

“All the Way Up” to the Second Circuit

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Fly Havana and Fat Joe are heading “All the Way Up” to the Second Circuit for “Another Round.” Earlier this month Fly Havana appealed New York District Court Judge Naomi Reice Buchwald’s conclusion that Fly Havana had transferred all ownership rights to the song “All the Way Up” to Fat Joe. Fly Havana had sued Fat Joe and numerous other defendants for copyright infringement, claiming he was the author and co-owner of the song. Fat Joe claimed Fly Havana had transferred ownership rights in the song to Fat Joe at an IHOP in March 2016 when Fly Havana signed a “piece of paper,” gave the sole copy back to Fat Joe and took a check from Fat Joe for \$5,000. Fly Havana did not dispute he signed the paper, and took the check.

So far so simple—all Judge Buchwald had to do was read the “piece of paper” to determine the parties’ respective rights to the song. The hook—Fat Joe couldn’t find the “piece of paper,” or any copies. And this is where the gunners get “So Excited” because the case starts to look like a bar examination question. But this is not made up, “The Shit

is Real.” Typically the “best evidence” rule requires that an original writing is required to prove its contents unless an exception applies. So, “Whatcha gon do” when you can’t find the original signed “piece of paper” that no one disputes existed?

Judge Buchwald cut through the “Yellow Tape” and relied on two exceptions to the best evidence rule. First, under Federal Rule of Evidence 1003, a duplicate of the original is admissible unless there are genuine questions about the original’s authenticity or the circumstances make it unfair to admit the duplicate. Second, under Federal Rule of Evidence 1004, an original is not required and other evidence is admissible if all the originals are lost or destroyed.

Here, Fat Joe and others, including his attorney, presented evidence that his attorney had sent him the draft of the “piece of paper” by email, that Fat Joe printed the email without making any changes and took it to IHOP for signature by Fly Havana. Fat Joe and others also presented substantial evidence about their inability to locate the original signed version, and about all the efforts they made to do so. Based on this evidence, which was apparently undisputed, Judge Buchwald concluded the draft of the “piece of paper” sent by Fat Joe’s attorney was admissible as a duplicate of the original under Rule 1003, and also admissible under Rule 1004 because the undisputed evidence established the original was lost or destroyed.

Perhaps most interesting is that Judge Buchwald made these factual determinations in the context of a pre-discovery motion for summary judgment, which necessarily means she concluded that there was no genuine dispute that the requirements for Rules 1003 and 1004 were met, and also that discovery could not as a matter of law uncover any contrary evidence.

These are not typically the type of factual determinations that are made in a pre-discovery motion for summary judgment, so it will be interesting to see what happens when the appeal gets “Cookin.” We will report back when the Second Circuit issues its opinion. Until then, “Lean Back.”