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13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA

15 SCORPIO MUSIC (BLACK SCORPIO) S.A. and  
16 CAN'T STOP PRODUCTIONS, INC.

17 Plaintiffs,

18 vs.

19 VICTOR WILLIS

20 Defendant.  
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Case No. 3:11-CV-01557-BTM (RBB)

**REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF DEFENDANT'S  
MOTION TO DISMISS THE  
COMPLAINT**

Honorable Barry T. Moskowitz

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1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002)..... 7

4 *Clark v. Capital Credit* 460 F.3d 1162 (9th Cir 2006) ..... 7

5 *Fred Fisher Music Co. v. M. Witmark and Sons*, 318 U.S. 642 (1943)..... 4

6 *Johnson v. Homecomings Financial*, 2011 WL 4373975 (S.D. Cal. Sept. 20, 2011) ..... 8

7 *Stitching Pensioenfonds ABP v. Countrywide Financial Corp.*, 2011 WL 3558173,

8 (C.D.Cal. Aug. 9, 2011)..... 8

9 *Sweet Music, Inc. v. Melrose Music Corp.*, 189 F. Supp. 655 (S.D. Ca. 1960)..... 5

10 **STATUTES**

11 17 U.S.C. § 203 (1976) ..... 2

12 17 U.S.C. § 203(a)(1) (1976)..... 7

13 17 U.S.C. § 203(b) (1976) ..... 9

14 17 U.S.C. § 24 (1909) ..... 2, 4

15 17 U.S.C. § 304 (1976) ..... 3

16 17 U.S.C. 201(d) (1976) ..... 6

17 **OTHER AUTHORITIES**

18 H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976)..... 3, 4, 5

19 S. Rep. No. 473, 94th Cong., 1st Sess. (1975)..... 3, 4, 5

20 **TREATISES**

21 *3 Nimmer on Copyright* § 11.03[A][1] ..... 6

22 *3 Nimmer on Copyright* § 9.02 ..... 2

23 *Goldstein on Copyright* § 5.4.2 (3d. ed. 2010) ..... 7

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With respect to the grantor issue, Plaintiffs simply ignore the plain, and concededly unambiguous, terms of the statute. Instead, Plaintiffs resort to reliance upon unsupported, and erroneous, contentions concerning purported policies and purposes of the statutory provisions at issue. Without citation to any support, Plaintiffs essentially attempt to turn the statute on its head and argue that the 1976 revisions to the Copyright Act were somehow meant to limit a co-author's rights. This is the exact opposite of the true purposes of the revisions to protect authors' rights, as expressly stated in the legislative history to the Act. Plaintiffs likewise ignore, and thereby concede, Willis' position that Plaintiffs' strained interpretation of the "Grant" -- to mean various separate grants of each co-author entered into at different times with various different grantees -- is wholly inconsistent and unworkable with the related provisions of the Copyright Act and implementing Regulations, which clearly contemplate the termination of a specific grant.

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## ARGUMENT

**I. PLAINTIFFS' OPPOSITION IS SOLELY BASED UPON THE INCORRECT CONTENTIONS THAT (i) A BROADER TERMINATION RIGHT EXISTED PRIOR TO THE 1976 REVISIONS TO THE COPYRIGHT ACT, AND (ii) THAT CONGRESS' INTENTION IN 1976 WAS PURPORTEDLY TO LIMIT THOSE BROADER RIGHTS**

**A. Contrary to Plaintiffs' Contentions, Termination Rights did not Exist at all under the Copyright Act of 1909**

On page 2 of the Opposition Memorandum, Plaintiffs make the erroneous statement that, "the 1976 revision to the Copyright Act changed Section 203 to require that a grant of copyright in a joint work executed on or after January 1, 1978, may be terminated only by a majority of the joint authors who granted rights." Plaintiffs then build upon this legal fallacy to argue that Willis is somehow attempting to return to old, rejected, law. Putting aside for the moment the tortuous paraphrasing of the statute, this statement is simply incorrect, as the revisions did not "change" Section 203. That section, and, for that matter, termination rights in general, simply did not exist prior to the 1976 revisions to the Copyright Act.

Under the Copyright Act of 1909, Section 24 thereof provided for two separate terms of copyright, an original and renewal term, both lasting 28 years, for a total of 56 years of copyright protection. 17 U.S.C. § 24 (1909). The purpose of the separate renewal term of copyright was to provide the author with a second opportunity to market his work after its value had been established during the original term of copyright. 3 *Nimmer on Copyright* § 9.02, citing the House Report for the 1909 Act, H.R. Rep. No. 2222 60<sup>th</sup> Cong. 2d Sess. P. 14. At the expiration of the original term of copyright, the copyright in the work would automatically, by operation of law, return to the author, or the statutory heirs of the author. Thus, there was no "termination right" under the Copyright Act prior to the 1976 revisions. Rather, barring an express assignment of the renewal term, the copyright would simply re-vest in the author.

The 1976 revisions to the Copyright Act did away with the renewal term system for new works created after January 1, 1978 (the effective date of the revisions) providing for a term of copyright of the author's life plus 50 years (since extended further), 17 U.S.C. § 203 (1976), and also added an additional 19 years to the renewal term of copyright for pre-1978 works. 17 U.S.C. § 304

(1976). Since there would now no longer be an automatic re-vesting in the author, the revisions also included a new termination right for post-1978 works, codified in the new § 203 of the Copyright Act. Moreover, with respect to then existing works (i.e. works created prior to 1978), the revisions also provided for a termination of the renewal term grant with respect to the additional 19 years of copyright (the so-called “extended term”), codified in new § 304 of the Copyright Act.

Thus, Plaintiffs’ Opposition wrongly represents that § 203 was “changed” by the 1976 revisions -- in an apparent attempt to further their errant implication that the 1976 revisions were meant to limit authors’ rights.

**B. Contrary to Plaintiffs’ Contentions, the Legislative History of the 1976 Revisions to the Copyright Act reflect that their Underlying Purposes and Goals were not to Limit Then-Existing Rights, but to Expand and Protect Authors’ Rights**

Plaintiffs cannot point to any statement, and Willis is not aware of any, in either the House or Senate Reports to the 1976 Copyright Act that would even remotely imply that the purpose and “legislative goals” underlying Sections 203 and 304 were to place limits upon, or to otherwise restrict, then-existing rights of authors under the Copyright Act of 1909. To the contrary, the House and Senate Reports unequivocally reflect that the purpose of enacting the termination provisions was to protect authors by providing an opportunity to re-market their works once the true value of such works had been established.

For example, the House and Senate Reports to the 1976 Copyright Act, in no uncertain terms, express the goal of protecting authors’ from “unremunerative transfers” made by authors due to unequal bargaining positions and the impossibility of knowing the true value of a work until it has a track record of exploitation :

The provisions of section 203 are based upon the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 124-28 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 111 (1975)

Moreover, the termination provisions, and in particular the prohibition against transfers of termination rights prior to the effective date of termination, were also a direct response to the Supreme Court's decision of *Fred Fisher Music Co. v. M. Witmark and Sons*, 318 U.S. 642 (1943), which effectively thwarted the legislative intent of the renewal term system. In that case, the Court held that an author's simultaneous assignment of both the original term and the author's contingent interests in the renewal term of copyright in a single document was valid, even though the renewal right would not vest until the commencement of the renewal term. Accordingly, this ruling significantly eviscerated the ability of an author to regain his copyright upon the commencement of the renewal term, as publishers could simply insert language assigning the renewal term of copyright into their original agreements with authors. As noted in the House Report and Senate Reports:

Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35 year period to start running. However, the bill seeks to avoid the situation that has arisen under the present renewal provision, in which third parties have bought up contingent future interests as a form of speculation. Section 203(b)(4) would make a further grant of rights that revert under a terminated grant valid "only if it is made after the effective date of the termination." ... H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 127 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 111 (1975)

Thus, rather than limiting authors' rights, the clear intent and purpose of the 1976 Copyright Act is to protect author's rights through the creation of a new termination right. Plaintiffs' strained interpretation of the termination provision espoused in this action is in direct conflict with that express purpose.

**C. Plaintiffs Likewise Wrongly Contend, without any support, that Congress inserted the Majority Requirement for Grants Executed by Co-authors into Section 203, but not Section 304, to place limits upon the termination rights of post-1978 co-authors; The True Reason for this Difference Arose from Unique Circumstances of the Renewal Term System, not any Goal of Limiting Authors' Rights**

Under the Copyright Act of 1909, an author's grant of the renewal term would only be effective if the granting author survived to the commencement of that term. 17 U.S.C. § 24 (1909). Thus, if the author died prior to the renewal term commencing, the author's grant of renewal rights would be void, and the renewal rights would instead vest automatically, by

1 operation of law, in the author's statutory heirs, notwithstanding the assignment of the renewal  
2 term contained in the document executed by the author. Thus, with respect to pre-1978 works, a  
3 termination of the renewal term grant would not be necessary for a deceased co-author's heirs to  
4 recapture the co-author's copyright interests in the work, since the renewal term copyright would  
5 have already automatically vested in the deceased author's heirs, by operation of law, if the  
6 author did not survive to the renewal term. Consequently, it could be the case that a grant  
7 executed by two or more authors would only act to convey renewal rights as to one of the two  
8 authors.

9         Given such circumstances unique to pre-1978 works, the House and Senate Reports make  
10 clear that the reason for the differing language under 203 and 304 was not to place limits upon co-  
11 authors going forward; Rather, it was due to the realities concerning renewal rights grants by two or  
12 more co-authors contained in one document, where one may vest and one may not vest due to the  
13 author's death:

14             Under Section 304, a grant of renewal rights executed by joint authors during the  
15 first term of copyright would be effective only as to those who were living at the time  
16 of renewal; where any of them are dead, their statutory beneficiaries are entitled to  
17 claim the renewal independently as a new estate. It would therefore be inappropriate  
to impose a requirement of majority action with respect to transfers executed by two  
or more authors. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 141 (1976); S. Rep.  
No. 473, 94th Cong., 1st Sess. 124 (1975)

18         Thus, once again, Plaintiffs' unsupported arguments as to the purposes and legislative goals  
19 of the 1976 revisions to the Copyright Act are directly contradicted by the actual legislative history.  
20 Rather than seeking to limit authors' rights, the House and Senate Reports clearly express an intent  
21 to protect an author's right to terminate (in this instance to preserve a surviving co-author's ability to  
22 terminate a grant of his extended term interests, notwithstanding the death of a co-author who  
23 executed the same grant).

24         In this connection, Plaintiffs oddly rely upon *Sweet Music v. Melrose Music*, 189 F. Supp.  
25 655 (S.D. Ca. 1960), which concerned the renewal term vesting issues discussed above, and  
26 holds that co-authors' separate renewal interests in a joint work are to be separately addressed,  
27 *even where the renewal assignments were contained in the same document*. Thus, the Court then  
28 found that because one of the co-authors did not survive to the renewal term, the renewal



1 assignment was not void in total, but rather the assignee only owned the renewal interests of the  
2 surviving co-author (with the dead co-author's renewal interests devolving to his heirs by  
3 operation of law). This holding is thus at odds with Plaintiffs' argument and wholly consistent  
4 with Willis' position and the fundamental copyright principles of alienability and severability of  
5 co-authors' copyright interests in a work. See 17 U.S.C. 201(d). As *Sweet Music v. Melrose*  
6 makes clear, it is proper and appropriate for Willis to terminate a Grant that solely concerns his  
7 copyright interests in a Composition, and thereby reclaim ownership of those copyright interests  
8 in the Composition. Plaintiffs' out-of-context quote from the *Melrose* decision noting that had  
9 there been separate assignments of the renewal terms the same result would have been reached  
10 (see Opposition at p. 5), simply does not support Plaintiffs' arguments here.

11 In this same vein, Plaintiffs' selective excising of one sentence from the *Nimmer* treatise on  
12 Copyright, when placed back into its full context, likewise actually supports Willis' position.  
13 *Nimmer* provides a hypothetical example of Author A, B, and C, all transferring their rights to D, to  
14 explain when a majority would be needed to terminate under Section 304 (for pre-1978 works).  
15 While Plaintiffs egregiously fail to note it in their Opposition, *Nimmer's* example is expressly based  
16 upon such authors having all executed the same granting document, not separate grants by each, and  
17 then *Nimmer* correctly notes that the termination of such a document under Section 203(for a post-  
18 1978 work) would require a majority of the three authors who executed that Grant:

19 Grants executed by two or more joint authors prior to January 1, 1978, are  
20 terminable by each executing joint author even if a majority of the executing joint  
21 authors do not join in such termination ... Suppose, for example, that a work is  
22 jointly written by A, B and C, who share the copyright equally. If all three joint  
23 authors join in executing a grant of renewal rights in the work to D in advance of the  
24 vesting of such rights, and if all three survive to the time of such vesting, then absent  
any termination of the grant, D will be entitled to the renewal term of copyright in  
the work. Suppose at the time the authors are able to terminate A wishes to terminate  
the grant, but neither B nor C is willing to join in the termination. As indicated  
above, if this were a grant executed on or after January 1, 1978, no termination could  
occur because the consent of a majority of joint owners is required for this purpose.

25 3 *Nimmer on Copyright* § 11.03[A][1](emphasis added). *Nimmer* also points out, however, in the  
26 earlier part of the section cited in Willis' initial motion papers, that a single grant executed by only  
27 three of five total authors of a work would only require a majority of the three authors who actually  
28 executed the Grant being terminated, not a majority of the five authors in total. *Id*; see also,

1 *Goldstein on Copyright* § 5.4.2, at 5:119 (3d. ed. 2010) (“Termination of a grant of interests in a  
2 joint work under section 203(a)(1) requires action by a majority of the authors who executed the  
3 grant, and not merely a majority of the authors of the work.”). Plaintiffs’ desperate attempt to  
4 conflate the two different examples provided by Nimmer only highlights the fallacy of Plaintiffs’  
5 Complaint in this action, and the depths to which Plaintiffs will go in their efforts to thwart Willis’  
6 termination rights.

7 **D. The Plain Meaning of the Statute is Wholly Consistent with the True Purposes of**  
8 **the Revisions to the Copyright Act**

9 Plaintiffs’ Opposition does not dispute that the unambiguous terms of a statute are to be  
10 given effect. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)(“As in all statutory  
11 construction cases, we begin with the language of the statute. The first step is to determine whether  
12 the language at issue has a plain and unambiguous meaning with regard to the particular dispute in  
13 the case); *Clark v. Capital Credit* 460 F.3d 1162, 1168 (9th Cir 2006)(“Well-established canons of  
14 statutory construction provide that any inquiry into the scope and meaning of a statute must begin  
15 with the text of the statute itself). Plaintiffs likewise do not dispute that the statute here is  
16 unambiguous, providing that, “in the case of a grant executed by one author, termination of the grant  
17 may be effected by that author . . . .” 17 U.S.C. § 203(a)(1) (1976).

18 The above review of the actual legislative history and purposes of the enactment of the  
19 termination provisions only confirms that the statute means what it says. Moreover, Plaintiffs’  
20 Opposition does not dispute that the related Regulations and other provisions of the Copyright Act  
21 noted in Willis’ initial Motion papers, are likewise wholly consistent with Willis’ position and a  
22 plain reading of the statute.

23 Willis, as the sole author who executed the Grants that are the subject of the Notice of  
24 Termination, is entitled to terminate those Grants.  
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1 **II. PLAINTIFFS HAVE NOT OPPOSED THE DISMISSAL OF THE REMAINING**  
2 **ALTERNATIVE CLAIMS CONTAINED IN THE COMPLAINT**

3 By failing to address Willis' remaining arguments in favor of dismissal, Plaintiffs'  
4 Opposition effectively concedes that the Complaint's other attacks upon the validity of the notice of  
5 termination are all unfounded. *See, Johnson v. Homecomings Financial*, 2011 WL 4373975, \*7  
6 (S.D. Cal. Sept. 20, 2011) (where plaintiff failed to address the arguments raised in defendants'  
7 motion to dismiss, the Court concluded that plaintiff conceded the merits of defendants' motion as to  
8 those claims); *see also, Stitching Pensioenfonds ABP v. Countrywide Financial Corp.*, 2011 WL  
9 3558173, \*4 (C.D.Cal. Aug. 9, 2011) ("In most circumstances, failure to respond in an opposition  
10 brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to  
11 the uncontested issue."), *citing, Sportscare of America, P.C. v. Multiplan, Inc.*, 2011 WL 589955, \*1  
12 (D.N.J. Feb. 10, 2011).

13 Notwithstanding Plaintiffs' one-sentence "reservation of rights" in a footnote with respect to  
14 the Complaint's work-made for-hire claim, Plaintiffs have not refuted or opposed Willis' requested  
15 dismissal of this claim. Willis has duly raised and argued in the initial motion papers that such claim  
16 fails to set forth a claim for which relief can be granted to Plaintiffs. As explained in the initial  
17 Motion papers, the Complaint's allegations are wholly insufficient to set forth a work-made-for-hire  
18 claim and are otherwise directly contradicted by the documents referred to and relied upon by  
19 Plaintiffs. Plaintiffs have provided no substantive opposition or refutation to deny the dismissal  
20 requested by Willis.

21 The Opposition then wholly fails to oppose any of the other claims placed into issue by the  
22 Motion. Plaintiffs do not oppose Willis' argument, raised in the initial Motion papers, that the  
23 Complaint's frivolous Laches, Statute of Limitations, and other time-related Claims, should all be  
24 dismissed as a matter of law. Similarly, the Opposition does not dispute or oppose that there is  
25 simply no controversy ripe for decision concerning the "derivative works exception," and thus the  
26 Complaint's claim in this regard should likewise be dismissed. Moreover, the Opposition does not  
27 oppose Willis' raised argument that the express, unambiguous, terms of the Copyright Act, which  
28 provide that upon the effective date of termination Willis will reclaim "all rights" under the

1 Copyright Act that were conveyed under the Grants, 17 U.S.C. § 203(b) (1976), mandates dismissal  
2 of the Complaint's claim that Willis' reclaimed rights should be limited to the specific 12-20%  
3 shares of income Willis agreed to accept thirty years ago in the Grants. Accordingly, Willis  
4 respectfully submits that for the reasons set forth in the Motion all of these meritless claims should  
5 be dismissed.

6 Finally, the fact that other issues may arise between the parties in the future simply has no  
7 bearing on the dismissal of this Complaint, which did not plead any such controversies between the  
8 parties. For example, while there may be a dispute as to the number of actual co-authors for certain  
9 of the Compositions, that dispute is simply not raised in the Complaint before this Court. Willis'  
10 Motion to Dismiss properly and dispositively addresses all of the claimed controversies set forth in  
11 the Complaint – each of which fail to set forth a claim for relief as a matter of law. It is respectfully  
12 submitted that the lack of any plausible claim for relief in the Complaint mandates its dismissal in  
13 total.

1 **CONCLUSION**

2 For all of the foregoing reasons, Defendant respectfully requests that this Court dismiss the  
3 Plaintiffs' Complaint in its entirety, and that Defendant be granted such other and further relief that to  
4 this Court seems just, proper and equitable.

5 DATED: November 11, 2011

Respectfully Submitted,

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on November 11, 2011, I caused the foregoing to be electronically filed  
3 with the Clerk of Court using the CM/ECF system which will send notification of such filing to the  
4 email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the  
5 foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF  
6 participants indicated on the Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the  
8 foregoing is true and correct. Executed on November 11, 2011.

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