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

13 UMG RECORDINGS, INC., *et al.*,

14 Plaintiffs,

15 v.

16 VEOH NETWORKS, INC., *et al.*,

17 Defendant.

Case No. CV-07-05744 AHM (AJWx)

**UMG'S OPPOSITION TO MOTION BY
 OWNER DEFENDANTS FOR
 ATTORNEYS' FEES AND COSTS [17
 U.S.C. § 505]**

- Filed Concurrently Herewith:**
- 1. Declaration of Steven Marenberg in Support Thereof;**
 - 2. Declaration of Carter Batsell in Support Thereof**

Judge: Hon. A. Howard Matz
 Date: July 20, 2009
 Time: 10:00 a.m.

Discovery Cutoff: May 11, 2009
 Pretrial Conference: August 8, 2009
 Trial Date: August 18, 2009

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Statutes

17 U.S.C. § 505..... 3, 16

Other Authorities

3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*
§ 12.04 (Matthew Bender, Rev. Ed.)..... 6

1 **I. INTRODUCTION**

2 Controlling copyright precedents have established a rigorous standard for
3 recovering attorneys' fees as the prevailing party under the Copyright Act. In this
4 instance, Defendants Shelter Capital, Spark Capital, and The Tornante Company
5 (collectively the "Owner Defendants") do not come remotely close to meeting it.

6 Specifically, the Owner Defendants' motion fails on either or both of two
7 discrete grounds. First, the Owner Defendants fail to meet the substantive standard
8 for recovering fees (*i.e.*, that the claims were baseless, frivolous, objectively
9 unreasonable, or improperly motivated). Any fair reading of the applicable
10 copyright precedents, UMG's actual pleadings (including the detailed facts set forth
11 therein), and this court's subsequent opinions on the motions to dismiss, confirms
12 that there certainly was a good faith and reasonable basis (both objectively and
13 subjectively) for UMG claims. Indeed, this Court expressly ruled that UMG's
14 claims would not be baseless, frivolous, or objectively unreasonable when it granted
15 UMG's motion to amend its complaint holding that UMG's claims "would not
16 'clearly be subject to dismissal.'" August 22, 2008 Minute Order (Dkt. No. 103) at
17 6.

18 Second, and in any event, the Owner Defendants' request for over \$1 million
19 in attorneys' fees is utterly and facially unreasonable. Here, the Owner Defendants
20 are seeking to recover more than \$1 million dollars in attorneys' fees and costs,
21 representing the efforts of approximately **30** attorneys, paralegals, and other billable
22 professionals, who supposedly spent more than **2,200** hours defending a case that
23 was resolved on a motion to dismiss. (Defendant Shelter alone employed *twenty*
24 different attorneys and legal professionals on this case.) Plainly, this is not
25 reasonable and the motion ought to be denied on this basis as well.

26 The Owner Defendants might argue that this small army of timekeepers was
27 working on tasks other than a pleading motion. If so, this only confirms that their
28 request is unreasonable. A review of the billing records suggests that a substantial

1 share of the fees sought here were incurred either: (i) in unsuccessful attempts
2 during suit to block UMG's access to discovery, which was appropriate *regardless*
3 of whether the Owner Defendants responded as defendants or as third parties, and
4 (ii) in responding (as third-parties) to post-suit requests for relevant discovery.
5 Seeking payment of these fees is wholly inappropriate. This Court acknowledged
6 the discoverability of this evidence – and its relevance to UMG's claims against
7 *Veoh*, as distinct from its claims against the Owner Defendants – when it denied the
8 Owner Defendants' *ex parte* application for a protective order to stay discovery
9 pending resolution of their first motion to dismiss. Minute Order Denying Owner
10 Defendants' *Ex Parte* Application for Protective Order (Dkt. No. 404). Shifting the
11 burden of responding to discovery is not what § 505 of the Copyright Act envisions,
12 nor would it further the purposes of the Copyright Act. To the contrary, it would
13 reward obstructive behavior in seeking to prevent relevant discovery in cases of
14 mass copyright infringement.

15 On any and all of these grounds, the motion for fees should be denied.¹

16 **II. THE OWNER DEFENDANTS FAIL TO ESTABLISH THEY ARE**
17 **ENTITLED TO ATTORNEYS' FEES UNDER THE COPYRIGHT ACT**

18 **A. The Owner Defendants Are Not Entitled To Attorneys' Fees As A**
19 **Part Of Costs Pursuant To 17 U.S.C. § 505**

20 The mere fact that the Owner Defendants prevailed on their motion to dismiss
21 does not necessarily entitle them to attorneys' fees. Rather, it is well settled that the
22 Court has "discretion" to award or not award attorneys' fees as part of costs. 17
23 U.S.C. § 505. As construed by the United States Supreme Court in *Fogerty*, fees
24 should only be awarded upon a showing that various factors – specifically,

25 _____
26 ¹ If the Court is inclined at all to award any fees, then UMG submits that,
27 given that an appeal of this Court's dismissal of UMG's claims is pending, this Court
28 should defer awarding any attorneys' fees until that appeal is resolved as it may
confirm – even if the Court's ruling is ultimately affirmed – that an attorneys' fee
award is in appropriate in this case.

1 "frivolousness, motivation, objective unreasonableness (both factual and in the legal
2 components of the case) and the need in particular circumstances to advance
3 considerations of compensation and deterrence" – warrant such an award. *See*
4 *generally Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994).

5 Here, the Owner Defendants fail to demonstrate that any of the factors
6 warrant an award of attorneys' fees. UMG's claims against the Owner Defendants
7 for contributory and vicarious copyright infringement, and for inducement of
8 copyright infringement, were non-frivolous, objectively reasonable, and consistent
9 with the purposes of the Copyright Act. Moreover, there is no evidence, nor could
10 there be, that UMG had anything but a proper motive in asserting its claims against
11 the Owner Defendants – to wit, the vindication of its exclusive rights in thousands
12 of infringed copyrights. As such, future copyright plaintiffs need not be deterred
13 from filing similar, reasonable suits.² To the contrary, an award of fees in this
14

15 ² The Owner Defendants quote *Assessment Technologies, LLC v. WIREData,*
16 *Inc.*, 361 F.3d 434, 439 (7th Cir. 2004), for the proposition that when a prevailing
17 party is a defendant there is a strong presumption in favor of attorneys' fees. Motion
18 at 10:10-17. The decision cited does not support this assertion and in any event this
19 is not the law of this Circuit. Judge Posner explicitly states that he is breaking from
20 Supreme Court and other Circuit's precedent, including the Ninth Circuit's. *Id.* at
21 436 ("[t]he courts have not said . . . that the symmetry of plaintiff and defendant in
22 copyright cases requires a presumption that the prevailing party, whichever it is, is
23 entitled to an award of attorneys fees. They have instead left it to judicial discretion
24 by setting forth a laundry list of factors, all relevant but none determinative.")
25 Posner then cites a string of cases, including *Fogerty v. Fantasy* and *Berkla v. Corel*
26 *Corp.*, 302 F.3d 909 (9th Cir. 2002). And even with this break from precedent,
27 Posner believes that the strength of each party's case is still one of the most
28 important factors in determining whether to award attorneys' fees. *Assessment*
Technologies, 361 F.3d at 436-37.

29 Here, an award of attorneys' fees was not needed to incentivize the Owner
30 Defendants to press their defense. *Id.* at 437 ("an award of attorneys fees may be
31 necessary to enable the party possessing the meritorious claim or defense to press it
32 to a successful conclusion rather than surrender it because the cost of vindication
33 exceeds the private benefit to the party."). Thus, there is neither the need nor legal
34 justification for a "presumption" that the Owner Defendants are entitled to fees. The
35 application of the *Fogerty* factors, set forth by the Supreme Court, is the appropriate
36 analysis here.

1 instance would encourage potential infringement and deter copyright owners from
2 asserting their rights in an era when new uses of the internet threaten copyrights.

3 **1. UMG's Claims Against the Owner Defendants Were Reasonable, Not**
4 **Baseless or Frivolous**

5 Attorneys' fees should not be awarded if the losing party brought claims that
6 were novel, complex, colorable, or are at least a "reasonable stand on an unsettled
7 principle of law." *Garnier v. Andin Intern., Inc.*, 884 F. Supp. 58, 62 (D.R.I. 1995)
8 (denying attorneys' fees where resolution of plaintiff's claims required appellate
9 court to engage in "careful factual and legal analysis"); *see also Lifshitz v. Walter*
10 *Drake & Sons, Inc.*, 806 F.2d 1426, 1435 (9th Cir. 1986) (denying attorneys' fees
11 where issues presented were "substantial questions of first impression in this
12 circuit"); *Donald Frederick Evans and Associates, Inc. v. Continental Homes, Inc.*,
13 785 F.2d 897, 916-17 (11th Cir. 1986) (affirming denial of attorney's fees where
14 plaintiff asserted "colorable copyright claims"); *Dean v. Burrows*, 732 F. Supp. 816,
15 827 (E.D. Tenn. 1989) (denying attorneys' fees where plaintiff presented "genuine
16 issue for the Court to resolve"). That is precisely the situation here.

17 That UMG's complaint against the Owner Defendants presented legitimate
18 and genuinely unsettled issues for the Court to resolve cannot fairly be disputed. As
19 noted above, Veoh opposed UMG's motion to amend its complaint to add the claims
20 at issue against the Owner Defendants. This Court granted the motion to amend,
21 holding that "what is clear is that based on this record the claims against the investor
22 defendants would not 'clearly be subject to dismissal.'" August 22, 2008 Minute
23 Order (Dkt. No. 103) at 6. Further, in ruling on the motion to dismiss the Second
24 Amended Complaint, the Court concluded its order by stating: "[i]n the absence of
25 clear precedent, this Court is not willing to expand the scope of copyright liability in
26 a manner that presents a substantial risk of upending well-established concepts of
27 corporate governance." May 5, 2009 Order at 15 (Dkt. No. 434). Far from
28 suggesting that UMG pursued a baseless or frivolous theory that was clearly rejected

1 in this Circuit, the Court expressly held that the issues presented lack clear
2 precedent. As set forth in a leading treatise on copyright law, the contours of
3 secondary copyright liability in the internet space are not well defined. *See, e.g.*, 3
4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[A][3][a]
5 (Matthew Bender, Rev. Ed.) (stating the current law on contributory copyright
6 infringement involving the internet is "in disarray"). In reaching its conclusions, the
7 Court was required to analyze UMG's claims. UMG cited numerous cases
8 supporting its positions, including cases where, UMG contends, similar claims were
9 upheld by other courts in the Ninth Circuit. *See, e.g., UMG Recordings, Inc. v.*
10 *Bertelsmann, AG*, 222 F.R.D. 408 (N.D. Cal. 2004). While the Court ultimately
11 distinguished the cases UMG cited, the mere fact of an adverse decision does not
12 render UMG's pursuit of the claims unreasonable, baseless, or frivolous. As the
13 Owner Defendants concede, the Court granted the motion to dismiss the First
14 Amended Complaint without prejudice. Far from holding that the claims were
15 unreasonable, baseless, or frivolous, the Court granted UMG leave to amend the
16 complaint.

17 The Owner Defendants place significant emphasis on the court's "caveat" to
18 its dismissal without prejudice in arguing that UMG's claims were objectively
19 unreasonable. They misread the Order. The court wrote:

20 Although Plaintiffs may file a Second Amended Complaint, they
21 should reflect carefully what is likely to result if they do so. The
22 Court's existing scheduling requirements and the near-certain
23 additional costs and complications that will flow from attempting
24 to go after deep pockets whose potential liability could entail
25 vexing issues of corporate governance caution that "less may be
26 more."

27 February 2, 2009 Order at 10 (Dkt. No. 298). This is far from an admonition to not
28 file a Second Amended Complaint because it would be unreasonable, baseless, or
frivolous. Rather, UMG was entitled to attempt to convince the Court, by adding
additional and specific facts in its Second Amended Complaint, that the Court's

1 analysis on the original motion to dismiss was in error (a position UMG will
2 respectfully assert on appeal).

3 Indeed, in the Court's second order, which dismissed UMG's Second
4 Amended Complaint, the Court still did not indicate that UMG's claims were
5 baseless or frivolous. To the contrary, the opinion acknowledged that UMG "made
6 some new arguments," Order at 8, and "supplemented," *id.* at 2, its factual
7 allegations. Although the Court ultimately concluded again that UMG's arguments
8 were "unpersuasive," it did not characterize them as baseless or meritless. Nor did
9 the Court suggest that UMG acted improperly in filing a Second Amended
10 Complaint. Instead, as noted above, the Court acknowledged the lack of clear
11 precedent. Such circumstances cannot support an award of attorneys' fees. If the
12 Owner Defendants' position were accepted, every case resolved against one party
13 would be "unreasonable" or "baseless" in hindsight. No authority has ever
14 suggested that such a standard should be applied.³

15 Moreover, the fact that the Court dismissed UMG's claims twice is not an
16 indicia of frivolousness. *See Luken v. Int'l Yacht Council, Ltd.*, 581 F. Supp. 2d
17 1226, 1240 (S.D. Fla. 2008) ("[a]lthough a frivolous and objectively unreasonable
18 defense will certainly fail if presented repeatedly . . . the converse is not always true.
19 . . . Courts regularly reject reasonable legal positions in favor of other reasonable
20 legal arguments. . . . [A] court must consider not how many times in the litigation at
21 issue the presiding court rejected a non-prevailing party's legal position, but rather,
22 the clarity of the law with respect to the losing party's position at the time that the
23 losing party pressed its argument.") In fact, to preserve issues for appeal, parties
24

25 ³ The Owner Defendants argue that the Court did not consider certain
26 elements of contributory and vicarious infringement when granting their motions to
27 dismiss. Motion at 10:25-27 & 12:8-9. The Court's refusal to decide issues
28 unnecessary to its holdings is not even an indication that the Owner Defendants
would have prevailed on those issues. It certainly does not indicate that UMG's
claims were unreasonable or frivolous.

1 frequently repeat arguments before the district court that has already rejected them.
2 *Id.* at 1240 n.6.

3 Ultimately, the Owner Defendants' motion reduces to the claim that simply
4 because the Court granted their motion to dismiss, UMG's pursuit of these claims
5 was unreasonable, baseless, and frivolous. This assertion is without legal or factual
6 support.⁴ We submit that the Court knows frivolous, objectively unreasonable
7 copyright complaints when it sees them, and perhaps it has seen plenty. Neither the
8 First or Second Amended Complaints (*i.e.*, the two pleadings asserting claims
9 against the Owner Defendants) are among them.

10 **2. Awarding Attorneys' Fees Would Deter Future Plaintiffs from Bringing**
11 **Reasonable Claims**

12 An award of attorneys' fees to the Owner Defendants here would ill serve the
13 interests of the Copyright Act nor serve any proper deterrent purpose. To the
14 contrary, awarding fees to the Investors would deter future reasonable lawsuits
15 insofar as it would raise fears that the mere failure to prevail on objectively
16 reasonable, good-faith claims would lead to an award of exorbitant attorneys' fees.
17 This is the exact opposite of what Section 505 was designed to achieve: economic
18 incentive to litigate meritorious copyright claims and defenses. *See Luken*, 581 F.
19 Supp. 2d at 1246 ("a party that advances a reasonable position should not be
20 deterred from doing so for fear that it will have to pay attorney's fees if it loses");
21 *Perfect 10, Inc. v. CWIE, LLC*, 2005 WL 5957973 at *3 (C.D. Cal. Feb. 10, 2005)
22 (finding no reason to award attorneys' fees for deterrent purposes; "[a]warding
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24 ⁴ The Owner Defendants also argue that UMG's removal of certain videos
25 from its infringing video list is evidence that its claims are unreasonable. Motion at
26 13 n.4. The mere fact that UMG has removed a small number of videos that had
27 inadvertently been included on its list incorrectly (without prompting by any party)
28 from its ultimate list of over 7,000 infringing videos that appeared on Veoh does not
bear on the reasonableness of UMG's claims. Even without these few videos, UMG
still asserted thousands of infringements against the Owner Defendants. Their
citation to *Maljack Productions* is thus wholly inapposite.

1 attorney's fees would . . . punish the Plaintiff for advancing a theory in an unclear
2 area of copyright law"); *Blanch v. Koons*, 485 F. Supp. 2d 516, 518 (S.D.N.Y. 2007)
3 (finding no need to award attorneys' fees for deterrent purposes; claims were not
4 frivolous and plaintiff's motivation was reasonable, among other factors); *see also*
5 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) ("defendants who seek to
6 advance a variety of meritorious copyright defenses should be encouraged to litigate
7 them to the same extent that plaintiffs are encouraged to litigate meritorious claims
8 of infringement").⁵ This Court should not deter future reasonable copyright claims
9 by awarding attorneys' fees to the Owner Defendants here.

10 **3. UMG's Motivation in Bringing Claims Against the Owner Defendants**
11 **Was Proper and Appropriate**

12 UMG sued the Owner Defendants to protect and vindicate its copyrights.
13 UMG asserted, and continues to assert in the Court of Appeals, that these defendants
14 are liable for contributory and vicarious copyright infringement, and for inducement
15 of copyright infringement, of thousands of UMG copyrights. Pursuant to the
16 Copyright Act, UMG is entitled to damages for such infringements, and it sought
17 damages from the parties whom it believes are liable for such infringement,
18 including the Owner Defendants. This is clearly a permissible motivation in
19 bringing a copyright suit. *Luken*, 581 F. Supp. 2d at 1245 ("[i]t goes without saying
20 that protection of one's copyright constitutes a permissible motivation in filing a
21 copyright infringement case against one whom the copyright holder believes in good
22 faith to have infringed the copyright"). Once again, the Court has already ruled on
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24 ⁵ The Owner Defendants should also recognize that owning a stake in a
25 massive copyright infringer like Veoh can attract lawsuits. *See Blanch*, 485 F.
26 Supp. 2d at 518 (noting that defendant, an "appropriation" artist (one who takes
27 other artists' work and incorporates it into his own product) "can expect that [his]
28 work may attract lawsuits. [He] must accept the risks of defense, including the time,
effort, and expenses involved. While that does not remove the . . . artist from the
protection of the [fair use] statute, litigation is a risk he knowingly incurs when he
copies the other's work").

1 this issue in granting UMG leave to amend its complaint. Specifically, this Court
2 ruled "[t]here is no evidence that UMG seeks to add the new defendants for any
3 improper purpose" August 22, 2008 Minute Order (Dkt. # 103) at 4.

4 UMG sought discovery before asserting its claims, and brought such claims
5 *only* against those entities it concluded had engaged in culpable conduct. UMG did
6 not assert claims against all investors in Veoh. Those "investors" in Veoh who did
7 not participate affirmatively in decisions intrinsically tied to Veoh's infringing
8 activity (*e.g.*, Time Warner and others) were *not* sued by UMG. UMG specifically
9 brought suit only against entities that UMG concluded had engaged in conduct
10 giving rise to copyright liability.⁶

11 **4. The Purposes of the Copyright Act Do Not Weigh in Favor of Awarding**
12 **Attorneys' Fees**

13 Because UMG's claims are objectively reasonable, the purposes of the
14 Copyright Act are not furthered by awarding attorneys' fees. As discussed above,
15 UMG acted with proper motivation, and there is no reason to deter the filing of
16 reasonable infringement claims.

17 The Owner Defendants are incorrect when they state that in determining
18 whether to award attorneys' fees, the district court "first determines whether the
19 successful defense furthered the purposes of the Copyright Act." Motion at 13:10-
20 12. The list of nonexclusive factors in *Fogerty*, also listed above, are "frivolousness,
21 motivation, objective unreasonableness (both factual and in the legal components of
22

23 ⁶ The Owner Defendants try to suggest that UMG's choice to conduct
24 discovery before asserting claims somehow evidences bad faith. Unsurprisingly, the
25 Owner Defendants cite no case where a court finds improper motivation because a
26 party conducted some, but "not enough," discovery. *See NLFC, Inc. v. Devcom*
27 *Mid-America, Inc.*, 916 F. Supp. 751, 759 (N.D. Ill. 1996) (finding bad faith by
28 plaintiff who "*never initiated any discovery whatsoever*," and only had "a third
person's 'belief' and its own 'information and belief' to rely upon to substantiate its
case") (emphasis added). The fact that UMG conducted some discovery prior to
initiating its claims evidences UMG's caution and good faith, contrary to the Owner
Defendants' assertions.

1 the case) and the need in particular circumstances to advance considerations of
2 compensation and deterrence." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19
3 (1994) (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)).
4 The purposes of the Copyright Act are not one of these factors. *See also Columbia*
5 *Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d
6 1186, 1197 (9th Cir. 2001) (listing the factors in *Fogerty* as those to be considered
7 in deciding whether to award fees; the Court adds "degree of success obtained" to
8 *Fogerty's* list, but does not include the purposes of the Copyright Act).

9 Rather, the *Fogerty* factors are to be "considered in light of the primary
10 objective of the Copyright Act: to encourage the production of original literary,
11 artistic, and music expression for the good of the public." *Perfect 10*, 2005 WL
12 5957973 at *3. In *Perfect 10*, the court engaged in such consideration and denied a
13 request for attorneys' fees by the defendant. The court reasoned that because
14 plaintiffs brought a legitimate claim and both parties diligently advocated their
15 positions and brought further analysis to copyright law, fees were not warranted. *Id.*
16 Likewise, here UMG brought legitimate claims against the Owner Defendants; both
17 parties advocated their positions; and thus both parties contributed to further
18 demarcation of the contours of secondary copyright liability. The "purposes of the
19 Copyright Act" provide no reason to award fees to the Owner Defendants.

20 **B. The Owner Defendants' Request For Over \$1 Million In Attorneys'**
21 **Fees And Costs Is Not Reasonable**

22 Even if the Court were to determine that some fee award to the Owner
23 Defendants was warranted, the amounts they seek here (more than \$1 million in
24 aggregate) are grossly unreasonable. The Owner Defendants do not even attempt to
25 suggest that these amounts were all devoted to the preparation of a motion to
26 dismiss. Indeed, in the Declaration of Annette Hurst, one of Shelter's more than 20
27 legal professionals, she attests that she was *primarily responsible* for the preparation
28 of the initial motion to dismiss, which was prepared during October and November

1 2008 (emphasis added). During that time, Ms. Hurst billed a total of only 50.8
2 hours. Hurst Decl., ¶ 20. Nonetheless, the Owner Defendants collectively seek
3 recovery for more than 2,200 hours of time expended by approximately 30 other
4 professionals. These amounts bear no reasonable relation to the costs of preparing
5 the motion to dismiss and instead reflect time devoted to responding to discovery
6 requests that were appropriate regardless of whether the Owner Defendants' were
7 parties to this action to this action or not. The Court confirmed this point when it
8 held that the Owner Defendants deserved no stay from discovery in the *Veoh* action
9 during the pendency of their motion to dismiss. *See* Minute Order Denying Owner
10 Defendants' *Ex Parte* Application for Protective Order (Dkt. No. 404). Even the
11 Owner Defendants impliedly acknowledged the appropriateness of this discovery by
12 responding (as third-parties) to subpoenas issued after the dismissal of UMG's suit
13 against them. *See, e.g.*, Edelson Decl., Ex. A at 78 (billing hours spent preparing for
14 and attending UMG's deposition of Tornante's Michael Eisner, which took place on
15 May 21st and 22nd, after the Court's May 5th dismissal of UMG's suit). Hence
16 many of the expenses for which the Owner Defendants seek recovery would have
17 been incurred regardless of whether UMG ever named them as defendants. No
18 authority justifies awarding such amounts.

19 **1. The Owner Defendants Seek Fees for Discovery And Other Activities**
20 **Wholly Unrelated to the Motions to Dismiss**

21 The Owner Defendants seek to recover all attorneys' fees, all costs, and all
22 non-attorney fees that they incurred for the entire time from September 2008
23 through the present. They make no effort to differentiate fees associated with
24 vindicating their position that the claims should be dismissed from fees associated
25 with other tasks. (Their frequent block-billing also prevents UMG from making this
26 differentiation. *See, e.g.*, Badal Decl., Ex. A at 13 (block billing for time spent (i)
27 revising motion papers relating to UMG's motion for summary judgment against
28 *Veoh* and (ii) discussing the Owner Defendants' first motion to dismiss).) As UMG

1 has noted in various motion practice before this Court, these defendants were
2 members of Veoh's board of directors and possessed information that was relevant
3 and discoverable whether they were parties to the case or not. As just one example,
4 in a number of instances, these entities produced relevant communications with
5 Veoh executives that were mysteriously absent from Veoh's own document
6 production. Additionally, the Owner Defendants seek to recover extensive fees and
7 costs that, due to the times at which they were incurred, could not possibly be
8 related to their efforts to obtain dismissal of the claims against them.

9 UMG filed its First Amended Complaint on August 26, 2008. The Owner
10 Defendants filed their motion to dismiss that complaint on October 16, 2008. The
11 reply in support of the motion was fully submitted by November 3, 2008. The Court
12 took the motion under submission without a hearing and issued a decision on
13 February 2, 2009. Thus, during November and December of 2008 and January of
14 2009, the Owner Defendants were not doing anything to advance the cause of
15 prevailing on their motion to dismiss; they were instead fighting relevant discovery
16 requests. Despite that fact, the Owner Defendants seek recovery of more than
17 \$338,000 for that time period – roughly 1/3 of their total request.⁷

18 The Second Amended Complaint was filed February 23, 2009. The Owner
19 Defendants filed their motion to dismiss that complaint on March 3, 2009, and the
20 reply in support of the motion was fully submitted on March 16, 2009. Once again,
21 the Court took the motion under submission without a hearing and issued its
22 decision on May 5, 2009. Thus, by mid-March, 2009, the Owner Defendants should
23 have expended no further efforts to obtain dismissal of UMG's claims. Despite this
24 fact, the Owner Defendants seek recovery of more than \$265,000 for the time period

25 ⁷ Specifically, the Owner Defendants seek a total of \$144,768.71 for Shelter
26 Capital, \$125,453.44 for Spark Capital, and \$68,621.67 for the Tornante Company
27 for the period from November 2008 through January 2009. (Because one of the
28 invoices for the two different law firms representing Shelter Capital aggregates
October and November 2008, this amount does not even include the amount sought
for the Orrick Herrington firm for November 2008.)

1 after their motion to dismiss the Second Amended Complaint was fully submitted.⁸
2 Notably, much of this time (May and June 2009) was after the Court had already
3 **granted** the motion to dismiss with prejudice. The suggestion that such expenses
4 were incurred to vindicate the Owner Defendants' position that they should not have
5 been sued is patently absurd; rather, these billings reflect time spent responding to
6 discovery as a third-party, time the Owner Defendants' would have spent whether
7 they were parties to the suit or not.

8 As set forth above, more than \$600,000 of the total amount that the Owner
9 Defendants seek was expended during time periods when they could not have been
10 working on their motions to dismiss. The Owner Defendants cite no authority to
11 suggest any entitlement to such an enormous windfall, and multiple recent cases
12 confirm that the Owner Defendants' request is exorbitantly high. *See, e.g., Plunket*
13 *v. Estate of Doyle*, 2009 WL 73146, *1 (S.D.N.Y. Jan. 12, 2009) (awarding
14 \$135,521.04 in attorneys' fees spent on successful motion to dismiss); *Mallery v.*
15 *NBC Universal, Inc.*, 2008 WL 719218, *1-2 (S.D.N.Y. Mar. 18, 2008) (awarding
16 defendant \$99,106.45 spent drafting motion to dismiss, which court converted into a
17 motion for summary judgment and granted); *Franklin Machine Products v. Heritage*
18 *Food Service Equipment, Inc.*, 2008 WL 687300, *4 (N.D. Ind. Mar. 11, 2008)
19 (awarding defendant attorneys' fees of \$29,172.25 spent on successful motion to
20 dismiss). Indeed, this amount represents the substantial majority of the amount
21 requested.

22 Further, even during the time periods in which the Owner Defendants could
23 have been working on obtaining a dismissal of the claims against them (September
24 and October 2008 and February and March 2009), the billing records submitted
25 confirm that they were working on other matters. For example, Shelter's records
26

27 ⁸ Specifically, the Owner Defendants seek a total of \$121,374.81 for Shelter
28 Capital, \$109,008.62 for Spark Capital, and \$35,057.36 for the Tornante Company
for the period from April 2009 through June 2009.

1 confirm that in September and October 2008, various attorneys billed time to
2 reviewing summary judgment papers (involving a motion brought against Veoh, not
3 the Owner Defendants), filing an *ex parte* application to prevent that summary
4 judgment motion from being considered, analyzing what submissions would be
5 required to notify the Court of Mr. Badal's transfer from one law firm to another,
6 and other similar activities. Badal Decl., Ex. B. Similarly in February and March
7 2009, Shelter seeks recovery for time spent inventorying discovery materials,
8 preparing documents for production (which were requested long before Shelter was
9 ever named as a defendant), editing Veoh's motion for summary judgment,
10 converting databases at the WilmerHale firm, and other similar activities. Badal
11 Decl., Ex. A. The same is true for Spark and Tornante. *See* Matuschak Decl., Ex.
12 A, and Edelson Decl, Ex. A. The Owner Defendants would have incurred these
13 costs even if UMG had never brought claims against them, since UMG would have
14 served subpoenas requesting the same documents and similar depositions. *See*
15 *Pinkham v. Camex, Inc.*, 84 F.2d 292, 294 (8th Cir. 1996) (affirming an award of
16 only 90% of requested attorneys' fees because 10% of attorneys' time was allocable
17 to separate matter). Unfortunately, it is difficult, if not impossible, to calculate how
18 much of the Owner Defendants' fee request is attributable to such activities because
19 many of the billing entries are redacted in such a manner as to make it unclear how
20 much time was expended on various tasks. None of these costs should be the
21 subject of any recovery for the Owner Defendants.⁹

22 _____
23 ⁹ Additionally, UMG learned only after the filing of Owner Defendants'
24 motion that Shelter Capital seeks recovery for time spent by a legal assistant who
25 should never have been working on this matter at all. Shelter seeks recovery for
26 \$1,687.50 for the time of Vikki Gonzalez in December 2008 and January 2009. Ms.
27 Gonzalez worked at plaintiffs' firm, Irell & Manella LLP, until approximately
28 September 2008, where she was staffed on this very matter on behalf of UMG.
Counsel for Shelter Capital has represented that they did not know of this issue until
UMG's counsel brought it to their attention after this motion was filed and
immediately put an ethical wall into place. Obviously, such a wall should have been
in place long before. While UMG reserves its rights regarding this situation for the
present, it certainly should not be expected to pay for Ms. Gonzalez's time.

1 **2. The Owner Defendants' Attorneys' Overstaffed this Case, Leading to the**
2 **Accumulation of Excessive Hours**

3 At most, the Owner Defendants may only recover "reasonable" attorneys'
4 fees, not actual attorneys' fees. 17 U.S.C. § 505. Thus, a court can downwardly
5 adjust the amount of attorneys' fees awarded "to account for unnecessary,
6 unreasonable, or unproductive hours." *Data General Corp. v. Grumman Systems*
7 *Support Corp.*, 825 F. Supp. 361, 365 (D. Mass. 1993) (citing *Pennsylvania v.*
8 *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564-66 (1986)).

9 The Owner Defendants' requested attorneys' fees should likewise be reduced
10 due to inefficiencies, which were myriad:

- 11 • Both motions to dismiss were filed jointly. Thus, the three defendants only filed
12 one set of motion papers in each instance. In total, the Owner Defendants
13 utilized *thirty* professionals, and five of these are attorneys with billing rates of
14 more than \$500 per hour.
- 15 • The fact that professional staffing for each of the Owner Defendants varies
16 wildly indicates inefficiency. Shelter utilized twenty professionals; Spark
17 engaged eight; and Tornante engaged two.
- 18 • Of its twenty legal professionals, Shelter paid fees for two attorneys who bill
19 more than \$600 per hour, while of the eight professionals working for Spark,
20 three of them have billing rates of more than \$500 per hour. Both of Tornante's
21 attorneys, meanwhile, have billing rates of under \$400 an hour. At least one
22 member of Spark's attorneys' support staff billed out at \$325 per hour. *See, e.g.,*
23 *Matushak Decl.*, ¶ 29 (billing out Patrick Gillespie at \$325 per hour).
- 24 • WilmerHale, counsel for Spark and Shelter, staffed a total of five partners –
25 Robert Badal, George Schuster, Mark Matuschak, Donald Steinberg, and Maria
26 Vento – to this case; Shelter added a sixth partner, Annette Hurst. UMG has
27 never staffed more than the same two partners on this matter and the related
28 *UMG v. MySpace* and *UMG v. Grouper* copyright litigations, which themselves

1 implicated an additional four defendants. Declaration of Steven Marenberg in
2 Support of UMG's Opposition ("Marenberg Decl."), ¶ 2.

- 3 • The Owner Defendants had attorneys working in four different cities across the
4 country – Los Angeles, San Francisco, Palo Alto, and Boston – on this action.
- 5 • In total, the Owner Defendants' legal professionals billed over 2,300 hours
6 between September 2008 and the middle of June 2009. It is unfathomable that
7 these hours are not excessive or duplicative. *See, e.g., NBC Universal*, 2008 WL
8 719218 at *2 (145.5 hours spent drafting motion to dismiss papers).
- 9 • Finally, the Owner Defendants submit no evidence that they actually paid these
10 amounts. Counsel declares that the amounts were incurred but offers no
11 testimony that they were actually paid by the parties seeking recovery.

12 **3. The Owner Defendants Have Not Met the Burden of Showing that the**
13 **Hours They Incurred and the Hourly Rates are Reasonable**

14 The Owner Defendants are not entitled to any fee recovery because they have
15 not met their required burdens. As the prevailing parties, the burden is on the
16 Owner Defendants to "demonstrat[e] the time spent and that it was reasonably
17 necessary." *Maljack Productions, Inc. v. Palisades Entertainment*, 1995 WL
18 779154 at *3 (C.D. Cal. Jun. 23, 1995); *see also Queenie, Ltd. v. Nygard Int'l*, 204
19 F. Supp. 2d 601, 608 (S.D.N.Y. 2002) ("[w]hile a party to a litigation may choose its
20 own level of litigation expense, it may not impose its own approach on a losing
21 adversary.") The Owner Defendants have not met this burden. One element of
22 assessing the reasonableness of the requested attorneys' fees is whether the
23 attorneys' hourly rates are reasonable. Again, as the prevailing parties, the Owner
24 Defendants have the burden of proving that their attorneys' hourly rates are
25 reasonable, and they fail to carry their burden. The only evidence put forward on
26 this subject is their own attorneys' declarations, which are insufficient to fulfill this
27 requirement. *See Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) ("the burden is on
28 the fee applicant to produce satisfactory evidence – *in addition to the attorney's own*

1 *affidavits* – that the requested rates are in line with those prevailing in the
2 community for similar services by lawyers of reasonably comparable skill,
3 experience and reputation") (emphasis added); *Bordanaro v. McLeod*, 871 F.2d
4 1151, 1168 (1st Cir. 1989) (holding that plaintiffs failed to meet their burden of
5 proving the prevailing market rate when the only evidence they produced to
6 establish this rate was their own attorneys' affidavits). Because the Owner
7 Defendants have failed to show that their billing rates are reasonable, this Court
8 cannot award attorneys' fees. *See Universal Studio Productions LLLP v. Bigwood*,
9 441 F. Supp. 2d 185, 192-93 (D. Me. 2006) (quoting *Blum* and denying attorneys'
10 fees motion due to the absence of supporting materials).

11 The absence of anything but interested party declarations here is important
12 because certain aspects of the fee request are highly questionable. To give but two
13 examples, first, the Owner Defendants seek recovery for large and exceptional rate
14 increases for calendar year 2009 – a time when virtually all law firms imposed
15 minimal rate increases on their clients (if any) and heavily discounted their
16 prevailing rates, all due to the extraordinary economic circumstances. *See*
17 Declaration of Carter Batsell in Support of UMG's Opposition, Exhibit A
18 (3/17/2009 *National Law Journal* article noting that "[u]nlike past years, when you
19 have seen across-the-board billable rate increases, that clearly didn't happen this
20 year;" "[s]ome firms have even touted their rate freeze;" and, at most, firms are
21 generally instituting modest "3 percent to 5 percent" rate increases), Exhibit B
22 (12/8/2008 *Law360* article noting that "firms are far more likely to apply small
23 increases [averaging 4.3% in 2008] limited to particular practices, and provide
24 discounts to certain clients in 2009"). The Owner Defendants' fee requests are
25 inconsistent with this widespread practice in the legal community. For example,
26 two of the WilmerHale partners representing Spark Capital (Mark Matuschak and
27 Donald Steinberg) increased their rates 11.5% and 13% respectively. Another
28 WilmerHale attorney, Joel Cavanaugh's rate increased more than 22% between

1 2008 and 2009. *See* Declaration of Mark Matuschak. Such increases (over already
2 significant rates) in the current economic climate go far beyond reasonable
3 attorneys' fees. UMG's attorneys' rates are substantially below those charged by the
4 Owner Defendants' attorneys. Marenberg Decl., ¶ 3.

5 Likewise, it appears that each of the firms are billing their clients (although
6 there is no evidence that the clients are paying) at undiscounted "rack" rates. There
7 is no evidence that this is consistent with prevailing practice – and indeed it is not.
8 It is customary in copyright cases such as this that clients receive discounts off
9 standard or book rates.¹⁰

10 **C. If The Court Will Not Deny The Motion, It Should Postpone**
11 **Deciding The Issue Until The Ninth Circuit Rules On The Merits of**
12 **UMG's Claims**

13 While this court has jurisdiction to award attorneys' fees despite UMG's
14 appeal, UMG respectfully submits that if the Court is presently inclined to grant any
15 recovery of attorneys' fees, it should defer ruling on the issue until the Ninth Circuit
16 determines the merits of the motions to dismiss. If the Ninth Circuit reverses this
17 Court, then UMG's claims would clearly be objectively reasonable and attorneys'
18 fees would be inappropriate. In fact, even if the Court of Appeals affirms this
19 Court's order, a vigorous dissent could indicate that UMG's claims were reasonable.
20 *See Matthew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 116, 122-23 (2d Cir.
21 2001) (holding that plaintiff's copyright claims were objectively reasonable because,
22 among other things, the merits appeals "provoked vigorous dissenting opinions
23 agreeing with [plaintiff's] positions"). Considering the impact the Ninth Circuit's
24 opinion could have on this Motion's merits, now is not the time to award the Owner
25 Defendants attorneys' fees.

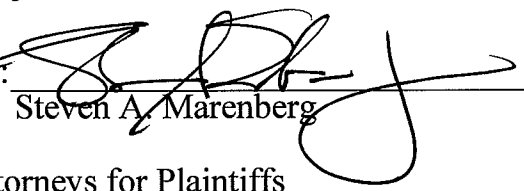
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27 ¹⁰ Accordingly, to the extent the Court was inclined to award any fees, UMG
28 respectfully submits that limited discovery of the reasonableness of the fees and
rates should be permitted.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Owner Defendants' motion for attorneys' fees
3 should be denied.

4
5 Dated: June 29, 2009

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7
8 By: 
9 Steven A. Marenberg

10 Attorneys for Plaintiffs

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