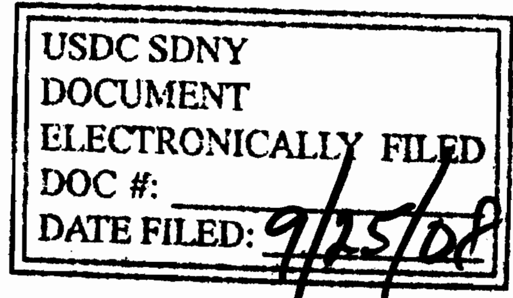

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC, et al.,

Plaintiffs,

-against-

LIME WIRE LLC, et al.,

Defendants.

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06 Civ. 5936 (GEL)

ORDER

GERARD E. LYNCH, District Judge:

By joint letter dated September 17, 2008, the parties have submitted a dispute about whether defendants should be permitted to depose Greg Bildson, a former defendant who has settled with the plaintiffs, and whether the defendants should be permitted to inspect documents relating to the settlement.

There is, however, no particular urgency to the request, as defendants do not seek to depose Bildson before the imminent deadline for filing responsive briefs on the parties' respective motions for summary judgment. There is thus time to explore issues not sufficiently briefed by the parties, and to permit Bildson himself an opportunity to be heard on those issues.[1] Certain conclusions, however, can be reached on the present record:

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1. There is no need for defendants to depose Bildson with respect to the underlying events at issue in this case. Defendants have had extraordinary access to Bildson, who was represented by counsel for defendants and whose knowledge of the facts has been available to defendants throughout the case. Defendants do not seem to dispute this point. Rather, they contend that they should be able to depose Bildson with respect to the "new facts" relating to the the plaintiffs' settlement negotiations with Bildson that "happened last week." (Joint Letter at 7; see also id. at 6 (defendants seek to learn about the "horse-trading and strong-arm tactics" that allegedly resulted in Bildson's settlement.) While fact discovery is long closed, defendants appear to be correct that the information they seek to uncover could not have been learned during the discovery period because the events in question had not yet occured at that time.

2. Contrary to plaintiffs' position (id. at 7), the facts regarding their negotiations with Bildson are not protected from discovery by Fed. R. Evid. 408. Rule 408 does not create a

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[1] The Court has received a notice of appearance from Bildson's new counsel. (Doc. # 129, Sept. 23, 2008.)

privilege. Rather, it provides that evidence of settlement negotiations is not admissible at trial for certain particular purposes. In suggesting that they seek information about these negotiations in order to learn of any "bias" Bildson may have, defendants are not seeking to "squeeze" within an exception or evade any "protection" provided by the Rule (id.); they are simply seeking to carry out a normal function of discovery, which is to obtain nonprivileged information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P 26(b)(1). Rule 408 prohibits the use of statements made during settlement to prove liability or damages, or to impeach by prior inconsistent statements, see Fed. R. Evid. 408(a), but it specifically permits admission of such statements to "prov[e] a witness's bias or prejudice," id. 408(b). As is familiar in criminal cases, where discovery is far less sweeping than under the civil rules, information about the inducements that may have been provided by a party to a witness to testify on behalf of a party, and particularly concerning the terms of "cooperation" obtained from a former defendant by the prosecution, is significant evidence of potential bias on the part of the witness, and must be disclosed to defendants. Rule 408 thus presents no obstacle to the discovery sought by defendants.

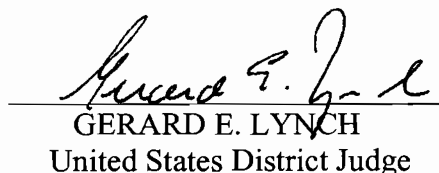
3. The settlement negotiations, however, are not relevant to the underlying facts of the case, or to any other issue in dispute between the parties, except insofar as they bear upon Bildson's credibility. At this point, plaintiffs have not presented any testimony by Bildson in connection with the summary judgment motion; plaintiffs profess not to have decided whether to submit any such testimony in their answering or reply papers; and it is unclear whether either party will seek to call him as a witness at trial, or even whether a trial will be necessary in light of the parties' motions for summary judgment. There is thus no apparent reason to reopen discovery to permit an inquiry into the credibility of a person neither party may have any interest in calling as a witness.

4. As plaintiffs point out, it is unclear whether defendants' counsel, who previously represented Bildson and who have apparently had access to his confidences, may cross-examine him consistently with their responsibilities to him. Because Bildson has not yet had an opportunity to be heard in this matter, it is unclear whether he has any objection to such examination. Nor is there any record with respect to a "waiver" agreement that Bildson may have signed (Joint Letter at 5) in connection with counsel's joint representation of Bildson and the other defendants. Should a deposition or other testimony become necessary, these issues would need to be further explored.

Accordingly, it is hereby ORDERED that defendants' request for leave to depose Greg Bildson is denied, without prejudice to renewal at a later appropriate time.

SO ORDERED.

Dated: New York, New York
September 25, 2008



GERARD E. LYNCH
United States District Judge