**REDACTED VERSION**
**COMPETE 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-PARTY MYSPACE, INC.'S OBJECTIONS TO MAGISTRATE JUDGE FREEMAN'S JANUARY 31, 2011 ORDER COMPELLING THE PRODUCTION OF INTERNAL AND EXTERNAL COMMUNICATIONS**

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## FEDERAL STATUTES

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-party MySpace, Inc. ("MySpace") to Magistrate Judge Freeman's Order, dated January 31, 2011 (the "Order"), compelling MySpace to produce certain internal and external communications, including emails.

## PRELIMINARY STATEMENT

MySpace'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. MySpace'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* 2/21/11 Scheduling Order, Dkt. 488.)

Although MySpace never sought a stay, it has still not produced a single document called for by the Order. As explained below, MySpace 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 MySpace. Indeed, MySpace's protestations of undue burden are particularly infirm, given that communications called for by the Order are concededly in the possession of MySpace Music LLC -- a joint venture between MySpace and

Plaintiffs that is controlled by MySpace. The Objections should be denied, and Magistrate Judge Freeman's January 31 Order affirmed.[1]

## FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2010, Defendants served the Subpoena, issued out of the United States District Court for the Central District of California, on MySpace, requesting that MySpace produce certain documents and appear for a deposition (the "Subpoena").[2] The Subpoena requested production of, *inter alia*, three principal types of documents (collectively, the "Documents"): (1) licenses or agreements between MySpace 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 MySpace 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 aggregate number of times that each of Plaintiffs' copyrighted songs (collectively, the "Songs") was accessed or viewed by MySpace users. (*See* Subpoena (Kozusko Decl., Ex. B) Request Nos. 1, 2, 4, 5, 11.)

On September 27, 2010, Plaintiffs moved to quash the subpoenas Defendants had served on MySpace and others. (Kozusko Decl. ¶ 6.) On October 15, 2010, the Court denied

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1 In briefing this issue before Magistrate Judge Freeman, Defendants expressly reserved the right to depose a representative of MySpace following the production of responsive documents should that prove necessary. (Joint Stipulation (Kozusko Decl., Ex. G) at 19 n.3.) MySpace did not address that issue in its submissions before Magistrate Judge Freeman or in its submission to this Court. Should this Court uphold the Order, Defendants do not anticipate taking MySpace's deposition based on those documents, unless such a deposition is strictly necessary for their defense at trial.

2 Declaration Of Dan C. Kozusko In Support Of Defendants' Response To Non-Party MySpace Inc.'s Objections To Magistrate Judge Freeman's January 31, 2011 Order Compelling The Production Of Internal And External Communications ("Kozusko Decl."), Ex. B.

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 to 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.)

Promptly after the Court issued the October 15 Order, Defendants attempted to work out a production schedule with MySpace. (Kozusko Decl. ¶ 10, Exs. D-E.) While negotiations over the scope of the MySpace 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 MySpace subpoena -- to produce responsive documents, and identified search parameters to locate the emails to be produced. (11/23/10 Order, Dkt. No. 367, at 2 (the "VEVO Order").) Defendants asked MySpace to comply with the Subpoena consistent with Magistrate Judge Freeman's VEVO Order. (Kozusko Decl., Ex. F.) Despite numerous attempts to resolve the matter, MySpace refused to comply with the subpoena and the VEVO Order, necessitating the filing of a motion to compel on December 20, 2010.[3] (Kozusko Decl. ¶ 13, Exs. F-G.)

On January 31, 2011, Magistrate Judge Freeman granted the motion to compel and issued the Order, ordering MySpace 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,

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[3] On January 19, 2011, the Honorable Patrick J. Walsh, United States Magistrate Judge for the Central District of California, transferred that motion to Magistrate Judge Freeman. (Kozusko Decl., Ex. H.)

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 MySpace's "own judgment as to the best means of locating the communications covered by" the Order, though noting that MySpace "may wish to take guidance from" the VEVO Order. (*Id.* at 5 n.3.)

Defendants forwarded the Order to MySpace promptly upon receiving it, and asked when and how MySpace intended to comply with it. (Kozusko Decl., Ex. J.) Defendants again offered to discuss any proposal MySpace might offer to search for relevant communications and provided, as requested, a list of MySpace personnel who had appeared on communications produced by Plaintiffs as a "starting point for arriving at a universe of custodians." (*Id.*) MySpace never responded to Defendants' offer, and instead filed its Objections on February 15, 2011. (*Id.* ¶ 19.) Although MySpace did not seek a stay of the Order, it has not produced any 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.

*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 MYSPACE'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. 339); Op. & 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." (10/15/10 Order at 6 (Dkt. 329).) Other non-parties have been compelled to produce their internal communications on that basis in this very case. (11/23/10 Order, Dkt. 367, at 2.) By the same token, MySpace's communications with Plaintiffs concerning their license agreements and MySpace'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 the non-party and other digital music providers, which are matters the Court has already determined are "relevant to Plaintiffs' damages claims." (10/15/10 Order at

1.) *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).

[redacted] Indeed, this is particularly true with respect to MySpace because Plaintiffs have entered into a joint venture with MySpace, called MySpace Music LLC ("MySpace Music"), to make Plaintiffs' copyrighted works available online, and it is MySpace Music that possesses communications sought by the Subpoena to MySpace. (Kozusko Decl., Ex. A; Gottlieb Decl., Dkt. 484, Ex. 5, ¶ 16.) Prior to becoming

Plaintiffs' joint venture partner, however, MySpace was in the same position as LimeWire, *i.e.*, a defendant in copyright infringement litigation, facing a complaint similar to the one Plaintiffs have filed here. (Kozusko Decl., Ex. N at 1 (complaint alleges that "No intellectual property is safe in the MySpace world of infringement").) MySpace settled that litigation by entering into the MySpace Music joint venture with Plaintiffs. (*Id.*, Ex. O.) [redacted]

MySpace also argues that the internal communications that the Order requires it to produce are the "most likely documents to contain privileged information." (MySpace Obj. at 9-10.) This is nothing more than rank speculation, since MySpace has not even begun to search for responsive documents and thus has no basis to say what portion of them are privileged. Moreover, simply because an attorney was involved does not necessarily render the communications privileged, as Magistrate Judge Freeman has correctly noted. (1/6/11 Hr'g Tr. at 17 ("Of course, attorneys who are acting in a business negotiation type capacity are not going to be able to claim privilege for a lot of what they do because if it's, you know, business advice that's being rendered as opposed to legal advice that's being rendered, it's not going to pass muster as a privileged communication.").) Merely because some undefined portion of responsive documents may "likely" be privileged is no reason to relieve a subpoena recipient from having to search for and produce those documents that are not. *See Software Rights Archive, LLC v. Google, Inc.*, Misc. No. 09-017-JJF, 2009 WL 1438249, at *3 (D. Del. May 21, 2009) (finding that in a case in which "documents are of unquestionable relevance . . . Movants

are entitled to have discovery of these documents to the extent they are not privileged. To the extent they are privileged, Respondents must produce a privilege log.").

## III. MAGISTRATE JUDGE FREEMAN'S FINDING THAT MYSPACE'S COMMUNICATIONS WITH PLAINTIFFS WERE NOT DUPLICATIVE OF DOCUMENTS PRODUCED BY PLAINTIFFS WAS NOT CLEARLY ERRONEOUS OR CONTRARY TO LAW.

MySpace does not seriously contest that its external communications with Plaintiffs are relevant. Nevertheless, MySpace objects to producing them on the grounds that the production would necessarily be duplicative of Plaintiffs' production. Indeed, MySpace 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 MySpace. That objection should be rejected.

Magistrate Judge Freeman, who routinely addresses these types of discovery issues, correctly rejected all of MySpace'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").[4] The justification for

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[4] *See also LG Display Co., Ltd. v. Chi Mei Optroelectronics Corp.*, No. 08-cv-2408, 2009 WL 223585, at *3 (S.D. Cal. Jan. 28, 2009) ("Sony Electronics further alleges the documents sought by Plaintiff's Subpoena are duplicative in that these documents are readily attainable from the defendants in the underlying matter. The Court finds this argument unavailing, particularly in light of Plaintiff's desire to test the accuracy and

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 quotations and citation omitted). As Defendants demonstrated to Magistrate Judge Freeman, that is demonstrably the case here and MySpace should therefore be directed to produce the documents forthwith.[5]

## IV. MAGISTRATE JUDGE FREEMAN'S FINDING THAT MYSPACE FAILED TO SHOW THAT PRODUCING THE REQUIRED COMMUNICATIONS WOULD BE UNDULY BURDENSOME WAS NEITHER CLEARLY ERRONEOUS NOR CONTRARY TO LAW.

As the party opposing the Subpoena, the burden rests on MySpace 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

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completeness of the defendants' discovery responses and their denials that additional information exists. Thus, Sony Electronics shall produce all responsive documents even if they are duplicative.").

5 MySpace 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. (MySpace Obj. at 10.) Defendants respectfully disagree with that ruling, which did not pay proper deference to the prior rulings of this Court 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.") (internal quotations omitted). Moreover, Magistrate Judge Walsh of the Central District of California, who originally had jurisdiction over this Subpoena, referred Defendants' motion to compel to Magistrate Judge Freeman for resolution. (Kozusko Decl., Ex. H.) MySpace gives no explanation as to why this Court should defer to Judge Pechman rather than to 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.

the subpoena."). The gravamen of MySpace's undue burden objection is that, as an allegedly "disinterested non-part[y]," it should not have to produce the potentially "hundreds of thousands" of documents called for by the Subpoena. (MySpace Obj. at 1; Joint Stipulation (Kozusko Decl., Ex. G) at 35.) Although MySpace does not dispute that it possess sufficient recourses to respond to the Subpoena, given that it is part of News Corp., a multinational conglomerate with assets in excess of $56 billion, it has rejected out of hand -- but without citing any authority -- the suggestion that its immense resources may be taken into account in determining whether the Subpoena is unduly burdensome. (Joint Stipulation (Kozusko Decl., Ex. G) at 35-36.)

None of that is correct. MySpace is hardly a typical non-party, given that documents sought by the Subpoena are in the possession of a joint venture in which Plaintiffs are all partners. Indeed, where as here, a non-party is closely allied with a party, that weighs against any finding of undue burden or cost-shifting. *See, e.g., JP Morgan Chase Bank v. Winnick*, No. 03 Civ. 8535, 2006 U.S. Dist. LEXIS 80202, at *6-7 (S.D.N.Y. Nov. 2, 2006); *Peskoff v. Faber*, No. 04-526, 2006 U.S. Dist. LEXIS 46372, at *9-10 (D.D.C. July 11, 2006); *Software Rights Archive*, 2009 WL 1438249, at *2-3.

Even if MySpace were a true non-party, as opposed to Plaintiffs' joint venture partner, MySpace's burden objections are not well-founded, in any event, given that MySpace has rebuffed Defendants' numerous offers to discuss ways to minimize that burden. (Kozusko Decl. ¶¶ 9–13, Exs. D, F.) By contrast, other non-parties elected to work with Defendants concerning the scope of their production of communications. (*Id.* ¶ 15.) As a result, several non-parties have produced or are producing communications pursuant to agreements with Defendants that address whatever concerns those non-parties had as to burden. (*Id.*) To the

extent that MySpace's dissatisfaction with the Order stems the burden of complying with it, such burden is a direct consequence of MySpace's recalcitrance and refusal to even engage in discussions with Defendants about producing communications.

Moreover, much as MySpace may not like it, courts do consider a non-party's resources in evaluating whether a subpoena imposes an undue burden. *See Viacom*, 2008 WL 3876142, at *5 ("Given the resources of the parties ... the Court finds that plaintiffs' discovery requests do not place an undue burden on respondents [non-party venture capital firms with substantial assets]."). MySpace's concededly immense resources only render its protestations of undue burden all the more infirm.

In any event, MySpace has not even attempted to satisfy its obligation of demonstrating why searching for and producing the communications in question would impose an undue burden, *e.g.*, by demonstrating that, even based on a reasonably limited search there would be too many "hits" or by otherwise quantifying what it would cost the non-party to comply. Instead, MySpace simply pronounces that the process of complying with the Order would take "many weeks of full-time resources," involve potentially "hundreds of thousands of documents," and that its costs would be "substantial."[6] (MySpace Obj. at 13; Gottlieb Decl., Dkt. 484, Ex. 5, ¶ 18.) That is insufficient to excuse MySpace's obligation to comply with the Subpoena. *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C-08-80211, 2009 WL 102808, at *5 (N.D. Cal. Jan. 14, 2009) (rejecting undue burden claim in connection with subpoena served by

[6] Although MySpace has submitted a Declaration from in-house counsel attesting to the purported burden of the Subpoena, counsel's testimony regarding this burden is based on nothing more than speculation, given that MySpace concededly has not even attempted to undertake any efforts to search for responsive communications or to generate a hit report that might substantiate the assertions of undue burden in its papers. (*See* Gottlieb Decl., Dkt. 484, Ex. 5, ¶¶ 17, 18.) Inexplicably, MySpace neglected to include such a report, although "hit reports" are a matter of standard practice regarding e-discovery and are very inexpensive to obtain.

defendants in a copyright infringement action, despite BayTSP's complaints that initial searches yielded over one million documents and that it had "already expended over 1900 hours in the last six months searching and reviewing the documents.").

## CONCLUSION

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

Dated: New York, New York
February 24, 2011

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