

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA MUSIC, ARISTA RECORDS
LLC, ATLANTIC RECORDING
CORPORATION, ELEKTRA
ENTERTAINMENT GROUP INC.,
LAFACE 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 Civ. 8407 (TPG)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO
DISMISS OF DEFENDANTS JOSHUA GREENBERG AND PAUL GELLER**

TABLE OF CONTENTS

INTRODUCTION 4

STATEMENT OF FACTS 5

ARGUMENT..... 8

I. THE CONDUCT OF GREENBERG AND GELLER AND THEIR CONTROL OVER THE CONDUCT OF ESCAPE’S EMPLOYEES GIVES RISE TO PERSONAL JURISDICTION UNDER NEW YORK’S LONG-ARM STATUTE. 8

 A. Greenberg and Geller Have Committed Multiple Tortious Acts Outside the State That Have Caused Injury Inside the State. 9

 B. Greenberg and Geller Should Have Expected Their Acts to Have Consequences in New York. 10

 1. Greenberg..... 11

 2. Geller..... 13

 C. Greenberg and Geller Have Derived Substantial Revenue from Interstate Commerce. 15

 1. Greenberg..... 15

 2. Geller..... 16

II. GREENBERG IS ALSO SUBJECT TO JURISDICTION BECAUSE HE DIRECTED ESCAPE’S INFRINGING ACTIVITY IN NEW YORK..... 18

III. THE EXERCISE OF JURISDICTION OVER GREENBERG AND GELLER COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS..... 20

IV. RENEWED MOTION FOR JURISDICTIONAL DISCOVERY 25

CONCLUSION..... 25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alpha Int’l, Inc. v. T-Reproductions, Inc.</i> , No. 02 Civ. 9586 (SAS), 2003 U.S. Dist. LEXIS (S.D.N.Y. July 1, 2003).....	15
<i>Armco Inc. v. North Atl. Ins. Co.</i> , 68 F. Supp. 2d 330 (S.D.N.Y. 1999).....	14
<i>Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez</i> , 305 F.3d 120 (2d Cir. 2002).....	17, 19, 20, 21
<i>Capitol Records, Inc. v. MP3Tunes</i> , 2009 U.S. Dist. LEXIS 96521, 07 Civ. 9931 (WHP), (S.D.N.Y. Oct. 16, 2009).....	17
<i>Capitol Records, Inc. v. MP3Tunes, LLC</i> , 2008 U.S. Dist. LEXIS 75329, 07 Civ. 9931 (WHP), (S.D.N.Y. Sept. 29, 2008)	15, 16
<i>Capitol Records, LLC v. VideoEgg Inc.</i> , 611 F. Supp. 2d 349 (S.D.N.Y. 2009).....	8, 11, 20, 21
<i>Citigroup Inc. v. City Holding Co.</i> , 97 F. Supp. 2d 549 (S.D.N.Y. 2000).....	9
<i>Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.</i> , 106 F.3d 284 (9th Cir. 1997)	18
<i>Energy Brands, Inc. v. Spiritual Brands, Inc.</i> , 571 F. Supp. 2d 458 (S.D.N.Y. 2008).....	passim
<i>Fantis Foods, Inc. v. Standard Importing Co.</i> , 49 N.Y.2d 317 (N.Y. 1980)	7
<i>Ingraham v. Carroll</i> , 90 N.Y.2d 592 (N.Y. 1997)	12
<i>Karabu Corp. v. Gitner</i> , 16 F. Supp. 2d 319 (S.D.N.Y. 1998).....	15
<i>LaMarca v. Pak-Mor Mfg. Co.</i> , 95 N.Y.2d 210 (N.Y. 2000)	5, 7, 12
<i>Lechner v. Marco-Domo Int’l Interieur GmbH</i> , 2005 U.S. Dist. LEXIS 4022, No. 03 Civ. 5664 (JGK), (S.D.N.Y. Mar. 14, 2005).....	6
<i>Lehigh Valley Indus., Inc. v. Birenbaum</i> , 389 F. Supp. 798 (S.D.N.Y. 1975).....	13

Light v. Taylor,
 2007 U.S. Dist. LEXIS 5855, 05 Civ. 5003 (WHP), (S.D.N.Y. Jan. 29, 2007)12

Luft v. Crown Publishers, Inc.,
 772 F. Supp. 1378 (S.D.N.Y. 1991).....6

M. Shanken Commc’ns, Inc. v. Cigar500.Com,
 2008 U.S. Dist. LEXIS 51997, 07 Civ. 7371 (JGK), (S.D.N.Y. July 7, 2008)18, 21

McGraw-Hill Cos., Inc. v. Ingenium Techs. Corp.,
 375 F. Supp. 2d 252 (S.D.N.Y. 2005).....9, 11

Penguin Grp. (USA) Inc. v. Am. Buddha,
 16 N.Y.3d 295 (N.Y. 2011)7

Pincione v. D’Alfonso,
 2011 U.S. Dist. LEXIS 103944, 10 Civ. 3618 (PAC), (S.D.N.Y. Sept. 13, 2011).....12, 14

Plastwood Corp. v. Robinson,
 2004 U.S. Dist. LEXIS 17403, 04 Cv. 3214 (BSJ), (S.D.N.Y. Aug. 30, 2004)5

Siegel v. Holson Co.,
 768 F. Supp. 444 (S.D.N.Y. 1991).....14

Sygma Photo News, Inc. v. High Soc’y Magazine, Inc.,
 778 F.2d 89 (2d Cir. 1985).....6

Whitaker v. Fresno Telsat, Inc.,
 87 F. Supp. 2d 227 (S.D.N.Y. 1999).....21

STATUTES

17 U.S.C. §§ 106 and 5017

C.P.L.R. § 302..... passim

INTRODUCTION

Joshua Greenberg is a founder, executive officer and major shareholder of Escape Media Group Inc. (“Escape”). He is also the architect of the website that Escape owns and operates www.grooveshark.com (the “Grooveshark website” or “Grooveshark”); a pirate music site that boasts that it makes every song in the world available free to anyone at any time. In these roles, Greenberg personally participated in the decision to amass Grooveshark’s extensive music collection by asking its users and employees to upload music to Grooveshark’s servers and the decision to then copy these recordings and make them available to anyone with an Internet connection without authorization from the owners of the copyrights to those recordings. The scope of the copyright infringement that Greenberg has directed is staggering. Grooveshark describes itself as “the world’s largest on-demand music streaming and discovery service” and boasts having 30 million unique visitors per month. *See* Declaration of Gianni P. Servodidio (“Servodidio Decl.”) Ex. G. As a direct consequence of Greenberg’s actions, sound recordings owned by Plaintiffs have been infringed billions of times, including millions of times in New York State.

Paul Geller is the head of external affairs at Escape. As a high-level executive, Geller has helped formulate Escape’s business strategy, including developing ways for Escape to profit from the data it collects related to the infringing activity of its users. Furthermore, as a public relations executive at Escape, Geller is intimately familiar with the Plaintiffs in this action and is aware that the principal places of business for most of the Plaintiffs is New York. In short, Geller has been instrumental in targeting and exploiting the New York market.

The Court’s exercise of personal jurisdiction over Greenberg and Geller is proper and well-founded. Both have uploaded and are liable for the uploading by others of copyrighted works belonging to New York companies. Both reasonably should have known that their

infringing activity would have consequences in New York. Both derive substantial revenue from interstate commerce. Greenberg is also subject to personal jurisdiction based on the fact that Escape acted as his agent in distributing massive numbers of infringing products into the state of New York.

As a result, Greenberg's and Geller's motion to dismiss the Amended Complaint for lack of personal jurisdiction must be denied.

STATEMENT OF FACTS

Plaintiffs respectfully refer the Court to the Amended Complaint and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint for a complete statement of relevant facts, and supplement those facts herein.

Joshua Greenberg is the co-Founder and Chief Technology Officer ("CTO") of Escape. Am. Compl. ¶ 19. In his capacity as CTO, he is responsible for formulating, approving, and controlling virtually all aspects of Escape's operations, and, as such, has directly designed the engine built to infringe Plaintiffs' copyrights. *Id.* His responsibilities include the design and functionality of the Grooveshark website, and ensuring the availability of sound recordings in the Grooveshark database. Declaration of Joshua Greenberg ("Greenberg Decl.") ¶ 9. [REDACTED]

[REDACTED] Greenberg oversees a staff of forty Escape employees. Greenberg Decl. ¶ 9. [REDACTED]

Paul Geller is the Senior Vice President ("SVP") of External Affairs at Escape, and a senior executive officer. Declaration of Paul Geller ("Geller Decl.") ¶ 2; Am. Compl. ¶ 20. He

is the public face of Escape, representing Escape's and Grooveshark's interest to legislators, other government bodies, and to the media. Geller Decl. ¶¶ 2,4.

Greenberg and Geller have *personally* uploaded thousands of infringing copies of copyrighted sound recordings to the Grooveshark website, including many of Plaintiffs' copyrighted sound recordings. Am. Compl. ¶ 21. In addition, Greenberg and Geller have directed the uploading by Grooveshark employees of tens of thousands of additional sound recordings, have exercised control over those infringing activities, and have personally benefited from the infringing activities. *Id.* Finally, they have exercised control over and directed Escape's distribution of infringing products into New York. *Id.* ¶¶ 27-28.

Ties to New York

[REDACTED]

Escape has numerous other ties with New York. Escape is registered to do business in New York, and maintains one of its two primary offices in New York, an office that houses multiple Escape employees. Am. Compl. ¶ 27. Escape's executives and employees have acknowledged conducting multiple trips to New York on Escape business in an effort to promote the Grooveshark website in the New York market. *See* Geller Decl. ¶4; Declaration of Benjamin

Westermann-Clark (“Westermann-Clark Decl.”) ¶4; Greenberg Decl. ¶¶ 13-14. Those business trips included fundraising, press interviews, and meetings with New York-based advertising and public relations executives. *Id.*

Finally, most of the major record companies are located in New York, including most of the Plaintiffs. [REDACTED]

[REDACTED] Escape has already been sued in New York by record companies for copyright infringement. *See* Servodidio Decl., Ex. F.

In addition to designing and operating the system that allows Groovespark to distribute millions of sound recordings into New York, Greenberg has other ties to New York. Greenberg traveled to New York as part of Escape’s efforts to open its New York office. Greenberg Decl. ¶ 13. Greenberg has also traveled to New York to meet with third parties concerning Escape’s business relationships, and to fundraise for Escape in New York. *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Geller has travelled to New York *nine times* on Escape business. Geller Decl. ¶ 3. His business trips have included work ranging from speaking engagements to meetings with New York-based public relations representatives to legislative affairs efforts. *Id.* In addition to

¹ Indeed, Exhibit B to the Amended Complaint references Escape’s attempts to enter into business agreements with “Sony” and “Warner,” which are obvious references to Sony Music Entertainment and Warner Music Group, record companies that are based in New York. With the exception of plaintiff UMG Recordings, Inc., all the plaintiffs in this action are included within either Sony Music Entertainment or the Warner Music Group. *See* Am. Compl. Ex. B.

coordinating the interviews of others, Geller has conducted his own press interviews in New York and has participated in music conferences in New York. *Id.*

ARGUMENT

For a statement of the standards governing this motion, Plaintiffs respectfully refer the Court to Plaintiffs' Memorandum of Law in Opposition to Defendants Benjamin Westermann-Clark's, Chanel Munezero's, and Nikola Arabadjiev's Motions to Dismiss the Amended Complaint.

I. THE CONDUCT OF GREENBERG AND GELLER AND THEIR CONTROL OVER THE CONDUCT OF ESCAPE'S EMPLOYEES GIVES RISE TO PERSONAL JURISDICTION UNDER NEW YORK'S LONG-ARM STATUTE.

Courts in New York have personal jurisdiction over a defendant who commits a tort outside of New York that causes harm inside New York. *See* N.Y. C.P.L.R. § 302(a)(3); *see also Plastwood Corp. v. Robinson*, 04 Cv. 3214 (BSJ), 2004 U.S. Dist. LEXIS 17403, at *13 (S.D.N.Y. Aug. 30, 2004) ("The third and most expansive prong of New York's long-arm statute allows jurisdiction over defendants who commit tortious acts out of state that cause injury within New York.").

In order to establish jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii), a plaintiff must show: (1) that defendant committed a tortious act outside the State; (2) that the cause of action arises from that act; (3) that the act caused injury to a person or property within the State; (4) that defendant expected or should reasonably have expected the act to have consequences in the State; and (5) that defendant derived substantial revenue from interstate or international commerce. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (N.Y. 2000). Only the fourth and fifth elements are truly at issue here.

A. Greenberg and Geller Have Committed Multiple Tortious Acts Outside the State That Have Caused Injury Inside the State.

In their motions, Greenberg and Geller do not present arguments as to why the first three elements of liability under § 302(a)(3)(ii)—that they committed tortious acts outside the State that caused injury inside the State—have not been adequately alleged in the Amended Complaint. The Amended Complaint unquestionably satisfies the first three elements of § 302(a)(3)(ii).

The Amended Complaint alleges that Greenberg and Geller have committed at least two classes of tortious acts outside the state that have caused injury to New York copyright holders. First, they personally uploaded thousands of infringing copies of copyrighted sound recordings to the Grooveshark website, including copies belonging to the New York Plaintiffs. Am. Compl. ¶ 21. Second, as the Founder, Executive, and CTO of Escape, and as SVP of External Affairs, respectively, Greenberg and Geller have directed the uploading of tens of thousands of additional sound recordings by Grooveshark employees, have exercised control over those infringing activities, and have personally benefited from those infringing activities.² *Id.* The Amended

² Under New York law, “[a]ll persons and corporations who participate in, exercise control over, or benefit from the infringement are jointly and severally liable as copyright infringers.” *Syigma Photo News, Inc. v. High Soc’y Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985); *see also Lechner v. Marco-Domo Int’l Interieur GmbH*, No. 03 Civ. 5664 (JGK), 2005 U.S. Dist. LEXIS 4022, at *6 (S.D.N.Y. Mar. 14, 2005) (“It is well-established that corporate officers can be held liable for the infringing acts of their corporations if they personally participated in the acts constituting infringement.”); *Luft v. Crown Publishers, Inc.*, 772 F. Supp. 1378, 1379-80 (S.D.N.Y. 1991).

The Amended Complaint alleges *specifically* that “[i]n his capacity as CTP, Mr. Greenberg has been responsible for formulating, approving, and controlling virtually all aspects of Escape’s operations. Thus, at all times, he has been one of the moving, active, conscious forces behind defendants’ infringement of Plaintiffs’ copyrights.” Am. Compl. ¶ 19. The Amended Complaint also alleges *specifically* that “Mr. Geller . . . is a key decision maker within Escape. Thus, at all times, he has been one of the moving, active, conscious forces behind defendants’ infringement of Plaintiffs’ copyrights.” *Id.* ¶ 20.

Therefore, the Amended Complaint adequately alleges that Greenberg and Geller directed and exercised control over the infringements of Grooveshark’s employees, and, as executives, key decision makers, and public representatives of Grooveshark, they stood to benefit from those uploads.

Complaint also alleges that these two classes of tortious conduct give rise to Plaintiffs' first cause of action for willful copyright infringement in violation of 17 U.S.C. §§ 106 and 501. Am. Compl. ¶ 43. Finally, the Amended Complaint alleges that a substantial portion of the sound recordings infringed by the Individual Defendants are owned by New York-based record companies, including Plaintiffs. *Id.* ¶ 39.

In *Penguin Grp. (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295, 302 (N.Y. 2011), the New York Court of Appeals held that, in cases alleging infringement via the uploading of copyrighted material onto the Internet, the situs of injury for purposes of determining long arm jurisdiction under N.Y. C.P.L.R. §302(a)(ii) is the "location of the copyright holder." *See also id.* at 306 ("The location of the infringement in online cases is of little import inasmuch as the primary aim of the infringer is to make the works available to anyone with access to an Internet connection, including computer users in New York").

Accordingly, under *Penguin*, the first three elements of §302(a)(3)(ii) are met.

B. Greenberg and Geller Should Have Expected Their Acts to Have Consequences in New York.

"An objective test—and not a subjective test—governs whether a defendant expects or should reasonably expect his act to have consequences within New York." *Energy Brands, Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 467-68 (S.D.N.Y. 2008). When a defendant commits numerous tortious acts outside of New York, it is not necessary that he know which specific act will cause harm in New York, or what the exact harm will be. Rather, the requirement of "foreseeability relates to forum consequences generally and not to the specific event which produced injury within the state[.]" *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326 n.4 (N.Y. 1980) (quotations and citations omitted); *see also LaMarca*, 95

N.Y. 2d at 215 (“[T]he defendant need not foresee the specific event that produced the alleged injury.”).

Foreseeability “must be coupled with evidence of a purposeful New York affiliation, for example, a discernable effort to directly or indirectly serve the New York market.” *Energy Brands*, 571 F. Supp.2d at 468 (quoting *Schaadt v. T.W. Kutter, Inc.*, 564 N.Y.S.2d 865, 866 (N.Y. App. Div. 1991)). “Stated differently, the foreseeability requirement is not satisfied unless there are tangible manifestations showing that the nondomiciliary defendant . . . either should have known where [its product was] destined or was attempting to reach a New York market.” *Capitol Records, LLC v. VideoEgg Inc.*, 611 F. Supp. 2d 349, 346 (S.D.N.Y. 2009) (quotation marks omitted) (alterations in original).

1. Greenberg

The facts alleged in the Amended Complaint, and the acknowledgements made by Greenberg in his declarations establish that Greenberg should have expected that his infringing conduct would have consequences in New York, that he made a discernable effort to “indirectly serve the New York market,” *Energy Brands*, 571 F. Supp.2d at 468, and that he should have known that his infringing products were “destined” for New York, *VideoEgg*, 611 F. Supp. 2d at 363.

The Amended Complaint alleges that Greenberg uploaded numerous infringing copies of copyrighted sound recordings, and has directed, exercised control over, and stood to benefit from the uploading by GroovesHark employees of tens of thousands of additional infringing copies of sound recordings. Am. Compl. ¶ 21. Escape’s business records establish unequivocally that those sound recordings include ones owned by the New York Plaintiffs. *Id.* ¶ 39.

Greenberg is not only aware that a substantial portion of the sound recordings uploaded by him and by Grooveshark employees are owned by New York-based record companies, he also took an *active* role in building New York relationships on behalf of Grooveshark. Exhibit B to the Amended Complaint, which includes an email between Escape’s chairman and Greenberg, shows that Greenberg was involved in and kept apprised of Escape’s attempts to enter into business arrangements with some of the New York-based Plaintiffs in this case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As courts have repeatedly held, knowledge of these facts alone is sufficient to satisfy the fourth prong of the New York long-arm statute. *See McGraw-Hill Cos., Inc. v. Ingenium Techs. Corp.*, 375 F. Supp. 2d 252, 256 (S.D.N.Y. 2005) (“It is reasonably foreseeable that the provision of materials that infringe the copyrights and trademarks of a New York company will have consequences in New York[.]”); *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 568 (S.D.N.Y. 2000) (“[I]t was reasonably foreseeable that publication of web sites with the offending marks would have consequences in New York.”).

Greenberg’s negotiations with New York companies on behalf of Escape are not the only ways in which he has served the New York market. Greenberg played a role in opening Escape’s New York office. Greenberg Decl. ¶ 13. He also participated in numerous business meetings with third parties in New York, and was active in fundraising efforts on behalf of Escape in New York. *Id.* This conduct reflects a discernable effort to serve the New York market.

Finally, Escape—the company that Greenberg designed, founded, manages, and operates—has saturated New York with infringing products in an effort to serve and target the

New York marketplace. [REDACTED]

[REDACTED] In addition, Escape has a primary office is in New York. Grooveshark's executives and employees have acknowledged contact with New York advertising and public relations firms in an effort to advertise and gain visibility in the New York market. Geller Decl. ¶ 4; Westermann-Clark Decl. ¶ 4. Escape's efforts to serve the New York market is consistent with its founder's efforts to serve the New York market. Thus, at all times, Greenberg was aware that the infringing uploads were "destined" for New York.

In short, as CTO, Greenberg, more than any other Defendant, is responsible for the fact that Escape operates the way that it does, and that it is able to distribute to its New York users massive numbers of infringing products. This lawsuit is, to a great extent, a direct result of Greenberg's technical design. It is thus astonishing that Greenberg would even suggest that he should not reasonably have expected that his actions would have consequences in New York, and that he did not make a discernable effort to indirectly serve the New York market.

2. Geller

Notwithstanding Geller's attempt, in his motion and through his legal representation, to align himself with Defendants Westermann-Clark, Munezero, and Arabadjiev, Geller is far more similar to Greenberg for purposes of a jurisdictional motion. As SVP of External Affairs, Geller's conduct at Escape is that of an executive in terms of his responsibilities, his control over Escape's employees, and his extensive ties with New York.

The facts alleged in the Amended Complaint, and the acknowledgements made by Geller in his declaration, establish that Geller should have expected that his infringing conduct would have consequences in New York, that he made a discernable effort to "indirectly" serve the New

York market, *Energy Brands*, 571 F. Supp.2d at 468, and that he should have known that his infringing products were “destined” for New York, *VideoEgg*, 611 F. Supp. 2d at 363.

In his declaration, Geller makes clear that he is the public face of Escape, a company whose entire business consists of delivering music files to internet users. Geller is responsible for representing the interests of Grooveshark in the halls of government and in the New York music community. Geller Decl. ¶¶ 2,4. Accordingly, Geller is well aware of the fact that a substantial percentage of those sound recordings uploaded by himself, and uploaded by Grooveshark employees at his direction, are owned by New York-based record companies. As noted above, this is precisely why New York courts have held that it is “reasonably foreseeable that the provision of materials that infringe the copyrights and trademarks of a New York company will have consequences in New York.” *McGraw-Hill*, 375 F. Supp. 2d at 256.

In addition, Geller has made a discernable effort to serve the New York market. Geller has acknowledged traveling to New York *nine times* on Escape business. During those business trips, Geller has: (1) promoted Escape through participating in New York speaking engagements, and through press interviews inside New York; (2) conducted multiple meetings with third parties in New York relating to Grooveshark’s data and legislative affairs efforts; (3) conducted interviews with possible public relations firms inside New York, in an effort to advertise and gain visibility in the New York market; and (4) attended a New York-based music conference during which he coordinated interviews for Grooveshark. Geller Decl. ¶ 4. This conduct reflects a discernable effort to serve the New York market, and demonstrates Geller’s awareness that the infringing uploads on Grooveshark were “destined” for New York. In short, Geller reasonably should have expected that his actions would have consequences in New York.

C. Greenberg and Geller Have Derived Substantial Revenue from Interstate Commerce.

The substantial-revenue prong of New York’s long-arm statute was “designed to narrow ‘the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but whose business operations are of a local character.’” *LaMarca*, 95 N.Y. 2d at 215 (citing *Ingraham v. Carroll*, 90 N.Y.2d 592, 599 (N.Y. 1997)). Escape’s operations clearly do not fall within that ambit. Additionally, satisfying this prong “requires no direct contact with New York State.” *Ingraham*, 90 N.Y.2d at 598 (citation omitted).

1. Greenberg

There can be no dispute that Escape derives nearly all of its revenue from interstate commerce. If a corporation derives substantial revenue from interstate commerce, that revenue can be imputed to its significant shareholders. *Cf. Pincione v. D’Alfonso*, 10 Civ. 3618 (PAC), 2011 U.S. Dist. LEXIS 103944, at *10 (S.D.N.Y. Sept. 13, 2011). [REDACTED]

[REDACTED] Accordingly, Greenberg derives substantial revenue from interstate commerce.

In addition, to the extent that Greenberg suggests that he does not meet the interstate commerce prong because of the current size of his salary, even small amounts of money earned in interstate commerce are sufficient to satisfy this prong of the long-arm statute, so long as interstate commerce represents a substantial percentage of a defendant’s earnings. *See Light v. Taylor*, 05 Civ. 5003 (WHP), 2007 U.S. Dist. LEXIS 5855, at *11 (S.D.N.Y. Jan. 29, 2007); *Energy Brands*, 571 F. Supp.2d at 468; 472 (finding that \$158.53 in interstate revenue satisfies the interstate commerce prong, because “[t]here is no bright-line rule regarding when a specific level of revenue becomes substantial for purposes of 302(a)(3)(ii)”).

2. Geller

Although § 302(a)(3)(ii) requires a defendant to have derived substantial revenue from interstate commerce in order to be subject to personal jurisdiction under that section, “the revenue derived from interstate commerce need not be related to the acts out of which the case arises[.]” *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F. Supp. 798, 805 (S.D.N.Y. 1975).

Publicly available information reveals that Geller is the CEO of Bigger Markets, Inc., the CEO and Co-Founder of Sponsr.com, the Founder of Republic Promotion Company, and the Founder of National Metrics. *See* Servodidio Decl., Ex. O. Bigger Markets is “a Guerrilla Marketing Agency that combines online and off-line tactics, including one of the largest on-campus street team networks in the United States, to reach the 18-24 year old college demographic.” *See id.*, Ex. P. Bigger Markets is present on over 250 college campuses across the nation. *See id.*, Ex. Q. In addition, publicly available information reveals that Geller’s companies own a number of federal trademark registrations. *See id.*, Ex. R. To obtain those trademarks, Geller would have had to submit declarations to the Patent and Trademark Office confirming that the marks were used *in interstate commerce*. *See id.* For these reasons, Geller derives substantial revenue from interstate commerce.

In addition, as alleged in the Amended Complaint, Geller derives substantial revenue from interstate commerce because his compensation is tied directly to the number of sound recordings he uploads and inserts into the stream of interstate commerce each week. Am. Compl. ¶ 37. Although Geller asserts in his declarations that his salary is not tied to the revenues or profits, that allegation cannot be assumed to be true at this stage of the proceedings. Until and unless the Plaintiffs have an opportunity to test that allegation through jurisdictional discovery, the facts alleged by Plaintiffs in the Amended Complaint *must* be viewed in the light most

favorable to Plaintiffs. *See Armco Inc. v. North Atl. Ins. Co.*, 68 F. Supp. 2d 330, 335 (S.D.N.Y. 1999).

Geller also contends that a corporation's revenue from interstate commerce cannot be imputed to a company's non-shareholding officers. *Cf. Pincione v. D'Alfonso*, 2011 U.S. Dist. LEXIS 103944, at *10. His argument is misplaced. Geller is a holder of stock-options in Escape, and, as such, Escape's revenue—which is derived almost exclusively from interstate commerce—can be imputed to him.³

Finally, Geller suggests that, even if he qualifies as a shareholder of Escape, he is not susceptible to jurisdiction under § 302(a)(3)(ii) because he is not a “major” shareholder of Escape. However, the case law does not reflect a requirement of ownership of any minimum percentage of shares in a corporation. Here, Geller owns tens of thousands of shares of stock or stock options and stands to gain tremendous benefit should the company ever go public or earn significant revenue.

Putting aside the sufficient evidence of revenue from interstate commerce for both Greenberg and Geller,⁴ “dismissal for lack of personal jurisdiction is inappropriate under 302(a)(3)(ii) ‘even where there is no proof that a defendant derives substantial revenue from interstate or international commerce, where that knowledge is peculiarly under the control of [the

³ To the extent that Geller suggests that a holder of stock options should be treated differently from a shareholder, their arguments are not persuasive. Nothing in New York's long-arm statute or the case law interpreting the interstate commerce prong distinguishes between shareholders and holders of stock options. The underlying rationale behind a court's decision to find shareholders subject to the jurisdiction of New York courts seems to be that shareholders receive the same benefit from the interstate activities of a corporation that the corporation receives. *Cf. Siegel v. Holson Co.*, 768 F. Supp. 444, 446 (S.D.N.Y. 1991). This is also true for holders of stock options: holders of stock options also receive the same benefit from the interstate activities of a corporation that the corporation receives.

⁴ In addition to the arguments made above, Plaintiffs incorporate their arguments made with respect to the interstate commerce prong as it relates to Defendants Benjamin Westermann-Clark, Chanel Munezero, and Nikola Arabadjiev, contained in Plaintiffs' opposition brief to the motions to dismiss filed by those three individual defendants.

defendant], and may come to light in the course of [s]ubsequent discovery.’’ *Energy Brands*, 571 F. Supp. at 468 (alterations in original) (quoting *Mfg. Tech., Inc. v. Kroger Co.*, 06 Civ. 3010 (JSR), 2006 U.S. Dist. LEXIS 90393, at *10 (S.D.N.Y. Dec. 13, 2006)). Plaintiffs have not yet had the opportunity to conduct the jurisdictional discovery necessary to explore the extent of Greenberg’s and Geller’s revenues derived from interstate commerce. Accordingly, Plaintiffs respectfully submit that there is no basis for dismissing the Amended Complaint on the record before the Court.

II. GREENBERG IS ALSO SUBJECT TO JURISDICTION BECAUSE HE DIRECTED ESCAPE’S INFRINGING ACTIVITY IN NEW YORK.

Plaintiffs have alleged facts sufficient to subject Escape to jurisdiction pursuant to C.P.L.R. § 302(a)(1), for distributing and performing infringing copies of sound recordings into New York. *See* Am. Compl. ¶ 27. Escape has not contested that allegation. Because Greenberg controlled Escape’s infringing distributions of sound recordings in New York, Greenberg is also subject to jurisdiction under C.P.L.R. § 302(a)(1), pursuant to an agency theory of jurisdiction.

Under New York law, an individual can be “subject to jurisdiction under New York’s long-arm statute if a corporate defendant is acting as his agent.” *Capitol Records, Inc. v. MP3Tunes, LLC*, 07 Civ. 9931 (WHP), 2008 U.S. Dist. LEXIS 75329, at *13 (S.D.N.Y. Sept. 29, 2008) (citing *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 (N.Y. 1988)). Specifically, “[j]urisdiction extends to the employees of a corporation who had knowledge of, and extensive control over, the New York transaction that is the source of this litigation.” *Alpha Int’l, Inc. v. T-Reproductions, Inc.*, No. 02 Civ. 9586 (SAS), 2003 U.S. Dist. LEXIS, at *9 (S.D.N.Y. July 1, 2003); *see also Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 323 (S.D.N.Y. 1998) (“At the heart of the inquiry is whether the out-of-state corporate officers were primary actors in the transaction in New York that gave rise to the litigation[.]” (quotations marks and

alterations omitted)).

The Amended Complaint alleges that Escape distributed massive amounts of infringing copies of Plaintiffs' copyrighted sound recordings to New York residents. As noted above, between April 2008 and February 2011, Grooveshark distributed over 100 million copies of sound recordings to New York users through the Grooveshark site. *See* Servodidio Decl. ¶ 7.

Greenberg, as CTO and technological inventor of the Grooveshark website, had knowledge of, and extensive control over, the New York transactions that are the source of this litigation; namely, Grooveshark's distribution of millions of infringing copies of copyrighted sound recordings into New York. In his capacity as CTO, Greenberg directly designed the engine built to infringe Plaintiffs' copyrights in this manner.

Specifically, the Amended Complaint alleges that Greenberg is "responsible for formulating, approving and controlling virtually all aspects of Escape's *operations*." Am. Compl. ¶ 19 (emphasis added). As CTO, Greenberg was the architect of the Grooveshark system, and controlled the manner in which the system distributed sound recordings. In addition, Greenberg kept close watch on where those streams went, and how the streams were being used. *See* Servodidio Decl., Exs. M, N.

Greenberg acknowledges his control over Grooveshark's operations, stating that, as CTO, he "has primary responsibility for the design and functionality of the Grooveshark website[.]" Greenberg Decl. ¶ 5; [REDACTED] This statement amounts to a recognition on Greenberg's part that Escape was his agent with respect to the distributions of infringing products made in New York (*i.e.*, the operation of the Grooveshark website).

Greenberg's citation to *MP3Tunes*, 2008 U.S. Dist. LEXIS 75329, for the proposition that the Amended Complaint fails to establish agency jurisdiction over him is inapposite. In

MP3Tunes, the Court found that the plaintiffs' attempt to invoke agency jurisdiction was insufficient because the complaint simply alleged that the defendant was the chief executive officer and a director and shareholder. The Court held that these titles by themselves did not imply control. *Id.* at *12.

Here, however, Plaintiffs have asserted facts that go far beyond his status as CTO, co-Founder, and major shareholder. Indeed, Plaintiffs have alleged that Greenberg "is responsible for formulating, approving and controlling virtually all aspects of Escape's *operations*." Am. Compl. ¶ 19. Those operations include distributing infringing products into New York—Escape's New York transaction giving rise to this litigation.

In summary, Greenberg was a "primary actor" in Escape's distribution of millions of infringing products into the New York marketplace, distributions that gave rise to the instant lawsuit. Accordingly, he is also subject to this Court's jurisdiction pursuant to an agency theory of jurisdiction under § 302(a)(1).

III. THE EXERCISE OF JURISDICTION OVER GREENBERG AND GELLER COMPORTS WITH THE REQUIREMENTS OF DUE PROCESS.

"In determining whether assertion of jurisdiction comports with the requirements of due process, a court must consider (1) whether a defendant has 'minimum contacts' with the forum state and (2) whether the assertion of personal jurisdiction in these circumstances is consistent with 'traditional notions of fair play and substantial justice.'" *Capitol Records, Inc. v. MP3Tunes*, 07 Civ. 9931 (WHP), 2009 U.S. Dist. LEXIS 96521, at *19 (S.D.N.Y. Oct. 16, 2009) (quoting *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1027 (2d Cir. 1997)).

Where the claim arises out of, or relates to, the defendant's contacts with the forum, "minimum contacts exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Bank Brussels*

Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002) (citations omitted).

“The Court should consider the relationship among the defendant, the forum, and the litigation.”

M. Shanken Commc’ns, Inc. v. Cigar500.Com, 07 Civ. 7371 (JGK), 2008 U.S. Dist. LEXIS 51997, at *23 (S.D.N.Y. July 7, 2008).

Greenberg has engaged in such purposeful activities. He is the technical architect of a website that distributes hundreds of millions of infringing copies of sound recordings—most owned by New York record companies—into New York. [REDACTED]

[REDACTED] In addition, his work arranging for and interacting with Escape’s New York office certainly constitutes purposeful activities directed at New York.

Similarly, Geller has engaged in purposeful activities directed at New York, such that he could reasonably foresee being haled into court in New York. Geller has traveled to New York on Escape business on *nine separate occasions* and has essentially operated as the alter ego of Escape in New York, representing Escape’s interests to New York government officials, New York media representatives, and New York music industry personnel.

In addition, Escape has successfully distributed millions of infringing products into the New York marketplace and thus harmed New York Plaintiffs, because of Greenberg’s and Geller’s efforts to promote, market, and create a presence for Escape in New York. *See Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997) (“Columbia alleged, and the district court found, that Feltner willfully infringed copyrights owned by Columbia, which, as Feltner knew, had its principal place of business in the Central District. This fact alone is sufficient to satisfy the ‘purposeful availment’ requirement.”), *rev’d on other grounds by Feltner v. Columbia Pictures Television*, 532 U.S. 340 (1998).

Greenberg and Geller contend that there is not a sufficient tie between their minimum contacts with New York and Plaintiffs' claims in this litigation. Greenberg contends that he did not engage "in any of the alleged activities during their visits to New York that form the predicate of plaintiffs' claims against him in this litigation." Greenberg Memorandum of Law at 17.

Those allegations wholly miss the mark. The minimum contacts analysis requires only that the claim arises out of, *or relates to*, the defendant's contacts with the forum. It was precisely this overly narrow reading of the minimum contacts requirement that Greenberg and Geller are suggesting to this court that, in part, caused the Second Circuit to reverse a district court's due process findings. In *Bank Brussels Lambert*, a breach of contract case, the Second Circuit reversed the district court's conclusion that jurisdiction violated due process, finding that the district court took "too narrow" a view of minimum contacts. 302 F.3d at 128. The Court held that the district court should have considered those contacts that "may not have directly given rise to the plaintiff's cause of action [but that] . . . relate[d] to [the cause of action]." *Id.* at 128. The Court noted that the defendant's contacts were "not the kind of random fortuitous or attenuated contacts . . . that the purposeful availment requirement is designed to eliminate as a basis for jurisdiction." *Id.* (quotation marks omitted).

Greenberg and Geller have sufficient contacts with New York that *relate to* Plaintiffs' claims in this case. Designing, operating, and publicly representing a website that infringes the copyrights of New York record companies, opening a New York office that supports the Grooveshark website, and promoting Grooveshark's website in the New York music community, certainly "relates to" Plaintiffs' claims in this case (that Grooveshark's executives and employees

have uploaded tens of thousands of infringing copies of sound recordings belonging to New York copyright holders, and have distributed those sound recordings into the New York market).

The second part of the due process analysis asks “whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice – that is, whether it is reasonable under the circumstances of the particular case.” *Id.* at 129 (quotation marks omitted). Defendants bear the burden of presenting “a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *VideoEgg*, 611 F. Supp. 2d at 364 (quotation marks omitted). Defendants can satisfy this burden only in “exceptional” circumstances. *Bank Brussels Lambert*, 305 F.3d at 130.

Courts consider five factors in evaluating reasonableness: “(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.” *Id.* at 129.

Greenberg does not assert that he would be burdened by defending a lawsuit in New York. Although Geller alleges that he would be so burdened, his nine different business trips to New York on Escape business, and his four other trips to New York for personal reasons, belie such a claim. There is no indication that there is any added burden to litigating in New York, rather than in Florida.⁵ In fact, it is likely cheaper for all the Defendants to litigate the case in one forum. Moreover, Geller has not even alleged that he is paying his own legal fees. In addition, courts have repeatedly reasoned that even “if forcing the defendant to litigate in a forum relatively distant from [his] home base were found to be a burden, the argument would

⁵ Any added costs of a trial in New York—if any—can be addressed at that time, if warranted.

provide defendant only weak support, if any, because ‘the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.’” *Id.* at 130 (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996)); *see also Whitaker v. Fresno Telsat, Inc.*, 87 F. Supp. 2d 227, 233 n.6 (S.D.N.Y. 1999) (“This burden may be less onerous if one considers that [a defendant] could have and should have reasonably foreseen that its actions would have consequences in New York.”). Finally, the Court must keep in mind that Greenberg and Geller are executives of “the world’s largest on-demand music streaming and discovery service.” *See Servodidio Decl.*, Ex. G.

The other factors support the exercise of jurisdiction. First, courts have recognized that “New York has a substantial interest in protecting the intellectual property of its copyright and trademark holders.” *M. Shanken Commc’ns*, 2008 U.S. Dist. LEXIS 51997, at *26. The interests of Plaintiffs are clearly served by litigating in New York. *See VideoEgg*, 611 F. Supp.2d at 365 (“[T]he Plaintiffs’ interest in convenient relief is served by litigating in this forum because many of them have New York as their principal place of business.”). Moreover, requiring separate legal proceedings to address the same claims would not further the judicial system’s interest in efficient resolution of this dispute. *See id.* (“[T]he interstate judicial system’s interest in efficient resolution of this dispute would not be served by dismissing the complaint against [one defendant] but not its Co-Defendant . . . which could lead Plaintiffs to file a substantially identical but separate action in California.”). Finally, this court’s “resolution of the instant dispute will not conflict with the fundamental substantive social policies of another State because Plaintiffs allege violations of federal copyright law.” *Id.* (quotations omitted).

For these reasons, this case does not constitute the “exceptional situation” in which the exercise of jurisdiction is unreasonable even though the minimum contacts are present.

IV. RENEWED MOTION FOR JURISDICTIONAL DISCOVERY

Plaintiffs have renewed their motion for jurisdictional discovery as part of their opposition to the motions to dismiss submitted by Benjamin Westermann-Clark, Chanel Munezero, and Nikola Arabadjiev. Plaintiffs incorporate herein that motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the motions of defendants Greenberg and Geller to dismiss the Amended Complaint for lack of personal jurisdiction. Alternatively, if the Court is disposed to grant either motion, Plaintiffs request the right to engage in limited jurisdictional discovery.

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March 14, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2012, a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to the Motion to Dismiss of Defendants Joshua Greenberg and Paul Geller was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. I further sent unredacted copies of the foregoing via overnight delivery to:

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