THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AALACHO MUSIC, LLC, a Washington limited liability company,

Plaintiff,

vs.

DEEP DISH RECORDS, INC., a District of Columbia corporation, and YOSHITOSHI SHOP, L.L.C., a limited liability company,

Defendants.

NO. CV03-2358L

PLAINTIFF AALACHO MUSIC, LLC'S MOTION TO QUASH DEFENDANTS' SUBPOENA FOR DEPOSITION OF PLAINTIFF'S COUNSEL; AND PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR ORDER COMPELLING DEPOSITION OF OPPOSING COUNSEL

NOTE ON MOTION CALENDAR:
September 3, 2004

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I. INTRODUCTION

Defendants served a subpoena on litigation counsel for Aalacho Music, LLC ("Aalacho") purporting to require counsel to testify in deposition. Defendants proffer they will obtain testimony of "unclean hands" by deposing Aalacho's counsel about its settlement discussions with Global Underground, Ltd. ("Global"), a third party. However, Defendants cannot show the extraordinary circumstances required to turn Aalacho's counsel into a witness. To the contrary, Defendants can depose third parties for the information they seek, and a deposition of Aalacho's counsel would inevitably lead to disclosure of privileged information. Additionally, the documents upon which Defendants rely undisputedly show that Aalacho does not have unclean hands, and Aalacho's counsel has no testimony contrary to that evidence. In any event, counsel's communications with Global are not admissible pursuant to FED R. EVID. 408 because those statements were made within the scope of compromise negotiations. Finally, Defendants should not be allowed to depose Aalacho's counsel for public policy reasons. Specifically, if a copyright owner's lawyer will be subject to a deposition by one infringer about settlement discussions with another infringer, then the copyright owner will be forced to hire a different lawyer to pursue each infringer.

Accordingly, Aalacho respectfully requests that the Court quash the Subpoena and require Defendants to pay Aalacho its reasonable attorneys' fees incurred in bringing this motion.

II. FACTS

A. DEFENDANTS' COPYRIGHT INFRINGEMENT AND PURPORTED DEFENSE

Aalacho is the copyright owner of the musical work entitled *Satellite* (the "Track"). (Order Den. Pl.'s Mot. for Summ. J. (Dkt. # 80) (hereinafter, the "Order"), p.2.) Defendants infringed upon the copyright to the Track by reproducing it, distributing copies of it, and authorizing a third party, Global, to distribute the Track. (*See* Pl.'s Mot. for Summ. J. (Dkt. # 66); Order, p. 6.) Defendants allege "Aalacho consented to the release or, at a minimum, induced Global to include the Track by telling Global it would

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agree to a license." (Defs.' Opp'n to Mot. for Summ. J., p. 20.) The day after Defendants filed the instant motion to compel, they issued a subpoena on Global for deposition and successfully served Global in the United States. (Balasubramani Decl. ¶ 12, Ex. H.) Defendants now seek to depose Aalacho's litigation counsel concerning communications between Global and Aalacho's lawyer.

B. AALACHO'S DEMANDS AGAINST AND SETTLEMENT DISCUSSIONS WITH GLOBAL

As soon as Aalacho learned Global might be involved with the infringements of copyrights of the Track, Aalacho's counsel contacted Global to demand Global cease and desist any infringements. (Balasubramani Decl. ¶ 3.) Thereafter, Global and Aalacho's counsel attempted to negotiate a settlement of Aalacho's claims against Global. (*See generally* Balasubramani Decl.) At no time, however, did Aalacho's counsel ever contact Global to negotiate a license for the Track outside of the scope of settlement negotiations. (Balasubramani Decl. ¶ 10.) Rather, the communications confirmed that "[Defendants do] not have any rights in the Track" (Balasubramani Decl. ¶ 4, Ex. A), and "Aalacho demands that Global immediately cease all infringing conduct, and account to Aalacho with respect to the revenues and goodwill derived from Global's exploitation of the Track" (Balasubramani Decl. ¶ 9, Ex. E).

All communications between Aalacho's counsel and Global were limited to resolving Aalacho's claims against Global, and took place after Defendants began the infringements alleged in this lawsuit. (Defs.' Opp. to Mot. for Summ. J., p. 19 (admitting that relevant conversation between Aalacho and Global took place "within two weeks after Toronto's release").) The parties never engaged in a business negotiation about a license outside of the settlement context. (*See generally* Balasubramani Decl.) Indeed, Aalacho expressly advised, and Global expressly confirmed, that Global never believed Aalacho had granted it a license. (Balasubramani Decl. ¶ 11, Ex. G (letter from Defendants to Global, and response thereto acknowledging Global had not been successful at negotiating a license with Aalacho).) Likewise, Defendants have no written documents leading to the conclusion that Global believed Aalacho had granted it a

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license.

Aalacho brought a Motion for Summary Judgment re Liability for Infringement (Dkt. #66). In ruling on the Motion, the Court noted that "Defendants admit that they sold . . . copies of the Track." (Order, p. 5.) The Court further noted that Defendants "provided no admissible evidence that Global had Aalacho's consent to use the Track." (Id.) The Court, however, refused Aalacho's request for summary judgment on the basis that "Defendants . . . made the barest showing that the doctrine of unclean hands prevents summary judgment." (Order, p. 6 (noting that "if it is ultimately determinated that this equitable doctrine is inapplicable, Deep Dish will be liable for infringement of the copyrights by distribution").) In arguing that Aalacho had led Global to believe that it was entitled to utilize the Track, Defendants relied on the statements of Kurosh Nasseri, who claimed Global informed him that Aalacho consented to exploitation of the Track. (Nasseri Decl. (Dkt. # 72), ¶ 16.) Aside from Mr. Nasseri's double-hearsay allegation, Defendants cannot provide any support for their "unclean hands" theory.

III. ARGUMENT

A. DEFENDANTS CANNOT MEET THE BURDEN OF SHOWING EXTRAORDINARY CIRCUMSTANCES REQUIRING COUNSEL'S DEPOSITION

"[D]epositions of opposing counsel are disfavored." United States v. Yonkers Board of Education, 946 F.2d 180, 185 (2d Cir. 1991). Indeed, courts recognize that a deposition of opposing counsel[1] presents "a unique opportunity for harassment; it disrupts the opposing attorney's preparation for trial, and could ultimately lead to disqualification of opposing counsel. . . ." Marco Island Partners v. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983); *see also* West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302 (S.D. Fla. 1990) (attorney depositions "inherently constitute an invitation to harass the attorney and parties, and to disrupt and delay the case"). Courts "generally take a

[1] The fact that Defendants seek to depose Aalacho's trial counsel, who has conducted extensive discovery, and prepared the case for trial, exacerbates the prejudice to Aalacho. *See*, *e.g.*, Johnston Development Group, Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 356 (D.N.J. 1990) (recognizing greater potential harm to adversary process where trial counsel, as opposed to corporate counsel, is deposed).

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critical view of such a tactic," FTC v. U.S. Grant Res., LLC, 2004 U.S. Dist. LEXIS 11769 (D. La. 2004), and hold that "deposing an opponent's attorney is a drastic measure and is infrequently proper." Dunkin' Donuts, Inc. v. Mandorico, Inc., 181 F.R.D. 208, 209 (D.P.R. 1998). Accordingly, "most federal courts" require the party seeking to depose opposing counsel to demonstrate the propriety and necessity of the deposition as well as the absence of privileged or protected communications. Antonious v. Spalding & Evenflo Cos., 1998 U.S. Dist. LEXIS 10728 (D. Md. 1998) (citing Kelling v. Bridgestone/Firestone, Inc., 153 F.R.D. 170, 171 (D. Kan. 1994) (collecting cases) and Mike v. Dymon, Inc., 169 F.R.D. 376, 378 (D. Kan. 1996)); *see also* Timothy Flynn, Jr., Notes: On "Borrowed Wits": A Proposed Rule for Attorney Depositions, 93 COLUM. L. REV. 1956, 1971 (1993) ("The reported decisions show a trend in recent years toward a greater willingness on the part of the federal courts to recognize the dangers inherent in allowing a party to depose opposing counsel").

The Eighth Circuit set forth the prevailing test in Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). Specifically Shelton requires the party seeking to depose opposing counsel to show that: (1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case (the "Shelton Test"). Shelton, 805 F.2d at 1327. The Second Circuit in In re Subpoena to Dennis Friedman, 350 F.3d 65, 71-72 (2d. Cir. 2003) cited the Shelton Test, but endorsed a flexible inquiry examining factors including: (1) the need to depose the lawyer; (2) the lawyer's role in connection with the underlying subject matter; (3) the risk of encountering privileged or work product information; and (4) the extent of discovery already conducted (the "Friedman Test").

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1. The Shelton Test Does Not Allow Defendants to Depose Aalacho Counsel

(a) Defendants Have Other Means of Obtaining the Information

Defendants contend that they relied upon Global's belief that Aalacho granted it a license through counsel. However, only Global would be competent to testify about whether it ever believed Aalacho granted it a license. If deposed, Aalacho's counsel would point to the correspondence between Global which unequivocally shows that Aalacho never granted Global a license and Global never understood there to be a license. The proper party for the testimony Defendants seek would be Global.

Defendants claim that "Global . . . is outside the subpoena power of any U.S. District Court." (Motion to Compel, p. 4.) Defendants additionally state that they "attempted to secure a declaration from [Global]" but have not succeeded. (Id.) Defendants caveat this by stating that they "are evaluating other ways to obtain discovery from Global . . . but are unsure whether these efforts ultimately will succeed." (Id.)

Notwithstanding their representations to the Court, Defendants very well know Global has an office in the United States and is therefore subject to United States subpoena power.[2] Indeed, the day after Defendants filed their Motion to Compel, Defendants issued a subpoena to Global which they successfully served on Global in New York. (Balasubramani Decl. ¶ 12, Ex. H.)

(b) Defendants Inevitably Seek Privileged Information

Defendants seek to depose Aalacho's counsel about correspondence with an adverse party. Such a deposition will inevitably probe into privileged areas regarding communications between counsel and Aalacho about Global's correspondence, Aalacho's

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[2]Even if Defendants were unable to subpoena Global, Defendants' contentions regarding Global's testimony suffers from another glaring flaw. Defendants fail to acknowledge that Global's testimony may be compelled via letters rogatory. *See* United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, 976 F. Supp. 207, 213 (S.D.N.Y. 1997) (noting that "testimony from English witnesses unwilling to travel to the United States can be obtained by letters rogatory"); R. Maganlal & Co. v. M.G. Chemical Co., 942 F.2d 164, 169 (2d Cir. 1991) (noting that the unavailability of witnesses was not a sufficiently weighty concern to require forum non conveniens dismissal because "any testimony MG needs from witnesses whose attendance cannot be compelled can be obtained, for example, though the use of letters rogatory").

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conversations with its counsel regarding settlement with Global, and counsel's advice to Aalacho based upon Global's conduct. For example, Defendants would necessarily ask whether counsel for Aalacho was authorized to make any oral representations to Global, and what counsel advised its client in that regard. Similarly, Defendants would inquire as to Aalacho's responses to Global's letters and discussions between Aalacho and counsel with respect thereto. Defendants could not lay foundation for questions of Aalacho's counsel without inquiring about counsel's communications with its client. *See*, *e.g.*, Dunkin' Donuts, Inc. v. Mandorico, 181 F.R.D. 208, 212 (D.P.R. 1998) (noting that deposition of counsel regarding reasons for termination of franchise agreement would involve inquiry into privileged areas).

(c) The Information Sought Is Not Crucial to Defendants' Case

The record in this case consists of written correspondence between Aalacho and Global. All of those documents speak for themselves. Absent a Hollywood movie moment where Aalacho's counsel surprisingly contravenes express correspondence with Global, and undermines its client's entire case, Defendants will not obtain evidence that Aalacho granted a license to Global. Any testimony Defendants gather from Aalacho's counsel would be about confidential settlement discussions and "cease-and-desist" letters. This type of information would not lead to the discovery of admissible evidence, and is not itself admissible.

2. The Friedman Test Does Not Allow Defendants to Depose Aalacho's Counsel

(a) Defendants Can and Should Obtain the Information Elsewhere

The information Defendants seek from Aalacho is either contained in correspondence Aalacho produced, or would be properly gathered from Global.

(b) Aalacho's Counsel Did Not Act as a Business Negotiator

The second factor looks to the specific role of counsel. Courts are more accepting of depositions of transactional counsel on the basis of the lesser degree of prejudice suffered in that instance. *See*, *e.g.*, Johnston Development Group, Inc. v. Carpenters

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Local Union No. 1578, 130 F.R.D. 348, 356 (D.N.J. 1990) (recognizing greater potential harm to adversary process where trial counsel, as opposed to corporate counsel, is deposed). In this instance, however, counsel for Aalacho acted as litigation counsel engaged to enforce Aalacho's rights against infringements to its intellectual property.

(c) Deposition of Aalacho's Counsel Would Certainly Encounter Privileged Information

Defendants could not depose Aalacho's counsel without delving into communications between counsel and its client.

(d) Defendants Have Been Remiss in Discovery Already Conducted

The final factor, the nature of discovery already taken place, also weighs against the deposition. The parties have been able to conduct discovery in this case since January. Defendants have not conducted any third party discovery. Defendants finally subpoenaed Global last week. Defendants have failed to exercise diligence in conducting discovery. The fact that Defendants did not even investigate whether Global had an office in the United States before filing their Motion to Compel underscores the lackluster manner in which Defendants have pursued third party discovery. Defendants sat on their right to conduct discovery, and should not now be permitted to gather all of their evidence from Aalacho's counsel, thereby prejudicing Aalacho.

3. Defendants Cannot Establish an "Unclean Hands" Defense

(a) Defendants Cannot Show Bad Faith or Fraud.

Courts characterize unclean hands as requiring proof "that plaintiffs have acted fraudulently, deceitfully, unconscionably, or in bad faith." Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1383 (6th Cir. 1995); *see also* Supermarket of Homes v. San Fernando Valley Bd., 786 F.2d 1400, 1408 (9th Cir. 1986) (denying unclean hands defense for failure to show fraud). The unclean hands doctrine "is a limited device, invoked by a court only when a plaintiff otherwise entitled to relief has acted so improperly with respect to the controversy at bar that the public interest in punishing the plaintiff outweighs the need to prevent defendant's tortious conduct."

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Playboy Enter., Inc. v. Chuckleberry Publishing, 486 F. Supp. 414, 435 (S.D.N.Y. 1980). Courts recognize the unclean hands defense in the copyright context "only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action." 3 M. Nimmer, NIMMER ON COPYRIGHT, § 13.09[B] at 13-296 (2002); *see also* National Cable Television Ass'n v. Broadcast Music, Inc., 772 F. Supp. 614, 652 (D.D.C. 1991) (citing Nimmer). Examples include falsification of court orders, falsification of evidence, misrepresentation of the scope of the copyright, or the commission of fraud on the copyright office. Nimmer, § 13.09[B] at 13-296. Defendants cannot possibly make such a showing on this record, and no testimony sought to be procured by Defendants from counsel for Aalacho will change that.

(b) Defendants Rely on Documents Which Expressly Represent in Writing That Global Understood it Never Had a License

In their opposition to Aalacho's summary judgment motion, Defendants relied on an e-mail from Aalacho's counsel to Colin Tierney of Global. As the Court noted, the e-mail stated Aalacho would be willing to entertain the terms of the license as proposed by Global, "*but have to first iron out [its] situation with [Defendants].*" (Order, p. 6, f.n. 4 (emphasis in original).) This document speaks for itself and could not reasonably be construed to equal permission to exploit the Track. The same is true of the attachment to the e-mail, which provided that Aalacho would not agree to a license with Global unless it first "finalize[d] an arrangement with [Defendants]." (Balasubramani, Decl., Ex D.) All of Aalacho's other communications with Global were further settlement discussions or demands to cease and desist infringements.

(c) The Communications on Which Defendants Rely Cannot Support an Unclean Hands Defense Because They Came After the Infringements

In order to show unclean hands based on representations from Aalacho there must be some showing that Aalacho caused the infringements at issue. *See* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (5th Cir. 1979) (denying defense of unclean hands because defendant was not "injured" by the plaintiff's

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inequitable conduct); Tempo Music, Inc. v. Myers, 407 F.2d 503, 509 (4th Cir. 1969) (allowing unclean hands defense (relying in part on ASCAP consent decree) because plaintiff failed to apprise defendants in advance of which songs were included in the ASCAP repertory). In this case, Aalacho did not–and could not have–influenced Global's decision to exploit the Track. Any allegedly misleading communications involving Aalacho only took place after Defendants and Global commenced exploitation of the Track. Defendants themselves admit that the relevant exchange between Global and Aalacho occurred subsequent to release of Toronto, the infringing album. (*See* Defs.' Opp. to Pl.'s Mot. for Summ. J., p. 19.) This fact alone precludes any bad faith defense on discussions between Aalacho and Global.

B. THE INFORMATION DEFENDANTS SEEK IS INADMISSIBLE UNDER FRE 408

Federal Rule of Evidence Rule 408 bars the admission of a compromise or an offer to compromise and "conduct or statements made in compromise negotiations." *See* FED R. EVID. 408. Courts apply this rule to prohibit evidence that a party's counsel agreed to a term or excused the violation when such statement is allegedly made in the context of a settlement discussion. *See*, *e.g.*, Gruner + Jahr Printing & Publ'g Co. v. Damian Music, 2001 U.S. Dist. LEXIS 12160 (S.D.N.Y. 2001) (barring admission of defendant's counsel's statement that her client "verbally agreed to pay a royalty of 20 [cents] per unit in the event your client placed two full page advertisements promoting the record" as inadmissible under Rule 408). Rule 408 also applies to statements made in settlement discussions with a non-party. *See*, *e.g.*, Branch v. Fidelity & Cas. Co., 783 F.2d 1289, 1294 (5th Cir. 1986) ("The spectre of a subsequent use to prejudice a separate and discrete claim is a disincentive which Rule 408 seeks to prevent.").

Defendants seek to rely on statements Aalacho's counsel made in the course of settlement discussions with Global. Indeed, one of the exhibits to Defendants' Motion is a statement attached to a proposed complaint–clearly indicating dispute and settlement status. As Defendants' own admissions make clear, by the time Aalacho entered into discussions with Global, both Defendants and Global had committed infringements, and

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Aalacho was pursuing both parties for infringement. Accordingly, these statements are inadmissible under Rule 408.

C. DEFENDANTS SHOULD NOT BE ALLOWED TO DEPOSE OPPOSING COUNSEL BECAUSE OF SUBSTANTIAL PUBLIC POLICY REASONS

Finally, policy strongly counsels against granting Defendants' request to compel the deposition of Aalacho's counsel in this, and other similar situations. A rule allowing the deposition would undoubtedly have a disruptive effect on a plaintiff litigating against multiple defendants, and on plaintiff's choice of counsel. Defendants seek to depose counsel for Aalacho about settlement discussions with a similarly situated infringer. If Defendants were allowed to take such a deposition, then copyright infringement plaintiffs would be forced to hire different lawyers to pursue each infringer. Otherwise, the plaintiffs risk their lawyers disclosing privileged information and becoming disqualified. This rule unreasonably wreaks havoc on a party's ability to select its own lawyer, a policy long recognized by the courts. *See* In re Cavanaugh, 306 F.3d 726, 734 (9th Cir. 2002) (noting that "[t]he choice of counsel has traditionally been left to the parties . . . . [s]electing a lawyer in whom a litigant has confidence is an important client prerogative).

D. DEFENDANTS SHOULD PAY AALACHO'S FEES FOR THIS MOTION

Rule 45 requires an attorney issuing a subpoena to take reasonable steps to avoid imposing an undue burden on the person subject to the subpoena. Rule 45 grants courts the power to impose this duty, and impose an appropriate sanction which may include attorney's fees. Fed. R. Civ. P. 45. *See also* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 814 (9th Cir. 2003) (noting that imposition of attorney's fees as sanction with respect to quashed subpoena is within the discretion of the district court); Am. Int'l Life Assur. Co. v. Vasquez, 2003 U.S. Dist. LEXIS 2680, No. 02 Civ. 141 (HB), 2003 WL 548736, at *3 (S.D.N.Y. Feb. 25, 2003) (concluding that award of attorney's fees was appropriate where the subpoena was improperly issued and the issuing party refused to withdraw it). In the present instance, Defendants represented to the Court that Aalacho's counsel is a necessary witness because Global is outside of subpoena power.

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Defendants' claim is belied by the fact that the day after filing their motion, Defendants issued a subpoena they successfully served on Global in the United States.

Defendants issued a subpoena on counsel and brought a motion to compel which is clearly a fishing expedition, and an attempt to prejudice Aalacho. Defendants should instead have sought this information from Global, rather than harass Aalacho by seeking to depose (and ultimately disqualify) Aalacho's counsel. Defendants failed to exercise any diligence in conducting discovery with respect to Global, and did not satisfy their duty of candor to the Court. Defendants' subpoena upon Aalacho's counsel amounts to bad faith. Accordingly, Defendants should have to reimburse Aalacho for its attorney's fees incurred in having to bring this motion to quash and respond to Defendants' motion to compel.

IV. CONCLUSION

Defendants' request to depose Aalacho's counsel is nothing more than a fishing expedition and transparent attempt to seek to disqualify Aalacho's counsel. Defendants fail to satisfy the heightened standard necessary to depose opposing trial counsel; Defendants fail to demonstrate their inability to obtain the sought after evidence elsewhere, and fail to demonstrate the admissibility of the sought after evidence. Aalacho respectfully requests the Court deny Defendants' Motion, quash the Subpoena, and grant Aalacho its reasonable attorney's fees in bringing the present motion.

DATED this 25th day of August, 2004.

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By: _____

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Attorneys for Plaintiff Aalacho Music, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of August, 2004, I caused the foregoing AALACHO MUSIC, LLC'S CROSS MOTION TO QUASH SUBPOENA AND OPPOSITION TO DEFENDANTS' MOTION TO COMPEL to be served via NOTICE OF ELECTRONIC FILING on the following parties:

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the forgoing is true and correct and that this declaration was executed on August 24, 2004, at Seattle, Washington.

Venkat Balasubramani

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