UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VIRTUS, INC.,

Plaintiff,

v. 26 Civ. 1883 (MMG)

ORCHARD ENTERPRISES NY, INC.,

Defendant.

Conference

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New York, N.Y.
June 5, 2026
2:00 p.m.

Before:

HON. MARGARET M. GARNETT,

District Judge

APPEARANCES

REITLER KAILAS & ROSENBLATT LLP
Attorneys for Plaintiff
BY: BRIAN D. CAPLAN
JULIE B. WLODINGUER

SHAPIRO ARATO BACH LLP
Attorneys for Defendant
BY: ANN E. PHILIP
CYNTHIA S. ARATO

(Case called)

THE DEPUTY CLERK: Counsel, please state your appearances for the record starting with the plaintiff.

MS. WLODINGUER: Julie Wlodinguer and Brian Caplan from Reitler Kailas & Rosenblatt LLP on behalf of the plaintiff. Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. ARATO: Good afternoon, your Honor. Cynthia Arato and Ann Philip on behalf of defendant, Orchard.

THE COURT: Good afternoon. Everybody can be seated. Thank you. We're here today for two purposes, to rule on the plaintiff's motion for a preliminary injunction and also to have our initial pretrial conference in the matter. So I am prepared to rule on those motions. I'm not going to lay out the facts of the case in detail or the parties' arguments in detail as I assume counsel's familiarity with both.

So pending before me are several motions. First, plaintiff's motion for preliminary injunction. Second, plaintiff's related motion for expedited discovery. And third, several motions to seal. And I'll address each of those in turn. This case is a breach of contract action masquerading as a copyright dispute. Plaintiff seeks to put on the costume of a copyright dispute to obtain an order preliminarily enjoining defendant "from commercially exploiting and/or distributing the master recordings that are owned or controlled by the plaintiff

during the pendency of this action." Injunctive relief is an extraordinary remedy. See *Winter v. Natural Resources Defense Council*, 555 U.S. 7 at 24 (2008). To receive this remedy, the plaintiff must meet the familiar four factors: First, that he is likely to succeed on the merits. Second, that he's likely to suffer irreparable harm in the absence of preliminary relief. Third, that the balance of equities tips in his favor. And fourth, that an injunction is in the public interest. And I will refer to these as the *Winter* factors.

Preliminary injunctions can be either prohibitory or mandatory. See *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 882 F.3d 32 at 37 (2d Cir. 2018). The former prohibitory injunctions maintain the status quo and mandatory injunctions alter it. The parties seeking a mandatory injunction must "meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits." Determining whether an injunction is mandatory requires a court to determine what is the status quo, meaning what is "the last actual, peaceable uncontested status which proceeded the pending controversy." See *Mastrio v. Sebelius*, 768 F.3d 116 at 120 (2d Cir. 2014). If an injunction changes that status quo, it is a mandatory injunction.

At the outset, I find the plaintiff is seeking a mandatory injunction. By operation of the 2015 agreement, the defendant has had the exclusive right to copy, distribute, and

sell the recordings for the last ten years. Defendant believes it still has the right to do that under its contracts with the plaintiff, and the plaintiff disagrees. Plaintiff now seeks injunctive relief prohibiting defendant from exploiting or distributing the recordings, a clear deviation from the decade-long status quo and from what the defendant believes are still its contractual rates. As a result, plaintiff seeks a mandatory injunction and must show a clear or substantial likelihood of success on the merits.

Whether plaintiff seeks a mandatory injunction is ultimately not dispositive here, however, because I would conclude that plaintiff has not shown a likelihood of success on the merits even under the traditional standard. In interpreting a contract, a court must afford each term its plain meaning. See *Palmieri v. Allstate Insurance*, 445 F.3d 179 at 187, (2d Cir. 2006). A term is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated disagreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in that particular trade or business." See *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89 at 99 (2d Cir. 2012). "When determining when a contract is ambiguous, it's important for the Court to read the integrated agreement as a whole."

The 2022 amendment includes the following extension of

term provision: "Notwithstanding anything contained within the agreement" -- and I'm reading from the contract now -- "the parties agree that the term of the agreement is hereby extended without interruption until: (a) June 30, 2030, and/or (b) the end of the accounting period during which all advances under the agreement are fully and completely recouped." And I should note that that agreement is filed at Docket Number 15, attachment 10, paragraph 1. Much rises and falls on the meaning of and/or. Plaintiff principally argues that and/or has a plain and unambiguous meaning of either or both. Accordingly, the plaintiff contends, this extension of term provision unambiguously provided that the 2015 agreement would terminate upon either June 30, 2030 or upon full recoupment of the advances, whichever came first. As a result, plaintiff argues this agreement terminated on June 30, 2025 when defendant fully recouped it's advances.

But this argument faces several important hurtles. First, and despite plaintiff's arguments to the contrary, and/or is simply not an unambiguous term. On the contrary, courts and commentators have long complained that the term is inherently confusing. See, for example, *United States v. Taylor,* 258 F.3d 815 at 819 (8th Cir. 2001). The Court remarks that the term "damages sentences and often leads to confusion or ambiguity." Eminent legal commentator on legal writer, Bryan Garner, in his Dictionary of Modern Legal Uses at page 56

commented "and/or has been vilified for most of its life and rightly so. The upshot is that the only safe rule to follow is not to use the expression in any legal writing document or proceeding under any circumstances." Courts in this district have regularly found that the term is ambiguous when used in a contract. See, for example, *Roc Nation, LLC v. HCC International Insurance Company*, 523 F. Supp 3d 539 at 565 (S.D.N.Y. 2021).

Second, reading and/or to mean either or both creates conflicts with other parts of the text. Under the plaintiff's reading, the 2015 agreement would automatically terminate on June 30, 2030 even if the defendant had not recouped all of its advances. But that interpretation squarely conflicts with other provisions of the 2022 amendment, namely the following clause from Paragraph 2(c) of the amendment. And I'm quoting now again from the contract. "For the avoidance of doubt: (i), the term of the agreement will in no event end earlier than the end of the monthly accounting period during which all advances paid by Orchard...are fully and completely recouped." Plaintiff asks the Court to ignore this clause because the extension of term provision begins "notwithstanding anything contained within the agreement." But this argument ignores applicable precedent that the language for the avoidance of doubt clarifies preexisting terms or provisions. See, for example, *Whitebox Relative Value Partners, LP v. Transocean*

Ltd., 2020 WL 7406063 at *5 (S.D.N.Y. Dec. 16, 2020), in which the Court noted that "the phrase for the avoidance of doubt indicates that it is merely a clarification of what the language already says." Read in context, the No-Earlier-Than Clause clearly clarifies the meaning of the extension of term provision.

Resisting this conclusion, plaintiff argues that "recoupment is the defining factor as to when the term of the agreement ends, not a date certain." But this interpretation also renders entirely superfluous the inclusion of the June 30, 2030 date and the extension of term provision at all. Additionally, it ignores the precise language in the No-Earlier-Than Clause stating the agreement would terminate "no earlier than" recoupment, which plaintiff's interpretation would effectively rewrite to mean the agreement would terminate upon the recoupment.

Referring to the drafting history that is before the Court so far does little to resolve this ambiguity at this stage of the case. As an initial matter, the 2015 agreement included a five-year term but gave the defendant the option in its sole discretion to extend the agreement until recoupment had occurred. Therefore, it contemplated a structure wherein termination would not occur absent both a date certain and recoupment. The 2019 amendment, which was the first amendment to the 2015 agreement's term, included a similar structure and

provided that termination would occur on the later of a date certain and recoupment. The drafting history of the 2022 amendment, which is most important to this suit, at least as it has been presented in connection with this motion, does not reflect a discussion regarding whether the parties intended to change the structure that had governed their dealings prior to that point, wherein termination would require both a date certain and recoupment, which had endured for over seven years. It seems implausible that the parties would affect such a large change in the workings of the 2015 agreement without discussion.

Furthermore, the May 6, 2022 email from plaintiff's agent, attaching the most recent draft of the 2022 amendment, referenced only a single change, and in the draft, only one change was redlined, although plaintiff had also edited the extension of term provision. Accordingly, the drafting history of the 2022 amendment, at least as presented on this motion, is ambiguous as to whether the parties intended to change the 2015 agreement so that it terminated upon either a date certain or recoupment as opposed to continuing to require both events before termination would occur.

In light of the foregoing, plaintiff has not carried its burden of showing a likelihood of success on the merits, let alone a clear or substantial likelihood of success to warrant a mandatory injunction.

Turning to irreparable harm, although the motion could be denied without reaching any of the other factors, I should also note that plaintiff has not shown a likelihood of irreparable harm absent injunctive relief. Firstly, because the plaintiff immediately delayed in seeking injunctive relief. "Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiff's rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic and speedy action." See *CitiBank v. Citytrust*, 756 F.2d 273 at 276 (2d Cir. 1985). Accordingly, "delay, standing alone, may preclude the granting of preliminary injunctive relief because it at least suggests that there is in fact no irreparable injury." See *Coscarelli v. Esquared Hospitality LLC*, 364 F. Supp 3d 207 at 222 (S.D.N.Y. 2019). The Second Circuit has noted that it has found "delays as little as ten weeks sufficient to defeat the irreparable harm that is essential to the issuance of a preliminary injunction." See *Weight Watchers Int'l, Inc. v. Luigino's, Inc*. 423 F.3d 137 at 144 (2d Cir. 2005).

The declaration of Ms. Alba, attached at Docket Number 15, provides that in June 2025, the plaintiff gave the defendant a six-month implied license to continue using the recordings. The parties continued to negotiate a revised amendment to the agreement during that time, but those

negotiations appeared to cease, and the implied license ended, at least from plaintiff's perspective, at the end of December of 2025. In plaintiff's view, therefore, the defendant arguably began illegally infringing on its copyrights from at least January 1 of 2026. Nevertheless, plaintiff did not commence this lawsuit until March 6 of 2026, over two months later. Plaintiff then waited an additional month after filing the complaint, until April 14 of 2026, to move for a preliminary injunction. And then plaintiff consented to a briefing schedule that did not provide for this conference to occur until June of 2026, three months after it filed the lawsuit.

There's, of course, nothing wrong with this schedule, except that it bespeaks a lack for an urgent need of speedy action. By plaintiff's telling, defendant has been infringing its copyright since the end of December 2025 at least when the implied license expired. Yet plaintiff did not seek injunctive relief to prevent that alleged infringement, which plaintiff contends is causing it irreparable harm, until four months later on April 14. Furthermore, plaintiff's theories of irreparable harm such as inability to control its copyright or the defendant's alleged failure to protect infringement by third parties have conceivably been occurring at least since June 30 of 2025 when plaintiff contends the agreement expired or, at the very latest, since January 1 of this year when

plaintiff contends defendant was infringing the copyrights without a license, implied or express. Plaintiff offers no theory why irreparable harm has not occurred over the intervening six months since then, but is now likely to occur unless the Court issues prompt injunctive relief.

In addition, because, if defendant's view is correct, they are merely continuing a contractual licensing relationship of long-standing, plaintiff has not shown that any harm being caused by the present state of affairs cannot be remedied by money damages if the plaintiff ultimately prevails. It is a rare circumstance where a harm that can be remedied by money damages can be deemed irreparable under the *Winter* factors.

As plaintiff has not shown a likelihood of success on the merits or irreparable harm absent injunctive relief, plaintiff's motion for preliminary injunction is denied.

Similarly, I'm going to deny the motion for expedited discovery. Both motions are denied as moot, both meaning plaintiff's motion and defendant's motion for leave to oppose, are denied as moot given that I'm denying the motion for preliminary injunction.

Finally, both parties move for leave to seal portions of their filings in connection with the motion for preliminary injunction. I'm going to grant each of those motions as the filings contain sensitive and confidential information concerning the parties' commercial agreements and their

negotiations to extend. Okay. And we'll put something on the docket, so that there's a record of the resolution of those motions.

Okay. So turning now to our primary purpose, which is to have an initial pretrial conference. I've reviewed your submissions for case management plan. It seems reasonable to me, but I have a couple of questions. The parties left blank the discussion of what type of expert discovery might be needed. And what I usually take from that is that you've included a date as a placeholder, but in all likelihood, the case is not going to require expert discovery. And just my own familiarity with the case suggests that a contract dispute usually doesn't require expert discovery, although one might -- I can imagine experts being needed for damages if plaintiffs were to prevail because the underlying problem is a copyright issue. And copyright damages sometimes need experts.

So I'd be curious to hear from counsel whether you think expert discovery is needed, and if so, is it for liability, or is it just sort of a placeholder for damages experts?

MS. WLODINGUER: Your Honor, Julie Wlodinguer for the plaintiff. We believe experts may be necessary for, as you pointed out, damages calculation. It may also be necessary with respect to the customer practice and the industry with respect to the definition of and/or in such contracts like the

distribution agreement, possibly. So we would reserve our rights on expert discovery for that basis.

THE COURT: All right. Ms. Arato, what's your view?

MS. ARATO: I agree with what plaintiff said. It may be those issues, but whether we use experts may depend on what the plaintiff does.

THE COURT: Okay. I mean, I assume that, should this matter go to trial or in discovery, that the actual participants -- many of the fact witnesses are going to be able to sort of fill out this custom and practice issue because they're the ones who negotiated the agreements and presumably have some level of experience and expertise in negotiating agreements of this type. So I question whether that kind of expert is -- I mean, I'm not precluding anything today to be clear. It's just, you know, while we're all together, I should give you the benefit of my thoughts. It doesn't seem to me very likely given what I know about the case today. The lawyers always know the case better than the judge. That's a universal truth. But given what I know about the case today, it doesn't seem like experts on liability is going to be necessary.

And so what I would suggest is that I just put a TBD on the timing of expert discovery because, as I don't have to tell you all, experts are quite expensive and time-consuming. And it seems to me that we might get to the end of fact

discovery and be at a place either where there's no need for any expert discovery or at least it might make sense to kind of put a pin in any expert discovery and have summary judgment practice on liability before anyone spends time or money on experts that might only be needed for damages. But none of us are going to really know that until fact discovery concludes.

So I'll adopt the parties' proposed date of October 5 for the close of fact discovery. We'll have a post fact discovery conference on Monday, November 2, at 1:00 p.m. And at that time, one of our topics for discussion will be the parties' views on whether the case is right for summary judgment on liability. Do you need expert discovery for liability? Does no one want to move for summary judgment, and we should just move on and set a schedule for damages, expert discovery? You know, we'll assess together what the state of the case is. You'll see in my individual rules that between October 5 and November 2, there's some correspondence that I'm going to expect from you all on those topics. Does anyone want to move for summary judgment, what's the posture of the case, and whether expert discovery is necessary. And then we'll discuss that all together when we meet again on November 2.

I know that you said you've had some limited settlement discussions. My general practice is not to force parties to go to settlement conference unless both sides think it would be helpful, particularly where both parties have

sophisticated counsel. So at the same time, I'm happy to send you to the magistrate judge or to the Court's mediation program at any time that both sides' counsel thinks it would be helpful. So I raise that only to say that no one should feel they have to wait until some preappointed time in the case to ask for a referral for settlement. If at any time as counsel are talking, both sides agree that it would be useful, just send me a letter, and I'll do the referral.

It also is kind of a universal truth that most of the time lawyers are perfectly capable of settling the case between themselves. And one of the great values of a third-party neutral is that the client is there and the parties are there and are participating in the process with the opinion and guidance and information of the magistrate judge or the mediator and that can be extremely helpful. So if you reach a point where both sides think it would be useful, just send me a letter, and I usually do the referral the same day. Okay.

MS. ARATO: Your Honor, may I just ask a question and one clarification?

THE COURT: Of course.

MS. ARATO: So at least as of now, both parties, we agreed that we would do private mediation.

THE COURT: Okay.

MS. ARATO: So we may certainly reevaluate that, but if we don't send a letter seeking a referral, it's because

we've agreed to do private mediation. I think we have a little bit of a disagreement over the timing of that, and we noted that in the scheduling order. And then on the discovery, I just want to make sure I understand this. The fact discovery cutoff, you expect that to include damages discovery, just not expert discovery? Or can we do a full bifurcation and have damages discovery after fact discovery?

THE COURT: Well, I mean, the -- I'm very open to bifurcating because my sort of baseline philosophy is that I should be helping you try to resolve the case in the most efficient and cost-effective way that is possible. So if the parties agree to that, I'm happy to do that and hold off on even document discovery that might be only relevant to damages until after we meet on November 2. So I don't know if you've had a chance to discuss that. Mr. Caplan.

MR. CAPLAN: We have not discussed that with our client yet, your Honor. But we can talk to our client and get back to the opposing counsel early next week.

THE COURT: Okay. So yes. Just confer on that. And if you both agree, just send me a letter on the docket so that it's preserved for the record that both sides have agreed, and everyone's on the same page that the deadline of October 5 is for liability discovery and that we'll discuss the status of the case and next steps on November 2nd.

MS. ARATO: But regardless, the current deadlines for

expert reports, you'll just take off?

THE COURT: Yes. I'll just write that and just say TBD. And when we're together on November 2 -- we'll set a reasonable schedule, right? If at that point where we are is continuing to do discovery before any kind of summary judgment practice or trial, we'll set a reasonable and appropriate schedule for what remains to be done. Okay. And if you do go to private mediation, you can tell me or not tell me. The only reason you really need to tell me is if the parties are asking to pause some kind of deadlines in discovery that might affect that October 5 deadline.

So you can agree by consent to move any interim date between now and October 5, and you don't need my involvement as long as both parties consent. The only thing that you need my permission for is if both sides would like to do something that is going to make that October 5 date impossible to meet and we need to move that. Then I would expect you to let me know, and I'll extend it or not. But otherwise, if you want to just pause something but you're still on track for October 5, then Godspeed, and you don't have to involve me in that.

Okay. The last couple of administrative matters that I have on my list -- and then I'm happy to hear if there's anything counsel would like to raise. The first thing is that I require request for extensions to be made two business days at least before the operable deadline unless there's a

legitimate emergency. I know we're all people in the world, and sometimes there are actual emergencies. But otherwise, I expect requests for extension at least two business days before the deadline. I generally handle all discovery disputes myself, and I have a very expedited procedure that's described in my individual rules for that. You have to confer, and when you've truly reached an impasse, the parties seeking discovery will send me a short letter laying out the issue. The other side has two business days to respond in a similarly short letter. I typically do those by video, and we try to have the conference, if I can, within a day or two after getting the second letter. And my goal is always to hear from you, and then send you away with a decision on that conference unless it's a particularly complicated privilege issue or there's some very complicated issue where I might need to review some documents or something. But most of the time, it's not that, and my intention and goal is to resolve it and send you away with a decision on that conference so that you can get back to work.

Okay. I think that's everything I have. Ms. Wlodinguer, is there anything else plaintiff would like to raise while we're all here together?

MS. WLODINGUER: No, your Honor.

THE COURT: Ms. Arato?

MS. ARATO: No, your Honor.

THE COURT: All right. Thank you all very much. We're adjourned. If not before, I will see you in November.

(Adjourned)