly credit Plaintiffs and Class members' royalty accounts, and
8 (ii) improperly withholding royalties and/or credits owed to Plaintiffs and the Class as
9 "reserves" for the return of products sold when, in fact, Digital Downloads cannot be returned.
10 As a result of Defendant's ongoing breach of the Royalty Provisions, Plaintiffs and Class
11 members have suffered tens of millions of dollars in damages.

12 7. Accordingly, Plaintiffs seek damages on behalf of themselves and the Class, as
13 well as an accounting and judgment declaring the proper method of calculating payments of
14 royalties or crediting royalty accounts with respect to the licensing of master recordings to third-
15 party Digital Content Providers. Further, Plaintiffs request that this Court order Defendant to
16 adhere to the proper methodology for calculation of such royalties in the future.

17 **THE PARTIES**

18 8. Plaintiff EMILIO CASTILLO is a musician, recording and performing artist,
19 who resides in Scottsdale, Arizona.

20 9. Plaintiff STEPHEN KUPKA is a musician, recording and performing artist, who
21 resides in West Hills, California.

22 10. Plaintiffs Castillo and Kupka (hereinafter "Plaintiffs") are collectively and
23 professionally known as TOWER OF POWER, a prominent musical group, originating in
24 Oakland, California, that has been performing for over 43 years. They are best known for their
25 hits "You're Still A Young Man", "So Very Hard To Go", "What Is Hip?", and "Don't Change
26 Horses (In the Middle of a Stream)."

27 11. Defendant WARNER MUSIC GROUP CORP. ("WMG"), is a corporation duly
28 organized and existing under the laws of the State of Delaware, with its principal place of

1 business in the State of New York. At all relevant times, WMG was and continues to be in the
2 business of exploiting the sound recordings of musical performances and the audio-visual
3 recordings of such performances of Plaintiffs and the Class members. Upon information and
4 belief, WMG is the third largest record label in the recording industry, making it one of the “Big
5 Four” record companies. WMG includes various major divisions/labels including but not
6 limited to Atlantic Records Group; Independent Label Group; Rhino Entertainment; Warner
7 Bros. Record Group; and Warner Nashville (hereinafter collectively WMG’s “predecessors and
8 successors-in-interest”). WMG’s exploitation includes, but is not limited to, producing,
9 manufacturing, distributing, licensing, and selling these recordings.

10 JURISDICTION AND VENUE

11 12. Jurisdiction is premised upon diversity of citizenship pursuant to the Class
12 Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. §§ 1711-1715 and 28 U.S.C. §§ 1332(d), in
13 that there is diversity of citizenship, and the amount in controversy exceeds Five Million Dollars
14 (\$5,000,000.00).

15 13. Venue is proper pursuant to 28 U.S.C § 1391(a)(2), et seq., as Defendant
16 transacts business in this district and many of the acts complained of herein, including but not
17 limited to the various predicate acts, occurred within this district and/or were known or intended
18 by Defendant to occur in or have consequences in this district.

19 SUBSTANTIVE ALLEGATIONS

20 Music Download Providers

21 14. Consumers are increasingly purchasing and downloading digital versions of
22 master recordings directly to their computers or other electronic storage devices (“Music
23 Downloads”) from various “Music Download Services” offered by “Music Download
24 Providers.” There is no physical packaging and returns are not permitted for Music Downloads.
25 Additionally, Music Downloads often have various restrictions in place to prevent the consumer
26 from copying and/or sharing the Music Download with others. Oftentimes, these restrictions are
27 enforced through a Digital Rights Management system (“DRM”) that encrypts the content.
28

1 15. In order to allow users to purchase digital copies of the master recordings owned
2 by record labels, Music Download Providers typically must sign licensing agreements with
3 record labels such as WMG. Depending on the licensing agreement with the record label, Music
4 Download Providers generally either: (a) charge a flat, per-download fee to end users; or (b)
5 operate as a subscription service, allowing consumers to access digital copies of the master
6 recordings for a set monthly fee for as long as they continue paying the monthly subscription
7 charge. Some providers offer both options. On information and belief, Defendant generally
8 provides "licensing" royalty rates for subscription services but provide "sales" royalty rates for
9 downloads.

10 16. Most of the prominent Music Download Providers have signed licensing deals
11 with Defendant and the other prominent record labels to offer Music Downloads to consumers.
12 These providers include, but are not limited to, Amazon.com, Buy.com, iTunes,¹ Liquid Digital
13 Media (walmart.com), Napster, MOG, Rdio, Rhapsody, Microsoft's Zune Marketplace, MTC,
14 Nokia, Spotify, Sprint, T-Mobile, Verizon Wireless, Orange, Vodafone and eMusic. In fact, the
15 International Federation of the Phonographic Industry ("IFPI"), a worldwide representative of
16 the record industry, estimates that record labels had "licensed" roughly thirteen million tracks of
17 music to over four hundred Music Download Providers by 2010.

18 17. Music Download Providers obtain licenses from Defendant that authorizes these
19 providers to sell or otherwise distribute, via digital download, Defendant's catalog of master
20 recordings, including Plaintiff's recordings as described herein, and the recordings owned and/or
21 controlled by the Class.

22 18. On information and belief, under its licensing agreements with Music Download
23 Providers, Defendant does not manufacture or warehouse any physical product or packaging,
24 nor does it ship or sell any product to stores or other distribution points, and faces no risk of
25

26 ¹ When Apple launched its iTunes Store in April 2003, and offered "legal" Music Downloads for, on average, 99¢
27 per track or \$9.99 per album, the popularity of digital downloads began to grow exponentially. On February 24,
28 2010, total music downloads from the iTunes Store reached ten billion tracks. Today, the iTunes Store accounts for
roughly two-thirds of all Music Downloads. The iTunes store generated \$1.4 billion in revenue for Apple in the
second quarter of 2011, up from \$1.1 billion in the second quarter of 2010.

1 breakage or the return of unsold product. Rather, as the Ninth Circuit held in *F. B. T*
2 *Productions, Inc. v. Aftermath Records*, 621 F.3d 958 (9th Cir. Sept. 3, 2010), cert. denied 79
3 U.S.L.W. 3370 (March 21, 2011), Defendant is "licensing" as opposed to "selling" its catalog of
4 recordings to Music Download Providers for distribution via digital download by consumers.

5 19. The prevalence of Music Download sales by Music Download Providers means
6 that Defendant's continued, improper accounting of royalties owed has deprived Plaintiffs and
7 the Class members of tens of millions of dollars in royalties. This is at a time when the music
8 industry as a whole is suffering from significant contraction in the volume of sales.

9 **Ringtone/Mastertone Providers**

10 20. Ringtones that are a portion clip of an artist's actual sound recording (rather than
11 an electronic reproduction, e.g., MIDI) that are played on a mobile phone when someone is
12 calling, texting, or otherwise trying to contact the mobile phone operator are known as
13 "Mastertones."

14 21. Mastertones are sold to consumers by "Ringtone Providers." Mastertones range
15 in price between \$1.00 and \$3.00 per ringtone. Ringtone Providers include, but are not limited
16 to, mobile phone companies (including, but not limited to, AT&T Wireless, Verizon Wireless,
17 Sprint, and T-Mobile), content owners (including, but not limited to MTV and VH1), and third-
18 party aggregators (including, but not limited to, Zed, Hudson Soft, Jamster and iTunes). In
19 general, consumers purchase and download Mastertones directly from their mobile phones.

20 22. On information and belief, in order to sell Mastertones to consumers, Ringtone
21 Providers must enter into license agreements with Defendant and other record labels that
22 authorize Ringtone Providers to use those labels' master recordings to produce Mastertones for
23 sale to consumers. In return, the Ringtone Providers pay the record labels approximately fifty
24 percent (50%) of the retail sales price of the Mastertone.

25 23. Record labels have made billions of dollars from their licensing agreements with
26 Ringtone Providers. Globally, Mastertone sales reached roughly \$4 billion in 2004. In the
27 United States alone, Mastertone sales reached \$714 million in 2007 and \$541 million in 2008.
28

1 24. Mastertones play an important role in the record industry's revenue stream. The
2 Recording Industry Association of America ("RIAA") has added its Gold and Platinum
3 recognition program to Mastertone sales. In 2006, the RIAA awarded Gold Status (500,000
4 downloads) to 84 Mastertones, Platinum Status (1,000,000 downloads) to 40 Mastertones, and
5 Multi-Platinum Status (2,000,000 downloads or more) to 4 Mastertones.

6 25. On information and belief, under its licensing agreements with Rington
7 Providers, Defendant does not manufacture or warehouse any physical product or packaging,
8 nor do they ship or sell any product to stores or other distribution points, and faces no risk of
9 breakage or the return of unsold product. Rather, Defendant is licensing its catalog of master
10 recordings to Rington Providers as it does with Music Download Providers, for sale or
11 distribution by them via digital download to consumers.

12 26. The agreements between Digital Content Providers and Defendant that allows
13 these providers to distribute Defendant's master recordings for sale through digital downloads
14 are "licenses" or "leases" and subject to the royalty provisions for such clauses. Defendant's
15 continued, improper accounting of royalties owed to Plaintiffs and Class members has deprived
16 Plaintiffs and the Class of tens of millions of dollars in royalties.

17 **The WMG Brothers Recording Agreement**

18 27. The WMG Agreement is used primarily with musical artists and producers.
19 Under the WMG Agreement, Plaintiffs and the Class agree to transfer title to master recordings
20 to allow Defendant to engage in the commercial exploitation of said recordings. In return,
21 Defendant agrees to pay the recording artists and producers royalties set forth in the Agreement.

22 28. The WMG Agreement sets forth and governs the calculation, distribution, and
23 payment of all royalties to Plaintiffs and each Class member. On information and belief, these
24 royalties are computed electronically through various software programs that Defendant
25 controls and maintain. Thus, the amount owed to Plaintiffs and any Class member is a matter of
26 simple calculations through adjustment of these software programs.

27 29. In accordance with industry practice, the WMG Agreement sets forth the same,
28 or substantially the same, two equations for all Class members. The royalties owed to these

1 artists and performers equals the sum of two equations: (i) Royalties for physical products sold
2 by Defendant and its affiliates in the United States and abroad ("sold equation"); and (ii)
3 Royalties for master recordings licensed by Defendant to third parties ("licensed equation").

4 30. These equations were drafted by Defendant and its predecessors-in-interest and
5 were non-negotiable terms of all WMG Agreements. While Defendant's agreements may have
6 varied slightly in non-material ways, every recording agreement that is part of this Class
7 contains these standard equations.

8 31. The WMG Agreement provided a significantly higher percentage of royalties
9 under the licensed equation than under the sold equation. In general, the sold equation provides
10 for royalties of ten percent (10%) (depending on the popularity of the artist, album and price the
11 record was sold at; i.e., the more popular the artist, or the more expensive the album, the higher
12 the royalty rate) while the licensed equation provides for royalties of fifty percent (50%) of net
13 receipts. As a result, a recording artist or producer is paid a significantly lower percentage of the
14 total money received by Defendant for their commercial exploitation of the artist or producer's
15 master recordings under the sold equation than under the licensed equation.

16 32. On information and belief, Defendant has entered into contracts with Digital
17 Content Providers that allow these providers to digitally distribute all or some of Defendant's
18 catalog of master recordings to end-users. In exchange, these Providers generally pay Defendant
19 a flat rate or fixed percentage per digital download (typically \$.70 on a \$.99 download).

20 33. Defendant's agreements with these Digital Content Providers constitute licenses
21 and not sales. As such, under the WMG Agreement, Defendant is required to pay Plaintiffs and
22 Class members 50% of the net receipts from these Digital Content Providers.

23 34. The licensing of master recordings to Digital Content Providers is, on
24 information and belief, one of the fastest growing segments of Defendant's business. In its most
25 recent Form 10-K, WMG reported that digital revenues increased by \$55 million or 8% for the
26 12 months that ended in September 2011.

27 35. In breach of its obligations under its Agreement, however, Defendant has treated
28 its transactions with Digital Content Providers as "sales" rather than "licenses." In so doing,

1 Defendant applied the incorrect formula for calculating royalties owed to Plaintiffs and Class,
2 taking unjustifiable deductions (including, but not limited to, the Net Sales or "Return"
3 Deduction, the Packaging Deduction, and the Audiophile Deduction), and applied a royalty
4 percentage that is, in general, less than half of what it should be applying in its computation.

5 36. On information and belief, before violating their royalty obligations to Plaintiffs
6 and the Class, Defendant vetted the policies and practices at issue in this case at the highest
7 corporate levels; that it commissioned, either on their own initiative or with the support of music
8 industry's trade organizations, so-called "white papers" on the issue; that they analyzed
9 internally the financial consequences of their misconduct and cast it in terms of the additional
10 profit to be made by them by avoiding their contractual obligations; and that they repeatedly
11 made public statements characterizing its agreements with digital music providers in the interest
12 of its recording artists.

13 37. Plaintiffs are also informed and believe that numerous artists have raised this
14 issue with Defendant in internal account audits and elsewhere and have made individual
15 settlements involving digital download claims. Defendant has never, however, offered to correct
16 these royalty miscalculations with the remaining artists on a Class wide basis. Thus, Defendant
17 is aware that transactions through Digital Content Providers should be counted as licenses under
18 its WMG Agreement.

19 38. The Master Lease/License provision in the WMG Agreement provides a higher
20 royalty rate than retail sales because in cases where Defendant "leases" or "licenses" the master
21 recordings, Defendant essentially act as a conduit between the artist and a third party, and thus
22 Defendant incurs none of the normal operating costs of goods sold, such as physical materials,
23 distribution, advertising and promotion. Because Defendant incurs none of the traditional costs
24 associated with physical distribution of records when it gives Digital Content Providers the right
25 to sell digital copies of master recordings, these agreements fall within the types of situations
26 contemplated by the parties when they agreed to the Master Lease/License provision.

27 39. Similarly, the "Basic Royalty Rate" in the WMG Agreement is generally
28 computed, in part, by deducting a "return deduction." However, such packaging deductions are

1 meant to compensate the record label for the physical packaging of a record, and as such, are
2 inappropriate for digital downloads that neither have, nor require, physical packaging.
3 Consequently, the “Basic Royalty Rate” is unascertainable for digital downloads and cannot
4 apply.

5 40. Similarly, on information and belief, Defendant only paid Plaintiffs and other
6 Class members roughly seven and a half percent of the royalties actually owed from its licensing
7 agreements with Ringtone Providers. A comparison of Defendant’s current, illegal methodology
8 of accounting royalties owed for its licensing agreements with Ringtone Providers and the
9 methodology it should be employing follows:

10 41. As a result of Defendant’s systematic violation of their contractual obligations to
11 Plaintiffs and other Class members to make proper royalty payments and to properly credit
12 royalty accounts pursuant to the WMG Agreement, Defendant has caused substantial damages
13 to Plaintiffs and Class members, the exact amount of which will be determined at trial, but
14 which likely equates to tens of millions of dollars if not more.

15 42. At all relevant times, Defendant has had a duty and obligation under the
16 recording agreements with Plaintiffs and other Class members to properly and accurately
17 account for moneys received by Defendant from Digital Content Providers, to which Defendant
18 licensed the master recordings of Plaintiffs and Class. Rather than fulfilling their contractual
19 obligations, however, Defendant systematically, knowingly, and intentionally miscalculated the
20 royalties due to Plaintiffs and the other Class members. As a result, Defendant under credited
21 and/or underpaid each and every Class member, while also deriving substantial financial
22 benefits from its leasing/licensing of these master recordings.

23 **Plaintiffs’ Recording Agreement**

24 43. Plaintiffs and WMG executed a standard WMG Agreement on January 25, 1972
25 (hereinafter “Tower Agreement”), which governs the payment of for the commercial
26 exploitation by Defendant (the Licensee) of music recordings owned or controlled by Plaintiffs
27 (the Licensor).

1 44. Paragraph 4 of the Tower Agreement states: “With respect to tape records
2 manufactured and sold by licensees of [WMG] in the United States (at present reel to reel only)
3 an amount equal to 50% of all compensation received by [WMG] for the use of Artist’s
4 masters...”

5 45. Paragraph (a) of Exhibit A of the 1972 Tower Agreement states that “net sales
6 shall be determined cumulatively on the basis of the number of copies of such records sold...
7 after all returns, rebates, credits, cancellations, exchanges, etc.... And prior to final
8 determination thereof, [WMG] may in the exercise of its sound discretion set up reasonable
9 reserves against such returns....”

10 46. It has long been industry practice to withhold “reserves” to ensure the Licensee,
11 does not distribute royalties it cannot recoup on units of an album that are shipped but later
12 returned. This policy is “reasonable” with respect to CDs or LPs, which may be returned if the
13 product is damaged or if the consumer wants to exchange the album with another. This policy is
14 not reasonable with respect to the license of Digital Downloads, which cannot be returned or
15 otherwise exchanged by consumers, and which do not require that Defendant incur any of the
16 normal costs of production or distribution associated with physical products such as CDs and
17 LPs. Accordingly, any “reserves” withheld on Digital Downloads is based on pure fiction and
18 deprive Plaintiffs and the Class of the full benefit of royalties they are entitled to.

19 **CLASS ACTION ALLEGATIONS**

20 47. Plaintiffs bring this class action pursuant to Federal Rules of Civil Procedure
21 23(a) and 23(b) on their own behalf and on behalf of:

22 All persons and entities, their agents, successors in interest,
23 assigns, heirs executors and administrators who are or were parties
24 to a WMG Recording Agreement containing License provisions or
25 their equivalent, through which such persons and entities, either
26 directly or indirectly, received royalties on, or financial credits or
27 adjustments for, income received for the commercial exploitation
28 of master recordings through Defendant’s leasing and/or licensing
of said master recordings to Digital Content Providers, at a rate
less than the rate provided for in the contract.

1 48. Plaintiffs additionally bring this subclass action pursuant to Federal Rules of
2 Civil Procedure 23(a) and 23(b) on their own behalf and on behalf of:

3 All persons and entities, their agents, successors in interest,
4 assigns, heirs executors and administrators who are or were parties
5 to an WMG Recording Agreement containing License provisions
6 or their equivalent, through which such persons and entities, either
7 directly or indirectly, received royalties on, or financial credits or
adjustments for, income received for the commercial exploitation
of master recordings through Defendant's leasing and/or licensing
of said master recordings to Digital Content Providers, that was
withheld as a reserve.

8 The following Persons shall be excluded from the Class: (1) Defendant and its
9 subsidiaries, affiliates, officers and employees; (2) all persons who make a timely election to be
10 excluded from the proposed Class; (3) governmental entities; and (4) the judge(s) to whom this
11 case is assigned and any immediate family members thereof.

12 49. This action is properly maintainable as a class action.

13 50. The Class for whose benefit this action is brought is so numerous that joinder of
14 all Class members is impracticable. While Plaintiffs do not presently know the exact number of
15 Class members, Plaintiffs are informed and believe that there are thousands of Class members,
16 and that those Class members can only be determined and identified through Defendant's files
17 and, if necessary, other appropriate discovery.

18 51. There are questions of law and fact which are common to Class members and
19 which predominate over any questions affecting only individual members of the Class. These
20 common questions include:

21 a) Whether Defendant violated its recording agreements by, *inter alia*,
22 mischaracterizing the money it received from Digital Content Providers as "sales" income rather
23 than "license" income in violation of the recording agreements;

24 b) Whether Defendant benefited financially from these wrongful acts;

25 c) Whether Defendant acted in a manner calculated to conceal the illegality
26 of its actions from recording artists and music producers;

27 d) Whether Defendant will continue collecting licensing income from
28 Digital content Providers and misrepresent the royalties due for such licensing income to

1 recording artists and music producers despite knowing that such misrepresentation constitutes a
2 breach of its artists' recording contract;

3 e) Whether Defendant, by way of the conduct alleged herein, must comply
4 with California Code of Civil Procedure §§ 337, 337(a) and provide a proper accounting of the
5 amounts owed to Plaintiffs and other Class members;

6 f) Whether Defendant, by way of the conduct alleged herein, engaged in
7 deceptive or unfair acts or practices in violation of California unfair trade practices laws
8 including, but not limited to, California Business & Professions Code §§ 17200, *et seq.* for
9 which Plaintiffs and the other Class members are entitled to recover;

10 g) Whether, assuming Defendant intend to continue breaching its contractual
11 obligations to Plaintiffs and the other Class members, and/or to violate California state statutory
12 law, declaratory and injunctive relief is appropriate to curtail its conduct as alleged herein;

13 h) Whether Plaintiffs and the other Class members have been damaged by
14 Defendant's actions or conduct; and

15 i) The proper measure of damages.

16 52. Plaintiffs are committed to prosecuting this action and have retained competent
17 counsel experienced in litigation of this nature. Plaintiffs' claims are typical of the claims of the
18 other Class members and Plaintiffs have the same interests as the other Class members.
19 Plaintiffs have no interests that are antagonistic to, or in conflict with, the interests of the other
20 members of the Class. Plaintiffs are adequate representatives of the class and will fairly and
21 adequately protect the interests of the Class.

22 53. The prosecution of separate actions by individual members of the Class could
23 create a risk of inconsistent or varying adjudications with respect to individual members of the
24 Class which could establish incompatible standards of conduct for Defendant or adjudications
25 with respect to individual members of the class which would, as a practical matter, be
26 dispositive of the interests of the members of the Class not parties to the adjudications.

1 54. Furthermore, as the damages suffered by some of the individual Class members
2 may be relatively small, the expense and burden of individual litigation make it impracticable
3 for the individual members of the Class to redress the wrongs done to them individually.

4 55. Plaintiffs anticipate no unusual difficulties in the management of this litigation as
5 a class action. Class members may be identified from Defendant's business records and such
6 Class members may be notified of the pendency of this action by mail or by electronic means
7 (like email), using techniques and a form of notice customarily used in class actions.

8 56. For the above reasons, a class action is superior to other available methods for
9 the fair and efficient adjudication of this action.

10 **FIRST CAUSE OF ACTION**
11 **(Breach of Contract)**

12 57. Plaintiffs repeat and reallege each and every allegation as though fully set forth
13 herein.

14 58. Plaintiffs and Class members entered into a standard WMG Agreement with
15 Defendant or one of its affiliates.

16 59. These agreements contained the same or substantially similar terms relating to
17 the treatment of licensing income for royalty accounting. By definition, such licensing income
18 includes income derived from the licensing of recordings to Digital Content Providers.

19 60. Plaintiffs and the other Class members have performed their obligations under
20 these contracts by providing master recordings to Defendant to exploit.

21 61. By reason of the foregoing, and other acts not presently known to Plaintiffs and
22 Class members, Defendant materially breached its contractual obligations under the pertinent
23 WMG Agreement by failing to properly account for and provide for adequate royalty
24 compensation to Plaintiffs and Class members with regard to licensing of master recordings to
25 Digital Content Providers. Further, Defendant disregarded the rights of Plaintiffs and other
26 Class members by breaching its contractual obligations.

27 62. By reason of the foregoing, Plaintiffs and the other Class members have been
28 damaged in an amount to be determined at trial.

1 63. Defendant has failed and refused to cure these breaches and continues to
2 incorrectly calculate these royalties in violation of Plaintiffs' and Class members' WMG
3 Agreement. Further, Defendant has continued to disregard the rights of Plaintiffs and the other
4 Class members.

5 **SECOND CAUSE OF ACTION**
6 **(Declaratory Judgment)**

7 64. Plaintiffs repeat and reallege each and every allegation as though fully set forth
8 herein.

9 65. Pursuant to the WMG Agreement, Defendant is obligated to pay and/or credit
10 Plaintiffs and the other Class members a certain percentage of the income Defendant derives
11 from the licensing of master recordings, produced for Defendant by Plaintiffs and other Class
12 members, to Digital Content Providers, but that Defendant failed to provide sufficient
13 payment/credit to Plaintiffs and other Class members by illegally mischaracterizing these
14 licenses as sales.

15 66. Plaintiffs and the other Class members have no adequate remedy at law.

16 67. By reason of the foregoing, there is a present controversy between Plaintiffs and
17 the other Class members, on the one hand, and Defendant, on the other hand, with respect to
18 whether this Court should enter a declaratory judgment determining that the pertinent
19 agreements obligate Defendant to pay and/or credit Plaintiffs and other Class members the
20 percentage specified for licensing, rather than for sales, when Defendant licenses such master
21 recordings to Digital Content Providers.

22 **THIRD CAUSE OF ACTION**
23 **(Common Counts - Open Book Account:**
24 **California Code Civ. Pros. § 337a)**

25 68. Plaintiffs repeat and reallege each and every allegation as though fully set forth
26 herein.

27 69. Pursuant to Defendant's agreements with Plaintiffs and the other Class members,
28 Defendant keeps, and at all relevant times has kept, open book accounts reflecting the debits and

1 credits made to each Class member's account with Defendant from inception. Plaintiffs are
2 informed and believe that said open book accounts include entries reflecting income Defendant
3 has received, and continues to receive, from license agreements with Digital Content Providers.

4 70. These book accounts constitute the principal records of the transactions between
5 Defendant and all Class members, including Plaintiffs.

6 71. Plaintiffs are informed and believe that said book accounts are, and at all relevant
7 times were, created in the regular course of Defendant's business and kept in a reasonably
8 permanent form and manner.

9 72. Defendant has become indebted to Plaintiffs and the other Class members on said
10 open book accounts in an amount equal to Defendant's underpayment on the income Defendant
11 has received, and continues to receive, from their licensees for digital downloads.

12 73. As such, the outstanding balance owed to Plaintiffs and the other Class members
13 on said open book including a calculation of the amount of underpayment with respect to digital
14 downloads, and can be determined by examining all of the debits and credits recorded for each
15 account.

16 **FOURTH CAUSE OF ACTION**

17 **(Violations of California's Unfair Competition Law:**
18 **California Business & Professions Code § 17200, et seq.)**

19 74. Plaintiffs repeat and reallege each and every allegation as though fully set forth
20 herein.

21 75. California Business and Professions Code § 17200 prohibits any unlawful, unfair
22 or fraudulent business acts or practices.

23 76. Defendant has violated the foregoing law, by engaging in unlawful and unfair
24 business practices. Defendant knowingly breached its contracts with Plaintiffs and the other
25 Class members. Defendant either knew, should have known, or recklessly disregarded that the
26 income collected from Digital Content Providers was in connection with a license agreement,
27 and as such, that the royalties payable to Plaintiffs and the other Class members should have
28 been accounted and paid for on this basis. Furthermore, failing to disclose the unlawful nature of

1 its conduct, and by employing such devices as are alleged above, as well as affirmatively
2 representing their authority to collect and account for this income on such basis, had a tendency
3 to mislead recording artists and producers.

4 77. The harm to Plaintiffs and the other Class members resulting from Defendant's
5 deceptive and unlawful practices outweighs the utility, if any, of those practices. There is no
6 possible economic justification for such conduct, and consequently, the gravity of the
7 misconduct outweighs any possible economic justification offered by Defendant.

8 78. Defendant's illegal conduct, as described herein, is ongoing, continues to this
9 date, and constitutes unfair acts and practices within the meaning of Business & Professions
10 Code § 17200, et seq.

11 **FIFTH CAUSE OF ACTION**
12 **(Trespass to Chattels)**

13 79. Plaintiffs repeat and reallege each and every allegation as though fully set forth
14 herein.

15 80. Common law prohibits the intentional intermeddling with personal property,
16 including money owed, in possession of another that results in the deprivation of the use of the
17 personal property or impairment of the condition, quality, or usefulness of the personal property.

18 81. By engaging in the acts alleged in this Complaint, Defendant intentionally
19 intermeddled with Plaintiffs and Class Members' ability to utilize their own financial resources,
20 which were improperly withheld by Defendant.

21 82. Defendant has improperly withheld, and continues to improperly withhold
22 royalties owed to Plaintiffs and the Class.

23 83. All the acts described above were acts in excess of any authority Plaintiffs and
24 Class Members granted when they signed the WMG Agreement.

25 84. As a direct and proximate result of Defendant's wrongful conduct, Defendant
26 harmed Plaintiffs and Class Members by depriving them of the use of their full financial
27 resources.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the other putative Class members, pray for judgment against Defendant as follows:

a. An order certifying the proposed Class, designating Plaintiffs as the named representatives of the Class, and designating the undersigned as Class Counsel;

b. A declaration that Defendant is financially responsible for notifying all Class members that the pertinent recording agreements obligate Defendant to pay and/or credit Plaintiffs and other Class members the percentage specified in their contracts for licensing, rather than for sales, and that Defendant has been improperly accounting for such transactions;

c. An injunction requiring Defendant to abide by the express terms of its WMG Agreements with regard to licensing/leasing of master recordings to Digital Content Providers;

d. An award to Plaintiffs and the Class of compensatory, exemplary, and/or statutory damages in an amount to be proven at trial;

e. An award of attorneys' fees and costs, as allowed by law;

f. An award of pre judgment and post judgment interest, as provided by law;

g. For leave to amend the Complaint to conform to the evidence produced at trial;

and

h. Such other or further relief as may be appropriate under the law and the circumstances.

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JURY TRIAL DEMANDED

Plaintiffs, individually and on behalf of the class, hereby demand a trial by jury.

Dated this March 27, 2012

AUDET & PARTNERS, LLP

/s/ Joshua C. Ezrin

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*Attorneys for Plaintiffs and the [Proposed]
Class*