

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

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UMG RECORDINGS, INC., et al,

05 CV 1095 (DGT)(RML)

Plaintiff,

-against-

MARIE LINDOR,

Defendant.

**DECLARATION IN
OPPOSITION TO
PLAINTIFF'S MOTION**

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RAY BECKERMAN declares under penalty of perjury:

1. I am a member of the bar of this Court in good standing, and have been since June 26, 1979. This declaration is respectfully submitted in opposition to the false, vicious, and unprincipled *ad hominem* attack launched by plaintiffs in the guise of a motion for voluntary dismissal without prejudice and “discovery sanctions”.

2. Not surprisingly, after four (4) years of pursuing an innocent woman, plaintiffs have finally made the inevitable motion to voluntarily dismiss this long running, heavily litigated, case brought against a woman who has never even used a computer, let alone engaged in “online media distribution” as plaintiffs frivolously alleged in their complaint.

3. In a transparent attempt to preemptively avert their presumptive liability for attorneys fees upon “throwing in the towel” in this copyright infringement case¹, plaintiffs have recklessly padded their voluntary dismissal motion with two frivolous additional requests, neither of which has any basis in the law or in fact: (a) a request that the dismissal be “without

¹ See, e.g. *Mostly Memories, Inc. v. For Your Ease Only, Inc.*, 526 F.3d 1093 (7th Cir. May 27, 2008); *Riviera Distributors, Inc.* 517 F.3d 926 (7th Cir. February 20, 2008).

prejudice”; and (b) a request that “discovery sanctions” be awarded against defendant and myself.

4. The entire basis for these requests is:

(I) plaintiffs' counsel's *opinion* as to what the true facts are,

(II) plaintiffs' counsel's argument, unsupported by any evidence and in some instances even contradicted by plaintiffs' own exhibits, that defendant and the undersigned 'covered up' these facts and that therefore this Court should deprive defendant of her day in court, and

(III) evidence that plaintiffs' counsel are displeased with the level of cooperation they received from some of defendant's relatives when pursuing them in third party discovery.

5. It goes without saying that plaintiffs' counsel do not get to decide what the true facts are -- the jury does that -- and that their displeasure with the cooperativeness of a defendant's relatives does not entitle them to a remedy depriving defendant of her right to defend herself.

6. Not surprisingly, plaintiffs counsel have no legal authority for their motion, since it is, if nothing else, quite original. Their unexceptionable legal authority is to the effect that spoliation of evidence by a party, repeated disobedience of court orders by a party, and flagrant failures of a party to live up to discovery obligations, can lead to discovery sanctions against that party. Unfortunately, plaintiffs have no way of fitting this case into that shoe, since none of the above ever took place here.

7. Thus, plaintiffs' motion must be denied, as a matter of law.

8. Regrettably, however, in view of the many misstatements of fact, and the irresponsible *ad hominem* insinuations of wrongdoing with which plaintiffs' counsel's papers

have been larded, albeit all of them unsworn, we have no recourse than to respond.²

Preliminary statement.

9. The action was commenced February 28, 2005, supposedly on the basis of a copyright infringement allegedly occurring in August 2004. The defendant, Marie Lindor, a home health aide whose primary language is Haitian Creole, initially appeared *pro se*. Her son Woody Raymond, who is not a member of the bar, appeared in court with her, acting as a translator/intermediary of sorts. On November 4, 2005, the undersigned appeared in the action to represent defendant. By August 10, 2006, all of defendant's discovery obligations had been fully completed.

10. In addition to defendant's compliance with her own obligations, when plaintiffs asked to take depositions of Ms. Lindor's daughter Kathleen Raymond and son Woody Raymond, defendant asked them to appear for their depositions voluntarily, which they did, without need for any subpoena, in July, 2006.

11. Prior to July 25, 2006, the only discovery dispute that has ever existed in this case relating to discovery *from defendant* was whether, subsequent to her delivery of the hard drive for inspection, and subsequent to receipt of the forensic examiner's report, she would be entitled to at least some limited discovery into the forensic examiner's report. The Court not only resolved that issue in her favor, it gave her more relief than she was seeking, by ruling that she was entitled to full discovery, including interrogatories and depositions, into the forensic examiner's report and the mirror imaging process.

² Unfortunately defendant's relatives, who are defamed by plaintiffs' reckless accusations, do not get to respond to the shameful allegations made against them.

12. Subsequent to July 25, 2006, there have been no discovery disputes regarding discovery *from defendant* at all, and there is not any discovery obligation that has ever existed in this case on the part of defendant, since the day I entered the case, that has not been fully complied with. The only discovery issues have related to (a) plaintiffs' pursuit of discovery from third parties into possible copyright infringements by those third parties³ and (b) plaintiffs' consistent refusal to comply with discovery notices served by defendant. I.e., all discovery issues related to (a) discovery from plaintiffs, and (b) discovery from third parties initiated by plaintiffs.

13. Plaintiffs sought and obtained a second deposition of Woody Raymond, and depositions of two nephews of defendant, Gustave Lindor and Jean Lindor, and of another daughter, Yannick Raymond-Wright. Neither the hard drive examination, nor any of the depositions, in any way implicated defendant in any copyright infringement, or even in the use of any computer. (Indeed, it might be noted, neither the hard drive examination, nor any of the depositions, implicated *anyone* in any copyright infringement.)

14. Plaintiffs waited until April, 2008, just before the close of discovery, to take the deposition of Ms. Raymond-Wright. Ms. Raymond-Wright, a military wife and mother of young children who lives in Illinois about an hour from Chicago, asked to have the deposition take place in Brooklyn, New York, where she could have child care. She appeared for her deposition without benefit of counsel, and seemingly on little sleep. Subsequent to the deposition she retained counsel and filed an errata sheet along with her signed transcript. Frivolously, plaintiffs' counsel ask the Court to (a) accept the transcript and (b) disregard the errata sheet. Ms. Raymond-Wright's deposition without the errata sheet forms forms virtually the entire

³ A subject which, we note, is entirely irrelevant.

'foundation' for their motion.

15. Finally admitting that they have no case, and apparently in an attempt to (a) thwart the noticed deposition of their investigator, who, it turns out, conducted his 'investigation' without having obtained an investigator's license, (b) shirk their apparent liability for defendant's attorneys fees, and (c) punish the undersigned for having dared to represent Ms. Lindor with diligence, plaintiffs have made the within motion, lashing out at others in order to deflect attention from their 4-year long pursuit of an innocent woman.

Response to plaintiffs' averments.

16. Plaintiffs' papers so reek with falsehood and fallacy it would take more time and paper than we can commit to this project to respond in full, but we will attempt to point out some of the more blatant and maddening examples.

General observations

17. A few general points at the outset:

(I) plaintiffs repeatedly attribute to defendant statements made by others, especially for the period prior to defendant's retention of counsel; they offer no legal basis for attributing to defendant any statements made by anybody other than defendant and defendants' counsel;

(II) they likewise attribute to defendant the alleged recalcitrance of some of the third parties to submit to third party discovery. I believe that these spurious and defamatory allegations are factually groundless, and I can say with absolute certainty that the averments of this type are legally irrelevant to a motion for discovery sanctions *against defendant*. The sole 'impediment' *defendant* may have ever interposed to plaintiffs' third party discovery rampage

was, on occasion, a totally lawful, appropriate, and justifiable one or two sentence letter in opposition, reminding the Court that the requested discovery did not relate to any possible liability of *defendant*, the proof of which would be the sole permissible purpose for such discovery;

(III) plaintiffs repeatedly rely on 'statements' that were not made in discovery and have nothing to do with a motion for “discovery sanctions”;

(IV) plaintiffs have made no attempt to show (and indeed were they to attempt to do so, the record would overwhelmingly contradict) that they ever at any time relied on anything they were told by anybody other than their own “investigator” and “expert”;

(V) plaintiffs have made no showing at all as to why dismissal of this heavily litigated case should be “without prejudice”; and

(VI) plaintiffs' *ad hominem* attacks are so far afield, and so irrelevant to any motion for “discovery sanctions”, that it is clear that they were included for an ulterior purpose and should themselves be sanctioned.

18. I.e. plaintiffs conducted the depositions they wanted to take, they conducted the forensic examinations they wanted to take, and their one outcry of 'spoliation' -- that Ms. Yannick Raymond-Wright may or may not have had a computer connected to that internet access account as of August 2004 -- is of no avail for a host of reasons: (a) it is based upon a false reading of the deposition which asks the Court to disregard the errata sheet, (b) it assumes, without benefit of any trial, that this deposition sans the errata sheet is correct, and everything everyone else has said is wrong, (c) if the lost computer were to incriminate anyone, it would be incriminating Ms. Raymond-Wright, not defendant, (d) the failure to take Ms. Raymond-Wright's

deposition sooner is the result solely of plaintiffs' own negligence in waiting until the close of discovery to initiate that deposition, and (e) there is no showing of any concealment of anything, or of any misstatement of anything, by defendant.

Specific observations.

19. *Detection of an individual.* On page 3 of their memorandum plaintiffs falsely represent that their investigator “[o]n August 7, 2004... detected an individual using the KaZaa file sharing program”. This statement is directly contradicted by the testimony of plaintiffs' expert witness who at his deposition testified repeatedly that the the investigator *could not and did not detect an individual.* (Exhibit A hereto).

20. *“Statement” re internet service.* On page 4 of their memorandum they falsely represent that on July 26, 2005, at a conference at which she appeared *pro se*, she “claimed she had no Internet Service in August 2004” and cite page 5 of the transcript of the conference (“Pro Se Transcript”)(Pltffs' Ex. C). In fact, this is what she said in the cited passage:

THE COURT: Do you understand what that means?

MS. LINDOR: I -- no, that's something I don't understand. The first thing, I don't have internet. Second of all, I don't know how to use computer. I don't have a need to or learn how to use computer. I don't know how to use computer.

(When this did come up in *discovery*, at defendant's deposition, she said she remembered the internet service being shut off sometime after her late husband's passing in 2001, and its being restored at some time thereafter, but testified repeatedly that she could not remember when it was restored. Deposition of Marie Lindor, exhibit B hereto, pp 30-36. Moreover, the plaintiffs' own exhibits establish that plaintiffs did not rely on the 2005 suggestion from Ms. Lindor's son as to when there was internet service, and verified the dates for themselves with Verizon in 2005. The

documents also establish that, at the 2006 deposition, plaintiffs' counsel indicated that he would again obtain the records from Verizon, which he did. So the intimation that plaintiffs were somehow thrown off the track is pure fabrication.)

21. *“Statement re wireless router.* On page 4 of their memorandum plaintiffs falsely claim that “Defendant also claimed that the infringement occurred through a wireless router, and that someone must have pirated her wireless Internet connection to download music”. In support of that they cite three (3) things, not a single one of which contains an instance of Ms. Lindor claiming anything about a wireless router, and not a single one of which is “discovery”. They cite page 10 of the Pro Se Transcript, in which she says nothing whatsoever about any wireless router. Only her son states that there was a wireless router. And then they cite two other documents which contain no statement by Ms. Lindor at all.⁴ (Not that it matters for purposes of this motion, but it should be noted that plaintiffs have no basis for insinuating that there was *not* a wireless router. At trial we expect to prove that there was in fact a wireless router.). All that Ms. Lindor had to say about a wireless router was this, from her deposition:

Q. I talked to your son earlier, a lot, about the computer and how it works, and we talked about things like wireless routers. You don't have any understanding about that?

A. I don't understand one word you say, P.C., D.C., it's the first time I hear those things. I don't know what they mean.

(Ex. C, hereto, ll. 8-14.)

22. *Representation about “debunking” wireless router.* At pages 4-5, plaintiffs hubristically misrepresent to the Court that they have 'debunked' Mr. Raymond's testimony that

⁴ One an article in Red Herring magazine, the other a letter by her son, in both of which Mr. Raymond indicated that there was a wireless router.

there was a wireless router, but their only support for that is two self serving, one-page letters mailed by plaintiffs' former counsel. Meanwhile, they fail to explain how, even if in fact they had 'debunked' Mr. Raymond's statement, that would form a basis for imposing 'discovery sanctions' on defendant. And they overlook the fact that these two (2) letters are proof positive that plaintiffs' counsel did not in any way rely upon the statements made by Mr. Raymond. Of course, plaintiffs did not rely on Mr. Raymond's averment, and their "expert witness" -- in his fifth version of the facts -- has testified that he has conducted his own forensic examination and believes he can prove that there was no wireless router. We welcome his technically unsound attempt to make that case at trial, as we believe he will fail miserably in it.

23. *Statement as to "no computer"*. At page 5 plaintiffs misrepresent to the Court that "Defendant and her counsel also claimed that there was no computer in Defendant's home during the time of infringement." In support of that they cite several things, *none of which relate to discovery taken from defendant*. They cite (a) page 17 of the Pro Se Transcript, in which defendant makes no such statement and her son states that the computer which was normally in the house was out for service, (b) the Red Herring article again, (c) a quote from the blog "Recording Industry vs. The People", (d) a letter from the undersigned to plaintiffs' counsel, and (e) Mr. Raymond's deposition testimony that there was no computer at the house at the time of the alleged infringement. This has nothing whatsoever to do with any motion for discovery sanctions against defendant or against the undersigned. Nor is there any basis for the Court to (a) discount Mr. Raymond's testimony, and (b) to give full credit to *a part of* Ms. Raymond-Wright's testimony while discounting the rest of Ms. Raymond-Wright's testimony. All that is shown is that the first version of Ms. Raymond-Wright's testimony was inconsistent with Mr. Raymond's

testimony. Plaintiffs ask the Court to (a) accept Ms. Raymond-Wright's first version; (b) disregard her second version; and (c) disregard Mr. Raymond's testimony. This is a job only the trier of fact can do. And an inconsistency between one of Ms. Lindor's children and another has nothing to do with Ms. Lindor's compliance with her discovery obligations. When the subject did come up in discovery, Ms. Lindor *never said* that there were no other computers in her house at the time of the infringement, only that she hadn't seen any:

Q. I want to talk about this computer very briefly, the one at your house; is it accurate, that was the only computer that was in your house?

A. That's the only one I see.

(Ex. D, ll. 14-18.)

24. "*When Plaintiffs were finally able to inspect Defendant's computer*". Further demonstrating their lack of even the slightest concern for integrity, plaintiffs' counsel intimate that they were unduly delayed in inspecting the computer that was in defendant's home. The actual facts are as described in my June 20, 2006, email to plaintiffs' counsel. (Ex. E). The delay which they experienced -- which was about a month -- was the result of their own sharp practice in unjustifiably trying to prevent defendant's counsel from having even limited discovery, prior to trial, into the substance of the forensic examiner's report. It was never an issue that the examination of the hard drive had to be done under an appropriate protective order. My adversary and I had reached agreement on 6 out of 7 points in a stipulated protective order. The only thing that had not been agreed upon was a provision which I had requested to the effect that if, after

examining the mirror image of the hard drive, plaintiffs elected to reserve the right to use it at trial, they were required to provide defendant's counsel with printouts of the information they intended to use, and to make available for deposition the persons making and/or analyzing the hard drive, and to provide working copies (as opposed to source code) of the software used. (See ex. F hereto, deleted paragraph 7). I had also indicated I would accept any reasonable alternative suggestion, but none was forthcoming from plaintiffs' counsel. I (not plaintiffs, as they misrepresent) then asked the Court for a ruling on the subject, on June 20, 2006. (Exhibit G hereto). When the issue was determined at the July 25, 2006, discovery conference⁵, the Court indicated that defendant would be entitled to full discovery from the plaintiff regarding the hard drive inspection, including both depositions and interrogatories, and in the August 3, 2006, order provided:

Defendant shall have the opportunity before the close of discovery to serve contention interrogatories and take expert and fact depositions of plaintiffs' witnesses as to the analysis of defendant's computer.

(August 3, 2006, order annexed hereto as exhibit H). I.e., the issue was resolved *in defendant's favor*. The inspection was completed a week later.

25. *Gustave Lindor's address*. At page 6, plaintiffs observe that when she was deposed, defendant testified that she did not know where Gustave Lindor, Jr., lived. Their “refutation” of her testimony is to observe that (a) when

⁵ Upon information and belief, plaintiffs' counsel are in possession of a transcript of that conference, but refuse to furnish the undersigned with a copy. (Ex. I). Yet another example of their persistent sharp practice.

they examined the hard drive of the computer *which Ms. Lindor never in her life used*, they found Gustave Lindor's resume with a Brooklyn address, and (b) when they deposed Gustave Lindor he testified that defendant knew he lived in Brooklyn. He did not testify that defendant knew his address or where in Brooklyn he lived. This point is nonsensical for a number of reasons, including the facts that (a) plaintiffs never asked Ms. Lindor whether she knew Gustave lived in Brooklyn, they just asked her the much broader question if she knew where he lived; (b) they examined the hard drive containing Mr. Lindor's resume on *August 10, 2006*, so that if they were 'in the dark' on Gustave's address, they were so for only 44 days; (c) the fact that the resume was on a computer which Ms. Lindor had never used says nothing whatsoever about *her* knowledge of the address; (d) Mr. Lindor had never used a computer at his aunt's house in any event, as confirmed by everyone's testimony and plaintiffs' own hard drive inspection; and (e) if the Court were to take the unwarranted leap plaintiffs take, and conclude that there was something inconsistent between Gustave's and Marie's testimonies, there is no basis for accepting the witness's testimony, and rejecting the defendant's, especially on a subject as to which defendant would have actual knowledge, and the witness would only be guessing. Only the jury could make that determination.

26. *Woody Raymond's second deposition*. Also on page 6 plaintiffs claim that defendant's son Woody Raymond was evasive in connection with his deposition. They omit to point out that Woody Raymond appeared for his first

deposition voluntarily, without requiring a subpoena at all, and that the deposition to which they are referring is the second deposition. Consistent with their disregard for the truth, they make a number of factual misrepresentations which have been refuted previously by Woody Raymond in connection with motion practice over the subject, but we need say only that not a whit of this discussion has anything to do with *defendant*, so plaintiffs' counsel's motivation for including it in this motion directed against *defendant* is, to say the least, questionable. Plaintiff's entire discussion of the issue was disingenuous in the extreme, since it turned out that the process server was going to an incorrect address, due to his own or plaintiffs' counsel's mistake, and since, as plaintiffs' counsel knew, Mr. Raymond is a paralegal and IT specialist at a Manhattan law firm, and very easily reachable there; they had no problem telephoning his boss when they wanted to humiliate him (see exhibit J). Plaintiffs' only reference to defendant was to complain that the photograph which defendant produced was too old, however they offer no proof that she had a more recent photograph in her possession.

27. "*Fishing expedition*" objection. Incredibly plaintiffs find it objectionable (see Plffs' memorandum at p 7) that, in response to plaintiffs' motion for an order directing an alternate service on Gustave Lindor, defendant filed a 1-page, 1-paragraph, 4-line letter opposing the motion on the ground that:

The requested third party discovery would have no bearing on the liability of Marie Lindor, who has never used a computer. The sought after discovery is a classic "fishing expedition".

(Ex. K hereto). It was not good advocacy on plaintiffs' part to bring this up, since, as it turned

out, defendant was completely right, and plaintiffs' pursuit of the younger Gustave Lindor turned out to be “a classic fishing expedition”.

28. *Computer inspection.* At page 8 plaintiffs make one misrepresentation after another about alleged delays leading up to the hard drive inspection which took place on August 10, 2006. The only support they cite is their own self serving June 23, 2006, cross-motion. Plaintiffs misrepresent to the Court that it was they who sought judicial intervention respecting the hard drive inspection. In fact it was defendant, who wrote to the Court on June 20, 2006, with a list of discovery problems, all of which, except for the hard drive issue, related to plaintiffs' failure to live up to their discovery obligations (Ex. G). As to the hard drive mirroring inspection we wrote as follows, on *June 20, 2006*:

Hard Drive Mirror Imaging Inspection

We are in agreement on an inspection of the hard drive for mirror imaging, to be governed by a stipulation. However, we have reached a slight impasse on the stipulation. We are in agreement on 6 paragraphs, which set forth the whole procedure. The dispute is over a 7th paragraph designed to ensure that defendant has the right to meaningful pretrial discovery on the 'mirror imaging' and its analysis if the plaintiffs are going to use the results of the imaging at trial. This was in our draft but plaintiffs object to it. We are not wedded to the specific language or mechanism, but plaintiffs refuse even to suggest any alternative language that would ensure the right to pretrial discovery. We request that Your Honor resolve this issue.

(Ex. G, p. 2). Additionally, we were seeking to compel discovery responses as to which plaintiffs were three (3) months in default. Not only do plaintiffs carefully omit all reference to the June 20, 2006, motion to which they were responding, they also omit defendant's response to their cross-motion (Ex. L hereto). As noted in paragraph 24, *supra*, (a) the “delay” was a very brief “delay”; (b) the only reasons for the delay were plaintiffs' refusal to stipulate to defendant's

having any discovery at all into the results of the forensic report; and (c) the Court resolved the dispute in defendant's favor, authorizing *more discovery* than what defendant had sought from the stipulation provision which plaintiffs rejected.⁶ Contrary to plaintiffs' false statement, the email referred to in plaintiffs' cross-motion does not reflect that the parties had agreed on all of the terms of the stipulation on May 3, 2006; it showed only that there were some terms upon which they had reached agreement and that no stipulation had yet been drafted. In fact the first version of the stipulation -- which plaintiffs opted to draft and for which we had to wait -- was not provided to the undersigned until May 9, 2006 (See ex. M hereto). Moreover, plaintiffs disingenuously overlook that almost all delays that took place on anything in this case -- including the hard drive inspection -- were attributable to plaintiffs' counsel having a much, much longer typical response time than defendant's counsel. (See, e.g. April 7, 2006, email, exhibit N, hereto, apologizing for delay in responding to undersigned re hard drive inspection.). (While I do not fault them for that, since they apparently had complex layers of approval to navigate, even on courtesies and procedural matters, I do fault them for making misrepresentations to the Court about it, and pretending that 'delays' for which they were primarily responsible should be attributed to the defendant, who has never wanted anything more than for this baseless case to be over and done with.)

29. *Alleged concealment of portable hard drive.* At pages 8-10, plaintiffs recklessly and falsely accuse defendant of having “concealed” an external hard drive that had

⁶ As we noted *supra*, plaintiffs, upon information and belief, are in possession of a transcript of the July 25, 2006, conference at which this issue was resolved, but since the transcript puts the lie to their misrepresentations, they have refused to furnish the undersigned with a copy, which is typical of their sharp practice. (Ex. I, hereto.).

been attached to the computer at some unspecified point in time.⁷ They base this on the forensic examiner's opinion, first claimed in his *fifth* version of the 'facts', that an external hard drive had been attached at some unspecified time. However, there is not a single word in plaintiffs' slanderous diatribe relating to anything at all that defendant did, other than filing document number 212 (Ex. 0 hereto). Document 212 was an objection to the plaintiffs' application for permission to file a supplemental expert's report on the grounds that (a) plaintiffs had failed to consult with opposing counsel prior to making the application, (b) the proposed report failed to comply with Fed. R. Civ. P. 26(a)(2)(B), and (c) plaintiffs had omitted to explain why the expert had omitted his findings from his four (4) previous reports of his findings.⁸ (Neither, for that matter, can plaintiffs point to any "concealment" of anything by anybody, let alone by defendant; at most they show disagreements between Ms. Lindor's son, who is an IT expert in his own right, and plaintiffs' expert, who made his supposed finding over a year after his examination of the hard drive and after he'd already testified 4 times, in one form or another, without ever mentioning the 'finding' before. None of which, of course, has anything to do with defendant.)

30. *Chronology regarding Yannick Raymond-Wright in Summer 2004.* At pages 10-14, plaintiffs argue that Ms. Yannick Raymond-Wright initially testified, in 2008, that she was staying at defendant's house for some of the summer of 2004, but then corrected herself when she submitted her signed transcript, indicating that she was in school in Virginia during the

⁷ An external hard drive is the type that is portable, easily plugged in and removed through a USB port, and which can be used by repairmen, for backups, for transfer of data, etc.

⁸ One formal report, one draft report, one declaration, and one five-hour deposition, none of which reported on this "finding", thus leading to the inescapable inference that this "finding" was something elicited by plaintiffs' counsel.

summer of 2004 (See errata sheet, exhibit P hereto). Plaintiffs frivolously ask the Court to decide that Ms. Raymond Wright's uncorrected transcript was correct, and that her corrected version is incorrect. And then they ask the Court to conclude that defendant and her son were testifying falsely, and intentionally so, when they testified in 2006 -- consistently with the corrected transcript -- that no one else was living in defendant's house in the summer of 2004. There is absolutely no basis for a litigant to cherry pick whose testimony it wants to believe, and which part of that person's testimony, and then to request that the Court pick that version of events as gospel. That is what trials are for.⁹

31. *Prior motions.* At page 19, plaintiffs' counsel appear to have culled discovery rulings which were at least partially in their favor, and characterized the undersigned's position in

⁹ Plaintiffs' papers are sprinkled with *ad hominem* attacks against myself and my copyright law blog, "Recording Industry vs. The People", <http://recordingindustryvspeople.blogspot.com>. I decline to enter into a point-by-point rejoinder in defense of my modest foray into "blogging". Suffice it to say that (a) my law blog is irrelevant to the motion, (b) plaintiffs' counsel themselves rely upon the blog in the course of their legal work (Ex. Q, p. 2, *Ars Technica*, October 4, 2007), (c) many in-house university counsels and student legal services offices refer their students to it (see, e.g., ex. R, Kent State University Student Legal Services Office where link entitled "Illegal Downloading Defense" is hyperlink to the blog), (d) many law schools and colleges use it in their curricula (see, e.g. ex. S, Lesson Plan from Digital Music Law Class of Prof. DeBeer at University of Ottawa School of Law), (e) many reputable organizations have found the views expressed in it to be worthy of further in-depth consideration (see, e.g. ex. T, Beckerman, Ray, "Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations", *ABA The Judges' Journal*, Summer 2008), (f) it has been cited in law review articles (see, e.g. ex. U, 9(2) *MINN. J.L. SCI. & TECH.* 977-1008 (2008).), and (g) plaintiffs' counsel are not candid about their real problem with the blog, which is that its existence interferes with their tactic of attempting to conceal the litigation events and prior inconsistent statements they don't want others to know about, from judges, litigants, and law enforcement authorities (see, e.g., ex. V, where the blog pointed out to the legal community that MediaSentry represented to law enforcement authorities in Michigan that its role in these cases is identical to that of a regular "expert witness", within weeks after representing to this Court in this case that its role was not that of an expert witness at all).

each as “frivolous”, seeking “discovery sanctions” here even though their request is based on *motion practice*. In doing so they have flouted the “safe harbor” provision of Fed. R. Civ. P. 11, and have themselves committed a most serious violation of Rule 11. This is but more unscrupulous behavior on their part. The time to raise any such contention would have been at the time of the motion, not now, and the method would have been Rule 11, so that the attorney making the motion would have the opportunity to rethink it and withdraw it within the “safe harbor” provision. There is no reason in the world to doubt, based upon the hyper-aggressive conduct plaintiffs' counsel have unwaveringly exhibited, that if they ever felt they had a basis for a Rule 11 motion they would have brought one. In fact, they never did. Moreover, in none of the referenced rulings was there any intimation by the Court that it considered defendant's position “frivolous”, and a review of the motions selected by plaintiffs shows that defendant's position was far from “frivolous”. In two of the three motions plaintiffs selected, the Court ruled partly in defendant's favor:

(a) Can it possibly be thought that it was “frivolous” to move to exclude the testimony of a proffered expert witness who admitted at his deposition that his methods satisfied not a single one of the *Daubert* reliability factors? [Doc. no. 165]

(b) Or that it was “frivolous” to seek to examine the retainer agreements of plaintiff's paid investigators? [Doc. no. 62].¹⁰ (In fact, the Court *granted* the motion to the extent of directing *in camera* review of the agreements. Only on the basis of that review did the Court conclude that the agreements were not discoverable. Since the Court's ruling was based on its *in*

¹⁰ Plaintiffs cite Doc. no. 201 but in that motion, which is pending at this time, we did *not* seek to have the retainer agreements of the investigators turned over to defendant's counsel, we asked that they be produced to the Court *in camera* in keeping with the Court's prior ruling.

camera review, something which was, by definition, not available to defendant, how can it possibly have implied that there was something “frivolous” about defendant's position?)

(c) Or that it was frivolous to move to preclude the introduction of sound recordings as to which plaintiffs had failed to produce the recordings in pretrial discovery, after its own investigators had sworn under oath that only with the actual recordings could copyright infringement be proved? [Doc. no. 69]. The only way the plaintiffs were able to defeat the motion was by distancing themselves from their own trial witness, saying his testimony in another case was not binding on them. The Court then proceeded to *grant* preclusion of any sound recordings that had not been turned over. The Court granted the motion in part, and denied it in part, noting that it was a case of first impression, and also noting why the Court was not granting the motion in full, despite the prior sworn testimony of plaintiffs' investigators:

This is an issue of first impression. This court’s independent research uncovered no case law stating whether a plaintiff recording company must produce a sound file in order to prevail on a copyright infringement claim. However, after giving this matter careful consideration, it seems clear that the question of whether defendant infringed plaintiffs’ copyrights by sharing plaintiffs’ sound recording files is one to be determined by a finder of fact.

.....

Defendant relies heavily on the deposition testimony of MediaSentry’s president that listening to a sound file is the only way one can be certain of its contents. However, as plaintiffs point out, MediaSentry’s president is not a party to this case and his testimony in an unrelated matter is not binding on plaintiffs. Plaintiffs state that they can present competent evidence to prove that defendant actually shared copyrighted sound files, even without the sound files themselves. This presents a genuine issue of material fact.

.....

For the reasons stated above, *I respectfully recommend that defendant’s motion be granted in the sense that plaintiffs should*

not be permitted to introduce at trial evidence that was not disclosed during discovery, but denied insofar as it seeks to prohibit plaintiffs from asserting that defendant infringed copyrighted sound files that plaintiffs cannot produce and play.....

(Exhibit W). To suggest that defendant's position was frivolous is itself frivolous.

As I look at the three motions selected by plaintiff, it occurs to me that it might have been malpractice on my part *not* to have made those motions.

Conclusion

Plaintiffs' papers make no case at all for their dismissal to be without prejudice.

Plaintiffs' papers make no case at all for sanctions other than a very convincing case for sanctions to be awarded against themselves.

WHEREFORE it is respectfully requested that the plaintiffs' motion be denied in all respects.

Dated: Forest Hills, New York
November 7, 2008

/s/ Ray Beckerman

RAY BECKERMAN (RB 8783)