UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., et al.,
Plaintiffs,

v.

MARIE LINDOR,
Defendant

05 CV 1095 (DGT)(RML)

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PLAINTIFFS' OBJECTIONS TO THE OCTOBER 9, 2009 ORDER AND REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE LEVY

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INTRODUCTION

This case arises out of the substantial copyright infringement that took place in August 2004 from a computer in Defendant's home, through Defendant's Internet account, and under the username "**jrlindor@KaZaA**", an obvious match to Defendant's last name, Lindor. The case could have been avoided altogether, or at least should have been over a long time ago, had Defendant and her counsel been forthright about what they knew. Instead, they provided false, misleading, and incomplete information regarding critical facts, including who was in Defendant's home during the summer of 2004 when Defendant's Internet account was used to infringe Plaintiffs' copyrights, what computers and peripheral devices, such as other hard drives, were connected to Defendant's Internet account at that time, how these devices were connected, who used them, and the location of such computers and devices. By the time Plaintiffs were able to sift through Defendant's misdirection, critical computer evidence had been destroyed. It was on this basis that Plaintiffs filed their Motion for Sanctions and to Dismiss ("Motion") (Doc. 264).

On October 9, 2009, Magistrate Judge Levy issued his Order and Report and Recommendation denying Plaintiffs' motion for sanctions but granting Plaintiffs' motion to dismiss this case without prejudice (Doc. 272). Now, Plaintiffs understand from Defendant's counsel's anti-recording industry blog, *RecordingIndustryvsThePeople*, that Defendant and her counsel intend to prolong this litigation even further by seeking attorney's fees under the Copyright Act.[1] And, even if this Court were to deny such a motion, Plaintiffs have little doubt that Defendant and her counsel would continue to pursue the litigation on appeal.

[1] Defendant's counsel's extreme animus towards the record industry is well known and set forth on his blog located at http://recordingindustryvspeople.blogspot.com.

Defendant's latest tactic is merely a continuation of the vexatious tactics Defendant and her counsel have engaged in from the beginning, as detailed in Plaintiffs' Motion. Plaintiffs' Motion for Sanctions sought to forestall this improper approach to litigation by Defendant and her counsel, and continue to believe that a sanction of, at a minimum, an admonishment is appropriate. Such a sanction could have the preclusive effect of deterring Defendant and her counsel from continuing their vexatious litigation tactics. It is for this reason that Plaintiffs file this objection to Magistrate Judge Levy's Order. Specifically, Plaintiffs respectfully disagree with the denial of sanctions against Defendant and her counsel. In particular, where a court declines to impose a monetary sanction, it may still impose the non-monetary sanction of admonishment. *See Dangerfield v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2003 U.S. Dist. LEXIS 16908, *40 (S.D.N.Y. Sept. 26, 2003); *Merex A.G. v. Fairchild Weston Sys.*, 1996 U.S. Dist. LEXIS 5946, *30 (S.D.N.Y. Apr. 29, 1996) (holding that "non-monetary sanctions are an alternative form of sanction available to the court" and sanctioning Plaintiffs' attorney with a public reprimand). In this case, as demonstrated below and in Plaintiffs' Motion, some form of admonishment is required to deter Defendant's and her counsel's vexatious litigation tactics.

ARGUMENT

A. Standard Of Review

Pursuant to 28 U.S.C. §636(b), a district judge may reconsider any order of a magistrate judge where "it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. §636(b).

> A decision is "clearly erroneous" when the Court is, "upon review of the entire record, [] left with the definite and firm conviction that a mistake has been committed." *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006). "It is well-settled that a magistrate judge's resolution of a nondispositive matter should be afforded substantial deference and may be overturned only if found to have been an abuse of discretion." *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94

Civ. 5587 (PKL), 2000 U.S. Dist. LEXIS 4892, 2000 WL 420548, at *2 (S.D.N.Y. Apr. 17, 2000).

McAllan v. Von Essen, 517 F. Supp. 2d 672, 678 (S.D.N.Y. 2007).

B. Some Form Of Sanction Should Be Imposed On Defendant And Her Counsel For Providing False And Misleading Information And For Unreasonably And Vexatiously Multiplying And Prolonging This Litigation.

Magistrate Judge Levy's Order specifically found that "defendant and her counsel were less than forthcoming at times" concerning what they knew of the facts and that "defendant's counsel took an unusually aggressive stance and, at times, veered into hyperbole and gratuitous attacks on the recording industry as a whole." Order at 6, 8. Notwithstanding these findings, Magistrate Judge Levy declined to impose any sanctions, finding, in part, no "clear evidence of bad faith on counsel's part." *Id.* at 8. A finding of bad faith, however, is not required for conduct to be sanctionable under both Rule 37 and the Court's inherent authority. *See Tse v. UBS Fin. Servs.*, 568 F. Supp. 2d 274, 321 (S.D.N.Y. 2008) ("The Court's finding that plaintiff's failure to disclose Getz's contact information was not intentional does not preclude the entry of sanctions against her for failing to [provide] that information. It is well settled that 'grossly negligent' conduct may be sanctioned under both Fed. R. Civ. P. 37 and the Court's inherent powers.").

Here, in addition to the specific finding in Magistrate Judge Levy's Order, Plaintiffs' Motion demonstrated that, at the outset of this litigation, Defendant falsely claimed that she did not have Internet service and that the infringement at issue, done under the name "jrlindor", occurred through a wireless router. Motion at 4. Of course, Plaintiffs later established that Defendant did, in fact, have Internet service at the time the infringement was discovered and that she did not even have a wireless router. *Id.*

Then, Defendant and her counsel for years claimed both to this Court and in public statements that "there was no computer and no laptop at the house" at the time the infringement was discovered. Motion at 5. This, of course, also turned out to be false. And there is no dispute that Defendant and her entire family never disclosed that Yannick Raymond-Wright, Defendant's adult daughter, lived with Defendant during the time of the infringement and that she had two different computers in the house connected to the Internet. *Id.* at 5, 10-12. These computers, key evidence in the case, were never disclosed to Plaintiffs and were allegedly discarded just before Plaintiffs learned of their existence, as recently as March 2008.

These are just a few of the examples of Defendant's and her counsel's vexatious behavior detailed in Plaintiffs' Motion. While Magistrate Judge Levy's Order finds that "memories fade," there is no dispute that Defendant, her counsel, and her entire family provided false testimony that led Plaintiffs down numerous rabbit holes, unnecessarily expanded and prolonged this litigation, and ultimately lead to the destruction of key evidence.

It appears that, although Magistrate Judge Levy was unhappy with the conduct of Defendant and her counsel and believed such conduct to be inappropriate, he did not wish to impose a monetary sanction upon them and therefore denied Plaintiffs' Motion for Sanctions. While Magistrate Judge Levy was unwilling to award monetary sanctions against Defendant and/or her counsel, his findings of "gratuitous attacks"[2] by Defendant's counsel and a pattern of being "less than forthcoming" in discovery, mandates some form of sanction to discourage

[2] A prime example of such a gratuitous attack was Defendant's counsel's opposition to Plaintiffs' request for an extension to file their reply. Defendant opposed Plaintiffs' request, stating, outrageously, "[w]e strongly suspect, knowing plaintiffs' tactics, that they are requesting the extension because they have someone at work trying to manufacture some evidence . . .." (Doc. 263). Then, as he has done throughout this litigation, Defendant's counsel immediately posted this scandalous and utterly unsupported allegation on his blog (*http://recordingindustryvspeople.blogspot.com*, November 18, 2008). Of course Defendant has no evidence to support such a defamatory and extrajudicial statement.

Defendant and her counsel from continuing these "unusually aggressive" tactics and continuing his missionary-like attacks on Plaintiffs and their counsel. As the Court explained in *Bricklayers & Allied Craftworkers Local 2, Albany, N.Y. Pension Fund v. Northeast King Constr., Inc.*, 2008 U.S. Dist. LEXIS 92607 (N.D.N.Y Nov. 13, 2008) (emphasis added),

> Sanctions are specific deterrents and are imposed for the purpose of obtaining compliance with the particular order issued, and **intended as a general deterrent effect on the case at hand and the future**, provided the party against whom sanctions are imposed was in some sense at fault. [*Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 70 (2d Cir. N.Y. 1988)] (*citing Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) (*per curiam*) & *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979)*); see also Metro. Opera Assoc.*, 212 F.R.D. at 219 *(citing Nat'l Hockey League*, 427 U.S. at 643 & *Penthouse Int'l, Ltd. v. Playboy Enters.*, 663 F.2d 371, 386 (2d Cir. 1981) for the proposition that Rule 37 sanctions may be applied both to penalize conduct that warrants sanctions and to **deter those who might be tempted to use such conduct in the absence of such a deterrent**).

See Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. N.Y. 1986) ("the underlying purpose of sanctions—to punish deviations from proper standards of conduct with a view toward encouraging future compliance and deterring further violations.").

Defendant, her counsel, and her family routinely and consistently gave Plaintiffs incomplete and incorrect information regarding material facts, including who was in Defendant's home during the summer of 2004 when the infringement occurred, what computers and peripheral devices were connected to Defendant's Internet account at that time and who used them, and the location of such computers and devices. Because of these misrepresentations and intentional concealments, Plaintiffs have suffered severe and irreparable prejudice, including the destruction of the very computer that was connected to Defendant's Internet account at the time of infringement. Plaintiffs fear this harm will continue for months if not years because Defendant's counsel has stated that he intends to continue this litigation in a hopeless effort to recover attorney's fees from Plaintiffs.

Plaintiffs believe that the record of submissions to this Court, and the findings in Magistrate Judge Levy's Order, require the imposition of sanctions. At a minimum, a sanction of an admonishment to Defendant and her counsel to cease these vexatious litigation tactics that do nothing but unnecessarily prolong this case and increase the cost of litigation is appropriate. Therefore, Plaintiffs respectfully object to Magistrate Judge Levy's Order denying sanctions and ask that Defendant's counsel be sanctioned. Specifically, Plaintiffs request that Defendant and her counsel be admonished that these vexatious and overly aggressive litigation tactics are inappropriate and should cease and that Defendant and her counsel should stop fruitlessly prolonging this litigation.

CONCLUSION

For all of these reasons, as well as those set forth in Plaintiffs' Motion, Plaintiffs ask that Magistrate Judge Levy's Order denying sanctions be overruled and that Defendant and her counsel be admonished that their vexatious and overly aggressive litigation tactics are inappropriate and should cease.

Respectfully submitted this 26th day of October, 2009.

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