

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; BMG MUSIC;
CAPITOL RECORDS, INC.; ELEKTRA
ENTERTAINMENT GROUP INC.;
INTERSCOPE RECORDS; LAFACE
RECORDS LLC; MOTOWN RECORD
COMPANY, L.P.; PRIORITY RECORDS LLC;
SONY BMG MUSIC ENTERTAINMENT;
UMG RECORDINGS, INC.; VIRGIN
RECORDS AMERICA, INC.; and
WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME GROUP LLC; LIME WIRE LLC; MARK
GORTON; GREG BILDSON, and M.J.G. LIME
WIRE FAMILY LIMITED PARTNERSHIP

Defendants.

ECF Case

06 CV 5936 (GEL)

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION
TO EXCLUDE THE DECLARATIONS OF THOMAS SEHESTED,
ANDREW KEMPE, AND KATHERYN COGGON FOR PLAINTIFFS'
FAILURE TO DISCLOSE FACTUAL WITNESSES**

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INTRODUCTION

Once again, Plaintiffs seek to subvert the Federal Rules of Civil Procedure and gain the upper hand by concealing the identities of their direct infringement witnesses. After being called to the evidentiary mat by Defendants, Plaintiffs scrambled to provide evidence of direct infringement; evidence that Plaintiffs had concealed throughout discovery under the cloak of work product immunity. For the reasons discussed herein, the Court should exclude the Declarations of Andrew Kempe, Thomas Sehested, and Katheryn Coggon.

ARGUMENT

I. PLAINTIFFS' DISREGARD FOR THEIR DISCOVERY OBLIGATIONS WARRANTS THE EXCLUSION OF ALL THREE DECLARATIONS.

A. CONTRARY TO PLAINTIFFS' CONTENTION, RULE 37 EXCLUSION SANCTIONS ARE NEAR AUTOMATIC FOR FAILURE TO DISCLOSE AND SUPPLEMENT.

Plaintiffs contend that Rule 37 exclusion sanctions are not “near automatic.” But, Plaintiffs ignore this Court’s opinion and recent Second Circuit authority that holds otherwise. *See Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 307 (S.D.N.Y. 2008) (Lynch, J.) (finding that exclusion sanctions are “near automatic”) (quoting *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 20 (1st Cir. 2001); *see also Design Strategy, Inc. v. Davis*, 469 F.3d 284, 297 (2d Cir. 2006) (quoting *Wilson*, 250 F.3d at 20 with approval). In fact, Plaintiffs’ own authority holds that “[Rule 37(c)(1)] provides for automatic exclusion of a witness who was not disclosed despite a party’s duty to disclose.” *Grdinich v. Bradlees*, 187 F.R.D. 77, 79 (S.D.N.Y. 1999) (Scheidlin, J.). Accordingly, if Plaintiffs cannot meet their burden to show that their discovery failures were either substantially justified or harmless, which they cannot, the evidence should be excluded. *Grdinich v. Bradlees*, 187 F.R.D. at 79.

B. PLAINTIFFS' DISCOVERY FAILURES ARE NOT SUBSTANTIALLY JUSTIFIED.

Plaintiffs' justification argument is simply untenable. Plaintiffs contend that the declarants are rebuttal witnesses¹ because Defendants made new arguments "in the middle of summary judgment proceedings." (Pls.' Opp'n at 16.) The issue of direct infringement can hardly be deemed a "new argument." As Plaintiffs are fully aware, the first element of every secondary copyright infringement claim is *direct infringement* by a third party.² See *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998) (contributory infringement requires direct infringement by a third party). Direct infringement does not somehow morph into a "new argument" simply because Defendants' Summary Judgment Motions exposed Plaintiffs' lack of direct infringement evidence.³ Plaintiffs' contention is without merit.

Plaintiffs also claim that "[t]here was no reason to believe that defendants here were going to challenge plaintiffs' evidence on [the issue of direct infringement]." (Pls.' Opp'n at 14 n. 14.) Plaintiffs' claim is belied by Defendants' discovery requests. Defendants propounded the following interrogatory upon all Plaintiffs:

Identify all persons with knowledge of any digital file that has been uploaded, made available, copied, downloaded, distributed or exchanged by you or on your behalf via the LimeWire software program, any other Gnutella-based peer-to-peer software application, or any file-sharing service/program.

¹ Plaintiffs offer no authority for the assertion that rebuttal witnesses need not be disclosed. Even if the declarants were considered rebuttal witnesses, which they are not, Rule 26(a) does not except the identification of such fact witnesses. Therefore, Plaintiffs still had the duty to supplement their disclosures and other discovery responses with the identity of these declarants.

² Plaintiffs dedicated over three pages of their opening summary judgment brief and over four pages of their 56.1 Statement to this issue alone.

³ According to Plaintiffs' logic, the proponent of a summary judgment could simply pick and choose which elements of the claim for which they wanted to disclose evidence. For the other elements, the proponent would assumingly wait for the opponent to raise the deficiency, at which time the proponent would offer never before disclosed evidence to "rebut" the opponent's "new argument." This chicanery is hardly contemplated by the Federal Rules, nor should it be endorsed by this Court.

(See 11/7/08 Baker Decl. In Support of Defs.’ Mot. to Exclude, Ex. B.)⁴ Obviously, this interrogatory sought the names of witnesses with knowledge of any alleged direct infringement, such as the present declarants. Instead of answering the interrogatory, Plaintiffs asserted, *inter alia*, the work product immunity. Plaintiffs knew Defendants contested the issue of direct infringement, and their claim to the contrary is suspect to say the least.

Accordingly, Plaintiffs’ contentions that direct infringement is a new argument and that Defendants were not suppose to challenge direct infringement are patently absurd and evidence Plaintiffs’ desperation. This hardly justifies, let alone substantially justifies, Plaintiffs’ discovery failures.

C. PLAINTIFFS’ DISCOVERY VIOLATIONS WERE HARMFUL.

Plaintiffs contend that their violations are harmless because Defendants have not sought to depose the declarants. This is simply false. Defendants have requested leave of this Court to depose the declarants. (See Defs.’ Mot. To Exclude at 8.) However, Defendants still maintain that Plaintiffs’ egregious discovery violations warrant preclusion of all three declarations without a need to waste further resources on such discovery.

As set forth in Defendants Motion to Exclude, there are a myriad of credibility issues surrounding these declarants and their proffered exhibits, and Plaintiffs newly submitted declarations for Kempe and Sehested create even more. For example, Plaintiffs resubmitted Exhibit A to the Declaration of Thomas Sehested, claiming that the previous file was “corrupted.” Neither Plaintiffs nor Sehested explains what they mean by “corrupted” or offers

⁴ As discussed *infra* at II., Plaintiffs’ failure to supplement these interrogatories is yet another reason to exclude these declarations.

any background facts regarding the issue.⁵ Apparently, Defendants and this Court are just to accept the explanation with no questions asked. Moreover, a close inspection of Exhibit A exposes additional questions regarding Sehested's alleged direct infringement evidence. For example, the chart lists that the first download date for "Usher Final Goodbye.mp3" was 11/26/2008. For the "second download" date, the chart lists the date as 11/25/2008. While this error may seem minor, given that Plaintiffs completely eliminated Defendants' opportunity to test the veracity of their witnesses, Plaintiffs' nondisclosure is anything but harmless. *See Tse*, 568 F. Supp. 2d at 306.

Furthermore, the *Krause* case on which Plaintiffs rely is readily distinguishable. *Krause* involved an employment discrimination claim. *Krause v. Buffalo & Erie Count. Workforce Dev. Consortium, Inc.*, 426 F. Supp. 2d 68, 89 (W.D.N.Y. 2005). The plaintiff withheld the identity of a potential witness because that witness was still a current employee of the defendants. *Id.* at 88–89. In *Krause*, the court found that this was a substantial justification and that the harm, if any was minimal. *Id.* This is hardly identical to the situation at hand, where Plaintiffs have unjustifiably withheld the identities of these declarants and Defendants have shown direct resulting harm.⁶

⁵ Notably, if Defendants had not challenged this declaration, the record would have included this "corrupt file" as evidence, which further underpins the harm of Plaintiffs' last minute offering of this undisclosed and unexamined evidence.

⁶ Plaintiffs contend that they disclosed Kempe's employer MediaSentry and another employee of MediaSentry. Defendants do not dispute this fact; however, this disclosure was not adequate to apprise Defendants of the existence of Kempe or the facts within his declaration. As discussed *infra* at II., Plaintiffs actively shielded discovery of MediaSentry employees by invoking the work product immunity in their interrogatory responses. As such, Defendants had no way of knowing that MediaSentry employees possessed knowledge of direct infringement. Also, because Plaintiffs invoked the work product immunity, it was reasonable for Defendants not to pursue discovery from these individuals and to assume that Plaintiffs would not use the immunized evidence as both a sword and a shield. Apparently, that assumption was wrong.

II. PLAINTIFFS' OFFENSIVE USE OF THE WORK PRODUCT IMMUNITY WARRANTS EXCLUSION OF THE DECLARATIONS.

The prohibition on offensive use is a basic tenet of the attorney-client privilege and work product immunity. (*See* Defs.' Mot. To Exclude at 6–7); *see also In re Sims*, 534 F.3d 117, 132 (2d. Cir. 2008) (“a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party”) (quoting *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d. Cir. 2000)); *United States v. Nobles*, 422 U.S. 225, 239–40, (1975) (party cannot present the trial testimony of an *investigator* and refuse, on the ground of *work product immunity*, to produce relevant portions of the investigator's report for use in cross-examining him). Plaintiffs dismiss Defendants' work product argument with a simple footnote, claiming they “do not claim any work product immunity in this regard.” However, this is belied by Plaintiffs' discovery responses, which clearly invoke the work product immunity to shield the identities of direct infringement witnesses, such as the declarants.

As noted in Defendants' Opening Brief, Plaintiffs answered all interrogatories regarding evidence of direct infringement by asserting, *inter alia*, the work product immunity. (*See Defs.' Mot. To Exclude at 6–7.*) Although Plaintiffs admit to retaining MediaSentry since at least 2004, remarkably, Plaintiffs refused to list Andrew Kempe or any other MediaSentry employee in response to these interrogatories, which directly asked for the identities of witnesses such as Kempe, Sehested, and Coggon. Instead, Plaintiffs hid behind the work product immunity, which apparently Plaintiffs now disclaim.⁷ Plaintiffs cannot have it both ways. By initially claiming

⁷ In the unlikely event that the Court finds Plaintiffs offensive use does not warrant exclusion, Defendants would respectfully request leave to seek discovery regarding all communications relating to direct infringement for which Plaintiffs previously designated as work product. Because Plaintiffs seek to avoid offensive use by now claiming not to assert the work product immunity regarding direct infringement, Defendants should be allowed access to that information.

work product immunity for employees of MediaSentry and then offering declarations of those employees, Plaintiffs are impermissibly using the immunity as both a sword and a shield, which warrants striking the declarations. *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1326–28 (N.D. Ala. 2008) (granting the defendants’ motion to strike a declaration proffered by the plaintiff because of the plaintiffs’ offensive use of the work product immunity).

Furthermore, under Rule 26(e), Plaintiffs had the obligation to supplement their interrogatory answers with the names of the three declarants. FED. R. CIV. P. 26(e). Instead, Plaintiffs maintained their position that such information was protected as work product. As discussed above with MediaSentry employees, Plaintiffs’ interrogatory response and later submission of the Kempe, Sehested, and Coggon Declarations constitutes impermissible offensive use. Accordingly, the Court should strike the declarations. *See Chao*, 568 F. Supp. 2d at 1326–28.

III. AT THE VERY LEAST, DEFENDANTS SHOULD BE GIVEN LEAVE TO DEPOSE THESE INDIVIDUALS AND TO SUBMIT SUPPLEMENTAL BRIEFING AS NECESSARY.

As shown in Defendants’ Motion to Exclude and further discussed above, Defendants have shown the requisite prejudice and harm to warrant exclusion of the declarations for Plaintiffs’ brazen disregard of their duty to disclose and to supplement discovery responses. However, as Plaintiffs concede in their opposition, if the Court were to decide not to exclude these prejudicial declarations, the Court should continue the summary judgment briefing and grant leave to Defendants’ to depose each declarant and to file supplemental briefing, if necessary, to minimize this prejudice. (*See* Pls.’ Opp’n at 16, n.16 (citing *Krause*, 426 F. Supp. 2d at 89 for this proposition).) Plaintiffs’ contend that Defendants never requested to depose

these individuals; however, Defendants requested this alternative relief in their Motion to Exclude. (Defs.' Mot. To Exclude at 8.)

CONCLUSION

For aforementioned reasons, Defendants respectfully request that this Court strike the declarations of Thomas Sehested, Andrew Kempe, and Katheryn Coggon, foreclose Plaintiffs from using Sehested's, Kempe's, or Coggon's testimony in further proceedings, and for any such other and further relief to which they may be entitled. Alternatively, in the unlikely event that the Court finds that Plaintiffs' blatant discovery violations do not warrant exclusion of evidence, Defendants respectfully request leave to depose all three declarants in order to assess their credibility and to file supplemental briefs as necessary.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 19th day of December, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via email.

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