

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

- - -

| | | |
|-------------------------------|---|---------------------------|
| UMG RECORDINGS, INC., ET AL., |) | |
| |) | |
| PLAINTIFFS, |) | |
| |) | |
| vs. |) | No. CV07-05744-AHM (AJWx) |
| |) | |
| VEOH NETWORKS, INC., ET AL., |) | |
| |) | |
| DEFENDANTS. |) | |
| _____ |) | |

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
THURSDAY, DECEMBER 4, 2008

CINDY L. NIRENBERG, CSR 5059
U.S. Official Court Reporter
312 North Spring Street, #438
Los Angeles, California 90012
www.cindynirenberg.com

1 APPEARANCES OF COUNSEL:

2

3 FOR THE PLAINTIFFS:

4 IREL & MANELLA
5 BY: BRIAN D. LEDAHL, ATTORNEY AT LAW
6 STEVEN A. MARENBERG, ATTORNEY AT LAW
7 1800 AVENUE OF THE STARS
8 SUITE 900
9 LOS ANGELES, CA 90067
10 310-277-1010

7

8

9 FOR THE DEFENDANTS:

10 WINSTON & STRAWN
11 BY: MICHAEL S. ELKIN, ATTORNEY AT LAW
12 THOMAS P. LANE, ATTORNEY AT LAW
13 200 PARK AVENUE
14 NEW YORK, NY 10022
15 212-294-6700

12

13 WILMER CUTLER PICKERING HALE & DORR
14 BY: ROBERT G. BADAL, ATTORNEY AT LAW
15 350 SOUTH GRAND AVENUE
16 SUITE 2100
17 LOS ANGELES, CA 90071

15

16 WILMER CUTLER PICKERING HALE & DORR
17 BY: MARIA K. VENTO, ATTORNEY AT LAW
18 1117 SOUTH CALIFORNIA AVENUE
19 PALO ALTO, CA 94304
20 650-858-6000

18

19 KULIK GOTTESMAN MOUTON & SIEGEL
20 BY: ALISA S. EDELSON, ATTORNEY AT LAW
21 15303 VENTURA BOULEVARD
22 SUITE 1400
23 SHERMAN OAKS, CA 91403
24 310-557-9200

21

22 (PRESENT TELEPHONICALLY)
23 ORRICK, HERRINGTON & SUTCLIFFE
24 BY: ANNETTE L. HURST, ATTORNEY AT LAW
25 405 HOWARD STREET
SAN FRANCISCO, CA 94105
415-773-5700

25

1 LOS ANGELES, CALIFORNIA; THURSDAY, DECEMBER 4, 2008

2 3:10 P.M.

3 - - - - -

4 THE CLERK: Calling Item Number 1, CV07-5744, UMG
5 Recordings, Inc. versus Veoh Networks, Inc., et al.

6 Counsel, your appearances, please.

7 MR. MARENBERG: Good afternoon, Your Honor. Steve
8 Marenberg and Brian Ledahl for the Universal Music Group
9 plaintiffs.

10 THE COURT: Good afternoon. Please keep your voice
11 up.

12 MR. ELKIN: Afternoon, Your Honor. Michael Elkin,
13 Winston & Strawn, counsel for defendant Veoh Network.

14 MR. LANE: Thomas Lane, Winston & Strawn, on behalf
15 of Veoh.

16 THE COURT: Lane?

17 MR. LANE: Lane. L-A-N-E, Your Honor.

18 MR. BADAL: Good afternoon, Your Honor. Robert
19 Badal, Wilmer & Hale, for the Shelter defendants.

20 MS. VENTO: Good afternoon, Your Honor. Maria Vento,
21 Wilmer & Hale, for the Spark Capital defendants.

22 MS. EDELSON: Good afternoon, Your Honor. Alisa
23 Edelson on behalf of defendant Tornante Company.

24 THE COURT: Okay. And I understand we have somebody
25 participating telephonically.

1 If there is someone on the telephone, will you please
2 enter your appearance.

3 THE CLERK: Ms. Hurst?

4 MS. HURST: Yes.

5 THE CLERK: Will you please announce your appearance.

6 MS. HURST: Yes. Thank you. Annette Hurst of
7 Orrick, Herrington & Sutcliffe for Shelter Capital.

8 THE COURT: All right. Can you hear what's going on
9 here in the courtroom, Ms. Hurst?

10 Ms. Hurst, can you hear what's going on in the
11 courtroom?

12 MS. HURST: I can when someone speaks.

13 THE COURT: Well, it doesn't appear that you can
14 because people have been speaking and we're not getting a
15 timely response.

16 *(Laughter.)*

17 THE COURT: But I'll try to speak directly into the
18 microphone here.

19 And given that we do have this lawyer participating
20 telephonically, I'm going to direct the lawyers to whom I ask
21 questions, or from whom I hear, to go to the lectern and speak
22 directly into the microphone at the lectern instead of at the
23 counsel table. Otherwise, I'd just try to get through this
24 faster by allowing comments at the conference table.

25 All right. We are here for a hurriedly arranged

1 status conference, and I will start out by saying that I feel
2 regrettably responsible for some of the factors that led up to
3 the need for this conference. The fact is that I don't think
4 that counsel know what's going on in chambers or in the court
5 generally, but I just haven't been able to turn to some of the
6 motions that are pending.

7 The summary judgment motion or summary adjudication
8 motion that the plaintiffs filed, I took under submission back
9 on October 17th. And the motion to dismiss that the investor
10 defendants filed, I took under submission on November 7th, and
11 there's just a tremendous amount of work. And I'm not going to
12 belabor that. When you have cases with 70 defendants and
13 parallel cases of 22 at a given time, they take priority, and
14 they take an immense amount of time and attention.

15 Perhaps if I had issued rulings on those two motions
16 that are under submission, some of the confusion that seems to
17 have developed could have been avoided. Maybe not. But I
18 wanted to put an end to the confusion and create some kind of
19 clarity. So when I heard about this ex parte application
20 yesterday and began to look at these papers, I concluded that
21 the fastest way to cut through this is to have today's hearing.

22 Before I proceed any further, I don't know because of
23 frequent delays in transmitting information now that we have
24 electronic filing whether the disclosure I issued yesterday
25 about my friendship with Mr. Badal has been received by the

1 lawyers.

2 Did that go out?

3 MR. MARENBERG: It has, Your Honor, and we have
4 received it, and we have no issues whatsoever.

5 THE COURT: Okay. Now, here's the way we are going
6 to proceed. The first matter of business for me is to find out
7 some aspects of what is pending in terms of discovery disputes
8 that may be before Judge Wistrich. Then I'm going to ask some
9 questions or make some comments about the snag that has
10 developed about the plaintiffs making discovery available to
11 the investor defendants. Then I'm going to tell you what I
12 want to accomplish, because I have a fixed view about what we
13 should do here.

14 In the course of some of this sequential approach, I
15 may ask some questions, and then I'm going to issue a proposal.

16 So let me start -- just so that my proposal is not
17 enunciated prematurely without my understanding of what minimal
18 background information I need to have, I had my law clerk pull
19 up the docket. You know that we don't receive copies of motion
20 papers, and I don't follow what's going on when there are
21 discovery disputes involving motions before the magistrate
22 judge. This could not be necessarily complete -- or correct
23 even -- but I see that on October 28th, Judge Wistrich issued
24 an order setting a briefing schedule on a motion that Veoh made
25 to compel plaintiff to identify works at issue and produce the

1 chain of title.

2 That motion is under submission or is it still being
3 briefed?

4 MR. LEDAHL: If I may, Your Honor. That motion --
5 should I use the (indicating) --

6 THE COURT: Yes, I think you need to.

7 MR. LEDAHL: That particular motion, if I'm --

8 THE COURT: Pull the microphone directly to you.
9 That way there will be less of a risk that the lawyer, Ms.
10 Hurst, won't hear.

11 MR. LEDAHL: Certainly.

12 THE COURT: Go ahead.

13 MR. LEDAHL: That particular motion as to which Judge
14 Wistrich set the briefing schedule, I believe he calendared the
15 hearing on that motion for November 13. He took it under
16 submission at that time, but that motion was subsequently
17 denied by Judge Wistrich.

18 Now, a very similar pair of motions raising the same
19 issue has since been essentially refiled. Judge Wistrich
20 denied that motion without prejudice I believe on November
21 21st. And I believe the following -- that was a Friday. I
22 believe the following Monday, Veoh refiled the same motions in
23 the form of two motions, as opposed to one, that are open. But
24 the motion that you were asking --

25 THE COURT: It's to compel specification of the works

1 at issue and provide the chain of title and the ownership
2 evidence and the like, right?

3 MR. LEDAHL: That is correct.

4 THE COURT: And that's still under submission or
5 being briefed?

6 MR. LEDAHL: I believe that it is under submission in
7 the sense that it is calendared for a hearing, if I am not
8 mistaken, for December 15 at this point.

9 THE COURT: Okay. Well, let me just mention
10 something parenthetically. This is not part of the order of
11 business before me right now, but issues like that, if I divine
12 what that motion is all about, are very much before me now on
13 the host of cases that Perfect 10 has brought that I assume the
14 lawyers are aware of.

15 And they are vexing issues, and I'll only say that
16 you should follow -- and check if you haven't done it -- some
17 of the orders that I've issued in that case which may provide
18 guidance to the parties in this case and especially to Judge
19 Wistrich.

20 I have been doing some innovative things. I don't
21 say that in a self-complimentary way. I say it only because I
22 don't know if anybody else has tried them -- and they may or
23 may not work -- working closely with Judge Hillman to cut
24 through the delays -- let me just put it in that neutral
25 fashion -- that that threshold question that defendants raise

1 and understandably raise frequently pose.

2 So there may be a way -- and it involves hard
3 negotiations that lead to specification of kinds of allegedly
4 infringed works, categories, samples and statistics that
5 depending upon rulings on the merits can then be extrapolated
6 into assessment of ranges of damages.

7 It involves sequential handling of copyright
8 infringement claims. And it may have zero benefit to the
9 parties here or application, but at least call it to Judge
10 Wistrich's attention.

11 Now, that's one motion. So what else is pending
12 before the magistrate judge?

13 MR. LEDAHL: I believe, Your Honor, essentially,
14 there are four discovery motions that are before magistrate
15 Judge Wistrich at this time.

16 I don't think that they are fully under submission in
17 as much as the hearing date for those hasn't occurred yet.

18 There are three motions filed by Veoh. As a brief
19 history, there was a motion that Veoh filed early in the
20 discovery period that was denied on August 25th without
21 prejudice.

22 Veoh has renewed portions of that motion in --
23 depending on how one chooses to count -- two or three of those
24 motions, and we also have a motion pending currently that is
25 before Judge Wistrich as well.

1 THE COURT: Okay. Now, none of these motions was
2 brought against or brought by the investor defendants, correct?

3 MR. LEDAHL: That is correct, Your Honor.

4 THE COURT: Okay. All right. Let's turn to this
5 issue that kind of underlies the position of the investor
6 defendants, that they haven't been given discovery and can't
7 comply with the existing deadlines. And I am aware of what
8 those deadlines are, and I want to stick to those, if it's
9 feasible, and I think it is.

10 I don't understand -- so at least give me an
11 explanation -- why this dispute arose, and why -- I don't know
12 if you are going to speak, Mr. Marenberg, or you, Mr. Ledahl.
13 What would have been the big deal, even though they haven't
14 answered the complaint and they may be out of the case, to turn
15 over documents that you had previously produced to Veoh that
16 could have been turned over under the same restrictions or
17 protective orders that were applicable to any exchange with
18 Veoh that could have been done maybe at the investor
19 defendants' expense and that would have saved your client a lot
20 of fees probably and a lot of time and avoided this problem
21 from developing sort of at the last minute?

22 What was the thinking that somehow precluded the
23 plaintiffs from just taking a very practical, pragmatic and
24 non-rule generated approach to taking care of the sideshow? I
25 want an explanation of that.

1 MR. MARENBERG: The explanation is as follows. And
2 wait until I get to the end before jumping to any conclusions
3 about this because I think you'll understand what I mean.

4 The defendants took the position, the investor
5 defendants, that they were not obliged to participate in
6 discovery. They essentially gave themselves a stay. We had a
7 lot of difficulties.

8 THE COURT: I haven't seen --

9 MR. MARENBERG: You haven't seen the correspondence
10 between the parties.

11 THE COURT: Well, I've seen a lot of it. I read the
12 documents attached to Mr. Badal's declaration. I'm not saying
13 I've read every word or seen everything that may have been
14 exchanged. Perhaps it wasn't included, but --

15 MR. MARENBERG: That said --

16 THE COURT: -- did you attempt to obtain discovery
17 from the investor defendants?

18 MR. MARENBERG: We did. But let me get to the bottom
19 line. I agree with you, and when I found out that we hadn't
20 gotten these documents, I said, "Give them the documents," and
21 they've got them.

22 And I think in retrospect, we may have been drawn
23 into a dispute because we couldn't get discovery from them.
24 They were saying that they didn't have to participate in this
25 case until the motion to dismiss was ruled upon.

1 We didn't think that was right, and we didn't want to
2 in a sense put ourselves in a position where we were giving
3 them everything and getting nothing. But the bottom line is
4 I've taken a look at it, and I said, "Give them all the
5 documents," and they've got them.

6 THE COURT: Except Paragraph 14 of Mr. Badal's
7 declaration tells me -- maybe there's been some later
8 development -- that the plaintiffs produced documents to Veoh
9 on or about September 30th and then describes what the
10 documents are that they're still missing despite some
11 subsequent turnover of documents by Veoh to the defendants.

12 Did I get it right? That's in Paragraph 14, I think.

13 MR. MARENBERG: Well, let me -- let me --

14 THE COURT: So, I mean, I don't want a chapter and
15 verse about a particular demand or a particular category of
16 documents, but my impression is that they don't have this stuff
17 yet; is that correct?

18 MR. MARENBERG: No. They do have it now, but they
19 have only gotten it recently.

20 In other words, when I saw that motion to stay or
21 sever, I said, "Look, regardless of whether we were right or
22 wrong as a legal matter in not providing them discovery, let's
23 get them the discovery," and so --

24 THE COURT: All right. Stop right there, Mr.
25 Marenberg.

1 Who is going to speak for the investor defendants?

2 MR. BADAL: I will, Your Honor.

3 THE COURT: Mr. Badal, do you have all the documents
4 that were the subject of the motion as of now, maybe last
5 night?

6 MR. BADAL: As of this morning, I received a hard
7 drive -- a portable hard drive and several DVD's which I am
8 having copied so copies can be made for the other investor
9 defendants. I don't know what's on them, but they are
10 represented to be everything we had requested to receive, and
11 we got this this morning from Mr. Ledahl.

12 THE COURT: Now I'm curious because now I'm going to
13 chastise you or your firm or your clients.

14 What would have been the problem about getting
15 everything from Veoh right away?

16 MR. BADAL: We got quite a bit of material from Veoh,
17 not quite right away, but a lot earlier than we got it from
18 them.

19 Veoh is not in control of everything that UMG had
20 either given or obtained in discovery, including non-party
21 discovery. One of the things we got today was documents
22 produced to UMG by a non-party, Time Warner.

23 THE COURT: I saw that.

24 MR. BADAL: And so we got that today, by the way, as
25 well.

1 THE COURT: Time Warner hadn't produced those
2 documents to Veoh?

3 MR. BADAL: We did not get them from Veoh, Your
4 Honor. We had asked both parties to provide us with what they
5 had received or given in the case to the date that we asked for
6 that.

7 Now, could I correct one misstatement that was made
8 by Counsel? Since we have been named as parties -- even though
9 we have moved to dismiss, since we've been named as parties,
10 UMG has not sought any discovery from the investor defendants.

11 Some discovery was sought from some investor
12 defendants before we were named as parties. Some of that
13 discovery was made. Some of it was abandoned by UMG. But
14 since we've been parties, no attempt has been made to obtain
15 discovery from us.

16 With regard to our position, I think you do have all
17 the pertinent correspondence. Our position is we would like to
18 be left out of the discovery by some stipulation or consent of
19 UMG, but at a minimum, if they are not going to do that, please
20 provide us with the discovery taken to date.

21 As I said, we got that today, and I am having copies
22 of that made and passed on to the other investor defendants.
23 So as of Monday of next week, I think all investor defendants
24 will have what UMG has provided to us.

25 THE COURT: Okay. Thank you, Mr. Badal. You can be

1 seated for the moment.

2 As I understand your position on this ex parte
3 application, which if I have my way is not going to generate a
4 later hearing this month, you didn't mind shortening the time
5 to bring on the motion for a stay of severance on December 15th
6 provided that you could seek an extension of the existing
7 deadlines in the case against Veoh for 120 days, right?

8 MR. MARENBERG: Correct, Your Honor.

9 THE COURT: Okay. Well, why don't you go to the
10 lectern. Why 120 days?

11 MR. MARENBERG: Several reasons, Your Honor. One, we
12 have not yet gotten -- bottom line is because I don't
13 believe -- I think they are right that practically within the
14 current guidelines, we cannot do either -- complete discovery
15 fairly, either in the case against the -- you've referred to
16 them as the investor defendants. I resist that term, but I'll
17 use it just for purposes of this hearing -- either against the
18 investor defendants or for that matter against Veoh.

19 Different reasons, but, for example, some of the
20 discovery against Veoh has been delayed. And I'm not seeking
21 to criticize anyone on this, but, for example, just last week,
22 Judge Wistrich issued an order on a motion that we filed in
23 July that had a hearing in August essentially saying to Veoh,
24 "Look, the hard line you took on your document production is
25 not right. Produce all the documents by December 8th."

1 So we don't even have all of their documents yet, and
2 it's been represented to us that we are going to get a
3 substantial production on December 8th.

4 There are issues going the other way that you've
5 correctly identified, Veoh discovery from us that they want,
6 although it's a little complicated. But let me spend 30
7 seconds on that.

8 One of the issues that has been troublesome is the
9 identification of the works that we allege are infringed.

10 There's two -- there are three ways we can identify
11 those works, but we need -- the third way, we need their
12 cooperation.

13 One is we obviously, before we filed the complaint,
14 looked at the Veoh website ourselves, identified certain works
15 that we saw were up there, made the appropriate copies of those
16 works to preserve the evidence. And we've identified -- and
17 we've identified from them now, if I am correct, about a
18 thousand or 1100 --

19 MR. LEDAHL: 1500.

20 MR. MARENBERG: -- 1500 works that were on the
21 website that we had copied that way.

22 The other way --

23 THE COURT: Before the complaint, pre-filing?

24 MR. MARENBERG: Either pre-filing or around the
25 filing of the complaint when we had what we call our evidence

1 collection project going on.

2 And it really is a time-intensive thing: Plug in an
3 artist, search for the videos. If you see them, record -- you
4 know, using the software, record the videos, record the website
5 page so that you have a --

6 THE COURT: How many do you think there are now, to
7 cut through this?

8 MR. MARENBERG: I think there may be upwards of
9 5,000. But the only way we know that is by reviewing their
10 media files. And there is an important shortcut to reviewing
11 their media files, which is --

12 THE COURT: Mr. Marenberg, I'm going to cut you off
13 because it may be a responsive answer, but I think I get the
14 gist of what you're telling me.

15 You need more time because there are unsettled issues
16 and need to negotiate means of resolving those or else get them
17 ruled upon by the magistrate judge and possibly appealed to me.

18 That's what it comes down to, right?

19 MR. MARENBERG: Correct.

20 THE COURT: Okay. So what is the position of Veoh?
21 Putting aside whatever happens to the status of the investor
22 defendants, what is the position of Veoh, in principle, to an
23 extension of the existing dates that govern the case? And
24 those dates were set on an order that I issued on March 25th
25 pursuant to the parties' stipulation then.

1 Now, the investor defendants, I granted the leave to
2 amend on August 22nd, and the First Amended Complaint came in
3 four days later on August 26th.

4 I will say parenthetically that compared to a lot of
5 other cases, this case is moving on an ostensibly pretty decent
6 pace as it is. Sometimes these cases get continued for a whole
7 lot of reasons, and maybe this one will have to be. But I
8 don't find that anybody has been derelict in trying to comply
9 with the existing schedule.

10 Now, if I have to or choose to extend the schedule,
11 what's your position?

12 MR. ELKIN: Thank you, Your Honor.

13 THE COURT: You are Mr. Elkin?

14 MR. ELKIN: I am. Mr. Elkin from Winston & Strawn.

15 Veoh would respectfully suggest that the deadlines
16 should not be disturbed. The parties have been working
17 assiduously from the time that the discovery period began.

18 There have been, there's no doubt, an array of
19 motions that have been put before Judge Wistrich, and the
20 parties have been working as best they can to try to address
21 and resolve the problems. I would say that to the extent that
22 the plaintiff has a problem with some of the discovery, I would
23 suggest that perhaps it's their own doing.

24 They just said for the first time that they
25 identified 1500 works before this lawsuit was filed. We have

1 been after them --

2 THE COURT: 1100 before -- oh, yeah, 1500.

3 MR. ELKIN: 1500 before -- I'm sorry, Your Honor.
4 1500 before this lawsuit was filed. We have been after them
5 informally and formally to tell us what are the infringing
6 works. Guess when we found out, Your Honor? We found out
7 yesterday for the first time.

8 THE COURT: All 5,000?

9 MR. ELKIN: The 1500 that they are claiming now.
10 They knew about this from the date this lawsuit was filed, so I
11 would suggest --

12 THE COURT: So I get your position. You think it's
13 going to reward their delay or their conduct to grant any
14 extension?

15 MR. ELKIN: Exactly. This is a -- I'm not expecting
16 any sympathy, Your Honor, but this is a start-up company where
17 we've devoted a lot of resources.

18 We're trying to meet all of the deadlines, work as
19 fast as we can to bring this case to a conclusion, and we are
20 ready to go to trial in April as the Court has scheduled it.

21 THE COURT: Okay.

22 MR. MARENBERG: Your Honor, may I just briefly
23 respond to that?

24 THE COURT: All right. Very briefly.

25 MR. MARENBERG: The most comprehensive way -- and, by

1 the way, Mr. Ledahl reminds me I misspoke. Not all of those
2 videos were identified by the time we filed the complaint. We
3 had an evidence collection project going on after we filed.

4 THE COURT: Okay.

5 MR. MARENBERG: But let me get to the bottom base
6 point. The best way and the easiest way to identify infringing
7 works both in this case -- and it worked in MySpace and it
8 worked in Grouper -- is that there is a filtering service
9 called Audible Magic now that identifies, that you can run over
10 all of the media files and identify by owner, by title the
11 media files, and it will do it electronically.

12 We asked for the meta data associated with that
13 Audible Magic filter, and it turned out that -- we didn't know
14 this -- that they had destroyed that while the case was
15 pending. So now what we've had to do is go to Audible Magic
16 itself, because apparently they retain a copy of it, and to
17 make arrangements from Audible Magic to get that meta data
18 which will identify, we believe -- because it did in MySpace
19 and it did in Grouper -- a substantial number of additional
20 files.

21 THE COURT: MySpace settled, right?

22 MR. MARENBERG: Both of them settled.

23 THE COURT: Okay. All right. I think I've heard
24 enough. Thank you, Mr. Marenberg.

25 Here's what I think you need to know, and then I'm

1 going to tell you what I think we should do.

2 I don't want to have to review and drop other things
3 that are very much in the middle of a mix to consider some kind
4 of -- to rule on the severance or stay motion later this month.
5 I don't know how I can possibly get to it unless I dropped a
6 whole lot of other things which are pretty pressing as it is.

7 I think it's highly likely that I'll be able to
8 rule -- because I started to turn to it this week -- on the
9 summary judgment motion that the plaintiffs brought. That's
10 not going to be case dispositive because it's only, at best, if
11 I find that it's meritorious, going to knock out one but not
12 necessarily all of the DMCA defenses, right?

13 So it's not going to necessarily change the
14 landscape, but it may provide some clarity. Either way,
15 whichever way I rule -- I have no idea how I'm going to rule --
16 but because it's under submission and because that's the way I
17 like to do things, I'm going to try to rule on it.

18 And I don't know if I can get to the motion to
19 dismiss, which brings us more directly to the situation here in
20 court, but it's very much on my mind. And I don't know how
21 much effort it would take, but I'd have to turn to that, and I
22 think I can but not by the end of this year.

23 In principle, I would rather not change the existing
24 schedule, but I don't find that Veoh's very brief explanation
25 of its position right here that Mr. Elkin articulated is

1 facially all that persuasive because we are not talking about a
2 situation where a great deal of time has elapsed because
3 plaintiffs are playing games or for other reasons that really
4 could not be either explained, justified or rewarded. So I'm
5 at least amenable to a change. A 120-day change I'm not so
6 sure of.

7 I do things because they are very efficient,
8 calendaring things in weekly increments. I think you know this
9 from the scheduling conferences. It would be 119 days --
10 that's 17 weeks if I granted that request -- before you even
11 made it.

12 If I exercise my authority to administer the cases as
13 the court requires and as justice permits, you would have a
14 non-expert discovery cutoff on May 5th of 2009 -- no. May 11th
15 of 2009, and I'm not sure we need to go that full distance.
16 And that's just the non-expert discovery cutoff.

17 The trial date would be -- I didn't calculate it, but
18 I could do it in a minute if you want me to.

19 So what I think makes sense is for the focus of the
20 case to be on the claims against Veoh because, although I
21 haven't looked into this carefully, I don't think there is a
22 dispute that all of the claims against the investor defendants
23 are derivative of the claims against Veoh.

24 And once I rule on dispositive motions or motions
25 that get to the merits of some or all of the claims against

1 Veoh or at least allow the parties to stake out their
2 respective positions within a reasonable calendaring deadline,
3 it to me is likely that you'll finally be ready to talk turkey
4 and to enter into a mediation or a settlement meaningfully, and
5 that's highly likely where this is going to go.

6 There is not too great a likelihood that there will
7 be a trial, although I recognize that there could be, Number 1;
8 and, secondly, that more work is necessary for the parties to
9 evaluate the strengths and weaknesses of their positions and to
10 enter into some kind of business-like arrangement. But that is
11 where it's going to head anyway is my assumption.

12 So I don't want to sever the claims against the
13 investor defendants, but I think it makes a great deal of sense
14 to stay the claims provided the parties enter into a
15 stipulation or I order the following: That if on the merits,
16 the claims against Veoh are rejected, let's say, on summary
17 judgment, if Veoh wins, the case goes away against the investor
18 defendants. If UMG wins, the parties would agree that the
19 Parklane Hosiery concept of collateral estoppel would kick in
20 and the investor defendants would be barred from challenging or
21 avoiding the next-step legal consequences of any finding of
22 infringement, whether direct, contributory, vicarious, possibly
23 inducing, against Veoh.

24 And then the issue would really be a narrow issue
25 about the extent to which in terms of Veoh's conduct, the

1 investor defendants could be liable derivatively -- and would
2 probably be by inducing -- but there would not be any right or
3 basis whatsoever to challenge the finding or any legal ruling
4 as to the liability, if any, of Veoh. And we would address the
5 claims against the investor defendants after the claims against
6 Veoh have either been clarified or resolved.

7 My guess is, given the apparent relationship between
8 the investor defendants and Veoh, that any settlement that
9 would result after I issue rulings on the merits of the claims
10 against Veoh, any settlement would sweep up into it the
11 situation of the plaintiffs' claims against the investor
12 defendants.

13 That, to me, is the most practical way to do this,
14 and I think it would require or at least permit an extension of
15 the existing deadlines, but not 17 weeks.

16 I don't know what's going to happen with Judge
17 Wistrich. That could affect how realistic any deadline is, and
18 I don't have any inclination to goose him because my impression
19 is he's got a lot of work on his plate, too, and he's certainly
20 a highly respected and respectable judge, so nothing I am
21 saying puts that in question.

22 That's my thinking. And part of it is self- -- and I
23 don't have a script here. I'm just telling you what I'm
24 thinking. Part of it is a reflection of what I know is my
25 availability or unavailability to focus a lot of time and

1 effort on this case, and I don't want to spend five minutes
2 doing something that we could work out here in court orally
3 without the need for more papers to be filed, more fees to be
4 run up, more disputes and letters.

5 Reading the letters attached to Mr. Badal's
6 declaration reminded me of how grateful I am that I don't have
7 to get involved in discovery disputes, and I don't want to see
8 those again.

9 *(Laughter.)*

10 THE COURT: So that's my thinking. Now I'll give
11 each side a chance to be heard.

12 What's your view, Mr. Marenberg?

13 MR. MARENBERG: Well, I think what you say has some
14 merit, although, with all honesty, I would like to think about
15 it some more, and one of the things I might suggest is that we
16 do get a chance to discuss it with our clients and come back in
17 a couple of days.

18 THE COURT: I wasn't about to issue a minute order
19 making it final, but I'm putting the bee in your bonnet.

20 MR. MARENBERG: Right. But one of the things that
21 you propose does make sense with one concern that I have. I
22 think it is possible in some sense to go forward on that basis
23 and then reserve the claims -- reserve findings as to whether
24 the, quote, investor defendants are liable either on an
25 inducement contributory or just vicarious liability basis.

1 As a practical matter, if we are completing discovery
2 in the underlying Veoh case, one of the concerns I had about
3 the proposal to stay and sever is that we are reluctant and, in
4 fact, would oppose their motion to the extent that it required
5 that in Phase 2, we would have to -- our witnesses would have
6 to appear for the same series of depositions that they appeared
7 for taken by Veoh to be questioned by the investor defendants.

8 THE COURT: But that won't happen. Your witnesses
9 are going to be -- you mean in the claims against Veoh?

10 MR. MARENBERG: Well, if the investor defendants are
11 going to assert the right to take the discovery again from UMG
12 that Veoh took, then I would have concerns with that. If they
13 are not asserting those rights, then I have fewer concerns
14 about that. But it seems to me, just anticipating what they're
15 going to say, is that they will say, "Well, Veoh wasn't
16 concerned about the derivative liability issues and, therefore,
17 the questions that Veoh asked, the UMG witnesses aren't
18 satisfactory to us."

19 THE COURT: I don't for the moment see why that would
20 even be much of a thrust of Veoh's discovery of your witnesses.

21 I don't think your witness is going to have a hell of
22 a lot to say about a legal basis to impose liability on the
23 investor defendants, so --

24 MR. MARENBERG: I agree with that, but I think --

25 THE COURT: -- I think it's -- I mean, you're being

1 careful, but I think it's a peculiar concern or possibly
2 misplaced.

3 Let's hear from Veoh.

4 MR. MARENBERG: Let me just make one more -- if the
5 investor defendants -- if the proposal is that they are bound
6 by determinations of, for example, others of Veoh's affirmative
7 defenses, like implied license or whatnot, then I think that
8 goes away because, again, if they are bound, then they don't
9 need that.

10 THE COURT: My proposal is they are going to be bound
11 on findings of liability against Veoh.

12 Then the question is can they be liable not only
13 because of their relationship, but possibly because of -- I
14 don't mean just the financial relationship, but some kind of
15 factual control or responsibility for whatever Veoh did.
16 That's a related but very different set of inquiries.

17 Now, what's your position about whether you would
18 insist -- and I'm really directing this to Mr. Badal -- whether
19 you on behalf of the investor defendants would insist that if I
20 stay the claims against the investor defendants along the lines
21 of what I threw out before, you are going to say, "But we have
22 a right to question the UMG witnesses about things that Veoh
23 forgot to do or chose not to do."

24 MR. BADAL: Well, I think it would depend on what
25 they forgot to do or failed to do.

1 I mean, there are clearly a different body of
2 evidence that would apply for them to perfect their claims
3 against the investor defendants under the theories they are
4 pursuing.

5 Insofar as that would be naturally handled by Veoh,
6 we would not need to replicate it.

7 THE COURT: But don't you and your clients have every
8 reason to conclude and to have a high level of confidence that
9 on the merits of the copyright claims, Veoh is going to
10 responsibly take whatever positions it can and whatever
11 discovery it needs to --

12 MR. BADAL: I have a high degree of confidence about
13 that, but I think that really begs the question -- I think what
14 you are inviting is a pig in a poke if you go down the path --
15 and let me divorce the question of collateral estoppel for a
16 second. If you go down the path of saying the tradeoff here is
17 no subsequent overlapping discovery -- so if Witness X showed
18 up in October of 2008, Witness X is never going to show up
19 again at a deposition.

20 THE COURT: No, I don't think it has to be
21 that absolute.

22 MR. BADAL: I don't think it has to either. But once
23 you start going down that path, you are going to be embroiled
24 in future disputes about the scope of the deposition, who asked
25 what questions, were the questions covered properly.

1 I don't think that's a fair tradeoff for what you are
2 suggesting. If the core suggestion is would the investor
3 defendants in exchange for a stay consider the possibility of
4 collateral estoppel on the underlying merits of the claim
5 against Veoh, that is certainly -- I think it's a very creative
6 thought, and I would certainly want to talk to my client about
7 it before I said yes to it, but it's something we could talk
8 about and I'd be happy to talk about with plaintiffs' counsel
9 but not with a lot of bells and whistles and conditions
10 associated.

11 We are not giving up the rights in exchange for --
12 other than the right to attack Veoh's underlying liability, not
13 our underlying liability.

14 And I can envision --

15 THE COURT: Okay. Let me put it in this context. I
16 don't think it follows necessarily or inevitably that if you
17 accept and the parties negotiate and approach along the lines I
18 threw out that a witness who was questioned or discovery that
19 was provided in the first phase, the case only against Veoh and
20 its affirmative defenses could never under any circumstances be
21 relevant or properly subject to questioning or discovery in the
22 second phase.

23 I am making this up. It's a little preposterous, but
24 I think it illustrates the point.

25 If there were some representative of one of the

1 investor defendants, before they decided to invest in Veoh, who
2 contacted UMG and said, "You know, this is a deal that we are
3 thinking of doing," and Veoh may permit access to information
4 that UMG later on would claim was improperly infringed or
5 infringed. "Can we have your assurance that you are not going
6 to hold us -- we're just going to be putting up the money and
7 providing some leadership on the board, but regardless of
8 whatever Veoh does and whatever you succeed in staking out
9 against Veoh, you're not going to come after us." And this
10 witness for UMG said, "Fine. We won't," that witness would
11 probably be subject to discovery in Phase 2.

12 MR. BADAL: I agree.

13 THE COURT: I know it didn't happen, but that's the
14 point that illustrates why you have some merit to your concern.
15 But I don't think it's a very practical concern.

16 MR. BADAL: Your Honor, it's not a question whether I
17 have a concern, it's a question of if you start engaging in
18 negotiations out of the scope of the deal we're striking and
19 you start going down the path of getting extracurricular
20 benefits out of the deal, we are going to run into a roadblock.

21 In advance of anything, I am not going to agree that
22 I'm not going to take somebody's deposition without even
23 knowing what the -- I just got the documents today.

24 So it's not that the suggestion is a bad one from the
25 beginning, it's a question of how much collateral horse trading

1 is going to go on to get there.

2 THE COURT: Okay. And I never expected when I walked
3 out here to pin that down.

4 MR. BADAL: Okay.

5 THE COURT: But what I did expect is to give you the
6 benefit of my assessment.

7 You're all experienced lawyers. You're good lawyers.
8 Now that Mr. Marenberg says that it's regrettable that the
9 discovery dispute was not avoided, I have a high level of
10 confidence that you can work most if not everything out that
11 has to be worked out without making me have to do more work
12 ruling on stay motions, severance motions, ex parte
13 applications and the like. I really don't want to do that. I
14 don't think I need to do that in a case like this.

15 MR. BADAL: Can I ask a clarifying question? With
16 regard to your proposal, this collateral estoppel proposal, are
17 you going to go ahead and rule on the motion to dismiss at some
18 point?

19 THE COURT: Yes. I thought I said that.

20 MR. BADAL: Okay. Sitting here -- or standing
21 here --

22 THE COURT: I would hope to rule on that -- I would
23 hope to rule on that by the middle of January. I can't be sure
24 I will be able to because -- I'll just leave it at that. I
25 can't be sure.

1 But I'm pretty sure that the plaintiffs' motion will
2 be resolved, including if I need to have a hearing, possibly by
3 the end of this month.

4 MR. BADAL: In response to the core proposal that you
5 put on the table, or suggestion, it's certainly appealing.
6 It's appealing to Shelter. I can't necessarily speak for all
7 the investor defendants. It's certainly appealing to Shelter.
8 It's certainly something I would talk to Mr. Marenberg about,
9 but I certainly want to talk to my client about it as well.

10 THE COURT: Okay. Does anybody wish to be heard on
11 behalf of any of the other investor defendants?

12 MS. VENTO: Your Honor --

13 THE COURT: Why don't you go to the lectern. Let's
14 see, now. Hold on a minute here. Could you tell me your name
15 again?

16 MS. VENTO: Yes. Maria Vento on behalf of the Spark
17 Capital defendants.

18 THE COURT: Same firm as Mr. Badal?

19 MS. VENTO: We are now at the same firm, Your Honor.

20 THE COURT: Okay.

21 MS. VENTO: I would concur with what Mr. Badal said.
22 I think that's something we would be interested in discussing
23 with our clients and with plaintiffs' counsel and then getting
24 back to the Court.

25 THE COURT: Okay. Anyone else wish to be heard?

1 Now, I cut you off before, because you were standing
2 up, Mr. Elkin. Is there something that you need to add?

3 MR. ELKIN: Your Honor, I think quite properly the
4 question was put to Mr. Badal and the other investor
5 defendants. That was the one point I was going to make, the
6 one just observation that I would like to share with the Court
7 in terms of your inkling to push the dates back. I think you
8 said May the 11th and then somehow the trial date would follow.

9 THE COURT: It would be May 11th if I granted 17
10 weeks, 119 days.

11 MR. ELKIN: Okay. I understand. There was a trial
12 commitment that I had in another courtroom in this building
13 that I just wanted to alert Your Honor to. If you were going
14 to fix a hard date today, that was going to be my only
15 observation.

16 THE COURT: No, I would actually require -- and I am
17 now requiring orally that the parties meet and confer and
18 discuss what we have discussed here in court this afternoon,
19 including a consented-to revision.

20 I don't think right now, although I have an open
21 mind, that everything has to be pushed back for 17 weeks. If
22 the parties agree to it, I wouldn't reject it.

23 I am not about to do some kind of mechanical thing
24 saying it's too much time and I'm going to exercise my
25 authority to squeeze the parties, because it just doesn't make

1 sense to do that here.

2 If the parties could agree on 17 weeks, I would go
3 along with it, but I don't right now think it's that necessary,
4 although, again, it depends on the rulings of Judge Wistrich
5 perhaps and other things.

6 But that's my take on this. I'm not going to have a
7 hearing on the 15th or the 22nd, either of those dates, on this
8 stay and severance motion.

9 A stay is much preferable to a severance because of
10 record keeping considerations and other considerations and
11 clarity for that matter. So think about it in terms of a stay.

12 Attach and negotiate the conditions that are fair to
13 both sides, and take it from there.

14 Now, how much time do you need before you can report
15 back to me on where things stand?

16 MR. ELKIN: I think this is a question that I'd
17 actually defer to Mr. Badal and his colleagues.

18 MR. BADAL: I'll speak with my client this afternoon,
19 and then we will start the discussions with Mr. Marenberg.
20 We'll go as fast as he wants to go.

21 I mean, I would hope to be back to the Court with
22 some help from the plaintiffs by next week sometime.

23 THE COURT: Next Monday? Next Wednesday? When would
24 be feasible?

25 MR. MARENBERG: My suggestion is next Wednesday.

1 THE COURT: Okay. So I'm ordering -- so we need to
2 have minutes that conform with all the clerical requirements.

3 I'm ordering -- and the minutes will very cursorily
4 reflect this -- that the parties file a joint status report as
5 to the matters discussed at this hearing on or before December
6 17th -- December 10th.

7 Does that give you enough time?

8 MR. MARENBERG: Yeah, I wanted to make sure I
9 didn't commit myself to something I couldn't comply with. That
10 does.

11 THE COURT: All right. And that would mean all the
12 parties, not just the question of what happens to the investor
13 defendants.

14 MR. ELKIN: Right. It also includes our proposal
15 with respect to adjusting the deadlines?

16 THE COURT: Yes.

17 MR. ELKIN: Okay.

18 THE COURT: All right. Thank you, counsel. We're
19 adjourned.

20 *(Proceedings concluded.)*

21 --oOo--

22

23

24

25