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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CAPITOL RECORDS, LLC, et al.,

Plaintiffs,

v.

12 CV 0095 (RJS)

REDIGI INC., et al.,

Defendants.
-----x

New York, N.Y.
June 29, 2016
10:30 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Plaintiffs
BY: RICHARD STEPHEN MANDEL
JONATHAN ZACHARY KING

ADELMAN MATZ P.C.
Attorneys for Defendant Redigi Inc.
BY: GARY PHILIP ADELMAN
SARAH MICHAL MATZ

1 (Case called)

2 THE COURT: Good morning. So I don't have anybody
3 here representing the individuals; right?

4 MR. ADELMAN: Not that we're aware of, no.

5 THE COURT: In one of your letters to me, Mr. Adelman
6 or Ms. Matz, you mentioned that the lawyers on the appeal would
7 be BakerHostetler. Is that what you said?

8 MR. ADELMAN: That is correct. There is a
9 representative from BakerHostetler here.

10 THE COURT: Who is that?

11 MR. WARSHAVSKY: Oren Warshavsky, your Honor. We have
12 not yet been engaged. We expect to be, and we've had
13 discussions. As of late last night, there is still no
14 retainer. We expect to be very shortly.

15 THE COURT: For the appeal?

16 MR. WARSHAVSKY: For the appeal.

17 THE COURT: But not for this action?

18 MR. WARSHAVSKY: We're also discussing if they'd like
19 us to appear.

20 THE COURT: That's good to know. Thanks for being
21 here. If you could just at the end maybe give a card to the
22 court reporter so she can get the correct spelling.

23 MR. WARSHAVSKY: Yes.

24 THE COURT: I guess we're here principally on the
25 contemplated motion of the plaintiffs for attorneys' fees.

1 So I received pre-motion letters on that issue, which
2 is an interesting issue. It seems to me that probably the
3 plaintiff's case got a little easier with the Supreme Court's
4 Kirtsaeng decision, but I'm not sure it's a slam dunk.
5 Obviously, I think we're going to have briefing on this.

6 As with all pre-motion conferences, I like to kick the
7 tires a bit. That's the reason we have these. They're helpful
8 for me, and I hope they're not wasteful to the parties.

9 Here it's a little more complicated because defense
10 counsel is trying to get out of this case. So I guess
11 everything you do is potentially wasteful if you're not getting
12 paid. So that's the principal purpose we're here.

13 There's also then a motion to withdraw by counsel for
14 the defendants and a contemplated motion to register the
15 judgment in other districts, which I don't think anybody has
16 responded to.

17 Right, Mr. Adelman? Ms. Matz?

18 MS. MATZ: No, your Honor. We sent a letter last
19 night. We apologize for the late hour of it. The client asked
20 us to seek an extension of their time to respond to the
21 pre-motion conference letter so that they could consult other
22 counsel.

23 THE COURT: With respect to the registering of the
24 judgment?

25 MS. MATZ: Yes, your Honor.

1 THE COURT: So I think really we're going to spend
2 most of our time talking about the attorneys' fees motion. I
3 guess I'm inclined to grant a little bit of time with respect
4 to the motion to register, but I want to hear from plaintiffs
5 as to how they're being prejudiced.

6 You're concerned, Mr. Mandel, that assets are
7 dissipating as we speak?

8 MR. MANDEL: We have concerns that -- we're not sure
9 what's going on. I mean, obviously, the defendants were unable
10 to post a bond which would have been the preferable way to
11 proceed here.

12 That raises questions. We've had concerns all along
13 about their financial condition. We now have counsel trying to
14 withdraw. We don't see why we shouldn't be allowed to register
15 in other districts.

16 THE COURT: I guess it would require at least some
17 showing that there is property in other districts. From
18 preliminary investigation, we know that one of the defendants
19 owns a home in Massachusetts. They're not located here in
20 New York.

21 So any assets, I think, are, by definition, not going
22 to be here. Mr. Rogel is employed as a professor at MIT. He
23 has a home in Massachusetts. He lives in Massachusetts.
24 Redigi was based --

25 THE COURT: So you would want to register in

1 Massachusetts?

2 MR. MANDEL: Massachusetts for sure.

3 THE COURT: Where else?

4 MR. MANDEL: To be honest, we're having some problems
5 determining what the status is with respect to Mr. Ossenmacher.
6 He appears to reside in California from what we can tell from
7 investigations. There are other addresses that he's had in
8 Florida. He uses post-office boxes for addresses. We envision
9 some challenges, frankly, in being able to enforce it.

10 What is clear is that there doesn't seem to be any
11 ability to go after any assets that we're aware of here in
12 New York. To the extent that we're going to be able to enforce
13 this judgment at all, it's clear we're going to have to go to
14 other jurisdictions where these defendants are actually located
15 and where they presumably have whatever assets they do have.

16 So that's the reason for the motion. We really don't
17 see any reason why we shouldn't be allowed to go and do that.
18 The judgment is final. If they want to appeal, they can
19 appeal.

20 They can avoid all this by just posting a bond for
21 \$3.5 million. That doesn't seem like it's going to happen. We
22 think we should be able to go ahead and enforce it if we're
23 able to.

24 THE COURT: I think what I'm inclined to do is
25 dispense with the pre-motion letter response and allow you to

1 make the motion. I expect the motion would include a
2 declaration for something to indicate where there is property
3 and the basis for believing there's property in other places,
4 and then I'll give defendants some time in which to respond,
5 but I don't want to drag this out indefinitely. I don't think
6 there's any reason to prevent you from filing the motion now.

7 MR. MANDEL: Thank you, your Honor.

8 THE COURT: How long do you think it will take you to
9 file that motion?

10 MR. MANDEL: If we could get it on file by the end of
11 next week.

12 THE COURT: That's fine.

13 MR. MANDEL: July 8 I think.

14 THE COURT: July 8. And then, Mr. Adelman or
15 Ms. Matz, do you have a sense as to when the other counsel will
16 be in this thing?

17 MS. MATZ: Candidly, your Honor, we don't. It sounds
18 like a lot of this has to do with the individual defendants.

19 THE COURT: Yes.

20 MS. MATZ: We don't represent them, and we don't have
21 any information as to that that would allow us to respond in
22 any substance.

23 MR. ADELMAN: As we made clear in our motion,
24 your Honor, we're not going to speak to it. We have no
25 information. We were actually told that they were already

1 engaged.

2 THE COURT: Who knows. It's not a fair question for
3 you.

4 MR. ADELMAN: We would like to ask the Court to at
5 least allow us to decide our motion prior to --

6 THE COURT: Decide the motion to withdraw you mean?

7 MR. ADELMAN: Decide the motion to withdraw prior to
8 the Defendants Redigi having to answer on this motion.

9 THE COURT: To respond to the motion?

10 MR. ADELMAN: Yes. We're kind of in a weird limbo.
11 We've been discharged. Yet, as we know, we know the law, and
12 we're here following the law. But we continue to be in this
13 odd legal limbo. We wouldn't know what to do at that point.

14 THE COURT: I think perhaps what I should have done
15 today is made the individual defendants show up and just make
16 sure they're aware of your motion, make sure they understand
17 the consequences of that motion, make sure they understand that
18 corporations have to be represented by attorneys and that if
19 they're not, then they're basically in default and inquire as
20 to whether they're planning to retain new counsel or they're
21 planning to represent themselves as individuals.

22 I think that's probably what I ought to do. Perhaps I
23 should have done that today. There are a lot of different
24 pieces in this case. So maybe I will end up doing that in the
25 near term.

1 MR. ADELMAN: You can put it in an order, your Honor.
2 In addition, we're a little different because we had
3 represented the entity. So the entity needs counsel to appear
4 here.

5 THE COURT: Yes. The principals would be the ones who
6 would be in the best position to know if they need to retain
7 counsel on behalf of the corporation.

8 MR. ADELMAN: That's why I circle back that we request
9 our motion be granted or at least decided before Defendant
10 Redigi be required to answer.

11 THE COURT: Yes.

12 MR. ADELMAN: I just wanted to put it on the record.
13 I hope you don't mind.

14 THE COURT: I would likely grant the motion, but it
15 would be good to know whether or not there's counsel coming in
16 and they plan to respond to the attorneys' fees motion,
17 for example, and the motion to register the judgment or not.
18 Those would be good things to know.

19 MR. ADELMAN: Yes.

20 THE COURT: So I may drag the defendants right back
21 here.

22 MR. ADELMAN: I appreciate that, your Honor. Thank
23 you.

24 THE COURT: So let's now talk about attorneys' fees,
25 the main event, as we'd like to call it.

1 I've reviewed the pre-motion letters, and I've read
2 the relevant and recent case law on this.

3 Mr. Mandel, it's your motion. This might have been a
4 tougher sell before the Supreme Court slapped down the Second
5 Circuit. But at the same time, this was a pretty novel
6 situation; right?

7 This is a case that was watched closely in the press
8 and certainly among folks in the technology press. It was a
9 one in which a lot of people had strong views on which this
10 case ought to go. I ruled, and I think I was pretty clear in
11 my reasoning. It seems to me this is clearly a violation of
12 the statute, but it seems others disagreed, including some very
13 smart people.

14 MR. MANDEL: I think Kirtsaeng is very much relevant.
15 In Kirtsaeng obviously the defendant had lost in the Second
16 Circuit and got three justices to vote, and the plaintiff got
17 three justices to vote with them in the Supreme Court.

18 So, clearly, there's a case where you would say that
19 should be dispositive of the fact that it was a reasonable
20 position, nonetheless, the Supreme Court felt compelled to send
21 it back and to say that while objective unreasonableness is
22 certainly a substantial fact, you have to look at the whole
23 situation.

24 I think that certainly bears looking at here because
25 part of what we're really focused on is we think that -- we

1 understand that there were issues that the defendants wanted to
2 address and thought that they had a right to do. We think that
3 it was pretty clear that they were wrong about that.

4 Also we think that the opinion on summary judgment
5 sets that out. There was a course of conduct in particular
6 after the individual defendants came into the case and were
7 represented by counsel who is no longer here where they really
8 followed a course that was designed to prolong the case, we
9 feel to litigate unnecessarily and unreasonably.

10 They weren't focused on -- if they really had a
11 legitimate issue about whether or not the for-sale doctrine
12 applied, that's one thing. But, instead, they spent a lot of
13 time arguing first with a motion to dismiss, then a
14 re-argument motion.

15 This was suing the individuals who were the principal
16 founders of the company and claiming that they didn't know what
17 they were accused of after they had litigated the case to a
18 summary judgment conclusion.

19 They then served voluminous discovery asking for all
20 kinds of things that had no potential relevance to anything,
21 things like our audit history with respect to musical
22 compositions, none of which was remotely at issue in this case.

23 They were basing it on totally implausible affirmative
24 defenses that Redigi, to their credit, didn't even assert
25 because they would have been frivolous. There was a lot of

1 cost and time lost in that conduct. So that's one principal
2 aspect of the reason for our motion.

3 I think, when you look at the litigation conduct, it
4 went well beyond just what we think was a fair defense of
5 arguably litigable issues and amounted to conduct that was not
6 appropriate and was reasonably the subject of an attorneys'
7 fees application.

8 We also believe that there is case law that says a
9 willful infringement is grounds for attorneys' fees, and we
10 believe that your Honor's ruling on summary judgment, while it
11 didn't expressly say it's willful, that you line up the factors
12 that you found, the factual findings that were made, and
13 compare it to what the Second Circuit has said with respect to
14 willfulness, we had argued in limine motions that we actually
15 were entitled to a ruling that there's already been a willful
16 infringement.

17 Now, I understand that was never ruled upon and the
18 case settled. We stand by the arguments we made that we think
19 as a matter of law there was a willful infringement just based
20 on the law of the case and the findings and the summary
21 judgment motion. We think that's also relevant here.

22 The other thing is we are, by agreement, limited in
23 the amount we can seek. The amount we are seeking is really
24 less than half the total fees that our client incurred. We
25 think it is a reasonable exercise here for us to be able to

1 recover the amount that we're seeking.

2 THE COURT: Tell me about what you think the effect of
3 Kirtsaeng is with respect to the Second Circuit principle.

4 MR. MANDEL: Well, I think what Kirtsaeng was saying
5 is that there was a tendency to say if there's an objectively
6 reasonable position, it's almost dispositive, that that's in
7 practice what was coming out of what the Second Circuit and
8 courts applying it were doing.

9 What the Supreme Court said is that's going too far.
10 Objective reasonableness is important. It's a substantial
11 factor, but they actually used language that says it's not
12 controlling, and it's certainly not dispositive.

13 They had concerns that it had evolved to almost
14 becoming dispositive because, looking at the actual results,
15 what you're finding is every case in which the Court finds that
16 there was a reasonable litigation position, the fees award is
17 being denied, and the Supreme Court said that doesn't
18 necessarily follow.

19 THE COURT: So I should give due consideration to all
20 other circumstances relative to granting fees.

21 MR. MANDEL: Correct.

22 THE COURT: That's a big help.

23 MR. MANDEL: I understand. I think that courts have
24 always been under the impression, under the Second Circuit
25 precedence, looked at litigation conduct.

1 THE COURT: What litigation conduct? You're saying
2 after the individual defendants came in, they made lots of
3 discovery requests. What about the sort of changing
4 characterizations of the technology here?

5 Initially, it was sort of copied to a cloud, but
6 that's okay. Then it was no, no. It's being migrated, sort of
7 like a train.

8 MR. MANDEL: Right.

9 THE COURT: And in reality, it was copied. It was
10 really just copying a file and destroying a file that appeared
11 on the original hard drive.

12 MR. MANDEL: We think that's relevant too because,
13 quite frankly, they came in. They made their admissions. They
14 said things in their answer, and they clearly tried to
15 backtrack and come up with a different story.

16 Obviously, it didn't matter legally in the end, but it
17 did cost additional time, efforts, in discovery and at the
18 depositions having to probe into it.

19 THE COURT: Presumably they knew what their technology
20 was; right?

21 MR. MANDEL: Presumably.

22 THE COURT: Presumably they understood that it wasn't
23 migrating a file.

24 MR. MANDEL: One would think that they did know that
25 and that as a result, we retained an expert that we actually

1 put in on summary judgment in response to their motion.

2 We always maintained that the statute spoke for itself
3 and that this was in the end irrelevant. But, obviously, it
4 was a distraction. It was litigation conduct that we feel was
5 inappropriate. This case could have been a lot simpler.

6 The issues that ultimately had to be resolved -- we
7 came into court from the beginning, and one of the reasons
8 everybody thought we could do this on a very expedited basis
9 was there really wasn't much of a dispute about what the
10 technology was.

11 The question was what's the legal impact of that, and
12 then perhaps based on the preliminary injunction hearing and
13 getting a look at your Honor's first read on what the law meant
14 and how it applied to that, suddenly the story changed, and it
15 became more complicated than it needed to be. So we think
16 that's relevant to the attorneys' fees application.

17 Again, the same thing with the individual defendants'
18 conduct. Mr. Adelman at the first conference I think quite
19 appropriately and realistically said that no additional
20 discovery would be required because there wasn't anything more
21 that anybody needed to know. And yet, nonetheless, we spent
22 probably two years or more litigating side issues that never
23 should have been introduced regarding affirmative defenses that
24 had no merit whatsoever.

25 So, you know, all of that together, we think there is

1 on this record a very legitimate basis for seeking attorneys'
2 fees.

3 THE COURT: With respect to willfulness, do you think
4 I'm in a position to rule on that or find that?

5 MR. MANDEL: I think you are. We did brief this on
6 the in limine motions. And, as I said, I recognize that that
7 didn't get resolved. If you look at what the Second Circuit
8 has said willfulness is, reckless disregard of consequences
9 clearly constitutes that. I don't think there's any doubt on
10 the summary judgment opinion that the defendants knew or should
11 have known that the conduct was infringing.

12 THE COURT: I guess the issue, the standard, is
13 whether the defendant had knowledge that its conduct
14 represented infringement or perhaps recklessly disregarding the
15 possibility.

16 MR. MANDEL: I think your Honor's rulings on it shows
17 there was a reckless disregard for the likelihood of
18 infringement.

19 THE COURT: Who is carrying the ball for the defense?
20 Ms. Matz.

21 MS. MATZ: Thank you, your Honor. So I apologize to
22 the Court. I don't represent the individual defendants. So I
23 can't speak to some of the arguments that Mr. Mandel has made
24 with regard to them, but I will address some of the points he
25 just made.

1 THE COURT: Mr. Mandel, you're seeking attorneys' fees
2 from all the defendants, not just the corporate defendants?
3 All the defendants?

4 MR. MANDEL: Yes. One thing I'm not certain -- I
5 thought Mishcon de Reya did represent the individual
6 defendants. I thought they put in appearances that included
7 the individual defendants. I recognize that they also asked to
8 be discharged. They don't seem to be here today. So I'm not
9 sure.

10 THE COURT: They don't seem to be here today. I'm
11 looking through my order to see if there was some ambiguity as
12 to who needed to be here. I'm not sure why they're not here.
13 They seem to be acting as though I granted their motion to
14 withdraw, which I haven't.

15 So I'll issue an order to show cause as to why they
16 should not be sanctioned for not being here. We're not going
17 to accomplish as much without them being here. That's not fair
18 to you.

19 Go ahead, Ms. Matz.

20 MS. MATZ: Just to start, I think the Kirtsaeng
21 decision is important, and it clarified some of the existing
22 Second Circuit -- courts that are within the Second Circuit,
23 some of the rulings that are important to this case.

24 One of the issues that the case clearly addressed was
25 the promotion of not granting attorneys' fees where a case is

1 going to clarify the boundaries of copyright law, which is
2 something that other courts in this district have addressed
3 repeatedly, since one of the goals of the Copyright Act is
4 broad access to public works, that the courts should not grant
5 attorneys' fees in cases that are novel or close because it
6 could potentially have a chilling effect.

7 In a recent Supreme Court case, Kirtsaeng argued that
8 the attorneys' fees should be awarded in hard and novel cases
9 because it would essentially encourage clarification in the
10 law.

11 The Supreme Court actually went to some great length
12 in explaining why they thought that that might not actually be
13 the effect of it and that it could actually have a deterrent
14 effect on parties from asserting objectively reasonable
15 defenses and vigorously both defending and prosecuting claims
16 that are going to clarify the copyright law.

17 So within that context, I think that the question
18 your Honor asked at the beginning was isn't it pretty clear
19 that this is a novel case. The answer is yes. That was
20 repeatedly acknowledged by all parties.

21 There weren't any cases out there that dealt with this
22 specific issue of applying the for-sale doctrine to the type of
23 technology that we were dealing with.

24 I also think that when you look at the way objective
25 unreasonableness is defined under the law, that there wasn't a

1 lack of legal support or a factual basis for the defenses that
2 Redigi asserted. Ultimately the court disagreed and found on
3 the law that there was liability. But the liability isn't
4 tantamount to a finding of objectively unreasonableness.

5 Here I think Redigi did act in good faith. The
6 parties completed discovery, at least Redigi's portion of
7 liability discovery, in a very short time frame. There were
8 motions for summary judgment. The parties have always worked
9 together.

10 At the same time as this was going on, there were
11 ongoing settlement negotiations. Ultimately, the parties were
12 able to avoid the expense of a trial by agreeing to the amount
13 of damages and certain other items.

14 I think all of this shows a course of conduct that
15 everyone was trying to get to a resolution in this case.

16 THE COURT: What about the sort of shifting
17 characterizations of the technology which is pretty stark, I
18 have to say. You may remember at various times we were talking
19 about "Star Trek" and transporting as opposed to cloning.

20 It was all sort of interesting and all. It turns out
21 that what this technology really did is pretty clear, pretty
22 clear from the outset.

23 To suggest that it was migrating or transporting the
24 way the "Star Trek" folks get from the Enterprise to the planet
25 is not really what was going on here. Right?

1 MS. MATZ: Well, I actually disagree with that.

2 THE COURT: Okay.

3 MS. MATZ: Obviously, your Honor, as you may recall,
4 we didn't actually represent Redigi.

5 THE COURT: So I don't think you were there for all of
6 those arguments.

7 MS. MATZ: I will just say that one of the purposes
8 obviously of discovery is to get to the issue of how things
9 work. To the extent that Redigi's previous attorney made
10 statements in the memo of law -- we argued this at length in
11 the summary judgment motion -- that the plaintiffs argued were
12 different and your Honor is saying are somewhat different, I
13 think that the issue is that the parties were very clear, as
14 discovery was going on, how the technology worked.

15 The plaintiff asked to look at the code at the
16 depositions, and it was explained to them. For them to come
17 back and say, well, we didn't know, and we had to get this
18 expert that they themselves acknowledged was essentially
19 irrelevant, I don't think that shows any bad faith.

20 THE COURT: It was the initial hearing; right? That
21 had to be briefed and litigated. That's sort of what I think
22 then started us down the road of discovery. I'll give
23 Mr. Mandel a chance to respond to that when you finish.

24 It sounded to me like this was really going to be an
25 issue as to what the technology was; that once you folks came

1 in, it became clear as to what the technology was and the legal
2 theory then changed is not a criticism of you. You folks did a
3 great job.

4 But I do think it suggests some amount of bad faith
5 perhaps on the part of the defendants here.

6 MR. ADELMAN: If I may respond to that.

7 THE COURT: She's doing good.

8 MR. ADELMAN: I just want to add this part because
9 these are the conversations I initially had with the clients
10 when we were first retained. Without dealing with
11 attorney-client privilege, it appeared to us, and without
12 disparaging the prior attorney, that the prior attorney did not
13 delve into the technology aspect of how the system worked.

14 And after having conversations -- and, in fact, Larry
15 Rudolph's Rogel's affidavit explains in great detail -- and he
16 is an MIT scientist -- exactly how the system works.

17 So I don't think that -- if there was not an order to
18 show cause at that point, the technology --

19 THE COURT: His affidavit in connection with the
20 preliminary injunction or in connection with summary judgment?

21 MR. ADELMAN: The summary judgment motion.

22 THE COURT: That was a long time later.

23 MR. ADELMAN: If you look at his affidavit, it details
24 exactly how the system works. It was obviously under seal for
25 a specific reason, and it's because I asked detailed questions

1 of exactly how it works.

2 My process and so forth is to be skeptical, and he
3 convinced me that that was the code that he wrote and the
4 process that he made. I don't think that the previous -- the
5 previous injunction hearing, the papers were written very
6 quickly. Obviously, the time to do that was very quickly. I
7 don't think it was explained to his attorney adequately at the
8 time. So I do not think there's any bad faith here.

9 THE COURT: I have to go back and take a look. I seem
10 to recall that some of the representations made to the public
11 were very consistent with what the lawyer was saying.

12 MR. ADELMAN: I don't recall that. From what I do
13 recall, I don't think it was inconsistent. I do not.
14 Nevertheless, I don't think there's bad faith here.

15 I think like you gave us a very short time period to
16 do discovery. We did all the discovery. We did all the
17 depositions within that time period.

18 I don't think there was any extraneous work that
19 needed to be done by the plaintiffs to do this, as Ms. Matz
20 just said. If you look at the experts' report, it's
21 basically -- I don't think it would add anything to their
22 summary judgment motion.

23 The fact that you concluded differently than what we
24 argued is a different story. But all I'm arguing is I don't
25 think there was bad faith as we're suggesting here.

1 I don't think that even today -- Redigi's position
2 today is still that the file migrates. I believe that based on
3 the patent, if you look at the patent and other things, I think
4 that bears it out.

5 Again, this is a pre-motion conference. I think that
6 whoever comes in will explain that in more detail in their
7 papers. I just wanted to -- since I had the argument with you
8 at the summary judgment and you mentioned the little
9 back-and-forth we had about the "Star Trek" factor and all
10 that.

11 THE COURT: That's right.

12 MR. ADELMAN: I thought that was a very good and
13 spirited argument.

14 THE COURT: Ms. Matz, what about willfulness? I guess
15 willful infringement does frequently generate an award of
16 attorneys' fees. There hasn't been a specific finding of that
17 so far.

18 Is that something that I should be doing now based on
19 what was presented in connection with the summary judgment
20 motion as a basis for determining whether attorneys' fees
21 should be awarded?

22 MS. MATZ: As your Honor rightly stated, there was
23 never a finding of willfulness. I don't think that's something
24 that the Court should be engaging in now.

25 At the end of the day, that was an issue that was

1 going to be decided at trial. The parties were able to resolve
2 the issue of damages and specifically dispense --

3 THE COURT: Isn't it relevant to this issue of
4 attorneys' fees?

5 MS. MATZ: I think if there had been a finding of
6 willfulness in the case, it would be relevant. I don't think
7 it necessarily would be dispositive.

8 I don't think that, given the fact that the parties
9 were able to resolve the issue and there has never been a
10 summary judgment where that was decided, that issue.

11 I know that the plaintiffs raised it on their motion
12 in limine and whether or not that was a proper issue on a
13 motion in limine or whether or not that needed to be decided at
14 summary judgment or at trial, it hasn't been.

15 I'm not sure that it makes sense for there to be an
16 additional type of briefing on factual determinations that the
17 parties were ultimately able to dispense with.

18 THE COURT: They were able to dispense with it for
19 purposes of a settlement. But for purposes of attorneys' fees,
20 it seems like you folks agreed to disagree.

21 MS. MATZ: I actually think they were able to dispense
22 with it for the purposes of efficiency and to save everybody
23 the resources of having to actually try the issue.

24 THE COURT: So what would need to be done to resolve
25 the issue of willfulness in your view?

1 MS. MATZ: I think that it would have needed to be
2 determined at trial. That's what the posture of the case was.
3 That issue was -- it was one of the issues as listed as going
4 to be decided at trial. Ultimately, there was no trial. I
5 also think here it would be difficult -- I understand
6 Mr. Mandel's argument.

7 THE COURT: Right. But to award attorneys' fees, you
8 think I need to have a trial with a jury to decide facts that
9 are relevant for purposes of determining attorneys' fees?

10 Do you think Kirtsaeng is contemplating that courts
11 will have trials by a jury to decide certain facts that would
12 be relevant to an attorneys' fees calculation?

13 MS. MATZ: No. I think that Kirtsaeng is
14 contemplating that the Court is going to look at the case and
15 the findings that were made in the case and is going to weigh
16 the various factors and putting emphasis on whether or not
17 there was objectively unreasonable conduct, keeping in mind the
18 goals of the Copyright Act and the potential deterrent effect
19 that attorneys' fees awards could have, and that the Court
20 would make a decision in its discretion.

21 But I don't think that there would be an argument
22 hinging on a finding of willfulness when there hasn't been a
23 finding of willfulness in this case.

24 One of the issues that we raised in opposition to the
25 motion in limine that contemplate a finding of willfulness at

1 this juncture is the application that a jury would use to find
2 whether there was in the range of damages between 750 and
3 30,000 or whether there was willfulness, there are a lot of
4 subjective elements and how they apply to various factors
5 they're supposed to consider.

6 I think at this juncture, there hasn't been a finding
7 of willfulness. So I don't think plaintiffs can hinge an
8 argument that there should be an attorneys' fees award when
9 there has been no finding of willfulness.

10 THE COURT: Mr. Mandel, let's hear you.

11 MR. MANDEL: If I can just respond very briefly. What
12 we're saying is there was in effect a finding of willfulness.
13 It wasn't addressed as being a finding of willfulness expressly
14 because it wasn't necessary at the summary judgment stage, but
15 the findings that were made at that summary judgment opinion,
16 if you look at what those findings were and you apply the law
17 of wilfulness to them, they amount to willfulness as a matter
18 of law.

19 So we don't think it's necessary to have a new factual
20 hearing or any new evidence. It's all been put in front of
21 your Honor already. I think all we need to look at is your
22 summary judgment findings and rulings and the applicable law on
23 willfulness. We think that provides the answer.

24 That's really what we argued in the pretrial
25 submissions and why we were saying that we didn't think

1 willfulness was an issue for the jury, that it had already been
2 determined, in effect, by the summary judgment opinion so that
3 that was why we believed that it really shouldn't even go to
4 the jury.

5 I recognize that issue your Honor didn't decide, but
6 there's no reason why you can't decide that issue, which was
7 briefed once in the context of this motion.

8 THE COURT: Well, you don't think I'm going to need to
9 consider live testimony? You don't think I'm going to need to
10 consider additional declarations and things like that?

11 MR. MANDEL: I don't think so. Our position is that
12 the findings that were made at summary judgment applied against
13 the applicable law speak for themselves and amount to
14 willfulness.

15 THE COURT: I don't think I'm going to be able to
16 resolve this today. I think it's a close call. Candidly, I
17 think my inclination is to award attorneys' fees.

18 Since defendants are not paying their own attorneys, I
19 don't think they're going to pay you, Mr. Mandel. In any
20 event, I'm not ruling. That is my sense. But I think this
21 would benefit from additional briefing.

22 So when do you want to file your motion?

23 MR. MANDEL: If we could have until July 15.

24 THE COURT: That's fine. Then we run into the same
25 issue with respect to the defense motion. I do intend to

1 resolve the motion to withdraw before they even file their
2 motion.

3 I think I'll set a date of 30 days after that. So
4 that will be August 15 for the defense response and then a
5 reply in 10 days. That's August 25.

6 MR. MANDEL: Your Honor, can we just ask for two weeks
7 on reply, because I know I'm on vacation the week after their
8 response comes in.

9 THE COURT: So the 29th then?

10 MR. MANDEL: Yes. If we could.

11 THE COURT: That's fine. If new counsel comes in,
12 things could get a little complicated. But I don't want to
13 reward the defendants for not paying their counsel that
14 necessitates a change of counsel.

15 Then I guess I'll issue an order to show cause to the
16 individual defendants and their counsel for not being here
17 today.

18 Has anybody been in touch with them, counsel for the
19 individual defendants?

20 MR. ADELMAN: We have spoken to them briefly.

21 THE COURT: About this motion? The motion for
22 attorneys' fees I mean.

23 MR. ADELMAN: I haven't.

24 MS. MATZ: No. Not in the past couple of weeks, no.
25 The letter was signed by both. So obviously we spoke with them

1 at the time it was being drafted.

2 Your Honor, if I can just say one other thing.

3 THE COURT: Sure.

4 MS. MATZ: I think there has been a little bit of
5 confusion created by the fact, without going into too much
6 detail because I think some of this is confidential, but there
7 was a representation made that incoming counsel would be
8 happening very shortly a couple of weeks ago.

9 So to the extent that we are able to resolve those
10 issues, I think that would be helpful in moving forward.

11 THE COURT: Resolve the issues of counsel?

12 MS. MATZ: Yes.

13 THE COURT: I plan to do that.

14 MR. ADELMAN: I'm not going to speak for Mishcon, but
15 we have been confused all week. We've been told they were
16 counsel. Then we were told they were negotiating. Then we
17 were told that they were paid. Then we were told that they had
18 a retainer. Then we were told they didn't. It's just been a
19 mass confusion in the last week. So that's why I'm saying we'd
20 like this resolved as soon as possible.

21 THE COURT: The docket sheet is kind of a mess because
22 it lists Mr. Raskin and Mr. DeVincenzo as being with different
23 firms, but they're both with Mishcon de Reya; right?

24 MS. MATZ: That's our understanding, yes.

25 THE COURT: So I'm not sure where they are and why

1 they're not here, but we'll get to the bottom of that. So I
2 will resolve this.

3 Remind me where the individual defendants are, the
4 individual defendants themselves, physically. One is in
5 Massachusetts? Is that right?

6 MR. ADELMAN: I believe Mr. Rudolph Rogel lives in
7 Massachusetts. I have no idea where Mr. Ossenmacher presently
8 resides.

9 THE COURT: You're local?

10 MR. ADELMAN: Yes.

11 THE COURT: I think I'm probably going to issue an
12 order that schedules a conference just with the defendants and
13 their counsel basically. Since some of that is likely to
14 involve privileged materials, I would probably have that
15 sealed, at least for the time being, and not have plaintiffs'
16 counsel there.

17 Do you care, Mr. Mandel?

18 MR. MANDEL: No, your Honor. We would like to know
19 where the defendants are though.

20 THE COURT: You want to know who is in and who's out.
21 I get that. You don't really feel that you need to be involved
22 in the nitty-gritty of the decision; right?

23 MR. MANDEL: No.

24 THE COURT: I think that's what we'll do. I'll
25 probably schedule something for next week on that.

1 Are you around?

2 MS. MATZ: Yes, your Honor. I believe Thursday we
3 have one other appearance. I think it's in the morning.

4 THE COURT: I'll issue an order on that. I think
5 that's what we'll do for today. Then obviously, if
6 BakerHostetler is coming in for everybody, so much the better
7 because they're here and know what took place today.

8 If not, then I guess the individual defendants are
9 going to have to respond on their own and represent themselves.
10 And the corporate defendant, it sounds like, is going to be in
11 default, which will have implications for all of these motions
12 and implications, perhaps, for the appeal too.

13 Who is counsel of record on the appeal?

14 MR. ADELMAN: Nobody that we're aware of.

15 MS. MATZ: We've been advised that Baker --

16 MR. ADELMAN: We've been advised that BakerHostetler
17 is handling the appeal.

18 THE COURT: That sounds like that's not the case.

19 MR. ADELMAN: We have no idea. We know that the due
20 date for the motion to appeal is close at hand, which is why
21 potentially we have this hearing or meeting with all the
22 parties on Tuesday. I think that's the last day to file an
23 appeal.

24 THE COURT: So there's a meeting on Tuesday?

25 MR. ADELMAN: No. You're issuing an order to bring us

1 all in.

2 THE COURT: When is good for you?

3 MR. ADELMAN: I could do it tomorrow. That would be
4 fine with me and preferable. Of course your Honor has his own
5 schedule. I would even come in Friday. We're actually closing
6 our office today, but I'm around. Ms. Matz will be in
7 California. I'm around tomorrow or Friday or Tuesday.

8 THE COURT: Do you have a preference between those
9 three? I'm starting a trial on Tuesday.

10 MR. ADELMAN: My preference would be Thursday or
11 Friday for sure. That way the issue would get resolved. Then
12 there would be no -- it would just be resolved, and I can enjoy
13 my July 4.

14 MS. MATZ: Your Honor, alternatively -- I don't know
15 if your Honor would be open to this or not. But to the extent
16 that it would need to happen sooner rather than later, like
17 Gary said, we're not entirely sure where they physically are at
18 this moment -- perhaps a telephone conference.

19 THE COURT: That's always an option. My preference is
20 that people who are around can pop in.

21 MS. MATZ: Of course.

22 THE COURT: I can do Friday morning if that works.

23 MR. ADELMAN: I'm going to say it works. We're
24 closing the office. So I assume that nothing is scheduled.

25 THE COURT: It may be hard to get people on that date.

1 That's my thinking.

2 MR. ADELMAN: It may. You're right, your Honor. I
3 know I can be here. Ms. Matz can be on the telephone.

4 MS. MATZ: Absolutely.

5 THE COURT: Tomorrow? It's now noon. It's 11:30.
6 What do you think? 2:30 tomorrow?

7 MR. ADELMAN: That would work. Yes. Absolutely.

8 THE COURT: Let's plan on that. I'll issue an order.
9 If people can't make it in person, they can, I guess, dial in,
10 and we can do it that way. We might as well get this resolved.

11 I think I'm going to grant the motion to withdraw. I
12 don't think law firms should work for free. At this point, I
13 don't think the plaintiffs will be prejudiced. If defendants
14 decide they don't want to have counsel and defaults follow, I
15 don't think that affects the plaintiffs too much.

16 Whether you collect on a judgment may be harder or
17 easier, but the lack of counsel is not going to make too much
18 of a difference.

19 MR. MANDEL: Right. That's fine, your Honor.

20 MS. MATZ: Your Honor, if I may, may I just ask to
21 appear by telephone tomorrow at 2:30?

22 THE COURT: You may.

23 So that's fine. If you want to appear telephonically,
24 that's fine too.

25 MS. MATZ: Should we dial in for the Court's

1 convenience?

2 THE COURT: It's probably easier if you set up a call.
3 I'd rather have people present, but on one day's notice, that's
4 going to be tricky if the individual defendants are outside of
5 the state.

6 MR. ADELMAN: I agree, your Honor.

7 THE COURT: I'll set it up as a telephone conference.
8 I'll issue an order, and I will set the dial-in number.

9 MR. ADELMAN: Very good, your Honor. Thank you so
10 much. Good seeing you.

11 THE COURT: Is there anything else we should cover
12 today?

13 MR. MANDEL: No, your Honor. Not from plaintiffs'
14 perspective.

15 THE COURT: So I'm going to issue a scheduling order
16 with respect to the two motions: July 15 for the motion on
17 attorneys' fees, July 8 for the motion to register the
18 judgment, August 15 for the defendant's response. I haven't
19 set a response date for the motion to register.

20 Mr. Mandel, that needs to move quickly in your view?

21 MR. MANDEL: We think it should move quickly. We
22 don't really know what basis there is to oppose it.

23 THE COURT: I'm going to set a date for a response on
24 July 22, but I'm open to moving that if I hear that that's a
25 hardship for anybody.

1 MS. MATZ: Thank you, your Honor.

2 MR. ADELMAN: Thank you, your Honor.

3 THE COURT: I don't think I even need a reply. If you
4 want to reply, you can ask, but I'm not going to schedule a
5 reply for that.

6 MR. MANDEL: That's fine, your Honor.

7 THE COURT: Thanks a lot. Always interesting.

8 I want to thank the court reporter for her time and
9 talents. If anybody needs a copy of the transcript, you can
10 take that up with the court reporter. And then tomorrow at
11 2:30, I'll hear from some of you.

12 (Adjourned)

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