APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12563

AFFORDABLE AERIAL PHOTOGRAPHY, INC.,

Plaintiff-Appellee

v.

PROPERTY MATTERS USA, LLC,

Defendant-Appellant

HOME JUNCTION INC.,

Defendant

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:22-cv-14296-AMC

Before WILSON, GRANT, and LAGOA, Circuit Judges.

LAGOA, Circuit Judge:

Property Matters USA, LLC, one of the defendants in this copyright infringement case, appeals the district court's denial of its motion for attorney's fees under 17 U.S.C. § 505. After carefully considering the

parties' arguments and with the benefit of oral argument, we conclude that a defendant is not the prevailing party under § 505 when a plaintiff's action is voluntarily dismissed without prejudice under Rule 41(a)(1)(A)(i) and affirm the district court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

Affordable Aerial Photography, Inc. ("AAP"), was incorporated in Florida in 2005. Robert Stevens, AAP's owner, is a real estate photographer who specializes in aerial photography and exterior and interior shots. He offers slide shows, virtual tours, and stock photography to luxury real estate companies. AAP owns all the photographs Stevens takes and licenses them for limited use by their customers.

Property Matters USA, LLC ("Property Matters") is a real estate brokerage in Boca Raton, FL. Home Junction Inc. ("Home Junction") is a real estate marketing solutions and services provider who designed and maintained Property Matters's website.

In 2010, AAP created the photograph at issue, titled "PRESIDENTIAL PLACE FRONT AERIAL 2010 AAP" ("the Work"), which provides an aerial view of a residential condominium complex. In the bottom left corner, AAP included its copy right management information: "© AAP 2010 all rights reserved." AAP also registered the Work with the Register of Copyrights on April 6, 2018.

On or before April 30, 2017, the Work appeared on Property Matters's website. While AAP used various techniques to search for copyright infringement of the Work at least once per year from 2017 to 2022, it did not discover the alleged infringement until February 21, 2022.

In August 2022, AAP filed a complaint in the Southern District of Florida, which included one count of copyright infringement with respect to both Home Junction and Property Matters. AAP sought, among other things, a declaration that both Home Junction and Property Matters willfully infringed on AAP's copyright; actual damages and disgorgement of profits or, in the alternative, statutory damages; costs and attorney's fees; and a permanent injunction prohibiting infringement of AAP's exclusive rights in the Work under copyright law.[1]

Property Matters subsequently filed a motion to dismiss—raising among other issues the statute of limitations set out in 17 U.S.C. § 507(b), which provides that no civil action may be maintained under Title 17 of the U.S. Code "unless it is commenced within three years after the claim accrued." Property Matters argued that the limitations period begins to run when the infringement occurs—here April 2017—and thus AAP's action was untimely by over two years. The district court denied this motion without prejudice for failure to comply with the district court's administrative order governing responsive filings in multiple-defendant cases. AAP then filed a notice of voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i) with respect to its action against Property Matters, and the district court entered an order pursuant to AAP's notice dismissing the action without prejudice. Soon after, AAP and Home Junction filed a joint notice of settlement, and the

[1] AAP filed an amended complaint that dropped Property Matters as a defend ant, but the district court struck it for failing to comply with Federal Rule of Civil Procedure 15.

district court closed the case.[2]

Property Matters then moved for attorney's fees under 17 U.S.C. § 505, seeking $22,650 in fees already incurred along with any fees that would result from litigation of its motion. Section 505 provides that, in any civil action under Title 17, "the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof," and, except as otherwise provided by Title 17, "the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." The district court assigned the issue to a magistrate judge. Although AAP's action against Property Matters was voluntarily dismissed without prejudice under Rule 41(a)(1)(A)(i), Property Matters argued that AAP is nevertheless barred from reasserting its infringement claim in a new proceeding because of the statute of limitations found in 17 U.S.C. § 507(b). Thus, according to Property Matters, it is the "prevailing party" as a matter of law. In response, AAP argued among other things that Property Matters is not the prevailing party because the voluntary dismissal was without prejudice and the limitations period has not yet expired. The parties, however, agreed that if claims of copyright infringement accrue when the act of infringement occurs, then AAP could not refile its claim and Property Matters would be the prevailing party.

The magistrate judge recommended denying Property Matters's motion and the district court, over Property Matters's objections, accepted the report and recommendation. In line with how other courts have decided the issue, the district court applied the

[2] Home Junction is not a party to this appeal.

"discovery rule" to conclude that AAP's copyright infringement claim did not accrue until it discovered the alleged infringement. The district court also agreed with the magistrate judge that AAP, "who ran annual reverse image searches of the [W]ork, exercised reasonable diligence and discovered through that diligence the alleged infringement on February 21, 2022—making February 21, 2022, the date the claim accrued for purposes of 17 U.S.C. § 507." Therefore, the district court said, because AAP was not time-barred from raising its copyright infringement claim against Property Matters in a separate suit through February 21, 2025, the voluntary dismissal did not materially alter the legal relationship between the parties and Property Matters was not the prevailing party.[3]

Property Matters timely appealed the district court's order.

II. STANDARDS OF REVIEW

In reviewing a district court's prevailing-party determination, we review any findings of fact for clear error. *Royal Palm Props., LLC v. Pink Palm Props., LLC*, 38 F.4th 1372, 1375 (11th Cir. 2022). We review de novo, however, the legal question as to whether those facts render a party a "prevailing party." *Id.*

III. ANALYSIS

For most of this litigation, the parties' advanced an incorrect understanding about the meaning of

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[3] The district court declined to address Property Matters's objections to the magistrate judge's alternative recommendation to deny attorney's fees based on the factors set out in *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994).

"prevailing party" in 17 U.S.C. § 505. Before the district court, the parties stipulated that "[i]f dismissal without prejudice occurred after the Copyright Act's limitation period expired, a defendant obtains 'prevailing party' status."[4] The district court appeared to agree with the parties. But we are "duty bound to apply the correct law," and "'parties cannot waive the application of the correct law or stipulate to an incorrect legal test.'" *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816 n.8 (11th Cir. 2022) (en banc) (quoting *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 923 (11th Cir. 2018)). Under the precedents of the Supreme Court and this Court, a defendant is not the prevailing party when a plaintiff's action is voluntarily dismissed without prejudice under Rule 41(a)(1)(A)(i). This is true regardless of whether a statute of limitations has expired. Therefore, to decide this case, we need not decide other issues, such as whether § 507(b) is subject to the injury rule or the discovery rule.

Section 505 authorizes a court to "award a reasonable attorney's fee to the prevailing party." "Prevailing party" is a "legal term of art." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 (2001). Congress has included it in various statutes, and the Supreme Court has "interpret[ed] the term in a consistent manner." *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016). The "touchstone of the prevailing party inquiry" is "the material alteration of the legal relationship of the parties," *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989), and

[4] AAP has disavowed this position on appeal.

"[t]his change must be marked by 'judicial *imprimatur*,'" *CRST Van Expedited*, 578 U.S. at 422 (emphasis in original) (quoting *Buckhannon*, 532 U.S. at 605).

The prevailing-party inquiry is different with respect to plaintiffs and defendants given that they "come to court with different objectives." *Id.* at 431. While a plaintiff "seeks a material alteration in the legal relationship between the parties," a defendant "seeks to prevent this alteration to the extent it is in the plaintiff's favor." *Id.* Given the defendant's objectives, it can attain prevailing-party status "whenever the plaintiff's challenge is rebuffed," even if for a nonmerits reason. *Id.* But this is true only when the rejection of the plaintiff's challenge is "marked by 'judicial *imprimatur*.'" *Id.* at 422 (emphasis in original) (quoting *Buckhannon*, 532 U.S. at 605). This means that a defendant does not attain prevailing-party status merely because, as a practical matter, a plaintiff is unlikely or unable to refile its claims. Instead, the court itself must act to reject or rebuff the plaintiff's claims. *See Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1298 (11th Cir. 2021) ("[T]o determine whether the City was the prevailing party in this case, we ask whether the district court's judgment rebuffed Beach Blitz's efforts to effect a material alteration in the legal relationship between the parties."); *cf. Buckhannon*, 532 U.S. at 604 (requiring "a court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant'" (alterations in original) (quoting *Tex. State Tchrs. Ass'n*, 489 U.S. at 792)).

For example, in *Beach Blitz*, the district court dismissed five counts without prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and denied Beach Blitz the opportunity to

amend four of the five counts. 13 F.4th at 1295. After Beach Blitz failed to file an amended complaint with respect to the fifth count, the district court entered judgment for the City and closed the case. *Id.* at 1295–96. Even though the district court's judgment was "without prejudice," this Court concluded that the City was the prevailing party. *See id.* at 1301. For one, the "dismissal was involuntary." *Id.* at 1298. Also, the district court dismissed the "claims on the merits in the sense that [it] 'pass[ed] directly on the substance of' Beach Blitz's claims'" when adjudicating the Rule 12(b)(6) motion. *Id.* at 1299 (second alteration in the original) (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501–02 (2001)). Therefore, as "a matter of '[c]ommon sense,'" this Court concluded that the district court "plainly rebuffed Beach Blitz's attempt to alter its legal relationship with the City and 'resolved [the case] in the defendant's favor.'" *Id.* at 1300 (alterations in original) (quoting *CRST Van Expedited*, 578 U.S. at 431–32); *see id.* ("[I]n every practical sense, the district court rebuffed Beach Blitz's effort to alter its legal relationship with City.").

And we applied a similar analysis—but reached a different result—in *United States v. $70,670.00 in U.S. Currency*, 929 F.3d 1293 (11th Cir. 2019). There, we were charged with determining whether the claimants in a civil forfeiture case "substantially prevail[ed]," 28 U.S.C. § 2465(b)(1), after the district court granted the government's motion to voluntarily dismiss its complaint without prejudice under Federal Rule of Civil Procedure 41(a)(2), *see $70,670.00 in U.S. Currency*, 929 F.3d at 1298–99, 1303. While not sharing identical text, we explained that "we interpret 'substantially prevailed' fee-shifting statutes consistently with 'prevailing party' fee-shifting statutes." *Id.*

at 1303 (citing *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 307 F.3d 1318, 1322 n.4 (11th Cir. 2002)). And we concluded that the claimants had not substantially prevailed because "a dismissal without prejudice places no 'judicial *imprimatur*' on 'the legal relationship of the parties,' which is 'the touchstone of the prevailing party inquiry.'" *Id.* (emphasis in original) (quoting *CRST Van Expedited*, 578 U.S. at 422). Instead, a voluntary dismissal without prejudice merely "renders the proceedings a nullity and leaves the parties as if the action had never been brought." *Id.* (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999)).

Even though we recognized in *$70,670.00 in U.S. Currency* that the government, as a "practical matter," may have a difficult time pursuing a new civil forfeiture action concerning the same properties, we explained that "the order of dismissal poses 'no legal bar precluding the government from refiling the same forfeiture action in the future.'" *Id.*; *see id.* ("[T]his practical difficulty is irrelevant."). What mattered, we said, was that "the claimants have not obtained a 'final judgment reject[ing] the [government's] claim' to the defendant funds." *Id.* (alterations in original) (quoting *CRST Van Expedited*, 578 U.S. at 431). We thus affirmed the district court's denial of the claimants' motion for attorney's fees.

While there are some differences between this case and *$70,670.00 in U.S. Currency*—including the statutory language at issue and the fact that the claimants in that case sought affirmative relief—we find that none of them supply a reason to reach a different result here. AAP's action against Property Matters was dismissed without prejudice by operation of AAP filing

a notice of voluntary dismissal under Rule 41(a)(1)(A)(i), and under that provision, the voluntarily dismissal takes effect "without a court order."[5] *See Absolute Activist Value Master Fund Ltd. v. Devine*, 998 F.3d 1258, 1265 (11th Cir. 2021) ("[A] plaintiff's voluntary dismissal under Rule 41(a)(1)(A)(i) 'is effective immediately upon . . . filing,' and thus no further court order is necessary to effectuate the dis missal." (second alteration in original) (quoting *Matthews v. Gaither*, 902 F.2d 877, 880 (11th Cir. 1990))). This is the opposite of a judicial "rebuff[]" of AAP's claim. *CRST Van Expedited*, 578 U.S. at 431. And because some judicial action rejecting or rebuffing a plaintiff's

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[5] In Property Matters's supplemental briefing, it contends for the first time that the district court's order dismissing AAP's action against Property Matters should be considered a dismissal under Federal Rule of Civil Procedure 21 rather than under Rule 41(a)(1)(A)(i) because Home Junction, the other defendant, remained in the case. But this contention is foreclosed by our precedent, which Property Matters incorrectly miscasts as dicta. *See Plains Growers ex rel. Florists' Mut. Ins. Co. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 253 (5th Cir. 1973) ("[W]e hold that plaintiff is entitled to a dismissal against one defendant under Rule 41(a), even though the action against another defendant would remain pending."); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all Fifth Circuit decisions issued before October 1, 1981); *accord, e.g.*, *Rosell v. VMSB, LLC*, 67 F.4th 1141, 1144 n.2 (11th Cir. 2023) ("Our Circuit has recognized that Rule 41(a) allows a district court to dismiss all claims against *a particular defendant*. But that exception (if it can be called that) is compatible with the rule's text because in a multi defendant lawsuit, an 'action' can refer to all the claims against one party.") (emphasis in original) (citations omitted)). In any case, Property Matters fails to explain how this argument is material to our prevailing-party analysis given that, either way, the district court in this case did not reject or rebuff AAP's claim. *See Beach Blitz*, 13 F.4th at 1298.

claim is necessary to endow a defendant with prevailing-party status, *see id.* at 422, 431, Property Matters is not the prevailing party in this litigation.

Property Matters's arguments do not convince us otherwise. It is true that, in the past, we have held that a defendant can be considered the prevailing party after a voluntary dismissal with prejudice. *See Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007).[6] And we have sometimes said that a dismissal without prejudice is tantamount to a dismissal with prejudice when it comes after the statute of limitations period has expired. *See, e.g.*, *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1280 (11th Cir. 2018); *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. Unit B May 1981).[7]

None of the cases Property Matters cites in support of this second proposition, however, concerned attorney's fees or the proper application of a prevailing-

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[6] In *Mathews*, this Court did not specify the provision of Rule 41 under which the actions at issue were voluntarily dismissed with prejudice. From our review of the district court docket in that case, it appears that the district court entered an order granting the plaintiff's motions for voluntary dismissals under Rule 41(a)(2). *Mathews* is thus different than both this case and *70,670.00 in U.S. Currency*, where the government could refile the same action in the future because the voluntary dismissal under Rule 41(a)(2) was without prejudice. *See 70,670.00 in U.S. Currency*, 929 F.3d at 1303. The voluntary dismissals with prejudice at issue in *Mathews* "clearly rebuffed with the court's *imprimatur*" the plaintiff's claims and prevented the plaintiff from re-litigating those same claims in the future. *Beach Blitz*, 13 F.4th at 1301 (emphasis in original). Therefore, *Mathews* cannot be read to support Property Matters's position in this case, where there is no judicial action preventing AAP from refiling its claim.

[7] In *Bonner*, we adopted all Fifth Circuit decisions issued before October 1, 1981, as binding precedent. 661 F.2d at 1209.

party fees statute like § 505. And none of them provide a reason to conclude that a defendant is the prevailing party in the absence of judicial action. Property Matters would have us conclude that the voluntary dismissal in this case has the same effect for the purposes of attorney's fees as an order from the district court dismissing AAP's claim because the statute of limitations has expired. But the two are completely different in this context. Only the latter supplies the necessary judicial rejection of AAP's claim. Even though our decision in *Beach Blitz* was informed by "common sense" and a "practical examination" of the case, *see* 13 F.4th at 1298, 1300 (alteration adopted) (quoting *CRST Van Expedited*, 578 U.S. at 431), we have been clear that practical effects—without a judicial imprimatur on the parties' relationship—are not sufficient to confer prevailing-party status, *see \$70,670.00 in U.S. Currency*, 929 F.3d at 1303 (stating that the "practical difficulty" of filing a new action is "irrelevant"). Although AAP may be unable to successfully litigate its claim against Property Matters in the future, this is not owed to any action of the district court. Indeed, after the voluntary dismissal, the opportunity remains for AAP to re-litigate the exact the same claim. And, as a result, Property Matters remains at risk. This "is not the stuff of which [a defendant's] legal victories are made." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

Property Matters's argument also conflicts with the Supreme Court's reasoning in *Buckhannon*. There, the plaintiffs sought attorney's fees as the "prevailing party" after their case against state agencies and officials became moot when the state legislature enacted two bills that eliminated the legal requirement at issue. 532 U.S. at 600–01. But the Supreme

Court refused to "allow[] an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. A "defendant's voluntary change in conduct," the Supreme Court explained, "although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* (emphasis in original). For the same reason, a plaintiff's voluntary decision to dismiss an action without prejudice also fails to confer prevailing-party status on a defendant. *See $70,670.00 in U.S. Currency*, 929 F.3d at 1303 (explaining that the holding in *Buckhannon* that "[a] defendant's voluntary change in conduct [is] the mirror image of a plaintiff's voluntary decision to withdraw a claim," and that the defendant's voluntary change in conduct "'lacks the necessary judicial imprimatur' to qualify the defendant as a prevailing party").

In sum, for a defendant to become the prevailing party, we have made clear that "the rejection of the plaintiff's attempt to alter the parties' legal relationship 'must be marked by "judicial *imprimatur*."'" *Beach Blitz*, 13 F.4th at 1298 (emphasis in original) (quoting *CRST Van Expedited*, 578 U.S. at 422). Because AAP's voluntary dismissal without prejudice under Rule 41(a)(1)(A)(i) did not supply the required judicial rejection of AAP's claim, Property Matters is not the prevailing party.

IV. CONCLUSION

Because "[w]e may affirm on any ground supported by the record, regardless of whether that ground was relied upon or even considered below," *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017), we reach the same conclusion as the district court: Property Matters is not the prevailing party in this

litigation. We thus affirm the district court's order finding that Property Matters is ineligible for an award of attorney's fees under 17 U.S.C. § 505.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

CASE NO. 22-14296-CIV-CANNON/McCabe

AFFORDABLE AERIAL PHOTOGRAPHY, INC.,

Plaintiff,

v.

PROPERTY MATTERS USA, LLC and HOME JUNCTION INC.

Defendants.

Filed: July 5, 2023

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION [ECF No. 62]

THIS CAUSE comes before the Court upon the Motion for Attorneys' Fees and Costs ("Motion") filed by Defendant Property Matters USA, LLC ("Property Matters") [ECF No. 26]. The Court referred the Motion to Magistrate Judge Ryon M. McCabe for a report and recommendation [ECF No. 27]. On May 10, 2023, Judge McCabe issued a report recommending that Defendant's Motion be denied (the "Report") [ECF No. 62]. Property Matters filed Objections to the Report [ECF No. 63], to which Plaintiff filed a Response [ECF

No. 64]. The Court has reviewed the Report [ECF No. 62], all related filings [ECF Nos. 63, 64], and the full record. For the reasons set forth below, the Report [ECF No. 62] is **ACCEPTED**.

RELEVANT BACKGROUND

Plaintiff commenced this copyright infringement suit against Defendants Property Matters USA, LLC and Home Junction Inc. on August 21, 2022 [ECF No. 1]. Property Matters then filed a Motion to Dismiss [ECF No. 10], which the Court denied without prejudice because it violated the Court's Order Requiring Combined Responses [ECF No. 15]. Thereafter, Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice as to Property Matters USA, LLC only [ECF No. 17], dismissing its claims against Property Matters without prejudice pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure. The Court then issued an Order Dismissing Plaintiff's Claims Against Defendant Property Matters USA, LLC [ECF No. 19], which terminated Property Matters from the action. Following the Order Dismissing Claims, Defendant filed the instant Motion for Attorneys' Fees and Costs (the "Motion"), seeking $22,650.00 in attorneys' fees through December 19, 2022 [ECF No. 26 p. 8]. This Court referred the Motion to Magistrate Judge McCabe for a report and recommendation [ECF No. 27]. The Report is ripe for adjudication [ECF Nos. 63, 64].

LEGAL STANDARD

To challenge the findings and recommendations of a magistrate judge, a party must file specific written objections identifying the portions of the proposed findings and recommendation to which objection is

made. *See* Fed. R. Civ. P. 72(b)(3); *Heath v. Jones*, 863 F.2d 815, 822 (11th Cir. 1989); *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). A district court reviews de novo those portions of the report to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1). To the extent a party fails to object to parts of the magistrate judge's report, the Court may accept the recommendation so long as there is no clear error of law or fact on the face of the record. *Macort*, 208 F. App'x at 784; *see also* 28 U.S.C. § 636(b)(1).

DISCUSSION

At bottom, Property Matter's Motion presents the question of what effect the Court's dismissal of Plaintiff's claims against Property Matters on October 20, 2022, had on Plaintiff's right to bring a future claim against Property Matters. If the three-year statute of limitations under the Copyright Act had expired, 17 U.S.C. § 507(b), then the Court's dismissal, though in name a dismissal without prejudice [see ECF No. 19], would effectively become a dismissal with prejudice. If so, then Property Matters "would be a prevailing party and may be entitled to attorneys' fees in connection with this action." *Tomelleri v. Natale*, No. 19-CV-81080, 2022 WL 2341237, at *3 (S.D. Fla. Feb. 18, 2022). However, if on October 21, 2022, Plaintiff could have re-filed its claims against Property Matters, then Property Matters would not be entitled to attorneys' fees in this action. *See id.*

Following the consistent trend of courts in this District, the Report correctly applies the "discovery rule" to determine whether the statute of limitations expired as of October 21, 2022 [ECF No. 62 pp. 6–7]. It

answers that question in the negative and concludes that, because Plaintiff's claim did not accrue until Plaintiff actually discovered the alleged infringement by Property Matters on February 21, 2022, the three-year statute of limitations in 17 U.S.C. § 507(b) does not expire until February 21, 2025 [ECF No. 62 pp. 6–7 (citing *Tomelleri*, 2022 WL 2341237, at *2; *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (11th Cir. 2023))]. Property Matters challenges the Report's use of the "discovery rule" as "contrary to the law of this Circuit" and "clearly erroneous" [ECF No. 63 p. 6]. However, it is clear that "neither the Supreme Court nor the Eleventh Circuit has ruled definitively on what test for 'accrual' applies in copyright infringement claims." *Tomelleri*, 2022 WL 2341237, at *2. Property Matters' attempt to dispute this fact rests on a 1971 Fifth Circuit decision, *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971), which Property Matters acknowledges interpreted an earlier iteration of the Copyright Act [ECF No. 63 p. 4 (noting that the Prather decision interpreted the "effectively verbatim pre-1976 Act's statute of limitation")]. Property Matters then points to a recent Eleventh Circuit decision, *MSPA Claims 1, LLC v. Tower Hill Prime Ins. Co.*, 43 F.4th 1259 (11th Cir. 2022) [ECF No. 63 p. 7]. However, as Property Matters acknowledges, that decision interprets 28 U.S.C. § 1658(a), "the catch-all statute of limitations for federal actions"—not the limitations period applicable here (17 U.S.C. § 507(b)) [ECF No. 63 p. 7]. Despite Property Matters' attempts to prove otherwise, the Eleventh Circuit has not resolved when an action "accrues" under the statute of limitations attendant to Copyright Act claims, 17 U.S.C. § 507(b). And upon review of the relevant authorities and principles, the Court agrees with the

Report and the trend in this District that accrual occurs when a "plaintiff learned of or, in the exercise of reasonable diligence, should have learned of the alleged infringement." *Tomelleri*, 2022 WL 2341237, at *2 (citing cases).

Applying the "discovery rule" to the instant case, the Report concludes, based on the evidence presented at an evidentiary hearing, that Plaintiff "exercised reasonable diligence in making the discovery" on February 21, 2022, and that Plaintiff "need not be held to a higher level of diligence that might have led to an earlier discovery date" [ECF No. 62 pp. 6–7].[1] Property Matters challenges this conclusion and argues that Plaintiff had constructive knowledge of the alleged infringement as early as 2017, when the work became publicly available on Property Matters' website [ECF No. 63 p. 10]. The Court agrees with the Report's well-supported conclusion that Plaintiff, who ran annual reverse image searches of the work, exercised reasonable diligence and discovered through that diligence the alleged infringement on February 21, 2022—making February 21, 2022, the date the claim accrued for purposes of 17 U.S.C. § 507 [ECF No. 62 p. 4 ¶ 9; ECF No. 62 p. 7].

Based on the accrual date of February 21, 2022, the Report correctly concludes that the statute of limitations on Plaintiff's claim for copyright infringement against Property Matters will not expire until February 21, 2025 [ECF No. 62 p. 7]. Because Plaintiff is not time-barred from raising its copyright infringement claim against Property Matters in a separate

[1] Property Matters raises no challenges to the Report's Findings of Fact [ECF No. 62 pp. 1–5]

suit through that period—and because Defendants remain subject to the risk of refiling given the Court's Order dismissing the claims without prejudice—the Court's Order Dismissing Claims did not "create[] a material alteration of the legal relationship of the parties." *Tomelleri*, 2022 WL 2341237, at *2 (internal quotation marks omitted). Property Matters is not the "prevailing party" in this litigation and is not entitled to an award of attorneys' fees under 17 U.S.C. § 505. *See generally Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 604 (2001).[2]

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Report and Recommendation [ECF No. 62] is **ACCEPTED**.

2. Defendant Property Matters USA, LLC's Motion for Attorneys' Fees and Costs [ECF No. 26] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 5th day of July 2023.

/s/ Aileen M. Cannon
AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

[2] The Court declines to address Property Matter's objections to the Report's alternative recommendation to deny attorneys' fees based on the factors laid out in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 535 n.19 (1994) [ECF No. 62 pp. 7–8; ECF No. 63 pp. 11–20].

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12563

AFFORDABLE AERIAL PHOTOGRAPHY, INC.,

Plaintiff-Appellee

v.

PROPERTY MATTERS USA, LLC,

Defendant-Appellant

HOME JUNCTION INC.,

Defendant

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:22-cv-14296-AMC

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, GRANT, and LAGOA, Circuit Judges.

PER CURIUM:

The Petition for Rehearing En Banc is DENIED, no

judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.