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11 UNITED STATES DISTRICT COURT
 12 CENTRAL DISTRICT OF CALIFORNIA
 13 WESTERN DIVISION

14 UMG RECORDINGS, INC., <i>et al.</i> , 15 16 Plaintiffs, 17 18 v. 19 VEOH NETWORKS, INC., 20 21 Defendant.) Case No. CV-07-05744 AHM (AJWx)) UMG'S NOTICE OF LODGING OF) PROPOSED ORDER PURSUANT TO) FEBRUARY 11, 2009 ORDER)) Magistrate: Hon. Andrew J. Wistrich)) Date: None) Time: None) Courtroom: 690
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1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that pursuant to the Court's Order of February 11,
3 2009, Plaintiffs (collectively "UMG") hereby lodge the attached [Proposed] Order
4 re: Veoh's Motion to Compel Chain of Title Information [Docket # 222]. UMG
5 lodges this Order pursuant to the Court's February 11, 2009 Order. Although the
6 Court's February 11, 2009 Order directed the parties to submit a joint proposed
7 order in "substantially the same form as the order concerning this issue that was
8 filed in UMG Recordings, Inc. v. DivX, Inc., Case No. CV 07-6835-AHM (AJWx)
9 on February 11, 2009," Veoh refused to submit such an Order. Veoh insisted on
10 material changes to the form of the Order the Court directed the parties to follow.
11 When UMG indicated that Veoh's changes were not acceptable, Veoh refused to
12 comply with the Court's February 11, 2009 Order and filed its own proposal. While
13 UMG submits the attached proposed order in the form directed by the Court, UMG
14 makes this submission without waiver of its right to object, move for
15 reconsideration, or otherwise appeal any Order based on the [Proposed] Order.

16 **I. VEOH REFUSED TO COMPLY WITH THE COURT'S FEBRUARY**
17 **11 ORDER**

18 In its February 11 Order, the Court directed the parties "to lodge by February
19 18, 2009 a joint proposed order in substantially the same form as the order
20 concerning this issue that was filed in UMG Recordings, Inc. v. DivX, Inc., Case
21 No. CV 07-6835-AHM (AJWx) on February 11, 2009." At approximately 3:00 p.m.
22 on February 18, 2009, Veoh sent UMG its proposed order, which varied from the
23 order the Court directed the parties to follow in several respects.¹ Veoh's efforts to
24 deviate from the form the Court directed to be followed included:

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28 ¹ UMG cannot understand why Veoh waited until 3:00 p.m. on the last day, particularly
when Veoh was well aware of the fact that the parties were conducting a deposition of a Veoh
witness at that time.

- 1 • Veoh sought to add an entirely new provision to require UMG to
2 organize its production in a manner to suit Veoh (something the Court
3 has previously rejected when requested by Veoh).
- 4 • Veoh sought to change the time for production the Court set previously
5 (to shorten UMG's time by half).

6 UMG responded at approximately 6:00 p.m. (immediately after the end of the
7 deposition of a Veoh witness conducted the same day). UMG provided a revised
8 proposed order that corrected these deviations and sought to clarify Veoh's
9 definition of "works-in-suit" to take account of the fact that Veoh still has not
10 produced Audible Magic data that Veoh represented to UMG (and indeed to the
11 Court) would be provided long ago. UMG also indicated to Veoh that its notice of
12 lodging the proposed order should include language confirming UMG's reservation
13 of the right to object to any Order ultimately entered by the Court.

14 Veoh provided no response to UMG until after 9:00 p.m. At that time, Veoh
15 sent a one-line email message stating "We are not able to agree to plaintiffs'
16 changes. It seems the parties will have to submit separate proposed orders." It is
17 unclear why Veoh required more than 3 hours to prepare this one-line email
18 message. Veoh's refusals to comply with the Court's Order and to correct its
19 proposal as UMG requested were unjustified.

20 **A. Veoh Still Has Not Produced Its Audible Magic Data**

21 In its proposed order, Veoh proposed that the "works-in-suit" be defined with
22 reference to UMG's response to Veoh's interrogatory number 25 (in response to
23 which UMG has already identified more than 2,500 infringing videos). UMG
24 sought to clarify that UMG would have the right to supplement that response upon
25 receipt of Audible Magic data regarding works identified on Veoh's system by
26 Audible Magic. As the Court may recall, Veoh represented to UMG and the Court
27 at the hearing on December 17, 2008 that such data would soon be forthcoming.
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1 As the Court may recall, Veoh admitted that it destroyed much of the
2 important metadata from Audible Magic identifying specific copyrighted works
3 found on Veoh's system. Veoh destroyed this information during the pendency of
4 this lawsuit. Veoh represented to UMG and the Court that this data could be
5 recreated. Though the Court set a January 16, 2009 date for UMG to supplement its
6 response to interrogatory number 25, the Court noted that if Veoh still had not
7 provided the Audible Magic data, that would constitute good cause to later
8 supplement further.

9 When UMG still had not received the Audible Magic data more than a month
10 later in late January, UMG sent Veoh a joint stipulation regarding a motion for
11 sanctions. Veoh promised that it would promptly obtain and produce the data to
12 UMG at its own expense and requested that UMG withdraw its joint stipulation.
13 UMG indicated its willingness to do so, provided that Veoh also acknowledge that
14 UMG would be permitted to further supplement its response to Interrogatory No. 25
15 after the data was provided. Veoh's counsel, Ms. Golinveaux, acknowledged that
16 Veoh would agree to that request, and acknowledged that the Court had essentially
17 directed as much already.

18 Now, almost a month later, Veoh's repeated promises that the Audible Magic
19 data will be produced remain illusory. Worse yet, Veoh now seeks to take
20 advantage of its misconduct by claiming to renege on its agreement that UMG
21 would be permitted to supplement its identification of infringing videos. Veoh
22 seeks to substantively benefit from its destruction of evidence and refusal to
23 promptly cooperate in an effort to recreate such evidence. Veoh is trying to limit the
24 scope of its liability by destroying the evidence of its wrongdoing. This simply
25 cannot be permitted.

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1 **B. Veoh Seeks To Add A Provision Requiring UMG To Organize Its**
2 **Production**

3 Veoh also added an entirely new paragraph – paragraph 1(e) to its proposed
4 Order. The Order to which the Court referred the parties contains no paragraph 1(e).
5 Veoh's paragraph seeks to require UMG to organize and categorize its production
6 for Veoh according to which work each document might relate. Veoh made a
7 similar request about UMG's document production generally in connection with
8 motions considered at the December 17, 2008 hearing. The Court explained during
9 the hearing that such categorization was not required and was likely unworkable to
10 boot. Veoh has never offered any explanation or justification for such a request, nor
11 has it done so here. Veoh's unauthorized addition is not consistent with the Court's
12 February 11, 2009 Order.

13 **C. Veoh Sought To Cut UMG's Time To Produce**

14 The Order referred to by the Court provided for 30 days for production of
15 materials contemplated by the Order (after identification of the works for which
16 materials would be produced). Veoh sought to change that time to 15 days. Veoh's
17 only purported explanation for this unauthorized change is that the discovery cut-off
18 is approaching (in two months). Veoh's "explanation" is unavailing. Veoh set its
19 own timing in pursuing the motion at issue here (and did so in procedurally
20 improper means on multiple occasions). Any delay is a product of Veoh's conduct
21 and decisions. Moreover, such delay cannot serve as justification to impose even
22 greater burdens on UMG. UMG respectfully submits that the proposed order
23 attached hereto would impose undue burdens on UMG even with a 30-day time
24 frame, and that Veoh has never provided any explanation or basis to support the
25 imposition of such burdens. In particular, Veoh has never explained how
26 correspondence with the copyright office, the copyright holder, the copyright
27 registrant and the copyright applicant (Veoh's paragraph 1(c)) could bear on any
28 issue in this case. Moreover, Veoh has never explained how the relevance of such

1 materials could possibly outweigh the undisputed burden on UMG of searching for,
2 collecting, and producing them. Veoh's further insistence on halving the time for
3 UMG to do so is unwarranted and inappropriate.

4 **D. UMG Must Be Afforded Its Right To Object To The Court's Order**

5 While UMG recognizes the Court's request for submission of an order in a
6 form that the Court could enter, the Court's Order directing submission of such a
7 proposed Order cannot and should not be used as a means to deny UMG the right to
8 object to the substance of the Order. Put simply, the attached proposal, while
9 consistent with the Court's direction is not UMG's proposal, and the mere
10 submission of it should not serve to waive UMG's rights. Veoh's attempt to cut off
11 UMG's rights cannot be supported.

12 * * *

13 For all of these reasons, UMG submits the attached [Proposed] Order
14 pursuant to the Court's February 11, 2009 Order and without waiver of UMG's right
15 to later object, move for reconsideration, or otherwise appeal any Order based on the
16 [Proposed] Order.

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18 Dated: February 18, 2009

Respectfully Submitted,

IRELL & MANELLA LLP

By: /s Brian Ledahl
Brian Ledahl

Attorneys for Plaintiffs

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