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. 4

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

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Defendant Aliaune Thiam p/k/a Akon ("Defendant" or "Akon") respectfully submits this memorandum of law in support of his motion, pursuant to C.P.L.R. §§ 3211(a)(1) and (7), to: (a) partially dismiss with prejudice the First Cause of Action of the Amended Complaint, dated January 18, 2022 ("Amended Complaint" or "FAC"), and (b) dismiss with prejudice the Second Cause of Action (NYSCEF Doc. 32), which amended pleading was filed by Plaintiffs Upfront Megatainment, Inc., formerly known as Upfront Entertainment, Inc., and Darrick Stephens a/k/a Devyne Stephens a/k/a Devyne ("Stephens").

INTRODUCTION

Plaintiffs simply refuse to accept the recent ruling of this Court and are intent upon evading it, even if that means making up facts and prolonging this dispute. Last October, this Court decisively dismissed those portions of Plaintiffs' complaint (the "Original Complaint") for:

> (1) a 20% share of Defendant's royalties from certain compositions and recordings (the "Stephens Revenue Share") after March 11, 2019, as provided under the October 25, 2018 settlement agreement between the parties (the "Settlement Agreement")[1]; and
>
> (2) a declaration that Plaintiffs are entitled to payment of the Stephens Revenue Share for so long as it takes Akon to record four (4) albums on a "major" record label.

NYSCEF Doc. 20.

In so ruling, this Court pointedly declared that any attempt to amend the Original Complaint would not succeed by arguing the terms of the Settlement Agreement:

> I wouldn't do that based on the language of the agreement because I have looked at that as closely as I am going to look at it, as closely as I think it needs to be looked at. I think you were talking about recission or this or that, that's up to you.

[1] A copy of the redacted Settlement Agreement, is attached to the accompanying Affirmation of Eric Olney, dated March 9, 2022 ("Olney Aff."), Exhibit ("Ex.") 1.

See Olney Aff. Ex 2: Transcript of Proceedings ("Motion Trans."), dated Sept. 28, 2021, at 24. Indeed, the Court held that the contractual provision at issue was not ambiguous.

At oral argument, Plaintiffs contended that, whether the Settlement Agreement was ambiguous or not, they could state a claim for contract "reformation" based on "mutual mistake," and that they would seek leave to amend the Original Complaint if the Court granted Defendant's motion to dismiss. *See Id.*, Ex. 2, Motion Trans. at 20. The Amended Complaint makes no claim for either contract reformation or recission. That is likely because Defendant's counsel demonstrated to Plaintiffs that such a claim could not be validly stated. *See* Olney Aff. Ex. 3: Letter from Cynthia S. Arato to Paul V. LiCalsi, dated October 29, 2021.

But rather than accept this Court's ruling that the Stephens Revenue Share is suspended while Akon is not recording songs for a "major" record label, Plaintiffs' *third set of lawyers* contend in the Amended Complaint that Plaintiffs' entitlement to the Stephens Revenue Share was never suspended or otherwise barred. Plaintiffs make two principal arguments:

First, the Amended Complaint alleges that BMG Rights Management ("BMG") is a "major" record label for whom Akon presently is a recording artist. As this Court previously held, Plaintiffs only participate in the Stephens Revenue Share for four (4) record album cycles on a "major" record label. Plaintiff's previous lawyers never alleged or argued that BMG is a "major" record label. Plaintiffs admitted *the exact opposite* in their court submissions, *i.e.*, that BMG is not a "major" record label. Having conceded in their own pleadings that Akon did not sign with a "major" record label, Plaintiffs are now precluded from contradicting their prior allegations, and from making the opposite claim now.

There is a good reason why Plaintiffs never previously alleged that BMG is a "major" record label – the claim is indefensible. BMG is not a "major" record label based upon any recognized music-industry measure or consensus. Indeed, BMG's webpage touts the company as

"the only global *alternative* to the established majors." (Emphasis added.) *See* https://www.bmg.com/us/. In the Original Complaint, Plaintiffs admitted that Akon was dropped from Atlantic Records ("Atlantic"), a "major" record label, and that he did not sign with another "major." And Plaintiffs' two prior law firms both acknowledged that BMG was not one of the three "major" record labels. Even so, Akon has never signed directly to BMG.

Second, Plaintiffs allege that Defendant's own conduct caused the termination of the Atlantic recording agreement (the "Atlantic Recording Agreement") and "therefore Akon is precluded under New York law from invoking that termination as a basis to avoid paying Plaintiffs …." FAC ¶ 79. But the Settlement Agreement discontinues payment to Plaintiffs upon termination of the Atlantic Recording Agreement. It does not reserve for Plaintiffs the right to continue receiving payments if, as they now claim, that termination arose from Atlantic's purported dissatisfaction with Akon. The unambiguous contractual language compels the result this Court reached on the first motion to dismiss, because Atlantic's undisputed termination of Akon discontinued the payment obligation.

In any event, the Atlantic Recording Agreement is an agreement between Atlantic and Upfront/Konvict LLC, an entity that was jointly owned by Akon and Plaintiff Stephens, and Atlantic exercised its contractual right to terminate that agreement after being notified that Akon and Stephens had dissolved Upfront/Konvict, which was a joint decision they made and memorialized in writing in the Settlement Agreement. *See* Olney Aff. Ex. 1 § 4(a). Thus, Stephens's written settlement agreement with Akon created the opportunity for Atlantic to forever terminate its ties with Akon, which it effected by letter dated March 11, 2019. *See* Olney Aff. Ex. 4: Letter from Atlantic Recording Corporation to Aliaune Thiam, p/k/a Akon, dated March 11, 2019.

To avoid this motion, Defendant's counsel notified Plaintiffs of their false pleading

allegations, which they knew to be false, *as admittedly experienced music professionals*, or if they did not know, then they should have discovered their falsity by simple investigation. By letter dated February 22, 2022, Defendant demanded that Plaintiffs withdraw their pleading. Plaintiffs also were notified that sanctions would be sought against them for their frivolous conduct, which includes asserting "material factual statements that are false."

The Amended Complaint makes up facts and hurls meritless and derogatory accusations against Defendant, forcing Akon to spend substantial sums to relitigate the very issues this Court has already decided in his favor. Defendant now moves to dismiss the same claims already excised from the Original Complaint: the claims seeking Stephens Revenue Share payments post-dating March 11, 2019, the date after which Atlantic terminated the Atlantic Recording Agreement for Akon's exclusive services.

For the foregoing reasons and those set forth below, this motion to dismiss should be granted in its entirety. Because this is Plaintiffs' second attempt at claiming entitlement to Stephens Revenue Share payments post-dating March 11, 2019, and because Plaintiffs have yet again failed to state a claim, this Court should dismiss that claim with prejudice.

BACKGROUND

Much of the relevant background is detailed in Akon's original motion to dismiss (NYSCEF Doc. 8 at 2-6) and is briefly summarized below for the Court's convenience. Akon assumes the truth of the Amended Complaint's allegations, as he must on a motion to dismiss, except where otherwise noted.

Plaintiff Stephens is a record producer and music executive. FAC ¶ 9. Stephens also is allegedly the founder and operator of Plaintiff Upfront Megatainment, Inc., a "full-service entertainment corporation" formerly known as Upfront Entertainment, Inc. *Id*. ¶¶ 10-11. Akon is a singer, songwriter, performer, record producer, and actor. *Id*. ¶ 13.

The parties signed the Settlement Agreement to resolve disputes that had arisen between them. Olney Aff. Ex. 1. At issue here is Akon's payment obligation under Paragraph 2(e) of that agreement. *Id*. ¶¶ 31-35, 45-58. This provision requires Akon to pay a percentage of his income earned from a specified group of older compositions and recordings, which the parties dubbed in the agreement the Stephens Revenue Share. *Id*. ¶ 31.

In the Amended Complaint, Plaintiffs seek recovery of, among other things, allegedly unpaid Stevens Revenue Share amounts that Akon purportedly owes them. *Id*. ¶¶ 45-47. The issue on the first motion to dismiss was whether Akon owed the Stephens Revenue Share after March 11, 2019, the date when Akon was terminated as a recording artist by Atlantic. This Court granted the motion, holding that the plain meaning of the Settlement Agreement foreclosed any recovery in Plaintiffs' favor. NYSCEF Doc. 20; Olney Aff. Ex. 2, at 23-24.

The Court correctly interpreted the Settlement Agreement to require Stephens Revenue Share payments only while Akon was signed to a "major label." *Id*. The Original Complaint confirmed that the term "major record label" "refers to the three largest music multi-nationals, Warner Music Group, Sony Entertainment and Universal Music Group." NYSCEF Doc. 1 ¶ 24; *see also* NYSCEF Doc. 14 at 2 n.2 (Plaintiffs' opposition to original motion to dismiss explaining that "major record labels" refers to "Warner Music Group, Sony Music Entertainment and Universal Music Group along with their affiliated labels").

At the time of the Settlement Agreement, Akon was signed to Atlantic, an affiliate of Warner Music Group. FAC ¶ 33. The Settlement Agreement provides that if Akon's preexisting Atlantic Recording Agreement was "terminated by Atlantic," and he did not sign with another "major" label, then the Stephens Revenue Share obligation stops. Olney Aff. Ex. 1, at § 2(e)(iv); NYSCEF Doc. 20.

There is no dispute that on March 11, 2019, Atlantic terminated the Atlantic Recording

Agreement. NYSCEF Doc. 1 ¶ 26; FAC ¶ 47; Olney Aff. Ex. 4. And Akon did not thereafter sign with another "major" record label. In fact, the Original Complaint alleged the opposite: that "[s]ince Thiam and Atlantic Records terminated the Atlantic Recording Agreement, Thiam has formed an *independent record label*, through which he has released new albums." NYSCEF Doc. 1 ¶ 28 (emphasis added). Thus, this Court granted Akon's motion to dismiss Plaintiffs' claim for the Stevens Revenue Share regarding payments post-dating March 11, 2019.

The Court's reasoning was straightforward: "[t]he contract makes clear that the revenue stream from the old body of work at issue would only continue during major record label album cycles, which did not happen here." NYSCEF Doc. No. 20 at 1. The Court warned Plaintiffs that it would not revisit this interpretation of the Settlement Agreement. Olney Aff. Ex. 2, Motion Trans. at 24 ("I have looked" at "the language of the agreement…as closely as I am going to look at it" and "as closely as I think it needs to be looked at").

Now, in the Amended Complaint, Plaintiffs seek to circumvent the Court's ruling in two ways: *First*, after conceding that the term "major record label" in the Settlement Agreement meant only "Warner Music Group, Sony Entertainment and Universal Music Group" (NYSCEF Doc. 1 ¶ 24), and that Akon subsequently signed to an "independent" label instead of one of the "majors" (*Id.* ¶ 28), Plaintiffs contradictorily allege Akon's "independent" label is actually a "major" label. FAC ¶¶ 54-58. *Second*, Plaintiffs allege that even though the Settlement Agreement forecloses any payment obligation if and when the Atlantic contract was "terminated by Atlantic," the Settlement Agreement does not actually mean what it says. Rather, according to Plaintiffs, Akon must continue paying the Stephens Revenue Share if, as Plaintiffs now falsely allege, Atlantic terminated the Atlantic Recording Agreement because of its supposed dissatisfaction with Akon. FAC ¶¶ 48-53.

As with the Original Complaint, the Amended Complaint asserts a duplicative claim for

declaratory judgment regarding the same subject matter – Akon's purported "obligation to account to and render payments for the Stephens Revenue Share" after the Atlantic Recording Agreement was terminated by Atlantic. FAC ¶¶ 77-81.

ARGUMENT

I. STANDARD OF REVIEW

"[O]n a motion addressed to the sufficiency of a complaint pursuant to C.P.L.R. § 3211(a)(7), the facts pleaded are presumed to be true," but "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995). Under C.P.L.R. § 3211(a)(1), "dismissal" of the complaint is "warranted … if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Morgenthow & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74, 78 (1st Dep't 2003).

II. THE PLAIN MEANING OF THE SETTLEMENT AGREEMENT BARS PLAINTIFFS' CLAIM

This Court previously ruled, based upon the Settlement Agreement, that the Stevens Revenue Share payment obligation ceased upon Atlantic's termination of the Atlantic Recording Agreement, and because Defendant never signed to another "major" record label. Olney Aff. Ex. 2. Plaintiffs seek to redo the first motion by retracting their prior judicial admission that Akon's new label is "independent" and not a "major," and by introducing extraneous and irrelevant accusations about why Atlantic terminated the Atlantic Recording Agreement. These efforts to circumvent the Court's prior ruling fail as a matter of law.

A. Plaintiffs Cannot Retract Their Prior Judicial Admission That Akon's New Label Is Independent

In the Amended Complaint, Plaintiffs claim that Akon's new label is a "major" record label. But that is the exact opposite of what Plaintiffs had always maintained. In the Original Complaint,

and again in opposing the first motion to dismiss, Plaintiffs made clear that Akon's new label was "independent," that it was not a "major" label, and that the only "major" labels were the three listed in the Original Complaint. Had Plaintiffs actually believed that Akon signed to another "major" record label, they certainly would have said so, because if Akon had been on a "major", then the Stevens Revenue Share obligation would have continued even under Defendant's interpretation of the Settlement Agreement. But Plaintiffs said the exact opposite, conceding that Akon signed to an "independent" label. Having made this claim-ending concession in multiple signed pleadings, and after the parties and this Court devoted substantial time and resources toward litigating and adjudicating the first motion to dismiss based upon this shared factual predicate, Plaintiffs cannot now stick their head in the sand and pretend they did not say what they said.

As a matter of law, an "amended complaint" cannot "flatly contradict" prior "admissions of fact." *888 7th Ave. Assocs. Ltd. P'ship v. AAER Sprayed Insulations*, 199 A.D.2d 50, 51 (1st Dep't 1993); *accord Ehrenspeck v. Spear, Leeds & Kellogg, L.P.*, 51 A.D.3d 409, 410 (1st Dep't 2008) (denying motion for leave to amend where "SLK's proposed amended cross claim … contradicted SLK's own allegations"); *Tomczak v. Trepel*, 283 A.D.2d 229, 230 (1st Dep't 2001) ("denying plaintiffs' motion to amend the complaint to allege the contradictory claim that no demand was made upon the Board" where original complaint alleged "demands were made"); *Peso v. Am. Leisure Facilities Mgmt. Corp.*, 277 A.D.2d 48, 49 (1st Dep't 2000) ("Denial of plaintiff's cross motion to amend her complaint was an appropriate exercise of discretion … where the alternative theory of negligence proffered by plaintiff was based on facts that would contradict her original theory.").

The bar to such contradictory factual allegations is especially true here because the very question at issue is which record labels the parties understood to be a "major" record label when they entered into the Settlement Agreement. *Zolotar v. New York Life Ins. Co.*, 172 A.D.2d 27, 30

(1st Dep't 1991) ("In interpreting a contract, the intent of the parties governs."). If Plaintiffs viewed Akon's new record label as a "major," then they would have obviously alleged so in the Original Complaint and not freely admitted to the exact opposite in that pleading and in their filings opposing Defendant's first motion to dismiss. Indeed, they cannot suddenly "discover" what they "truly" intended when it became convenient for them to do so. *See*, *e.g.*, *Am. Int'l Life Assur. Co. of New York v. Kandros*, 254 A.D.2d 34, 34 (1st Dep't 1998) ("The version of events told by Kandros in her affidavit in support of the cross motion was inconsistent with the pleading as to which amendment was sought even though the occurrences described in her affidavit had taken place prior to the time the pleading sought to be amended had been filed.").

The plain reality is that Plaintiffs have made up this new allegation, after the fact, contradicting what they previously admitted being a fact, in an effort to mislead this Court in order to try and save their claim. There is a logical reason Plaintiffs made these prior concessions regarding which companies are the "major" record labels, why this Court accepted them, and why the Court should find them irreversible. By any objective and recognized standard or measure, the "major' record labels consist solely of Universal Music Group, Sony Music Entertainment, and Warner Music Group, and their affiliate labels.[2] Moreover, Plaintiffs' allegations in the Amended Complaint contradict BMG's own public-facing acknowledgements on its website that they are *not* one of the three "major" record labels.

Put simply, Plaintiffs are bound by their prior admissions in this action, which Plaintiffs conceded, as they should have, because they are entirely accurate – BMG is not a "major record label. Since the termination of the Atlantic Recording Agreement by Atlantic on March 11,

[2] These three labels hold a market share of 66.1% of the recorded music space. *See*, *e.g.,* https://musicindustryblog.wordpress.com/tag/record-label-market-share. Of these three "majors," the smallest market share is held by Warner Music Group, which is about 13%. By comparison, according to *Billboard*, BMG held 1.07% market share in 2019 amidst a sea of other "independent" record companies and/labels. *See* https://www.billboard.com/pro/bmg-earnings-2020-first-half-revenue-profit-up-pandemic/. Plaintiffs' supposed evidence to the contrary is nothing more than hyperbole and headlines without more.

2019, Akon has *not* entered into a recording contract with any "major" record label. Plaintiffs have no valid claim against Defendant for the continuation of any payments of the Stephens Revenue Share. Indeed, their assertion of the claim is entirely frivolous and sanctionable.

B. The Payment Obligation Discontinued Upon Termination of The Atlantic Recording Agreement

The Court granted the original motion to dismiss because, under the Settlement Agreement, there was no obligation to pay the Stevens Revenue Share after Atlantic's termination of the Atlantic Recording Agreement on March 11, 2019. Plaintiffs now improperly seek to reopen this inquiry based upon new allegations about why Atlantic supposedly terminated that contract. They falsely allege that Atlantic terminated the agreement because Akon missed "delivery deadlines," wished to release multiple albums simultaneously, and declined an offer to have an Atlantic executive help promote Akon. FAC ¶¶ 48-53. None of that matters for purposes of this motion, even if all of it were true, which none is.

Dispositive here, Plaintiffs agreed to forego any right to payment of the Stephens Revenue Share if and when the Atlantic Recording Agreement was "terminated by Atlantic." Olney Aff. Ex. 1 § 2(e)(iv). Had Plaintiffs wanted the right to payment of the Stephens Revenue Share if the termination arose because of Akon's conduct, then they would have bargained for that right in the Settlement Agreement. But they did not do so; instead, they agreed to forego such entitlement at any time that the Atlantic Recording Agreement was "terminated by Atlantic," regardless of the reason.

New York law prohibits courts from "impos[ing] obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) (Sotomayor, J.); *accord Feuer v. Feuer*, 178 A.D.3d 413, 415 (1st Dep't 2019) ("it would be improper to read into the agreement [an] additional obligation" absent from agreement itself). Yet that is precisely what Plaintiffs now seek to achieve

– *i.e.*, to receive Stephens Revenue Share payments for which they did not bargain, and which contradict the Settlement Agreement's unambiguous terms.

Regardless, Upfront/Konvict was formed by Akon and Stephens, one of the Plaintiffs here. Stephens voluntarily agreed to dissolve Upfront/Konvict in the Settlement Agreement. FAC ¶ 12. That, in turn, was the reason cited by Atlantic for "exercis[ing] our right to terminate" the Atlantic Recording Agreement. Olney Aff. Ex. 4. There is no mention in the termination letter of the grounds made up by Plaintiffs. Atlantic, not Plaintiffs, knows why it terminated that agreement, and the reason given by Atlantic has nothing to do with the purported misconduct alleged in the Amended Complaint. Instead, it resulted from Plaintiff Stephens' own decision to dissolve Upfront/Konvict.

Plaintiffs' allegations about the rationale behind Akon's termination from Atlantic are nevertheless irrelevant as a matter of law and contrary to the incontrovertible record proof. Thus, Plaintiffs claim for the Stephens Revenue Share cannot survive this motion.

III. THE DECLARATORY JUDGMENT CLAIM MUST BE DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CLAIM

The declaratory judgment claim (FAC ¶¶ 77-81) fails for the same reason that the Court previously granted the motion to dismiss this claim in the Original Complaint: such claim improperly seeks payment of the Stevens Revenue Share after March 11, 2019, and it is duplicative of the meritless breach of contract claim.

As argued in the first motion to dismiss (NYSCEF Doc. 8 at 10-11), New York law prohibits declaratory relief covering the same issues as the Plaintiffs' breach of contract claim. *See*, *e.g.*, *Wells Fargo Bank, Nat. Ass'n v. GSRE II, Ltd.*, 92 A.D.3d 535, 535–36 (1st Dep't 2012) ("the claim for declaratory relief was also properly dismissed, in light of the assertion of the breach of contract claim"); *accord Apple Recs., Inc. v. Capitol Recs., Inc.*, 137 A.D.2d 50, 54 (1st Dep't 1988).

Here, the issues raised by Plaintiffs' declaratory judgment claim are indistinguishable from those raised by the breach of contract claim. The Amended Complaint seeks the following declaratory relief: that "Akon's obligation to … pay the Stephens Revenue Share … continues through the present and beyond," and "BMG Rights Management is a 'major' record label." FAC ¶¶ 78, 81. Because this relief overlaps completely with the breach of contract claim, Plaintiffs' duplicative declaratory judgment claim must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendant's motion should be granted, dismissing: (a) that portion of the Amended Complaint's First Cause Action seeking payment of the Stephens Revenue Share for the period after March 11, 2019; (b) the Second Cause of Action seeking a declaratory judgment covering the same issue; and (c) such other and further relief as the Court deems just and proper.

Dated: March 9, 2022
New York, New York

/s/ Cynthia S. Arato

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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 3,705 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: March 9, 2022
New York, New York

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