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United States District Court,  
E.D. New York.  
UMG RECORDINGS, INC., et al., Plaintiffs,  
v.  
Marie **LINDOR**, Defendant.  
**Civil Action No. CV-05-1095(DGT).**

Nov. 9, 2006.

[Brian Eugene Moran](#), Robinson & Cole, Stanford, CT, [Richard L. Gabriel](#), Holme Roberts & Owen LLP, Denver, CO, [Richard J. Guida](#), Robinson & Cole LLP, New York, NY, for Plaintiffs.

Marie C. **Lindor**, Brooklyn, NY, pro se.

[Morlan Ty Rogers](#), [Ray Beckerman](#), Vandenberg & Feliu LLP, New York, NY, for Defendant.

*MEMORANDUM AND ORDER*

TRAGER, J.

\*1 The above captioned case is presently before the court on defendant's motion for leave to amend her answer. For the reasons set forth below, the motion for leave to amend is granted.

**Background**

Plaintiffs UMG Recordings, Inc., Warner Brothers Records Inc., Arista Records LLC, Interscope Records, Motown Record Company, L.P., and Sony BMG Music Entertainment (collectively, "plaintiffs") are the owners or licensees of exclusive rights to certain sound recordings under United States copyright law. Plaintiffs allege that defendant, Marie C. **Lindor** ("**Lindor**"), infringed their exclusive rights by downloading, distributing and/or making available for distribution certain sound recordings using an online media distribution system. Complaint ¶ 12. For their injuries, plaintiffs seek statutory damages pursuant to [17 U.S.C. § 504\(c\)\(2\)](#), attorneys' fees and costs pursuant to [17 U.S.C. § 505](#) and injunctive relief pursuant to [17 U.S.C. §§ 502](#) and [503](#). Complaint ¶¶ 16, 17.

Plaintiffs filed their complaint on February 28, 2005. **Lindor**, appearing *pro se*, filed her answer on June 6, 2005. After retaining counsel, **Lindor** filed an amended answer on March 20, 2006. On April 21, 2006, **Lindor** emailed plaintiffs, asking them to consent to the filing of a Second Amended Answer, which would add one additional affirmative defense that the minimum statutory damages plaintiffs seek under [17 U.S.C. § 504\(c\)\(1\)](#) are unconstitutionally excessive. Def.'s Reply Aff., Ex. A. Plaintiffs refused. On April 25, 2006, **Lindor** requested a pre-motion conference on her motion. Def.'s Reply Aff., Ex. B.

**Lindor** now moves for leave to file a Second Amended Answer pursuant to [Rule 15\(a\) of the Federal Rules of Civil Procedure](#) ("FRCP") to include a ninth affirmative defense that the minimum statutory damages of \$750.00 per sound recording sought by plaintiffs pursuant to [17 U.S.C. § 504\(c\)\(1\)](#) of the Copyright Act are unconstitutionally excessive. [\[FN1\]](#)

[FN1](#). The Second Amended Answer **Lindor** proffers sets forth a Ninth Affirmative Defense, which reads "[t]he statutory damages sought by plaintiffs are unconstitutionally excessive and disproportionate to any actual damages that may have been sustained, in violation of the Due Process Clause." Notice of Mot., Ex. B, ¶ 15.

Plaintiffs argue that **Lindor's** motion should be denied because (1) the amendment would be futile; (2) the amendment was presented after undue delay; (3) the amendment will introduce substantial new issues for discovery; and (4) **Lindor** has failed to give notice to the Attorney General required by [28 U.S.C. § 2403](#) and [FRCP 24\(c\)](#).

For the foregoing reasons, **Lindor** is granted leave to file a Second Amended Answer.

### Discussion

Leave to amend pleadings "shall be freely given when justice so requires". Fed.R.Civ.P. § 15(a). The Supreme Court and the Second Circuit have emphasized that leave to amend should only be denied if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party. See Foman v. Davis, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.' "); Min Jin v. Metro. Life Ins. Co., 310 F.3d 84, 101 (2d Cir.2002); Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir.1993); State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir.1981); Credit Suisse First Boston, LLC v. Intershop Commc'n AG, 407 F.Supp.2d 541, 545 (S.D.N.Y.2006). The decision to grant or deny a motion to amend lies within the sound discretion of the district court. Foman, 371 U.S. at 182; Zahra v. Town of Southhold, 48 F.3d 674, 685 (2d Cir.1995).

### (1)

#### Futility

\*2 In opposing **Lindor's** Motion for Leave to Amend, plaintiffs claim that "as a matter of law, the [affirmative] defense that defendant seeks to assert is baseless, and, thus, her motion for leave would be futile and should be denied." Pls.' Br. in Opp'n to Def.'s Mot. for Leave to File Second Amended Answer ("Pls.' Brief") at 6. Plaintiffs assert, in the alternative, that "even if the due process standard could theoretically apply to statutory damages, there is no conceivable state of facts that could be pled or proved here that would support a due process defense." *Id.* at 7.

A proposed amendment will be considered futile if it is "clearly frivolous or advances a claim or defense that is clearly meritless." Slavin v. Benson, 493 F.Supp. 32, 33 (S.D.N.Y.1980). If, however, the proposed amendment raises at least colorable grounds for relief, leave to amend will be granted. See Kaster v. Modification Sys., Inc., 731 F.2d 1014, 1018 (2d Cir.1984); S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Bldg. 1 Hous. Dev. Fund Co., 608 F.2d 28, 42 (2d Cir.1979) ("[I]f the plaintiff has at least colorable grounds for relief, justice does so require" leave to amend to be granted, absent prejudice); Burns v. Imagine Films Entm't, Inc., 165 F.R.D. 381, 385 (W.D.N.Y.1996) ("Where a proposed amendment to add an affirmative defense raises a colorable ground for relief, the amendment should be permitted, absent prejudice to the plaintiff."); Fiske v. Church of St. Mary of the Angels, 802 F.Supp. 872, 877 (W.D.N.Y.1992) ("A motion to amend an answer to raise additional affirmative defenses may be granted to the extent that the proposed affirmative defenses raise colorable grounds for relief."). Importantly, when deciding "a motion for leave to amend, the court need not finally determine the merits of a proposed claim or defense, but merely satisfy itself that it is colorable and not frivolous." T & N plc v. Fred S. James & Co. of New York, 1991 WL 190581, at \*2 (S.D.N.Y. Sept. 16, 1991) (quoting Sumitomo Elec. Research Triangle, Inc. v. Corning Glass Works, 109 F.R.D. 627, 628 (S.D.N.Y.1986)). The moving party is not required to "establish a probability it would prevail on the merits in order for the court to grant its motion to amend ... [i]nstead ... defendant is merely required to assert proposed amendments which are not frivolous on their face." *T & N*, at \*2 (internal citations omitted).

In assessing whether the proposed amendment states colorable grounds for relief, the court is required to adopt the same analysis as applied on a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the FRCP. Silberblatt, 608 F.2d at 42. See also Hampton Bays Connections, Inc. v. Duffy, 212 F.R.D. 119, 123 (E.D.N.Y.2003); Olumuyiwa v. Harvard Prot. Corp., 1999 WL 529553, at \*5 (E.D.N.Y. July 21, 1999). Accordingly, the facts alleged by **Lindor** must be taken as true and viewed in the light most favorable to her. Olumuyiwa, 1999 WL 529553, at \*5 (citing Adar Import & Distrib. Corp. v. Thompson Consumer Elecs., Inc., 1998 WL 760264, at \*2 (E.D.N.Y. Sept. 11, 1998)).

\*3 Thus, at this juncture, the court need only determine whether the an affirmative defense alleging that statutory damages are unconstitutionally excessive is frivolous. Foremost, plaintiffs can cite to no case foreclosing the applicability of the due process clause to the aggregation of minimum statutory damages proscribed under the Copyright Act. On the other hand, **Lindor** cites to case law and to law review articles suggesting that, in a proper case, a court may extend its current due process jurisprudence prohibiting grossly excessive punitive jury awards to prohibit

the award of statutory damages mandated under the Copyright Act if they are grossly in excess of the actual damages suffered. *See* Def.'s Mem. of Law in Supp. of Mot. for Leave to File Second Amended Answer ("Def.'s Memo"); Def.'s Reply Mem. of Law in Supp. of Mot. for Leave to File Second Amended Answer ("Def.'s Reply"). Furthermore, **Lindor** provides a sworn affidavit asserting that plaintiffs' actual damages are 70 cents per recording and that plaintiffs seek statutory damages under the Copyright Act that are 1,071 times the actual damages suffered. *Aff. of Morlan Ty Rogers*, ("Rogers Aff."), ¶¶ 5, 6. *See also* *Aff. of Aram Sinnreich*, ("Sinnreich Aff."), ¶ 2, 3 (attesting that popular music sound recording downloads and consumer license to use same are lawfully obtainable to the public at 99 cents per song, and of that 99 cents, roughly 70 cents per song is paid by the retailer to the record label). As [FRCP Rule 12\(b\)\(6\)](#) requires that this figure be taken as true for purposes of the motion, **Lindor** has alleged a factual basis supporting her affirmative defense.

For purposes of the motion for leave to amend, **Lindor's** affirmative defense is not frivolous. The court will address the merits of the affirmative defense, if necessary, at a later date.

## (2) Delay and Prejudice

Plaintiffs also argue that **Lindor's** motion to amend should be denied because her "delay in asserting the defense has been inordinate" and it would "inject substantial new issues for discovery". Pls.' Brief at 8-9.

The rule in the Second Circuit with respect to delay is that a court may deny a motion for leave to amend "where the motion is made after inordinate delay, no satisfactory explanation is offered for the delay and the amendment would prejudice other parties." [Grace v. Rosenstock](#), 228 F.3d 40, 53-54 (2d Cir.2000) (internal citations omitted). Thus, while delay is one factor for a court to consider when deciding whether to grant leave to amend, delay alone is not enough to warrant denial of the motion. Plaintiffs must also show bad faith or prejudice to the opposing party. *See* [Block](#), 988 F.2d at 350; [State Teacher's Ret. Bd. v. Fluor Corp.](#), 654 F.2d, 843, 856 (2d Cir.1981) ("Mere delay ... absent a showing of bad faith or undue prejudice does not provide a basis for the district court to deny the right to amend."); [Middle Atl. Utils. Co. v. S.M.W. Dev. Corp.](#), 392 F.2d 380, 384 (2d Cir.1968) ("[Delay] may be a factor to be considered but unless the motion either was made in bad faith or will prejudice [the nonmoving party], delay by itself is not enough to deny the requisite relief."); [City of New York v. B.L. Jennings, Inc.](#), 219 F.R.D. 255, 256-57 (E.D.N.Y.2004) (citing *Middle Atlantic* for the same proposition). However, " 'the longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice.' " [Block](#), 988 F.2d at 350 (quoting [Evans v. Syracuse City Sch. Dist.](#), 704 F.2d 44, 47 (2d Cir.1983)).

\*4 In determining whether the granting of the amendment would be unduly prejudicial, courts consider whether the assertion of the new claim would "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction". *Id.*

**Lindor** moved to file a second amended answer one year from the date her original *pro se* answer was filed, but only one month from the date her first amended answer, drafted by counsel, was filed. The one month delay between the filing of the first amended answer and this motion is not a lengthy delay. Even if the court were to consider the relevant time period to be the one year between the filing of **Lindor's** original *pro se* answer and the current motion, a one year delay, without more, does not constitute inordinate delay. *See, e.g.,* [United States on Behalf of Maritime Admin. v. Continental Illinois Nat. Bank & Trust Co.](#), 889 F.2d 1248, 1254-56 (2d Cir.1989) (allowing amendment after approximately 16-month delay); [Fluor Corp.](#), 654 F.2d at 845, 856 (three-year delay); [Middle Atl. Utils. Co.](#), 392 F.2d at 384 (three-year delay); [T & N](#), 1991 WL 190581, at \*3 (approximately one-year delay).

Plaintiffs do not suggest that **Lindor** acted in bad faith or with dilatory motives in seeking leave to file a second amended answer. The only claim of prejudice plaintiffs allege in their motion is that the assertion of the new affirmative defense would "inject substantial new issues for discovery," particularly it would "open an entirely new round of expert and fact discovery [and] would serve no purpose other than to increase the costs for all parties". Pls.' Brief at 9. The proposed affirmative defense requires the court to assess whether the minimum statutory damages mandated under the Copyright Act are so grossly excessive of the actual harm suffered by the plaintiffs as to invoke the due process clause. Accordingly, the affirmative defense necessitates an inquiry into actual damages suffered by plaintiffs. [\[FN2\]](#) Since

discovery is still ongoing in this case and no date has been set for trial, it is hard to see how the addition of an affirmative defense would prejudice the plaintiffs other than simply expanding the scope of discovery to include the valuation of a license for illegal reproduction and distribution of the sound recordings. [Continental](#), 889 F.2d at 1255 (holding that "the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading"); [Middle Atlantic](#), 392 F.2d at 386 (holding that "the burden of further discovery and motions is not a satisfactory basis to deny the motion to amend"); [T & N](#), 1991 WL 190581, at \*4 ("an increase in plaintiffs' discovery burden is simply not sufficient prejudice to require refusal of defendant's amendments"). The fact that plaintiffs served their Rule 26(a)(2) expert disclosures on April 12, 2006 does not constitute significant prejudice warranting denial of the motion. As **Lindor** points out in her motion, because plaintiffs' expert report is a stock report, identically generated in every recording industry case, it does not appear that granting the motion will cause significant prejudice, at least not any more so than if plaintiffs had known about the affirmative defenses from the onset of discovery. Def.'s Reply Aff. ¶ 4. See, e.g., [S.S. Silberblatt](#), 608 F.2d at 43 (holding "the burden of undertaking discovery, which [the opposing party] would have shouldered had the proposed amendment been incorporated in the complaint as originally filed, hardly amounts to prejudice outweighing the policy of [Rule 15\(a\)](#) in favor of permitting the parties to obtain an adjudication of the merits"); [Hampton Bays Connections, Inc.](#), 212 F.R.D. at 123-124 (citing *S.S. Silberblatt* for the same proposition). Thus, no prejudice to the plaintiffs would occur if the answer is amended to include the affirmative defense that the minimum statutory damages sought by plaintiffs are unconstitutionally excessive.

[FN2](#). **Lindor** contends that the actual damage to plaintiffs is 70 cents per recording. Rogers Aff. ¶¶ 5, 6. See also Sinnreich Aff. ¶ 2, 3. Plaintiffs do not provide a figure, but claim that actual damages caused by violations of the exclusive distribution right far exceed the minimum statutory damages of \$750.00 per recording. Pls.' Brief at 7.

### (3)

#### Requisite Notice to the Attorney General

\*5 28 U.S.C. § 2430(a) and [FRCP 24\(c\)](#) require the court to notify the Attorney General of the United States when the constitutionality of a federal statute affecting the public interest is challenged and neither the United States nor one of its officers, agents, or employees is a party. Additionally, Local Rule 24.1 of the Southern and Eastern Districts of New York ("Local Rule") requires the party questioning the constitutionality of an Act of Congress affecting the public interest to notify the court in writing to enable the court to be able to comply with 28 U.S.C. § 2430(a). Local Rule 24.1. Plaintiffs urge the court to deny the motion for leave to amend because **Lindor** failed to provide the Attorney General with this notice, or, in the alternative, to order **Lindor** to provide the requisite notice. Pls.' Brief at 9.

A plain reading of Local Rule 24.1 and of the applicable statutes makes it clear that the challenging party is responsible for notifying the court of the existence of the constitutional question, and the court, in turn, bears the burden of notifying the Attorney General. See Local Rule 24.1 ("such party shall notify the court in writing"); [FRCP 24\(c\)](#) ("the court shall notify the Attorney General"); 28 U.S.C. § 2430(a) ("the court shall certify such fact to the Attorney General"). The Second Circuit has affirmed the plain meaning of 28 U.S.C. § 2430(a). See [Merrill v. Town of Addison](#), 763 F.2d 80, 82 (2d Cir.1985) ("the obligation to certify rests with the court, not with the parties").

Here, **Lindor** alerted the court to the fact that she wanted to interpose the affirmative defense that statutory damages in the amount of \$750.00 per recording would be unconstitutionally excessive in her April 25, 2006 pre-motion conference letter and June 22, 2006 follow-up pre-motion conference letter to the court, and thus fulfilled her obligation under Local Rules 24.1. If the court determines that the constitutionality of an Act of Congress affecting the public interest is in issue, it will fulfill its obligation under [FRCP 24\(c\)](#) and 28 U.S.C. § 2430(a) and alert the Attorney General at a later date. Thus, plaintiffs' argument is baseless and does not factor into the decision of whether to grant or deny **Lindor's** motion for leave to amend.

#### Conclusion

The proposed affirmative defense is not futile and the plaintiffs will not suffer undue prejudice as a result of the amendment. Neither [FRCP 24\(c\)](#) nor 28 U.S.C. § 2430(a) impacts the decision whether to grant leave to amend. For the foregoing reasons, **Lindor's** motion for leave to file a Second Amended Answer to include a ninth affirmative defense that the minimum statutory damages of \$750.00 per sound recording sought by plaintiffs pursuant to [17 U.S.C. § 504\(c\)\(1\)](#) of the Copyright Act are unconstitutionally excessive is granted.

SO ORDERED.

Slip Copy, 2006 WL 3335048 (E.D.N.Y.)

**Motions, Pleadings and Filings ([Back to top](#))**

- [1:05cv01095](#) (Docket) (Feb. 28, 2005)
- [2005 WL 693877](#) (Trial Pleading) Complaint for Copyright Infringement (Feb. 22, 2005)

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