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, v. LIME GROUP LLC; LIME WIRE LLC; MARK GORTON; GREG BILDSON; M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP, Defendants.	No.: 06 CIV. 5936 (GEL)

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY QTRAX, INC.'S MOTION TO QUASH DEFENDANTS' SUBPOENA PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45(C)

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I. PRELIMINARY STATEMENT

QTrax, Inc. ("QTrax") submits this Memorandum of Law, along with the accompanying Declarations of Herbert F. Kozlov, Esq. ("Kozlov Decl.") and Allan Klepfisz ("Klepfisz Decl."), in support of its Motion to Quash the Subpoena issued by the Defendants ("Subpoena") in this action, pursuant to Federal Rules of Civil Procedure 45(c)(3)(B)(i), 45(c)(3)(A)(iv) and Fed. R. Civ. P. 45(b)(1).

Defendants' motivation for serving the instant non-party subpoena is apparent. Defendants developed, distributed and supported a peer-to-peer ("P2P") music platform that allows users to share and download music tracks from other users. In this action, the major record labels have sued Defendants for vicarious and contributory copyright infringement resulting from the file-sharing process its platform facilitates. Recently, QTrax has emerged as a new P2P music platform that will allow its registered users to share music tracks under licensing agreements that QTrax is negotiating with certain record labels. Using this litigation as a vehicle, Defendants are trying to harass and gain an unfair business advantage over QTrax, its only prospective, legally operating competitor, by acquiring "**[a]ll documents that refer, relate, or pertain to any agreement, draft or otherwise, with any of the Plaintiffs, the RIAA or the Major Labels.**[1]" *See* Subpoena at Exhibit "A" at 8, a true and correct copy is annexed as Exhibit 1 to the Kozlov Declaration.

The information Defendants seeks to obtain from QTrax constitutes confidential,

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[1] The four "Major" U.S. Labels are: EMI (which owns Capital Records, Inc., Priority Records LLC and Virgin Records America, Inc); Sony (which owns Arista Records LLC, BMG Music, LaFace Records LLC, and Sony BMG Music Entertainment); Warner Music Group (which owns Warner Bros. Records Inc., Atlantic Recording Corporation, and Elektra Entertainment Group Inc.); and Universal Music Group (which owns UMG recordings, Inc., Interscope Records, and Motown Record Company, L.P.). *See* Opinion and Order #95476, dated 12/3/2007 [Docket No. 51] ("12/3/07 Opinion") at 3 n.2, a true and correct copy is annexed as Exhibit 2 to the Kozlov Declaration.

proprietary information that would provide Defendants with an unfair business advantage over QTrax, would impair QTrax's contractual and business relations with major music industry players, and could be financially devastating to QTrax. Moreover, the Subpoena request is overly broad and places an undue burden on QTrax because it is not reasonably calculated to lead to information relevant to this case, and any relevant, non-confidential information requested by the Subpoena could have been (and likely was) requested by Defendants in its discovery requests to the Plaintiffs in the underlying litigation. As a non-party, QTrax should be protected from this onerous request in Defendants' Subpoena. Furthermore, as Defendants failed to provide QTrax with the required witness fee pursuant to Rule 45(b)(1), the subpoena is technically deficient. Accordingly, QTrax respectfully requests that this Court quash the Subpoena.

II. STATEMENT OF FACTS

A. The Interested Parties and the Underlying Litigation.

Defendants are Lime Group LLC, its wholly-owned subsidiary Lime Wire LLC, two officers of these entities, and a limited partnership controlled by one of the officers. *See* 12/3/07 Opinion at 2. Defendants developed and distribute a P2P downloadable software platform called Lime Wire that allows users to share and download music tracks without charge. *See id.* at 4. In addition to its P2P platform, Defendants also created a website called "MagnetMix" which provided its users to links to licensed, copyrighted music files, again without charge. *Id.* Defendants' products and services directly compete with QTrax's prospective products and services. *See* Klepfisz Decl. at ¶¶ 8, 16.

Plaintiffs are thirteen major record companies: 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. *See* First Amended Complaint [Docket No. 35] ("First Am. Compl.") at ¶¶ 9-25, a true and correct copy is annexed as Exhibit 3 to the Kozlov Declaration. Plaintiffs own the rights to "the vast majority of copyrighted sound recordings sold in the United States." *Id.* at ¶ 23. As a group, Plaintiffs own the rights to "the vast majority of copyrighted sound recordings sold in the United States." *Id.*

In the current action, Plaintiffs filed suit against Defendants in this Court alleging vicarious and contributory copyright infringement and unfair competition, among other state and federal claims (the "Litigation"). *See, generally, id.* According to this Court's December 3, 2007 opinion and order dismissing Defendants' counterclaims against the Plaintiffs, Defendants have already "received substantial discovery from the [Plaintiffs], including more than 1 million pages of documents and approximately 100 gigabytes [] of data... which roughly equates to more than 29 million pages." *See* 12/3/07 Opinion at 44.

QTrax, Inc., which is not a party to this litigation, or any related action, is currently developing what it claims will be the world's first "legal" P2P platform available for users to share music files. *See* Klepfisz Decl. at ¶¶ 12-13. Its claim is based on the fact that it is currently painstakingly negotiating licensing agreements with record labels and other music industry groups, including many of the Plaintiffs to this action. *Id.* at ¶ 13. QTrax's platform is currently still in "Beta" testing, and has yet to officially launch. *Id.* at ¶ 15. To that effect, none of the Plaintiffs' copyrighted material appears on or is available for download from QTrax's site. *Id.*. Furthermore, QTrax is still in the process of negotiating or soliciting licensing agreements with the major record labels. *Id.* at ¶ 13. QTrax has invested significant effort in both the technical design of the platform and the negotiation of its licensing agreements to ensure that

QTrax will not vicariously infringe or facilitate the infringement upon any copyrights or other intellectual property held by the recording industry. *Id.* at ¶ 14.

Upon QTrax's prospective launch, Qtrax and Lime Wire will directly compete as rival P2P music file sharing platforms. *Id.* at ¶¶ 8, 16. Not only are QTrax and Defendants direct competitors, but a recent, public interaction displayed precisely how hostile relations are between the two companies. On February 27, 2008 at the Digital Music Forum East in New York, after QTrax CEO Allan Klepfisz delivered comments to a group in which he observed that members of the press had "crucified" QTrax in connection with product launch delays, Lime Wire LLC's Director of Business Operations Mr. Brian Dick approached and stated, in substance, "I hope the press will crucify you a second time." *Id.* at ¶¶ 17, 21. The Defendant's subpoena was issued and served upon QTrax one week after this hostile exchange. *Id.* at ¶ 21.

Clearly, any pre-launch disclosure of information relating to any agreements and communications between QTrax and any record labels to a hostile competitor – and to the major record labels with whom QTrax has (and has not) already begun negotiating licensing agreements – would compromise potential contracts and the successful launch of its product. *Id.* at ¶ 19. Furthermore, granting Defendants unbridled access to its confidential communications and draft agreements with the record labels would give Defendants an unfair business advantage over QTrax and impair Qtrax's ability to compete in the P2P music market. *Id.* at ¶ 18-20.

It is also crucial to note that QTrax has never been a party, nor has it been accused of any wrongdoing, in this or any related Litigation. *Id.* at ¶¶ 1, 6.

B. Defendants Have Issued An Overly Broad Non-Party Subpoena To QTrax In Order To Seek Highly Confidential and Proprietary Information That Is Not Relevant To This Action.

On March 6, 2008, a messenger delivered Defendants' Subpoena to QTrax's office manager, Theodora Cucu, at QTrax's offices at 211 Madison Avenue in New York., NY. *See*

Klepfisz Decl. at ¶ 3. The Subpoena was issued in connection with the present Litigation. *See* Subpoena. The Subpoena seeks the following information in a blanket, overly broad fashion through both document production and deposition testimony of QTrax's CEO, Allan Klepfisz, as follows: "**[a]ll documents that refer, relate, or pertain to any agreement, draft or otherwise, with any of the Plaintiffs, the RIAA or the Major Labels.**" *Id.* at Exhibit "A" at p.8 (emphasis added). The Subpoena calls for the documents to be produced at the videotaped deposition of QTrax's CEO, Allan Klepfisz, on **March 21, 2008**. *See id.* (emphasis added). In addition, the messenger who served the Subpoena did not serve the requisite witness fee pursuant to Federal Rule of Civil Procedure 45(b)(1). *See* Klepfisz Decl. at ¶ 5.

Defendants' request encompasses all internal, shared, or other documents and communications concerning, pertaining or relating to QTrax's agreements with any major U.S. record labels or the RIAA. *See* Subpoena. QTrax's business competitiveness is based upon the efforts it is taking to individually negotiate agreements with certain record labels that will enable it to become the first P2P music download site that will not violate copyright laws or passively enable infringement by its users. *See* Klepfisz Decl. at ¶ 13-14.

In addition, all communications and potential or draft agreements between QTrax and any major record label or the RIAA are highly confidential and contain proprietary information. *See id.* at ¶ 20. If these documents were released to Defendants, and exposed to all of the Plaintiffs, it would cripple QTrax's business edge and could impair QTrax's contracts and/or ongoing negotiations with record industry players. *Id.* at ¶ 19. Furthermore, Defendant has already had ample opportunity to obtain any contracts or communications that are not confidential directly from the Plaintiffs themselves. *See, e.g.,* 12/3/07 Order at 44. Finally, Defendants' recent, hostile exchange with QTrax's CEO, just days before the service of this

Subpoena, suggests that the Subpoena was delivered in bad faith and to harass or undermine QTrax before the music industry. *See* Klepfisz Decl. at ¶¶ 17, 21.

As set forth below, these requests are unduly burdensome as QTrax is not involved in the dispute between the Plaintiffs and the Defendants in this action. Defendants seek highly confidential information, the disclosure of which could be extremely harmful to QTrax and would give Defendants an unfair business advantage. Moreover, the Subpoena request is not reasonably calculated to lead to the discovery of information relevant to the present copyright infringement action against Lime Wire as QTrax's activities have no connection to Lime Wire's P2P platform or activities, none of QTrax's communications with the major record labels have matured into final agreements and none of the major labels' music or other copyrighted property is available for users to download from QTrax's platform. Lastly, to the extent the documents Defendants seek could be obtained directly from other parties to this action, Defendants' Subpoena is unnecessarily duplicative and burdensome on QTrax. Due to its substantive and procedural defects, QTrax respectfully requests that this Court quash the Subpoena.

III. LEGAL ARGUMENT

A. DEFENDANTS' SUBPOENA MUST BE QUASHED BECAUSE THE SUBPOENA IS SUBSTANTIVELY DEFECTIVE.

The Subpoena issued by Defendants is substantively deficient, overreaching and improper because it (1) seeks non-relevant information from a non-party to the Litigation; (2) improperly attempts to obtain trade secrets and other confidential or proprietary information from a non-party; and (3) is overly broad and creates an undue burden or expense for non-party QTrax. For these reasons, the Subpoena should be quashed and a protective order entered in QTrax's favor.

1. Defendants' Subpoena Is An Improper Attempt To Obtain Confidential or Proprietary Information From QTrax, A Non-Party.

Rule 45(c)(3)(B) permits the Court, in its discretion, to quash or modify a subpoena if it "requires disclosure of a trade secret or other confidential research, development, or commercial information[.]" Indeed, the Federal Rules of Civil Procedure require a district court that issues a subpoena to quash or modify the subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Fed. R. Civ. P. 45 (c)(3)(A)(iii). The Rules also specifically permit the court to quash a subpoena if the party serving the subpoena has not shown a substantial need for the disclosure of confidential information. *See* Fed. R. Civ. P. 45(c)(3)(B). Defendants have not demonstrated "substantial need" for the documents or information it requests from QTrax. *See* Fed. R. Civ. P. 45(c)(3)(C)(i).

The information that Defendants are seeking from QTrax, which has developed a product and service that directly competes with Defendents' "Lime Wire" and "MagnetMix" products and services, constitutes commercially sensitive information. (*See* Aff. at ¶). "[C]ourts have traditionally recognized that disclosure to a competitor is more harmful than disclosure to a noncompetitor." *Mannington Mills, Inc. v. Armstrong World Indust., Inc.*, 206 F.R.D. 525, 531 (D. Del. 2002) (involving a lawsuit between two competitors in which the plaintiff served a Subpoena upon a third, non-party competitor that sought trade secrets and other confidential information) (citing *Am. Standard, Inc. v. Pfizer Inc.*, 838 F.2d 734, 741 (Fed. Cir. 1987)). QTrax's agreements and negotiations with the record industry are highly proprietary and confidential; and QTrax's ability to operate and compete legally as a P2P music sharing platform is based upon its carefully negotiated relationships and contracts with the recording industry. If this information were to fall into the hands of hostile competitors, such as the Defendants, the disclosure would severely disadvantage QTrax's competitiveness in the market. (*See* Aff. at ¶).

Weighing QTrax's interest in keeping its proprietary business information out of the hands of its hostile competitor against any potential value of the information to Defendants in this lawsuit should lead this court to quash Defendants' subpoena. *See Solow v. Conseco, Inc.*, No. 06 Civ. 5988, 2008 WL 190340, at *5 (S.D.N.Y. Jan. 18, 2008).

Furthermore, while there may be an underlying protective order entered in the Litigation between Defendants and Plaintiffs, any such protective order is insufficient to protect QTrax's interests as a nonparty to the Litigation. *See In re Vitamins Antirust Litig.*, 267 F.Supp. 2d 738, 742 (S.D. Ohio 2003) (considering, *inter alia*, that the court has no "enforcement power over the extant protective order, and, thus, would be unable to protect [the non-party's] interests were its terms to be breached" the motion to quash will be granted). Though the terms of the existing protective order may permit QTrax to designate information as "Confidential-Attorneys Eyes Only" if it contains "competitively sensitive information," as a nonparty to the case, QTrax would have no remedy if any of the parties (or its attorneys) did not adhere to the terms of the protective order. *See Mannington*, 206 F.R.D. at 530 (stating that "[w]hat happens with any information disclosed by Congoleum in response to Mannington's subpoena ... is anyone's guess" because although there is a protective order with an attorneys' eyes only provision, "the parties to this litigation are left with the option of how disclosure of such confidential information is handled at trial."); *see also Solow*, 2008 WL 190340, at *5, n.5 (quashing subpoena request despite the existance of a protective order).

Accordingly, because of the potential for substantial economic harm to its business competitiveness, QTrax's confidential, internal documents should not be disclosed. *See In re Vitamins Antirust Litig.*, 267 F. Supp. 2d at 742 (granting motion to quash Subpoena directed to nonparty where the party seeking the information was a competitor of the nonparty).

2. Defendants' Subpoena Creates Undue Burden Or Expense On QTrax, A Non-Party Because The Subpoena is Not Calculated To Lead To Any Information Relevant To This Case And Is Otherwise Duplicative Of Party Discovery.

As stated above, Rule 45 affirmatively requires the party serving a subpoena to take reasonable steps to avoid imposing an undue burden or expense on the recipient -- *especially* if the recipient is a non-party. *See* Fed. R. Civ. P. 45(c)(1). When determining whether a subpoena causes undue burden on a non-party, courts consider "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed" in responding. *Concord Boat*, 169 F.R.D. at 49 (citing *U.S. v. IBM*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979)); *see also JPMorgan Chase Bank v. Winnick*, No. 03 Civ. 8535 (GEL), 2006 WL 278192 (S.D.N.Y. Feb. 6. 2006) (same); *Nova Biomedical Corp. v. i-STAT Corp.*, 182 F.R.D. 419, 422-23 (S.D.N.Y. 1998) (same). Further, where the subpoena targets a non-party, "courts may impose broader restrictions." *Concord Boat*, 169 F.R.D. at 49 (citing *Packer v. Hansen*, No. 98-380, 1999 U.S. Dist. LEXIS 17618, at *15 (E.D. Pa. Nov. 12, 1999)).

Significantly, a subpoena may be unreasonable if the documents requested of a non-party are equally if not more easily discoverable from a party in the underling litigation. *See, e.g., Grigsby & Assoc., Inc. v. Rice Derivative Holdings, L.P.*, No. 00 CIV 5056 (RO), 2001 WL 1135620 (S.D.N.Y. Sept. 26, 2001) (granting motion to quash non-party subpoenas where requests in subpoenas were duplicative of discovery served on party). Service of a Subpoena that seeks the *same* information from QTrax, a non-party, can only serve to cause an undue burden or expense. *See* Fed. R. Civ. P. 45(c)(3)(A)(iv); *see also* Fed. R. Civ. P. 26(b)(2)(C) ("The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is

unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought . . . ."). Undue burden on a non-party includes situations where the subpoenaed material is duplicative of discovery requests that were served on the parties. *See Grigsby & Assoc., Inc.* 2001 WL 1135620, at *3 (stating that non-party subpoena "is duplicative of the document requests to which defendants already responding and as such impose an undue burden on non-parties."); *see also Barnes Found. v. Township of Lower Merion*, No. Civ. A. 96-0372, 1997 WL 255534, at *3 (E.D. Pa. May 8, 1997) (denying request to compel discovery from non-party that "is unreasonably cumulative or duplicative") (citations omitted).

Here, the request in this Subpoena is not calculated to lead to any information relevant to the underlying claims and so created an undue burden on non-party QTrax. In this case, Plaintiffs have sued Defendants over the vicarious copyright infringement of their material from the use of Lime Wire and MagnetMix. The issues involved in this litigation involve ***Defendants'*** platform, ***Defendants'*** licensing agreements, if any, with the music industry, and ***Defendants'*** clients' ability to share and download unlicensed music. The issues in this case do ***not*** relate to QTrax's involvement in the internet music market, which does not infringe on any of Plaintiffs' copyrights, as none of Plaintiffs' copyrighted material is available on QTrax's platform. Indeed, QTrax is now only operating a "Beta" site, has not yet fully launched its product, and has yet to finalize any of its potential agreements with any major record labels, so it is likely that any documents Defendants seek through the Subpoena were created ***after*** the events that inspired this lawsuit occurred. It is unclear what tenuous relevance, if any, there is between QTrax's interactions with the major labels and this Litigation. Instead, this Subpoena appears to be a

fishing expedition by Defendants to determine what licensing terms QTrax has been able to negotiate with various music labels, and what technology QTrax has developed that will enable it to operate while honoring the license agreements.

Second, not only is the Subpoena request not relevant to the Litigation, it is unreasonably duplicative of the discovery Defendants have already obtained (or could have obtained) from Plaintiffs and thus creates an undue burden or expense to QTrax, a nonparty to this litigation. *See* Klepfisz Decl. at ¶ 22. Defendants are seeking information about agreements that QTrax may have negotiated with the Plaintiffs in this action, which is potentially discoverable from those Plaintiffs. *See* Subpoena. It has been stated on the record that Defendants have already served discovery requests on the Plaintiffs and have received "substantial discovery ... including 'more than 1 million pages of documents and approximately 100 gigabytes [] of data... which roughly equates to more than 29 million pages.'" *See* 12/3/07 Opinion at 44. To the extent that Defendant viewed Plaintiffs' discovery responses as insufficient, it still could have obtained any potentially discoverable materials by less intrusive means than overly broad discovery directed to QTrax, a non-party. As such, this Subpoena should be quashed.

3. As A Non-Party, QTrax Deserves Greater Protection From Onerous Discovery Of Confidential Information.

QTrax is not a party to the Litigation currently pending between these Plaintiffs and these Defendants. *See* Klepfisz Decl. at ¶1, 6. In fact, prior to service of the Subpoena on March 6, 2008, QTrax had no connection whatsoever to the Litigation. *See id.* at ¶ 6. While federal courts have universally embraced a strong policy in favor of liberal discovery for litigants,[2] courts are generally more inclined to impose greater restrictions on the scope of discovery when a non-party to the litigation is the target of the discovery. S*ee Small v. Provident Life and Accident Ins.*

[2] *See Hickman v. Taylor*, 329 U.S. 495 (1957).

Co., NO.CIV. A. 98-2934, 1999 WL 1128945, *1 (E.D. Pa. Dec. 8, 1999) ("courts have imposed broader restrictions on the scope of discovery when a non-party is targeted"); *Tetratec Corporation v. E.I. DuPont De Nemours & Co., Inc.*, NO.CIV. A. 90-1867, 1992 WL 202169, *1 (E.D. Pa. Aug. 12, 1992) ("'[t]he rule is thus well established that non-parties to litigation enjoy greater protection from discovery than normal parties.'") (internal citations omitted); *see also Dart Industries Co., Inc. v. Westwood Chemical Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (noting "strong considerations indicating that discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents"). In fact, "[t]here appear to be quite strong considerations indicating that discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents." *Dart Industries Co.*, 649 F.2d at 649 (citing *Collins & Aikman Corp. v. J.P. Stevens & Co.*, 51 F.R.D. 219, 221 (D.S.C. 1971)). Indeed, the Ninth Circuit has acknowledged that the "more appropriate nomenclature is 'nonparty' discovery -- not 'third-party' discovery -- as the word nonparty serves as a constant reminder of the reasons for the limitations that characterize 'third-party' discovery." *Id.* (citing Getman, R., "Federal 'Third-Party' Discovery in the Small Antitrust Case," 45 BROOKLYN L. REV. 311 (1979)).

There are several strong equitable factors that weigh against broadly construing the Subpoena against non-party QTrax. First, the Subpoena seeks the disclosure of highly confidential, proprietary information that is not relevant to the Litigation. (*See* Section III.A.1, *supra*). Second, service of the Subpoena on QTrax can only serve to cause an undue burden or expense on a non-party, particularly in light of the unreasonably duplicative request. (*See* Section III.A.2, *supra*). Finally, Defendants appear to be on a fishing expedition for QTrax's information and contacts with the music industry. (*See* Section III.A.2, *supra*). These factors,

considered individually or together, support a finding that QTrax should be shielded from the burdensome discovery demands contemplated by Defendants under the Subpoena.

B. DEFENDANTS' SUBPOENA MUST BE QUASHED BECAUSE THE SUBPOENA IS ALSO TECHNICALLY DEFECTIVE.

Defendants failed to tender the statutorily required witness fee or compensation for travel expenses required for effective service of the Subpoena. *See* Klepfisz Decl. at ¶ 5. Fed. R. Civ. P. 45(b)(1) mandates that "[s]ervice of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and mileage allowed by law." Many federal courts have invalidated subpoenas by motion to quash or otherwise when the serving party fails to comply with the provisions of Rule 45. *See Meyer v. Foti*, 720 F. Supp. 1234, 1244 (E.D. La. 1999) ("Technically, the Subpoena is invalid if no fee is tendered.") (citing *CF & I Steel Corp. v. Mitsui & Co. (USA), Inc.*, 713 F.2d 494 (9th Cir. 1983)); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 686 (D. Kan. 1995) ("Failure to tender witness fee and mileage allowance with service of Subpoena renders Subpoena invalid."). In *In re Dennis*, 330 F.3d 696, 704-05 (5th Cir. 2003), the Fifth Circuit made clear that the witness fee requirement under Rule 45 is a necessary predicate to the enforcement of a subpoena:

> The conjunctive form of the rule indicates that proper service requires not only personal delivery of the subpoena, but also tendering of the witness fee and a reasonable mileage allowance. "[T]he plain meaning of Rule 45[(b)(1)] requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena.[3]

[3] The Fifth Circuit upheld the trial court's decision in *In re Dennis* to quash a subpoena where the subpoenaing party tendered the statutory witness fee of $40 but failed to tender money for travel expenses, which were expected to total only about $5. *In re Dennis*, 330 F.3d 696, 704-05 (5th Cir. 2003); *see also Ganz v. Griffith*, No. CIV.A. 95-CV-0574, 1996 WL 122184, at *1 (E.D. Pa. March 19, 1996) and citations therein.

Similarly, another District Court found that:

> The rule [45(b)(1)] is clear that a witness is entitled to the fees before appearance is compelled. The witness is not required to rely on the good faith of the party who subpoenas him to pay the fees when he appears. When a party subpoenas a witness without tendering the fees, the party is assuming the risk that the witness will not appear and is not entitled to sanctions when that occurs.

Klockner Namasco Holdings Corp. v. Daily Access.Com, Inc., 211 F.R.D. 685, 687 (N.D. Ga. 2002). In this case, neither the witness fee nor the travel expenses were tendered by Defendant at the time of service. *See* Decl. at ¶ 5. As Defendants have not taken steps to cure the deficiency in the Subpoena, it is invalid and should be quashed.

IV. CONCLUSION

QTrax, Inc. respectfully requests that this Court GRANT this Motion, ordering that the Subpoena issued to QTrax, Inc. be quashed and that Defendants make no further attempts to Subpoena QTrax, Inc. for deposition or the production of documents, and award the reasonable attorney's fees incurred in responding to the Subpoena.

Dated: New York, New York
March 17, 2008

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