UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually and IDAZ GREENBERG, individually, Plaintiffs, v. NATIONAL GEOGRAPHIC SOCIETY, a District of Columbia corporation, NATIONAL GEOGRAPHIC ENTERPRISES, INC., a corporation, and MINDSCAPE, INC., a California Corporation, Defendants.	Case No. 96-3924 Civ-Lenard

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

Defendants National Geographic Society (the "Society"), National Geographic Enterprises ("Enterprises"),[1] and Mindscape, Inc., by their attorneys, Weil, Gotshal & Manges LLP, respectfully submit this reply memorandum in further support of their motion for reconsideration of the Court's Order dated January 11, 2002 granting Plaintiffs' motion to strike Defendants' answers.

PRELIMINARY STATEMENT

Plaintiffs grossly mischaracterize the Court's January 11, 2002 Order in claiming that the Order's "primary grounds" for granting their motion to strike was that Defendants' answers were untimely. In fact, the Court does not mention the timeliness issue at all in its

[1] National Geographic Enterprises is incorporated under the name National Geographic Holdings, Inc.

analysis, focusing exclusively on the mandate rule, which was clearly the "primary grounds" for the Court's decision. The Court's discussion of that rule was apparently influenced by an obviously inadvertent misreading of the Eleventh Circuit's mandate caused by the illegibility of the copy sent to the Court. This Court's January 11, 2002 Order directly quotes the Eleventh Circuit's opinion to evidence the appellate court's mandate, but, as demonstrated, this Court's quoted attribution is incomplete according to the printed text of the Eleventh Circuit's corrected opinion. Reviewing the handwritten correction to this "corrected opinion" shows the understandable reason for an erroneous quotation. Denying Defendants the opportunity to present meritorious defenses on the basis of such an inadvertent clerical error would result in a serious miscarriage of justice.

ARGUMENT

Plaintiffs accuse Defendants of engaging in "wordplay about [the Eleventh Circuit's] handwritten corrections, [which] . . . is of no consequence. . ." (Pl. Mem. p. 3). Yet Plaintiffs' interpretation of the corrections to the Eleventh Circuit's opinion makes no sense, either as a matter of plain English or common logic. Plaintiffs assert that the "only fair reading of the margin notes is that 'if any' modified only references by the appellate court to injunctive relief." (Pl. Mem. p. 5). The corrected opinion reads, "Upon remand, the district court should ascertain the amount of damages and attorneys fees that are due, *if any*, *as well as* any injunctive relief that may be appropriate." (Def. Mem. Exh. C) (emphasis added). The only possible reasonable interpretation of this language is that the words "if any" modify "the amount of damages and attorneys fees that are due." Indeed, they are separated from the clause dealing with injunctive relief by the phrase "as well as," indicating that the subject of the sentence is changing from damages and attorneys fees to injunctive relief. The notion that the words "if

any," as used in the corrected opinion, modify subsequent language does not comport with basic tenets of grammar and syntax.

Plaintiffs also assert that the Eleventh Circuit's corrections to its initial opinion are merely procedural and have no substantive effect, speculating that the reason why the court withdrew its direction to the District Court to enter judgment was because "that was a role reserved to this Court after considering the remaining issues of damages and fees." To the contrary, the Eleventh Circuit corrected the opinion specifically in response to Defendants' petition for rehearing as reflected by the record attached to Defendants' Motion for Reconsideration, which pointed out that liability issues not addressed by the appellate court remained to be litigated below. The fact that the court did not include the words "for further proceedings consistent with this opinion" is of no consequence, because it is clear from the circumstances that the court was directly responding to the concerns that Defendants expressed in their petition for rehearing. The addition of the words "if any" and the deletion of the direction to enter judgment are significant changes in the mandate from the initial opinion to the corrected opinion issued after Defendants filed their Motion for Rehearing. The corrected opinion can only mean that the Eleventh Circuit recognized that there were other liability issues to be decided. Otherwise, the Eleventh Circuit would have left undisturbed its original direction to enter judgment for Plaintiffs. Plaintiffs' interpretation reads all substantive meaning out of the Eleventh Circuit's correction to its opinion, which would make the correction superfluous, pointless and inexplicable.

Because Plaintiffs recognize how inequitable it would be to preclude Defendants from presenting meritorious defenses on the basis of a clerical error that led to a misreading of the mandate, they elevate the timeliness issue to a status not warranted by its treatment in the

Court's January 11 Order. If Defendants' answers were late by a few days, which Defendants submit they were not, as set forth in the Memorandum of Law in Support of Defendants' Motion for Reconsideration in detail, then it is within the Court's discretion to extend the filing deadline, even after the fact. Plaintiffs do not even attempt to demonstrate that they would be prejudiced by such an extension. Nor should the Court rely upon Plaintiffs' assertion that the proposed defenses are "not grounded in law" in determining whether to grant Defendants' motion for reconsideration. Such arguments are appropriately made in a summary judgment motion, not here.[2]

---

[2] Plaintiff's argument is analogous to one sometimes made in opposition to a party's motion to amend its pleading – that the proposed claim or defense would be futile. Courts analyze such claims in light of the standard set by Fed. R. Civ. P. 12(b)(6), assuming that all allegations in the proposed pleading are true. El-Haji v. Fortis Benefits Ins. Co., __F.Supp.2d__, 2001 WL 893791 at *8 (D.Me. Aug. 8, 2001); Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc., 106 F.Supp.2d 761, 764-65 (D.N.J. 2000). Applying this standard, it is clear that Defendants' proposed answers state legally cognizable defenses.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' motion.

Dated: New York, New York
February 6, 2002

Robert G. Sugarman
Naomi Jane Gray
Pierre M. Davis (not admitted in the S.D. Fla.)

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153-0119
Telephone: (212) 310-8000
Attorneys for Defendants

Edward Soto
Peter Berlowe

Weil, Gotshal & Manges LLP
701 Brickell Avenue, Suite 2100
Miami, FL 33131
Telephone: (305) 577-3100

- and -

Terrence B. Adamson, Esq.
Executive Vice President
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688
Of Counsel