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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THE GUY MITCHELL & BETTY J.  
MITCHELL FAMILY TRUST,

Plaintiff,

v.

ARTIST RIGHTS ENFORCEMENT  
CORPORATION, a New York  
Corporation,

Defendant.

NO: 11-CV-0024-TOR

ORDER DENYING DEFENDANT’S  
MOTION TO DISMISS FOR LACK  
OF SUBJECT MATTER  
JURISDICTION

BEFORE THE COURT is Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 165). This matter was submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

Defendant Artist Rights Enforcement Corporation (“AREC”) moves the court under Fed. R. Civ. P. 12(h)(3) for an order determining that the Court lacks subject matter jurisdiction, arguing that Plaintiff the Guy Mitchell & Betty J.

1 Mitchell Family Trust (“the Trust”) has failed to meet the amount-in-controversy  
2 requirement of the diversity statute. ECF No. 165 at 2.

### 3 BACKGROUND

4 Guy Mitchell was a successful musician in the 1950s who released at least  
5 nine records that have sold more than one million copies each. ECF No. 61 at 2.  
6 Before he died in 1999, Mr. Mitchell assigned to the Trust the rights to collect  
7 music royalties under various recording contracts with Sony. *Id.* Mrs. Mitchell  
8 was a co-trustee with her son Joseph Stanzak (“Stanzak”) until her death in  
9 November 2010, at which point Stanzak became sole trustee. *Id.* For decades,  
10 Sony Music, Inc. and/or its predecessor-in-interest (“Sony”) has paid regular semi-  
11 annual royalties to Guy Mitchell or to the Trust. *Id.* The Trust also performed  
12 periodic audits revealing errors and underreporting of royalties from Sony, which  
13 would result in an additional lump sum payment to the Trust.

14 On June 13, 2005, Mrs. Mitchell, on behalf of the Trust, and Chuck Rubin  
15 (“Rubin”) on behalf of AREC, signed an agreement (“Agreement”) for AREC to  
16 represent the Trust in investigating and recovering royalties due to the Trust from  
17 Sony. ECF No. 61-1. The Agreement provided in relevant part that

18 [i]n return for your services rendered hereunder, you shall be initially  
19 entitled to an on-going twenty-five (25%) percent of all sums and assets  
20 which are received from Sony BMG Music Entertainment (successor-in-  
interest to Columbia Records, CBS Records and Sony Music) beginning  
with any special payments made after June 30, 2005 and specifically with

1 the period ending December 31, 2005. However, in return for your services  
2 rendered hereunder and as a proximate result of your activities pursuant to  
3 this agreement, if you are successful through either negotiation or litigation  
4 in generating income that is in excess of the amount THE FAMILY TRUST  
5 would have received but for your involvement, you shall then be entitled to  
6 an on-going fifty (50%) percent of such sums and assets. I further agree that  
7 all out-of-pocket expenses (including fees to additional local counsel)  
8 incurred by you in connection with the handling of THE FAMILY TRUST's  
9 claim(s) shall be reimbursed and deducted "off the top" from the amounts  
10 recovered before the division of our respective shares.

11 ECF No. 7-1. The Trust also authorized AREC to collect and receive all royalties  
12 on behalf of the Trust. ECF No. 74-5. In October 2006, AREC arranged for  
13 counsel to represent the Trust in a lawsuit against Sony, and AREC coordinated the  
14 resulting litigation and participated in the settlement negotiations. ECF No. 61 at  
15 4. In March of 2009, the lawsuit against Sony was settled for a one-time payment,  
16 and the royalties accrued thereafter would continue to be governed by pre-existing  
17 recording contracts. ECF No. 66 at 5. According to the Trust, in August 2009,  
18 AREC improperly retained 50 percent of the Trust's royalty payment in the  
19 amount of \$3,010.34. *See* ECF No. 61-1.

20 The Trust sued AREC in diversity, alleging breach of contract, breach of  
fiduciary duty, common law fraud, negligent misrepresentation and conversion.  
ECF No. 7. Plaintiff is a trust currently existing under the laws of the State of  
Washington. Defendant is a New York corporation with its principal place of  
business in Westchester County, New York. Plaintiff's Amended Complaint



1           The amount in controversy is generally determined from the face of the  
2 pleadings. *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1131 (9th Cir.  
3 2000). “The sum claimed by the plaintiff controls so long as the claim is made in  
4 good faith.” *Id.* (citing *St. Paul Mercury Indem. Co v. Red Cab Co.*, 303 U.S. 283,  
5 288 (1938)). “In actions seeking declaratory or injunctive relief, it is well  
6 established that the amount in controversy is measured by the value of the object of  
7 the litigation.” *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (citing  
8 *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977)). The  
9 amount in controversy is determined at the time of suit. *Molina v. Richardson*, 578  
10 F.2d 846, 849 (1978). “To justify dismissal, it must appear to a legal certainty that  
11 the claim is really for less than the jurisdictional amount.” *Crum*, 231 F.3d at 1131  
12 (citations omitted).

13           Here, it does not appear to a legal certainty that the Trust’s claim is really for  
14 less than the jurisdictional amount. In addition to the unspecified money damages  
15 the Trust claims, the Trust requests “permanent injunctive relief” to prevent  
16 Defendant from “retaining any portion of Plaintiff’s royalties.” ECF No. 7 at 18-  
17 19. In cases seeking injunctive relief, the amount in controversy is determined by  
18 the value of the object of the litigation. *Cohn*, 281 F.3d at 840. The object of the  
19 requested injunctive relief as stated in the Trust’s amended complaint is, in part,  
20 AREC’s right to retain fees stemming from future royalty payments. *See* ECF No.

1 7 at 19. The Agreement specifies that AREC is entitled to an “on-going” 25 then  
2 50 percent of semi-annual royalty payments, ECF No. 7-1; the Agreement does not  
3 have a definite duration, *id.*; and the Trust seeks on-going and indefinite injunctive  
4 relief, *see* ECF No. 7 at 18-19.

5 The Trust notes that it used \$12,000 in royalty payments per year<sup>1</sup> as an  
6 average to calculate the amount in controversy because it was the “base” the  
7 parties had agreed to use in the past. *See* ECF No. 183 at 3. However, even if the  
8 Court uses as a base the average yearly royalty income from 2006 through 2010<sup>2</sup>  
9 (when AREC’s involvement began through commencement of this suit), the  
10 jurisdictional amount would be reached within 20 years: \$7,576.73 (the 2006-2010  
11 average) divided in half (50 percent fee claimed by AREC) equals \$3788.36;  
12 multiplied by 20 years, equals \$75,767.26. Defendant argues that “the amount of  
13 royalties generated in the years preceding the filing of the complaint was far from  
14 consistent.” ECF No. 165 at 8. However, even if the yearly royalty payments  
15 decrease in value, they could conceivably continue to accrue for many years; thus,

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17 <sup>1</sup> This is the amount used in Judge Suko’s order denying Defendant’s first motion  
18 to dismiss. ECF No. 26. Defendant disputes the propriety of using this number in  
19 several instances. *See* ECF No. 165 at 2, 4, 7 and 8.

20 <sup>2</sup> *See* earnings table, ECF No. 183 at 14.

1 the Court cannot find *to a legal certainty* that they will not exceed the  
2 jurisdictional amount.

3 AREC argues that the Trust cannot base jurisdiction on events occurring  
4 after the complaint is filed. ECF No. 184 at 8. However, here, the jurisdictional  
5 amount is calculated based on the value of the contract; i.e., the amount AREC  
6 would have a right to take under the contract. The contract—and its resulting  
7 potential future benefit or liability—existed at the time the complaint was filed.

8 AREC also contends that “the extrapolation of future royalties based on past  
9 sales of Mr. Mitchell’s works constitutes improper speculation as a matter of law.”  
10 ECF No. 165 at 8. The Court finds Defendant’s arguments and cited authority  
11 unpersuasive. For example, AREC states that “consideration of future payments in  
12 computing the amount in controversy” is limited “to awards that may be paid by a  
13 single judgment reduced to present value” citing *Aetna Cas. & Sur. Co. v. Flowers*,  
14 330 U.S. 464, 467 (1947). ECF No. 165 at 9. *Aetna* succinctly stated the principle  
15 that “[i]f this case were one where judgment could be *entered only for the*  
16 *installments due at the commencement of the suit*. . . future installments could not  
17 be considered in determining whether the jurisdictional amount was involved....”  
18 *Id.* (emphasis added). But then the Court held, “this is not that type of case.” *Id.*  
19 In *Aetna*, a widow sued for burial expenses and death benefits payable at a rate of  
20 not more than \$18 per week. At that time, the diversity minimum amount in

1 controversy was \$3,000. Death benefits were limited to 60% of the average  
2 weekly wages of the deceased, could not continue for more than 400 weeks, ceased  
3 upon the death or remarriage of the widow, and ceased upon the attainment of the  
4 age of eighteen by her children. The Supreme Court then held:

5 Nor does the fact that it cannot be known as a matter of absolute  
6 certainty that the amount which may ultimately be paid, if respondent  
7 prevails, will exceed \$3,000, mean that the jurisdictional amount is  
8 lacking. This Court has rejected such a restrictive interpretation of the  
9 statute creating diversity jurisdiction. It has held that a possibility that  
10 payments will terminate before the total reaches the jurisdictional  
11 minimum is immaterial if the right to all the payments is in issue.  
12 Future payments are not in any proper sense contingent, although they  
13 may be decreased or cut off altogether by the operation of conditions  
14 subsequent. And there is no suggestion that by reason of life  
15 expectancy or law of averages the maximum amount recoverable can  
16 be expected to fall below the jurisdictional minimum. Moreover, the  
17 computation of the maximum amount recoverable is not complicated  
18 by the necessity of determining the life expectancy of respondent.

19 *Id.* at 348 (citations omitted).

20 The instant case is more like *Aetna* than not. The Trust seeks prospective  
injunctive relief for future royalty payments; thus the judgment it seeks is not just  
the payments due at the commencement of the suit, but rather it also includes a  
stream of royalty payments indefinitely.

Defendant cites several cases concerning the amount in controversy in  
removal proceedings (*see* ECF No. 165 at 9-12; ECF No. 184 at 4-5), but the Court  
does not find them persuasive because “somewhat different standards of proof



1 typically are used for actions that enter the federal court system by way of  
2 removal....” 14AA Wright & Miller, Fed. Prac. & Proc. Juris. § 3702 (4th ed.  
3 2013). The test here is whether Defendant can establish to a “legal certainty” that  
4 the claim is really for less than the jurisdictional amount. Defendant has not done  
5 so here.

6 **B. Other Matters**

7 Additionally, AREC’s supplemental reply asks the Court to strike the Trust’s  
8 “improper surreply submitted in the guise of a tardy ‘opposition.’” ECF No. 184 at  
9 3. The Trust’s Opposition to Defendant’s Motion to Dismiss for Lack of Subject  
10 Matter Jurisdiction (ECF No. 183) was filed on October 1, 2013—fourteen days  
11 after the Court granted Defendant’s Motion for Leave to File Motion to Dismiss.  
12 *See* ECF No. 180. This is within the time allotted by Local Rule 7.1(b) for filing a  
13 responsive memorandum to a dispositive motion. The Trust’s opposition is timely  
14 and was not waived by its earlier opposition to Defendant’s motion for leave to file  
15 its motion to dismiss. The Court declines to strike the Trust’s response.

16 Accordingly, **IT IS HEREBY ORDERED:**

17 Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF  
18 No. 165) is **DENIED**.

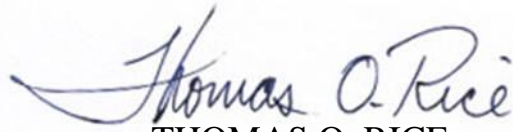
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1           The District Court Executive is hereby directed to enter this Order and  
2 provide copies to counsel.

3           **DATED** October 8, 2013.



5             
6           THOMAS O. RICE  
7           United States District Judge

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