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July 4, 2008

By mail and electronic filing

Hon. Robert M. Levy

Magistrate Judge

U. S. District Court, Eastern District of New York

225 Cadman Plaza East

Brooklyn, NY 11201

Re: UMG Recordings, Inc., et al v. Lindor, 05CV1095(DGT)(RML)

Dear Judge Levy:

We are attorneys for defendant and write in response to the plaintiffs' request for a pre-motion conference in contemplation of a motion for (a) voluntary dismissal without prejudice, (b) "discovery sanctions", and (c) a stay. Needless to say, defendant is not opposed to voluntary dismissal. However, to dismiss a heavily litigated three year old case *without prejudice* would be absurd. Due to the incomplete nature of plaintiffs' pre-litigation "investigations", which admittedly do not point to the individual who may have committed a copyright infringement (see testimony of *plaintiffs'* expert annexed hereto as exhibit A), but merely to a person who paid the bill for an internet access account, there are, as one might anticipate, a huge percentage of false positives<sup>1</sup>. To permit dismissal without prejudice would be to bless the plaintiffs' counsel's failure to diligently investigate prior to commencement of lawsuits.

There is an evolving body of law to the effect that where the plaintiffs "throw in the towel" in a copyright infringement case, the defendant is presumptively entitled to an award of attorneys fees under 17 USC § 505. Mostly Memories, Inc. v. For Your Ease Only, Inc., 526 F.3d 1093 (7<sup>th</sup> Cir. May 27, 2008); Riviera Distributors, Inc. v. Jones, 517 F.3d 9026 (7<sup>th</sup> Cir. February 20, 2008). This issue is presently being litigated in the Second Circuit in the appeal that is pending in Lava Records LLC v. Amurao, 07-cv-321 (CLB)(USDC SDNY), where these same plaintiffs and/or their affiliates voluntarily dismissed their claim, and sought to do so "without prejudice" in order to avoid an attorneys fee award. In several cases where these same plaintiffs and/or their affiliates "threw in the towel", they have been assessed with counsel fees, despite

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<sup>1</sup> Indeed we would wager that the majority of cases brought to this Court's attention are cases in which the defendant is not a primary infringer or a person against whom any meritorious secondary liability theory could be interposed, either.

mighty efforts in both cases, not unlike the effort being made in this case<sup>2</sup>, to blame the defendant, rather than themselves, for having sued an innocent party. In Capitol Records, Inc. v. Foster, 04-CV-1569 (W.D. Oklahoma)(Unpublished decisions dated February 6, 2007, April 23, 2007, and July 16, 2007, collectively annexed hereto as exhibit B) , after a voluntary dismissal, they were held liable for \$68,685.23 in attorneys fees, and in Atlantic Recording Corp. v. Andersen 05-CV-933 AS (D. Oregon) (2008 U.S. Dist. LEXIS 48357, 2008 U.S. Dist. LEXIS 4877, 2008 U.S. Dist. LEXIS 3460, and unpublished decision of Magistrate Judge September 21, 2007, collectively annexed hereto as exhibit C), again after a voluntary dismissal, they were assessed \$107,834.00. The words of Magistrate Judge Ashmanskas in Andersen resonate here: “[W]hen plaintiffs dismissed their claims in June 2007, they apparently had no more material evidence to support their claims than they did when they first contacted defendant in February 2005....”, as do the words of District Judge West in Foster: “[N]either the parties' submissions nor the Court's own research has revealed any case holding the mere owner of an internet account contributorily or vicariously liable for the infringing activities of third persons....”

In order to attempt an end run around their obvious liability for attorneys fees, plaintiffs attempt to blame Ms. Lindor and the undersigned for the fact that they have sued an innocent person. However, their argument is lacking in logic. Here are just a few of the reasons:

1. They submitted their letter based upon a deposition without a transcript. At the time of plaintiffs' letter, neither defendant nor the deposition witness had been furnished with a transcript. Clearly the witness was entitled to see her transcript, and to review it, and the defendant's counsel was entitled to review it, before rather than after an application based upon it had been made. To this day we have not seen a signed transcript from the witness.
2. There is nothing in the transcript which implicates defendant (or anyone else) in copyright infringement.
3. It is plaintiffs', not defendant's, fault that plaintiffs chose to depose this witness on the eve of the close of discovery, rather than years earlier. Defendant has never done anything to impede plaintiffs' discovery; all the impeding in this case has come from plaintiffs in response to defendant's discovery requests. When the undersigned entered into this case in early 2006, we immediately made defendant available for her deposition and made the hard drive available for imaging. In fact, when plaintiffs indicated that they wanted to take the depositions of Ms. Lindor's son Woody Raymond and Ms. Lindor's daughter Kathleen Raymond available for deposition, Ms. Lindor asked them to appear for their depositions voluntarily, without a subpoena, which they did, in Summer 2006. *All* discovery plaintiffs had requested of defendant was completed in the Summer of 2006. The 2006 deposition testimony identified Yannick Raymond-Wright, and if plaintiffs wished to take her deposition they had two years to do so.
4. The averments that plaintiffs were ‘deceived’ by defendant are completely unsupported and unsupportable, and find no support in the record. In the unlikely event that plaintiffs can point to a discrepancy between something Ms. Lindor said at her deposition and something Ms. Raymond said at her deposition, that could mean many things, including (a) Ms. Raymond-Wright’s being mistaken, (b) Ms. Lindor’s being mistaken, (c) Ms. Raymond-Wright knowing something that Ms. Lindor – who testified that she is out of the house 12 hours a day 6 days a week and who testified that she knows nothing about computers – did not know. And in

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<sup>2</sup> In fact, the same lawyers who wrote the letter to Your Honor to which we are responding acted as lead counsel in losing the Atlantic v. Andersen motion.

the unlikely event that there were a factual controversy, and it actually bore upon a material fact, Ms. Lindor would be entitled to a jury trial and to her day in court. Plaintiffs cannot deprive her of that by deciding whom they would want to believe.

5. There is nothing anywhere in the record to suggest that Ms. Raymond-Wright committed any copyright infringement.

6. If Ms. Raymond-Wright had committed the copyright infringement, there is nothing anywhere in the record suggesting that Ms. Lindor would have been liable for it.

7. The statement by Mr. Reynolds that defendant attempted to "impede discovery at every step" is a complete and total fabrication. The only "bitter discovery disputes" in which defendant has been involved have been the plaintiffs' repeated refusals to respond to her discovery requests. She had completely and fully responded to all of plaintiffs's discovery requests by the Summer of 2006.

While the letter contains too many ludicrous and baseless statements to which to respond in this limited space, such as reference to an article in "Red Herring" magazine, and plaintiffs' inability to make service on some of defendant's relatives, these statements serve to underscore the baselessness of plaintiffs' application.

Additionally, the motion would be technically deficient since, as a dispositive motion, it is supposed to be made before the District Judge, not the Magistrate Judge. And as a discovery motion it would be technically deficient as well, since -- far from following a "meet and confer" -- it came from out of the blue. When counsel realized their omission a Mr. Reynolds (not Ms. Burton) called me up and indicated he'd already written and was about to file a motion. To the best of my recollection, he filed it about an hour later. Needless to say, a perfunctory call of that nature would not constitute the good faith attempt to resolve discovery related disputes that the rules contemplate.

Although plaintiffs say they seek "discovery sanctions" against the undersigned personally, they do not say (a) what that means, (b) what the undersigned did that he should not have done that would warrant "discovery sanctions", or (c) what the undersigned did not do that he ought to have done that would warrant "discovery" sanctions.

We have been telling plaintiffs all along that the defendant is innocent of any infringement. Unmindful of their duties as officers of the Court, they nevertheless persisted. Now that the time has come to pay the piper, they seek to scurry away, rather than face the music. Justice requires that they be held accountable.

Plaintiffs' contemplated motion is entirely without merit, and would in any event need to be made before the District Judge.

Respectfully submitted,

/s/

Ray Beckerman  
(RB8783)

cc: Timothy R. Reynolds  
(By ecf and email)