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February 27, 2008

DENVER

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BOULDER

Hon. David G. Trager
U.S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

COLORADO SPRINGS

Re: Elektra Entertainment Group, Inc., et al. v. Rae J. Schwartz,
1:06-cv-03533-DGT-RML
Supplemental Authority

Dear Judge Trager:

LONDON

We represent Plaintiffs in the above-referenced action. We write in response to the supplemental authority recently filed by Defendant (Docket No. 70).

LOS ANGELES

On February 25, 2008, Defendant filed a copy of *Atlantic Recording Corp. v. Brennan*, 2008 WL 445819 (D. Conn. February 13, 2008), as supplemental authority. In *Brennan*, the court, *sua sponte*, suggested a number of defenses that the defendant in that case *might* raise in an effort to defend against the plaintiffs' claim of copyright infringement. The court raised these issues without the benefit of any briefing by any party and did not pass on the actual merits of *any* of such possible defenses. In addition, although the court considered the application of Rule 12(b) in the context of the plaintiffs' motion for default judgment, the court did not dismiss the plaintiffs' complaint.

MUNICH

SALT LAKE CITY

In contrast to the *Brennan* decision, Plaintiffs would direct the Court's attention to a recent holding in the United States District Court for the Western District of Michigan, which is attached hereto. *See LaFace Records, LLC et. al v. Does 1-5*, Civ. No. 2:07-CV-187 (W.D. Mich. Feb. 22, 2008). In its analysis of a defendant's motion to strike, the *LaFace Records* court found that the complaint filed in that matter, which is substantially similar to the one filed in this matter, was sufficient under the pleading standards set forth in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1964-1965 (2007). The *LaFace Records* court further held that any arguments regarding whether allegations of "making available" were sufficient to support a claim of copyright infringement would be best addressed in a motion for summary judgment and noted that any such argument would only apply to the plaintiffs' distribution claim but had no bearing on the plaintiffs' reproduction claim.

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Id. at 10-11. Finally, the arguments raised in *LaFace Records* were fully briefed by all parties before the court rendered its decision.

The plaintiffs in *Brennan* are preparing to file a motion for reconsideration of the court's February 25, 2008 Order, in which they will provide the applicable law to the court. In light of the procedural context and lack of any briefing by any party on the issues raised in the order, Plaintiffs respectfully submit that the *Brennan* order has no bearing on the issues before the Court in this case. Plaintiffs additionally submit that the *LaFace Records* court's holding further supports Plaintiffs' position that their Complaint is more than sufficient under Fed. R. Civ. P. 8(a) and 12(c) and that Defendant's motion for judgment on the pleadings should be denied.

Respectfully submitted,


s/Richard L. Gabriel
Counsel for Plaintiffs

RLG:ptg
Attachment

cc: Hon. Robert M. Levy (by ECF and first-class mail; w/attach.)
Ray Beckerman, Esq. (by ECF and e-mail; w/attach.)
Morlan Ty Rogers, Esq. (by ECF and e-mail; w/attach.)
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