

Derringer v F.G.G. Prods. Inc.
2020 NY Slip Op 33854(U)
November 18, 2020
Supreme Court, New York County
Docket Number: 653264/18
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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RICK DERRINGER, RANDY ZEHRINGER, and RONNIE
BRANDON,

Plaintiffs,

DECISION AND ORDER

- v -

Index No. 653264/18

F.G.G. PRODUCTIONS INC., SONY MUSIC HOLDINGS
INC., RICHARD GOTTEHRER, ROBERT FELDMAN, and
GERALD GOLDSTEIN,

MOT SEQ 001,002

Defendants.

-----x

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiffs, Rick Derringer ("Derringer"), Randy Zehringer ("Zehringer"), and Ronnie Brandon ("Brandon"), former members of the musical group "The McCoys," bring this action seeking monetary damages and declaratory relief in connection with their allegations that the defendants FGG Productions, Inc. ("FGG"), and the individuals alleged to be FGG's owners, Richard Gottehrer ("Gottehrer"), Robert Feldman ("Feldman"), and Gerald Goldstein ("Goldstein") (collectively, the "FGG defendants") attempted to steal from the plaintiffs their rights and interests in the sound recordings of The McCoys, including their rights in the successful sound recording "Hang on Sloopy." In their amended complaint, the plaintiffs state claims sounding

in, *inter alia*, rescission, fraud, and violation of the plaintiffs' publicity rights.

The FGG defendants now move to dismiss the amended complaint pursuant to CPLR 3211(a)(5) and (7) (MOT SEQ 001). Defendant Sony Music Entertainment ("Sony"), sued herein as Sony Music Holdings, Inc., also moves to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) (MOT SEQ 002). The plaintiffs oppose the motions. For the reasons discussed herein, the FGG defendants' motion is granted in its entirety and Sony's motion is granted in part.

II. BACKGROUND

A. Factual Background

The following allegations are drawn from the plaintiffs' amended complaint, unless otherwise noted, and are assumed to be true solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

Commencing in the early 1960s, the plaintiffs and Randy Hobbs ("Hobbs") were musicians and vocalists who performed in a musical group called "Rick and the Raiders." In or about late July 1965, at FGG's request, the plaintiffs travelled with

Derringer and Zehringer's parents,¹ Janice and John Zehringer (the "Zehringer Parents") from their home in Indiana to Best Sound Studio in New York City to perform and record the song "My Girl Sloopy." Derringer recorded the guitar portion of My Girl Sloopy shortly after arriving in New York. After a number of days of rehearsal the plaintiffs recorded the vocal portion of the song. Upon completion of the recording of the song, the studio erupted with shouts of "Hit!", "Hit!"

After some discussion among the plaintiffs, Hobbs, and the FGG defendants, the name of the song was changed from "My Girl Sloopy" to "Hang on Sloopy." The name of the plaintiffs' band was changed from "Rick and the Raiders" to "The McCoys" to avoid confusion with an existing musical group called "Paul Revere and the Raiders." At the time the plaintiffs recorded Hang on Sloopy in July 1965, Derringer was 17, Zehringer was 15, and Brandon was 19.

After the plaintiffs recorded Hang on Sloopy, defendant Goldstein asked the plaintiffs and the Zehringer Parents to meet with him at FGG's offices in New York. The meeting took place in early August 1965 at the Brill Building in Manhattan. Goldstein told the plaintiffs and the Zehringer Parents that

¹ Plaintiffs Derringer and Zehringer are brothers. According to the plaintiffs' submissions in opposition to the defendants' motions, Derringer changed his surname from Zehringer to Derringer at some time after the events alleged in the amended complaint.

they needed to sign a recording agreement with FGG so that FGG could release Hang On Sloopy. Goldstein then told the plaintiffs and the Zehringer Parents "that a 'great' lawyer able to represent and advise them was just down the hall." The person Goldstein represented to be a lawyer was Julie Rifkind ("Rifkind"). At the time, Rifkind worked for the record label Bang Records, which was to promote, release, sell and distribute the sound recording of Hang On Sloopy. Bang Records maintained offices in the Brill Building on the same floor as FGG's offices.

Goldstein took the plaintiffs, the Zehringer Parents, and Hobbs to Rifkind's office down the hall. Rifkind, in the presence of the plaintiffs, the Zehringer Parents, and Hobbs, reviewed a document prepared by FGG (the "1965 Document"). Rifkind then "stated words to the effect that [the 1965 Document] was a 'good contract,'" gave it to the Zehringer Parents, and advised them to sign it. The Zehringer Parents signed the 1965 Document on behalf of Derringer and Zehringer. Brandon and Hobbs were not asked to sign the 1965 Document and did not sign it.

Neither the Zehringer Parents nor any of the plaintiffs were given a copy of the 1965 Document. Instead, Rifkind told the plaintiffs and the Zehringer Parents that the 1965 Document should be left in his possession for safekeeping, as he was

their "attorney." The plaintiffs "currently have no knowledge of what the Zehringer Parents signed, or what the [1965] Document set forth, if anything." On June 26, 2018, the plaintiffs learned from the New York State Office of Attorney Registration that Rifkind was never an attorney licensed to practice in New York State.

After Derringer's parents signed the 1965 Document, at FGG's request, the plaintiffs performed and recorded as The McCoys 20 additional songs (together with the sound recording for "Hang on Sloopy," the "recordings"). FGG subsequently assigned by agreement any and all rights it had in and to the recordings to Bang Records. Through a series of purchases, transfers, and corporate and business consolidations, Sony currently owns whatever rights Bang Records held in the recordings.

The plaintiffs allege that the defendants have continuously exploited the recordings since 1965 and have received substantial income therefrom. The plaintiffs have received no payments, statements, or documents, from the defendants concerning the recordings in the 53 years period prior to commencing this action. The plaintiffs never consented to the defendants' use of their names, photographs and likenesses for any commercial purposes in connection with the recordings.

The plaintiffs have made written requests for a copy of the 1965 Document to FGG and Sony, but neither FGG nor Sony has provided any such copy. As described in submissions made by the plaintiffs in opposition to the defendants' motion, on August 24, 2017, counsel for Derringer transmitted a letter to Sony demanding that Sony cease and desist from exploiting the sound recordings. Derringer's cease and desist letter resulted in several phone calls and emails between counsel for Derringer and counsel for Sony. On or about September 26, 2017, Derringer's counsel claims that Sony's counsel disclosed to him on a telephone call that Sony had been paying royalties to FGG for Sony's commercial exploitation of the recording Hang on Sloopy.

On November 21, 2017, counsel for Derringer transmitted a cease and desist letter to FGG. The letter also demanded (i) a copy of any agreement between FGG and the plaintiffs permitting FGG to exploit the recordings and (ii) copies of royalty statements and/or royalty payments that FGG claims they may have made for exploiting the recordings. Mailings made to FGG were returned labeled as "Unable to Forward" and "Return to Sender." New York Department of State records show that FGG was dissolved pursuant to Section 203-A of the Tax Law on June 27, 1979.

As detailed in his affidavit submitted in support of the plaintiffs' opposition, on or about June 2018, the plaintiffs' counsel purchased a compact disc on Amazon.com entitled "The

Best of The McCoys.” The compact disc bore a copyright stamp on its back cover reading, “© 1995 Sony Music Entertainment, Inc.” Subsequently, the plaintiffs’ counsel discovered other commercial exploitations of their names and likenesses. These include other compact discs offered for sale by Amazon.com and the exploitation of the plaintiffs’ names, likenesses and voices on streaming music websites such as Spotify.com. In March 2016, an entity known as SC Entertainment published a video on Youtube.com of Derringer performing Hang on Sloopy. The plaintiffs allege that Sony is collecting the royalties associated with this YouTube video.

B. Procedural Background

On June 28, 2018, Derringer commenced this action, originally captioned Rick Derringer v FGG Productions, Inc., by filing a summons and complaint. FGG answered the complaint on August 8, 2018.

On November 18, 2018, the plaintiffs filed an amended complaint without leave of court. This amendment joined Zehringer and Brandon as plaintiffs in this action, and Gottherer, Feldman, Goldstein, and Sony as defendants. The plaintiffs did not issue a supplemental summons to these new defendants until January 19, 2019. Because the amendment was filed without leave of court more than 20 days after FGG answered the original complaint, (see CPLR 3025), the amendment

was procedurally improper. However, none of the defendants have rejected or otherwise objected to the untimely amendment filed without leave of court. Instead, they elected to treat the amendment as the operative pleading in the case and moved to dismiss the amended complaint. Accordingly, the court deems any procedural objections that the defendants may have had to the filing of the amended complaint as waived. See Nassau County v Inc. Vill. of Roslyn, 182 AD2d 678 (2nd Dept. 1992).

The amended complaint asserts nine causes of action. The first cause of action seeks rescission of the 1965 Document as against all defendants based on the fraudulent misrepresentation that Rifkind was an attorney representing the plaintiffs and the Zehringer Parents. The second cause of action asserts a claim of fraud against the FGG defendants only for the same alleged conduct. Assuming, without admitting, that the 1965 Document was a contract, the plaintiffs' third cause of action as against all defendants seeks to rescind such contract for "failure of consideration" and breach. The fourth cause of action as against all defendants seeks a judicial declaration that the plaintiffs are the owners of the copyrights for all of the recordings. The fifth cause of action as against all defendants seeks an accounting of all the monies received by the defendants from the exploitation of the recordings. The sixth, seventh, eighth and ninth causes of action include claims that all of the

defendants violated the plaintiffs' rights of publicity by exploiting the plaintiffs' names, photographs, and likenesses without their consent for commercial and/or advertising purposes.

The defendants now move to dismiss the amended complaint in its entirety.

III. LEGAL STANDARD

A. CPLR 3211(a) (5)

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired." Benn v Benn, 82 AD3d 548, 548 (1st Dept. 2011) (quoting Island ADC, Inc. v Baldassano Architectural Group, P.C., 49 AD3d 815, 816 [2nd Dept. 2008]); see also Gravel v Cicola, 297 AD2d 620 (2nd Dept. 2002). "The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or whether the action was actually commenced within the period propounded by the defendant." QK Healthcare, Inc. v InSource, Inc., 108 AD3d 56, 65 (2nd Dept. 2013); see MTGLQ Investor, LP v Wozencraft, 172 AD3d 644 (1st Dept. 2019); Epiphany Community Nursery School v Levey, 171 AD3d 1 (1st Dept.

2019); J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652 (2nd Dept. 2014). The plaintiff's submissions in response to the motion "must be given their most favorable intendment." Benn v Benn, supra at 548 (quoting Arrington v New York Times Co., 55 NY2d 433, 442 [1982]).

B. CPLR 3211(a)(7)

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

IV. DISCUSSION

The FGG defendants and Sony move separately to dismiss all claims against them pursuant to CPLR 3211(a)(5) and 3211(a)(7). The defendants argue principally that the plaintiffs are barred from bringing this lawsuit by the expiration of the statutes of limitations governing their claims. The defendants further contend that, even if the plaintiffs' claims were not time-barred, they fail to state causes of action as a matter of law. The Court addresses each cause of action in turn.

A. First and Second Causes of Action

The plaintiffs' first and second causes of action sound in misrepresentation-based rescission and fraud. CPLR 213(8) provides that the applicable statute of limitations for fraud-based claims, including misrepresentation, is six years from the commission of the fraud or two years from when the plaintiff discovered or should have discovered the fraud with reasonable diligence, whichever is later. See CSAM Capital, Inc. v Lauder, 67 AD3d 149 (1st Dept. 2009); Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175 (1st Dept. 1998). Thus, to adequately defeat a motion to dismiss under CPLR 3211(a)(5), the plaintiffs must show that they could not have discovered any fraud or misrepresentation with reasonable diligence prior to June 28, 2016, two years before they commenced this action.

"The test as to when fraud should with reasonable diligence have been discovered is an objective one." Gutkin v Siegal, 85 AD3d 687, 688 (1st Dept. 2011). "[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'" Id. (quoting Higgins v Crouse, 147 NY 411, 416 [1895]); see Epiphany Community Nursery School v Levey, supra; Aozora

Bank, Ltd. v Credit Suisse Group, 144 AD3d 437 (1st Dept. 2016).

The question of whether a plaintiff had inquiry notice of fraud is appropriate for determination on a motion to dismiss only if it conclusively appears on the face of the complaint that a plaintiff had knowledge of facts from which the alleged fraud might be reasonably inferred. See Epiphany Community Nursery School v Levey, supra; Weisl v Polaris Holding Co., 226 AD2d 286 (1st Dept. 1996).

Even viewing the facts most favorably to the plaintiffs, the Court concludes that the plaintiffs had inquiry notice of the defendants' alleged fraud sufficient to trigger the statute of limitations in CPLR 213(8) long before June 28, 2016. Several facts alleged in the amended complaint would have raised clear red flags to a reasonable person in the plaintiffs' position. The plaintiffs and the Zehringer parents knew as early as 1965 that their "attorney," whom they met with once and apparently have never communicated with again, was recommended by FGG, their contractually adverse party, and worked for the company that would distribute the plaintiffs' recordings. More significantly, the plaintiffs allege that they have received no payment for the exploitation of the recordings since 1965, in spite of Rifkind's representations to them that they were signing a "good contract."

The Court is not unsympathetic to the fact that at the time of the events central to this action, the plaintiffs were aged 15, 17, and 19, respectively. The plaintiffs presumably had little experience in the music industry, in contrast to Goldstein and the other FGG executives with whom the plaintiffs did business. Based on the allegations that have been made, the plaintiffs were exploited by more powerful music industry figures, who reaped financial benefits from the plaintiffs' creative talents without providing the plaintiffs with any monetary compensation.

However, the plaintiffs did not remain unsophisticated teenage musicians over the five decades that have elapsed since the exploitation allegedly began. Indeed, according to the amended complaint, Derringer has since "had a long and distinguished musical career which continues to the present day." He is a "renowned guitarist, songwriter, music producer, vocalist and entertainer," has received two Grammy awards for his work, and has performed on 20 albums that achieved Gold or Platinum sales status. Even if the circumstances immediately surrounding the execution of the 1965 Document were not independently sufficient to put the plaintiffs on notice of any alleged fraud, over 50 consecutive years of unpaid payments and unspent statements should have prompted someone of Derringer's sophistication to look further into the matter. Nonetheless,

the plaintiffs failed even to inquire about obtaining a copy of the 1965 Document until 2017.

The plaintiffs address this issue in their opposition by claiming that lack of payment would have merely put them on notice of a breach of contract, rather than fraud or misrepresentation. However, the plaintiffs' argument is belied by the fact that the crux of their fraud-based claims, and the primary motivation for the plaintiffs' commencing this action, is their assertion that they are entitled to some payment or accounting for the exploitation of the recordings beginning in 1965. Indeed, the principal damages arising from the defendants' alleged fraud and misrepresentation derive from the defendants' "steal[ing] from Plaintiffs their rights and interests" in the recordings. Put differently, the plaintiffs point to lack of payment as evidence that they were defrauded. Their contention that the same lack of payment could not or should not have put them on notice of fraud is inconsistent.

The plaintiffs do not otherwise explain why none of them, now in or nearing their seventies, questioned or inquired as to why they never received payments for recording Hang on Sloopy after it successfully climbed the pop charts. Nor do they proffer any reason why they failed to make any such inquiries after they recorded 20 additional songs for FGG, which launched

their music career and have been released on numerous albums since.

The facts of this case are similar to those in Baiul v William Morris Agency, LLC, 2014 WL 1804526 (S.D.N.Y. May 6, 2014). In Baiul, the federal court dismissed Olympic medalist Oksana Baiul's fraud claims pursuant to CPLR 213(8). Baiul alleged that as a 16-year-old Ukrainian-born figure skater, she was fraudulently induced into signing numerous contracts in English, a language she did not fully understand, in connection with various performances and undertakings. Baiul stated that she failed to receive any compensation for certain undertakings and was deprived of millions of dollars in royalties for her performances. Describing the plaintiff's claims as "plainly time barred," "frivolous," and raising "serious issues" as to whether the plaintiff should be sanctioned under Fed. R. Civ. P. 11 for commencing the action, the court dismissed Baiul's fraudulent inducement and other related claims. The court reasoned that even in the face of Baiul's age and language barrier, Baiul's silence for 12 years in the face of the defendant's failure to pay her for the numerous performances she claimed entitled her to significant compensation was fatal to her claims. In short, nonpayment was deemed sufficient to put Baiul on inquiry notice of any potential fraud.

For similar reasons, the Court concludes that the defendants' exploitation of the recordings beginning in 1965 without any attribution or compensation to the plaintiffs put the plaintiffs on inquiry notice of the defendants' alleged fraud and misrepresentations. See Cusimano v Shurr, 137 AD2d 527 (1st Dept. 2016) (plaintiffs were on inquiry notice of fraud when defendants did not pay them in accordance with alleged obligations to do so); Stern v Barney, 129 AD3d 619 (1st Dept. 2015) (plaintiffs were on inquiry notice of investment firm's alleged fraud that took place 10 years prior where they either received monthly account statements, or, if no such statements were received, failed to inquire); Prestandrea v Stein, 262 AD2d 621 (2nd Dept. 1999) (the six-year limitation period is not tolled if a plaintiff has a reasonable basis to suspect wrong and fails to exercise due diligence to investigate the matter). Moreover, given the ease with which the plaintiffs obtained such information over 50 years later, the Court finds that reasonable diligence would have revealed to the plaintiffs that Rifkind was not an attorney.

In reaching its conclusion, the Court is mindful of the policy considerations underlying statutes of limitations. The Court of Appeals has "emphasized that the primary purpose of a limitations period is fairness to a defendant." Duffy v Horton Memorial Hosp., 66 NY2d 473, 476 (1985) (citation omitted); see

Ajdler v Province of Mendoza, 33 NY3d 120 (2019). A defendant should “be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the “evidence has been lost, memories have faded, and witnesses have disappeared.””

Flanagan v Mount Eden Gen. Hosp., 66 NY2d 473, 476 (1985) (quoting Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185); see Ajdler v Province of Mendoza, supra at 130 n.6 (citing with approval Flanagan v Mount Eden Gen. Hosp., supra). The Court of Appeals has also pointed to the “societal interest or public policy of giving repose to human affairs” as a justification for the enforcement of statutes of limitations. ACE Sec. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 593 (2015) (quotation omitted); see Deutsche Bank Nat. Trust Co. v Flagstar Capital Markets Corp., 143 AD3d 15, 19 (1st Dept. 2016).

There can be little dispute that the policy considerations described by the Court of Appeals justify the application of the statute of limitations to bar the plaintiffs’ fraud-based claims in this action. Over 50 years has passed since the events at the center of the plaintiffs’ claims transpired. Key witnesses to the events, including Rifkind and Hobbs, have passed away. Those witnesses that are still alive may understandably be unable to recall specific details about events that took place

half a century ago with a high degree of accuracy. Even the 1965 Document is shrouded in mystery; the plaintiffs have no idea what it contained and no party has been able to produce a copy of it. In sum, the plaintiffs' fraud-based claims raise precisely the sort of concerns against which statutes of limitations are meant to protect.

For all of the foregoing reasons, the first and second causes of action of the amended complaint must be dismissed in their entirety as time-barred pursuant to CPLR 3211(a)(5). The Court does not reach the parties' arguments as to the sufficiency of these causes of action pursuant to CPLR 3211(a)(7).

B. Third Cause of Action

The third cause of action presumes that the 1965 Document was a contract that was materially breached because the defendants failed to pay the plaintiffs any royalties or provide any accountings for 50 years. The plaintiffs concede they do not know what the 1965 Document provided, which is very likely fatal to any breach of contract-related claim they seek to bring. Nonetheless, even assuming for the moment that the 1965 Document entitled the plaintiffs to some type of performance, the third cause of action is governed by the six-year statute of limitations applicable to rescission claims in CPLR 213(1) and

is therefore time-barred. See Bowes & Co. v Am. Druggists' Ins. Co., 96 AD2d 1023 (1st Dept. 1983).

The plaintiffs argue that their rescission claim is not time-barred because it can only accrue after a "consistent and prolonged period of nonperformance." Since, according to the plaintiffs, the defendants' failure to pay continued unabated for 50 years, the third cause of action plainly accrued prior to 2012 by any reasonable metric, even if did not accrue in 1965.

Moreover, New York does not apply a "discovery" rule to statutes of limitations in contract actions. See ACE Sec. Corp. v DB Structured Prods., Inc., supra. Rather, the "statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." Id. at 721 (internal quotation marks omitted) (citation omitted). The plaintiffs' claim sounding in breach of contract-based rescission thus accrued when the defendants first failed to perform their obligations under the 1965 Agreement, and not when the plaintiffs discovered the breach. In any event, it is clear that the plaintiffs knew of the breach well before they commenced this action. Hypothesizing that the 1965 Agreement required the defendants to provide the plaintiffs with payments and accountings, the plaintiffs state that the defendants'

nonperformance first took place in 1965, and has continued for over a half-century since.

For the foregoing reasons, the plaintiffs' third cause of action accrued in or about 1965 and must be dismissed as untimely pursuant to CPLR 3211(a)(5). The Court does not reach the parties' arguments as to the sufficiency of the third cause of action pursuant to CPLR 3211(a)(7).

C. Fourth Cause of Action

The fourth cause of action seeks a judicial declaration that the plaintiffs are the owners of the copyright of the recordings under New York common law. The defendants correctly argue that this cause of action is governed by the residual six-year statute of limitations for claims for which no limitation is specifically prescribed by law, as set forth in CPLR 213(1). See Town of Huntington v Cty. of Suffolk, 79 AD3d 207, 215 (2nd Dept. 2010); Solnick v Whalen, 49 NY2d 224 (1980); Underground Utilities, Inc. v Comptroller of City of New York, 170 AD3d 481 (1st Dept. 2019).

"Generally, a cause of action accrues, thereby triggering the statute of limitations, 'when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief.'" Kainer v Christie's Inc., 141 AD3d 442, 443 (1st Dept. 2016) (quoting Gaidon v Guardian Life Ins. Co. of Am., 96 NY2d 201,

210 [2001])). A cause of action for declaratory relief accrues “when there is a bona fide, justiciable controversy between the parties.” Westhampton Beach Assoc., LLC v Incorporated Vil. of Westhampton Beach, 151 AD3d 793, 796 (2nd Dept. 2017) (quoting Zwarycz v Marnia Constr., Inc., 102 AD3d 774, 776 2nd Dept. 2013)]; see Touro Coll. v Novus Univ. Corp., 146 AD3d 679 (1st Dept. 2017); CPLR 3001. “To constitute a ‘justiciable controversy,’ there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect.” Chanos v MADAC, LLC, 74 AD3d 1007, 1008 (2nd Dept. 2010); see Touro Coll. v Novus Univ. Corp., supra.

The plaintiffs claim that FGG began wrongfully asserting copyright interests in and profiting off of the recordings in 1965. To the extent the plaintiffs aver that the FGG defendants wrongfully held themselves out as owners of the recordings when no transfer of copyright interests had occurred, the plaintiffs’ claim accrued in 1965, or several years thereafter when each plaintiff attained the age of majority, at the latest, and is time-barred. See Merchant v Levy, 92 F3d 51 (2d Cir. 1996).

It is less clear from the amended complaint when Sony began exploiting the copyright in the recordings. However, the plaintiffs included in their submissions in opposition to the defendants’ motions a copy of the back cover of a compact disc

jacket entitled "The Best of the McCoys," which includes the notation "© 1995 Sony Music Entertainment Inc." Based on this notation, Sony has held itself out as the owner of the copyright now claimed by the plaintiffs since at least 1995, more than 20 years before the plaintiffs commenced this action. Since the plaintiffs had knowledge that the recordings were being exploited and that they were receiving no compensation consistent with their claim to copyright in the recordings, the plaintiffs' copyright ownership against Sony is time-barred.

Alternatively, to the extent the plaintiffs argue that the 1965 Document assigned their copyright to FGG, their declaratory judgment claim is based on their direct challenges to the enforceability of the 1965 Document, which the Court has already determined must be dismissed as time-barred. To summarize, the plaintiffs' argument that their fraud allegations tolled the statute of limitations beyond 2012 is unavailing, as is their argument that they are entitled to rescission of the 1965 Document due to the defendants' nonperformance. With diligence, the plaintiffs could and should have discovered the alleged fraud well before June 28, 2012. Moreover, claims derived from the plaintiffs' breach of contract allegations accrued upon the initial breach, and not 50 years thereafter.

The plaintiffs attempt in their opposition papers to save their fourth cause of action by casting it as one for replevin

of stolen chattel, which they argue would be timely because it did not accrue until demand was made for the property's return. This argument is unconvincing. The plain language of the amended complaint establishes that the plaintiffs seek a declaration that they own the copyrights to the recordings. This is readily distinguishable from seeking a return of stolen goods. See Solomon R. Guggenheim Foundation v Lubell, 77 NY2d 311 (1991) (claim for replevin to recover stolen work of art accrued upon demand for its return).

For the foregoing reasons, the plaintiffs' fourth cause of action must be dismissed as untimely. While there does appear to be a good faith dispute as to ownership of the copyright to the recordings, the plaintiffs have proffered no sound basis for failing to look into the matter over the 50 years when other parties were openly claiming the copyright and reaping all of the financial benefits the plaintiffs now claim are due to them. Dismissal serves the additional purpose of furthering the important policy goals behind statutes of limitations, discussed above, and "promotes the principles of repose integral to a properly functioning copyright market." Merchant v Levy, supra at 57.

Having disposed of the fourth cause of action in this manner, the Court need reach the parties' arguments as to its legal sufficiency pursuant to CPLR 3211(a)(7).

D. Fifth Cause of Action

The plaintiffs' fifth cause of action for an accounting is governed by a six-year limitations period. See CPLR 213(1). An accounting claim typically requires a fiduciary relationship between a plaintiff and a defendant and accrues when there is an open repudiation of the fiduciary's obligation or a judicial settlement of the fiduciary's account. See Knobel v Shaw, 90 AD3d 493 (1st Dept. 2011); Evangelista v Mattone, 44 AD3d 704 (2nd Dept. 2007). Alternatively, an accounting may be available under New York law when other special circumstances warrant equitable relief. See Morgulas v J. Yudell Realty, Inc., 161 AD2d 211 (1st Dept. 1990).

Assuming, without deciding, that the plaintiffs have sufficiently pleaded circumstances warranting relief – namely, the defendants' alleged misappropriation of the plaintiffs' copyrights and profits – the plaintiffs' accounting claim accrued more than six years before this action was commenced and is subject to dismissal on that ground. Accepting the allegations of the amended complaint as true, the defendants began openly exploiting the copyrights to the recordings and withholding payments and account statements from the plaintiffs

in 1965. The plaintiffs fail to show they were unaware that the defendants were marketing their records without paying them.

The plaintiffs contend that they are nonetheless entitled to an accounting for the six years prior to the commencement of this action under the continuing wrong doctrine. The continuing wrong doctrine "is an exception to the general rule that the statute of limitations "'runs from the rime of the breach though no damage occurs until later.'" Henry v Bank of America, 147 AD3d 599, 601 (1st Dept. 2017). "The doctrine 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs.'" Id. (quoting (Doukas v Ballard, 39 Misc 3d 1227(A) [Sup. Ct., New York County 2013])).

The plaintiffs argue that each failure to account and pay the plaintiffs upon the defendants' receipt of income derived from exploitation of the recordings is a separate, compensable wrong. Therefore, the plaintiffs argue, their accounting claim is rendered timely under the continuing wrong doctrine.

The Court disagrees. Taking the plaintiffs' factual allegations as true, the wrong that led to their economic damages was defendants' misappropriation of their copyright. The plaintiffs theorize that this occurred either when the copyright was fraudulently transferred in 1965, or shortly

thereafter when FGG began holding itself out as the owner of the copyright even though no transfer had occurred. Alternatively, the wrong that led to the plaintiffs' damages was the defendants' breach of the 1965 Document, which the plaintiffs speculate entitled them to profits. This breach, too, occurred many years prior to June 28, 2012.

The Court further notes that in arguing for the applicability of the continuing wrong doctrine, the plaintiffs appear to be conflating their accounting claim with a copyright infringement claim. Copyright infringement claims typically accrue on the date of infringement, such that each exploitation of a copyright may give rise to a new cause of action. See Capitol Records, Inc. v Naxos of Am., Inc., 4 NY3d 540 (2005). However, the plaintiffs have declined to bring a copyright infringement claim here, perhaps because there remains a disputed question of copyright ownership. Cf. Kwan v Schlein, 634 F3d 224 (2d Cir. 2011) (applying federal copyright law (where plaintiff's copyright ownership is not conceded, copyright ownership, and not infringement, is the gravamen of plaintiff's claim to which statute of limitations applies)).

In sum, the harms which may form the basis of the plaintiffs' accounting claim occurred well beyond the statutory period. The continuing wrong doctrine is inapplicable. The plaintiffs may not save their time-barred claims alleging fraud

and breach of contract by recasting them as an accounting claim. Nor may they save their accounting claim by recasting it as a copyright infringement claim.

For the foregoing reasons, the fifth cause of action is dismissed as time-barred. The Court does not reach the parties' remaining arguments as to this cause of action.

E. Sixth Cause of Action

The sixth through ninth causes of action seek injunctive relief and monetary damages arising from the defendants' alleged violation of the plaintiffs' rights of publicity. In the sixth cause of action, Derringer, a Florida resident, states a claim sounding in violation of his right of publicity under Florida common law and Florida Statute ("Fla. Stat.") § 540.08. The defendants argue that the sixth cause of action is subject to dismissal as untimely and insufficient as a matter of law.

As a preliminary matter, the Court notes that under Florida law, the elements of common law commercial misappropriation of likeness coincide with the elements of unauthorized publication of name or likeness in violation of Fla. Stat. § 540.08. See Almeida v Amazon.com, Inc., 456 F3d 1316, 1320 n 1 (11th Cir. 2006) (the elements establishing both common law and statutory claims for misappropriation "are substantially identical"). Accordingly, the Court's analysis herein is equally applicable

to the plaintiffs' statutory and common law claims.

i. Timeliness

Claims under Fla. Stat. § 540.08 are governed by a four-year statute of limitations, which accrues upon the first unauthorized use of a plaintiff's name and likeness. See Putnam Berkley Grp., Inc. v Dinin, 734 So 2d 532, 533-36 (Fla. App. Ct. 4th Dist. 1999); see also Fla. Stat. § 770.07 ("The cause of action for damages founded upon a single publication or exhibition or utterance ... shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state."). Stated differently, Florida "applies the 'single publication rule' in misappropriation cases brought under Fla. Stat. § 540.08." Miller v Anheuser Busch, Inc., 348 Fed Appx 547, 550 (11th Cir. 2009).

However, as the plaintiffs correctly argue, a new claim accrues for purposes of the limitations period with each new publication that prints, displays or otherwise publicly uses Derringer's photograph, or his likeness, without his consent. See Musto v Bell South Telecommunications, 748 So 2d 296 (Fla. App. Ct. 4th Dist. 1999); see also Epic Metals Corp. v CONDEC, Inc., 867 F Supp 1009 (M.D. Fla. 1994). Thus, the statute of limitations period begins to run anew with each re-publication or dissemination of Derringer's image and name. See Lorentz v

Sunshine Health Prods, 2010 WL 3733986 (S.D. Fla. Aug. 27, 2010) (applying Florida law).

The YouTube video cited by the plaintiffs, entitled "Rick Derringer - Hang on Sloopy," which depicts Derringer's likeness and exploits his voice, was allegedly published in 2016 by "SC Entertainment Inc." The plaintiffs state that Sony receives income from the video. The plaintiffs further refer to items listed for sale on Amazon.com in 2019 that include Derringer and the other band members' names and likenesses, a Spotify.com webpage including Derringer's name, and a compact disc with liner notes purchased in 2018 indicating that Sony claims the copyright to the sound recordings on the disc, including Hang on Sloopy. At this early stage in the proceedings, the plaintiffs' submissions adequately support their claim that Sony made publications and disseminations including Derringer's name and likeness without permission within the statutory period. However, the plaintiffs have not identified any violation of Derringer's right of publicity by the FGG defendants within the statutory period.

Construing the facts in the light most favorable to the plaintiffs, the Court concludes that Derringer has stated a claim falling within the statutory limitations period set forth by Fla. Stat. § 540.08 as against Sony, but not the FGG defendants. Therefore, Sony's motion to dismiss the sixth cause

of action under CPLR 3211(a)(5) is denied and the FGG defendants' motion for the same relief is granted.

ii. Legal Sufficiency

Sony argues that even if the sixth cause of action is not time-barred, the plaintiffs fail to state a claim for violation of Derringer's right to publicity under Florida law.

Fla. Stat. § 540.08 provides in relevant part that "[n]o person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use" given by that person or another authorized in writing to license the commercial use of his likeness. Fla. Stat. § 540.08. Here, the plaintiffs aver that the "[d]efendants have used Derringer's name, photograph and likeness for the purposes of trade and for commercial and advertising purposes in connection with the exploitation of the [recordings], including the distribution and sale of copies of the [recordings] without his consent." The plaintiffs have further offered as evidence the YouTube video, Amazon.com and Spotify.com webpage printouts, and compact disc with liner notes described above.

Sony contends that the plaintiffs' allegations, taken as true, do not show that Derringer's name and likeness were used for "commercial or advertising purpose" within the meaning of

the Florida statute. The Florida Supreme Court has observed that "the purpose of section 540.08 is to prevent the use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with something else." Tyne v Time Warner Entertainment, 901 So 2d 802, 808 (Fla. 2005) (citing Loft v Fuller, 408 So 2d 619, 622 [Fla. App. Ct. 4th Dist. 1981]); see also Lane v M.R.A. Holdings, LLC, 242 F Supp 2d 1205 (M.D. Fla. 2002). Therefore, the use of another's identity in motion pictures and similar expressive works that do not "directly promote a product or service" does not ordinarily have a "commercial purpose" even though such works are sold for profit. Tyne v Time Warner Entertainment, supra at 810; see Almeida v Amazon.com, Inc., supra. The use of another's identity in an expressive work constitutes a violation of Florida law only where "the name or likeness is used solely to attract attention to a work that is not related to the identified person." Tyne v Time Warner Entertainment, supra at 807 (internal quotation marks omitted) (citations omitted).

In accordance with the foregoing, courts applying Florida law have typically dismissed claims brought pursuant to Fla. Stat. § 540.08 where the plaintiff claimed only that his or her image or likeness was used in a movie, television show, or book, or in advertising incident to such works. For example, in Lane,

the federal district court dismissed the claims of a plaintiff whose image was used in the video "Girls Gone Wild" and on the cover of the "Girls Gone Wild" DVD, holding "that while [the plaintiff's] image and likeness were used to sell copies of Girls Gone Wild, her image and likeness were never associated with a product or service unrelated to that work." Lane v M.R.A. Holdings, LLC, supra at 1210, 1213. see also, e.g., Fuentes v Mega Media Holdings, Inc., 721 F Supp 2d 1255 (S.D. Fla. 2010) (dismissing § 540.08 claims where sole allegation was that plaintiff's likeness was used during a television broadcast and clips of the broadcast were posted online); Spilfogel v Fox Broad. Co., 2009 WL 10666811 (S.D. Fla. Dec. 2, 2009) (dismissing § 540.08 claims where plaintiff who appeared in COPS episode did not plead "that her image or likeness was used to promote a product or service other than the expressive work (the particular episode or the COPS program in general) in which she appeared"). Similarly, in Almeida v Amazon.com, Inc., supra at 1326, the Eleventh Circuit ruled that an internet retailer's display of a book cover containing a photograph of the plaintiff when she was ten years old and a quote from the plaintiff regarding the photographer was "incidental to, and customary for, the business of internet book sales" and was not actionable under Fla. Stat. § 540.08.

The plaintiffs argue that the Court should construe the holding in Tyne and related cases narrowly to cover only appropriations of an individual's image and name that occur on film or in books. Relatedly, the plaintiffs claim that Tyne would be applicable only if Derringer's name were used in the lyrics of the recordings. The plaintiffs have offered no authority supporting such bright-line rules. However, the Court agrees that there are important differences between the facts of the Florida cases invoked by Sony and the facts alleged in this action.

The Florida cases all involved appropriations of an individual's likeness within, or in connection with the marketing of, original, expressive works authored by another party. See Tyne v Time Warner Entertainment, supra (movie depicting individuals killed in fishing vessel during storm); Almeida v Amazon.com, Inc., supra (photograph of plaintiff taken by fashion photographer used on cover of the photographer's book); Lane v M.R.A. Holdings, LLC, supra (images of plaintiff used in the film "Girls Gone Wild"); Fuentes v Mega Media Holdings, Inc., supra (plaintiff's likeness used during a television broadcast); Spilfogel v Fox Broad. Co., supra (images of plaintiff used in COPS television show). It is well-settled that these sorts of expressive works enjoy greater protections under the First Amendment and are typically classified as non-

commercial for purposes of First Amendment jurisprudence. See Tyne v Time Warner Entertainment, supra; Foster v Svenson, 128 AD3d 150 (1st Dept. 2015).

Here, in contrast, the plaintiffs allege that their likenesses were used to market their own performances, embodied in the recordings without modification, without the plaintiffs' permission. The First Amendment does not preclude an award of damages to a performer for violation of the right of publicity where a defendant broadcasts a performer's entire act without permission in this manner. Zacchini v Scripps-Howard Broadcasting Co., 433 US 562 (1977); see also Harper & Row, Publishers, Inc. v Nation Enters., 471 US 539, 557 (1985) ("The fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression ... "); Hilton v Hallmark Cards, 599 F3d 894, 910 (9th Cir. 2010) ("merely merchandising a celebrity's image without that person's consent, the prevention of which is the core of the right of publicity," is not protected by the First Amendment). While the plaintiffs' performances themselves could undoubtedly be described as creative works, the packaging and marketing of the performances for profit in formats such as compact discs and electronic media, using the plaintiffs' names

and likenesses to promote sales, does not constitute protected speech under the First Amendment.

The constitutional considerations motivating the Florida Supreme Court's decision in Tyne to exempt a film from coverage under Fla. Stat. § 540.08 are therefore not present here. Instead, unlike in Tyne and related cases, the use of Derringer's image and name on such items as a CD cover directly promotes Sony's product and serves a "commercial purpose." See Gritzke v M.R.A. Holding, LLC, 2002 WL 32107540 (N.D. Fla. Mar. 15, 2002); cf. Rostropovich v Koch Int'l Corp., 1995 WL 104123 (S.D.N.Y. Mar. 7, 1995) (applying similar New York right of publicity law in case where plaintiff musician claimed defendant misappropriated likeness on CD covers containing his performances). Accordingly, the Court concludes that Sony's use of Derringer's likeness and name, as described by the plaintiffs, does fall within the ambit of Fla. Stat. § 540.08

The Court's conclusion is bolstered by an additional consideration. Fla. Stat. § 540.08(4)(b) contains an explicit carveout excepting from liability uses of an individual's name and likeness "in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or

distribution thereof.” The parties dispute whether the plaintiffs consented to the use of their names and likenesses in connection with the initial sale and distribution of the recordings. Nonetheless, it seems clear that this exception is meant to cover precisely the sort of resale and distribution of an artist’s work at issue in this case. Finding that such activities are in fact not commercial within the meaning of the statute would render Fla. Stat. § 540.08(4)(b) superfluous.

In light of the foregoing, the Court finds that the use of Derringer’s name and likeness in connection with Sony’s marketing of the recordings within the statutory period falls within the scope of Fla. Stat. § 540.08. Accordingly, the Court declines to dismiss the plaintiffs’ sixth cause of action as against Sony at this juncture.

F. Seventh and Eighth Causes of Action

In the seventh and eighth causes of action, Brandon, an Indiana resident, states claims sounding in violation of his publicity rights under Indiana Code (“Ind. Code”) § 32-36-1-0.2 *et seq.* (seventh) and Indiana common law (eighth). The defendants argue that the seventh and eighth causes of action are subject to dismissal as untimely and insufficient as a

matter of law.

i. Timeliness

Claims sounding in violation of an individual's publicity rights under Indiana law are subject to a two-year statute of limitations. Ind. Code § 34-11-2-4. Thus, Brandon's claims against the defendants are time-barred to the extent they accrued prior to June 28, 2016. However, as described above, the plaintiffs have introduced evidence indicating that Sony has used images of Brandon and the other members of The McCoy's to sell the recordings as recently as 2019. Accordingly, the seventh and eighth causes of action survive Sony's challenge pursuant to CPLR 3211(a)(5). Since the plaintiffs do not make any concrete allegation that the FGG defendants misappropriated Brandon's image within the statutory period, the FGG's motion to dismiss the seventh and eighth causes of action pursuant to CPLR 3211(a)(5) is granted.

ii. Legal Sufficiency

Ind. Code § 32-36-1-8(a) provides that a "person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person specified in section 17 of this chapter." Ind. Code § 32-36-1-8(a). The statute defines a person's right of publicity as "a

personality's property interest in the personality's: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms." Ind. Code § 32-36-1-7. "Commercial purpose" is broadly defined as use of an aspect of a personality's right of publicity "[o]n or in connection with a product, merchandise, goods, services, or commercial activities," "[f]or advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities," or "[f]or the purpose of fundraising." Ind. Code § 32-36-1-2. Ind. Code § 32-36-1-1(c)(2)(B) specifically exempts from the statute's coverage "[t]he use of a personality's name to truthfully identify the personality as the performer of a recorded performance under circumstances in which the written work or recorded performance is otherwise rightfully reproduced, exhibited, or broadcast."

The plaintiffs aver that Sony appropriated Brandon's name and likeness in connection with their sale of the recordings, satisfying the elements of the statute. While Sony argues that the seventh cause of action nonetheless falls into the exemption carved out by Ind. Code § 32-36-1-1(c)(2)(B), the plaintiffs dispute that the recordings at issue were "rightfully reproduced, exhibited, or broadcast." Specifically, the plaintiffs claim that the recordings were reproduced in

violation of their exclusive copyright. The plaintiffs face an uphill battle in establishing that Sony does not hold the copyright to the recordings given that the plaintiffs' primary challenges to Sony's copyright are time-barred. However, Sony has not introduced documentary evidence establishing that there is no factual dispute as to its ownership of the copyright in the two years preceding the commencement of this action.

Taking the plaintiffs' allegations as true, as the Court must at this juncture, Brandon has stated a claim sounding in violation of his statutory right of publicity based on Sony's publications within the statutory period. Moreover, as the Court has explained, the First Amendment does not bar Brandon's claim. The seventh cause of action survives.

Turning to the eighth cause of action, the Indiana Court of Appeals has defined the tort of invasion of privacy as including "[t]he unwarranted appropriation or exploitation of one's personality." Continental Optical Co. v Reed, 96 NE2d 306, 308 (Ind. Ct. App. 1949) (quoting Annotation, Right of Privacy, 138, ALR 22, 25 [1942]); see Felsher v Univ. of Evansville, 755 NE2d 589 (Ind. 2001). "The tort invasion of privacy by appropriation of name or likeness is implicated when an individual uses the plaintiff's name or likeness for his own benefit." Warren v State, 120 NE3d 285, 290 (Ind. Ct. App. 2019) (citing Westminster Presbyterian Church of Muncie v Yonghong Cheng, 992

NE2d 859, 869 [Ind. Ct. App. 2013]). The benefit need not be a commercial or pecuniary one. Felsher v University of Evansville, 727 NE2d 783 (Ind. Ct. App. 2000) (rev'd on other grounds).

For the same reasons applicable to Brandon's statutory claim, Brandon adequately states a claim under Indiana common law sounding in violation of his publicity rights. The eighth cause of action survives as against Sony.

G. Ninth Cause of Action

In the ninth cause of action, Zehringer, a Virginia resident, states a claim sounding in violation of his publicity rights under Virginia Code ("Va. Code Ann.") § 8.01-40. The defendants argue that the ninth cause of action is subject to dismissal as untimely and insufficient as a matter of law.

i. Timeliness

Claims for violating an individual's right to publicity in Virginia are governed by a 5-year statute of limitations. Lavery v Automation Mgmt. Consultants, Inc., 234 Va. 145 (1987). Zehringer's claim against the defendants is time-barred to the extent it accrued prior to June 28, 2013. As described above, however, the plaintiffs have alleged that Sony has used the name and image of Zehringer to sell the recordings as recently as 2019. The plaintiffs have not made analogous allegations as against the FGG defendants. Accordingly, Sony's CPLR 3211(a)(5)

motion to dismiss the ninth cause of action is denied and the FGG defendants' motion for the same relief is granted.

ii. Legal Sufficiency

Virginia Code § 8.01-40 states in relevant part,

Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

Va. Code Ann. § 8.01-40.

Since the plaintiffs allege that Sony used Zehringer's name and picture without his consent "for advertising purposes or for the purposes of trade," and the plaintiffs' allegations are not barred by the First Amendment, Sony's motion dismiss the ninth cause of action is denied.

V. CONCLUSION

Accordingly, it is

ORDERED that (A) the motion of FGG Productions, Inc., Richard Gottehrer, Robert Feldman, and Gerald Goldstein to


dismiss the amended complaint as against them pursuant to CPLR 3211(a)(5) and (7) (MOT SEQ 001) is granted to the extent that the amended complaint is dismissed as against those defendants in its entirety pursuant to 3211(a)(5); and (B) the motion of Sony Music Entertainment, sued herein as Sony Music Holdings, Inc., to dismiss the amended complaint as against it pursuant to CPLR 3211(a)(5) and (7) (MOT SEQ 002) is granted in part to the extent that (i) the first, second, third, fourth, and fifth causes of action are dismissed as against Sony Music Entertainment in their entirety pursuant to 3211(a)(5), and (ii) the motion is otherwise denied; and it is further

ORDERED that Sony Music Entertainment is directed to serve an answer to the sixth, seventh, eighth, and ninth causes of action of the amended complaint, the only surviving claims in this action, within 20 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that counsel for the plaintiffs and Sony Music Entertainment are directed to appear for a preliminary/settlement conference on January 21, 2021, at 2:30 p.m. and all counsel appearing shall have full settlement authority.

This constitutes the Decision and Order of this Court.

Dated: November 18, 2020



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON