

Richard S. Busch (SB 5613)  
KING & BALLOW  
315 Union Street, Suite 1100  
Nashville, Tennessee 37201  
Telephone: 615-726-5422  
Facsimile: 615-726-5417  
rbusch@kingballow.com

Kenneth E. Gordon (KG 5703)  
GORDON, GORDON & SCHNAPP, P.C.  
30 Broad Street 21st Floor  
New York, New York 10004  
Telephone: (212) 355-3200  
Facsimile: (212) 355-3292

*Attorneys for Plaintiff*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**ROBERT E. PETTIBONE,  
d/b/a LEXOR MUSIC**

**Plaintiff,**

**v.**

**WB MUSIC CORP.,  
A Delaware Corporation;  
WARNER/CHAPPELL MUSIC, INC.,  
A Delaware Corporation.**

**Defendants.**

**Case No. 1:17-cv-2569**

**COMPLAINT FOR**

- 1. BREACH OF CONTRACT;**
- 2. DECLARATORY JUDGMENT;**
- 3. RELIEF UPON ENTRY OF  
DECLARATORY JUDGMENT;**

**JURY TRIAL DEMANDED**

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COMES NOW, Plaintiff, Robert E. “Shep” Pettibone d/b/a Lexor Music (“Pettibone” or “Plaintiff”), by and through undersigned counsel, as and for their Complaint against WB Music Corp. and Warner/Chappell Music, Inc. (collectively Defendant WB Music Corp. and Defendant Warner/Chappell hereinafter referred to as “Defendants”) in this action, alleges as follows:

## **INTRODUCTION**

1. This is a civil action to recover damages for breach of contract and for injunctive and declaratory relief in the form of a declaratory judgment to clarify the rights and obligations of the parties. Plaintiff brings the declaratory judgment action requesting a declaration that the plain language of the contract at issue does not allow Defendants to withhold or deduct royalties from Plaintiff to recoup attorneys' fees or costs incurred during a copyright infringement action in which Plaintiff was the prevailing party, and the claim of infringement dismissed. Plaintiff requests injunctive relief to order Defendants to immediately render accounting statements and pay the royalties owed to Plaintiffs and to stop Defendants from further withholding royalties.

2. The Complaint arises out of the Agreement entered into between the parties on or about June 1, 1990 and subsequent actions taken thereafter.

## **THE PARTIES**

3. Plaintiff Robert E. "Shep" Pettibone ("Plaintiff" or "Pettibone") d/b/a Lexor Music is a resident and citizen of the State of New Jersey.

4. Defendant WB Music Corp. is a Delaware Corporation doing business in New York. WB Music Corp. and regularly conducts business with this Judicial District, where it may be found.

5. Defendant Warner/Chappell Music, Inc. is a Delaware Corporation doing business in New York. Warner/Chappell regularly conducts business with this Judicial District, where it may be found.

## **JURISDICTION AND VENUE**

6. The Court has subject-matter jurisdiction over this action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; 28 U.S.C. § 1331 and 28 U.S.C. § 1338

with respect to claims seeking declaratory and other relief arising under the Copyright Act; 28 U.S.C. § 1332, and diversity jurisdiction due to the complete diversity of plaintiff and defendants, and with amount in controversy more than \$75,000 exclusive of interest and costs

7. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c) and 28 U.S.C. § 1400(a), in that the claims arise in this Judicial District, where Defendants regularly conduct business and may be found and because the contract at issue contains a venue provision that all actions seeking the interpretation and/or enforcement of this Agreement shall be brought only in the State or Federal Courts located in New York County.

### **FACTUAL ALLEGATIONS**

8. On or about June 1, 1990, Plaintiff and Defendant entered into an exclusive administration agreement (“Agreement”) between the parties regarding Plaintiff’s undivided 50% interest in the song entitled “VOGUE”, jointly written and composed by Plaintiff and Madonna (referred to in the Agreement as the “SC”). (Ex. A: Exclusive Administration Agreement).

9. The Agreement contains the following regarding warranties and representations:

(7.) **Warranties and Representations:**

7.1. By your signature below, you warrant and represent that (1) you have the right to grant the rights granted to us hereunder, (2) the SC does not infringe the rights of any third party or violate any applicable criminal statute, including but not limited to copyright, trademark, servicemark, or right of privacy or publicity, (3) that the SC is not defamatory and (3) that you and your music publishing designee are and will remain affiliated with ASCAP. You acknowledge that Virgin Songs Inc. (“Virgin”) claims that the SC infringes their copyrighted musical compositions entitled “Ain’t Nobody Better” and you agree to indemnifies [sic] and hold harmless with respect to such claim in accordance with para. 8 below.

10. The Agreement contains an indemnification clause as follows:

(8). **Indemnities; Cure of Breaches:**

8.1. Each party will indemnify the other against any loss or damage (including court costs and reasonable attorneys' fees) due to a *breach* of this agreement by that party which results in a judgment against the other party or which is settled with the other party's prior written consent (not to be unreasonably withheld). In addition, your [Plaintiff Pettibone] indemnity shall extend to the "deductible" under our errors-and-omissions policy without regard to judgment or settlement. Each party is entitled to be notified of any action against the other brought with respect to the SC, and to participate in the defense thereof by counsel of its choice, at its sole cost and expense. In the event that one of us refuses to approve a settlement which the other party considers reasonable, the party refusing its consent shall assume the further defense of the subject claim, action or proceeding. (emphasis added).

8.2. If a claim is made against us, we may withhold a reasonable amount from monies due or to come due to you, but we will refund it (together with interest on the amount released at the regular saves and loan passbook interest rate prevailing in Los Angeles from time to time during the period of withholding) if (and to the extent that) suit is not brought with respect to the sum within 1 year thereafter, and we won't withhold if you provide us with a satisfactory commercial surety bond.

8.3. Neither party will be deemed in breach unless the other party gives notice and the notified party fails to cure within 30 days after receiving notice...

11. The indemnification provision expressly provides that each party will be required to indemnify the other party only if there is a breach of the Agreement which results in a judgment against the other party or which is settled with the other party's prior written consent.

12. There has been no breach of the Agreement by Plaintiff or a judgment against the other party or a settlement with the other party's prior written consent. Therefore, the indemnification provision has not been triggered.

13. In the event there is an action brought against one party, Section 8.1 of the Agreement provides that each party may "participate in the defense thereof by counsel of its choice, at its sole cost and expense."

14. On July 11, 2012 VMG Salsoul, LLC filed a Complaint in the Federal District Court for the Central District of California alleging that both Plaintiff and Defendants, and others, committed copyright infringement. VMG Salsoul sought profits attributable to the allegedly infringing use of the composition and sound recording of the song ““Love Break” in the song “VOGUE”, or alternatively, for statutory damages for willful infringement of copyright as well as costs and attorneys’ fees.

15. Plaintiff and Defendants in this action filed a motion for summary judgment on the claims of infringement. The Court granted that motion for summary judgment and denied there was infringement as a matter of law.

16. On December 2, 2013, the Court entered Judgment in favor of Plaintiff and Defendants in this action ruling that there was no copyright infringement as a matter of law.

17. Plaintiff Pettibone and Defendants in this case sought attorneys’ fees and costs, against VMG Salsoul. The Court granted their Motion and awarded a total of \$670,117.25 in attorneys’ fees and \$50,055.00 in costs.

18. The case was appealed to the Court of Appeals for the Ninth Circuit, which, on June 27, 2016, affirmed the judgment in favor of Plaintiff Pettibone and Defendants, but vacated the award of attorneys’ fees and remanded to the District Court for reconsideration.

19. On remand, on August 22, 2016, VMG Salsoul filed a motion for reconsideration regarding the award of attorneys’ fees.

20. On September 23, 2016, the District Court reconsidered its previous award of attorneys’ fees, and it denied Plaintiff Pettibone’s and Defendants’ motion for Attorneys’ Fees.

21. Pursuant to the plain terms of the Agreement, if Defendants chose to participate in the defense of the VMG Salsoul lawsuit, Defendants were responsible for their costs and attorneys' fees at their sole expense, not the expense of Plaintiff Pettibone.

22. Although the Court in the VMG Salsoul infringement action found in favor of Plaintiff Pettibone and Defendants in this case, Defendants have admittedly withheld and failed to pay Pettibone royalties owed to Plaintiff for its defense of the VMG Salsoul lawsuit despite Plaintiff's demand that they pay these royalties to him, and despite giving them notice of breach. Based upon historic royalties paid to Pettibone prior to the breach by Defendants, Pettibone is informed and believes that unpaid royalties being withheld and owed to him are in excess of \$500,000.

23. Defendants allege they are entitled to withhold, deduct and retain royalties from Plaintiff as part of the indemnification clause of the Agreement between the parties.

24. Defendants may claim the right to withhold a reasonable amount of monies pursuant to Paragraph 8.2 during the pendency of a claim. However, the Agreement does not allow Defendants to retain any monies after any claim is dismissed absent a triggering of the indemnification clause.

25. Defendants may also claim that the monies being withheld are pursuant to Paragraph 8.1, which extends the indemnity clause to cover a deductible "under our errors-and-omissions policy without regard to judgment or settlement." Defendants, however, have not claimed to have any relevant insurance policy related to the VMG Salsoul lawsuit. Furthermore, even if there were such an insurance policy, Paragraph 8.1 still requires a breach of the Agreement in order for the indemnification to be triggered.

26. There has been no triggering of the indemnification clause because there has been no breach of the Agreement. There has been no breach of any Warranties and Representations in the Agreement as a matter of law and Defendants have not notified Plaintiff of any other alleged breaches.

27. There has been no breach of the Agreement by Plaintiff according to the clear and unambiguous terms of the Agreement. Defendants must therefore pay to Pettibone all money to which he is owed plus interest.

28. Defendants are also in breach of the Agreement due to its failure to render royalty accountings and payments to Plaintiff since the inception of the litigation

29. The Agreement contains royalty accounting and audit provisions as follows:

(6). **Accounting and Payment:**

6.1. We will account to you (and make payment where appropriate) within 60 days following the end of each semi annual calendar period. However, if the amount due for a specific statement is less than \$50., payment may be deferred until the aggregate amount due to you exceeds \$50.

6.2. We will only be required to account and pay with respect to amounts actually received by us in the U.S. (or credited to our account in reduction of a previous advance received by us in the U.S.); provided, that amounts collected by our foreign music publishing subsidiaries shall (subject to the “blocked currency” provisions set forth below) be deemed to have been reported by them to us no later than the end of the semi-annual period during which such amounts are actually collected by such subsidiaries.

6.2.1. You (or a certified public accountant on your behalf) shall have the right to audit our books and records as to each statement for a period of 2 years after such statement is received (or deemed received as provided below). Legal action with respect to a specific accounting statement or the accounting period to which such statement related shall be barred if not commenced in a court of competent jurisdiction within 3 years after such statement is received (or deemed received as provided below).

6.2.2. For the purposes of calculating such time periods, you shall be deemed to have received a statement when due unless we receive notice of nonreceipt from

you (in the manner prescribed in paragraph 9, below) within 60 days thereafter. However, your failure to give such notice shall not affect your right to receive such statement (and, if applicable, your royalty and/or Net Income payment) after such thirty-day period.

**COUNT I:**  
**BREACH OF CONTRACT**

30. Plaintiff re-alleges each and every fact set forth in the preceding Paragraphs of the Complaint as if they were fully set forth herein.

31. Pursuant to Paragraph 8.1 of the Agreement, there must be a breach of the agreement for indemnification to arise. This paragraph specifically extends to any obligation to indemnify for attorneys' fees.

32. The indemnification provision provides that a party will indemnify only if there is a breach of the Agreement which results in a judgment against the other party or which is settled with the other party's prior written consent.

33. There has been no breach of the Agreement or a judgment against either party or a settlement with the other party's prior written consent. Therefore, the indemnification provision of the Agreement has not been triggered.

34. Although there were allegations made against Plaintiff and Defendants of copyright infringement, the lawsuit was defeated as a matter of law. Therefore, there was no infringement of any copyright on the part of Plaintiff or Defendants.

35. Plaintiff did not as a matter of law violate any Warranties or Representations between the parties as contained in the Agreement.

36. In withholding monies, Defendants may attempt to rely on the second sentence in Paragraph 8.1 of the Agreement, which states "In addition, your indemnity shall extend to the 'deductible' under our errors-and-omissions policy without regard to judgment or settlement."

However, the deductible provision of the Agreement still must be based upon a breach. If breach was not a prerequisite for the deduction provision to apply, the plain language of the Agreement would have expressly stated it to be so. By its own terms, in order for indemnification to arise, Paragraph 8 requires a breach.

37. There has been no breach of the Agreement by Plaintiff to trigger the indemnification clause. Further, Defendant did not give notice to Plaintiff, as required in Section 8.3 of the Agreement, of an alleged breach. Defendants also have not provided royalty accounting statements to Plaintiff since it unilaterally began withholding royalties owed.

38. Furthermore, Paragraph 8.1 allows each party to participate in the defense of any action against either party by using “counsel of its own choice, at its sole cost and expense.” Defendants chose to utilize counsel of its choice, but now wants Plaintiff Pettibone to pay for it.

39. Pursuant to the plain terms of the Agreement, if Defendants chose to participate in the defense of the VMG Salsoul lawsuit, Defendants were responsible for their costs and attorneys’ fees at their sole expense, not the expense of Plaintiff Pettibone.

40. By reason of the foregoing, Defendants have materially breached the Agreement between the parties by improperly withholding royalties belonging to Plaintiff.

41. Defendants have breached the Agreement by also failing and refusing to render royalty accounting statements to Plaintiff as required pursuant to the provisions of paragraph 6 thereof.

42. Plaintiff has been damaged by Defendants’ material breach in an amount to be proven at trial. Defendants’ breach is continuous, and unless enjoined by this Court will continue.

**COUNT II:**  
**DECLARATORY JUDGMENT**

43. Plaintiff re-alleges each and every fact set forth in the preceding Paragraphs of the Complaint as if they were fully set forth herein.

44. Pursuant to 28 U.S.C. § 2201, the Court may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is, or could be, sought. Any such declaration shall have the full force and effect of a final judgment or decree and shall be reviewable as such.

45. Plaintiff seeks a declaration that the indemnification clause of the Agreement between the parties requires a breach of the Agreement to trigger any withholding and deduction of royalties as recoupment of attorneys' fees or costs.

46. Plaintiff seeks a declaration that there has been no breach of the Agreement by Plaintiff to trigger the indemnification clause.

47. Plaintiff seeks a declaration and requests the Court to take judicial notice that there has been no breach or copyright violation in the underlying VMG Salsoul lawsuit as the Court ruled there that Pettibone and Defendants in this action had not committed copyright infringement as a matter of law.

48. Plaintiff seeks a declaration that there is no indemnification required of Plaintiff to any of Defendants for costs or attorneys' fees associated with the VMG Salsoul lawsuit.

49. Plaintiff seeks a declaration that Defendants were solely responsible for any and all costs, expenses and attorneys' fees for any claim, action or lawsuit, including the VMG Salsoul lawsuit.

50. Plaintiff seeks a declaration that Defendants have no right to withhold, deduct from, or refrain Plaintiff's royalties for payment of costs and attorneys' fees relating to the VMG Salsoul lawsuit.

51. Plaintiff seeks a declaration that Defendants are improperly withholding royalties that belong to Plaintiff in material breach of the Agreement.

52. Plaintiff seeks a declaration that Defendants are improperly failing and refusing to render royalty accounting statements to Plaintiff in material breach of the Agreement.

53. Plaintiff seeks a declaration that the time period(s) set forth in paragraph 6.2 of the Agreement for Plaintiff to audit Defendant's books and records, to commence an action with respect thereto, and the date on which statements are deemed to have been received by Plaintiff, be tolled and extended to allow Plaintiff to do so within two years (for an audit) and three years (to commence an action) following Plaintiff's actual receipt of such royalty accounting statements following judgment in this case.

**COUNT III:  
RELIEF UPON ENTRY OF DECLARATORY JUDGMENT**

54. Plaintiff re-alleges each and every fact set forth in the preceding Paragraphs of the Complaint as if they were fully set forth herein.

55. Upon entry of an order granting the Declaratory Judgment, the Plaintiff requests that the Court immediately order Defendant to render full and complete royalty accounting statements and pay all royalties in full, plus interest.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff seeks judgment awarding him the following relief:

- a. An Order that Defendants have materially breached the Agreement between the parties;

- b. Full payment of all royalties owed;
- c. An Order declaring that the indemnification clause between the parties requires a breach of the Agreement prior to any trigger; that there has been no breach of the Agreement by Plaintiff to trigger the indemnification clause; that there has been no breach or copyright violation in the underlying VMG Salsoul lawsuit as the Court declared there had been no copyright infringement; that there is no indemnification required by Plaintiff of any of Defendants' costs or attorneys' fees.
- d. A Declaration that Defendants are improperly withholding royalty accounting statements due to Plaintiff in breach of the Agreement.
- e. A Declaration that Defendants are improperly withholding royalties that belong to Plaintiff in material breach of the Agreement.
- f. An Order enjoining Defendants from further withholding Plaintiff's royalties.
- g. An Order enjoining Defendants from refusing to render royalty accounting statements to Plaintiff.
- h. An Order awarding attorneys' fees, costs, and expenses to Plaintiff incurred in connection with this action;
- i. An award of pre-and post-judgment interest to Plaintiff; and
- j. An order awarding such other and further relief as this Court deems just and proper.

**JURY TRIAL DEMAND**

Plaintiff Pettibone demands a trial by jury.

Dated: April 10, 2017.

By:

/s/ Richard S. Busch

Richard S. Busch (SB 5613)

KING & BALLOW

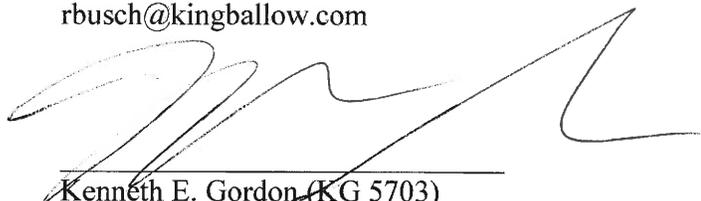
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*Attorneys for Plaintiff*

*Robert E. Pettibone d/b/a lexor music*