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

WARNER'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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Warner respectfully submits this Reply in Support of Its Motion to Dismiss.[1]

I. INTRODUCTION.

AFM's Opposition to Warner's Motion to Dismiss ("AFM Opp.") does not—and cannot—walk back its two fatal admissions: *first*, that AI Use "is not a purpose covered by the SRLA" (FAC ¶ 45); and *second*, that "[t]here is no underlying agreement for AI use" (Tr. at 7:11-18). Rather than confront them, AFM argues that the admissions do not matter because the SRLA is "ambiguous." AFM Opp. at 7. However, AFM identifies no ambiguity. Instead, it attempts to *create* ambiguity by arguing that the SRLA itself somehow qualifies as "the AFM agreement that would then be effective" to cover a "new use" for a purpose not covered by the SRLA, and that the SRLA itself sets the rates for new uses by "requir[ing] at least session scale rates for" its members' work in the recordings at issue. AFM Opp. at 8. AFM's contorted reading of the SRLA should be rejected, not least of all because AFM members were ***already paid*** those session scale rates AFM contends they would be owed under its newly devised theory.

AFM's Opposition also does not dispute that in order for AFM to prevail on its claim that it has a contractual right to additional payments for AI Use, the Court would have to fashion such contract terms out of whole cloth. That is not the Court's role. It is clear that AFM is using this lawsuit to obtain more favorable contractual rights than it currently possesses, but collective bargaining on this very issue is currently underway. The Court should reject AFM's effort to circumvent the parties' negotiations.

[1] Unless otherwise noted, capitalized terms are as defined in Warner's Motion to Dismiss, ECF No. 41 ("Motion").

II. THE SRLA IS NOT AMBIGUOUS.

As both Warner and UMG demonstrated in their Motions to Dismiss, nothing in the SRLA creates a right to payment for AI Use. AFM has conceded this, and therefore, resorts to attempting to manufacture an ambiguity where none exists.

AFM does not dispute that in order to create an ambiguity entitling it to discovery, it must put forth some competing, *reasonable* interpretation. AFM Opp. at 7; *see also, e.g.*, *Metro. Life Ins. Co. v. RJR Nabisco Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (no ambiguity where "there is no *reasonable* basis for a difference of opinion"); *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996) ("no ambiguity exists where the alternative construction would be unreasonable"). In its Opposition, AFM argues, for the first time, that even though the SRLA does not apply to AI Use, Article 21(a) may still provide a mechanism for payment if it is read to refer back to itself rather than a nonexistent agreement regarding AI Use. AFM Opp. at 8-9. But rather than create ambiguity, AFM's new circular argument supports Warner's position and defeats AFM's claim.

AFM posits that Article 21(a) could be read to refer back to the SRLA's base session scale rates. According to AFM, "[i]f a musician were hired to make a recording for an AI platform, the session rate, benefits, and related payments would be knowable under the SRLA." AFM Opp. at 8. This is true, and those base rates would apply to any recording to which the SRLA applies. Critically, however, AFM does not contend that musicians on any recording at issue were ***not*** paid those base rates. They were paid those base rates, which is precisely what they are entitled to under the SRLA. They do not have a right to the additional payments AFM now seeks.

AFM's other newly raised argument is that it is entitled to payments provided under the SRLA's sampling provisions for AI Use. AFM Opp. at 17. The SRLA expressly defines sampling as "the encoding of a portion of a phonograph record … into a digital sampler, computer, digital hard drive storage unit or any other device for subsequent play-back on a digital synthesizer or other play-back device for use in another song." ECF No. 33-2 at 23. In other words, playing the *exact excerpt* of a sound recording in another song. AFM does not allege that AI Use constitutes sampling. Indeed, the word "sample" is not mentioned once in the FAC. AFM admits as much in seeking leave to amend its complaint again. AFM Opp. at 17. Rather, AFM alleges that entire sound recordings—not "samples" or "portion[s]"—were licensed to AI companies for AI Use. Nor did the underlying copyright infringement lawsuits filed by Warner and UMG, on which AFM bases its claims, assert unauthorized sampling by the AI companies. There is simply no plausible basis, alleged or unalleged, for AFM to claim entitlement to "new use" payments under the SRLA's sampling provisions.

In the end, as AFM concedes, AI Use is not addressed in the SRLA, nor in any other AFM agreement. While AFM agrees that Warner's and UMG's reading of the SRLA is at least "possible" (AFM Opp. at 7), the fact is that it is the *only* possible reading. Thus, AFM's claim must be dismissed.

III. AFM'S "SHALL PAY" ARGUMENT IGNORES THE REST OF ARTICLE 21 AND WOULD RESULT IN AN UNENFORCEABLE OBLIGATION.

AFM repeats its argument that the words "shall pay" in Article 21 create a standalone payment obligation even in the absence of any specified rate or amount. AFM Opp. at 10-13. To the extent AFM now contends the applicable rate is the base session rates already paid, that argument warrants dismissal as discussed above. To the extent AFM contends it need not identify any amount owed, just an unspecified payment obligation, that argument warrants dismissal pursuant to both logic and law.

As Warner explained in its Motion, "shall pay" cannot be read without the last half of the sentence: "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." Motion at 5. If there is no such agreement, then the amount owed under such nonexistent agreement must be zero. AFM's response rests entirely on a discovery order granting a motion to compel in *AFM v. Sony Music Entertainment*, but as AFM concedes, the court in that case observed that "Article 21(a) 'would seem … to point' to another AFM agreement." AFM Opp. at 11 (quoting *AFM v. Sony Music Entertainment*, 2016 WL 3031029 (S.D.N.Y. 2016)). That is not the case here.

Next, AFM argues that a damages calculation without any contractual basis would "not be too indefinite." AFM Opp. at 11-12. But as Warner explained in its Motion, a "fee provision" is unenforceable if it contains "no methodology, formula, or external measure by which the Court might objectively determine the compensation to be paid." Motion at 6 (quoting *Stone Key Partners LLC v. Monster Worldwide, Inc.*, 333 F. Supp. 3d 316, 334-35 (S.D.N.Y. 2018)).

AFM's cases are not to the contrary, and none awarded damages in the absence of some contractual basis to set a rate. *Lodges 743 & 1746, IAM v. United Aircraft Corp.*, 534 F.2d 422, 430 (2d Cir. 1975), involved promotion issues, so damages could be calculated by determining the differences in wages. AFM points to the award of attorneys' fees in *Local 78, Asbestos, Lead & Hazardous Waste Laborers v. Termon Constr., Inc.*, 521 F. Supp. 2d 316, 318 (S.D.N.Y. 2007), but, of course, attorneys' fees are generally calculated at an invoiced hourly rate, which the court reviewed. *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007) confirms that a plaintiff must "show a stable foundation for a reasonable estimate of the damage incurred…." *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483

(1989), involved a lease-renewal provision that supplied an objective standard—fair market value—determinable without further agreement.

Article 21(a) supplies no method for calculating a rate other than reference to another, separate agreement that AFM concedes does not exist. AFM speculates that the Court might be able to fashion a rate itself through reference to the "session, streaming, and sampling rates" in the SRLA (AFM Opp. at 12), but that would impermissibly turn the Court into a "central planner[], identifying the proper price," as Justice Scalia put it, or in Judge Easterbrook's words, a "little version[] of the Office of Price Administration…." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (Scalia, J.); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (Easterbrook, J.). If the parties do reach agreement on whether AI Use warrants additional payment, the amount of such payment (if any), and whether it should be based on previously negotiated session, streaming, or sampling rates, must be left to the collective bargaining process.

IV. AFM'S DOWNSTREAM USE ARGUMENT IS UNPLED AND HYPOTHETICAL.

Finally, AFM argues that there may be some downstream musical creations by users of Udio's or Suno's platforms that would entitle AFM's members to additional payment. According to AFM, "if an AI-generated recording derived from a covered recording is marketed on Spotify, for example, the SRLA's existing audio-streaming provisions supply an objective rate" for streaming. AFM Opp. at 13. AFM, however, does not explain how a recording created on an AI platform, and on which no AFM member musician performed any music, could conceivably entitle AFM to payment under the SRLA. That must come from an AFM agreement. AFM points to no contractual provision entitling it to payment for AI-generated recordings, because no such provision exists.

Nor does AFM dispute that this scenario, in which some unidentified AI-generated recording somehow is covered by the SRLA, is "a hypothetical completely" and unalleged. Motion at 6 (quoting AFM's counsel at the July 21, 2026 Pre-Motion Conference (the "Conference")).

V. THE COURT SHOULD ALLOW THE COLLECTIVE BARGAINING PROCESS TO PLAY OUT UNIMPEDED.

As Warner explained at the Conference and in its Motion, the parties are engaged in collective bargaining on precisely this issue "right now." Motion at 3. AFM does not dispute this. Nor does it dispute that the law specifically protects collective bargaining negotiations from judicial intervention. *Id.* at 4. In fact, AFM points to provisions the parties have previously negotiated for additional payments for other "new uses" such as "video games." AFM Opp. at 14-15. In doing so, AFM quotes statements by Warner's counsel at the Conference that such uses were "resolved at the bargaining table." *Id.* at 16. Additional "new use" payments must be negotiated and agreed upon. It remains entirely undisputed that no such payment has been agreed upon with respect to AI Use.

VI. THERE IS NO REQUIREMENT TO PROVIDE INFORMATION ON NON-SRLA USES.

AFM concedes its notice claim for "such a new use" rises and falls with its new use payment claim. AFM Opp. at 18 ("'such' here simply refers to the 'new use'"). The notice requirement is designed to facilitate the payment requirement, but if there is no payment requirement, there is no need to provide information about a non-covered use.

AFM's alternative reliance on Article 24(b) is not pled, as the FAC alleges a breach of Article 21(a) only. AFM cannot add a new claim via its Opposition. In any event, Article 24(b) applies to situations where the licensee signs an "assumption agreement" as provided for in Article

24(a) and is thus obligated to make AFM payments. Once again, AFM is attempting to cherry pick provisions of the SRLA out of context. There is no allegation that any AI company has signed such an assumption agreement. Nor can Exhibit F, which merely implements the notice mechanism for qualifying new uses under Article 21(a), expand Article 21(a)'s substantive scope. Rather, a close reading of Exhibit F establishes that a new use under Article 21 is entirely different from a license under Article 24, as the form is to be used "either" for "a new use" or "a sale, lease, license or other transfer of title to or permission to use" a phonograph record.

VII. THE FAC SHOULD BE DISMISSED WITH PREJUDICE.

AFM's concessions, the text of Article 21(a), and the parties' ongoing collective bargaining establish that AFM cannot state a claim. The pleading cannot be cured by adding more facts about licenses or hypothetical AI outputs, and no amendment can create a new AFM agreement or payment term the parties never made. Accordingly, Warner respectfully requests that the Court dismiss the FAC with prejudice.

Dated: September 11, 2026

Respectfully submitted,

/s/ David A. Munkittrick

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(c) of the United States District Court for the Southern District of New York, and this Court's Individual Practices, I hereby certify that this brief contains 2,088 words. In making this certification, I have relied on the word count feature of Microsoft Word, the computer program that I used to prepare this brief.

Dated: September 11, 2026

/s/ *David A. Munkittrick*
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