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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TANYA ANDERSEN,

Case No. 3:07-CV-934-BR

Plaintiff,

v.

Defendants'
**RESPONSE TO PLAINTIFF'S
"STATUS REPORT" DATED
FEBRUARY 6, 2009**

**ATLANTIC RECORDING
CORPORATION, et al.,**

Defendants.

On the eve of Monday's oral argument on the pending motion respecting Defendants' objections to Plaintiff's Document Request No. 14, and associated privilege issues, Plaintiff has submitted, under the guise of a "status report," a document that (a) significantly misstates

Defendants' positions with respect to various discovery issues and (b) attempts to pre-argue issues for Monday's hearing that have been fully briefed for the Court.

I. WRITTEN DISCOVERY

1. Plaintiff's Request for "documents regarding the creation, implementation, operation or modification of the 'litigation program.'" This is the subject of Monday's hearing. The documents requested by Plaintiff on these subjects all were written by attorneys in anticipation of and during litigation. Defendants have objected to Plaintiff's request on the bases that all or substantially all of these documents are protected from disclosure, and that requiring Defendants to search for them and generate a privilege log would be unduly burdensome. The Court requested and received briefing on these issues and set oral argument for Monday. Plaintiff's arguments regarding supposedly "withheld" documents will be largely resolved by whatever decision the Court reaches following that hearing.

2. Plaintiff's Request for "Board Minutes" and Financial Records. Defendants have substantially complied with the provisions of the December 16, 2008 "Stipulated Order" requiring the production of certain financial records and board minutes. *See* Order at 3-4, respecting Plaintiff's Request No. 16. Defendants provided a large production of these documents to Plaintiff as the Stipulated Order required. In the letter covering that production, Defendants advised that they had just recently discovered a small quantity of additional documents, and promised to produce or log those additional documents shortly. Defendants expect to make that additional production within the next several days, at which time Defendants will certify the completeness of their production.

3. Plaintiff's "Amended Requests." With respect to two of Plaintiff's specific document requests, Nos. 15 and 22, the Court sustained Defendants' overbreadth and undue burden objections after Defendants represented that responding to these requests would require them to manually review tens of thousands of files respecting individual infringement cases. The Stipulated Order directed the parties to "confer further regarding ways to narrow

the scope of th[ese] Request[s].” Rather than conferring with Defendants as the Stipulated Order required, on December 23, Plaintiff simply served “amended requests.” The amendments purported to redefine the information Plaintiff wants Defendants to produce from within the individual case files, but still would require Defendants to conduct a manual review of the entire universe of files. Because the burden of responding to the amended requests would have been identical to that which the Court considered undue in respect of the original request, Defendants re-asserted their objections, and invited Plaintiff to confer further, as the Stipulated Order required. *See* Declaration of Kenneth R. Davis, II (“Davis Decl.”) submitted concurrently herewith, Exhibit A (Defendants’ Objections and Responses to Plaintiff’s “Amended Requests”).

The parties held a meet-and-confer on January 27 and have had additional exchanges thereafter. Plaintiff and Defendants exchanged correspondence on January 28 and January 30 (*see* Davis Decl., Exhibits B and C), and ***agreed*** in that exchange that, rather than reviewing more than 30,000 individual files, Defendants would manually review their files respecting the approximately 100 residents of Oregon who were sued or threatened with suit for P2P copyright infringement. That review is underway and, as Defendants promised in their January 30 letter, Defendants will produce any documents responsive to Plaintiff’s requests within the next two weeks. Plaintiff’s statement that Defendants “would not even review their own files” is thus incorrect and contradicted by this correspondence.

II. DEPOSITIONS

On January 23, 2009, Plaintiff made her first request for depositions in this matter, demanding that some 13 depositions occur “in early February,” because Plaintiff is under an obligation to move for class certification by March 2. *See* Davis Decl., Exhibit D. In response, on January 28, Defendants identified the group of Plaintiff’s requested deponents who have the most detailed knowledge of the subjects described in Plaintiff’s letter, and offered to make all of them available for deposition on specified dates in early February. *See* Davis Decl., Exhibit E.

On February 2, Plaintiff's counsel wrote to Defendants that, despite having demanded depositions in "early February," none of Plaintiff's counsel would actually be available to take depositions until the week of February 23. *See* Davis Decl., Exhibit F. Plaintiff's counsel asked Defendants which of their witnesses would be available for deposition that week. On February 4, Defendants advised that five of the specified deponents would be available during the week of February 23, and proposed a schedule for those depositions. *See id.* As of this writing, Plaintiff's counsel has not responded to that proposed schedule.

As for the deposition of Matthew Oppenheim, Defendants do not intend to assert the privilege with respect to *facts* about how the litigation program was developed and operated. If Plaintiff asks Mr. Oppenheim about the *legal advice* that he or any other attorney rendered with respect to the program, however, Defendants would expect to assert that this information is protected from disclosure. This distinction seems fairly straightforward.

Defendants will be prepared to address any or all of these issues during the hearing on February 9.

DATED: February 6, 2009

By /s/ Kenneth R. Davis, II
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