

THE HONORABLE ROBERT S. LASNIK

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

AALACHO MUSIC, LLC, a Washington
limited liability company,

Plaintiff,

vs.

DEEP DISH RECORDS, INC., a District of
Columbia corporation, and YOSHITOSHI
SHOP, L.L.C., a limited liability company,

Defendants.

NO. CV03-2358L

**AALACHO MUSIC, LLC'S
REPLY IN SUPPORT OF
MOTION TO QUASH SUBPOENA**

I. INTRODUCTION

Without any factual support or evidence, Defendants Deep Dish Records, Inc. and Yoshitoshi Shop, L.L.C. (together, "Defendants") have alleged an unclean hands defense to their copyright infringement. They now seek to depose counsel for Aalacho Music, LLC ("Aalacho") ostensibly in hopes of obtaining testimony that counsel led Global Underground, Ltd. ("Global") to believe Global had a license to exploit Aalacho's copyrighted material. Defendants argue that Global is beyond the subpoena power of the Court; but Defendants' counsel has already arranged to take Global's deposition, and Global has a New York office upon which Defendants effected service of a subpoena.

1 correspondence between Defendants and itself, which Defendants failed to produce in
2 response to discovery requests.

3 Second, from a legal standpoint, courts routinely compel the production of
4 documents subpoenaed from a domestic subsidiary of a foreign corporation, *see, e.g.*,
5 Gerling Int’l Ins. Co. v. Comm’r of Internal Revenue, 839 F.2d 131, 140-41 (3d Cir.
6 1988), or documents subpoenaed from a domestic branch of a foreign corporation. *See*
7 Dietrich v. Bauer, 2000 U.S. Dist. LEXIS 11729 (S.D.N.Y. Aug. 16, 2000) (ordering
8 non-party to produce documents held abroad based on jurisdiction conferred by domestic
9 branch). In the Dietrich case, the existence of a bank branch in the United States
10 supported the assertion of jurisdiction over the foreign entity, and ultimately entitled the
11 party seeking discovery to obtain it from the foreign entity. In the present case, Global, a
12 U.K. entity, has a New York office—on which Defendants were able to effect service. As
13 in Dietrich, the fact that Global has a New York office allows a United States District
14 Court to assert jurisdiction over Global, and to compel production of documents through
15 Global’s New York office. On the other hand, if Global (New York) is an entity separate
16 from Global (U.K.), a court may order production of documents from Global (New York)
17 based on the fact that Global (New York) “controls” the documents “in possession of [a]
18 parent, subsidiary, or sister corporate entity.” Gerling, 839 F.2d at 140-41 (noting
19 expansive definition of “control” under Rule 45); *see also* United States v. International
20 Union of Petroleum and Indus. Workers, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989)
21 (“A corporation must produce documents possessed by a subsidiary that the parent
22 corporation owns or wholly controls.”). In either event, the law allows for compulsion of
23 the documents from Global’s New York office even if those documents are not physically
24 located there.

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28 September 9, and willingness to produce documents responsive to Defendants’ discovery requests well in advance
of the deposition. Both of these documents were received September 1, 2004.

1 **B. DEFENDANTS DO NOT, AND CANNOT, PROFFER ANY RELEVANT EVIDENCE**
2 **THEY HOPE TO OBTAIN FROM AALACHO’S COUNSEL**

3 Defendants fail to proffer even one iota of evidence they hope to obtain from
4 Aalacho’s counsel. Defendants merely continue to press forward with their fishing
5 expedition in an effort to disrupt Aalacho’s relationship with its counsel and prejudice
6 Aalacho.

7 Defendants claim “discovery from Global is not a substitute for the deposition” of
8 Aalacho’s counsel. (Reply, p. 2.) However, the relevant question, if any, is the
9 impression formed by Global—*i.e.*, whether Global was led to believe by Aalacho that
10 they could exploit the Track. Defendants themselves acknowledge this in their
11 reply/opposition, alleging “[Aalacho’s representations] would have misled Global into
12 *believing its use was authorized . . .*” (Reply, p. 4 (emphasis added).) Thus, the key
13 testimony would come from Global (regarding its belief) and not from Aalacho’s counsel.

14 Moreover, Global’s testimony unequivocally indicates Aalacho never represented to
15 Global that Global had Aalacho’s permission to utilize the Track. Aalacho attaches a
16 declaration signed by Colin Tierney attesting that: (1) Global did not rely on any
17 representations by Aalacho in exploiting the Track; and (2) Global relied solely on the
18 representations of the Deep Dish Defendants in exploiting the Track. (*See* Tierney Decl.
19 ¶¶ 21 & 22.) In the face of this evidence, no testimony from Aalacho’s counsel could
20 validate Defendants’ unclean hands argument.

21 **C. AALACHO IS ENTITLED TO ITS ATTORNEY’S FEES IN DEFENDING AGAINST THE**
22 **SUBPOENA**

23 Rule 45 allows for the liberal issuance of a subpoena, but imposes a duty on a
24 party issuing a subpoena “to take reasonable steps to avoid imposing undue burden or
25 expense on the person subject to the subpoena.” FED. R. CIV. P. 45(c)(1). “Abuse of this
26 liberal authority is constrained by Civil Rule 45(c), which subjects attorneys to a ‘sword
27 of Damocles’ when they overreach.” Polo Bldg Group, Inc. v. Rakita (In re Shubov), 253
28 B.R. 540, 547 (Bankr. (9th Cir.) 2000) (citing 9A WRIGHT & MILLER § 2463 (2d ed.

1 1995)). A breach of this duty is enforced by exposure to a sanction that includes, but is
2 not limited to, a reasonable attorney's fee. FED. R. CIV. P. 45(C)(1). In this instance,
3 Defendants ignored the principle that “the basic idea of attacking an opponent by
4 dragging his or her attorney into the fray is offensive.” In re Duque, 154 B.R. 93, 96
5 (Bankr. D. Fla. 1993). Defendants failed to undertake any efforts to minimize prejudice
6 to Aalacho, and simply issued the subpoena to counsel for Aalacho, without verifying
7 whether Global was under the subpoena power of the Court or would otherwise provide
8 testimony. Under these circumstances, an award of attorney’s fees is appropriate.

9 **III. CONCLUSION**

10 As set forth herein, Defendants’ request to depose Aalacho’s counsel is nothing
11 more than a fishing expedition, and a transparent attempt to interfere with Aalacho’s
12 working relationship with its counsel. Defendants are able to, and should, obtain
13 testimony from Global. Moreover, any testimony procured from Aalacho’s counsel could
14 not contradict Global’s own testimony that it did not rely on Aalacho’s representations in
15 utilizing the Track. For the foregoing reasons, the subpoena issued to Aalacho’s counsel
16 should be quashed, and Aalacho should be awarded its fees for this matter.

17 DATED this 2nd day of September, 2004.

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19 **NEWMAN & NEWMAN,
20 ATTORNEYS AT LAW, LLP**

21 By: 

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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on this 2nd day of September, 2004, I caused
3 the foregoing **AALACHO MUSIC, LLC'S REPLY IN SUPPORT OF MOTION TO**
4 **QUASH SUBPOENA** to be served via **NOTICE OF ELECTRONIC FILING** on the
5 following parties:

6 Alan S. Middleton
7 Eric Stahl
8 Davis Wright Tremaine LLP
9 2600 Century Square
10 1501 Fourth Avenue
11 Seattle, Washington 98101-1688
12 Facsimile: (206) 628-7699.

13 I declare under penalty of perjury under the laws of the United States and the State
14 of Washington that the foregoing is true and correct and that this declaration was executed
15 on September 2nd 2004, at Seattle, Washington.

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29 Venkat Balasubramani