UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA,

Plaintiff,

v.

WARNER RECORDS, INC., ATLANTIC RECORDING CORP., and UNIVERSAL MUSIC GROUP, INC.,

Defendants.

Case No. 1:26-cv-04760-ER

ORAL ARGUMENT REQUESTED

UNIVERSAL MUSIC GROUP, INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Orin Snyder
Brian Ascher
Lefteri J. Christos
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
OSnyder@gibsondunn.com
BAscher@gibsondunn.com
LChristos@gibsondunn.com

Ilissa Samplin
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: (213) 229-7354
ISamplin@gibsondunn.com

Counsel for Defendant
Universal Music Group, Inc.

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PRELIMINARY STATEMENT

This is a paradigm case for dismissal based on the clear and unambiguous language of a contract. Article 21(a) of the SRLA is susceptible to only one meaning. When a Company uses a covered recording "for a purpose not covered by this Agreement," it must pay "an amount equal to all payments . . . that would be required under *the AFM agreement that would then be effective* if the recording were originally made for the purpose set forth under that agreement." Ex. 2 (SRLA) Art. 21(a).[1] Article 21(a) does not state a rate. It imports one from the separate AFM agreement governing the new purpose. And AFM has conceded that no such agreement exists for the AI Use. When the Court observed at the pre-motion conference that Article 21(a) requires the parties to "look to the underlying agreement of the new use," AFM's counsel agreed: "That's correct." When the Court asked whether such an agreement exists for AI, counsel answered: "No. So, there is no underlying agreement for AI use. We conceded that." Ex. 3 (Tr.) at 7:11–17. AFM is a party to every AFM agreement and knows whether such an agreement exists. It has told the Court that none does. That concession ends this case. Discovery cannot change that fact, much less create the missing agreement. A payment obligation measured by an agreement that does not exist is no payment obligation at all. The plain text of Article 21(a) mandates dismissal as a matter of law.

Unable to answer that text, AFM offers a scattershot series of arguments that obscure rather than confront what the contract makes clear. AFM now says the SRLA itself can be "the AFM agreement" governing the AI Use, even though its own complaint alleges that the "[u]se of sound recordings in generative AI software models *is not a purpose covered by the SRLA*." Ex. 1 (FAC) ¶ 45. It says the words "shall pay" create a payment obligation detached from the measure the

[1] Citations to "Ex." are to the exhibits to the Declaration of Ilissa Samplin, ECF No. 33. "Mot." is UMG's opening memorandum, ECF No. 32 (the "Motion"), and "Opp." is AFM's opposition, ECF No. 50. Defined terms carry the meanings given in the Motion. All emphasis is added unless otherwise noted.

parties chose, with the amount to be selected by the Court after discovery. It points to streaming rates that govern a different, downstream use, and to sampling provisions the FAC never pleads. It invokes bargaining history that the law forbids it to use to create ambiguity, and that in any event confirms UMG's reading. And it closes with a footnote asking for leave to plead a different claim under a different provision.

None of this identifies a second reasonable meaning of the words the parties wrote. A contract is ambiguous only if its language is reasonably susceptible to more than one meaning; a reading that "strain[s] the contract language beyond its reasonable and ordinary meaning" does not create ambiguity. *Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010) (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459 (1957)). Ambiguity is a property of contractual text, not a litigation strategy. AFM cannot manufacture it simply by offering multiple theories that the text does not reasonably support. And several of those theories are not interpretations of Article 21(a) at all: they replace the parties' chosen measure with the SRLA itself, a court-selected rate, a streaming rate for a different use, or a sampling provision for a different claim. Substitution is not interpretation.

No amount of discovery can save this case, because it is foreclosed by the plain terms of the agreement. Discovery can illuminate facts; it cannot create the AFM agreement that Article 21(a) requires and that AFM concedes does not exist. And there is nothing inequitable about that result. The SRLA prices new uses in exactly two ways: through rates the parties wrote into paragraphs 21(b) through 21(h), and through rates imported from the separate AFM agreement governing the new purpose. Every rate in that system was the subject of bargaining. When video games emerged, the parties did not ask a court to select an analogous rate after discovery; they negotiated paragraph 21(b) at the bargaining table. The same process is underway for AI, with proposals already exchanged. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, empowers this Court to enforce the bargain the parties made, not to write a new one. AFM cannot collect in this Court what it has not obtained at the bargaining table. The FAC should be dismissed with prejudice.

ARGUMENT

I. Article 21(a) Is Susceptible to Only One Meaning, and AFM's New Reading Is Not a Reasonable One.

Article 21(a) identifies the agreement that supplies the payment by its purpose. The Company must pay what "would be required under the AFM agreement that would then be effective if the recording were originally made for *the purpose set forth under that agreement*." Ex. 2 (SRLA) Art. 21(a). The sentence identifies one purpose, and one purpose only: the new one, "not covered by this Agreement." The closing phrase, "the purpose set forth under that agreement," therefore reaches back to the AFM agreement under which the new purpose is set forth, and the payment is what that agreement would require if the recording had been made for that purpose from the start. One agreement supplies both the governing purpose and the payment owed. That is the only reading any court has given this language. *See Am. Fed'n of Musicians of the U.S. & Canada v. Sony Music Entm't, Inc.*, 2016 WL 3031029, at *2 n.5 (S.D.N.Y. May 2, 2016) (Article 21(a) "would seem, in turn, to point to" the agreement governing the new medium).

AFM's answer is that the second "purpose" refers instead to the services of the musician who made the recording, so that "the AFM agreement that would then be effective" can be the SRLA itself. Opp. 8–9. Three independent obstacles foreclose that reading. The first is AFM's own pleading. The FAC alleges that the "[u]se of sound recordings in generative AI software models is *not* a purpose covered by the SRLA." Ex. 1 (FAC) ¶ 45. An agreement cannot at once fail to cover a purpose and be the agreement under which that same purpose is "set forth." AFM's own pleading forecloses that construction, and its counsel confirmed the point at the conference: "there is no underlying agreement for AI use. We conceded that." Ex. 3 (Tr.) at 7:16–17.

The second obstacle is the surrounding text. When the parties wanted the SRLA's own rates to govern, they named the SRLA. Article 20, which governs re-use of a recording in the same medium, requires "all payments . . . that would be required under *the Sound Recording Labor Agreement* that would apply if the phonograph record so used were an original recording." Ex. 2 (SRLA) Art. 20. Article 16 designates "the minimum session fee set forth in *the Sound Recording Labor Agreement*." *Id.* Art. 16. Article 21(a), which governs use in other mediums, says something different: "*the AFM agreement* that would then be effective." *Id.* Art. 21(a). Where contract provisions use different language, "courts must assume the parties intended different meanings." *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Cap., Inc.*, 821 F.3d 297, 309 (2d Cir. 2016) (citation omitted). The parties knew how to write "the Sound Recording Labor Agreement." In Article 21(a), they wrote something else.

The third obstacle is that AFM's construction reads critical language out of the provision. On AFM's theory, once Article 21(a) is triggered by a purpose the SRLA does not cover, the answer to the provision's next question—what "AFM agreement" would govern if the recording had originally been made for that purpose—is always the SRLA, because the musician would still be making a "phonograph record." That construction makes the cross-reference to "the AFM agreement that would then be effective" for "the purpose set forth under that agreement" do no independent work. The parties could simply have directed UMG to pay the SRLA session rate, as they did elsewhere. They did not. A construction that renders contractual language superfluous is not a reasonable alternative interpretation. *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005); *Law Debenture*, 595 F.3d at 467.

AFM's own positions confirm what the text commands. Until its opposition, AFM read Article 21(a) exactly as UMG does. The FAC describes paragraphs 21(b) through 21(h) as rates the parties adopted "rather than" the payments "required under the AFM agreement that would then be effective." Ex. 1 (FAC) ¶ 37. AFM's pre-motion letter described the cross-reference as running to "other AFM agreements." ECF No. 25 at 2. And at the conference, AFM agreed with the Court that under Article 21(a) "you look to the underlying agreement of the new use," and acknowledged there is none for AI. Ex. 3 (Tr.) at 7:11–17. AFM is a party to every AFM agreement and knows whether any of them governs the AI Use. It has identified none and expressly told the Court that none exists. Only after the Motion showed why that undisputed fact defeats its claim did AFM advance its new theory that the referenced agreement can be the SRLA itself. That new theory does not make Article 21(a) reasonably susceptible to a second meaning.

II. "Shall Pay" Cannot Be Severed From the Measure That Defines the Obligation.

AFM's fallback is grammatical: "shall" is mandatory, so the duty to pay exists even if the amount must be determined later. Opp. 10. "Shall" is mandatory. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). And it governs everything that follows the verb: the Company "shall pay . . . an amount equal to all payments . . . that would be required under the AFM agreement that would then be effective." Ex. 2 (SRLA) Art. 21(a). The measure is not an accessory to the obligation; it is the obligation. AFM cannot enforce the verb while deleting its object. Without the referenced agreement containing the required payment obligation, Article 21(a) commands the payment of nothing.

AFM's damages cases answer a question this motion does not present. Courts may quantify damages for breach of an established obligation without a contractual formula. Opp. 11–13. But the term missing here is not a damages formula; it is the payment term that defines the duty AFM claims UMG breached. A court may not, "under the guise of contract interpretation," "add additional terms" to create that duty. *Am. Fed'n of Musicians & Emps.' Pension Fund v. Atl. Recording Corp.*, 203 F. Supp. 3d 301, 310 (S.D.N.Y. 2016); *see Impax Labs., Inc. v. Turing Pharms. AG*, 2017 WL 4357893, at *10 (S.D.N.Y. Sept. 29, 2017) (Ramos, J.) (courts may not supply terms "nowhere to be found in the relevant provisions"). This Court has likewise refused to measure recovery by "the prospective terms of a nonexistent contract," rejecting the same reliance on *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89 (2d Cir. 2007), that AFM presses here. *Anthem, Inc. v. Express Scripts, Inc.*, 2022 WL 1558879, at *9 (S.D.N.Y. Mar. 31, 2022) (Ramos, J.) (quoting *Goodstein Constr. Corp. v. City of New York*, 80 N.Y.2d 366, 373 (1992)); *see* Opp. 12.

Neither *AFM v. Sony* nor *Cobble Hill* fills the gap. *Sony* involved an independent conduct obligation, Article 8's restriction on the purposes for which a session may be called, and an existing agreement, the Motion Picture Agreement, that could serve "as a reference" in measuring damages. 2016 WL 3031029, at *2, *4. Every path to payment in *Sony* ran through an agreement that existed. Here, the nonexistent agreement is the crucial missing piece. *Cobble Hill* enforces an open term only where the amount "can be determined objectively without the need for new expressions by the parties," through "a method for reducing uncertainty to certainty" found in the agreement, an extrinsic event, commercial practice, or trade usage. *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989). That rule lets a court apply the method the parties chose; it does not let a court choose one for them. Article 21(a) states the parties' method: the amount required under the AFM agreement governing the new purpose. AFM's proposal, under which the Court would select among session, streaming, sampling, or other rates after discovery, Opp. 12–13, is not that method.

That is also why AFM's plea for discovery misses the mark. AFM acknowledges that the

SRLA contains no AI rate, Opp. 15; Ex. 3 (Tr.) at 5:19–20, and concedes that no other AFM agreement governs the AI Use, Ex. 3 (Tr.) at 7:11–17. Discovery into license terms, revenues, and industry practice cannot produce "the AFM agreement that would then be effective," because no such agreement exists. No amount of discovery can save a claim the contract forecloses.

III. AFM's Streaming and Sampling Theories Are New, Unpleaded Claims That Contradict the One It Brought.

The FAC pleads a single payment theory: the AI Use "is not a purpose covered by the SRLA," and UMG breached Article 21(a) by failing to pay for that new use. Ex. 1 (FAC) ¶¶ 45–47, 55–57. The streaming and sampling theories in AFM's opposition are not readings of that claim. They are different claims, resting on different uses and different provisions, and the FAC pleads neither. "A party is not entitled to amend its complaint through statements made in motion papers." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) (citation omitted).

The streaming theory concerns a different use. AFM's own brief describes a later stream of an AI-generated output as "a later, separately regulated exploitation." Opp. 14. A rate for a later, separately regulated use is not the Article 21(a) rate for UMG's alleged licensing of existing recordings for AI training. Nor does the FAC allege that any such downstream streaming occurred. AFM acknowledged at the pre-motion conference that its example of an AI-generated track appearing on Spotify was "a hypothetical completely." Ex. 3 (Tr.) at 6:6–7. A hypothetical downstream use cannot supply the payment term for the different use the FAC actually challenges.

The sampling theory defeats the claim it is offered to save. The FAC alleges that the AI Use is "not a purpose covered by the SRLA." Ex. 1 (FAC) ¶ 45. AFM now suggests that licensing recordings for AI training is "sampling" the SRLA already covers. Opp. 17. If that were true, the premise of AFM's Article 21(a) claim, a use *not* covered by the SRLA, would be false. AFM recognizes as much: it asks in a footnote for leave to plead a separate sampling claim should the

Court accept the theory. Opp. 17 n.4. A footnote is not a motion. A motion to amend must attach the proposed pleading and a redline, Local Civil Rule 15.1(a), and an informal request tucked into an opposition brief may be denied without discussion. *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006) (per curiam); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 220 (2d Cir. 2006), *abrogated on other grounds by FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

IV. The Notice Claim Falls With the Payment Claim, and Article 24 Is Not in This Case.

Article 21(a)'s notice sentence is part of the payment mechanism established by the preceding sentence, not a freestanding audit right. The first sentence creates the payment obligation; the second provides that "[i]n order to effect such a 'new use,'" the Company must "first" identify the records involved and the intended use on the Exhibit F form. Ex. 2 (SRLA) Art. 21(a). "Such" ties the notice to the new use the paragraph has just described, and "[i]n order to effect" and "first" sequence it as a preliminary step in the payment machinery. Where no AFM agreement governs the new purpose, there is no Article 21(a) payment obligation to effect, and the attendant notice duty never arises. Mot. 23–24.

AFM's "circularity" objection misdescribes UMG's position. AFM warns that a company could withhold notice and then invoke the absence of a payment formula. Opp. 18. But the reason the agreement Article 21(a) requires is missing is not that UMG withheld a form. It is missing because no AFM agreement governs the AI Use, and that would remain true had UMG filed Exhibit F on day one. Notice does not create agreements. Where an AFM agreement governs a new purpose, the payment duty and the notice duty operate exactly as written; where none does, neither arises. There is no circle.

Article 24 cannot fill the gap, because it is not in this case. The FAC pleads a failure to provide "the information required under Article 21(a) and Exhibit F," "in violation of Article 21." Ex. 1 (FAC) ¶¶ 48, 60. It never mentions Article 24, and AFM may not add that claim through an opposition brief. *Wright*, 152 F.3d at 178. Exhibit F does not smuggle Article 24 into the pleading: the form implements both Articles 21 and 24, and a form that serves two provisions does not merge them. Ex. 2 (SRLA) Ex. F. The distinction matters, because Article 24 carries its own requirements, including a cure provision AFM's brief never mentions: an inadvertent failure to comply "shall in no event constitute a default by the Company hereunder or a breach of this Agreement, provided that such failure is cured promptly after notice thereof from [AFM] . . . ." *Id.* Art. 24(b). The FAC alleges none of those facts and asserts no Article 24 breach. If AFM believes it has such a claim, it must plead one that satisfies Article 24's own terms. It has not.

V. Bargaining History Cannot Create Ambiguity, and the History AFM Cites Confirms UMG's Reading.

AFM has the sequence backwards. Bargaining history and other extrinsic evidence may be consulted only after the text is found ambiguous. *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000); Mot. 16. Extrinsic evidence cannot generate the ambiguity that is the precondition for considering it.

In any event, the history AFM invokes is UMG's best evidence. AFM quotes industry counsel's account of an earlier dispute over whether an existing AFM agreement applied to video-game licenses. Opp. 16–17. The very passage AFM quotes explains how the parties resolved that question: "at the bargaining table." Ex. 3 (Tr.) at 13:18–25. They did not ask a court to designate the closest analogous rate or to fix an amount after discovery. They negotiated a rate and wrote it into the contract as paragraph 21(b). That is the system Article 21 reflects: every payment obligation rests on a bargained rate, either written into the SRLA or imported from another AFM agreement. The parties are following the same process for AI now. Negotiations are underway, and proposals on AI compensation have been exchanged. *Id.* at 8:1–3, 13:14–15. The Court itself closed the conference by "encourag[ing the parties] to continue the collective bargaining process." *Id.* at 22:8–9. That process, not this lawsuit, is where the parties' contract sends AFM's demand.

VI. Dismissal Should Be With Prejudice, Because No Amendment Can Supply the Missing Agreement.

Amendment is futile where the defect lies in the contract rather than the pleading. AFM's Article 21(a) claim fails because "the AFM agreement that would then be effective" for the AI Use does not exist, and no pleading can create an agreement the parties never made. AFM is a party to every AFM agreement. It has identified none governing the AI Use, and its counsel has told the Court there is none. Ex. 3 (Tr.) at 7:16–17. The only amendment AFM mentions, a sampling claim floated in a footnote, would not cure its Article 21(a) claim; it would plead a different claim under a different provision. *See supra* Part III.

Atlantic Recording confirms the proper disposition. "[W]here an unambiguous document requires dismissal in a contract case, further amendment will often be futile." 203 F. Supp. 3d at 311 (quoting *Arag-A Ltd. v. Republic of Argentina*, 178 F. Supp. 3d 192, 203 (S.D.N.Y. 2016)). The court there dismissed a payment claim with prejudice, on the pleadings, because the governing agreements unambiguously did not impose the payment obligation asserted. The same principle applies here. More allegations cannot change what Article 21(a) says, and they cannot conjure the agreement it requires.

CONCLUSION

For these reasons and those stated in the Motion, the Court should dismiss AFM's claim against UMG with prejudice and without leave to amend.

Dated: September 11, 2026
New York, NY

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Orin Snyder*

Orin Snyder
Brian Ascher
Lefteri J. Christos
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
OSnyder@gibsondunn.com
BAscher@gibsondunn.com
LChristos@gibsondunn.com

Ilissa Samplin
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel: (213) 229-7354
ISamplin@gibsondunn.com

Counsel for Defendant
Universal Music Group, Inc.

CERTIFICATE OF COMPLIANCE

I, Orin Snyder, hereby certify that this memorandum of law complies with the length restrictions in Local Civil Rule 7.1(c), as modified by § 2.B.i of this Court's Individual Practices.

I further certify that this memorandum of law contains 3,473 words, including any footnotes or endnotes and excluding only those sections of the brief that are exempted under Local Civil Rule 7.1(c) and this Court's Individual Practices. In preparing this certificate of compliance, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: */s/ Orin Snyder*
Orin Snyder