UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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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.

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

GOOGLE INC.'S REPLY IN SUPPORT OF ITS OBJECTIONS TO MAGISTRATE JUDGE FREEMAN'S ORDER COMPELLING THE PRODUCTION OF INTERNAL AND EXTERNAL COMMUNICATIONS

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Google Inc. ("Google") respectfully submits this brief in further support of its Objections to Magistrate Judge Freeman's Order, dated January 31, 2011, compelling production of its external and internal communications concerning online licensing and LimeWire ("January 31 Order").

First, Defendants assert that this Court has "already determined" that Plaintiffs' views concerning licensing and LimeWire are "relevant to Plaintiffs' damages claims." Defendants' Response, filed February 24, 2011 ("Response") at 5. But the Court only addressed that issue in connection with *party discovery*, and even in that context deemed the relevance to be "tenuous." *See* Declaration of Matthew D. Ingber in support of Google's Objections to Magistrate Judge Freeman's Order Compelling Production of Internal and External Documents, dated February 18, 2011 ("Ingber Decl."), Ex. 6 (Nov. 19 Order). The Court also found the relevance of Plaintiffs' internal communications regarding LimeWire to be so minimal and the burden of producing them so high that it held such production in abeyance. *Id.*

Second, and even more to the point, the fact that hypothetical internal and external communications in Google's possession concerning Plaintiffs' views about licensing or LimeWire may have some theoretical probative value (a point in dispute) is not the relevant issue. Contrary to LimeWire's straw man argument, Google has not argued that potentially duplicative discovery is *never* available from a non-party; rather, the Court must weigh the *incremental* relevance of getting *additional* documents from non-parties (here, a fraction of already "tenuous" relevance) against the burden imposed on a non-party in collecting and producing them. Analysis of the incremental relevance of producing internal and external communications must begin with a recognition that Defendants are in possession of the *actual agreements* pursuant to which Plaintiffs licensed their works to third parties. These agreements

would seem to be some of the best evidence of Plaintiffs' "conduct and attitude" toward licensing their works, as opposed to what Google might conceivably report about Plaintiffs' views on that subject. In addition to those agreements, Defendants have obtained external communications produced by the Plaintiffs, and have had the full opportunity to take deposition testimony of the Plaintiffs' licensing representatives. Given this robust discovery on issues of peripheral relevance to the damages inquiry, further discovery of internal Google communications reflecting Plaintiffs' views regarding licensing or LimeWire is unnecessary and unjustified.[1]

When faced with Defendants' demand that Plaintiffs produce external communications associated with licensing, this Court has observed that production of such documents is "potentially burdensome." *Id.*, Ex. 6. Here, when properly weighed, the incremental relevance of producing additional internal and external communications is far outweighed by the obvious and demonstrated burden on Google – a non-party – of collecting, reviewing, identifying and producing such documents.[2]

Third, Defendants' argument that Google "makes no effort to substantiate the assertion that the burden at issue is "on its face . . . obvious and substantial" (Response at 9) is nonsense.

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[1] And there is even less reason to seek internal Google communications regarding Plaintiffs' views concerning online licensing when Defendants indisputably have never sought those documents from Plaintiffs themselves.

[2] As of the time of filing we are still working with counsel for Plaintiffs and Defendants to receive an unredacted version of Defendants' Response, and therefore remain unable to address all of the arguments raised therein. If and when we receive an unredacted version of the Response, Google will supplement this Reply, if necessary or if directed by the Court to do so. To the extent that the redacted portions suggest that Google might have internal documents reflecting Plaintiffs' views on licensing, that is beside the point. Any documents from Google reflecting Plaintiffs' views on licensing are certainly no more relevant than those in Plaintiffs' possession, which Defendants have already obtained, and discovery of those documents cannot be justified in light of the burden imposed on Google, a nonparty.

As an initial matter, the burden is so obvious and substantial *on its face* that it does not require substantiation. Defendants seek the production of communications between Google and thirteen different plaintiffs, concerning license agreements that were negotiated over long periods of time among teams of employees from Goggle and each respective plaintiff, as well as the production of internal communications for which there is no easy search mechanism (as there are no search terms that could possibly capture communications from one Google employee to another that reflect not those employees' attitudes and views, but rather the attitudes and conduct of the Plaintiffs). But Google has in fact explained why the process of the collection, search, review and production here is so burdensome. What Defendants actually posit is that that Google must bear the significant burden of collection and production in order to demonstrate the significant burden of collection and production. That is as absurd as it is false.

Fourth, citing Magistrate Judge Freeman's November 23 order concerning non-party VEVO, Defendants assert that "[o]ther non-parties have been compelled to produce their internal communications . . . in this very case." Response, at 5. That assertion, repeated throughout these proceedings,[3] is blatantly misleading. In the November 23 order, Judge Freeman adopted non-party VEVO's *own* production proposal, and did not compel VEVO to produce anything that it had not volunteered to produce in the first place. Order, 11/23/10, at 2 (Dkt. 367). The fact that VEVO *volunteered* to produce internal communications is irrelevant to the question of whether Google should be *compelled* to do so. Indeed, in the two other proceedings in which Defendants sought to compel the same type of non-party communications – from Amazon and MediaDefender – the courts denied Defendants' motion to compel, and in so doing struck the proper balance between the marginal relevance of the internal communications to Plaintiffs'

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3 *See, e.g., id.*, Ex. 5 (Letter from M. Ingber to Hon. Debra C. Freeman, Jan. 6, 2011) at 5.

"conduct and attitude" and the burden to the non-parties in producing them. *See* Ingber Decl., Ex. 5, at Ex. C (Order, Dec. 22, 2010); Ex. 11 (Order on Motion to Compel, Feb. 9, 2011).

Fifth, Defendants assert that it is "demonstrably" the case that Google's files "contain different versions of documents, additional material, or perhaps, significant omissions." Response at 8. Plaintiffs have "demonstrated" nothing of the sort. At most, Defendants have offered speculation regarding Plaintiffs' production of Google communications based, in turn, on speculation concerning Plaintiffs' production of communications with other non-parties. *See* Ingber Decl. Ex. 4 (Letter from M. Eaton to Hon. Debra C. Freeman, Jan. 14, 2011) at 4-5. This speculation based on speculation is a far cry from showing that duplicative and burdensome discovery from a non-party is warranted.

Finally, there is no reason for defendants to be "offended" by Google's objection to Magistrate Judge Freeman's refusal to apportion costs of compelled production based on Google's annual revenues. To the extent that Google's resources bear upon the burden analysis, it is but one factor of many. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003). It cannot be the law that once a non-party reaches a certain level of revenue, it can be forced to undertake any burden demanded of it in the name of party discovery – especially where, as here, the discovery sought is of such minimal relevance to the case.

For these reasons, and those discussed in Google's Objections, Google respectfully requests that the Court overrule those portions of the January 31 Order compelling Google's production of documents.

Dated: February 25, 2011

Respectfully submitted,

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