

Before the
COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of)	
)	
Distribution of DART Sound Recordings Fund)	Docket No. 16–CRB–0014 DART-
Featured Recording Artists and Copyright Owners)	SRF (CO) (2015) and 16-CRB-0022-
Subfunds Royalties for 2015)	DART-SRF (FRA) (2015)

**MOTION IN SUPPORT OF SETTLING CLAIMANTS’ NOTICE OF SETTLEMENT
AND REQUEST FOR PARTIAL DISTRIBUTION OF THE 2015 DART SOUND
RECORDINGS FUND FEATURED RECORDING ARTISTS AND COPYRIGHT
OWNERS SUBFUNDS ROYALTIES**

The Alliance of Artists and Recording Companies (“AARC”), on behalf of itself, Jeffery Jacobson (“Jacobson”) and Featured Recording Artist Subfund claimant George Clinton (“Clinton FA”) (collectively referred to as the “Settling Parties”), submit these comments to the Copyright Royalty Board Notice Soliciting Comments on the Motion for Partial Distribution of 2015 DART Sound Recordings Fund Royalties, (“Copyright Royalty Board Notice”). The Settling Parties respectfully offer this filing in support of their Notice of Settlement and Request for Partial Distribution of the 2015 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds Royalties¹ (“Notice of Settlement and Request”).

AARC was unable to obtain settlements with Eugene Curry (“Curry”), Herman Kelly (“Kelly”), Copyright Owners Subfund claimant George Clinton (“Clinton CO”), and C Kunspyruhzy-George Clinton (collectively referred to as the “Non-Settling Parties”)² for the

¹ Notice of Settlement and Request for Partial Distribution of the 2015 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds Royalties Docket No. 16–CRB–0014 DART-SRF (CO) (2015) and 16-CRB-0022 DART-SRF (FRA) (2015) (Copyright Royalty Bd. June 23, 2017).

² AARC filed a motion to dismiss Henley J. Menefee’s Copyright Owners Subfund claim based on his failure to provide a basis for his claim. Motion to Dismiss Henley J. Menefee’s 2015 DART Sound Recordings

2015 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds (“2015 DART Sound Recordings Fund”).

For the reasons set forth in AARC’s Notice of Settlement and Request and as elaborated below, AARC, on behalf of the Settling Parties, respectfully submits this Motion in Support of its Notice of Settlement and Request.

I. Given the Settling Parties’ Significant Share of Record Sales for Royalty Year 2015, Distribution of 98% of the 2015 DART Sound Recordings Fund is Warranted.

Pursuant to the Audio Home Recording Act of 1992, if the distribution of royalty payments is in dispute, the Copyright Royalty Judges must allocate the Sound Recordings Fund’s royalties based on the distribution (record sales) of the claimant’s sound recordings during the relevant period (the “Royalty Year”).³ Further, the Copyright Royalty Board has the ability to partially distribute Sound Recordings Fund royalties that are not in dispute, provided that “no claimant entitled to receive such fees has stated a reasonable objection to the partial distribution.

...”⁴

Partial distribution of 98% of the 2015 DART Sound Recordings Fund royalties to the Settling Parties is warranted because the remaining 2% of the DART Sound Recordings Fund royalties is more than sufficient to satisfy the Non-Settling Parties’ claims based on their low record sales during the 2015 Royalty Year.

a. Non-Settling Featured Recording Artists Subfund Claim

Nielsen SoundScan sound recording data sales have been recognized in the music industry, and previous DART proceedings, as credible evidence of distribution for allocation of

Fund/Copyright Owners Subfund Claim (Aug. 9, 2016). The United States Copyright Royalty Judges granted AARC’s motion to dismiss Menefee’s Copyright Owners Subfund claim, finding that Menefee had failed to meet the filing requirements of CRB Rule 360.22. *See* Order Granting AARC’s Motion to Dismiss Henley Menefee’s Claim to a Share of the 2015 DART Sound Recording Fund/Copyright Owners Subfund (ordered June 1, 2017).

³ 17 U.S.C. § 1006(c)(1) (2012).

⁴ *Id.* § 801(b)(3)(C).

royalties.⁵ The SoundScan sales data reports that the total record sales for all claimants of the 2015 Featured Recording Artists Subfund, including the Settling Parties' sales, is 820,674,723 units.⁶ The 2015 record sales of the Settling Parties total 820,517,623.46 units, which account for 99.981% of the 2015 Featured Recording Artists Subfund.⁷ SoundScan data reported a total of 157,099.54⁸ record sales in 2015 for all titles claimed by Kelly, all titles listing Kelly as a featured recording artist, and all titles under the Kelly-related name "Herman Kelly & Life."⁹ Kelly's record sales for those titles therefore amount to \$7.12, or less than 0.019 % of the total 2015 Featured Recording Artists Subfund of \$37,493.82.¹⁰

Based on the SoundScan sound recording data, which indicates that Non-Settling Featured Recording Artists Subfund claimant Kelly's claim amounts to approximately nineteen-thousandths of a percent (0.019%) of the total 2015 Featured Recording Artists Subfund, partial distribution of 98% of the 2015 Featured Recording Artists Subfund to the Settling Parties is appropriate because the remaining 2% is more than sufficient to satisfy Kelly's claim.

⁵ See e.g. Distribution of the 1995, 1996, 1997 and 1998 Digital Audio Recording Technology Royalties, 66 Fed. Reg. 9360, 9362 (Copyright Office Feb. 7, 2001) ("[F]inding no other basis for determining the universe of total record sales in the written record, the Panel accepted the testimony of Michael Fine [concerning the use of SoundScan data] for determining the total number of record sales in any given year."); Distribution of 1992, 1993 and 1994 Musical Works Funds, 62 Fed. Reg. 6558, 6562 (Copyright Office Feb. 12, 1997) (concluding that the Copyright Arbitration Royalty Panel's use of SoundScan data to determine record sales "was not arbitrary"); see *Music Sales Measurement*, THE NIELSEN COMPANY (2017), <http://www.nielsen.com/us/en/solutions/measurement/music-sales-measurement.html> (explaining that Nielsen data collection "is the authority" in determining record sales for music).

⁶ Notice of Settlement and Request, *supra* note 1, at 4; Stern Decl. Ex. A at para 5.

⁷ Notice of Settlement and Request, *supra* note 1, at 5.

⁸ The sales figure is not a whole number because Kelly claims percentages of forty-nine (49) of the titles he listed in his claim.

⁹ Notice of Settlement and Request, *supra* note 1, at 5; Stern Decl. Ex. A at para. 3. Out of the 157,099.54 record sales we are crediting Kelly, SoundScan identified Kelly as a featured recording artist for only 721 record sales. See Stern Decl. Ex. A, at para. 3(a)(i), 3(a)(iii). SoundScan identified Herman Kelly & Life, a Kelly-related name that he did not file under for the 2015 Featured Recording Artists Subfund proceeding, accounts for forty-three (43) of the total record sales. See *id.* at para. 3(a)(iv). The remaining 156,335.54 record sales are from forty-nine (49) titles that Kelly listed in his claim and for which he named other performers as the featured recording artists. *Id.* at para. 3(a)(ii). Solely for the purposes of this pleading, we are crediting Kelly for all of the sales listed above. AARC, on behalf of the Settling Parties, reserves the right to challenge any and all of Kelly's record sale claims at a hearing.

¹⁰ Notice of Settlement and Request, *supra* note 1, at 5.

b. Non-Settling Copyright Owners Subfund Claims

The total record sales for all claimants of the 2015 Copyright Owners Subfund, including the Settling Parties' sales, is 887,533,449 units.¹¹ The 2015 record sales of the Settling Parties total 887,341,173.46 units, or 99.978% of the 2015 Copyright Owners Subfund.¹² There are four separate Non-Settling 2015 Copyright Owners Subfund claimants. First, SoundScan's data reported 1,294 record sales in 2015 for all titles claimed by Clinton CO in addition to all titles listing Clinton CO as a copyright owner that were not included in his claim.¹³ Second, SoundScan's data reported 28,736 record sales in 2015 for all titles claimed by C Kunspyruhzy-George Clinton in addition to all titles listing C Kunspyruhzy-George Clinton as a copyright owner that were not included in his claim.¹⁴ Third, SoundScan's data reported 157,099.54 record sales in 2015 for all titles claimed by Kelly in addition to all titles that list the entity "Afterschool Publishing Company" as the copyright owner that were not included in Kelly's claim.¹⁵ SoundScan did not identify Kelly himself as the copyright owner for any sales, and SoundScan identified Afterschool Publishing Company as the copyright owner for only 762 record sales out of the 157,099.54 record sales.¹⁶ Finally, SoundScan reported 5,146 record sales for the sole title listed in Curry's claim¹⁷ in addition to one other title not listed in his claim but which he may attempt to add to his claim.¹⁸ There are no other record sales for any titles listing Curry as the

¹¹ Notice of Settlement and Request, *supra* note 1, at 4; Stern Decl. Ex. A at para. 6.

¹² Notice of Settlement and Request, *supra* note 1, at 8.

¹³ See Notice of Settlement and Request, *supra* note 1, at 5-6; Stern Decl. Ex. A, at para. 4(I)(a)-(c).

¹⁴ See Notice of Settlement and Request, *supra* note 1, at 6; Stern Decl. Ex. A, at para. 4(II)(a)-(c).

¹⁵ See Notice of Settlement and Request, *supra* note 1, at 6-7; Stern Decl. Ex. A, at para. 4(III)(a)-(c). Although Kelly did not file under the name "Afterschool Publishing Company" for the 2015 Copyright Owners Subfund, we are aware that he has filed under that name in the past. Solely for the purposes of our Request for Partial Distribution, we are crediting Kelly for all sales under Afterschool Publishing Company.

¹⁶ See Stern Decl. Ex. A., at para. 4(III)(a)-(c). SoundScan identifies copyright owners other than Kelly for the remaining 156,335.54 record sales. *See id.* at para. 4(III)(a)(iii).

¹⁷ SoundScan identifies Universal Music Group, not Curry, as the copyright owner of that title. *See* Notice of Settlement and Request, *supra* note 1, at 7; Stern Decl. Ex. A, at para. 4(IV)(a).

¹⁸ See Notice of Settlement and Request, *supra* note 1, at 7-8; Stern Decl. Ex. A, at para. 4(IV)(d). In the Order Denying AARC's Motion to Dismiss Curry's Claim, the Copyright Royalty Judges noted that Curry may amend his claim to add the additional title "If I Didn't Have You (Without You)." Order Denying AARC's Motion to Dismiss

copyright owner.¹⁹ Solely for purposes of this pleading, the Settling Parties will credit the Non-Settling Parties with all of the above record sales, which total 192,275.54 record sales.²⁰ The Non-Settling Copyright Owners Subfund claimants' combined record sales amount to \$12.18, less than 0.02166% of the total Copyright Owners Subfund of \$56,240.73.²¹

Based on the SoundScan sound recording data, which indicates that the Non-Settling Copyright Owners Subfund claimants' claims amount to less than twenty-two thousandths of a percent (0.02166%) of the total 2015 Copyright Owners Subfund, partial distribution of 98% of the Copyright Owners Subfund to the Settling Parties is appropriate because, in the best case scenario for the Non-Settling Parties, the remaining 2% is more than sufficient to satisfy the Non-Settling Copyright Owner Parties' claims.

II. The Settling Parties Agree to Return Any Excess Royalty Amounts Plus Interest to the Extent Necessary to Comply With the Copyright Royalty Board's Final Determination Regarding the Distribution of the 2015 DART Sound Recordings Fund.

The Settling Parties agree to comply with the conditions set forth under 17 U.S.C. § 801. If the Copyright Royalty Board agrees to partial distribution of 98% of the 2015 DART Sound Recordings Fund royalties and later concludes that a controversy exists as to the distribution of such funds,²² the Settling Parties agree "to return any excess amounts to the extent necessary to comply with the final determination on the distribution [of the 2015 DART Sound Recordings Fund royalties]."²³ Further, the Settling Parties agree to sign such an agreement and "file the agreement with the Copyright Royalty Judges"²⁴

Eugene Curry's Claim (ordered June 1, 2017). Solely for the purposes of this Request for Partial Distribution, we are crediting Curry for this title.

¹⁹ See Stern Decl. Ex. A, at para. 4(IV)(a), 4(IV)(c).

²⁰ See Stern Decl. Ex. A, at para. 6. AARC, on behalf of the Settling Parties, reserves the right to challenge any and all Non-Settling Parties' total record sale claims at a hearing.

²¹ Notice of Settlement and Request, *supra* note 1, at 8.

²² 17 U.S.C. §801(b)(3)(B).

²³ *Id.* § 801(b)(3)(C)(ii).

²⁴ *Id.* § 801(b)(3)(C)(iii).

III. Conclusion

In view of the foregoing, the Settling Parties believe that there can be no reasonable objection to the partial distribution of 98% of the 2015 DART Sound Recordings Fund to the Settling Parties.

Accordingly, the Settling Parties respectfully request that the Copyright Royalty Board grant their Notice of Settlement and Request for Partial Distribution of 2015 DART Sound Recordings Fund, and distribute 98% of the 2015 DART Sound Recordings Fund to AARC as agent for the Settling Parties.

Respectfully submitted,
On Behalf of the Settling Parties

/s/ **Linda R. Bocchi**

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September 14, 2017