

founder of the musical group called El Gran Combo (EGC) has been the featured artist on every record recorded by the aforementioned group.

4. Defendant in this action Charlie Aponte claims to be the owner of the right to collect the digital performance royalties from Sound Exchange as performing featured artist.

5. In this action, Plaintiffs seeks a declaration that the right to collect performance royalties belongs to Plaintiffs as the featured artist.

III. PARTIES

6. Plaintiff, Don Rafael Ithier is an individual residing in the city of Bayamon in the Island of Puerto Rico doing business. Rafael Ithier as director and founder of the musical group called El Gran Combo (EGC) has been the featured artist on every record recorded by the aforementioned group has been doing business with his music orchestra in Puerto Rico and throughout the entire world since 1962. His address is MN-18 Calle Paseo del Río, Urb. Monte Claro, Bayamón, PR 00961.

7. Plaintiff, EGC Corp. a.k.a. El Gran Combo (EGC) is a corporation residing in the Island of Puerto Rico, doing business as a music orchestra in Puerto Rico and the corporation is registered under the laws of the Commonwealth of Puerto Rico.

8. Upon information and belief, co-defendant CARLOS JUAN APONTE CRUZ a/k/a Charlie Aponte, is a US citizen and resident of Puerto

Rico address is Calle Sevilla #40, Ciudad Jardín Bairoa, Caguas, PR 00727. He is a musical artist and was EGC's singer.

9. Co-defendant JANE DOE is the fictitious name of co-defendant Mr. Aponte's wife, with who, upon Plaintiff's belief, he had comprised a LEGAL CONJUGAL PARTNERSHIP, all being jointly liable for damages resulting from the production, display, and distribution for profit of artworks and unauthorized derivative works of the Plaintiff. The real name is unknown at this time and will be substituted pursuant to the Federal Rules of Civil Procedure once the real name is made known.

10. Co-defendant ABC INSURANCE COMPANY is the fictitious name of any insurance company jointly liable for the trademark violation alleged in the complaint. The real name of ABC Insurance Company is unknown at this time and will be substituted pursuant to the Federal Rules of Civil Procedure once the real name is made known.

11. COMPANY XYZ is the fictitious name of any company or corporate entity jointly liable for the trademark violation alleged in the complaint. The real name of Company XYZ is unknown at this time and will be substituted pursuant to the Federal Rules of Civil Procedure once the real name is made known.

12. Co-Defendants RICHARD DOE and MARY ROE and the LEGAL CONJUGAL PARTNERSHIP they comprise are the fictional names of any person jointly liable for the trademark violations alleged in the complaint,

whose names and identities are unknown at this moment. The real name of RICHARD DOE and MARY ROE are unknown at this time and will be substituted pursuant to the Federal Rules of Civil Procedure once the real name is made known.

VI. COPYRIGHT ACT BACKGROUND

12. Sound Exchange is a non-profit collective rights management organization. It is the sole organization designated by the U.S. Congress to collect and distribute digital performance royalties for sound recordings. It pays featured and non-featured artists and master rights owners for the non-interactive use of sound recordings under the statutory licenses set forth in 17 U.S.C. § 112.

13. Sound Exchange collects these royalties from three main sources: Satellite and Digital Cable TV: When a song is played through digital cable and satellite television music related services like Music Choice (Digital Cable) and Muzak (Dish), Sound Exchange collects and distributes the royalties.

14. Overseen by a board of directors composed of artists, artist representatives, and sound recording copyright owners, Sound Exchange is also an advocate for music licensing reform. As of 2018 Sound Exchange had paid more than \$5 billion to recording artists and rights owners.

15. Sound Exchange also administers statutory licenses for sound recording copyrights, primarily through the collection and distribution of

royalties for sound recording performances occurring under the jurisdiction of federal law. It operates, in part, pursuant to Copyright Office regulations set forth in 37 C.F.R. Parts 370, 380, 382, 383 and 384.

16. Sound exchange Royalties are distributed in the following manner; 50% goes to the master owner, 45% to the performing featured artist and 5% to the performing non featured artist.

17. The term "featured artist" refers to the group or individual most prominently featured on a sound recording, track or album. "Featured artists" receive direct payments from Sound Exchange.

18. A "non-featured artist" is an artist who is not prominently featured on a sound recording, track or album (i.e. a session musician or vocalist or back-up vocalist). Royalties for "non-featured artists" are covered by organizations such as the American Federation of Musicians (AFM) and SAG-AFTRA.

V. FACTUAL BACKGROUND

19. El Gran Combo (EGC) music orchestra was founded by Rafael Ithier in 1962. Since that date this music orchestra has been the sole ownership of Rafael Ithier. Since its creation every record cover has featured El Gran Combo as the group and featured artist. Some covers have even featured Rafael Ithier as owner of the group.

20. EGC Corp. was first incorporated in 2002 to administer the rights owned by Rafael Ithier under the name Timbalero Corporation later to

changed to EGC Corp. Presently EGC Corp., collects the monies paid by Sound Exchange.

21. Mr. Ithier has, and always has had, the power to hire or fire the vocalist of his choosing for his band. Many male singers have been hired as lead vocalists for EGC by Ithier.

22. All the revenue that the Band has ever generated has gone to Rafael Ithier as owner and presently through EGC Corp. After payment to plaintiff for the shows performed, the musicians and singers get paid as employees.

23. Ithier has never transferred any property rights over EGC Corp. or to any person or entity. Similarly, Ithier is the Sole Owner of the Trademark El Gran Combo registered in the local trademark office.

24. Plaintiff, Mr. Ithier has further been recognized as an employer for hire of all the members of the band in previous judicial determinations including the National Labor Relations Board in 1980.

25. When co-defendant, Mr. Aponte, became the singer of the group he signed an employee's manual including the rules and regulations by which his services had to be performed.

26. More importantly, Mr. Aponte by signing this document defendant, specifically admitted that he was an employee of plaintiff, EGC Corp. The regulations manual signed by Aponte refers to him as an employee of EGC Corp.

27. Moreover, the aforesaid employee manual describes in detail what are the rules and regulations that apply to every employee of EGC Corp. and defendant, Mr. Aponte, clearly acknowledging being one of them.

28. The aforesaid employee manual includes among other things the rights the employee is entitled to in case of a resignation, bonuses, benefits, bonus payments, disability, retirement, attire norms, rules of conduct, termination rights and procedure. All these elements typical of an employer and employee relationship. As employer Plaintiff, EGC, selects and engages the employee; makes the payment of wages; has the power to dismiss the employee and control the employee's conduct down to the attire to be worn.

29. Furthermore, when defendant resigned from plaintiff, EGC, he did so as an employee of said group without claiming any rights to future royalties or the service trademark.

30. Mr. Aponte was never presented as the featured artist in any EGC recording.

31. Co-defendant Charlie Aponte left EGC on his own volition the 31st of December 2014.

32. In addition, at that time of resignation, Aponte did not assert or claim any propriety rights over any of his performances fixed in the masters published by EGC as principal Artist.

33. Moreover, defendant was never been paid a royalty on albums sales of EGC as a featured Artist. He was only paid as a one of the EGC singers for live performances.

34. Unbeknownst to Plaintiff approximately two years ago co-defendant Charlie Aponte made a formal royalties request from SE as a featured artist that he be paid as the performing featured artist knowing very well that during his tenure as singer for EGC was the only featured performing artist for Sound Exchange purposes. In other words Aponte has made a claim to collect all the royalties due to the featured performing artist which is 45% of all digital performing royalties due for every digital performance.

35. Due to Defendant Aponte's claim Sound Exchange (SE) has frozen the EGC account payments for Artist Royalties.

36. Co-defendant Charlie Aponte was told by SE that these royalties were being paid to Plaintiffs.

37. Since Aponte's claim as artist then Plaintiffs SE account has been frozen.

38. Plaintiff has never paid any moneys to the members of the band coming from SE.

39. Contrariwise, practically all the income paid by SE has been used to cover costs related to the band's operation only paid by the plaintiffs.

40. Attorney's fees, the bands attire, recording costs, administrative costs and travel expenses have been some of the expenditures covered by the SE payments.

41. Several fruitless attempts were made by Plaintiff requesting that Mr. Aponte, withdraw a 45% artist royalty claim payment from SE.

42. We believe co-defendant Mr. Aponte's claim for royalties is made in bad faith, objectively weak and frivolous.

43. To solve this matter co-defendant should immediately withdraw his claim as performing artist from SE. Defendants' position is contrary to the law.

44. Due to the factual background stated above, a judicial declaration is necessary and appropriate at this time so that Plaintiff can rely on quiet, unclouded title to his rights.

V. DECLARATORY JUDGMENT OF EL GRAN COMBO AS PERFORMING ARTIST

COUNT ONE

45. Plaintiff hereby incorporates by reference paragraphs 1 through 44 above as if fully set forth herein.

46. Defendants have refused to acknowledge that the Plaintiff is to be considered the Artist with the sole right to collect the digital performance royalties from Sound Exchange.

47. A declaration is sought so that the Plaintiff may be deemed the sole proprietor of the right to collect digital performance royalties from Sound Exchange.

COUNT TWO

48. Plaintiff hereby incorporates by reference paragraphs 1 through 47 above as if fully set forth herein.

49. Defendant has refused to acknowledge that during his tenure at the EGC Aponte was an employee of EGC under a work for hire contract.

50. Thus, all the recorded performances made by Aponte while in EGC may be deemed to have been performed under a work for hire employer – employee labor relationship.

51. A declaration is also sought so that this Court declares Plaintiffs the sole proprietor of the right to collect digital performance royalties from Sound Exchange because of Aponte's performances for EGC during his tenure were made under a work for hire agreement.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays for relief against Defendants as follows:

- A. A declaration that Rafael Ithier is the sole owner of the right to collect royalties as Artist from Sound Exchange as a featured artist;
- B. A declaration that the during Aponte's Tenure in EGC the defendant was an employee for hire for El Gran Combo making Plaintiff the sole proprietor of any rights to collect royalties from Sound Exchange.

- C. A declaration that Aponte's is a non-featured artist with a right to collect royalties as a non-featured Artist from Sound Exchange.
- D. An order awarding Plaintiff his costs and fees, including his attorneys' fees; and
- E. Such other and further relief as the Court deems just and proper.

In San Juan, Puerto Rico, this day 07, November 2019.

s/ROBERTO SUEIRO DEL VALLE
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