UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., et al,

Plaintiffs,

-against-

MARIE LINDOR,

Defendants.

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05 CV 1095 (DGT)(RML)

DEFENDANT'S OBJECTIONS TO REPORT AND RECOMMENDATIONS OF MAGISTRATE JUDGE

Defendant, by her attorneys RAY BECKERMAN, P.C., hereby objects to the Report and Recommendations of Magistrate Judge Hon. Robert M. Levy dated October 9, 2009, on the following grounds:

1. The Magistrate Judge erred in failing to properly address the factors enumerated in Zagano v. Fordham Univ., 900 F.2d 12 (2d Cir. 1990), as follows:

(a) Second factor: vexatiousness. The Court recognized that plaintiffs have never produced a shred of evidence to the effect, and do not claim, that the defendant herself engaged in any act of copyright infringement or ever even used a computer. That is the only permissible basis for bringing and prosecuting a case against someone. Additionally, the Court overlooked the vexatiousness of (i) asking for dismissal to be "without prejudice" and (ii) coupling it with a motion based on deliberate factual misstatements for "discovery sanctions" which never occurred (this will become clear to the Court when it evaluates defendant's pending Rule 11 motion, which the Magistrate Judge did not determine).

(b) Third factor: extent to which suit has progressed. The case has been the

subject of intensive litigation and substantial discovery and motion practice and is ready for trial but for the subpoena duces tecum response and deposition of plaintiffs' lead witness, all of which was noticed and subpoenaed by defendant *almost two years ago,* on *November 14, 2007*, and which has been sitting on the Magistrate Judge's desk since *February 19,2008.* The Second Circuit has emphasized time and again the importance of this third factor, and the Magistrate Judge has failed to accord it the weight it deserves consistent with the Second Circuit's guidelines. Were this Court to dismiss without prejudice, the Second Circuit will certainly reverse once it learns that the defendant has been ready for trial for two years but for the plaintiffs' attempt to stonewall, and the Magistrate Judge's failure to allow, a single witness's documents and deposition, both of which had been diligently and promptly sought by the defendant two (2) years earlier.

(c) Fifth factor: adequacy of explanation. The Magistrate Judge completely misapprehended this factor. The determination, in the report, does not actually make sense. Plaintiffs are required to show why they are dismissing and why they are seeking to do so without prejudice. All the Magistrate discusses is plaintiffs' feeble explanation as to why they waited so many years to take a certain witness's deposition, and why their interpretation of her testimony suddenly woke them up to the fact that they have no case against defendant. The plaintiffs have in fact offered *no explanation at all* of why they are seeking dismissal or why they are seeking to do so without prejudice. The plaintiffs admitted in the record that they have no intention of suing defendant again, so it is clear that their only motivation for seeking a “without prejudice” motion is to better position themselves for the ensuing attorneys fee motion pursuant to 17 USC 505, in which they will no doubt argue that defendant was not a “prevailing party” if

dismissal is “without prejudice”. This is clearly in bad faith, and it is not something that was sanctioned by the Second Circuit as a permissible factor to be considered in deciding a motion for voluntary dismissal without prejudice.

2. The Magistrate Judge improperly made a statement in the “Conclusion” that dismissal was to be “without fees or costs”. The Magistrate Judge had no jurisdiction to make such a determination, as no 17 USC 505 attorneys fee motion has been made, or could yet be made, until the action is concluded.

3. The Magistrate Judge's refusal to condition dismissal on plaintiffs' payment of attorneys fees was improper.

4. The Magistrate Judge's decision to accept the plaintiffs' version of the facts as true was completely erroneous.

5. The Magistrate Judge's statement, in the earlier part of his decision, that “defendant and her counsel were less than forthcoming at times”, was not based upon *anything* in the record, and there is nothing in the record upon which such an insulting statement could have been predicated (as the Court will see when it evaluates defendant's pending Rule 11 motion). Each and every one of the plaintiffs' accusations was proven, in detail, to be a gross misstatement of fact. Not a single instance of defendant or her counsel being “less than forthcoming” was cited by the Court or demonstrated by plaintiffs. Likewise the statement that the plaintiffs' false and frivolous accusations were “largely overstated” falsely and misleadingly suggests that there was some basis to the accusations, when in fact there was none.

WHEREFORE, the report and recommendation should be rejected solely to the extent hereinabove set forth, and in all other respects adopted.

Dated: Forest Hills, New York
October 26, 2009\

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