UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA MUSIC, ARISTA RECORDS LLC, ATLANTIC RECORDING CORPORATION, ELEKTRA ENTERTAINMENT GROUP INC., LA FACE RECORDS LLC, SONY MUSIC ENTERTAINMENT, UMG RECORDINGS, INC., WARNER BROS. RECORDS INC., AND ZOMBA RECORDING LLC, Plaintiffs, v. ESCAPE MEDIA GROUP INC., SAMUEL TARANTINO, JOSHUA GREENBERG, PAUL GELLER, BENJAMIN WESTERMANN-CLARK, JOHN ASHENDEN, CHANEL MUNEZERO, AND NIKOLA ARABADJIEV, Defendants.	11 CV 8407 (TPG)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS GELLER, WESTERMANN-CLARK, ASHENDEN, MUNEZERO AND ARABADJIEV'S MOTIONS TO DISMISS

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Defendants Paul Geller, Benjamin Westermann-Clark, Chanel Munezero, John Ashenden, and Nikola Arabadjiev (the "Defendants") submit this memorandum of law in support of their motions to dismiss the Amended Complaint, filed on December 15, 2011 (the "Complaint").

This is a case about Grooveshark.com ("Grooveshark"), a website through which users can upload music from their personal libraries, listen to music shared by other users, and organize their libraries and preferences. Plaintiffs – all of whom operate major music labels – claim that their rights to various copyrighted materials are being infringed by defendant Escape Media Group Inc. ("Escape"), the corporate entity behind Grooveshark.

In addition to Escape, Plaintiffs have chosen to name as defendants seven individual employees of the company, including Geller, Westermann-Clark, Munezero, and Arabadjiev (the "Jurisdiction Defendants") over whom jurisdiction is asserted based upon conclusory and factually inaccurate allegations. Plaintiffs' obvious gamesmanship in suing the Jurisdiction Defendants – each of whom is a salaried employee of limited financial means – is no substitute for the legal justification necessary to bring these individuals before this Court. Each of the Jurisdiction Defendants has submitted a sworn declaration attesting to the true nature of his contacts – more precisely, his lack of contacts – with the State of New York, making clear that Plaintiffs have no basis to assert jurisdiction. None of the Jurisdiction Defendants are New York residents. None owns real estate in New York. None has a New York bank account, nor owns any other assets or property in New York. None occupies a role at or possesses ownership in the company sufficient to impute the company's jurisdictional contacts to him. None has engaged in any alleged infringement directed toward New York. In contrast with the complete absence of a relationship between any Jurisdiction Defendant and this forum is the enormous burden that this lawsuit will impose on these individuals. Consequently, none of the Jurisdiction Defendants is properly before this Court under New York's long-arm statute or the Due Process clause of the U.S. Constitution. Accordingly, the Complaint should be dismissed in its entirety with respect to these individuals.

Furthermore, even if the Court could exercise jurisdiction over some or all of the Jurisdiction Defendants, Plaintiffs' vague and ambiguous allegations are insufficient to state a claim of copyright infringement. The complaint fails to identify which specific works were allegedly infringed; fails to establish each Plaintiff's ownership of the allegedly infringed works; and fails to identify which Defendant allegedly infringed each work and when the infringement took place. Absent these details, no infringement is properly alleged against any Defendant, and this Court should dismiss the Complaint in its entirety.

STATEMENT OF FACTS

The following section sets forth the facts relevant and necessary to the disposition of these motions. As noted, these facts are based upon the Complaint, a copy of which is annexed as Exhibit A to the Declaration of Marisa Sarig, dated February 28, 2012 ("Sarig Decl.") as well as supporting declarations from the Jurisdiction Defendants[1] relating solely to the jurisdictional issues.

The Parties

Plaintiffs are music companies that operate, to varying degrees, out of New York. Compl. at ¶¶ 8-16; 30. Plaintiffs allege that they are the owners or exclusive United States licensees of sound recordings that are available, without their authorization, through Defendant

[1] *See* Declaration of Paul Geller, dated February 27, 2012 ("Geller Decl."); Declaration of Benjamin Westermann-Clark, dated February 28, 2012 ("Westermann-Clark Decl."); Declaration of Chanel Munezero, dated February 27, 2012 ("Munezero Decl."); and Declaration of Nikola Arabadjiev, dated February 27, 2012 ("Arabadjiev Decl.").

Escape Media Group Inc.'s ("Escape") website www.grooveshark.com ("Grooveshark"). *Id.* at ¶¶ 32 & 39.

Defendant Paul Geller is a resident of Orlando, Florida. Geller Decl. at ¶ 1. He is responsible for handling government affairs on behalf of Escape. *Id.* at ¶ 2. Defendant Benjamin Westermann-Clark is a resident of Gainesville, Florida. Westermann-Clark Decl. at ¶ 1. He is no longer employed by Escape, but was formerly responsible for copywriting and editing communications for the company. *Id.* at ¶ 2. Defendant Chanel Munezero is a resident of Gainesville, Florida. Munezero Decl. at ¶ 1. He writes software code for Escape. *Id.* at ¶ 2. Defendant Nikola Arabadjiev is a resident of Gainesville, Florida. Arabadjiev Decl. at ¶ 1. He is responsible for quality assurance on behalf of Escape. *Id.* at ¶ 2. Defendant John Ashenden (who joins only in the motion to dismiss for failure to state a claim) is a resident of Brooklyn, New York. He is a senior vice-president, creative director and product design.

The Alleged Conduct

Much of the Complaint focuses on the alleged copyright infringement by Escape and unspecified "executives," "employees" and "senior officers" based on their purported uploading and distribution of songs without authorization from their copyright owners.[2] The Complaint also alleges, apparently based solely on an anonymous and unverified comment on a website, that Escape's executives directed its employees to participate in this infringement. The Complaint's allegations of specific conduct on the part of the Jurisdiction Defendants are as follows:[3]

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[2] As set forth in Section II below, the Defendants join the motion to dismiss filed concurrently by Defendants Escape, Samuel Tarantino and Joshua Greenberg.

[3] The Complaint misleadingly labels Geller as one of the "Executive Defendants", Compl. at

- "Geller…[has] personally uploaded thousands of infringing copies of copyrighted sound recordings including hundreds of infringing copies of Plaintiffs' copyrighted sound recordings to the Grooveshark website." Compl. at ¶ 21.

- "In addition, these Executive Defendants [including Geller] have directed the uploading of tens of thousands of additional recordings including thousands of Plaintiffs' recordings, have exercised control over the infringing activities described herein and have personally benefitted from this infringing activity through their ownership interest in the company." *Id.*

- "… Westermann-Clark, Munezero and Arabadjiev…have engaged in systematic and widespread illegal uploading of Plaintiffs' copyrighted content to the Grooveshark website. Acting pursuant to the direction of Escape and the Executive Defendants, the Employee Defendants have copied tens of thousands of sound recordings, including thousands of sound recordings belonging to Plaintiffs, and uploaded them to the Grooveshark website." *Id.* at ¶ 26.

- "[R]ecords of user uploads maintained by Escape demonstrate that the Executive and Employee Defendants, together with other Escape employees, have uploaded more than 100,000 sound recordings to the Grooveshark website…." *Id.* at ¶ 38.

- "The Employee Defendants have engaged in [the infringing activity] at the direction, for the benefit, and under the control of Escape and the Executive Defendants." *Id.* at ¶ 39.

Additionally, the Complaint, *id.* at ¶ 38, includes a table attributing "Min. Number of Uploads" as follows:

  - Paul Geller – 3,453
  - Benjamin Westermann-Clark – 4,654
  - John Ashenden – 9,195
  - Chanel Munezero – 20,756
  - Nikola Arabadjiev – 40,243

This table does not purport to be limited to uploads of copyrighted works owned or controlled by Plaintiffs.

¶ 21, while labeling Westermann-Clark, Ashenden, Munezero and Arabadjiev as "Employee Defendants," *id.* at ¶ 26. The Jurisdiction Defendants use these labels in this brief only to avoid any confusion and expressly object to any resulting substantive import from their use.

The allegations in the Complaint are vague and conclusory. Among other things, the Complaint does not allege where such "uploads" took place, which Defendant uploaded which songs, which, if any, Plaintiff owns the copyright to any specific allegedly uploaded song, and whether the copyright in all the works allegedly infringed have been registered.

ARGUMENT

This Complaint should be dismissed under Rule 12(b)(2) of the Federal Rules of Civil Procedure ("FRCP") with respect to the Jurisdiction Defendants because the Court cannot exercise personal jurisdiction over any of them consistent with the requirements of New York's long-arm statute and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Furthermore, the Complaint fails to state a cognizable claim of copyright infringement and therefore must be dismissed pursuant to FRCP Rule 12(b)(6).

I. THIS COURT CANNOT EXERCISE JURISDICTION OVER ANY OF THE JURISDICTION DEFENDANTS

a. The Legal Standard

The Court must first analyze whether personal jurisdiction over each defendant comports with the requirements of New York law. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007) (citations omitted). If jurisdiction is found to be proper, the Court must then consider whether the exercise of jurisdiction is consistent with due process under the Fourteenth Amendment. *Id.*

Section 302 of the New York Civil Procedure Laws and Rules ("CPLR") confers specific jurisdiction over a nondomiciliary who[4]:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

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[4] The Complaint does not allege jurisdiction over any of the Jurisdiction Defendants under CPLR § 301, New York's statute providing for general jurisdiction.

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

CPLR § 302(a). In order to invoke jurisdiction under Section 302, the cause of action alleged must arise from one of the four enumerated categories of activities. *Id.*

A complaint must allege with specificity each defendant's involvement in the conduct purporting to establish jurisdiction. *Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 324 (S.D.N.Y. 1998). Allegations consisting merely of "broad conclusory statements [that] are but rote restatements of the relevant statutory language...do not constitute a prima facie showing of jurisdiction pursuant to C.P.L.R. § 302(a)." *Capitol Records, L.L.C. v SeeqPod, Inc.*, 09 CIV. 01584 (LTS)(KNF), 2010 WL 481228, at *4 (S.D.N.Y. Feb. 1, 2010) (*citing Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185 (2d Cir. 1998) (explaining that "conclusory statements... without any supporting facts...[that] are but a restatement of ... the factors to be considered under the [applicable] standards" are insufficient and that courts "are not bound to accept as true a legal conclusion couched as a factual allegation")). Moreover, although the pleadings and supporting affidavits should be construed in the light most favorable to the plaintiff, unsupported allegations can be refuted by "direct, highly specific, testimonial evidence regarding a fact essential to jurisdiction" where plaintiffs fail to counter such evidence. *Schenker v. Assicurazoni Generali S.p.A., Consol.*, No. 98 Civ. 9186(MBM), 2002 WL 1560788, at *3 (S.D.N.Y. Jul. 15, 2002).

The deficiencies in the Complaint combined with the Jurisdiction Defendants' sworn declarations make clear that the exercise of personal jurisdiction here would neither comport with New York law nor due process under the Fourteenth Amendment. Because the Complaint alleges different bases of jurisdiction over the "Employee Defendants" (which include Westermann-Clark, Munezero, and Arabadjiev) than the so-called "Executive Defendants" (which include Geller), the allegations with respect to each will be analyzed separately.

b. There Is No Basis For Personal Jurisdiction Over Westermann-Clark, Munezero, and Arabadjiev

This Court has no personal jurisdiction over Westermann-Clark, Munezero, and Arabadjiev (the "Employee Defendants"). Plaintiffs assert jurisdiction under CPLR § 302(a)(3) "because *inter alia* (i) these defendants have committed tortious acts outside the State of New York that have caused damage to Plaintiffs inside the State of New York and (ii) these defendants expect or reasonably should have expected their actions to have consequences in New York, and they derive substantial revenue from interstate commerce through their employment at Escape." Compl. at ¶ 29. Although the Employee Defendants do not concede that they have committed tortious acts outside of the state that have caused Plaintiffs injury, the issue need not be resolved because the Complaint is devoid of the requisite allegations that any of the Employee Defendants expects or should reasonably expect his acts to have New York consequences *and* derives substantial revenue from interstate or international commerce. *See Virgin Enters. Ltd. v. Virgin Eyes LAC*, 08 Civ. 8564 (LAP), 2009 WL 3241529, at *5 (S.D.N.Y. Sept. 30, 2009) (because each element of § 302(a)(3) is "essential", the absence of one is dispositive) (citations omitted).

i. The Complaint Fails To Allege That Any Employee Defendant Expected Or Reasonably Should Have Expected His Actions To Have Consequences In New York

In order to satisfy the expectation of New York consequences element of CPLR 302(a)(3)(ii), a defendant must be alleged to have made "a discernable effort ... to serve, directly or indirectly, a market in the forum state." *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (defendant's awareness of plaintiff's presence in New York is insufficient to show its expectation of New York consequences) *aff'd*, 126 F.3d 25 (2d Cir. 1997). Here, the Complaint makes no specific connection between each of the Employee Defendants and New York sufficient to satisfy this element of § 302(a)(3)(ii), instead alleging in the most conclusory fashion that "these defendants expect or should reasonably have expected their actions to have consequences in New York…." Compl. at ¶ 29. The Second Circuit has held that such allegations are insufficient as a matter of law. *See Jazini,* 148 F.3d at 185-6.

ii. The Complaint Fails To Allege That Any Employee Defendant Derives Substantial Revenue From Interstate Commerce

The Complaint also does not sufficiently allege that any Employee Defendant derives substantial revenue from interstate commerce, as required by § 302(a)(3)(ii). Its only attempt to satisfy this requirement is an allegation suggesting that Escape's alleged interstate revenue should be imputed to the Employee Defendants by virtue of their employment at the company. Compl. at ¶ 29. Courts have consistently rejected this argument absent a showing that the employee is a major shareholder. *See Pincione v D'Alfonso,* No. 10 Civ. 3618 (PAC), 2011 WL 4089885, at *10 (S.D.N.Y. Sept. 13, 2011) (even "if a corporation derives substantial revenue from interstate or international commerce, that revenue cannot be imputed to the company's non-shareholding officers.") *citing Siegel v. Holson Co.*, 768 F. Supp. 444, 446 (S.D.N.Y. 1991); *Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 360 (S.D.N.Y. 2007) (a corporation's revenue can only be imputed to major shareholders for jurisdictional purposes).

None of the Employee Defendants could possibly be considered a "major shareholder" of Escape. In fact, with one exception, none owns *any* shares in Escape: although each has been offered stock options, only Arabadjiev has exercised such options. Westermann-Clark Decl. ¶ 3; Munezero Decl. ¶ 3 and Arabadjiev Decl. ¶ 3. Arabadjiev's ownership, however, amounts to less than .0003 of one percent of Escape's outstanding shares, Arabadjiev Decl. at ¶ 3, and the options offered to or owned by Westermann-Clark and Munezero, if exercised, would amount to a similarly miniscule percentage of ownership, Westermann-Clark Decl. at ¶ 3 (less than .003%) and Munezero Decl. at ¶ 3 (less than .0065%). *See, e.g., KDDI America, Inc. v. Electronic & Unit Recorder Data Center, Inc.*, No. 0116005/2006 (RBL), 2007 WL 2815350, at *1 (N.Y. Sup. Ct. Aug. 15, 2007) (finding no jurisdiction over officer who indirectly owns "an infinitesimal percentage of [the corporate defendant's] stock"). Furthermore, each Employee Defendant receives only a salary from Escape, no part of which is tied to the revenues, profits or performance of the company. Westermann-Clark Decl. ¶ 3; Munezero Decl. ¶ 3 and Arabadjiev Decl. ¶ 3.

iii. The Complaint Fails To Allege Any Other Basis For Jurisdiction Over The Employee Defendants

Although the Complaint asserts jurisdiction over the Employee Defendants solely under CPLR § 302(a)(3), no other basis of personal jurisdiction could be satisfied here. The Complaint fails to allege that any of the Employee Defendants "transact[ed] any business within [New York] or contract[ed] anywhere to supply goods or services in [NewYork]" out of which the alleged infringement arose, as required under CPLR § 302(a)(1). In order to demonstrate that a nondomiciliary "transacts business" under this subsection, a plaintiff must allege that the defendant "purposefully avails himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of the state's laws." *Girl Scouts of U.S.A. v Steir*, 102 F. App'x 217, 219 (2d Cir. 2004) (holding that the defendants' website, which was directed at the entire country, did not establish the defendants' intent to target New York specifically or to avail themselves of the benefits of New York law). Moreover, there must be a "substantial relationship between these business transactions and the allegations against defendant in the complaint." *Flamel Tech. v. Soula*, 847 N.Y.S.2d 901, at *2 (N.Y. Sup. Ct. 2007) (citations omitted).

The Complaint makes no specific allegations as to *any* business transacted in New York by *any* of the Employee Defendants, let alone activities that would constitute "purposeful availment" of New York law that are related to the alleged copyright infringement. *See, e.g., SeeqPod, Inc.*, 09 CIV. 01584 (LTS)(KNF), 2010 WL 481228, at *4 (denying jurisdiction under § 302(a)(1) where plaintiffs failed to allege specific facts as to any transactions made in New York by the individual defendants). Although Westermann-Clark has visited New York briefly while employed by Escape, his attendance at a music festival and meetings with public relations firms had nothing to do with the alleged infringement. Westermann-Clark Decl. at ¶ 4. *See, e.g., Capitol Records, Inc. v MP3tunes, LLC*, 07 CIV. 9931 (WHP), 2008 WL 4450259, at *4 (S.D.N.Y. Sept. 29, 2008) (declining to extend long-arm jurisdiction under § 302(a)(1) over company's founder and CEO absent "evidence that [his] only activities in New York-a trip for a meeting with vTunes and a trip to speak at an industry forum-relate to Plaintiffs' claims.") Munezero's and Arabadjiev's sole "contacts" with New York – merely passing through while on vacation – do not even come close to satisfying the "transacting business" requirement of § 302(a)(1). *See* Arabadjiev Decl. at ¶ 4; Munezero Decl. at ¶ 4.

Similarly, the Complaint also cannot satisfy the requirements of CPLR § 302(a)(2), which permits jurisdiction over a defendant who commits a tortious act within the state of New York if the plaintiff's cause of action arises from that act. As a threshold matter, Plaintiffs have not alleged that any of the Employee Defendants were physically present in New York when they purportedly uploaded the infringing material. The absence of such an allegation is, in and of itself, sufficient to defeat jurisdiction under CPLR § 302(a)(2). *SeeqPod, Inc.*, 09 CIV. 01584(LTS)(KNF), 2010 WL 481228, at *5 (jurisdiction under § 302(a)(2) is proper only when the defendant was physically present in the state when the act was committed) *citing Bensusan Rest. Corp. v. King*, 126 F.3d 25, 28-9 (2d Cir. 1997) (website did not establish physical presence in New York). Again, for the reasons stated above, each Employee Defendant's brief presence in New York had nothing to do with the alleged infringement. Finally, the Complaint does not allege that any Employee Defendant owns real estate in New York, as required by § 302(a)(4). *See* Westermann-Clark Decl. ¶ 6; Munezero Decl. ¶ 6 and Arabadjiev Decl. ¶ 6.

Accordingly, Plaintiff cannot establish personal jurisdiction under CPLR § 302 over any Employee Defendant.

c. There Is No Basis For Personal Jurisdiction Over Geller

The Complaint asserts personal jurisdiction over Geller (named as one of the so-called "Executive Defendants") based upon two theories: (i) Geller is subject to personal jurisdiction because he lives and works in and directs the infringing activity from New York and (ii) Escape's contacts with New York should be imputed to Geller. Compl. at ¶ 28. Both arguments must fail.

i. Geller Does Not Live Or Work In New York

First, the Complaint falsely alleges that the Court "has personal jurisdiction over Paul Geller because he lives and works in New York and directs infringing activities from within the state." Compl. at ¶ 28. Geller does not live and work in New York: he lives and works in Orlando, Florida. Geller Decl. at ¶¶ 1, 4. Therefore, this basis of personal jurisdiction is improper.

ii. Escape Cannot Be Viewed As Geller's Agent In Order To Impute Its Alleged Contacts With New York To Him

Second, Escape's alleged contacts with New York cannot not be attributed to Geller. In order to invoke this agency theory of jurisdiction, Plaintiffs must allege that "(1) that the corporation engaged in purposeful activities in New York in relation to the transaction; (2) that the corporation's activities were performed for the benefit of the individual defendant; (3) that the corporation's activities were performed with the knowledge and consent of the individual defendant; and (4) that the individual defendant exercised some control over the corporation." *Anna Sui Corp. v. Forever 21, Inc.*, 07 CIV. 3235 (TPG), 2008 WL 4386747, at *2 (S.D.N.Y. Sept. 25, 2008) (*citing Beatie & Osborn LLP v. Patriot Scientific Corp.*, 431 F. Supp. 2d 367, 389 (S.D.N.Y. 2006)). Moreover, "[a]s a necessary part of this inquiry, a plaintiff must demonstrate that the out-of-state corporate officers were primary actor[s] in the transaction in New York that gave rise to the litigation, and not merely some corporate employee[s] ... who played no part in it." *Arma v. Buyseasons, Inc.*, 591 F. Supp. 2d 637, 647 (S.D.N.Y. 2008) (citations and quotation marks omitted). Geller's sworn testimony makes clear that Escape cannot be considered his "agent" for jurisdictional purposes, notwithstanding the ambiguous and false allegations contained in the Complaint.

Regardless of Escape's alleged activities in New York, Plaintiffs have not alleged (nor can they) that Geller exercised control over the alleged infringement and that he benefits from such activity. The Complaint alleges that "[e]ach of the Executive Defendants [including Geller] exercises direction and control over, and benefits from Escape's infringing activities as alleged herein." Compl. at ¶ 28. Such conclusory allegations of "the Executive Defendants[']" control over the company's activities are insufficient to establish the agency relationship between Escape and Geller individually. *See, e.g., MP3tunes, LLC,* 07 CIV. 9931 (WHP), 2008 WL 4450259, at

*5 (defendant's position as chief operating officer, director and shareholder held insufficient to establish his control over the infringing activities)[5]; *Arma*, 591 F. Supp. 2d at 647-48 (declining to attribute company's contacts with New York to its CEO where the allegations fail to allege his control over activities related to plaintiff's claims); *Karabu Corp.*, 16 F. Supp. 2d at 324 ("control" cannot be established merely based upon the defendant's title or position or conclusory allegations that it controls the company).

In fact, Geller *does not* exercise direction and control over the alleged infringing activities: as the senior vice-president of external affairs, Geller's supervisory authority is limited to the government affairs department, which has nothing to do with uploading, streaming or other forms of infringement alleged in the Complaint. Geller Decl. at ¶ 2. *Compare with Anna Sui Corp.*, 07 CIV. 3235 (TPG), 2008 WL 4386747 at *3 (attributing corporate contacts with New York to individual defendants who are primary owners and responsible for the company's management and operation). Nor does Geller "benefit" from Escape's allegedly infringing activities: Geller has no ownership interest in Escape nor is any part of his compensation tied to the company's revenues, profits or performance. *Id.* at ¶ 3. For the reasons set forth supra in Section I(b)(ii), Geller cannot be shown to share in the company's revenues.

The Complaint alleges that "[s]everal of the Executive Defendants are founders of Escape's operations and have personally participated in developing the infringing features of the Grooveshark website and business." Compl. at ¶ 28. Assuming arguendo that this vague description refers to Geller, it is false. In fact, Geller began working at Escape in February 2010,

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[5] In a subsequent decision, the court in *MP3tunes, LLC* granted plaintiff's motion to rejoin the defendant in light of new evidence regarding his control over the infringing activities. *See Capitol Records, Inc. v MP3tunes, LLC*, 93 U.S.P.Q.2d 1282, 1288 -90 (S.D.N.Y. 2009). Nevertheless, the court's analysis of the defendant's relationship to the company as it appeared as of the original decision is instructive.

well after the Grooveshark website existed in its current form. Geller Decl. at ¶ 2. Moreover, the Complaint misapprehends Geller's role at the company: as the government affairs spokesperson, Geller's responsibilities focus entirely on the company's communications and lobbying efforts, not product development or programming. *Id.* at ¶ 2.

Finally, the Complaint alleges that "each of the Executive Defendants has entered New York repeatedly for purposes of transacting business on behalf of Escape." Compl. at ¶ 28. Although Geller has traveled to New York on behalf of the company, the cause of action alleged here – infringement based on the massive uploading of songs – did not arise from the limited business he transacted here. Geller Decl. at ¶ 4. Geller's visits to New York involved both business and personal matters. *Id.* With respect to the business activities, Geller traveled to New York to meet with potential partners and clients to generate interest in the company's data on music consumption, to coordinate press inquiries, to interview prospective public relations firms, to meet with candidates for a position in Escape's public relations department, to participate in music industry events and other speaking engagements and to meet with the company's attorneys regarding a state court litigation in New York. *Id.* Significantly, none of these activities involved the uploading and distribution of the allegedly infringing material. *Id.*

iii. The Complaint Fails To Allege Any Other Basis For Jurisdiction Over Geller

Geller is simply not within the Court's jurisdiction under any theory. Geller's limited contacts with New York did not give rise to the copyright infringement alleged here, as required to satisfy long arm jurisdiction under CPLR § 302(a)(1), *see MP3tunes, LLC,* 07 CIV. 9931 (WHP), 2008 WL 4450259, at*4 (declining to find that defendant's visits to New York constituted transacting business where no evidence that the visits related to plaintiffs' claims). Nor did the alleged infringement occur when he was physically present in New York, as required to satisfy CPLR § 302(a)(2). *See Bensusan Rest. Corp.*, 126 F.3d at 28-9. In order to qualify for jurisdiction under CPLR § 302(a)(3), the Complaint must allege that Geller expected or reasonably should have expected his out of state infringement to have consequences in New York and that he derive substantial revenue from interstate commerce – the Complaint contains no such allegations as to the former, and as stated supra at Section I(b)(ii), Geller's lack of ownership in Escape precludes any imputation of the company's revenue to him. Finally, Geller owns no real estate in New York, eliminating § 302(a)(4) as a basis of jurisdiction. Geller Decl. at ¶ 6.

d. Exercise of Jurisdiction Over the Jurisdiction Defendants Would Violate Due Process

Even if the alleged conduct satisfied New York's long-arm jurisdiction requirements, the exercise of jurisdiction here would run afoul of the Due Process clause, which requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citation omitted). *See also Lechner v. Marco-Domo Internationales Interieur GMBH*, No. 03 Civ. 5664(JGK), 2005 WL 612814, at *3 (S.D.N.Y. Mar. 14, 2005) (citations omitted) (considering, under Due Process, whether the defendant has sufficient contacts with the forum state and whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice under the circumstances of the particular case.") As noted by the *Karabu* court, "Not only would it be terribly unfair to hail out-of-state corporate officers into a New York court without any good faith basis for doing so, it would also raise grave due process concerns." *Karabu Corp.*, 16 F. Supp. 2d at 325 (S.D.N.Y. 1998). "Creating a site, like placing a product into the stream of commerce, may be felt nationwide-or even worldwide-but, without more, it is not an act purposefully directed toward the forum state."

Bensusan Rest. Corp., 937 F. Supp. at 301 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112, (1992)). The district court in *Bensusan* held that absent any presence in New York, the defendant could not be subject to jurisdiction consistent with due process based merely on a website that can be accessed worldwide. *Id.*

There is no connection between any of the Jurisdiction Defendants, the alleged infringement and New York. The Jurisdiction Defendants are four salaried employees living and working in Florida. The Complaint is bereft of any allegations suggesting that their purported misconduct was directed toward the state of New York sufficient to satisfy due process. Moreover, the exercise of jurisdiction here would impose a substantial burden on this Court as well as on Geller, Westermann-Clark, Munezero and Arabadjiev, all of whom are Florida residents who have no legally significant connection to New York. *See Lechner*, No. 03 Civ. 5664(JGK), 2005 WL 612814, at *3 (court should consider, *inter alia*, the burden that the exercise of jurisdiction will impose on the defendants along with the forum's and the parties' interests in the dispute). In light of these factors, this Court should not exercise personal jurisdiction over any of the Jurisdiction Defendants.

II. THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

The Defendants join with Section II of the memorandum of law in support of the motion of Defendants Escape Media Group Inc., Samuel Tarantino, and Joshua Greenberg to Dismiss Plaintiff's Amended Complaint, dated February 29, 2011, (the "Escape Motion"), which seeks dismissal under Rule 12(b)(6) for failure to state a cognizable copyright infringement claim. As the arguments raised in that section of the Escape Motion apply to Defendants with equal force, Defendants will not burden the Court by repeating them, but instead incorporate such arguments herein by reference. In order to place in the issue in the proper context of the present motion, Defendants do note the following by way of summary only.

It is well-settled that a claim for copyright infringement must allege "1) which specific original works are the subject of the copyright claim, 2) that plaintiff owns the copyrights in those works, 3) that the copyrights have been registered in accordance with the statute, and 4) by what acts during what time the defendant infringed the copyright." *Jacobs v. Carnival Corp.*, 06 Civ. 0606 (DAB), 2009 WL 856637, at *4 (S.D.N.Y. Mar. 25, 2009); *Plunket v. Doyle*, 99 Civ. 11006 (KMW), 2001 WL 175252, at *4 (S.D.N.Y. Feb. 22, 2001). While FRCP Rule 8 does not prohibit collective allegations against multiple defendants, it does require that the allegations be "sufficient to put *each* defendant on notice of what they allegedly did or did not do." *Dunlop v. City of New York*, 06 Civ. 0433 (RJS), 2008 WL 1970002, at *7 (S.D.N.Y. May 6, 2008) (citations omitted) (emphasis added).

The Complaint gives the Defendants no guidance as to the universe of copyrighted works allegedly infringed and whether Plaintiffs are even entitled to bring suit based on the claimed infringement. Indeed, the Complaint fails to satisfy *any*, let alone all, of the elements necessary to plead a copyright infringement claim. With respect to the first element, the Complaint makes no attempt to identify which of Plaintiffs' works are the subjects of the claim, instead appending to the Complaint self-styled "representative" lists of *certain* of the works that they claim were infringed. Compl. Exs. G, H & I. Plaintiffs concede that these lists do not identify all of the works at issue, and it is well-settled that allegations of "nebulous multiple [works]," or vague averments that a defendant infringed "any of" a number of works, are insufficient to plead a sustainable cause of action for infringement. *See DiMaggio v. Int'l Sports Ltd.*, 97 Civ. 7767 (HB), 1998 WL 549690, at *2 (S.D.N.Y. Aug. 31, 1998); *Cole v. Allen*, 3 F.R.D. 236, 237 (S.D.N.Y. 1942).

With respect to the second and third elements of a claim for infringement, *i.e.*, plaintiffs' alleged ownership and registration of the works at issue, the Complaint alleges only that Plaintiffs (collectively as a group and with no differentiation as to any particular work) "are the owners or exclusive United States licensees of sounding recordings containing the performances of some of the most popular and successful recording artists of all time…," providing registration numbers only for *some* of works at issue, *i.e.*, those identified on their admittedly incomplete "representative" lists. Compl. at ¶ 32 & Exs. G, H & I. Having failed to identify each of the sound recordings that they allege were infringed by Defendants, Plaintiffs have, by definition, failed to allege either ownership or registration of the copyrights in all of the works that form the predicate of their infringement claim.

Even more importantly, the Complaint fails to apprise each individual Defendant "by what acts and during what time" that defendant allegedly infringed each Plaintiff's copyrights, as required by the fourth element of infringement claim. *Jacobs*, 2009 WL 856637, at *4. The Complaint alleges generally that the Executive Defendants personally uploaded "thousands of infringing copies of copyrighted sound recordings including hundreds of infringing copies of Plaintiffs' copyrighted sound recordings" and the Executive Defendants directed the uploading of and the Employee Defendants uploaded "tens of thousands of sound recordings, including thousands of sound recordings belonging to Plaintiffs…" Compl. at ¶¶ 21 & 26. *See also id.* at ¶ 39 ("The recordings uploaded…include thousands of recordings owned by Plaintiffs….") Plainly, these sort of sweeping allegations are insufficient to provide each Defendant with sufficient notice of what acts of infringement he allegedly participated in, and when.

The only allegation that attempts to specify conduct by any individual Defendant is a a table entitled "Min. No. of Uploads," which, apparently, purports to show the gross number of sound recordings allegedly uploaded by each Defendant. *Id.* at ¶ 38. This table does nothing to cure the fatal deficiencies of the Complaint. It is unclear to what this table refers and whether it includes works other than those owned by Plaintiffs. Moreover, it fails to identify which recordings owned or registered by Plaintiffs were allegedly uploaded by each Defendant or when such uploads took place as required to state a claim of infringement. *See Jacobs*, 2009 WL 856637, at *4.

Stated most succinctly, ignoring Rule 8's admonition that each defendant must be placed on notice of what he "allegedly did or did not do," *Dunlop*, 2008 WL 1970002, at *7, the Complaint attempts to sweep all Defendants, without differentiation, into broad allegations of infringement, without even identifying the specific works that were allegedly unlawfully uploaded by each individual Defendant. Such deficiencies make it impossible for any Defendant to properly defend the claims ostensibly asserted against him, *i.e.*, he cannot determine from the Complaint which works he allegedly infringed; whether his alleged uploading of a particular recording was authorized by the copyright holder; and whether the alleged uploading took place within the statutory limitations period.

For the foregoing reasons, and for the reasons stated in the corresponding section of the Escape Motion, Plaintiffs have failed to sufficiently allege a cognizable claim of copyright infringement and that, as a result, the Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Jurisdiction Defendants' motion to dismiss the complaint for lack of personal jurisdiction be granted in its entirety and all of the Defendants' motion to dismiss for failure to state a claim be granted in its entirety.

Dated: New York, New York
February 29, 2012

By: ____________________________

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