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February 14, 2007

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VIA FAX: (914) 390-4152 and (212) 805-6326; seven pages
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Hon. Colleen McMahon
United States District Judge
United States Courthouse
300 Quarropas Street, Room 533
White Plains, New York 10601-4150

2/14/07
I will Accept
the late filing of these
Enough silly
letters

Re: In Reply to Plaintiffs' Opposition to Defendant's Request to late file an Answer in Opposition to Plaintiffs' Motion to Dismiss Without Prejudice *Elektra, et al. v. Santangelo*, Civil Action No. 7:05-cv-2414 (CM)(MDF)

Dear Judge McMahon:

Defendant respectfully submits this in reply to Plaintiffs' opposition to Defendant's request to file late an Answer in Opposition to Plaintiffs' Motion to Dismiss Without Prejudice.

I am aware of the excusable neglect standard and do not believe it applies the way presented by Plaintiffs. Rather, what controls is Your Honor's Individual Practices ¶ 1(E), which I take at the severity of its meaning.

The determination of whether neglect resulting in failure to timely file a motion is excusable is determined at the Court's discretion. Tenenbaum v. Williams, 907 F.Supp. 606 (E.D.N.Y., 1995).

In Lee v. ITT Standard, 268 F.Supp.2d 315 (W.D.N.Y., 2002), the concept of "excusable neglect" was described as "elastic" and the court would consider, in addition to "circumstances beyond control of movant," delays caused by inadvertence, mistake, or carelessness, "at least when delay was not long, there is no bad faith, there is no prejudice to opposing party, and movant's excuse has some merit." (Quoting LoSacco v. City of Middletown, 71 F.3d 88, 93 (2d Cir. 1995), which was itself quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 388, 392, 394-95, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)).

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I have previously described the matters, and they are not based upon the typical "calendar" situation. I was appointed by a federal agency as guardian over a woman who again became actively suicidal, and she and her minor child both happen to "act out" at the same time as the motion was made, after a period of relative calm. It is also no accident that Plaintiffs filed three matters on the same day in regard to the Santangelo cases, but that is their right as it relates to this case (in the other Santangelo case, Plaintiffs' actions represent two elements of affirmative bad faith). As to an opposing counsel's cancer treatments, that was not a "calendar" issue; like the guardian issue and her son, it is a "human" issue, and ones over which I had no control other than to ignore them and live with the consequences or respond to them and live with the other consequences. As to my injuries and the resulting spasms, my description was hardly vague, they are unplanned, debilitating and a matter of record in other cases. Further, I offered Mr. Gabriel a copy of my hospital papers, and he cordially refused. The hospital matter occurred during the time to answer the motion.

A "comment" is hardly an "interview." Throughout the litigation, until after the depositions, I kept my remarks to a minimum, and it was in that period that I responded to requests for substantive commentary. In fact, my comment on the proposed dismissal without prejudice was limited to the Defendant being able to stand up to large companies and that the dismissal was not worth much being without prejudice. It was hardly an "interview." As to my alleged work over the interval, I made clear that I found counsel to take over for me where I could not (including the answer for Robert Santangelo, Jr.); however, on *pro bono* cases, the pool of available attorneys is sadly small. I shall not make up more than there is for my convenience.

The most compelling "justice" reasons offered were the importance to Ms. Santangelo, no prejudice to the Plaintiffs, and, respectfully, no evident impact on the administration on justice. Certainly no disrespect was meant to the power of the Court or Your Honor. Equally compelling, but on a parallel track, is that Plaintiffs' motion contains false and misleading information, known to be so at the time it was made and is misleading the Court. Following are offers of proof.

"I am therefore I was:" Plaintiff is attributing present day standards to conditions of the past. When Patricia Santangelo appeared before Your Honor, she claimed she had never downloaded, rarely used the Internet, and barely knew how to access her email. Without presuming that the Court made a final finding, Your Honor

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indicated, at least temporarily, that it appeared Ms. Santangelo was not a heavy or knowledgeable Internet user. Nothing adduced in any discovery device changed the fact of what Ms. Santangelo *was* like and what she *knew* when she *appeared* before the Court. *Past tense words, all.*

Over the 16 or more months between her appearance before Your Honor and her depositions, Ms. Santangelo, in participating in her defense, researched the “downloading industry,” learned how to use email, and learned other skills on the computer. Only Your Honor or a jury can determine the extent of her knowledge by testing her credibility, unless Ms. Santangelo had made a contradictory statement during discovery, which she did not. Nonetheless, Plaintiffs proffer in Plaintiffs’ Memorandum Brief in Support of Their Motion to Dismiss Without Prejudice (“Brief”), at page 1:

Defendant’s claims of technological illiteracy and her steadfast denials of any involvement by her, her children, or her children’s friends lasted for well over a year – until plaintiffs, after substantial efforts in discovery, found that defendant uses e-mail and the Internet regularly, that two of her children and her son’s best friend [Matthew Seckler] did engage in the substantial infringement at issue, and that defendant had the full right and ability to control her children’s use of the computer. [Emphasis added.]

What Mr. Seckler did was to install an insidious program which operates in the background in ways unknown to the user, owner, or other operator without Ms. Santangelo’s knowledge or permission.¹ Nothing changed about Ms. Santangelo’s position. Plaintiffs speak of Ms. Santangelo’s *present* state of knowledge.

Further, nothing adduced during discovery ever indicated any “involvement” by Ms. Santangelo. It is a falsehood.

“Upon further investigation, plaintiffs found *defendant* to be *distributing* plaintiffs’ copyrighted sound recordings on well over 100 occasions beginning as early as August 6, 2003 and continuing through at least May 29, 2004.” [Emphasis added.] Brief at p. 2.

¹ Mr. Seckler was only 13 or 14 at the time, and testified at his deposition that he did not know all the aspects of how the program worked when he installed it.

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This is the first time Plaintiffs have ever claimed that Ms. Santangelo “distributed” anything. They acknowledge elsewhere that she was not the direct infringer, have previously acknowledged that she did not “download” anything, but now accuse her of “distributing.” Quoting Plaintiffs’ Brief at page 1: “As a result, plaintiffs have now filed suit against defendant’s children, who are the direct infringers here. [P]laintiffs generally prefer to pursue the direct infringers, as opposed to *secondary infringers like defendant* [Ms. Santangelo]” [Emphasis added.] How can Ms. Santangelo be a secondary infringer here, but the distributor or downloader or infringer elsewhere? She can not, and the other statements are false and misleading, and contrary to the evidence adduced through discovery. At a minimum, the deposition transcripts and all discovery instruments should be made available for the Court’s review.

Of a different, more insidious note, that “Defendant refused to settle prior to litigation,” this simply harkens back to when Plaintiffs told this Court how Ms. Santangelo was going to be handled by their Settlement Center, which did not please the Court. Brief at p. 3. Ms. Santangelo refused to settle, as if she didn’t have the right, which is exactly how the Plaintiffs have handled everyone and everything, and do so again to the Court. In fact, there was no reason for her to settle: Plaintiffs have adduced no evidence of primary or secondary infringement, using their own standards presented in the cases in their Brief (more, *infra*).

“Moreover, when directly asked whether anyone in her home was downloading music, she replied, ‘I know nothing about them downloading or trading files.’” Brief at p. 4.

This is completely consistent with what Ms. Santangelo told Your Honor at the time, and has been consistent throughout. In fact, Plaintiffs have never until this motion even hinted that they believed Ms. Santangelo knew anything about what may have occurred at the time of the alleged infringements, much less adduced any evidence or testimony to that effect.

Plaintiffs do try to tie Ms. Santangelo’s opinion to an alleged *knowledge* of the neighbor’s activities, which they couch in terms of a *suspicion*. Nothing in the discovery requirements confer an active obligation to search out who, if anyone, was an interloper, trespasser, or other intermeddler. Nor did she have to have “suspicions.” There’s a long distance between withholding knowledge or turning a blind eye, and

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becoming Plaintiff's investigator, or worse. Plaintiffs' imputed Teutonic tautology does not appear in the FRCP. Even misprision requires *actual* knowledge.

Plaintiff's claim Michelle admitted to downloading and uploading Plaintiffs' copyrighted sound recordings. Brief at p. 4. However, that is not what Michelle said and it is certainly not what she meant. Of course, with RIAA's counsel **physically beating on the table**, *slamming* down post-it notes with question after question in front of Mr. Gabriel and scaring Michelle out of her seat, sending her crying from the room, she did not know which way was up for dozens of questions. I will be pleased to demonstrate for Your Honor, provided I will not end up wearing Orange.² The depositions will bear out the reality of the testimony and, for Michelle, keeping in mind the circumstances under which she testified, will help explain her often befuddled responses.

Ms. Santangelo is cited as having placed restrictions on her children's access to chat rooms. Brief at p. 5. Obviously, such restrictions (the dynamics, scope, and programming of which is controlled entirely by the ISP, like AOL) have not been enough around the globe to prevent people from downloading; yet, they appear to have been enough to prevent Plaintiffs' alleged warning messages from being transmitted to children. The accusation that this shows culpability of control on Ms. Santangelo's part is a technological and factual falsity, which Plaintiffs know full well.

As between Plaintiffs – who have a vested interest in their messages getting through – and the ISP's on the one hand, and the Parents – who had no idea the messages were out there (if indeed they were) and further no *reason* to know – and the ISP's on the other hand, who was and remains in the better position to resolve that issue? Should Ms. Santangelo, instead, have left the gate open for the predators and pornographers?

Plaintiffs mis-avail themselves of the “contributory infringing standard” of Metro-Goldwyn-Meyer Studios, Inc. v. Grokster Ltd., 545 U.S. 913, 125 S. Ct. 2764, 2776 (2005), thus: one infringes contributorily by *intentionally inducing or encouraging* direct infringement *and* infringes vicariously by *profiting* from direct infringement while *declining* to exercise a right to stop or limit it. [Emphasis added.] No evidence was

² I, too, “jumped” the first time he did it. As to why I did not stop it, even after multiple times: I saw it as a rope with which he was to hang himself. I respectfully assert, he has.

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adduced to support that Ms. Santangelo was “intentional,” that she “induced” or “encouraged,” or that she “profited” by it or that she “declined” to exercise a right to stop or limit it. Brief at p. 6. Whether Ms. Santangelo is allowed to have a motion in place or not does not give the Plaintiffs the right to affirmatively misrepresent facts or law to the Court.

Plaintiffs also offer Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971), claiming the case offers that one may be vicariously liable if one has the right and ability to supervise the infringing activity *and also* has a *direct financial interest* in such activities. No financial interest of any type was ever alleged or proven against Ms. Santangelo.

The Plaintiffs’ complaint in Mr. Gabriel’s answering letter that they *tried* to dismiss the case for six months is of no moment and false: there was nothing stopping them from filing this same motion months ago, regardless of whether Ms. Santangelo wanted to settle. Whether it was six months or six years that she did not want to settle is irrelevant: she wanted to take the case to trial and still wishes to do so. Ms. Santangelo simply would not cave in to Plaintiffs’ demands.

Plaintiffs claimed they were looking for the person who was the *actual* infringer; they obtained that information in a deposition last April from Robert Santangelo, Jr., regarding Matthew Seckler. There was nothing stopping them from filing this same motion.

As to my position, I work for Ms. Santangelo, and she wants to take this to trial. She had no obligation to settle *and* she had done nothing wrong. Plaintiffs uncovered nothing different at depositions regarding Patricia Santangelo. Their arguments in their brief about her “steadfastly refus[ing] to take responsibility for either her or her children’s actions” tells the Court nothing: first there had to be something for which to take responsibility. Brief at p. 1.

What happened before Judge Robinson’s Court shall be presented to Judge Robinson, unless Your Honor so demands, of course; but, I respectfully offer that such is proper to present to Judge Robinson. And, as is so often the case, “things are seldom what they seem.”

As to my representation of Mr. Gabriel’s position regarding a late submission, at first he did cite the delay as the reason, but then specifically said that all I

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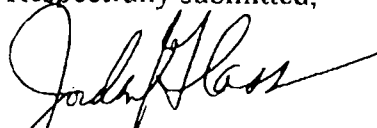
was authorized to say was that "Plaintiffs oppose the motion." I have never violated one of our agreements, so if that was what he wanted, that's what I wrote. If we couldn't count on each other in this regard, the system – what's left of it – would come to a grinding halt. Mr. Gabriel's statement was *exactly correctly transmitted*, but I did not intend to imply that Mr. Gabriel *refused* to give me a reason. (I was, respectfully, aware of Your Honor's rule regarding stipulations as noted in Your Honor's Individual Practices ¶ 1(E), but the same rule required asking for consent as well as other requirements.)

The decision in Foster had nothing to do with my request with Mr. Gabriel, though we did discuss it and I did cite it in my previous letter as being of interest to the Court.

Lest I be accused of putting in a motion through the back door which I could not march in through the front, I have thus ignored the decision in Foster and not offered law in support of Ms. Santangelo's opposition to Plaintiffs' motion. I stand by the fact that Plaintiffs' claims are false and misleading and rise to a level that should be addressed for the Court regardless of whether Ms. Santangelo is allowed to put in a response and regardless of consequence.

For all of these reasons, Defendant respectfully requests that this Court grant Defendant's late offering. If the Plaintiffs wish for the case to truly end, they can dismiss it with prejudice. The Foster holding, as they interpret it, does not bring them any danger as it relates to legal fees.

Respectfully submitted,



Jordan D. Glass.

To: Richard Gabriel, Esq., Holme Roberts & Owen, LLP (fax and email)
Brian Eugene Moran, Esq., Richard John Guida, Esq. (fax and email)