

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,

AFFIDAVIT

Defendant.

-----x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MORLAN TY ROGERS, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and Of Counsel to Vandenberg & Feliu, LLP, attorneys for defendant Marie Lindor, and respectfully submit this affidavit in support of her motion for an Order, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, granting her 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.

2. The Complaint (Exhibit “A” hereto) alleges in conclusory fashion and upon information and belief that defendant used “an online media distribution system” to download and/or make available for distribution certain copyrighted recordings. Complaint, ¶ 14.

3. The Complaint seeks statutory damages under 17 U.S.C. § 504(c) for each copyrighted recording allegedly infringed by defendant. Complaint, ¶ 16.

4. The minimum statutory damages awarded under 17 U.S.C. § 504(c) are **\$750** for each copyrighted recording.

5. Even if plaintiffs' recordings were infringed, plaintiffs' actual damages would be only about **70 cents** per recording. As set forth in the annexed 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.

6. In other words, plaintiffs are seeking statutory damages equal to **1,071 times** the amount of their actual damages.

7. As set forth in the accompanying memorandum of law, an award of statutory damages that, as here, is so disproportionate to the amount of plaintiffs' actual damages is an unconstitutionally excessive form of punishment barred by the Due Process Clause.

8. 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.

9. A copy of the proposed Second Amended Answer is annexed hereto as Exhibit "B". The only change from the First Amended Answer is the inclusion of a Ninth Affirmative Defense.

10. On April 25, 2006, we wrote to the Court to request a pre-motion conference regarding a motion to amend defendant's answer to include this defense and to move for partial summary judgment based on that ground.

11. The Court subsequently granted us permission to move for both forms of relief.

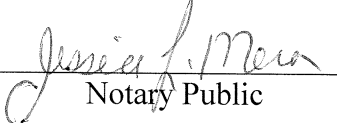
12. After deciding not to proceed with the summary judgment portion of the contemplated motion, we asked plaintiffs' attorneys to stipulate merely to defendant's amending her answer to include the defense of unconstitutional excessiveness.

13. Plaintiffs refused, making this motion necessary.

WHEREFORE, it is respectfully requested that the Court grant the within motion in all respects.


MORLAN TY ROGERS

Sworn to before me this
22nd day of June, 2006


Notary Public

JESSICA L. MORAN
Notary Public, State of New York
No. 01MO6139766
Qualified in Rockland County
Commission Expires 1/23/10