REDACTED VERSION
-COMPLETE VERSION FILED UNDER SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

06 Civ. 05936 (KMW)(DCF)
ECF CASE

PLAINTIFFS' REPLY IN SUPPORT OF OBJECTIONS TO MAGISTRATE JUDGE FREEMAN'S ORDER COMPELLING THE PRODUCTION OF PLAINTIFFS' INTERNAL COMMUNICATIONS "REFERRING TO LIMEWIRE"

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants fail to bolster the erroneous Order compelling Plaintiffs to engage in eleventh-hour (and later) searches of the email communications of multiple custodians for the last three years' worth of references to "Lime Wire" – a time period coextensive with this very litigation.

- Recognizing that the Order does not evaluate Defendants' showing against the two-part test this Court ordered, Defendants essentially pretend the test does not exist. This Court held this discovery order in abeyance until Defendants could show, *with documentary proof*, that discovery thus far had yielded relevant evidence and further discovery would be *necessary*. Order (Nov. 19, 2010, Dkt. 363) at 7. They mention this Court's standard only once, in the procedural background. *See* Opp. at 5-6. Then, like the Order they seek to defend, Defendants ignore the standard and advocate for a "compromise" that is no compromise at all.
- Defendants do not come close to showing that the massive discovery that Plaintiffs and third parties have been compelled to provide generated relevant documents. From the mass of already-produced discovery, Defendants discuss just *five* documents – and even then entirely perfunctorily. *See* Opp. at 10-11. The discussions shows (1) that Defendants are bent on resuscitating their meritless and *twice* rejected "blacklisting" theory, and (2) that a presentation by one third party (Needham) to another third party (VEVO) included a slide with a bullet point saying, [redacted] Opp. at 11. While it is refreshing that – after four-plus years of litigation –

Defendants are finally conceding their users were engaged in "theft," the slide is an irrelevant statement by one non-party to another.

- Defendants likewise fail to show that production of still more documents referring to "Lime Wire" is necessary. Defendants admit they do not need the documents for depositions, because they do not intend to take any further depositions. *See* Opp. at 1. This is hardly surprising, since Defendants spent the last round of CEO, COO and CFO depositions not only striking references to Lime Wire but generally avoiding the subject of Lime Wire and its illegality. When Defendants do talk about necessity in this brief, they speculate. They say that more documents about "blacklisting" Lime Wire will show that Plaintiffs wanted "to gain leverage." Opp. at 10. Defendants never say what the leverage might be or what it could conceivably be relevant to. Speculation and conjecture do not show necessity.

- Defendants' unfounded extrapolations of the potential burden have no basis in the reality of today, and ignore the practical effect this erroneous Order would have at this late stage of the case. Defendants attempt to speculate based on data from years ago what the burden would be today of producing Plaintiffs' most senior executives' internal communications regarding Plaintiffs' opponent *in this very lawsuit*. Never once do Defendants say that they are not seeking precisely those sorts of communications. The net effect of this Order if it stands will be to prejudice Plaintiffs with a time-consuming endeavor collecting and reviewing tens of thousands of communications about this very lawsuit, most of which are likely to end up on a privilege log rather than produced. Of the likely small

population that will actually end up being produced after this time-consuming and pointless endeavor, the population of actually conceivably admissible documents would no doubt be even smaller. Imposing such a fruitless burden for would be specious in the earliest stages of discovery. It was particularly "tenuous" in November, when this Court first considered it. And it is even more inappropriate now, when the parties should be focusing on preparing for the most efficient presentation of their case at trial. Defendants cannot disguise the havoc the Order would wreak in the last weeks before trial by hearkening back to productions made years ago when this case first began. In any event, Plaintiffs' actual data refute Defendants' speculative claims. Mr. McMullan searched his own documents and identified tens of thousands of potential documents for review – and that is only one of the custodians Defendants demand Plaintiffs search.

Defendants spent the last seven months engaged in a virtual "do-over" of the massively burdensome discovery campaign they engaged in pre-summary judgment. The Court already held that this additional discovery should be ordered only if Defendants showed *both* relevance *and* necessity. The fact that Defendants are unable to articulate coherent theories of *neither* relevance and necessity at this juncture simply underscores why enough is enough. The Order should be overruled in its entirety.

II. ARGUMENT

A. Defendants Fail To Show That The Quarter-Million Pages Plaintiffs Produced And Thousands More That Non-Parties Produced In This Phase Generated Relevant Documents

Defendants have received huge numbers of documents referring to Lime Wire, peer-to-peer services and file-sharing during the damages phase of discovery. This Court ordered

Defendants to show that this expedition yielded relevant evidence. If the expedition had yielded such evidence, one would expect Defendants to cite a wide array of documents and articulate a coherent theory of why references to Lime Wire are relevant at this juncture. Defendants instead cite to this Court a grand total of five documents – and then provide a cursory discussion of three of them. None of this shows relevance.

1. The Documents That Allegedly Show "Plaintiffs' Bad-Faith Conduct Toward Lime Wire" In Fact Reflect Sensible And Appropriate Attempts By Plaintiffs To Protect Their Copyrights From Intentional Infringement – Conduct That This Court Has Already Held Would Be An Appropriate And Justified Response To Infringement

Defendants again argue that documents about "blacklisting" – a Plaintiff ensuring that an authorized distributor will not turn around and provide its content to services (like Lime Wire) that are inducing the mass infringement of that content – are relevant. This theory has no more relevance concerning the parties' "conduct and attitude," than it did in Defendants' failed attempt to use it to plead an antitrust violation or to charge "copyright misuse."

The *one* document on "blacklisting" that Defendants actually discuss in their opposition shows the irrelevance of this issue. The document in question is an email between Universal and VEVO. *See* Opp. at 10 (citing Exhibits 12-14 of Declaration of Mary Eaton). Rather than doing anything that could remotely be interpreted as "bad faith," what Universal actually communicates is the quite sensible point that, if Universal is going to provide VEVO Universal's copyrighted music videos, what assurances will VEVO provide that it will not simply turn around and give the videos to entities that are infringing copyrights? *See* Exh. 12 to Eaton Decl. The document confirms that Universal did not want its business partners giving Universal's copyrighted content to illegal services. So what? None of that is news, and none of that demonstrates bad faith.

The documents that Defendants say "confirm that the 'blacklisting' of Lime Wire . . . did, in fact, occur" are nothing more sinister than: (1) a draft licensing agreement [redacted] *See* Exhibits 13 and 14 to Eaton Decl.

These documents demonstrate that what Defendants attempt to cast as "Plaintiffs' bad-faith conduct toward Lime Wire" or "blacklisting," Opp. at 10, was nothing more than an entirely appropriate and eminently sensible business response to what this Court has already found was Lime Wire's intentional inducement of infringement on a "massive scale." No doubt, had Plaintiffs not taken these reasonable protective measures against massive, intentional copyright infringement, Defendants would now be trying to claim that the lack of protective measures demonstrates that Plaintiffs don't actually value their own copyrights. This is simply as irrelevant a theory here as it was every other time the Court rejected it.

Finally, Defendants' rank speculation that Plaintiffs may have "blacklisted Lime Wire not because of its status as an adversary in copyright infringement litigation . . . but in order to gain leverage" of some unspecified sort – which Defendants hope further discovery "will reveal" – is wholly unsupported and does not justify still more discovery. *See Sacramona v. Bridgestone/Firestone, Inc.*, 152 F.R.D. 428, 431 (D. Mass. 1993) (refusing to permit discovery

where "Defendants essentially seek to engage in 'wholly exploratory operations in the vague hope that something helpful will turn up.'").

2. The Record Companies' Purported "Change in Thinking" About File-Sharing Has Nothing To Do With Damages – And Even If It Did, Plaintiffs Have Already Produced Over 22,000 Pages Of Third-Party Research Reports Commissioned By The Record Companies On The Impact Of File-Sharing

Defendants point to two documents involving *non-parties* discussing the impact of file-sharing – and then claim that these non-party communications demonstrate that Plaintiffs' internal communications are somehow relevant. First, Defendants highlight a document in which [redacted] Opp. at 11; Ex. 15 to Eaton Decl. Even if such a document could show, as Defendants argue, "a growing belief *on the part of the record companies* that P2P actually could be used to increase their revenues," Opp. at 11 (emphasis added), this "growing belief" regarding the impact of file-sharing has nothing to do with the issue of damages for Defendants' already-adjudicated liability.

Defendants also showcase a presentation made by non-party Needham & Co. to VEVO, in which the Needham analyst opines that [redacted] Opp. at 11; Ex. 16 to Eaton Decl. Defendants speculate that the discovery they seek will show a "marked shift in the understanding of the benefits P2P music services, like LimeWire, have brought to the music industry." Opp. at 11. Here again, any "change in thinking" about Lime Wire's already-adjudicated inducement of the

massive-scale theft of Plaintiffs' copyrighted works has no relevance whatsoever to the damages for which Lime Wire is liable.[1]

Even if these irrelevant topics had something to do with damages, Plaintiffs have already produced over 22,000 pages of third-party research reports (and other related documents) commissioned by Plaintiffs on the impact of file-sharing and digital music. Declaration of Melinda E. LeMoine In Support of Reply ("LeMoine Decl."), ¶ 2. Even if Plaintiffs' supposed "change in thinking" about Lime Wire were remotely relevant, requiring Plaintiffs to search for, review and log what are likely to be almost entirely privileged internal communications about Lime Wire's illegal service over the past three years, during this litigation, would be an especially pointless exercise when Defendants already have these third-party research reports about file-sharing and digital music.

B. Defendants Fail To Show Necessity – And Their Admission That They Do Not Intend To Take Further Depositions, Even After Failing To Ask Hardly Any Questions At All About Lime Wire Over The More Than 80 Hours Of Deposition Of The Custodians At Issue Here, Further Underscores The Lack Of Necessity

The Order does not make the finding of necessity for still more discovery that this Court's November 19 Order requires. The Opposition makes only the most cursory attempt to meet that standard of "necessity." If anything, their arguments demonstrate the opposite: the further discovery Defendants demand is *unnecessary*.

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[1] If they exist at all, communications reflecting the record companies' "change in thinking" about peer-to-peer file-sharing and Lime Wire over the past three years – while this litigation was ongoing – are almost all likely to be privileged. Defendants' assertion that it is immaterial whether the discovery they seek is likely to be almost entirely privileged ignores the fact that Defendants are demanding that Plaintiffs engage in a massive effort to search for and to log privileged and irrelevant (to say nothing of unnecessary) documents *on the eve of trial* – when creation of a lengthy privilege log of irrelevant documents will result in little, if any, utility for Defendants and will impose an extraordinary burden on Plaintiffs.

Defendants admit they do not need the documents for depositions, because they do not intend to take any further depositions. *See* Opp. at 1. Even in the last round of CEO, COO and CFO depositions (of many of the very same custodians whose internal communications Defendants claim are "necessary"), Defendants carefully avoided questioning about Lime Wire's illegal service and in numerous instances even moved to strike the witnesses' references to Lime Wire. If learning about these custodians' supposed "change in thinking" about Lime Wire, or "conduct and attitude" toward Lime Wire, or discussions about Lime Wire were truly *necessary* to the development of Defendants' case, surely Defendants would have questioned these witnesses extensively about these topics. Defendants complain that they could not ask questions about documents they did not have, *see* Opp. at 14 – but Defendants in fact *did* have (as they admit) thousands of documents from each of Plaintiff's companies referring to Lime Wire. *See* Opp. at 4. The inescapable conclusion is that they made the tactical decision not to ask about those, and even to prevent Plaintiffs from expressing their views on Lime Wire in their responses. This tactical decision belies Defendants' hollow contentions here.

In sum, Defendants have failed to demonstrate that the additional, incredibly burdensome discovery they seek is relevant, much less necessary. Because Defendants have failed to meet the standard required by this Court, Magistrate Judge Freeman's Order is clearly erroneous, an abuse of discretion, and must be overruled.

C. Defendants Have Proposed A New List of Custodians That Includes Not Only Lawyers But Also Principal Executives Whose Internal Communications About Lime Wire *During The Course Of This Litigation* Are Highly Likely To Have Been Both Voluminous And Privileged

Defendants' back-of-the-envelope "calculations" and conjectures about the burden to Plaintiffs, *see* Opp. at 2-4, are demonstrably unreliable. Defendants extrapolate from a production Plaintiffs made at the early outset of this litigation from a different set of custodians

than the one Magistrate Judge Freeman intended *or* the set that Defendants have selected. The production Defendants now demand would most likely include exponentially more documents. The looming intervening fact of this lawsuit necessarily means more communications about Lime Wire took place in this time period than took place in the previous time period. Indeed, Mr. McMullan's search of his own emails returned results in the tens of thousands, which directly refutes Defendants' baseless musings. Both the custodians demanded and the time period covered would necessitate a hopeless burden that would result in little if any benefit.

First, as to the custodians Defendants demand, their calculations ignore that they have come up with a *new* list of custodians that they know would require another round of extensive and time consuming data collection. *See* LeMoine Decl., ¶¶ 3-4. Defendants further ignore that they have insisted Plaintiffs search the files of several of their most senior executives – and, with respect to Plaintiff EMI, the in-house counsel responsible for supervising the litigation of this case. Defendants have continued to insist on this list even though Magistrate Judge Freeman made clear in a conference with counsel just last week that she had no intention for her Order to require collection from custodians outside the list of 43 primary negotiators of legitimate distribution agreements. *See* LeMoine Decl., ¶¶ 3-4. Despite this clarification, Defendants have not revised their list one whit, and continue to demand Plaintiffs search the electronic files of their most senior executives without regard for Judge Freeman's admonition.

Second, Defendants' calculations ignore the elephant in the room – this very heated, vigorously fought litigation. During the time period for which Defendants now demand Plaintiffs' internal communications related to Lime Wire, this hard-fought litigation has been ongoing – unlike the pre-litigation time period covered by the production from which Defendants

base their inaccurate burden conjecture. Speculative "calculations" premised upon Plaintiffs' previous production of documents referring to Lime Wire should not be credited.

The difference in time periods is critical, because it highlights the burden imposed now that did not exist to the same extent then. The internal communications of the most senior executives in the last couple of years that refer to Lime Wire – during a time of grinding litigation – are overwhelmingly likely to constitute or refer to communications with litigation counsel about this litigation or to involve settlement discussions. The documents that Defendants claim are necessary likely thus will be almost entirely privileged or documents not appropriate for discovery requests. Thus, even if Magistrate Judge Freeman's Order were allowed to stand and Plaintiffs were to conduct a massive and incredibly burdensome search for these internal communications referring to Lime Wire, Defendants would receive – not the production of documents relevant to and potentially admissible at the trial – but little more than a voluminous privilege log. *See Allen County, Ohio v. Reilly Indus*., 197 F.R.D. 352, 354 (N.D. Ohio 2000) (declining to compel discovery of settlement agreements where such agreements would not be admissible and are not relevant to the issues to be determined at trial). The virtual certainty that the documents Defendants seek will be almost entirely privileged only further underscores the fact that the documents are not "necessary."

III. CONCLUSION

For the foregoing reasons, Magistrate Judge Freeman's Order compelling the production of internal communications referring to Lime Wire should be overruled.

Dated: February 24, 2011

Respectfully submitted

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