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November 13, 2023

The Honorable Rozella A. Oliver
United States Magistrate Judge
Roybal Federal Building and United States Courthouse
255 E. Temple St., Los Angeles, CA, 90012
Courtroom 590, 5th Floor

Re: *Cher v. Bono, et al.*, Case No. 2:21-CV-08157 JAK (RAOx)

Dear Magistrate Judge Oliver:

Pursuant to the Court's November 6, 2023 Order (Doc. 57), plaintiff and counterdefendant Cher respectfully submits this letter brief in support of her informal discovery motion requesting that the Court overrule the attorney-client privilege and work product doctrine objections of defendant and counterclaimant Mary Bono to the production of her and her counsel's communications with third parties.

1. Relevant Background

In 1978 and as part of their division of community property following the dissolution of their marriage, Sonny Bono assigned to Cher, among other things, fifty percent of all musical composition royalties that he, his successors, or heirs received from any source with respect to musical compositions Sonny authored, co-authored, or acquired prior to their separation. Cher's right to those royalties is confirmed in their 1978 Marriage Settlement Agreement (the "MSA," Ex. 2 at 6-8, ¶ 10(d)), the 1978 State Court Judgment in their dissolution proceeding (Ex. 3 at 6-7 ¶ 7D), and in the 1999 Creditor's Claim Agreement entered into by Cher and Ms. Bono in the probate of Sonny's estate after his death in 1998 (Ex. 4). These royalties are generally hundreds of thousands of dollars per year.

In the Creditor's Claim Agreement, Cher and Ms. Bono agreed to cooperate in "the collection and proper disbursement of such royalties," and in 2011, they (through their respective trusts) *jointly* engaged Wixen Music Publishing, Inc. ("Wixen") as their "agent" to, among others things, collect and disburse those royalties on their behalves, pursuant to three written agreements,

a Collection Agreement, Administration Agreement, and Promotion Agreement (collectively, the "Agreements"). *See* Exs. 5-7.[1]

Section 304(c) of the Copyright Act provides that a deceased author's surviving spouse and other heirs may, under certain circumstances, terminate the author's pre-January 1, 1978 grants of copyrights or copyright rights. 17 U.S.C. § 304(c). In 2016, Ms. Bono and her two children served on grantees of Sonny's pre-1978 grants, a Section 304(c) notice terminating those copyright grants, with the earliest terminations beginning in 2018 and then continuing through 2026. Ex. 8. Neither the 1978 MSA, the 1978 State Court Judgment, nor the 1999 Creditor's Claim Agreement pre-date January 1, 1978. Neither are they grants of copyrights or copyright rights—the right to receive royalties is not a copyright right[2]—and Ms. Bono's notice of termination does not mention them and was not served on Cher. Also, Section 304(c)(6)(E) states that "[t]ermination of a grant under this subsection … in no way affects rights arising under any other Federal, State, or foreign laws." 17 U.S.C. § 304(c)(6)(E). So, not surprisingly, the District Judge has ruled at the pleading level that Ms. Bono's notice of termination did not terminate Cher's rights to fifty percent of the composition royalties.[3]

However, in September 2021, Ms. Bono's lawyer disclosed to Cher's transactional counsel that at Ms. Bono's direction, her and Cher's agent, Wixen, secretly had begun diverting to Ms. Bono Cher's fifty percent of the composition royalties, on the specious ground that Ms. Bono's Section 304(c) notice terminated Cher's right to fifty percent of those royalties—nearly $190,000 has been diverted and far more is in a separate account pending the outcome of this litigation. On October 13, 2021, Cher filed this action for a declaration that Ms. Bono's notice did not affect Cher's rights and for breach of contract. She also filed a State action against Wixen, but her claims against Wixen have effectively been placed on hold pending this action.

In the course of discovery, Cher sought e-mails and other written communications between Ms. Bono and Wixen and one of the terminated grantees, Warner Chappell Music Publishing, Inc. ("Warner Chappell"), between 2016 and the filing of this action in October 2021, regarding Ms. Bono's notice of termination, its supposed effect on Cher's rights, and the diversion of Cher's royalties. Cher also questioned Ms. Bono, and Wixen's lay principal, Randall Wixen, at their depositions about these subjects. However, Ms. Bono withheld the communications and she and Mr. Wixen were instructed not to answer the deposition questions, on the ground that Mr. Wixen was her agent and, as a result, her and her lawyer's communications with Wixen—which is not represented by Ms. Bono's lawyer—are protected by the attorney-client privilege and work

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[1] Ms. Bono has designated Exhibits 5, 6, 7, 11 as CONFIDENTIAL under the parties' Stipulated Protective Order (Doc. 38). Accordingly, these documents have not been filed, but have been emailed to Chambers separately.

[2] *See, e.g.*, *Broadcast Music, Inc. v. Hirsch*, 104 F.3d 1163, 1166 (9th Cir. 1997) (assignments of royalty interests have "no relationship to the existence … of a copyright, nor to 'rights under a copyright.'").

[3] *See* Mar. 14, 2023, Order (Doc. 43) at 8. Much of that Order deals with whether Ms. Bono's notice of termination terminated Cher's rights to a different stream of royalties: record royalties under recording contracts. However, Ms. Bono has admitted that her notice did not mention the recording contracts.

product immunity.[4] There is no dispute that this discovery is relevant and, accordingly, the discrete issue is whether the attorney-client privilege and work product immunity apply.

2. The Communications Are within the Scope of Discovery Under Rule 26

As a threshold matter, the communications are discoverable under Federal Rule of Civil Procedure 26. Rule 26(b) provides that discovery extends to "matter that is relevant to any party's claim or defense and proportional to the needs of the case." Ms. Bono's written and oral communications with Wixen regarding the misuse of the notice of termination to cause the diversion of Cher's royalties is directly relevant to Cher's claims that Ms. Bono did exactly that. And Ms. Bono does not contend that she would be unduly burdened by producing the communications—she has already identified them in privilege logs—or by the completion of her and Mr. Wixen's depositions as to the questions they were instructed not to answer on privilege grounds.

3. The Communications Are Not Protected by the Attorney-Client Privilege

Ms. Bono contends that the attorney-client privilege shields communications between Ms. Bono and/or her attorneys, on the one hand, and Wixen, on the other, because the privilege may extend to communications with third parties acting as her agents and, under the 2011 agreements, Wixen was her agent. But Wixen also was Cher's agent at the same time, and Ms. Bono offers no explanation of her withholding of communications with Warner Chappell.

(a) The Attorney Client Privilege Does Not Apply to Ms. Bono's Communications with Cher's Agent, Wixen, and Warner Chappell

In the Ninth Circuit, courts analyzing whether communications are shielded by the attorney-client privilege utilize an eight-part test, which requires, among other things, that the communications be "made in confidence." *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (citation omitted). The "decisive inquiry" is "whether the client reasonably understood the conference to be confidential." *Griffith v. Davis*, 161 F.R.D. 687, 695 (C.D. Cal. 1995) (quoting *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984)); MCCORMICK ON EVIDENCE § 91 at 189 (2022). Here, Ms. Bono could not have reasonably understood that her and her counsel's communications were in confidence because Wixen is Cher's agent too.

As discussed above, it is undisputed that Cher and Ms. Bono *jointly* engaged Wixen as their agent when they co-signed the Agreements in 2011. The existence of this relationship is evidenced by the Wixen Collection Agreement and Wixen Promotion Agreement, which expressly refer to Wixen as an "agent" of both parties. Exs. 5 at 2 § 1(a), 7 at 5 § 4(c)(iii). Randall Wixen

[4] Wixen has taken no position on the privilege objection and Wixen's counsel made it clear he instructed Mr. Wixen not to answer questions only because Ms. Bono's lawyer asked him to, and Wixen's counsel has agreed to abide by the Court's determination whether the privileges apply as Ms. Bono claims. *Id.* at 16:14-24; 126:18-130:9.

also stated that "[a]s a representative of both Cher and Mary, [he] really shouldn't be advocating one party's POV to the other." Ex. 10. Indeed, Ms. Bono's attorney-client privilege argument is premised on Wixen being an agent pursuant to the Agreements. She simply turns a blind eye to the fact that, under those Agreements, Wixen was a *joint* agent for Cher with respect to the same services.

While it is black-letter law that an agent owes a duty of disclosure to its principal, the Agreements provide they are governed by California law (*see* Exs. 5 at 9 § 17(d), 6 at 8 § 14(d), 7 at 7 § 9(d)), and California law is clear that "an agent is required to disclose to the principal all information relevant to the subject matter of the agency." 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Agency § 106 (11th Ed. 2023); *see, e.g.*, *O'Riordan v. Fed. Kemper Life Assurance Co.*, 36 Cal. 4th 281, 288 (2005) ("Once he became Kemper's agent, Hoyme had a duty to disclose to Kemper any material information he had pertaining to [subject of agency], and Kemper is deemed to have knowledge of such facts"). As the subject matter of Wixen's agency with Cher is Cher's royalty and related approval rights, Wixen was obligated to disclose to Cher that, for example, Ms. Bono and Wixen would claim they no longer existed and divert Cher's royalties. Accordingly, Ms. Bono could not reasonably have believed that her or her counsel's communications with Wixen regarding these rights would be kept secret from Cher.

From 2016 through October 2021, Ms. Bono, often with her lawyer, *convinced Cher's agent, Wixen,* to divert Cher's royalties. There is no co-conspirator privilege and there is no merit to Ms. Bono's argument that these communications are protected by her attorney-client privilege.

(b) There Is No Merit to Ms. Bono's Arguments to Keep Her Relevant Communications Secret

First, Ms. Bono cites *Skidmore v. Led Zeppelin* for the proposition that "a music publisher does not have a fiduciary relationship with its composers, absent special circumstances." 952 F.3d 1051, 1078 (9th Cir. 2020). This argument is a red herring. Cher is not Wixen's composer and, unlike most music publishers, including in *Skidmore*, Wixen does not own the copyrights exploited. *See* Ex. 6 at 3 § 2(c). Further, special circumstances exist here because Wixen did more than "collect[ ] royalties and pass[ ] them on" to Cher and Ms. Bono. *Faulkner v. Arista Recs. LLC*, 602 F. Supp. 2d 470, 482 (S.D.N.Y. 2009) (record company, like music publishers, not a fiduciary if it only collects monies and pays royalties). Wixen was granted broad administration rights "on behalf of [Cher and Ms. Bono]" (Ex. 6 at 2-3 § 2) and authorized Wixen to promote Sonny & Cher, their recordings, and pursue new Sonny & Cher projects (Ex. 7 at 1, Recitals, 2-3, ¶ 1).

Also, the agreements expressly refer to Wixen as Cher's and Ms. Bono's *agent* and under California law, which governs the agreements, an agent owes a duty of disclosure to its principals. *O'Riordan*, 36 Cal. 4th at 288. Furthermore, Wixen acted on behalf of and subject to the substantial control of Ms. Bono and Cher. *See, e.g.*, Ex. 5 at 3 ¶ 4, 4 ¶ 5. That makes it an agent under California law. *McCollum v. Friendly Hills Travel Center*, 172 Cal. App. 3d 83, 90-91

(1985). Ultimately, though, Ms. Bono's argument is self-defeating because if Wixen was not *Cher's agent* because the Agreements did not create a fiduciary relationship, then Wixen also was *not Ms. Bono's* agent. As a result, Ms. Bono's communications with Wixen were not with an agent but with a third party and, accordingly, also were not confidential attorney-client communications.

Second, Ms. Bono may argue that the fact she secretly entered into an agreement with Wixen to divert Cher's royalties, dated as of January 1, 2019 but signed in late January 2020 (Exs. 11, 12), created a separate legal relationship with Wixen beyond her and Cher's joint engagement of Wixen under the Agreements. However, not only was that agreement kept secret from Cher, but it purports to supplant only the original 2011 Collection Agreement and then only as to Cher's royalty rights are supposedly terminated, song by song, from 2019 to 2026. Ex. 11 at 1, 2nd Recital, & 1-2. As a result, despite that secret agreement, Wixen remained Cher's agent under the original 2011 Agreements, which Cher terminated only in October 2021.

Ms. Bono knew that her communications with Wixen were not made in confidence because Wixen was her and Cher's joint agent. As a result, Wixen owed Cher a duty to disclose their communications. There is no merit to Ms. Bono's claim of attorney-client privilege.

4. The Communications Also Are Not Protected by the Work Product Doctrine

Ms. Bono asserts that the communications are also shielded by the work product doctrine. The work product doctrine "protects from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *United States v. Christensen*, 828 F.3d 763, 805 (9th Cir. 2016) (citation omitted), *cert. denied*, 580 U.S. 1049 (2017); Fed. R. Civ. P. 26(b)(3)(A). The work product doctrine does not apply here because the communications were not made in anticipation of litigation and Ms. Bono waived the privilege by disclosing the work product to Wixen.

(a) The Communications Were Not Made in Anticipation of Litigation

Ms. Bono's communications with Wixen and Warner Chappell regarding the notice of termination and Cher's royalties or approval rights are not protected by the work product doctrine because they were not "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A).

First, Ms. Bono has asserted the work product immunity as to communications with Wixen going back to 2016, when Ms. Bono served the notice of termination. And her privilege log lists communications with Warner Chappell in July 2021. *See* Ex. 1 at 41, 43-44, 47. However, no dispute arose until September 2021 when Cher's representatives learned that Ms. Bono had gotten Wixen to begin diverting Cher's royalties, and objected to them doing so. And litigation was not filed until October 2021. Ms. Bono has argued that while these communications involved getting Wixen to accede to Ms. Bono's view that the notice of termination affected Cher's rights, she and

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