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

----------x

UMG RECORDINGS, INC., et al,

Plaintiff,

-against-

MARIE LINDOR,

Defendant.

----------x

05 CV 1095 (DGT)(RML)

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE AND DISCOVERY SANCTIONS**

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**Preliminary statement.**

Plaintiffs' legal argument for "discovery sanctions" is based upon classic "discovery sanction" cases, where a litigant failed utterly to live up to its discovery obligations, repeatedly violated court orders and warnings, or committed spoliation or concealment of evidence, all fact patterns that are irrelevant to the facts here, where defendant fully complied with all of her discovery obligations within eight months of retaining counsel, and has never committed any spoliation or concealment of evidence. Plaintiffs' counsel's solution to that problem was to (a) make numerous material misrepresentations to the Court, and treat those as facts, (b) cherry pick the parts of the record they like, ignore any factual issues, and then present their resolution of the factual issues as though they were facts, and (c) then fit this collection of manufactured "facts" into the law. Unfortunately for them, it doesn't work like that, and their argument for "discovery sanctions" is frivolous in the extreme.

Plaintffs' argument for dismissal “without prejudice” is contrary to law, misapplies the *Zagano* factors by applying them to fictionalized “facts”, and attempts to ignore, by rewriting, the key factor, which is how much 'water has gone under the bridge'. Moreover, their reason for dismissal, which is transparently their wish to avoid suffering the consequences of their prosecuting a frivolous case for four (4) years, is simply not a permissible reason for “without prejudice” dismissal.

Additionally, based upon their unsupportable opinions that several of defendant's discovery motions were “frivolous”, including motions which were granted in part, plaintiffs have shamefully made a disguised Rule 11 motion without complying with the safeguards for Rule 11, implying they have “inherent powers” which belong only to the Court.

The facts, untwisted, are set forth in our accompanying declaration.

**I.**

**Plaintiffs' “discovery sanctions” authorities are inapposite.**

The following cases, relied upon by plaintiffs, were based on spoliation of evidence by a party (plaintiffs have not offered a shred of evidence of spoliation of evidence by the defendant): *Atlantic Recording v. Howell*, 06-CV-02076-PHX-NVW (D. Arizona August 29, 2008; *Arista Records v. Tschirhart,* 241 F.R.D. 462 (W.D. Texas 2006).

The following cases, relied upon by plaintiffs, were based on flagrant violations of Court discovery orders (plaintiffs do not allege any violation of a Court discovery order): *Fears v. Wilhelmina Model Agency, Inc.*, 2004 U.S. Dist. LEXIS (S.D.N.Y. 2004)(flagrant violation of Courts' discovery order in ase where there had been prior discovery sanctions); *Cielo Creations, Inv. v. Gao Da Trading Co.* 2004 U.S. Dist. LEXIS 11924 (S.D.N.Y. 2004)(flagrant violation of

discovery order in case where there was history of noncompliance with prior order and with discovery requests)*; Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir 1979)(history of disobedience of Magistrate's rulings in the face of repeated warnings).

The following case, relied upon by plaintiffs, was based on intentional concealment of evidence by a party (plaintiffs have not offered a shred of evidence of concealment of evidence by the defendant, intentional or otherwise): *Interscope Records v. Barbosa,* 2006 U.S. Dist. LEXIS 94210 (E.D.N.Y. 2006).

Plaintiffs' citation to *Outley v. City*, 837 F.2d 587 (2d Cir. 1988) is a mystery, as it was a case involving the failure to supplement interrogatory answers, and it held that preclusion was too harsh a response to counsel's inadvertent failure to supplement interrogatory answers.

*Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19 (S.D.N.Y. 1995) involved a party's expert's omission to produce 90% of the records he was supposed to produce, something which has not occurred here.

*Novick v. Pennsylvania R. Co.*, 18 F.R.D. 296 (W.D. Pa. 1955), was not a sanctions case at all.

**II.**

**Plaintiffs' discussion of the law regarding dismissal "without prejudice" is incorrect.**

Plaintiffs' counsel's suggestion that it would be consistent with the law to permit dismissal of a heavily litigated case of this nature, at this late date, to be "without prejudice", is baseless. They cite -- *and therefore presumably have read -- Zagano v. Fordham University*, 900 F.2d 12 (2d Cir.), *cert. denied*, 498 U.S. 899 (1990) which *denied* a plaintiff's motion to dismiss

without prejudice under similar circumstances, ruling as follows:

> The circumstances here amply justified the district judge's denial of the Rule 41(a)(2) motion. Under any test, the motion was made far too late. The action had been pending for over four years, during which it was contested vigorously, if sporadically, and extensive discovery had taken place. Zagano's counsel had affirmatively indicated at the January conference that she intended to pursue the Title VII action, and a firm trial date was set. Only when the trial was less than ten days away did Zagano seek dismissal without prejudice.
>
> Judge Owen was also justified in concluding that granting the Rule 41(a)(2) motion would prejudice the defendants because of the resources they had spent in preparing after a trial date was set at the January conference. We also agree with Judge Owen that the likelihood of additional substantial delays in the SDHR proceedings might result in further loss of pertinent testimony through illness or death.

900 F.2d at 14.

In *D'Alto v. Dahon California, Inc.*, 100 F.3d 281 (2d Cir. 1996), the Second Circuit reversed and remanded a lower court order allowing dismissal without prejudice because "the district court failed to consider the Zagano factors in assessing whether the case had proceeded so far along that the defendant would be prejudiced by granting the plaintiffs' application for withdrawal of the case without prejudice to reinstating it in the state court." 100 F.3d at 283. See also *Philan Insurance Ltd. v. Frank B. Hall & Co.*, 786 F. Supp. 345 (S.D.N.Y. 1992)(denying dismissal without prejudice where case was pending for 4 years, discovery was ongoing, and the Court had invested substantial resources in the case and was familiar with the issues).

Plaintiffs of course flunk all of the *Zagano* factors:

(1) they make no showing, and could make no showing, of "diligence" in making the motion; when they learned that defendant had never used a computer they should have made the motion then, which was a few years ago; dismissal then "without prejudice" might have made some sense; today it does not;

(2) they have been nothing if not vexatious; their bringing of this frivolous motion, based on one misrepresentation after another, is yet one more illustration of their (a) unprincipled and (b) scorched earth strategy;

(3) the suit has of course progressed very far; extensive discovery has taken place, and it is only plaintiffs' and its lead fact witness's refusal to respond to the outstanding subpoena duces tecum, followed by the within motion, that has delayed this matter from proceeding to trial; the Court and counsel have invested huge resources in the case, and the Court is familiar with the issues;

(4) obviously the duplicative expense of relitigating this case would be enormous, and where would it be litigated if not in the Eastern District of New York, where defendant lives?; there is no other forum for this case;

(5) plaintiffs have no explanation for their need to dismiss without prejudice, because they cannot honestly disclose their reason : they are dismissing because they have no case, and because they wish to avoid suffering the consequences they must bear for having pursued a baseless case for four (4) years.[1]It is clear that their purpose in seeking "without

[1] See, e.g., *Atlantic Recording v. Andersen,* 2008 WL 185806 (D. Oregon January 16, 2008), assessing $108,000 in attorneys fees against the same cast of characters for having pursued a similarly innocent woman for three years. See also *Mostly Memories, Inc. v. For Your Ease Only, Inc.,* 526 F.3d 1093 (7th Cir. May 27, 2008) and *Riviera Distributors, Inc*. 517 F.3d 926 (7th Cir. February 20, 2008), holding that in copyright infringement cases, where the plaintiff

prejudice" designation is impermissible; it is being done in hopes of convincing the Court later that it should not be held liable for attorneys fees under the Copyright Act.[2]

Plaintiffs' analysis of the *Zagano* factors is not worth the paper it is printed on, because it is based on fabricated facts, refuted by the documentary evidence, including the exhibits plaintiffs themselves offered.

It is understandable that plaintiffs wish to dismiss the case, but there is no basis for the dismissal being "without prejudice".

The plaintiffs' case is in a shambles. They have zero evidence that the defendant committed any copyright infringement; their sole 'fact witness', Tom Mizzone of MediaSentry, whose deposition is on the horizon, is being investigated all across the country for engaging in the investigation business without a license, which in most states is a felony or a misdemeanor (in New York it's a misdemeanor); plaintiffs and MediaSentry have made inconsistent statements all across the country; they have a probable cause hearing coming up in North Carolina, and have violated a cease and desist order in Massachusetts; their expert witness gave a deposition which totally discredits the trustworthiness of his methods, discredits the trustworthiness of the investigator's methods, and contains demonstrably false testimony; their one trial verdict, out of 40,000 or so cases, has been set aside because the judge discovered that he had been misled by the plaintiffs' lawyers (the same lawyers who are making this motion), *Capitol Records, Inc. v. Thomas,* 2008 U.S. Dist. LEXIS 84155 (D. Minnesota September 24, 2008), so they will no

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voluntarily dismisses, the defendant is presumptively entitled to attorneys fees.

[2] While it would not be an absolute bar to an attorneys fee award, in the Second Circuit, that the dismissal were "without prejudice", it would certainly assist the plaintiffs in arguing against a fee award.

longer be able to rely on the absurd legal theory they had convinced that judge to accept in the midst of that trial; their investigator witness in that case is the same investigator who is the witness in this case, and who is himself the subject of investigations in a number of states; Ms. Lindor has been fortunate enough to enlist as her expert witness one of the world's foremost experts on peer to peer file sharing, while plaintiffs' expert is, to say the least, questionable. Once the MediaSentry subpoena duces tecum is complied with, the deposition of Mr. Mizzone taken, and the deposition of the defendant's expert taken, the case is ready for trial. And at the trial, plaintiffs do not stand a chance.

Small wonder that the plaintiffs now wish to scurry away with their tails between their legs after hounding this poor woman for more than four (4) years -- a woman who has never even used a computer -- and a woman who, sadly, probably never will use a computer, after this experience.

Marie Lindor is entitled to her day in Court. She is entitled to be judged by a jury of her peers. And she is entitled to confront the dishonest bullies who have made of her life and her families' lives a living hell these past four (4) years.

Either that, or she is entitled for the dismissal to be “with prejudice”, and to receive full vindication.

**III.**

**Attorneys fees and costs are authorized.**

While we do not think there is any way an order granting dismissal without prejudice could satisfy the Second Circuit's standards, certainly if there were to be such an order it should condition the dismissal upon plaintiffs' reimbursement to defendant of all the attorneys

fees and costs involved in the defense of this action to date. See, e.g. *Horton v. TWA*, 169 F.R.D. 11 (E.D.N.Y. 1996). And it should *not* permit them to start a whole new litigation over the amount of the attorneys fees, as they are wont to do each time they are assessed with attorneys fees in these "throwing in the towel" cases. Rather they should be required to reimburse the defendant based upon an affidavit and the business records showing the time charges and disbursements.

**IV.**

**Rule 11 was flouted.**

To justify their having disregarded Fed. R. Civ. P. 11, plaintiffs make much of the "inherent power" of the Court.

However, while *the Court* has a great deal of "inherent power", we lawyers representing litigants do not. We are supposed to follow the Federal Rules of Civil Procedure.

If plaintiffs' counsel had a beef with the meritoriousness of any discovery motion defendant served, or with any opposition papers defendant served in response to one of plaintiffs' many discovery motions, their remedy was to file a motion under Fed. R. Civ. P. 11, not to make a public motion for "discovery sanctions".

As the Court knows, under Fed. R. Civ. P. 11, in its present incarnation, there is a 21-day "safe harbor" or "cooling off period", in which the party against whom the motion has been made is afforded an opportunity to rethink whether he or she wishes to go forward with the papers or withdraw them.

No such motion was ever made by plaintiffs under Rule 11 in this case at any time. It is outrageous for them to have simply disregarded the rules under which we are required

to comport ourselves, solely for the purpose of reaching out to besmirch another's reputation.

I sincerely hope the Court will use its "inherent power" to sanction plaintiffs' counsel for all of their disgraceful misconduct in connection with this motion: the distortion of the facts; the flouting of Rule 11; the frivolous request for dismissal to be "without prejudice"; the gratuitous *ad hominem* attacks upon the undersigned and Ms. Lindor's family.

Plaintiffs' entire claim for sanctions, as we detail in our accompanying declaration, has no basis in fact or law, and is itself sanctionable.

**Conclusion.**

Plaintiffs have made, and could make, no showing whatsoever of any spoliation of evidence, concealment of evidence, violation of discovery orders, or failure to comply with discovery notices on the part of defendant, so plaintiffs' application for "discovery sanctions" is entirely frivolous.

Dismissal of a case that has gone so far, and in which the Court and the parties have invested so much, "without prejudice", solely for the purpose of plaintiffs attempting to avoid their liability for attorneys fees, is clearly contrary to the law.

Making a claim for sanctions, based on prior motion papers, by calling it a motion for "discovery sanctions", in order to evade the safeguards of Rule 11, is itself sanctionable conduct.

For the reasons set forth herein, and in the accompanying Declaration and exhibits, plaintiffs' motion must be in all respects denied.

Respectfully submitted,

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