

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

ALTICOR INC.; and AMWAY CORP.,

Plaintiffs,

v.

Case No. 6:14-cv-542-Orl-37DAB

UMG RECORDINGS, INC.; CAPITOL  
RECORDS; LLC, SONY MUSIC  
ENTERTAINMENT; and WARNER  
MUSIC GROUP CORP.,

Defendants.

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**ORDER**

This cause is before the Court on the following:

1. Motion to Dismiss and Supporting Memorandum of Law of Defendants UMG Recordings, Inc., Capitol Records, LLC, Sony Music Entertainment and Warner Music Group (Doc. 40), filed May 30, 2014;
2. Alticor Inc.'s and Amway Corp.'s Memorandum in Opposition to Motion to Dismiss (Doc. 44), filed June 13, 2014; and
3. Joint Motion of Plaintiffs and Defendants Requesting Track Three Designation (Doc. 45), filed June 20, 2014.

**BACKGROUND**

This action arises from allegations that Plaintiffs Alticor Inc. and Amway Corp. and Plaintiffs' distributors have used copyrighted music belonging to Defendants UMG Recordings, Inc. ("UMG"), Capitol Records, LLC ("Capitol"), Sony Music Entertainment ("Sony"), and Warner Music Group Corp. ("Warner") in hundreds of Internet videos promoting Amway and its products ("Accused Videos"). (Doc. 1.) Plaintiffs initially

learned of Defendants' allegations through a notice of infringement dated November 27, 2012 ("Notice") (*id.* ¶ 27), and through additional notices of infringement received in 2013 (*id.* ¶ 29 (describing 2013 notices of infringement ("2013 Notices")).) The notices were required pursuant to dispute resolution procedures set forth in a settlement agreement dated March 16, 1998 (the "Agreement").<sup>1</sup> (See *id.* ¶¶ 23–33.)

Plaintiffs allege that Defendants submitted the notices to Plaintiffs in bad faith because: (1) Defendants waited "at least 18 months" to "ambush" Plaintiffs with "hundreds" of alleged copyright infringements (*id.* ¶ 3); (2) Defendants included allegations concerning multiple videos uploaded to YouTube even though Defendants had effectively licensed the videos pursuant to a program with YouTube called ContentID (*id.* ¶¶ 4–6, 38–49); and (3) Defendants included multiple videos that they could have "quickly and easily" removed from the Internet by using the notice procedures set forth in the Digital Millennium Copyright Act ("DMCA") (*id.* ¶¶ 6, 55.b). Nonetheless, Plaintiffs allege that they responded to the notices with an "extensive

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<sup>1</sup> The Agreement resolved copyright infringement claims that were pending in this Court more than a decade ago in *Arista Records, Inc. v. Amway Corporation*, No. 6:96-cv-175-Orl-18DAB ("Arista Action"). (See Doc. 1, ¶ 25; see also *Arista Action*, Docs. 411, 412.) The plaintiffs in the *Arista Action* are related to two defendants in the instant action, including: (1) Capitol Records, LLC (Capitol Records, *Inc.* was named in the *Arista Action*); and (2) Sony Music Entertainment (Sony Music Entertainment, *Inc.* was named in the *Arista action*). (*Arista Action*, Doc. 381.) The primary defendant in the *Arista Action*—Amway Corporation—also is related to the Plaintiffs in this action. Specifically, Alticor alleges that it "is the successor in interest to Amway Corporation," and Amway is an "indirect subsidiary of Alticor." (Doc. 1, ¶¶ 8–9.) The remaining two Defendants in this action—UMG and Warner—were not parties to the *Arista Action*; however, Plaintiffs allege that Warner has agreed "to abide by the procedures of the . . . Agreement." (*Id.* ¶¶ 27, 53.) Finally, the remaining defendants in the *Arista Action*—thirty-eight individual Amway distributors—are not parties to the instant action. (See *id.* ¶ 35 (alleging that 99% "of the persons allegedly involved in creating or uploading the Accused Videos had nothing to do with the [*Arista Action*], and most were not even part of Amway in the 1990s"); see also Doc. 45, p. 1 (asserting that Defendants intend to join "additional Defendants" in this action).)

investigation” and a “41-page report” in compliance with the terms of the Agreement. (*Id.* ¶¶ 28–29.) Plaintiffs allege that the parties then proceeded through an unsuccessful mediation before retired Judge Daniel Weinstein. (*Id.* ¶¶ 31–33.)

The day after the final day of mediation (see *id.* ¶¶ 31–33), Plaintiffs initiated this action against Defendants claiming: (1) breach of the Agreement and implied duty of good faith and fair dealing (*id.* ¶¶ 50–56 (“Count I”)); (2) tortious interference with Plaintiffs’ rights under the Agreement (*id.* ¶¶ 57–63 (“Count II”)); (3) civil conspiracy (*id.* ¶¶ 64–66 (“Count III”)); and (4) a right to declaratory relief (*id.* ¶¶ 67–103 (“Count IV”)).<sup>2</sup> Defendants jointly moved to dismiss Counts I, II and III. (Doc. 40.) Plaintiffs responded. (Doc. 44.) The parties also filed a case management report (Doc. 46) and a joint motion requesting track three designation (Doc. 45).

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<sup>2</sup> Specifically, Plaintiffs request that the Court declare that:

- (1) Plaintiffs “are not directly, vicariously or contributorily liable for alleged acts of copyright infringement relating to the Accused Videos” (Doc. 1, p. 25; see also *id.* ¶¶ 69–71, 77–78, 81–82);
- (2) “Accused Videos uploaded to YouTube are impliedly licensed” (*id.* ¶ 8);
- (3) Accused Videos “in the nature of personal photographs and home videos of day in the lives of people who happen to be” Amway distributors “constitute fair use” (*id.* ¶¶ 85, 90);
- (4) “Accused Videos created and uploaded to the Internet outside the United States do not constitute infringement under the copyright laws of the United States” (*id.* ¶ 94);
- (5) “Defendants are committing copyright misuse as to Accused Videos uploaded to YouTube” (*id.* ¶ 96); and
- (6) “Defendants’ claims of copyright infringement are barred” under the doctrines of laches (*id.* ¶ 98), estoppel (*id.* ¶ 101), and unclean hands (*id.* ¶ 103).

Defendants have not moved to dismiss this Count.

The parties appeared for a preliminary pretrial conference July 8, 2014. (Doc. 49.) At the conference, the parties were advised of a potential basis for disqualification of the Undersigned, and the matter was continued pending resolution of the disqualification issue. (Doc. 51.) On July 16, 2014, the parties filed waivers of disqualification (Doc. 54); accordingly, the matter will proceed before the Undersigned. Upon consideration of the matters that are presently ripe for adjudication, the Court finds that the joint motion for track three designation (Doc. 45) is due to be granted, and the motion to dismiss (Doc. 40) is due to be granted in part.

### **STANDARDS**

If a complaint does not comply with minimum pleading requirements or otherwise fails to “state a claim to relief that is plausible on its face,” the defendant may seek dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 672, 678–79 (2009). When resolving a Rule 12(b)(6) motion, courts must limit their consideration to the complaint, its attachments, “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007); e.g., *GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). Courts also must accept all well-pled factual allegations—but not legal conclusions—in the complaint as true. *Tellabs*, 551 U.S. at 322; e.g., *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). After disregarding allegations that “are not entitled to the assumption of truth,” the court must determine whether the complaint includes “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” then whether the complaint is plausible on its face. *Iqbal*, 556 U.S. at 663, 679 (citing *Twombly*, 550 U.S. at 556).

## DISCUSSION

### I. The Agreement

Counts I, II and III all relate to the Agreement entered into in 1998 to resolve the *Arista* Action. (See *supra* note 1.) The Agreement is repeatedly referenced in the Complaint, and Defendants have requested that the Court consider the Agreement in relation to their motion to dismiss. (Doc. 41 (requesting judicial notice of the Agreement).) Defendants submitted a portion of the Agreement (Doc. 41-1), and Plaintiffs advise that they do “not object to the Court taking judicial notice of Section 13” of the Agreement. (Doc. 44, p. 3 n.1.) Under these circumstances, it is appropriate to consider the Agreement even though Plaintiffs did not attach a copy to their Complaint. See *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010); see also *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (holding that district courts may consider a document extrinsic to the complaint if it is central to the claims and its authenticity is not challenged).

Plaintiffs allege that Capitol, UMG, and Sony are signatories to the Agreement, Warner subsequently became a party to the Agreement (Doc. 1, ¶¶ 2, 26), and Alticor is a party to the Agreement because it is “the successor in interest to Amway Corporation” (*id.* ¶¶ 8, 25). Because the Agreement does not conflict with Plaintiffs’ allegations,<sup>3</sup> the Court assumes that Alticor and Defendants are parties to the Agreement for purposes of Defendants’ motion. Section 13, which sets forth the contractual terms most pertinent to

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<sup>3</sup> It is not clear who the parties to the Agreement are based on the portions of the Agreement submitted to the Court. The Agreement states that it is “by and between the Recording Industry Association of America, Inc. (hereinafter ‘the RIAA’) and the Plaintiff Record Companies identified in Schedule 1 . . . , and Amway Corporation . . . the signatory distributors of Amway products identified in Schedule 2,” and others. (Doc. 41-1, p. 1.) The parties have not provided copies of Schedules 1 or 2.

Counts I, II and III, provides in relevant part:

**13. Alternative Dispute Resolution**

**13.1** It is the intent of this provision that the Parties will cooperate to ensure that no independent distributor of Amway products . . . will, in the future, infringe any copyrights or other rights in sound recordings owned or controlled by RIAA member record companies. . . . Subject to the terms of this paragraph 13, nothing herein shall otherwise restrict or limit the ability of the Parties to pursue legal action for any future conduct, nor shall anything in this paragraph 13 impose obligations on the Parties except as expressly set forth herein. . . .

**13.2** If the Plaintiff Record Companies . . . reasonably believe that activities or conduct on the part of a current or future independent distributor of Amway products . . . may infringe any copyright or other right in any sound recording owned or controlled by one of the Plaintiff Record Companies, the Plaintiff Record Companies shall, prior to initiating any legal action, notify in writing both Amway and (to the extent known) the independent distributor of Amway products . . . . Such notice shall include sufficient information to allow Amway and the independent distributor . . . to investigate in a reasonable manner the alleged infringement including (to the extent known or in their possession) the name of the distributor . . . involved, the nature of the alleged infringement and a video and/or audio copy of the alleged infringement. If these facts are not fully known, then at a minimum all facts known to Plaintiff Record Companies shall be provided to Amway and the independent distributor . . . with such notice concerning the alleged infringement. The Plaintiff Record Companies agree that Amway shall have no liability regarding the alleged infringements simply as a result of conducting such investigation. If the Plaintiff Record Companies do not know the identity of the distributor . . . involved, Amway will cooperate with the Plaintiff Record Companies by providing that identity and address once it has been ascertained by Amway.

**13.3** Upon receiving the notice with the information pursuant to Paragraph 13.2, Amway and the independent distributor . . . shall have thirty (30) days to investigate. Within such thirty (30) days, Amway or the independent distributor . . . allegedly involved shall provide the Plaintiff Record Companies with a report in writing regarding the charge of infringement. . . . If such report is not timely provided, the Plaintiff Record Companies will not be bound to proceed to negotiate or mediate as set forth in paragraphs 13.4 and 13.5.

**13.4** After the Plaintiff Record Companies receive the report pursuant to Paragraph 13.3, if there is still a dispute, then the Plaintiff Record Companies, Amway and/or the independent distributor . . . shall

initially consult and negotiate with each other, in good faith and attempt to reach a just and equitable resolution satisfactory to all parties. Consultation and negotiation shall . . . commence no later than ten (10) days after any request by Plaintiff Record Companies for such initial consultation. If not commenced within such ten (10) days, Plaintiff Record Companies will not be bound to proceed to negotiate or mediate as set forth herein, unless such delay was solely caused by Plaintiff Record Companies or a force majeure. At any point after such initial consultation and negotiation, the Plaintiff Record Companies, Amway and/or the independent distributor . . . may elect to immediately submit the dispute to a mediator.

**13.5** Any mediation proceedings shall be conducted by a single mediator agreed upon by the parties, shall be non-binding and shall be conducted under the Commercial Mediation Rules of the American Arbitration Association (hereinafter the “AAA”) . . . . The mediation shall commence as soon as the mediator is available but no later than within thirty (30) days of such election. If not commenced within such thirty (30) days, Plaintiff Record Companies will not be bound to proceed to negotiate or mediate as set forth herein, unless such delay was solely caused by Plaintiff Record Companies or a force majeure.

**13.6** If a dispute remains after three (3) days after the commencement of the mediation, the parties shall no longer be bound by this Agreement to continue any further negotiation or mediation.

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**13.8** The RIAA shall use its best efforts to encourage its member record companies which are not parties to this Agreement to abide by the Alternative Dispute Resolution procedure contained herein.

(Doc. 41-1; *see also* Doc. 1, ¶ 25 (quoting and paraphrasing paragraphs 13.1, 13.2, 13.3, and 13.8); Doc. 1, ¶ 55; Doc. 44, pp. 6–7 (arguing that Defendants “deliberately breached” duties imposed under paragraphs 13.1 and 13.2).)

## **II. Count I**

Count I is for “breach of contract and implied duty of good faith and fair dealing.” (Doc. 1, pp. 16–18.) Under Florida law, the elements of a breach of contract claim are: “(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006)

(citing *Knowles v. C.I.T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977)). The plaintiffs also must “prove performance of its obligations under the contract or a legal excuse for its nonperformance.” *Id.* (citing *Old Republic Ins. Co. v. Von Onweller Constr. Co.*, 239 So. 2d 503, 505 (Fla. 2d DCA 1970)).

An “implied covenant of good faith and fair dealing” is a part of every Florida contract to protect “the reasonable expectations of the contracting parties” based on the express terms of their agreement.<sup>4</sup> See *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass’n*, 94 So. 3d 541, 547–48 (Fla. 2012); see also *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001). A “cause of action for breach of the implied covenant cannot be maintained (a) in derogation of the express terms of the underlying contract or (b) in the absence of breach of an express term of the underlying contract.” *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1318 (11th Cir. 1999) (holding that implied covenant claim failed as a matter of law because the plaintiff “cited no express provision” of either agreement that had been breached); see also *QBE Ins. Corp.*, 94 So. 3d at 548. A viable implied covenant claim arises where “a contract gives a party substantial discretion to promote its self interest,” in which case the covenant provides a “gap-filling default rule” to temper such discretion. See *Mahdavi v. Suntrust Mortg., Inc.*, No. 13-62801-CIV, 2014 WL 1365425, at \*4 (S.D. Fla. Apr. 7, 2014).

Here, Plaintiffs allege that Defendants breached the Agreement “and the duty of good faith and fair dealing” by:

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<sup>4</sup> A sufficiently pled claim “for breach of the implied covenant” must allege a “refusal to discharge contractual responsibilities, prompted . . . by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party.” *Resnick v. Avmed, Inc.*, 693 F.3d 1317, 1329 (11th Cir. 2012) (quoting *Tiara Condo. Ass’n v. Marsh & McLennan Cos.*, 607 F.3d 742, 747 (11th Cir. 2010)).



- a. Failing to provide Amway with prompt, reasonable notice that the Defendants reasonably believed that Amway distributors were engaging in activities that may infringe the copyrights in their sound recordings and instead, ambushing Amway after secretly stockpiling hundreds of alleged infringements for at least 18 months;
- b. Failing to take reasonable measures to prevent and mitigate the alleged copyright infringements by electing to “block” the Accused Videos on YouTube through Content ID, or by sending simple DMCA take-down notices to the Internet service providers hosting the Accused Videos;
- c. Failing to notify Amway in writing of “all facts known” to the Record Companies concerning the alleged infringement, including the fact that the Record Companies had been generating revenue from most of the Accused Videos through Content ID; and
- d. Attempting to entrap the uploaders of the Accused Videos by leading them to believe they had permission to post their videos to YouTube, and now seeking a double recovery on those videos for which the Record Companies already have been compensated.

(Doc. 1, ¶ 55.)

In their motion to dismiss, Defendants contend that Count I is defeated by the provision of paragraph 13.1 prohibiting a reading of the Agreement that would “*impose obligations on the Parties except as expressly set forth herein.*” (Doc. 40, p. 8.) Defendants further argue that “none of the ‘obligations’ Plaintiffs contend were breached appears anywhere” in the Agreement. (*Id.* at 3; *id.* at 7 (“Plaintiffs fail to allege that the [Defendants] breached any specific term” of the Agreement); *id.* at 11 (noting that neither YouTube nor the DMCA even existed when the Agreement was executed).) According to Defendants, the Agreement requires only that Defendants provide Plaintiffs a notice of infringement “prior to initiating legal action”—not “promptly after forming a belief” that infringement occurred. (*Id.* at 9.) No deadlines were imposed concerning notice—even though deadlines were imposed elsewhere in paragraph 13.

(See *id.* at 9–10.) Further, Defendants note that the Complaint alleges compliance with the explicit provisions of paragraph 13, including providing notices of infringement to Plaintiffs sufficient to permit Plaintiffs’ “extensive investigation.” (See *id.* at 10 (citing Doc. 1, ¶¶ 27–29); *id.* at 12–13.) Because Count I attempts to “impose additional obligations” and “impermissibly” tries “to rewrite” the Agreement “by eliminating the language” concerning no additional obligations, Defendants argue that the Court should dismiss Count I. (See *id.* at 7–13.)

Conceding that the Agreement “does not specify the myriad ways in which the [Defendants] could cooperate to minimize new copyright infringements” by distributors and that it “leaves undefined how much discretion the [Defendants] have, in light of their cooperation duties, to wait before notifying [Plaintiffs] of a suspected infringement” (Doc. 44, p. 10), Plaintiffs argue that the absence of such specification and definition is why “the implied covenant of good faith and fair dealing is both relevant and applicable.” (*id.* at 15.) In response to Defendants’ argument that Plaintiffs fail to identify a specific term of the Agreement allegedly breached, Plaintiffs counter that “one can reasonably infer” from the Complaint that Defendants deliberately breached: (1) the “obligation to cooperate to minimize future infringements” by distributors (*id.* at 6 (citing paragraph 13.1)); (2) the “obligation to provide Amway with ‘sufficient information to allow Amway . . . to investigate in a reasonable manner the alleged infringement’” (*id.* at 6 (quoting paragraph 13.2)); and (3) the “obligation to provide Amway with ‘at a minimum all facts known’ to the Record Companies concerning the alleged infringement” (*id.* at 7 (quoting paragraph 13.2)).<sup>5</sup> Plaintiffs further argue that the “no additional obligations” provision

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<sup>5</sup> Plaintiffs further argue that Defendants’ motion ignores the duty to cooperate set forth in “the very first sentence” of paragraph 13.1, which “must be read in

does not “avoid application of the covenant of good faith, which is implied in every contract under Florida law.” (*Id.* at 14.) Finally, Plaintiffs argue that the cases cited by Defendants are distinguishable and that Defendants’ motion is premature to the extent that it requires interpretation of the Agreement. (*Id.* at 14–15.)

Although Defendants’ arguments are compelling, they are undermined by Defendants’ citation only to cases resolved on summary judgment, after a trial, or from outside Florida. The procedural posture of the cases cited by Defendants adds weight to Plaintiffs’ argument that Defendants’ motion is premature. Further, Plaintiffs’ allegations concerning the cooperation and notice requirements of paragraphs 13.1 and 13.2 satisfy Plaintiffs’ obligations to identify specific terms allegedly breached by the Defendants. Accordingly, Count I is not due to be dismissed; however, Defendants’ arguments may be reasserted on a more developed record.

### **III. Counts II & III**

Count II is for “tortious interference with contractual [sic] rights,” and Count III is for “civil conspiracy” to tortiously interfere with Plaintiffs’ contractual rights. (Doc. 1, pp. 18–19.) To state a claim for tortious interference with contract under Florida law, a plaintiff must allege facts permitting plausible inferences of four elements: “(1) the existence of a business relationship under which plaintiff has legal rights . . . ; (2) proof of defendant’s knowledge; (3) intentional and unjustified interference with relationship by defendant; and (4) damage to plaintiff as a result of interference.” *See Hodges v. Buzzeo*, 193 F. Supp. 2d 1279, 1284 (M.D. Fla. 2002). “[A] cause of action for tortious interference does not exist against one who is himself a party to the contract allegedly interfered with.” *United of Omaha Life Ins. Co. v. Nob Hill Assocs.*, 450 So. 2d 536, 539

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conjunction with” the notice requirements of paragraph 13.2. (Doc. 44, p. 9.)

(Fla. 3d DCA 1984) (reversing verdict of tortious interference where the defendant was a party to the contract); see also *Palm Beach Cnty. Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090, 1094 (Fla. 4th DCA 2009) (“For the interference to be unjustified, the interfering defendant must be . . . a stranger to the business relationship.”). Finally, a tortious interference claim also will fail absent sufficient allegations of a breach of contract. See *Hodges*, 193 F. Supp. 2d at 1286.

The essential elements of a civil conspiracy claim are: “(a) a conspiracy between two or more parties, (b) to do an unlawful act, or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.” *Bond v. Koscot Interplanetary, Inc.*, 246 So. 2d 632, 635–36 (Fla. 4th DCA 1971) (quoting 4 Fla. Law & Practice, Conspiracy § 13) (internal quotation marks omitted). A civil conspiracy claim is not an independent claim under Florida law; rather, it is “derived from the underlying claim that forms the basis of the conspiracy.” See *Alloco v. City of Coral Gables*, 221 F. Supp. 2d 1317, 1360–61 (S.D. Fla. 2002) (citing *Churruca v. Miami Jai Alai, Inc.*, 353 So. 2d 547, 550 (Fla. 1977)). Accordingly, “a claim that is found not to be actionable cannot serve as the basis for a conspiracy claim.” *Id.* (citing *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1217 (11th Cir. 1999)).

Defendants contend that the Court should dismiss Count II because: (1) Defendants are alleged to be parties to the Agreement; and (2) “Plaintiffs merely recite the legal elements” of a tortious interference claim without providing “factual allegations to support an inference that any [Defendant] engaged in improper conduct that caused any other [Defendant] to engage in the conduct that Plaintiffs contend breached” the Agreement. (Doc. 40, pp. 14–15.) Defendants further contend that the

Court should dismiss Count III because Count II fails. (*Id.* at 15–16.) Plaintiffs concede that Warner “is not a signatory” to the Agreement, but they contend that their allegations that Warner is bound by the Agreement is a permissible alternative pleading. (Doc. 44, pp. 2–3, 18.) Thus, Plaintiffs argue that the Court should not dismiss Counts II or III. (*Id.*)

Plaintiffs’ argument that their tortious interference claim concerning Warner is in the alternative based on Warner not being a signatory to the Agreement is at odds with the text of the Complaint. The Complaint does *not* allege in the alternative that Warner is a stranger to the Agreement—it repeatedly alleges that Warner is a party to the Agreement, and those allegations are incorporated by reference in Count II. (Doc. 1, ¶¶ 2, 26, 53, 57.) Accordingly, Count II fails as a matter of law because Defendants are not alleged to be strangers to the Agreement. *See Palm Beach Cnty. Health Care Dist.*, 13 So. 3d at 1094; *see also United of Omaha Life Ins. Co.*, 450 So. 2d at 539. Because Count II fails, Count III also fails. *See Alloco*, 221 F. Supp. 2d at 1360–61. Further, Count II is subject to dismissal for the separate reason that Plaintiffs’ allegations in support of Count II are too conclusory to support a plausible claim. (See Doc. 1, ¶¶ 57–63.)

### CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Motion to Dismiss and Supporting Memorandum of Law of Defendants UMG Recordings, Inc., Capitol Records, LLC, Sony Music Entertainment and Warner Music Group (Doc. 40) is **GRANTED IN PART**.
2. Count II and III of the Complaint (Doc. 1) are **DISMISSED**.
3. Plaintiffs are granted leave to file an Amended Complaint on or before

August 4, 2014. If Plaintiff does not file an Amended Complaint, then this action will proceed solely with respect to Counts I and IV of the Complaint.

4. Joint Motion of Plaintiffs and Defendants Requesting Track Three Designation (Doc. 45) is **GRANTED**.
5. The Clerk of the Court is **DIRECTED** to designate this action on track three for future management pursuant to Local Rule 3.05(a).
6. The Court will issue a Case Management and Scheduling Order in a separate docket entry.

**DONE AND ORDERED** in Chambers in Orlando, Florida, on July 18, 2014.

  
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ROY B. DALTON JR.  
United States District Judge

Copies:

Counsel of Record