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March 4, 2010

BY ECF AND FIRST-CLASS MAIL

Hon. David G. Trager
U.S. District Court Judge
U.S. District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *UMG Recordings, Inc., et al. v. Lindor*, 05-cv-1095-DGT-RML

Dear Judge Trager:

We write in response to Defendant's February 25, 2010 letter seeking a pre-motion conference concerning Defendant's proposed motion for fees and costs. The Court should deny Defendant's request for further briefing.

First, both Magistrate Judge Levy and Your Honor have already considered and rejected Defendant's request for fees and costs. In its February 2, 2010 Order, the Court specifically ruled that Defendant's request is "inappropriate" in light of Defendant's and her counsel's "delayed disclosures" and "unduly contentious approach" to this litigation. (Doc. 276 at 4.) Any additional filings from Defendant seeking fees or costs against Plaintiffs would be a waste of time and would only further demonstrate Defendant's and her counsel's vexatious litigation tactics.

Second, Defendant is not a prevailing party as a matter of law and cannot seek attorney fees under section 505 of the Copyright Act. Section 505 gives courts discretion to award fees only to a "prevailing party." 17 U.S.C. § 505. A prevailing party is one who has achieved a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. West Va. Dept. of Health & Human Servs.*, 532 U.S. 598, 605 (2001). Where a court dismisses a plaintiff's claims "without prejudice," the defendant is not a prevailing party because such dismissal neither constitutes a judgment on the merits nor alters the legal relationship of the parties. *Mr. L. v. Sloan*, 449 F.3d 405, 407-08 (2d Cir. 2006) (holding that, where the plaintiff's case has been dismissed "without prejudice," the defendant is "not a prevailing party" to

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whom the district court could award fees).[1] Here, because the Court dismissed Plaintiffs' claims "without prejudice," Defendant is not a "prevailing party" and cannot seek fees under section 505. *See Mr. L.*, 449 F.3d at 407-08; *Cadkin*, 569 F.3d at 1148-50.

Third, the Court should reject Defendant's request for a determination on the "statute of limitations." Defendant did not assert this affirmative defense in any of her three answers in this case (*see* Doc. Nos. 9, 22, and 87), and there is no basis for addressing statutes of limitation after the case has been dismissed.

Finally, even if Defendant could show that she is a prevailing party (which she cannot), she is not entitled to fees. Courts award fees under section 505 only as a matter of their "equitable discretion" and only when such an award is consistent with the purposes of the copyright laws. *Fogerty v. Fantasy Inc.*, 510 U.S. 517, 533-34 (1994). *Fogerty* lists several non-exclusive factors that courts may consider in determining whether to award fees to a prevailing party,

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[1] *See also Cadkin v. Loose*, 569 F.3d 1142, 1148-50 (9th Cir. 2009) (defendant was not a "prevailing party" following dismissal of plaintiff's claims without prejudice and, therefore, not entitled to fees under section 505); *Oscar v. Alaska Dept. of Educ. and Early Development*, 541 F.3d 978, 981-82 (9th Cir. 2008) (a dismissal without prejudice neither "constitutes a judgment on the merits" nor "alter[s] the legal relationship of the parties" and, therefore, does "not confer prevailing party status upon the defendant"); *Chambers v. Time Warner, Inc.*, 279 F. Supp. 2d 362, 365 (S.D.N.Y. 2003) (the plaintiffs' voluntary withdrawal of their complaint meant that there was no "judicial determination" of the claims and no prevailing party under section 505); *Elektra Entm't Group, Inc. v. Perez*, No. 05-931 AA, 2006 U.S. Dist. LEXIS 78229, at *9-10 (D. Or. Oct. 25, 2006) (the plaintiffs' dismissal without prejudice meant that the defendant was "not a prevailing party under § 505"); *Herkemij & Partners Knowledge, B.V. v. Ross Sys., Inc.*, No. 1:05-cv-650-WSD, 2006 U.S. Dist. LEXIS 38783, at *18-19 (N.D. Ga. June 12, 2006) (because the complaint was dismissed without prejudice, the defendant was not a "prevailing party" under the Copyright Act).

including (1) frivolousness, (2) motivation, (3) objective unreasonableness, and (4) the need to advance considerations of compensation and deterrence. *Crescent Publ'g Group, Inc. v. Playboy Enters.*, 246 F.3d 142, 147 (2d Cir. 2001).

Here, Plaintiffs brought this case based on substantial evidence that copyright infringement took place on a computer in Defendant's residence and through her Internet account. Thus, Plaintiffs' claim against Defendant was neither frivolous nor objectively unreasonable. Plaintiffs' lawsuit is also entirely consistent with the very purpose of the Copyright Act—protecting Plaintiffs' legitimate copyright interests—and Plaintiffs moved to dismiss the case only upon learning that critical evidence had been destroyed, which action the Court found entirely appropriate under the circumstances. (*See* Doc. No. 272 at 11-12.) Thus, Defendant cannot question Plaintiffs' motives. Defendant, on the other hand, prolonged this litigation unnecessarily by failing to disclose material witnesses and information. (*See* Doc. No. 276 at 2-3.) Indeed, had Defendant disclosed this information at the outset, this litigation might have been avoided altogether. (*See id.*) For all these reasons, an award of fees to Defendant would be inconsistent with the purposes of the Copyright Act and entirely inappropriate.

Sincerely,

Eve G. Burton

cc: Ray Beckerman, Esq.