

**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/Counterclaim Defendants,

v.

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

Defendants.

CIVIL ACTION NO. 06 CV. 5936
(GEL)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' OPPOSITION
TO NON-PARTY QTRAX, INC.'S MOTION TO QUASH DEFENDANTS' SUBPOENA**

Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, Greg Bildson, and M.J.G. Lime Wire Family Limited Partnership (collectively, "Defendants") file this Memorandum of Law in Support of Defendants' Opposition to Non-Party QTrax, Inc.'s Motion to Quash Defendants' Subpoena Pursuant to Federal Rule of Civil Procedure 45(c) ("QTrax's Motion") and respectfully show as follows.

INTRODUCTION

Armed with little more than conclusory assertions that Defendants seek "highly confidential" and "proprietary" information, QTrax, Inc. ("QTrax") seeks to quash the

Subpoena that Defendants served on Allan Klepfisz, QTrax's Chairman and CEO. QTrax, however, has failed to sustain its burden to demonstrate the propriety of its objections. The documents requested in Defendants' single, carefully circumscribed Request for Production are highly relevant to Defendants' defense that their Lime Wire P2P software application has substantial noninfringing uses, and their defenses of implied license and estoppel. The existing two-level Protective Order in this case adequately protects QTrax's purportedly confidential and proprietary information, allowing it to designate such information "Confidential-Attorneys' Eyes Only" so that Lime Wire can never see the information. The Court should deny QTrax's Motion to Quash and order Mr. Klepfisz to appear for his limited deposition and produce the requested documents.

ARGUMENT AND AUTHORITIES

The Federal Rules of Civil Procedure establish "very liberal limits on the scope of discovery." *Burns v. Bank of Am.*, No. 03 Civ. 1685 (RMB) (JCF), 2007 WL 1589437, at *3 (S.D.N.Y. 2007). "A party may inquire about 'any matter, not privileged, that is relevant to [a] claim or defense[.]'" *Id.* (quoting FED. R. CIV. P. 26(b)). "It is well-established that the rules pertaining to discovery, including its permissible scope, are to be broadly interpreted." *Member Servs., Inc. v. Security Mut. Life Ins.*, No. 3:06-CV-1164 (TJM/DEP), 2007 WL 2907520, at *4 (N.D.N.Y. 2007).

It is equally well-established that "[t]he burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the discovery rules found in the Federal Rules of Civil Procedure." *Id.* (citations omitted). "[G]eneral and conclusory objections as to relevance, overbreadth, or burden are

insufficient to exclude discovery of requested information.”’ *Id.* (quoting *Melendez v. Greiner*, No. 01 Civ. 07888 SAS DF, 2003 WL 22434101, at *1 (S.D.N.Y. 2003)).

I. THE INFORMATION DEFENDANTS SEEK IS HIGHLY RELEVANT TO DEFENDANTS’ DEFENSES.

Defendants’ Subpoena to Mr. Klepfisz contains a single, limited Request for Production:

All Documents that refer, relate, or pertain to any agreement, draft or otherwise, with any of the Plaintiffs, the RIAA or the Major Labels.

Defendants’ Notice of Intention to take the Oral Deposition of Allan Klepfisz and Subpoena Duces Tecum at 8 (attached as Exhibit A to the Declaration of Allan Klepfisz in support of Non-Party QTrax, Inc.’s Motion to Quash Subpoena).

The requested information is highly relevant to Defendants’ defense that their Lime Wire P2P software application is capable of substantial noninfringing use. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1161-62 (9th Cir. 2004), *vacated and remanded*, 545 U.S. 913 (2005); 35 U.S.C. § 271(c). QTrax, throughout its Motion, repeatedly touts the noninfringing aspects of its P2P platform. *See, e.g.,* QTrax’s Motion at 1 (“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.”); *id.* at 3 (“[QTrax] is currently developing what it claims will be the world’s first ‘legal’ P2P platform available for users to share music files.”); *see also* www.qtrax.com/features.html (“QTrax is the world’s first, 100% legal and free Peer-2-Peer music application. QTrax works directly with record labels and publishers, licensing their content for distribution online.”) The relevance of this information to Defendants’ defense that Lime Wire, like others, is capable of substantial noninfringing use is

indisputable.¹ If evidence exists of a P2P software application, such as QTrax's, that will allow its users to legally share, download, and upload the Plaintiffs' music, then this will undoubtedly show that a P2P software application that apparently operates or will operate just like Lime Wire, is capable of substantial noninfringing use, and is the most compelling, relevant evidence on this point.

In addition to supporting Defendants' defense of actual or potential noninfringing uses of its software, the information sought by Defendants will likely support their defenses of implied license and estoppel, at a minimum. If evidence exists that the Plaintiffs have freely licensed their works for unbridled distribution over the Gnutella P2P network, the same network of which Lime Wire users are members, any downloading, sharing, or uploading of those same works are no longer subject to claims of direct copyright infringement because any Gnutella user, including Lime Wire users, will have open access to those same licensed songs and can freely exchange those songs over the Gnutella network without fear of being sued for copyright infringement. Given that the Plaintiffs continue to sue Lime Wire for both past, present, and future infringement allegedly committed by its users, this information may not only provide a defense to past and present infringement, but may also prevent the imposition of any injunction against Lime Wire in the unlikely event that Plaintiffs can first prove liability.

II. THE PROTECTIVE ORDER IN THIS CASE ADEQUATELY PROTECTS QTRAX'S CONFIDENTIAL AND PROPRIETARY INFORMATION.

Throughout its Motion, QTrax conclusorily asserts that the information Defendants request is confidential and proprietary. *See, e.g.*, QTrax's Motion at 1-2, 5, 7, 8. As a threshold matter, QTrax has failed to demonstrate the confidential and proprietary nature of the requested

¹ QTrax does not dispute or otherwise address the relevancy of the requested information to Defendants' substantial noninfringing use defense. QTrax argues only that "[t]he 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." QTrax's Motion at 10.

information. *See* Klepfisz Decl. at ¶¶ 19, 20 (arguing against disclosure of information “relating to its contracts and communications with the music industry” without describing that information, and concluding that “[t]he information Defendants seek to obtain from QTrax thus constitutes confidential, proprietary information”). Noticeably absent from both QTrax’s Motion and the Declaration of Mr. Klepfisz is *any* explanation of what is confidential or proprietary about the information sought. In fact, given that QTrax repeatedly states that it is in negotiations with the Major Labels to allow QTrax to distribute the same works on the same P2P network that Lime Wire has been sued over, there is no evidence that any such agreements truly exist. But if they do, they should be produced.

Assuming for purposes of this Response only that the information requested in Defendants’ Subpoena is confidential and proprietary, the March 8, 2007 Stipulation and Protective Order (“Protective Order”) entered in this case adequately protects any such information. The Protective Order is “applicable to and govern[s] all depositions, documents produced in responses to requests for admission, and all other discovery taken pursuant to the Federal Rules of Civil Procedure, and other information hereafter furnished, directly or indirectly, by or on behalf of any party or nonparty in connection with this action” A copy of the Protective Order is attached as Exhibit A. Importantly, the Protective Order contains two levels of protection, allowing for discovery materials to be designated as either “Confidential” or “Confidential-Attorneys’ Eyes Only.” Accordingly, any concerns that QTrax’s purportedly confidential and proprietary information will be disclosed to Lime Wire, any other alleged

competitor, or any persons other than the attorneys in this case are more than adequately addressed by the Protective Order.²

To alleviate QTrax's professed concerns based on its broad unsupported assertions that apparently everything it has in its possession is so highly confidential that Defendants' counsel should be denied access to this information, Defendants have offered to QTrax to redact certain sensitive information in any such agreements or documents, such as pricing information and so forth. QTrax's counsel has steadfastly refused to budge even slightly, broadly claiming that *all* information sought by Defendants should never be produced.

Of course, all of QTrax's noise about the alleged adverse effect on its actual and potential deals with the Labels is pure speculation. QTrax's argument is further undercut by its argument that most, if not all of the requested information is in the Labels' possession. Accordingly, QTrax's Motion to Quash should be denied.

III. QTRAX FAILS TO ESTABLISH THAT THE SUBPOENA IMPOSES AN UNDUE BURDEN.

As with its other arguments, QTrax conclusorily asserts that the Subpoena places an "undue burden" on it. Motion at 10. This assertion is completely unsupported; there is no evidence of what would be required to comply with the Subpoena, such as what the cost of compliance would be, where the documents are located, how long it would take to gather the requested information, or how many persons would be needed to gather the requested information. QTrax, therefore, has failed to sustain its burden to show that the requested information imposes an undue burden on it.

² QTrax's contention that "granting Defendants unbridled access to its confidential communications and draft agreements with the record labels would give Defendants an unfair business advantage over QTrax," Motion at 4, is rather obviously baseless. The parties are embroiled in acrimonious litigation.

In fact, QTrax's main complaint with regard to the alleged burden on it is its unfounded contention that the Subpoena seeks information that is potentially discoverable from [] Plaintiffs." Motion at 11; *see also* Klepfisz Decl. at ¶ 21 ("I also wish to point out that the Subpoena is very broad and places an undue burden on QTrax because 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."). First, QTrax fails to show that any of the requested information has either been requested or produced by any of the Plaintiffs. Regardless, the fact that information may be obtained from other sources does not render discovery improper or burdensome. Moreover, even if any of that information had been produced by the Plaintiffs, it would not contain any of QTrax's notations, and certainly none of QTrax's internal documents.³ QTrax's complaint that the requested discovery is burdensome is meritless.

IV. DEFENDANTS HAVE TENDERED THE WITNESS FEE.

Since the filing of QTrax's Motion to Quash, Defendants have tendered to Mr. Klepfisz the witness fee of forty dollars and travel funds sufficient to cover the cost of his travel from 211 Madison Avenue to 156 W. 56th Street. QTrax's petty complaint regarding the witness and travel fee is, therefore, moot.

WHEREFORE, Defendants respectfully request that the Court deny QTrax's Motion to Quash Defendants' Subpoena and grant Defendants such other and further relief to which they may be justly entitled.

³ Moreover, even if the Labels had produced some of the requested information in this litigation, it would likely mean that QTrax has waived its objections to the production of this information. Presumably, any such agreements would contain a nondisclosure agreement and QTrax has not previously objected to the production of any such agreements, assuming such agreements have, in fact, been produced.

Dated: March 21, 2008.

Respectfully Submitted,

Of counsel:

Lauren E. Handler
SDNY (LEH 6908)
PORZIO, BROMBERG &
NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
(973) 538-5146 (Facsimile)
(973) 889-4326 (Telephone)
lehandler@pbn.com

/s/
Charles S. Baker (CB1365)
Joseph D. Cohen (JC3017)
Susan K. Hellinger (SH8148)
PORTER & HEDGES, LLP
1000 Main Street, 36th Floor
Houston, Texas 77002
(713) 226-6000 (Telephone)
(713) 228-1331 (Facsimile)
cbaker@porterhedges.com
jcohen@porterhedges.com
shellinger@porterhedges.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

This is to certify that the foregoing document was served upon the parties listed below via e-mail on March 21, 2008.

Katherine B. Forrest
Teena-Ann V. Sankoorikal
Cravath, Swaine & Moore, LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
(212) 474-3700 (fax)

Kenneth L. Doroshow
Karyn A. Temple
Recording Industry Association of America
1025 F Street, NW, 10th Floor
Washington, DC 20004
(202) 775-0101
(202) 775-7253 (fax)

Lawrence J. Reina
Reed Smith LLP
599 Lexington Avenue
22nd Floor
New York, NY 10022-7650

/s/
Charles S. Baker