

BRIARPATCH LIMITED L.P. and GERARD F. RUBIN, Plaintiffs,

v.

**GEISLER ROBERDEAU, INC., PHOENIX PICTURES, INC., MORRIS
"MIKE" MEDAVOY, and TERENCE MALICK, Defendants.**

No. 99 Civ. 9623.

United States District Court, S.D. New York.

November 30, 2009.

BARRYL. GOLDIN, ESQ., Allentown, PA, Attorney for Plaintiffs.

GREENBERG TRAURIG, LLP, New York, NY, By: VincentH. Chieffo, Esq., Ronald D. Lefton, Esq., Attorneys for Defendants.

OPINION

ROBERT W. SWEET, District Judge.

Defendants Phoenix Pictures, Inc. ("Phoenix") and Morris "Mike" Medavoy ("Medavoy") have moved for an order pursuant to Fed. R. Civ. Proc. 54(d) and Section 505 of the Copyright Act, 17 U.S.C. S 505 determining that plaintiffs Briarpatch Limited L.P. (the "Partnership") and Gerard F. Rubin ("Rubin") (collectively "Plaintiffs"), jointly and severally, are liable to Phoenix and Medavoy for their reasonable attorneys' fees and full costs as prevailing parties in this litigation. The motion was heard and marked fully submitted on June 3, 2009.

Prior Proceedings

The relevant facts and procedural history of this litigation are set forth in numerous decisions of this Court. See e.g., *Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, 2000 WL 235284 (March 1, 2000) (denying motion to remand) (the "2000 Opinion"); 148 F. Supp.2d 321 (June 28, 2001) (denying motion to amend complaint) (the "2001 Opinion"); 2002 WL 31426207 (October 30, 2002) (granting summary judgment to Defendants) (the "2002 Opinion"); 2005 WL 2861604 (November 1, 2005) (granting motion to amend complaint on remand) (the "2005 Opinion"); 2007 WL 1040809 (April 4, 2007) (granting, again, summary judgment to Defendants) (the "2007 Opinion"). The 2000 Opinion and the 2002 Opinion were the subject of *Briarpatch Limited L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004) ("Briarpatch 1"). The 2007 Opinion was the subject of *Briarpatch Limited L.P. v.*

Phoenix Pictures, Inc., No. 07-CV-5536, 2009 WL 506610 (2d Cir. March 2, 2009) (Summary Order) ("Briarpatch II").

The Plaintiffs have asserted four claims against Defendants. Two claims, originally pleaded by Plaintiffs as state law claims, asserted claims arising under the Copyright Act (the "Copyright Claims"). Briarpatch I, 373 F.3d at 306-307; 2002 Opinion at *11-12. Plaintiffs' two other claims alleged that Defendants had aided and abetted breach of fiduciary duties and had conspired to breach fiduciary duties (the "Fiduciary Duty Claims"). Briarpatch I, 373 F.3d at 307; 2002 Opinion at *7; 2007 Opinion at *20.

All four claims asserted throughout this litigation against Phoenix and Medavoy related to the production by Phoenix of the Academy Award nominated picture "The Thin Red Line," ("TRL Movie") theatrically released in the United States in December 1998. The TRL Movie was a derivative work based upon the TRL Motion Picture Rights that Phoenix had acquired by a 1996 written agreement (the "Phoenix TRL Acquisition Agreement") with Briarpatch Film Corp. ("Briarpatch Film"), Robert Geisler ("Geisler"), John Roberdeau ("Roberdeau") and Geisler Roberdeau Inc. ("GRI"). Briarpatch I, 373 F.3d at 306; 2007 Opinion at *5-8. Plaintiffs have throughout this litigation claimed that they, rather than Phoenix, own the TRL Motion Picture Rights, that the production and exploitation of the TRL Movie infringed the TRL Motion Picture Rights that Plaintiffs claimed town, and that Phoenix and Medavoy had conspired with, and aided and abetted, Geisler's and Roberdeau's breaches of fiduciary duty arising from their failure to account to Plaintiffs for the \$1,500,000 paid by Phoenix as consideration, inter alia, for the assignment to Phoenix of the TRL Motion Picture Rights. As the Second Circuit noted, both the Copyright Claims and the Fiduciary Duty Claims "unquestionably derive from a common nucleus of operative facts, because they all deal with the purported sale of 'The Thin Red Line' to Phoenix." Briarpatch I, 373 F.3d at 308.

Prior to filing the instant action, Rubin and the Partnership had successfully prosecuted an action in New York State Court against Geisler and Roberdeau (the "1998 New York Action"). In the 1998 New York Action, Plaintiffs obtained a judgment that inter alia (1) awarded them \$1,500,000 in damages upon the theory that Geisler and Roberdeau had misappropriated the \$1,500,000 paid by Phoenix in its performance of the Phoenix TRL Acquisition Agreement and (2) conveyed to Briarpatch all of the contract rights of Geisler, Roberdeau, GRI and Briarpatch Film in and to the Phoenix Acquisition Agreement, including any and all rights thereunder to deferred and contingent compensation calculated on the commercial success of the TRL Movie produced by Phoenix. 2007 Opinion at *8-9, 13.

This action was originally filed by Plaintiffs in August, 1999, in New York State Court against Medavoy, Phoenix, Terrence Malick, and GRI. The action was timely removed by Defendants to this Court on September 10, 1999. This Court denied Plaintiffs' motion for remand. 2000 Opinion. For approximately two years, the parties engaged in discovery and motion practice, including Plaintiffs' unsuccessful effort to amend their complaint to add a new defendant. 2001 Opinion. Ultimately, this Court entered judgment for Medavoy and Phoenix after granting, on the merits, their summary judgment motions as to the Copyright Claims and the Fiduciary Duty Claims. 2002 Opinion.

That judgment, and the 2000 Opinion, was the subject to an appeal to the Second Circuit. Briarpatch I. In Briarpatch I, with respect to Medavoy and Phoenix, the Court of Appeals (1) affirmed the dismissal of the two Copyright Claims that were subject to complete preemption under the Copyright Act, although on grounds different than those relied upon by this Court, and (2) vacated and remanded the grant of summary judgment for Defendants on the two non-preempted Fiduciary Duty Claims (without reaching the merits). Briarpatch I, 373 F.3d at 309; 2007 Opinion at *2. The Second Circuit explained that it remanded the Fiduciary Duty Claims because its holding that the claims against GRI were erroneously dismissed left it "wondering whether plaintiffs would have been able to gather more evidence to withstand summary judgment had that corporation been kept in the action as a party. The district court is in the best position to answer this question." Briarpatch I, 373 F.3d at 309.

Plaintiffs petition for writ of certiorari to the United States Supreme Court was denied. Briarpatch Limited L.P. v. Phoenix Pictures Inc., 544 U.S. 949, 125 S.Ct. 1704 (2005).

On remand, Plaintiffs sought and were granted the right to file a first amended complaint (the "FAC"). 2005 Opinion. The Plaintiffs FAC asserted no new claims against defendants and in the fifth and sixth causes of action of the FAC, plaintiffs realleged designating those claims as arising under the Copyright Act. 2007 Opinion at *2. Plaintiffs also realleged the identical two Fiduciary Duty Claims that had been alleged in the original 1999 complaint. *Id.*

Plaintiffs did add GRI as a defendant to the FAC and purported to serve GRI by serving the New York Secretary of State because GRI, a New York corporation, had been dissolved on September 23, 1998 for failure to pay taxes, a fact of which Plaintiffs have always been fully aware. 2007 Opinion at *2, n.1. GRI never responded to the FAC and never appeared in this action on remand. Nor did Plaintiffs ever seek to take any direct discovery from GRI while this action was before this Court on remand. Plaintiffs did depose Geisler, a principal of GRI who was available as a witness before the Briarpatch I appeal, as was, at that time, John Roberdeau.

Plaintiffs have had the opportunity prior to the Briarpatch I appeal to take discovery from GRI and Geisler, not only in this case but in the myriad lawsuits Plaintiffs have been litigating against Geisler, Roberdeau, and GRI for many years. See, e.g., 2001 Opinion, 148 F. Supp.2d at 325, n.3; 2005 Opinion at *1 (listing numerous cases litigated by Plaintiffs, including state cases against GRI); Briarpatch Ltd., L. P. v. Stage Fright LLC, 86 F. Supp. 2d 368 (S.D.N.Y. 2000) (granting Plaintiffs' motion to remand case which named GRI as one of the defendants); Briarpatch Ltd., L.P. v. Pate, 81 F. Supp. 2d 509, 513, 518 (S.D.N.Y. 2000) (granting Plaintiffs' motion to file second amended complaint adding GRI, and others, as defendants and then remanding case to New York state court)

Plaintiffs were allowed to take extended discovery on remand, including depositions of Geisler, Malick (who had been dismissed by Plaintiffs from this action before the Briarpatch I appeal), Malick's business manager (Henry Bamberger), and of Phoenix current and former employees (all of whom had also been deposed before the Briarpatch I appeal).

Plaintiffs also propounded additional written discovery on Defendants, all of which was responded to.

Pursuant to this Court's order, and after almost eight months of discovery, on July 31, 2006, defendants renewed and supplemented their prior motions for summary judgment on the Copyright Claims and the Fiduciary Duty Claims. After remand, Defendants had filed a motion for summary judgment on the Fiduciary Duty Claims then remaining in the case, the Court of Appeals having affirmed in Briarpatch I this Court's prior dismissal of the Copyright Claims. In connection with this Court allowing Plaintiffs to file the amended complaint and take discovery, this Court ordered that "upon the completion of discovery, Phoenix and Medavoy are granted leave to renew their motion for summary judgment on the papers submitted or any additional materials." 2005 Opinion at *2.

In April, 2007, Defendants' motion for summary judgment was granted on all claims asserted against them. The Opinion noted that the Copyright Claims in the FAC were "based upon the same facts as the two state law claims in the original complaint that this Court, and the Second Circuit, found subject to complete preemption by the federal Copyright Act" and that Plaintiffs had admitted that the copyright claims alleged in the FAC did "not raise substantially new theories of recovery" that might differ from their original complaint" and that Plaintiffs sought "similar relief as that previously pleaded." 2007 Opinion, at *11.

The Plaintiffs appealed this Court's grant of summary judgment to Defendants and the Second Circuit issued its Summary Order dated March 2, 2009, which affirmed this Court's grant of summary judgment as to Medavoy and Phoenix. Briarpatch II.

The Court of Appeals ruled that "plaintiffs declaratory judgment and copyright infringement claims fail because Briarpatch Film Corp. ("BFC"), not plaintiffs, had legal title to the copyrights at issue." Briarpatch II at *1. The Second Circuit affirmed the 2007 Opinion on the Copyright Claims stating that Plaintiffs' had produced no evidence nor presented any legal theory to question Briarpatch Film's former ownership of the TRL Motion Picture Rights, and the effective transfer of those rights to Defendants. Noting the factual intertwining of Plaintiffs' Copyright Claims and Fiduciary Duty Claims, the Second Circuit also affirmed this Court's grant of summary judgment on the Fiduciary Duty Claims stating that "plaintiffs' claim that defendants aided and abetted a breach of fiduciary duty fails for the same reason [as their Copyright Claims] — they have not adduced evidence sufficient to allow a trier-of-fact to reasonably infer that the defendants had 'actual knowledge' of BFC, Geisler, and Roberdeau's breaches of their fiduciary duties to the plaintiffs, as required by New York State law." Id. at *2. As to Plaintiffs' argument that Defendants had actionable knowledge about Geisler's and Roberdeau's misdeeds, the Second Circuit pointedly observed that the "plaintiffs grossly mischaracterize" Geisler's testimony in their efforts. Id. at *1.

The Defendants Are Prevailing Parties

The Copyright Act provides, in relevant part, that in a copyright action, "the court in its discretion may allow the recovery of full costs by or against any party ... [and] may also award a reasonable attorneys' fee to the prevailing party as part of the costs." 17 U.S.C. § 505. The mechanism for recovering such costs and fees is provided in Fed. R. Civ. P. 54(d) (2).

The Defendants have successfully defended against all claims actually litigated against them. As the prevailing parties, Defendants are entitled to an award of full costs, and reasonable attorneys' fees, as a matter of judicial discretion under the copyright statute. *Repp v. Webber*, 892 F. Supp. 552, 560 (S.D.N.Y. 1995); *Mathew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 116, 120 (2d Cir. 2001).

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Supreme Court held that the standard governing the award of attorneys' fees under Section 505 of the Copyright Act should be identical for prevailing plaintiffs and prevailing defendants. The Court noted that "[t]here is no precise rule or formula for making [attorneys' fees] determinations, but instead equitable discretion should be exercised," and listed several nonexclusive factors that courts should consider when exercising such discretion including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at 534, 534 n.19 (internal quotation marks and citations omitted). The Second Circuit has also stated that a party's unreasonable or bad faith litigation conduct may also serve as a basis for the court's exercise of its discretion to award fees. *Mathew Bender & Co.*, 240 F.3d at 124-25. In all cases, the Supreme Court cautioned, such factors may be used only "so long as [they] are faithful to the purposes of the Copyright Act." *Fogerty*, 510 U.S. at 534 n.19.

The Copyright Claims Asserted In This Action Were Objectively Unreasonable

In evaluating a motion for attorneys' fees under the Copyright Act, the Second Circuit has stated that "objective reasonableness is a factor that should be given substantial weight in determining whether an award of attorneys' fees is warranted." *Mathew Bender & Co.*, 240 F.3d at 122. "[C]laims that are without merit or otherwise patently devoid of legal or factual basis ought to be deemed objectively unreasonable." *Penguin Books U.S.A. v. The New Christian Church Of Full Endeavor, Ltd.*, No. 96-CV-4126, 2004 WL 728878 at *3 (S.D.N.Y. Apr. 6, 2004). It is not necessary that this Court make a finding of frivolousness or bad faith in order to award a fee. *Sparaco v. Lawler, Matusky, Skelly, Eng'rs LLP*, 60 F. Supp. 2d 247, 258-59 (S.D.N.Y. 1999).

Fees have been awarded based on the prosecution of claims that have been found "objectively unreasonable" because they had no sufficient factual basis. See, e.g., *Arclightz & Films PVT. Ltd. v. Video Palace, Inc.*, No. 01-CV-10135, 2003 WL 22434153 at *5 (S.D.N.Y. Oct. 24, 2003) (plaintiffs "built their case on little more than `supposition and

innuendo" and "the consistent lack of evidentiary support for plaintiff's claims ... supports a finding that plaintiff's claims were, in fact, objectively unreasonable."); *Chivalry Film Productions v. NBC Universal, Inc.*, No. 05-CV-5627, 2007 WL 4190793, at *3 (S.D.N.Y. Nov. 27, 2007) (finding objectively unreasonable plaintiff's claims that plaintiff's novel and screenplay were infringed by two motion pictures after the court determined on summary judgment that the works were not substantially similar and that defendants' films were based upon other independent creations that predated the plaintiff's copyrighted works); *Baker v. Urban Outfitters, Inc.*, 431 F. Supp.2d 351, 356, 358-59 (S.D.N.Y. 2006) (In a case where defendant had conceded liability, asserting a speculative and factually unsupported actual damage claim for \$260,000 for copyright infringement was objectively unreasonable where court granted partial summary judgment limiting the amount of actual damages to \$3,896.); *Mallery v. NBC Universal, Inc.*, No. 07-CV-2250, 2008 WL 719218, at *1 (S.D.N.Y. Mar. 18, 2008) (copyright infringement claim objectively unreasonable where "nearly every instance of alleged similarity between [defendant's work] and plaintiffs' work relates to unprotected ideas rather than protectable expression."); *Rodriguez v. Klum*, No. 05-CV-102318, 2009 WL 73115 at *1-2 (S.D.N.Y. Jan. 8, 2009) (objectively unreasonable to continue litigating infringement claim after plaintiff received undisputed evidence that defendants' allegedly infringing television series was created prior to when plaintiff claimed defendants had access to plaintiff's allegedly infringed treatment for a television show); *Crown Awards, Inc. v. Discount Trophy & Co., Inc.*, 564 F. Supp. 2d 290, 296 (S.D.N.Y. 2008) ("Defendant's independent creation defense proved objectively unreasonable at trial, since it was predicated on testimony that the court found inherently incredible."); *Vargas v. Transeau*, No. 04-CV-9772, 2008 WL 3164586, at *3 (S.D.N.Y. Aug. 6, 2008) (assertion of infringement claim objectively unreasonable where plaintiffs' own expert conceded possibility of independent creation.)

Similarly, fees have been awarded based on the prosecution of claims that have been found "objectively unreasonable" because they had no sufficient legal basis. See, e.g., *Earth Flag Ltd. v. Alamo Flag*, 154 F. Supp.2d 663, 667 (S.D.N.Y. 2001) (infringement claim objectively unreasonable because it was based on claim that Earth Flag was sufficiently original to warrant copyright protection when, in fact, it was "nothing more than a public domain photograph" of the earth from space and also because it relied on a theory of copyright expressly rejected by a controlling United States Supreme Court decision); *Torah Soft LTD. v. Drosin*, No. 00-CV-5650, 2001 WL 1506013 at +4-5 (S.D.N.Y. Nov. 27, 2001) (copyright infringement claim objectively unreasonable because it was based on protection of non-copyrightable portion of plaintiff's work.); *Video-Cinema Films, Inc. v. CBS Corp.*, No. 98-CV-7128, 2003 WL 1701904 at *2-3 (S.D.N.Y. Mar. 31, 2003) (plaintiffs copyright infringement claim based on defendant's use of a short clip from plaintiff's motion picture in television obituaries of actor Robert Mitchum was objectively unreasonable after court granted summary judgment to defendant on copyright fair use defense because plaintiff's opposition to the motion for summary judgment made unreasonable legal arguments that mischaracterized controlling case law and relied upon inapplicable case law).

Additionally, "obsessive pursuit of [copyright] claims already rejected" is a factor that should be considered in determining objective unreasonableness or the appropriateness of an

award of fees in general. *Hudson v. Universal Studios Inc.*, No. 04-CV-6997, 2009 WL 536564, at *3 (S.D.N.Y. Mar. 4, 2009). See also, *Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 593 (6th Cir. 2008) (plaintiffs' "pressing of a futile claim" considered as part of plaintiff's "overly aggressive litigation tactics" in affirming award of attorneys fees under Copyright Act.).

Plaintiffs' copyright claims were premised on the assertion that Phoenix did not acquire the TRL motion picture rights from Briarpatch Film despite having fully performed the Phoenix TRL Acquisition Agreement by July 18, 1997. Plaintiffs have contended:

- That Defendants were bound by the judgment in the 1998 New York Action which Plaintiffs claimed had determined that the Partnership (and not Briarpatch Film) was the legal owner of the TRL Motion Picture Rights as of the Partnership's creation in 1994 and that such finding had been reconfirmed by a 2006 New York court judgment Plaintiffs' counsel had obtained in yet another action to which Defendants were not parties.
- That Briarpatch Film had transferred legal ownership of the TRL Motion Picture Rights to the Partnership upon entering into the Briarpatch Limited Partnership Agreement ("LPA") because prior to that time Briarpatch Film had been administratively dissolved.
- That the Phoenix TRL Acquisition Agreement was only a "quit claim" and therefore did not convey legal ownership of the TRL Motion Picture Rights.
- That Briarpatch Film was never paid at a consideration for any assignment of the TRL Motion Picture Rights to Phoenix.
- That Phoenix was not a bona fide purchaser for value of the TRL Motion Picture Rights because Defendants knew of Plaintiffs' business relationship with Briarpatch Film, Geisler and Roberdeau, and that Defendants were aware that that relationship was going to be breached by Briarpatch Film, Geisler and Roberdeau.

Plaintiffs' contention that Defendants did not acquire the TRL Motion Picture Rights by fully performing the Phoenix TRL Acquisition Agreement, and their factual and legal arguments to support that contention, had no legal or factual support. These claims have been granted by summary judgment to Defendants and the Second Circuit has affirmed.

This Court determined that at all times prior to its transfer of the TRL Motion Picture Rights to Phoenix, Briarpatch Film had been the legal owner of those rights, that the Partnership was never the legal owner of those rights, and that Plaintiffs therefore could not assert any copyright infringement claim based upon the production of the TRL Movie by Phoenix. 2007 Opinion at *11-14. In the second appeal, the Second Circuit affirmed

all of this Court's rejection of Plaintiffs' claims by Summary Order. The Second Circuit agreed that Plaintiffs presented no factual or legal support for their claim that the Partnership, rather than Briarpatch Film, owned the TRL Motion Picture Rights and did not convey them to the Defendants stating that "plaintiffs' contention that [Briarpatch Film] transferred legal to Briarpatch [LP] is not supported by any writing in the record, and

plaintiffs have not pointed to any operation of law by which title would have been transferred." Briarpatch II, at *1. The Second Circuit similarly dismissed Plaintiffs' arguments that Defendants somehow did not acquire good title from Briarpatch Film because of some alleged knowledge they had of Rubin's business relationship with Geisler and Roberdeau and Briarpatch Film. The Second Circuit concluded that "Phoenix took title to the copyrights free of [plaintiffs'] purported equitable interest" because "Phoenix purchased the copyrights for value and plaintiffs have not adduced sufficient evidence from which a trier-of-fact could reasonably infer that Phoenix had knowledge of the actions of BFC, Robert Geisler, or John Roberdeau breached any duties to Briarpatch [LP] or Rubin." *Id.* In reaching this conclusion, the Court also noted that "plaintiffs grossly mischaracterize" the Geisler deposition testimony on which Plaintiffs relied to claim Defendants had such alleged knowledge. *Id.*

As this Court has ruled twice, and as the Second Circuit has now confirmed, Plaintiffs for over 8 years of litigation have pursued claims (1) that had no factual or legal basis, (2) that were directly contradicted by the Plaintiffs' own sworn allegations, and the findings and judgment in the 1998 New York Action; (3) that Plaintiffs were judicially estopped from litigating, and (4) that this Court dismissed on the merits in 2002, but which Plaintiffs continued to press despite no new evidence and no change in applicable law. Plaintiffs' claims were "clearly without merit [and were] patently devoid of legal or factual basis [and they] ought to be deemed objectively unreasonable." *Penguin Books U.S.A. v. The New Christian Church Of Full Endeavor, Ltd.*, *supra*, 2004 WL 728878 at *3.

In addition, it is appropriate for this Court to consider other equitable factors relevant to this Court's exercise of discretion to award fees and costs. Indeed, "[i]n an appropriate case, the presence of other factors might justify an award of fees despite a finding that the non-prevailing party's position was objectively reasonable. *Matthew Bender*, *supra*, 240 F.3d at 122 (citing *Matthews v. Friedman*, 157 F.3d 25, 29 (1st Cir. 1998)) ("depending on other circumstances, the district court could conclude that the losing party should pay even if all of the arguments it made were reasonable.")

These other factors, discussed below, include improper motivation of the litigant, unreasonable and bad faith litigation tactics, and the need for compensation and deterrence. See e.g., *Baker v. Urban Outfitters, Inc.*, *supra*, 431 F. Supp.2d at 357.

The Motions of the Plaintiffs Were Improper

The prior proceedings establish that this action was brought and litigated for over 8 years because the Plaintiffs concluded that they would never collect any judgment they had obtained, or might obtain, against Geisler and Roberdeau, or any of their affiliates including the judgment entered in the 1998 New York Action. The history of Plaintiffs' litigation marathon demonstrates this. See, e.g., *Briarpatch Limited L.P. v. Geisler Roberdeau Inc.*, 194 F.2d 256, 250-254 (S.D.N.Y. 2002) (Summarizing some of Plaintiffs litigation collection efforts against Geisler and Roberdeau in the New York and Texas state and federal courts including bankruptcy court in Texas).

Courts have awarded attorneys fees under the Copyright Act where other have been so motivated. See, e.g., *Video-Cinema Films, Inc. v. CBS Corp.*, supra, 2003 WL 1701904 at *4-5 (Awarding fees where court concluded that plaintiff's prosecution of copyright infringement claims based on defendants use of a short clip from a motion picture in televised obituaries was improperly motivated because it "was nothing more than an obvious effort to use the Copyright Act to secure payment from Defendants for their fair use of the film footage."); *Torah Soft Ltd. v. Drosin*, supra, 2001 WL 1506013 at *5 ("[A] party that knowingly gambles on an unreasonable legal theory in order to achieve a secondary gain — this case, the leveraging of a settlement — is indeed improperly motivated."); *Baker v. Urban Outfitters, Inc.*, supra, 431 F. Supp.2d 351, 356, 358-59 (Court awarded fees and costs in part because it concluded that plaintiff "(and his counsel" filed and maintained this suit in an attempt to extract a significant payment from perceived "deep pocketed" defendants (and in an attempt to garner publicity for [plaintiff's] agent and for his lawyer)."); *Mailer v. RKO Teleradio Pictures, Inc.*, 332 F.2d 747, 749 (2d Cir. 1964) (Award of attorneys' fees to defendant affirmed, in part, where Second Circuit found "the inference inescapable that Mailer" asserted his copyright claim because he was "disappointed in the failure of the film [based on the Nakes and the Dead] to return the expected profits [and he] merely sought to recover those profits in the form of a judgment or, more likely, a substantial settlement.").

The Plaintiffs prosecuted the Copyright Claims that had already been rejected by this Court in 2002. As noted above, "obsessive pursuit of [copyright] claims already rejected" is a factor that should be considered in determining objective unreasonableness or the appropriateness of an award of fees in general. *Hudson v. Universal Studios Inc.*, supra, 2009 WL 536564 at *2; see also, *Rodriguez v. Klum*, supra, 2009 WL 73115 at *1-2 (Fees awarded based on plaintiff continuing to litigate infringement claim after discovering undisputed evidence that defendants' allegedly infringing television series was created prior to when plaintiff claimed defendants had access to plaintiff's allegedly infringed treatment for a television show.); *Bridgeport Music, Inc. v. WB Music Corp.*, supra, 510 F.2d at 593 (Plaintiffs' "pressing of a futile claim," even though it was originally objectively reasonable, considered as part of plaintiff's "overly aggressive litigation tactics" and a reason for affirming an award of attorneys fees under Copyright Act.). Plaintiffs had no new facts to support their Copyright Claims (or their Fiduciary Duty Claims) after this Court first granted summary Judgment (2002 Opinion) and after dismissal of those claims was affirmed in *Briarpatch I*, albeit on different grounds. Indeed, Plaintiffs never produced any new relevant facts in opposition to Defendants renewed motion for summary judgment. 2007 Opinion at *3.

Plaintiffs on numerous occasions actively mischaracterized testimony. See, e.g., *Briarpatch II* at *1 (stating that Plaintiffs "grossly mischaracterize" Geisler's testimony), 2007 Opinion at *23 n.10 and *19 (rejecting Plaintiffs' characterization of Medavoy's testimony about his views of Geisler and Roberdeau and Plaintiffs' false claim that *Briarpatch Film* did not receive any of the consideration paid by Phoenix).

While this case was originally before this Court, and after this Court denied Plaintiffs' remand motion, Plaintiffs moved to file an amended complaint to add as a new defendant the former New York law firm that represented Geisler and Roberdeau. In part that motion was denied because Plaintiffs brought it for the improper purpose of trying to divest this Court of subject matter jurisdiction. 2002 Opinion, 148 F. Supp. 2d at 330-33. On more than one occasion, Plaintiffs have filed motions without the required memorandum of law. *Id.*, 148 F. Supp. 2d at 329.

In light of the foregoing, this is a case where an award of fees is important for deterrence and to compensate Defendants for expense of this suit which should never have been brought, and even if brought, should never been litigated as Plaintiffs litigated it. "[T]he denial of fees and cost to a prevailing defendant in an objectively unreasonable copyright case may spur additional frivolous lawsuits, of exactly the sort an award of fees and costs is designed to `chill.'" *Chivalry Film Productions*, 2007 WL 4190793, at *3 (citation omitted); *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d at 359; *Earth Flag Ltd. v. Alamo Flag Co.*, 154 F. Supp. 2d at 668; *Arclightz & Films PVT. Ltd. v. Video Palace, Inc.*, 2003 WL 22434153 at *5.

Plaintiffs have contended that the instant motion of the Defendants is premature and is just an effort to delay final resolution of this almost 10-year old lawsuit. However, Judgment of May 1, 2007, specifically retained jurisdiction "for the purpose of hearing a motion, as allowed by Fed. R. Civ. P. 54(d)(2), by Defendants for recovery of full costs and attorneys' fees pursuant to 17 U.S.C. § 505." By letter endorsed by this Court dated May 2, 2007, this Court ordered that Defendants' motion for attorneys' fees and costs under the Copyright Act be filed by Defendants no later than 30 days of the Plaintiffs' appeal becoming final.

This Court's jurisdiction to decide the pending motion is not affected by the pendency of Plaintiffs' appeal with respect to the issue of Plaintiffs' claim for an award of costs against the moribund GRI. This Court retains jurisdiction to make an award of attorneys' fees under the Copyright Act (or any other fee shifting statute), matters collateral to the final judgment, even after the filing of a notice of appeal with respect to final judgment on the merits of the underlying dispute. *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 452 (1982); *Yurman Designs Inc. v. PAJ, Inc.* No. 98-CV-8697, 2001 WL 797474, *2 (S.D.N.Y. 2001). Moreover, the Second Circuit has affirmed this Court's grant of summary judgment in Defendants' favor on all claims. *Briarpatch Ltd. LP v. Phoenix Pictures, Inc.*, 312 Fed. Appx. 443 (2d Cir. 2009).

Rubin Is Liable Only As A Winding Up Partner

The FAC alleged that all named general partners of GRI were dissolved prior to 1998 and the Partnership was dissolved.

Where, as here, all general partners have been dissolved and so disqualified from serving as general partner, it becomes necessary for someone else to prosecute Partnership claims

and wind up the Partnership. To encourage limited partners to do so, New York Partnership Law exculpates from liability a limited partner serving as winding up partner:

Upon dissolution of a limited partnership, the persons winding up the limited partnership's affairs may, in the name of, and for and on behalf of, the limited partnership prosecute and defend suits, whether civil, criminal or administrative ... all without affecting the liability of limited partners including limited partners participating in the winding up of the limited partnership's affairs.

N.Y. P'Ship Law § 121-803(b)

Upon dissolution of the Partnership, sole limited partner Rubin was so designated, and then found in the state court's July 1999 decision to be properly serving as, sole winding up partner of the Partnership.

The First Amended Complaint alleged that Rubin filed the action as "sole limited and designated winding up partner of the Partnership". Accordingly, Rubin is explicitly exculpated from any liability beyond that of a winding up partner.

In light of the foregoing conclusions and authorities, the Defendants' motion is granted. The parties will meet and confer to schedule any further proceedings with respect to fees and costs.

It is so ordered.