SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UPFRONT MEGATAINMENT, INC., formerly known as UPFRONT ENTERTAINMENT, INC., and DARRICK STEPHENS a/k/a DEVYNE STEPHENS a/k/a DEVYNE,

Plaintiffs,

v.

ALIAUNE THIAM p/k/a AKON,

Defendant.

No. 652156/2021

Mot. Seq. 5

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT ALIAUNE THIAM'S MOTION TO DISMISS

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Defendant respectfully submits this memorandum of law in further support of his motion to dismiss.

PRELIMINARY STATEMENT

Plaintiffs cannot unilaterally take back their prior admission that BMG Rights Management ("BMG") is *not* a "major" record label. That admission is binding and conclusive as a matter of law absent relief from this Court. Plaintiffs have not such sought relief, and Plaintiffs have neither sought nor justified the granting of that relief. To the contrary, Plaintiffs merely conclude that their prior lawyer's statements—which they do not deny reviewing—were "erroneous" without explaining how or why such a "mistake" allegedly was made or should be excused. The law is settled that the amendment process cannot be used in this manner to alter a factual position to overcome a motion to dismiss, which is precisely what Plaintiffs seek to do here. Moreover, Plaintiffs' purported showing that BMG is a "major" record label is not credible and not entitled to be accepted as true. *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995). Plaintiffs' ploy to sustain the Amended Complaint should be rejected.

Plaintiffs' prior assertions that BMG was *not* a "major" record label formed the core of Plaintiffs' original Complaint and opposition to Akon's prior motion to dismiss. Plaintiffs previously contended that while Akon, whose company had a deal with BMG, was *not* signed to a "major" record label, the parties' Settlement Agreement still obligated him to pay Plaintiffs the Stephens Revenue Share because Akon had not yet completed four album cycles on a "major" record label. The Court rejected Plaintiffs' arguments and, relying on Plaintiffs' own admissions about BMG, found that the Settlement Agreement unambiguously provides that Akon's payment obligations "would only continue *during* major record label album cycles, *which did not happen here*." NYSCEF No. 20 at 1 (emphasis added).

Under these circumstances, the Court need not accept as true Plaintiffs' newly contrived

and inconsistent allegation that BMG suddenly is a "major" record label. Rather, the Court can and should treat as binding legal admissions Plaintiffs' prior assertions to the contrary. That result is especially warranted here because:

- both BMG and the leading recorded music trade organization of which BMG is a member publicly agree that BMG is *not* a "major" record label;
- The "evidence" that Plaintiffs provide the Court does not establish otherwise—among other things, the articles that purportedly identify BMG as the "fourth major" quote the companies' CEO stating only that "our *ambition* is that we are a major;" and
- Plaintiffs *continue* inconsistently to contend, as part of their "prevention doctrine" argument, that BMG is *not* a "major" record label.

Plaintiffs' reliance on the prevention doctrine separately fails because: (1) Akon's documentary evidence—Atlantic Recording Corporation's termination letter—conclusively establishes that Atlantic terminated its relationship with Akon because Plaintiffs and Akon had dissolved the company they jointly owned and which furnished Akon's recording services to Atlantic and not because of any purported wrongful conduct, and (2) the occurrence of that contingency was foreseeable.

ARGUMENT

I. PLAINTIFFS ARE BOUND BY THEIR PRIOR JUDICAL ADMISSIONS

A. This Court Can Disregard Plaintiffs' Newly Contrived Allegation That BMG Is a "Major" Record Label.

Plaintiffs fail to meaningfully distinguish Akon's cited cases holding that a plaintiff's prior factual allegations are binding legal admissions that prevent a plaintiff from filing an amended pleading containing inconsistent allegations. *See* Def. Mem. at 8 (NYSCEF No. 89).

Talking Capital LLC v. Omanoff, 169 A.D.3d 423 (1st Dep't 2019), does not require the

Court to ignore all other First Department authority on the subject simply because that case states that inconsistent allegations in an original pleading are "informal judicial admissions, entitled to evidentiary weight but not dispositive." *Id*. at 424-25; *see* Opp. Mem. at 3 (NYSCEF No. 117). *Talking Capital* is not binding on this Court for this purported point because *Talking Capital* relies on a single prior case—*Bogoni v. Friedlander*, 197 A.D.2d 281 (1st Dep't), *lv. denied* 84 N.Y.2d 803 (1994)—that does not stand for this proposition and holds the opposite:

> a judicial admission is binding and conclusive, *unless* modified or relieved in the discretion of the court. *In this event*, the prior complaint remains admissible as an informal judicial admission, the circumstances of which may be explained at trial.

Id. at 292-93 (cleaned up) (emphasis added). Contrary to holding that prior inconsistent allegations are never binding, *Bogoni* holds that such allegations are "binding and conclusive" admissions *unless* they are "modified or relieved" by a court, in the court's discretion. It is only in this latter event that the prior allegations become mere informal admissions.[1]

Bogoni instructs that courts should exercise that discretion sparingly, so as not to condone deception or gamesmanship:

> The purpose of this procedural device is to permit the plaintiff to amend his theory of recovery *to comply with the facts as they unfold*, not to permit the plaintiff *to alter his representation of material facts to best suit his theory of recovery and thereby overcome defenses* raised in opposition.

197 A.D.2d at 292 (emphasis added); *see also Du Bose v. Vel*ez, 63 Misc. 2d 956, 959-60 (N.Y. Cnty. Sup. Ct. 1970) (cited by *Bogoni*) (barring party from introducing new testimony inconsistent with pleadings because "[w]hen one party or the other presents blatantly dishonest

[1] If the Court believes that *Talking Capital* conflicts with the prior authority, the Court is to resolve the conflict by examining the antecedent cases (*Crispo v. Art Student League*, 180 Misc. 2d 54, 55 (Kings Cnty. Sup. Ct. 1999) and fashioning a decision consistent with the prior case law (*Vidal v. Maldonado*, 23 Misc. 3d 186, 213–14 (Bronx Cnty. Sup. Ct. 2008) (rejecting later decision that is out of step with Court of Appeals and prior Appellate Division precedent); *People v. Onyeabor*, 8 Misc. 3d 310, 315 (Kings Cnty. Sup. Ct. 2005) ("This court does not find itself bound by any particular precedent of the Appellate Division, Second Department, in this area because of the conflicting inferences in the case law.")).

testimony, the Judge should decline to help that party accomplish what it is the spirit of our legal system to prevent."); *Schwartz v. Scott & Co*., 25 A.D.2d 596, 596 (3d Dep't 1966) (cited by *Bogoni*) (noting with approval a trial court's denial of application to retract admissions through amendment of a pleading); *Brunetti v. Musallam*, 59 A.D.3d 220, 223 (1st Dep't 2009) (amendment denied where plaintiff sought to change facts to fit new legal theory); *New Haven Properties, Ltd. v. Grinberg*, 293 A.D.2d 386, 387 (1st Dep't 2002) (defendant bound by prior admission where changed position was unsupported by record and unexplained); *Peso v. American Facilities Mgt. Corp.*, 277 A.D.2d 48, 49 (1st Dep't 2000) (denying amendment where new negligence theory depended on facts inconsistent with prior theory); *Ouyang v. NYU Hosp. Center*, No. 154107/2014, 2014 WL 6682635, at *3 (N.Y. Sup. Ct. Nov. 24, 2014) (denying amendment that "flatly contradicts [plaintiff's] initial affidavit" coupled with "absence of some explanation for this complete change of position").

It is irrelevant that Akon's cited cases concern motions to amend and not to dismiss. Opp. Mem. at 15. Because the standard for such motions *is the same*, courts may disregard inconsistent allegations when ruling on motions to dismiss just as they do when ruling on motions to amend. *See Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 185 (1st Dep't 2001) (denying leave to amend where amended pleading cannot survive a motion to dismiss); *Olam Corp. v. Thayer*, No. 652764/2018, 2021 WL 408232, at *1 (N.Y. Sup. Ct. Feb. 5, 2021) (collecting cases and explaining "the commonsense view that it would be pointless to grant leave to file an amended complaint if the Court concludes that the complaint will, in turn, be dismissed under CPLR 3211").

B. The Court Should Decline to Exercise Its Discretion to Relieve Plaintiffs' Prior Judicial Admissions.

The Court should decline to exercise its discretion to relieve or modify Plaintiffs' prior admissions because: (1) Plaintiffs have not sought this relief; (2) Plaintiffs have failed to provide

any explanation as to how their prior trial counsel—an experienced music lawyer—supposedly made an error; and (3) Plaintiffs' purported showing that BMG *is* a "major" record label is inherently incredible, especially because Plaintiffs continue to allege—via their "prevention doctrine"—that BMG is *not* a "major" record label.

1. Plaintiffs have not sought relief from their prior admissions

Plaintiffs have not asked the Court for relief from their prior admissions. Indeed, Plaintiffs do not even concede that they made any such admissions (Stephens Aff. ¶ 3 (NYSCEF No. 116) ("if prior counsel made such statement"); Opp. Mem. at 15 (same)), and they wrongly contend that the Court must ignore any prior admissions as a matter of law (*id*.). Because Plaintiffs seek no relief from the Court from their prior admissions, there is no relief for this Court to grant. *Cf. Sabr Chemicals Grp., LLC v. Ne. Chemicals, Inc.*, 192 A.D.3d 647, 648 (1st Dep't 2021) (plaintiff waived right to arbitration by arguing that arbitration provision was a fraud versus seeking to compel arbitration).

2. Plaintiffs have not explained, and cannot explain, their prior admissions

Relief from their prior admissions is also not warranted because Plaintiffs fail to explain those admissions—which formed the core of their original pleading. Plaintiffs were previously represented by Paul LiCalsi, an experienced music attorney,[2] and Plaintiffs fail to explain why LiCalsi would have so unambiguously—yet allegedly mistakenly—represented to the Court that after Atlantic terminated Akon's recording services (NYSCEF No. 1, ¶ 26), Akon formed his own "*independent* record label" (*id*. ¶ 28); Akon "ha[d] not signed any new recording agreement

[2] It is a matter of public record that LiCalsi regularly represents parties in the music industry, including, recently, the recording artist 50 Cent (*In re Jackson*, 972 F.3d 25 (2d Cir. 2020)), music publishers (*Saint Amour v. Richmond Org., Inc*., No. 16-cv-4464 (PKC), 2020 WL 978269 (S.D.N.Y Feb. 28, 2020)), and Apple Corps Limited (a/k/a The Beatles) (*Sid Bernstein Presents v. Apple Corps Limited*, No. 16-cv-7084 (GBD) (KNF), 2018 WL 1587125 (S.D.N.Y. Mar. 29, 2018)).

with a 'major' record label" (*id*. ¶ 27); and it was therefore "undisputed that [Akon] has not yet completed four album cycles, either with Atlantic and/or with *any other 'major' record label*" (*id*. ¶ 28) (all emphasis added).

Plaintiffs similarly do not explain why LiCalsi repeated these allegedly erroneous admissions in Plaintiffs' opposition to Akon's first motion to dismiss (NYSCEF No. 14 at 2) and added that there are *only three major record labels* in the United States and that *BMG was not one of them*: "The term ''major' record labels' commonly refers to the three largest music multi-nationals, Warner Music Group, Sony Music Entertainment and Universal Music Group along with their affiliated labels." *Id*. at 2 n.2.

Plaintiffs, instead, provide the empty statement that "if" LiCalsi made those statements "it was erroneous." Stephens Aff. ¶ 3. Notably, Plaintiffs do not contend that they were unaware of the contents of their previously filed documents or did not authorize their filing. Plainly, the admissions were intentional and not a mistake. The Court should disregard Plaintiffs newly contrived and inconsistent allegations for this reason alone.

3. Plaintiffs' newly contrived allegation is not credible

The Court also should disregard Plaintiffs' new and inconsistent allegation that BMG is a supposed "major" record label because: (1) Plaintiffs continue to rely on the opposite allegation; and (2) Plaintiffs' "evidence" that BMG is a supposed "fourth major" record label is not credible.

The Amended Complaint continues to rely, in the alternative, on the theory that BMG is not a "major" record label. Specifically, Plaintiffs contend that: (1) Akon intentionally "poisoned" his relationship with "major" record label Atlantic to provoke Atlantic into terminating Atlantic's agreement for Akon's services (the "Atlantic Agreement"), so that Akon could be free to record for BMG; and (2) the "prevention doctrine" thus bars Akon from arguing that he is no longer signed to a "major" record label. (Amended Complaint ¶ 52; Opp. Mem. at

16-18). For these allegations to make sense, and for Akon's switch to free him from paying the Stephens Revenue Share, Plaintiffs can only mean that BMG is not a "major" record label because otherwise Akon would have traded one "major" for another, which would entitle Plaintiffs to continued payments. Plaintiffs' own pleading thus continues to rely, at least in the alternative, on BMG *not* being a "major" record label. That is a further reason Plaintiffs' prior admissions should remain binding and conclusive. *See*, *e.g.*, *Drexel Burnham Lambert Grp. v. Vigilant Ins. Co.*, 157 Misc. 2d 198, 207-08 (N.Y. Cnty. Sup. Ct. 1993) ("Theories as to the basis for legal recovery may be inconsistent, but not facts.").

Plaintiffs' "evidence" that BMG is a supposed "major" record label is also inconsistent with BMG's own public statements and the statements made by the Recording Industry Association of America ("RIAA"), the record industry trade association of which BMG is a member.

BMG's own descriptions of its place in the world of recorded music are irreconcilable with Plaintiffs' new-found contention that BMG is supposedly a "major" record label. For example, BMG does not publicly describe itself as being a "major" record label. BMG, instead, describes itself on its official LinkedIn page as "the world's *fourth biggest music publisher*" and "the *first new global player in the recordings business* in decades." *BMG – The New Music Company*, LinkedIn, https://www.linkedin.com/company/bmg-the-new-music-company/ (emphasis added), attached as Ex. 1 to the Affirmation of Cynthia S. Arato ("Arato Aff.").[3] But even if true, being the "fourth biggest *music publisher*" is different from being the "fourth biggest"—let alone a "major"—*record label*. In that relevant space, BMG claims to be only the

[3] The Court can take judicial notice of the contents of this website and the others mentioned below. *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 19 (2nd Dep't 2009) ("Judicial notice…has been applied by case law to…public documents that are generated in a manner which assures their reliability."); *Jones Lang LaSalle N.Y., LLC v. N.Y.C. Sch. Const. Auth.*, 31 Misc. 3d 424, 427 (N.Y. Sup. Ct. 2011) (taking judicial notice of website).

newest kid on the block—"the first new global player." BMG's website similarly describes its recorded music operations not as a "major" record label, but as "the world's most artist-friendly *international record label*" and a "global *alternative to the established majors.*" *About BMG*, https://www.bmg.com/us/ (Arato Aff., Ex. 2).[4]

The RIAA—the prominent trade organization in the United States for recorded music—also does not identify BMG as a "major" record label. The RIAA is the trade organization that "advocates for recorded music and the people and companies that create it in the United States." RIAA Home Page, https://www.riaa.com/ (*see* Arato Aff., Ex. 3). Its "several hundred members"—which include BMG—"rang[e] from major American music groups with global reach to artist-owned labels and small businesses." *Id.*; *RIAA Members*, RIAA, https://www.riaa.com/about-riaa/riaa-members/ (Arato Aff., Ex. 4). Just as LiCalsi did, the RIAA publicly defines the "major" record labels as "Sony Music Entertainment, Universal Music Group, or Warner Music Group"—and not BMG. *Become an RIAA Member*, RIAA, https://www.riaa.com/about-riaa/become-an-riaa-member/ (Arato Aff., Ex. 5).

Plaintiffs' contrary "evidence" is not credible, especially in light of the above. Stephens' self-serving statement that he "understood" that BMG "constitutes a major record label" (Stephens Aff. ¶ 3) has no significance (and cannot be reconciled with his prior filings) because a parties' uncommunicated subjective intent is inadmissible. *Commonwealth of Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 25 N.Y.3d 543, 551 (2015); *Sally v. Sally,* 225 A.D.2d 816, 818 (3d Dep't 1996); *cf. China Privatization Fund (Del.), L.P. v. Galaxy Ent. Grp. Ltd.*, 187 A.D.3d 596, 597 (1st Dep't 2020) (evidence of intent admissible *when communicated*

[4] This statement cannot be credibly read to identify BMG as a "*non-established* major record label" alternative to the "*established* majors." (Opp. Mem. at 12 n.5). It plainly identifies BMG as a non-"major" alternative to the "majors." That reading is buttressed by BMG's description of itself in the same sentence as an "international record label" and not as a "major" label. *About BMG*, *supra*.

to the other side).

Plaintiffs' purported expert, Nancy Harkness, also provides no credible evidence that BMG is a "major" record label. Harkness cites to news articles quoting CEO Hartwig Masuch using the phrase "fourth major label" (Harkness Aff. ¶ 13 (NYSCEF No. 115)), but she omits the full context of the quote, which reveals that it is merely Masuch's *ambition* for BMG to be the "fourth major" (without specifying record label or publisher). As reported, Masuch was asked if he thought the "new BMG" was now on the same level as a "major," and he responded as follows:

> I think we can do whatever you think a major should be able to do. Yes, we are the fourth major.
>
> Our DNA, by acquiring some very important independent companies, is that we share the values of those independent companies…
>
> But *our ambition is that we are a majo*r.
>
> To say we're the leading independent would be to shy away from *the ambition that we have*…. Saying we are the leading independent is cheating.

Byron Jones, *BMG Chief Says: "We Are the Fourth Major,"* The Music Network (June 13, 2018), https://themusicnetwork.com/bmg-chief-says-we-are-the-fourth-major/ (*see* Arato Aff., Ex. 6) (emphasis added).

BMG obviously cannot already have achieved what Masuch merely hopes that BMG will one day achieve—the status of being a "major" record label. In any event, even if Masuch believed that BMG already was the "fourth major" record label, such a subjective and braggadocio characterization of his own company would not qualify as credible evidence of anything, especially where that characterization conflicts with the recorded music industry's own definition of the "major" record labels as consisting of only Sony, Warner, and Universal.

Harkness similarly contends that "Crunchbase" has described BMG as "a major," but the article she cites provides only that BMG is "the *youngest major international company* in the

music industry" without any assertion that BMG is a "major" record label. Harkness Aff. ¶ 12 (emphasis added) (Arato Aff. Ex. 7).

Harkness also conflates BMG's publishing and other assets with its recorded music business. *Id*. ¶ 13. Her cited articles focus on music publishing assets and acquisitions, which exclude the creating, manufacturing, and distributing of recorded music, *i.e.*, record labels. *Id*. ¶ 13 n.5. By any standard, BMG is not comparable to the "majors" in the recorded music field.[5]

Harkness, finally, is even less qualified to opine on the parties' intent with respect to the meaning of the term "'major' record label" in the Settlement Agreement (*id.* ¶ 21) than Stephens. She lacks any personal knowledge of that agreement or the parties' intent regarding that agreement.

II. THE PREVENTION DOCTRINE IS INAPPLICABLE

Plaintiffs cannot rely on the prevention doctrine to compel Akon to continue paying the Stephens Revenue Share because: (1) Plaintiffs previously agreed that the Stephens Revenue Share was payable only when Akon was signed to a "major" record label and Plaintiffs assumed the risk that Akon's recording relationship with Atlantic could come to an end; and (2) Plaintiffs do not allege that Akon *wrongfully* sought to end his relationship with Atlantic in order to deprive Plaintiffs of that revenue share.

Because the prevention doctrine "is only applicable when it is consistent with the intent of the parties" (*Thor Props. LLC v. Chetrit Grp.*, 91 A.D.3d 476, 477 (1st Dep't 2012)), the doctrine will not alter the allocation of risks dictated by the agreement (*HGCD Retail Servs., LLC v. 44-45 Broadway Realty Co.*, 37 A.D.3d 43, 53–54 (1st Dep't 2006)), and it is not implicated "where the contingency was foreseeable and defendants' acts were consistent with the agreement" (*Ninth St.*

[5] In 2019, for example, the three "major" record labels had a market share of *66.1%* while BMG held only a *1.07%* market share amidst numerous other independents. Def. Mem. at 9.

Assocs. v. 20 E. Ninth Corp., 114 A.D.3d 518, 519 (1st Dep't 2014)).

The parties expressly recognized in the Settlement Agreement that Akon may not remain signed to Atlantic and may not sign with any other "major" in the future, and they provided for the consequences of those events. Thus, the contingency of Akon no longer being signed to a "major" record label was foreseeable, and Plaintiffs assumed the risk of that contingency. That alone bars Plaintiffs from relying on the prevention doctrine to evade the terms of their settlement.

That Akon was relieved of his payment obligations as a result of the Atlantic termination is particularly apt because, as part of the Settlement Agreement, the parties bargained for the mandatory dissolution of Upfront/Konvict LLC ("Productions"). Productions is the company that Akon jointly owned with Plaintiffs and which furnished Akon's services to Atlantic under the Atlantic Agreement. Ex. 1 to Movit Aff. (NYSCEF No. 114). As parties to the Atlantic Agreement, Plaintiffs understood and agreed that a dissolution of Productions could trigger termination of that recording contract. They also understood and agreed that Atlantic was not obligated to directly contract with Akon to continue his recording services if Productions was dissolved. Moreover, Plaintiffs did not negotiate in the Settlement Agreement for any relief or protection from these effects. Plaintiffs thereby assumed such risks, even though a termination following the agreed-upon dissolution of Productions was predictable and foreseeable and, essentially, invited by the dissolution.

The prevention doctrine also has no application because Plaintiffs do not allege, and are foreclosed by documentary evidence from alleging, that Akon acted *wrongfully* for the purpose of preventing them from receiving the Stephens Revenue Share. That doctrine provides only that:

> One who *unjustly* prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own *wrong*, and to escape from liability for not rendering his promised performance by preventing the happening of the condition

on which it was promised.

Long Island Sav. Bank, F.S.B. v. Geloda/Briarwood Corp., 190 A.D.2d 64, 67 (1st Dep't 1993) (emphasis added) (quoting 3A Corbin, *Contracts* § 767); *see also Cauff, Lippman & Co. v. Apogee Fin. Grp.*, 807 F. Supp. 1007, 1022 (S.D.N.Y. 1992) ("The doctrine of prevention excuses a condition precedent when a party *wrongfully* prevents that condition from occurring." (cleaned up)); *Akanthos Cap. Mgmt., LLC v. CompuCredit Holdings Corp*., 677 F.3d 1286, 1297 (11th Cir. 2012) ("[T]he key operative language in the definition of the prevention doctrine is the term 'wrongfully prevented.' *If defendant's alleged 'prevention' is authorized by the contract, then naturally it does not constitute a breach and cannot be considered 'wrongful.'*" (citation omitted) (emphasis added)).

While Plaintiffs allege (falsely) that Akon intentionally secured the termination of the Atlantic Agreement, they do not allege that Akon did so to prevent Plaintiffs from receiving the Stephens Revenue Share. The Settlement Agreement does not require Akon to stay signed to Atlantic, bar him from leaving Atlantic, or obligate him to sign with another "major" record label if the Atlantic Agreement ends. The Settlement Agreement did not render Akon an indentured servant to Atlantic or any of the "major" record labels. Rather, Akon was free to pursue his recording career as he saw fit. Accordingly, even if Akon "intentionally" sought to leave Atlantic "so he could work with BMG" (Amended Complaint ¶ 52) (and he did not, as evidenced by Atlantic's action), he was free to do so for his own artistic and professional reasons.

In any event, the documentary evidence that Akon previously provided to the Court demonstrates conclusively that Atlantic terminated its relationship with Akon solely because of the dissolution of Productions and for no other reason. It certainly was not because of any of the alleged misconduct that Plaintiffs alleges solely on "information and belief." (Amended Complaint p.1 and ¶ 53):

> We hereby acknowledge receipt of your notice apprising us of *Productions' dissolution as of January 25, 2019*. Please be advised that this letter shall serve as our notice pursuant to paragraph 13(a) of the Agreement that we hereby exercise our right to terminate the Term of the Agreement, effective as of the date of this letter. As a result of the foregoing, *you shall not be required to render services directly to Company in the event of Productions' dissolution pursuant to paragraph 3(e) of the Artist Inducement Letter* annexed to the Agreement as Exhibit A.

Ex. 4 to Olney Aff. (NYSCEF No. 88) (emphasis added).

The Atlantic letter, quoted above, demonstrates that neither the dissolution of Productions (which occurred by mutual agreement of the parties), nor Atlantic's decision to terminate the Atlantic Agreement (and not sign Akon directly under the Artist Inducement Letter) was caused by any "wrongful" conduct by Akon. Plaintiffs' "information and belief" allegations regarding Akon's supposed misconduct cannot overcome this evidence. *Born to Build LLC v. 1141 Realty LLC*, 105 A.D.3d 425, 426 (2013) (reversing denial of motion to dismiss where "petition makes assertions premised only upon information and belief" and documentary evidence contradicted the assertions).

CONCLUSION

For all the foregoing reasons, and those in Akon's prior submissions to the Court, this motion should be granted in all respects.

Dated: May 10, 2022
New York, New York

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ATTORNEY CERTIFICATION PURSUANT TO RULE 202.8-b

I, Cynthia S. Arato, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law in Support of Defendant's Motion to Dismiss complies with the word count limit set forth in 22 NYCRR 202.8-b because it contains 4,193 words, excluding the parts of the memorandum exempted by this Rule. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: May 10, 2022
New York, New York

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