

**Before the
COPYRIGHT ROYALTY BOARD
Washington, D.C.**

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

**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 Artists Subfund claimant George Clinton (“Clinton FA”) (collectively referred to as the “Settling Parties”), submits this notice reporting that the Audio Home Recording Act of 1992 (“AHRA”) 2015 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds (“2015 Sound Recordings Fund”) distribution proceeding is settled, except for the claims submitted by Eugene Curry (“Curry”), Henley J. Menefee (“Menefee”)¹, Herman Kelly (“Kelly”), Copyright Owners Subfund claimant George Clinton (“Clinton CO”), and C Kunspyruhzy-George Clinton (collectively referred to as the “Non-Settling Parties”). Therefore, the Settling Parties request partial distribution of the 2015 Sound Recordings Fund.

¹ AARC filed a motion to dismiss Menefee’s claim based on his failure to provide a basis for his claim. Motion to Dismiss Henley J. Menefee’s 2015 DART Sound Recordings Fund/Copyright Owners Subfund Claim (Aug. 9, 2016). The United States Copyright Royalty Judges granted AARC’s motion to dismiss Menefee’s claim, finding that Menefee had failed to meet the filing requirements of CRB Rule 360.22. 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). Therefore, Menefee is no longer a party to the 2015 DART Sound Recording Fund/Copyright Owners Subfund proceeding.

I. Status of Settlement

AARC pursued and obtained settlements with three (3) of the nine (9) claimants² for the 2015 Sound Recordings Fund, as detailed below:

A. Featured Recording Artists Subfund

Of the three (3) 2015 DART Sound Recordings Fund Featured Recording Artists Subfund (“2015 Featured Recording Artists Subfund”) claimants,³ AARC has obtained settlements with Jacobson⁴ and Clinton FA.⁵ AARC has been unable to settle with the sole remaining 2015 Featured Recording Artists Subfund claimant, Kelly, who has *de minimis* record sales totaling 157,099.54⁶ units out of a universe of nearly *one billion* 2015 record sales of the claimants to the 2015 Sound Recording Fund, Featured Recording Artists Subfund. *See* Declaration of Michael Stern (attached hereto as Exhibit “A”), at para. 3, 5. Therefore, the Settling Parties respectfully request distribution of 98% of the 2015 Sound Recording Fund, Featured Recording Artists Subfund.

² The nine (9) claimants for the 2015 Sound Recordings Fund, excluding AARC, are: (1) Jacobson as a Featured Recording Artists Subfund claimant; (2) Jacobson as a Copyright Owners Subfund claimant; (3) Clinton FA; (4) Clinton CO; (5) C Kunspruhzy-George Clinton; (6) Curry; (7) Kelly as a Featured Recording Artists Subfund claimant; (8) Kelly as a Copyright Owners Subfund claimant; and (9) Menefee. Menefee’s 2015 Sound Recordings Fund Copyright Owners Subfund claim, however, has been dismissed, and he is no longer a party to the 2015 DART Sound Recording Fund/Copyright Owners Subfund proceeding. *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, *supra* note 1.

³ The three (3) claimants to the 2015 Featured Recording Artists Subfund, excluding AARC, are: (1) Jacobson, (2) Kelly, and (3) Clinton FA.

⁴ Jacobson filed two 2015 Featured Recording Artists Subfund claims, both of which are included in his settlement with AARC.

⁵ Clinton FA is currently registered as a participant with AARC.

⁶ We are crediting Kelly with the foregoing sales solely for purposes of this pleading. We reserve the right to contest any and all of Kelly’s claims at hearing.

B. Copyright Owners Subfund

Of the six (6) 2015 Sound Recordings Fund Copyright Owners Subfund (“2015 Copyright Owners Subfund”) claimants,⁷ AARC has reached a settlement with Jacobson.⁸ The four (4) remaining 2015 Copyright Owners Subfund royalty claimants with whom AARC has been unable to obtain settlement are: Curry, Kelly, Clinton CO, and C Kunspyruhzy-George Clinton.⁹ For purposes of this pleading, the Settling Parties will credit the Non-Settling Copyright Owners Subfund claimants with combined record sales of merely 192,275.54¹⁰ units out of a universe of nearly *one billion* record sales of claimants’ sound recordings sold in 2015. *See id.* at para. 4, 6. Therefore, the Settling Parties respectfully request distribution of 98% of the 2015 Copyright Owners Subfund.

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

Pursuant to the AHRA, allocation of the Sound Recordings Fund’s royalties must be based on distribution (record sales) of the claimants’ sound recordings during the year for which royalties were collected (“Royalty Year”). 17 U.S.C. § 1006(c) (2012); Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 Fed. Reg. 6,558, 6,561 (Copyright Office Feb. 12, 1997). Under § 801(b)(3)(C) of the Copyright Act, the Copyright Royalty Board (“CRB”) has authority to make a partial distribution of the Sound Recordings Fund provided that no claimant entitled to receive such fees has stated a reasonable objection to the partial distribution.

⁷ The six (6) claimants for the 2015 Copyright Owners Fund, excluding AARC, are: (1) Jacobson, (2) Curry, (3) Kelly, (4) Clinton CO, (5) C Kunspyruhzy-George Clinton and (6) Menefee. Menefee’s claim, however, has been dismissed. *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, *supra* note 1.

⁸ Jacobson filed two 2015 Copyright Owners Subfund claims, both of which are included in his settlements with AARC.

⁹ Menefee’s 2015 Subfund Copyright Owners claim has been dismissed. *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, *supra* note 1.

¹⁰ We are crediting Copyright Owners Subfund claimants with the foregoing sales solely for purposes of this pleading. We reserve the right to contest any and all claims by Copyright Owners Subfund claimants at hearing.

Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801(b)(3)(C) (2012).

Partial distribution will allow the Settling Parties to collect, in a timely fashion, the royalties that they are entitled to, while allowing the CRB to retain sufficient funds to cover any outstanding claims. *See id.*

Here, the Settling Parties will establish that partial distribution is warranted because the Non-Settling Parties in the 2015 Sound Recordings Fund are entitled to minimal, if any, royalties based on the low sales figures of their sound recordings during the 2015 Royalty Year. SoundScan¹¹ record sales data reports the total record sales for all 2015 Featured Recording Artists Subfund claimants as 820,674,723, and the total record sales for all 2015 Copyright Owners Subfund claimants as 887,533,449. Stern Decl. Ex. A, at para. 5-6. As detailed below, the total percentage of record sales for the Non-Settling Featured Recording Artists claimant is 0.019%, and the total percentage of record sales for the Non-Settling Copyright Owners claimants is 0.02166%. *See id.* at para. 3-6. Adding both percentages together equates to approximately 0.04% of all record sales – merely four hundredths of a percent. Thus, reserving 2% of the 2015 Sound Recordings Fund will provide more than sufficient funds to resolve the Non-Settling Parties' Subfunds claims.

A. **Featured Recording Artists Subfund**

Using SoundScan's 2015 record sales data, AARC researched the featured recording artist Herman Kelly and the fifty-eight (58) titles that Kelly listed in his claim.¹² SoundScan unit sales data reports a total of 706 record sales for the nine (9) titles Kelly listed in his claim with him as

¹¹ SoundScan is the industry-recognized source for sound recording sales in the United States and has been recognized in past DART proceedings as credible evidence of distribution for allocation of royalties. *See* Distribution of 1995, 1996, 1997 and 1998 Digital Audio Recording Technology Royalties, 66 Fed. Reg. 9360, 9362 ¶ 61 (Copyright Office Feb. 7, 2001); *see also* Distribution of 1992, 1993 and 1994 Musical Works Funds, 62 Fed. Reg. at 6,562 (“The [Copyright Arbitration Royalty] Panel’s decision to reject the record sales data submitted by Mr. Curry and rely upon the SoundScan data was not arbitrary.”).

¹² Kelly identified himself as a featured recording artist for only nine (9) of the titles. For the remaining forty-nine (49) titles, Kelly identified other performers as the featured recording artists. Stern Decl. Ex. A, at para. 3(a).

the featured recording artist. *Id.* at para. 3(a)(i). Regarding the other forty-nine (49) titles listed in his claim, SoundScan unit sales data reports a total of 156,335.54 record sales but identified artists other than Kelly as the featured recording artists. *Id.* at para. 3(a)(ii). SoundScan identified one (1) additional title listing Kelly as a featured recording artist but which was not included in his claim. *Id.* at para. 3(a)(iii). For this additional title, SoundScan unit sales data reports fifteen (15) record sales. *Id.* Furthermore, we found a different Kelly-related name (“Herman Kelly & Life”),¹³ which SoundScan reports as having a total record sales of forty-three (43) units.¹⁴ *Id.* at para. 3(a)(iv). Solely for the purposes of this Request for Partial Distribution, we are crediting Kelly for all of the above record sales, (157,099.54 units), even if he is not identified as the featured recording artist.¹⁵ *Id.* at para. 3(b).

In sum, if we subtract Kelly’s total sales of 157,099.54 units from the featured recording artists’ universe of sales, which total 820,674,723 units, the result is 820,517,623.46 units for the Settling Parties or 99.981% of the total 2015 Featured Recording Artists Subfund. Thus, the record sales for Kelly amount to less than 0.019% of the total 2015 Featured Recording Artists Subfund of \$37,493.82¹⁶ or approximately \$7.12.

B. Copyright Owners Subfund

Next, AARC used SoundScan’s 2015 record sales data to research the Non-Settling Copyright Owners Claimants’ names and the titles listed in their claims. First, beginning with

¹³ No claim was filed under the name “Herman Kelly & Life” for the 2015 Featured Recording Artists Subfund.

¹⁴ The titles for Herman Kelly & Life were the same as the nine (9) titles listed with Herman Kelly as a featured recording artist. *Id.* at para. 3(a)(iv).

¹⁵ We reserve the right to contest Kelly’s claims at hearing.

¹⁶ The amount available in 2015 Sound Recordings Fund is calculated based on the U.S. Copyright Office Licensing Division Report of Receipts (“Report”) and allocations outlined in the AHRA. As of the most recent Report available at the time of this motion’s filing date, the 2015 total deposit is \$146,460.24. U.S. COPYRIGHT OFFICE LICENSING DIVISION, REPORT OF RECEIPTS (June 16, 2017), <http://copyright.gov/licensing/receipts.pdf>. The Sound Recording Fund receives 66 2/3% of the total DART deposits for the Royalty Year, of which, 96% is allocated to Featured Recording Artists and Sound Recording Copyright Owners Subfunds. The Featured Recording Artists Subfund then receives 40% of that allocation. 17 U.S.C. § 1006(b)(1) (2012).

Clinton CO, SoundScan unit sales data reports 1,136 record sales for all titles in Clinton CO's claim.¹⁷ *Id.* at para. 4(I)(a). SoundScan unit sales data reports an additional 158 record sales for Clinton CO as a copyright owner for titles not included in his claim. *Id.* at para. 4(I)(b). Therefore, solely for the purposes of this Request for Partial Distribution, we are crediting Clinton CO with a total record sales of 1,294. *Id.* at para. 4(I)(c).

Next, regarding the second Non-Settling Copyright Owners Subfund Claimant, C Kunspyruhzy-George Clinton, SoundScan unit sales data reports 3,858 record sales for all titles listed in his claim.¹⁸ *Id.* at para. 4(II)(a). SoundScan unit sales data reports an additional 24,878 record sales for C Kunspyruhzy-George Clinton as a copyright owner for titles not included in his claim. *Id.* at para. 4(II)(b). Therefore, solely for the purposes of this Request for Partial Distribution, we are crediting C Kunspyruhzy-George Clinton with a total record sales of 28,736. *Id.* at para. 4(II)(c).

The third Non-Settling Copyright Owners Subfund Claimant, Kelly, submitted a list of the fifty-eight (58) titles that is identical to the one he submitted in his 2015 Featured Recording Artists Subfund claim. SoundScan unit sales data reports 747 record sales for nine (9) of the fifty-eight (58) titles listed in Kelly's claim. *Id.* at para. 4(III)(a)(ii). However, SoundScan identifies Afterschool Publishing Company, not Kelly, as the copyright owner of these titles. *Id.* SoundScan did not report any titles listing Kelly as a copyright owner. *See id.* at para. 4(III)(a)-(b). For the remaining forty-nine (49) titles that Kelly listed in his claim, SoundScan unit sales data reports 156,335.54 record sales, and SoundScan identifies copyright owners other than Kelly or Afterschool Publishing Company for these titles. *Id.* at para. 4(III)(a)(iii). SoundScan reports one (1) additional title by Afterschool Publishing Company that was not listed in Kelly's

¹⁷ We reserve the right to contest Clinton CO's claims at hearing.

¹⁸ We reserve the right to contest C Kunspyruhzy-George Clinton's claims at hearing.

claim. *Id.* at para. 4(III)(b). SoundScan unit sales data reports a total of fifteen (15) record sales for this additional Afterschool Publishing Company title. *Id.* 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. In an abundance of caution, and solely for the purposes of this Request for Partial Distribution, we are crediting Kelly for all of the above sales, which include all sales under the name “Afterschool Publishing Company,” as well as all titles listed in his claim that belong to other copyright owners.¹⁹ Therefore, we are crediting Kelly with a total record sales of 157,099.54. *Id.* at para. 4(III)(c).

Curry, the fourth and final Non-Settling Copyright Owners Subfund claimant, lists one (1) title in his claim.²⁰ However, SoundScan identifies Universal Music Group, not Curry, as the copyright owner of this title. *Id.* at para. 4(IV)(a). Nevertheless, we are crediting Curry with the sales of this title solely for purposes of this pleading.²¹ SoundScan unit sales data reports 5,124 record sales for this title. *Id.* SoundScan sales data reports no other titles with sales that list Curry as a copyright owner. *Id.* at para. 4(IV)(c). Furthermore, in the Order Denying AARC’s Motion to Dismiss Curry’s Claim,²² the Copyright Royalty Judges noted that Curry may amend his claim to add an additional title, “If I Didn’t Have You (Without You).”²³ In an abundance of caution, and solely for the purposes of this pleading, we are crediting Curry for sales of the title “If I Didn’t Have You (Without You)” in addition to the title listed in his claim. SoundScan unit sales

¹⁹ We reserve the right to contest, at hearing, Kelly’s right to credit of all titles listed in his claims.

²⁰ Curry listed the title “Somebody Loves You, Baby,” as the basis for his claim.

²¹ We reserve the right to contest, at hearing, Curry’s right to credit of the title listed in his claim.

²² Order Denying AARC’s Motion to Dismiss Eugene Curry’s Claim (ordered June 1, 2017).

²³ Curry has filed claims for nearly every year since the inception of DART proceedings, and by now should recognize the importance of filing timely claims with a sound basis. Congress has specifically contemplated and addressed the negative effects of permitting claimants to file baseless claims. *See, e.g.*, 37 C.F.R. § 360.22(b) (2016). The requirement that a Sound Recordings Fund claimant provide at least one (1) of its sound recording titles, which was sold in the US during the royalty year, so as to establish a basis for the claim, is essential to maintaining the administrative efficiencies of the DART proceedings and preventing an increase in the CRB’s workload. Moreover, without this critical element of a claim, which requires each claimant to establish himself as a bona fide claimant, other bona fide claimants will make little, if any, effort to negotiate settlement.

data reports twenty-two (22) record sales for this additional title. *Id.* at para. 4(IV)(b). Therefore, we are crediting Curry with a total record sales of 5,146. *Id.* at para. 4(IV)(d).

In sum, if we subtract the Non-Settling Copyright Owners Claimants' alleged record sales, which total 192,275.54 units from Copyright Owners record sales universe, which totals 887,533,449 units, the result is 887,341,173.46 unit sales for the Settling Parties or 99.978%, of the 2015 Copyright Owners Subfund. Thus, the Non-Settling Copyright Owners claimants' combined record sales amount to 0.02166% of the total Copyright Owners Subfund of \$56,240.73,²⁴ or approximately \$12.18 to be shared by all the Non-Settling Parties.

Based upon the foregoing, the Settling Parties do not believe that the Non-Settling Parties can plausibly claim even four hundredths of one (1) percent of the 2015 Sound Recordings Fund. Therefore, the 2% of the 2015 Sound Recordings Fund that will remain after the 98% partial distribution will provide more than sufficient funds to cover any claims by the Non-Settling Parties. *See* Order Granting AARC's Request for Partial Distribution of Royalties from the 2014 DART Sound Recordings Fund, In the Matter of Distribution of 2014 Digital Audio Recording Royalty Funds (Copyright Royalty Bd. Jan. 21, 2016) (No. 15-CRB-0011 DART SR (CO/FA)); Order Granting AARC'S Request for Partial Distribution of Royalties from the 2013 DART Sound Recordings Fund, In the Matter of Distribution of 2013 Digital Audio Recording Royalty Funds (Copyright Royalty Bd. Dec. 19, 2014) (No. 14-CRB-0006 DART SR (CO/FA)); Order Granting AARC's Request for Partial Distribution of 2011 DART Sound Recordings Fund, In the Matter of Distribution of 2011 Digital Audio Recording Royalty Funds (Copyright Royalty

²⁴ The amount available in the 2015 Sound Recordings Fund is calculated based on the U.S. Copyright Office Licensing Division Report of Receipts ("Report") and allocations as outlined in the AHRA. As of the most recent Report available at the time of this motion's filing date, the 2015 total deposit is \$146,460.24. U.S. COPYRIGHT OFFICE LICENSING DIVISION, REPORT OF RECEIPTS (June 16, 2017), <http://copyright.gov/licensing/receipts.pdf>. The Sound Recording Fund receives 66 2/3% of the total DART deposits for the Royalty Year, of which, 96% is allocated to Featured Recording Artists and Sound Recording Copyright Owners Subfunds. The Copyright Owners Subfund then receives 60% of that allocation. 17 U.S.C. § 1006(b)(1) (2012).

Bd. Nov. 17, 2011) (No. 2012-3 CRB DD 2011); Order Granting AARC's Request for Partial Distribution of 2010 DART Sound Recordings Funds, In the Matter of Distribution of 2010 Digital Audio Recording Royalty Funds (Copyright Royalty Bd. Nov. 17, 2011) (No. 2011-6 CRB DD 2010) (granting partial distribution of 2010 DART funds despite attempts from non-settling parties to block partial distribution because the non-settling parties did not state reasonable objections); Order Granting AARC's Request for Partial Distribution of 2009 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfund Royalties, In the Matter of Distribution of 2009 Digital Audio Recording Royalty Funds (Copyright Royalty Bd. Nov. 2, 2010) (No. 2010-5 CRB DD 2009).

Further, based on the foregoing analysis of the 2015 SoundScan data, the Settling Parties believe that no reasonable objection to the partial distribution can be filed by any of the Non-Settling Parties. What qualifies as a reasonable objection has been well-established by the CRB in past proceedings. The CRB has held that objections that are baseless and implausible are considered unreasonable and do not warrant blocking a partial distribution. *See* Order Granting AARC's Request for Partial Distribution of 2008 DART Sound Recordings Fund/Copyright Owners Subfund Royalties, In the Matter of Partial Distribution of 2008 DART Sound Recordings Fund (Copyright Royalty Bd. Aug. 19, 2009) (No. 2009-3 CRB DD 2008) (rejecting objection to request for partial distribution because objection was "facially implausible"). The data clearly demonstrates that even in the best-case scenario for the Non-Settling Parties, they are entitled to *far less* than 1% of the Sound Recordings Fund. Therefore, 98% of the Sound Recordings Fund is not in controversy and should be distributed to the Settling Parties.

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

As a condition to the partial distribution of the 2015 Sound Recordings Fund royalties, the Settling Parties hereby agree to be bound by the conditions imposed by § 801(b)(3)(C). Specifically, 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 Sound Recordings Fund royalties. 17 U.S.C. § 801(b)(3)(C)(ii) (2012). The Settling Parties agree to sign and file such an agreement as prepared by the Copyright Royalty Judges pursuant to § 801(b)(3)(C)(ii)–(iii).

By agreeing to this condition, the Settling Parties ensure that the Non-Settling Parties are protected from potential risk resulting from the requested partial distribution, while also ensuring that the Settling Parties, who represent the vast majority of entitled recipients, receive the royalties to which they are entitled in a timely fashion.

IV. 2015 DART Sound Recordings Fund Partial Distribution Payment to AARC as an Agent of the Settling Parties

As to the amounts to be distributed to each Settling Party, we move to have the distribution made in bulk to AARC as a common agent for all Settling Parties. Agreements as to the proportionate allocation of royalties and the designation of a common agent to receive payment on behalf of the Settling Parties are permitted by the AHRA. 17 U.S.C. § 1007(a)(2) (2012).

V. Conclusion

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

WHEREFORE, pursuant to the authority granted to the CRB by § 801(b)(3)(C), the Settling Parties respectfully request a 98% partial distribution of the 2015 Sound Recordings Fund to AARC, as agent for the Settling Parties.

Respectfully submitted,
On Behalf of the Settling Parties



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June 22, 2017