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SHARMAN NETWORKS LIMITED and
LEF INTERACTIVE PTY LTD

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

METRO-GOLDWYN-MAYER STUDIOS, INC., et al.

Plaintiffs,

v

GROKSTER, LTD., et al.,

Defendants

AND RELATED COUNTERCLAIMS

CASE NO. 01-08541 SVW (PJWx)

Case Assigned to
Honorable Stephen V. Wilson

CV 01-8541-SVW (PJWx)
CV 01-9923-SVW (PJWx)

EX PARTE APPLICATION FOR PROTECTIVE ORDER REGARDING DUPLICATIVE AND VEXATIOUS DISCOVERY PROCEEDINGS IN AUSTRALIA

DATE: February 6, 2004
TIME: 12:00 p.m.

TELEPHONIC HEARING
PLACE: Courtroom 827A,
Los Angeles, 312 Spring Street
DISCOVERY CUT-OFF: TBA
PRETRIAL: TBA

Please take notice that Defendants Sharman Networks Limited ("Sharman") and LEF Interactive PTY ("LEF") hereby seek protective orders from this Court in

order to abate and eliminate prejudice associated with parallel, duplicative and intrusive discovery tactics employed by agents and subsidiaries of Plaintiffs in Australia.

On Friday morning, Australian time, the Record Industry Plaintiffs

businesses of defendants Sharman and LEF Interactive. Relying upon a 23 page Australian court order, obtained ex parte, without any notice, the record company

Sharman headquarters as well as the homes of Sharman, LEF and Altnet executives, including Nikki Hemming, Phil Morle and Kevin Bermeister. By its terms, the order prevented any of the defendants from notifying anyone concerning these "raids" on their homes and businesses until after 6 pm U.S. time.

Under threats of imprisonment for noncompliance, this order was forcibly served in order to search and seize a long list of materials located on all of these premises, among others. A copy of the Order which was served is attached to the Declaration of Allan Morris. Computers were a principal target and hard drives were actually downloaded on the spot. In the process, ***plaintiffs seized and destroyed the hard drive of the computer at the home of Phil Morle, chief technology officer of Sharman.*** As a result, Mr. Morle and Sharman lost all of the vitally important information maintained on his computer.

As drafted by plaintiffs, the order allowed forcible removal of information

which was privileged, highly confidential, and copyright protected. In addition, literally tens of thousands of other documents were demanded for seizure, many of which was requested in the U.S. action and rejected by order of this court. All of this activity was authorized by the Australian court in reliance upon representations from plaintiffs which concealed highly relevant information, while indicating that the information they were seeking was about to be destroyed by the defendants or their employees.

At no time was the Australian court advised that a similar action in the Netherlands has now proceeded to a final, adverse judgment against the same plaintiffs. Nor was the court apprised of the fact that a second action is proceeding against the same defendants, making essentially the same accusations in the United States. As this Court is aware, summary judgment has been entered against the plaintiffs in this action. Yet, that fact was also omitted. Plus, no information was provided about the extensive effort has been expended by Sharman to facilitate discovery and by this court to monitor and equitably control discovery of all of the information which is common to all three of these actions.

Specifically, plaintiffs have made the same accusations in the actions in the Netherlands, here in the United States and now in Australia. All of the same propriety information was relevant to each of those actions. Sharman vigorously objected to plaintiff's attempt to exercise jurisdiction over its Vanuatu and Australian activities here in the United States. Sharman moved to dismiss the

Plaintiffs' complaint on the basis that the action should appropriately proceed in Australia. Nonetheless, choosing to exercise its economic superiority, Plaintiffs were able to force Sharman to expend a considerable portion of its resources to wage battle on foreign soil.

Now that summary judgment has been granted in favor of the other peer to peer defendants in this case and the Ninth Circuit oral argument did not appear to favor their interests, Plaintiffs have unleashed a third economic attack upon Sharman and LEF. It was no accident that these discovery orders in Australia were timed and targeted as they were. (The industry had alerted reporters to their activities who were awaiting the story while the subpoenas were being served.) A true and correct copy of but one of the many articles trumpeting their "raid" is attached at the end of Mr. Morris' declaration.

Plaintiffs were well aware that Sharman attorneys would need to meet with their clients, review thousands of documents and prepare to respond to the 30(b)(6) deposition notice, characterized by Plaintiffs' counsel Mr. Blum as the most detailed, technical and specific notice of this kind he had ever seen. Transparently, seizure of all of the documentation in the possession of Sharman was designed to literally shut down the business operations of Sharman. This would predictably prevent Sharman employees from meeting with their attorneys and locating (much less reviewing) all of the necessary materials for the depositions.

In addition to these tactical advantages, this duplicative and vexatious

approach to litigation was intended to inflict an additional economic hardship upon Sharman. Plaintiffs were well aware of the extensive nature of their discovery efforts in the action pending here in the United States. They were also aware of the limitations upon that discovery imposed by this Court, including, but not limited to, confidential documents. Yet, without even alerting the Australian Court to the complete familiarity of the U.S. Court with these issues and the ongoing protections extraordinary and highly intrusive order.

It is patent that the Australian Court was provided with none of the foregoing information. Instead, as in the application supporting the seizure order (attached to Mr. Morris' declaration), the Court was fed an (unchallenged) series of unfounded claims about the urgency of their demands and imminent perils which they would suffer if such an order did not issue. Most notably, Plaintiffs concealed the fact that Sharman has fully cooperated with every single stage of discovery here in the United States, including voluntarily expediting its responses to discovery. In the place of this information which should have been provided, the Court was told that in the "experience" of Australian counsel, actions "of this kind" require seizure orders to protect against destruction of the evidence.

Such representations are truly outrageous in view of the close relationship between the parties, and the completely overlapping nature of all three cases. This

Court clearly has the authority to stop such parallel, duplicative and vexatious discovery by the Plaintiffs and/or their subsidiaries and agents. Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 855-56 (9th Cir. 1981

Late afternoon yesterday, Sharman lawyers in the United States first learned about what was transpiring. Request was made for an *ex parte* hearing on a

occurring and its own lawyers were unable to take steps to protect it until after 6:00 p.m. our time. *Ex parte* notice was delivered to the Mitchell, Silverberg & Knupp firm representing the non-AOL Time Warner record company plaintiffs. A true and correct copy is attached to this application.

Sharman believes that these efforts to circumvent the orders of this Court, conduct parallel and vexatious discovery, disrupt the business of Sharman and LEF, destroy the computers of its key personnel and improperly take possession of materials which have either already been produced or which have been excluded from similar demands for production, should not be tolerated. Accordingly, Sharman and LEF hereby request orders:

. Enjoining Plaintiffs, by and through any of their subsidiary corporations or agents, from proceeding with any further discovery actions in Australia or, alternatively, staying any further prosecution of this action;

2. Excluding from this action any and all documents or other evidence

obtained as a result of these Australian discovery tactics;

3. Precluding any Plaintiff, subsidiary, employee or agent from using or communicating (directly or indirectly) to any U.S. attorneys, any of the information obtained as a result of these Australian discovery tactics; and

4. Staying all Australian depositions until Sharman can fully recover from the business interference and confusion occasioned by these strategically timed discovery efforts, and its personnel noticed for depositions in this case are available to prepare for depositions and attend the depositions.

DATED: February 6, 2004

HENNIGAN BENNETT & DORMAN LLP

WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P.

By 

David B. Casselman
Attorneys for Defendant,
SHARMAN NETWORKS LIMITED

PROOF OF SERVICE

STATE OF CALIFORNIA,)
SS
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 601 South Figueroa Street, Suite 3300, Los Angeles, California 90017.

On February 6, 2004, I served the foregoing document described as **EX PARTE APPLICATION FOR PROTECTIVE ORDER REGARDING DUPLICATIVE AND VEXATIOUS DISCOVERY PROCEEDINGS IN AUSTRALIA** on the interested parties in this action by e-mail and by placing the true copy thereof enclosed in sealed envelopes addressed as follows:

☒ By electronic transmission. I caused to be transmitted the documents described above to the individuals on the service list.

☒ By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of this bar of this court at whose direction the service was made.

Executed on February 6, 2004 at Los Angeles, California.

Lisa Spears

Larry Hadley

From: Casselman, David [DCasselman@wccplaw.com]
Sent: Thursday, February 05, 2004 5:03 PM
To: 'GMB@MSK.com'
Cc: Larry Hadley; Roderick G. Dorman
Subject: Urgent: Re Ex Parte Application in MGM litigation

Dear George

This correspondence is forwarded to determine your availability for an urgent telephone conference with Judge Walsh, relating to the activities of your clients in Australia. As per your conversation with Rod Dorman, you are aware of those efforts. Please include only those individuals who are entitled to participate.

We intend to proceed in the next hour or two, subject to the availability of the court. Please advise the individuals you wish to include. If we are not able to set something up for this evening, the court has set aside time to hear this matter tomorrow at noon. We will advise further upon word from the court. Please confirm your awareness of our request and your availability.

Very truly yours David Casselman

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***LEIBER, et al. v. GROKSTER, LTD., et al.*, U.S.D.C. No. CV 01-9923 SVW (PJWx)**

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