

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UMG RECORDINGS, INC., et al,

05 CV 1095 (DGT) (RML)

Plaintiffs,

-against-

MARIE LINDOR,

Defendant.

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**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR LEAVE TO FILE SECOND AMENDED ANSWER**

Defendant Marie Lindor, by her attorneys Vandenberg & Feliu, LLP, respectfully submits this memorandum of law in support of her motion, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, for leave to file a Second Amended Answer that includes an affirmative defense that the statutory damages sought by plaintiffs are unconstitutionally excessive and disproportionate to any actual damages that may have been sustained.

Rule 15 of the Federal Rules of Civil Procedure provides:

...a party may amend the party's pleading ... by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a) (emphasis added).

It is well established that “a district judge should freely grant leave to amend when justice requires, absent a substantial reason to deny. A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a).” 3 James

W. Moore et al., Moore's Federal Practice § 15.14[1], at 15-26 (3d ed. 1998) (footnote omitted); see, e.g, Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 235 (2d Cir. 1995) (courts prefer to permit amendments).

Here, the parties are in the early stages of discovery and there is no reason to deny the requested leave.

**The Statutory Damages Sought By Plaintiffs  
Are Unconstitutionally Excessive and Disproportionate**

It is well established that “[t]he Due Process Clause ... prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S.Ct. 1513, 1519-20 (2003); BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589 (1996). Although a statutory damages award need not necessarily embody a punitive component, it will do so *whenever it exceeds the actual amount of harm caused*. See United States v. Halper, 490 U.S. 435, 448, 109 S.Ct. 1892 (1989) (“a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term”) (italics added); *id.* at 442 (civil penalty authorized by statute “may be so extreme and so divorced from [actual] damages and expenses as to constitute punishment”). Moreover, statutory damages carry with them the potential for *massive* amounts of punishment, both in absolute terms and in proportion to the amount of actual harm. See Halper, *supra*, 490 U.S. at 449, 109 S.Ct. 1892 (statutory fixed-penalty provision constitutes punishment when it “subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused”).

Thus, the United States Court of Appeals for the Second Circuit acknowledged in Parker v. Time Warner Entertainment Co., 331 F.3d 13, 22 (2d Cir. 2003), that statutory damages are subject to constitutional review for excessiveness. This principle is no less applicable to statutory damages in copyright cases such as the instant case. See In re Napster Inc., 2005 WL 1287611 at \*10-11, 77 U.S.P.Q. 2d 1833, 2005 Copr. L. Dec. P 29,020 (N.D. Cal. June 1, 2005) (noting that “an award of statutory damages may violate due process if the amount of the award is ‘out of all reasonable proportion’ to the actual harm caused by a defendant's conduct” and deferring consideration of unconstitutional excessiveness of statutory damages claim in copyright infringement case until later stage in proceeding) (citing Parker, supra, 331 F.3d at 22).

The “most commonly cited indicium of an unreasonable or excessive punitive damages award is its *ratio to the actual harm* inflicted on the plaintiff.” BMW, supra, 517 U.S. at 580, 116 S.Ct. 1589 (italics added). “[F]ew awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process.” State Farm, supra, 538 U.S. at 425, 123 S.Ct. at 1524 (italics added).

Here, the Complaint seeks statutory damages under 17 U.S.C. § 504(c) for each copyrighted recording allegedly infringed by defendant. Complaint, ¶ 16. The minimum statutory damages awarded under 17 U.S.C. § 504(c) are **\$750** for each copyrighted recording.

Even assuming that plaintiffs’ recordings had been infringed by defendant, plaintiffs’ actual damages would have been only about **70 cents** per recording. As set forth in the accompanying affidavit of music industry analyst Aram Sinnreich, music

downloads are available to the general public at a price of 99 cents per song. Of this amount, the record companies receive only roughly 70 cents per song in revenue.

In other words, plaintiffs are seeking statutory damages that are not merely 3 or 4 or even 9 times the amount of their actual damages (i.e., a single-digit ratio), but **1,071 times** that amount.

An award of statutory damages that is *more than a thousand times* the amount of actual damages is undoubtedly an unconstitutionally excessive form of punishment barred by the Due Process Clause. See State Farm, supra, 538 U.S. at 425-26, 123 S.Ct. at 1524.

Defendant therefore seeks to amend her answer to include the defense that plaintiffs' statutory damages claim is unconstitutionally excessive and disproportionate to any actual damages that may have been sustained.

As set forth in the accompanying affidavit of Morlan Ty Rogers, defendant requested from this Court a pre-motion conference regarding a motion to amend defendant's answer to include this defense and to move for partial summary judgment on that ground.

The Court subsequently granted us permission to file a motion for both forms of relief.

After deciding not to proceed with the summary judgment portion of the motion, we contacted plaintiffs' attorneys to see if they would stipulate merely to defendant's amendment of her answer to include the defense of unconstitutional excessiveness.

Plaintiffs refused, making this motion necessary.

**CONCLUSION**

The within motion should be granted in all respects.

Respectfully submitted,

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