



Holme Roberts & Owen LLP  
*Attorneys at Law*

BOULDER

June 16, 2008

**By Fax (914-390-4179)**

COLORADO SPRINGS

Honorable Stephen C. Robinson  
United States District Judge  
Southern District of New York  
United States Courthouse  
300 Quarropas St., Room 275  
White Plains, NY 10601

DENVER

Re: Warner Bros. Records Inc. v. Cassin, Case No. 06-cv-3089-SCR

LONDON

Dear Judge Robinson:

LOS ANGELES

We represent Plaintiffs in the above matter and write in response to Defendant's letters dated June 12, 2008 asking the Court to recall its Order of June 4, 2008 and order that this case be dismissed with prejudice so that Defendant can seek attorney fees as a "prevailing party," and advising the Court that Defendant has asked Judge Brieant to treat Plaintiffs' newly filed case, *Warner Bros. Records Inc. v. Does 1-4*, Case No. 08-cv-5149-CLB, as "related" to this one so that it can be reassigned to your Honor.

MUNICH

PHOENIX

First, Defendant cites no basis for the Court to "recall" its June 4, 2008 Order, nor is there any. "The law is settled that the filing of a notice of dismissal under Rule 41(a)(1)(i) automatically terminates the lawsuit." *Thorp v. Scarne*, 599 F.2d 1169, 1171 n.1 (2d Cir. 1979) (emphasis added). A "voluntary dismissal prior to defendant's service of an answer or a motion for summary judgment is effective in the absence of any action by the court." *Id.* at 1176. Here, no answer had been served and no motion for summary judgment had been filed when Plaintiffs filed their Rule 41(a)(1)(i) notice of dismissal on May 27, 2008 (copy attached). Plaintiffs' Notice was effective upon filing, automatically terminated this case, and is not subject to vacatur. *See Thorp*, 599 F.2d at 1171 n.1 and 1176.

SALT LAKE CITY

SAN FRANCISCO

Second, any suggestion by Defendant that Plaintiffs' dismissal of this case and filing of the new Doe case was a form of judge shopping is simply wrong. Plaintiffs originally brought this case against Defendant because she was identified by her Internet Service Provider, Verizon Internet Services, Inc., as

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the person responsible for the Internet Protocol address through which the alleged infringement of Plaintiffs' copyrights occurred. In response, Defendant filed a Rule 12(b)(6) motion to dismiss, but otherwise refused to discuss the merits of the case with Plaintiffs. It was not until May 27, 2008 that Defendant's counsel first made clear Defendant's claim that she is not responsible for the infringement that occurred through her Internet account. Plaintiffs also learned, from their own continued investigation, that other individuals resided in Defendant's household, including an individual with initials that match the username at issue, "omc@KaZaA." Based on their own continued investigation, and on Defendant's recent denial of responsibility, Plaintiffs decided that the appropriate course of action was to dismiss this case and to file the Doe lawsuit to determine the identity of the true infringer.

Plaintiffs have no objection to the reassignment of the Doe case to your Honor. Plaintiffs have no concern regarding whether your Honor or Judge Briant presides over the new Doe case and leave the issue of assignment to the Court. Plaintiffs note, however, that the Doe case was not designated as "related" by Plaintiffs because no case related to the Doe case existed at the time it was filed. As discussed above, "the filing of a notice of dismissal under Rule 41(a)(1)(i) automatically terminates the lawsuit." *Thorp*, 599 F.2d at 1171 n.1. Here, Plaintiffs' Notice was effective upon filing and automatically terminated this case on May 27, 2008. *See id.* at 1176. Thus, there was no related case pending at the time Plaintiffs filed the new Doe case on June 4, 2008.

Third, there is no basis to convert Plaintiffs' voluntary dismissal to a dismissal "with prejudice." Rule 41's provision "that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim," Fed. R. Civ. P. 41(a)(1), has no application here. To begin with, the so called "two dismissal" rule, where it applies, is designed to bar future actions, and has no application to this case. As discussed above, Plaintiffs' dismissal without prejudice was effective upon filing and is not subject to vacatur. Moreover, the Second Circuit has held that the two-dismissal rule should be construed narrowly to serve the interests of justice and to preserve a plaintiff's right to be heard on the merits, particularly in the absence of any intent to harass a

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defendant. *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017 (2d Cir. 1976). A defendant who was not actually named as a party in prior actions generally may not invoke the two-dismissal rule to bar a third action, even if the third action is based on the same claim. *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 728 (9th Cir. 1991). Here, there has been only one dismissal against Defendant—*i.e.*, the dismissal of this case on May 27, 2008. Thus, the two-dismissal rule has no application here. In addition, there has never been anything close to an adjudication on the merits of Plaintiffs' claim and in no way can Defendant be considered a "prevailing party." This case has involved only a single status conference and a Rule 12(b)(6) motion to dismiss. The Court did not rule on the 12(b)(6) motion and the parties conducted no discovery.

Finally, Defendant's contention that Plaintiffs have a custom of not providing notice of motion papers is without merit. Plaintiffs served their notice of dismissal on Defendant's counsel by first class mail on May 27, 2008, the same day it was filed. (See attached Notice and Certificate of Service). Plaintiffs' Motion for Leave to Take Expedited Discovery in the Doe case also stated that a copy of the Motion for Leave was being served on Defendant's counsel. When Plaintiffs discovered on June 12, 2008, that the Motion for Leave had not, in fact, been served as intended, they immediately contacted Defendant's counsel to apologize for the mistake and to discuss a briefing schedule for Defendant's anticipated opposition. Thus, far from hiding the fact of their new filing, Plaintiffs themselves brought it to Defendant's attention.

Respectfully submitted,

By:   
Counsel for Plaintiffs

Attachment

cc: Ray Beckerman (w/attach.)  
Brian E. Moran (w/attach.)



