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 FILED BY DEFENDANTS BENJAMIN-WESTERMANN-CLARK, CHANEL MUNEZERO, AND NIKOLA ARABADJIEV

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INTRODUCTION

Defendants in this action—officers, executives, and integral employees of Escape Media Group Inc. ("Escape")—operate a pirate website, www.grooveshark.com (the "Grooveshark website" or "Grooveshark"), with the stated objective of making every song in the world available for free. Every day, millions of people access the Grooveshark website and listen to millions of sound recordings—the majority of which are owned by Plaintiffs. Defendants have no license or authorization from Plaintiffs to exploit these sound recordings, but they continue to present themselves to the public as a legitimate service. Defendants earn money from displaying advertising along with the infringing sound recordings. They also earn money through the sale of premium memberships to users. This money would not have been generated but for the availability of Plaintiffs' recordings.

Escape and its employees have built up their library of infringing sound recordings by personally uploading over one hundred thousand unauthorized sound recordings to the Grooveshark website. The three defendants addressed in this brief—Benjamin Westermann-Clark, Chanel Munezero, and Nikola Arabadjiev (collectively, the "Individual Defendants")[1]—are named in this lawsuit because they are *personally responsible for uploading over 70,000 unauthorized sound recordings* to the Grooveshark website, sound recordings that have likely been infringed millions of times. Accordingly, despite their efforts to characterize themselves as passive, low-level employees, the Individual Defendants are, in fact, integral, active and long-time participants in the Grooveshark operation, who have *personally* engaged in the theft of copyrighted sound recordings on a massive scale. Their efforts are a material contribution to

[1] Plaintiffs' opposition to Defendant Paul Geller's motion to dismiss is addressed in Plaintiffs' opposition to Defendant Joshua Greenberg's motion to dismiss.

Grooveshark's ability to boast that it is "the world's largest on-demand music streaming and discovery service," having 30 million unique visitors per month.

Given the magnitude of their infringing conduct, the Individual Defendants should have expected that their unlawful conduct would have consequences in New York. New York is one of the two main hubs of the music industry, and is where the majority of Plaintiffs are located. The Individual Defendants, all of whom work in the music industry, [redacted] and are aware that many of the Plaintiffs are located here. Indeed, Escape has previously been sued for copyright infringement in New York by record companies.

Defendants should also have anticipated that their infringing products would enter the New York market. Escape has targeted the New York market place in numerous ways. Escape is registered to do business in New York and maintains one of its two primary offices in New York. Escape's executives and employees have engaged New York advertisers, public relations executives, and other New York music industry representatives, in an effort to promote the Grooveshark website in the New York market.

[redacted] In short, the

Individual Defendants knew—or certainly should have known—that their unlawful conduct would cause significant harm to New York Plaintiffs, and that their infringing products would reach New York.

In addition, the Individual Defendants have derived substantial revenue from interstate commerce. There is no question that the Grooveshark website is an interstate, indeed, an international operation. Every sound recording that the Individual Defendants add to the Grooveshark website becomes publicly available to anyone with an internet connection, and thus, the audience for those infringing sound recordings is worldwide. As alleged in the Amended Complaint, compensation of the Individual Defendants' is tied directly to the number of sound recordings they upload and insert into the stream of interstate commerce each week. Moreover, the Individual Defendants are shareholders or stockholders of Escape, and thus, Escape's revenue from interstate commerce can be imputed to them.

In summary, all elements required to find personal jurisdiction for the massive infringement are present and alleged in the Amended Complaint. Accordingly, there is no basis for dismissing the Defendants from this action.

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.

The Individual Defendants Have Massively Infringed Plaintiffs' Copyrights.

Escape describes itself as "the world's largest on-demand and music discovery service[.]" Am. Compl. ¶ 34. Having a virtually complete library of popular sound recordings was—and remains—essential to being able to attract and retain users. *Id.* ¶ 36. As a result, Escape's own

executives, officers, and employees took on the direct responsibility for "seeding" (*i.e.* uploading) a significant volume of infringing content to ensure that it was available to users of the Grooveshark website. *Id.*

Plaintiffs have—so far—been able to confirm that the Individual Defendants have uploaded more than 70,000 unauthorized sound recordings, including thousands owned by Plaintiffs. *Id.* ¶ 38. Plaintiffs did not sue individuals who have infringed only a small number of recordings. Westermann-Clark, a vice-president of Escape, has uploaded nearly 5,000 sound recordings to the Grooveshark Website. *Id.* Munezero, a software engineer, has uploaded over 20,000 sound recordings. *Id.* Arabadjiev, another long-term employee has uploaded over 40,000 sound recordings. *Id.*

Escape Has Extensive Ties to New York.

As noted above, [redacted]

In addition, Escape has affirmatively targeted the New York market. Escape has only two primary offices, one of which is in New York and houses multiple Escape employees. [redacted] Escape has engaged New York advertisers, public relations

[2] 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.

executives, and other New York music industry representatives, in an effort to promote the service in New York. Finally, 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* Declaration of Paul Geller ("Geller Decl.") ¶ 4; Declaration of Benjamin Westermann-Clark ("Westermann-Clark Decl.") ¶ 4; Declaration of Joshua Greenberg ¶¶ 13-14; *see also* Servodidio Decl. ¶¶ 30-33. Those business trips included fundraising, press interviews, meetings with New York-based advertising and public relations executives. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

Where there has been no discovery on the issue of personal jurisdiction, the plaintiff need only make a *prima facie* showing of jurisdiction. *See DiBella v. Hopkins*, 187 F. Supp. 2d 192, 198 (S.D.N.Y. 2002).

On a 12(b)(2) motion, all pleadings and supporting documents "must be construed in the light most favorable to the plaintiffs, and all doubts resolved in plaintiffs' favor." *Armco Inc. v. N. Atl. Ins. Co.*, 68 F. Supp. 2d 330, 335 (S.D.N.Y. 1999). "By filing a Rule 12(b)(2) motion, the defendant in effect demurs to the plaintiff's factual allegations." *Gianino v. Panacya, Inc.*, 00 CIV. 1584 (SHS), 2000 U.S. Dist. LEXIS 12338, *10 (S.D.N.Y. Aug. 29, 2000).

In fact, a "plaintiff at th[is] stage of the litigation satisfies his burden even when the moving party makes contrary allegations that place in dispute the factual basis of plaintiff's *prima facie* claim."[3] *Id.* at *10-11.

[3] As discussed in more detail in Section III *infra*, when a defendant moves to dismiss a complaint based on factual allegations submitted to the court through declarations, as the Individual Defendants have done here, those declarations cannot be the basis for dismissing a motion without jurisdictional discovery. *See*

II. THE CONDUCT OF THE INDIVIDUAL DEFENDANTS RENDERS THEM SUBJECT TO PERSONAL JURISDICTION UNDER NEW YORK'S LONG-ARM STATUTE.

Pursuant to N.Y. C.P.L.R. § 302(a)(3)(ii), courts in New York have personal jurisdiction over a defendant where the defendant 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 five elements: (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. The Individual Defendants Have Committed Tortious Acts Outside the State That Have Caused Injury Inside the State.

The first three elements of liability under § 302(a)(3)(ii)—that the Individual Defendants committed tortious acts outside the State that caused injury inside the State—are clearly established in this case.

The Amended Complaint alleges that the Individual Defendants collectively uploaded over 70,000 infringing copies of copyrighted sound recordings to the Grooveshark website. Am.

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, No. 05 Civ. 9016 (SAS), 2006 U.S. Dist. LEXIS 11617, at *27 (S.D.N.Y. Mar. 20, 2006) (noting that it is well-settled that "jurisdictional discovery should be granted where pertinent facts bearing on the question of jurisdiction are controverted[.]" (quotation marks omitted)).

Compl. ¶ 38. The Amended Complaint also alleges that this tortious conduct is the foundation for 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 those 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)(3)(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").

The Individual Defendants have not presented any arguments as to why the first three elements of §302(a)(3)(ii) have not been satisfied.

B. The Individual Defendants Should Reasonably Have Expected Their Conduct to Have Consequences in New York.

In their motion papers, the Individual Defendants argue that it is not reasonable to expect that they should have known that their conduct would 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) (quotation marks 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).

Based on the facts alleged in the Amended Complaint, the Individual Defendants should have expected that their infringing conduct would have consequences in New York. The Individual Defendants have personally engaged in the systemic and widespread uploading of Plaintiffs' copyrighted content without authorization from or payment to the Plaintiff copyright owners. Am. Compl. ¶ 38. Escape's business records establish that those sound recordings include many owned by the New York Plaintiffs. *Id.* ¶ 39.

The Individual Defendants, who work for a music company with a primary office in New York, are well aware that three of the four largest record groups in the United States are headquartered in New York. *See* Am. Compl. ¶¶ *8-16.* Further, a reasonable inference is that the Individual Defendants were aware of [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."). Thus, from the moment that the Individual Defendants uploaded infringing copies of copyrighted sound recordings owned by New York-based record companies to Grooveshark, it was objectively reasonable for them to expect that their conduct would have consequences in New York, and that they could be haled into a New York court.

Not only is it clear that the Individual Defendants should have known that their unlawful conduct would have consequences in New York, but the facts alleged in the Amended Complaint establish that the Individual Defendants should have known that their infringing uploads were "destined" for New York. *See VideoEgg*, 611 F. Supp. 2d at 363. First, Escape has saturated New York with infringing products (including the works in suit) in an effort to serve and target the New York marketplace. *See* Am. Compl. ¶ 27. [redacted]

[redacted]

In addition, Escape has aggressively targeted the New York market. It is registered to do business in New York and maintains one of its primary offices in New York, which serves as a workplace for multiple Escape employees. Further, Grooveshark's executives and employees have acknowledged having contact with New York advertising and public relations firms, in an effort to gain visibility in the New York marketplace. Geller Decl. ¶ 4; Westermann-Clark Decl. ¶ 4.

At this point in the proceeding, when all inferences must be drawn in Plaintiffs' favor, it is a reasonable inference that the Individual Defendants knew about these New York connections. It is a reasonable inference that, as employees of a company with a primary office in New York, the Individual Defendants communicated across offices, and their roles and responsibilities included servicing the New York office and assisting other Escape employees with their work in New York. It is also a reasonable inference that the Individual Defendants were aware of [redacted] and work with New York third parties.

Further, Defendant Westermann-Clark's declaration, as well as a preliminary review of publicly available information, reveals that he has additional ties to New York that are important to consider when assessing whether he was indirectly serving the New York market. Although Westermann-Clark calls himself a "Communications Agent," Westermann-Clark Decl. ¶ 2, he was actually Escape's "Vice President of Public Relations." *See* Servodidio Decl., Ex. T. In that role, part of his job was communicating facts about the Grooveshark website to the public. *See id.*, Exs. T, V. To do so, Westermann-Clark, *inter alia*, participated in discussions on a

Meet-Up site[4] with the location listed as New York, NY. *See id.* Ex. S. Westermann-Clark also purports to be knowledgeable about Escape's New York contacts and negotiations, including its negotiations with New York-based record companies, New York-based copyright holders, and New York-based performing rights organizations. *See id.*, Ex. U. He has been a key spokesperson for Escape on piracy issues. *See id.*, Exs. T, U &V.

In arguing against reasonable forseeability, the Individual Defendants focus on a single, inapposite decision, *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997). *Bensusan* was a trademark infringement case, and the plaintiff's allegations of foreseeability in New York were "based solely on the fact" that the defendant, an individual who owned a single restaurant in Columbia, Missouri, was aware that the plaintiff's jazz club, whose trademark he was allegedly infringing, was located in New York. *Id.* at 300. The Court found that the plaintiff had failed to establish that the defendant had made a discernable effort to indirectly serve the New York market. *Id.*

In contrast, based on the preceding facts and the allegations, the Individual Defendants (1) should have known that their infringing products would reach New York; (2) should have known that their products were destined for New York; and (3) were making a discernable effort to indirectly serve the New York market.[5] *See Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 317 (S.D.N.Y. 1986) ("[A]mong the most important facts of each case are the overall nature of the defendant's business and the extent to which he can fairly be expected to defend lawsuits in foreign forums.").

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[4] Meetup is the "world's largest network of local groups" organized through online communications. *See* Meetup Home Page, http://www.meetup.com/about/ (last visited Mar. 12, 2012).

[5] Defendants emphasize the small number of times that they have travelled to New York. However, Defendants need not have physically entered New York in order to have a reasonable expectation that their conduct would harm New York Plaintiffs, or that their infringing products would enter New York.

C. The Individual Defendants Have Derived Substantial Revenue from Interstate Commerce.

The interstate commerce 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)) (emphasis added).

The conduct of Escape and the Individual Defendants does not consist of "business operations of a local character." Rather, the Individual Defendants were "seeding" an international website with tens of thousands of infringing sound recordings. The very intent of the tortious activity was that the infringing works that they uploaded onto the Grooveshark website would be found on the computers of people all across the globe. In short, the Individual Defendants were operating as integral employees of "the world's largest on-demand music streaming and discovery service." *See* Servodidio Decl., Ex. G.

Unable to argue that the actions of the Individual Defendants were local in character, they instead focus on the comparatively small amounts of their salaries to date. However, 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) ("There is no specific dollar threshold at which revenue becomes 'substantial' for purposes of C.P.L.R. § 302(a)(3)(ii)."); *Energy Brands*, 571 F. Supp.2d at 468, 472 (finding that $158.53 in interstate revenue satisfies the interstate commerce prong, because "[t]ere is no bright-line rule regarding when a specific level of revenue becomes substantial for purposes of 302(a)(3)(ii)").

Moreover, there is no legal barrier to considering the Individual Defendants' salaries for purposes of satisfying this prong of the statute. As alleged in the Amended Complaint, the Individual Defendants derive substantial revenue from interstate commerce because their compensation is tied directly to the number of sound recordings they upload and insert into the stream of interstate commerce each week. Am. Compl. ¶ 37. Although the Individual Defendants assert in their declarations that their salary is not tied to the revenues, profits, or performance of the company, that allegation cannot be assumed to be true at this stage of the proceedings. As shown below, until and unless the Plaintiffs have an opportunity to test those allegations through jurisdictional discovery, the facts alleged by Plaintiffs in the Amended Complaint *must* be assumed to be true, and *must* be viewed in the light most favorable to Plaintiffs. *See Armco*, 68 F. Supp. 2d at 335.

Apart from their salaries, Escape's revenues can be imputed to the Individual Defendants to satisfy the substantial revenue test. The Individual Defendants contend that a corporation's revenue from interstate commerce cannot be imputed to a company's non-shareholding officers. *See Pincione v. D'Alfonso*, 10 Civ. 3618 (PAC), 2011 U.S. Dist. LEXIS 103944, at *10 (S.D.N.Y. Sept. 13, 2011). However, each of the Individual Defendants is a shareholder or the holder of stock-options in Escape, and, as such, Escape's revenue – which is derived almost exclusively from interstate commerce – can be imputed to the Individual Defendants.[6]

[6] To the extent that the Individual Defendants suggest 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 and 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.

The Individual Defendants next argue that even if they are deemed to be shareholders of Escape, Escape's income is not attributable to them because they are not "major" shareholders. However, the case law does not reflect a minimum ownership share necessary before such imputation of income is justified. Here, the Individual Defendants each own tens of thousands of shares of stock or stock options and stand to gain tremendous benefit should the company ever go public or earn significant revenue.[7]

While the allegations in the Amended Complaint are sufficient to satisfy the requirements of alleging revenue from interstate commerce at this stage in the proceeding, it should be noted that "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 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)). Accordingly, dismissal at this stage would not be appropriate.

D. The Exercise of Jurisdiction over the Individual Defendants Comports with the Requirements of Due Process.

"In determining whether the 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)).

[7] Considering the share price generated through IPOs for start-up websites and other website businesses, the value of each Individual Defendant's shares could exceed a million dollars.

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).

The allegations relating to the Individual Defendants have easily satisfied these tests. The Individual Defendants have illegally uploaded over 70,000 infringing copies of copyrighted sound recordings, a substantial portion of which are owned by New York-based companies, in an acknowledged effort to ensure that all popular recordings were available to Grooveshark's users, including its large number of New York users. In addition, as detailed above, the Individual Defendants are employees of a company that has targeted the New York market. These facts satisfy the purposeful availment requirement. *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); *see also Bank Brussels Lambert*, 305 F.3d at 127-28 (reversing a district court's finding that jurisdiction violated due process, on the basis that the district court took "too narrow" a view of minimum contacts, and failed to consider 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]" (quotation marks omitted)).

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. 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.

Although the Individual Defendants assert that defending a lawsuit in New York would place an undue burden on them, there is no indication that there is any added burden to litigating in New York, rather than in Florida.[8] In fact, it is likely cheaper for all the Defendants to litigate together in a single forum. The Individual Defendants focus on the size of their compensation in arguing that litigating in New York would be a burden. However, the Individual Defendants have not alleged that they are paying their own legal expenses. Given that the infringing activity at issue in this case occurred within the scope of their employment and the absence of such allegation, the reasonable conclusion is that they are not paying their own legal fees. For all of these reasons, courts have noted that, "if forcing the defendant to litigate in a forum relatively

[8] Indeed, there need not be any burden. If Defendants can support the application factually, it is within the discretion of the Court to require their depositions to occur in Florida. Moreover, any added costs of a trial in New York can be addressed at that time, if warranted.

distant from its home base were found to be a burden, the argument would 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.").

The other four factors strongly favor the exercise of jurisdiction. With respect to New York's interest in adjudicating this case, in undertaking a "reasonableness analysis," 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, the instant litigation does not constitute the "exceptional situation" in which the exercise of jurisdiction is unreasonable even though the minimum contacts are present. *Bank Brussels Lambert*, 305 F.3d at 130.[9]

III. PLAINTIFFS' RENEWED MOTION FOR JURISDICTIONAL DISCOVERY

On February 14, 2012, Plaintiffs filed a letter with the Court seeking jurisdictional discovery. After oral argument during a telephonic conference, the Court denied that request without prejudice to Plaintiffs' right to renew the application as part of their oppositions to the pending Motions to Dismiss. Plaintiffs hereby renew that motion.

In the event that the Court denies Defendants' jurisdictional motions, no discovery is necessary. However, if the Court determines either: (1) that in evaluating these motions, it will consider the factual allegations contained in the declarations of the Individual Defendants that are inconsistent with the jurisdictional allegations contained in the Plaintiffs' Amended Complaint; or (2) that Plaintiffs have not made out a *prima facie* showing of personal jurisdiction in the Amended Complaint, but have made a sufficient start and shown its position to be non-frivolous, Plaintiffs request that the Court permit them to conduct jurisdictional discovery in order to allow Plaintiffs to inquire into facts that are exclusively in the Defendants' control.

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[9] The Individual Defendants cite to *Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 325 (S.D.N.Y. 1998), in asserting that haling an out-of-state corporate employee into a New York court "would . . . raise grave due process concerns." *Karabu* is highly distinguishable from the instant facts. In *Karabu*, two travel agencies brought suit against multiple senior officers of a major airline company. In finding that an exercise of jurisdiction did not comport with due process, the *Karabu* court focused on the fact that the plaintiffs' complaint was "completely devoid of any factual specificity indicating how each of the six defendants participated in the allegedly tortious conduct or what role they each played." *Id.* at 325. The Court noted that the plaintiffs' allegations against the six individual defendants were "grafted, word-for-word" from their prior complaints against the corporation.

By contrast, here, Plaintiffs have included in their complaint allegations specific to all three Individual Defendants, namely, that the they, and only they, collectively uploaded over 70,000 infringing copies of copyrighted sound recordings for the benefit, and under the control of, Escape and its Executives. Am. Compl. ¶ 39. In fact, the complaint breaks down the sound recordings by each individual Defendant.

To the extent the Court considers the declarations submitted by Defendants in support of their motions, jurisdictional discovery must be granted. When a defendant moves to dismiss a complaint based on its own factual allegations submitted to the court through declarations—as Defendants have done here—those declarations cannot form the basis for dismissing a motion without jurisdictional discovery. *See Univ. of Montreal Pension Plan*, 2006 U.S. Dist. LEXIS 11617, at *27.

Specifically, the Individual Defendants have submitted factual allegations addressing the issue of substantial revenue from interstate commerce. If the Court intends to consider these factual allegations that are contrary to the allegations in the Amended Complaint, Plaintiffs are entitled to jurisdictional discovery. For example, Defendants argue that jurisdiction under § 302(a)(3) does not exist, because their compensation is not dependent upon their contributions to Escape's profits. *See, e.g.*, Declaration of Nikola Arabadjiev ¶ 3. As a result, Plaintiffs are entitled to test this assertion. Moreover, they are also entitled to discovery to see what other forms of compensation Defendants receive. For example, Paul Geller operates two of his own companies, and the revenue from those companies is relevant to the jurisdictional analysis. *See* Servodidio Decl. ¶¶ 27-29. Plaintiffs are entitled to seek details about similar sources of income from the other moving defendants.

Further, Defendants have submitted declarations in support of their argument that it was not reasonable for them to foresee that their conduct would cause harm in New York. It is clear that these declarations are self-serving and omit material facts. For example, a review of the public record reveals that Westermann-Clark has engaged New York in a way that was not disclosed in his declarations. *See* Servodidio Decl. ¶¶ 30-33. If the Court considers these factual allegations, Plaintiffs are entitled to discovery to test those claims; for example, discovery that

would speak to Defendants' contact with Escape's New York office as well as contacts with New York record companies, advertisers, media outlets, public relations firms, vendors and investors.

A second basis for jurisdictional discovery is present when the Court believes that the Plaintiffs have not made a prima facie showing of jurisdiction but have "made a sufficient start and shown its position to be non-frivolous." *BHP Trading (UK) Ltd. v. Deep Sea Int'l Shipping Co.*, No. 90 Civ. 2231 (WK),1991 U.S. Dist. LEXIS 13220, at *14 (S.D.N.Y. Sept. 23, 1991). Here, Plaintiffs have made a prima facie showing of jurisdiction. However, if the Court determines otherwise, it is clear that Plaintiffs have gone far beyond merely demonstrating a "non-frivolous" position with respect to personal jurisdiction. Rather, they have demonstrated sufficient and continuous contacts with New York and demonstrated numerous acts of infringement causing harm within New York pursuant to section 302(a)(3) of the New York long-arm statute. Accordingly, jurisdictional discovery is warranted in this circumstance as well.

Finally, any argument by Defendants in their reply papers that their belated agreement to allow Plaintiffs to use a small portion of the discovery provided in the State Court Proceeding moots the request for jurisdictional discovery is frivolous. Plaintiffs' request for jurisdictional discovery focuses primarily on Defendants' allegations that they did not receive substantial revenue from interstate commerce. None of the documents that Defendants have permitted Plaintiffs to use in opposing this motion addresses that subject, nor do any of the allegations contained in Defendants' declarations.

For these reasons, Plaintiffs respectfully renew their motion for limited jurisdictional discovery.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Individual Defendants' motion to dismiss Plaintiffs' Amended Complaint for lack of personal jurisdiction, and certainly not grant the Individual Defendants' motion without permitting Plaintiffs to engage in limited jurisdictional discovery.

Dated: New York, New York
March 14, 2012

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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 Filed by Defendants Benjamin-Westermann-Clark, Chanel Munezero, and Nikola Arabadjiev 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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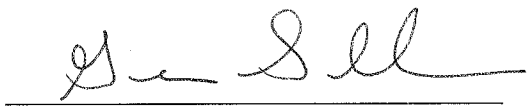

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