

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
BAY CITY DIVISION

PRIORITY RECORDS LLC, a California limited liability company; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; MOTOWN RECORD COMPANY, L.P., a California limited partnership; WARNER BROS. RECORDS INC., a Delaware corporation; SONY MUSIC ENTERTAINMENT INC., a Delaware corporation; UMG RECORDINGS, INC., a Delaware corporation; and ARISTA RECORDS LLC, a Delaware limited liability company,

Plaintiffs,

v.

BRITTANY CHAN,

Defendant.

CASE NO. 05-CV-73727-DT
HON. LAWRENCE P. ZATKOFF

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PLAINTIFFS' MOTION TO RECONSIDER COURT'S DISMISSAL

AND REQUEST FOR STATUS CONFERENCE

Plaintiffs, by and through their counsel, respectfully move this Court to reconsider its Order and Judgment of March 27, 2006 and request a status conference to discuss alternatives to identifying and funding a GAL for the Defendant. In support of this Motion, Plaintiffs state the following:

A. Plaintiffs Believed They Were Submitting A Functional Proposal To The Court.

Plaintiffs were very surprised by this Court's dismissal of the case. Like this Court, Plaintiffs would like to resolve the GAL issue and reach the merits of the case. In responding to this Court's Order of February 13, 2006, Plaintiffs respectfully suggest that they were, in fact, trying to provide this Court with a functional proposal for appointing and paying for a GAL. While Plaintiffs acknowledge that in their response to the Court's Order they did not label their suggestion as a "functional proposal," they intended it as one.

Prior to crafting its response, Plaintiffs attempted to locate an attorney who would be willing to serve as a GAL on a pro bono basis. Plaintiffs' counsel considered various child advocacy programs and made personal calls to inquire as to whether two separate programs at the University of Michigan Law School (legal aid and the child advocacy clinic) could provide a GAL. Plaintiffs' counsel was told that this matter was not the type of case that either program takes on a pro bono basis. Plaintiffs have also attempted to locate counsel in the area who might be willing to act as a GAL. However, given the nature of this case (a civil copyright infringement suit against a minor from a family of apparent means whose mother implicated her as the person who illegally uploaded and downloaded music on the internet), attorneys appear unwilling to volunteer their time to defend Ms. Chan.

Assuming that payment can be assured, Plaintiffs do not believe that it will be difficult to identify a suitable GAL who would be willing to take the case. Plaintiffs believe this Court is aware of that fact and believe that this is why the Court suggested the Plaintiffs pay into an escrow account pending resolution of the case. As a result of this belief, Plaintiffs focused their response to this Court's Order to the section dealing with payment of a GAL. As such, Plaintiffs believed they were putting forth a "functional proposal" in asking this Court to consider either

the Defendant's or her parent's abilities to pay. It was not Plaintiffs' intent to simply reject the Court's non-binding suggestion out of hand. Rather, Plaintiffs believe that Ms. Chan and her parents have more than sufficient assets to pay for Ms. Chan's GAL, and therefore, should.

B. Plaintiffs Were Unaware That This Court Would Not Read Its Response As Functional And Had No Warning That This Court Would Dismiss The Case If It Did Not Regard It's Response As Functional.

This Court has the power to dismiss an action for failure of a plaintiff to comply with any court order. Fed. R. Civ. P. 41(b). However, this power has been described as “the most severe sanction that a court may apply.” *M.S. v. Wermers*, 557 F.2d 170, 175 (8th Cir. 1977); *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366, 368 (5th Cir. 1967). Plaintiffs were unaware that this Court would construe their response as a failure to comply with a Court Order and had no hint that were they deemed not to be in compliance, they would face outright dismissal.

The Sixth Circuit has held that “dismissal of an action for an attorney's failure to comply” should only be ordered where there is a clear record of delay or contumacious conduct.” *Harmon v. CSX Transportation, Inc.*, 110 F.3d 364, 367 (6th Cir. 1997). Most cases involving dismissal concern discovery abuses, but Plaintiffs believe the factors the Sixth Circuit uses to review such dismissals are relevant to evaluating whether outright dismissal was warranted. The Sixth Circuit considers four factors:

- (1) whether the party's failure to cooperate is due to willfulness, bad faith, or fault;
- (2) whether the adversary was prejudiced by the dismissed party's failure to cooperate;

- (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and
- (4) whether less drastic sanctions were imposed or considered before dismissal was ordered.”

Harmon v. CSX Transportation, Inc., 110 F.3d 364, 367 (6th Cir. 1997), *citing Regional Refuse Sys. Inc. v. Inland Reclamation Co.* 842 F.2d 150, 153-55 (6th Cir. 1988).

Plaintiffs respectfully submit that none of these four factors applies here. First, it was not bad faith for Plaintiffs to decline to pay for a GAL for Defendant or to suggest that she or her parents pay for a GAL. Furthermore, as discussed above, Plaintiffs attempted in good faith to comply with this Court’s Order. Plaintiffs did not outline the steps that they took to find a GAL for Ms. Chan and may have focused too much on why they believe that it would be inappropriate for them to pay for a GAL for Ms. Chan; however, Plaintiffs did diligently seek alternatives to this Court’s non-binding suggestion that the Plaintiffs pay and believed that the true issue before the Court was (and remains) the payment of the GAL for anticipated services. Plaintiffs in good faith believed that their suggestions were in compliance with the Court’s order.

Second, Defendant has not been prejudiced in any way by any of Plaintiffs’ conduct. To the contrary, Defendant would obtain a remarkable windfall were this Court to dismiss the claims against her for her admitted infringement of Plaintiffs’ copyrighted works. She would, in essence, get a free pass for her infringement of Plaintiffs’ copyrights. Indeed, Defendant would be able to escape not only without paying damages, but also with no injunction preventing future infringement. Further, as the Court acknowledges in its Order of March 27, 2006, Defendant Chan has neither answered nor filed any response to the instant motion. Opinion and Order, *Priority Records LLC v. Chan*, No. 05-CV-73727, 2 (E.D. Mich. March 27, 2006). Thus,

Defendant has neither incurred any unnecessary expense, nor has her defense of this action been prejudiced in any way.

Third, Plaintiffs were unaware, and had no reason to be aware, that this Court was even contemplating dismissal if it did not deem Plaintiffs' response as an adequate "functional proposal." "Where a plaintiff has not been given notice that dismissal is contemplated, 'a district court should impose a penalty short of dismissal unless the derelict party has engaged in bad faith or contumacious conduct.'" *Harmon*, 110 F.3d at 367, quoting *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988). MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY defines "contumacious" as "stubbornly disobedient; rebellious." 272 (11th ed., 2003). As noted above, although Plaintiffs recognize that the Court did not believe that their response was appropriate, Plaintiffs respectfully submit that they were attempting to respond in good faith to the Court's request and that any misunderstanding as to what the Court was seeking cannot properly be deemed to have been "stubbornly disobedient" towards this Court.

In the absence of "contumacious conduct, an alternative sanction that would protect the integrity of the pretrial procedures should be utilized rather than dismissal with prejudice." *Harmon*, 110 F.3d at 368, citing *Freeland v. Amigo*, 103 F.3d 1271, 1280 (6th Cir. 1997). This Court's Order asked for a functional proposal to identify and pay for a GAL and made a non-binding suggestion that Plaintiffs pay into an escrow fund pending resolution of the case. Order, at 5. Even accepting this Court's conclusion that Plaintiffs' response did not meet this Court's standard for a response, Plaintiffs had no warning that their response was inadequate or that such an inadequate response would result in the harsh penalty of dismissal with prejudice. To the contrary, as noted above, Plaintiffs believed that they had provided a good faith response to the Court's request.

Finally, there are certainly less drastic sanctions that could have been imposed by the Court. Although Plaintiffs believe that their good faith effort to comply with this Court's Order does not warrant any sanction at all, as noted above, under settled Sixth Circuit law, a trial court must consider alternative options prior to dismissing a case as a sanction. Plaintiffs are aware of no such alternative sanctions considered by the Court.

For the above stated reasons, Plaintiffs respectfully submit that Plaintiffs' good faith actions, the lack of prejudice to Ms. Chan, and the lack of warning from this Court all indicate that outright dismissal was unwarranted. Thus, Plaintiffs respectfully request that the Court reconsider and withdraw that dismissal.

C. Plaintiffs Were Concerned With Any Precedent That Required Plaintiffs To Pay For A Minor Defendant's GAL Fees Prior to Consideration Of Defendant's Ability To Pay And Resolution Of The Merits Of The Case, And Therefore, Focused Much of Its Response On That Issue.

This case is not factually uncommon for this type of litigation. This case is similar to hundreds of other cases across the country brought by Plaintiffs in an effort to stem the tide of rampant copyright infringement on various peer-to-peer ("P2P") networks over the internet. Accused parents often implicate their minor children and then refuse to even consider accepting responsibility for the acts of their children. When this happens, Plaintiffs sometimes have little choice, but to bring suit against the minor child. Were Plaintiffs forced to pay up front for each GAL in such cases, Plaintiffs' ability to protect its copyrights would be significantly affected. Parents would be able to shift the blame to their children, deny knowledge of their children's activities and force the Plaintiffs to pay for that child's legal fees. Parents or minor children would have no incentive to resolve the matter (as is normally present when each side pays its own attorneys fees), or even to litigate solely on the merits. Worse, when the child ultimately loses, the Parents and the child simply declare the child has no assets from which to recoupe the

GAL costs as required by Fed. R. Civ. P 54(b). The end result is that Plaintiffs could be left with a totally hollow victory that would do little to deter rampant illegal downloading by teenagers.

Thus, while Plaintiffs understand this Court's role in protecting minor children and respect this Court's concern for the payment of a GAL, Plaintiffs respectfully suggest that the Court's dismissal effectively placed solely on Plaintiffs' shoulders the responsibility of either paying for a GAL, or finding pro bono counsel for Defendant and absolved Defendant of all responsibility for her illegal actions. Therefore, Plaintiffs request that this Court reconsider its dismissal and set a status conference to discuss the GAL issue directly with Plaintiffs' appointed representative and counsel on these matters.

D. Plaintiffs Suggest The Following Topics For Discussion Regarding Resolution Of The GAL Issue.

Plaintiffs suggest this Court could consider the following topics for discussion at a status conference.

- 1) Whether Ms. Chan is now of sufficient age and capability to be able to represent herself or obtain legal counsel without the aid of a GAL?
- 2) In the event the Court still believes that Ms. Chan needs a GAL, the process for locating a GAL who will take the case for a fee. Plaintiffs believe that this will not be an issue.
- 3) Whether Brittany Chan has the means to pay for a GAL herself, pending the outcome of the litigation?
- 4) Whether it is appropriate to ask Brittany's parents to contribute to Brittany's defense?

- 5) Whether Candy Chan, Brittany's mother, might now be an appropriate GAL, since her potential conflict may have been resolved with the dismissal of her with prejudice?
- 5) Whether it is more appropriate to dismiss the case without prejudice and allow the suit to be recommenced when Brittany reaches the age of majority?

WHEREFORE, Plaintiffs respectfully ask this Court to reconsider its dismissal of this case and request a status conference to discuss alternatives to identifying and funding a GAL for the Defendant.

Respectfully submitted,

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Dated: April 10, 2006

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFFS' MOTION TO RECONSIDER COURT'S DISMISSAL AND REQUEST FOR STATUS CONFERENCE** was forwarded in accordance with the Federal Rules of Civil Procedure on this 10th day of April, 2006, via First Class Mail as follows:

BRITTANY CHAN
35 Slatestone Drive
Saginaw, MI 48603

s/Matthew E. Krichbaum
Matthew E. Krichbaum, Esq.