

ORIGINAL

assigned to Judge Ruth Ann Korman

1 DREIER STEIN KAHAN BROWNE WOODS
 2 GEORGE LLP
 3 Mark D. Passin (No. 101195)
 4 mpassin@dreierstein.com
 5 Jonathan E. Stern (No. 222192)
 6 jstern@dreierstein.com
 7 The Water Garden
 8 1620 26th Street
 9 Fourth Floor, North Tower
 10 Santa Monica, California 90404-4060
 11 Telephone: 310-828-9050
 12 Facsimile: 310-828-9101

13 DREIER LLP
 14 Joseph L. Grier (Pro Hac Vice Admission Pending)
 15 jgrier@dreierllp.com
 16 499 Park Avenue
 17 New York, New York 10022
 18 Telephone: 212-328-6100
 19 Facsimile: 212-328-6101

20 Attorneys for the Plaintiffs
 21 JAMES YOSHINOBU IHA AND D'ARCY
 22 WRETZKY-BROWN

FILED
 LOS ANGELES SUPERIOR COURT

JUL 24 2008

JOHN A. CLARKE, CLERK
 BY D.M. SWAIN, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF LOS ANGELES

18 JAMES YOSHINOBU IHA, an individual;
 19 and D'ARCY WRETZKY-BROWN, an
 20 individual,

21 Plaintiffs,

22 vs.

23 VIRGIN RECORDS AMERICA, INC., a
 24 California Corporation, and DOES 1-50,
 25 inclusive,

26 Defendants.

CASE NO. BC395038

COMPLAINT FOR:

1. BREACH OF CONTRACT;
2. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
3. UNJUST ENRICHMENT; AND
4. ACCOUNTING

DEMAND FOR JURY TRIAL

CIT/CASE: BC395038 LEA/DETA
 RECEIPT #: CM115782027
 DATE PAID: 07/24/08 12:51:55 PM
 PAYMENT: \$320.00 0310
 RECEIVED:
 CHECK: 320.00
 CASH:
 CHANGE:
 FUND:

1 Plaintiffs James Yoshinobu Iha ("Iha") and D'Arcy Wretzky-Brown ("Wretzky")
2 (collectively, "Plaintiffs"), as and for their claims against Defendant Virgin Records America,
3 Inc. ("Virgin"), allege as follows:

4 **NATURE OF ACTION**

5 1. This is an action to obtain redress for the unauthorized commercial
6 exploitation of the musical recordings of the internationally renowned rock band The Smashing
7 Pumpkins, of which Iha and Wretzky were founding members. Specifically, Virgin entered into
8 agreements with third parties, without Plaintiffs' consent, to provide The Smashing Pumpkins'
9 recordings for sale as electronic transmissions (e.g. download computer files, ringtones, etc.).
10 Such unauthorized commercial exploitation by Virgin constitutes a material breach under a
11 recording agreement entered into between Iha, Wretzky and William Patrick Corgan ("Corgan"),
12 collectively and professionally known as "The Smashing Pumpkins," and Virgin, dated May 11,
13 1998 (the "Recording Agreement").

14 **FACTUAL ALLEGATIONS**

15 **A. The Parties**

16 2. Iha is an individual residing in the County of New York, New York.

17 3. Wretzky is an individual residing in the County of Berrien, Michigan.

18 4. Plaintiffs are informed and believe, and based thereon allege, that Virgin is
19 a corporation duly organized and existing under the laws of the State of California, with its
20 principal place of business in New York, New York. Plaintiffs are further informed and believe,
21 and based thereon allege, that Virgin is a record label presently owned by the EMI Group.

22 5. The true names and capacities, whether, individual, corporate, associate or
23 otherwise of Defendants DOES 1-50, inclusive, are unknown to Plaintiffs, who therefore sue
24 these Defendants by their fictitious names. Plaintiffs are informed and believe, and, based
25 thereon allege, that each of the Defendants designated herein as a fictitiously-named defendant is
26 in some manner responsible for the events and happenings herein referred to, either contractually
27 or otherwise, and caused the damage to Plaintiffs as herein alleged. When Plaintiffs ascertain the
28 true names and capacities of DOES 1-50, inclusive, they will ask leave of the Court to amend

1 their Complaint by setting forth the same. (Virgin and DOES 1-50 are hereinafter collectively
2 referred to as "Defendants.")

3 **B. Jurisdiction**

4 6. The parties have consented to this Court's jurisdiction in the Recording
5 Agreement, which provides that any claim or dispute arising under the Recording Agreement
6 shall be brought only in the state or federal courts of the State of California.

7 **C. Background**

8 7. The Smashing Pumpkins are a musical recording group formed in 1988
9 after Corgan and Iha met Wretzky in Chicago, Illinois and began performing together under the
10 moniker "The Smashing Pumpkins."

11 8. For the next five years, the popularity of The Smashing Pumpkins steadily
12 grew, with the band achieving mass success with the 1993 release of the album "Siamese
13 Dream." The album debuted at #10 on the Billboard chart, selling over one million copies in the
14 first four months of its release.

15 9. In 1994, The Smashing Pumpkins B-sides/rarities compilation "Pisces
16 Iscariot" was released and reached #4 on the Billboard chart.

17 10. Thereafter, in 1995, the band's double album "Mellon Collie and The
18 Infinite Sadness," was released and debuted at #1 on the Billboard charts. Four singles were
19 released in the United States during 1996 and the album earned the band seven Grammy Award
20 nominations in 1997. By early 1998, the Recording Industry Association of America certified the
21 album eight times platinum in the United States.

22 **D. The Recording Agreement**

23 11. By the Spring of 1998, The Smashing Pumpkins were at the height of their
24 acclaim and entered into negotiations with Virgin regarding the band's future relationship with
25 the record label. As a result of the band's success, the Recording Agreement was to provide the
26 band with significant control and approval rights over the creation, marketing and sale of their
27 recordings.

28 12. On or about May 11, 1998, Iha, Wretzky and Corgan, collectively

1 professionally known as The Smashing Pumpkins, each signed the Recording Agreement with
2 Virgin in their individual capacities.

3 13. The Recording Agreement provided, *inter alia*, that the mutual consent of
4 all parties was necessary for Virgin to exploit the band's recordings via any new technology
5 created. In this regard, paragraph 13(b) of the Recording Agreement provides that:

6 Exploitation of any new technology which is hereafter developed,
7 including the exploitation of newly-created long-form home videos
8 shall only be with your and our mutual consent.

8 Recording Agreement, ¶13(b).

9 14. Additionally, pursuant to the Recording Agreement, the band had approval
10 rights over the manner and approach of distribution of the recordings. In this regard, paragraph
11 13(c) of the Recording Agreement provides in relevant part that:

12 You will have the right to approve all exploitation of Masters other
13 than in the form(s) and sequence(s) delivered and other than as
14 top-line sales through normal retail distribution channels.
15 Accordingly, there shall be no exploitations of any kind of
16 Masters, except as delivered for exploitation by you hereunder and
17 under the Prior Agreement, and except as released prior to the
18 Effective Date, without your specific written consent.

16 Recording Agreement, ¶13(c).

17 E. Virgin Breaches The Recording Agreement

18 15. Thereafter, in or around September 1999, Wretzky left the band, and within
19 the following year the band announced their breakup, performing in a farewell tour culminating at
20 the end of 2000 – a situation of which Virgin was fully aware. In fact, after The Smashing
21 Pumpkins disbanded, in 2001 Corgan formed a new band known as “Zwan.” Reprise Records,
22 not Virgin, released Zwan’s only album in 2003.

23 16. Five years after the group disbanded, in 2005, Virgin sought The Smashing
24 Pumpkins’ permission via amendment to the Recording Agreement to exploit all of the band’s
25 recordings via electronic transmissions. However, despite the fact that Virgin was fully aware
26 that the band had mutually disbanded, Virgin attempted to enter into such amendment to the
27 Recording Agreement without obtaining the consent or signatures of Iha and Wretzky.
28

1 17. Corgan's counsel negotiated the proposed amendment to the Recording
2 Agreement for Corgan which, in addition to the exploitation of electronic transmissions,
3 permitted Virgin to implement a mid-price sales campaign of the band's albums whereby Virgin
4 would also promote Corgan's forthcoming debut solo album (to be released on another record
5 company's label), in connection with the campaign.

6 18. However, the proposed amendment was not executed by all of the parties,
7 including the Plaintiffs, whose signatures and consent were expressly required under the
8 Recording Agreement for any amendments or modifications. In this regard, paragraph 22(a) of
9 the Recording Agreement provides in relevant part that:

10 [N]o modification, amendment, waiver, termination or discharge of
11 this Contract or of any its terms shall be binding upon either of us
12 unless confirmed by a document signed by you and by a duly
authorized officer of ours.

13 Recording Agreement, ¶ 22(a) (emphasis added).

14 19. The first sentence of the Recording Agreement defines "you" as Corgan,
15 Iha and Wretzky and, in fact, the proposed amendment, similar to the Recording Agreement,
16 includes three signature lines for each of the three band members.

17 20. Notwithstanding the foregoing, in 2005, Virgin began licensing various
18 recordings of The Smashing Pumpkins through electronic transmissions, such as via download
19 transmissions, streaming transmissions, and/or other forms of digital delivery.

20 21. Joseph Grier ("Grier") counsel for Iha and Wretzky, repeatedly advised
21 Virgin, orally and in writing that the proposed amendment was negotiated and approved solely by
22 Corgan and his representatives, and that any amendment to the Recording Agreement had to be
23 executed by all three of the original band members. Grier also requested a direct accounting of
24 all income derived from electronic transmissions to date and demanded that until the amendment
25 was properly negotiated and executed by all parties, all monies collected with respect to
26 electronic transmissions should be held internally by Virgin.

27 22. On or about May 3, 2007, Plaintiffs were informed that Virgin distributed
28

1 at least one royalty accounting and payment of 100% of the band's digital monies pertaining to
2 such accounting directly to Corgan. Yet, at no point prior to or upon the release of the digital
3 monies did Virgin inform Iha and/or Wretzky of said distribution. Thereafter, on or about May
4 15, 2007 both Iha and Wretzky individually sent letters to the attention of Sati Renjen, Director of
5 EMI/Virgin Royalties, requesting copies of prior digital income statements and copies of any
6 checks issued by Virgin directly to Corgan. As a result of Virgin's continued lack of notice to
7 Plaintiffs, Plaintiffs were unaware of the distribution of Virgin's accountings.

8 23. Despite the above, Virgin continues to neglect any and all requests for a
9 direct accounting and payment of Plaintiffs' monies claiming a need for Corgan's permission.

10 24. To date, Virgin continues to engage in the exploitation of electronic
11 transmissions of the band's recordings without Plaintiffs' consent. In permitting the sale of
12 electronic transmissions without Plaintiffs' consent, Virgin has deprived Plaintiffs of the benefits
13 and the protections specifically negotiated in the Recording Agreement and due to them under the
14 Recording Agreement, and/or any subsequent modification or amendment thereto.

15 **FIRST CAUSE OF ACTION**

16 **(Breach of Contract)**

17 25. Plaintiffs incorporate here by reference each and every allegation of
18 paragraphs 1 through 24, inclusive, as though fully set forth herein.

19 26. Virgin has materially breached the Recording Agreement as of the
20 commencement of exploitation of electronic transmissions of the band's recordings by, *inter alia*,
21 proceeding with exploitation of the recordings without receiving Iha and/or Wretzky's consent.

22 27. Plaintiffs have performed all of their obligations pursuant to the terms of
23 the Recording Agreement.

24 28. As a direct and foreseeable result of Virgin's breach of contract, Plaintiffs
25 have suffered, general, special and incidental damages in an amount to be proven at trial, but
26 which Plaintiffs are informed and believe, and based thereon allege, are within the jurisdictional
27 limits of this Court, plus pre-judgment and post-judgment interest at the legal rate.
28

1 **FOURTH CAUSE OF ACTION**

2 **(Accounting)**

3 37. Plaintiff incorporates here by reference each and every allegation of
4 paragraphs 1 through 24, 26 through 28, 30 through 33 and 35 through 36, inclusive, as though
5 fully set forth herein.

6 38. The amount of money due from Virgin to Plaintiffs based on the
7 exploitation of electronic transmissions of the band's recordings is not wholly known to
8 Plaintiffs, and cannot be ascertained without a full and complete accounting.

9 39. Accordingly, Plaintiffs request that the Court order Virgin to render a full,
10 complete and current accounting to ascertain the full amount of money, since inception, due and
11 owing directly to Plaintiffs.

12 **WHEREFORE**, Plaintiffs pray for judgment against Defendants as follows:

13 **AS TO THE FIRST CAUSE OF ACTION:**

14 40. For general, special and incidental damages against Virgin, in an amount to
15 be proven at trial;

16 **AS TO THE SECOND CAUSE OF ACTION:**

17 41. For general, special and incidental damages against Virgin, in an amount to
18 be proven at trial;

19 **AS TO THE THIRD CAUSE OF ACTION:**

20 42. For the imposition of a constructive trust over the monies Virgin derived
21 from the exploitation of electronic transmissions;

22 **AS TO THE FOURTH CAUSE OF ACTION:**

23 43. For an accounting from Virgin of royalties and any other monies due to
24 Plaintiffs.

25 ///

26 ///

27 ///

28 ///

1 ON ALL CAUSES OF ACTION:

- 2 44. For costs of suit, incurred herein, including contractual attorneys' fees;
3 45. For pre- and post-judgment interest at the maximum legal rate; and
4 46. For such other and further relief as this Court may deem just and proper.

5
6 DATED: July 24, 2008

DREIER STEIN KAHAN BROWNE WOODS
GEORGE LLP

7
8
9 By 

Mark D. Passin
Attorneys for Plaintiffs
JAMES YOSHINOBU IHA and D'ARCY
WRETZKY-BROWN

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28