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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Alexander C. Baker;
All other similarly situated Songwriters;
Adam Bravery LLC;
All other similarly situated Royalty
Assignees;
Plaintiffs,
v.
American Society of Composers, Authors
And Publishers, aka ASCAP;
Broadcast Music, Inc., aka BMI;
Mike O'Neil;
Erika Stallings;
and
Does 1-10,
Defendants.

Case No. 4:21-cv-00022-RM

CLASS ACTION

**VERIFIED FIRST AMENDED
COMPLAINT (Class Claims 1-6):**

1. **DECLARATORY JUDGMENT**
ASCAP & BMI Mandatory
Arbitration Clause is Void and
Unenforceable for Economic Duress
 2. **DECLARATORY JUDGMENT**
ASCAP & BMI and Their Officials
are State Actors
 3. **DECLARATORY JUDGMENT**
ASCAP & BMI Arbitration Clause
Violates First and Seventh
Amendment without Due Process
 4. **DECLARATORY JUDGMENT**
Performance Royalties are a Federally
Protected Right `
 5. **DECLARATORY JUDGMENT**
ASCAP & BMI Owe Songwriters a
Fiduciary Duty
 6. **BREACH OF FIDUCIARY DUTY**
For Underpayment - Failing To Obey
the Royalty Calculation Formula
- 7-15. **NON-CLASS TORT CLAIMS**

DEMAND FOR JURY TRIAL

1 Plaintiff Alexander C. Baker, by and through his attorney, brings this action on behalf
2 of himself and all other similarly-situated Songwriters ("Songwriter Class Members" or
3 simply "Songwriters"). Plaintiff Adam Bravery LLC, by and through its attorney, brings
4 this action on behalf of itself and all other similarly-situated Royalty Assignees of
5 Songwriters.
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I. SHORT PLAIN STATEMENT OF THE CLASS ACTION CASE

(Songwriter Class and Assignee Class v. ASCAP & BMI)

A. ASCAP & BMI Owe a Fiduciary Duty to Songwriters And Must Be Held Accountable

1. It is time that ASCAP & BMI are finally held accountable for the \$2 billion they collect annually as fees for music performance licenses. ASCAP & BMI are “not-for-profit” organizations and so-called Performance Royalty Organizations (“PRO”), who act as an agent on behalf of Songwriters to collect, hold, and then appropriately distribute the Performance Royalty money to which each Songwriter is entitled. After operating expenses, half of the money collected is supposed to be paid to Songwriters, the other half is supposed to go to Publishers.

2. However, Songwriters are presently unable to conduct any type of audit of ASCAP & BMI, under the theory that ASCAP & BMI do not owe Songwriters a fiduciary duty. Songwriters come to this Honorable United States District Court, and do hereby challenge ASCAP & BMI, seeking Declaratory Judgment that yes, ASCAP & BMI do *so* owe Songwriters a fiduciary duty, and Songwriters do *so* have a right to audit ASCAP & BMI.

B. Songwriters’ Constitutional Rights Must Be Restored

3. Furthermore, BMI Songwriters have discovered that their constitutional right to a civil jury trial under the First and Seventh Amendments was destroyed by the terms of a decades-old Consent Decree, which mandates that BMI force all BMI Songwriters to submit to a Mandatory Arbitration Agreement as a pre-condition of receiving any Performance Royalties at all. Under their respective Consent Decrees, the United States commands both ASCAP & BMI to admit as members any Songwriter with at least one published song. Thus, Songwriters seek a Declaratory Judgment that receiving Performance Royalties is a federally-protected right (not a contractually-created right), and that a Songwriter need not relinquish the right to petition (or any other constitutional right) as a precondition of receiving Performance Royalties.

C. ASCAP & BMI Should Be Declared State Actors

4. Currently boasting an estimated 1.5 million writer members between them, ASCAP & BMI are “not-for-profit” organizations. Having long ago been prosecuted in federal antitrust litigation under the Sherman Act, ASCAP & BMI are bound by federal Consent Decrees, which operate as federal law upon them. The Consent Decrees compel ASCAP & BMI to act in certain ways as a pre-condition of conducting operations. For this reason, under the State Compulsion Test, Songwriters seek a Declaratory Judgment that ASCAP & BMI and their Officials are State Actors for civil rights purposes.

D. Collecting Performance Royalties Should Be Declared A Federally-Protected Right

5. Among other Consent Decree mandates, both ASCAP & BMI are compelled to collect Performance Royalty money for any Songwriter with at least one published work. Songwriters thus seek a Declaratory Judgment that collecting Performance Royalties is a federally-protected statutory right, not a contractually-created right.

E. BMI’s Mandatory Arbitration Agreement Is Unconstitutional and Is Void For Economic Duress

6. For all intents and purposes, any Songwriter who seeks to earn Performance Royalty money must sign with either ASCAP or BMI. Besides ASCAP & BMI, the only other significant PRO is SESAC (formerly the foreign Society of European Authors and Composers), a private, “invitation-only” society catering exclusively to highly successful, established writers, and which Songwriters have no right to join.

7. Unlike ASCAP, BMI’s Consent Decree compels BMI to include a Mandatory Arbitration Clause in its standard Writer “Agreement.” While this may superficially appear to represent a meaningful choice for the Songwriter, it really doesn’t.

8. First, for any given time period, Songwriter must sign with either ASCAP or BMI, but not both. Thus, each of Songwriter’s songs is registered with ASCAP or BMI, but not both. Second, to collect Performance Royalties for any song, the Songwriter and the Publisher must sign up with *the same* PRO, either ASCAP or BMI. Thus, if the Publisher

1 is already a publishing member of BMI, the beginning songwriter must also sign up with
2 BMI.

3 9. Since both ASCAP & BMI are bound to accept any writer with at least one
4 published song, and since both ASCAP & BMI disclaim owing a fiduciary to Songwriters,
5 ASCAP & BMI are identical in the most fundamental respects. Clearly, a Songwriter must
6 sign with either ASCAP or BMI to collect any Performance Royalties at all. And, there are
7 many situations in which the Songwriter does not have a meaningful choice to join
8 ASCAP, and must sign with BMI, or else not collect Performance Royalties.

9 10. The inability to collect any Performance Royalties can lead to economic ruin. For
10 this reason, Songwriter's seek a Declaratory Judgment that BMI's Mandatory Arbitration
11 Clause is void for economic duress.

12 11. Moreover, BMI's Mandatory Arbitration Clause is mandated by a decades-old
13 Consent Decree to which Songwriters were not party. For this reason, Songwriters seek a
14 Declaratory Judgment that BMI's Mandatory Arbitration Clause infringes Songwriter's
15 First and Seventh Amendment rights to petition and jury trial, without affording the Due
16 Process promised by the Fifth/Fourteenth Amendments.

17 **F. Alexander C. Baker and his Assignee Adam Bravery, LLC are Viable**
18 **Class Representatives**

19 12. Songwriter Class Members are ASCAP & BMI writers with at least one published
20 song that generates Performance Royalties. Songwriter Class Representative Alexander C.
21 Baker is a composer, songwriter and music producer who has earned upwards of \$1
22 million in Performance Royalties for the use of his music on TV shows over the last two
23 decades. Baker originally signed with ASCAP in 1990, then moved to BMI in 1999. Baker
24 has earned royalties from both ASCAP & BMI in every distribution quarter since.
25 Assignee Class Representative Adam Bravery LLC is a Limited Liability Company to
26 which Baker assigned the right to receive royalty payments.

27 13. Baker's interests are aligned perfectly with the interests of Songwriters in finding
28 that ASCAP & BMI owe Songwriters a fiduciary duty, and that such fiduciary duty was

breached by systematically cheating Songwriters from money owed. Baker's interests are further aligned with Songwriters in voiding the Mandatory Arbitration Clause, in obtaining a declaration that receiving Performance Royalties are a federal-protected right, and in holding ASCAP & BMI and their agents to be State Actors for civil rights purposes.

G. The Court Should Bifurcate the Declaratory Judgments and Try Them Purely As A Matter of Law

14. In the interest of judicial economy, Class Action Plaintiffs will request that the Court bifurcate the first five Declaratory Judgment class action claims, pleaded here as the First, Second, Third, Fourth and Fifth Causes of Action (collectively, the "Declaratory Judgment Claims").

15. Class Action Plaintiffs believe and on that basis allege that there are no material facts in dispute relevant to the Declaratory Judgment Claims. Based on the undisputed facts regarding the standard operating procedure of ASCAP & BMI, a dispute has now arisen as to the enforceability and/or constitutionality of various elements of that procedure. Regarding the Declaratory Judgment Claims, there is no need for any discovery by the Parties, nor any fact-finding by the Court.

16. For the above reasons, Songwriters believe the Declaratory Judgment Claims can and should be bifurcated and brought to a Court Trial in short order.

H. Class Injury Can *Only* Be Remedied By Class-Wide Relief

17. As will be set forth fully in Plaintiffs' Motion to Certify Class, despite more than 1 million Class Plaintiffs, per Fed. R. Civ. Pro. § 23(b)(2) there will not arise a duty to notify Plaintiffs and provide an opportunity to opt out, because Plaintiffs injury can *only* be remedied by class-wide relief. (See *Tinsley v. McKay*, 156 F. Supp. 3d 1024 (9th Cir. filed Apr. 30, 2018) (No. 17-17501), Appellants' Joint Opening Brief at 53.)

II. SHORT PLAIN STATEMENT OF THE UNDERLYING CASE

18. BMI is legally obligated to pay Performance Royalties to Adam Bravery, LLC, the rightful Assignee of Alexander C. Baker, a BMI writer member from 1999-present. After paying royalties faithfully for over 20 years, in March 2020 BMI stopped doing so without legal justification, but upon a false and fabricated pretext.

19. Likewise, ASCAP is legally obligated to pay Performance Royalties to Baker, an ASCAP writer member from 1990-1999. ASCAP has failed to obey a July 2016 Court Order and Letter of Direction requiring it to equalize royalties between Baker and his former co-writer.

III. SUBJECT MATTER JURISDICTION

A. Federal Question Jurisdiction

20. Class Plaintiffs assert original federal jurisdiction under 28 U.S.C. § 2201 et. seq., the Declaratory Judgment Act, as Songwriters seek Declaratory Judgments that the Mandatory Arbitration Clause is void for coercion; the Mandatory Arbitration Clause unconstitutionally violates Songwriters' federal rights to petition and to a jury trial; receiving Performance Royalties is a federally-protected right; ASCAP & BMI and its officials are State Actors for civil rights purposes; and that ASCAP & BMI owes a fiduciary duty to its writer members, who thereby have a right to audit.

21. Federal jurisdiction is also asserted under 42 U.S.C. § 1983, the Civil Rights Act, as Plaintiffs seek to hold Defendants liable for civil rights violations.

22. Furthermore, federal jurisdiction was expressly retained in the Consent Decrees. See *United States v. ASCAP*, 2001 WL 1589999 (S.D.N.Y.); *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.).

B. Alexander Baker and Adam Bravery LLC Assert Diversity Jurisdiction

23. In addition to federal question jurisdiction, Plaintiffs to the underlying action against assert diversity jurisdiction.

24. Plaintiff Adam Bravery LLC is a Limited Liability Company registered and headquartered in Arizona.

25. Plaintiff Alexander C. Baker resides in California.

26. Defendant ASCAP is a Delaware corporation, with headquarters in New York.

Likewise, Defendant BMI is a Delaware corporation, with headquarters in New York.

On information and belief, Defendants Mike O'Neill and Erika Stallings each reside in New York.

27. The value of Alexander Baker's BMI royalty stream in the underlying case was at least \$100,000, rendered worthless by BMI's unjustified royalty stoppage.

28. Additionally, Plaintiffs to the underlying case against BMI seeks general damages of not less than \$1,000,000, and special damages of not less than \$200,000.

29. Therefore federal diversity jurisdiction is proper over all underlying claims by Plaintiffs Alexander C. Baker and Adam Bravery LLC.

C. Supplemental Jurisdiction

30. The District Court should exercise supplemental jurisdiction over the State law claims because all of the claims arise from a common nucleus of operative facts that are so inextricably intertwined that they cannot reasonably be separated.

IV. PERSONAL JURISDICTION

31. State long-arm statutes frequently authorize specific personal jurisdiction over defendants for intentional torts that cause effects in the forum state. See *Calder v. Jones*, 465 U.S. 783, 790 (1984).

32. Under Ariz. R. Civ. P. 4.2(a), an Arizona court may exercise personal jurisdiction over a non-resident defendant to the maximum extent permitted by the U.S. Constitution.

1 Arizona's long-arm statute has a broad remedial purpose and is liberally construed to
2 confer upon Arizona residents the maximum privileges permitted by the federal
3 constitution. *Meyers v. Hamilton Corp.*, 143 Ariz. 249, 252, 693 P.2d 904, 907 (1984).

4 33. For an Arizona court to exercise personal jurisdiction over a non-resident defendant,
5 the plaintiff must show that the defendant had minimum contacts with Arizona such that
6 maintaining the suit in Arizona does not offend traditional notions of fair play and
7 substantial justice. *Id.* at 252, 693 P.2d at 907.

8 34. "The notion of 'fair play and substantial justice' is a flexible one, requiring courts to
9 look at the fact situation of each case to determine whether there are sufficient, purposeful
10 'minimum contacts' with the forum." *O'Connor, Cavanagh, Anderson, Westover,*
11 *Killingsworth & Beshears, P.A. v. Bonus Utah, Inc.*, 156 Ariz. 171, 173, 750 P.2d 1374,
12 1376 (Ct. App. 1988) (emphasis added). *See also Williams v. Lakeview Co.*, 199 Ariz. 1,
13 3-4, 13 P.3d 280, 282-83 (2000) ("We cannot decide the issue of personal jurisdiction by
14 applying any mechanical test or 'talismanic jurisdictional formulas'; the facts of each case
15 must always be weighed in determining whether personal jurisdiction would comport with
16 'fair play and substantial justice.'") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S.
17 462, 485-86 (1985)).

18 35. In deciding if minimum contacts exist, "it is not the number of contacts involved but
19 the importance of the particular contacts. Quality, not the quantity of defendant's
20 activities, is what is persuasive." *Meyers*, 143 Ariz. at 253, 693 P.2d at 908. Therefore, a
21 **single act is sufficient to establish a basis for personal jurisdiction.** *O'Connor*, 156
22 Ariz. at 173, 750 P.2d at 1376. *See, e.g., Id.*, 156 Ariz. at 173, 750 P.2d at 1376
23 (defendant's hiring of Arizona law firm to file answer on its behalf in pending lawsuit
24 created minimum contact necessary to establish personal jurisdiction over him); *Holmes*
25 *Tuttle Broadway Ford, Inc. v. Concrete Pumping, Inc.*, 131 Ariz. 232, 235, 639 P.2d 1057,
26 1060 (Ct. App. 1981) (**defendant's single act of ordering a new engine from plaintiff**
27 **without intending to pay for it was sufficient to satisfy minimum contacts test**).
28

1 36. Here, BMI's single act of promising to pay royalties to an Arizona citizen, then
2 stopping royalties without legal justification is sufficient to satisfy minimum contacts test.

3 **V. VENUE**

4 37. Venue is proper in Arizona because that is the State in which Plaintiff Adam
5 Bravery LLC is registered to do business. On information and belief regarding
6 operative case law, Plaintiff Adam Bravery LLC is precluded from seeking relief in
7 a Federal Court in any other State besides Arizona.

8 **VI. PARTIES**

9 **A. Plaintiffs**

10
11 38. Plaintiff and proposed Songwriter Class Representative Alexander C. Baker
12 ("Baker") is an individual. Baker is a songwriter and music producer, and the aspiring
13 producer of a music-driven animated entertainment franchise titled "Adam Bravery."

14 39. The proposed Songwriter Class is all ASCAP & BMI writer members who signed
15 the Writer "Agreement" of ASCAP and/or BMI, who wish to collect Performance
16 Royalties, but also wish to no longer be bound by the unenforceable, unconscionable
17 and/or unconstitutional terms and conditions imposed upon them by ASCAP & BMI as a
18 pre-condition, and about which Class Action Plaintiffs complain herein throughout.
19 Beyond all else, Songwriters seek to establish, once and for all, that ASCAP & BMI owe
20 them a fiduciary duty.

21 40. Plaintiff and proposed Assignee Class Representative Adam Bravery, LLC, is an
22 Arizona Limited Liability Company formed by Baker and two other equal members in
23 2018, is the assignee and legal claimant to benefit from Alexander C. Baker's Performance
24 Royalty money. The purpose of Adam Bravery LLC is to produce and commercially
25 exploit a music-driven, animated motion picture authored by Baker, and to commercially
26 exploit its associated music and merchandise.

27 41. The proposed Assignee Class is all persons and entities to whom rights to receive
28 Performance Royalties have been validly assigned, who wish to collect Performance

Royalties, but also wish to no longer be bound by the unenforceable, unconscionable and/or unconstitutional terms and conditions imposed upon them by ASCAP & BMI as a pre-condition, and about which Class Action Plaintiffs complain herein throughout.

B. Defendants

42. Defendant American Society of Composers, Authors and Publishers, commonly known as “ASCAP,” is a Delaware not-for-profit corporation with its principal office in New York.

43. Defendant Broadcast Music Inc., commonly known as “BMI,” is a Delaware not-for-profit corporation with its principal office in New York.

44. ASCAP & BMI are Performing Rights Organizations (“PRO”) as set forth in the Copyright Act and whose purpose is to collect and distribute music Performance Royalty money to its affiliated writer and publisher members.

45. Defendant Mike O’Neill is the CEO of BMI, and sued in his individual capacity for involvement in the false pretext to withhold royalties (Claims 7-12).

46. Defendant Erika Stallings is presently Assistant General Counsel at Facebook, but was in-house counsel for BMI at all relevant times, and is believed to be personally responsible for issuing a false pretext on which to stop paying royalties to Adam Bravery LLC. Stallings is sued in her individual capacity for her involvement in the false pretext to withhold royalties (Claims 7-12).

C. Doe Defendants

Doe Defendants are unknown BMI officials involved in authorizing, planning and executing the false pretext for withholding royalties (Claims 7-12).

VII. STANDING

A. Individual Standing for Plaintiff Alexander C. Baker

47. Plaintiff Alexander C. Baker has standing to sue ASCAP & BMI for the Declaratory Judgments sought in the First – Sixth Causes of Action because he has suffered injury in fact – both constitutional and monetary injuries.

1 48. As a direct and proximate consequence of Defendants' actions, Baker has suffered
2 injuries in fact, which injuries are the loss of value of his share of ownership in Adam
3 Bravery LLC, which loss in value was actually and proximately caused by the destruction
4 of the federally protected right to receive BMI Performance Royalty money, which right is
5 presently held by Plaintiff Adam Bravery LLC. Baker has also been injured by the
6 unjustified withhold of ASCAP royalties.

7 49. Baker seeks to vindicate his First Amendment right to petition and Seventh
8 Amendment right to a jury trial, which rights are vigorously asserted here, but which
9 rights BMI contends was "waived" by virtue of the BMI Writer "Agreement" and its
10 Mandatory Arbitration Clause.

11 50. Baker seeks a Declaratory Judgment that ASCAP & BMI owe him a fiduciary duty,
12 and that such fiduciary duty was breached, not only by the unwarranted royalty stoppages,
13 but also by ASCAP & BMI's failure to abide their own royalty calculation formulas.

14 51. Baker alleges that both ASCAP & BMI breached their fiduciary duty to him, and to
15 all Songwriters, by cheating them out of Performance Royalties owed, as the demanded
16 audit will show.

17 52. Moreover, Baker seeks a declaration that BMI's Mandatory Arbitration Clause is
18 void and/or unconstitutional, or finding performance royalties to be a federally protected
19 right, or finding ASCAP & BMI and its officials to be State Actors would allow Adam
20 Bravery LLC to recover damages, and recover the withheld royalty money, which would
21 restore the lost value of the company.

22 53. Baker's injuries – both constitutional and monetary - are remediable by the relief
23 sought.

24 **B. Organizational Standing for Adam Bravery LLC**

25 54. Plaintiff Adam Bravery LLC has standing to pursue the Declaratory Judgments
26 sought in the First – Fifth Causes of Action because it has suffered injury in fact. As
27 Assignee, Adam Bravery LLC has the right to receive royalty money. Under the U.S.
28 Constitution, Adam Bravery LLC has a right to petition the government for grievances,

1 and a right to a jury trial, the loss of which rights constitutes injury. Moreover, the
2 unjustified withholding Performance Royalty money is clear financial injury.

3 55. Moreover, an association has standing to bring suit on behalf of its members when
4 its members would otherwise have standing to sue in their own right, the interests it seeks
5 to protect are germane to the organization's purpose, and neither the claim asserted nor the
6 relief requested requires the participation of individual members in the lawsuit. *Hunt v.*
7 *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 335, 97 S. Ct. 2434, 2437 (1977)

8 56. Here, for the reasons set forth above, Alexander Baker has standing to sue in his
9 own right for Declaratory Judgments and for civil rights violations. Though he assigned
10 his federally-protected right to receive performance royalties to the LLC, he has a vested
11 financial interest in the LLC as a 1/3 owner.

12 57. Adam Bravery LLC seeks to protect its right to collect Performance Royalties,
13 which is germane to its overall purpose for two reasons. First, it exists to create and
14 commercially exploit copyrighted content, which commercial exploitation should in the
15 future encompass receiving performance royalties. Second, and most pressingly, Adam
16 Bravery LLC depends crucially on the quarterly income from ASCAP & BMI royalties in
17 order to operate. While one member of Adam Bravery LLC – Baker – is party to this
18 lawsuit, neither the Declaratory Judgment nor Civil Rights claims asserted nor the relief
19 requested require the participation of the other members.

20 58. Therefore, Adam Bravery LLC has standing to pursue Declaratory Judgment and
21 Civil Rights claims because Defendants acted under color of law to deprive Adam Bravery
22 LLC of its federally protected right to receive Performance Royalty money. Defendants
23 also acted to deprive Adam Bravery LLC of its First Amendment Right to Petition, and
24 Seventh Amendment right to a jury trial, which right is vigorously asserted here.

VIII. FACTS RELEVANT TO CLASS ACTION CLAIMS

A. Background on ASCAP & BMI

59. Since well before World War II, ASCAP & BMI have operated as not-for-profit organizations in the role of Performance Rights Society, or Performing Rights Organization ("PRO") as set forth in the "Definitions" section of Copyright Act at 17 U.S.C. § 101.

60. ASCAP & BMI enter into purported "contracts" with music writers ("writer members," and herein "Songwriters") for the purpose of collecting and distributing Performance Royalty money owed to Songwriters. Performance Royalties are often the only way a Songwriter can monetize.

B. Facts Regarding Copyrights In Recorded Music

61. "Copyright" is a right of ownership. It applies to authored works, such as a song, and refers to the exclusive legal rights of (1) reproduction, (2) adaptation, (3) publication, (4) public performance, and (5) public display. See 17 U.S.C. § 106.

62. There are *two* separate copyrights for a piece of recorded music – one copyright in the musical Composition (held by the Publisher, and often referred to as the "publishing rights"), and one copyright in the Master Recording (held by the Master Owner, and often referred to as the "master rights").

63. Under the Copyright Act of 1976 (17 U.S.C. § 101 et. seq.), copyright owners have the exclusive right to license a recorded song for use¹ on a TV show. Thus, use of *one* recorded song on a TV show requires the TV show producer to obtain, at arms length, *two* licenses – a "synchronization" license issued by the Publisher for use of the Composition, and a "master" license issued by the Master Owner for use of the Master.

64. Songwriter is neither the Publisher nor the Master Owner. Songwriter does *not* own *either* of the copyrights. Songwriter has no right to license the use of the recorded song on

¹ "Use" of recorded music on a TV show involves the rights of reproduction,

1 a TV show. Songwriter has no right to license the use of the recorded song to *anyone for*
 2 *any purpose*.

3 **C. Facts Regarding Songwriters' Assignment of Public Performance**
 4 **Rights To ASCAP & BMI**

5 65. Having contractually assigned all copyright ownership to Publisher, Songwriter
 6 retains only the right to collect the so-called "writer's share" of public Performance
 7 Royalties.

8 66. By virtue of the license described in the standard Writer "Agreement," Songwriters
 9 assign to ASCAP & BMI the right to license the public performances of their songs.
 10 ASCAP & BMI each have a vast repertoire of songs written by Songwriters.

11 **D. Facts Regarding ASCAP & BMI Granting "Blanket" Licenses**

12 67. Acting as a global agent on behalf of Songwriters, ASCAP & BMI enter into
 13 blanket license agreements with end-users of recorded music such as TV networks.
 14 ASCAP & BMI charge a license fee in exchange for granting – on behalf of all
 15 Songwriters - the public performance rights to the *entire repertoire* of music written by all
 16 ASCAP & BMI Songwriters. Note that as PROs, ASCAP & BMI license *only* the
 17 performance rights, *not* any of the other fundamental rights.

18 68. Together, ASCAP & BMI collect roughly \$2 billion in license fees on an annual
 19 basis. ASCAP & BMI retain that license fee money for a period of time, typically for
 20 about nine months, taking an unknown amount of the money for operating expenses.
 21 Then, on a quarterly basis, in January, March, June and September of each year, ASCAP
 22 & BMI distribute the remainder money as Performance Royalties, purportedly according
 23 to a formula based on the results of performance surveys, and a weighting factor based on
 24 the type of musical use.

25 **E. Facts Distinguishing Performance Royalties from Artist Royalties**

26 69. Performance Royalties - central to this case – are distinguishable from Artist
 27 Royalties. Artist Royalties are paid by a Record Company to a musical Artist according to
 28

the terms of a contract between the Artist and the Record Company. A typical such “artist deal” obligates the for-profit Record Company to pay the Artist royalties based on a *negotiated* percentage of the revenue from sales of the Artist’s musical product, after a *negotiated* recoupment of the Record Company’s initial investment into the project.

70. Note that there is a direct relationship between the money received by the Record Company in revenue vs. the money it owes in royalties. At no time is the money co-mingled with other moneys owed to other artists, who have their own, different negotiated contracts. For these reasons, prior court cases have found that no fiduciary duty exists between the Artist and the Record Company, as an artist deal contract is negotiated “at arms length.” See e.g. *Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 482 (S.D.N.Y. 2009)

F. Facts Distinguishing Performance Royalties From Royalties Paid On Third Party License Deals

71. Performance Royalties are also distinguishable from royalties paid on third-party license deals. In some cases a copyright owner of a song will grant a license to a Licensee, with the understanding that Licensee then has the right to turn around and grant a license for use of the song to a third party. Under such a contract, the Licensee will pay a royalty to Licensors as a *negotiated* percentage of the license fees received from the third party.

72. Note that there is a direct relationship between the money received by the Licensee and the royalty owed to the Licensors. At no time is the money co-mingled with other monies owed to other licensors, who have their own, different negotiated contracts. For these reasons, prior court cases have found that no fiduciary duty exists between the Licensors and Licensee in such third-party license agreements, as such agreements are negotiated “at arms length.” See e.g. *Surge Licensing v. Copyright Promo. LTD*, 258 A.D.2d 257

G. Facts Regarding The Co-Mingling of All Performance Royalty Money

73. Performance Royalties are fundamentally different from the other types of royalties for several reasons. First, ASCAP & BMI are not-for-profit entities, whereas Record Companies and Third Parity Licensees are for-profit entities.

74. Second, the “agreement” between Songwriter and ASCAP & BMI to collect Performance Royalties is not negotiated at arms length. In fact, the “agreement” is not negotiated at all. There is a standard, one-size-fits-all writer “agreement” that Songwriter signs, or else does not receive Performance Royalties. Unlike the other types of music royalties, Songwriters are bound by identical “agreements.”

75. Third, there is no relationship at all between the money collected by ASCAP & BMI and the Performance Royalty paid to Songwriter for use of the song. This is because ASCAP & BMI do not collect money for use of the song, and have no involvement in licensing the song for use on a TV show.² Rather, ASCAP & BMI charge TV Networks annual blanket fees, which fee covers their entire repertory, unrelated to any particular song or songs. All of the money collected by ASCAP is co-mingled together in a giant ASCAP pool. Likewise, all of the money collected by BMI is co-mingled together in a giant BMI pool.

76. If, and only if, a Publisher / Master Owner licenses Songwriter’s song for use on a TV show, does a Performance Royalty become due to Songwriter. Performance Royalties are paid to Songwriters in quarterly distributions, allegedly according to a set formula.

H. Facts Regarding The Mysterious Nature of the Performance Royalty Formula

77. In a publication called “ASCAP’s Survey and Distribution System: Rules & Policies,” ASCAP describes its formula, in part, as:

Distribution to each writer member (hereinafter called “writer”) from this fund shall be calculated on the basis of the number of performance credits

² Songs are licensed to a TV show by the Publisher and Master Owner.

of such writer recorded during the most recent available fiscal survey quarter year multiplied by the performance credit value for that quarter year, multiplied by 20%.

See <https://www.ascap.com/~media/files/pdf/members/payment/drd.pdf>

78. BMI employs a similar formula. How exactly ASCAP & BMI tally the number of “performance credits,” or how a number is assigned to “performance credit value,” or how those numbers relate to the total amount of money collected, is unknown to Plaintiffs. More importantly, even if the specifics of the formula were known, Plaintiffs are unable to verify whether ASCAP & BMI are adhering to it.

I. Facts Regarding The Consent Decrees

79. Long ago, ASCAP & BMI were each prosecuted by the United States of America for violations of the Sherman Anti-Trust Act. The net result of those prosecutions were Consent Decrees containing the terms and conditions under which ASCAP & BMI are allowed to operate.

80. The Consent Decrees are periodically renegotiated, or updated. On information and belief, the most recent version of the Consent Decree controlling BMI is the 1994 version, a true and correct copy of which is attached to this complaint as EXHIBIT “A,” pp. 2-10. The most recent Consent Decree controlling ASCAP is the 2001 version, a true and correct copy of which is attached to this complaint at EXHIBIT “R,” pp. 92-100.

81. Under the Consent Decree, ASCAP & BMI have no right to refuse membership to any Songwriter with at least one work published. At Article V (A) (“No Right to Refuse”), the BMI Consent Decree states, in relevant part:

“[BMI] shall not refuse to enter into a contract providing for the licensing by [BMI] of performance rights with any writer who shall have had at least one copyrighted musical composition of his writing commercially published or recorded...”

See EXHIBIT “A,” p. 3

82. Likewise, at Article XI, A(1), the ASCAP Consent Decree States:

ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise, [a]ny writer who shall have had at least one

work regularly published, whether or not performance of the work has been recorded in an ASCAP survey.

See EXHIBIT “R,” p. 98

83. The BMI Consent Decree requires BMI to divest all songwriters of their enumerated right to a jury trial. At Article VII (C) (“Arbitration Mandate”), the BMI Consent Decree states:

Defendant [BMI] shall include in all contracts which it tenders to writers, publishers and music users relating to the licensing of performance rights a clause requiring the parties to submit to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association, all disputes of any kind, nature or description in connection with the terms and conditions of such contracts or arising out of the performance thereof or based upon an alleged breach thereof, except that in all contracts tendered by defendant to music users, the clause requiring the parties to submit to arbitration will exclude disputes that are cognizable by the Court pursuant to Article XIV hereof.

See EXHIBIT “A,” p. 5

84. The ASCAP Consent Decree does not include an Arbitration Mandate. See EXHIBIT “R,” p. 92 et. seq.

J. ASCAP & BMI Standard Writer “Agreement”

85. Pursuant to their obligations under the Consent Decrees, ASCAP & BMI offer potential writer-members a standard Writer “Agreement.” See current Writer “Agreements” for ASCAP (EXHIBIT “Q,” p. 92 et. seq.) and BMI (EXHIBIT “C,” p. 17 et. seq.)

86. The Writer “Agreements” granting performance rights to ASCAP & BMI are “non-exclusive” in one sense, meaning that the Publisher retains the right to license performance rights directly, without utilizing the services of the PRO. However, in a different sense, the Writer “Agreement” *is* exclusive, in that Songwriter may only belong to one PRO at a time. Any and all songs registered with one PRO forever remain with that PRO, regardless of whether Songwriter later changes his or her affiliation.

87. On June 4, 1999, Baker signed the BMI standard Writer “Agreement” (hereafter the “BMI-Baker Writer ‘Agreement’”), attached to this Complaint at EXHIBIT “B,” p. 12-15.

1 88. At paragraph 13 ("Power of Attorney clause"), the BMI-Baker Writer "Agreement"
2 states that:

3 You make, constitute and appoint us, or our nominee, your true and lawful
4 attorney, irrevocably during the Period, in our name or that of our
5 nominee, or in your name, or otherwise, in our sole judgment, to do all
6 acts, take all proceedings, execute, acknowledge and deliver any and all
7 instruments, papers, documents, process or pleadings that, in our sole
8 judgment, may be necessary, proper or expedient to restrain infringement
9 of and/or to enforce and protect the rights granted by you hereunder, and
to recover damages in respect to or for the infringement or other violation
of said rights, and in our sole judgment to join you and/or others in whose
names the copyrights to any of the Works may stand.

10 EXHIBIT "B," p. 14

11 89. The current ASCAP Writer "Agreement" has a similar Power of Attorney clause.
12 See EXHIBIT "Q," p. 90, Item 5.

13 90. At paragraph 17 ("Right to Payment of Money") the BMI-Baker Writer
14 "Agreement" states:

15 You acknowledge that the rights obtained by you pursuant to this
16 agreement constitute rights to payment of money and that during the
Period we shall hold title to the performing rights granted to us hereunder.

17 EXHIBIT "B," p. 15

18 91. At paragraph 18 ("Promise to Pay") the BMI-Baker Writer "Agreement" states:

19 We agree to distribute to you royalties and monies collected by us
20 pursuant to the authorization granted in subparagraph 18(a), pursuant to
21 our then prevailing practices, including deduction of our expenses
therefor.

22 EXHIBIT "B," p. 15

23 92. Likewise, the current ASCAP Writer "Agreement" promises:

24 a fair, just and equitable distribution of royalties among the membership.

25 EXHIBIT "Q," p. 90, Item 8.

26 93. At paragraph 19, ("Mandatory Arbitration Clause") the BMI-Baker Writer
"Agreement" states:

27 All disputes of any kind, nature or description arising in connection with
28 the terms and conditions of this agreement shall be submitted to the

American Arbitration Association in New York, New York, for arbitration under its then prevailing rules.

EXHIBIT “B,” p. 15

94. The ASCAP Writer “Agreement” does not contain a Mandatory Arbitration Clause.

95. The standard BMI Writer “Agreement” appears to have changed since 1999 when Baker signed his. On February 4, 2020, Baker downloaded from the BMI website its “Writer Kit,” which contains the current standard “agreement” (“New Writer ‘Agreement’”) plus instructions on how to fill out the forms. The New Writer “Agreement” is attached hereto as EXHIBIT “C,” pp. 16-23.

96. In many respects, the new Writer “Agreement” is identical to the 1999 version that Baker signed. For example, the “Power of Attorney” language in paragraph 13 of the BMI-Baker Writer “Agreement” is found at paragraph 15 of the New Writer “Agreement”; EXHIBIT “C,” p. 21; the “Right to Payment” language in paragraph 17 of the BMI-Baker Writer “Agreement” is now present in paragraph 19 of the New Writer “Agreement,” *Id.*, p. 22; the “Promise to Pay” language in paragraph 18 of the BMI-Baker Writer “Agreement” is now found at paragraph 20 of the New Writer “Agreement,” *Id.*, p. 22; and the Mandatory Arbitration Clause at paragraph 19 of the BMI-Baker Writer “Agreement” is now found at paragraph 21 of the New Writer “Agreement,” *Id.*, p. 22.

97. However, the New BMI Writer “Agreement” contains a significant difference as compared to the BMI Writer “Agreement” Baker signed, as paragraph 24 of the current version (“No Fiduciary Duty”) states:

You acknowledge that the relationship between you and us which is created by this agreement is one of ordinary contracting parties and is not intended to be a fiduciary relationship with respect to any of the rights or obligations hereunder.

EXHIBIT “C,” p. 22

98. The “No Fiduciary Duty” language is not present in the BMI-Baker Writer “Agreement.” On information and belief, both ASCAP & BMI disclaim owing a fiduciary duty to Songwriters.

K. Background on Class Representative Alexander Baker

99. Plaintiff Alexander C. Baker ("Baker") is a songwriter, lyricist and music composer. Primarily a pianist and keyboard player, Baker also sings, plays guitar and percussion instruments. Baker can improvise music and spontaneously compose music, to specifications, "at the drop of a hat." This ability allowed Baker to be a very prolific composer.

100. In 1990, Baker signed a Writer "Agreement" with ASCAP.

101. In 1993 Baker met Clair Marlo. Baker and Marlo formed a business partnership called "Invisible Hand Productions" for the purpose of writing, producing and commercially exploiting music.

102. By 1994, along with his writing partner Marlo, Baker was earning ASCAP Performance Royalties for original music composed for the Muzak background music service. At that time, Baker was informed by Marlo (also an ASCAP writer) and informed by their then-publisher Dean Whitney (DeWhit Music Publishing Company, ASCAP) that BMI *did not collect* from Muzak.

103. In 1995 Baker and Marlo were legally married.

104. By 1996, Baker and Marlo began working on a "work-for-hire" basis for FirstCom Music, writing and producing collections of music for use on TV shows. FirstCom had both ASCAP & BMI publishing companies.

105. Both Baker and Marlo began earning ASCAP Performance Royalties for music licensed by FirstCom to TV shows. However, in or about 1999, Baker and Marlo were informed that, as to Performance Royalties for music on TV shows, BMI paid significantly more than ASCAP.

106. On June 4, 1999, Baker resigned from ASCAP and signed with BMI (hereafter the "BMI-Baker Writer 'Agreement'"), attached to this Complaint at EXHIBIT "B," p. 12-15.

107. For a period of about 2 years, 1999 - 2001, Baker was a BMI writer while Marlo remained an ASCAP writer. Since there were numerous co-written songs earning Performance Royalties, Marlo (who handled the business) compared Performance

Royalties paid by ASCAP to those paid by BMI for the same performances. It was confirmed that – at least regarding such production music - BMI pays significantly more for TV show usage than does ASCAP.

108. In or about 2001, Clair Marlo resigned ASCAP and also became a BMI writer.

109. In the ensuing 2 decades, Baker had literally thousands of performances of his music on TV. Baker never failed to earn royalties in any quarterly distribution since. By the year 2010, Baker's annual BMI royalties were over \$100,000 per year.

110. Since 2010, Baker's royalties have gradually tapered off, and currently earn about \$40,000 per year.

IX. CAUSES OF ACTION IN CLASS ACTION CASE

FIRST CAUSE OF ACTION

Declaratory Judgment – 28 U.S.C. § 2201

BMI Mandatory Arbitration Clause is Void and Unenforceable

Coercion / Economic Duress

(Songwriter Class and Assignee Class v. BMI)

111. Class Action Plaintiffs repeat, reallege, and incorporate by reference all facts stated above.

112. Each BMI Songwriter undisputedly signed a document titled “Writer Agreement” with BMI, which document undisputedly contains a Mandatory Arbitration Clause, the language of which undisputedly purports to mandate arbitration for any dispute arising from the collection and distribution of performance royalties. Each member of the Assignee Class undisputedly assigned the rights to collect royalties under said Writer “Agreement.”

113. An actual controversy has arisen between Class Action Plaintiffs and BMI. Plaintiffs believe BMI’s Mandatory Arbitration Clause is void and unenforceable because it was signed under coercion. BMI believe the Arbitration Clause is an enforceable agreement.

114. Songwriters will be deemed to have been coerced into signing the BMI Writer “Agreement” if they can prove all of the following. (1) That BMI used a wrongful act or

1 wrongful threat to pressure Songwriters into consenting to the contract; (2) that a
2 reasonable person in Songwriter's position would have believed that they had no
3 reasonable alternative except to consent to the BMI Writer "Agreement"; and (3) that
4 Songwriter would not have consented to the contract without the wrongful act or wrongful
5 threat. (See CACI Jury Instructions, No. 333)

6 115. At paragraph 19, ("Mandatory Arbitration Clause") the BMI Writer "Agreement"
7 states:

8 All disputes of any kind, nature or description arising in connection with
9 the terms and conditions of this agreement shall be submitted to the
10 American Arbitration Association in New York, New York, for arbitration
under its then prevailing rules.

11 116. Applicable case law instructs us that economic duress has taken place when "a
12 reasonably prudent person subject to [economic coercion] may have no reasonable
13 alternative but to succumb when the only other alternative is bankruptcy or financial ruin."
14 (*Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 157 Cal. App. 3d 1154, 1155, 204 Cal. Rptr.
15 86, 87 (1984), and see also *Frank Culver Elec., Inc. v. Jorgenson*, 136 Ariz. 76, 77-78,
16 664 P.2d 226, 227-28 (App. 1983))

17 117. If Songwriter's Publisher is a BMI Publisher, then Songwriter does not have the
18 option of joining ASCAP. Even if Songwriter is an ASCAP writer, if Songwriter seeks to
19 obtain proper Performance Royalties for performances on TV shows, Songwriter must
20 resign ASCAP and join BMI as Alexander Baker did in 1999, or else suffer very
21 significant financial losses.

22 118. BMI's conduct clearly meets the standard for economic duress, because a typical
23 BMI Songwriter seeking Performance Royalties for music on TV shows, e.g. Alexander
24 Baker, has no other method to obtain proper Performance Royalty money besides signing
25 BMI's Mandatory Arbitration Clause.

26 119. Such a loss of Performance Royalties is reasonably expected to lead to financial ruin
27 for a typical Songwriter, because a typical Songwriter works on a "work-for-hire" basis, or
28 otherwise surrenders copyright ownership. As set forth in the Copyright Act (17 U.S.C. §

101 et. seq.), under a “work-for-hire,” the songwriter gives copyright ownership – and all associated royalty rights - to the Publisher. The only royalty right remaining to the songwriter under a work-for-hire is the right to collect Performance Royalties.

120. Thus, to earn a living, a BMI Songwriter has no reasonable alternative to BMI. It is either sign BMI’s Mandatory Arbitration Clause, or face economic ruin. This is more than theory or speculation. After collecting royalties upwards of \$1 million over the years, Class Representatives Alexander Baker and Adam Bravery LLC are now faced with economic ruin, as a direct and proximate consequence of BMI’s unjustified royalty stoppage. Had Baker never signed the Mandatory Arbitration Clause in the first place, he could not possibly have ever received the money he did and would have been economically ruined long ago.

121. Therefore, the Court should find that Songwriter’s signature on BMI’s Mandatory Arbitration Clause was obtained by the coercion of economic duress, and on that basis declare the BMI Mandatory Arbitration Clause null, void and unenforceable.

SECOND CAUSE OF ACTION

Declaratory Judgment – 28 U.S.C. § 2201

ASCAP & BMI and Their Officials are Government Actors for § 1983 Purposes (Songwriter Class and Assignee Class v. ASCAP & BMI)

122. Plaintiffs repeat, reallege and incorporate by reference the facts alleged above.

123. An actual controversy has arisen, as Songwriters and their Assignees believe that ASCAP & BMI and their Officials are State Actors for civil rights purposes, while ASCAP & BMI maintain that they are private not-for-profit organizations.

124. ASCAP & BMI are each Delaware not-for-profit corporations. ASCAP & BMI and its officers are nominally private actors.

125. However, ASCAP & BMI and their officers must be held to be government actors for Section 1983 purposes, under the State Compulsion Test.

126. Under the State Compulsion Test, a private actor will be treated as a government official for Section 1983 purposes when a state exercises such coercive power that the "choice must in law be deemed to be that of the State.” *Blum v. Yaretsky*, 457 U.S. 991,

1004 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson*, 419 U.S. at 357; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173(1965)).

127. The State Compulsion Test is met when a state encourages or coerces a private party to engage in the challenged conduct. See Paul C. McCaffrey, Note, "Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should be Treated as State Action," 22 WASH. U. J.L. & POL'Y 645, 664 (2006).

128. Here, the Consent Decrees coerce both ASCAP & BMI to collect royalties for "any writer" with at least one published song, thus creating a federal entitlement and federal right. The choice in law is that of the United States of America, not of ASCAP & BMI. ASCAP & BMI have no choice in the matter.

129. The Ninth Circuit has explained:

The state compulsion test asks whether a private actor who violates someone's constitutional rights under the "compulsion" or framework of a state law or a state custom having force of law offends the Fourteenth Amendment. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 169-170, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975).

Gorenc v. Salt River Project Agric. Improv. & Power Dist., 869 F.2d 503, 508 (9th Cir. 1989)

130. In addition to mandating membership and the collection of Performance Royalties, the BMI Consent Decree also coerces BMI to deprive its members of the Seventh Amendment right to jury trial by mandating arbitration. Again, the choice in law is that of the United States of America, not of BMI.

131. Finding State compulsion is based on the degree of the state's influence over the private actor and, therefore, its potential application is much broader than, for example, the Public Function Test. As Justice Souter noted in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, coercion and encouragement refer to the "kinds of facts that can justify characterizing an ostensibly private action as public instead." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288,303 (2001).

132. In light of the “any writer” mandate, both Consent Decrees’ degree of influence over ASCAP & BMI is *total*, as it states essentially *all* the significant terms under which ASCAP & BMI is and is not allowed to operate.

133. Violations of the Consent Decree would subject ASCAP & BMI to punishment under the law. The Consent Decree compels ASCAP & BMI to act in certain ways, and to refrain from acting in other ways, and has all the force and power of federal statutory law.

134. Thus, the mandates of the Consent Decrees satisfy the State Compulsion Test.

135. Moreover, the Copyright Act (17 U.S.C. § 101 et. seq) mentions ASCAP & BMI *by name* in its definition section. Other than the Copyright Act, Plaintiffs are not aware of any other statutes, federal or state, that mention any private entities, whether for-profit or not-for-profit.

136. Therefore, the Court should issue a Declaratory Judgment that, for Section 1983 purposes, ASCAP & BMI and its officials are State Actors.

THIRD CAUSE OF ACTION

42 U.S.C. § 1983 Civil Rights, 28 U.S.C. § 2201 Declaratory Judgment BMI Consent Decree Arbitration Mandate and BMI Arbitration Clause Violate Right to Petition and Right to Jury Trial Without Due Process (Songwriter Class and Assignee Class v. BMI)

137. Plaintiffs repeat, reallege and incorporate by reference the facts alleged above.

138. An actual controversy has arisen between Class Action Plaintiffs and BMI. Acting under color of the Consent Decree, BMI has a policy and custom of Mandatory Arbitration. Plaintiffs believe BMI’s Mandatory Arbitration Clause is unconstitutional because it deprives Plaintiffs of the rights to petition and to a jury trial without the due process promised in the Fifth Amendment. BMI believes its Mandatory Arbitration Clause is an enforceable agreement, and that Songwriters voluntarily waived their constitutional rights.

139. The First Amendment to the U.S. Constitution states, in relevant part:

Congress shall make no law ... abridging ... the right ... to petition the Government for a redress of grievances.

1 140. The Seventh Amendment to the U.S. Constitution states:

2 In Suits at common law, where the value in controversy shall exceed
3 twenty dollars, the right of trial by jury shall be preserved, and no fact
4 tried by a jury, shall be otherwise reexamined in any Court of the United
States, than according to the rules of the common law.

5 The Fifth Amendment to the U.S. Constitution states, in relevant part:

6 No person ... shall be deprived of ... property ... without due process of
law.

7 Procedural due process rules are meant to protect persons from the mistaken or
8 unjustified deprivation of life, liberty, or property. (*Carey v. Piphus*, 435 U.S. 247, 259
9 (1978)). Thus, the required elements of due process are those that “minimize substantively
10 unfair or mistaken deprivations” by enabling persons to contest the basis upon which a
11 State Actor proposes to deprive them of protected interests. (*Fuentes v. Shevin*, 407 U.S.
12 67, 81 (1972)).

13 141. In its Section VII (C), the Consent Decree states:

14 "[BMI] shall include in all contracts which it tenders to writers, publishers
15 and music users relating to the licensing of performance rights a clause
16 requiring the parties to submit to arbitration in the City, County and State
17 of New York under the then prevailing rules of the American Arbitration
18 Association, all disputes of any kind, nature or description in connection
with the terms and conditions of such contracts or arising out of the
performance thereof or based upon an alleged breach thereof..."

19 142. At paragraph 19, ("Mandatory Arbitration Clause") the BMI-Baker Writer
20 "Agreement" states:

21 All disputes of any kind, nature or description arising in connection with
22 the terms and conditions of this agreement shall be submitted to the
23 American Arbitration Association in New York, New York, for arbitration
under its then prevailing rules.

24 143. Mandating arbitration is, by definition, a prior restraint of the right the petition and
25 of the right to a jury trial. It has long been established that a prior restraint comes to the
26 Court "with a heavy presumption against its constitutional validity." (*Bantam Books v.*
27 *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)). *Procter & Gamble*
28 *Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996)).

1 144. Thus, the Court should find that the burden of proof shifts to BMI to demonstrate
2 the constitutional validity of its Mandatory Arbitration Clause, and that such is a heavy
3 burden.

4 145. Citing the U.S. Supreme Court's *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750,
5 752, 108 S. Ct. 2138, 2141 (1988) ("Lakewood"), the Eleventh Circuit recently explained
6 the impermissible nature of unbridled discretion in issuing a prior restraint, which explains
7 why BMI's Mandatory Arbitration Clause must be struck down:

8 Perhaps the plainest example of an unconstitutional grant of unbridled
9 discretion is a law that gives a government official power to [allow or
10 disallow speech] but that provides no standards by which the official's
11 decision must be guided.

12 (*Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1221 (11th Cir. 2017))

13 If we look to the plain language of the BMI Consent Decree, which has all the force of
14 federal statutory law, there is no standard by which BMI has any discretion as to when the
15 songwriter's First Amendment right to petition may or may not be restrained. Rather, the
16 Songwriter's constitutional rights are simply done away with. Thus, BMI's Mandatory
17 Arbitration Clause is worse than "unbridled discretion" to destroy rights, it is the ex ante
18 wholesale destruction of rights, with no exercise of discretion required.

19 146. The present deprivation of Class Action Plaintiffs' constitutional rights to petition
20 and to a jury trial must be considered unfair and/or mistaken, because the Consent Decree
21 and BMI's Mandatory Arbitration Clause purports to ex ante deny Songwriters the First
22 Amendment right to petition the government for redress of grievances, and of the Seventh
23 Amendment right to a jury trial, prior to the songwriter even contemplating such a thing as
24 performance royalties. Indeed, the deprivation of rights occurred prior to most Songwriters
25 alive today having even been born.

26 147. "An elementary and fundamental requirement of due process in any proceeding
27 which is to be accorded finality is notice reasonably calculated, under all the
28 circumstances, to apprise interested parties of the pendency of the action and afford them

1 an opportunity to present their objections. (*Mullane v. Central Hanover Bank & Trust Co.*,
2 339 U.S. 306, 314 (1950))

3 148. No Songwriter here was party to the BMI Consent Decree, thus was not apprised of
4 the pendency of the action and not afforded any opportunity to present objections. There
5 was no notice to the Songwriters that their rights to petition and to a jury trial were at
6 stake, or that by executing the Consent Decree the right to petition and to a jury trial
7 would forever be lost. Defendants cannot even reasonably argue that Plaintiffs were
8 afforded due process, let alone could it be proven.

9 149. Therefore, the Court should issue a Declaratory Judgment striking BMI's
10 Mandatory Arbitration Clause as unconstitutional. The Court should find that BMI's
11 Mandatory Arbitration Clause, and the Consent Decree arbitration mandate underlying it,
12 constitute an impermissible prior restraint of the First Amendment right to petition, and of
13 the Seventh Amendment right to a jury trial, and that such prior restraint was imposed
14 upon Plaintiffs without affording them the substantive and procedural due process
15 guaranteed by the Fifth and/or Fourteenth Amendment.

16 **FOURTH CAUSE OF ACTION**

17 **Declaratory Judgment – 28 U.S.C. § 2201**

18 **Collecting Performance Royalties is a Federal Right**

19 **Regardless of Whether ASCAP & BMI Are State Actors**

20 **(Songwriter Class and Assignee Class v. ASCAP & BMI)**

21 150. Class Action Plaintiffs repeat, reallege and incorporate by reference the facts alleged
22 above.

23 151. And actual controversy has arisen, as Songwriters and their Assignees believe that
24 collecting Performance Royalties is a federally-protected statutory right, whereas ASCAP
25 & BMI believe the collecting Performance Royalties is a contractual right only.

26 152. The Consent Decree has all the force and power of federal statutory law. At Article
27 V (A) ("No Right to Refuse"), the BMI Consent Decree states, in relevant part:

28 "[BMI] shall not refuse to enter into a contract providing for the licensing
by [BMI] of performance rights with *any writer* who shall have had at

1 least one copyrighted musical composition of his writing commercially
2 published or recorded..."

3 See EXHIBIT "A," p. 2, emphasis added.

4 153. Likewise, at Article XI, A(1), the ASCAP Consent Decree States:

5 ASCAP is hereby ordered and directed to admit to membership, non-
6 participating or otherwise, *any writer* who shall have had at least one work
7 regularly published, whether or not performance of the work has been
8 recorded in an ASCAP survey.

9 See EXHIBIT "R," p. 98, emphasis added.

10 154. Clearly the United States intended the Consent Decrees to operate as federal law,
11 and to establish a federal entitlement to collect performance royalties. Otherwise, the
12 United States would not have mandated that ASCAP & BMI collect and distribute
13 royalties to "any writer."

14 155. The Supreme Court has consistently held that a federal entitlement creates a federal
15 right. For example, a person's entitlement to welfare benefits under the federal Social
16 Security Act is a federal right that can be protected by section 1983. See *Maine v.*
17 *Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) ("*Thiboutot*").

18 156. In *Thiboutot, supra*, the Supreme Court contended with the issue of the scope of
19 coverage under Section 1983. The Court began by quoting the text from 42 U.S.C. § 1983:

20 Every person who, under color of any statute, ordinance, regulation,
21 custom, or usage, of any State or Territory, subjects, or causes to be
22 subjected, any citizen of the United States or other person within the
23 jurisdiction thereof to the deprivation of any rights, privileges, or
24 immunities secured by the Constitution *and laws*, shall be liable to the
25 party injured in an action at law, suit in equity, or other proper proceeding
26 for redress."

27 *Thiboutot, supra*, at 2504, emphasis in original.

28 157. The Supreme Court then explained the large applicability of Section 1983:

Even were the language [of Section 1983] ambiguous, however, any doubt
as to its meaning has been resolved by our several cases suggesting,
explicitly or implicitly, the § 1983 remedy broadly encompasses violations
of federal statutory as well as constitutional law. *Rosado v. Wyman*, 397
U.S. 397 (1970), for example, "held that suits in federal court under §
1983 are proper to secure compliance with the provisions of the Social

Security Act on the part of participating States." *Edelman v. Jordan*, 415 U.S. 651, 675 (1974). *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-701 (1978), as support for its conclusion that municipalities are "persons" under § 1983, reasoned that "there can be no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." Similarly, *Owen v. City of Independence*, 445 U.S. 622, 649 (1980), in holding that the common-law immunity for discretionary functions provided no basis for according municipalities a good-faith immunity under § 1983, noted that a court "looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Mitchum v. Foster*, 407 U.S. 225, 240, n. 30 (1972), and *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543, n. 7 (1972), noted that § 1983's predecessor "was enlarged to provide protection for rights, privileges, or immunities secured by federal law." *Greenwood v. Peacock*, 384 U.S. 808, 829-830 (1966), observed that under § 1983 state "officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well."

Thiboutot, supra, at 2504-05

158. Thus, the Court must find that the Consent Decree mandate that ASCAP & BMI collect and pay performance royalties to "any writer" creates a federal right in the Songwriter.

159. Because there is no language prohibiting assignment of rights to collect royalties, and indeed ASCAP & BMI have a standard form to facilitate assignment of royalties, the federal right to receive performance royalties must extend to Assignees.

160. Therefore, the Court should issue a Declaratory Judgment that a songwriter with at least one published musical composition of his or her writing has a federally protected right to collect performance royalties, and that such federal right extends to assignees.

FIFTH CAUSE OF ACTION

Declaratory Judgment – 28 U.S.C. § 2201

ASCAP & BMI Owe a Fiduciary Duty to Writers and Their Assignees

Regardless of Whether ASCAP & BMI Are State Actors

(Songwriter Class and Assignee Class v. ASCAP & BMI)

161. Plaintiffs repeat, reallege and incorporate by reference the facts alleged above.

162. An actual controversy has arisen between Class Action Plaintiffs and ASCAP & BMI. Plaintiffs contend that ASCAP & BMI owes a fiduciary duty to all its Songwriter members, and to their Assignees. ASCAP & BMI contend they do not owe any fiduciary duty to its Songwriters or their Assignees.

The standard ASCAP & Writer “Agreement” explicitly makes the PRO Songwriter’s “true and lawful attorney.” See ASCAP, EXHIBIT “Q,” p. 90, Item 5; BMI EXHIBIT “C,” p. 21, Item 15.

163. A true and lawful attorney is a fiduciary, by definition.

164. As the Courts have explained:

In determining whether one party owes a fiduciary duty to another, the courts focus on the substance of their relationship, not the labels they use.

...

If the "overall purpose" of the parties' agreement is to engage one party to act on the other's behalf, as agent, general contractual language purporting to "preclude [] the existence of an agency relationship" may be disregarded. *Samba Enterprises*, 2009 U.S. Dist. LEXIS 23393, 2009 WL 705537, at *7-8 (where purpose of agreement was "to engage Samba to act on iMesh's behalf" and where Samba held itself out as iMesh's "agent" to third parties, "Samba was iMesh's agent," and "owed iMesh fiduciary duties under New York law, notwithstanding clause in contract reciting that it was "not intended to create a 'partnership, franchise, joint venture, agency, or employment relationship.'"); see also *Veleron Holding, B.V. v. Morgan Stanley*, 117 F. Supp. 3d 404, 451-52 (S.D.N.Y. 2015) (where substance of parties' relationship was that of agent to principal, it was "of little consequence that the [contract] declares Morgan Stanley to be 'acting as an independent contractor'"). "It is the character and circumstances surrounding the relationship that determine the duty of the agent." *Impax Media, Inc. v. Ne. Advert. Corp.*, 2018 U.S. Dist. LEXIS 139972, 2018 WL 3962841, at *7 (S.D.N.Y. Aug. 17, 2018).

1 *Morgan Art Found. Ltd. v. Brannan*, No. 18-CV-8231 (AT) (BCM), 2020 U.S. Dist.
2 LEXIS 14043, at *56-57 (S.D.N.Y. Jan. 28, 2020)

3 165. Regardless of labels, the responsibility of ASCAP & BMI are those of a collection
4 agent, and closely akin to those of an escrow officer: ASCAP & BMI are obligated to
5 collect Performance Royalty monies due to all Songwriters (blanket license fees), to hold
6 that money for some period of time, to deduct its own expenses, then calculate the amount
7 due to each Songwriter, then to pay. Agents and escrow officers are fiduciaries, by
8 definition.

9 166. To determine if a fiduciary relationship exists, "New York law inquires whether one
10 person has reposed trust or confidence in the integrity and fidelity of another who thereby
11 gains a resulting superiority or influence over the first." (*Teachers Ins. & Annuity Assoc.*
12 *of Am. v. Wometco Ent., Inc.*, 833 F. Supp. 344, 349-50 (S.D.N.Y. 1993)) Thus, a fiduciary
13 duty exists where one assumes control and responsibility over another, or where one has a
14 duty, created by his undertaking, to act primarily for the benefit of another in matters
15 connected with his undertaking. (*Abercrombie v. College*, 438 F. Supp. 2d 243, 274
16 (S.D.N.Y. 2006))

17 167. Songwriter has reposed trust and confidence in the integrity of ASCAP & BMI, as
18 over \$ 2 billion annually is collected, and is supposed to be distributed fairly and
19 accurately among over 1 million Songwriters, according to a proscribed formula. Thus,
20 ASCAP & BMI's responsibilities are very closely akin to those of a trustee obligated to
21 make regular distributions to a number of similarly-situated beneficiaries. A trustee is a
22 fiduciary, by definition.

23 168. Because they are entrusted to collect, hold and fairly distribute Songwriters' money,
24 the relationship between ASCAP & BMI and the Songwriter is the very *essence* of a
25 fiduciary relationship.

26 169. Therefore the Court should issue a Declaratory Judgment finding a fiduciary
27 relationship between a Songwriter, on the one hand, and ASCAP & BMI on the other.
28 This fiduciary relationship must extend to any subsequent assignees of rights to receive

royalty money. The Court should explicitly define that a fiduciary duty includes the right to conduct an audit of ASCAP & BMI, and to make public the *entirety* of the formula by which royalties are allocated amongst Songwriters.

SIXTH CAUSE OF ACTION

Breach of Fiduciary Duty

(Songwriter Class and Assignee Class v. ASCAP & BMI)

170. Plaintiffs repeat, reallege and incorporate by reference the facts alleged above.

171. ASCAP & BMI owe Songwriters a fiduciary duty. *Supra*.

172. ASCAP & BMI collect over \$ 2 billion per year in blanket license fees.

173. ASCAP & BMI promise to distribute Performance Royalties among Songwriters according to a formula that contains ambiguous and subjective terms such as “credit value.” As far as Songwriters can tell, ASCAP & BMI are free to numerically manipulate such ambiguous terms to obtain essentially any result.

174. Even to the extent that the royalty calculation formula is objective, Songwriters have no reason to believe that the Performance Royalty money is distributed according to the formula.

175. Songwriters believe, and on that basis allege, that ASCAP & BMI manipulate the terms of the formula, or otherwise disobey the formula, on an ad hoc basis so as to cheat Songwriters from the full amount of Performance Royalties due to them, while improperly transferring undue amounts of money to society officers and others.

176. Songwriters believe, and on that basis allege, that ASCAP & BMI significantly underpay Songwriters in such amount as proven at trial.

X. PRAYER FOR RELIEF ON CLASS ACTION CLAIMS

177. Wherefore, Class Action Plaintiffs pray for relief as follows:

A. Declaratory Relief

For a Declaratory Judgment that the Mandatory Arbitration Clause within the Writer “Agreement” of ASCAP & BMI is void for economic duress;

1 For a Declaratory Judgment that, for purposes of Section 1983 litigation, ASCAP &
2 BMI is a government entity and its officials are government actors;

3 For a Declaratory Judgment that the Arbitration Mandate in the Consent Decree and in
4 the standard ASCAP & BMI Writer “Agreement” violates the First Amendment right to
5 petition and the Seventh Amendment right to a jury trial;

6 For a Declaratory Judgment that any songwriter with at least one song published has a
7 federally-protected right to collect Performance Royalties, and that such federal right is
8 assignable; and

9 For Declaratory Judgment that ASCAP & BMI owes Songwriters and their Assignees
10 a fiduciary duty, with rights to audit;

11 **B. Accounting**

12 For a full accounting of revenues received, application of royalty formula, and
13 distribution of Performance Royalties, from the most recent year and as far back in time as
14 the Court deems reasonable;

15 **C. Damages**

16 For monetary damages in an amount necessary to make Songwriters whole, according
17 to proof;

18 **D. Injunctive Relief**

19 For a permanent injunction prohibiting ASCAP & BMI from disclaiming a fiduciary
20 duty to its Songwriter members and their Assignees;

21 For a permanent injunction prohibiting BMI from compelling arbitration as a
22 precondition of collecting Performance Royalties for Songwriters;

23 **E. Costs and Fees**

24 For the cost of the suit plus pre-judgment interest;

25 For attorney fees as allowed by statute and/or by contract; and

26 For any other such relief as the Court may deem appropriate.
27
28

XI. DEMAND FOR COURT TRIAL AND JURY TRIAL ON CLASS ACTION CLAIMS

178. Class Action Plaintiffs hereby demand a Court trial on claims 1-5, and a Jury Trial on Claim 6.

XII. FACTS RELEVANT TO THE UNDERLYING CASE AGAINST BMI

A. The Baker-Marlo Divorce, Stipulation and Royalty Order

179. In June 2014, Alexander Baker (“Baker”) filed for divorce from his wife and business partner Clair Marlo (“Marlo”). The divorce proceeding is Los Angeles Superior Court, Case. No. LD068701 ("Baker Family Law Case").

180. On July 7, 2016, Baker and Marlo stipulated and the Family Court ordered that music royalties be equalized between them for all songs created after January 11, 1995 (the date of marriage) and before April 7 2015 (putative date of separation), (Royalty Reallocation Order). The Family Court Stipulation and Order is attached to the Complaint as EXHIBIT “D,” pp. 25-27.

181. To effectuate the Royalty Reallocation Order, Baker and Marlo were instructed to draft and submit to all royalty-paying entities a Letter of Direction, instructing each entity to reallocate the royalties. Baker and Marlo quickly realized that determining the date of creation for each of thousands of songs was impossible, and decided to instead use date of registration, which is a record known to be kept by all royalty-paying entities. Reasoning that it typically takes 4-6 weeks for a song to be registered after submitting that song to the record company, Baker and Marlo agreed to use the date of June 1, 2015 as the cutoff date for inclusion in the royalty reallocation.

182. On July 18, 2016, Baker and Marlo jointly signed and mailed Letters of Direction to royalty-paying entities, including ASCAP & BMI, instructing them to equalize the music royalties on all music registered after January 11, 1995 and before June 1, 2015. See EXHIBIT “E,” p. 29.

1 183. BMI did comply with the Letter of Direction, and did reallocate the royalties as
2 equal between Baker and Marlo. Beginning with the September 2016 distribution, and
3 continuing unabated until March of 2020, BMI made equal payments to Baker and Marlo.

4 184. ASCAP did not comply with the Letter of Direction.

5 **B. Baker's Assignment of BMI Royalties to the LLC**

6 185. In or about September 2016, on the advice of his tax preparer, Baker formed Write
7 Hear, LLC, a single-member Limited Liability Company. The purpose of Write Hear,
8 LLC was to write, produce and commercially exploit music, and to obtain a more
9 favorable tax treatment. Baker timely notified Marlo on the formation of Write Hear LLC
10 within the Family Court disclosure process.

11 186. On April 12, 2017, on advice of his tax preparer, Baker assigned his BMI royalty
12 stream to Write Hear, LLC, which company paid Baker a salary. Baker used BMI's
13 standard assignment form for the assignment. Baker timely notified Marlo about the
14 assignment of royalties to Write Hear LLC within the Family Court disclosure process.
15 See EXHIBIT "F" attached hereto.

16 187. Beginning with the June 2017 distribution, BMI paid Performance Royalties to
17 Write Hear LLC.

18 188. During the summer of 2017, Baker decided to embark on the creation of an
19 animated, music driven show called "Adam Bravery." Write Hear LLC hired numerous
20 independent contractors toward the goal of producing the show, including illustrators,
21 animators, writers and musicians.

22 189. In or about April 2018, Baker persuaded two other individuals – Lisa Margulies and
23 Chris Gebbia – to partner with him in the creation of the Adam Bravery show. Margulies
24 had a financial background and also had connections in the animation world. Gebbia had a
25 music background and was willing to put in long hours of creative work.

26 190. In May of 2018, Baker and his two partners formed Adam Bravery, LLC, an
27 Arizona Limited Liability Company. Prior to dissolving Write Hear LLC, all assets of
28

1 Write Hear LLC, including equipment and numerous work-for-hire contracts, were
2 assigned from Write Hear LLC to Adam Bravery LLC.

3 191. On July 9, 2018, Baker's BMI royalties were assigned from Write Hear LLC to
4 Adam Bravery LLC. The same standard BMI royalty assignment form was used for the
5 assignment as before. Baker timely notified Marlo regarding the assignment of assets,
6 including the assignment of royalties, from Write Hear LLC to Adam Bravery LLC within
7 the Family Court disclosure process. See EXHIBIT "G."

8 192. Beginning with the September 2018 distribution, BMI paid Adam Bravery, LLC.

9 **C. BMI and Erika Stallings Fabricate a False "Dispute" and Repeatedly**
10 **Threaten to Stop Paying Royalties**

11 193. In the week prior to July 16, 2019, Marlo's attorneys Mike DiNardo and Joe Yanny
12 contacted Erika Stallings and devised a plan to inflict emotional and financial distress
13 upon Baker, for the purpose of defeating him in court. Under the plan, BMI would
14 withhold paying Baker's share of royalties to Adam Bravery LLC, while continuing to pay
15 Marlo's share of the royalties to Marlo.

16 194. Plaintiffs have no direct knowledge of any bribes or kickbacks paid to Erika
17 Stallings. However, insofar as BMI has certainly stopped paying royalties without legal
18 justification, and Erika Stallings has certainly concocted a false pretext on which to stop
19 paying, it is a reasonable inference that, in exchange for cooperation, Marlo or someone
20 pays Erika Stallings money as a bribe or kickback, in an amount and by methods to be
21 proven to the jury at trial.

22 195. At all relevant times, Defendants knew that the BMI royalties are crucial to the
23 operation of Adam Bravery LLC, including the payment of Baker's salary, his source of
24 livelihood.

25 196. On July 16, 2019, BMI counsel Erika Stallings emailed Baker stating:

26 I am writing with respect to the July 7, 2016 order from the Superior Court
27 of California regarding the terms of your divorce with Clair Marlo.
28 Pursuant to that order, all works created between November 11, 1995 [sic]
through April 7, 2015 are to be split 50/50 and both parties agreed to not

to make any deals with any third parties regarding the aforementioned works. You assigned your share of the works [sic] to Adam Bravery LLC which is owned by you and three other individuals [sic] which is seemingly in violation of the terms of the order. Please advise as to your position. If you have legal counsel in this matter please forward me their contact information.

EXHIBIT “H,” p. 39

197. Besides getting the date wrong (begin date of royalty reallocation is January 11, 1995, not November 11, 1995), and the number of partners wrong (Baker has two other partners, not three), the July 16, 2019 BMI email was false in one very important, material respect: No “share of the works” was assigned.

198. A musical “work” is defined in the Copyright act, and refers to the ownership of copyright of a musical composition. See 17 U.S.C. § 101 et. seq.

199. ASCAP defines “work” in the text of its Writer “Agreement”:

“Musical Works” Defined. The phrase “musical works” shall be construed to mean musical compositions and dramatico-musical compositions, the words and music there of, and the respective arrangements thereof, and the selections therefrom.

EXHIBIT “Q,” p. 90, Item 10

200. The Royalty Reallocation Order states that:

Neither party shall sell, transfer, assign, or make any deal whatsoever with any third party **for any work** created 1-11-95 through 4-7-15 without the written consent of the other party or court order.

EXHIBIT “D,” pp. 25-26, bolding added.

201. Under the copyright act, it is valid to assign works, i.e. to assign copyright ownership. Indeed, on the vast majority of royalty-earning musical compositions at issue between Baker and Marlo, the copyright is not owned by Baker or Marlo, rather it is owned by a third-party record company.

202. At no time did Baker - whether acting as an individual or on behalf of any LLC - ever sell, transfer, assign or make any deal whatsoever with any third party for any work created 1-11-95 through 4-7-2015. The ownership of all works at issue is identical now as before.

203. What Baker did do was assign his own share of the court-equalized Performance Royalty money to pay into a different bank account. Before, Baker's royalties paid into Baker's personal bank account. After the first assignment, the royalties paid into the Write Hear LLC bank account. After the July 2018 assignment, the royalties paid into the Adam Bravery LLC bank account. None of these assignments affected Marlo in any way, shape or form.

204. A Performance Royalty is not a work.

205. A work is not a Performance Royalty.

206. In July 2019, and at all relevant times, BMI and Mike O'Neill and Erika Stallings and each of them understood and appreciated the distinction between "work" and "royalty." BMI and Mike O'Neill and Erika Stallings and each of them knew that the statement "You assigned your share of the works to Adam Bravery LLC..." was false.

207. The assignments of royalties from Baker to Write Hear LLC, and from Write Hear LLC to Adam Bravery LLC did not affect Marlo in any way, nor did it affect the Family Court's ability to reallocate the royalties again, should it choose to do so. Regardless of who BMI is paying Baker's royalties to, any future reallocation would take place at BMI, just as it did in July 2016 when the royalties were reallocated the first time.

208. On August 21, 2019, Baker and Marlo received a letter from BMI counsel Erika Stallings entitled "Broadcast Music Inc. Royalties," attached hereto as EXHIBIT "I," p. 41. This letter begins by falsely stating:

BMI was recently made aware of a July 7, 2016 order issued by the Superior Court of California, County of Los Angeles (the "Order") relating to musical works written during your marriage.

EXHIBIT "I," p. 41.

209. In fact, BMI was aware of the Order in July 2016, because the Letter of Direction, which BMI undisputedly complied with, begins with "Pursuant to July 7, 2016 Orders of the Court in Los Angeles Superior Court case LD068701..." See EXHIBIT E, p. 29.

210. BMI's August 21, 2019 letter is also deceptive in that it does not refer to a royalty reallocation, but rather to an order "relating to musical works." EXHIBIT "I," p. 41. BMI

1 and Mike O'Neill and Erika Stallings and each of them were acting with malice in
2 willfully attempting to deceive, not only Baker, but also the Court, into falsely believing
3 that Baker assigned works, when Baker provably did no such thing.

4 211. The only reasonable inference from these facts is that BMI and Mike O'Neill and
5 Erika Stallings and each of them conspired and colluded with Marlo and her attorneys to
6 intentionally injure Baker and Adam Bravery LLC.

7 212. BMI's August 21, 2019 letter states:

8 In 2018, Mr. Baker transferred his BMI royalties for the above referenced
9 works to Adam Bravery, LLC, a multimember LLC. Ms. Baker has
10 alleged that this transfer is in violation of the Order. Mr. Baker's position
11 is that the transfer was merely a transfer of payment of royalties, not a
12 transfer of the works and that no violation of the Order has occurred.

13 As this is now a disputed matter between the parties, please be advised
14 that unless the parties come to a resolution of this matter by September 5,
15 2019, BMI will be placing the disputed royalties on withhold and will
16 proceed with filing a third party interpleader action to deposit the royalties
17 with the court until the dispute is resolved.

18 EXHIBIT "I," p. 41.

19 213. BMI has a standard dispute hold policy, which states in relevant part that:

20 BMI will withhold royalties earned by any works that are the subject of
21 litigation, upon receipt of a copy of the complaint as filed with the court
22 and a written directive to BMI from the court requiring such withholding.

23 EXHIBIT "J," pp. 45-46

24 214. If there was any "dispute" as to the proper payee of Baker's BMI royalty stream,
25 that dispute would be between Baker and Adam Bravery LLC. Nothing Baker did affected
26 Marlo's royalties in any fashion.

27 215. As of September 2019, no complaint or any dispute had been filed by Marlo. Any
28 legitimate dispute hold would stop all royalties payable on the works, according to policy.
Here, BMI threatened to stop royalties paid to Baker, while continuing to pay Marlo. The
only reasonable inference from this fact is that BMI and Mike O'Neill and Erika Stallings
and each of them have the requisite state of mind to constitute actual malice toward
Plaintiffs.

216. By September 5, 2019, per BMI's request, Baker and Marlo did not reach any agreement about the supposed "dispute." Baker and Marlo could not possibly have reached any agreement about the supposed "dispute," because there was no dispute regarding the proper allocation and payment of BMI royalties on which Baker and Marlo could either agree or disagree.

217. The July 7, 2016 stipulation and order of the Family Court mandates that royalties are 50-50 between Baker and Marlo, and, as of this writing (March 2021), no order has superseded it.

218. Despite BMI's threat to withhold royalties, on September 20, 2019 BMI royalty money was paid to Adam Bravery LLC.

219. On September 26, 2019, BMI outside counsel AnnMarie Mori sent Baker an email asking him to stipulate that he and Marlo had a dispute, evidently in an effort to justify BMI withholding the money. Baker responded, in relevant part, as follows:

I've never heard of stipulating to a dispute. That's agreeing to disagree, which is the same as no agreement. I don't understand why you are representing [Marlo]. I do know that neither she nor any of her attorneys has ever once contacted me on this issue, so that's strange. I do not know that [Marlo] disputes the propriety of the assignments, I only know that Erica^[sic] Stallings and AnnMarie Mori represent that [Marlo] disputes the assignments. I have never been served with any court document that indicates that she disputes this, and, frankly Ms. Mori, I don't believe you. The reason I don't believe you is that you lied about being unaware of the Order. Do you have any evidence that [Marlo] disputes the assignment?

EXHIBIT "K," p. 49.

220. BMI did not respond any further to the September 26, 2019 email thread.

D. Marlo Files Meritless Contempt Action Which is Dismissed

221. On October 2, 2019, by and through attorney Joe Yanny, Marlo filed a Contempt action in Family Court, alleging that the assignment of royalties violated the court order. EXHIBIT "L," pp. 52-69. According to plan, Marlo's Contempt action mimicked BMI's false contention that Baker has assigned "copyright," or assigned "works," when in fact Baker assigned royalties. Marlo sought severe penalties against Baker, alleging that:

Each song is a separate violation of the Court Order. I ask the Court to impose fines of \$1,000 for each of the 3,000 plus songs that were transferred, for Contempt of Court and to impose jail time to [Baker] of up to five days for each violation.

EXHIBIT “L,” p. 69.

222. On October 7, 2019, BMI wrote a letter to Both Marlo and Baker, stating that they had received notice of Marlo’s Contempt action filed against Baker, and noting that said Contempt action:

...sets forth Ms. Marlo's contention that the that the 4/2017 assignment by Mr. Baker of his royalties to Write Hear, LLC, and the subsequent 7/2018 assignment of royalties by Mr. Baker on behalf of Write Hear, LLC to Adam Bravery LLC violated the July 2016 Court Order issued in the marital dissolution action.

EXHIBIT M, p. 71.

223. BMI’s October 7, 2019 letter also states:

Please be advised that BMI has placed a hold on the Assigned Royalties pending an order of the Court resolving the dispute or the written agreement of the parties as to the disposition of the Assigned Royalties.

EXHIBIT M, p. 71.

224. Immediately thereafter, on or about October 10, 2019, the other members of Adam Bravery LLC fired Baker from his full time job.

225. On November 7, 2019, the Family Court issued an order dismissing Marlo’s Family Law Contempt action under Cal. Penal Code § 1385. EXHIBIT “N,” p. 74.

226. At the November 7, 2019 Contempt hearing, parties had been sworn in, thus jeopardy attaches and the Contempt action cannot be refilled. A dismissal of a Contempt action is non-appealable order under California law.

E. BMI Officially Imposes Dispute Hold, But Then Pays Again Anyway

227. After the November 7, 2019 dismissal of Marlo’s Contempt action, Baker contacted BMI and demanded that they lift the dispute hold. However, BMI indicated that they would maintain the dispute hold.

228. Nevertheless, on January 20, 2020, BMI paid Adam Bravery LLC the royalties per the usual January distribution.

F. BMI Stops Paying Royalties

229. On March 18, 2020, Adam Bravery LLC bank account received the BMI royalties as per the usual March distribution, in the amount of \$9,243.31. However, within minutes, BMI reversed the deposit, and electronically removed \$9,243.31 from the Adam Bravery LLC bank account.

230. On June 11, 2020, BMI failed to pay \$9,911.00 owed to Adam Bravery, LLC.

231. On September 10, 2020, BMI failed to pay \$9,342.68 owed to Adam Bravery, LLC.

232. On January 14, 2021, BMI failed to pay \$9,082.93 owed to Adam Bravery, LLC.

233. On March 19, 2021, BMI failed to pay \$9,731.55 owed to Adam Bravery, LLC.

234. To date (March 2021), BMI has failed to pay a total of \$47,311.37.

XIII. CAUSES OF ACTION IN UNDERLYING CASE

SEVENTH CAUSE OF ACTION

42 U.S.C. § 1983

Deprivation of Federal Right to Collect Performance Royalties

(Alexander C. Baker and Adam Bravery LLC v. BMI)

235. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

236. Under the State Compulsion Test, BMI and Erika Stallings and Mike O'Neill are State Actors for civil rights purposes. *Supra*. Baker had a federally-protected right to collect performance royalties, *supra*, which right was validly assigned to Adam Bravery LLC.

237. Acting under color of the Consent Decree, which is federal law, BMI and/or Erika Stallings and/or Mike O'Neill intentionally denied Adam Bravery LLC the Performance Royalty money that it has a federal right to collect. BMI and/or Erika Stallings and/or Mike O'Neill knew that there is no "dispute" between Marlo and Baker upon which to base any sort of "Dispute Hold," and he, she or they decided to withhold funds anyway.

1 238. Plaintiffs believe, and on that basis allege, that BMI has a policy and custom
2 allowing for the fabrication of a false pretext on which to impose a “dispute hold,” and
3 that Erika Stallings and/or Mike O’Neill and/or Does are responsible for implementing
4 that policy on an ad hoc basis.

5 239. Alternatively, Plaintiffs allege that Erika Stallings and/or Mike O’Neill and/or Does
6 acted without authorization in fabricating the false pretext under which BMI royalties
7 were stopped.

8 240. BMI and/or Erika Stallings and/or Mike O’Neill knew that Baker depends on the
9 royalties for his livelihood, because Baker told Erika Stallings so in a phone call on or
10 about July 2019. Similarly, BMI and/or Erika Stallings and/or Mike O’Neill knew that
11 Adam Bravery LLC depends on the royalties for its operation and continued existence.
12 BMI and/or Erika Stallings and/or Mike O’Neill knew that withholding royalties would
13 greatly diminish the market value of Adam Bravery LLC, and would injure Baker.

14 241. On March 18, 2020, under direction of Erika Stallings, BMI failed to pay \$9,243.31.
15 To date, BMI failed to pay a total of \$47,311.37.

16 242. Adam Bravery LLC was harmed by BMI’s failure to pay \$47,311.37 so far, and will
17 continue to be harmed for every subsequent payment missed.

18 243. Baker has on several occasions had communications with an individual working for
19 a company called “Royalty Exchange.” Royalty Exchange is in the business of brokering
20 the auction sales of royalty streams, such as Baker’s. Royalty Exchange estimated that
21 Baker’s royalty stream might fetch \$150,000 at auction, and suggested setting that as a
22 reserve price.

23 244. BMI official Erika Stallings and/or Mike O’Neil, each State Actors for Section 1983
24 purposes, intentionally deprived Plaintiffs of their federally-protected right to collect
25 performance royalties. At minimum, Erika Stallings and/or Mike O’Neill acted with a
26 reckless disregard Plaintiffs’ federally protected rights.

27 245. As a direct and proximate result of the deprivation of civil rights, Plaintiffs are
28 injured in the amount of royalties withheld to date, and/or the loss of value of the business.

246. Therefore, BMI, Erika Stallings and Mike O'Neill are jointly and severably liable to Plaintiffs for Civil Rights violations.

EIGHTH CAUSE OF ACTION

Breach of Contract

(Adam Bravery, LLC v. BMI)

247. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

248. If for whatever reason BMI and its officials are not held to be State Actor, or Plaintiffs right to receive royalties is not held to be a federally-protected right, then without waiving the right to present the legal claims set forth above and below, Plaintiffs *alternatively* present a Breach of Contract theory, i.e. an alternative to Deprivation of Civil Rights.

249. In 1999, Baker and BMI entered into the BMI-Baker Writer "Agreement," a binding contract obligating BMI to pay performance royalties to Baker. At all relevant times prior to March 2020, Baker and BMI performed under the contract.

250. In July 2016, Baker and co-writer Marlo instructed BMI to equalize royalties between them for all works registered after January 11, 1995 and before June 1, 2015. BMI complied with the reallocation. At all relevant times prior to March 2020, Baker and BMI performed under the modified contract.

251. In April 2017, with BMI's consent, Baker validly assigned the right to receive royalties to Write Hear LLC. At all relevant times prior to March 2020, Write Hear LLC and BMI performed under the modified contract.

252. In July 2018, with BMI's consent, Write Hear LLC validly assigned the right to receive royalties to Adam Bravery LLC. At all relevant times prior to March 2020, Adam Bravery LLC and BMI performed under the modified contract.

253. The BMI-Baker Writer "Agreement" constitutes the "rights to payment of money," which right to be paid is validly held by Adam Bravery LLC.

254. To date, BMI failed to pay a total of \$47,311.37.

255. Adam Bravery LLC was harmed by BMI's failure to pay \$47,311.37 so far, and will continue to be harmed for every subsequent payment missed.

256. Baker has on several occasions had communications with an individual working for a company called "Royalty Exchange." Royalty Exchange is in the business of brokering the auction sales of royalty streams, such as Baker's. Royalty Exchange estimated that Baker's royalty stream might fetch \$150,000 at auction, and suggested setting that as a reserve price.

257. As a direct and proximate result of BMI's having stopped paying royalties, the royalty stream is worthless on the market.

258. Adam Bravery LLC depends crucially on the royalty money to operate, and has necessarily ceased all operations as a direct and proximate result of BMI's breach of contract.

259. The net value of Adam Bravery LLC was diminished by at least \$150,000 as a direct and proximate result of BMI's intentional and baseless failure to pay royalties.

260. Therefore, BMI is liable to Adam Bravery LLC for Breach of Contract.

NINTH CAUSE OF ACTION

Breach of Fiduciary Duty

(Adam Bravery LLC v. BMI)

261. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

262. A fiduciary is a person in whom another has placed the utmost trust and confidence to manage and protect property or money. A fiduciary duty a duty to act for someone else's benefit, while subordinating one's own interests to that of the other.

263. All attorneys are fiduciaries, which is to say they owe clients fiduciary duties.

RESTATEMENT OF THE LAW GOVERNING LAWYERS, §16(3). An attorney owes the client a fiduciary duty of the very highest character. *Bird, Marella, Boxer & Wolpert v. Superior Court*, 106 Cal. App. 4th 419, 421, 130 Cal. Rptr. 2d 782, 784 (2003)

264. A fiduciary relationship was formed between BMI (the agent-trustee) and Baker (the principal-beneficiary) upon signing the BMI-Baker Writer "Agreement" in 1999. The

1 BMI-Baker Writer "Agreement" explicitly makes BMI Baker's attorney-in-fact, providing
2 that:

3 "You [Baker] make, constitute and appoint us [BMI], or our nominee,
4 your true and lawful attorney, irrevocably during the Period, in our name
5 or that of our nominee, or in your name, or otherwise, in our sole
6 judgment, to do all acts, take all proceedings, execute, acknowledge and
7 deliver any and all instruments, papers, documents, process or pleadings
8 that, in our sole judgment, may be necessary, proper or expedient to
9 restrain infringement of and/or to enforce and protect the rights granted by
10 you hereunder..."

11 EXHIBIT "B," p. 14.

12 265. Under the BMI-Baker Writer "Agreement," the responsibilities of BMI are closely
13 akin to those of an escrow officer: BMI promises to collect monies due to Baker, to hold
14 them for some period of time, to deduct its own fees, then to distribute the remainder as a
15 royalty payment. This is the very essence of a fiduciary relationship.

16 266. Baker formed with BMI a relationship of trust and confidence whereby BMI is
17 bound to exercise the utmost good faith and undivided loyalty toward Baker throughout
18 the relationship, by paying Performance Royalties in strict accordance with the royalty
19 calculation formula.

20 267. By virtue of the assignment, to which BMI consented, BMI's fiduciary duty extends
21 to Adam Bravery LLC. Nothing in the language of the assignment contracts restricts the
22 assignability of any rights.

23 268. BMI failed to pay the March 2020 royalty distribution, which is misconduct. To
24 date, BMI has failed to pay a total of \$47,311.37.

25 269. Plaintiffs have no *direct* evidence of any bribes or kickbacks being paid. But insofar
26 as BMI has stopped paying royalties without justification, and gone as far as concocting a
27 false pretext on which to do so, it is a reasonable inference that, in exchange for
28 cooperation, Marlo pays BMI money as a bribe or kickback, in an amount and by methods
to be proven to the jury at trial. Accepting such a kickback or a bribe in exchange for not
paying royalties is not in Adam Bravery LLC's interest.

270. Adam Bravery LLC depends crucially on the royalty money to operate, and has necessarily ceased all operations as a direct and proximate result of BMI's failure to pay royalties as it is legally obligated to do.

271. Therefore BMI is liable to Adam Bravery LLC for Breach of Fiduciary Duty.

TENTH CAUSE OF ACTION

Constructive Fraud

(Adam Bravery LLC and Alexander C. Baker v.

BMI, Mike O'Neill and Erika Stallings in their individual capacities)

272. Plaintiffs repeat, reallege and incorporate by reference the facts alleged above.

273. Courts have given instructions on what constitutes constructive fraud:

As a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent.

Salahutdin v. Valley of Cal., Inc., 24 Cal. App. 4th 555, 558, 29 Cal. Rptr. 2d 463, 464 (1994).

274. Here, BMI and/or Mike O'Neill and/or Erika Stallings fabricated a false "dispute" between Marlo and Baker as a pretext to impose a royalty hold against Baker, while continuing to pay Marlo. Knowing that a Court order prohibited Baker from assigning works, BMI and/or Mike O'Neill and/or Erika Stallings falsely contended that Baker assigned works, knowing that Baker never did so. Baker assigned his own royalty stream to pay to a business entity, while ownership of the works has remained unchanged.

275. BMI and/or Mike O'Neill and/or Erika Stallings further compounded the falsity by construing the fabricated "dispute" as being a dispute between Marlo and Baker, knowing that even if there was a dispute as to the proper payee of Baker's royalty stream, the dispute would be between Baker and Adam Bravery LLC. Marlo's royalties have

1 remained completely unaffected throughout, a fact known to BMI and/or Mike O'Neill
2 and/or Erika Stallings.

3 276. BMI and/or Mike O'Neill and/or Erika Stallings compounded the falsity yet again
4 by withholding royalties only from Baker, while continuing to pay Marlo. This
5 demonstrates that BMI and/or Mike O'Neill and/or Erika Stallings do not believe there is a
6 dispute between Baker and Marlo. If there was a dispute between Baker and Marlo, BMI
7 would withhold royalties from both parties, according to their standard policy.

8 277. Plaintiffs believe, and on that basis allege that BMI has never in its entire history
9 imposed a unilateral royalty dispute hold, such as BMI now claims to have imposed
10 unilaterally on Baker and Adam Bravery LLC. Plaintiffs believe, and upon that basis
11 allege that all other royalty dispute holds imposed by BMI in its entire history have
12 involved the withholding of royalties from both parties to the dispute.

13 278. Knowing that there was no actual dispute between Baker and Marlo, BMI and/or
14 Mike O'Neill and/or Erika Stallings undertook a series of steps intended to entrap Baker
15 into admitting that there was a "dispute" upon which to withhold Baker's royalty stream
16 from Adam Bravery LLC. First BMI, in the person of Erika Stallings, emailed Baker and
17 simply asked him for his "position" on the "dispute." Next, BMI requested that Baker
18 "stipulate" that there was a dispute.

19 279. When the above two attempts failed to succeed in tricking Baker into "admitting" or
20 "stipulating" that there was a "dispute," BMI and/or Mike O'Neill and/or Erika Stallings
21 then insisted that Marlo file a Family Law Contempt action. Marlo did file a contempt
22 action, alleging that Baker's assignment of royalties violated the Family Court Royalty
23 Reallocation Order, and **falsely claiming that Baker had assigned works**. Even if there
24 had been merit to Marlo's Contempt action (which there was not), this would be a dispute
25 between Baker and the Court. Marlo never alleged that Baker's assignment of royalties to
26 the LLC harmed her or affected her in any way, because it obviously did not.

27 280. **The Family Court dismissed Marlo's Contempt action**, jeopardy attached, it
28 cannot be refilled, and is non-appealable. While there never was any merit to the idea that

1 there was a “dispute” between Baker and Marlo regarding the payment of ASCAP & BMI
2 royalties, the dismissal of Marlo’s Contempt action must remove any lingering doubt,
3 even among the uninitiated.

4 281. There is no dispute between Marlo and Baker regarding the current proper payee of
5 BMI royalties. BMI and Mike O’Neill and Erika Stallings and each of them know that
6 there is no dispute. BMI and Mike O’Neill and Erika Stallings and each of them falsely
7 contend that there is a dispute as a pretext for withholding royalties so as to intentionally
8 injure Baker and Adam Bravery LLC on the one hand, while benefitting Marlo on the
9 other hand.

10 282. While Baker and Adam Bravery LLC never believed BMI in all their false
11 representations, Plaintiffs had no choice but to rely on them. BMI has total power over the
12 situation. If BMI doesn’t pay the royalties, then the royalties are not getting paid.

13 283. Because BMI and/or Mike O’Neill and/or Erika Stallings knew that there was no
14 royalty dispute between Baker and Marlo, and expended great thought and planning
15 towards trying to falsely convince Baker (and now the Court) that there was a dispute, and
16 maintained the false story about a dispute even in the face of the Family Court dismissing
17 Marlo’s contempt action, the only reasonable inference to be drawn by the jury is that
18 BMI and/or Erika Stallings and/or Mike O’Neill acted with actual premeditated malice
19 toward Plaintiffs.

20 284. BMI and/or Mike O’Neill and/or Erika Stallings knew that withholding money from
21 Adam Bravery LLC would injure and quite possibly destroy the business, BMI and/or
22 Mike O’Neill and/or Erika Stallings knew it was wrong to do so, and did it anyway,
23 having accepted money from as a bribe or kickback, in an amount and by methods to be
24 proven to the jury at trial. While Plaintiffs have no direct evidence of this bribe or
25 kickback, it is a reasonable inference from the facts which are known. At trial, Plaintiffs
26 will ask the jury to make this inference.

1 285. Adam Bravery LLC depends crucially on the royalty money to operate, and has
 2 necessarily ceased all operations as a direct and proximate result of BMI and/or Mike
 3 O'Neill and/or Erika Stallings withholding payment.

4 286. The net value of Adam Bravery LLC has diminished by at least \$150,000 as a direct
 5 and proximate result of Defendants' intentional actions of withholding the royalties
 6 without justification.

7 287. Plaintiffs believe, and on that basis allege that BMI has a policy and custom
 8 allowing for dishonest and injurious conduct, on an ad hoc basis. Alternatively, Plaintiffs
 9 allege that BMI does not have such a policy and custom, and that Erika Stallings and/or
 10 Mike O'Neill and/or Does acted on their own volition.

11 288. BMI and/or Erika Stallings and/or Mike O'Neill withholding money constitutes
 12 malice, fraud and/or oppression as defined in California Civil Code § 3294.

13 289. Therefore BMI and Erika Stallings and Mike O'Neill and each of them are jointly
 14 and severally liable to Plaintiffs for constructive fraud.

15 **ELEVENTH CAUSE OF ACTION**
 16 **Intentional Infliction of Emotional Distress**
 17 **(Alexander C. Baker v. BMI,**
 18 **Mike O'Neill and Erika Stallings in their individual capacities)**

19 290. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

20 291. Proving Intentional Infliction of Emotional Distress requires a showing that
 21 Defendant's conduct was both "extreme" and "outrageous." The words "extreme" and
 22 "outrageous" are not synonymous. Rather, they function as a double threshold for the
 23 nature of the conduct and how unusual it is. Restatement (Third) of Torts: Liability for
 24 Physical and Emotional Harm. § 46. (Am. Law Inst. 2012).

25 292. Here, BMI and/or Mike O'Neill and/or Erika Stallings's conduct is extremely
 26 unusual, because it is the only time in BMI's entire existence that they have ever imposed
 27 a unilateral dispute hold, i.e. withholding money from one party to the supposed dispute,
 28 while paying the other.

1 293. Knowing that there was no actual dispute between Baker and Marlo, BMI and/or
2 Mike O'Neill and/or Erika Stallings undertook a series of steps intended to entrap Baker
3 into "admitting" that there was a "dispute" upon which to withhold Baker's royalty stream
4 from Adam Bravery LLC. First BMI and/or Mike O'Neill and/or Erika Stallings emailed
5 Baker and simply asked him for his "position" on the "dispute." When Baker declined,
6 ASCAP & BMI and/or Erika Stallings falsely threatened to withhold Plaintiff's money. This
7 is extreme and outrageous conduct. Knowing that Baker depends on the royalty money to
8 survive, BMI's conduct was extreme, and outrageous, and intended to cause emotional
9 distress.

10 294. BMI paid royalties in September 2019. Then, BMI and/or Mike O'Neill and/or
11 Erika Stallings requested that Baker "stipulate" that there was a dispute. After Baker
12 refused to "stipulate" to a dispute (whatever that means), Marlo filed a Contempt action,
13 alleging that Baker's assignment of royalties violated an Order of the Family Court.
14 Because the Contempt action was baseless, and because it came only after BMI attempted
15 to get Baker to "stipulate" to a dispute, it is reasonable to infer that BMI and/or Mike
16 O'Neill and/or Erika Stallings then instructed Marlo to file the baseless Contempt action.

17 295. After the Contempt action was filed, BMI and/or Mike O'Neill and/or Erika
18 Stallings again threatened to withhold the money.

19 296. Marlo's Contempt action was dismissed. Even after the Contempt action was
20 dismissed with no possibility of appeal or refilling, BMI and/or Mike O'Neill and/or Erika
21 Stallings continued to insist that they would withhold the money. BMI's conduct was
22 extreme, outrageous and intended to cause emotional distress. BMI and/or Mike O'Neill
23 and/or Erika Stallings knew at all times that Baker depended on the royalty money to
24 survive.

25 297. BMI and/or Mike O'Neill and/or Erika Stallings's threat of withholding turned out
26 to be false again, as BMI paid the royalties in January 2020. BMI paid the royalties again
27 in March 2020. But then, BMI and/or Mike O'Neill and/or Erika Stallings reversed
28

1 charges and took the money back. As emotionally injurious as the false threats of
2 withholding money are, making good on those threats is even more injurious.

3 298. In repeatedly threatening to withhold money, and then actually withholding money,
4 with the full knowledge that there is no valid basis to withhold the money, BMI and/or
5 Mike O'Neill and/or Erika Stallings acted to intentionally injure the psyche of Baker.

6 299. BMI and/or Erika Stallings injured Baker by depriving him of his livelihood,
7 starving him and threatening him with homelessness. Because neither BMI nor Erika
8 Stallings have any legal basis for withholding the royalty money has now been done, the
9 question of motive is reasonably raised. In addition to the reasonable inference of bribes
10 and kickbacks, Plaintiffs reserve the right to allege a motive such as bias based on race, or
11 sex, or any other motive revealed in discovery, or reasonably implied by facts obtained in
12 discovery.

13 300. Whatever the motives, Erika Stallings and Mike O'Neill and BMI have the power
14 to destroy Baker's life, and they have done so, on purpose and with particular glee. BMI
15 and/or Erika Stallings and/or Mike O'Neill knew at all relevant times that Baker has no
16 options when it comes to his royalties.

17 301. At minimum, BMI and/or Erika Stallings and/or Mike O'Neill acted with reckless
18 disregard of the probability that Baker would suffer emotional distress, knowing that
19 Baker depended on the money to survive, and knowing that all reasonable people will be
20 expected to suffer emotional distress if deprived of their livelihood for no legally valid
21 reason.

22 302. With respect to the requirement that the plaintiff show severe emotional distress, the
23 courts have set a high bar. Severe emotional distress means "emotional distress of such
24 substantial quality or enduring quality that no reasonable [person] in civilized society
25 should be expected to endure it." *Potter v. Firestone Tire & Rubber Co*, 6 Cal. 4th at 1004.

26 303. Here, no reasonable person could be expected to endure the emotional distress of
27 having BMI and/or Erika Stallings and/or Mike O'Neill baselessly threaten to withhold the
28 source of livelihood, then actually withholding the source of livelihood. BMI and/or Mike

1 O'Neill and/or Erika Stallings' repeated efforts to fabricate a false "dispute" as a pretext
2 for stopping royalties, including but not limited to attempting to trick Baker into
3 "stipulating" that there was a "dispute," are extreme and outrageous conduct by any
4 reasonable standard.

5 304. In deciding whether conduct meets the threshold of "outrageous," the
6 RESTATEMENT (SECOND) OF TORTS §46(1)(1965) instructs us that the existence of a
7 special relationship in which there is "abuse of a position, or a relation with the other, which
8 gives [the actor] ... the power to affect [the] interests" of another may "produce a character
9 of outrageousness that otherwise might not exist." *Bridges v. Winn Dixie*, 176 Ga. App.
10 227, 230, 335 S.E.2d 445,447 (1985).

11 305. Here, BMI occupies a vastly superior position of bargaining power as compared to
12 Baker. If Baker wants to collect performance royalties, he must agree to BMI's terms,
13 which terms are mandated in the Consent Decree. Baker has no bargaining power
14 whatsoever. It is "take it or leave it."

15 306. If Baker had any power vis-à-vis BMI whatsoever, then the moment BMI started
16 abusively threatening to withhold royalties, he would have quit BMI and obtained
17 performance royalties elsewhere. Under the terms of the BMI-Baker Writer "Agreement,"
18 and under the Consent Decree, which is the law, as far as Baker understands, it is not
19 possible to change affiliation on any music titles in the past. As to all those royalty-earning
20 music titles on which Baker has been getting paid for over two decades, Baker and BMI
21 are "stuck with each other."

22 307. Plaintiff Alexander C. Baker has suffered severe emotional distress, including fear,
23 worry, mortification, outrage, shame, humiliation, degradation, anger, and depression.
24 Baker faces the prospect of being homeless. Baker has extreme difficulty concentrating
25 because he can't process or accept how the system allows BMI and Erika Stallings and
26 Mike O'Neill to perpetrate such intentional injury.

27 308. The intentional, malicious conduct of Defendants is maddening, and would be
28 maddening to any reasonable person similarly-situated to Baker. Baker suffers Post

1 Traumatic Stress Disorder, but cannot afford the medical treatment required, which
 2 inability to afford treatment is directly and proximately caused by Defendants' tortious
 3 conduct described herein, and which inability to afford necessary treatment compounds
 4 the severity of Baker's emotional distress caused by Defendants.

5 309. Plaintiffs believe, and on that basis allege that BMI has a policy and custom
 6 allowing for extreme and outrageous conduct, on an ad hoc basis. Alternatively, Plaintiffs
 7 allege that BMI does not have such a policy and custom, and that Erika Stallings and/or
 8 Mike O'Neill and/or Does acted on their own volition.

9 310. Defendants' conduct is the direct and proximate cause of Baker's emotional distress.

10 311. Therefore, BMI, Erika Stallings and Mike O'Neill are jointly and severably liable to
 11 Baker for Intentional Infliction of Emotional Distress.

12 **TWELVTH CAUSE OF ACTION**

13 **Fraudulent Inducement**

14 **(Alexander C. Baker v. BMI and Erika Stallings in her individual capacity)**

15 312. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

16 313. The elements of fraudulent inducement are: (1) a knowingly false representation by
 17 the defendant; (2) and intent to deceive or induce reliance; (3) justifiable reliance by the
 18 plaintiff; and (4) resulting damage. Every element of the cause of action for fraud must be
 19 alleged in full, factually and specifically. *Wilhelm v. Pray, Price, Williams & Russell*
 20 (1986) 186 Cal.App.3d 1324, 1332. The critical pleading elements are that a
 21 misrepresentation was made, Defendants knew it untrue at the time, and they intended
 22 Plaintiff rely on the misrepresentation. At the pleading stage an averment that defendant
 23 knew it untrue and that Defendant intended reliance is sufficient. *Charpentier v. Los*
 24 *Angeles Rams Football Co., Inc.* (1999) 75 Cal. App.4th 301, 312. Further, the specificity
 25 pleading requires facts that "show how, when, where, to whom, and by what means the
 26 representations were tendered." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.

27 314. Alleging fraud against a corporation must include the names of the persons who
 28 made the misrepresentations; their authority to speak for the corporation; to whom they

1 spoke; what they said or wrote; and when it was said or written. See *Lazarat* 645;
2 *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal. App. 4th 153, 157; *Perlas v.*
3 *GMAC Mortg., LLC* (2010) 187 Cal. App. 4th 429, 434.

4 315. On August 26, 2019, after BMI began threatening to withhold royalties, Baker filed
5 into the Family Law case a Motion for Joinder, seeking to add BMI as a party. Baker
6 sought a simple order that BMI was required to pay royalties in equal amounts to both he
7 and to Marlo, as the July 7, 2016 stipulation and order require, as the July 18, 2016 Letter
8 of Direction instruct BMI to do, and as BMI has in fact been doing since September 2016.

9 316. On September 3, 2019, Baker was contacted by email by attorney AnnMarie Mori,
10 representing BMI. Plaintiff believes that Erika Stallings was at all times making the
11 substantive decisions. Ms. Mori discussed the situation between Baker and Marlo, and
12 concluded:

13 Therefore, it does not appear that Mr. Baker or Ms. Marlo dispute that at
14 this time the royalty payments should continue to be distributed 50/50.

15 EXHIBIT O, p. 76

16 317. In the days immediately following September 3, 2019, Ms. Mori on behalf of BMI
17 indicated that BMI wished to enter into a stipulation with Baker under which Baker would
18 dismiss the Motion for Joinder seeking to join BMI to the Family Law case, and BMI
19 would promise to be bound by any order the Family Court would make allocating the
20 royalties.

21 318. On or about September 12, 2019, a phone call was made between AnnMarie Mori
22 for BMI, Baker, and attorney Marc Angelucci. The purpose of the call was to discuss the
23 terms of the stipulation to relieve BMI from joinder. Baker sought assurances that, until
24 further order of the Family Court, that BMI would continue to pay royalties, just as they
25 had been doing. Ms. Mori repeated her assurances from the Sept. 3 email, stating:

26 There is not a dispute regarding the current allocation of royalties. It is our
27 understanding that that issue will be decided at trial. Nothing will change
28 at BMI until either the parties stipulate and we receive a new Letter of
 Direction, or there is a new Court Order.

1 319. BMI's statement "it does not appear that Mr. Baker or Ms. Marlo dispute that at this
2 time the royalty payments should continue to be distributed 50/50" is true, but highly
3 misleading, because it is clearly intended to convince Baker that BMI would not stop
4 paying royalties, when in fact BMI was planning to stop paying Baker's royalties all
5 along. BMI knew that the statement was highly misleading and intended to induce a false
6 belief in Baker that BMI would continue to pay royalties.

7 320. BMI's statement "Nothing will change at BMI until either the parties stipulate and
8 we receive a new Letter of Direction, or there is a new Court Order" is false, because
9 something did change at BMI – they stopped paying Baker's royalties to Adam Bravery
10 LLC – despite the fact that Marlo and Baker have not issued any new Letter of Direction,
11 nor has there been a new Court Order regarding the allocation of royalties. ASCAP &
12 BMI was planning to stop paying Baker's royalties all along, thus ASCAP & BMI knew it
13 was a false statement.

14 321. Both of BMI's above statements were intended to deceive Baker, and to induce him
15 into believing that BMI would not stop paying royalties, when in fact BMI was so
16 intending to stop paying royalties.

17 322. Both of the above statements were intended to induce Baker's reliance, because
18 Baker had brought a Motion for Joinder seeking to join BMI to the Family Law case, and
19 BMI knew that Baker would not agree to release BMI from the Joinder Motion unless he
20 was deceived into thinking that BMI would continue to pay royalties as the BMI-Baker
21 Writer "Agreement" requires, as the Consent Decree requires, as the July 7, 2016 Court
22 Order requires, and as the July 18, 2016 Letter of Direction requires.

23 323. Baker relied on BMI's September 3, 2019 false statement that "it does not appear
24 that Mr. Baker or Ms. Marlo dispute that at this time the royalty payments should continue
25 to be distributed 50/50." Baker relied on BMI's false statement "Nothing will change at
26 ASCAP & BMI until either the parties stipulate and we receive a new Letter of Direction,
27 or there is a new Court Order." Had Baker not received these false assurances, Baker
28 would not have agreed to the stipulation dismissing the Joinder action against BMI.

1 324. On or about September 25, 2019, Baker did in fact sign a stipulation with BMI,
2 dismissing the Joinder. EXHIBIT “P,” p. 80-82.

3 325. Plaintiff believes and thus alleges that BMI has a custom and policy which permits
4 it to make fraudulent misrepresentations, despite such fraudulent misrepresentations being
5 generally contrary to public policy. As an alternative theory, Plaintiff alleges that BMI
6 does not have such a policy, but that Erika Stallings in her individual capacity was directly
7 responsible for crafting and implementing intentional misrepresentations.

8 326. Baker was damaged in his reliance on the false statements by BMI, because had he
9 not dismissed the Joinder action, he could have obtained a Court order compelling BMI to
10 obey the July 7, 2016 Order equalizing royalties between Baker and Marlo.

11 327. Plaintiffs believe, and on that basis allege that BMI has a policy and custom
12 allowing for dishonest and injurious conduct, on an ad hoc basis. Alternatively, Plaintiffs
13 allege that BMI does not have such a policy and custom, and that Erika Stallings acted on
14 her own volition.

15 328. Therefore, BMI and/or Erika Stallings are liable to Baker for fraudulent inducement.

16 **THIRTEENTH CAUSE OF ACTION**

17 **42 U.S.C. § 1983**

18 **Deprivation of Federal Right to Collect Performance Royalties** 19 **(Alexander C. Baker v. ASCAP)**

20 329. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

21 330. Under the State Compulsion Test, ASCAP is a State Actor for civil rights purposes.
22 *Supra.* Baker has a federally-protected right to collect performance royalties, *supra.*

23 331. Acting under color of the Consent Decree, which is federal law, ASCAP
24 intentionally denied Alexander Baker the Performance Royalty money that he has a
25 federal right to collect. ASCAP knew that there was a July 2016 stipulation and court
26 order to pay equal royalties between Baker and Marlo. With regard to the royalties
27 covered in the July 2016 Stipulation and Court Order, ASCAP knew that there is no
28 “dispute” between Marlo and Baker upon which to base any sort of “Dispute Hold.”

1 332. Plaintiffs believe, and on that basis allege, that ASCAP has a policy and custom
2 allowing for the fabrication of a false pretext on which to impose a “dispute hold.”

3 333. Beginning September 2016, and continuing in each quarterly distribution thereafter,
4 ASCAP did not pay Alexander Baker the equalized royalties.

5 334. ASCAP intentionally deprived Baker of his federally-protected right to collect
6 performance royalties. At minimum, ASCAP acted with a reckless disregard Baker’s
7 federally protected rights.

8 335. As a direct and proximate result of the deprivation of civil rights, Baker is injured in
9 the amount of ASCAP royalties improperly withheld to date, subject to proof.

10 336. Therefore ASCAP is liable to Alexander Baker for Civil Rights violations.

11 **FOURTEENTH CAUSE OF ACTION**

12 **Breach of Contract**

13 **(Alexander Baker v. ASCAP)**

14 337. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

15 338. If for whatever reason ASCAP is not held to be a State Actor, or Plaintiffs right to
16 receive royalties is not held to be a federally-protected right, then without waiving the
17 right to present the legal claims set forth above and below, Plaintiff *alternatively* presents
18 a Breach of Contract theory, i.e. an alternative to Deprivation of Civil Rights.

19 339. In 1990, Baker and ASCAP entered into a Writer “Agreement,” a binding contract
20 obligating ASCAP to pay performance royalties to Baker. At all relevant times prior to
21 September 2016, Baker and ASCAP performed under the contract.

22 340. In July 2016, Baker and co-writer Marlo instructed ASCAP to equalize royalties
23 between them for all works registered after January 11, 1995 and before June 1, 2015.
24 ASCAP did not comply with the reallocation.

25 341. Starting in September 2016, ASCAP failed to pay the equalized royalties.

26 342. Baker was harmed by ASCAP’s failure to pay Baker, in an amount of money
27 subject to proof at trial.

28 343. Therefore, ASCAP is liable to Alexander Baker for Breach of Contract.

FIFTEENTH CAUSE OF ACTION
Breach of Fiduciary Duty
(Alexander Baker v. ASCAP)

344. Plaintiff repeats, realleges and incorporates by reference the facts alleged above.

345. ASCAP owes Alexander Baker a fiduciary duty. *Supra*.

346. ASCAP is legally obligated to pay Performance Royalties to Alexander Baker. By failing to pay the court-ordered equalized royalties, ASCAP breached its fiduciary duty every quarter beginning September 2016 – present.

347. Therefore, ASCAP is liable to Alexander Baker for Breach of Fiduciary Duty.

XIV. PRAYER FOR RELIEF ON UNDERLYING CLAIMS

348. Wherefore, Plaintiffs pray for relief as follows:

A. Damages

349. **General Damages against BMI** – for Baker’s pain and suffering, for Adam Bravery’s lost business, and for all other such general damages as are reasonably certain to flow from the misconduct proven, in an amount found reasonable at trial, but not less than \$1,000,000;

Actual Damages against BMI – for the total value of Plaintiffs’ BMI royalty stream, plus medical expenses, plus all other money damages actually and proximately caused by Defendants’ conduct, such amounts to be proven at trial, but not less than \$200,000;

Punitive Damages against BMI - to punish BMI Defendants for intentionally tortious conduct, to make examples of them, and to deter others from similar conduct, in an amount deemed sufficient to achieve the purpose of punitive damages, in light of BMI’s stated yearly revenue of over \$1 billion, and the net worth of Erika Stallings and of Mike O’Neill, subject to proof;

Actual Damages against ASCAP – for the amount of Performance Royalties improperly withheld, subject to proof;

For a permanent injunction compelling ASCAP & BMI to pay the Performance Royalties due and payable for performances of Alexander C. Baker's musical works to Baker, to Adam Bravery LLC, or to whomever shall in the future become a valid assignee of said royalties, such payments to be at all times compliant with any pending court order as to proper allocation;

For a permanent injunction prohibiting ASCAP & BMI from disclaiming a fiduciary duty to Baker;

For the cost of the suit plus pre-judgment interest;

For attorney fees as allowed by statute and/or by contract; and

For any other such relief as the Court may deem appropriate.

Plaintiffs hereby demand a jury trial on all issues so triable.

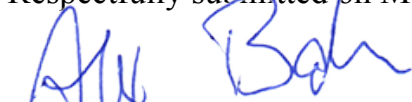
G. S. S. S. S.

G. Scott Sobel, Esq.
Attorney for Plaintiffs

**VERIFICATION AND SWORN DECLARATION
OF ALEXANDER C. BAKER**

I am the Plaintiff in this case. I have personal knowledge of the facts stated within this first amended complaint, and hereby attest to its accuracy. The documents attached hereto as exhibits to the complaint are true and correct copies of the documents they purport to be. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Respectfully submitted on March 20, 2021,


Alexander C. Baker

PROOF OF SERVICE BY ELECTRONIC MAIL

I am over the age of 18. I am not a party to this action. My business address is 1180 S. Beverly Drive, Suite 610, Los Angeles, CA 90035-1158. My email address is GScottSobel@gmail.com. On the date indicated below, I served the indicated persons the following documents:

**PLAINTIFF'S VERIFIED FIRST AMENDED COMPLAINT
EXHIBITS TO FIRST AMENDED COMPLAINT**

I accomplished service by attaching PDF copies of the document(s) to an email sent to the recipients indicated below. The service list is as follows:

Jackson Wagener
Attorney for ASCAP
jwagener@ascap.com

AnnMarie Mori
Attorney for BMI
amori@troygould.com

Date of service: March 25, 2021.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 25, 2021



G. Scott Sobel, Esq.
Attorney for Plaintiffs