

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

JOSEPH MALDONADO,

Plaintiff,

v.

Case No: 3:22-cv-18229-TKW-ZCB

VINCE JOHNSON,

Defendant.

---

**DEFENDANT’S MOTION FOR LEAVE TO FILE  
MOTION TO DISMISS AND ALTERNATIVE UNOPPOSED MOTION TO  
EXTEND DISCOVERY PERIOD UNTIL MARCH 29, 2024**

Defendant, Vince Johnson, hereby moves for leave to file a motion to dismiss Plaintiff’s Amended Complaint [Dkt. 39]. Alternatively, Johnson moves to extend the discovery period until March 29, 2024.

On November 23, 2022, Plaintiff filed its Amended Complaint in response to the Court’s order partially granting of Defendant’s first Motion to Dismiss [Dkt. 14] on the basis of lack of personal jurisdiction. *See* [Dkt. 36], Order on Motion to Dismiss. Thereafter, Defendant proceeded with filing a document [Dkt. 54] to avoid default and reassert his challenge to being subjected to personal jurisdiction in this Court.

As this Court and Plaintiff are aware, at the time Defendant filed its document he was not represented or being advised by counsel. Defendant simply

filed the document because he believed that was its only remaining course of action since Plaintiff renewed its claims in the Amended Complaint following the Court's partial dismissal of the Complaint [Dkt. 1]. In the document, Defendant maintained his challenge to personal jurisdiction. *See* [Dkt. 54] at 4. Defendant also explained that the "complaint fails to state a claim upon which relief can be granted...." *Id.* at 4-5.

On October 3, 2023, and October 20, 2023, the undersigned appeared in this case in response to the Court's Order [Dkt. 82] requesting the appearance of *pro bono* counsel for Defendant. Notably, the Court's Order was not issued until after Defendant had already prepared and filed the document. Now that Defendant is presently being advised and represented by counsel, he respectfully requests that the Court grant him the opportunity to move to dismiss the Amended Complaint for lack of personal jurisdiction, and alternatively to dismiss certain counts for failure to state a claim. A copy of the motion to dismiss is attached as Exhibit A.

Defendant is not in any way attempting to cause further delay to these proceedings. Defendant respectfully requests that the Court grant him the opportunity to file its motion to dismiss the Amended Complaint.

Alternatively, the Court presently has set November 30, 2023 as a discovery cutoff. Given the recent appearance of counsel, Defendant alternatively requests

an extension of the discovery period through March 29, 2024. Plaintiff does not oppose an extension of the discovery period.

Dated: November 7, 2023

By: /s/ Woodrow H. Pollack

Woodrow H. Pollack

Florida Bar No. 26802

Brian J. Paul

Florida Bar No. 1018684

**SHUTTS & BOWEN, LLP**

4301 West Boy Scout Boulevard

Suite 300

Tampa, FL 33607

wpollack@shutts.com

bpaul@shutts.com

Telephone: 813-463-4894

Facsimile: 813-229-8901

*Attorney for Defendant*

**LOCAL RULE 7.1(B) CERTIFICATION**

Pursuant to Local Rule 7.1(B), on November 3, 2023, the undersigned counsel conferred with counsel for Plaintiff on the requested relief, who stated on November 5, 2023, that Plaintiff opposes the relief requested herein.

**LOCAL RULE 7.1(F) AND 5.1(C) CERTIFICATION**

I HEREBY CERTIFY that this Motion complies with the applicable word count requirements of Local Rule 7.1(F) and contains 369 words, excluding the parts exempted by L.R. 7.1(F). This word count was calculated using the word-processing system of Microsoft Word.

This Motion also complies with the format requirements of Local Rule 5.1(C) and is double-spaced with 14-point font.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 7, 2023 a true and correct copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing.

/s/ Woodrow H. Pollack  
Woodrow H. Pollack

# **EXHIBIT A**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

**JOSEPH MALDONADO,**

**Plaintiff,**

**v.**

**Case No: 3:22-cv-18229-TKW-ZCB**

**VINCE JOHNSON,**

**Defendant.**

---

**DEFENDANT’S MOTION TO DISMISS**

Defendant, Vince Johnson, hereby files this Motion to Dismiss Plaintiff’s Amended Complaint [Dkt. 39] for Lack of Personal Jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(2)-(b)(3), or in the alternative, to dismiss Counts II and XI of the Amended Complaint because it fails to properly state its claims.

**I. INTRODUCTION**

The present dispute involves purported breach of contract claims, as opposed to claims for copyright infringement. In particular, the present dispute arises from Plaintiff’s claims that Defendant breached its obligations under certain documents in which Defendant allegedly transferred its rights to the musical works “I Saw A Tiger,” “Pretty Women Lover,” “GW and ME,” “The Sun Says,” and “My First Love,” (the “Musical Works”) to Plaintiff [Dkts. 39-1, 39-2, 39-3, 39-4, and 39-5] (the “Transfer Documents”) and a Compensated Employee Confidentiality

Agreement [Dkt. 39-6]. The action is brought by Plaintiff, Joseph Maldonado, who is currently incarcerated in Federal Prison upon his conviction for a failed “murder-for-hire” scheme and is now seeking vengeance against any conceivable person he feels may have wronged him. As demonstrated by Plaintiff’s most recent filings, Plaintiff seeks to take advantage of the United States judicial system and pursue hollow claims that have no merit in order to get payback against his enemies. Even worse, Plaintiff seeks to force his enemies into financial submission by pursuing his claims in federal court literally on the opposite side of the country from where Mr. Johnson (a resident of Washington state) is located.

Despite knowing that neither Plaintiff nor Defendant are residents of Florida, and that Defendant does not have sufficient contacts with Florida, Plaintiff still chose to file the present action in this State and pursue frivolous claims that have no merit. In particular, Plaintiff frames the present dispute as centering around alleged infringement of Plaintiff’s purported copyrights in the Musical Works that he does not own. Before even needing to address this ownership issue, a reasonable investigation would have revealed that Plaintiff’s copyright infringement claims are precluded by his failure to obtain copyright registrations for any of the musical works at issue. Read in its best light, this dispute is a simply dispute over agreements entered into (verbally and otherwise) between Plaintiff and Mr. Johnson. But Mr. Johnson is not subjected to personal jurisdiction here, thus dismissal is warranted.

## II. BACKGROUND

Defendant is a small solo singer-songwriter who lives in Washington and is in the business of making and producing music for use by his clients. In addition to operating as a solo act, Defendant routinely partnered with Danny Clinton, now deceased, to form “The Clinton Johnson Band.” Over the years, The Clinton Johnson Band wrote, sang, recorded, and produced various songs for use by their clients who requested a song be made with particular lyrics or themes.

In or around 2013, Plaintiff, Joseph Maldonado learned of The Clinton Johnson Band and sought to engage the band to write and produce certain musical works for Mr. Maldonado’s use. It was understood that Mr. Maldonado would merely provide a subject and a few details describing the type of song he wanted. The Clinton Johnson Band would then write and produce the song with no further input from Mr. Maldonado. The parties reached a number of oral agreements whereby Johnson would write and record (with The Clinton Johnson Band) songs based on themes Plaintiff requested. Johnson would sell these works to Plaintiff with a different pricing structure based on what rights Plaintiff wanted. If Plaintiff wanted to use the song and still attribute it to Johnson and Clinton, there was one price. If Plaintiff wanted to use the song with no obligation to attribute it to Johnson and Clinton, there was a different price. Plaintiff never fully paid Johnson for the songs, so Plaintiff has no rights in them.

Since the filing of the original Complaint, Defendant has maintained his objections to personal jurisdiction in this State. Neither Plaintiff nor Defendant are residents of Florida, and Defendant does not have sufficient minimum contacts with this State. Unrepresented by counsel, Defendant filed a document he found on the Northern District of Florida's site for pro se responses to complaints, and he wrote: "I have no contacts with Florida. I've never been there. Maldonado was a[n] Oklahoma resident who was captured in Florida." [Dkt. 54] at 3. Johnson further explained that the Court did not have personal jurisdiction over him. *See id.* at 4. Defendant is not subjected to personal jurisdiction in this Court, and the Court should dismiss Plaintiff's claim.

### **III. LEGAL STANDARD**

#### **A. Motion to Dismiss Standard**

##### **1. Personal Jurisdiction**

"When reviewing a motion to dismiss for lack of personal jurisdiction, the Court must first determine 'whether the Florida long-arm statute provides a basis for personal jurisdiction.'" *FlexSteel Pipeline Techs., Inc. v. Chen*, 2020 WL 13189197, at \*1 (N.D. Fla. Feb. 18, 2020) (quoting *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996)). "If so, the Court must then determine whether sufficient minimum contacts exist between the defendants and the forum state so as

to satisfy traditional notions of fair play and substantial justice under the Due Process Clause.” *Id.* (Internal quotation marks and citations omitted).

## **2. Failure to State a Claim**

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In determining a motion to dismiss, the Court should take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). The Court is not, “however, required to accept the labels and legal conclusions in the complaint as true.” *Id.* (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir.2009)).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal quotations omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft*, 556 U.S. at 678.

## **IV. ARGUMENT**

### **A. The Court Lacks Personal Jurisdiction Over Defendant**

Within the Eleventh Circuit, courts must use a two-step analysis for determining whether it may exercise jurisdiction over non-resident defendants, which includes considering: (i) whether Florida’s long-arm statute, Fla. Sta. § 48.193, provides a basis for jurisdiction; and, if it does, (ii) whether the defendant had sufficient minimum contacts with the State of Florida such that the Fourteenth Amendment’s Due Process Clause is satisfied. *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996); *Bond v. Ivy Tech State Coll.*, 2006 WL 306046, at \*1 (11th Cir. 2006).

The Plaintiff bears the burden of establishing contacts by nonresident defendants sufficient to invoke the jurisdiction of the Court. *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). To satisfy this burden, Plaintiff must put forth evidence and make a prima facie showing of personal jurisdiction. *Id.*; *Meier ex. Rel. Meier v. Sun Int’l Hotels, Ltd.*, 288 F.3d 1264, 1268-69 (11th Cir. 2002). A Plaintiff must “present enough evidence to withstand a motion for directed verdict.” *Meier*, 288 F.3d at 1269. Here, Plaintiff wholly fails to meet this burden as it presents insufficient evidence to show that personal jurisdiction is proper over this Washington defendant.

#### **1. Plaintiff Cannot Satisfy Florida’s Long-Arm Statute**

Florida courts first look to its long-arm statute to determine if jurisdiction is proper. *Cable/Home Commun. Corp. v. Network Productions, Inc.*, 902 F.3d 829, 855 (11th Cir. 1990). In pertinent part, Florida's long-arm statute provides that,

(1)(a) A person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts:

1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.
2. Committing a tortious act within this state.
- ...
6. Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either: a. The defendant was engaged in solicitation or service activities within this state; or b. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

Fla. Stat. § 48.193.

Here, Plaintiff has neither stated a basis for this Court to find that Florida's long arm statute has been satisfied, nor has Plaintiff supplied facts sufficient to support such a basis. Instead, Plaintiff's Amended Complaint merely relies on vague statements that Defendant made during a deposition while unrepresented by counsel. Amended Compl. ¶ 12.

“Under the Florida long-arm statute, a defendant can be subject to either general or specific personal jurisdiction in the state.” *Valle v. 3M Co.*, 647 F. Supp. 3d 1262, 1267 (N.D. Fla. 2022). “To be subject to general personal jurisdiction, the defendant must be engaged in substantial and not isolated activity in the state.” *Id.* (Internal quotations and citations omitted). In contrast, to be subject to specific personal jurisdiction, the plaintiff's cause of action must arise from certain enumerated contacts the within the state. *Id.*, 647 F. Supp 3d at 1268.

General jurisdiction over an individual “is the individual’s domicile.” *See Goodyear Dunlop tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Defendant is domiciled in Washington. As such, there is no general personal jurisdiction over Mr. Johnson in this Court.

Defendant is also not subject to specific personal jurisdiction because Plaintiff’s causes of action do not arise from Defendant’s purported contacts with Florida. Although Plaintiff contends that Defendant allegedly mislead Florida media (*see* Amended Compl. ¶ 15), the Amended Complaint does not plead *any* facts demonstrating that Defendant actively misled Orlando Weekly or Creative Loafing to further his “fake campaign to take credit for Maldonado’s music.” Defendant has never had any contact with Orlando Weekly or Creative Loafing and did not exercise any control over the writing or publishing of their articles which gave him credit for “I Saw A Tiger.” Defendant also was not even aware of the articles’ existence at the

time they were published. Plaintiff cannot be allowed to support its allegations with bare statements and factual conclusions. *See Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006) (explaining that when a party relies “solely on vague and conclusory allegations” in a complaint, such allegations are “insufficient to establish a prima facie case of personal jurisdiction”); *see also Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (noting that “conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.”).

Moreover, Defendant permanently resides in Washington and therefore any other allegedly infringing contact, or alleged breach of the parties’ agreements, would have occurred in Washington, not Florida. Plaintiff has not plead facts sufficient to show that Defendant engaged in any other specific activity in Florida that could have plausibly given rise to Plaintiff’s claims.

**a. Paragraph (1) of Florida’s Long-Arm Statute is Not Satisfied**

As mentioned above, Defendant has not engaged in any business activities in Florida. Plaintiff fails to allege any other business activity aimed at this state that satisfies its burden. As such, paragraph (1) of Florida’s Long Arm Statute does not support jurisdiction over Defendant.

**b. Paragraphs (2) and (6) of Florida’s Long-Arm Statute Do Not Justify an Exercise of Jurisdiction over Defendant**

Plaintiff contends that it is a resident of Florida and was injured by the alleged breaches of contract and copyright infringement. However, Plaintiff does not appear to have been a resident of Florida prior to his incarceration and has not provided any evidence in the Amended Complaint to demonstrate that he was. The only apparent connection Plaintiff has to Florida is by way of its counsel, who is located in Jacksonville, Florida.

Further, Plaintiff has failed to demonstrate that the alleged copyright infringement and breaches of contract would be a tort within Florida. Defendant has been a resident of Washington since 2013 and therefore any tortious acts committed by Defendant would have taken place in Washington, not Florida. And because Plaintiff is not a resident of Florida, any purported breaches of these agreements would not have injured Plaintiff in Florida. In view of the foregoing, it is clear that the conditions of paragraphs (2) and (6) of Florida's long-arm statute have not been satisfied. As such, this Court does not have personal jurisdiction over Defendant.

## **2. Plaintiff Cannot Satisfy Due Process**

Plaintiff cannot sustain its burden to demonstrate that this Court's exercise of jurisdiction would comport with Due Process. Here, Defendant is a resident of Washington, and through his individual actions has not purposefully availed himself of the privilege of conducting activities within this State. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174, 2181-85 (1985). The "purposeful availment"

requirement ensures—and demands—that a defendant not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Id.*, 105 S. Ct. at 2183. Plaintiff has not alleged any sufficient facts to show that Defendant can or should be subject to the personal jurisdiction of this Court. The exercise of personal jurisdiction, given the utter lack of connection to Florida, would certainly offend “traditional notions of fair play and justice” as required by the U.S. Constitution. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). When determining whether Due Process considerations are satisfied, “a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Calder v. Jones*, 465 U.S. 783, 788 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). Here, allegations of a brief exchange after Ms. Baskin reached out to the Defendant is insufficient to show that Defendant directed any activities at Florida.

Thus, Plaintiff has not shown, and cannot show, how an exercise of jurisdiction over Defendant would comport with the Constitutional requirement of sufficient minimum contacts with the State of Florida, such that the Due Process Clause’s traditional notion of fair play and substantial justice are not offended. The Court must dismiss this action for lack of personal jurisdiction.

**B. Owning a Copyright Registration is a Pre-Requisite to Bringing Suit for Copyright Infringement**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff’s claims for copyright infringement under the Copyright Act (Count II) must be dismissed.

“[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 35 U.S.C. § 411. “Before pursuing an infringement claim in court, however, a copyright claimant generally must comply with § 411(a)'s requirement that ‘registration of the copyright claim has been made.’” *Fourth Estate Public Benefit Corp v. Wall-Street.com, LLC*, 139 S.Ct. 881, 887 (2019). Plaintiff does not plead any copyright registration, or any statutory exception, and thus Plaintiff cannot plead a copyright infringement claim. *Id.* (“Therefore, although an owner's rights exist apart from registration, see § 408(a), registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights.”) (Emphasis added). Nor did Plaintiff ever obtain the ownership rights to the Musical Works. As discussed in more detail below, the Transfer Documents are not valid contracts and therefore were not effective in transferring ownership of the Musical Works to Plaintiff. Without ownership rights, Plaintiff cannot bring its claims for copyright infringement nor can Plaintiff even pursue registration for any of the Musical Works.

Even if the Court were to permit a copyright infringement claim, which it can't in light of § 411 and *Fourth Estate*, Plaintiff's claim for statutory damages is also separately due to be dismissed. Because Plaintiff does not own copyright registrations for the Musical Works, it is also barred from seeking statutory damages

under 17 U.S.C. § 504(c). “As a procedural matter, the plaintiff copyright owner must have registered the copyright prior to the infringement in order to obtain statutory damages.” *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990); 17 U.S.C. § 412 (1982). In *Duncanson v. Wathen*, 2016 WL 7319714 (M.D. Fla. Apr. 14, 2016), the Middle District court acknowledged that “a decision about whether to allow a claim for statutory damages and attorney's fees may be resolved at the motion to dismiss phase where it is apparent from the face of the complaint that § 412 would bar such remedies.” *Duncanson*, 2016 WL 7319714, at \*4. Likewise, the Court should find here that it is appropriate to dismiss Plaintiff's claims for statutory damages since it apparent from the face of the Amended Complaint that Plaintiff never obtained a copyright registration for any of the Musical Works.

**C. The Amended Complaint Does Not Allege Sufficient Facts to Establish a Prima Facie Case That Any Valid Contract Was Breached**

Pursuant to Fed.R.Civ.P.12(b)(6), Count XI of the Amended Complaint must also be dismissed as it pertains to the purported breach of the Transfer Documents and the Confidentiality Agreement. Stated simply, neither the Transfer Documents nor the Confidentiality Agreement are agreements enforceable by law. Oklahoma law is clear that contracts, whether written or oral, require: (1) parties capable of contracting, (2) free and mutual consent communicated by each party to the other,

(3) a lawful object, and (4) sufficient cause or consideration. *See Dillard Grp. of Texas, Ltd. v. MER Holding Co., Inc.*, 2021 WL 4487986, at \*4 (W.D. Okla. Sept. 30, 2021); *see also* Okla. Stat. tit. 15, §§ 2. Here, it's clear neither the Transfer Documents nor the Confidentiality Agreement meet each of these basic requirements. Namely, there is no consideration. The documents unfairly favor Plaintiff and call for the transfer of Defendant's rights to the Musical Works without any compensation. Because these documents omit a basic fundamental element that is required of all contracts, they cannot be considered valid and enforceable "agreements."

**1. Transfer Documents**

**a. The Transfer Documents Are Not Valid Contracts**

The language of each Transfer Document makes clear that Oklahoma law controls. *See e.g.*, [Dkt. 39-1] ("This Agreement shall be governed by the laws of the State of Oklahoma, applicable to agreements made and to be wholly performed therein."). Under the laws of Oklahoma, the Transfer Documents do not meet all of the most basic requirements to establish valid and enforceable contracts. In particular, the Transfer Documents make no mention of the consideration that is to be paid to Defendant in exchange for the purported transfer of the rights for each Musical Work. "To be enforceable, a contract must be supported by valid consideration." *Smith v. Verizon Commc'ns, Inc.*, 2005 WL 1907307, at \*3 (W.D.

Okla. Aug. 10, 2005) (citing *Powers Restaurants, Inc. v. Garrison*, 465 P.2d 761, 763 (Okla. 1970)). “Consideration is any benefit conferred, or agreed to be conferred upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor.” *Id.* (Internal quotation marks and citations omitted).

Here, the Transfer Documents make no mention of the consideration to be paid to Defendant in exchange for the transfer of rights to Plaintiff. By omitting such a critical element, the Transfer Documents cannot be considered valid contracts because they are not sufficiently definite to enable a court to ascertain the parties’ intentions with reasonable certainty. *See Vice v. Conoco, Inc.*, 150 F.3d 1286, 1290 (10th Cir. 1998) (“Under Oklahoma law an agreement which is not sufficiently definite to enable a court to ascertain the parties’ intentions with reasonable certainty does not constitute an enforceable contract.”) (Internal quotation marks and citations omitted). As such, Plaintiff’s breach of contract claims must be dismissed since the Transfer Documents are not valid and enforceable contracts.

## **2. Plaintiff Does Not Plead any Confidential Information**

Plaintiff also has not plead facts sufficient to satisfy its burden of establishing a *prima facie* case for breach of contract of the Confidentiality Agreement and has not alleged facts sufficient to put Defendant on notice of what confidential

information was used improperly to cause the purported breach. Instead, the Amended Complaint only alleges the following:

At all times relevant herein, JOHNSON breached the valid and enforceable contractual obligations by, inter alia, engaging in alternate financial agreements wherein he claimed ownership of the subject music; claimed creative rights to the subject music, performed the subject music under alternate agreements; published the subject music under alternate agreements; and sold the subject music under alternate agreements. Each act constitutes a material breach as they are inconsistent with the terms of all five (5) [Transfer Documents] and the Confidentiality Agreement.

Amended Compl. ¶ 162.

These vague and conclusory statements do nothing to demonstrate how Defendant breached any duty of confidentiality it owed to Plaintiff or what confidential information was provided to Defendant. Nor do these statements establish that the Confidentiality Agreement is a valid contract since the Confidentiality Agreement does not define the consideration to be exchanged between the parties. Instead, the Confidentiality Agreement merely states “For GOOD CONSIDERATION, and in consideration of being compensation by Joe Schrelbvogel...,” without providing any further detail as to what consideration was intended. [Dkt. 39-6].

Nonetheless, Plaintiff still cannot plead a breach. In writing, composing, and producing the Musical Works, no information was given to Defendant other than a generic subject for each song. No confidential information, or any substantive

information for the matter such as lyrics, musical arrangements, musical chord progressions, etc., were provided to Defendant. And the plain language of the Confidentiality Agreement does nothing to further identify what specific information is considered “confidential.” Instead, it merely recites general categories of what it considers to be “trade secrets”:

- (a) Technical Information: Methods, processes, formulas, compositions, systems, techniques, inventions, machines, computer programs, research projects, songs, music, scripts, and trade secrets.
- (b) Business Information: Customer lists, pricing data, sources of supply, financial data and marketing, diets, policies, procedures, inspections, complaints, accidents, inventory, production, or merchandising systems or plans.

[Dkt. 39-6] at ¶ 1. As previously mentioned, Plaintiff only provided Defendant with a general subject for each song. Plaintiff did not provide any songs, music, or scripts of its own to Defendant. This is because doing so would have defeated the purpose of Plaintiff needing to engage Defendant. Defendant was engaged for the sole purpose of writing and producing the songs. And Defendant did so *before* the purported Confidentiality Agreement was entered into.

Further, the Confidentiality Agreement is not enforceable because it includes a “liquidated damages clause” that calls for \$1,000,000.00 to be paid by Defendant to Plaintiff for each breach of the Confidentiality Agreement. This \$1,000,000.00 payment obligation is clearly a penalty and is not reasonably tied to any actual damages that could be expected upon a breach of the Confidentiality Agreement. As

explained by the Tenth Circuit, under the laws of Oklahoma, “[i]f the liquidated damages provision constitutes a penalty, the provision will be deemed void even if the damage resulting from a breach would be difficult to ascertain.” *Yale 41 Assocs. Ltd. P'ship v. Five Shopping Ctr. Co.*, 16 F. App'x 921, 922 (10th Cir. 2001). The three criteria used by Oklahoma courts to distinguish a valid liquidated damages clause from a penalty are: “1) the injury caused by the breach must be difficult or impossible to estimate accurately; 2) the parties must intend to provide for damages rather than for a penalty; 3) the sum stipulated must be a reasonable pre-breach estimate of the probable loss.” *Id.* (Citing *Sun Ridge Investors, Ltd. v. Parker*, 956 P.2d 876, 878 (Okla. 1998)). “The burden of demonstrating that damages would be difficult to ascertain and that the liquidated damages provision does not impose a penalty rests on the party seeking to enforce the stipulated damage provision.” *Id.*, 16 F. App'x at 922-23.

Here, Plaintiff clearly intended for the clause to provide for a penalty rather than damages, despite how the clause is framed in the Confidentiality Agreement. “It is well settled that in determining whether a particular clause calls for liquidated damages or for a penalty, the name given to the clause by the parties is but of slight weight, and the controlling elements are the intention of the parties and the special circumstances of the case.” *Id.* (Quoting *Fretwell v. Protection Alarm Co.*, 764 P.2d 149, 152 (Okla.1988)). The circumstances surrounding the parties entering into the

Confidentiality Agreement is that Plaintiff wanted Defendant to write and create songs for Plaintiff's own personal use. It's not clear how \$1,000,000.00 is even remotely proportionate to any expected damages, especially since its highly unlikely the Musical Works have generated streaming revenues anywhere near \$1,000,000.00 given the number of streams and Plaintiff has even acknowledged that it does not expect to substantially profit from the use of the Musical Works.

As such, the "liquidated damages" sum is grossly disproportionate to any actual damages that might have been expected from any individual breach, even if the Confidentiality Agreement were enforceable. The inclusion of the damages penalty renders the Confidentiality Agreement unenforceable. At the very least, the damages penalty itself is unenforceable.

## **V. CONCLUSION**

In view of the foregoing reasons, Defendant respectfully requests this Court enter an Order: (1) dismissing Counts II and XI of the Amended Complaint with prejudice based upon the Court's lack of personal jurisdiction over Defendant and Plaintiff's failure to articulate a claim even after amending its original Complaint; and (2) granting any further relief this Court deems fair and proper.

### **LOCAL RULE 7.1(B) CERTIFICATION**

Pursuant to Local Rule 7.1(B), on November 3, 2023, the undersigned counsel conferred with counsel for Plaintiff on the requested relief, who stated on November 5, 2023, that Plaintiff opposes the relief requested herein.

**LOCAL RULE 7.1(F) AND 5.1(C) CERTIFICATION**

I HEREBY CERTIFY that this Motion complies with the applicable word count requirements of Local Rule 7.1(F) and contains 4,591 words, excluding the parts exempted by L.R. 7.1(F). This word count was calculated using the word-processing system of Microsoft Word.

This Motion also complies with the format requirements of Local Rule 5.1(C) and is double-spaced with 14-point font.

Dated: November 7, 2023

By: /s/ DRAFT

Woodrow H. Pollack  
Florida Bar No. 26802  
Brian J. Paul  
Florida Bar No. 1018684  
**SHUTTS & BOWEN, LLP**  
4301 West Boy Scout Boulevard  
Suite 300  
Tampa, FL 33607  
wpollack@shutts.com  
Telephone: 813-463-4894  
Facsimile: 813-229-8901

*Attorney for Defendant*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 7, 2023 a true and correct copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing.

/s/ DRAFT

Woodrow H. Pollack