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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON HENLEY, MIKE CAMPBELL and DANNY KORTCHMAR,

Plaintiffs,

v.

CHARLES S. DEVORE and JUSTIN HART,

Defendants.

Case No. SACV09-0481 JVS (RNBx)

PLAINTIFFS' NOTICE OF MOTION AND MOTION *IN LIMINE* NO. 3 TO PRECLUDE DEFENDANTS FROM RELITIGATING UNDISPUTED FACTS OR THE COURT'S DETERMINATION OF INFRINGEMENT

Pretrial Conference Date: July 19, 2010
Time: 11:00 a.m.
Ctrm: Hon. James V. Selna

Trial Date: August 3, 2010

NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on July 19, 2010 at 11:00 a.m., in accordance with the Court's August 11, 2009 Order Setting Dates for Jury Trial and May 25, 2010 Order Regarding Continuation of Settlement Conference, Pretrial Conference and Trial Dates, Plaintiffs Don Henley, Mike Campbell, and Danny Kortchmar will and hereby do submit this motion *in limine* for an order, pursuant to Federal Rules of Evidence 401 through 403, precluding Defendants Charles S. DeVore and Justin Hart from offering argument or eliciting evidence seeking to challenge undisputed facts in the record and/or the Court's determination of infringement. This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on June 28, 2010.

This motion is be based on this Notice of Motion and Motion and the Memorandum of Points and Authorities contained herein, the pleadings and papers on file in this action, and the argument of counsel presented at the hearing on the motion.

Dated: June 28, 2010

MORRISON & FOERSTER LLP
Jacqueline C. Charlesworth
Craig B. Whitney
Tania Magoon
Paul Goldstein

By: /s/ Jacqueline C. Charlesworth
Jacqueline C. Charlesworth

Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Federal Rules of Evidence 401 through 403, Plaintiffs Don Henley, Mike Campbell and Danny Kortchmar hereby submit this motion *in limine* to preclude Defendants Charles S. DeVore and Justin Hart and their attorneys from offering argument or eliciting evidence seeking to challenge undisputed facts in the record and/or the Court's determination of Defendants' liability for copyright infringement.

On June 10, 2010, after considering the parties' extensive briefing on summary judgment, including numerous undisputed facts as reflected in Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Partial Summary Judgment, dated April 9, 2010 (Pls.' Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Partial Summary Judgment, dated April 9, 2010 ("Pls. SS")), the Court rejected Defendants' fair use defense and ruled that Defendants are liable for direct, contributory, and (with the exception of Hart) vicarious copyright infringement. Thus, at trial, the jury is to decide only two questions – whether Defendants' infringing activities were willful under the Copyright Act, and the appropriate measure of damages to be awarded Plaintiffs.

Notwithstanding the clear finding of infringement, Defendants have suggested that they are nonetheless entitled to argue to the jury that "reasonable minds can differ" as to whether Defendants' activities were infringing, that the issue of liability was a "close" one, and otherwise that the Court's ruling is questionable. DeVore and Hart may likewise seek to testify to this effect. Such an attempt to reopen and relitigate the question of infringement, or the undisputed facts giving rise to that determination, is improper and should not be countenanced by this Court.

This Court has granted summary judgment on the question of Defendants' liability – and that ruling is the law of the case, to which the parties are now bound. Argument or testimony that invites the jury to reconsider the Court's determination on infringement would be confusing and misleading; the jury should not be second-

guessing the Court's finding of infringement or determination that Defendants' use of Plaintiffs' songs was not fair. Nor should any such second-guessing play a role in the jury's determination of willfulness or damages. Defendants' tactic would be highly prejudicial to Plaintiffs, who have already litigated and established that Defendants' actions were infringing, at considerable burden and expense. Accordingly, Defendants should be precluded from offering arguments or eliciting testimony seeking to challenge the Court's findings on infringement and fair use.

Similarly, Defendants should not be permitted to relitigate undisputed facts in the record, as set forth in Defendants' Response to Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, dated May 3, 2010 (Defs. Resp. to Pls. SS.) To the extent that Defendants stipulated that certain facts are undisputed in this action, it is improper to relitigate those facts before the jury. As discussed below, a recent Supreme Court decision makes abundantly clear that parties are bound by the factual admissions they make on summary judgment. That rule applies here.

II. DEFENDANTS SHOULD BE PRECLUDED FROM RELITIGATING UNDISPUTED FACTS IN THE RECORD AND/OR THE COURT'S DETERMINATION OF INFRINGEMENT

To permit relitigation of undisputed facts or the Court's determination on the question of infringement based upon those facts would thwart the purpose of summary judgment, undermine the law of the case, and effectively render null and void the time, effort and resources expended by the parties and this Court in connection with the Court's ruling.

The purpose of an order of partial summary judgment is to narrow the issues at trial. Here, partial summary judgment on the question of liability was rendered based upon numerous facts in the record, established through discovery, and that Defendants conceded were undisputed. (*See* Pls. SS.; Defs.' Resp. to Pls. SS.) As the Supreme

Court explained in a recent decision, Defendants are not permitted to relitigate facts to which they stipulate for purposes of summary judgment; such factual concessions are considered "binding and conclusive" – and therefore established – for purposes of further proceedings in the case. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. __, 2010 U.S. LEXIS 5367, at *27 (June 28, 2010) ("Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that . . . facts, stipulated into the record, were established.") (quoting *H. Hackfeld & Co. v. United States*, 197 U. S. 442, 447 (1905)). An agreement by the parties to treat a fact as undisputed "'ha[s] the effect of withdrawing [the] fact from issue and dispensing wholly with the need for proof of that fact.'" *Id.* at *28 (quoting 2 K. Broun, *McCormick on Evidence* §254 (6th ed. 2006)).

Moreover, the doctrine of law of the case precludes reconsideration of "an issue that has already been decided by the same court . . . in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)) (internal quotations omitted). It is "designed to protect both the court and the litigants before it from repeated reargument of issues already decided." *United States v. Real Prop. Located at Incline Vill.*, 976 F. Supp. 1327, 1353 (D. Nev. 1997). The Ninth Circuit applies the law of the case doctrine to interlocutory orders, as well as to final judgments. *Id.* at 1354 (citing *Ridgeway v. Montana High Sch. Ass'n*, 858 F.2d 579, 587-88 (9th Cir. 1988)). Here, the question of Defendants' liability for infringement, and the related issue of fair use, were fully briefed, reviewed, and decided by this Court. The Court's determination on these issues is binding on the parties as the law of the case.

The Court should preclude Defendants from arguing or eliciting testimony to the effect that the Court's findings on liability or fair use were "close" questions, something on which "reasonable minds could differ," or otherwise unjustified, because any such argument or evidence would not be probative of the willfulness and damages issues to be litigated at trial. As this Court has indicated, willfulness exists where the

defendant knowingly infringes or acts in reckless disregard to infringement. (June 10, 2010 Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment at 26.) Thus, the focus of the inquiry is the Defendants' actions and state of mind *at the time of the infringing activities*. *See, e.g.*, 4 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 14.04[B][3] (2010). Defendants seem to be confusing the issue of what Defendants believed at the time the infringements took place with Defendants' view of the Court's ruling on liability *now*. Defendants' view of whether the Court's decision on summary judgment was right or wrong is wholly irrelevant to a determination of willfulness or the appropriate level of damages. *See* Fed. R. Evid. 402; 17 U.S.C. § 504; *Arnold v. United States Theatre Circuit, Inc.*, 158 F.R.D. 439, 459 (N.D. Cal. 1994) (excluding evidence irrelevant to damages); *Columbia Pictures Indus., Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1195-96 (9th Cir. 2001) (excluding evidence relevant only to liability and irrelevant to damages).

Additionally, if Defendants are permitted to raise arguments and elicit testimony suggesting that this Court's determination on liability is questionable or wrong, it would cause severe prejudice to Plaintiffs, who would be forced effectively to relitigate the question of liability before the jury, notwithstanding that this Court has already decided that issue in their favor. This would not only cause unnecessary delay, it would negate the substantial efforts and resources that were expended on the summary judgment motions and further waste the limited resources of this Court.

Even more significantly, if Defendants argue or introduce evidence suggesting that the Court's determination on liability was unjustified, it will confuse and mislead the jury. *See* Fed. R. Evid. 403. A suggestion that the determination of liability was a "close" one on which "reasonable minds could differ," that Defendants' uses should have been held fair, or that this Court's decision was somehow incorrect, will invite the jury to retry those issues, improperly interfering with and influencing the jury's

consideration of willfulness and damages. Any such attempt by Defendants should be barred by this Court.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court preclude Defendants and their attorneys from offering argument or eliciting evidence seeking to challenge undisputed facts in the record and/or the Court's determination of Defendants' liability for copyright infringement.

Dated: June 28, 2010

MORRISON & FOERSTER LLP
Jacqueline C. Charlesworth
Craig B. Whitney
Tania Magoon
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