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

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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

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

Case No. 11CV1557 BTM RBB
 Honorable Barry T. Moskowitz

Plaintiffs,
 vs.
 VICTOR WILLIS, an individual,
 Defendant.

PLAINTIFFS' REPLY MEMORANDUM
 TO MEMORANDUM OF AMICUS
 PARTY SONGWRITER'S GUILD OF
 AMERICA IN SUPPORT OF
 DEFENDANT'S MOTION TO DISMISS

Date: January 20, 2012
 Time: 11:00 a.m.
 Ctrm: 15

ORAL ARGUMENT REQUESTED

1 I. **INTRODUCTION**

2 The Songwriter's Guild of America ("SGA") has chosen to use hyperbole and
3 unfounded attacks on Plaintiffs' intentions, rather than offering any true expertise or
4 assistance to the Court with the legal issues involved in this action. The SGA's
5 accusation that Plaintiffs are engaging in "protracted litigation and legal gamesmanship"
6 is an unfounded, irrelevant and outrageous charge apparently made for the sole
7 purpose of obscuring the two basic legal issues raised by this action.

8 As the SGA is well aware, the termination provisions of 17 U.S.C. § 203 are self-
9 executing. A grantee that has been served with a notice of termination that it considers
10 to be invalid has no choice, therefore, but to bring an action for declaratory relief so that
11 its legal rights will be protected. Given that the SGA concedes that the legal issue of
12 Willis' right to terminate is a question of first impression, Plaintiffs had hoped that the
13 SGA would have refrained from accusations of "vexatious" litigation and instead
14 contributed legal scholarship. Rather than do so, however, the SGA has chosen to
15 ignore the two basic legal issues presenting in this action: (a) whether it matters that
16 the grantors of the assignment of copyright ownership in the works that they created
17 jointly executed different physical documents effectuating that assignment (Plaintiffs
18 maintain that it does not); and (b) what rights Willis would acquire if his Notice of
19 Termination is found to be valid as to any of the thirty three joint works involved in this
20 action and how such rights, if any, would impact on the other co-writers (Plaintiffs
21 maintain that the impact would be a negative one which should be avoided).

22 The one substantive point that the SGA attempts to make, dealing with the intent
23 of Congress (See SGA Memorandum part B "Importance of Preserving Congressional
24 Intent) actually supports Plaintiffs' position. The quote from the Senate Reports (SGA
25 Memorandum p. 3, lines 10-14), makes it clear that Congress intended to safeguard
26 "authors" (plural) and in the case of joint works, this means a majority of the authors,
27 not one acting alone and usurping the rights of the majority.

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1 II. ARGUMENT

2 A. The SGA has misstated the basic issue:

3 The SGA asserts in the first sentence of its “Summary of Argument” that this
4 case will determine “whether the authors of creative works will be able to exercise their
5 crucial statutory right to terminate transfers of copyright that they made over 35 years
6 ago ..” Nothing could be further from the truth.

7 This case is not about whether the right of termination exists. It clearly does,
8 both as to transfers made before January 1, 1978, and after January 1, 1978, but
9 different requirements and different rights exist with regard to each set of grants.

10 No one disputes that for grants executed prior to January 1, 1978, any one
11 author (or his heirs) can terminate his or her portion of the grant, even where a joint
12 work is involved. Section 304(c)(1) of the Copyright Act (17 U. S. C. § 304(c)(1))
13 specifically provides in pertinent part that:

14 “In the case of a grant executed by one or more of the
15 authors of the works, termination of the grant may be effective,
16 to the extent of a particular author’s share in the ownership of the
17 renewal copyright or any right under it, executed before January 1,
18 1978 . . .” (Emphasis added)

19 Congress, of course, could have, but did not, create the same right for authors
20 who executed grants after January 1, 1978. Instead, Congress specifically provided
21 that action by a majority of authors is required in the case of a joint works:

22 “In the case of a grant executed by two or more authors
23 of a joint work, termination of the grant may be effected by a
24 majority of the authors who executed it . . .” (Emphasis added) 17 U.S.C. §
25 203(1).

26 If, as the SGA and Willis argue, Congress had not intended to change the
27 ground rules applicable to termination of copyrights in joint works, there would have
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1 been no need to enact the above quoted portion of Section 203(1).

2 The gravamen of this case is not whether a non-exclusive license of a
3 copyrighted work can be effected by one of the copyright owners. Instead, it is one of
4 whether joint authors can, on his own, without reference to his co-authors, unilaterally
5 terminate the assignment of copy right ownership to a third party publisher. In this
6 case, the specific issue relating to thirty-three copyrights of joint works where three, and
7 sometimes four, people are co-writers, is the right of the majority of the writers to
8 prevent a single individual from exercising control over copy right ownership of their
9 joint works. To prevent abuse of termination of copyrights in joint works, a majority of
10 the authors of a joint work must consent to such termination.

11 That Congress intended that a majority of copyright authors be required is clear
12 from the reference to a “majority of authors” in Section 203(1).

13 No similar provision exists with regard to grants executed prior to January 1,
14 1978. Congress clearly intended to avoid the situation which had previously existed
15 where one author of a joint work could accomplish a termination (a situation that existed
16 because of the unique renewal term provisions of the 1909 Act which Congress also
17 decided to eliminate with the enactment of the 1976 Act for works created on or after
18 January 1, 1978).

19 Both the SGA and Willis attempt to conflate the issue of the claimed right of one
20 joint author to grant (and terminate) non-exclusive rights to exploit a joint work with the
21 right to terminate the original grants of copyright ownership by the authors that created
22 the joint work.

23 It is beyond dispute that any one author of a joint work can grant a non-
24 exclusive license to exploit that work, subject, of course, to his duty to account to the
25 other joint authors. *Sybersounds Records ,Inc. v. UAV Corp.* 517 F.3rd 1137, 1145 (9th
26 Cir. 2008); *Meredith v. Smith*, 145 F.2d 620, 621 (9th Cir. 1944); *Edward B. Marks*
27 *Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266, 268 (2nd Cir.1944); *Piantadosi v.*
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1 *Loew's, Inc.*, 137 F.2d 534, 537 (9th Cir.1943)

2 The **termination of licenses to exploit**, however, is **not** the same as the
3 **termination of the grant of copyright ownership in the joint work**. There Congress
4 has clearly required a majority to act. See *Sybersounds*, 517 F. 3d 1137 (where the
5 Court held that a single author of a joint work could not issue an **exclusive** licence to a
6 third party for the exploitation of a composition since such exclusive license, unlike a
7 non-exclusive license, would limit the rights of the other authors).

8 Neither Willis nor the SGA has offered any authority for the proposition that the
9 right of less than a majority of the authors to terminate would depend on the fortuitous
10 circumstance that all of the joint authors did not execute the same document when
11 creating the work.

12 In fact, the only case that any party to this action has cited that deals with the
13 issue of one document versus multiple documents is *Sweet Music, Inc. v. Melrose*, 189
14 F.Supp. 655 (SD Cal.1960), cited by Plaintiffs in their reply Memorandum. *Sweet*
15 clearly holds that the "mere circumstance" of whether joint authors execute the same or
16 different grant documents is irrelevant to determining the rights of the parties.

17 The speciousness of the argument by the SGA and Willis is clearly illustrated by
18 the possible scenario where three joint authors, each having executed a separate
19 document granting their copyright interests, all individually seek to recapture the
20 copyright under the provisions of Section 203(1) of the Copyright Act. The chaos can
21 only be imagined as each co-writer of a joint work jockeys for position as being the one
22 writer who could terminate the grant of copy right ownership to a third party publisher
23 and, hence, administer the entire copyright on behalf of the other co-writers. Third
24 parties seeking to license the use of the joint work would be uncertain as to with which
25 writer they should deal, with the result that the commercial value of the composition
26 would likely diminish. This could not have been the intent of Congress which, the SGA
27 stresses, was to maximize the financial position of songwriters. In fact, to avoid this
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1 horrible scenario, Congress specifically rested the right to recapture the copyright with
2 the **majority** of the joint authors. Since by definition there can be only one majority, the
3 possibility of there being multiple claimants has been prevented, a result that both the
4 SGA and Willis are now trying to avoid.

5 Yet, without basis, the SGA argues that Plaintiffs are trying to usurp the rights of
6 songwriters when, in fact, it is the SGA position that a single author, acting unilaterally
7 and against the wishes of his co-author, can defeat the rights of the majority. This
8 “tyranny of one” cannot be what Congress had in mind when it enacted Section 203.

9 B. The SGA has ignored the issue of the rights, if any, that Willis would
10 acquire.

11 Even if, for the sake of argument, Willis has the right, by himself, to terminate the
12 copyright assignment in the joint works involved in this action, the question remains as
13 to exactly what rights revert to Willis. Who will administer the commercial exploitation
14 of the copyrights? Can Willis maintain that the shares of the copyrights accorded for
15 years to each author of the joint works be changed to fit Willis’ own sense of equity?
16 What recourse will the majority of co-authors have against Willis if he were to
17 unilaterally start administering the copyrights and issuing fiats concerning authorship
18 interest and splits? Without explanation, the SGA’s Memorandum, just as Willis’, is
19 totally silent on the issue of what rights Willis would acquire if he is correct that he alone
20 can exercise termination rights as to the joint works in this action.

21 These issues are the proper subject of Plaintiffs’ Complaint for Declaratory Relief
22 and would require numerous factual determinations to be made as to Willis’
23 contributions to each of the songs involved. A declaratory judgment on these issues is
24 obviously needed.

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III. CONCLUSION

The SGA has added nothing new to the argument. Willis' Motion to Dismiss should be denied.

DATED: January 6, 2012

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By 
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