

Despite the well-reasoned and well-grounded findings by the Magistrate Judge, Defendant has filed objections to the Magistrate Judge's Memorandum Opinion making the same conclusory arguments he made to the Magistrate Judge. Defendant continues to seek fees against Plaintiffs despite his undisputed failure to provide relevant information regarding the infringement that took place in his home and through his Internet account until over two years after the information was first requested by Plaintiffs. Defendant has offered no legal authority or arguments to dispute the Magistrate Judge's findings. Accordingly, Plaintiffs respectfully request that the District Court reject Defendant's Objections in their entirety and adopt the Magistrate Judge's recommendations.

STATEMENT OF RELEVANT FACTS

On June 29, 2005, Media Sentry, a third party retained by Plaintiffs, detected substantial infringement of Plaintiffs' copyrighted sound recordings from a computer connected to the Internet at a specific Internet Protocol ("IP") address, 172.158.149.24. This person was distributing 450 digital audio files—including many of Plaintiffs' copyrighted sound recordings—at the time MediaSentry observed the infringement. In response to a federal court subpoena, Defendant's Internet Service Provider, America Online, Inc., identified Defendant, David Licata, as the person responsible for IP address 172.158.149.24 at the time of infringement.

Based on the substantial evidence of infringement from an Internet account for which Defendant is responsible, Plaintiffs reached out to Defendant to resolve the issue without resorting to legal action against him. (*See* Plaintiffs' November 28, 2008 Letter, Doc. No. 19-5.) Defendant, however, offered only a blanket denial and refused otherwise to discuss the matter. With no resolution, and no explanation from Defendant as to how his computer and his Internet

account were used to infringe Plaintiffs' copyrights if he was not responsible, Plaintiffs filed this lawsuit. When Defendant filed his Answer accusing other "third persons" of the infringement (Doc. No. 7 at 2, Third Separate Defense), Plaintiffs made it clear to Defendant that they were only interested in pursuing those most responsible for the infringement and inviting Defendant to provide relevant information regarding those individuals responsible for the infringement. (*See* Plaintiffs' September 7, 2008 Letter, Doc. No. 19-6.) Defendant persisted in his refusal to discuss the matter and provided only vague and incomplete responses to Plaintiffs' written discovery. It was not until late March 2008, when faced with depositions of himself and his family members—depositions that Plaintiffs told Defendant in September 2007 they would have to take if Defendant persisted in refusing to discuss the matter (*see id.*)—that Defendant finally informed Plaintiffs that his family members would assert a Fifth Amendment privilege against self-incrimination if asked any questions about the infringement of Plaintiffs' copyrights. (*See* Defendant's March 20, 2008 Letter, Doc. No. 19-9.)

Upon receipt of this new information, which Plaintiffs had been requesting for months, Plaintiffs immediately moved to dismiss this case against Defendant in order to pursue those individuals who are more culpable for the infringement. (Doc. No. 19.) Defendant filed a Response in opposition to Plaintiffs' motion on April 28, 2008 (Doc. No. 22) and Plaintiffs filed a Reply on May 9, 2008 (Doc. No. 23). On August 25, 2008, the Magistrate Judge issued a Memorandum Opinion and Order (Doc. No. 28) recommending that Plaintiffs' Motion for Voluntary Dismissal Under F.R.C.P. 41(a)(2) (Doc. No. 19) be granted by the District Judge.¹

¹ The Magistrate Judge issued a subsequent Order (Doc. No. 30) on August 26, 2008 stating that the Memorandum Opinion (Doc. No. 28) is to be construed as a Report and Recommendation to the District Judge.

The Magistrate Judge also recommended that both Defendant's Motion to Dismiss (Doc. No. 14) and Plaintiffs' Motion to Strike (Doc. No. 18) be denied as moot.

In analyzing Plaintiffs' Motion under the Sixth Circuit's *Grover* factors, *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716 (6th Cir. 1994), the Magistrate Judge found that "Defendant will not suffer plain legal prejudice" because "the *Grover* factors ***militate strongly in favor of voluntary dismissal without prejudice.***" (Memorandum Op. at 10, emphasis provided.) The Magistrate Judge determined that all four *Grover* factors weighed in Plaintiffs' favor for voluntary dismissal without prejudice. Regarding the first *Grover* factor (Defendant's effort and expense of trial preparation), the Magistrate Judge found that "the case remains in its early stages of litigation, and Defendant's effort and expense to date does not compel dismissal with prejudice." (*Id.* at 7.) Regarding the second *Grover* factor (existence of excessive delay and lack of diligence on the part of Plaintiffs in prosecuting this action), the Magistrate Judge found that "Plaintiffs acted in good faith, and diligently prosecuted their theory of the case, which theory remained viable throughout the litigation." (*Id.* at 8.) The Magistrate Judge further found that:

It is disingenuous for Defendant to claim that Plaintiffs have known all along that Defendant is not the direct infringer when, in fact, Defendant, armed with more information than Plaintiffs, is not willing to disclose relevant information. Defendant could have avoided prolonging this litigation by promptly providing information relevant to the direct infringers.

(*Id.* at 8.) Regarding the third *Grover* factor (sufficiency of explanation of the need for dismissal), the Magistrate Judge found that Plaintiffs' explanation for dismissing after Defendant provided information that his family members would assert a Fifth Amendment privilege against self-incrimination in discovery was sufficient for dismissal. (*Id.* at 9.) The Magistrate Judge further found that Defendant's argument stemming from his blanket denial since the inception of this lawsuit "is insufficient to rebut Plaintiffs' explanation for ending the litigation . . . [w]ere

that the case, then all defendants in any type of lawsuit could obtain a dismissal with a simple denial of responsibility.” (*Id.*) Regarding the fourth *Grover* factor (whether a motion for summary judgment has been filed), the Magistrate Judge found as a matter of law that no motion for summary judgment had been filed because the Court “never notified the parties that he would consider Defendant’s motion to dismiss as a motion for summary judgment.” (*Id.* at 10.)

Furthermore, the Magistrate Judge found that Defendant should not be awarded attorneys’ fees under Section 505 of the Copyright Act because “not only is Defendant not a prevailing party, but the circumstances *weigh strongly against* an award of fees.” (*Id.*, emphasis provided.) In addition to Defendant’s inability to meet the threshold requirement (success as a prevailing party) in order to be eligible for fees under Section 505, the Magistrate Judge found that all four of the traditional *Fogerty* factors weighed against an award of fees to Defendant. (*Id.*) First, regarding the first *Fogerty* factor (frivolousness of the action) and third *Fogerty* factor (objective unreasonableness of the claims), the Magistrate Judge found “Plaintiffs’ lawsuit was neither frivolous nor objectively unreasonable.” (*Id.* at 11.) The Magistrate Judge based this finding on Plaintiffs’ evidence of “substantial copyright infringement on a computer in Defendant’s home and through Defendant’s Internet account,” which led Plaintiffs to act “reasonably in filing this lawsuit with the purpose of protecting their valid copyrights.” (*Id.*) Second, regarding the second *Fogerty* factor (plaintiff’s motivation) and the fourth *Fogerty* factor (need to advance considerations of compensation and deterrence), the Magistrate Judge found that “there is no indication that Plaintiffs’ suit was not a *bona fide* effort to seek redress for copyright infringement.” (*Id.*) In addition to finding no evidence that Plaintiffs brought the action to “harass, embarrass, or abuse the Defendant or the civil process,” the Magistrate Judge found no “pattern of willful misconduct or negligence on behalf of Plaintiffs’ counsel.” (*Id.*)

On September 15, 2008, Defendant filed his Objections to the Magistrate Judge's Memorandum Opinion. (Doc. No. 33.) Defendant's Objections should be overruled because the Magistrate Judge's findings and conclusions follow applicable law and are fully supported by the record.

ARGUMENT

I. Standard of Review.

Under Rule 72(b), a party may submit objections to the recommendations on findings of fact or conclusions of law by a magistrate judge. A district judge shall make a *de novo* determination of those portions of the magistrate judge's report and recommendations to which an objection is made. 28 U.S.C. § 636(b)(1)(C). Upon review, a district judge may accept, reject, or modify a magistrate judge's findings. Here, for the reasons more fully set forth below, Magistrate Judge Black properly applied settled law to the facts of the case and properly recommended that Plaintiffs' Motion for Voluntary Dismissal be granted, that Defendant be denied an award of attorneys' fees under Section 505 of the Copyright Act, and that Defendant's Motion to Dismiss be denied as moot. As Magistrate Judge Black's report and recommendations are well-grounded in fact and supported by law, Defendant's objections should be overruled.

II. The Magistrate Judge's Recommendation To Grant Plaintiffs' Motion for Voluntary Dismissal Is Supported Factually and Legally.

A. Voluntary Dismissal Is Supported by the Factual Record in this Case.

1. The Magistrate Judge's Finding that Defendant Was Armed With More Information and that Defendant Withheld That Information Is Correct.

Defendant first objects to the Magistrate Judge's finding (Memorandum Op. at 8) that "[i]t is disingenuous for Defendant to claim that Plaintiffs have known all along that Defendant is not the direct infringer when, in fact, Defendant was armed with more information than

Plaintiffs, [and] is not willing to disclose relevant information.” (Objections at 5.) Defendant challenges this finding by arguing that the Magistrate Judge “unwarrantedly imputed dishonesty” to Defendant and that “it is not disingenuous to be unable to ascertain, with certainty, the identity of the [infringers] . . .” (*Id.*)

The Magistrate Judge’s finding is clearly supported by the record because Defendant waited for over two years to provide critical information regarding the identity of the infringers. First, as early as November 2005, Plaintiffs requested that Defendant contact Plaintiffs to discuss the infringement that occurred through his Internet account. (*See* Plaintiffs’ November 28, 2005 Letter, Doc. No. 19-5.) Defendant refused to discuss the matter with Plaintiffs or even identify the individuals who used his Internet account. Second, in September 2007, Plaintiffs again invited Defendant to provide any information regarding the use of his computer and Internet account to engage in the infringement at issue. (*See* Plaintiffs’ September 6, 2007 Letter, Doc. No. 19-6.) In response, Defendant stated that “he in fact has no knowledge as to who the actual infringer may be and is unable to testify as to the identity of the person who downloaded or uploaded files.” (Defendant’s September 20, 2007 Letter, Doc. No. 19-7.) Third, in Defendant’s written discovery responses in February 2008, Defendant avoided providing relevant information regarding who was responsible for the infringement of Plaintiffs’ copyrights when he improperly limited his response to himself and “any person acting under [his] direction.” (Resp. to Interrog. No. 12, Doc. No. 19-8.) Then, faced with the prospect of depositions of Defendant and his family members, Defendant finally provided critical information regarding the infringement in March 2008. Defendant stated that “[e]ach member of [Defendant’s] household can and should assert a Fifth Amendment privilege against self-incrimination . . . regarding their participation in

the illegal downloading and or publication of copyrighted works.” (Defendant’s March 20, 2008 Letter, Doc. No. 19-9.)

The Magistrate Judge is correct that Defendant was armed with more information than Plaintiffs and simply refused to disclose it to Plaintiffs. Since Plaintiffs first contacted Defendant in November 2005, Defendant has known the identity of those persons who used his computer and Internet account – because *they lived with him*. (See Resp. to Interrog. Nos. 6, 7, Doc. No. 19-8, identifying his family members as individuals who used his computer at the time Plaintiffs discovered infringing activity.) Regarding relevant information related to the infringement, all Defendant had to do was ask his family members about their involvement in the infringing conduct. The fact that Defendant failed to reveal until March 2008 that his family members “can and should” assert a Fifth Amendment privilege against self-incrimination during discovery infers that Defendant knew all along that he had relevant information and simply refused to reveal it until the prospect of depositions. As a result, the Magistrate Judge’s finding is fully supported by the factual record in this case.

2. The Magistrate Judge’s Finding that Defendant Was Responsible For the Use of His Internet Account is Supported By the Facts and the Law.

Defendant next objects to the Magistrate Judge’s finding (Memorandum Op. at 7) that “[b]efore filing [the lawsuit], Plaintiffs identified Defendant as the responsible individual [for Defendant’s Internet account] based on AOL’s IP address identification.” Specifically, Defendant objects to the Magistrate Judge’s consideration (Memorandum Op. at 7) of a subpoena response (Doc. No. 15-4) from Defendant’s Internet Service Provider, AOL, in another federal case in which Plaintiffs ascertained that Defendant was the account holder for the IP address used to infringe Plaintiffs’ copyrights. (Objections at 6.) This objection should be

overruled because Defendant has waived it, and because the objection is both irrelevant and without legal basis.

First, Defendant waived this objection by failing to object when the exhibit was initially filed with the Court. Plaintiffs filed the document in support of their Response to Defendant's Motion to Dismiss (Doc. No. 15) submitted to the Court on March 3, 2008. In Defendant's Reply Memorandum (Doc. No. 16) filed on March 20, 2008, Defendant never raised an objection to consideration of the subpoena response. In fact, Defendant used his Reply to object to other exhibits submitted by Plaintiffs in their Response. (*See* Doc. No. 16 at 3-4 regarding Defendant's challenges to Exhibits A and B of Plaintiffs' Response.) Defendant had the opportunity to object to the subpoena response six months ago. By failing to do so, Defendant is barred from asserting that objection now.

Second, the objection has no bearing on the Magistrate Judge's finding because Defendant has admitted being the account holder responsible for the AOL Internet Account connected to the IP address in question. Defendant has repeatedly admitted that he maintained an Internet account with AOL for his residence on June 29, 2005, the date on which Plaintiffs discovered the infringement at issue. (*See* Declaration of David Licata, Doc. No. 14-2, ¶¶ 5, 10; *see also* Resp. to Req. for Admiss. No. 1, Doc. No. 22-7.) The declaration submitted by Defendant from David Haltermon, a computer-servicing engineer and security consultant, also concedes that Defendant maintained the AOL Internet Account. (*See* Doc. No. 16-3 at ¶ 1, stating that he reviewed the AOL subpoena response; and ¶ 3(f) and (g), referencing "Mr. Licata's ISP account with America On Line on June 29, 2005.") Therefore, Defendant's objection to the Magistrate Judge's consideration of the subpoena response is irrelevant as he himself has already admitted the facts contained within the document.

Finally, Defendant also offers no legal basis for objecting to the Magistrate Judge's finding that Defendant was responsible for his Internet account. In finding that Plaintiffs had a reasonable basis to bring suit, the Magistrate Judge relied on case law which has found similar evidence sufficient. (Memorandum Op. at 7-8, citing *Sony Pictures Home Entm't v. Lott*, 471 F. Supp. 2d 716, 719, 722 (N.D. Tex. 2007); *Virgin Records Am., Inc. v. Thompson*, 512 F.3d 724, 726 (5th Cir. 2008); *Atlantic Recording Corp. v. Heslep*, No. 4:06-cv-132-y, 2007 U.S. Dist. LEXIS 35824, at *15 (N.D. Tex. May 16, 2007).) *See also* *BMG v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005)²; *Capitol Records, Inc. v. O'Leary*, 2006 U.S. Dist. LEXIS 5115 (C.D. Cal. Jan. 31, 2006)³. Because Defendant offers no legal basis for disputing the Magistrate Judge's finding, the objection should be overruled.

3. The Magistrate Judge Was Correct In Finding that Defendant Unduly Prolonged This Case.

Next, Defendant objects to the Magistrate Judge's finding that Defendant unduly prolonged the litigation in this case. Specifically, Defendant challenges the Magistrate Judge's finding that Plaintiffs reached out to Defendant to resolve the case without litigation. (Objections at 6.) Defendant also contends that his denial of liability alone should have caused Plaintiffs to dismiss this case. Defendant's arguments should be overruled.

First, the record supports the Magistrate Judge's finding that Plaintiffs have reached out to Defendant in an effort to resolve this matter. As Plaintiffs previously recounted (*see, supra*, Section II(A)(1)), Plaintiffs have repeatedly attempted to resolve this matter with Defendant. Plaintiffs attempted to resolve this case *before even initiating the lawsuit* in November 2005.

² Cited for this proposition in Plaintiffs' Reply Memorandum (Doc. No. 23) at 7.

³ Cited for this proposition in Plaintiffs' Memorandum in Support of Motion for Voluntary Dismissal (Doc. No. 19-2) at 10.

(See Plaintiffs' November 28, 2005 Letter, Doc. No. 19-5.) Had Defendant simply asked his family members whether they were involved in the infringement in late 2005, Plaintiffs might never have filed this lawsuit against Defendant. Instead, Defendant waited until March 2008 to finally inform Plaintiffs that his family members should assert a Fifth Amendment privilege against self-incrimination. (See Defendant's September 20, 2007 Letter, Doc. No. 19-7.) This admission to Plaintiffs was six months after Plaintiffs informed Defendant that they would "continue with discovery, including taking [Defendant's] deposition and the depositions of those individuals [Defendant] identifies as living in his household." (Plaintiffs' September 6, 2007 Letter, Doc. No. 19-6.) Thus, the record is clear that Defendant had the opportunity first to prevent this litigation in 2005 and then to end this litigation in 2007. Defendant chose, instead, to conceal relevant information until March 2008. As a result, the record supports the Magistrate Judge's finding that Defendant unduly prolonged this litigation.

Second, Defendant contends that his denial alone should have caused Plaintiffs to dismiss this case. Defendant is wrong for several reasons. Every court to have considered similar allegations of copyright infringement has ruled that Plaintiffs' evidence is more than sufficient to bring a lawsuit, *even in the face of a defendant's denial*. See, e.g., *Lott*, 471 F. Supp. 2d at 721; *Thompson*, 512 F.3d at 725; *Heslep*, 2007 U.S. Dist. LEXIS 35824, at *8. Despite Defendant's claim that there is a "lack of legal authority for plaintiffs' position" (Objections at 7), Defendant has not attempted to dispute the legal authority cited by Plaintiffs or the Magistrate Judge. Nor has Defendant offered any legal authority to the contrary. Furthermore, as a practical matter, litigation would grind to a halt if plaintiffs were required to dismiss a case every time a defendant denied liability. Indeed, as the Magistrate Judge found, Defendant's blanket denial of liability "was insufficient to rebut Plaintiffs' explanation for ending the litigation . . . [w]ere that

the case, then all defendants in any type of lawsuit could obtain a dismissal with a simple denial of responsibility” (Memorandum Op. at 9).

Finally, Defendant’s objections ignore completely the fact that for months Defendant deliberately withheld information that was readily available to him. For all of these reasons, the factual record fully supports the Magistrate Judge’s finding that Defendant unduly prolonged the litigation.

B. The Magistrate Judge Correctly Applied the *Grover* Factors To Determine that Defendant Will Suffer No Legal Prejudice Upon Dismissal.

Defendant objects to the Magistrate Judge’s finding that Defendant will suffer no legal prejudice by dismissal under Rule 41(a)(2). Specifically, Defendant contends that the Magistrate Judge “incorrectly applied” the law in *Grover* in this case. (Objections at 8.) Defendant concedes that “plain legal prejudice” does not include the prospect of having to defend a second lawsuit. (*Id.*) Defendant argues, however, that the Magistrate Judge misapplied the law and that he will suffer plain legal prejudice on three grounds: (1) that the outcome in *Grover* involved upholding the dismissal of plaintiffs’ claim in that case; (2) that the standard for “plain legal prejudice” differs when applied to corporate defendants than to individuals; and (3) that Plaintiffs’ Complaint fails to satisfy the standards of *Bell Atlantic Corp. v. Twombly*. (*Id.* at 8-9.) Each of these contentions lacks merit and should be rejected.

First, the facts in *Grover* have nothing to do with this case. In *Grover*, the Sixth Circuit found that plain legal prejudice existed to bar dismissal without prejudice because plaintiffs had litigated a case for five years under a cause of action that did not exist under Ohio law. *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d. 716, 717-718 (6th Cir. 1994). The Sixth Circuit held that dismissal without prejudice was improper by the district court because the plaintiffs had certified the question as to whether the cause of action existed under Ohio law, and the Ohio Supreme

Court held that the cause of action did not exist. *Id.* at 718. Here, in contrast, Plaintiffs moved for dismissal eight months after filing the Complaint, and only because Defendant finally provided previously withheld information relevant to the claims in the lawsuit. Furthermore, unlike *Grover*, Plaintiffs' cause of action for copyright infringement exists under the Copyright Act and has been upheld by every court to consider Plaintiffs' claims in other cases with similar facts. *See e.g., Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203, at *8-10 (S.D. Cal. Dec. 28, 2007); *LaFace Records, LLC, et al. v. Does 1-5*, Case No. 07-cv-187, at 12 (W.D. Mich. Feb. 22, 2008) (Doc. No. 15-6); *LaFace Records, LLC, et al. v. Does 1-38*, Case No. 07-cv-00298-BR, at 3 (E.D.N.C. Feb. 27, 2008) (Doc. No. 15-7); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961 (N.D. Tex. 2006); *Fonovisa, Inc. v. Alvarez*, No. 1:06-CV-0011-C (N.D. Tex. July 24, 2006) (Doc. No. 15-8); *Warner Bros. Records v. Payne*, 2006 U.S. Dist. LEXIS 65765 (W.D. Tex. July 17, 2006); *Warner Bros. Records Inc., v. Duarte*, No. SA-06-CV-615 (W.D. Tex. May 2, 2007) (Doc. No. 15-9); *Interscope Records, v. Duty*, 2006 U.S. Dist. LEXIS 20214 (D. Ariz. Apr. 14, 2006).

Second, Defendant's conclusory statement that a different standard for plain legal prejudice should apply to individuals as opposed to corporate defendants has no legal basis. The only case cited by Defendant regarding plain legal prejudice is *Grover*. The Sixth Circuit made no such distinction in *Grover*, and Defendant has cited no case that makes such a distinction.

Third, Plaintiffs' Complaint more than satisfies the standards set out by the Supreme Court in *Twombly*. Defendant incorrectly argues that his blanket denial of liability infers that Plaintiffs cannot "step across some border of plausibility" under *Twombly*. (Objections at 9.) This argument simply has no basis under the law, nor has Defendant cited to any legal authority to support his argument. Plaintiffs have alleged facts in their Complaint that easily satisfy the

two elements for a copyright infringement claim: ownership and proof of infringement. (See Plaintiffs' Response to Defendant's Motion to Dismiss, Doc. No. 15, at 6-9.) In fact, every court to have considered Plaintiffs' Complaint has found it sufficient under *Twombly*. See e.g., *Serrano*, 2007 U.S. Dist. LEXIS 95203, at *8 (denying motion to dismiss under *Twombly*, finding "Plaintiffs supply more than enough information to give Defendant fair notice of who owns the copyrights and how and when Defendant allegedly infringed them.") (Doc. No. 15-5); *LaFace Records, LLC, et al. v. Does 1-5*, Case No. 07-cv-187, at 12 (W.D. Mich. Feb. 22, 2008) (denying defendant's motion to dismiss, finding "Under the standard recently established by the United States Supreme Court, the complaint alleges sufficient facts to raise the right to relief above the speculative level.") (Doc. No. 15-6); *LaFace Records, LLC, et al. v. Does 1-38*, Case No. 07-cv-00298-BR, at 3 (E.D.N.C. Feb. 27, 2008) (Doc. No. 15-7).

C. The Magistrate Judge Correctly Assessed and Determined That Defendant Is Not Entitled to Attorneys' Fees in this Case.

Defendant objects to the Magistrate Judge's conclusion that Defendant is not entitled to an award of attorneys' fees under Section 505 of the Copyright Act. The Magistrate Judge found that fees under Section 505 are inapplicable because "not only is Defendant not a prevailing party, but the circumstances *weigh strongly against* an award of fees." (Memorandum Op. at 10, emphasis provided.) Defendant challenges the Magistrate Judge's decision on two grounds: (1) that a finding on fees was premature; and (2) that Plaintiffs' claim of copyright infringement against Defendant was objectively unreasonable. (Objections at 10-11.) Both objections have no legal or factual support and should be rejected.⁴

⁴ As an additional matter, the Magistrate Judge specifically concluded that Defendant is not a prevailing party under 17 U.S.C. § 505. (Memorandum Op. at 10.) Therefore, Defendant is not entitled to fees as a matter of law and his argument that the issue of fees is premature is irrelevant.

The Magistrate Judge's decision on attorney's fees is in no way premature. First, Defendant prayed for an award of attorneys' fees in his Answer. (Doc. No. 7 at 2.) Second, since April 2008—just after Defendant revealed critical information to Plaintiffs regarding the infringers—Defendant has made clear he refuses to stipulate to a dismissal for the sole purpose of seeking to recover attorneys' fees under Section 505. (*See* Plaintiffs' Reply, Doc. No. 23, at 3.) Third, in response to Plaintiffs' Motion for Voluntary Dismissal, Defendant raises the issue of fees itself and argued that he should be eligible for fees under Section 505. (*See* Defendant's Response, Doc. No. 19, at 7-8, 13.) In response to Defendant's arguments, Plaintiffs briefed the reasons why Defendant is not entitled to fees under Section 505 by demonstrating: (1) that the traditional *Fogerty* factors do not weigh in Defendant's favor, and (2) that *Bridgeport Music* is inapplicable to the facts in this case. (Plaintiffs' Reply, Doc. No. 23, at 11-17.) Fourth, in his Objections, Defendant raises no cogent arguments under Section 505 regarding why he should be eligible for fees. Nor does Defendant rebut any arguments made in Plaintiffs' Reply (Doc. No. 23) or in the Magistrate Judge's Memorandum Opinion. As a result, the issue of attorneys' fees was ripe before the Court when the Magistrate Judge made his finding that "the circumstances weigh strongly against an award of fees" (Memorandum Op. at 10), and the finding is fully supported by the record and applicable legal standards.

Turning to Defendant's objection to the Magistrate Judge's finding that Plaintiffs' claim is objectively reasonable, the only case Defendant cites to support his objection is *Bridgeport Music*, a case which he previously cited in his Response (Doc. No. 22, at 7-8) and which was in the record (Doc. No. 22-3) before the Magistrate Judge when he rendered his Memorandum Opinion. Defendant's reliance on *Bridgeport Music* is entirely misplaced as that case involved plaintiffs whom the Court found had continued to pursue a futile legal theory and repeatedly

engaged in discovery abuses. (Doc. No. 23, at 16-17.) In contrast, Plaintiffs' claim here has been deemed objectively reasonable in every court to have considered the issue. *See Thompson*, 512 F.3d at 726 (declining to award fees to defendant in copyright infringement case); *Virgin Records Am., Inc. v. Darwin*, 2006 U.S. Dist. LEXIS 96069, at *13 (C.D. Cal. Apr. 17, 2006) (same); *O'Leary*, 2006 U.S. Dist. LEXIS 5115 at *4 (same); *Priority Records L.L.C. v. Chan*, 2005 U.S. Dist. LEXIS 20360, at *6 (E.D. Mich. May 19, 2005). Likewise, courts have also concluded that Plaintiffs' conduct in pursuing the person responsible for the Internet account through which the infringement undisputedly occurred is a reasonable, good faith effort to protect their copyrights. *See, e.g., Thompson*, 512 F.3d at 726; *Darwin*, 2006 U.S. Dist. LEXIS 20360 at *6; *O'Leary*, 2006 U.S. Dist. LEXIS 5115 at *4; *Chan*, 2005 U.S. Dist. LEXIS 20360 at *6.

III. The Magistrate Judge's Finding that Defendant's Motion to Dismiss is Moot is Warranted Under the Law.

Finally, Defendant challenges the Magistrate Judge's denial of Defendant's Motion to Dismiss (Doc. No. 14) as moot. Defendant's entire objection here hinges on the Magistrate Judge's finding that Defendant had not filed a motion for summary judgment under Rule 56 before Plaintiffs' moved for voluntary dismissal under Rule 41(a)(2). (Objections at 12-16.) Defendant argues that his Motion to Dismiss under Rule 12(b)(6) (Doc. No. 14) should be treated as a Rule 56 motion under the *Grover* factors. (Objections at 12.) Here again, Defendant's objection has no legal basis.

The Magistrate Judge's finding that no Rule 56 motion was pending is supported under the law. Under the fourth *Grover* factor, the Magistrate Judge found that "Defendant had not filed a motion for summary judgment." (Memorandum Op. at 10.) As the Magistrate Judge correctly determined (*id.* at 8), "before a Rule 12 motion to dismiss can be converted into a Rule

56 motion, the court is required to provide notice to all parties of the court's intention to treat the motion as one for summary judgment." *See Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493 (6th Cir. 1995); *see also Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004). Here, the Magistrate Judge correctly ruled that the Court "never notified the parties that [it] would consider Defendant's motion to dismiss as a motion for summary judgment." (Memorandum Op. at 10.) Defendant has not attempted to dispute the settled law in the Sixth Circuit that notice must be provided in order to convert a Rule 12 motion to a Rule 56 motion. Nor has Defendant cited any legal authority to dispute the Magistrate Judge's finding. Instead, Defendant merely recounts the same arguments which the Magistrate Judge specifically rejected in his Memorandum Opinion. Defendant's objection is without legal merit and should be rejected.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the District Court reject each of Defendants' Objections to the Magistrate Judge's September 15, 2008 Memorandum and Order (Doc. No. 33), and that the District Court accept and adopt the Magistrate Judge's Memorandum and Order (Doc. No. 28) in its entirety. Plaintiffs further respectfully contend that oral argument, as requested by Defendant, is not necessary to make a determination on Defendant's Objections. Plaintiffs further ask for any such relief as the Court deems just and necessary.

Respectfully submitted,

Dated: September 29, 2008

By: /s/ Brian J. O'Connell
Brian J. O'Connell
Dinsmore & Shohl, LLP
255 East Fifth Street
Suite 1900
Cincinnati, Ohio 45202
Phone (513) 977-8200
Fax (513) 977-8141

Michael King, Esq.
Dinsmore & Shohl, L.L.P.
191 W. Nationwide Blvd.
Suite 300
Columbus, Ohio 43215
Phone: (614) 628-6880
Fax: (614) 628-6890

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 29, 2008, a copy of the foregoing PLAINTIFFS' RESPONSE TO DEFENDANT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER was served upon the Defendant's counsel via United States Mail as follows:

Albert T. Brown Jr.
1014 Vine Street
2550 Kroger Building
Cincinnati, Ohio 45202
Attorney for Defendant

/s/ Brian J. O'Connell

Brian J. O'Connell
Dinsmore & Shohl, LLP
255 East Fifth Street
Suite 1900
Cincinnati, Ohio 45202