

REDACTED VERSION  
COMPLETE VERSION FILED UNDER SEAL

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,

– against –

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

Defendants.

ECF Case

06 Civ. 5936 (KMW) (DCF)

**DEFENDANTS' RESPONSE TO NON-PARTIES IMESH, INC. AND MUSICLAB,  
LLC'S OBJECTIONS TO MAGISTRATE JUDGE FREEMAN'S JANUARY 31, 2011  
ORDER COMPELLING THE PRODUCTION OF INTERNAL AND EXTERNAL  
COMMUNICATIONS**

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Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) respectfully respond to the objections (the “Objections”) of non-parties iMesh, Inc. and MusicLab, LLC (iMesh, Inc.’s wholly-owned subsidiary and, with iMesh, Inc., “iMesh”) to Magistrate Judge Freeman’s Order dated January 31, 2011 (the “Order”).

### PRELIMINARY STATEMENT

iMesh’s Objections to Magistrate Judge Freeman’s Order represent the latest in a series of efforts to evade its obligations under Rule 45 to produce documents in response to Defendants’ subpoena – documents that it indisputably possesses and that this Court has deemed relevant to the issues to be tried in this case. iMesh’s stonewalling has gone on for months, and its Objections to Magistrate Judge Freeman’s limited Order are nothing more than a last-ditch effort to avoid doing what it should have done long ago. The Order should be affirmed so that all responsive documents (and any attendant privilege log) can be produced sufficiently in advance of the March 14 deadline for the exchange of trial exhibit lists. (*See* 2/22/11 Scheduling Order, Dkt. 488.)

Although iMesh never sought a stay, it has still not produced a single document called for by the Order. As explained below, iMesh has failed to meet its burden of showing that Magistrate Judge Freeman committed “clear error” because the communications in question are clearly relevant, and their production will be neither duplicative of Plaintiffs’ production nor unreasonably burdensome to iMesh. The Objections should be denied, and Magistrate Judge Freeman’s January 31, Order affirmed.<sup>1</sup>

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<sup>1</sup> In briefing this issue before Magistrate Judge Freeman, Defendants expressly reserved the right to depose a representative of iMesh following the production of responsive documents should that prove necessary. (Declaration of Paul W. Horan in Support of Defendants’ Response to Non-Parties iMesh, Inc. and MusicLab, LLC’s Objections to

## FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2010, Defendants served the Subpoena on iMesh, requesting that iMesh produce certain documents and appear for a deposition (the “Subpoena”). (Declaration, Ex. A.) The Subpoena requested production of, *inter alia*, three principal types of documents (collectively, the “Documents”): (1) licenses or agreements between iMesh and any Plaintiffs in this action “concerning the use, publication, display, or broadcast of any material” to which any Plaintiff holds the copyright; (2) communications (both internal and external) regarding those licenses or agreements, including the negotiation thereof; and (3) documents reflecting amounts paid by iMesh to any Plaintiff pursuant to those agreements or licenses, *e.g.*, annually or on a song-by-song basis, together with figures relating to the total number of sales of each of Plaintiffs’ copyrighted songs (collectively, the “Songs”) through the iMesh service. (*See id.*, Request Nos. 1, 2, 4, 5, 11.)

On September 27, 2010, Plaintiffs moved to quash the subpoenas Defendants had served on iMesh and others. On October 15, 2010, the Court denied Plaintiffs’ motion to quash in its entirety and also ruled that licensing agreements between Plaintiffs and non-parties, together with communications regarding those licensing agreements, were relevant to the amount of Plaintiffs’ lost revenues from copyright infringement and the conduct and attitude of the parties, both of which are factors that the Court must take into account in determining the amount of damages to award to Plaintiffs. (10/15/10 Order, Dkt. 329, at 5-6.)

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Magistrate Judge Freeman’s January 31, 2011 Order Compelling the Production of Internal and External Communications (“Declaration”), Ex. E.) iMesh objected to the subpoena for a deposition on the grounds that Defendants previously deposed iMesh in this case in April 2008 in connection with an earlier subpoena. (*Id.*, Ex. F.) Should this Court uphold the Order, Defendants do not anticipate taking iMesh’s deposition based on those documents unless such a deposition is strictly necessary for trial.

Promptly after the Court issued the October 15 Order, Defendants attempted to work out a production schedule with iMesh. (Declaration, Ex. E at 2-3.) While negotiations over the scope of the iMesh subpoena were ongoing, Defendants sought and obtained an order from Magistrate Judge Freeman compelling another non-party – who had been served with a subpoena that was virtually identical in all material respects to the iMesh subpoena – to produce responsive documents, and identified search parameters to locate the emails to be produced. (11/23/10 Order, Dkt. No. 367, at 1-2 (the “VEVO Order”).) Defendants asked iMesh to comply with the Subpoena consistent with Magistrate Judge Freeman’s VEVO Order. Despite numerous attempts to resolve the matter, iMesh refused to comply with the Subpoena and the VEVO Order, necessitating the filing of a motion to compel on December 13, 2010. (Declaration Exs. B, C, D, E.)

On January 31, 2011, Magistrate Judge Freeman granted the motion to compel and issued the Order, ordering iMesh to search for and produce “any communications, both internal and with Plaintiffs, relating to their licenses with Plaintiffs and/or relating to LimeWire, to the extent those communications reflect information regarding Plaintiffs’ conduct, positions, or views about online licensing or about LimeWire.” (Order at 6.) Magistrate Judge Freeman limited the production of documents to the period after April 18, 2008. (*Id.* at 5-6.) The Court left it to iMesh’s “own judgment as to the best means of locating the communications covered by” the Order, though noting that iMesh “may wish to take guidance from” the VEVO Order. (*Id.* at 5 n.3.)

Although iMesh initially stated that it would comply with the Order, hoping to make an initial production of documents on February 18, 2011, and completion by March 4, 2011, on February 16, 2011, iMesh abruptly changed course by informing Defendants that it had

changed its mind, that it would not comply with the Order, and that it would be filing Objections to the Order later that day. (Declaration, Exs. I, J, K.) Although iMesh did not seek a stay, it has not produced any of the documents required by the Order.

## **ARGUMENT**

### **I. The Order Should Not Be Disturbed Unless It Is “Clearly Erroneous Or Contrary To Law.”**

The district court reviews orders regarding non-dispositive matters “under the ‘clearly erroneous or contrary to law’ standard.” *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990); *see also* 28 U.S.C. § 636(b)(1)(A) (2006) (“A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.”); Fed. R. Civ. P. 72(a) (“The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.”). The “clearly erroneous or contrary to law” standard set forth in section 636(b)(1)(A) is akin to an abuse of discretion standard. *See Edmonds v. Seavey*, No. 08 Civ. 5646, 2009 WL 2150971, at \*2 (S.D.N.Y. July 20, 2009). Thus, the ruling of a magistrate judge is “entitled to substantial deference” and may not be set aside “unless the court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Bank Hapoalim, B.M. v. Am. Home Assurance Co.*, No. 92 Civ. 3561, 1994 WL 119575, at \*2 (S.D.N.Y. Apr. 6, 1994) (Wood, J.) (citations and quotation marks omitted).

### **II. Magistrate Judge Freeman’s Ruling That iMesh’s Internal Communications Are Relevant Was Not Clearly Erroneous Or Contrary To Law.**

It is beyond dispute that documents bearing on the alleged lost revenues of the copyright holder and “the conduct and attitude of the parties” are relevant, and thus the proper subject of a subpoena. *Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010).

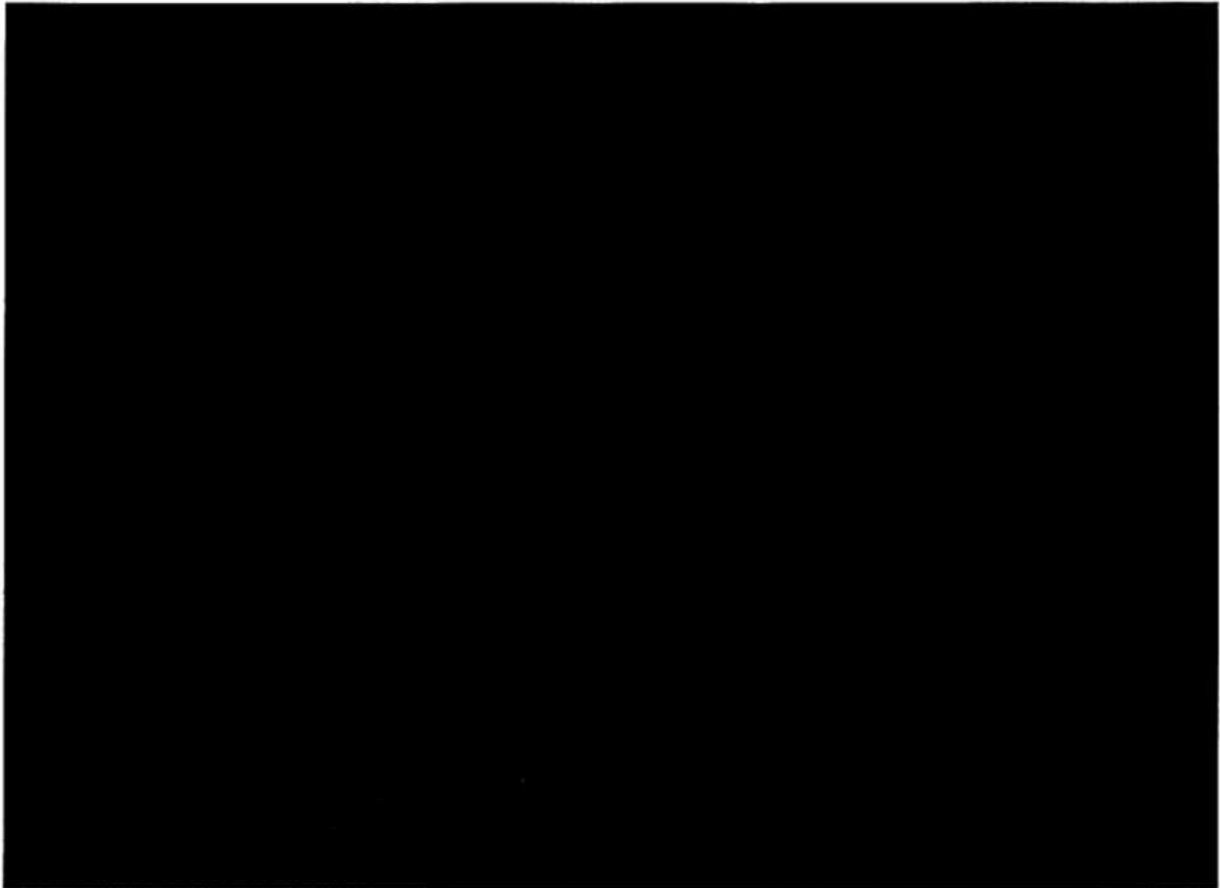
Indeed, it has been held on multiple occasions in this action that documents related to the “conduct and attitude” of the parties are appropriate subjects of discovery concerning Plaintiffs’ damages. *See* Order, 10/15/10 (Dkt. 329); Order, 11/2/10 (Dkt. 139); Opinion and Order, 11/19/10 (Dkt. 363); Order, 11/23/10 (Dkt. 367).

The “conduct and attitude” factor encompasses both “Plaintiffs’ attitudes regarding the value of [their] copyrights” and how “Plaintiffs conducted themselves in dealing with others in the internet marketplace.” Order, 10/15/10, at 6 (Dkt. 329). Other non-parties have been compelled to produce their internal communications on that basis in this very case. Order, 11/23/10, at 2 (Dkt. 367). By the same token, iMesh’s communications with Plaintiffs concerning their license agreements and iMesh’s internal documents discussing the licenses and LimeWire will illuminate either Plaintiffs’ views as to the true value of their works or how Plaintiffs acted toward iMesh and other digital music providers, which are matters the Court has already determined are “relevant to Plaintiffs’ damages claims.” Order, 10/15/10, at 1 (Dkt. 329). *Accord Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989) (lower award of statutory damages is appropriate where the copyright holder has acted in bad faith); *Entral Grp. Int’l, LLC v. YHLC Vision Corp.*, No. 05-CV-1912, 2007 WL 4373257, at \*3 (E.D.N.Y. Dec. 10, 2007) (holding that low statutory damage award was “justified by the attitude and conduct of *plaintiff*” which made unreasonable licensing fee demands) (emphasis added).

Based solely on the documents that have been produced by others, it is crystal clear that iMesh is in possession of exactly the sorts of communications the Court had in mind in issuing the foregoing orders. For example:







Such documents reflect the lack of harm suffered by Plaintiffs as a result of the existence of free music on the internet and refute Plaintiffs' contention that, but for LimeWire, music customers would have purchased content from paid sites like iTunes. They also are clearly probative of Plaintiffs' conduct and attitude vis-à-vis LimeWire for alleged piracy while entering into business partnerships with others they accused of allowing piracy and having filters that did not work. Given these communications, it is inconceivable that iMesh has no additional, relevant internal documents. They should be produced promptly.

**III. Magistrate Judge Freeman's Finding That iMesh's External Communications With Plaintiffs Were Not Duplicative Of Documents Produced By Plaintiffs Was Not Clearly Erroneous Or Contrary To Law.**

iMesh does not seriously contest that its external communications with Plaintiffs are relevant. Nevertheless, iMesh objects to producing them on the grounds that the production would necessarily be duplicative of Plaintiffs' production. Indeed, iMesh seems to believe that Defendants somehow had the duty and the ability to ensure receipt of a complete production from Plaintiffs before seeking any non-party discovery from iMesh. That objection should be denied.

Magistrate Judge Freeman, who routinely addresses these types of discovery issues, correctly rejected all of iMesh's arguments. Put simply, neither the Federal Rules of Civil Procedure nor the relevant case law precludes a party from obtaining discovery from a non-party where the information sought may be available from the requesting party's adversary. *See In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 301 (S.D.N.Y. 2003) (holding a non-party must produce documents in response to a subpoena even though they were seemingly duplicative of discovery requests served on the other party); *see also State Farm Mut. Auto. Ins. Co. v. Accurate Med., P.C.*, No. CV 2007-0051, 2007 U.S. Dist. LEXIS 75336, at \*3 (E.D.N.Y. Oct. 10, 2007) ("nothing in the Federal Rules of Civil Procedure requires a litigant to rely solely on discovery obtained from an adversary instead of utilizing subpoenas").<sup>2</sup>

The justification for compelling a non-party to produce documents that a party might have is particularly compelling where "the files of the third party may contain different versions of documents, additional material, or perhaps, significant omissions." *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C 08-80129, 2008 WL 3876142, at \*3 (N.D. Cal. Aug. 18, 2008) (internal

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<sup>2</sup> *See also LG Display Co., Ltd. v. Chi Mei Optoelectronics Corp.*, No. 08-cv-2408, 2009

quotations and citation omitted). As Defendants demonstrated to Magistrate Judge Freeman, that is demonstrably the case here, and iMesh should therefore be directed to produce the documents forthwith.<sup>3</sup>

**IV. Magistrate Judge Freeman’s Finding That iMesh Failed To Show That Producing The Required Communications Would Be Unduly Burdensome Or That Cost-Shifting Was Appropriate Was Neither Clearly Erroneous Nor Contrary To Law.**

As the party opposing the Subpoena, the burden rests on iMesh to demonstrate that producing the communications in question is unduly burdensome. *See In re Ramaekers*, 33 F. Supp. 2d 312, 314 (S.D.N.Y. 1999) (“The burden of persuasion is borne by the party opposing the subpoena.”) Although iMesh attempts to satisfy that burden with the declaration of Robert Summer (the “Summer Declaration”), its purported showing is deficient in numerous ways.

First, iMesh failed to present the facts set forth in the Summer Declaration to Magistrate Judge Freeman, and as a result those facts are not properly before the Court now and may not be considered. *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) (when reviewing an order by a magistrate judge on a non-dispositive matter under Rule 72(a), “the

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<sup>3</sup> iMesh relies on the ruling by Judge Pechman of the U.S. District Court for the Western District of Washington concerning Defendants’ subpoena of documents from Amazon.com, Inc., another of Plaintiffs’ licensees. Defendants respectfully disagree with that ruling, which did not pay proper deference to the prior rulings in this action concerning the relevance of the discovery sought, as Ninth Circuit law requires. *Del Campo v. Am. Corrective Counseling Servs., Inc.*, No. C 01-21151, 2010 WL 3744436, at \*2 (N.D. Cal. Sept. 20, 2010) (“[A] district court whose only connection with a case is supervision of discovery ancillary to an action in another district should be especially hesitant to pass judgment on what constitutes relevant evidence thereunder. Where relevance is in doubt... [t]he court should be permissive.”). Moreover, Magistrate Judge Walsh of the Central District of California, who originally had jurisdiction over Defendants’ motion to compel against another non-party, referred that matter to Magistrate Judge Freeman for resolution. (Declaration, Ex. P.) iMesh gives no explanation as to why this Court should defer to Judge Pechman rather than Magistrate Judge Walsh, who properly recognized Magistrate Judge Freeman’s familiarity with the issues in dispute here. In any event, Judge Pechman’s ruling is not consistent with the law in this Circuit governing the duties of a subpoena under Rule 45 and is not controlling in this Court.

district court is not permitted to receive further evidence; it is bound by the clearly erroneous rule in reviewing questions of fact”); *State Farm Mut. Auto. Ins. Co. v. CPT Med. Servs., P.C.*, 375 F. Supp. 2d 141, 158 (E.D.N.Y. 2005) (party’s failure to submit to magistrate judge affidavit presented with Rule 72(a) objection to non-dispositive order “compels the Court to affirm the Order... because, based on the evidence before it, [the Magistrate’s order] was not clearly erroneous”). As such, it is too late for iMesh to rely on that evidence now. *State Farm*, 375 F. Supp. 2d at 158 (“Defendants have not cited any case, and the Court has not found one, in which Rule 72(a) objections are sustained based on evidence not presented to the magistrate judge.”).

Second, the affidavit is in any event deficient on its face. For instance, while the affidavit purports to identify the search terms iMesh used to identify allegedly responsive documents (none of which have been produced to date), it fails to disclose the number of “hits” generated by each term, making it impossible to ascertain whatever true burden compliance actually imposes. Whatever its intent in presenting the results of the searches in the aggregate, rather than broken out by term, no conclusions about “burden” (undue or not) can be reached on the basis of this late evidence.

iMesh’s purported cost analysis is equally unilluminating – and suspect. According to the Summer Declaration, iMesh has reviewed only 1,500 documents – i.e., 5% of the approximately 30,000 hits – and in doing so has incurred over \$20,000 in legal fees, or over \$13.00 per document. This represents shocking inefficiency. It is well-known in the e-discovery industry that document review projects – from collection and review, through to production – can be completed for as little as from \$1.00 to \$2.50 per document. (Declaration, Exs. N and O.) Why *iMesh spent more than 10 times the industry norm* in reviewing what is, by standards of complex commercial cases, a paltry number of documents, is nowhere explained. As such,

iMesh's belated cost claims are insufficient to show that its burden in complying with Magistrate Judge Freeman's Order would be "undue."<sup>4</sup>

### CONCLUSION

For all of the foregoing reasons, the Court should reject iMesh's objections to the Order and this Court should affirm the Order in its entirety and order iMesh to produce documents forthwith.

Dated: New York, New York  
February 24, 2011

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<sup>4</sup> As to iMesh's appeal of Magistrate Judge Freeman's denial of its cost application, iMesh has not demonstrated that Magistrate Judge Freeman's finding was in error on this score either.