

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ARISTA RECORDS, LLC, et al. )  
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 Plaintiffs, )  
 )  
 v. ) **CIVIL NO. 1:07-cv-00162-JAW**  
 )  
 DOES 1-27, )  
 )  
 Defendants. )  
\_\_\_\_\_ )

**DEFENDANT DOES #16's and #18's REPLY MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

Defendant Does #16 and #18, through their undersigned counsel, submit the following Reply Memorandum in support of their Motion to Dismiss the Complaint for Copyright Infringement filed by Plaintiffs Arista Records, LLC et al pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. As set forth below, Plaintiffs' Opposition to Motion to Dismiss of Does #16 and #18 ("Opposition") is based on case law that is no longer applicable and otherwise fails to offer any valid basis for this Court to permit their generalized and vague Complaint against Defendants to proceed.

A. Plaintiffs Have Ignored the Significant Change to the Applicable Legal Standard for Reviewing the Sufficiency of the Complaint

Plaintiffs base their entire Opposition on a legal standard that is no longer applicable in federal courts and on case law that can no longer provide authority or guidance on the minimum pleading required in copyright cases. When ruling on a motion to dismiss for failure to state a claim upon which relief could be granted, a court must look to the complaint to determine

whether it satisfies the threshold pleading requirements under Fed. R. Civ. P. (8)(a). This Rule states that a complaint must contain at a minimum a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Fed. R. Civ. P.* 8(a)(2). On May 21, 2007, in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the United States Supreme Court clarified this requirement and provided a detailed explanation of what is now needed to survive a motion to dismiss. In *Twombly*, the Supreme Court rejected the oft-cited language of *Conley v. Gibson*, 355 U.S. 41 (1957), which provided that, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” *Conley*, 355 U.S. at 45-46. Rather, according to the *Twombly* opinion, in order to survive a motion to dismiss, a complaint must allege a “plausible entitlement to relief.” *See Twombly*, 127 S. Ct. at 1967. The Supreme Court further explained:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

*Id.* at 1964-65.

The United States Court of Appeals for the First Circuit already has recognized and applied this new standard when ruling on motions to dismiss in various types of civil actions. *See Rodriguez-Ortiz v. Caribe, Inc.*, 490 F.3d 92, 95-96 (1st Cir. 2007) (ruling that a complaint alleging federal securities fraud should be dismissed for failing to meet the new pleading requirements set forth in *Twombly*); *see also Alvarado v. Negron*, \_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 28032, at \*3 (1st Cir. Dec. 5, 2007); *Aguilar v. U.S. Immigration & Customs*

*Enforcement Div. of the Dep't of Homeland Security*, \_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 27334, at \*52 (1st Cir. Nov. 27, 2007); *Marrero-Gutierrez v. Molina*, 491 F. 3d 1, 9-10 (1st Cir. 2007).

The U.S. District Court for the District of Maine also has recognized and applied the new standard. *See Putney, Inc. v. Pfizer, Inc.*, 2007 U.S. Dist. LEXIS 77717, at \*3-4 (D. Me. Oct. 17, 2007) (describing the Supreme Court as having “explicitly backed away from the Rule 12(b)(6) standard articulated in *Conley*”); *McDermott v. Genentech, Inc.*, U.S. Dist. LEXIS 54316, at \*3 n.1 (D. Me. July 24, 2007) (noting that the Supreme Court has “finally rejected the oft-cited language” of *Conley*); *see also In Re New Motor Vehicles Canadian Export Antitrust Litigation*, 490 F. Supp. 2d 13, 17 (D. Me. 2007); *Surplec, Inc. v. Maine Public Serv.*, 501 F. Supp. 2d 195, 197 (D. Me. 2007); *Lightfootlane v. Maine Dep't of Heath and Human Servs.*, 2007 U.S. Dist. LEXIS 74540, at \*3-4, 15 (D. Me. Sept. 25, 2007); *Eichelberger v. Northern Outdoors, Inc.*, 2007 U.S. Dist. LEXIS 74542, at \*2-3 (D. Maine Oct. 4, 2007); *Dupuis v. Magnusson*, 2007 U.S. Dist. LEXIS 56143, at \*1-2 (D. Me. July 31, 2007); *Tobin v. Algora Publ'g*, 2007 U.S. Dist. LEXIS 81144, at \*1 (D. Me. Oct. 26, 2007); *Lipin v. Ellis*, 2007 U.S. Dist. LEXIS 54489, at \*12-13 (D. Me. July 26, 2007).

Further, dozens of copyright infringement cases have been evaluated under the *Twombly* standard. *See Dell, Inc. v. This Old Store, Inc.*, 2007 U.S. Dist. LEXIS 47818, at \*5-11 (S.D. Tex. July 2, 2007) (granting a motion to dismiss a complaint that failed to “allege some specificity as to each Defendant” or “otherwise satisfy the pleading requirements of Rule 8 . . . as clarified by *Twombly*.”) *See also, e.g., Weidner v. Carroll*, 2007 U.S. Dist. LEXIS 72604, at \*2-3 (S.D. Ill. Sept. 28, 2007) (denying a motion to dismiss a copyright infringement claim because it satisfied the pleading requirements of *Twombly*); *Adams v. Warner Bros. Pictures Network*, 2007 U.S. Dist. LEXIS 47448, at \*6, 2007 Copr. L. Dec. 29, 408 (E.D. N.Y. June 29,

2007) (granting a motion to dismiss a claim of copyright infringement because the Plaintiff has “not nudged [his] claims across the line from conceivable to plausible”) (quoting *Twombly*, 127 S. Ct. at 1974); *Franklin Machine Products v. Heritage Food Serv. Equip., Inc.*, 2007 U.S. Dist. LEXIS 89666, at \*3-4 (N.D. Ind., Fort Wayne Div. Dec. 5, 2007) (granting a motion to dismiss a copyright infringement case between two competitors in the food industry service and noting that the standard for Fed. R. Civ. P. 12(b)(6) had remained static for nearly fifty years prior to *Twombly*).

Thus, the District Court in *Interscope Records v. Rodriguez*, 2007 U.S. District LEXIS 60903, 2007 Copr. L. Dec. 29, 465 (S.D. Calif. Aug. 17, 2007), cited by Defendants in their Motion to Dismiss, plainly and correctly followed the appropriate standard and precedent when it evaluated the complaint there. In their Opposition, Plaintiffs attempt to distinguish that opinion by pointing to the difference in the procedural postures of *Rodriguez* and this case. However, this cannot overcome the fact that the clear language by the *Rodriguez* court applies the new standard set forth *Twombly* to allegations nearly identical to those in Plaintiffs’ Complaint. The *Rodriguez* court stated that a “bare conclusory statement that on ‘information and belief’ Defendant has downloaded, distributed and/or made available for distribution to the public copyrighted works” . . . “without any facts pertaining specifically to the instant Defendant” is nothing more than speculation and fails to sufficiently state a claim upon which relief can be granted. *Id.* at \*3-4.

Plaintiffs state in their Opposition that “hundreds of courts” have held that the generalized complaints filed by the RIAA in the parallel proceedings are sufficient to meet the minimal pleading standards. (Opposition at 1, 8.) Remarkably, *every* case cited by Plaintiffs was decided *prior* to *Twombly*. *Id.* Therefore, Plaintiffs have failed to provide to this Court with

any valid authority to support that their assertion that the boilerplate allegations are sufficient to survive a Motion to Dismiss.

Plaintiffs state in their Opposition that Defendants “appear to argue” that they should held to “some higher pleading standard.” (Opposition at 5.) While Plaintiffs are correct that the parties’ briefs urge this Court to apply different standards, Defendants did not ask this Court to fashion a new standard, but merely follow the precedent of the U.S. Supreme Court and the First Circuit Court of Appeals.

B. Plaintiffs’ Opposition Refers to ‘Significant’ Violations and ‘Incalculable’ Damages That Are Not Supported by Factual Allegations in Their Complaint.

In their Opposition, Plaintiffs refer to Defendants as “significant infringers” who have unlawfully distributed, and continue to distribute, thousands of copyrighted audio files owned by Plaintiffs to “millions” of other people across the world, resulting in “incalculable” damages for Plaintiffs. (Opposition at 3, 10.) Plaintiffs further assert in their Opposition that they have gathered “substantial evidence” of this so-called “viral [] or exponential infringement set in motion” by Defendants. *Id.* If Plaintiffs have, in fact, gathered substantial evidence against Defendants, they failed to provide any details of such evidence in their Complaint.

Instead, Plaintiffs simply allege the following:

Plaintiffs are *informed* and *believe* that each Defendant, without the permission or consent of Plaintiffs, has continuously used, and continues to use, an online media distribution system to download *and/or* distribute to the public certain of the Copyrighted Recordings.

(Compl. ¶ 24 (emphasis added).)

Aside from this simplistic conclusion that Defendants have continuously downloaded “and/or” distributed Plaintiffs’ copyrighted recordings (apparently, Plaintiffs do not even have sufficient information or belief as to what conduct can be attributed to Defendants), the

Complaint lacks any facts—let alone proof of “substantial evidence”—to show the plausibility of Plaintiffs’ allegations of copyright infringement against Defendants. Plaintiffs do not provide any details explaining how Defendants downloaded and/or distributed Plaintiffs’ copyrighted recordings. Plaintiffs refer to Defendants’ use of any online media distribution system; however, they do not name the system, explain how it works or specify whether all 27 Defendants are alleged to have used the same system. In fact, the Complaint does not contain any specific facts pertaining to the individual unnamed Defendants. It simply alleges that they committed a violation of the “same law” by committing the “same act” by using the “same means.” (Compl. ¶ 4.) Such broad, conclusory allegations are not enough to survive the Motion to Dismiss because they do not raise Plaintiffs’ right to relief above a speculative level. *See Twombly*, 127 S. Ct. at 1964-65.

Plaintiffs assert that their Complaint meets the *Twombly* standard because it is based on “well-supported allegations of direct copying of Plaintiffs’ copyrighted sound recordings by each Doe Defendant and direct distribution of Plaintiffs’ copyrighted sound recordings to millions of P2P network users across the world.” (Opposition at 5.) However, no such information is provided in the Complaint itself. In their Opposition, Plaintiffs refer to “Exhibit A” of their Complaint as providing information specific to each alleged IP address. In fact, Exhibit A to the Complaint contains only list of the Does’ alleged IP addresses. Plaintiffs appear to be referring to a document that was apparently attached, not to the Complaint, but to a proposed “AO Form 121 Report” filed by Plaintiffs. Such information, therefore, is not part of the Complaint and should not be considered in determining the sufficiency of the allegations. Even if the lists of songs had been included in the Complaint, such lists nonetheless fail to set forth the required specificity to allege a “plausible entitlement to relief,” as required by

*Twombly*.<sup>1</sup> The lists contain no allegations that would provide a plausible, not speculative, basis for finding that Defendants engaged in any *illegal* activity with respect to these song titles.

Like the copyright claims in *Rodriguez, Dell* and several other recent cases, Plaintiffs' Complaint fails to provide anything more than labels, conclusions and a formulaic recitation of the elements of copyright infringement, and it fails to distinguish among the various Doe Defendants. In their Opposition, Plaintiffs use vague, exaggerated terms to describe the enormous effect of Defendants' alleged violations. Referring to "billions" of copyrighted works and "millions" of people receiving illegal downloads does not bring the Complaint into compliance with the newly-defined standards for Fed. R. Civ. P 8.

#### CONCLUSION

For all of the reasons discussed above, the action should be dismissed for failing to state a claim upon which relief can be granted.

Respectfully submitted,

Dated: December 21, 2007

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<sup>1</sup> Plaintiffs also argue that Defendants did not even contest the truth of the Plaintiff's allegations that Defendants improperly distributed "thousands" of Plaintiff's copyrighted sound recordings. Opposition at 6. Of course, a Motion to Dismiss is not the proper vehicle to assert such denials. Defendants in fact strongly dispute the allegations asserted against them.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2007, I electronically filed Defendant Does #16's and #18's Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss with the Clerk of Court using the CM/ECF system which will send notification of each filing to the following:  
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