

Respectfully submitted,

/s/

John G. Browning
State Bar. No. 03223050
GORDON & REES LLP
2100 Ross Avenue, Suite 2800
Dallas, Texas 75201
Telephone: (214) 231-4660
Facsimile: (214) 461-4053

and

Charles Lee Mudd, Jr.
Mudd Law Offices
3114 W. Irving Park Road, Suite 1W
Chicago, Illinois 60618
Telephone: (773) 588-5410
Facsimile: (773) 588-5440

**ATTORNEYS FOR DEFENDANT
DAVID GREUBEL**

CERTIFICATE OF CONFERENCE

I certify that on April 17, 2008, I attempted to confer with Tim Reynolds, Counsel for Plaintiff, and I was advised that Mr. Reynolds was on vacation. I then contacted Andrew Mohraz, another attorney with Mr. Reynolds, and was advised that Plaintiffs oppose the Motion to Quash. It is, therefore, submitted to the Court for determination.

/s/

John G. Browning

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule 5.1(d) on this 18th day of April, 2008. Any other counsel of record will be served by first class mail.

/s/

John G. Browning

a management company for recording artists. The Subpoena seeks all documents which refer “in any way” to the instant lawsuit and the lawsuit previously filed against deponent, David Greubel, but which was later dismissed with prejudice.

4. The Subpoena requests that deponent provide the requested materials on or before April 18, 2008.

5. Deponent asks the Court to quash the subpoena duces tecum in its entirety.

II. BACKGROUND

Deponent was previously sued by various Plaintiff recording companies in another copyright infringement lawsuit in this district, one of tens of thousands of lawsuits filed by the recording industry plaintiffs nationwide, many of which were filed against innocent individuals who had never downloaded music in their lives. Deponent was one of those many innocent individuals. After responding to the lawsuit and being forced to engage in needless discovery and expense in an effort to clear his name, Mr. Greubel was ultimately nonsuited from that lawsuit.

Not content with this result, and on the eve of claim limitations, Plaintiffs in this cause instituted the current action against the children of David Greubel. In prosecuting this claim, they now seek discovery of irrelevant correspondence between David Greubel (as well as Mr. Greubel’s representatives, including counsel) and Nettwerk Management. The subpoena duces tecum served on David Greubel is a fishing expedition of the worst kind, issued by Plaintiffs to further meritless claims and attempt to intimidate, harass and coerce a settlement from Defendants.

Of greatest concern, Plaintiffs seek discovery of any document concerning either of the lawsuits brought against the Greubels, including communications between Nettwerk Management and defense counsel Charles Mudd and/or John Browning. While Plaintiffs’

counsel does not state any basis for attempting to obtain such communications, it is apparently predicated on the belief that Nettwerk Management has agreed to monetarily support the defense of the Defendants. For obvious reasons, Mr. Greubel objects to Plaintiffs' subpoena duces tecum on the grounds that it is overly broad and seeks documents which are not relevant to the claims pled to date. Most importantly, Mr. Greubel asserts the attorney-client privilege and the attorney work product privilege as to any documents which involve deponent's or Defendants' counsel. Seeking correspondence between an attorney and a client of his (both Charles Mudd and local counsel John Browning have an attorney-client relationship with Nettwerk Management, in addition to their representation of David Greubel and the Defendants in the current litigation) in this situation is analogous to compelling a defense attorney to produce privileged communications discussing a pending lawsuit between that attorney and an insurance carrier providing defense to an insured.

III. ARGUMENT

A court must, on timely motion, quash or modify a subpoena that requires disclosure of privileged or protected material and no exception of waiver applies. FED. R. CIV. P. 45(c)(3)(A). Mr. Greubel has timely filed this motion before the time for performance. FED. R. CIV. P. 45(c)(3)(A). For the following reasons, the Court must quash this deposition.

A. The Subject Subpoena Improperly Seeks Privileged Materials

Deponent objects to the Subpoena Duces Tecum first on privilege grounds. As such, the requests in this Subpoena Duces Tecum are fatally flawed because they seek documents the Plaintiffs know to be privileged under the Federal rules, Texas rules, and the case law of every jurisdiction of the United States. By seeking communications not just between David Greubel and Nettwerk Management, but communications between Mr. Greubel's counsel and Nettwerk management, Plaintiffs are blatantly attempting to invade the attorney client and attorney work

product privileges.

All documents sought by Plaintiffs that contain attorney-client communications or which contain information which was created by legal counsel and constitutes his work product is not producible and, moreover, not relevant to this dispute. These documents include but are not limited to notes and memoranda prepared by attorneys for deponent, whether while he was a party to a lawsuit or those communications that have taken place since then. These protections are also afforded to that information provided by deponent to his attorneys and correspondence between deponent and his attorneys for agents acting on their behalf. Plaintiff cannot establish a substantial need for such documents and even if it could, such a need would be insufficient to require deponent to produce the requested documents.

1. The Attorney Client Privilege Prohibits Production

Plaintiffs seek communications which are clearly protected by the attorney-client privilege. In the definitions, which preface the Subpoena Duces Tecum, “YOU” or “YOUR” is defined to mean David Greubel, **his legal counsel**, or anyone acting under his direction. *See* Subpoena Duces Tecum, attached as **Appendix, Page 3**. (Emphasis added) The attorney-client privilege relates to communications made to a member of the bar or subordinate, in confidence, for the purpose of securing legal advice, assistance, or representation. *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975). The privilege is based upon two related premises: (1) that an attorney needs to know all that “relates to the client’s reasons for seeking representation if the professional mission is to be carried out”; and (2) that privilege is necessary “to encourage clients to make full disclosure to their attorneys.” *Upjohn Corp. v. United States*, 449 U.S. 383, 389, 101, S.Ct. 677, 66 L.Ed.2d 584 (1981). “The Rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and

skill in its practice, which assistance can only be safely and readily availed of when free of the consequences or the apprehension of disclosure.” *Upjohn Co.* at 389.

In this case, the plaintiffs are seeking communications between the third party (David Greubel), his attorneys, and another party that is also entitled to claim the attorney-client privilege (Netzwerk Management). Such requests seek documents that constitutes (1) a writing; (2) prepared in anticipation of litigation; and (3) by a party. In such an instance, the court must find that it is protected from discovery unless the plaintiffs have “substantial need and face undue hardship.” See *Southwest Louisiana Convention of Visitors Bureau v. Employers Mutual Casualty Co.*, 2008 W.L. 938959 at *1 (W.D.La. Apr. 4, 2008). To date, plaintiffs have not shown that they will be prejudiced by the failure to produce these documents nor have they shown any substantial need for the information requested. For these reasons alone, the Subpoena Duces Tecum should be quashed. Nonetheless, other privileges also prohibit production of these documents.

2. The Attorney Work Product Doctrine Also Precludes Production

The purpose of the work product privilege differs from the attorney-client privilege and does not exist to protect the confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of an opponent. *Fields v. Sturm, Ruger & Co.*, 864 F.2d. 379, 382 (5th Cir. 1989). This class of documents is also sought by the Plaintiff by their Subpoena Duces Tecum.

The work-product doctrine is codified in Fed.R.Civ.P. 26(b)(3). *In re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586 (5th Cir.2000). The rule provides, in relevant part, that a party may obtain “discovery of documents ... otherwise discoverable ... and prepared in anticipation of litigation ... by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that

the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” FED.R.CIV.P. 26(b)(3). The party who asserts work-product protection bears the burden of establishing that the document was prepared in anticipation of litigation or in the course of actual litigation. Because Greubel actively defended the previous lawsuit, there is no doubt that any communication or document prepared in that regard was done for litigation, not just in anticipation thereof. If the party can satisfy that requirement, which has been done here, the burden shifts to the Plaintiffs to overcome that protection. *Hodges, Grant & Kaufmann v. I.R.S.*, 768 F.2d 719 (5th Cir.1985). This privilege also protects from disclosure those materials and documents prepared in anticipation of litigation, *see* FED.R.CIV.P. 26(b)(3) and, among other things, it “insulates a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements from an opposing counsel's inquiries.” *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir.1991).

The situation presented here is not unlike the tripartite relationship traditionally found between an insurance company, its insured and the attorney hired by the insurer to represent the insured. While the attorney's duty is always to the insured first, the insurance company is often considered a client as well. *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex.1973). Here, counsel has two clients and the traditional concerns regarding conflict are not present. Communications containing work product to and from both clients should be protected. The materials prepared were obviously done in anticipation of or as a reaction to litigation. Theoretically, if Plaintiffs' assertion that Nettwerk Management is funding the defense of the Greubel defendants is correct, then Plaintiffs are no more entitled to communications between defense counsel and Nettwerk than they would be to communications between defense counsel and an insurance carrier that was underwriting such a defense.

As mentioned, the work-product doctrine shields from discovery the materials prepared by or for an attorney in preparation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In *Hickman*, the United States Supreme Court provides that even a “substantial need” is unlikely to overcome privileged status, for “work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship.” See also *Upjohn Corp. v. US*, 449 US 383, 389-390 (1981). The privilege protects categories of materials: ordinary work-product and opinion work product. *Snowden v. Connaguht Lab. Inc.*, 137 F.R.D. 325, 330-32(D.Kan.1991). Any communication between the deponent and any other party, including any party’s legal counsel was necessarily created or communicated only after the previous lawsuit was served on Mr. Greubel and/or after the subsequent lawsuit was filed against the Greubel children and is necessarily opinion work product. Further, the fact that Mr. Greubel is no longer a party to the lawsuit does not mean that he is not still afforded the protection of the attorney-client and attorney-work product privileges. In fact, work-product immunity extends to documents prepared in anticipation of prior, terminated litigation, regardless of the interconnectedness of the issues and facts. The work-product privilege (as recognized in *Hickman, supra*) does not evaporate when the litigation for which the document was prepared has ended. *In re Grand Jury Proceedings*, 43 F.3d. 966, 971 (5th Cir. 1994). Any documents possessed by Greubel and/or his legal counsel would have been prepared in anticipation or during the course of litigation, and the work product immunity of those documents extends into perpetuity. The fact that Plaintiffs nonsuited their previous case against Mr. Greubel does not affect the work product doctrine.

3. Plaintiffs Have a Greater Burden to Show Need for Work Product

The requesting party is also required to meet a higher standard in their attempts to discover attorney work product. In fact, in *Conkling v. Turner*, 883 F.2d. 431, 434-435 (5th Cir.

1989), the court held that there must be showing of *compelling* need and the inability to discover the substantial equivalent by other means than work product, which evidence is mental impressions of counsel, conclusions, opinions, and legal theories of an attorney. David Greubel is listed as a witness in this cause. Because he is a witness, he would be available for deposition and thus, there is a substantial equivalent to the requested information which is available through other methods of discovery. The Fifth Circuit has held that the cost of one or even a few depositions is not sufficient to justify discovery of work product. *Southern Scrap Metal Co. v. Fleming*, 2003 WL 21474516 *9 (E.D.La).

B. Plaintiffs' Seeking Such Communications Represents and Impermissible Double Standard

Plaintiffs are apparently seeking communications between defense counsel and a non-party to this case (Nettwerk Management) based upon the belief that Nettwerk Management is providing financial support to the defense of this litigation. In point of fact, Nettwerk Management has publicly expressed support for the Greubel defendants, just as various recording artists have publicly condemned the recording industry's campaign of pursuing legal action against music fans and attempting to extort money from individuals whom they know to be innocent of any allegedly infringing activity. This litigation, like the recording industry's entire campaign against purported digital piracy, is brought in the name of particular recording company plaintiffs but is being orchestrated and directed by the recording industry's trade association, the Recording Industry Association of America ("RIAA"). The RIAA, upon information and belief, has not only formulated the theories upon which Plaintiffs will proceed but coordinates the investigation leading up to each lawsuit (performed, at least in part, by a company called Media Sentry); the pre-litigation efforts to reach non-negotiable "settlements" with accused individuals through a clearing house known as the "Settlement Information Line,"

the presentation of virtually identical lawsuits alleging copyright infringement through national counsel at Holme Roberts Owen and local counsel; as well as the direction of these lawsuits, including such tasks as assisting in discovery and attending court-ordered settlement conferences and mediation. It is the RIAA – not employees of individual recording company plaintiffs – who attends such conferences and mediation, including but not limited to Mr. Matt Oppenheim, an attorney for the RIAA.

Yet oddly enough, despite feeling no compunctions against inquiring into the relationship between Nettwerk Management and defense counsel, Plaintiffs have vigorously resisted any attempt to inquire into the role played by the RIAA in this litigation; the relationship between the RIAA and each of the Plaintiffs in this action; the relationship between the R IAA and Media Sentry, Inc.; and the role played by the RIAA in the thousands of lawsuits filed by the Plaintiffs and other recording companies against allegedly infringing individuals. In fact, in response to discovery requests from one or more of the Defendants that asked about these subjects, Plaintiffs objected that such requests sought “irrelevant information,” as well as “confidential, proprietary information that has no bearing on the issues in this case, privileged information, or information that is protected by the work product doctrine.” See, for example, Plaintiff Arista’s Response to Defendant Brenton James Greubel’s Interrogatory No. 22, attached hereto as **Appendix, Page 34** and incorporated by reference as if set forth fully herein; and Plaintiff Elektra’s Responses to Defendant Brenton James Greubel’s Interrogatories Nos. 14, 15, and 16, attached hereto as **Appendix, Pages 52-54** and incorporated by reference as if set forth fully herein.

Clearly, Plaintiffs do not believe that what is good for the goose is good for the gander. Exhibiting the height of hubris, Plaintiffs apparently believe that they are entitled to inquire into privileged matters between the Greubel defense counsel and a non-party to this case, while at the same time maintaining that the highly relevant active role played by the RIAA is somehow off

limits from discovery. Such an impermissible double standard cannot be allowed by this Court to continue. If Plaintiffs are entitled to probe into the communications between the Greubel defense counsel and Nettwerk Management, then every single communication by, between, or among Plaintiffs' counsel and the RIAA and/or its representatives is fair game as well.

C. The Subject Subpoena Served On David Greubel Was Irrelevant, Overbroad and Intended To Harass.

Lastly, discovery should be denied when the purpose of the request is to gather information for use in proceedings other than the pending suit, or when a party's aim is to delay bringing a case to trial or to embarrass or harass the party from whom he seeks discovery. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353, 98 S.Ct. 2380, 57 L.Ed.253 (1978). Here, Plaintiffs seek documents concerning communications between the deponent and a third party which have no bearing on the claims in this lawsuit. Unless and until NETTWERK is a party to this lawsuit or Plaintiffs can show how such communications bear any relevancy to the copyright infringement case brought against these Defendants, there is no justification for this fishing expedition. These requests are also overbroad to the extent they seek documents from the deponent from "January 2005 through present..." and to the extent they seek "all" documents "relating or referring in any way" to the subject litigation. Further, Mr. Greubel is not a party to the instant lawsuit, has been dismissed with prejudice from any claims against him, and has no duty to maintain any records or documents for the Plaintiffs' convenience.

Plaintiffs' issuance of the Subpoena Duces Tecum on David Greubel can be for no other purpose other than to harass him. Again, deponent is not a party to this suit and the relevance of the requested documents is not remotely connected to the claims in the instant case. In their First Amend Complaint for Copyright Infringement, Plaintiffs recite only one cause of action against the Greubel children; copyright infringement. There is no mention of David Greubel or

NETTWERK in their pleadings and any requests for correspondence or documents relating to their communications, or those with legal counsel, is simply a fishing expedition. *NLRB v. Carolina Food Processors*, 81 F.3d at 513. The foregoing notwithstanding, deponent will produce a privilege log upon request, which references these documents withheld.

IV. CONCLUSION

Because Plaintiff's Subpoena Duces Tecum to David Gruel is overly broad, irrelevant, and most importantly seeks production of privileged information, David Greubel respectfully requests that Plaintiffs' Subpoena Duces Tecum be quashed.

Respectfully submitted,

/s/

John G. Browning
State Bar. No. 03223050
GORDON & REES LLP
2100 Ross Avenue, Suite 2800
Dallas, Texas 75201
Telephone: (214) 231-4660
Facsimile: (214) 461-4053

and

Charles Lee Mudd, Jr.
Mudd Law Offices
3114 W. Irving Park Road, Suite 1W
Chicago, Illinois 60618
Telephone: (773) 588-5410
Facsimile: (773) 588-5440

**ATTORNEYS FOR DEFENDANT
DAVID GREUBEL**

CERTIFICATE OF CONFERENCE

I certify that on April 17, 2008, I attempted to confer with Tim Reynolds, Counsel for Plaintiff, and I was advised that Mr. Reynolds was on vacation. I then contacted Andrew Mohraz, another attorney with Mr. Reynolds, and was advised that Plaintiffs oppose the Motion to Quash. It is, therefore, submitted to the Court for determination.

/s/
John G. Browning

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule 5.1(d) on this 18th day of April, 2008. Any other counsel of record will be served by first class mail.

/s/
John G. Browning