

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

05 CV 1095 (DGT)(RML)

v.

MARIE LINDOR,  
Defendant

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

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 2

    I. Defendant And Her Counsel Should Be Sanctioned For Providing  
    False And Misleading Information And For Vexatiously Multiplying  
    This Litigation..... 2

        A. Plaintiffs properly seek sanctions under Rule 37,  
        28 U.S.C. § 1927, and the Court’s inherent authority..... 4

        B. Woody Raymond’s statements are attributable to Defendant..... 5

        C. Yannick Raymond-Wright’s errata should be disregarded..... 6

        D. Defendant’s counsel vexatiously multiplied this litigation..... 7

        E. Plaintiffs were not required to bring their sanctions motion  
        under Rule 11..... 7

    II. Plaintiffs’ Complaint Should Be Dismissed Without Prejudice  
    And Without The Conditions Defendant Seeks To Impose..... 8

        A. Plaintiffs were diligent in bringing this motion. .... 9

        B. This case progressed to the stage it did only because Plaintiffs  
        were given false and misleading information. .... 9

CONCLUSION..... 11

## INTRODUCTION

Defendant, her counsel, and her family have routinely and consistently given Plaintiffs incomplete and incorrect information regarding material facts, including who was in Defendant's home during the summer of 2004 when the infringement occurred, what computers and peripheral devices were connected to Defendant's Internet account at that time and who used them, and the location of such computers and devices. Because of these misrepresentations and intentional concealments, Plaintiffs have suffered severe and irreparable prejudice, including the destruction of the very computer that was connected to Defendant's Internet account at the time of infringement. Therefore, Defendant and her counsel should be sanctioned for their misconduct and Plaintiffs should be permitted to dismiss this case without prejudice.

In her Response, Defendant does not dispute that, on numerous occasions, Plaintiffs were led down multiple rabbit holes and forced to spend substantial time and money debunking Defendant's spurious theories about how the copyright infringement that occurred *through her Internet account* by someone with the username "*jrlindor*" could not possibly have been committed by Defendant or anyone in her family. Instead, Defendant argues that Plaintiffs' sanctions authorities are inapposite, that Defendant should not be held accountable for statements made by her legal counsel and by her chosen representative Woody Raymond, that Ms. Raymond-Wright's original deposition testimony should be wholly disregarded, and that Plaintiffs should have filed their sanctions motion under Rule 11. Defendant also argues that Plaintiffs have not met the standards for dismissal without prejudice set forth in *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). As demonstrated below, Defendant's contentions are without merit and Plaintiffs' Motion should be granted.

This Court is well aware of the length and extent of this litigation and how counsel have conducted themselves. Had Defendant been forthright from the outset of this litigation, this

lawsuit would have been quickly resolved. Instead Defendant and her counsel litigated this case without regard for the truth and with extending and obfuscating these proceedings as a litigation strategy. Defendant's denials are without merit.<sup>1</sup> And while Defendant takes issue with a handful of cases in Plaintiffs' Motion (while ignoring most), and characterizes the conduct as unusual and/or extreme, those fact patterns are no worse than the conduct of Defendant and her counsel in this case and certainly do not diminish their precedential value.

## ARGUMENT

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

Plaintiffs brought this Motion under Rule 37, the Court's inherent authority, and 28 U.S.C. § 1927 because of Defendant's and her counsel's repeated discovery and litigation abuses. Rule 37(c) permits a court to impose sanctions for providing false or misleading discovery responses. Sanctions under the Court's inherent authority are appropriate when a party has abused the litigation process. *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). Regarding the relationship between the inherent power and express rules, the Supreme Court explained:

[The inherent] power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.

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<sup>1</sup> Rather than rebut Plaintiffs' showing, Defendant's briefing surrounding Plaintiffs' Motion exemplifies Defendant's counsel's vexatiousness. As just one example, Defendant opposed Plaintiffs' request for an extension to file this Reply, stating, outrageously, "[w]e strongly suspect, knowing plaintiffs' tactics, that they are requesting the extension because they have someone at work trying to manufacture some evidence . . ." (Doc. No. 263). Then, as he has done throughout this litigation, Defendant's counsel immediately posted this scandalous and utterly unsupported allegation on his blog. (<http://recordingindustryvspeople.blogspot.com>, November 18, 2008.). Of course, Defendant has no evidence to support such a defamatory and extrajudicial statement.

*Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). *Chambers* thus permits, indeed requires, the court to separately consider Plaintiffs' Motion under both Rule 37 and the Court's inherent power, which is an independent basis for assessing sanctions. See *Pickholtz v. Rainbow Techs.*, 284 F.3d 1365, 1377 (Fed. Cir. 2002).<sup>2</sup> Another basis for assessing sanctions is 28 U.S.C. § 1927, which provides that 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."

Here, throughout this litigation, Defendant and her counsel made misstatements and provided incomplete and inaccurate information about facts material to Plaintiffs' prosecution of this case. Indeed, Defendant's Opposition does not directly contest the following material misrepresentations demonstrated in Plaintiffs' Motion:

- Defendant falsely claimed she did not have Internet service at the time of the infringement. (Motion at 4.)
- Defendant falsely claimed, and continues to assert even today, that the infringement occurred over a wireless router. (Motion at 4-5.)
- Defendant, and her counsel, falsely claimed that there was no computer in her home at the time of infringement. (Motion at 5.)
- Defendant falsely claimed that no one lived, or was staying, with her during the summer of 2004. (Motion at 10.)
- Defendant falsely claims that she did not know the whereabouts of, and was unable to contact, her nephew, Gustave "Junior" Lindor. (Motion at 6-8.)
- Defendant provided false and misleading information regarding Yannick Raymond-Wright's whereabouts and computers. (Motion at 10-12.)

Nor does Defendant's Opposition contest that, as a result of these misrepresentations, Plaintiffs have suffered substantial and irreparable prejudice. Specifically, and over Defendant's objection

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<sup>2</sup> At pages 8-9 of her Opposition, Defendant appears to argue that only a court can raise the issue of sanctions under the Court's inherent authority and that Plaintiffs are somehow trying to usurp the powers of this Court. Defendant, of course, cites no authority for this apparent belief, and Plaintiffs have cited multiple cases where courts have exercised their inherent authority to impose sanctions at the request a party. (See Motion at 16-20.)

to the taking of Ms. Raymond-Wright's deposition, Plaintiffs recently learned (1) that Ms. Raymond-Wright had, in fact, stayed with Defendant during the summer of 2004, (2) that she had brought two computers with her, including a desktop computer that she connected directly to Defendant's Internet account at the time of the infringement, and (3) that the desktop computer was recently discarded. (Motion at 10-12.)

Instead, Defendant argues that Plaintiffs' sanctions authorities are inapposite, that Defendant should not be held accountable for statements made by her legal counsel and by her chosen representative Woody Raymond, that Ms. Raymond-Wright's original deposition testimony should be wholly disregarded, that Defendant's counsel did not vexatiously multiply the litigation, and that Plaintiffs should have filed their sanctions motion under Rule 11. As demonstrated below, Defendant's arguments are without merit.

**A. Plaintiffs properly seek sanctions under Rule 37, 28 U.S.C. § 1927, and the Court's inherent authority.**

First, Defendant's contention that Plaintiffs' sanction authorities are "inapposite" is without merit. Defendant takes issue with a handful of cases cited by Plaintiffs but does not dispute the rule that sanctions, including monetary sanctions, are appropriate, against a party and/or her counsel, for providing false or misleading discovery responses, committing repeated litigation abuses, and obstructing the search for the truth. (Motion at 15-21.) Nor does Defendant dispute Plaintiffs' extensive case law demonstrating that sanctions are appropriate for withholding critical evidence and/or providing false deposition testimony which leads a party down a rabbit hole. *See e.g., Karaha Bodas Co. v. Preushaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 U.S. Dist. LEXIS 31702, \*4 (S.D.N.Y. Apr. 30, 2007); *Jung v. Neschis*, 2007 U.S. Dist. LEXIS 97179, \*45 (S.D.N.Y. Oct. 23, 2007). The cases are squarely on point.

Nor does Defendant challenge the factors to be considered in determining the appropriateness of sanctions: (1) the degree of the offending party's fault; (2) the adequacy of notice; (3) the efficacy of lesser sanctions and (4) the need to deter others from engaging in similar deceptive behavior. (Motion at 20.) As established in Plaintiffs' Motion, sanctions are appropriate here because Defendant 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. (Motion at 2-14.) Defendant's misrepresentations caused Plaintiffs and the Court to waste substantial time and resources chasing empty leads and ultimately led to the destruction of critical evidence in this case. Monetary sanctions are required both to punish Defendant and her counsel and to deter others from engaging in similar misbehavior.

**B. Woody Raymond's statements are attributable to Defendant.**

Defendant's claim that she should not be held to account for Woody Raymond's false statements is also without merit because Mr. Raymond acted as Defendant's designated representative in this case. Mr. Raymond communicated with Plaintiffs and with the Court on Defendant's behalf. (April 6, 2005 minute entry, Doc. No. 5: ORDER granting request by W. Raymond for an extension of time for defendant, Marie Lindor.) He also appeared at the July 25, 2005 status conference and made it clear that he was acting as Defendant's representative and speaking on Defendant's behalf. (July 26, 2005 Tr., Exhibit C<sup>3</sup>.) Therefore, Mr. Raymond's inaccurate and misleading statements regarding critical facts are attributable directly to

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<sup>3</sup> All Exhibits referenced herein are attached to Plaintiffs' Memorandum.

Defendant. Among other false statements, Mr. Raymond claimed on various occasions that there was no computer in Defendant's house in August 2004, (July 26, 2005 Tr. at p. 17: 7-9, Ex. C), that Defendant had no Internet Service in August 2004 (*id.* at 5:9 – 6:20); and that the infringement occurred through a wireless router (Sept. 26, 2005 letter from W. Raymond, Ex. U).

**C. Yannick Raymond-Wright's errata should be disregarded.**

Ms. Raymond-Wright provided sworn testimony that she 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. (Motion at 10-12.) Recognizing that Ms. Raymond-Wright's testimony exposes significant and material misrepresentations by Defendant and her counsel, Defendant argues that Ms. Raymond-Wright's subsequent errata, claiming she brought the computers to Defendant's home in 2006, creates an issue of fact. (Beckerman Decl. ¶ 30.) Defendant is wrong.

First, Ms. Raymond-Wright did not serve her errata seeking to change her testimony until over three months after her deposition, and months after she became aware that Plaintiffs were seeking sanctions and dismissal based, in part, on her testimony. As demonstrated in Plaintiffs' Motion, Ms. Raymond-Wright's purported errata should be disregarded because Ms. Raymond-Wright waived any right to review or change her testimony and because her changes were woefully late. (Motion at 13.) Like a sham affidavit used to attempt to defeat summary judgment, such untimely errata should be disregarded. *See Sundaram v. Brookhaven Nat'l Labs.*, 424 F. Supp. 2d 545, 587 (E.D.N.Y. 2006). Moreover, even if her changes are considered, they do not replace her 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, \*11-15 (S.D.N.Y. July 6, 2001); *Podell v. Citicorp*, 112 F.3d 98, 103 (2d Cir. 1997). Defendant's Opposition does not contest any of these points.



Second, as demonstrated in Plaintiffs' Motion, Ms. Raymond-Wright's initial testimony is the only story that makes sense in light of the evidence. (Motion at 13-14.) For example, Ms. Raymond-Wright's testimony that she brought a desktop computer from Virginia to her mother's home in 2004 because her mother's computer had stopped working is entirely consistent with Woody Raymond's testimony that he removed Defendant's computer from the house in June or July 2004 because it was "dragging." (See Raymond-Wright Depo. at 57:25 – 66:16; 74:14 – 77:25, Ex. S; July 7, 2006 W. Raymond Depo. at 78:7 – 80:8, Ex. H.) Moreover, during her deposition, Ms. Raymond-Wright repeated her story several times and tied her timeline to important life events, such as the birth of her children. Ultimately, her changes make no sense in conjunction with her repeated testimony and the timeline established by numerous witnesses. Defendant's suggestion that she simply confused the dates is not credible and is further evidence of Defendant's, her family's, and her counsel's efforts to mislead and obfuscate.

**D. Defendant's counsel vexatiously multiplied this litigation.**

Plaintiffs' Motion also demonstrated that Defendant's counsel vexatiously multiplied these proceedings by filing frivolous motions. (Motion at 18-20.) Defendant makes no effort to rebut Plaintiffs' showing except to argue, incredulously, that the Court resolved the issue of the computer inspection in Defendant's favor. (Beckerman Decl. ¶ 24.) Contrary to Defendant's argument, however, the Court specifically rejected Defendant's demand that Plaintiffs itemize all potential trial evidence related to the inspection and ordered the inspection to go forward without Defendant's proposed procedure. (Aug. 3, 2006 minute entry.) This unorthodox procedural demand by Defendant needlessly delayed the computer inspection for months.

**E. Plaintiffs were not required to bring their sanctions motion under Rule 11.**

In apparent last-ditch effort to avoid sanctions, Defendant argues that Plaintiffs were required to seek sanctions under Rule 11, and not under Rule 37 or the Court's inherent

authority. Defendant's argument is wrong. While the objectives of Rules 11 and 37 may be similar - deterrence of improper litigation conduct - Rule 11 applies to misconduct in pleadings and motions, while Rule 37 applies to discovery misconduct. *Pickholtz*, 284 F.3d at 1376. Indeed, subsections (a) through (c) of Rule 11 do not apply to "disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." Fed. R. Civ. P. 11(d). As for the safe harbor provisions of Rule 11, those provisions do not apply here because Defendant's and her counsel's misconduct has already occurred and cannot be rectified by simply withdrawing a pleading.

**II. Plaintiffs' Complaint Should Be Dismissed Without Prejudice And Without The Conditions Defendant Seeks To Impose.**

A motion to dismiss without prejudice should be granted unless the defendant can show legal prejudice. The Second Circuit has identified five factors to determine whether a defendant will suffer legal prejudice: "the plaintiff's diligence in bringing the motion; any 'undue vexatiousness' on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss." *Zagano*, 900 F.2d at 14.

Plaintiffs' Complaint should be dismissed without prejudice and without condition. Plaintiffs acted diligently to bring this motion once they learned of the destroyed computer, there has been no vexatiousness at all on Plaintiffs' part, and this case progressed to the stage it did only because Defendant provided false and misleading information to Plaintiffs. (Motion at 25-29.) Defendant's contention that Plaintiffs "flunk all the *Zagano* factors" is without merit and her opposition focuses only on Plaintiffs' diligence and on the time this case has been pending.

**A. Plaintiffs were diligent in bringing this motion.**

Defendant's contention that Plaintiffs were not diligent is without merit. Plaintiffs requested leave to bring this Motion less than one month after learning, 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 Defendant's Internet service at the time of infringement. (Motion at 22-23.)

**B. This case progressed to the stage it did only because Plaintiffs were given false and misleading information.**

Defendant contends that, because this case was filed three and a half years ago, dismissal should be with prejudice and conditioned upon an award of attorney fees to Defendant. Defendant's contention is wrong both on the law and the facts.

First, contrary to Defendant's assertion, the standard for granting dismissal without prejudice and without conditions is not simply an inquiry into how long the case has been pending. *See Zagano*, 900 F.2d at 14. Rather, courts consider all five *Zagano* factors.

Second, the cases Defendant relies on to support her argument for a dismissal with prejudice and for an award of attorney fees do not help her. In *Zagano*, the plaintiff sought dismissal without prejudice only 10 days before trial, despite having recently reaffirmed her intention to try the case. *Zagano*, 900 F.2d at 14. The Second Circuit noted that the plaintiff's proffered justification was inadequate and that the defendants would be prejudiced because of the resources spent in preparing *after the trial date had been set* and after the plaintiff had affirmed her intention to try the case. *Id.* at \*14. Similarly, in *Philan Insur. Ltd. v. Frank B. Hall & Co.*, 786 F. Supp. 345 (S.D.N.Y. 1992), the court held that the plaintiffs were not diligent having waited until just weeks before the scheduled trial to seek dismissal. *Id.* at 649. Here,

Plaintiffs diligently prosecuted this action and brought the present Motion promptly after discovering that critical computer evidence had been destroyed and before any trial date was set.

Third, Plaintiffs initiated and prosecuted this case in good faith, and any litigation expense Defendant incurred “would be a classic case of self-inflicted wounds.” *See Read Corp. v. Bibco Equip. Co.*, 145 F.R.D. 288, 290 (D.N.H. 1993). As demonstrated, Defendant and her counsel 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. Defendant and her counsel should not be rewarded for delaying the proceedings by providing misinformation that threw Plaintiffs off track and for continuously opposing appropriate discovery requests and filing frivolous motions.

Finally, as established in Plaintiffs’ Motion and conceded by Defendant, courts in this Circuit have refused to award fees and costs following a Rule 41(a)(2) dismissal absent 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). While Defendant argues in conclusory fashion that Plaintiffs “have been nothing if not vexatious,” she provides no evidence of any “ill-motive” by Plaintiffs. Nor does she rebut the findings by numerous courts that Plaintiffs bring these cases in good faith and for proper purposes. (Motion at 23-24.)

## CONCLUSION

For all of these reasons, and the reasons set forth in Plaintiffs' Motion, Plaintiffs respectfully request that Plaintiffs be awarded monetary sanctions against Defendant and her counsel in an amount to be determined and that the case be dismissed without prejudice.

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