UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Capitol Records, LLC, d/b/a EMI Music North America,

Plaintiff,

–v–

Escape Media Group, Inc.,

Defendant.

12-CV-6646 (AJN)

MEMORANDUM AND ORDER

ALISON J. NATHAN, District Judge:

Before the Court is the report and recommendation ("Report" or "R&R") of Magistrate Judge Sarah Netburn dated May 28, 2014, Dkt. No. 90, regarding Plaintiff EMI Music North America ("EMI")'s motion for summary judgment. EMI moved for summary judgment as to its First and Sixth Claims for federal and common law copyright infringement. By stipulation, Defendant Escape Media Group, Inc. ("Escape") conceded liability as to EMI's Second Claim for breach of the parties' September 24, 2009 Digital Distribution Agreement ("Distribution Agreement"). Dkt. No. 24. EMI did not move for summary judgment as to its Third Claim for breach of the parties' September 24, 2009 Settlement Agreement and Mutual Release ("Settlement Agreement"), Fourth Claim for unjust enrichment, or Fifth Claim for unfair competition, so those claims were not before Judge Netburn and are not before the Court now. Judge Netburn recommended denying Escape's challenge to the declaration of Ellis Horowitz and granting EMI's challenge to the declaration of Cole Kowalski. She also recommended denying EMI's motion for summary judgment as to its claim for direct infringement of its right of reproduction, but granting the motion as to its remaining copyright infringement claims and as to Escape's affirmative defenses under the Digital Millennium Copyright Act ("DMCA") and under the parties' Distribution and Settlement Agreements. Escape objects to Judge Netburn's

recommendations regarding (1) challenges to the Horowitz and Kowalski Declarations, (2) its entitlement to a DMCA safe harbor, and (3) the release of claims under the parties' prior agreements. For the reasons discussed below, the Court adopts Judge Netburn's recommendations in full.

I. BACKGROUND

Because Escape objects only to Judge Netburn's application of the law to the facts of this case, the Court adopts in full her recitation of the relevant facts. *See* R&R 27-41.[1] The Court assumes familiarity with this material.

II. STANDARD OF REVIEW

District courts may designate magistrate judges to hear and determine certain dispositive motions and to submit proposed findings of fact and a recommendation as to those motions. 28 U.S.C. § 636(b)(1). Any party wishing to object to a magistrate judge's report and recommendation must do so within fourteen days after being served with a copy of the report and recommendation. *Id.* If a party submits a timely objection to a report and recommendation, the district court reviews *de novo* those portions to which the party objected. *Id.*; *see also Norman v. Astrue*, 912 F. Supp. 2d 33, 39 (S.D.N.Y. 2012). Otherwise, if "no 'specific written objection' is made, the district court may adopt those portions 'as long as the factual and legal basis supporting the findings and conclusions set forth . . . are not clearly erroneous or contrary to law.'" *Norman*, 912 F. Supp. 2d at 39 (quoting *Eisenberg v. New England Motor Freight, Inc.*, 564 F. Supp. 2d 224, 226-27 (S.D.N.Y. 2008)). "A decision is 'clearly erroneous' when the reviewing Court is left with the definite and firm conviction that a mistake has been committed." *Courtney v. Colvin*, No. 13 Civ. 02884 (AJN), 2014 U.S. Dist. LEXIS 4559, at *3-4 (S.D.N.Y. Jan. 14, 2014) (quoting *Laster v. Mancini*, No. 07 Civ. 8265 (DAB), 2013 U.S. Dist. LEXIS 138599, at *6-7 (S.D.N.Y. Sept. 25, 2013)).

[1] Where the Court cites additional factual materials, it draws from the Reply Statement of Undisputed Facts ("RSUF"), Dkt. No. 85. If supported, and if Escape did not controvert the fact by pointing to admissible evidence, the Court "consider[s] the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2); Local Rule 56.1(d); *see also Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993).

Summary judgment is granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A genuine dispute as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On a motion for summary judgment, a court views all evidence in the light most favorable to the non-movant, *Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 89 (2d Cir. 2004), and "resolve[s] all ambiguities and draw[s] all permissible factual inferences in favor of the party against whom summary judgment is sought," *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004).

The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. But "[e]ven where facts are disputed, in order to defeat summary judgment, the nonmoving party must offer enough evidence to enable a reasonable jury to return a verdict in its favor." *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001). And if "a plaintiff uses a summary judgment motion, in part, to challenge the legal sufficiency of an affirmative defense—on which the defendant bears the burden of proof at trial—a plaintiff 'may satisfy its Rule 56 burden by showing that there is an absence of evidence to support [an essential element] of [the non-moving party's case].'" *Nw. Mut. Life Ins. Co. v. Fogel*, 78 F. Supp. 2d 70, 73-74 (E.D.N.Y. 19990 (quoting *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994)).

III. DISCUSSION

As noted, Escape objects to Judge Netburn's recommendations regarding (1) challenges to the Horowitz and Kowalski Declarations, (2) its entitlement to a DMCA safe harbor, and (3) the release of claims under the parties' prior agreements. EMI does not object to Judge Netburn's Report, including her recommendation that the Court deny its motion with respect to

direct infringement of its right of reproduction. The court will turn to issues relating to the declarations first and will then analyze the merits of the dispositive motion.

A. Objections to the Horowitz and Kowalski Declarations

Before delving into the merits of EMI's summary judgment motion, Judge Netburn addressed challenges concerning two declarations submitted by the parties. Judge Netburn recommended (1) denying Escape's challenge to the Horowitz Declaration and (2) granting EMI's challenge to the Kowalski Declaration. R&R 7.

Escape objects to both recommendations and contends that they should be reviewed *de novo* as if it had made an objection to a dispositive matter. The Court disagrees. Both Escape and EMI argued to Judge Netburn that the challenged declarations violated Rule 26, the Federal Rule of Civil Procedure governing discovery, and Judge Netburn properly noted that both parties' attempts to preclude the Court from relying on the declarations were based primarily on Rule 37, which provides certain sanctions for failures to make disclosures or to cooperate in discovery. Magistrate judges may, and often do, rule on nondispositive pretrial matters, including discovery disputes. Fed. R. Civ. P. 72(a). Contrary to Escape's suggestion, such nondispositive pretrial matters are reviewed for clear error. *Id.*; *see also* § 636(b)(1)(A).

Moreover, the fact that Judge Netburn efficiently resolved the Rule 37 sanctions in the same Report in which she provided recommendations as to the motion for summary judgment does not change the standard of review applied to the Rule 37 sanctions. *See Cardell Fin. Corp. v. Suchodolski Assocs.*, 896 F. Supp. 2d 320, 324 (S.D.N.Y. 2012) ("A district court evaluating a magistrate judge's report may adopt those portions of the report addressing non-dispositive matters as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law." (citing Fed. R. Civ. P. 72(a)); *see also Arista Records, LLC v. Doe*, 604 F.3d 110, 116 (2d Cir. 2010) ("Matters concerning discovery generally are considered 'nondispositive' of the litigation." (quoting *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990)); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL) (RLE), 2000 U.S. Dist. LEXIS 4892, at *4 n.1

(S.D.N.Y. 2000) ("A decision to admit or exclude expert testimony is considered 'nondispositive' of the litigation." (collecting cases)). Therefore, the Court reviews Judge Netburn's recommendations concerning the Horowitz and Kowalski Declarations for clear error. Finding none, the Court adopts her recommendations to deny Escape's challenge to the Horowitz Declaration and to strike the Kowalski Declaration under Rule 37(c)(1).

B. Copyright Infringement

With one minor exception, Escape does not make any specific objections to Judge Netburn's conclusions of direct and secondary liability for copyright infringement. Rather, Escape primarily contends that there was no evidence from which copyright infringement could be found because it argued that the Horowitz Declaration should be excluded from the universe of facts at issue on this motion. As noted, the Court finds no clear error with Judge Netburn's discovery-related conclusions. Therefore, there is evidence from which copyright infringement can be found because Horowitz's analysis of Grooveshark's system revealed, *inter alia*, 2,807 EMI-copyrighted sound recordings were copied on Escape's servers in at least 13,855 separate files, and EMI-copyrighted works were streamed 12,224,567 times since March 23, 2012.

The only specific objection regarding copyright infringement that Escape raises is a footnote in its objection brief arguing that Judge Netburn "overlooked an important distinction between federal and New York law concerning 'public performance' rights in sound recordings." Obj.[2] 18 n.11. But Escape did not raise this point in its opposition to summary judgment, and it is well established that a party may not raise an argument in an objection to a report and recommendation of a magistrate judge that was not fairly presented to the magistrate judge in the first instance. *See, e.g., U.S. Bank N.A. v. 2150 Joshua's Path, LLC*, No. 13-CV-1598 (SJF), 2014 U.S. Dist. LEXIS 127596, at *4 (E.D.N.Y. Sept. 10, 2014) ("'A district court will generally not consider arguments that were not raised before the magistrate judge.'" (quoting *Diaz v. Portfolio Recovery Assocs., LLC*, No. 10 Civ. 3920, 2012 U.S. Dist. LEXIS 72724, at *5

[2] Obj. stands for Escape's objection to Judge Netburn's Report (Dkt. No. 94).

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