

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

VIPER PUBLISHING, LLC,

Plaintiff,

-against-

HOWARD BAILEY, JR. P/K/A “CHINGY”,

Defendant.

:
:
: Case No.

: **COMPLAINT**
:
: **JURY TRIAL DEMANDED**

Plaintiff Viper Publishing, LLC (“Plaintiff” or “Viper”), by its attorneys, Fox Rothschild LLP, brings this Complaint for damages and declaratory relief against Defendant Howard Bailey, Jr. p/k/a “Chingy” (“Defendant” or “Bailey”), and complains and alleges, upon knowledge with respect to its own acts and upon information and belief with respect to the acts of all others, as follows:

NATURE OF ACTION

1. This case arises from Defendant’s knowing and deliberate breach in or about April 2017 of a purchase agreement, made as of April 25, 2014, between Viper and Bailey (the “Purchase Agreement”). Under the Purchase Agreement, Viper acquired all of Bailey’s right, title and interest to, among other things, all digital performance royalties due and to become due following execution of the Purchase Agreement in respect of any sound recordings created by Bailey (the “Transferred Recordings”).

2. In particular, Bailey’s recent actions have indefensibly interfered with and deprived Viper of its exclusive right under the Purchase Agreement to receive royalties collected by SoundExchange in respect of the Transferred Recordings (the “SoundExchange Royalties”).

Bailey took these improper actions after passage of an uninterrupted period of nearly three years following execution of the Purchase Agreement, during which Viper received the SoundExchange Royalties without incident.

BACKGROUND

3. Under the Purchase Agreement, Bailey sold, assigned and transferred to Viper, among other things, all of his right, title and interest to receive monies arising from the digital performance of the Transferred Recordings and to administer and exploit the digital performance rights to the Transferred Recordings. The Purchase Agreement expressly provides that the sale, assignment and transfer includes, without limitation, “all monies collected by SoundExchange” in connection with the Transferred Recordings.

4. SoundExchange is a nonprofit collective management organization that collects and distributes digital performance royalties to musical artists, copyright holders and to their respective successors and assignees.

5. In violation of the Purchase Agreement, in or about April 2017, Bailey altered the SoundExchange account applicable to the Transferred Recordings in order to cause SoundExchange to pay future SoundExchange Royalties to a bank account maintained by or for Bailey’s benefit, thereby interfering with and violating Viper’s right under the Purchase Agreement to receive all such monies. As a result of Bailey’s misconduct, which he has refused to rectify, Viper had no choice but to file this lawsuit.

THE PARTIES

6. Plaintiff Viper is a Nevada limited liability company with its principal place of business in North Carolina. The sole owner of Viper is Leslie Charles King II (“King”), who is domiciled in North Carolina.

7. Upon information and belief, Defendant Bailey is an individual that resides in the State of Missouri. Paragraph 6.2(b) of the Purchase Agreement permits service of process upon Bailey at the address specified in the notice provision. The notice provision requires all notices to be delivered to Bailey at the following address: FullDekk Music Group, 4615 Lake Holden Hills Dr., Orlando, FL 32839, Attention: Howard Bailey, Jr.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over the subject matter of this action under 28 U.S.C. §1332 because there is complete diversity between the parties and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

9. Venue is proper in this District under 28 U.S.C. §1391 because a substantial part of the events or omissions giving rise to the claim occurred within this judicial district.

10. Jurisdiction and venue in this District is also proper pursuant to Paragraph 6.2(b) of the Purchase Agreement. Paragraph 6.2(b) provides that the parties “irrevocably submit to the jurisdiction of the North Carolina courts (state and federal) in any action or proceeding involving a controversy arising out of this Agreement and irrevocably waive any right to contest the jurisdiction or power or decision of that court other than appropriate appellate courts.”

FACTS COMMON TO ALL CAUSES OF ACTION

Entering Into the Purchase Agreement

11. Viper is an entertainment company that collects digital revenue.

12. Bailey is a musical recording artist and performer who is professionally known as “Chingy.”

13. Beginning at some point prior to 2012, King performed management services for Bailey pursuant to an oral management agreement (the “Management Agreement”). King and

Bailey ended the management relationship in 2012. Neither King, Viper nor any other entity in which King or Viper held an interest performed any management or other services for Bailey at any time after 2012. Accordingly, the management services King provided to Bailey ended more than one year prior to Viper and Bailey entering into the Purchase Agreement, which was “made as of April, 2014” and executed by Bailey on May 1, 2014.

14. Marquis Smith (“Smith”) was Bailey’s manager at the time the Purchase Agreement was negotiated and executed. Smith participated in the negotiation of the Purchase Agreement on Bailey’s behalf.

15. Concurrently with the negotiation and execution of the Purchase Agreement, the parties also negotiated and executed an agreement pursuant to which, among other things, Bailey and King acknowledged that they terminated the Management Agreement in 2012 and exchanged mutual releases of all claims relating to the Management Agreement. The releases expressly provided, “[f]or the avoidance of doubt,” that they did not release any claims relating to obligations under the Purchase Agreement.”

Applicable Terms of the Purchase Agreement

16. The Purchase Agreement is a valid and enforceable contract.

17. Under the Purchase Agreement, Bailey sold, assigned and transferred to Viper all of his right, title and interest in the “Assets.” Section 1.1(a) of the Purchase Agreement defines “Assets” as

any and all worldwide digital performance rights to any sound recording created by [Bailey], whether created before the date hereof or hereafter, including without limitation the sound recordings set forth in Schedule A attached hereto; and whether currently owned or owned in the future, and any and all monies that derive therefrom as of the Closing Date, **including without limitation, any monies related to the digital audio transmissions of sound recordings subject to statutory**

licensing under section 114 of the U.S. Copyright Act and collected by Sound Exchange (or other such collection agency) and any and all international monies, rights and remedies due to Seller in connection with the Assets from any other copy right collection society or agency located throughout the world.
(Emphasis added)

18. Pursuant to Section 1.1(b) of the Purchase Agreement, Bailey sold, assigned and transferred to Viper “all of [his] right, title and interest (whether existing, contingent, expectant or otherwise) in and to the Assets, including without limitation:”

(i) The right to collect public performance and ephemeral royalties for the transmission and reproduction of sound recordings payable under 17 USC 112(e) and 114 and any applicable regulations including without limitation any monies collected and disbursed by SoundExchange and/or any other copyright collection society or agency located throughout the world;

(ii) The right to license the public performance or communication of a sound recording created by [Bailey] under 17 USC 112(e) and 114 and/or any other applicable international copyright statute, regulation or law;

(iii) The right to grant reproduction rights of sound recordings created by [Bailey] for the purposes of facilitating public performances or communications;

(iv) All rights in connection with the Assets now known or which may hereafter be recognized or come into existence throughout the world (and, to the extent owned or controlled by [Bailey], the universe) under applicable laws, treaties, regulations and directives now or hereafter enacted or in effect together with the right to administer and exploit same in any and all media now or hereafter known; and

(v) All agreements which affect or memorialize the use and/or exploitation of the Assets and all proceeds thereof. [Viper] is also granted all future rights and options in any such agreements under which musical compositions and/or songwriting services are still to be delivered or rendered, as applicable.

19. Independently, under Section 1.1(c), Bailey transferred, sold and assigned all of his rights under agreements with “SoundExchange, Fintage, Kobalt and with any other collection agencies and all other performing rights societies affecting any of the sound recordings.”

20. Pursuant to Section 1.6 of the Purchase Agreement, in the event that Bailey breaches any obligation owed to Viper under section 1, Viper is entitled to liquidated damages in the amount of \$350,000 per breach (the “Liquidated Damages Sum”). The provision specifies that “the Liquidated Damages Sum shall be due and payable for each and every breach under this Section 1, and, for the avoidance of doubt, shall not be a one-time payment if there are multiple breaches.” Further, Section 1.6 sets forth the parties express agreement that the liquidated damages sum:

[R]epresents a reasonable estimate of the actual damages which would be suffered by Buyer as a result of any breach of this Section 1, and which payment the Parties further expressly agree is not a penalty nor punitive in any way. The Parties further represent and agree that this liquidated damages provision is fair and reasonable in light of all of the attendant circumstances, including the fact that the actual damages which would be suffered by Buyer as a result of any breach of this Section 1 would be difficult to ascertain.

21. Section 2.1 of the Purchase Agreement obligates Viper to pay to Bailey (i) Twenty-Two Thousand Five Hundred Dollars (\$22,500.00), as the purchase price for the Assets (“Purchase Price”), and (ii) fifteen hundred dollars (\$1,500.00) towards Bailey’s legal fees.

22. Pursuant to section 3.1 (a) of the Purchase Agreement, Bailey represented that he had the full right, power and authority to execute the Purchase Agreement, to perform the transactions contemplated by the Purchase Agreement, and to sell and transfer to Viper the Assets, all rights in and to the Assets and all other rights expressly or impliedly sold and transferred.

23. Pursuant to section 3.1 (h) of the Purchase Agreement, Bailey represented that Viper and its affiliates and licensees “shall enjoy at all times, without restriction, exclusive worldwide administration and exploitation rights with respect to the Assets.”

24. Pursuant to section 3.1 (n) of the Purchase Agreement, Bailey represented that he has not performed, and that he will not perform, “any act that will in any way, directly or indirectly,

act to deprive [Viper] of any right herein expressly or impliedly granted, with respect to the Assets.”

25. Pursuant to section 3.1(q) of the Purchase Agreement, Bailey expressly acknowledged that he had the opportunity to consult with an independent attorney of his choosing in connection with the negotiation and execution of the Purchase Agreement. Bailey further acknowledged that if he chose not to consult with an attorney, it was because Bailey had, of his own will and volition, chosen to rely on his own business judgment and forego the advice of counsel.

26. Bailey specifically acknowledged his representations in section 3.1(q) by writing his initials in the space provided immediately below that section in the Purchase Agreement.

27. Pursuant to section 5.2(b) of the Purchase Agreement, Bailey agreed to reimburse Viper for legal expenses incurred in connection with any claim or liability arising out of any breach or alleged breach by Bailey of any of his obligations, warranties or representations in the Purchase Agreement.

28. Upon signing the Purchase Agreement, Viper paid to Bailey the Purchase Price and the additional fifteen hundred dollars (\$1,500.00) toward Bailey’s legal fees.

Bailey’s Material Breaches of the Purchase Agreement

29. As set forth above, the Assets Viper purchased pursuant to the Purchase Agreement include the SoundExchange Royalties, which includes all royalties SoundExchange collected in respect of the Transferred Recordings at any time after execution of the Purchase Agreement.

30. Until in or about April 2017, in accordance with the terms of the Purchase Agreement, Viper has received all SoundExchange Royalties since the parties executed the Purchase Agreement.

31. Notably, in or around September 2016, Bailey attempted to change the SoundExchange bank account information applicable to the Transferred Recordings in order to route to himself payment of the SoundExchange Royalties in violation of the Purchase Agreement.

32. In response, on or about October 7, 2016, Viper sent Bailey a letter demanding that he cease and desist from all correspondence and communications with SoundExchange, and from all attempts to breach the Purchase Agreement by interfering with Viper's rights under that agreement.

33. Bailey complied with the cease and desist letter and Viper continued to receive the SoundExchange Royalties without interruption.

34. However, in or about April 2017, Bailey again contacted SoundExchange, and, in breach of the Purchase Agreement, changed the bank account applicable to the Transferred Recordings in order to route to himself or for his benefit payment of the SoundExchange Royalties. When Viper learned of the change, it demanded that SoundExchange disregard it and continue to pay the SoundExchange Royalties to Viper. In response, SoundExchange advised that its policy is not to make determinations as to who of multiple claimants is entitled to payment, but rather to make payments based upon the bank account information in its system until it receives instructions directly from the account holder or a copy of a court order to the contrary.

35. On or about April 12, 2017, counsel for Viper sent a letter to counsel for Bailey notifying him that Bailey's actions in redirecting the SoundExchange Royalties was a material breach of the Agreement, and demanded that Bailey restore the SoundExchange account within five (5) business days (the "Demand Letter").

36. Bailey failed and refused to comply with the Demand Letter.

37. As a result of Bailey's material breaches of contract, Viper is entitled to actual damages, liquidated damages, interest, costs and attorney's fees.

38. Viper is also entitled to a declaration that the Purchase Agreement is a fully enforceable and valid agreement, that Viper is the owner of the Assets, including, without limitation, the SoundExchange Royalties, and that Viper has the full and unfettered right to exploit such Assets without any further obligation whatsoever to Bailey.

Count I
(Breach of Contract)

39. Viper repeats and realleges the allegations in paragraphs 1 through 38 of the complaint as if fully set forth at length herein.

40. Viper has fully performed and completed all obligations of it required under the Purchase Agreement.

41. Despite Viper's demands to Bailey to comply with the terms of the Purchase Agreement, Bailey has materially breached Section 1.1(b) of the Purchase Agreement by, among other things, re-routing the flow of monies from SoundExchange, thereby depriving Viper of its right, title and interest in the SoundExchange Royalties.

42. Bailey's breach of Section 1.1(b) of the Purchase Agreement entitles Viper to recover liquidated damages pursuant to Section 1.6 of the Purchase Agreement.

43. As a direct and proximate result of Bailey's breach of contract, Viper has been damaged in the amount of \$350,000.00, plus interest, costs and attorney's fees.

Count II
(Breach of Contract)

44. Viper repeats and realleges the allegations in paragraphs 1 through 43 of the complaint as if fully set forth at length herein.

45. Viper has fully performed and completed all obligations of it required under the Purchase Agreement.

46. Despite Viper's repeated demands to Bailey to comply with the terms of the Purchase Agreement, Bailey has materially breached section 1.1(c) of the Purchase Agreement by, among other things, re-routing the flow of monies from SoundExchange, thereby depriving Viper of its right, title and interest in the SoundExchange Royalties.

47. Bailey's breach of section 1.1(c) of the Purchase Agreement entitles Viper to recover liquidated damages pursuant to Section 1.6 of the Purchase Agreement Viper to recover under the Liquidated Damages Clause.

48. As a direct and proximate result of Bailey's breach of contract, Viper has been damaged in the amount of \$350,000.00, plus interest, costs and attorney's fees.

Count III
(Breach of Contract)

49. Viper repeats and realleges the allegations in paragraphs 1 through 48 of the complaint as if fully set forth at length herein.

50. Viper has fully performed and completed all obligations of it required under the Purchase Agreement.

51. Despite Viper's repeated demands to Bailey to comply with the terms of the Purchase Agreement, Bailey has materially breached section 1.1(h) of the Purchase Agreement by, among other things, re-routing the flow of monies from SoundExchange, thereby depriving Viper of its right, title and interest in the SoundExchange Royalties.

52. Bailey's breach of section 1.1(h) of the Purchase Agreement entitles Viper to recover liquidated damages pursuant to Section 1.6 of the Purchase Agreement.

53. As a direct and proximate result of Bailey's breach of contract, Viper has been damaged in the amount of \$350,000.00, plus interest, costs and attorney's fees.

Count IV
(Breach of Contract)

54. Viper repeats and realleges the allegations in paragraphs 1 through 53 of the complaint as if fully set forth at length herein.

55. Viper has fully performed and completed all obligations of it required under the Purchase Agreement.

56. Despite Viper's repeated demands to Bailey to comply with the terms of the Purchase Agreement, Bailey has materially breached section 3.1(h) of the Purchase Agreement by, among other things, re-routing the flow of monies from SoundExchange, thereby depriving Viper of its right, title and interest in the SoundExchange Royalties.

57. As a direct and proximate result of Bailey's breach of contract, Viper has been damaged in an amount to be proven at trial, plus interest, costs and attorney's fees.

Count V
(Breach of Contract)

58. Viper repeats and realleges the allegations in paragraphs 1 through 57 of the complaint as if fully set forth at length herein.

59. Viper has fully performed and completed all obligations of it required under the Purchase Agreement.

60. Despite Viper's repeated demands to Bailey to comply with the terms of the Purchase Agreement, Bailey has materially breached section 3.1(n) of the Purchase Agreement by, among other things, re-routing the flow of monies from SoundExchange, thereby depriving Viper of its right, title and interest in the SoundExchange Royalties.

61. As a direct and proximate result of Bailey's breach of contract, Viper has been damaged in an amount to be proven at trial, plus interest, costs and attorney's fees.

Count VI
(Declaratory Judgment)

62. Viper repeats and realleges the allegations in paragraphs 1 through 61 of the complaint as if fully set forth at length herein.

63. An actual controversy exists between the parties.

64. The dispute and controversy between the parties is of a justiciable nature and is not speculative.

65. This Court is vested with the power to declare and adjudicate the rights and other legal relationships of the parties to this action concerning issues raised by this Complaint.

66. Viper seeks a declaratory judgment that the Purchase Agreement is a fully enforceable and valid agreement, that Viper is entitled to control and administer Bailey's SoundExchange account, that Viper is the owner of the Assets, and that Viper is entitled to receive the SoundExchange Royalties without any further obligation whatsoever to Bailey, and.

67. A judicial determination is necessary and required at this stage in order to adjudicate the parties' respective rights and obligations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays the Court for the following relief:

(a) in respect of Counts I – V, an award to Viper of monetary damages in an amount to be determined at trial, but not less than \$350,000 on each of Counts I, II and III; and

(b) in respect of Count VI, a declaration that (i) the Purchase Agreement is a fully enforceable and valid contract, (ii) Viper is entitled to control and administer Bailey's SoundExchange account (iii) Viper is the owner of the Assets, and (iv) that Viper is entitled to receive the SoundExchange Royalties without any further obligation whatsoever to Bailey; and

- (c) an award to Viper of its interest, costs and attorney's fees; and
- (d) such other and further relief as may be just and proper.

Dated: June 9, 2017

Respectfully submitted,

s/Kimberly A. Herrick

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