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)

REPLY MEMORANDUM IN FURTHER SUPPORT OF NON-PARTY QTRAX INC.'S MOTION TO QUASH DEFENDANTS' SUBPOENA PURSUANT TO RULE 45(C)

Qtrax, Inc. ("Qtrax") submits this Reply Memorandum of Law, along with the accompanying Declaration of Lawrence J. Reina, Esq. ("Reina Decl."), in further support of its Motion to Quash Defendants' Subpoena ("Motion").

In response to Qtrax's Motion, Defendants submitted a memorandum ("Opposition") claiming that (1) the information Defendants demand in the Subpoena is relevant and necessary to their defense of this case, (2) the current Protective Order in the case adequately protects non-party Qtrax's interests, and (3) Qtrax has not established undue burden or hardship. However, not only do Defendants not contest the fact that QTrax is a competitor but Defendants have not established the relevance of or need for Qtrax's sensitive documents, and Defendants ignore the fact that Qtrax is not a party to this litigation and thus is afforded greater protection from the

hardships of their discovery request. Therefore, the Court must grant Qtrax's Motion.

I. ARGUMENT

Defendants fail to recognize that non-parties are afforded greater protection from onerous discovery requests such as the overly broad Subpoena Defendants served on Qtrax. Although Qtrax has shown its legitimate interests in protecting its confidential information, Defendants failed to establish a "significant need" for enforcement of its Subpoena because they have not shown how the information they seek from Qtrax that is publicly available or otherwise available from less invasive sources is insufficient for their purposes. Furthermore, the parties' Protective Order does not adequately protect non-party Qtrax's interests with respect to the confidential and proprietary information sought by Defendants. Finally, Defendants admit that they failed to serve the statutory witness fee with service of their Subpoena pursuant to Rule 45(b)(1), and, as such, their technically deficient Subpoena fails.

A. Defendants Ignore The Fact That, As A Non-Party To This Litigation, Qtrax Is Afforded Greater Protection From Defendants' Invasive And Duplicative Discovery Demand

Courts have recognized that where a subpoena targets a non-party, "courts may impose broader restrictions." *Small v. Provident Life and Accident Ins. Co.*, NO.CIV. A. 98-2934, 1999 WL 1128945, *1 (E.D. Pa. Dec. 8, 1999). In *Jones v. Hirshfield*, 219 F.R.D. 71, 74 (S.D.N.Y. 2003), this Court explained that "Fed. R. Civ. P. 45(c) provides additional protection for non-parties subject to a subpoena by mandating that a court 'quash or modify the subpoena if it ... subjects [the] person to undue burden.'" (citing Rule 45(c)(3)(A)(iv)); *see also JPMorgan Chase Bank v. Winnick*, No. 03 Civ. 8535 (GEL), 2006 WL 278192, at *2 (S.D.N.Y. Feb. 6. 2006) (stating that "the Court will 'quash or modify' any subpoena that subjects such a non-party 'to undue burden.'"). *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"); *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.'").

Here, undue burden does not just mean "expense" or time or effort to comply with a subpoena, as suggested by Defendants. *See* Opposition at 6. Undue burden also includes, as here, the unnecessary demand for production of information or materials from a non-party. *See, e.g., Concord Boat Corp. v Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (factors for determining undue burden include relevance, "the breadth of the document request" and "the need of the party for the documents.") (citing *U.S. v. IBM*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979)); *see also JPMorgan Chase Bank*, 2006 WL 278192, at *2 (same); *Grigsby & Assoc., Inc. v. Rice Derivative Holdings, L.P.*, No. 00 CIV 5056 (RO), 2001 WL 1135620, at *3 (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).

The fact that Defendants' request for information is contained in only one sentence in the Subpoena does not mean that it is not overbroad, as Defendants suggest. *See* Opposition at 3. The Subpoena demands: "[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." *See* Subpoena at 8. This broad request, read with the expansive definition of "document" contained within the Subpoena, presumably encompasses a huge volume of Qtrax's sensitive, internal material. *See id.* Defendants' Subpoena is therefore not merely a "single, limited Request for Production." Opposition at 3.

In its opening papers, Qtrax established that it is a competitor of Lime Wire and the sensitive nature of internal business documents requested by Defendants' Subpoena. Defendants do not deny that Qtrax is a competitor. It is unreasonable to suggest, as Defendants do, that disclosure of a company's internal commercially-sensitive documents to its main competitor would not be harmful to Qtrax, which has legitimate interests in keeping its internal documents and sensitive business communications confidential.[1] In addition, the information that Defendants claim they need for their defenses is public knowledge and they do not establish that the public sources of such information is insufficient. *See* Section I.B., *infra*. Therefore, Defendants' Subpoena to Qtrax is unnecessary and overly broad for its purpose. To enforce this Subpoena and to require Qtrax to produce all of its sensitive, internal communications and documents concerning draft agreements will create undue burden and hardship for Qtrax.

The burden has therefore shifted to Defendants to show their "substantial need" for these internal documents, which they have failed to do. *See* F.R.C.P. 45(c)(3)(C)(i) (stating that the party demanding the information must show "a substantial need for the testimony or material that cannot be otherwise met without undue hardship"); *Mannington Mills, Inc. v. Armstrong World Indust., Inc.*, 206 F.R.D. 525, 528 (D. Del. 2002) ("If the information sought is confidential and its disclosure might be harmful, then 'the burden shifts to the party seeking discovery to establish that disclosure of … confidential information is relevant and necessary to its case.'") (citing *American Standard Inc v. Pfizer Inc*., 828 F.2d 734 (Fed. Cir. 1987)). Defendants' supposed

---

[1] The fact that Qtrax has not yet launched its product, and is the subject of extreme scrutiny and criticism from the press and competitors including Lime Wire, plainly establishes the commercial sensitivity of the information sought by Defendants. *See* Klepfisz Decl. at ¶¶ 15, 19, 21 (filed March 17, 2008). Further, this same fact – that Qtrax has not yet launched its product and has yet to finalize its contracts with the Plaintiffs – undercuts Defendants' argument that discovery from Qtrax is relevant to Defendants' "non-infringing use" defense.

need for the material is clearly outweighed by Qtrax's interest in keeping this material confidential and the potential hardship of disclosing the requested material.

B. Access To Qtrax's Sensitive, Internal Documents Is *Not* Necessary To Establish Defendants' Claimed Defenses

Defendants' Opposition states that the documents requested in the Subpoena are necessary to establish certain defenses, *i.e.*, that Defendants' P2P platform has a potential non-infringing use:

> 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.

Opposition at 4. However, Defendants have failed to show why the Subpoena directed to Qtrax is necessary when – as they admit – it is public knowledge that Qtrax has been negotiating licenses with various major record labels in order for Qtrax to become a legal, non-infringing P2P music sharing platform. Qtrax's public website, cited in Defendants' Opposition, unequivocally states such facts:

> 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. When you download and play music, the support of advertisers allows Qtrax to compensate artists for their work.

See Qtrax, *Features*, available at http://qtrax.com/features.html (last accessed March 24, 2008). Defendants have not explained why their "non-infringing use" defense requires the exposure of Qtrax's confidential and commercially sensitive internal and draft documents to establish their defense, when this publicly available information arguably serves the same end. There is simply no need for Defendants' lawyers to examine "Qtrax's notations" on confidential draft agreements between Qtrax – a non-party – and certain of the Plaintiffs, or "Qtrax's internal documents"

relating to potential agreements with the Plaintiffs, in order to establish these same facts. Opposition at 6. In addition, Defendants have not sufficiently established the relevance of Qtrax's contracts, which are not yet in place, and its platform, which has not yet launched, to this defense.

Similarly, Defendants have failed to establish why the Subpoena is necessary to support Defendants' other claimed defense, that Plaintiffs' may be licensing their songs over the "Gnutella network," when such information is also easily – and much less invasively – procurable from public sources. Qtrax's website readily states that Qtrax is "Gnutella-based" – thus the need for this information from Qtrax's internal documents is illusory. *See* Qtrax, *Disclaimer*, available at http://www.qtrax.com/legal.html (last accessed March 24, 2008) ("Qtrax is a free, Gnutella-based file sharing software allowing users around the world to make peer-to-peer connections with each other.") (emphasis added). In addition, Defendants may have already received this information from the depositions of Plaintiffs' representatives or from discovery of Plaintiffs' documents, to which Qtrax does not have access. As it is not a party to this litigation, Qtrax does not know precisely what information Defendants have requested or received from Plaintiffs. However, Defendants' counsel has ***admitted*** that Defendants have received information regarding Qtrax directly from the Plaintiffs. *See* Reina Decl. at ¶ 4 (claiming Defendants have not been successful in getting "necessary" information about Qtrax from Plaintiffs). To the extent Defendants' view ***Plaintiffs*** discovery responses concerning Qtrax as deficient; they have not stated they cannot obtain the information from less intrusive methods and sources other than Qtrax. Again, it appears the information Defendants claim they need is public information, or otherwise available from the parties, demonstrating how the Subpoena is

overly broad and unduly burdensome on Qtrax.[2]

C. The Protective Order Does *Not* Adequately Protect Qtrax

Contrary to Defendants' argument, the parties' Protective Order cannot sufficiently protect Qtrax's interests in its confidential information. For example, footnote 1 to the parties' Protective Order states, "This Protective Order does not apply to hearings before the Magistrate or hearings or trial before the District Court." *See* Protective Order, attached to Defendants' Opposition.[3] In addition, paragraph 7 of the Protective Order, which restricts certain documents to "Attorneys' Eyes Only," allows any such documents to be viewed by the parties' in-house counsel, experts, and others. *Id.* It is the parties, including their legal departments, from whom Qtrax wishes to safeguard this information. As such, Qtrax is simply not convinced that this Protective Order gives it – as a non-party to the agreement and litigation – sufficient protection from disclosure to the parties, especially if the parties are left with the option of how disclosure of information or documents is handled at trial or before the Magistrate. *See Mannington Mills*, 206 F.R.D. at 530 ("What 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 v. Conseco, Inc.*,

---

[2] Defendants accuse Qtrax of admitting that some the information Defendants requested may be in Plaintiffs' hands. *See* Opposition at 6. Qtrax suggested only that certain "relevant, non-confidential information requested by the Subpoena," if any such information exists, would be more easily discovered from parties to this action which may have possession of such information. *Id.* (citing Qtrax's Memorandum of Law). Qtrax by no means waived its right to protect its own, internal, confidential communications or draft documents by suggesting that this type of information may be available from the Plaintiffs in this action.

[3] It also appears from the Protective Order that the burden would be on Qtrax – a non-participant – to file a motion to seal the record if any of its sensitive information were used in a recorded Court proceeding. *See* Protective Order at n.1.

No. 06 Civ. 5988, 2008 WL 190340, at *5 n.5 (S.D.N.Y. Jan. 18, 2008) (quashing non-party subpoena request despite the existence of a protective order).[4]

D. Defendant's Tardy Service Of The Witness Fee Does Not Cure The Subpoena's Technical Deficiency

Consistent with their hasty and unnecessary Subpoena to Qtrax, Defendants failed to comply with Rule 45(b)(1). When a subpoena demands the presence of a witness, service of a subpoena is invalid without the simultaneous delivery of the witness and mileage fee. *See CF & I Steel Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 713 F.2d 494, 496 (9th Cir. 1983) ("[T]he plain meaning of Rule 45 requires simultaneous tendering of witness fees and the reasonably estimated mileage allowed by law with service of a subpoena."). This Court has stated that "such improper service warrants quashing the subpoena." *Song v. Dreamtouch, Inc*. No 01-civ-0368, 2001 WL 487413 (S.D.N.Y. May 8, 2001).

In their Opposition, Defendants admit that they failed to serve the statutory witness fee and travel expenses upon Mr. Klepfisz, and call Qtrax's insistence that Defendants follow the Rules of Civil Procedure "petty." Without citing any legal authority to the contrary Defendants would have this Court ignore the case law whereby courts have quashed Subpoenas as a result of this deficiency under the plain meaning of the Rule. *See CF & I Steel Corp.* at 494 (affirming the plain meaning of Rule 45 and upholding the trial court's decision to quash where service was deemed ineffective due to late tender of witness fees). "[R]ule 45(b)(1) contains no *de minimis* exception." *In re Dennis*, 330 F.3d 696, 705 (5th Cir. 2003). Defendants' deficient Subpoena

---

[4] Defendants' Opposition also states that Defendants offered to allow Qtrax to redact certain sensitive information from the requested documents in lieu of a full production under the Subpoena. However, no such offer was made to Qtrax. *See* Reina Decl. at ¶ 5. For the reasons set forth herein, however, even redacting information from documents provided to Defendants cannot adequately protect Qtrax's legitimate confidential business interests.

should similarly be quashed.

II. CONCLUSION

For the reasons stated above and in its Memorandum of Law in Support of its Motion To Quash Defendants' Subpoena, 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 attempt to Subpoena Qtrax, Inc. for the deposition of Allan Klepfisz or for the production of documents, and award the reasonable attorney's fees incurred in responding to the Subpoena.

Dated: New York, New York
March 24, 2008

REED SMITH LLP

By: S/ Lawrence J. Reina
Lawrence J. Reina, Esq. (LR 7327)
Herbert F. Kozlov, Esq. (HK 4983)
599 Lexington Avenue
22nd Floor
New York, NY 10022-7650
Telephone: 212.521.5400
Facsimile: 212.521.5450

Attorneys for Non-Party Qtrax, Inc.