UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SONY BMG MUSIC ENTERTAINMENT *et al.*, Plaintiffs, v. JOEL TENENBAUM, Defendant.	Civ. Act. No 07-cv-11446-RWZ (formerly consolidated with Civ. Act. No. 03-cv-11661-NG) On remand from the First Circuit Court of Appeals, Nos. 10-1883, 10-1947, 10-2052)

PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S AMENDED FURTHER SUBMISSION

Long after the close of briefing, and four months after the Court heard argument on the parties' briefs on remand, Defendant submitted his "Amended Further Submission" ("Submission," Dkt No. 80) seeking to "clarify the remedy" he recommends to the Court. That submission should be stricken, as Defendant's new brief is not only untimely, but also directly contrary to his earlier representations to the Court.

Defendant's arguments also fail on the merits. Although he attempts to frame his challenge to the jury instructions as distinct from the arguments that the First Circuit has already rejected, that gambit has no basis in law or fact. Defendant cites no authority whatsoever in support of his argument that an excessive verdict necessarily resulted from unlawful jury instructions. And the whole premise of his argument—that the verdict was excessive—is wrong, as Plaintiffs have already explained at length. Moreover, Defendant's requested remedy—the order of a new trial without following long-established procedure for common law remittitur—has no legal basis and contravenes the First Circuit's explicit mandate. Accordingly, Plaintiffs

respectfully request that Defendant's "Further Submission" be stricken or, in the alternative, rejected on the merits.

1. The arguments advanced in Defendant's new brief are flatly contrary to the position he has previously advanced before this Court. Both in his briefs on remand and at oral argument, Defendant consistently took the position that "[r]emittitur is neither appropriate nor desirable." Dkt. No. 70 at 2; *see also* Dkt. No. 73 at 6 ("remittitur is inappropriate and may be avoided"). Now, however, after mulling the issue for the last few months, Defendant not only suggests that the Court should order remittitur, but offers an entirely novel set of procedures that he believes should govern this process. The First Circuit has rejected Defendant's earlier attempts to disclaim prior positions he has taken in this litigation, *see* Order, *Sony BMG Music Entertainment v. Tenenbaum*, No. 10-1883 (Oct. 7, 2011), and this Court should do the same.

Defendant's Submission is also untimely. In its December 13, 2011 Minute Order, the Court set a hearing for February 22, 2012 and instructed the parties to file all briefing related to the First Circuit's Mandate on or before February 6, 2012. Defendant's Submission filed on June 5, 2012 does not remotely comply with this briefing schedule, and Defendant has not properly sought leave of court to file his Submission. *See* LR, D. Mass. 7.1(b)(3). Nor is there any basis for Defendant's Submission at this late date because: (1) the facts and circumstances have not changed in any way since Defendant's original filings or the February 22 hearing, (2) Defendant has cited no new legal authority since the time of the hearing to justify an additional submission, and (3) Defendant has already had an adequate opportunity to be heard on

this issue having filed an Opening Brief (Dkt No. 71) and two Reply Briefs (Dkt Nos. 73, 74)[1] and presented arguments at the February 22 hearing.

2. In addition to being procedurally improper, the arguments raised in Defendant's Submission also fail on the merits. Defendant suggests that the First Circuit upheld the jury instructions on the assumption that the $675,000 damage award was not excessive. If that award were to be found excessive, Defendant reasons that the jury instructions authorizing that award were necessarily unlawful, and a new trial must be granted. It is unsurprising that Defendant cites no authority in support of this argument, as his proposed procedures for remittitur make no sense and are contrary to centuries of common law practice. A jury instruction is either lawful or unlawful, and must be assessed on its own merits at the time it is given. Defendant's argument would produce the bizarre result that every excessive damage award necessarily impugns as well the jury instructions that led to that verdict. That cannot possibly be the law—a jury might return an excessive damage award even if it is properly instructed about the governing legal standards. Thus, even though Defendant seeks to cast his argument in slightly different terms, his challenge to the jury instructions fails for all of the reasons already addressed by the First Circuit. *See Sony BMG Entertainment v. Tenenbaum*, 660 F.3d 487, 503-08 (1st Cir. 2011).

In any event, the premise of Defendant's argument—that the jury verdict was excessive—is wrong. Defendant has already briefed this issue many times (thus precluding any need for an "Amended Further Submission"), and Plaintiffs have explained at length why Defendant's position is deeply flawed as a matter of both fact and law. The jury's award was at the low end of the statutory range set by Congress, and is fully supported by record evidence

[1] On February 13, 2012, Plaintiffs filed a Motion to Strike, or in the Alternative, to Disregard Defendant's Reply Briefs (Dkt No. 75) for failure to comply with the Court's instructions. This motion is fully briefed and pending before the Court.

documenting Defendant's long-term, willful distribution of Plaintiffs' sound recordings and his repeated misconduct in the course of this litigation. *See* Plaintiffs' Memorandum of Points and Authorities (Dkt No. 72) at 12-14, 21-28.

Finally, Defendant's request that the Court simply order a new trial ignores long established precedent concerning the nature and function of common law remittitur. Where appropriate, remittitur obliges the Court to "review the evidence in the light most favorable to the prevailing party and to grant remittitur or a new trial on damages only when the award 'exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before it.'" *E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492, 502 (1st Cir. 1994). At a minimum, an order for remittitur requires that Plaintiffs be given the option either to accept the remitted amount or to proceed to a second trial on damages. *See Kolb v. Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982). But, as Plaintiffs have explained at length—and as Defendant also contended until his most recent pleading—remittitur is simply inappropriate in this case.

CONCLUSION

Wherefore, Plaintiffs respectfully request that the Court strike Defendant's Amended Further Submission (Dkt No. 80).

Respectfully submitted,

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS LLC; and UMG RECORDINGS, INC.

By their attorneys,

DATED: July 6, 2012

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

The undersigned counsel hereby certifies that he has conferred with counsel for the Defendant in connection with this motion and Defendant's counsel does not assent to the relief requested herein.

/s/ Daniel J. Cloherty
Daniel J. Cloherty

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on July 6, 2012.

/s/ Daniel J. Cloherty
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