

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CRAIG REED, et al.,

Plaintiffs

vs.

FREEBIRD FILM PRODUCTIONS, INC., et al.,

Defendants.

CASE NO. 1:08-CV-01761

JUDGE CHRISTOPHER A. BOYKO

**BRIEF IN SUPPORT OF MOTION  
OF DEFENDANT RHI  
ENTERTAINMENT DISTRIBUTION,  
LLC (SUCCESSOR IN INTEREST  
TO NAMED DEFENDANT  
HALLMARK ENTERTAINMENT  
DIST., LLC) FOR SUMMARY  
JUDGMENT**

**PRELIMINARY STATEMENT**

This case, as far as defendant RHI Entertainment Distribution, LLC (“RHI”) is concerned, is really quite simple. RHI is accused in the Complaint of only one thing: violating copyrights that the plaintiffs claim to hold in certain backstage film of the band Lynyrd Skynyrd that was taken by Craig Reed (“the Reed Footage”). According to plaintiffs, RHI violated their copyrights by its involvement in manufacturing, distributing, or selling various specified DVD’s and music videos that incorporated, without plaintiffs’ consent, portions of the Reed Footage. In fact, RHI was not involved in any of these matters, and the plaintiffs have admitted that they have no evidence that RHI did any of these things. Accordingly, RHI is entitled to summary judgment on the only claim asserted against it in the Complaint.

Although they have not asserted any such claim in their Complaint, plaintiffs have also suggested that they can proceed against RHI on a third party beneficiary theory, based on RHI's acquisition of the assets of Cabin Fever, Inc. ("Cabin Fever"), including Cabin Fever's sublicense from Freebird Film Productions, Inc. ("Freebird"), the defendant that originally was licensed by plaintiff Reed to use his film. Plaintiffs claim that they are third party beneficiaries of that sublicense from Freebird to Cabin Fever. In fact, plaintiffs cannot establish the right to assert a claim as an *intended* third-party beneficiary; and even if they could, no compensation is due Freebird and by extension no compensation is due plaintiffs because the costs associated with production of the movie have not been recouped, as provided for in the Freebird/Cabin Fever agreement.

## STATEMENT OF FACTS

### A. The Parties.

Plaintiff Reed is a former stage hand for the band Lynyrd Skynyrd. Plaintiff Survivor Films, Inc. is a company formed by Reed to hold title to certain of his claimed intellectual property. (Complaint, ¶¶ 1-2; 16; 90.)

Defendant Freebird is a company that itself owned and that also acquired from others the rights to various film footage of the band Lynyrd Skynyrd (including a portion of the Reed Footage), which it licensed to defendant Cabin Fever (which is now defunct) in connection with the production of a documentary motion picture on the band's history. (Complaint, ¶ 31-33.) Defendant Cabin Fever produced that documentary motion picture, "Freebird . . . The Movie," the film at issue herein ("the Movie"). (Ringler Dec., ¶ 6.)

RHI is the successor in interest to named defendant Hallmark Entertainment Dist., LLC. (Ringler Dec., ¶ 2.) RHI acquired the assets of Cabin Fever pursuant to an Asset Purchase Agreement dated March 2, 1998. (Ringler Dec., ¶ 3; Ringler Dec. Ex. A.) Included among those assets was the Cabin Fever agreement of January 15, 1995 with Freebird (“License Agreement”). (Ringler Dec., ¶ 5; Ringler Dec. Ex. C.) The rights to the Movie were specifically assigned to RHI by Cabin Fever through an Assignment effective as of March 2, 1998. (Ringler Dec., ¶ 3; Ringler Dec., Ex. B.)

For purposes of this motion, the other named defendants are not relevant.

**B. The Creation Of The Freebird Movie and the Reed Agreement.**

After Freebird and Cabin Fever entered into the License Agreement, Freebird searched for additional film footage of the Lynyrd Skynyrd band. According to plaintiffs, Reed was approached in the summer of 1995, six months *after* the License Agreement was signed, and asked if he would license some of the Reed Footage for, inter alia, inclusion in the Movie. (Complaint, ¶ 31.) Reed and Freebird ultimately entered into an agreement dated July 31, 1995 licensing the use of Reed’s footage of Lynyrd Skynyrd in the Movie (“Reed Agreement”). A copy of the Reed Agreement is attached hereto as Exhibit 1.

The Reed Agreement specifically provided that, if Cabin Fever (which was producing the movie) examined Reed’s film and decided it was useable for the Movie, Freebird would “pay or cause [Cabin Fever] to pay” Reed \$2,500; and that, if any of the Reed Footage was actually used in the Movie, Freebird would “pay or cause to be paid” to Reed an additional \$2,500.

Significantly, the Reed Agreement also stated that *Freebird* agreed “to pay to you 2.5% of *our net profits* derived from the exploitation of the Documentary [the Movie] itself in any manner or

media.” (emphasis added).<sup>1</sup> It says nothing about Freebird “causing” anyone else to make a future payment.

There is no dispute among the parties that the Movie was in fact produced, and that the Movie included licensed portions of the Reed Footage.

**C. Cabin Fever’s Rights And Obligations.**

Pursuant to the License Agreement, Cabin Fever paid an advance of \$60,000 to Freebird; paid a \$70,000 minimum tape fee to Freebird as a license fee for certain Lynyrd Skynyrd footage from a concert known as the “Knebworth Concert” that was owned and controlled by Freebird; and was allowed a minimum \$10,000 fee for legal expenses to be added to production costs (collectively “Initial Advances”). (Ringler Dec., ¶ 7; Ringler Ex. C, License Agreement., ¶¶ 4.1(a), 4.1(b) and 4.5.) The parties agreed that Cabin Fever had the right to recoup these Initial Advances of \$140,000 before any additional payments were required. (Ringler Dec., ¶ 7; License Agreement. ¶ 4.1(d).) Additionally, the parties to the License Agreement agreed that one half of the production costs would be charged back against the royalties provided for in ¶ 4.2 (non device proceeds) and one half of the production costs to be charged back against the royalties provided for in ¶ 4.3 (audio visual devices) (collectively “Production Advances”). (Ringler Dec., ¶ 7; License Agreement., ¶ 4.4.)

Once the Initial Advances and the Production Advances were “recouped” by royalties earned from exploitation of the Movie, Freebird had a right to participate in additional monies

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<sup>1</sup> There is no claim asserted that plaintiff was not paid the initial \$2,500, or the additional \$2,500 for the use of his film. To the contrary, the only claim with respect to non-payment is in paragraph 44 of the Complaint and directed solely at defendant Freebird, where plaintiff alleges that “Defendant Freebird Video Promised Plaintiff Reed that ‘[p]rovided any of the [Reed] Footage is included in the Documentary, . . . we agree to pay you 2.5% of our net profits derived from exploitation of the Documentary itself in any manner or media.’”

received by Cabin Fever. (Ringler Dec., ¶ 8; License Agreement., ¶ 4.3 and Ex. A thereto.) How that participation was to be calculated depended upon whether RHI itself manufactured and sold audio visual devices or licensed third parties to do so. RHI did not itself manufacture these items, but instead licensed others, principally former defendant Artisan Entertainment, Inc. and its successor Lions Gate, Inc. to manufacture and sell them. (Ringler Dec., ¶ 9.) In the case of licenses from RHI, the License Agreement provided that Cabin Fever [RHI] would pay to Freebird 50% of Cabin Fever's [RHI's] "net receipts with respect to licenses to third parties." (Ringler Dec., ¶ 9; License Agreement, ¶ 4.3 and Ex. A thereto, Sec. 1.02(a).)

Based upon documentation provided to RHI by Cabin Fever at the time of the Asset Purchase Agreement, unrecouped Production Advances were about \$941,000, of which \$219,542 were unrecouped Production Advances chargeable against future royalties for audio visual devices. (Ringler Dec., ¶ 10.) Until those amounts are "recouped," Cabin Fever (and by extension RHI) has no obligation to make any payments to Freebird. As of this date, net receipts earned by Freebird from exploitation of the Movie over the 10 years since the Asset Purchase Agreement was signed are approximately \$88,000. Accordingly, there is another \$131,542 that remains unrecouped. Thus, there are no payments to be made and no "net receipts" after recoupment to be shared with Freebird. (Ringler Dec., ¶ 10.)

**D. Other Alleged Uses Of Reed's Film.**

The Complaint claims that RHI, among others, infringed plaintiffs' alleged copyrights by utilizing portions of the Reed Footage in one or more of a number of DVD's and music videos identified in the Complaint. (*See generally*, Complaint ¶¶ 59-66.)<sup>2</sup> Plaintiffs also allege broadly

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<sup>2</sup> The Complaint alleges that the infringed works are "Lynyrd Skynyrd – Live From Steel Town," "Lynyrd Skynyrd – The Vicious Cycle Tour," "2003 Nashville Live," "Simple Man," the music video for the song "Freebird," and the

that RHI was involved in the “creation, duplication, distribution, marketing and/or sale of one or more of the video projects listed in paragraphs 59-66” of the Complaint, and that RHI “benefited financially from the creation, duplication, distribution and/or sale of one or more of the projects listed in paragraphs 59-66” of the Complaint. (Complaint, ¶¶ 75, 86.) In fact, RHI had no involvement whatsoever with any of the DVD’s or music videos alleged to constitute infringements in the Complaint. (Ringler Dec., ¶¶ 11-12.)

Plaintiffs were asked in discovery to admit that RHI did not infringe plaintiffs’ rights in the Reed Footage in connection with any of the foregoing DVD’s and music videos, but plaintiffs denied those requests. Plaintiffs further objected to requests that they admit that they have no evidence that RHI was involved in the creation, duplication, distribution or marketing of any of the projects listed in ¶¶ 59-66 of the Complaint. Despite their efforts to evade admitting what they should have, plaintiffs did concede in response to Interrogatory No. 6 served upon them that “plaintiffs do not currently have specific evidence that defendant Hallmark [RHI] is involved in the Alleged Infringements.” (See Answer to Interrogatory No. 6, Exhibit 2 hereto.)<sup>3</sup>

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music video for the song “Sweet Home Alabama.”

<sup>3</sup> As a result of correspondence between counsel concerning plaintiffs’ failure to admit the foregoing requests for admissions, counsel for plaintiffs wrote as follows on December 16: “[W]e already indicated that Plaintiffs presently have no evidence linking the RHI/Lions Gate Defendants to the videos you have identified as the ‘disputed videos.’ (See Responses to Interrogatory Nos. 6 and 7. Regardless, to make the responses to the Requests for Admissions consistent with the responses provided to Interrogatory Nos. 6 and 7, Plaintiffs will amend Responses to Requests for Admissions Nos. 1-16.” (H. Alan Rothenbuecher letter, December 16, 2008.) Plaintiffs have not amended their Responses to the Request for Admissions. In any event, as is clear from the Declarations and from plaintiffs’ responses to the Interrogatories, they have absolutely no evidence whatsoever that defendants were involved in any of the alleged infringements.

## ARGUMENT

### **I. DEFENDANT RHI IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' COPYRIGHT CLAIM.**

A person infringes a copyright when he violates any of the exclusive rights of the copyright owner set forth in §§ 106 – 122 of Title 17 of the United States Code. 17 U.S.C. § 501(a). Those include the rights alleged in the Complaint herein.

As set forth above, RHI had no involvement with any of the DVD's or music videos that plaintiff claims were infringed. (*See generally*, Ringler Dec., ¶¶ 11-12.) Plaintiff has no evidence to the contrary. (*See* Answer to Interrogatory No. 6, Exhibit 2 hereto.) It is black letter law that a party faced with a motion for summary judgment may not rest upon the allegations of his complaint, but must bring forth specific facts by affidavit or otherwise to demonstrate that there is a genuine issue of material fact that precludes the entry of summary judgment:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See Livingston Care Ctr. v. Dep't of HHS*, 388 F.3d 168, 173 (6th Cir. 2004) (to prevail in a motion for summary judgment, "the moving party may . . . point to a failure by the non-moving party to present evidence 'sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial'" (quoting *Celotex Corp.*, 477 U.S. at 322)); *Hansard v. Barrett*, 980 F.2d 1059, 1061 (6th Cir. 1992).

Plaintiffs have not and cannot produce evidence that RHI participated in any way in the alleged copyright infringements. Indeed, a review of the answer to Interrogatory No. 6 reflects that the copyright claim was specious when filed. Plaintiffs' stated reason for including a claim against RHI, as explained by them, is that RHI has "distributed at least one Lynyrd Skynyrd product containing Plaintiffs' copyrighted material [viz., the Movie] in the past, however." (See Answer to Interrogatory No. 6, Ex. 2 hereto.) Of course, RHI was not sued for copyright infringement with respect to the Lynyrd Skynyrd product it distributed in the past – because, as plaintiffs knew, RHI distributed the Movie pursuant to license. The fact RHI made a licensed use of copyrighted material is hardly grounds for alleging it violated that copyright in another instance.

RHI is entitled to summary judgment on the copyright claim.

**II. RHI IS ENTITLED TO SUMMARY JUDGMENT ON THE UNPLED THIRD PARTY BENEFICIARY CLAIM.**

As noted above, although they made no allegations to this effect in the Complaint, plaintiffs orally and in Interrogatory Answers have taken the position that they are entitled to proceed against RHI on an intended third party beneficiary theory, based upon the License Agreement between Freebird and Cabin Fever, and RHI's subsequent acquisition of the assets of Cabin Fever.

But the License Agreement nowhere evidences the parties' intent to give plaintiffs the benefit of Cabin Fever's promised performance. (See Ringler Dec., Ex. C.) Consequently, plaintiffs may not enforce the License Agreement against Cabin Fever, or by extension, against RHI. Moreover, RHI does not owe any royalties under the License Agreement because the



Initial Advances and Production Advances for the Movie have yet to be recouped. For all these reasons, RHI is entitled to summary judgment on plaintiffs' unpled third party beneficiary claim.

**A. Plaintiffs Are No More Than Incidental Beneficiaries of the License Agreement and Thus May Not Enforce It.**

Under New York law,<sup>4</sup> a person who is not a party to a contract may only enforce the contract when he is an intended beneficiary of the contract:

For cases in which the claimant is not a party to the contract, but claims third-party rights therefrom, New York has adopted the standard set forth in the Restatement (Second) of Contracts. In order to claim third-party benefits, the putative third-party beneficiary will be deemed an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties *and* either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. . . . An incidental beneficiary . . . is not an intended beneficiary."

*LaSalle Nat'l Bank v. Ernst & Young L.L.P.*, 729 N.Y.S.2d 671, 676 (N.Y. App. Div. 2001) (quoting Restatement (Second) of Contracts § 302).

Here, as in the *LaSalle Nat'l Bank* case, subpart (a) of the test does not apply.<sup>5</sup>

Therefore, to enforce the License Agreement against RHI, plaintiffs must prove both that allowing plaintiffs to enforce the License Agreement is in keeping with Freebird's and Cabin

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<sup>4</sup> Both the License Agreement and the Asset Purchase Agreement are governed by New York law. (Ringer Dec., Ex. C at Sec. 10.8, Ex. A at Sec. 9.8.)

<sup>5</sup> Subpart (a) of this standard does not apply because Cabin Fever has not promised to pay any debt of Freebird to plaintiffs. The type of beneficiary to which subpart (a) applies, often referred to as a creditor beneficiary, "is the beneficiary of a promise to pay the promisee's debt." *Town & Country Homecenter v. Woods*, 725 N.E.2d 1006, 1010 (Ind. Ct. App. 2000). As illustrated by *Town & Country Homecenter*, subpart (a) cannot apply without there being a pre-existing debt owed by the promisee to the creditor beneficiary: "In this case, [plaintiff] is not a creditor beneficiary because such a beneficiary is one who is a creditor of the promisee. Here, the promisee was Fellows, and [plaintiff] was not his creditor. Thus, the analysis which [plaintiff] asks us to perform does not apply." *Id.* Here also, plaintiffs were not Freebird's creditors when the License Agreement was entered into. Freebird's obligation to pay Reed a portion of its net profits from the Movie does not arise until Freebird is paid: "[Freebird] shall pay [Reed his] percentage of net profits as and when [Freebird] receive[s] monies." (Reed Agreement, Ex. 1, ¶ 4.)

Fever's intentions and that the circumstances show that *Freebird* intended to give plaintiffs the benefit of Cabin Fever's promised performance.

Furthermore, plaintiffs' status as intended third-party beneficiaries must be manifest in the License Agreement itself:

A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary, and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party *must be apparent from the face of the contract*. Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent.

*Id.* (emphasis added; citations omitted); *see also Aymes v. Gateway Demolition Inc.*, 817 N.Y.S.2d 233, 234 (N.Y. App. Div. 2006) (finding plaintiff not to be a third-party beneficiary of contracts between defendant demolition companies and the City of New York because “[t]he contracts do not contain language evincing an intent to benefit the property owner”).

Nothing in the License Agreement supports plaintiffs' contention that they are intended third-party beneficiaries. Plaintiffs are not mentioned in the agreement. Nor are there any provisions that suggest an intent to benefit unnamed third parties. There is no evidence on “the face of the contract” that makes it “apparent” that *Freebird* and Cabin Fever entered into the agreement for the benefit of anyone but themselves.

Indeed, even third parties who are explicitly identified in an agreement are only incidental beneficiaries in the absence of language clearly showing an intent that they be permitted to enforce the agreement. In *Oursler v. Women's Interart Center, Inc.*, 566 N.Y.S.2d 295 (N.Y. App. Div. 1991), a writer and media artist were found to be incidental beneficiaries of a grant from the National Endowment for the Arts to defendant, a nonprofit corporation that

produces and exhibits arts projects. Even though defendant's grant application in connection with the video project at issue referred to the plaintiffs by name and referenced proposed salaries of \$10,000 for each plaintiff, the court still found that plaintiffs were not intended beneficiaries:

The NEA surely had the right to recover of defendant if defendant breached its contract with the NEA, and there is nothing in the grant documents clearly showing an intent by the NEA or defendant to permit enforcement of the contract by the plaintiffs. Plaintiffs were merely incidental beneficiaries of the contract between the NEA and defendant, and so may not sue upon it.

*Id.* at 297. Likewise, in the License Agreement here, there is nothing to suggest that plaintiffs were intended beneficiaries. Moreover, Freebird is perfectly capable of enforcing its contractual rights against RHI should the need arise. In this case, as in *Oursler*, there is no need to permit plaintiffs to interject themselves into litigating an agreement with respect to which they are merely incidental beneficiaries.

Even if the Court were to look at evidence beyond the four corners of the License Agreement, that additional evidence only underscores that plaintiffs are not intended beneficiaries. First, when the License Agreement was entered into on January 15, 1995, neither Freebird nor Cabin Fever had discussed with plaintiffs the possibility of using the Reed Footage in the Movie. Plaintiffs concede that those discussions did not take place until the summer of 1995. (Complaint, ¶ 31.) Given that the License Agreement predates Freebird's discussions and negotiation of the rights to Reed's footage, it is inconceivable that plaintiffs are intended beneficiaries of the agreement. *See Zelber v. Lewoc*, 776 N.Y.S.2d 134, 136 (N.Y. App. Div. 2004) (finding that neither a title insurance company nor a lender could have intended to benefit plaintiff in a title insurance policy because neither party had notice of plaintiff's alleged continuing interest in the insured property); *Marino v. Dwyer-Berry Construction Corp.*, 597 N.Y.S.2d 466, 467 (N.Y. App. Div. 1993) (“[A]s a remote purchaser of the property, the plaintiff

was not contemplated in the contractual arrangement between [defendant] and the original owner of the parcel, and the contract was not intended to benefit, nor was performance to be made directly to, the plaintiff.”) Freebird and Cabin Fever could not have intended to benefit plaintiffs through their agreement when they had not even initiated discussions with Reed to obtain his footage, and had no idea if that footage was even useable or would be used in the Movie.

Additionally, under the Reed Agreement of July 31, 1995, the parties specifically addressed the issue of payment to Reed, designating certain fixed payments to Reed that might come from Cabin Fever, but specifying that any royalties from the Movie were to come only directly from Freebird. The Reed Agreement provides that, following Cabin Fever’s examination of the Reed Footage, Freebird “shall pay or cause [Cabin Fever] to pay to [Reed] the sum of Two Thousand Five Hundred (\$2500) Dollars.” (Ex. 1, ¶ 2.) Likewise, if any of the Reed Footage is used in the Freebird Movie, Freebird “shall pay or cause to be paid to [Reed] an additional Two Thousand Five Hundred (\$2500) Dollars.” (Ex. 1, ¶ 4.) With respect to future royalty payments, however, the Reed Agreement states that *Freebird* agrees “to pay to [Reed] 2.5% of [Freebird’s] *net profits* derived from the exploitation of the [Movie] itself in any manner or media.” (Ex. 1, ¶ 4 (emphasis added).) The absence of language allowing royalty payments to come directly from Cabin Fever is telling since such language was used in connection with the fixed payments. Moreover, the fact that Reed’s participation in the exploitation of the Movie is pegged to *Freebird’s net profits* contravenes any intent that plaintiffs would be able to enforce the License Agreement against Cabin Fever, which plainly would not know and could not calculate *Freebird’s net profits*. Thus, the terms of the Reed Agreement also belie plaintiffs’ contention that they are intended third-party beneficiaries of the License Agreement.

Because neither the License Agreement itself nor the circumstances surrounding the Movie project give any indication that plaintiffs are intended beneficiaries of Cabin Fever's promise to pay, after recoupment of the Initial Advances and Production Advances, royalties to Freebird, summary judgment in favor of RHI should be awarded as to plaintiffs' unpled third-party beneficiary claim.

**B. Even If Plaintiffs Were Entitled to Enforce the License Agreement, RHI Owes No Royalties Because the Initial Advances and Production Advances Are Unrecouped.**

Even if plaintiffs were intended beneficiaries of the License Agreement, RHI still would be entitled to summary judgment on plaintiffs' unpled third-party beneficiary claim: no royalties are owing under the agreement due to the fact that the Initial Advances and Production Advances have yet to be recouped.

Pursuant to the License Agreement, the Initial Advances by Cabin Fever as well as the Production Advances for the Movie are to be charged back against Freebird's future royalties. (Ringler Dec., ¶ 7; License Agreement, ¶ 4.1(d) and 4.4.)

On the face of the License Agreement, Cabin Fever paid Initial Advances to Freebird of a \$60,000 advance, a \$70,000 tape fee for the Knebworth Concert footage, and a \$10,000 fee for legal expenses. (Ringler Dec., ¶ 7; License Agreement, ¶¶ 4.1(a), 4.1(b) and 4.5.) In addition, documentation provided to RHI by Cabin Fever at the time of the Asset Purchase Agreement reflects that the total still unrecouped Production Advances aggregated to \$941,000, of which \$219,542 were unrecouped Production Advances chargeable against royalties for audio visual devices under ¶ 4.4 of the License Agreement. (Ringler Dec., ¶ 10.) Until this amount is recouped as provided in the License Agreement, RHI has no obligation to share its earnings or

receipts with Freebird through royalty payments. To date, Freebird has earned only about \$88,000 in net receipts over ten years by virtue of exploitation of the Movie. (Ringler Dec., ¶ 10.) Consequently, \$131,542 in Production Advances remains unrecouped and RHI owes no royalties to Freebird under the License Agreement.

Because RHI has not breached its obligations to Freebird under the License Agreement, plaintiffs would have no claim against RHI under that agreement even if they were intended third-party beneficiaries to it. Consequently, summary judgment in favor of RHI should be awarded as to plaintiffs' unpled third-party beneficiary claim.

### **CONCLUSION**

RHI is entitled to summary judgment on the copyright claim because it did not infringe plaintiffs' alleged copyrights, and plaintiffs have no evidence to the contrary.

If the Court chooses to address plaintiffs' unpled claim that they can proceed against RHI on a third party beneficiary theory, RHI is entitled to summary judgment on that claim because (1) plaintiffs cannot establish that they are intended third party beneficiaries under the License Agreement, and (2) even if they could do so, there remain unrecouped advances under that agreement and no payments to Freebird (and by extension, from Freebird to plaintiffs with respect to that agreement) are due.

Respectfully submitted,

/s/Louis A. Colombo

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon counsel for plaintiffs and each of the defendants via the Court's electronic filing system this \_\_\_\_ day of January, 2009.

/s/Louis A. Colombo  
*One of the Attorneys for Defendants*  
*RHI Entertainment Distribution, LLC*



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