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March 25, 2011

Ms. Margaret Carter
Clerk, United States Court of Appeals for the First Circuit
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: *Sony BMG v. Tenenbaum*, Nos. 10–1883, 10-1947, 10-2052

Dear Ms. Carter:

This case is scheduled for oral argument on April 4, 2011. Pursuant to FRAP 28(j), Defendant-Appellee/Cross-Appellant Joel Tenenbaum respectfully directs the Court's attention to supplemental authority providing additional support for the proposition that the plaintiffs should not be allowed to aggregate infringements in a way that leads to absurdly large statutory damage awards. *See* Tenenbaum Opening Br. 16–21.

In *Arista Records v. Lime Group* (No. 06-5963, S.D.N.Y.), many of the same plaintiffs involved in this case sued a software manufacturer for secondary copyright infringement of their sound recordings. *See* Opinion and Order of March 10, 2011, Docket No. 622, *available at* http://bit.ly/LimeGroup. Summary judgment was granted to the plaintiffs on the issue of infringement. Plaintiffs subsequently claimed that, at the forthcoming trial on damages, they will be entitled to a "separate statutory award for each individual's infringement of a work as to which Defendants are jointly and severally liable." *Id.* at 2. Plaintiffs claimed they are entitled to damages that "could reach into the *trillions*" of dollars. *Id.* at 6.

On March 10, the district court issued an opinion rejecting that contention. As relevant here, it noted that such an interpretation would "offend[] the 'canon that we should avoid endorsing statutory interpretations that would lead to absurd results.'" *Id.* at 6 (quoting *Torraco v. Port Authority of New York and New Jersey*, 615 F.3d 129, 145 (2d Cir. 2010)). The absurdity arises because, on plaintiffs' theory, they would be entitled to "'more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877.'" *Id.* (quoting Def. Mem. at 2–3).

As we argue in our briefs, the same absurdity is present here. If their argument were accepted, they would be entitled to recover "more than the total revenue of the entire recording industry would earn over six years" merely by refusing to settle in all of the cases they filed against consumer filesharers. Tenenbaum

Opening Br. 18. This month's ruling in *Lime Group* provides additional support for the proposition that this absurd result must be avoided.

Sincerely,

/s/ CHARLES R. NESSON
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cc: Opposing counsel and amicus (via ECF)