

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS LLC, et al.,

Plaintiffs,

Case Number: 06 CIV 05936 (KMW/DCF)

-against-

LIME GROUP LLC, et al.,

Defendants.

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**REPLY MEMORANDUM OF LAW OF iMESH AND MUSICLAB IN FURTHER  
SUPPORT OF THEIR OBJECTIONS TO MAGISTRATE JUDGE FREEMAN'S  
ORDER COMPELLING DISCLOSURE**

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## I. INTRODUCTION

Non-party iMesh<sup>1</sup> hereby briefly responds to two points raised by Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) in their Response to iMesh’s Objections (Dkts. 516) (“Defendants’ Response”) to Magistrate Judge Freeman’s Order (Dkt. 443) (the “Order”) dated January 31, 2011 (Dkt. 477) (the “Objections”).

Without any support whatsoever, Defendants contest iMesh’s computation of legal fees already incurred with respect to the vast document collection, review and production which the Order mandates. Defendants seek to divert the Court’s attention away from the tremendously burdensome and costly review that iMesh faces -- by calculating, on a “per document” basis, the fees associated with collection, processing and review of documents that iMesh has incurred to date. In doing so, Defendants ignore the fact that iMesh faces a review of approximately 30,000 emails and related attachments which, even in Defendants’ underestimation, will cost iMesh, a non-party which has already produced documents and appeared at a deposition in this case, a minimum of between \$60,000 and \$75,000.

Further, since Defendants are unable to credibly rebut the sworn statements of Robert Summer of iMesh, they instead seek to have the Court completely disregard the evidence of burden and cost contained in Mr. Summer’s declaration (Dkt. 478) (“Summer Declaration”). In arguing that the Summer Declaration was not submitted to Magistrate Judge Freeman, Defendants fail to mention that the Summer Declaration *could not have been submitted* in opposition to Defendants’ motion to compel because, at the time of such briefing, Magistrate Judge Freeman had not yet issued the Order. Therefore, iMesh could not have known that the Order was going to issue or what the scope of the Order was going to be. Only in initially

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Objections.

attempting to comply with the Order, after it was issued, was iMesh able to assess, through first-hand experience, the burden and expense that such compliance would entail. As such, it would be inequitable, unfair and inappropriate for this Court not to consider the actual evidence of burden submitted by iMesh in support of its objections to the Order.

**II. DEFENDANTS HAVE NOT REBUTTED iMESH'S SHOWING OF THE UNDUE BURDEN AND COST THAT WOULD RESULT FROM COMPLYING WITH THE ORDER**

Defendants fail to rebut the significant burden and projected cost detailed by the Summer Declaration. The legal fees referred to at Paragraph 8 of the Summer Declaration, exceeding \$20,000 to date, include not only attorney review time, but also time spent on working with iMesh to identify and collect documents, paralegal time related to document organization and coordinating with document processing vendors, compilation and evaluation of search terms, document formatting, running of search terms and preparation of documents for review. In any event, Defendants' unsuccessful attempt at discrediting the specific cost figures provided by iMesh fall far short of establishing that review and production of approximately 30,000 email and related attachments will not be a time-consuming, burdensome and expensive process.

Indeed, Defendants do not even attempt to make such a showing. Instead, they opt to focus on their own per-document cost "standard" for document review. The approach to attempting to discredit iMesh's costs to date is obviously flawed since it fails to spread out iMesh's initial setup and review costs over the entire estimated production. Moreover, instead of supporting the Defendants' position, the Defendants' per-document figures actually support iMesh's contention with respect to undue burden and cost. That is, even taking Defendants' own proposed cost per document at \$1.00 to \$2.50 – a figure which iMesh does not acknowledge -- iMesh faces review costs which, at minimum, are projected *by Defendants* to be between

\$60,000 to \$75,000.<sup>2</sup> It would be folly to argue that such costs would not be overly burdensome to iMesh, and indeed, Defendants do not even attempt to do so.

### **III. THE COURT SHOULD CONSIDER THE SUMMER DECLARATION**

iMesh submitted the Summer Declaration in opposition to the Order compelling iMesh's disclosure of certain categories of documents delineated in the Order. Defendants contend that iMesh should have submitted the Summer Declaration to Magistrate Judge Freeman in opposition to Defendants' motion to compel. Obviously, iMesh could not have submitted the Summer Declaration to Magistrate Judge Freeman on the underlying motion to compel because iMesh did not know the scope of the Order until the Order was issued on January 31, 2011. The Court should consider the Summer Declaration.

Defendants' position that this Court cannot consider the Summer Declaration, which specifically addresses that burden of complying with the Court's Order, is a red herring. *See* Defendants' Response, at 8, 9. Only after the Order was issued could iMesh evaluate the burden of compliance with the Order and make its informed submission to the Court delineating the breadth of the production, the actual universe of documents that iMesh faces and the costs that have already begun to mount. Defendants' invitation to this Court to avoid considering relevant information, which goes directly to the significant burden imposed by the Order and placed on iMesh, a non-party, should be rejected. The Court should therefore consider the Summer Declaration and vacate the Order and vacate the Order based on the overwhelming burden that the Order poses to iMesh.

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<sup>2</sup> In calculating what they contend is an appropriate cost "per document" rate, Defendants' refer the Court, at Exhibits N and O to the Horan Declaration, to promotional materials issued by self proclaimed "document factories" rather than any actual evaluation of real-world attorney review costs in matters involving the production of sensitive business materials by non-parties.

**CONCLUSION**

For all the reasons set forth above, in iMesh's Objections, in the Summer Declaration and in the Weingart Declaration, iMesh respectfully requests that the Court vacate Magistrate Judge Freeman's Order, sustain iMesh's objections to the Subpoenas, deny Defendants' motion to compel production and quash the Subpoenas, or in the alternative, order Defendants to pay iMesh's costs and fees associated with compliance with the Order, and grant iMesh such other and further relief as the Court deems just and proper.

Dated: New York, New York  
February 24, 2011

**MEISTER SEELIG & FEIN LLP**

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