Exhibit C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PANDORA MEDIA, LLC,

Applicant,

v.

WORD COLLECTIONS, INC.,

Respondent.

Case No. 2:23-mc-00140-MCS-MAR

PANDORA MEDIA, LLC'S NOTICE OF MOTION AND MOTION FOR REVIEW OF MAGISTRATE ORDER REGARDING PANDORA'S MOTION TO COMPEL

Hon. Mark C. Scarsi

Date: January 22, 2024
Time: 9:00 AM
Crtrm: Courtroom 7C

TO THE COURT AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that on January 22, 2024, or as soon thereafter as counsel may be heard in Courtroom 7C of the United States District Court, Central District of California, located at 350 W. 1st Street, Los Angeles, CA 90012, Applicant Pandora Media, LLC ("Pandora"), by and through its counsel, will and hereby does move for review of Magistrate Judge Rocconi's Order denying in part and granting in part Pandora's Motion to Compel Word Collections, Inc. ("Word Collections") to Comply with Pandora's Subpoena, entered on December 7, 2023 (the "Order").

This Motion is made pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Local Rule 72-2.1, and follows the conference of counsel pursuant to Local Rule 7-3, which took place on December 14, 2023.

This Motion is based on this notice of motion, the accompanying memorandum of points and authorities, the pleadings and records on file with this Court (including all memoranda, declarations, and exhibits before Magistrate Judge Rocconi), all matters of which this Court may take judicial notice, and on such oral and documentary evidence as may be presented at the hearing of this Motion.

Dated: December 21, 2023

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

FACTUAL AND PROCEDURAL BACKGROUND 2

I. Factual Background 2

II. Procedural Background 5

LEGAL STANDARD 7

ARGUMENT 8

I. Word Collections Is No Typical Third Party, And In Any Event, The Same Relevance Test Applies To Parties And Non-Parties 8

II. It Was Legal Error To Strike Certain Requests And Limit Others To Just Documents That Relate To The Plaintiffs 13

a. The Order Ignored Key Arguments Explaining The Relevance Of Various Requests 13

b. The Order's Assessment Of Pandora's Misuse Defense Is Contrary To Law 16

c. Word Collections' Own Actions Are Directly Relevant To Pandora's Copyright Misuse And Unclean Hands Defenses 21

III. It Was Legal Error To Permit Word Collections To Base Its Refusal To Comply With The Subpoena On Boilerplate Objections. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Adolph Coors Co. v. Wallace,
570 F. Supp. 202 (N.D. Cal. 1983) 16

Aleman v. Riverside Cnty. Sheriff's Dep't.,
2023 WL 4680925 (C.D. Cal. June 9, 2023) 10

Aquastar Pool Prods. Inc. v. Paramount Pool & Spa Sys.,
2019 WL 250429 (D. Ariz. Jan. 17, 2019) 11

Bhd. Mut. Ins. Co. v. Vinkov,
2020 WL 6489326 (C.D. Cal. Oct. 5, 2020) 12

BLK Enters., LLC v. Unix Packaging, Inc.,
2018 WL 5993841 (C.D. Cal. Sept. 26, 2018) 2, 17

Dart Indus. Co. v. Westwood Chem. Co.,
649 F.2d 646 (9th Cir. 1980) 12

Exp.-Imp. Bank of Korea v. ASI Corp.,
2017 WL 11509453 (C.D. Cal. June 26, 2017) 8

Fisher & Paykel Healthcare Ltd. v. Flexicare Inc.,
2020 WL 7094077 (C.D. Cal. Oct. 29, 2020) 15, 16

In re Japan Display Inc. v. Tianma Am., Inc.,
2021 WL 5990191 (C.D. Cal. Oct. 1, 2021) 10

Kaupelis v. Harbor Freight Tools USA, Inc.,
2020 WL 7383355 (C.D. Cal. Sep. 28, 2020) 8

Keith H. v. Long Beach Unified Sch. Dist.,
228 F.R.D. 652 (C.D. Cal. 2005) 12

L.A. Terminals, Inc. v. United Nat'l Ins. Co.
340 F.R.D. 390 (C.D. Cal. 2022) 23

L.G. Philips LCD Co. v. Tatung Co.,
2007 WL 869256 (N.D. Cal. March 20, 2007) 10

Lasercomb Am., Inc. v. Reynolds,
911 F.2d 970 (4th Cir. 1990) 20

Laxalt v. McClatchy,
116 F.R.D. 455 (D. Nev. 1986) 11, 12

M. Witmark & Sons v. Jenson,
80 F. Supp. 843 (D. Minn. 1948) ..... *passim*

Minden Pictures, Inc. v. John Wiley & Sons, Inc.,
795 F.3d 997 (9th Cir. 2015) 18

Nguyen v. Lotus by Johnny Dung Inc.,
2019 WL 3064479 (C.D. Cal. June 5, 2019) 10, 11

Ortiz v. Cellular,
2021 WL 4642795 (C.D. Cal. Jan. 29, 2021) 8

Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n,
121 F.3d 516 (9th Cir. 1997) 20

Ramos v. Yates,
2006 WL 8435255 (S.D. Cal. Oct. 26, 2006) 15, 16

Ross v. Santa Clara Cnty. Sheriff's Dep't,
2015 WL 4511341 (N.D. Cal. July 23, 2015) 11, 12

Saks Inc. v. Attachmate Corp.,
2015 WL 1841136 (S.D.N.Y. Apr. 17, 2015) 20

Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.,
2018 WL 2981827 (E.D. Cal. Jun. 14, 2018) 13

Starz Ent., LLC v. MGM Domestic Television Distrib. LLC,
2022 WL 2230129 (C.D. Cal. May 31, 2022) 11

Villery v. Jones,
2021 WL 2227363 (E.D. Cal. Jun. 2, 2021) 23, 24

Wixen Music Publishing, Inc. v. Triller, Inc.,
2022 WL 3636000 (C.D. Cal. Aug. 1, 2022) ..... *passim*

Wolpin v. Philip Morris Inc.,
189 F.R.D. 418 (C.D. Cal. 1999) 8

Statutes

28 U.S.C. § 636(b)(1)(A) 7

Other Authorities

Fed. R. Civ. P. 26 ..... *passim*

Fed. R. Civ. P. 34 ..... *passim*

Fed. R. Civ. P. 45 ..... *passim*

Fed. R. Civ. P. 72(a) 7, 23

Local Rule 72-2.1 ..... 7, 23

Steven S. Gensler, 1 *Fed. Rules of Civ. Proc., Rules and Commentary*
(2018) 11

INTRODUCTION

After months of broken promises and a failure to produce a single document in response to Pandora's subpoena—even those it agreed that it would produce—Word Collections left Pandora with no choice but to move to compel compliance with Pandora's lawfully-issued Subpoena. Magistrate Judge Rocconi's Order granted Pandora's motion in part and denied it in part. With respect to the partial denial, however, the Order rests on multiple conclusions that are contrary to law, all of which are reviewable de novo by this Court.

First, the Order mistakenly concluded that Word Collections is a "typical nonparty" and, as a result, any discovery sought from it pursuant to Rule 45 must be subjected to a higher standard of relevance than what would apply to a party. But as Pandora demonstrated, ***Word Collections is anything but a typical nonparty***. It is a true party in interest that stands to benefit from, instigated, funded, retained counsel for, and has otherwise controlled the Consolidated Litigation. Indeed, the Consolidated Litigation is nothing short of a proxy war launched by Word Collections (and Spoken Giants) to create a new market for their superfluous licenses. Particularly against this backdrop, it was legal error to depart from the well-settled precedent holding that Rule 26 provides the same relevance standard for parties and non-parties alike.

Second, the Order's reasoning for striking several Requests and limiting others was legally erroneous. The Order simply ignored Pandora's arguments regarding the relevance of the Requests to its defenses based on industry custom and practice and to damages. And where the Order did address Pandora's arguments—those regarding its copyright misuse defense—it made a number of errors resulting in a conclusion that is contrary to law. The Order: (i) made premature substantive findings regarding the propriety of Pandora's misuse

defense; (ii) misread squarely analogous precedent; and (iii) ignored the inextricable role that Word Collections plays in the misuse scheme at issue. In short, ***the Order prevents Pandora from even pursuing discovery*** central to a live defense, based on substantive findings akin to those made on a full record at summary judgment. But this case remains in the discovery phase—this is not summary judgment. As a result, Pandora, like any party, "is entitled to obtain discovery—written, deposition, and *third party discovery*—sufficient to test the factual validity of [a] defense." *BLK Enters., LLC v. Unix Packaging, Inc.*, 2018 WL 5993841, at *4 (C.D. Cal. Sept. 26, 2018) (emphasis added). Denying its ability to do so was legal error.

Third, the Order does not even *mention* that Word Collections offered only non-specific and conclusory boilerplate objections, in violation of Rule 34(b)(2) and Magistrate Judge Rocconi's own Standing Order on Discovery Disputes. Pandora cited ample authority demonstrating that these sorts of objections must be rejected and/or deemed waived—with no rebuttal from Word Collections. The Order, however, ignored this one-sided record, absolving Word Collections of this failing. This too constitutes reversible legal error.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Pandora, best known for its flagship, free-to-the-consumer, non-interactive internet radio service, began streaming spoken-word comedy recordings in addition to music in 2011. *See* Answer at 11, *Yellow Rose Prods. v. Pandora Media LLC,* Case No. 2:22-cv-00809-MCS-MAR (the "Consolidated Litigation"), ECF No. 71 ("Answer"). In any given year, Pandora pays out millions of dollars in royalties for the comedy it streams and provides comedians with other benefits, including promotion. *Id.* at 12.

Pandora has always secured the licenses necessary to stream spoken-word comedy pursuant to long-standing comedy industry custom and practice. *Id.* at 2-3. Like all other copyright intensive industries except the dysfunctional music industry, spoken-word comedy is licensed "at the source," where the source, or creator of the final product—the record label that creates and/or distributes the comedy recording—secures and passes along all necessary rights, including any rights in pre-existing works used in the new derivative work, to all downstream distributors, licensees, and end users, either explicitly or implicitly. *Id.* As a result of this logical, efficient, and long-standing practice, Pandora has all of the rights it needs to stream comedy recordings and is able to secure those rights in a single transaction. *Id.* at 3-4. This is precisely the practice that Pandora has followed and been transparent about since it began streaming comedy recordings. *Id.* at 3, 11.

For nearly a decade after Pandora started streaming comedy, no comedian ever objected to this industry custom and practice. *Id.* at 14. No comedian ever asked Pandora to take a second license, on top of the one Pandora already secures to use comedy recordings, just for the jokes embodied in those recordings. *Id.* Nor had any comedian ever asked Pandora for additional royalties. *Id.* To the contrary, comedians regularly approached Pandora in an effort to obtain more plays of their comedy recordings, demonstrating their satisfaction with the way that their content was being licensed and the compensation they were receiving. *Id.* at 4.

That all changed when Word Collections (and Spoken Giants) emerged. According to its co-founder and CEO Jeff Price, Word Collections is "a US and global copyright administration and licensing organization retained by a number of the Plaintiffs to license and administer the rights to their literary works." Consol. Litig., ECF No. 178-8 at ¶ 1. Word Collections licenses those rights collectively, bundled together with the rights of all of its other affiliated comedians. Answer at

15. According to Mr. Price, this gives Word Collections a "collective weight and 'stick' [that] is much larger" than that of any individual comedian. ECF No. 13-1 at 8 (Reply Declaration of Allison Aviki ("Aviki Reply Decl.") Ex. A). With its "collective weight and 'stick'" in hand, Word Collections made several attempts to force Pandora to pay for superfluous licenses while simultaneously threatening to bring copyright infringement actions. Answer at 14-18.

When Pandora did not comply with its demands, Word Collections made good on its threat to bring infringement actions, and the first tranche of Plaintiffs—all of which are affiliated with Word Collections—filed lawsuits. Despite never before having raised any concerns with Pandora's use of their recordings, now nine comedians in total have challenged Pandora's licensing practices. *See id.* at 14-21. Seven of the nine Plaintiffs are formally affiliated with Word Collections, the self-described exclusive licensor of the jokes that are embedded in those comedians' recordings.[1] As a result, the purported "literary works" of these seven Plaintiffs, according to Word Collections, can only be secured from Word Collections. *Id.* at 15.

But Word Collections' role here is far more involved than a mere licensing administrator retained by multiple Plaintiffs: it was Word Collections that provoked and coordinated the Plaintiffs' sudden change in behavior by falsely promising Plaintiffs and other comedians a new windfall stream of income, from which Word Collections would take a substantial cut. *See* ECF No. 13-1 through 13-4 (Aviki Reply Decl. Exs. A-D). Moreover, recently produced discovery reveals that Word

[1] As to the other two Plaintiffs, Lewis Black at relevant times was—and Pandora contends still effectively is—an affiliate of Spoken Giants. *See* Consol. Litig., ECF No. 122-2. While the final Plaintiff, George Lopez, claims he is not formally affiliated with either organization, documents first produced only after Pandora's motion to compel was fully briefed demonstrate that Word Collections is behind his lawsuit against Pandora as well.

Collections is deeply involved in the lawsuits brought by almost all of the Plaintiffs in the Consolidated Litigation. Among other things, that discovery confirmed that:

- Multiple plaintiffs decided to bring their lawsuits as a result of conversations they had with Word Collections and Mr. Price. ECF No. 2 at 6-7 (Opening Brief) (citing Consol. Litig., ECF Nos. 185-10; 185-11; 185-12; 185-13).
- Word Collections recruited at least seven Plaintiffs with promises of windfall recoveries in the hundreds of millions of dollars. ECF No. 13-1 through 13-4 (Aviki Reply Decl. Exs. A-D).[2]
- Word Collections retained legal representation for Plaintiffs. *Id.*
- Word Collections is shouldering the costs of litigation such that there is "no financial exposure" to Plaintiffs. *Id.*
- Word Collections acted on Plaintiffs' behalf to gather information and additional documents from third parties in pursuit of these claims. *Id.*

In short, this Consolidated Litigation is a proxy war, conceived, instigated, funded, and controlled by Word Collections (and Spoken Giants)—using the individual Plaintiffs as pawns—to upend historic licensing practices and create a market for its superfluous license so that it can take a cut of any fees it can extract from businesses that license comedy recordings.

II. Procedural Background

Pandora brought counterclaims against Word Collections and the Plaintiff comedians with which it is affiliated, alleging violations of Sections 1 and 2 of the Sherman Act. *See* Consolidated Litigation, ECF No. 34. Despite being a party to

[2] Despite Plaintiffs and Word Collections having these same documents in their possession for years—and receiving discovery requests from Pandora seeking these documents long ago—Pandora was only able to obtain many of these documents from a third party who is not represented by counsel for the Plaintiffs and Word Collections. *See* Consol. Litig., ECF No. 183 at 3.

the Consolidated Litigation for 11 months, Word Collections did not produce a single document—even after its motion to stay discovery was denied. *See* Consol. Litig., ECF No. 139 at 1, 3. In that denial, the Court expressly noted that even if Pandora's counterclaims were to be dismissed, the target of those counterclaims (*i.e.*, Word Collections) "would still need to disclose information in response to a number of Pandora's discovery requests." *Id.* at 3. In an effort to secure such discovery after the counterclaims were dismissed, Pandora served a Subpoena on Word Collections on April 29, 2023. *See* ECF No. 3-1 (Declaration of Allison Aviki ("Aviki Decl.") Ex. A.). Word Collections served Responses on May 12, 2023, which consisted of boilerplate objections, along with empty promises to produce documents in response to several requests. ECF No. 3-2 (Aviki Decl. Ex. B).

Pandora and Word Collections' counsel scheduled a meet and confer for May 24, 2023. Before the meeting, Word Collections' counsel communicated that "Word Collections cannot provide a date certain for *completion* of discovery other than the [then] close of fact discovery on August 28, 2023" but committed to "begin producing documents as soon as possible." ECF No. 3-3 at 10 (Aviki Decl. Ex. C). After the meet-and-confer, Word Collections promised to get back to Pandora "tomorrow." *Id.* at 7. After receiving nothing, Pandora followed up on June 6, and Word Collections' counsel again promised its "further response tomorrow." *Id.* at 4. Again, Pandora received nothing. Pandora followed up again on June 12 and, receiving no response, on June 16. *Id.* at 2-3. On June 19, Word Collections finally responded, promising "further substantive responses . . . before June 23." *Id.* at 2. On June 26, Pandora again followed up after receiving nothing, and Word Collections responded that it was "continuing . . . further investigation," saying that "further responses . . . will be forthcoming." *Id.* at 1. Word Collections

once again ignored Pandora and the date by which it promised to complete its production came and went without having produced anything.

Left with no other option, on August 31, 2023, Pandora moved to compel Word Collections' compliance with the Subpoena. The motion was fully briefed on September 11, 2023. Weeks later—on September 29, 2023—Word Collections filed a motion to transfer to this Court, which was granted on October 5. On December 7, 2023, Magistrate Judge Rocconi entered her Order.

The Order: (i) requires Word Collections to fully comply with the four requests (Nos. 1, 3, 6, and 16) that it previously agreed to comply with (Order at 5); (ii) struck ten Requests (Nos. 2, 10-12, 14, 17-20, and 22) on the grounds that those Requests "solely seek[] information on Word Collections's business model, investors, catalogue, research, clients (other than Plaintiffs), or communications with other entities that do not implicate Plaintiffs" because they "are not relevant to the claims or defenses at issue here" (*id.* at 5-7); and (iii) narrowed the remaining thirteen requests (Nos. 4-5, 7-9, 13, 15, 21, and 23-27) to just documents concerning the Plaintiffs or the Asserted Works (*id.* at 5-8). Because the portions of the Order striking or modifying Pandora's Requests rest on conclusions that are contrary to law, Pandora filed this Motion for Review.

LEGAL STANDARD

A district court may review a magistrate judge's ruling on a "pretrial matter not dispositive of a party's claim or defense," such as the motion to compel at issue here. *See* Fed. R. Civ. P. 72(a); L.R. 72-2.1. Under Rule 72(a), a district court may modify or reverse a magistrate judge's non-dispositive Order if it was "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A) (same). Notably, a magistrate judge's legal conclusions are not entitled to deference; the district court instead performs an independent de novo

review in determining whether those conclusions were "contrary to law." *See, e.g.*, *Exp.-Imp. Bank of Korea v. ASI Corp.*, 2017 WL 11509453, at *3 (C.D. Cal. June 26, 2017); *Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 422 (C.D. Cal. 1999) ("The 'clearly erroneous' standard applies to the magistrate judge's findings of fact; legal conclusions are freely reviewable de novo to determine whether they are contrary to law"); *Ortiz v. Cellular*, 2021 WL 4642795, at **1-2 (C.D. Cal. Jan. 29, 2021) (Scarsi, J.) (reviewing de novo and vacating magistrate judge's non-dispositive discovery order that contained a legal conclusion that was contrary to law). Accordingly, the standard of review "provide[s] for de novo review by the district court on issues of law." *Kaupelis v. Harbor Freight Tools USA, Inc.*, 2020 WL 7383355, at *1 (C.D. Cal. Sep. 28, 2020).

ARGUMENT

I. Word Collections Is No Typical Third Party, And In Any Event, The Same Relevance Test Applies To Parties And Non-Parties

The Order held that because Word Collections is now a "non-party" (following the dismissal of Pandora's counterclaims), Pandora needed to offer a "stronger showing of relevance" than is typically the case for party discovery. Order at 4. This conclusion is contrary to law for multiple reasons.

First, this holding fundamentally misconstrues Pandora's argument. The Order asserts that it was "not persuaded by Pandora's argument that Word Collections, *as a former party*, should not be afforded the same considerations as a typical nonparty." *Id.* (emphasis added). But Pandora's argument did not hinge on Word Collections' "former party" status. Rather, Pandora has shown that—separate and apart from that status—Word Collections is no ordinary, disinterested non-party. *See* ECF No. 2 at 25-27 (Opening Br.); ECF No. 12 at 1 (Reply Br.).

Indeed, it is undisputed that Word Collections has formal affiliations with seven of the nine Plaintiffs. And it is funding, coordinating, and still actively participating in this lawsuit as a real party-in-interest. *See* ECF No. 13-1 through 13-4 (Aviki Reply Decl. Exs. A-D). This is not mere conjecture; evidence submitted on Pandora's motion includes documents that Pandora obtained from a third-party detailing just some of Word Collections' concerted efforts to concoct and launch the Consolidated Litigation. Word Collections has:

- solicited comedians to join the extortionate scheme, thereby adding to the "collective weight" and enlarging the "stick" it has to bludgeon services like Pandora (Aviki Reply Decl. Ex. A);
- retained counsel for Plaintiffs (Aviki Reply Decl. Ex. B);
- consulted with that counsel to "confirm the potential statutory damages and legal foundation" and "nail down a commensurate rate" for the case (Aviki Reply Decl. Ex. C);
- promised a "commitment" of various litigation-related "services," including "payments to fund the lawsuit and associated fee[s]" (*id.*); and
- assuaged comedians who had yet to file lawsuits that "there is no financial exposure to you" because ***"[a]ll costs are being shouldered by Word Collections*** . . ." (Aviki Reply Decl. Ex. D) (emphasis added).

The Order did not address *any* of this evidence. Notably, though, the Magistrate Judge appeared to accept this reality in denying costs sought by Spoken Giants, the other spoken-word licensing collective, in a separate order issued the same day. In logic that applies *all the more so* to Word Collections, Magistrate Judge Rocconi "acknowledge[d] that Spoken Giants does not stand as an entirely

disinterested third party." Order at 11, *Pandora Media, LLC v. Spoken Giants, LLC*, Case No. 2:23-mc-00149-MCS-MAR (Dec. 7, 2023), ECF No. 36. Rather, like Word Collections, Spoken Giants "has a direct connection to the case" given its affiliation with Plaintiff Lewis Black. *Id.* And even "more importantly," Spoken Giants, like Word Collections, "seeks to retain royalties" on the works at issue, "and thus has a strong financial interest in the outcome of this action." *Id.* These realities demonstrate that Word Collections is anything but a mere "former party." *Compare id.* with Order at 4.

Second, in concluding that Pandora must make a "stronger showing of relevance" in the context of a Rule 45 subpoena, the instant Order (at 4) misapplied well-settled discovery principles. Rule 45 permits non-party discovery regarding *any* nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. *See, e.g.*, *Aleman v. Riverside Cnty. Sheriff's Dep't.,* 2023 WL 4680925, at *2 (C.D. Cal. June 9, 2023) ("The scope of discovery allowed under a Rule 45 subpoena is the same as that allowed under Federal Rule of Civil Procedure 26"); Fed. R. Civ. P. 26(b)(1). As the Order correctly recognizes, "third party discovery is a time-honored device to get at the truth of a claim or defense." Order at 3 (quoting *L.G. Philips LCD Co. v. Tatung Co.*, 2007 WL 869256, at *2 (N.D. Cal. March 20, 2007)).

The "scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules." Fed. R. Civ. P. 45, advisory committee notes to 1970 amendment; *see also* advisory committee notes to 1991 amendment ("The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34."). In turn, "[u]nder Rule 34, the proper scope of discovery is as specified in Rule 26(b)"—*i.e.*, nonprivileged matter that is relevant to any party's claim or

defense and is proportional to the needs of the case. *In re Japan Display Inc. v. Tianma Am., Inc.*, 2021 WL 5990191, at *4 (C.D. Cal. Oct. 1, 2021); *Nguyen v. Lotus by Johnny Dung Inc.*, 2019 WL 3064479, at *1 (C.D. Cal. June 5, 2019) (relevance for discovery purposes "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." (quotation marks and citations omitted))

Even while recognizing that third-party discovery is a "time-honored device," Order at 3, the Order ignored that ***the "test for 'relevance,' in the context of a Rule 45 subpoena to a non-party, is no different than the test under Rules 26 and 34***." *Aquastar Pool Prods. Inc. v. Paramount Pool & Spa Sys.*, 2019 WL 250429, at *2 (D. Ariz. Jan. 17, 2019) (emphasis added); *see also Starz Ent., LLC v. MGM Domestic Television Distrib. LLC*, 2022 WL 2230129, at *8 (C.D. Cal. May 31, 2022) (examining "each of the [Requests] included in the Subpoena against the requirements of Rule 26(b)(1), which also defines the proper scope of discovery from a non-party under Rule 45."); Steven S. Gensler, 1 *Fed. Rules of Civ. Proc., Rules and Commentary*, Rule 45, at 1189 (2018) ("The scope of information that may be sought via [third party] subpoena is the same as the scope of discovery generally under Rule 26(b).").

The Order nonetheless concluded that Pandora must make a "stronger showing of relevance" when it comes to non-parties like Word Collections. Order at 4. Specifically, and on the basis of a case from the District of Nevada, *Laxalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986), the Order held that there is a different relevance standard that applies for "subpoenas served on nonparties," on the one hand, and "simple party discovery," on the other. Order at 4. As an initial matter, that observation cannot be reconciled with the familiar framework of

Federal Rules 26, 34, and 45. But in all events, it certainly does not mean that "[n]onparties are . . . immune from discovery," as more recent cases distinguishing *Laxalt* have recognized. *See Ross v. Santa Clara Cnty. Sheriff's Dep't*, 2015 WL 4511341, at *2 (N.D. Cal. July 23, 2015) (rejecting non-party's relevance arguments under *Laxalt* and finding that "defendants have made the requisite showing of relevance here" since "the scope of pre-trial discovery is very broad").

To be sure, Pandora agrees that non-party discovery has limits in place to "protect nonparties from harassment, inconvenience, or disclosure of confidential documents"—limits that are found in Rule 45 itself. *See* Order at 3 (citing *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980)). But those limits have no bearing on the relevance inquiry, which is the same whether analyzed under Rules 26 and 34, or, as here, under Rule 45. Moreover, it was *Word Collections'* burden to show that Pandora's Subpoena was burdensome or harassing (it was neither)—either through a motion to quash or through proper objections.

Once relevance and proportionality (the latter of which the Order does not take issue with) has been shown—and here, Pandora has done just that (*see* ECF No. 2 at 15-22)—"the party who resists discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655-56 (C.D. Cal. 2005). But as explained below, mere conclusory statements by a responding party that the requested discovery is "overly broad" or "unduly burdensome"—such as those interposed by Word Collections here—are insufficient. *See infra* Argument, § III. Rather, "the party resisting discovery must show specifically how . . . each question is overly broad, burdensome or oppressive." *Bhd. Mut. Ins. Co. v. Vinkov*, 2020 WL 6489326, at *6 (C.D. Cal. Oct.

5, 2020) (quotation marks and citation omitted). Because Word Collections failed to do so, the Order should be reversed.

Nor is there any substantive reason to invoke Word Collections' "non-party status" as a consideration here. On the contrary, Rule 45's incorporation of the broad relevance standards of Rule 26 makes perfect sense in the case of an entity like Word Collections, which is playing an instrumental role in this case, as set forth above. *See, e.g.*, *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, 2018 WL 2981827, at *5 (E.D. Cal. Jun. 14, 2018) (ordering full compliance with third-party subpoena where third-party has "an interest in the transactions at issue" in the underlying litigation).

II. It Was Legal Error To Strike Certain Requests And Limit Others To Just Documents That Relate To The Plaintiffs

In its moving brief, Pandora explained that the Requests are relevant to the claims and defenses in the Consolidated Litigation for three reasons—they relate to Pandora's copyright misuse and unclean hands defenses (ECF No. 2 at 17-20); many are relevant to Pandora's defenses that relate to comedy industry custom and practice (*id.* at 20); and many are relevant to the calculation of damages, if needed (*id.* at 20-22). The Order either ignored or failed to properly evaluate these arguments, resulting in legal conclusions that are contrary to law.

a. The Order Ignored Key Arguments Explaining The Relevance Of Various Requests

The Order entirely sidesteps Pandora's arguments regarding industry custom and practice, a central issue that relates to a number of Pandora's affirmative defenses—including license, estoppel, laches, and waiver—and a key reason why Pandora is entitled to documents responsive to Requests that the Order either struck or narrowed. These Requests all seek highly relevant documents regarding how

spoken-word comedy has been licensed as well as efforts to change that licensing practice. Specifically:

- Request No. 4 seeks documents concerning Pandora and its parent company, Sirius XM. This relates to how Pandora and Sirius XM have historically licensed comedy and efforts to change that.
- Request No. 5 calls for communications between Word Collections and comedians. Such communications almost certainly include discussion of licensing practices and efforts to change them, as Word Collections undoubtably attracted comedians with promises of a never-before-received revenue stream.
- Request No. 7 seeks documents concerning past enforcement actions and related efforts to protect any rights in underlying comedy routines. Such actions would reveal whether comedians have ever previously taken the position now advocated by Plaintiffs and Word Collections. If comedians never tried to enforce any rights in their "literary works," that would suggest that Plaintiffs' infringement theory rests on an ahistorical assessment of how comedy has been licensed.
- Request No. 15 seeks marketing and investor pitch materials. These materials almost certainly discuss Word Collections' plans to bundle together the works of its affiliated comedians into a single blanket license so as to secure for the comedians and itself a new revenue stream that has never been paid before, and at a rate that no individual comedian could secure acting alone.
- Request Nos. 20 and 21 seek information regarding any benefits that comedians would or could receive by affiliating with Word Collections, which presumably will show that Word Collections

solicited numerous comedians—Plaintiffs and non-Plaintiffs alike—with promises of securing a new royalty stream that, as a result of the collective licensing practices of Word Collections, will be well above the royalty level any individual comedian could secure acting alone.

The Order similarly skirts Pandora's arguments regarding damages, and without explanation, struck or modified a number of Requests that seek highly relevant documents regarding the value of the rights at issue in the Consolidated Litigation. These include:

- Request No. 17, which seeks Word Collections' historic and forecasted license fees, as well as related financial information, for the precise rights at issue in the Consolidated Litigation. Particularly here, where Pandora has never had to separately license the rights at issue, valuation of such rights for damages purposes can only be done—as they frequently are in infringement cases—by looking to royalty rates negotiated by third parties or assessments of royalty rates made by others for the same or similar rights.
- Request No. 26 seeks documents relating to the value of the rights at issue. By limiting this Request solely to Word Collections' communications with the Plaintiffs, the Order ignored that as the exclusive licensor of the rights to underlying comedy routines, it is perfectly conceivable that Word Collections has various analyses of the value of those rights that it has not shared with any Plaintiff.

Because the Order ignored several arguments explaining the relevance of multiple Requests, it is contrary to law and cannot stand. *See Fisher & Paykel Healthcare Ltd. v. Flexicare Inc.*, 2020 WL 7094077, at *2 (C.D. Cal. Oct. 29, 2020) (remanding motion to compel where magistrate judge failed to address

parties' argument and thus issued order "contrary to law"); *Ramos v. Yates*, 2006 WL 8435255, at *3 (S.D. Cal. Oct. 26, 2006) (finding error where magistrate judge "did not address respondent's arguments concerning whether petitioner's claims are procedurally barred"); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 203 (N.D. Cal. 1983) (remanding where "Magistrate's order failed to address several crucial considerations in determining the appropriateness of Plaintiffs' discovery requests").

Along similar lines, the Order, without explanation, also struck Request No. 2, which seeks documents concerning Word Collections' involvement in the Consolidated Litigation. This Request plainly relates to the Plaintiffs, which was the Order's guiding principle in determining whether Requests should be stricken or modified. Order at 5-8. Yet the Order strikes this Request as well, without any explanation. The Order should be reversed with respect to this Request as well. *See Fisher*, 2020 WL 7094077, at *2; *Ramos*, 2006 WL 8435255, at *3; *Adolph Coors*, 570 F. Supp. at 203.

b. The Order's Assessment Of Pandora's Misuse Defense Is Contrary To Law

The Order's conclusions regarding Pandora's copyright misuse defense are likewise contrary to law. The Order's entire analysis in this regard is limited to a discussion of *M. Witmark & Sons v. Jenson*, 80 F. Supp. 843 (D. Minn. 1948)—a case Pandora relies on to demonstrate how Word Collections, as the collective licensor of many of the allegedly infringed works must fall within the ambit of Pandora's copyright misuse defense. The Order explains that *Witmark* is "distinguishable from this case" because the copyright misuse there "was directly tied to an antitrust violation." Order at 4. The Order goes on to conclude that because Pandora has not made a prima facie showing that Word Collections has

"monopoly power," Pandora cannot have a cognizable copyright misuse defense that is based on blanket licensing. *Id*. On this basis alone, the Order precludes Pandora from securing a variety of discovery from Word Collections that is highly relevant to this misuse defense.

This conclusion is wrong as a matter of law for several reasons. *First*, the Order's legal conclusion that absent a showing of "monopoly power" or other actionable antitrust claim, Pandora is not entitled to ***even pursue discovery*** from Word Collections to prove up its copyright misuse defense flips the litigation process on its head. Evaluating the merits of a defense in a manner akin to summary judgment is premature: the Consolidated Litigation remains in the discovery phase, and Pandora, like any party, "is entitled to obtain discovery—written, deposition, and *third party discovery*—sufficient to test the factual validity of [a] defense." *BLK Enters.*, 2018 WL 5993841, at *4 (emphasis added). Whether Pandora can ultimately prevail on this defense is beside the point at this stage, where it is "axiomatic that relevance for discovery purposes is not synonymous with admissibility." *Id*.

Wixen Music Publishing, Inc. v. Triller, Inc.—a case relied on by both Pandora and Word Collections—makes this abundantly clear. In *Wixen*, the defendant brought a motion to compel the very sort of discovery at issue here because, like here, that discovery was relevant to its copyright misuse defense. Recognizing that the issue before it was a discovery dispute, the *Wixen* court properly refused to "sustain Plaintiff's objection that Defendant's copyright misuses defense lacks legal support." 2022 WL 3636000, at *2 (C.D. Cal. Aug. 1, 2022). The court explained that (as here) the misuse defense "was pled in Defendant's answer, and it remains in the case," and thus the "Defendant is entitled to seek proportional discovery that is relevant to the misuse defense." *Id.* The court

ultimately ordered Wixen to produce many of the same types of documents at issue here—including "blanket or catalog license agreements"; documents relating to negotiation and pricing of "blanket or catalog license agreements"; documents discussing blanket licensing efforts; documents discussing "policy, strategy or market analysis regarding blanket or catalog license agreements"; and various financial documents, including the licensor's revenues and profits. *Id.* at *3. That same result is warranted here.

To be sure, in *Wixen*, it was the plaintiff that was ordered to produce documents. But that does not mean that a third-party acting as the collective licensor of the rights at issue—the role played by Wixen—is not similarly obligated to produce these same types of documents. As noted above, non-parties and parties are subject to the same scope of discovery. *See supra* § I (collecting cases and other authority). What was relevant for Wixen (the collective licensor there) to produce thus applies with equal force to Word Collections (the collective licensor here). Moreover, in *Wixen*, the collective licensor sued in its own name instead of having the individual songwriters named as plaintiffs. *Wixen*, 2022 WL 3636000, at *1. Word Collections, as the exclusive licensor of the rights at issue, could have done the same. *See Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1005-06 (9th Cir. 2015). That it made the strategic decision to hide behind its affiliated comedians does not absolve it of its discovery obligations.

Second, the Order was wrong on the merits. Blanket licensing of the sort facilitated by Word Collections can amount to copyright misuse, even absent a showing of an antitrust violation. *Wixen* is again directly on point. There, the defendant's copyright misuse defense was nearly identical to the one at issue here. The *Wixen* defendant argued that the aggregation and blanket licensing of copyrights from a number of individual authors (in that case, songwriters) with

rights complementary to already-licensed sound recordings constituted copyright misuse. 2022 WL 3636000, at *1. Importantly, the *Wixen* court granted the motion to compel *without any showing whatsoever of a market share higher than 65%*. *See generally* 2022 WL 3636000. Indeed, a recent study put out by the Independent Music Publishers International Forum, of which Wixen is a member, notes that no independent music publisher (including Wixen) has a market share of more than 5%. *See* IMPF Global Market View, *Independent Music Publishing* at 3, 23 (Third. Ed., April, 2023), *available at* https://www.impforum.org/wp-content/uploads/2023/04/Third-Edition-IMPF-Independent-Music-Publishing-Global-Market-View.pdf.

Witmark, the case on which the Order based its conclusion, also did not turn on a finding of an antitrust violation. There, *at the merits stage*, the court analyzed a copyright misuse defense that mirrors Pandora's misuse defense here—namely, that by licensing their works bundled together in a blanket license with those of other copyright holders, through a licensing intermediary, Plaintiffs have secured for themselves "an economic advantage and economic control beyond that granted to each of them by the copyright laws." *Witmark*, 80 F. Supp. at 846. That expansion of economic power, the court concluded, amounts to copyright misuse. *Id.* at 850. And while the *Witmark* court *separately* concluded that the collective licensor there had an 80% market share, *id*. at 849, the court's rejection of infringement claims was not premised on this finding. As the court made clear, "[i]n view of the Court's finding that the copyright monopoly has been extended, it is not necessary to determine whether anti-trust violations alone would deprive plaintiffs of the right of recovery." *Id.* at 850.

Finally, the Order erred in concluding that "Pandora has cited no authority that would support the proposition that, absent a potential antitrust violation, the

mere existence of Word Collections as a collective of comedians would automatically make their actions relevant to this action[.]" Order at 4. Pandora, in fact, demonstrated precisely this, explaining (at ECF No. 2 (Opening Br. at 17-20, 24-26); ECF No. 12 (Reply Br. at 7-10)) that it is long settled that "a defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright misuse defense." *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997); *see also Saks Inc. v. Attachmate Corp.*, 2015 WL 1841136, at *12 (S.D.N.Y. Apr. 17, 2015) ("It is true that, historically, the defense of copyright misuse has been successfully asserted most often in cases where anticompetitive effects were alleged. But . . . other courts (also outside this circuit, but including at least two Circuit Courts of Appeals) have concluded that the defense can be asserted when 'the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.'" (citation omitted)); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) ("[W]hile it is true that the attempted use of a copyright to violate antitrust law probably would give rise to a misuse of copyright defense, the converse is not necessarily true—a misuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action."). Affirming this very point, in the same order dismissing Pandora's initial antitrust counterclaims against Word Collections, this Court explained that even with the counterclaims dismissed, Pandora is still entitled to discovery to support its defenses, including copyright misuse. Consol. Litig., ECF No. 83 at 27. Nor is Pandora's misuse defense based upon the "mere existence" of Word Collections; it is the Plaintiffs' use of Word Collections as a vehicle for bundling their rights into a blanket license, thereby expanding their bargaining power far beyond that conferred to an individual copyright owner by the Copyright Act—precisely as held in *Wixen* and *Witmark*—that constitutes misuse.

In short, the law is clear: it is not necessary for there to be an antitrust violation for licensing tactics to amount to copyright misuse. The *sine qua non* of this misuse defense is not, as the Order would have it, "monopoly power" as evidenced by a particular market share threshold, but rather the type of *pricing power* and pricing scheme enabled by Word Collections on behalf of Plaintiffs. The Order's conclusion was contrary to law.

c. Word Collections' Own Actions Are Directly Relevant To Pandora's Copyright Misuse And Unclean Hands Defenses

The Order separately erred in concluding that Pandora's misuse and unclean hands defenses "are solely based on Plaintiffs' knowledge and actions" and that Word Collections' own actions are irrelevant. Order at 5. This conclusion fundamentally misstates the nature of the alleged misuse. Word Collections is indisputably acting as the exclusive licensor of comedians, including at least seven of the nine Plaintiffs, and licenses the rights of all of its affiliated comedians on a blanket basis. Word Collections did not dispute any of this below.

Word Collections is thus acting just as ASCAP did in *Witmark*, the licensing collective Word Collections publicly states it models itself after, ECF No. 13-7 (Aviki Reply Decl. Ex. G), and Wixen did in *Wixen*. It is acting on behalf of the Plaintiffs, and necessarily in conjunction with the other non-Plaintiffs comedians, to effectuate Plaintiffs' misuse. The misuse could not work without the participation of Word Collections and the other affiliates. It necessarily follows that the licensing practices and other conduct of Word Collections on behalf of Plaintiffs and all of its other affiliates are directly relevant. Indeed, it is implausible that the ***collective that is negotiating and issuing blanket licenses on behalf of the Plaintiffs and the other affiliates necessary to work the misuse*** does not have relevant documents beyond those it chose to share with the Plaintiffs. To the contrary, Word

Collections' documents regarding its business plans and licensing strategies (including documents responsive to stricken or limited Request Nos. 5, 11, 15, 18-22, 25-27) and its collective might (including documents responsive to stricken or limited Request Nos. 8-10, 12-13, 14, 17, 23-24) are central to Pandora's misuse defense and are highly relevant even, and perhaps especially, if never shared with a Plaintiff.

Pandora has already obtained communications between Word Collections and a non-party wherein Word Collections candidly describes the scheme it is undertaking, asserting that the list of comedians it represents gives it "collective weight and [a] 'stick' [that] is much larger" than that of any individual comedian. ECF No. 13-1 at 8 (Aviki Reply Decl. Ex. A). This is just the tip of the iceberg, and there is no more convenient, less burdensome source for documents with similar admissions than Word Collections itself.

III. It Was Legal Error To Permit Word Collections To Base Its Refusal To Comply With The Subpoena On Boilerplate Objections

Rule 34(b)(2) of the Federal Rules is clear: objections to Requests must "state with specificity the grounds for objecting to the request, including the reasons." Yet as Pandora showed below, Word Collections responded to each of Pandora's Requests with non-specific, conclusory, and duplicative boilerplate objections, thus violating Rule 34(b)(2). *See* ECF Nos. 2 at 22-24 and 3-2 (Aviki Decl. Ex B). Throughout its Responses, Word Collections resorted to the same refrain—without any elaboration or factual detail—that it was objecting "on the grounds that the Request is overly broad and unduly burdensome." *See generally id.* And as Word Collections conceded below, it merely incorporated blunderbuss "General Objections" into each of its specific responses, *see* ECF No. 11 at 11 n.2, a tactic that is likewise deficient under the Federal Rules.

Pandora cited ample authority from the Central District rejecting the use of such "general or boilerplate objections" as "improper—especially when a party fails to submit any evidentiary declarations supporting such objections." *See, e.g.*, *L.A. Terminals, Inc. v. United Nat'l Ins. Co.*, 340 F.R.D. 390, 397 n.2 (C.D. Cal. 2022) (quotation marks and citation omitted); *see also* ECF No. 2 at 23 n.8 (collecting additional cases). Indeed, Magistrate Judge Rocconi's own Standing Order on Discovery Disputes ***expressly rejects*** the practice: "Parties responding to document requests shall not use boilerplate objections that violate Rule 34(b)(2) . . . Nor shall responding parties use the concept of 'disproportionality' as a synonym for previous boilerplate objections of irrelevance, overbreadth, undue burden, or the like . . . Conclusory objections based on alleged disproportionality, burden, cost, or overbreadth without any basis in fact shall be summarily rejected and/or deemed waived."[3] Word Collections' Opposition failed to address, let alone distinguish, *any* of this authority. *See* ECF No. 11. Nor did Word Collections explain why its objections should not have been "summarily rejected and/or deemed waived" under the Magistrate Judge's well-established discovery protocols. *Id.*

The Order nonetheless ignored Pandora's showing, eschewed Magistrate Judge Rocconi's own Standing Order, and—without any explanation—absolved Word Collections of the need to provide specific, non-conclusory objections based in evidentiary fact. This was clearly erroneous and contrary to law, and the Order should be reversed on this basis alone. *See, e.g.*, *Villery v. Jones*, 2021 WL 2227363, at *7 (E.D. Cal. Jun. 2, 2021) (granting Rule 72(a) motion because "magistrate judge conclu[sion] that defendant [] sufficiently responded with boilerplate objections" was "contrary to law").

[3] *See* Standing Order on Discovery Disputes (Rocconi, MJ) (April 2021) at § 4, *available at* https://www.cacd.uscourts.gov/sites/default/files/documents/MAR/AD/MAR%20Chambers%20Standing%20Discovery%20Order_April2021.pdf.

CONCLUSION

Pandora respectfully requests that the Court grant its Motion and order Word Collections to fully comply with Pandora's Subpoena without any modification by a date certain.

Dated: December 21, 2023

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FILER'S ATTESTATION

The undersigned, counsel of record for Defendant Pandora Media, LLC, certifies that this brief contains 6,993 words, which complies with the word limit of L.R. 11-6.1.

Dated: December 21, 2023

/s/ Paul M. Fakler
Paul M. Fakler

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PANDORA MEDIA, LLC,

Applicant,

v.

WORD COLLECTIONS, INC.,

Respondent.

Case No. 2:23-mc-00140-MCS-MAR

[PROPOSED] ORDER GRANTING DEFENDANT PANDORA MEDIA, LLC'S MOTION FOR REVIEW OF MAGISTRATE ORDER REGARDING PANDORA'S MOTION TO COMPEL WORD COLLECTIONS, INC.

Hon. Mark C. Scarsi

Date: January 22, 2024
Time: 9:00 AM
Crtrm: Courtroom 7C

Defendant Pandora Media, LLC's Motion for Review of Magistrate Judge Rocconi's Order Regarding Pandora's Motion to Compel Word Collections, Inc. (the "Motion") came on for hearing on January 22, 2024. After considering the Motion, the accompanying declaration and exhibits, the pleadings and documents incorporated by reference therein, the parties' briefing, and arguments of counsel, the Court **GRANTS** the Motion and hereby compels Word Collections, Inc. to fully comply with Pandora's Subpoena, as originally written, within 21 days of the date of this Order.

IT IS SO ORDERED.

Dated: _____

_____
MARK C. SCARSI
United States District Judge

Proof of Delivery

I hereby certify that on Friday, July 19, 2024, I provided a true and correct copy of the Ex. C_Pandora v. Word Collections, Mot. for Review of Magistrate Order Re Pandora's MTC to the following:

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Signed: /s/ Scott Edelman