UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UMG RECORDINGS, INC., a Delaware corporation; WARNER BROS. RECORDS INC., a Delaware corporation; ARISTA RECORDS LLC, a Delaware limited liability company; INTERSCOPE RECORDS, a California general partnership; MOTOWN RECORD COMPANY, L.P., a California limited partnership; and SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership, Plaintiffs, -against- MARIE C. LINDOR, Defendant.	:	CIVIL ACTION NO.: 05CV1095-DGT-RML

PLAINTIFFS' OPPOSITION TO DEFENDANT'S NOTICE OF RULE 11 MOTION AND SUPPORTING DECLARATIONS

INTRODUCTION

On November 13, 2008, Defendant filed a Notice of Motion Pursuant to Fed. R. Civ. P. 11 and supporting Declarations (Dock. No. 261). It was not accompanied by any Memorandum. Defendant's Motion fails to provide sufficient detail to comply with either the "safe harbor" provision of Rule 11, or provide the Court or Plaintiffs with sufficient information to evaluate her Motion. Additionally, the Motion fails because the underlying Motion that Defendant claims violates Rule 11, Plaintiffs' Motion for Discovery Sanctions to Dismiss without Prejudice, is fully supported by the factual record, the exhibits filed with Plaintiffs' Motion, and the case law cited therein. It is neither frivolous nor a "fraud upon the Court" as Defendant contends. For these reasons, Defendant's Motion should be denied.

On September 12, 2008, Plaintiffs served on Defendant's counsel their Motion for Sanctions and for Dismissal without Prejudice.[1] Plaintiffs' Memorandum included approximately 250 pages of exhibits and extensive citations to the record, the Court docket and case law. *See* Plaintiffs' Motion and Memorandum in Support of Motion for Sanctions and to Dismiss without Prejudice ("Plaintiffs' Motion") (Doc. No. 264), incorporated by reference herein. On October 22, 2008, Defendant served on Plaintiffs her Notice of Motion Pursuant to Fed. R. Civ. P. 11 and supporting Declaration. The Notice simply states that Defendant is seeking sanctions under Rule 11 against Plaintiffs and their counsel for the filing of Plaintiffs' allegedly frivolous Motion. The accompanying declaration argues in conclusory fashion that Plaintiffs' Motion is frivolous, contains misstatements and misrepresentations of law and fact, and was made with ulterior motives. Defendant's Rule 11 papers included no accompanying memorandum, failed to cite any case law, docket entry, or document, and failed to provide a single specific example of any alleged misstatement or misrepresentation that purportedly forms the basis of her Rule 11 Motion.

In response, on November 5, 2008, Plaintiffs' counsel sent a letter to Defendant's counsel stating that Defendant's Motion and accompanying declaration contain "no substance or specific examples of any alleged misconduct." (November 5, 2008 e-mail and letter from Eve G. Burton to Ray Beckerman, attached as Exhibit A.) Plaintiffs' counsel explained that Plaintiffs believe their Motion to be well supported with citations to the record and to applicable law. (*Id.)* However, it continued, "if you believe you have specific instances of misrepresentations of fact or law. . . please provide that information so that Plaintiffs may have an opportunity to respond." (*Id.)*

[1] It was not filed with the Court until December 4, 2008, pursuant to the Court's bundling procedures.

In response, on November 6, 2008, Defendant's counsel sent two e-mail responses in which he refused to provide any further information stating instead that "you will have my opposition papers to your frivolous and dishonest motion on or before November 10th, which will tell you what you already know, and you will have several days in which to withdraw your motion prior to my filing the Rule 11 motion on November 13th. (November 6, 2008 e-mail from Ray Beckerman to Eve G. Burton, attached as Exhibit B). Defendant's counsel then sent a second e-mail stating, without support, that "your colleague's twisting of the facts had to be deliberate" and again stating in essence, you should know what you did. (November 6, 2008 e-mail from Ray Beckerman to Eve Burton, attached as Exhibit C). However, despite Plaintiffs' counsel's specific request and the requirements of Rule 11, Defendant's counsel failed to provide a single example or reference to Plaintiffs' Motion, case law or the record.

ARGUMENT

Defendant's purported Rule 11 Motion should be denied because it fails procedurally and substantively. First, based on Defendant's failure to provide sufficient information to understand the basis of Defendant's Motion, and her counsel's refusal to provide such information, she has failed to satisfy the "safe harbor" provision and the specificity requirements of Rule 11 and her Motion should be denied. *See* Fed. R. Civ. P. 11(c) (any motion for sanctions pursuant to Rule 11, "must describe the specific conduct that allegedly violates Rule 11(b)."). As the Second Circuit has explained on numerous occasions:

> Alluding to the due process rights of any person potentially subject to any kind of sanctions, this Circuit has explained that:
>
> > At a minimum, the notice requirement mandates that the subject of a [Rule 11] sanctions motion be informed of: . . . [inter alia] the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense. Indeed, only conduct explicitly referred to in the instrument providing notice is sanctionable.

> *Schlaifer Nance & Co.*, 194 F.3d at 334 (internal citation omitted). This notice requirement permits the subjects of sanctions motions to confront their accuser and rebut the charges leveled against them in a pointed fashion.

Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 389 (2d Cir. N.Y. 2003). *See also Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. N.Y. 1999) ("In particular, a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable. . . ."). In this case, Defendant's Motion fails to provide specific notice of the allegedly violative conduct at issue and should be denied.

Second, and most importantly, Defendant's Rule 11 Motion should be denied because Plaintiffs' Motion for Sanctions and to Dismiss, and Plaintiffs' Reply (Doc. No. 264), respectfully incorporated herein, are well grounded in fact and law and contain extensive citations to the factual record and case law. *See* Fed. R. Civ. P 11(c) ("if . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction . . . ."); *Perez v. Posse Comitatus*, 373 F.3d 321, 325 (2d Cir. N.Y. 2004) (sanctions under Rule 11(c) for violations of Rule 11(b) are discretionary). As explained in *Barth v. Kaye*, 178 F.R.D. 371, 380 (N.D.N.Y 1998) (internal citations and quotations omitted):

> The test as to whether an attorney [or party] made a reasonable inquiry prior to signing a pleading is an objective standard of reasonableness under the circumstances at the time the attorney [or party] acted. Rule 11 requires litigants to take responsibility for the claims they present by requiring a reasonable inquiry to assure that the claims represented are well-grounded in both law and fact. In layman's terms, Rule 11 require[s] litigants to 'stop-and-think' before initially making legal or factual contentions.

Here, while Defendant may not like that Plaintiffs are seeking sanctions and dismissal without prejudice based on her conduct, and that of her counsel, including providing incomplete and misleading information throughout the course of this litigation, Defendant's Rule 11 Motion fails to establish or provide any support for her claim that Plaintiffs' Motion was made for improper purpose or was objectively unreasonable. *Id; Pierce v. F.R. Tripler & Co.*, 955 F.2d

820, 830 (2d Cir. 1992) (to constitute frivolous legal position for purposes of Fed. R. Civ. P. 11, it must be clear that there is no chance of success). As Defendant has not, and cannot, make any showing that Plaintiffs' conduct in bringing their Motion was objectively unreasonable and was not well grounded in facts and law, it must be denied. *Id.*

CONCLUSION

For these reasons, this Court should deny Defendant's Rule 11 Motion without additional waste of the Court or the parties resources. As the Advisory Committee Notes to Rule 11 expressly state "the court should not ordinarily have to explain its denial of a motion for sanctions." Fed. R. Civ. P. 11 Advisory Committee Note (1993). *See Perez*, 373 F.3d at 327 (same).

DATED: New York, New York
September 12, 2008.

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