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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

**NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION**

**DECLARATION OF ALEXANDER
C. BAKER**

**DECLARATION OF G. SCOTT
SOBEL**

Date:

Time:

Room: 6B

Judge: Hon. Rosemary Márquez

NOTICE OF MOTION

To the Court, to all Parties and their attorneys of record:

PLEASE TAKE NOTICE that at the above stated time and place, under FRCP Rule 65, Plaintiffs will and hereby do move for a Preliminary Injunction, ordering Defendant BMI to lift the Royalty Withhold, to immediately release money belonging to Plaintiff Adam Bravery, LLC, and enjoining BMI from imposing any such unwarranted Royalty Withhold in the future.

The motion will be based on this notice, the following Memorandum of Points and Authorities, the attached Declarations submitted herewith, and any oral argument as may be requested at the hearing.

Respectfully submitted on April 5, 2021,



G. Scott Sobel, Esq.
Attorney for proposed class plaintiffs

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. RELEVANT FACTS.....	1
A. The Baker-Marlo Divorce, Stipulation and Royalty Order	1
B. Baker’s Assignment of Royalties to the LLC.....	2
C. BMI and Erika Stallings Fabricate a False “Dispute” and Repeatedly Threaten to Stop Paying Royalties	3
D. Marlo Files Meritless Contempt Action Which is Dismissed	7
E. BMI Officially Imposes Dispute Hold, But Then Pays Again Anyway	8
F. BMI Stops Paying Royalties	9
III. ARGUMENT	9
A. Legal Standard for Preliminary Injunction	9
B. Plaintiff Is Likely To Succeed On The Merits	10
1. Plaintiff is likely to prevail on § 1983 - Deprivation of Federal Right to collect Performance Royalties	11
2. Alternatively, Plaintiff is likely to prevail on Breach of Contract	11
3. Plaintiff is likely to prevail on Breach of Fiduciary Duty.....	11
4. Plaintiff is likely to prevail on Constructive Fraud.....	11
5. Plaintiff is likely to prevail on Intentional Infliction of Emotional Distress	13
6. Conclusion to Likelihood of Prevailing	14
C. Plaintiffs Will Suffer Irreparable Harm Absent Relief.....	14
1. Inability to pursue chosen career is irreparable harm	14
2. Emotional distress is irreparable harm	15
3. Conclusion to irreparable harm	16
D. Balance of Equities Tips Completely in Plaintiffs’ favor.....	16
E. The Requested Injunction is Strongly in the Public Interest	17
IV. OVERALL CONCLUSION.....	18

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)..... 9

FEDERAL CASES

All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011) 10

Chalk v. U.S. Dist. Ct., 840 F.2d 701, 709-10 (9th Cir. 1988)..... 14

CTIA - Wireless Ass’n v. City of Berkeley, 854 F.3d 1105, 1124 (9th Cir. 2017)..... 17

De Vico v. United States Bank, 2012 U.S. Dist. LEXIS 155622, at *22 (C.D. Cal. Oct. 29, 2012)..... 16

Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017) 10

E.E.O.C. v. Chrysler Corp., 546 F. Supp. 54 [29 Fair Empl. Prac. Cas. (BNA) 284] (E.D. Mich. 1982) 15

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Guzman v. Shewry, 552 F.3d 941, 948 (9th Cir. 2009) 10

Hernandez v. Sessions, 872 F.3d 976, 990 (9th Cir. 2017) 10

Oshiver v. Court of Common Pleas, 469 F. Supp. 645, 653 [20 Fair Empl. Prac. Cas. (BNA) 1328] (E.D. Pa. 1979) 16

Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) 14, 15

Scotts Co. v. United Indus. Corp., 315 F.3d 264, 284 (4th Cir. 2002) 16

Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1291 (9th Cir. 2013) 17

Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009) 16

1 STATUTES

2 California Civil Code § 3294 13

3
4 OTHER AUTHORITIES

5 Restatement (Third) of Torts: Liability for Physical and Emotional Harm. § 46. (Am. Law
6 Inst. 2012)..... 13

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

BMI is legally obligated to pay Performance Royalties to Adam Bravery, LLC, the rightful assignee of BMI songwriter Alexander C. Baker. After paying royalties faithfully for over 20 years, BMI has stopped doing so without legal justification, but upon a false and fabricated pretext. FAC, Doc. 10, ¶ 18.

Plaintiffs seek a Preliminary Injunction restoring the status quo ante, i.e. that BMI dissolve its present Royalty Withhold and release the money improperly withheld from Adam Bravery LLC (\$47,311.37 to date), and that BMI is enjoined from imposing any such Royalty Withhold until further order of this Court.

II. RELEVANT FACTS

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

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”).

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 hereto as EXHIBIT “D”, Doc. 10-1, pp. 25-27.

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

1 submitting that song to the record company, Baker and Marlo agreed to use the date of
2 June 1, 2015 as the cutoff date for inclusion in the royalty reallocation.

3 On July 18, 2016, Baker and Marlo jointly signed and mailed Letters of Direction
4 to royalty-paying entities, including ASCAP & BMI, instructing them to equalize the
5 music royalties on all music registered after January 11, 1995 and before June 1, 2015.
6 See EXHIBIT “E”, Doc. 10-1, p. 29.

7 BMI complied with the Letter of Direction, and did reallocate the royalties as equal
8 between Baker and Marlo. Beginning with the September 2016 distribution, and
9 continuing unabated until March of 2020, BMI made equal payments to Baker and
10 Marlo.

11 **B. Baker’s Assignment of Royalties to the LLC**

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

17 On April 12, 2017, on advice of his tax preparer, Baker assigned his BMI royalty
18 stream to Write Hear, LLC, which company paid Baker a salary. Baker used BMI’s
19 standard assignment form for the assignment. Baker timely notified Marlo about the
20 assignment of royalties to Write Hear LLC within the Family Court disclosure process.
21 See EXHIBIT “F” attached hereto.

22 Beginning with the June 2017 distribution, BMI paid the royalties to Write Hear
23 LLC.

24 During the summer of 2017, Baker decided to embark on the creation of an
25 animated, music driven show called “Adam Bravery”. Write Hear LLC hired numerous
26 independent contractors toward the goal of producing the show, including illustrators,
27 animators, writers and musicians.
28

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

5 In May of 2018, Baker and his two partners formed Adam Bravery, LLC, an
6 Arizona Limited Liability Company. Prior to dissolving Write Hear LLC, all assets of
7 Write Hear LLC, including equipment and numerous work-for-hire contracts, were
8 assigned from Write Hear LLC to Adam Bravery LLC.

9 On July 9, 2018, Baker’s BMI royalties were assigned from Write Hear LLC to
10 Adam Bravery LLC. The same standard BMI royalty assignment form was used for the
11 assignment as before. Baker timely notified Marlo regarding the assignment of assets,
12 including the assignment of royalties, from Write Hear LLC to Adam Bravery LLC
13 within the Family Court disclosure process. See EXHIBIT “G”.

14 Beginning with the September 2018 distribution, and continuing until March 2020,
15 BMI paid Adam Bravery, LLC.

16 **C. BMI and Erika Stallings Fabricate a False “Dispute” and**
17 **Repeatedly Threaten to Stop Paying Royalties**

18 In the week prior to July 16, 2019, Marlo’s attorneys Mike DiNardo and Joe Yanny
19 contacted Erika Stallings and devised a plan to inflict emotional and financial distress
20 upon Baker, for the purpose of defeating him in court. Under the plan, BMI would
21 withhold paying Baker’s share of royalties to Adam Bravery LLC, while continuing to
22 pay Marlo’s share of the royalties to Marlo.

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

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

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

I am writing with respect to the July 7, 2016 order from the Superior Court of California regarding the terms of your divorce with Clair Marlo. 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", Doc. 10-1, p. 39

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.

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

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", Doc. 10-1, pp. 25-26, bolding added.

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.

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

1 created 1-11-95 through 4-7-2015. The ownership of all works at issue is identical now
2 as before. Period. And BMI knows this, it's a matter of their records.

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

9 A Performance Royalty is not a work. A work is not a Performance Royalty.

10 In July 2019, and at all relevant times, BMI understood and appreciated the
11 distinction between "work" and "royalty". BMI knew that the statement "You assigned
12 your share of the works to Adam Bravery LLC..." was false.

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

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

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

23 EXHIBIT "I", Doc 10-1, p. 41.

24 In fact, BMI was aware of the Order in July 2016, because the Letter of Direction,
25 which BMI undisputedly complied with, begins with "Pursuant to July 7, 2016 Orders
26 of the Court in Los Angeles Superior Court case LD068701..." See EXHIBIT E, Doc
27 10-1, p. 29.
28

1 BMI's August 21, 2019 letter is also deceptive in that it does not refer to a royalty
2 reallocation, but rather to an order "relating to musical works". EXHIBIT "I", Doc 10-1,
3 p. 41. BMI was acting with malice in willfully attempting to deceive, not only Baker,
4 but also the Court, into falsely believing that Baker assigned works, when Baker
5 provably did no such thing.

6 BMI's August 21, 2019 letter states:

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

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

14 EXHIBIT "I", Doc 10-1, p. 41.

15 BMI has a standard Royalty Withhold policy, which states in relevant part that:

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

19 EXHIBIT "J", Doc 10-1, pp. 45-46

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

23 As of September 2019, no complaint or any dispute had been filed by Marlo. Any
24 legitimate dispute hold would stop all royalties payable on the works, according to
25 BMI's policy. Here, BMI threatened to stop royalties paid to Baker, while continuing to
26 pay Marlo. The only reasonable inference from this fact is that BMI has the requisite
27 state of mind to constitute actual malice toward Plaintiffs.
28

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

6 The July 7, 2016 stipulation and order of the Family Court mandates that royalties
 7 are 50-50 between Baker and Marlo, and, as of this writing – February 2021 - no order
 8 has superseded it.

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

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

14 I've never heard of stipulating to a dispute. That's agreeing to disagree,
 15 which is the same as no agreement. I don't understand why you are
 16 representing [Marlo]. I do know that neither she nor any of her
 17 attorneys has ever once contacted me on this issue, so that's strange. I
 18 do not know that [Marlo] disputes the propriety of the assignments, I
 19 only know that Erica^[sic] Stallings and AnnMarie Mori represent that
 20 [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?

21 EXHIBIT "K", Doc 10-1, p. 49.

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

23 **D. Marlo Files Meritless Contempt Action Which is Dismissed**

24 On October 2, 2019, by and through attorney Joe Yanny, Marlo filed a Contempt
 25 action in Family Court, alleging that the assignment of royalties violated the court
 26 order. EXHIBIT "L", Doc 10-1, pp. 52-69. Marlo's Contempt action mimicked BMI's
 27
 28

1 false contention that Baker has assigned “copyright”, or assigned “works”, when in fact
 2 Baker assigned royalties. Marlo sought severe penalties against Baker, alleging that:

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

6 EXHIBIT “L”, Doc 10-1, p. 69.

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

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

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

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

17 ...sets forth Ms. Marlo's contention that the that the 4/2017 assignment
 18 by Mr. Baker of his royalties to Write Hear, LLC, and the subsequent
 19 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.

20 EXHIBIT M, Doc 10-1, p. 71.

21 BMI’s October 7, 2019 letter also states:

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

25 EXHIBIT M, Doc 10-1, p. 71.

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

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.

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

F. BMI Stops Paying Royalties

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, shortly thereafter, on March 18, 2020, BMI reversed the deposit, and electronically removed \$9,243.31 from the Adam Bravery LLC bank account.

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

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

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

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

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

III. ARGUMENT

A. Legal Standard for Preliminary Injunction

To succeed on a motion for a temporary restraining order or preliminary injunction, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that a balance of equities tips in the favor of the moving party; and (4) that an injunction is in the public interest. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("*Winter*").

The Ninth Circuit has maintained that a preliminary injunction "may also be appropriate if a movant raises 'serious questions going to the merits' and the 'balance of hardships tips sharply towards' it, as long as the second and third *Winter* factors are

1 satisfied.” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)
2 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)).
3 Further, in the Ninth Circuit, “the elements of the preliminary injunction test are
4 balanced, so that a stronger showing of one element may offset a weaker showing of
5 another.” *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quotation omitted).

6 Plaintiff will show that all four elements favor granting the requested relief.
7

8 **B. Plaintiff Is Likely To Succeed On The Merits**

9 At an irreducible minimum, the moving party must demonstrate a fair chance of
10 success on the merits or questions serious enough to require litigation. *Guzman v.*
11 *Shewry*, 552 F.3d 941, 948 (9th Cir. 2009).

12 Here, Defendant BMI is legally obligated to pay Performance Royalties to Plaintiffs
13 and has stopped doing so without any legal justification whatsoever. BMI’s “Royalty
14 Withhold” is without merit because there is no dispute as to the proper payee of the
15 royalties in question. *Supra*. Plaintiffs will prevail on at least one cause of action against
16 BMI, the only question is which one or ones. This will depend on whether BMI is held
17 to be a State Actor, in which Case BMI will be liable for deprivation of civil rights. If
18 not, BMI will still be liable for Breach of Fiduciary Duty and Constructive Fraud. Even
19 if BMI is somehow found to not owe a fiduciary duty, BMI is still liable for breach of
20 contract. And regardless of anything else, BMI will be found liable for Intentional
21 Infliction of Emotional Distress.

22 Because BMI has stopped paying royalties with no legal justification, and because
23 this has prevented Plaintiff from pursuing his chosen profession, and caused tremendous
24 emotional distress, Plaintiffs are likely to succeed on any or all of the following Claims,
25 which are presented briefly below, and in great detail in the Complaint (Doc. #1).
26
27
28

1. Plaintiff is likely to prevail on § 1983 - Deprivation of Federal Right to collect Performance Royalties

Plaintiff sues BMI for Deprivation of Rights. See Cpt. Sixth Cause of Action, ¶¶ 181-192. Plaintiff seeks to establish through Declaratory Judgment that BMI is a State Actor for civil rights purposes, and that collecting Performance Royalties is a federally protected right, as opposed to a contractually-created right. If Plaintiff is successful on Declaratory judgment, then the fact that BMI stopped royalties with no legal justification will constitute the willful deprivation of rights under color of law. BMI will be made to release the funds wrongfully withheld.

2. Alternatively, Plaintiff is likely to prevail on Breach of Contract

As an alternative theory, Plaintiff sues BMI for Breach of Contract. See Cpt., Seventh Cause of Action, ¶¶ 193-206. Even if BMI is held to be a private actor, they still have a legal obligation to pay royalties to Adam Bravery, LLC, and have stopped doing so without legal justification. Under this theory, BMI will be held in breach, and made to release the funds wrongfully withheld.

3. Plaintiff is likely to prevail on Breach of Fiduciary Duty

Regardless of the declaratory judgments, Plaintiff sues BMI for Breach of Fiduciary Duty. See Cpt. Eighth Cause of Action, ¶¶ 207-217. BMI undisputedly collects a large amount of money (\$1 billion annually according to their annual statement), then is responsible to allocate that money fairly to over 1 million Songwriters. This is a fiduciary relationship, by definition. Since BMI stop paying Plaintiffs royalties without legal justification, BMI will be held in Breach of Fiduciary Duty, and made to release the funds wrongfully withheld.

4. Plaintiff is likely to prevail on Constructive Fraud

Plaintiff sues BMI for constructive Fraud. See Cpt., Ninth Cause of Action, ¶¶ 218-235. 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

1 fiduciary duties constitute constructive fraud. The failure of the
2 fiduciary to disclose a material fact to his principal which might affect
3 the fiduciary's motives or the principal's decision, which is known (or
4 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.

5 *Salahutdin v. Valley of Cal., Inc.*, 24 Cal. App. 4th 555, 558, 29 Cal. Rptr. 2d 463, 464
6 (1994).

7 Here, BMI fabricated a false “dispute” between Marlo and Baker as a pretext to
8 impose a royalty hold against Baker, while continuing to pay Marlo. Knowing that a
9 Court order prohibited Baker from assigning works, BMI falsely contended that Baker
10 assigned works, knowing that Baker never did so. Baker assigned his own royalty
11 stream to pay to a business entity, while ownership of the works has remained
12 unchanged.

13 BMI further compounded the falsity by construing the fabricated “dispute” as being
14 a dispute between Marlo and Baker, knowing that even if there was a dispute as to the
15 proper payee of Baker’s royalty stream, the dispute would be between Baker and Adam
16 Bravery LLC. Marlo’s royalties have remained completely unaffected throughout, a fact
17 known to BMI.

18 BMI compounded the falsity yet again by withholding royalties only from Baker,
19 while continuing to pay Marlo. This demonstrates that BMI does not believe there is a
20 dispute between Baker and Marlo. If there was a dispute between Baker and Marlo,
21 BMI would withhold royalties from both Songwriters, according to their standard
22 policy.

23 Adam Bravery LLC depends crucially on the royalty money to operate, and has
24 necessarily ceased all operations as a direct and proximate result of BMI withholding
25 payment.

26 The net value of Adam Bravery LLC has diminished by at least \$150,000 as a
27 direct and proximate result of Defendants’ intentional actions of withholding the
28 royalties without justification.

1 BMI withholding money constitutes malice, fraud and/or oppression as defined in
2 California Civil Code § 3294.

3 Therefore, the Court should find it likely that BMI will be liable to Plaintiffs for
4 constructive fraud, and will be made to release the funds wrongfully withheld.

5 **5. Plaintiff is likely to prevail on Intentional Infliction of Emotional**
6 **Distress**

7 Plaintiff sues BMI for Intentional Infliction of Emotional Distress. See Cpt., Tenth
8 Cause of Action, ¶¶ 236-257. Proving Intentional Infliction of Emotional Distress
9 requires a showing that Defendant's conduct was both "extreme" and "outrageous". The
10 words "extreme" and "outrageous" are not synonymous. Rather, they function as a
11 double threshold for the nature of the conduct and how unusual it is. Restatement
12 (Third) of Torts: Liability for Physical and Emotional Harm. § 46. (Am. Law Inst.
13 2012).

14 Here, BMI's conduct is extremely unusual, because it is the only time in BMI's
15 entire history that they have imposed a Royalty Withhold on one party to a supposed
16 dispute, while continuing to pay the other party. Knowing that there was no actual
17 dispute between Baker and Marlo, BMI undertook a series of steps intended to entrap
18 Baker into "admitting" that there was a "dispute" upon which to withhold Baker's
19 royalty stream from Adam Bravery LLC. First BMI emailed Baker and simply asked
20 him for his "position" on the "dispute". When Baker declined, BMI falsely threatened to
21 withhold Plaintiff's money, then paid royalties in September 2019. This is extreme and
22 outrageous conduct. Knowing that Baker depends on the royalty money to survive,
23 BMI's conduct was extreme, and outrageous, and intended to cause emotional distress.

24 BMI's again falsely threatened to withhold royalties in November 2019, then paid
25 the royalties in January 2020. BMI paid the royalties again in March 2020. But then,
26 BMI reversed charges and took the money back. As emotionally injurious as the false
27 threats of withholding money are, making good on those threats is even more injurious.
28

BMI holds a position of extreme power over Plaintiff. In repeatedly threatening to withhold money, and then actually withholding money, with the full knowledge that there is no valid basis to withhold the money, BMI acted to intentionally injure the psyche of Baker. Plaintiff Alexander C. Baker has suffered severe emotional distress, including fear, worry, mortification, outrage, shame, humiliation, degradation, anger, and depression. Baker faces the prospect of being homeless. Baker has extreme difficulty concentrating because he can't process or accept how the system allows BMI to perpetrate such intentional injury.

Therefore, the Court should find that Plaintiff is likely to prevail on Intentional Infliction of Emotional Distress, and BMI will be made to release the funds wrongfully withheld.

6. Conclusion to Likelihood of Prevailing

In light of the above, the Court should find that because BMI wrongfully withheld royalty money, that Plaintiffs are likely to succeed on at least one claim that requires BMI to release the royalty money.

C. Plaintiffs Will Suffer Irreparable Harm Absent Relief

Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages. See *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

1. Inability to pursue chosen career is irreparable harm

The "loss of opportunity to pursue [Plaintiffs'] chosen profession" constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709-10 (9th Cir. 1988).

Here, BMI has stopped paying royalty money to Plaintiff Adam Bravery LLC without legal justification. *Supra*. Adam Bravery LLC is a small company dedicated to producing a music-driven animated feature film. FAC, Doc. 10, ¶¶ 186-190.

Adam Bravery LLC depends on the BMI royalty stream for its operation, and has had to shut down operations because of BMI's Royalty Withhold. FAC, Doc. 10, p. ¶

240. Alexander Baker depends on the BMI royalty stream for his income. FAC, Doc. 10, p. ¶ 240. 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. FAC, Doc. 10, p. ¶ 120.

BMI's unjustified Royalty Withhold has caused the loss of Plaintiffs' opportunity to pursue their chosen profession - creating a music-driven animated show. Therefore, the Court should find that absent the requested injunction, Plaintiff Adam Bravery LLC and Plaintiff Alexander C. Baker will suffer irreparable harm.

2. Emotional distress is irreparable harm

Because intangible injuries generally lack an adequate legal remedy, "intangible injuries [may] qualify as irreparable harm." *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

Several cases support Plaintiffs' claim that their non-monetary deprivation is irreparable. The most striking parallel is *E.E.O.C. v. Chrysler Corp.*, 546 F. Supp. 54 [29 Fair Empl. Prac. Cas. (BNA) 284] (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 [34 Fair Empl. Prac. Cas. (BNA) 1401] (6th Cir. 1984), where the court granted a preliminary injunction ordering reinstatement of employees terminated in violation of the Age Discrimination in Employment Act.

The court acknowledged that the loss of income and its effects were compensable after trial and did not constitute irreparable harm. 546 F. Supp. at 69-70. Nonetheless, **irreparable injury was found in the consequent emotional stress, depression and reduced sense of well-being**, which constituted "**psychological and physiological distress . . . the very type of injury Congress sought to avert.**" *Id.* at 70, *bolding* added. See also *Ray*, 666 F. Supp. at 1534 (excluded seropositive children suffered severe emotional distress, including **anxiety, feelings of anger, resentment, and fear of social rejection**, resulting in minor physiological disorders; **irreparable injury found**); *E.E.O.C. v. City of Bowling Green*, 607 F. Supp. 524, 527 [37 Fair Empl. Prac.

1 Cas. (BNA) 963] (W.D. Ky. 1985) (age discrimination resulted in **anxiety and**
 2 **emotional problems** and an inability to keep up with current matters; **irreparable**
 3 **injury found**); *Oshiver v. Court of Common Pleas*, 469 F. Supp. 645, 653 [20 Fair
 4 Empl. Prac. Cas. (BNA) 1328] (E.D. Pa. 1979) (**nervous and emotional problems**
 5 brought on by age and sex discrimination constituted **irreparable injury**).

6 Here, Plaintiff Alexander Baker has suffered emotional injury as a direct result of
 7 BMI's unjustified Royalty Withhold. Baker suffers PTSD. FAC, Doc. 10, p. ¶ 308.
 8 Baker suffers severe emotional distress, including fear, worry, mortification, outrage,
 9 shame, humiliation, degradation, anger, and depression. Baker faces the prospect of
 10 being homeless. Baker has extreme difficulty concentrating because he can't process or
 11 accept how the system allows BMI to perpetrate such intentional injury. FAC, Doc. 10,
 12 p. ¶ 307.

13 Therefore, the Court should find that Plaintiff's emotional distress is caused by
 14 BMI's conduct, and that such emotional distress does constitute irreparable harm.

15 **3. Conclusion to irreparable harm**

16 In light of the above, the Court should find that, absent the requested relief, that
 17 Plaintiffs will continue to suffer irreparable harm from inability to pursue career, or
 18 emotional distress, or both.

19 **D. Balance of Equities Tips Completely in Plaintiffs' favor**

20 Plaintiffs must show the balance of equities tips in its favor. In assessing whether
 21 the plaintiffs have met this burden, the district court has a duty to balance the interests
 22 of all parties and weigh the damage to each. *Stormans, Inc. v. Selecky*, 586 F.3d 1109,
 23 1138 (9th Cir. 2009). The court must evaluate the interim harm the defendants are likely
 24 to sustain if the injunction is granted and compare it with the harm the plaintiff is likely
 25 to suffer if an injunction does not enter. *De Vico v. United States Bank*, 2012 U.S. Dist.
 26 LEXIS 155622, at *22 (C.D. Cal. Oct. 29, 2012). The real issue is the degree of harm
 27 that will be suffered by the plaintiff or the defendant if the injunction is improperly
 28 granted or denied. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002).

Here, BMI will not be injured in any way when ordered to release the withheld funds, and to stop imposing any unwarranted Royalty Withhold ever again. After all, it isn't BMI's money. On the other hand, Plaintiffs are financially and emotionally devastated as a direct result of BMI's Royalty Withhold. Plaintiffs total injury is contrasted with the complete lack of any injury to BMI.

The relative size and strength of each enterprise may be pertinent to the balance of equities inquiry. *Gold Club-SF, LLC v. Platinum SJ Enter.*, 2013 U.S. Dist. LEXIS 134379, at *37 (N.D. Cal. Sep. 18, 2013).

Here, BMI is large (\$1 billion collected annually) not-for-profit corporation with over 1 million members. Plaintiff Alexander Baker is an individual facing economic ruin and homelessness. Plaintiff Adam Bravery LLC is a 3-member LLC whose survival depends on the royalty stream in question. Thus, relative size and strength of each enterprise completely favors Plaintiffs.

If a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor and the other two *Winter* factors are satisfied. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (emphasis in original).

Here, Plaintiffs have certainly shown a likelihood of success on the merits. *Supra*. But suppose Plaintiff merely meets the threshold of “serious questions”. Clearly, the balance of hardships tips in Plaintiffs' favor, because BMI suffers no hardship whatsoever.

E. The Requested Injunction is Strongly in the Public Interest

The public interest inquiry primarily addresses the impact on nonparties rather than on the parties. It embodies the U.S. Supreme Court's direction that, in exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. *CTIA - Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1124 (9th Cir. 2017).

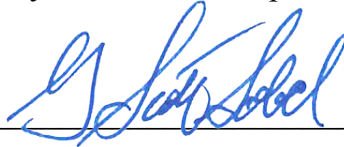
1 BMI is responsible for fairly distributing \$1 billion / year. If they are allowed to get
2 away with wrongly stopping the royalty payments for one songwriter and his assignee,
3 then there is nothing stopping them from doing the same thing to other songwriters. And
4 if BMI can do such a thing, then others might very well follow suit.

5 The public interest is well-served by granting the injunction, and would be ill-
6 served by anything besides granting the requested injunction.

7 **IV. OVERALL CONCLUSION**

8 In light of the foregoing, the Court should grant the requested Preliminary
9 Injunction, restoring the status quo ante. The Court should Order BMI to dissolve the
10 “Royalty Withhold” on Alexander Baker’s BMI royalties and immediately release to
11 Adam Bravery LLC the total amount of royalty money withheld to date. The Court
12 should enjoin BMI from imposing any such unwarranted royalty stoppage until further
13 order of this Court.
14

15 Respectfully submitted on April 5, 2021,

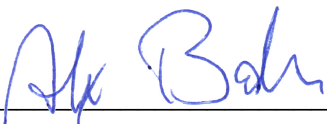
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18 _____
19 G. Scott Sobel, Esq.
20 *Attorney for Plaintiffs*
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DECLARATION AND VERIFICATION OF ALEXANDER BAKER

1. I am Plaintiff Alexander C. Baker. I have personal knowledge of the facts stated above in this Motion for Temporary Restraining Order and for Preliminary Injunction, and I verify the accuracy of every fact. If called as a witness, I could and would testify competently thereto.
2. I have written music since I was a child. I have been a professional composer and songwriter since 1994, when I first began earning Performance Royalties from ASCAP, and beginning in 1999, from BMI. From that time until the present, I have earned both ASCAP and BMI royalties in every single quarterly royalty distribution.
3. There is not and never has been a dispute as to the rightful payee on my BMI royalties. After earning BMI royalties every quarter since 1999, on advice of my tax person, I assigned my royalties to pay to my LLC. I used BMI's standard assignment form to do so, and BMI paid the royalties into the LLC from June 2017 – January 2020.
4. The assignment of royalties did not affect my ex-wife or any other co-writer in any way. The assignment of royalties did not violate any order of the Family Court. The order in question prohibits the assignment ***of musical works***, not the assignment of royalties. Royalties and works are two different things, they are both assignable. I never assigned any works. I assigned royalties.
5. The Exhibits attached hereto are true and correct copies of the documents they purport to be.
6. I declare under penalty of perjury under the laws of the United States of America the foregoing is true and correct.

Respectfully submitted on April 5, 2021,



Alexander C. Baker

PROOF OF ELECTRONIC SERVICE

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:

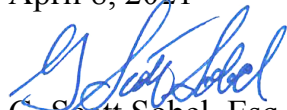
NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; PROPOSED ORDER ON PRELIMINARY INJUNCTION

I accomplished service by attaching PDF copies of the documents to an email. The service list is as follows:

AnnMarie Mori, TroyGould PC Atty. for BMI 1801 Century Park East, Suite 1600 Los Angeles, CA 90067-2367 Tel. (310) 789-1204 Email: amori@troygould.com	Andrew M. Jacobs, Snell & Wilmer LLP Atty. for ASCAP 1 S Church Ave., Ste. 1500 Tucson, AZ 85701-1630 Tel. 520-882-1200 Email: AJacobs@swlaw.com
Erika Stallings Erika.stallings@gmail.com	

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

April 8, 2021


G. Scott Sobel, Esq.