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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GEORGE CLINTON, an individual,

Plaintiff,

v.

WILL ADAMS, p/k/a will,I,am individually and d/b/a will.i.am music publishing , et al.,

Defendants.

Case No. CV 10-09476-ODW-PLA

The Honorable Otis D. Wright II

GEORGE CLINTON'S NOTICE OF MOTION AND MOTION TO BE RELIEVED FROM DEEMED ADMISSIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Action Filed: December 10, 2010

TO THE PARTIES HERETO AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 26, 2012 at 1:30 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Otis D. Wright, II of the above-entitled Court located at 312 N. Spring Street, Courtroom 11, Los Angeles, California 90012, Plaintiff George Clinton ("CLINTON") will and hereby does move to be relieved from deemed admissions.

This Motion is brought pursuant to Rule 36(b) of the Federal Rules of Civil Procedure, on the ground that CLINTON should be excused from being deemed to have admitted the Requests for Admission set forth in Defendants' First Set of Requests for Admission dated November 9, 2011 within the meaning of Fed.R.Civ.P. 36(b).

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities and Exhibit(s) attached hereto, the pleadings and records on file in this and related actions, and such additional authority and argument as may be presented in any Reply and at the hearing on this Motion.

DATED: February 16, 2012

By: /s/ Jeffrey P. Thennisch

Attorneys for Plaintiff, George Clinton

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In accordance with the provisions of Fed.R.Civ.P. 36(b), L.R. 83-2.3.2 of the Central District Of California, and the Ninth Circuit's prior decision in *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1430-31 (9th Cir. 1996) which discusses "service" via the Federal Express private delivery service under Fed. R. Civ. P. 5(b)(2)(C), Clinton respectfully moves this Court to withdraw and/or amend any putative "admission" that may flow from the failure by CLINTON's counsel to respond, or object to, the First Set Of Requests For Admission Propounded By Defendant Will Adams To Plaintiff George Clinton dated November 9, 2011 and attached hereto at Exhibit A.

As set forth and shown at Exhibit A, Page 7, of the requests for admission by Defendant Adams, putative service to both CLINTON's local counsel, Larry Haakon Clough, and CLINTON's undersigned Pro Hac Vice counsel, Jeffrey P. Thennisch, was transmitted via the Federal Express private delivery service[1]. CLINTON, and each of his counsel, acknowledge that responses to the November 9, 2011, requests for admission were not provided to counsel for Defendant Will Adams until Friday, February 10, 2012 (See Exhibit B), which was within twenty-four hours after counsel

[1] This writing is not intended to be an excuse for any dilatory conduct, but rather simply describes and supports a particular situation where the withdrawal or amendment of any putatively deemed admission(s) meet(s) the criteria set forth in Rule 36(b).

for Defendant Will Adams provided the requests at Exhibit A to CLINTON's undersigned counsel via e-mail on February 9, 2012, and which was the first time that the undersigned counsel received, and was aware of, the actual requests at Exhibit A.

At the present time, counsel for Defendant Will Adams has asserted that the November 9, 2011, requests for admission are deemed admitted. As a threshold matter, CLINTON initially questions whether the putative service by the Federal Express private delivery service upon both CLINTON's local counsel, Larry Haakon Clough, and CLINTON's undersigned Pro Hac Vice counsel, Jeffrey P. Thennisch, as shown at Exhibit A, Page 7 constitutes proper service under Rule 5(b)(2)(C). If the putative service by Federal Express does not constitute proper service under Rule 5(b)(2)(C), then it is submitted that CLINTON's February 10, 2012, responses to the First Set Of Requests For Admission Propounded By Defendant Will Adams To Plaintiff George Clinton shown at Exhibit B are, in fact, timely and not subject to admission since they were provided and responded to within 24 hours after CLINTON's undersigned counsel received them from counsel for Defendant Will Adams on February 9, 2012, via an e-mail attachment.

In accordance with the local rules of the Central District of California regarding concurrence, the undersigned attorney states that a written request for concurrence was made to opposing counsel on Friday, February 10, 2012 and was followed by a telephonic discussion. Concurrence was sought, but not obtained.

To the extent that Defendant Will Adams asserts that CLINTON's February 10, 2012 responses to the First Set Of Requests For Admission at Exhibit B are untimely and should be treated as "admitted," CLINTON brings this motion pursuant to Fed.R.Civ.P. 36(b), which sets forth that the Court, upon motion, may permit any deemed admissions to be withdrawn. Rule 36(b) sets forth a two-pronged test: whether deeming the matters admitted would short-circuit an actual presentation of the merits of the case, and whether the opposing party would be prejudiced by allowing withdrawal of the admissions. Both considerations make it appropriate for the deemed admissions, if any, to be withdrawn here. First, if CLINTON were deemed to have admitted these requests, there could be no adjudication of the merits of CLINTON's claims at all since the admissions seek information regarding Defendant Will Adams' putative, and wholly unwritten, affirmative defense that Defendant Will Adams possessed a license form CLINTON to utilize the musical work at issue. Second, Defendant Will Adams would not be prejudiced by withdrawal of the admissions because CLINTON has consistently denied Defendant Will Adams' allegations from the very outset of this case that any putative "license" existed between CLINTON and Defendant Will Adams ever existed, and any and all of the Defendants have had many opportunities to pursue in discovery evidence that might support their claims, including providing documentary evidence, if any, of a supposed explicit or written "license" supporting this affirmative defense against CLINTON's claims.

In addition, other factors identified by the Ninth Circuit as bearing on this analysis all support granting of CLINTON's motion: CLINTON can show good cause for the brief delay, and the Plaintiff's case on the merits remains strong, especially where the most central issue of the existence of a supposed license is inherently factual. In these circumstances, it would be a manifest injustice to deem the requests admitted, and the present Motion should be granted, which will allow this case to proceed on the merits, if it cannot be resolved by a mutual agreement which the parties have previously stipulated to at least two prior extensions of discovery at D/E 65 and D/E 69, as well as the voluntary dismissal of certain defendants at D/E 71.

Plaintiff further asserts that the First Set of Requests for Admission propounded by Defendant Will Adams to Plaintiff George Clinton was directed to Plaintiff by Defendant Will Adams only and should not be extended to any other Defendants.

II. FACTUAL BACKGROUND

As set forth at Exhibit A, Page 7, on November 9, 2011, Defendant Will Adams dropped off with Federal Express his First Set of Requests for Admission to Plaintiff CLINTON. The requests were shipped via Federal Express to be delivered to counsel for CLINTON on November 10, 2011. Although the proof Of Service at Exhibit A, Page 7 shows that other counsel of record were served with these same Requests For Admission via the U.S. Postal Service, each of CLINTON's attorneys received

putative service via the Federal Express delivery service.

Although CLINTON readily admits that the Federal Express receipts at Exhibit A speak for themselves, the undersigned counsel states that he did not receive the requests for admission at Exhibit A until counsel for Defendant Will Adams informed him that Defendant Will Adams would be seeking summary judgment based upon the putatively admitted requests for admission during the week of February 6, 2012. CLINTON's undersigned counsel requested copies of the request to admit at Exhibit A together with a proof of service and counsel for Defendant Will Adams provided the materials at Exhibit A on February 9, 2012.

Upon receipt of the requests to admit on Exhibit A on February 9, 2012, CLINTON provided responses on February 10, 2012 within 24 hours of the undersigned counsel first receiving them from opposing counsel.

III. ARGUMENT

A. CLINTON's Responses To Defendant Will Adams's First Set of Requests for Admission on February 10, 2012, Were Timely Because Defendant Did Not Comply With Proper Service Under Fed. R. Civ. P. 5 When He Used Federal Express To Serve Plaintiff On November 9, 2011

While Fed. R. Civ. P. 4 pertains to service of a complaint on a party, Fed. R. Civ. P. 5 addresses service of other papers. It is well-established that both rules permit service "by mail," but several circuits, including the Ninth Circuit have held that "mail" does not mean the Federal Express private delivery service. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1430-31 (9th Cir. 1996).

Specifically, the court in *Magnuson* addressed this rather similar issue as to whether delivery by Federal Express qualified as "mail" for the purposes of compliance with Fed. R. Civ. P. 5(b). *Id.* at 1431. The Ninth Circuit reasoned that the term "mail" bears it traditional meaning of "U.S. mail" and that allowing private delivery such as by Federal Express to qualify as "mail" for purposes of the federal rules does not comply with the intentions of Congress and would lead to confusion. *Id.* The *Magnuson* court explained that were the court to allow delivery by Federal Express qualify as "mail" under Rule 5, it would force further analysis of whether Federal Express qualified as "mail" under Rule 6(e), which would add three days to computation of time to respond in a timely fashion. Because Federal Express usually delivers overnight, a likely argument would arise "that Congress did not intent that Rule 6(e) apply to service by Federal Express, *i.e.*, that Federal Express is not mail under Rule 6." *Id.* In the interest of preserving consistency within the Rules and preventing confusion and different interpretations of the Rules, the *Magnuson* court concluded that Federal Express does not mean "mail" for the purposes of Federal Rules of Civil Procedure, and as such, "Federal Express does not satisfy the requirements of Rule 5(b)." *Id.*

Defendant Will Adams's counsel delivered the First Set of Requests for Admission at Exhibit A via Federal Express to each of CLINTON's local counsel and the undersigned counsel. See Defendant's own Proof of Service at Exhibit A, Page 7.

Although CLINTON is not attempting to split hairs or excuse any dilatory conduct, it is submitted that Defendant Will Adams failed to use the U.S. mail services and, under *Magnuson*, the Defendant failed to comply with proper service under Fed. R. Civ. P. 5(b). Interestingly, the Defendant served all other parties by U.S. mail in compliance with Rule 5. Once again, neither CLINTON nor his counsel are attempting to be coy in any manner. If the undersigned attorney had, in fact, actually received the requests to admit at Exhibit A in November 2011, he would have addressed them regardless of how they were served. Thus, this is a situation where the lack of proper service under Rule 5 may have exacerbated the issue. Furthermore, even with Federal Express, the Defendant had an option to ensure that his First Set of Requests for Admission was indeed delivered by choosing that Plaintiff's counsel's signature is obtained upon receipt. Had Defendant Will Adams's counsel chosen delivery upon Plaintiff's counsel's signature, he would have been put on notice that Plaintiff's counsel did not receive the documents and could have remedied the situation.

Defendant Will Adams's counsel now asserts that Plaintiff's responses were untimely when, indeed, CLINTON's counsel did not physically receive the First Set of Requests for Admission until February 9, 2012, by e-mail from Defendant's counsel. Upon receipt of the document by e-mail, the undersigned counsel responded within 24 hours, and provided Defendant Will Adams's counsel with responses on February 10, 2012 via email and regular mail. See Exhibit B hereto.

Because Defendant Will Adams's counsel did not comply with proper service upon Plaintiff CLINTON or CLINTON's counsel (local or otherwise), it cannot be asserted the Requests for Admission at Exhibit A are deemed admitted. More simply stated, a party cannot reasonably obtain a benefit under Rule 36 and simultaneously fail to comply with the underlying requirements of Rule 5. Rather, as shown at exhibit B, Plaintiff responded on February 10, 2012, that is virtually immediately after receipt of Defendant Will Adams's the First Set of Requests for Admission on February 9, 2012. Therefore, Plaintiff CLINTON has arguably responded in a timely fashion.

B. In The Alternative, CLINTON Should Be Allowed To Withdraw Any Putative Admissions Because Withdrawal Would Promote Prosecution Of The Merits And Defendant Will Adams's Would Not Be Prejudiced By The Withdrawal

Assuming *arguendo* that CLINTON's Responses to Plaintiff's First Set of Requests for Admission at Exhibit B were, in fact, late despite improper service on the Plaintiff under Fed.R.Civ.P. 5, and are treated as "admitted," CLINTON brings this motion to withdraw admissions pursuant to Fed.R.Civ.P. 36(b).

Federal Rule of Procedure 36(a)(3) provides that "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." However, Federal Rule of Civil Procedure 36(b) provides that a "matter admitted under this rule is conclusively established *unless the court, on motion, permits the admission to be withdrawn or amended*." (Emphasis added.) The

rule goes on to state that "the court may permit withdrawal or amendment if it would promote the prosecution of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits."

The Ninth Circuit confirmed this two-prong test as follows: (1) presentation of the merits of the action must be preserved, and (2) the party who obtained the admission must not be prejudiced by the withdrawal. *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001). The court in *Hadley v. U.S.*, 45 F.3d 1345, 1348 (9th Cir. 1995) specified that the first prong is met when "upholding the admissions would practically eliminate any presentation of the merits of the case." In Hadley, the denial of the motion to withdraw the admissions would have eliminated any need to determine merits because the admissions "essentially admitted the necessary elements" of the case. *Id.* Just like in *Hadley*, if CLINTON's motion to withdraw the putative admissions is denied, and he is deemed to have admitted Defendant Will Adams's First Set of Requests for Admission at Exhibit A, there would be no adjudication of the merits because CLINTON would be deemed to have admitted that Defendant Will Adams possessed a license from CLINTON to utilize the musical work at issue. In other words, CLINTON would be deemed to have admitted something he has been consistently denying from the very outset of this case (i.e. that any of the Defendants to this action had any type of "license", express or implied, to use his musical works.

Because this is a central issue of this case and the subject matter of a putative affirmative defense to the cause of action for copyright infringement under 17 U.S.C. §501, the first prong of the test in Rule 36(b), just like in *Hadley*, is met as the "withdrawal of the admissions would certainly facilitate a presentation of the merits of [CLINTON]'s case" *Id.*

Since the disposition of merits is favored, therefore, the burden of proving prejudice is on the party receiving the admissions. *Sonoda,* 255 F.3d at 1039. The second prong "relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence." *Hadley*, 45 F.3d at 1348. Courts have found prejudice mostly in cases where the motion for withdrawal was submitted in the middle of the trial or once a trial began. *Id.*, *see, e.g., 999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985) (holding under prejudice prong of FRCP 30(b) test that "a more restrictive standard" applies in permitting withdrawal of deemed admissions once trial has commenced).

In *Hadley*, the government argued prejudice despite the fact that the other party filed the motion to withdraw before the trial began. *Hadley*, 45 F.3d at 1349. The government further argued that they would have cross-examined the other party in a much more vigorous fashion during a deposition if Hadley filed his responses in a timely fashion. *Id.* The *Hadley* court held that because the cases in which motion for withdrawal require a high level of reliance on the admissions, the government did not

meet its burden, and the inconvenience the government suffered because of the withdrawal could be overcome by various means, such as cross-examination at trial. Just like in *Hadley*, CLINTON is requesting a motion for withdrawal of admissions before any trial has commenced and, indeed, before the close of discovery. Furthermore, Defendant Will Adams is not prejudiced by the withdrawal because CLINTON has consistently denied Defendant Will Adams's allegations that any putative "license" between CLINTON and Defendant Will Adams ever existed from the very outset of this case. Additionally, the Defendant has had and will have (no discovery cut-off has passed) many opportunities to pursue in discovery, evidence that might support his claims, including providing documentary evidence, if any, of a supposed explicit or written "license" supporting his defense against CLINTON's claims. Still further, loss of a basis for summary judgment has been found to be insufficient legal prejudice to justify binding plaintiff to deemed admission. *Conlon v. U.S.*, 474 F.3d 616, 623 (9th Cir. 2007), *citing Raiser v. Utah County*, 409 F.3d 1243, 1246-47 (10th Cir. 2005). This is particularly relevant here since it was Defendant Will Adams request to discuss summary judgment which alerted CLINTON and his attorneys to the existence of the requests for admission at Exhibit A.

Lastly, CLINTON can show good cause for the brief delay, and the Plaintiff's case on the merits remains strong, especially where the most central issue of the existence of a supposed license is inherently factual.

Here, the Ninth Circuit has identified two additional factors that a court should consider in determining whether to exercise its discretion to allow deemed admissions to be withdrawn if a party has satisfied this two-part test: "whether the moving party can show good cause for the delay and whether the moving party appears to have a strong case on the merits." *Conlon,* 474 F.3d at 625. The dilatory conduct in *Conlon* was caused by plaintiff's failure to keep in touch with his attorney for no excusable reasons. *Id.* Unlike in the cited case, CLINTON can show good cause for responding in February 2012 instead of December 2012 due to the fact that neither CLINTON nor his counsel were served properly in compliance in with Rule 5, as explained forth above in Section A. In addition, although not offered as an excuse, the parties did extend the discovery response period twice by Order during this same timeframe and did successfully negotiate the voluntary dismissal of some named defendants. Furthermore, CLINTON's case remains strong as the most central issue of the existence of a supposed license is inherently factual.

Because both factors under the Rule 36(b) test have been met, and two additional factors of good cause for the delay and Plaintiff's strong case on the merits have been complied with as well, Plaintiff CLINTON respectfully asks the Court to grant his Motion to Withdraw his admissions.

IV. CONCLUSION

For the reasons stated above, CLINTON's motion to be relieved from deemed

admissions should be granted. CLINTON also respectfully suggests that oral argument is not necessary for the adjudication of this motion.

DATED: February 16, 2012

/s/Jeffrey P. Thennisch
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CERTIFICATE OF SERVICE

I, hereby certify that on February 16, 2012, I electronically filed the foregoing:

GEORGE CLINTON'S NOTICE OF MOTION AND MOTION TO BE RELIEVED FROM DEEMED ADMISSIONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

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