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15 VEOH NETWORKS, INC.

16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**
18 **SAN DIEGO DIVISION**

19 VEOH NETWORKS, INC. a California Corporation)
20)
21 Plaintiff,)
22 vs.)
23 UMG RECORDINGS, INC., a Delaware corporation; UNIVERSAL MUSIC CORP., a)
New York corporation; SONGS OF)
24 UNIVERSAL, INC., a California corporation;)
UNIVERSAL-POLYGRAM)
25 INTERNATIONAL PUBLISHING, INC., a)
Delaware corporation; RONDOR MUSIC)
26 INTERNATIONAL, INC., a California)
corporation; and DOES 1-10 inclusive)
27 Defendant.)

Case No. 07 CV 1568 TJW (BLM)

VEOH NETWORKS, INC.'S SUR-REPLY
IN SUPPORT OF VEOH NETWORKS,
INC.'S OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, TRANSFER;
DECLARATION OF REBECCA LAWLOR
CALKINS

Date: October 15, 2007
Time: 10:00 a.m.
Judge: Hon. Thomas J. Whelan
Courtroom 7

Complaint Filed: August 9, 2007

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1 UMG's Reply Brief in Support of Motion to Dismiss, or in the Alternative, To Transfer
2 ("Reply") contains material factual misstatements regarding 1) the Central District Order Re
3 Transfer Pursuant to General Order 07-02 ("Order") (which Veoh did *not* have at the time of filing
4 Veoh's Opposition to UMG's Motion to Dismiss); and 2) the proposed, but never filed, Amici Brief
5 of NBC which UMG incorrectly represents as "filed." (See Supplemental Declaration of Benjamin
6 Glatstein in Support of Defendants' Motion to Dismiss, ¶ 4)) Because the factual inaccuracies in
7 UMG's Reply are material, Veoh Networks, Inc. seeks to correct the record through this sur-reply
8 ("Sur-Reply"). Importantly, UMG had not served Veoh with the transfer order discussed at length in
9 Defendants' Reply brief prior to Veoh's preparation and filing of its Opposition. Veoh saw the
10 Transfer Order for the first time on September 26, after UMG faxed it after business hours on
11 September 25.

12 As Veoh's Sur-Reply corrects the misstatements in UMG's Reply and will thus aid the Court
13 in making its determination about whether Veoh's Complaint action should remain undisturbed in
14 the Southern District, Veoh respectfully requests that the Court affording Veoh the opportunity to
15 correct UMG's misstatements prior to the October 15 hearing date, by considering Veoh's Sur-Reply.

16 **I. STATEMENT OF FACTS**

17 **A. The Order re Transfer Does *Not* Reflect Findings By Judge Matz, It Sets Forth**
18 ***Counsel's* Stated Reasons for Transfer.**

19 On September 4, 2007, UMG filed a Notice of Related Case which automatically triggered
20 the completion of a proposed transfer order form. (General Order 07-02 Section 5.2; (Calkins Decl.,
21 Exh. A) "Whenever a party files a Notice of Related Cases indicating that any one or more of the
22 circumstances set forth in Section 5.1 exist, the Clerk shall prepare a proposed transfer order."
23 General Order 07-02, Section 5.2. The Order re Transfer ("Transfer Order") is a pre-printed form
24 with pre-printed "reasons for transfer" which is completed by the clerk. (Calkins Decl., Exh. B).
25 The clerk checks off the reasons for transfer *as indicated by counsel*, here, UMG. Importantly, the
26 boxes checked by the clerk do *not* reflect findings of Judge Matz but identify the reasons UMG set
27 forth for transfer. Indeed, the "reasons" section is plainly entitled "Reason For Transfer as Indicated
28

1 **By Counsel.**" The transferee judge then merely consents to take the case or not, based on Counsel's
2 representations. (Order re Transfer Pursuant to General Order 07-02, Calkins Decl., Exh. A).

3
4 **B.** Judge Howard Lloyd's Denial of Viacom and NBC Universal's s Request to File
5 Amici Brief in *Io Group, Inc. v. Veoh Networks, Inc.*

6 In its Reply, UMG invites this Court to consider the amici brief purportedly filed by Viacom
7 and NBC Universal in another matter. But this is incorrect - Judge Lloyd denied Viacom's and
8 NBC's request to file the brief. (Calkins Decl. Exh. C). Defendants nonetheless attach the brief as
9 Exhibit C to the Supplemental Declaration of Benjamin Glatstein declaring that Exhibit C is a "true
10 and correct copy of the Brief ... filed August 14, 2007, in the case in the case [sic] *Io Group, Inc. v.*
11 *Veoh Networks, Inc.*, N.D. Cal. Case No. C 06-3926." The amici brief, in addition to being
12 irrelevant and beyond the scope of these papers in any event, should be disregarded in its entirety as
13 it was never filed in any action despite Mr. Glatstein's declaration to the contrary.

14 **II. LEGAL ARGUMENT**

15 **A. Defendant's Reply Brief Contains Misstatements Regarding Purported**
16 **"Rulings" by Judge Matz Prior to the October 15, 2007 Hearing Before the**
17 **Court.**

18 In their Reply brief, Defendants devote a section to overstating the transfer order in the
19 Central District. Veoh did not address the transfer order in its Opposition because Veoh did not
20 know about it yet – Defendants had not yet given Veoh notice despite the fact that Defendants had
21 been ordered to four days earlier by the Court. Defendants' misstatements are many in this regard,
22 for example, in their Reply brief, Defendants incorrectly state:

- 23 • that Judge Matz "'ruled' that UMG's suit against Veoh in the Central District, UMG
24 Recordings, Inc. et al. v. Veoh, is related to UMG's other pending Central District
25 suits" (Reply 2:5-6);
- 26 • that "because UMG's actual dispute with Veoh is related to those pending Central
27 District actions, Judge Matz has now transferred UMG recordings, Inc., et al, v. Veoh
28 to his docket too" (Reply 6:28-7:2);

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- that "Judge Matz's ruling rebuts Veoh's Arguments against transfer" (Reply 7:6);
- that "Judge Matz reviewed UMG's complaint against Veoh and ruled ... that UMG's dispute with Veoh is related to UMG's three pending Central District actions and he therefore transferred the case to his docket" (Reply 7:15-17);
- that Judge Matz held that UMG's dispute with Veoh and UMG's ending actions "arise from the same or closely related transactions, happenings or events, and call for determination of the same or substantially related or similar questions of law and fact. (Reply 7:19-21).
- Judge Matz ruled ... that it would entail substantial duplication of labor if [UMG's related suits were] heard by different judges. (Reply 7:24-25.)
- Judge Matz's ruling stands as a definitive rebuttal to Veoh's suggestion that transfer would achieve nothing because there are other cases throughout the state and country, which implicate Section 512(c), and the issues in this case are so highly fact specific as to make discovery in UMG's pending cases in the Central District entirely irrelevant. (Reply 7:26-8:1);
- that Judge Matz disagreed on both counts, finding UMG's pending Central District suits against mass infringers legally and factually related to UMG's dispute with Veoh, and meriting coordination before a single federal judge as a matter of judicial economy.
- that "Judge Matz's ruling also exposes the irrelevance of Veoh's argument that this Court is "qualified to hear this matter."
- "Judge Matz ruled the cases *are* related (Reply 10:13-14).

But Judge Matz never ruled any of this. UMG's Central District case was transferred from Judge Wu to Judge Matz because UMG filed a Notice of Related Cases, not because Judge Matz made "findings" or "rulings" – he did not.

And Defendants assert that Veoh "failed to disclose" the transfer order to this Court. Veoh however did not "fail to disclose," rather Defendants failed to give Veoh notice as ordered.

B. This Court Should Disregard The Never Filed Proposed Amici Brief

Judge Lloyd denied Viacom's and NBC Universal's request to appear as amici and file an amici brief. While the amici brief is irrelevant in any event, this Court should disregard the proposed amici brief in its entirety.

III. CONCLUSION

Because Defendants' Reply contains material factual misstatements which would prejudice Veoh, Veoh respectfully requests this court disregard Defendants' misstatements and Viacom and NBC Universal's never filed amici brief.

Dated: October 11, 2007

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STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Winston & Strawn LLP, 333 South Grand Avenue, Los Angeles, CA 90071-1543. On October 11, 2007, I served the within documents:

VEOH NETWORKS, INC.'S SUR-REPLY IN SUPPORT OF VEOH NETWORKS, INC.'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TRANSFER; DECLARATION OF REBECCA LAWLOR CALKINS

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, addressed as set forth below.

On October 11, 2007, I sent such document(s) from facsimile machine 213-615-1750. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine 213-615-1750 which confirms said transmission and receipt.

By Electronic Filing: The above and foregoing document(s) was electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following

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I declare that I am employed in the office of a member of the bar of this court whose direction the service was made.

Executed on October 11, 2007, at Los Angeles, California.

/s/ Arlene Zamora

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