

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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

**PLAINTIFFS’ MOTION TO STRIKE, OR IN THE ALTERNATIVE,  
TO DISREGARD DEFENDANT’S REPLY BRIEFS**

On February 6, 2012, Defendant filed two briefs, Defendant’s Reply Brief to Plaintiffs’ Memorandum of Points and Authorities, and Defendant’s Reply Brief to Intervenor United States’ Memorandum on Remand (hereinafter, “Defendant’s Reply Briefs”) Those filings are improper for three reasons. First, Defendant’s Reply Briefs substantially exceed the page limits set by the Court in its December 13, 2011 Order. Second, Defendant’s Reply Briefs raise new issues and make new arguments not previously set forth in Defendants’ opening brief. Third, and finally, Defendant’s Reply Briefs refer to and rely on matters that are not in the trial record and not part of this proceeding. Plaintiffs respectfully request that Defendant’s Reply Briefs be stricken, or in the alternative, that the Court disregard any facts or arguments that are improperly included in those briefs.

**1. Defendant’s Brief Improperly Exceeds the Court’s Page Limitation.**

At the hearing on December 13, 2011, the Court conferred with the parties regarding a proper briefing schedule to address Defendant’s remittitur and due process arguments. After that

conference the Court issued an Order limiting Defendant's to a single reply brief of five (5) pages. Defendant filed not one, but two reply briefs, the first of which was twelve (12) pages, and the second of which was thirteen (13) pages. Faced with a five (5) page limit, Defendant filed twenty-five (25) pages, wholly disregarding the Court's Order. Courts regularly strike pleadings that are well in excess of the maximum page limit provided by the Court. *See, e.g., Morris v. Bank of Am.*, 2010 U.S. Dist. LEXIS 3407, at \*1-\*2 (N.D. Cal. Jan. 14, 2010); *United States v. Merkosky*, 2008 U.S. Dist. LEXIS 99415, at \*19 (N.D. Ohio Dec. 9, 2008) (striking portions of a brief that exceeded page limit).

This was not an instance where Defendant's filings are just barely over the page limit and Defendant's failure to abide by the Court's order is more technicality than substance. Here, Defendant filed briefs that were five times the Court's page limit. On that basis alone, Defendant's briefs should be stricken.

## **2. Defendant Improperly Raises New Arguments.**

Courts regularly refuse to consider arguments raised for the first time in a reply brief. *See, e.g., Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 474 n.14 (1st Cir. 2009) ("Because arguments raised for the first time in reply briefs are procedurally barred, we need not consider this contention."). Here, by granting himself an extra twenty pages in his Reply Briefs, Defendant was able to raise several new arguments that he had not raised in his Opening Brief. For example, in his Opening Brief, Defendant included only two sentences and no substantive argument as to why remittitur is not appropriate. (*See* page 2, Dkt 70). In his Reply Briefs, Defendant has included in excess of a dozen pages of briefing that injects entirely new arguments concerning remittitur, including the novel arguments that in considering remittitur the Court is not constrained by the statutory

damage provisions contained in the Copyright Act (page 9, Dkt 74), that the Court should require Plaintiffs to indicate whether they would accept a remittitur at a series of different damage levels, (page 6, Dkt 74), and that Defendant should be given the option of a new trial if he is not satisfied with the remitted amount, (page 12, Dkt 74). By including new arguments in his Reply Briefs, Defendant has denied Plaintiffs the opportunity to respond to them. While Plaintiffs agree that a remittitur is not appropriate, they certainly do not endorse these arguments and would have responded to them had Defendant made them in his Opening Brief.

The inclusion of new arguments on reply is not proper, and for that reason, Defendant's Reply Briefs should be stricken.

**3. Defendant's Reply Briefs Refer To and Rely On Matters Not In The Record.**

As a general proposition, post-trial motions may only refer to evidence that was part of the trial record. *See Eastern Mt. Platform Tennis v. Sherwin-Williams Co.*, 40 F.3d 492, 502 (1st Cir. 1994) (a review of damages award must be based solely on the evidence at trial); *Monge v. Cortes*, 233 Fed. Appx. 8, 10-11 (1st Cir. 2007) (reviewing district court record in assessing denial of post-trial motion). In deciding a motion for remittitur, the Court is obligated to construe all facts in evidence in Plaintiffs' favor. *Smith v. Kmart Corp.*, 177 F.3d 19, 30 (1st Cir. 1999) (in reviewing the jury's verdict, courts must "view[] the evidence in the light most favorable to the verdict"). Similarly, in deciding whether the jury's award comports with due process, the Court must be constrained to considering only that evidence that was before the jury. *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 565 (1st Cir. 2003).

Defendant's Reply Briefs repeatedly refer to and rely on matters that were not before the jury, including:

1. A study indicating that there were 40 million unduplicated files sharers per month. (page 1, Dkt 73).
2. A declaration by trial counsel in a wholly unrelated case regarding enforcement efforts by Plaintiffs. (pages 1-2, Dkt 73 and pages 5-6, Dkt 74).
3. Default judgments in other peer to peer file sharing cases. (pages 5-6, Dkt 74).

Defendant does not and cannot cite any part of the trial record for this evidence. Since it was not admitted, it cannot be relied upon now. Moreover, this newly provided information bears no relevance to consideration of Plaintiffs' Motion for Remittitur or due process challenge since consideration of both issues must be based on the evidence that was before the jury at the time that it rendered its verdict.

Finally, even had Defendant sought to introduce such evidence at trial, it likely would not have been admitted. The actions Plaintiffs took in other, unrelated cases, bears no relevance to the case at bar. The fact that Plaintiffs may have agreed as a matter of compromise and expediency to accept minimum statutory damages in cases where a defendant did not appear bears no relevance to the appropriate measure of damages against Joel Tenenbaum. Similarly, the fact that there may have been many other individuals engaging in file sharing also is not relevant to the individualized actions of this Defendant.

### **CONCLUSION**

Wherefore, Plaintiffs respectfully request that the Court strike Defendant's Filings (Dkt Nos. 73, 74). Alternatively, Plaintiffs ask that the Court disregard any facts referenced in Defendant's Filings that are not properly before the Court.

Respectfully submitted,

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

By their attorneys,

DATED: February 13, 2012

By: /s/ Daniel J. Cloherty

Daniel J. Cloherty (BBO #565772)  
COLLORA LLP  
600 Atlantic Avenue - 12th Floor  
Boston, Massachusetts 02210-2211  
Telephone: (617) 371-1000  
Facsimile: (617) 371-1037  
Email: dcloherty@collorallp.com

Matthew J. Oppenheim (*pro hac vice*)  
OPPENHEIM & ZEBRAK, LLP  
7304 River Falls Drive  
Potomac, Maryland 20854  
Telephone: (301) 299-4986  
Facsimile: (866) 766-1678  
Email: matt@oandzlaw.com

Paul D. Clement (*pro hac vice*)  
BANCROFT PLLC  
1919 M Street, NW, Suite 470  
Washington, DC 20036  
Telephone: (202) 234-0090  
Facsimile: (202) 234-2806  
Email: pclement@bancroftpllc.com

Timothy M. Reynolds (*pro hac vice*)  
BRYAN CAVE LLP  
1700 Lincoln Street, Suite 4100  
Denver, Colorado 80203  
Telephone: (303) 861-7000  
Facsimile: (303) 866-0200  
Email: timothy.reynolds@bryancave.com

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

**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 February 13, 2012.

/s/ Daniel J. Cloherty

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