AMERICAN ARBITRATION ASSOCIATION

SHANE MCANALLY, et al.	)	
	)	
Claimant	)	
v.	)	**Case No. 1-18-0000-5736**
	)	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS	)	
	)	
Respondent.	)	

CLAIMANT SHANE MCANALLY'S PRE-HEARING REPLY

ASCAP utilizes a thirty-five-page brief to attempt to erase from existence the Consent Decree, the Membership Agreement, the Articles of Association, and the unequivocal testimony of ASCAP executives who confirmed that the alleged "rules" in dispute do not actually exist anywhere in writing within ASCAP's governing documents, and instead, tries to argue that Mr. McAnally failed to conduct due diligence prior to resignation. Moreover, by either gross oversight (at best) or intentional misrepresentation (at worst), ASCAP repeatedly lays out claims of particular testimony that is expressly unsupported by the very citations ASCAP points to in the Record.

As the old Carl Sandburg adage goes, if you have neither the law nor the facts on your side, "pound the table and yell like hell." ASCAP "pounds the table" for thirty-five pages because its knows it has neither the law nor the facts in this case. Yet somehow, it is Mr. McAnally's fault for failing to predict the unconscionable and ask unknown individuals if the unconscionable might happen. At the hearing, the reason for not having the "rules" in writing was because those rules contain allegedly proprietary information, and now, according to its Response, it is because those rules are merely "nuances."

To accept ASCAP's arguments would mean, among other things, that ASCAP is currently not under any restraints from the Department of Justice and that the plain language found within ASCAP's Membership Agreement and Articles of Association do not control the parties' relationship. It would also mean that ASCAP can create whatever policy it wants to and unilaterally re-write (or re-interpret) the terms of the agreement of which the parties enter, all without regard to the actual language of the contractual documents that govern. The result is that ASCAP intends to require its members (and frankly, its executives who have been just as clueless leading up to this dispute) to look into a magic crystal ball and figure out each and every possible scenario and question to ask – hoping that they ask the right question to the right person who may have the mystical answer.

ASCAP further argues that even if the payments to Mr. McAnally are found to be unfair, unjust, or inequitable, as expressly prohibited by the Consent Decree and ASCAP's own governing documents, this Panel does not have the authority to hold it accountable. That is simply not how contract law works, and to accept ASCAP's position would be shocking. Such assertions are not only brazen, but nonsensical and this Panel should reject all such notions.

1. **"Fairness" and the Panel's Authority**

ASCAP repeatedly asserts in its brief that "fairness" in paying resigned members is not applicable to ASCAP's rules, and more disturbingly, that the terms of ASCAP's Membership Agreement and Articles of Association "have no direct relevance" to this dispute. Resp. at 24 and 29, n. 12. If the Board of Review and appellate panel are the ***sole*** recourse an ASCAP member has with respect to grievances, yet, those reviewing bodies have no authority to actually hold ASCAP accountable based on the terms of ASCAP's governing documents, what is a member's true right of recourse? It is nothing short of a mafia-style relationship.

Yet, this Panel does not necessarily have to find that the purported "rule" is discriminatory (though Mr. McAnally respectfully suggests that it would be, if it actually existed), nor does it have to void it. All this Panel has to do is find exactly what Mr. Roberts and Dr. Boyle have already confirmed – that the alleged "rule" **does not even exist**. If it is not in writing, Mr. McAnally, as a party to the license agreement (i.e., Membership Agreement) with ASCAP, cannot be bound to it, nor could ASCAP properly apply such a non-existent rule. Further, though ASCAP wishes to cover its eyes to the repeated use of the phrase "fair, just and equitable distribution" as used throughout its governing documents, it cannot hide from its contractual obligation to comply with those requirements when paying its members. This Panel has the authority to hold ASCAP accountable, and should do so.

2. Purpose of Hit Song Premiums

ASCAP continues to distort, if not outright erase, the original intent of the hit song premium when it came into effect in 1994. Unfortunately for ASCAP, the purpose is in black and white via the November 1994 Amended Order, whereby ASCAP acknowledged that the "base" payments paid to its writers were an inadequate representation of the hit song's actual value. Nov. 1994 Amended Order, at p. 3 (noting that the premiums would be made "to writer members whose works have a unique prestige value for which adequate compensation would not otherwise be received"). ASCAP's then-president, Marilyn Bergman, informed members that the premiums "will allow ASCAP to make larger payments, to more hit songs at radio, **and which will be funded only from revenues attributable to radio performances**." (Corr. Jt. Ex. 27) (emphasis added). For ASCAP to proclaim that "[i]t simply is not accurate to suggest that the AFP constitutes payment for surveyed performances on radio" is preposterous and wholly unsupported by its own former president's representations. *See Id.; c.f.,* Resp. at 27. Such is

precisely the purpose of the premium payments.[1]

Dr. Boyle testified that [redacted] This ties directly back to Mr. McAnally's argument that separate and equal shares of a song cannot have dramatically different values simply based on the status of the songwriter's membership at ASCAP. *See* Brief at 16-18. Here, ASCAP has admitted that it drastically underpays writers for hit songs at radio – hence, the very purpose of the premium payments. The fact that ASCAP may choose to fund those drastic underpayments from another source should have no bearing in whether or not that songwriter receives the "full value" of the works licensed by ASCAP to radio.

3. Purpose of the Phase-Out

Recall that the purpose of the phase-out is this:

> This phase-out is meant to account for the fact that the great majority of ASCAP's thousands of licenses for bars, restaurants, nightclubs, retail stores and most other general licensees are for one-year terms that expire on different dates during the calendar year with the majority of such licenses expiring during the first calendar quarter.

Resp. at 18. ASCAP is attempting to utilize the four-quarter phase-out of unsurveyed license revenues to try to get out of paying hit song premiums to resigned members all while utterly

[1] Rule 2.8 of the Survey & Distribution Rules confirms this as it provides that: [The premium applies to] "works achieving high levels of Feature Performances in ASCAP's terrestrial radio, satellite radio and music streaming surveys, respectively…; provided, however, that [the premiums] shall be based primarily on the number of Feature Performance credits or plays received by the works for performances in each such survey quarter."

ignoring the entire basis of the four-quarter phase-out. Hit songs played at radio are licensed via the RMLC license, which consists of a singular license with a term of several years at a time, as opposed to the "thousands" of general licenses, which expires annually. Thus, the theory that hit song premiums should be phased out, when those licenses are in effect for several years, is unreasoned.

4. Global Music Rights and Due Diligence

In an apparent attempt to take the Panel's eye off of the simple and unequivocal issue in this dispute, ASCAP attempts to create a rabbit hole by spending several pages discussing the alleged (a) lack of due diligence conducted by Mr. McAnally pre-resignation, (b) the timing of Mr. McAnally's resignation notices after certain breakfast meetings, and (c) its continued obsession with Mr. McAnally's subsequent affiliation with one of ASCAP's competitors, Global Music Rights ("GMR"). None of these issues lends a scintilla of assistance to the Panel in determining whether or not the "rule" actually existed, and/or whether ASCAP fulfilled its contractual obligations to pay Mr. McAnally as directed by the Consent Decree and ASCAP's governing documents.

[redacted] There is no dispute between the parties that ASCAP was the sole performing rights society that licensed Mr. McAnally's works to radio prior to 2016 (with respect to works written prior to that date). Jt. Stips. 17-20.

The other items contain blatant mischaracterization of the actual testimony. In lieu of laying out point by point where ASCAP overtly misrepresents the testimony of record, Mr.

McAnally respectfully suggests that the Panel look closely at the citations in the Response and compare it with the actual testimony. Just two examples of ASCAP's questionable conduct are:

- ASCAP misleads the Panel by claiming that Mr. Baum relied on his own knowledge in determining what the Rules provide. Resp. at 22. But what Mr. Baum actually stated is that he and Mr. McAnally "*did* seek counsel with people that were in positions of power [at ASCAP]," including then-director Marc Driskill, LeAnn Phelan, Michael Martin, and Robert Filhart – all current or former executives at ASCAP's Nashville office. Tr. at 64:16-66:17; 106:13-108:16; 186:9-18; and 188:3-6.

[redacted]

CONCLUSION

This Panel has the opportunity to protect ASCAP's 670,000 songwriter and publisher members from ASCAP management's shameless attempts to scare those same members from ever resigning from ASCAP and freely moving to another PRO – as ASCAP's own former chairman argued in favor of in 1986 when several BMI members found themselves in a strikingly similar situation after affiliating with ASCAP. ASCAP certainly is not going to hold itself accountable. Mr. McAnally respectfully requests that this Panel do what the Board of

[redacted]

Review was too fearful of doing – hold ASCAP's management accountable for the despicable actions committed against Mr. McAnally and ensure that no other writer is ever prevented from making a free decision to switch PROs out of fear of losing hundreds of thousands of dollars in license fees.

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Respectfully submitted,

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