

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

Warner Bros. Records, Inc., a Delaware corporation; Capitol Records, Inc., a Delaware corporation; UMG Recordings, Inc., a Delaware Corporation; Sony BMG Music Entertainment, a Delaware general partnership; ARISTA Records LLC, a Delaware limited liability company; BMG Music, a New York general partnership;	§	
Plaintiffs,	§	Case No. Civ-06-00793-VML
vs.	§	
Tallie Stubbs,	§	
Defendant.	§	

**Defendant’s Motion to Strike With Objections to  
Plaintiffs’ Motion for Leave to File Reply/Response Brief**

Comes now the Defendant and hereby moves the Court to strike Plaintiffs’ Motion for Leave to File Reply/Response to Defendant’s response to the Plaintiffs’ Motion to Dismiss [Doc. 19].

1. On August 23, 2006 [Doc. 11] Defendant filed her answer ***and counterclaims seeking affirmative relief***. *See, e.g.* Answer and Counterclaims, pgs. 5-11 (emphasis added). *Contra*, Plaintiffs’ September 20, 2006 Motion [Doc. 19], ¶ 4 (“Plaintiffs would like a full and fair opportunity to address the issues raised by Defendant ***for the first time***.”)(emphasis added).
2. On August 24, 2006, [Doc. 12] Plaintiffs filed a motion to dismiss without prejudice their Complaint pursuant to Fed. R. Civ. P. 41. Plaintiffs’ motion ignores mandatory precedent applicable to plaintiffs’ dismissal without prejudice in light of the affirmative relief sought by Defendant in her answer and counterclaims filed on August 23, 2006.
3. Defendant submits that Plaintiffs’ motion for leave to file reply/response filed on September 20, 2006 is merely a belated attempt by Plaintiffs to cure substantial substantive defects

required Fed. R. Civ. P. 41 and lacking from Plaintiffs' motion to dismiss filed on August 24, 2006. The authorities set forth in Defendant's Brief in Opposition to Plaintiffs' Motion to Dismiss Without Prejudice at pages 3-13 filed herein on September 11, 2006 [Doc. 16] further show the defective nature of Plaintiffs' motion to dismiss their complaint against Defendant Tallie Stubbs without prejudice.

4. Plaintiffs in essence forfeited the ability to dismiss their case *without prejudice* under Fed. R. Civ. P. 41 because they sued Defendant in August, 2006, served Defendant with the complaint, and waited until Defendant filed an answer with counterclaims and affirmative defenses to seek dismissal without prejudice.
5. Under the Federal Rules of Civil Procedure, Plaintiffs had 120 days to serve Defendant. Such date could have been extended by the Court upon motion by Plaintiffs to enable Plaintiffs to further investigate into the impropriety of suing Defendant Mrs. Tallie Stubbs. However, Plaintiffs intentionally elected to serve Defendant and thereby caused Defendant to answer with affirmative defenses and counterclaims and to incur attorney's fees, costs and expenses.
6. On August 23, 2006, Defendant Mrs. Stubbs presented evidence Defendant's Exhibits 1-4 attached to her answer and counterclaims seeking affirmative relief, that Plaintiffs did not dispute in its motion to dismiss without prejudice; i.e., Plaintiffs sued her and then served her when Plaintiffs knew or should have known that Defendant should not be sued for infringement of Plaintiffs' copyrights.
7. Apparently, Plaintiffs anticipated that Defendant would merely respond to their motion to

dismiss without prejudice by merely stating whether she objected or had no objection to plaintiffs' motion to dismiss without prejudice as evidenced by Plaintiffs September 20, 2006 Motion [Doc. 19], ¶ 3, reciting in pertinent part: "In other words, Defendant is seeking affirmative relief as opposed to just responding to Plaintiffs' motion . . ."). However, Defendant was required to file a brief in response to Plaintiffs' motion to dismiss without prejudice to present the authorities (and relevant evidence) to the District Court to point out the fatally defective nature of Plaintiffs' motion to dismiss. *See*, Defendant's September 11, 2006 Response, pg. 6, ¶ 2(a) ("Plaintiffs provide not explanation of need for dismissal").

8. Defendant continues to seeks a dismissal with prejudice and an expeditious end to Plaintiffs claims against her in this litigation.
9. Defendant submits that the Court should not permit Plaintiffs to cure their defective motion to dismiss under the auspices of a reply or response brief. Plaintiffs do not argue that they discovered new evidence not available at the time that they filed suit against Tallie Stubbs and at the time that they filed their motion to dismiss without prejudice.

Wherefore, Defendant requests the Court strike the Plaintiffs' motion for leave to file reply/response brief [Doc. 19]. The Court should enter an order dismissing the complaint filed against Defendant Tallie Stubbs with prejudice. *See*, Defendant's Exhibits 1-4 to Answer and Counterclaims with request for affirmative relief.

Respectfully submitted,  
S:/Marilyn D. Barringer-Thomson  
Marilyn D. Barringer-Thomson  
OBA 11057  
Post Office Box 54444  
Oklahoma City, OK 73514

Telephone: 405-840-3101

Telecopier: 405-842-3843

-And-

**Warren W. Henson, III**

OBA 13084

4901 Richmond Square, Suite 104

Oklahoma City, OK 73118

Telephone: 405-843-3889

Telecopier: 405-843-0322

**Counsel for Defendant**

**CERTIFICATE OF SERVICE**

This is to certify that on this 1st day of October, 2006 a true and correct copy of the above and foregoing was transmitted to the following Counsel of Record via the Court's Notice of Electronic Filing System:

Colin G. Martin

OBA 19165

GARDERE WYNNE SEWELL LLP

1601 Elm Street, Suite 3000

Dallas, Texas 75201-4761

Telephone: 214-999-4227

Telecopier: 214-999-3227

[cmartin@gardere.com](mailto:cmartin@gardere.com)

Attorney for Plaintiffs

Shawn Harrell

OBA 16660 shawn.harrell@mcafeetaft.com

Charles L. McLawhorn, III

chad.mclawhorn@mcafeetaft.com

McAFEE & TAFT, P.C.

Tenth Floor, Two Leadership Square

211 North Robinson

Oklahoma City, OK 73102-7103

Telephone: 405-235-9621

Telecopier: 405-235-0439

Attorney for Plaintiffs

S:/Marilyn D. Barringer-Thomson

Marilyn D. Barringer-Thomson