

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., et al.,

05 CV 1095 (DGT)(RML)

Plaintiffs,

- against

MARIE LINDOR,

Defendant

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR  
MOTION FOR SANCTIONS AND TO DISMISS WITHOUT PREJUDICE**

HOLME ROBERTS & OWEN LLP

Richard L. Gabriel (RG-5065)

1700 Lincoln Suite 4100

Denver, Colorado 80203

Telephone: 303-861-7000

Facsimile: 303-866-0200

ROBINSON & COLE LLP

Richard J. Guida (RG-5147)

28<sup>th</sup> Floor, 885 Third Avenue

New York, NY 10022

Telephone: 212-451-2900

Facsimile: 212-451-2999

Attorneys for Plaintiffs

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Plaintiffs move for sanctions against Defendant and her counsel under F.R.C.P. 37, the Court's inherent authority, and 28 U.S.C. § 1927 for discovery abuse and for unreasonably and vexatiously multiplying this litigation. Plaintiffs also move under F.R.C.P. 41(a)(2) for dismissal without prejudice of their claim for copyright infringement against Defendant.

### **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. As demonstrated below, from before the inception of this case, Defendant, her family, and her counsel have 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 and who used them, and the location of such computers and devices.

Now, over two years into discovery, Plaintiffs learned for the first time during the recent deposition of Defendant's daughter, Yannick Raymond-Wright, that Ms. Raymond-Wright had spent part of the summer of 2004 at Defendant's home, had brought not one but two computers into Defendant's home, and had connected those computers to Defendant's Internet account during the time of infringement. This directly contradicts the testimony of Defendant and of her designated representative, Woody Raymond, who claimed that there was no computer in the house at the time of infringement and that no one stayed with Defendant during the summer of 2004. This evidence also directly contradicts repeated statements by Defendant's counsel, who claimed "there was no computer there" at the time of the infringement. Plaintiffs also learned for

the first time that, remarkably, Ms. Raymond-Wright discarded the critical computer as recently as March of 2008, more than two years after Plaintiffs began their extensive efforts to find it.

Defendant, her family, and her counsel have also thrown up every road block imaginable in order to thwart Plaintiffs' search for the truth concerning the infringement of their copyrights. Defendant provided false information about her nephew, Gustave Lindor, Jr., who goes by the nickname "Junior"; both Gustave Lindor, Jr. and Defendant's representative, Woody Raymond, intentionally evaded service of deposition subpoenas; and Defendant and her counsel improperly aided in Gustave Lindor, Jr.'s and Woody Raymond's efforts to avoid being deposed, unreasonably fought Plaintiffs' efforts to inspect Defendant's computer for evidence of infringement, and filed countless baseless motions which were also posted on Defendant's counsel's anti-recording industry blog—<http://recordingindustryvspeople.blogspot.com>.

Defendant had an obligation to provide complete and truthful disclosures and discovery responses to Plaintiffs, but failed to do so, choosing instead to mislead Plaintiffs at every step. The loss of the critical computer and Defendant's obstructionist tactics have severely and irreparably prejudiced Plaintiffs' ability to prove their case. Plaintiffs, therefore, ask that Defendant and her counsel be sanctioned both to punish Defendant and her counsel for their intentional misconduct and to discourage others from engaging in similar behavior. In addition, because of the severe and irreparable harm Defendant, her family, and her counsel have caused to Plaintiffs' case, Plaintiffs seek a dismissal of this case without prejudice.

## **BACKGROUND**

### **A. Plaintiffs Discovered Substantial Copyright Infringement Through Defendant's Internet Account.**

Plaintiffs are recording companies who own copyrights in sound recordings. Collectively, they face a massive problem of digital piracy over the Internet. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005) (characterizing the magnitude of

online piracy as “infringement on a gigantic scale”). Peer-to-peer (or “P2P”) networks are online media distribution systems that allow users to transform their computers into interactive Internet sites for swapping copyrighted sound recordings with other users. P2P users who distribute and copy (download) copyrighted material violate the Copyright Act. *See id.* at 919-23.

On August 7, 2004, MediaSentry, a third-party retained by Plaintiffs, detected an individual using the KaZaA file sharing program to distribute 624 music files—many of them Plaintiffs’ copyrighted sound recordings—to potentially millions of other P2P users under the username “**jrindor@kazaa.**” MediaSentry determined that the individual used Internet Protocol (“IP”) address 141.155.57.198 to connect to the Internet. Plaintiffs then brought a “Doe” action against this anonymous individual and obtained a court order allowing them to serve a subpoena on this individual’s Internet Service Provider, Verizon Internet Services, Inc. (“Verizon”). In response to Plaintiffs’ Rule 45 subpoena, Verizon identified Defendant, Marie Lindor, as the person responsible for IP address 141.155.57.198 at the time of infringement.

**B. Defendant, Her Family, And Her Counsel Intentionally Concealed Critical Information And Evidence Regarding The Infringement At Issue.**

Plaintiffs made it clear from the beginning that they were seeking information central to their infringement claim and that Defendant had an obligation to preserve such evidence and to provide it to Plaintiffs. *See e.g.*, Dec. 3, 2004 Letter, Exhibit A; Dec. 14, 2005 E-mail from M. Miller to R. Beckerman, Exhibit B. Instead of heeding Plaintiffs’ warning, and complying with her obligation to provide complete and truthful disclosures and discovery responses to Plaintiffs, Defendant, her family, and her counsel intentionally provided false information, attempted to misdirect Plaintiffs as to relevant facts and events, and concealed critical information and evidence regarding the infringement at issue, all of which severely prejudiced Plaintiffs.

**1. Defendant falsely claimed that she did not have Internet Service.**

Defendant began her pattern of deception at the outset of the litigation. At the initial status conference, as well as in previous conversations with Defendant's designated representative, Woody Raymond, Defendant claimed she had no Internet Service in August 2004. *See* July 26, 2005 Tr. at p. 5, line 9 – p. 6, line 20, Exhibit C. Based on this claim, Plaintiffs contacted Verizon to confirm that it had correctly identified Defendant. *See* July 25, 2005 E-mail, Exhibit D. In response, Verizon confirmed its identification of Defendant as the person responsible for the Internet account in question and confirmed that Defendant did, in fact, have Verizon Internet service in August 2004. *See* July 27, 2005 E-mail, Exhibit E.

**2. Defendant falsely claimed that the infringement occurred over a wireless router.**

Apparently recognizing that Plaintiffs would discover the truth, *i.e.*, that Defendant did, in fact, have Internet service in August 2004, Defendant also claimed that the infringement occurred through a wireless router, and that someone must have pirated her wireless Internet connection to download music.<sup>1</sup> *See* Sept. 26, 2005 letter from Woody Raymond, Exhibit U; *See* July 26, 2005 Tr. at p. 10, lines 10 – p. 11, line 3, Exhibit C; “Download Suit Defense: ‘No PC,’ Red Herring, Feb. 3, 2006, available at <http://www.redherring.com/Article.aspx?a=15592>, Exhibit G.

Plaintiffs were then forced to debunk this claim, too, and ultimately confirmed the infringement did not occur through a wireless Internet connection as Defendant claimed, but

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<sup>1</sup> Defendant claimed that the “**jrlindor**” username was just a coincidence. *See* July 26, 2005 Tr. at p.16, lines 12-18, Exhibit C. Amazingly, Defendant's representative claimed “[t]here's nobody in the household with that last name,” *see id.*, even though Defendant's last name is Lindor.

through a physical or hardwired connection to Defendant's Internet account. *See* Aug. 3 and Sept. 2, 2005 Letters, Exhibit F.

**3. Defendant and her counsel falsely claimed that there was no computer in Defendant's residence at the time of infringement.**

Defendant and her counsel also claimed that there was no computer in Defendant's home during the time of infringement. At the initial status conference, Defendant, through her representative, Woody Raymond, claimed that there was no computer in her house in August 2004. *See* July 26, 2005 Tr. at p. 17, lines 7-9, Exhibit C. Defendant, again through Woody Raymond, repeated this claim to the press, "[T]here was no computer attached and no laptop at the house." *See* "Download Suit Defense: 'No PC,' Red Herring, Feb. 3, 2006, Exhibit G. During his deposition, Woody Raymond again claimed there was no computer in the house and, thus, that no one in the house could have used a file-sharing program. *See* July 7, 2006 W. Raymond Depo., p. 89, lines 4-15, Exhibit H. He claimed that in June or July 2004 he had removed the computer tower from the home to be repaired because it was "dragging." *See id.* at p. 7, line 7 – p. 80, line 8.

Defendant's counsel repeated this claim. In a press interview, Defendant's counsel claimed "there was no computer there" at the time of infringement. *See* "Download Suit Defense: 'No PC,' Red Herring, Feb. 3, 2006, Exhibit G. On his anti-recording industry blog, Defendant's counsel again stated, "The router had been used by her adult children, but not at the time of the alleged screenshot, at which time there was no computer at all in the house." *See* Marie Lindor to Move for Summary Judgment, Comment dated Feb. 4, 2006 12:31:00 PM EST, available at <http://recordingindustryvspeople.blogspot.com/2006/02/marie-lindor-to-move-for-summary.html>, at p. 9, Exhibit I. Defendant's counsel repeated the claim to Plaintiffs' counsel. *See* Dec. 13, 2005 E-mail, Exhibit J. As explained below, all of these claims were false.

**4. Defendant provided intentionally false information regarding Junior Lindor.**

Throughout the litigation, Defendant, her family, and her counsel continued to stonewall, conceal, and provide false information. When Plaintiffs inquired as to whom in the Lindor family went by Junior or Junior Lindor, Defendant identified her brother's son, Gustave Lindor, Jr., but claimed she did not know where he lived. *See* M. Lindor Depo., p. 10, line 16 – p. 12, line 24, Exhibit K. Woody Raymond also claimed he did not know where his cousin, Gustave Lindor, Jr., lived. *See* July 7, 2006 W. Raymond Depo., p. 23, lines 6-21, Exhibit H. Defendant's daughter, Kathleen Raymond, claimed not even to know of any relative named Junior Lindor. *See* K. Raymond Depo., p. 27, line 25 – p. 28, line 15, Exhibit L.

When Plaintiffs were finally able to inspect Defendant's computer, however, they found a copy of Gustave Lindor, Jr.'s resume on the hard drive with an address for Gustave Lindor, Jr. in Brooklyn, New York. *See* Dec. 15, 2007 Supp. Decl. and Expert Report at p. 5, ¶ 26, Exhibit M. When Plaintiffs finally deposed Gustave Lindor, Jr., he confirmed both that he goes by the name "Junior Lindor" and that Defendant and her family were aware that he lived in Brooklyn, New York and were in regular contact with him. *See* Oct. 22, 2007 G. Lindor, Jr. Depo., p. 20, lines 3-9; p. 24, line 24 - p. 25, line 2; p. 26, lines 3-6; p. 39, lines 9-17; p 43, line 23– p. 44, line 4, Exhibit N.

**5. Defendant and her family unreasonably sought to prevent, and interfered with, Plaintiffs' ability to depose Woody Raymond and Junior Lindor.**

Consistent with Defendant's family's conduct throughout this litigation, Woody Raymond avoided service of process for his deposition. In fact, Plaintiffs were forced to seek the assistance of the Court to take this deposition. *See* Jan. 3, 2007 Letter (Doc. No. 129). In response to Woody Raymond's evasive antics, the Court ordered Defendant to produce a photo of Woody Raymond to aid Plaintiffs in their efforts to serve him. *See* Jan. 19, 2007 Minute

Order. Incredibly, in response to the Court's Order, Defendant produced a photo of her son that was likely over ten years old, and was of little use to Plaintiffs.

When Plaintiffs sought to depose Gustave Lindor, Jr. ("Junior Lindor"), Defendant objected to the subpoena arguing that Junior Lindor had no relevant information and that the subpoena was a "fishing expedition." *See* Def.'s Obj. (Doc. No. 97). The Court overruled Defendant's objection, however, finding that a deposition of Junior Lindor was "reasonably calculated to lead to the discovery of admissible evidence of the claims and defenses in this action." *See* May 27, 2007 Minute Order. After the Court overruled Defendant's objection, Junior Lindor evaded service for over seven months, to the point where Plaintiffs had to resort to a stake-out at great expense. *See* Affidavits of Non-service and Investigations and Serving by Irving Receipt, Exhibit O. Because of Junior Lindor's continued avoidance, Plaintiffs once again sought the Court's assistance, and the Court ordered Defendant to produce a photo of Junior Lindor to aid in Plaintiffs' efforts to serve him. *See* Jan. 19, 2007 Minute Order. The Court also granted leave to serve Junior Lindor by alternate means. *See* May 27, 2007 Minute Order. After Plaintiffs were finally able to serve Junior Lindor, he failed to appear and failed to contact Plaintiffs' counsel to reschedule. *See* July 3, 2007 G. Lindor, Jr. Depo., Exhibit P.

During this time, Defendant's counsel claimed that neither he nor Defendant had the ability to contact Junior Lindor or to accept service on his behalf. On the day of the default deposition of Junior Lindor, however, Defendant's counsel contacted Plaintiffs' counsel regarding Junior Lindor's failure to appear at his properly subpoenaed deposition and represented, incredibly, that he had communicated with Junior Lindor that same day. *See* Pls.' Mot. for Contempt and exhibits (Doc. No. 180). Defendant's counsel further represented that Defendant had authorized him to act as a middleman in attempting to arrange a mutually

convenient time and place for the adjourned deposition. *Id.* Thus, contrary to their representations, Defendant apparently had the ability to contact Junior Lindor the whole time.

**6. Defendant unreasonably refused to produce her computer for inspection.**

When Plaintiffs sought to inspect Defendant's computer, they again were met with obstruction and delay. For four months, Plaintiffs attempted to schedule the forensic inspection of Defendant's computer. *See* Pls.' June 23, 2006 Letter Motion and exhibits (Doc. No. 34). Although, at various times, Defendant agreed to provide dates for the inspection, she did not do so, choosing instead to raise one new hurdle after another. *Id.* On May 3, 2006, Defendant agreed to the inspection, but only if Plaintiffs would stipulate to certain terms. Although not required to do so, Plaintiffs stipulated to all of Defendant's terms. *Id.* More than a month later, however, Defendant sought to impose additional terms, demanding that Plaintiffs agree to specific and unreasonable pretrial disclosure procedures. *Id.* After months of bending over backwards to accommodate Defendant, Plaintiffs were again forced to seek the Court's assistance. *Id.* On August 3, 2006, the Court ordered Defendant to produce the computer pursuant to the stipulation previously agreed to in May 2006, over three months earlier. *See* Aug. 3, 2006 Minute Order.

**7. Defendant concealed evidence of an additional hard drive.**

When Plaintiffs finally inspected Defendant's computer, they learned that an additional hard drive had been connected to the computer which had never been identified or produced by Defendant. *See* Dec. 15, 2007 Supp. Decl. and Expert Report at p. 5, ¶ 21, Exhibit M. In addition, Plaintiffs' expert determined that the user, "Woody," accessed song files and other files from a directory located on the missing hard drive. *Id.* at ¶ 22. This directly contradicts Woody Raymond's statements that there were no other hard drives in Defendant's house. *See* W. Raymond Decl. ¶ 2 (Doc. No. 218). Over Defendant's and Woody Raymond's objections (Doc.

Nos. 211, 212), the Court ordered Defendant and Woody Raymond to produce the missing hard drive. *See* Jan. 16, 2008 Minute Order. Instead of producing the hard drive, Woody Raymond filed a declaration claiming that he had never installed a Western Digital 100 GB USB “external” hard drive and had never owned such a hard drive. *See* W. Raymond Decl. ¶ 2 (Doc. No. 218).

Due to the inconsistencies between the evidence on Defendant’s computer and Woody Raymond’s apparent denial of the existence of the missing hard drive, Plaintiffs were forced to depose him a second time. Specifically, Plaintiffs sought to ask Woody Raymond if he had installed, owned, purchased, or knew of *any other hard drive* to have ever been in Defendant’s house. Mr. Raymond, however, refused to answer questions and was generally obstructionist and unresponsive. As just one example among many, when Plaintiffs’ counsel asked, “Mr. Raymond, with respect to the computer that is in your mother’s home, are you aware of any hard drive, other than the one that you produced, that was either attached to or in any way used in connection with that computer?”, Defendant’s son responded, “I don’t understand the question.” *See* April 22, 2008 W. Raymond Depo., p. 22, lines 22– p. 23, line 6, Exhibit Q. A review of the deposition transcript demonstrates the extent of Mr. Raymond’s evasiveness and serves as a prime example of the misconduct Defendant and her family have engaged in during the course of this litigation. *See* April 22, 2008 W. Raymond Depo., Exhibit Q.

Woody Raymond also claimed to Plaintiffs and to the Court that Western Digital did not manufacture any such hard drive and produced a partial list of Western Digital products to support his claim. *See* W. Raymond ¶ 3 (Doc. No. 218). When Plaintiffs researched Mr. Raymond’s claim, however, they discovered that the pages missing from the partial list produced by Mr. Raymond did, in fact, list the hard drive that Plaintiffs had identified. *See* April 22, 2008 W. Raymond Depo., p. 35, lines 16 – p. 45, line 8, Exhibit Q; Feb. 21, 2008 Letter, Exhibit R. Plaintiffs’ counsel have repeated their requests for the missing hard drive that

connected to Defendant's computer, (*see* correspondence attached collectively as Exhibit R), but the missing hard drive has never been identified or produced.

**8. Defendant provided intentionally false and misleading information regarding Yannick Raymond-Wright's whereabouts and computers.**

In her deposition, Defendant stated that no one else lived in her home in 2004. *See* M. Lindor Depo., p. 13, line 14 - p. 14, line 2, Exhibit K. Defendant had previously stated that, at the time of infringement, her youngest daughter, Kathleen Raymond, was staying in Virginia with a relative. *See* July 26, 2005 Tr. at p. 16, lines 12-18, Exhibit C. Similarly, Woody Raymond claimed that, at the time of infringement, Defendant lived alone and that his sisters, Kathleen Raymond and Yannick Raymond-Wright, were living in Virginia. *See* July 7, 2006 W. Raymond Depo., p. 42, line 23 – p. 43, line 13, Exhibit H. When asked if anyone else had stayed with Defendant for an extended period during the summer of 2004, Woody Raymond said no. *Id.* at p. 45, lines 20-23. Finally, Kathleen Raymond also claimed that no one else lived in Defendant's house or visited for any extended period during the summer of 2004. *See* K. Raymond Depo., p. 24, line 11 – p. 25, line 7, Exhibit L.

Because Defendant and her family had claimed that Yannick Raymond-Wright was not in Defendant's home during the relevant time, Plaintiffs did not immediately seek to depose her. When Plaintiffs did seek to depose Ms. Raymond-Wright, Defendant again sought to quash the subpoena arguing that Ms. Raymond-Wright had no relevant information and that the subpoena was a "fishing expedition." *See* Letter Motion (Doc. No. 225). The Court overruled Defendant's objection, finding that the deposition was "reasonably calculated to shed light on both plaintiffs' claims of infringement and Marie Lindor's defenses." *See* April 15, 2008 Minute Order.

When Plaintiffs finally took Ms. Raymond-Wright's deposition, they learned that Defendant and her family had repeatedly provided false information regarding Ms. Raymond-Wright's whereabouts and that Ms. Raymond-Wright had, in fact, stayed with Defendant during

the summer of 2004. *See* Raymond-Wright Depo., p. 79, line 24 – p. 80, line 25, Exhibit S. Plaintiffs also learned that Ms. Raymond-Wright had brought two computers to Defendant’s home in August 2004 and had connected them to Defendant’s Internet account. *Id.*

Specifically, Ms. Raymond-Wright regularly brought her laptop to Defendant’s house during the summer of 2004 (*id.* at p. 65, line 18 – p. 66, line 20; p. 80, lines 8-10) and connected her laptop to Defendant’s Internet account using a wireless router (*id.* at p. 66, lines 11-20).

Ms. Raymond-Wright believes that Defendant knew that she brought her laptop to Defendant’s home during the summer of 2004.<sup>2</sup> *Id.* at p. 117, lines 11-13.

Ms. Raymond-Wright also brought a desktop computer to Defendant’s house during the summer of 2004 to replace Defendant’s desktop computer, which had stopped working. *Id.* at p. 80, lines 11-25. Ms. Raymond-Wright connected her desktop computer directly to Defendant’s Internet account in August 2004. *See id.* at p. 88, line 15 – p. 90, line 15.

Additionally, Ms. Raymond-Wright explained that her cousin, “Junior Lindor,” had stayed with her in Virginia for an extended period of time before she brought her desktop computer to Defendant’s home and connected it to the Internet. *Id.* at p. 131, line 11- p. 132, line 2. She also testified that Junior Lindor may have used the desktop computer while he was staying with her. *Id.* at p. 132, lines 5-10. The desktop computer that Ms. Raymond-Wright brought to Defendant’s house and connected to Defendant’s Internet account in August 2004, and which Junior Lindor may have used, is a critical piece of evidence. Ms. Raymond-Wright

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<sup>2</sup> Because the infringement at issue did not occur through a wireless Internet connection, Plaintiffs do not believe the laptop was used to infringe Plaintiffs’ copyrights. Ms. Raymond-Wright’s testimony that she brought her laptop to Defendant’s house during the summer of 2004, however, directly contradicts claims made by Defendant, her family, and her counsel throughout this litigation that there was no computer in the home in August 2004.

claimed, however, that she sold it at a yard sale, possibly as recently as March 2008. *Id.* at p. 83, line 22 – p. 84, line 17.

Had Defendant disclosed that Ms. Raymond-Wright was staying with her in August 2004 or that Ms. Raymond-Wright had brought a computer to Defendant's home, Plaintiffs would have immediately sought to depose Ms. Raymond-Wright and to inspect her computer. Because of Defendant's intentionally false and misleading statements concerning Ms. Raymond-Wright's whereabouts and what computers were in Defendant's home in August 2004, the critical computer has now been lost and put permanently beyond Plaintiffs' reach.

Remarkably, both Defendant and Woody Raymond had spoken with Ms. Raymond-Wright about this lawsuit on numerous occasions. *Id.* at p. 29, line 4 – p. 30, line 10. Yet, both Defendant and Woody Raymond failed to disclose critical information regarding Ms. Raymond-Wright's computer and her whereabouts during the summer of 2004. It is highly unlikely that Defendant did not recall the fact that Ms. Raymond-Wright spent the much of the summer of 2004 at Defendant's home, as Ms. Raymond-Wright brought her young son with her. A grandmother is unlikely to forget her toddler grandson staying with her over the course of several months.

**9. Ms. Raymond-Wright's belated changes to her deposition testimony should be rejected because they are untimely and because they are internally inconsistent and make no sense in the context of her testimony as a whole.**

On August 28, 2008, over 3 months after her deposition, and months after she became aware that Plaintiffs were seeking sanctions and dismissal based, in part, on her testimony, Ms. Raymond-Wright submitted an errata sheet purporting to claim that she brought her desktop computer to Defendant's home not in August 2004 as she had repeatedly testified, but in 2006. Ms. Raymond-Wright's eleventh hour changes should be disregarded for at least three reasons.

First, a deponent who fails to make a request to review and sign the deposition before the end of the deposition waives the right to make changes. *United States v. Garcia*, 527 F.2d 473, 475 (9th Cir. 1975); *Agryap, Inc. v. Woodstream Corp.*, 232 F.R.D. 491, 493 (E.D. Pa. 2006) (denying a non-party witness permission to alter deposition transcript where neither party nor witness requested it). Here, Ms. Raymond-Wright did not ask to review or sign her deposition transcript as required under Rule 30(e)(1) and, thus, waived the right to do so.

Second, “untimely deposition changes are to be disregarded, particularly where they have the effect of creating a disputed issue of fact.” *Sundaram v. Brookhaven Nat’l Labs.*, 424 F. Supp. 2d 545, 587 (E.D.N.Y. 2006); *see also Qatar Nat’l Navigation & Transp. Co. v. Citibank*, 1996 U.S. Dist. LEXIS 15424, at \*2 (S.D.N.Y. Oct. 16, 1996) (“Failure of the party or deponent to return the deposition with properly executed changes within 30 days constitutes a waiver of the right to examine and read the transcript.”). Here, Ms. Raymond Wright took more than 60 days to make her changes. Therefore, her purported changes are untimely and should not be considered. Even if the changes are considered, they do not replace Ms. Raymond-Wright’s original and repeated testimony that she connected her desktop computer to Defendant’s Internet account in August 2004. *See Desulma v. City of New York*, 2001 U.S. Dist. LEXIS 9678, at \*11-15 (S.D.N.Y. July 6, 2001); *Podell v. Citicorp*, 112 F.3d 98, 103 (2d Cir. 1997).

Third, Ms. Raymond-Wright’s purported changes are internally inconsistent and make no sense in the context of her testimony as a whole. Ms. Raymond Wright testified repeatedly, for example, that she brought her desktop computer to New York because Defendant’s desktop computer was not working. *See Raymond-Wright Depo.*, p. 57, line 25 – p. 66, line 16; p. 74, line 14 – p. 77, line 25, Exhibit S. It is clear based on the testimony of not only Ms. Raymond Wright, but of Woody Raymond as well, that Defendant’s desktop computer was not working in August 2004. *See id.*; *see also July 7, 2006 W. Raymond Depo.*, p. 78, line 7 – p. 81, line 10,

Exhibit H. Ms. Raymond Wright also testified repeatedly that her laptop and her desktop were in New York at the same time, and she testified repeatedly that she had her laptop with her in New York in August 2004. *See* Raymond-Wright Depo., p. 65, line 18 – p. 66, line 16; p. 67, line 22 – p. 68, line 9; p. 78, line 1 – p. 80, line 24, Exhibit S. Ms. Raymond Wright cannot avoid her initial testimony by simply declaring that she brought her desktop computer to New York two years later in 2006. In addition, Ms. Raymond Wright makes no changes at all to her testimony responding to multiple questions about the desktop computer she brought with her to New York in August 2004 that was “probably” connected to Defendant’s Internet by cord at that time. *Id.* at p. 88, line 20 – p. 90, line 7. This testimony proves Plaintiffs’ theory that Ms. Raymond Wright’s desktop computer is the critical computer in this case and is not changed at all.

Ultimately, Ms. Raymond Wright’s changes simply make no sense when evaluated in conjunction with the consistent and repeated testimony at her deposition and the timeline established by numerous witnesses in this case. Rather than exculpating Defendant, Ms. Raymond Wright’s attempted changes only provide more evidence of Defendant’s, her family’s, and her counsel’s efforts to mislead and obfuscate.

**C. Defendant’s Massive Cover-Up Resulted In Increased Litigation Costs And The Destruction Of Critical Evidence And Severely And Irreparably Prejudiced Plaintiffs And Undermined The Judicial Process.**

Defendant’s and her family’s obstructionist discovery tactics, culminating in the loss of the critical desktop computer that was connected to Defendant’s Internet account at the time of infringement, have severely and irreparably prejudiced Plaintiffs’ ability to prove their case. As the court explained in *Arista Records v. Tschirhart*, a case similar to this one:

The Court also finds that the destruction of evidence in this case has substantially prejudiced plaintiffs in proving their case. Defendant has strenuously denied throughout this lawsuit that she violated plaintiffs’ copyrights. The best proof of whether she did so would be to examine her computer’s hard drive which would show, among other things, the existence of any P2P file-sharing programs and the presence of plaintiffs’ copyrighted sound recordings. Unfortunately, that

information is now largely gone and permanently irretrievable. Plaintiffs are left to prove their case with the scant and piecemeal evidence remaining. **By destroying the best evidence relating to the central issue in the case, defendant has inflicted the ultimate prejudice upon plaintiffs.**

241 F.R.D. 462, 465 (W.D. Tex. 2006) (emphasis added).

In addition to the prejudice that Plaintiffs have suffered due to the cover-up, Defendant and her family's misconduct undermines the administration of justice. Their actions were deliberately calculated to conceal the truth. In *Atlantic Recording Corp. v. Howell*, another case similar to this one, the court explained that the defendant's destruction of computer evidence "wholly undermined the integrity of the judicial process." No. 06-CV-02076-PHX-NVW, at \*5 (D. Ariz. Aug. 29, 2008), Exhibit V. The Court imposed sanctions both as a "deterrent effect and to remedy the prejudice inflicted on the recording companies and on the Court." *Id.*

Finally, Defendant's obstructionist tactics and misinformation led Plaintiffs down multiple rabbit holes, caused substantial delay, and forced Plaintiffs to seek the Court's assistance on numerous occasions to obtain routine discovery. This conduct, by Defendant, her family, and her counsel, substantially increased the time and cost of this litigation, further prejudicing Plaintiffs.

## ARGUMENT

### **A. Defendant And Her Counsel Should Be Sanctioned For Providing False And Misleading Information And For Unreasonably And Vexatiously Multiplying And Prolonging This Litigation.**

#### **1. Defendant and her counsel should be sanctioned for discovery abuses under Rule 37 and the Court's inherent authority.**

Rule 37(c) permits a court to impose sanctions on a party for providing false or misleading discovery responses. Specifically, Rule 37(c) provides, in relevant part:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is [subject to sanction]. . . . In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these

sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) . . . .

Fed. R. Civ. P. 37(c)(1). Rule 37(b)(2)(C) permits a court to impose sanctions on the party, “the attorney advising that party or both.” Fed. R. Civ. P. 37(b)(2)(C).

The Court also possesses inherent authority to sanction parties and their counsel for discovery abuses. *See New Phone Co. v. N.Y. City Dep’t of Info. Tech. & Telecomms.*, 2007 U.S. Dist. LEXIS 74693, at \*50-51 (E.D.N.Y. Oct. 5, 2007). Sanctions under this authority are appropriate when a party has abused the litigation process. *Id.* at \*50. Similarly, sanctions under this authority are warranted for spoliation of evidence. *Barsoum v. NYC Housing Auth.*, 202 F.R.D. 396, 399 (S.D.N.Y. 2001).

Federal courts do not hesitate to impose sanctions where a party makes false and misleading statements that obstruct the search for the truth. The Second Circuit has held that sanctions are warranted for prolonged obstruction of discovery and misleading statements by counsel. *Penthouse Int’l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 391 (2d Cir. 1981). Sanctions are also appropriate for withholding critical evidence, *Jung v. Neschis*, 2007 U.S. Dist. LEXIS 97173, at \*45 (S.D.N.Y. Oct. 23, 2007), and for or false deposition testimony which leads a party down a rabbit hole, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 U.S. Dist. LEXIS 31702, at \*4 (S.D.N.Y. Apr. 30, 2007).

In *Jung*, the court imposed sanctions for “dilatory and misleading” conduct in withholding critical cassette tapes until they later became unavailable due a third party’s incapacitating illness. *Jung*, 2007 U.S. Dist. LEXIS 97173, at \*41. The court noted that the plaintiffs never produced cassette tapes, which had been requested through Rule 34, presented no evidence that they ever attempted to obtain the tapes, and then made “questionable representations” about which of several tapes were relevant. *Id.* at \*43. While significant

questions about the tapes' contents remained unanswered, the court sanctioned the plaintiffs for ensuring that the tapes would never be reviewed. *Id.*

In *Karaha*, the court imposed sanctions in the amount of \$500,000 for false deposition testimony. *Karaha*, 2007 U.S. Dist. LEXIS 31702, at \*4. The court noted that the false testimony regarding ownership of refineries had the purpose of leading the other party and the court "off the track," caused the other party to seek additional discovery, and prolonged the litigation by two years. *Id.* at \*4, \*15.

Here, sanctions are appropriate because Defendant, her family, and her counsel engaged in a deliberate pattern of misconduct by providing false, misleading, and incomplete information as to the status of Defendant's Internet service in August 2004, who resided in Defendant's home during that time, the identity and location of witnesses with information about the case, and the existence and owner of the computer connected to Defendant's Internet account at the time of infringement. As in the *Jung* and *Karaha* cases, Defendant's misrepresentations caused Plaintiffs and the Court to waste substantial resources chasing empty leads and ultimately led to the destruction of critical evidence in this case. The actions of Defendant and her counsel have caused Plaintiffs to engage in additional discovery at great time and expense, prolonged this litigation unnecessarily, and resulted in the destruction of critical computer evidence severely and irreparably prejudicing Plaintiffs' ability to prove their case.

For two years, Plaintiffs have been given incorrect and incomplete information, have been led down rabbit holes, and have been forced to expend unnecessary time and money, often being forced to seek the Court's assistance, to obtain virtually every piece of information they sought. And when Plaintiffs finally were provided information regarding who was in the home and what computer was connected to the Internet at the relevant time, that evidence had been recently destroyed, severely prejudicing Plaintiffs' ability to prove their case. An award of

sanctions is necessary under these circumstances to punish Defendant and her counsel for their misconduct, to reimburse Plaintiffs for the costs needlessly incurred, and to deter others from committing similar discovery abuses.

**2. Defendant's counsel should be sanctioned for engaging in vexatious litigation in violation of 28 U.S.C. § 1927 by making false statements, fighting Plaintiffs' good faith efforts to uncover crucial evidence, and filing frivolous motions, all of which unnecessarily increased the costs of this litigation.**

Under 28 U.S.C. § 1927, an attorney who “so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” Section 1927 imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics. *Diamond v. Simon*, 1992 U.S. Dist. LEXIS 444, at \*6 (S.D.N.Y. Jan. 15, 1992). Courts have held that § 1927 sanctions are appropriate where an attorney is obstructive and requires the other side “to take many steps which it should not have been obliged to take.” *United States v. Chicago Blower Salse*; 851 F. Supp. 83, 86 (W.D.N.Y. 1993); *see also Morales v. Zondo, Inc.*, 204 F.R.D. 50, 57-58 (S.D.N.Y. 2001) (imposing sanctions where counsel’s overzealous representation caused unnecessary, vexatious delay). Similarly, an award of sanctions under § 1927 is warranted where an attorney (i) makes misleading statements, *Malhiot v. S. Calif. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984); *In re Interstate Steel Setters, Inc.*, 65 B.R. 312, 316-17 (N.D.Ill. 1986) (attorney misrepresented that he did not really know if documents presented were authenticated, even though attorney knew all along that documents were actual copies); (ii) makes excessive objections without a valid legal basis, *Leiching v. Conrail*, 1997 U.S. Dist. LEXIS 3561, at \*8-9 (N.D.N.Y. Mar. 24, 1997), or (iii) makes frivolous motions, *see Nike, Inc. v. Top Brand Co. Ltd.*, 216 F.R.D. 259, 276 (S.D.N.Y. July 3, 2003). Sanctions are also appropriate where pleadings are filed without legal basis and for the improper purpose of supporting a bad faith public relations campaign to embarrass the other party.

*Galonsky v. Williams*, 1997 U.S. Dist. LEXIS 19570, at \*17-19 (S.D.N.Y. Dec. 10, 1997)

(finding it “appropriate to consider the press conference held by counsel in assessing the issue of his good faith in filing frivolous claims and motions”).

Here, Defendant’s counsel should be sanctioned for forcing Plaintiffs to take many unnecessary steps to obtain basic information, for making misleading statements, and for making baseless discovery objections and frivolous motions which he posted on his anti-recording industry blog. Specifically, as demonstrated above, Defendant’s counsel consistently forced Plaintiffs to seek Court intervention for routine discovery requests and engaged in a pattern of filing frivolous motions. For example, Plaintiffs were forced to seek the Court’s assistance to inspect Defendant’s computer, to serve deposition subpoenas on basic fact witnesses like Woody Raymond, Junior Lindor, and Yannick Raymond-Wright, and to compel Defendant and her son to produce the missing hard drive. As the Court held, each of these requests was a good faith effort to uncover evidence of copyright infringement. Similarly, Defendant’s counsel filed frivolous motions seeking, among other things, to preclude evidence (Doc. No. 69), to exclude Plaintiffs’ expert’s testimony (Doc. No. 165), and to compel production of a proprietary contract with MediaSentry (Doc. Nos. 62 and 201). Defendant’s counsel’s refusal to cooperate in good faith and repeated frivolous motions designed to thwart Plaintiffs’ discovery resulted in an unreasonable multiplication of these proceedings.

Defendant’s counsel also made misleading statements to Plaintiffs. His assertions that there was no computer in the home at the time of infringement and that Defendant had no way of contacting her nephew Junior Lindor were both false, and both materially prolonged and complicated these proceedings unnecessarily.

Finally, as this Court is aware, Defendant’s counsel has maintained an anti-recording industry blog during the course of this case and has consistently posted virtually every one of his

baseless motions on his blog seeking to bolster his public relations campaign and embarrass Plaintiffs. Such vexatious conduct demeans the integrity of these judicial proceedings and warrants this imposition of sanctions. *See Galonsky*, 1997 U.S. Dist. LEXIS 19570, at \*18-19.

**3. Defendant, her counsel, or both should be ordered to pay monetary sanctions to Plaintiffs because their misconduct demeaned the integrity of the judicial process and unnecessarily prolonged and increased the cost of this lawsuit.**

Having established that Defendant and her counsel committed discovery abuses warranting sanctions under Rule 37, the Court's inherent authority, and 28 U.S.C. § 1927, the only issue is what sanctions should be imposed. The district court exercises wide discretion in sanctioning a party for concealing discoverable information. *See Outley v. City of New York*, 837 F.2d 587, 589 (2d Cir. 1988); *Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 21 (S.D.N.Y. 1995). Factors relevant to determining appropriate sanctions include (1) the degree of the offending party's fault, (2) the adequacy of notice, and (3) the efficacy of lesser sanctions. *See Fears v. Wilhelmina Model Agency, Inc.*, 2004 U.S. Dist. LEXIS 8364, at \*24 (S.D.N.Y. 2004) (imposing monetary sanctions). Courts also consider the need to deter others from engaging in the same deceptive behavior. *See Cielo Creations, Inc. v. Gao Da Trading Co.*, 2004 U.S. Dist. LEXIS 11924, at \*7 (S.D.N.Y. 2004) ("Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent'"). Consideration of the three factors cited compels an award of monetary sanctions in this case.

First, the incomplete, false, and misleading information repeatedly provided by Defendant and her counsel was not merely the result of an oversight or an innocent mistake. To the contrary, Defendant and her family intentionally concealed the whereabouts of Ms. Raymond Wright and Junior Lindor, as well as the whereabouts of the relevant computer and any hard drives, in an effort to prevent Plaintiffs from obtaining critical evidence. This misconduct caused

severe prejudice and forced Plaintiffs to expend substantial time and money unnecessarily. Defendant had an obligation to provide complete and truthful information regarding this case. *See* Fed. R. Civ. P. 33(b)(1) (“Each interrogatory shall be answered separately and fully in writing under oath . . . .”); *Interscope Records v. Barbosa*, 2006 U.S. Dist. LEXIS 94210, at \*5 (E.D.N.Y. Dec. 29, 2006) (parties have an obligation to provide complete and truthful responses to discovery requests); *Novick*, 18 F.R.D. at 298 (holding that the defendant had a duty to supply additional information received after the initial answers were supplied). Defendant’s intentional failure to provide basic information to Plaintiffs should be sanctioned.

Second, because Plaintiffs have proceeded by way of a formal motion, Defendant has had sufficient notice. *See Fears*, 2004 U.S. Dist. LEXIS 8364, at \*25. Plaintiffs repeatedly informed Defendant, her counsel, and the Court that they sought information regarding the relevant computer, the identity of “jrlindor,” and the identify of those individuals who were in Defendant’s residence during the time of infringement and might have information about this case. There can be no doubt that Defendant and her counsel knew what Plaintiffs wanted and, yet, they deliberately concealed this information from Plaintiffs.

Finally, the Second Circuit has characterized monetary sanctions as the mildest of the sanctions authorized by Rule 37. *See Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979). Here, the incomplete, false, and misleading information provided by Defendant and her counsel inflicted the “ultimate prejudice upon plaintiffs,” prolonged this case, and resulted in unnecessary motions practice, court conferences and depositions. *See Tschirhart*, 241 F.R.D. at 465. Monetary sanctions are the only appropriate remedy. Other possible sanctions, such as an order compelling amended discovery responses or the preclusion of evidence, would be ineffective as the critical evidence has now been destroyed and Plaintiffs are moving to dismiss this case. *See id.* at 465 (“By destroying the best evidence

relating to the central issue in the case, defendant has inflicted the ultimate prejudice upon plaintiffs.”); *see also Fears*, 2004 U.S. Dist. LEXIS 8364, at \*24-25 (weighing the efficacy of lesser sanctions in determining whether to impose monetary sanctions).

**B. Plaintiffs Are Entitled to Voluntarily Dismiss Their Complaint Without Prejudice Under the Circumstances.**

Rule 41(a)(2) allows a plaintiff, with the court’s permission and subject to the terms the court deems proper, to voluntarily dismiss an action at any time. *See* Fed. R. Civ. P. 41(a)(2). The presumption in the Second Circuit “is that a court should grant a dismissal pursuant to Rule 41(a)(2) absent a showing that defendants will suffer substantial prejudice as a result.” *Gap, Inc. v. Stone Int’l Trading*, 169 F.R.D. 584, 588 (S.D.N.Y. 1997) (citations omitted); *see also Wakefield v. N. Telecom Inc.*, 769 F.2d 109, 114 (2d Cir. 1985); *Thomas v. N.Y. State Dep’t of Corr. Servs.*, 2004 U.S. Dist. LEXIS 16573, at \*5 (S.D.N.Y. Aug. 20, 2004) (“[T]he presumption in this circuit is that a court should grant a [Rule 41(a)(2)] dismissal . . . absent a showing that defendants will suffer substantial prejudice as a result.”) (quotations omitted). “[S]tarting a litigation all over again does not constitute legal prejudice.” *D’Alto v. Dahon Cal., Inc.*, 100 F.3d 281, 283 (2d Cir. 1996) (citing *Jones v. SEC*, 298 U.S. 1, 19 (1936)).

Courts must consider five factors in determining whether a defendant will suffer legal prejudice: “(1) the plaintiff’s diligence in bringing the motion; (2) any ‘undue vexatiousness’ on the plaintiff’s part; (3) the extent to which the suit has progressed, including the defendant’s efforts and expense in preparation for trial; (4) the duplicative expense of relitigation; and (5) the adequacy of the plaintiff’s explanation for the need to dismiss.” *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). Analysis of these factors clearly weighs in Plaintiffs’ favor.

**1. Plaintiffs have been diligent in bringing this motion.**

Plaintiffs requested leave to bring this Motion less than one month after Plaintiffs learned for the first time that Defendant’s adult daughter was staying with Defendant, had brought two

computers into Defendant's home, and had connected them to the Internet at the time of infringement. Plaintiffs would have brought this Motion sooner, and may never have brought this case at all, had Defendant simply provided Plaintiffs with accurate information about Ms. Raymond-Wright's presence in Defendant's house with two computers that connected to Defendant's Internet account at the time of infringement. *See* Dec. 14, 2005 E-mail, Exhibit B. Instead, as described above, Defendant, her family, and her counsel spent two years denying that anyone else was in Defendant's home and claiming that no computer was connected to the Internet at the relevant time. These intentional misrepresentations prolonged and compounded this case unnecessarily. As soon as Plaintiffs learned that Defendant's entire family had engaged in a massive cover-up culminating in the loss of critical computer evidence, they acted quickly to bring this Motion. There can be no question that Plaintiffs have acted diligently.

**2. There has been no vexatiousness at all on Plaintiffs' part.**

"Undue vexatiousness" requires a finding of "ill-motive." *Jewelers Vigilance Comm., Inc. v. Vitale Inc.*, 1997 U.S. Dist. LEXIS 14386, at \*7 (S.D.N.Y. Sept. 19, 1997). The standard for ill motive is high and courts in this Circuit routinely decline to label even unprofessional and acrimonious behavior unduly vexatious. *See Comunidad Autonoma Del Pais Vasco v. Am. Bureau of Shipping, Inc.*, 2006 U.S. Dist. LEXIS 55822, at \*8-9 (S.D.N.Y. Aug. 4, 2006) (declining to label behavior unduly vexatious where plaintiffs brought multiple prior suits against defendants); *Tekula v. Suffolk County Cmty. College*, 2004 U.S. Dist. LEXIS 23735, at \*5 (E.D.N.Y. Nov. 24, 2004) (granting the plaintiff's motion to dismiss where the record did not indicate a pattern of undue vexatiousness on the part of the plaintiff). Courts require concrete evidence of ill motive in order to deem conduct vexatious. *Jewelers Vigilance*, 1997 U.S. Dist. LEXIS 14386, at \*3. Rhetoric and hyperbole are not sufficient. *See Banco Central de Paraguay v. Paraguay Humanitarian Found.*, 2006 U.S. Dist. LEXIS 87093, at \*14. Similarly,

lawsuits brought in good faith, yet ultimately unsuccessful, are not vexatious. *Global One Communs. World Holding B.V. v. Gaul*, 2008 U.S. Dist. LEXIS 54319, at \*3-4 (N.D.N.Y. July 16, 2008).

Here, Plaintiffs brought their claims in good faith after discovering evidence of massive copyright infringement from a computer in Defendant's home, on Defendant's Internet account, and under the username "jrlindor@KaZaA," an obvious match to Defendant's last name. With all of this information linking Defendant to the infringement, and no evidence to the contrary, Plaintiffs reasonably litigated their suit against Defendant. See *Atlantic Recording Corp. v. Heslep*, 2007 U.S. Dist. LEXIS 35824, at \*15-16 (N.D. Tex. 2007) (holding that the plaintiffs "brought this lawsuit not for the purposes of harassment or to extort [the defendant] . . . , but, rather, to protect their . . . copyrights from infringement and to help . . . deter future infringement"); *Atlantic Recording Corp. v. Raleigh*, No. 06-CV-1708-CEJ, Slip. op. at 7-8 (E.D. Mo. Aug. 18, 2008), Exhibit T (finding that the plaintiffs had probable cause where they linked the infringing activity to the IP address of a computer to which the defendant had access, even though defendant denied responsibility for the infringement at issue). This Motion itself is consistent with Plaintiffs' desire to pursue claims against the most culpable party.

**3. The lawsuit has progressed to this stage only because defendant failed to provide material information to Plaintiffs.**

The advanced state of litigation is not by itself determinative of a motion for voluntary dismissal; rather, "dismissals have been granted on the eve of trial and even after trial has commenced." *Eastman Mach. Co. v. Diamond Needle Corp.*, 2000 U.S. Dist. LEXIS 18766, at \*7 (W.D.N.Y. Dec. 15, 2000) (quotation omitted). Here, Plaintiffs are bringing this Motion at this stage of the litigation only because of Defendant's decision to conceal material information. Defendant easily could have obviated the need for Plaintiffs to bring suit against her at all, let alone the need for motions practice and discovery, had she only provided relevant information up

front. Instead, Defendant, her family, and her counsel provided incorrect information, including misrepresentations of persons present in the home during the relevant time-frame, misleading statements about whether computers were in the home and connected to the Internet, and misstatements and misdirection as to Junior Lindor and his whereabouts. This information all turned out to be false. Therefore, both the timing of Plaintiffs' Motion and any expenses that Defendant may have incurred have been caused by Defendant, not Plaintiffs.

Moreover, this motion to dismiss does not come on the eve of trial, and in fact no significant trial preparation has begun. No trial date has been set and discovery remains stayed.

**4. Defendant suffers no threat of duplicative expense.**

Plaintiffs are requesting to dismiss this action without prejudice because, to date, they have insufficient information to determine who is the direct infringer. While Plaintiffs certainly have no intention of relitigating this case against Ms. Lindor at this point, and would simply continue this litigation if that were their intent, if additional information were to come to light implicating Defendant, Plaintiffs should not be precluded from doing so. However, even if that were to occur, all of the effort and expense incurred to date could simply be reused in any subsequent proceeding. Moreover, Plaintiffs have prevailed on virtually every motion and objection filed by Defendant. Therefore, most of the expenses incurred by her were unnecessary. Finally, because all of these efforts and expenses could have been avoided by Defendant had she and her counsel simply provided complete and correct information in discovery, as required, these efforts and expenses should not be a factor in dismissal.

**5. Plaintiffs' explanation for bringing this Motion at this time is more than adequate to support their Motion.**

Plaintiffs brought this case based on substantial evidence of Defendant's infringement of Plaintiffs' copyrights. Plaintiffs now bring this Motion directly following their discovery that Defendant, her counsel, and her family spent the last two years concealing critical information

and obstructing discovery, resulting in the eventual loss of critical evidence. Plaintiffs' explanation for bringing this Motion now more than adequately supports Plaintiffs' Motion.

**C. The Voluntary Dismissal Should Not be Conditioned Upon an Award of Attorneys' Fees or Costs.**

District courts exercise discretion in deciding whether to impose costs or fees as a condition for dismissing a case without prejudice. *Young v. Dole*, 1991 U.S. Dist. LEXIS 11290, at \*7 (E.D.N.Y. July 11, 1991) (citation omitted). Courts in the Second Circuit however, "have refused to award fees and costs following a Rule 41(a)(2) dismissal absent circumstances evincing bad faith or vexatiousness on the part of the plaintiff." *Icon Licensing Group, LLC v. Innovo Azteca Apparel, Inc.*, 2005 U.S. Dist. LEXIS 7477, at \*15, n. 6 (S.D.N.Y. Apr. 26, 2005); *BD v. DeBuono*, 193 F.R.D. 117, 125 (S.D.N.Y. 2000); *Ultimate Nutrition, Inc. v. Diamond Drinks*, 2007 U.S. Dist. LEXIS 70412, at \*8 (D. Conn. Sept. 24, 2007). As demonstrated above, there has been no bad faith or vexatiousness on the part of Plaintiffs. Indeed, Plaintiffs have established their good faith basis for commencing and continuing this action. In contrast, Defendant and her counsel have severely and irreparably prejudiced Plaintiffs by concealing information until the central evidence, the computer connected to the Internet at the time of infringement, was destroyed. Additionally, Plaintiffs have been forced to expend significant time and expense as a result of Defendant, her family, and her counsel's misrepresentations and misdirection. Plaintiffs have been forced to file many motions to compel and seek the Court's assistance regarding unnecessary discovery disputes, almost all of which Plaintiffs prevailed on, but only after significant expense and delay. Plaintiffs have also been forced to spend substantial time and money serving witnesses who were attempting to evade service and taking numerous depositions that would have been unnecessary had Defendant, her family, or her counsel simply provided the relevant information regarding Junior Lindor, Ms. Raymond-Wright, and the computer at issue from the beginning, as they were required to do. It is Defendant's conduct that

has been vexatious and in bad faith and, therefore, the Court should not condition the dismissal upon an award of attorneys' fees.

Further, while the Second Circuit has not set out a precise "test" for determining whether to impose fees as a condition of dismissal, other courts also consider the following factors:

(1) the effort and expense incurred by a defendant in preparing for trial; (2) the extent to which the litigation has progressed; and (3) the plaintiff's diligence in moving to dismiss. 8-41

Moore's Fed. Prac. -- Civ. § 41.40 [10] [d] [I] and cases cited therein.

Analysis under these additional factors similarly weighs against conditioning dismissal upon an award of attorneys' fees under Rule 41(a)(2). First, any litigation expenses Defendant incurred "would present a classic case of self-inflicted wounds [. . .]." *Read Corp. v. Bibco Equip. Co.*, 145 F.R.D. 288, 290 (D.N.H. 1993) (court granted the plaintiff's motion to dismiss without prejudice and denied the defendant attorneys' fees where the plaintiff brought the lawsuit in good faith and where the defendant "could have easily saved itself most, if not all costs of [the] litigation"); see *Ultimate Nutrition*, 2007 U.S. Dist. LEXIS 70412, at \*8 (denying fees under Rule 41(a)(2) where the defendant sought reimbursement of fees incurred as a result of its own actions). As demonstrated above, Defendant could have avoided most, if not all, costs of the litigation by providing Plaintiffs with the information they requested at the outset this lawsuit and continuously throughout the litigation. Instead, Defendant concealed witnesses and crucial evidence at every opportunity. Defendant should not be rewarded for such actions. Moreover, while this case has been ongoing for over two years, discovery remains open, no trial date has been set, and no trial preparation is underway.

Finally, it cannot be disputed that Plaintiffs acted diligently in moving to dismiss. As soon as Plaintiffs learned of Defendant's cover-up and that crucial computer evidence had been

destroyed, they took steps to dismiss the case without prejudice voluntarily. Indeed, Plaintiffs' diligence further weighs against an award of attorneys' fees under Rule 41(a)(2).

As Plaintiffs brought this action in good faith and reasonably conducted the litigation to determine who in Defendant's house is responsible for the infringement at issue, while Defendant intentionally misinformed and mislead Plaintiffs regarding the witnesses and evidence they sought, causing Plaintiffs substantial prejudice, the circumstances do not justify conditioning the dismissal upon an award of attorneys' fees.

### **CONCLUSION**

Based on the foregoing, Plaintiffs respectfully request that Plaintiffs be awarded monetary sanctions against Defendant and her counsel in an amount to be determined for repeated discovery abuses and the case be dismissed without prejudice.

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HOLME ROBERTS & OWEN LLP

By: s/Eve G. Burton  
Eve G. Burton (EB-3799))  
1700 Lincoln Street, Suite 4100  
Denver, Colorado 80203  
Telephone: 303-861-7000  
Facsimile: 303-866-0200

ROBINSON & COLE LLP  
Victor B. Kao (VB-6967)  
28<sup>th</sup> Floor, 885 Third Avenue  
New York, NY 10022  
Telephone: 212-451-2900  
Facsimile: 212-451-2999

Attorneys for Plaintiffs

To:  
Ray Beckerman, Esq.  
Ray Beckerman PC  
108-18 Queens Boulevard  
4th Floor  
Forest Hills, NY 11375