UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

In Re Subpoena to Global Music Rights, LLC	Related to *United States v. Broadcast Music, Inc.*, 64 Civ. 3787 (LLS) Related to *Broadcast Music, Inc. v. Radio Music License Committee, Inc.*, 18 Civ. 4420 (LLS)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF GLOBAL MUSIC RIGHTS, LLC'S
MOTION TO QUASH BROADCAST MUSIC, INC.'S SUBPOENA

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I. INTRODUCTION

The business of licensing public performances of music has long been dominated by two behemoths: ASCAP and BMI. Global Music Rights, LLC ("GMR"), an upstart performance rights organization ("PRO") founded in 2013, injected new competition into the industry for the first time in decades. (Grimmett Decl. ¶¶ 8, 10.) GMR is nothing like its larger competitors. Whereas BMI and ASCAP have more than 1.4 million affiliates and control over 23 million compositions, GMR represents just 77 songwriters and has a repertory of roughly 33,000 compositions. (*Id.* ¶ 9.) This is by design; GMR's size is its strength. Unlike ASCAP and BMI, GMR operates as a "boutique," offering individualized service to a small number of highly talented artists and songwriters, as well as compensation befitting their in-demand musical works. (*Id.* ¶¶ 11-12.)

As a new entrant, GMR has fought tooth and nail to gain a foothold in the industry. It has faced an illegal blockade by the commercial radio industry, orchestrated by the Radio Music License Committee, Inc. ("RMLC"). (*Id.* ¶ 10.) Since GMR's inception, RMLC and its thousands of members refused to obtain a license with GMR licenses unless GMR acceded to the radio industry's collusive rate demands, including depressed rates and compulsory licensing—even as stations played GMR songs day in and day out, without authorization and without paying GMR or its songwriters a dime. (*Id.* ¶¶ 27-30.) GMR is presently engaged in antitrust litigation against RMLC in two forums. Despite the radio boycott, GMR persisted—and has been lauded for bringing competition and innovation to a staid industry.

BMI threatens to undo GMR's hard-fought progress. Earlier this month, BMI served a sweeping subpoena on GMR in connection with rate court proceedings against RMLC (the "Subpoena"). The Subpoena demands that GMR reveal the most closely guarded aspects of its business to BMI, its largest competitor, and to RMLC, a litigation adversary and powerful

counterparty in license negotiations. Among other things, BMI asks GMR to produce all radio license agreements, all documents relating to GMR's radio license negotiations, detailed revenue and compensation data, internal market analyses, and documents underpinning GMR's antitrust claims against RMLC. Put simply, the Subpoena asks GMR to give a dominant competitor and adversary near-comprehensive access to the heart and soul of GMR's business.

The Federal Rules do not require GMR to equip BMI and RMLC with the very tools they would need to unfairly disadvantage GMR in the marketplace. BMI's Subpoena should be quashed in full for the following reasons:

First, the Subpoena asks GMR to produce documents and appear for deposition in New York City, even though GMR is based in Los Angeles. Rule 45 prohibits BMI from demanding GMR's compliance more than 100 miles from its headquarters. Fed. R. Civ. P. 45(c).

Second, the Subpoena demands that GMR designate a witness to testify on behalf of the company, but does not "describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). In fact, the Subpoena does not identify ***any*** matters for examination.

Third, the Subpoena seeks highly confidential material for which BMI has no "substantial need." Fed. R. Civ. P. 45(d)(3)(C)(i). BMI's contention that GMR licenses may serve as an appropriate benchmark in rate-setting proceedings finds no support in law or fact—and, in any event, could not support its demand for near-unfettered access to GMR's license agreements, private negotiations, market analyses, revenues, and pricing structures.

Fourth, even if BMI could articulate some need to know the inner workings of GMR's business, that need would not outweigh the severe harm GMR would suffer if forced to disclose this information to its biggest competitor and to the radio industry's negotiating body. Since

BMI's and RMLC's counsel in these proceedings also act as their clients' negotiators, "outside counsel's eyes only" restrictions would not cure the prejudice to GMR.

Fifth, compliance with BMI's expansive Subpoena would entail substantial costs to GMR and its small staff. There is no reason to subject GMR to this undue burden.

BMI's Subpoena is improper, through and through. The Court should quash it.

II. BACKGROUND

A. GMR Is An Innovative Start-Up PRO.

GMR is the first new competition the public performance rights licensing industry has seen in decades. (Grimmett Decl. ¶ 10.) Rather than emulating the dominant PROs, GMR competes by distinguishing itself from them. (*Id.* ¶¶ 11-12.) GMR's business model is founded on providing "concierge" service to a small group of talented songwriters, all while operating as a lean, cost-efficient company. (*Id.* ¶ 12.) GMR is orders of magnitude smaller than ASCAP, BMI, and SESAC. (*Id.* ¶ 9.) It maintains only one office, in Los Angeles. (*Id.* ¶ 7.)

B. GMR Is Engaged In Antitrust Litigation Against RMLC.

Not everyone has welcomed a new entrant into the marketplace. The RMLC represents 3,000 radio companies, controlling over 90% of terrestrial radio stations, and openly states that its primary objective is to use its colossal collective buying power to extract from licensors below market license rates. (*Id.* ¶ 23.) When GMR refused to capitulate to the buying cartels anticompetitive demands, RMLC effected a licensing boycott, pursuant to which its members refused to enter licensing agreements with GMR, but nevertheless continued to perform musical compositions in GMR's catalog. (*Id.* ¶¶ 27-30.)

Prior to the lawsuit RMLC's extraordinary market power manifested itself with only ***two*** out of 3,000 members—.07% of RMLC's total membership—breaking rank and agreeing to accept a license with GMR. (*Id.* ¶ 29.)

Pennsylvania Action. On November 18, 2016, RMLC filed suit against GMR in the Eastern District of Pennsylvania alleging that GMR is a "monopolist" in a "market" consisting of the performance rights for the songs in its own repertory. Radio Music License Committee, Inc. v. Global Music Rights, LLC, No. 2:16-CV-06076 CDJ (E.D. Pa. Nov. 18, 2016) (E.D. Pa. Dkt. 1). RMLC simultaneously filed a motion for preliminary injunction that would require GMR to make performance rights licenses available to RMLC's members during the pendency of the lawsuit. (E.D. Pa. Dkt. 3). GMR denied RMLC's allegations and was preparing to oppose RMLC's injunction motion.

The Honorable C. Darnell Jones II referred to Magistrate Judge Lynn A. Sitarski RMLC's motion for preliminary injunction. (E.D. Pa. Dkt. 9) Judge Sitarski convened several hearings, during which she encouraged GMR and RMLC develop a solution that would obviate the need for extensive injunction proceedings. (Marroso Decl. ¶ 5.) Pursuant to Judge Sitarski's direction, GMR and RMLC agreed to an interim resolution pursuant to which GMR would offer RMLC members a short-term performance license in exchange for a fee. (*Id.*) The interim license terms, including license rate, were part of a litigation compromise to avoid injunction proceedings. (*Id.*) The interim license agreements state that the agreement itself, and all negotiations that led to it, were compromise negotiations protected by Federal Rule of Evidence 408; and that each party reserved their respective rights were subject to subsequent adjustment pending the outcome of the parties' respective litigations. (*Id.*) GMR filed motions to dismiss for lack of personal jurisdiction and failure to state a claim. (*Id.* ¶ 6) In November 2017, a magistrate judge issued a lengthy recommendation that the district judge dismiss RMLC's lawsuit because the court lacked personal jurisdiction over GMR. (*Id.*) The district judge has not ruled on either of GMR's motions to dismiss. (*Id.*)

On three separate occasions, GMR has agreed to extend the interim licenses on the same terms. (*Id.* ¶ 7.) In the meantime, GMR has sought to negotiate and enter longer term market licenses with RMLC members. (Grimmett Declaration ¶ 30.) In the nearly two years since the first lawsuit was filed, not one RMLC member has broken ranks and agreed to an individually negotiated market license. (*Id.*)

California Action. In December 2016, GMR sued RMLC in California for fixing license fees below competitive levels and orchestrating an illegal boycott of GMR licenses. (Marroso Decl. ¶ 8.) In April 2017, the district court denied RMLC's motion to dismiss for lack of subject matter jurisdiction, but stayed the case pending the Pennsylvania court's resolution of GMR's personal jurisdiction motion. (*Id.*) Discovery has not begun in either action. (*Id.* ¶¶ 4-8.)

C. BMI's Subpoena to GMR.

In June 2018, RMLC filed a Petition on behalf of thousands of radio stations seeking a final determination of rates for licenses with BMI.[1] In its Response to the Petition, without recounting the history of the GMR-RMLC lawsuit or the fact that GMR's licenses with RMLC Station Groups are explicit litigation compromises, not market-negotiated business deals, BMI self-servingly contends that "final agreements between large RMLC Station groups and GMR" may serve as "benchmarks" in the rate court proceeding.[2]

On August 13, 2018, GMR accepted service of BMI's Subpoena. (Marroso Decl. ¶ 3.) Even though GMR is based in Los Angeles, the Subpoena purports to require GMR to produce a

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[1] Petition ¶ 2, *Radio Music License Committee, Inc. v. Broadcast Music, Inc.*, No. 18 Civ. 4420 (LLS) (S.D.N.Y. May 17, 2018) [*hereinafter* "RMLC Pet."].

[2] Response ¶¶ 29, 35, *Radio Music License Committee, Inc. v. Broadcast Music, Inc.*, No. 18 Civ. 4420 (LLS) (S.D.N.Y. May 29, 2018) [*hereinafter* "BMI Resp."].

corporate designee for deposition in New York on August 28, 2018. (*Id.*, Ex. 1.) The Subpoena also purported to require GMR to produce a sweeping array of proprietary and highly confidential documents—none of which has relevance or probative value to the rate setting petition. Even though BMI is a direct competitor of GMR's and even though RMLC is GMR's current litigation adversary, the Subpoena seeks all licenses between GMR and any radio licensee, all documents concerning radio license negotiations, granular revenue and compensation data, client details, internal market analyses, and even clear work-produce and privileged documents underlying GMR's antitrust claims against RMLC. (*See id.*) The Subpoena covers an eight-year period, eclipsing GMR's entire existence. (*Id.*) GMR served objections to the Subpoena on August 27, 2018. (*Id.*, Ex. 2.)

III. LEGAL STANDARD

"Protection of non-parties from inconvenience and burden is one of the important goals of Rule 45." *Alexander Interactive, Inc. v. Adorama, Inc.*, No. 12 Civ. 6608 (PKC) (JCF), 2013 WL 2455924, at *1 (S.D.N.Y. June 4, 2013). To that end, the Rule imposes a duty on parties to "avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). The court for the district where compliance is required "must enforce this duty." *Id.*

Rule 45 also "provides certain procedural and due process protections not provided by other Rules of Federal Civil Procedure." *Tiger Lily Ventures Ltd. v. Barclays Capital Inc.*, No. 17-MC-499 (GBD) (KNF), 2018 WL 3300703, at *3 (S.D.N.Y. May 2, 2018), *report & recommendation adopted*, 2018 WL 2316727 (S.D.N.Y. May 22, 2018). For example, a subpoena must identify a compliance location that is within 100 miles of the recipient's residence or place of business. Fed. R. Civ. P. 45(c)(1)(A), (2)(A). Subpoena-related disputes also generally must be resolved in that district so as to minimize the nonparty's burden. Fed. R. Civ. P. 45(d)(3)(A). The Court "***must*** quash or modify" a subpoena that violates the rule's

"geographical limits." Fed. R. Civ. P. 45(d)(3)(A)(ii) (emphasis added); *see, e.g.*, *M'Baye v. N.J. Sports Production, Inc.*, 246 F.R.D. 205, 207–08 (S.D.N.Y. 2007) (quashing subpoena).

Rule 45 institutes stringent protections for nonparties' confidentiality. Fed. R. Civ. P. 45(d)(3)(B)(i). A nonparty need not produce trade secrets or other confidential material unless the propounding party "shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship," Fed. R. Civ. P. 45(d)(3)(C)(i), and even then only if the need "outweighs the burden and prejudice to the non-party." *Anker v. G.D. Searle & Co.*, 126 F.R.D. 515, 522 (M.D.N.C. 1989). The imperative to protect nonparties is especially acute where a subpoena requires disclosure to a ***direct competitor***. *See Am. Std. Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) ("Courts have presumed that disclosure to a competitor is more harmful than disclosure to a noncompetitor."); *Solow v. Conseco, Inc.*, No. 06 Civ. 5988 (BSJ) (THK), 2008 WL 190340, at *4 (S.D.N.Y. Jan. 18, 2008) ("Macklowe clearly has a privacy interest in maintaining the confidentiality of the information. That interest is particularly heightened in the present context, where the information is sought by a competitor[.]").

IV. ARGUMENT

A. <u>BMI's Subpoena Must Be Quashed Because It Violates the 100-Mile Rule.</u>

Rule 45 requires the party propounding a subpoena to identify a place of compliance that is within 100 miles of "where the [recipient] resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(A), (2)(A). Where the recipient is an entity rather than a natural person, the entity's residence is determined by its headquarters. *See Europlay Capital Advisors, LLC v. Does*, 323 F.R.D. 628, 629–30 (C.D. Cal. 2018); *GMA Accessories, Inc. v. Eminent, Inc.*, No. 07 Civ. 3219 (LTS) (DF), 2007 WL 4456009, at *1 (S.D.N.Y. Dec. 11, 2007). Violating Rule 45's geographic limitations is a sufficient basis for quashing a subpoena. *See,*

e.g., *Europlay*, 323 F.R.D. at 629–30; *Hermitage Global Partners LP v. Prevezon Holdings Ltd.*, No. 14-mc-00318 (TPG), 2015 WL 728463, at *4 (S.D.N.Y. Feb. 19, 2015).

BMI's Subpoena identifies the New York City office of its counsel as the place of compliance. (Marroso Decl., Ex. 1.) But as the Subpoena acknowledges, GMR is headquartered in Los Angeles, California—well in excess of 100 miles from New York City. (*Id.*) GMR has no offices or facilities within 100 miles of New York City. (Grimmett Decl. ¶ 7.) This alone warrants quashing BMI's Subpoena.[3]

B. BMI's Subpoena Must Be Quashed Because It Does Not Identify Any Topics For Examination.

When a subpoena requests that an entity appear for deposition through a designated witness, the propounding party must comply with Rule 30(b)(6), *see Wultz v. Bank of China Ltd.*, 293 F.R.D. 677, 679 (S.D.N.Y. 2013), which states that the party "***must*** describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6) (emphasis added). BMI's Subpoena purports to require GMR to appear for deposition, but does not ***identify*** any "matters for examination," much less "describe [them] with reasonable particularity." (*See* Marroso Decl., Ex. 1.) For this reason, the subpoena for testimony must be quashed. *See, e.g.*, *Freeman v. Rochester Psychiatric Center*, No. 12-CV-6045T, 2015 WL 4250892, at *3 (W.D.N.Y. July 10, 2015); *Monge v. Maya Magazines, Inc.*, No. 2:10-CV-00230-RCJ-PA, 2010 WL 2776328, at *4–5 (D. Nev. July 14, 2010).

[3] Alternatively, the Court may modify the Subpoena to identify Los Angeles as the compliance location. Indeed, GMR reserves the right and may seek to transfer court oversight of the subpoena to the Central District of California. Fed. R. Civ. P. 45(d)(3)(A), (B).

C. BMI's Subpoena Must Be Quashed Because It Requests Highly Confidential Material For Which There Is No Substantial Need.

The prime defect in BMI's Subpoena is apparent on its face: it asks GMR to divulge voluminous information touching the most sensitive aspects of its business to a chief competitor (BMI) and a cartel of radio groups against which GMR is embroiled in antitrust litigations across the country (RMLC). There is no need in the rate setting proceeding between BMI and RMLC for GMR's material, to say nothing of the "substantial need" Rule 45 demands. Fed. R. Civ. P. 45(d)(3)(C)(i). "An antitrust action"—or a rate court proceeding stemming from BMI's antitrust violations—"does not come with an automatic entitlement to force non-parties to reveal their competitive thinking." *In re eBay Seller Antitrust Litig.*, No. C09-0735 RAJ, 2009 WL 10677051, at *5 (W.D. Wash. Aug. 17, 2009). The Court should put a stop to BMI's fishing expedition.

1. The Subpoena Seeks Highly Confidential, Competitively Sensitive Information.

The Subpoena demands that GMR turn over a broad range of highly confidential documents, from licensing agreements, to revenue data, to GMR's private assessments of the competitive landscape. But the Federal Rules do not obligate GMR to disclose "the very essence of its [past and] current strategic business operations" to BMI, its largest competitor, or to RMLC, a litigation adversary and potential counterparty in licensing negotiations. *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2018 WL 3818914, at *4 (D. Kan. Aug. 10, 2018) (quashing subpoena). Far from it, "[a] subpoena may be quashed to protect trade secrets or other confidential information." *Holquin v. Celebrity Cruises, Inc.*, No. 10-20215-CIV, 2010 WL 6698221, at *1 (S.D. Fla. July 22, 2010). Discovery material qualifies as confidential if disclosure would "cause 'substantial

economic harm' to the competitive position of the entity from [which] it is obtained." 9 *Moore's Federal Practice—Civil* § 45.52[1] (2018) (collecting cases).

The Court should quash BMI's Subpoena as an unjustified intrusion into GMR's confidential business affairs. The trove of proprietary and competitively sensitive materials demanded in the Subpoena are entitled to protection under Rule 45:

Request No. 1: All interim and final licenses and/or other agreements concerning the right to publicly perform musical works between GMR and any station or radio group. Licensing agreements are the core of GMR's business. (Grimmett Decl. ¶ 14.) GMR maintains these agreements as confidential, and they are subject to express confidentiality provisions. (*Id.*) Disclosing these agreements—together with the licensing rates and other competitive terms they embody—to a rival PRO and to an entity that is devoted to using cartel power to extract below-market licensing rates would be unfairly prejudicial to GMR. (*Id.*) The agreements are plainly confidential. *See Toto, Inc. v. Sony Music Entm't*, No. C-13-mc-80168-MISC-JST (DMR), 2014 WL 793558, at *2 (N.D. Cal. Feb. 26, 2014) (refusing to enforce subpoena seeking "highly confidential" licensing agreements; rejecting argument that discovery was warranted because non-party's licensing agreements were similar to agreements in dispute); *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 638 (C.D. Cal. 2005) ("documents related to nonparty KSA's business relationship with other nonparties" were "clearly" confidential; quashing subpoena).

Request Nos. 2–3: All documents and communications concerning the negotiation of any interim or final license or agreement with RMLC or any station or radio group. Documents relating to private business negotiations are routinely protected as confidential—and GMR treats them as such. (Grimmett Decl. ¶ 15); *see, e.g.*, *Waymo LLC v. Uber Techs., Inc.*, No. 17-cv-00939-WHA (JSC), 2017 WL 2929439, at *1, *3–4 (N.D. Cal. July 7, 2017)

(agreements, letters of intent, term sheets, and negotiation documents and communications relating to deal between nonparty Lyft and party Waymo protected as confidential; subpoena quashed). The sensitivities are heightened here, given that BMI competes against GMR in ***negotiating with these same entities***, and RMLC ***represents these same entities*** in licensing negotiations. (Grimmett Decl. ¶ 22.); *see Monterey Bay Military Housing, LLC v. Pinnacle Monterey LLC*, No. C15-80123 HRL, 2015 WL 2229229, at *3 (N.D. Cal. May 12, 2015) (quashing subpoena where disclosure of "terms and pricing" of nonparty's insurance program would hamper its "ability to negotiate the terms of its insurance portfolio" in the future).

Moreover, contrary to BMI's unsubstantiated (and erroneous) claims, GMR's interim licenses are not any kind of "benchmark" for BMI's rate setting proceedings. The interim licenses between GMR and RMLC's members are not freely negotiated licenses in an open marketplace. Rather, as explained above, they are court-directed litigation compromises entered to obviate the need for injunction proceedings. These temporary settlement discussions were "meant to be confidential." *Camacho v. Dean*, No. 1:14-CV-01428, 2015 WL 4478755, at *6 n.6 (M.D. Pa. July 22, 2015); *see Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 11 CV 2450, 2013 WL 5423852, at *4 (N.D. Ill. Sept. 27, 2013) ("courts are generally reluctant to order disclosure of negotiations or documents related to a settlement agreement;" declining to enforce subpoena) (quotation omitted). Many documents related to interim license negotiations include privileged information and/or attorney work product. (Grimmett Decl. ¶ 37.)

Request Nos. 4–5: License revenue data for each year GMR has been in existence, broken down by blanket license fees, fees paid on a "program-period basis," and fees derived from "New Media transmissions," and the percentage of GMR license fees that GMR distributed to its members or affiliates. GMR does not publicly disclose licensing

revenue or distribution figures. (Grimmett Decl. ¶ 16.) Indeed, GMR's formula for calculating disbursements to its clients is one of the key metrics on which it competes against larger PROs. (*Id.* ¶ 11.) These data are paradigmatic examples of confidential commercial information. *See EpiPen*, 2018 WL 3818914, at *4–5 (nonparty's "revenues, pricing, sales, rebates, incentives, budgets, revenue projections, cost projections, and profits" protected as confidential; quashing subpoena); *GreenCycle Paint, Inc. v. PaintCare, Inc.*, No. 15-cv-04059-MEJ, 2018 WL 1399865, at *3–4 (N.D. Cal. Mar. 19, 2018) (nonparty's "pricing and customer information" protected as confidential; quashing subpoena); *Edwards v. Cal. Dairies, Inc.*, No. 1:14-mc-00007-SAB, 2014 WL 2465934, at *5–6 (E.D. Cal. June 2, 2014) (nonparty's "pricing data" protected as confidential; denying motion to compel); *Solow*, 2008 WL 190340, at *4–5 (quashing subpoena seeking nonparty's "assets and financial plans").

Request No. 6: Internal market studies and analyses, including about GMR's and its competitors' current or projected shares of public performances, and all supporting methodologies, data and documents. Like any competitive going concern, GMR treats internal studies and analyses of the marketplace as highly confidential, as they reveal GMR's competitive thinking and inform its business strategy. (Grimmett Decl. ¶ 17.) In some instances, these analyses constitute or reflect attorney work product. (*Id.*) Courts routinely shield nonparties from disclosing internal market analyses to competitors. *See, e.g.*, *EpiPen*, 2018 WL 3818914, at *4–5 (internal "market research and analysis" and documents relating to "competition in the market" protected as confidential; quashing subpoena); *Verinata Health, Inc. v. Sequenom, Inc.*, No. C 12-00865 SI, 2014 WL 2600367, at *2–3 (N.D. Cal. June 10, 2014) ("view of the market" protected as confidential; quashing subpoena); *eBay*, 2009 WL 10677051, at *4–6 (internal market assessments protected as confidential; subpoena quashed as to these documents).

Request No. 7: Information concerning the songwriters, composers, and publishers that GMR represents, including the date on which GMR began (or *will begin*) representing each of its clients and GMR's clients' former PRO affiliations. To the extent BMI merely seeks a list of songwriters in GMR's catalog, that information is readily and publicly available on GMR's website. (Grimmett Decl. ¶ 18.) To the extent BMI seeks addition information about the songwriters or publishers, such as past business relationships and when those relationships terminated, BMI must obtain that information, if at all, from the participants, not GMR. GMR does not publicize or disclose details concerning its client relationships—as GMR's clients rightly expect. (*Id.*); *see Edwards*, 2014 WL 2465934, at *5 ("[nonparty]'s customers expect their information to be kept confidential;" quashing subpoena). In fact, GMR's client agreements include express confidentiality obligations. (Grimmett Decl. ¶ 18.) This nonpublic information is entitled to protection under Rule 45. *See, e.g.*, *GreenCycle*, 2018 WL 1399865, at *3–4 ("customer information" protected; quashing subpoena); *Am. Soc'y of Media Photographers, Inc. v. Google, Inc.*, No. 13 C 408, 2013 WL 1883204, at *5 (N.D. Ill. May 6, 2013) (quashing subpoena seeking confidential information about nonparty's customers).

Request No. 8: All documents and communications concerning RMLC and its members' boycott of GMR, as described in GMR's antitrust lawsuit against RMLC. These documents would largely consist of GMR's privileged and work product material, which obviously would not be produced. Any non-lawyer-related information in this category would mainly concern negotiations (and attempted negotiations) with RMLC and radio stations, (Grimmett Decl. ¶ 19.), which are confidential, as discussed above. (*Id.* ¶¶ 15, 19); *see Waymo*, 2017 WL 2929439, at *1, *3–4; *Monterey Bay*, 2015 WL 2229229, at *3; *Verinata Health*, 2014 WL 2600367, at *2–3.

Request No. 9: All documents and communications concerning the removal of GMR-affiliated musical works from radio broadcasts or new media transmissions. GMR uses data from a third-party service to track stations' performances of GMR works. (Grimmett Decl. ¶ 20.) GMR is contractually bound to keep these data confidential. (*Id.*) And like all of its private dealings with actual and potential licensees, GMR keeps confidential any communications dealing with the removal of GMR works from radio broadcasts and other transmissions. (*Id.*) Documents "related to [a nonparty's] business relationship with other nonparties" are "clearly" confidential. *Moon*, 232 F.R.D. at 638. Moreover, since the extent to which broadcasters have removed GMR works in lieu of purchasing a license may be indicative of GMR's financial condition (Grimmett Decl. ¶ 20), disclosure to a large competitor and the organization that negotiates license rates on behalf of the commercial radio industry could be ruinous to GMR's competitive position. (*Id.*)

In sum, the Subpoena seeks confidential and competitively sensitive information that "cover almost every aspect" of its business. *EpiPen*, 2018 WL 3818914, at *4. These materials are entitled to protection from disclosure. Fed. R. Civ. P. 45(d)(3)(B)(i).

2. BMI Does Not Have a Substantial Need For the Requested Documents and Information.

Because the Subpoena seeks confidential commercial information, the Court may not enforce it against GMR unless BMI "shows a ***substantial need*** for the . . . material that cannot be otherwise met without undue hardship." Fed. R. Civ. P. 45(d)(3)(C)(i) (emphasis added). Substantial need is a much higher bar than "simple relevance." *Meyer v. Colavita, USA, Inc.*, No. SACV 11-00696-AG (MLGx), 2011 WL 2457681, at *3 (C.D. Cal. June 17, 2011). A "substantial need" exists only where the requested discovery is "***essential*** to a judicial determination of [the party's] case." *Scientific Games Corp. v. AGS LLC*, No. 2:17-cv-00343-

JAD-NJK, 2017 WL 3671286, at *2 (D. Nev. Aug. 24, 2017), *aff'd*, 2018 WL 2292811 (D. Nev. May 18, 2018) (emphasis added); *see Nat'l Cong. For Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000) ("substantial need" exists where "the information sought is 'essential' to the party's defense, is 'crucial' to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues"). BMI does not come close to demonstrating a "substantial need" for GMR's confidential material.

RMLC has petitioned the Court to set reasonable license rates for "the FCC-licensed broadcast radio stations operating in the United States that it represents." (RMLC Pet. ¶ 2.) To determine a reasonable license rate, the Court must "define a rate or range of rates that approximates the rates that would be set in a competitive market." *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 576 (2d Cir. 1990). Accordingly, BMI must demonstrate that the documents it seeks from GMR carry "great probative value" in defining a competitive "rate or range of rates" for a license between BMI and RMLC.

While rate courts have at times considered so-called "benchmark" agreements when defining a reasonable rate, not all license agreements make suitable benchmarks. *See United States v. BMI* ("*BMI I*"), 316 F.3d 189, 194 (2d Cir. 2003) ("[D]etermination [of a reasonable rate] is often facilitated by the use of a benchmark—that is, reasoning by analogy to an agreement reached after arms' length negotiation between ***similarly situated parties***.") (emphasis added). Rather, a license agreement must be "comparable" to a license agreement between the parties to the rate court proceeding. *United States v. BMI* ("*BMI II*"), 426 F.3d 91, 95 (2d Cir. 2005). Rate courts consider multiple factors in assessing whether an agreement is "comparable," including "[1] the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, [2] the comparability of the rights in question, [3] the similarity of the

economic circumstances affecting the earlier negotiators and the current litigants[,] and [4] the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned." *Id.*

Applying these standards, GMR's licenses with RMLC members are not "comparable" and there is no "substantial need" for the documents BMI has requested. BMI's Subpoena principally seeks documents and communications relating to two categories of GMR license agreements: **(a)** final license agreements with RMLC or its member stations; and **(b)** interim license agreements with RMLC or its members station. Neither category is remotely "comparable" to a license between BMI and RMLC.

GMR's Final License Agreements. To date, GMR has only entered into final license agreements with ***two*** RMLC members. (Grimmett Decl. ¶ 29.) These agreements are not adequate benchmarks. First, a license between GMR and a single RMLC member is not comparable to a license between BMI and the entire RMLC membership. RMLC has ***thousands*** of members. Some RMLC members own hundreds of radio stations, while others own just one or two. RMLC's members also operate stations in different media markets and in different formats (*e.g.*, talk radio, news, adult contemporary, classic rock). Because of this, the rates a single RMLC member (or a small handful of members) may be willing to pay for a GMR license are not necessarily probative of the appropriate across-the-board rate for thousands of "broadcast radio stations operating in the United States." (RMLC Pet. ¶ 2.)

Second, the dramatic size differential between BMI and GMR underscores that GMR licenses are not appropriate benchmarks. ASCAP and BMI each represent hundreds of thousands of artists and control millions of songs; by both metrics, GMR and SESAC are significantly smaller. (Grimmett Decl. ¶ 9.) Rate court decisions have found SESAC licenses to

be poor benchmarks precisely because of its small size. In *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014), for example, the ASCAP rate court indicated that "[t]he SESAC license has historically been a benchmark of limited value"—largely because "SESAC's small size . . . amplifies any error" when trying to use SESAC rates to determine the implied license rate for a much larger PRO. *Id.* at 362; *see also In re Application of MobiTv, Inc.*, 712 F. Supp. 2d 206, 254 (S.D.N.Y. 2010) ("SESAC agreements have never been used as benchmarks in ASCAP rate court proceedings."). Here the contrast is even starker, since GMR is a tiny fraction of SESAC's size. (Grimmett Decl. ¶ 9.) With 77 songwriters and 33,000 songs, GMR's client base is just 0.25% of SESAC's membership, and its repertory is only 8.25% the size of SESAC's. (*See id.*) If SESAC licenses have "limited value" in rate court proceedings, *Pandora*, 6 F. Supp. 3d at 362, GMR's handful of final license agreements are virtually useless.

GMR's Interim License Agreements. At no point in its Response to RMLC's Petition does BMI even ***suggest*** that GMR's interim licenses would be adequate benchmarks. (*See* BMI Resp. ¶ 29 (alleging only that GMR's "***final*** license agreements" with "large RMLC Station groups" may serve as benchmarks) (emphasis added).) Nonetheless, the Subpoena demands that GMR produce "[a]ll" interim licenses and "[a]ll documents" concerning the negotiation of "any" interim license. (Marroso Decl., Ex. 1.) Since even relevancy is circumscribed by the pleadings,[4] BMI cannot assert a "substantial need" for licenses it did not even mention.

In any event, GMR's interim licenses are not comparable to long-term BMI licenses. In late 2016, after the antitrust litigations were underway, GMR offered interim licenses to RMLC's

[4] *See Varelas v. Crown Equip. Corp.*, No. 17-CV-869-JPS-JPS, 2018 WL 1307961, at *2 (E.D. Wis. Mar. 13, 2018) ("Rule 26 limits discovery to the scope of the pleadings."); *Toth v. Cal. Univ. of Pa.*, Civ. No. 09-1692, 2011 WL 2436138, at *2 (W.D. Pa. June 15, 2011) ("The complaint and its claims circumscribe the scope of discovery."); *Heredia v. Heyman*, 203 F.R.D. 112, 113 (S.D.N.Y. 2001) (denying discovery outside the scope of the complaint).

members. (Grimmett Decl. ¶ 31). These interim licenses were litigation expedients that allowed participating RMLC members to perform works in GMR's repertory for a short period while the cases proceeded. (*Id.*). As temporary settlements, they do not reflect competitive rates.

First, unlike the BMI license RMLC is seeking, the interim license agreements are for very short terms. Whereas RMLC is seeking a ***five-year*** license (RMLC Pet. ¶ 2), the first GMR interim license lasted for only ***nine months***. (Grimmett Decl. ¶ 32.) Since then, GMR has periodically entered into new interim licenses for just ***six-month*** terms. (*Id.*)

Second, the interim license agreements are riddled with litigation-specific provisions. For example, a material term was whether either party could rely on the existence of interim licenses in their respective lawsuits. (*Id.* ¶ 33.) Similarly, the parties negotiated a provision to address copyright infringement by RMLC members prior to the interim license agreements. (*Id.*) These and other provisions have no bearing on the appropriate rate for a license between BMI and RMLC. These litigation-specific provisions also demonstrate that the rates included in GMR's interim licenses reflect concerns unique to the parties' litigation, and do not accurately reflect the value of music licenses generally or of a GMR license specifically.

Third, the interim license agreements are subject to subsequent adjustment, by either GMR or the radio groups, depending on the outcome of the pending antitrust suits. (*Id.*) Far from being "free market deals" (BMI Resp. ¶ 29), the agreements expressly contemplate that the interim license rates do not "approximate[] the rates that would be set in a competitive market." *ASCAP*, 912 F.2d at 576.

The *MobiTV* rate court decision is on point. SESAC had accused MobiTV of willfully infringing copyrights in the SESAC repertory. *MobiTV*, 712 F. Supp. 2d at 221. The parties ultimately entered into a settlement, whereby MobiTV agreed to **(a)** take a license from SESAC

and **(b)** pay a lump sum in satisfaction of its alleged copyright infringement. *Id.* In a subsequent rate court proceeding, the court found that SESAC's license agreement with MobiTV was "a poor yardstick to measure the fairness of any fee to ASCAP" and had "limited relevance." *Id.* at 222. In particular, the court explained that MobiTV's license fee took into account other factors, such as litigation risks. *Id.* at 254. And the court noted that ASCAP and SESAC were in different positions with respect to MobiTV because, unlike SESAC, ASCAP had no potential claim for copyright infringement against MobiTV. *Id.*

So too here. GMR's interim licenses reflect and account for specific litigation risks and concerns. And unlike GMR and RMLC, BMI and RMLC do not have pending antitrust claims against each other. Neither the "negotiating parties" nor the "economic circumstances" surrounding GMR's interim licenses are comparable to a license between BMI and RMLC. *BMI*, 426 F.3d at 95; *see also United States v. BMI*, No. 64 Civ. 3787 (LLS), 2001 WL 829874, at *6 (S.D.N.Y. July 23, 2001) (finding that, in light of "special considerations affecting [the licensees] position in the negotiations" regarding a prior license with BMI, that license "should not be regarded as reflecting normal competitive market terms.").

Additional Documents Requested by the Subpoena. In addition to license agreements, BMI requests all documents relating to interim or final radio license negotiations, GMR's revenue and compensation data, information about GMR's clients, internal market analyses, and evidence of RMLC's boycott. BMI cannot demonstrate a "substantial need" for any of these documents. First, much of this information is already at BMI's fingertips. For instance, BMI is capable of conducting its own market studies, and it is improper for BMI to use a subpoena to piggy back on any analyses GMR has undertaken at its own expense. *See In re eBay Seller Antitrust Litig.*, No. C09-735RAJ, 2009 WL 5205961, at *3 (W.D. Wa. Dec. 23, 2009) ("EBay

does not have a substantial need to force Amazon to turn over market analyses that eBay could conduct on its own."). And BMI should be fully aware of whether and when any of its artists have left BMI to join GMR. BMI cannot demonstrate a "substantial need" for information it can discern or analyses it can perform on its own.

Second, these extraneous materials are not necessary (or even relevant) to determining a reasonable rate for a five-year BMI license agreement. ***GMR's*** license revenues, distributions to clients, client details, and in-house market analyses say nothing about what license fees RMLC's thousands of members should pay ***BMI***—and neither the Subpoena nor BMI's Response to the Petition suggests otherwise. And even ***if*** GMR's interim or final licenses could conceivably serve as benchmarks—and they cannot—BMI would not need to comb through tens of thousands of negotiation documents to determine the comparability of the negotiating parties, the rights conveyed, or the economic and market circumstances in question. *See BMI II*, 426 F.3d at 95.

Since none of the documents BMI has requested are probative of the "rate or range of rates" for a license between BMI and RMLC, BMI cannot contend that they are even ***relevant*** to the present rate court proceedings—much less "essential" to them. *Scientific Games*, 2017 WL 3671286, at *2. BMI does not have a substantial need for these documents.

D. Disclosing Confidential Material to a Direct Competitor and Litigation Adversary Would Irreparably Injure GMR.

Even if BMI could demonstrate a substantial need for GMR's confidential business documents—and it cannot—that need would not outweigh the burden and prejudice GMR stands to suffer. *Anker*, 126 F.R.D. at 522; *see Warner Chilcott Ltd. v. Express Scripts, Inc.*, No. 4:17MC250 RLW, 2017 WL 4084045, at *2 (E.D. Mo. Sept. 14, 2017) ("While Allergan argues that it has a substantial need for the documents, the Court finds that any need does not outweigh the burden and hardship of producing highly confidential and competitive trade secrets belonging

to Express Scripts."). Requiring GMR to disclose the inner workings of it business to BMI, its biggest competitor, and to RMLC, a counterparty in negotiations and litigation adversary, would unfairly and irreparably damage its competitive position.

1. Disclosure to BMI Would Irreparably Harm GMR.

BMI is one of GMR's chief competitors. (Grimmett Decl. ¶ 21.) BMI represents over 800,000 affiliates and has 13 million compositions in its repertory. (BMI Resp. ¶ 5.) These figures dwarf GMR's 77 songwriter clients and 33,000-composition repertory. (Grimmett Decl. ¶ 9.) Founded just five years ago, GMR has fought long and hard to gain a foothold in the PRO industry. (*Id.* ¶ 10.) Turning over to BMI the heart and soul of GMR's business would imperil all the progress GMR has made. (*Id.* ¶ 22.)

Disclosing GMR's license agreements, negotiations with broadcasters, client information, and detailed revenue and distribution data would give BMI everything it would need to unfairly undermine GMR's competitive position. BMI could target the broadcasters with which GMR does business and the songwriters GMR represents, surgically undercutting GMR's negotiation strategies and competitive offers. (*Id.*) And GMR's financial data would give BMI a window to any pressure points, which BMI could then exploit. (*Id.*) Courts routinely quash subpoenas that threaten these very harms. *See, e.g.*, *Waymo*, 2017 WL 2929439, at *3–4 (protecting nonparty competitor's agreements and negotiation documents); *Toto*, 2014 WL 793558, at *2 (protecting nonparty competitor's licensing agreements); *Edwards*, 2014 WL 2465934, at *5 (protecting "information [that] could be used by its [nonparty's] competitors to undercut [its] prices"); *Verinata Health*, 2014 WL 2600367, at *2–3 (quashing subpoena seeking nonparty competitor's "pricing strategies" and "view of the market"); *Solow*, 2008 WL 190340, at *4–5 (nonparty need not disclose its "present financial condition" to competitor).

Earlier this month, a district court quashed an equally invasive subpoena directed to a competitor. In *EpiPen*, the defendant pharmaceutical company, Mylan, served a sweeping subpoena on kaléo, a much smaller upstart. 2018 WL 3818914, at *1–4. Like BMI, Mylan sought documents reflecting its smaller competitor's "business-development efforts," "market research and analysis," and "revenues, pricing, [and] sales" data. *Id.* at *3–4. The court recognized that these materials were "critical to kaléo's business," and that disclosing them to "the biggest market player" would "create a competitive disadvantage and potentially devastate the company." *Id.* at *4–5. The nonparty's diminutive size heightened these concerns. *See id.* at *4 ("Also relevant is kaléo's size relative to Mylan."). Concluding that "***even if*** Mylan had shown a need for these documents, the potential harm to kaléo would outweigh Mylan's need," the court denied Mylan's motion to compel. *Id.* at *5 (emphasis added).

This Court should do likewise. Requiring GMR to give "the biggest market player" access to far-reaching, confidential business information would "create a competitive disadvantage and potentially devastate the company." *Id.* at *4–5. That harm far outweighs any purported need BMI may assert.

2. Disclosure to RMLC Would Irreparably Harm GMR.

Disclosing the requested documents to RMLC would be no less damaging to GMR. The reasons are twofold: first, RMLC is a powerful counterparty in licensing negotiations; and second, GMR is engaged in antitrust litigation against RMLC. Complying with the Subpoena would give RMLC an unfair advantage over GMR in both the marketplace ***and*** the courtroom.

According to the its own Executive Director, RMLC's "overwhelming objective is to keep license fees for the commercial radio industry as low as [it] can possibly keep them." (Marroso Decl., Ex. 3.) As RMLC admits in this case, it "negotiates with performance rights organizations" on behalf of "thousands of terrestrial radio stations throughout the United States."

(RMLC Pet. ¶ 3.) In litigation against GMR, RMLC purports to represent the interests of ***10,000*** radio stations,[5] which account for ***over 90%*** of the billions of dollars in annual revenue generated by the U.S. terrestrial radio industry. (Grimmett Decl. ¶ 23.) This gives the RMLC tremendous market power in license negotiations. (*Id.*)

Disclosing GMR's license agreements, negotiation documents, pricing structures, and internal market analyses would give RMLC insight into GMR's negotiation strategies and thought processes—affording it ***even more*** leverage in any future negotiations. (*Id.* ¶ 26.) This imminent danger warrants quashing the Subpoena. *See SEC v. Ahmed*, No. 3:15cv675 (JBA), 2018 WL 1541902, at *3 (D. Conn. Mar. 29, 2018) (denying motion to compel where disclosure of nonparty's stock purchase agreements "could cause [it] commercial harm in negotiating with counterparties"); *Monterey Bay*, 2015 WL 2229229, at *3 (protecting "confidential commercial information" that was key to nonparty's "ability to negotiate the terms of its insurance portfolio"); *DISH Network, L.L.C. v. WNET*, No. 13-cv-00832-PAB-KLM, 2014 WL 1628132, at *1, *3–4, *10 (D. Colo. Apr. 24, 2014) (quashing subpoena where "[b]roadcasters sit on the opposite side of the bargaining table from DISH," and disclosure would give broadcasters "an advantage over DISH in future business negotiations").

That GMR is engaged in antitrust litigation against RMLC further compounds the prejudice of disclosure. Discovery has not commenced in either the California suit or the Pennsylvania suit. Requiring GMR to disclose licensing negotiations and other documents relating to the California action would effectively give RMLC early discovery on GMR's antitrust claims—before RMLC itself bears any reciprocal discovery obligations.

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[5] First Am. Compl. ¶ 18, *Radio Music License Committee, Inc. v. Global Music Rights, LLC*, No. 2:16-cv-6076-CDJ (E.D. Pa. Feb. 10, 2017).

Courts are rightly wary of enforcing subpoenas that would give a party a litigation advantage against the nonparty in another proceeding.[6] Though RMLC did not serve the Subpoena, enforcing it against GMR would undoubtedly give RMLC a leg up in the antitrust actions. In *Lakeview Pharmacy of Racine, Inc. v. Catamaran Corp.*, No. 3:15-290, 2017 WL 4310221 (M.D. Pa. Sept. 28, 2017), the court quashed several subpoenas to avoid this very risk. Lakeview, a pharmacy, sought a nonparty pharmacy benefits manager's contracts with several competing pharmacy chains. *Id.* at *1, *3–4. The nonparty, Catamaran, objected that disclosure of these confidential agreements would not only "benefit Lakeview in future negotiations with Catamaran," but also give Lakeview "undue advantage in related litigation." *Id.* at *8–10. Finding that the discovery "may unfairly influence Lakeview's litigation strategy in these outside proceedings," the court quashed the subpoenas. *Id.* at *10; *see also DISH*, 2014 WL 1628132, at *3–4, *10 (quashing subpoena that would have required nonparty to disclose confidential material to its "opponent in on-going federal court litigation").

Since BMI's Subpoena expressly seeks documents underlying GMR's antitrust claims against RMLC, it is all but certain that disclosure would influence RMLC's litigation strategy in that action. The Court should quash the Subpoena.

3. A Protective Order Would Not Cure the Harm to GMR.

BMI may argue that a protective order would cure any harm to GMR. Not so. A protective order is not a panacea, even if it allows for "outside counsel's eyes only" treatment.

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[6] *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978) ("[W]hen the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied."); *Koch v. Greenberg*, No. 07 Civ. 9600 (BSJ) (DF), 2009 WL 2143634, at *5 n.3 (S.D.N.Y. July 14, 2009) ("Plaintiff has instituted a separate action against [nonparty] Rodenstock . . . in which discovery has been stayed. The instant action should not provide a vehicle for Plaintiff to evade that discovery stay.").

See eBay, 2009 WL 10677051, at *4 (noting, in response to a request for an order restricting disclosure to outside counsel, that "Rule 45 does not require the court to permit the disclosure of competitively sensitive information ***even under such a protective order***") (emphasis added). It would be "divorced from reality to believe that either party here would serve as the champion of its competitor"—or, in the case of RMLC, its litigation adversary and negotiating counterparty—"to maintain the confidentiality designation or to limit public disclosure." *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 530–31 (D. Del. 2002) (quoting *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990)).

Although the parties' stipulated protective order provides for "Restricted" and "Outside Counsel's Eyes Only" designations, it ***expressly contemplates*** that "key non-legal officers, directors, or personnel of each party may require access to the material terms of proposed benchmark agreements and potentially other critical information." (Stipulation and Protective Order ¶ 13, *Radio Music License Committee, Inc. v. Broadcast Music Inc.*, No. 18 Civ. 4420 (LLS) (S.D.N.Y. June 28, 2018).) And it is disclosure to the parties' business personnel that raises the highest likelihood of commercial harm.

But even if GMR had assurance that its information could be restricted to outside counsel, that would not avoid the injury due to a unique facet of this industry. RMLC is represented in these proceedings by Mr. Kenneth L. Steinthal. Mr. Steinthal is a longtime advocate for RMLC, and has previously represented RMLC ***in license negotiations with GMR***. (Grimmett Decl. ¶ 34.) Likewise, Ms. Atara Miller, counsel for BMI, "negotiates appropriate rates for music performing rights, on behalf of Broadcast Music, Inc." (Marroso Decl., Ex. 4.) While GMR does not doubt counsel's professionalism, there is simply no way to eliminate the possibility (indeed, the likelihood) that knowledge of GMR's licensing agreements, negotiations,

and pricing strategies may impact their own conduct when negotiating on behalf of BMI and RMLC. These lawyers cannot "unsee" what they are trying to see here.

A protective order would not avoid the significant competitive harm GMR faces. The Court should quash the Subpoena in full.

E. **The Subpoena Must Be Quashed Because Compliance Would Impose Significant Undue Burdens on GMR.**

BMI's demand that GMR divulge the most sensitive aspects of its business is reason enough to quash the Subpoena. But the burdens do not end there. By its terms, the Subpoena would require GMR to review thousands upon thousands of hard-copy and electronic documents stretching all the way back to its founding. (Grimmett Decl. ¶¶ 36-37.) In fact, it is difficult to think what documents GMR would ***not*** have to review. (*Id.*) Since BMI's "sweeping subpoena" would require GMR to "sift through virtually every document in its files," it is "*prima facie* improper." *S.N. Phelps & Co. v. Circle K. Corp.* (*In re Circle K Corp.*), 199 B.R. 92, 102 (Bankr. S.D.N.Y. 1996).

Complying with the Subpoena would cost tens of thousands of dollars and strain GMR's already-lean staff. (Grimmett Decl. ¶ 35.) To comply with the Subpoena, GMR would have to search through the emails of every current and former member of its staff involved in business development and licensing. (*Id.* ¶ 36) This would require those employees to comb through years' worth of emails to identify every potentially responsive document—an enormous expenditure of time and resources that would detract from GMR's ability to run its day-to-day business. (*Id.*) Moreover, it is not uncommon for a single license negotiation to involve dozens (if not hundreds) of separate communications. (*Id.* ¶ 37.) Responsive documents likely number in the tens of thousands. (*Id.*) And because GMR negotiated and offered interim licenses in the context of litigation, GMR would have to carefully review those documents and communications

for privileged material. (*Id.*)

BMI's Subpoena also implicates stringent confidentiality commitments to GMR's clients and licensees. All of GMR's license agreements with radio station groups contain a confidentiality provision, under which GMR must provide written notice before the agreement can be produced. (*Id.* ¶ 38.) To comply with the Subpoena, GMR would have to separately notify each radio group that has ever taken a license—by now hundreds of radio station groups—that its confidential license agreement will be produced to BMI. (*Id.*) As most stations also pay for BMI licenses, they may be reluctant to disclose their agreements to a rival PRO. (*Id.*) The disclosure could very well impact GMR's relationship with its licensees. (*Id.*)

Because the Subpoena would impose substantial, undue burdens on GMR, it should be quashed in its entirety. Fed. R. Civ. P. 45(d)(3)(A)(iv).

V. CONCLUSION

For the foregoing reasons, the Court should quash BMI's Subpoena in full.

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