



03-CV-02358-ORD

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AALACHO MUSIC, LLC,

Plaintiff,

v.

DEEP DISH RECORDS, INC., and  
YOSHITOSHI SHOP, LLC,

Defendants.

Case No. C03-2358L

ORDER DENYING MOTION TO  
COMPEL AND GRANTING  
MOTION TO QUASH

**I. INTRODUCTION**

This matter comes before the Court on a motion to compel (Dkt. # 90) filed by defendants Deep Dish Records and Yoshitoshi Shop (collectively, "Defendants") and a motion to quash (Dkt. # 93) filed by plaintiff Aalacho Music, LLC ("Aalacho"). For the reasons set forth in this Order, the Court denies Defendants' motion to compel and grants Aalacho's motion to quash.

**II. DISCUSSION**

**A. Background.**

On August 4, 2004, this Court issued an order (the "Summary Judgment Order") (Dkt. # 80) denying Aalacho's motion for summary judgment. In that order, the Court found that Defendants had made the "barest showing" on an unclean hands defense, thereby preventing

1 summary judgment in Aalacho's favor on its direct copyright infringement claim. (Summary  
2 Judgment Order at 6.) The primary basis for Defendants' unclean hands defense is the allegation  
3 that Aalacho led Global Underground Ltd. ("Global") to believe that inclusion of the *Satellite*  
4 track ("the Track") on Global's *Deep-Dish Toronto # 25* album ("*Toronto*") was permissible  
5 prior to the release of that album.

6 Shortly after the Court issued the Summary Judgment Order, Defendants issued a  
7 subpoena to Aalacho's attorney, Venkat Balasubramani. See Stahl Decl. Ex. A. Defendants  
8 seek deposition testimony from Mr. Balasubramani regarding topics related to Defendants'  
9 unclean hands defense. Specifically, Defendants contend that Mr. Balasubramani is the  
10 individual who led Global to believe it could include the Track on *Toronto*.

11 **B. Analysis.**

12 The Federal Rules of Civil Procedure authorize broad discovery. "Parties may obtain  
13 discovery regarding any matter, not privileged, that is relevant to the claim or defense of any  
14 party . . . . Relevant information need not be admissible at the trial if the discovery appears  
15 reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).  
16 "A party may take the testimony of any person . . . by deposition." Fed. R. Civ. P. 30(a)(1).  
17 However, "depositions of opposing counsel are disfavored." United States v. Yonkers Bd. of  
18 Educ., 946 F.2d 180, 185 (2d Cir. 1991).

19 The Ninth Circuit has not adopted a particular inquiry that courts should follow when  
20 determining whether deposing an opposing counsel is appropriate. Aalacho contends that this  
21 Court should follow Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). The  
22 Shelton Court observed that taking the deposition of opposing counsel "disrupts the adversarial  
23 system[,] . . . lowers the standards of the profession [and] adds to the already burdensome time  
24 and costs of litigation." Shelton, 805 F.2d at 1327. However, that court recognized no absolute  
25 prohibition on deposing trial counsel. Id. Rather, the court held that such depositions should be  
26 limited to circumstances where the party seeking to take the deposition shows that (1) no other  
27

1 means exist to obtain the information, (2) the information sought is relevant and non-privileged,  
2 and (3) the information is crucial to the preparation of the case. Id.

3 Defendants urge this Court to apply the more liberal inquiry adopted by the Second  
4 Circuit Court of Appeals. In In re Subpoena Issued to Dennis Friedman, 350 F.3d 65 (2d Cir.  
5 2003), the Second Circuit adopted a “flexible approach” to determining whether a lawyer  
6 deposition is appropriate. In re Subpoena Issued to Dennis Friedman, 350 F.3d at 72. Under  
7 that approach a court should

8 take[] into consideration all of the relevant facts and circumstances to determine  
9 whether the proposed deposition would entail an inappropriate burden or hardship.  
10 Such considerations may include the need to depose the lawyer, the lawyer’s role  
11 in connection with the matter on which discovery is sought and in relation to the  
12 pending litigation, the risk of encountering privilege and work-product issues, and  
13 the extent of discovery already conducted. These factors may, in some  
14 circumstances, be especially appropriate to consider in determining whether  
15 interrogatories should be used at least initially and sometimes in lieu of a  
16 deposition. Under this approach, the fact that the proposed deponent is a lawyer  
17 does not automatically insulate him or her from a deposition nor automatically  
18 require prior resort to alternative discovery devices, but is a circumstance to be  
19 considered.

20 Id.

21 This Court need not resolve whether it should apply the Second Circuit’s “flexible  
22 approach” or the stricter Shelton test because even under the more liberal inquiry, Defendants’  
23 proposed deposition is improper. Defendants contend that because Mr. Balasubramani  
24 communicated with Global on Aalacho’s behalf, he “was directly and personally involved in the  
25 conduct that defendants allege constitutes unclean hands.”<sup>1</sup> (Defendants’ Motion at 7.)  
26 However, Defendants already possess Mr. Balasubramani’s written communications with  
27 Global. Additionally, the Court finds that in the circumstances present here, given that

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28 <sup>1</sup>Defendants’ speculation that Mr. Balasubramani “is responsible for engineering  
Aalacho’s refusal to honor its prior license with Deep Dish Records” is insufficient to justify  
deposing Mr. Balasubramani. It is difficult to conceive how refusing to honor the license could  
constitute unclean hands, as Defendants cancelled that agreement. See June 28, 2004 Nasseri  
Decl. (Dkt. # 72) Ex. E.

1 Defendants only made the "barest showing" of an unclean hands defense, the Court should  
2 consider the availability of alternate sources of information. Although Defendants noted the  
3 difficulty of obtaining information from Global, which is a British company, the latest evidence  
4 before the Court shows that Defendants successfully served a subpoena duces tecum upon  
5 Global's New York office and that Global's managing director would sit for a telephonic  
6 deposition on September 9, 2004, and provide the documents identified in the subpoena duces  
7 tecum prior to that time. See Supp. Balasubramani Decl. Ex. A. Under all of these  
8 circumstances, the Court finds that Defendants' alleged need for the information sought is  
9 outweighed by the risk that permitting the proposed deposition to go forward would disrupt this  
10 litigation.

11 **III. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Aalacho's motion to quash (Dkt. # 93) and  
13 DENIES Defendants' motion to compel (Dkt. # 90). Aalacho's request for attorney's fees is  
14 DENIED.

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16  
17 DATED this 20<sup>th</sup> day of September, 2004.

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19   
20 Robert S. Lasnik  
United States District Judge