SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of, FROZEN MOMENTS, LLC, Petitioner, For an Order pursuant to Section 3102(c) of the Civil Practice Law and Rules to compel pre-action disclosure from: UMG RECORDINGS, INC, and SPOTIFY USA INC., Respondents.	Index No. 161023/2024 Hon. Eric Schumacher Motion Seq. No. 001

RESPONDENT SPOTIFY USA INC.'S MEMORANDUM OF LAW IN OPPOSITION TO VERIFIED PETITION

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PRELIMINARY STATEMENT

This proceeding arises out of a long-running feud between the popular recording artists Aubrey Drake Graham (p/k/a "Drake") and Kendrick Lamar Duckworth (p/k/a/ "Kendrick Lamar"). Drake (via Petitioner Frozen Moments LLC, an entity he solely owns) now contends that Universal Music Group (together with its affiliates, "UMG"), which owns rights to recordings by both Drake and Kendrick, worked with various third parties to unfairly promote Kendrick Lamar's "Not Like Us" (a song critical of Drake) at Drake's expense. The Petition speculates that UMG artificially inflated the popularity of the track through a number of avenues, including by using "bots" and "pay-to-play" agreements, paying social media influencers to promote the song, and taking steps to conceal its scheme by allegedly terminating employees associated with Drake.

Under cover of the far-fetched contention that this gives rise to a civil RICO claim, Petitioner in this proceeding seeks to invoke the extraordinary remedy of pre-action discovery. As to Spotify—a stranger to this fracas—the Petition sets forth a single allegation, on information and belief, that Spotify agreed with UMG to a discounted royalty rate for "Not Like Us" in exchange for "recommending [it] to users who are searching for other unrelated songs and artists." On this basis, Petitioner seeks pre-action discovery of documents sufficient to show any such agreement and the financial benefits allegedly received.

As set forth in the accompanying affirmation, the predicate of Petitioner's entire request for discovery from Spotify is false: there is no such agreement. In any event, however, the Petition is legally deficient and should be denied.

Importantly, pre-action discovery under CPLR 3102(c) requires a petitioner to first establish that it has a meritorious cause of action. Here, however, Petitioner offers only information-and-belief speculation rather than well-pled facts. And the Petition does not demonstrate how those speculative allegations make out the elements of the civil RICO, deceptive

business practices, and false advertising claims Petitioner seeks to assert. That shortcoming is particularly salient given that RICO claims are notoriously difficult to plausibly plead. Courts in New York uniformly hold that CPLR 3102(c) cannot be used to conduct a fishing expedition as to *whether* a cause of action exists—but that is precisely what this Petition seeks to do.

Moreover, pre-action discovery is a narrow tool, primarily used to identify unknown defendants where the petitioner has been harmed in a legally cognizable way but lacks the ability on its own to identify the perpetrator. Here, however, Petitioner does not contend that there are any unknowns as to Spotify—Petitioner purports to already know of an arrangement between Spotify and UMG, and its relevant terms. Thus, even accepting Petitioner's position at face value —which to be clear, Spotify does not—the Petition seeks evidence necessary to *prove* rather than *frame* its claims. That is precisely the sort of pre-litigation discovery that CPLR 3102(c) does not permit.

For these reasons and those stated below, the Petition should be denied.

BACKGROUND

A. The Drake/Kendrick Feud and Petitioner's Allegations Against UMG

Over the course of 2024, Kendrick Lamar and Drake engaged in a highly publicized feud in which each released tracks with lyrics attacking the other—commonly referred to as "diss" tracks.[1] On May 4, 2024, Kendrick Lamar released one such track, the single "Not Like Us" through Interscope Records, a division of UMG. Doc. No. 1 (the "Petition" or "Pet.") ¶¶ 6, 21. The track debuted at No. 1 on the *Billboard Hot 100* songs chart.[2] "Not Like Us" ended its first

[1] *See, e.g.*, Frazier Tharpe, *The Kendrick Lamar/Drake Beef, Explained*, GQ (Nov. 26, 2024), https://www.gq.com/story/the-kendrick-lamar-drake-beef-explained.

[2] Gary Trust, *Kendrick Lamar's 'Not Like Us' Blasts In at No. 1 on Billboard Hot 100*, Billboard (May 13, 2024), https://www.billboard.com/lists/kendrick-lamar-not-like-us-hot-100-number-one-debut/not-like-us-no-1/.

week with 70.9 million official streams.[3] The song has been nominated for five Grammy Awards, including Record of the Year, Song of the Year, and Best Rap Song.[4]

In the wake of the artists' feud, the Petition contends that the success of "Not Like Us" is not organic, but instead is the result of a "scheme" by UMG—the same record company that releases and earns revenue from Drake's tracks, *see* Pet. ¶ 21—to "deceive consumers into believing ["Not Like Us"] was more popular than it was in reality," *id.* ¶¶ 8, 13. Specifically, the Petition alleges that UMG "launched a campaign to manipulate and saturate the streaming services and airwaves with . . . 'Not Like Us,' in order to make that song go viral, including by using 'bots' and pay-to-play agreements." *Id.* ¶ 5.

The Petition principally concerns actions purportedly taken by UMG and parties other than Spotify that Petitioner contends amount to a civil RICO conspiracy and deceptive business and false advertising practices. *See, e.g.*, *id.* ¶¶ 9 ("UMG hired other unknown third parties to use 'bots' to promote 'Not Like Us' and also to inflate the streams of the 'Not Like Us' music video."), 11 ("UMG engaged in similar pay-to-play schemes to increase the air play of 'Not Like Us' on the radio."), 12 ("UMG employed a similar scheme by paying social media influencers to promote and endorse the Song and Video."), 18 ("UMG has been taking steps in an apparent effort to conceal its schemes, including, but not limited to, by terminating employees associated with or perceived as having loyalty to Drake."). The Petition asserts no specific facts of any kind in support of these alleged RICO and deceptive practices violations. Instead, it relies exclusively on speculation—pled on "information and belief," or the claims of anonymous individuals on the

[3] *Id.*

[4] Jazz Monroe & Matthew Strauss, *Grammy Nominations 2025: See the Full List Here*, Pitchfork (Nov. 8, 2024), https://pitchfork.com/news/grammy-nominations-2025-see-the-full-list-here/.

internet. On this basis, Petitioner seeks discovery from UMG, as well as an order requiring that UMG preserve all relevant documents and communications. *Id.* ¶¶ 30, 32.

B. The Petition's Allegations Concerning Spotify

The Petition contains only three allegations that concern Spotify in any way: (1) an assertion, on information and belief, that "UMG charged Spotify licensing rates 30 percent lower than its usual licensing rates for 'Not Like Us' in exchange for Spotify affirmatively recommending the Song to users who are searching for other unrelated songs and artists"; (2) citation to an assertion by an unknown, anonymous individual that he was paid by Interscope to use "bots" to achieve "30,000,000 streams on Spotify in the first days of the release of 'Not Like Us,'" and who allegedly said Spotify was the "easiest platform 'to bot'" because it lacks certain security measures; and (3) an allegation, again on information and belief, that UMG paid or approved payments to Apple Inc. to have Siri misdirect users to "Not Like Us" on platforms like Spotify. *Id.* ¶¶ 7–8, 10 & n.15.

Based on these allegations, the Petition seeks "pre-action disclosure" from Spotify of documents and communications sufficient to show (1) "the dates, methods, and amounts of financial benefit" provided to Spotify by UMG/Interscope "in exchange for the promotion, publication, or recommendation of the Song on Spotify," if any, and (2) "what [] Spotify agreed to provide and did provide in exchange" for such alleged financial benefits. *See id.* at Ex. B.

The Petition alleges no *facts* supporting the Petition's information-and-belief and hearsay assertions, and two of the three are not even related to the relief sought by the Petitioner. The sole allegation in the Petition that actually pertains to Petitioner's requested discovery from Spotify is the information-and-belief assertion that UMG charged Spotify lower licensing rates for "Not Like Us" in exchange for Spotify "affirmatively recommending the Song to users who are searching for other unrelated songs and artists." *Id.* ¶ 7. As set forth in the accompanying affirmation from

Spotify employee David Kaefer, however, Spotify and UMG have never had any such arrangement. *See* Affirmation of David Kaefer ("Kaefer Aff."), filed concurrently herewith, ¶ 4.

The other allegations that mention Spotify do not allege any relevant conduct by Spotify and do not bear at all on the discovery that Petitioner seeks from it. Specifically, with respect to the Petition's assertions regarding alleged Siri misdirection, the Petition does not allege that *Spotify* had any alleged payment arrangement with UMG or Apple Inc., nor that it was aware of any such arrangement between those other parties. *See* Pet. ¶ 10. Similarly, as to the "unknown" individual who claimed that Spotify is "easy to bot" and purports to have received compensation from Interscope to artificially inflate streams for "Not Like Us" on Spotify, the allegation concerns dealings between parties *not* including Spotify.[5]

LEGAL STANDARD

Discovery under Section 3102(c) "will only be directed upon a showing that the petitioner has a meritorious cause of action." *In re Peters*, 34 A.D.3d 29, 3 (1st Dep't 2006); *see also Saloman v. Porter*, 59 Misc. 3d 1210(A), *4 (Sup. Ct. N.Y. Co. 2018) ("[P]etitioners must demonstrate that they have a meritorious and/or prima facie cause of action."). In addition, a petitioner seeking pre-action discovery must establish that "the information sought is material and necessary to the actionable wrong." *Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 271 A.D.2d 346, 347 (1st Dep't 2000). The Petition fails to meet either burden.

[5] Not surprisingly, Spotify found no evidence to substantiate this unidentified individual's claim. Kaefer Aff. ¶ 5. And far from being "easy to bot," Spotify invests heavily in automated and manual reviews to prevent, detect, and mitigate the impact of artificial streaming on its platform. *See id.* ¶ 6; *see also, e.g.*, Spotify for Artists, *All you need to know about artificial streaming*, https://artists.spotify.com/artificial-streaming (last visited Dec. 19, 2024).

ARGUMENT

I. Petitioner's Section 3102(c) Request Should Be Denied Because Petitioner Has Failed to Demonstrate Any Meritorious Cause of Action.

Discovery under Section 3102(c) is typically granted only where the facts establishing a cause of action are clear, but the identity of the alleged wrongdoer cannot be established without pre-action discovery. *See, e.g.*, *Diaz v. Metro. Transit Auth.*, 190 A.D.3d 734, 735 (2d Dep't 2021) (granting pre-action discovery where "the facts alleged by the petitioner state a cause of action and the discovery that he seeks is limited to obtaining the identity of prospective defendants"). Indeed, the First Department repeatedly has held that pre-action discovery *cannot* be used to determine *whether* a cause of action exists or "for the purpose of exploring the possibility of alternative theories of liability or whether the prospective plaintiff has a cause of action worth pursuing"—precisely what the Petition seeks to do here. *Thomas v. MasterCard Advisors, LLC*, 74 A.D.3d 464, 465 (1st Dep't 2010); *see also GTV Media Grp., Inc. v. Confidential Glob. Investigations*, 205 A.D.3d 539, 539 (1st Dep't 2022) ("Pre-action discovery 'is not permissible as a fishing expedition to ascertain whether a cause of action exists.'"); *Holzman*, 271 A.D.2d at 346 ("Pre-action discovery . . . cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all.").

Because Petitioner cannot demonstrate that it has any meritorious cause of action, there is no basis under CPLR 3102(c) to burden Spotify with pre-action discovery, and the Petition should be denied as to Spotify.

A. The Petition fails to establish a *prima facie* federal civil RICO claim.

Petitioner purports to have a cause of action for civil RICO against UMG—not Spotify, *see* Doc. No. 5 ("Mem.") at 5—but the Petition clearly fails to set forth sufficient facts to support a *prima facie* cause of action. "To state a civil RICO claim based on a violation of § 1962(c),

[Petitioner] must allege (1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity, as well as injury to business or property as a result of the RICO violation." *McKenzie v. Artists Rts. Soc'y, Inc.*, 2024 WL 4803870, at *7 (S.D.N.Y. Nov. 15, 2024) (quoting *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013) (internal quotation marks and citations omitted)). Racketeering activity is defined to include various predicate acts, including mail and wire fraud. 18 U.S.C. § 1961(1).

It is rare for *any* plaintiff to be able to state a *prima facie* civil RICO claim. Courts have explained that civil RICO plaintiffs "almost always miss the mark," *Sky Medical Supply v. SCS Support Claims Services*, 17 F. Supp. 3d 207, 220–21 (E.D.N.Y. 2014), because of the difficulty of demonstrating these elements and the "formidable intricacies and pitfalls inherent in RICO litigation," *Gross v. Waywell*, 628 F. Supp. 2d 475, 479 (S.D.N.Y. 2009). In addition, where, as here, a party asserts a claim predicated on mail or wire fraud, it must meet the heightened pleading standard of Rule 9(b). *See Entretelas Americanas S.A. v. Soler*, 2020 WL 9815186, at *8 (S.D.N.Y. Feb. 3, 2020) ("[T]he 'overwhelming trend' among 'courts is to apply Rule 9(b) strictly in order to effect dismissal of civil RICO suits' alleging mail and wire fraud."), *aff'd*, 840 F. App'x 601 (2d Cir. 2020). The Petition is no exception. It fails to set forth facts showing basic elements of the claim and fails to articulate any viable theory of RICO causation or injury. Any one of these defects is independently sufficient to defeat any showing of a meritorious RICO cause of action.

1. The Petition fails to establish the elements of the predicate fraud claims, which would need to be pled with particularity under Fed. R. Civ. P. 9(b).

The Petition fails to establish the necessary predicate fraud claims. In fact, Petitioner *concedes* that it cannot plausibly state a RICO claim on the basis of its assertions, and that it seeks pre-action discovery in order to be able to "satisfy the heightened [Federal] Rule [of Civil Procedure] 9(b) pleading standard applicable to complaints sounding in fraud." Pet. ¶ 28. That

concession alone is fatal to the Petition: the heightened pleading standard of Rule 9(b) is specifically intended, among other things, to avoid subjecting parties to discovery absent a well-pled claim, and that purpose would be subverted entirely by allowing Petitioner to obtain pre-action discovery for the purpose of demonstrating the *existence* of a well-pled claim. *See, e.g.*, *O'Neill v. NYU Langone Hosps.*, 2024 WL 4216501, at *5 (E.D.N.Y. Sept. 17, 2024) ("One of the purposes of Rule 9(b) is to discourage the filing of complaints as a pretext for discovery of unknown wrongs.") (quoting *Madonna v. United States*, 878 F.2d 62, 66 (2d Cir. 1989)); *see also Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536 (1st Dep't 1989) (denying pre-action discovery where petitioner "failed to show the existence of any meritorious cause of action" and had conceded "the reason for the desired pre-action disclosure [was] to discover whether a cause of action for breach of contract or unfair competition can be found.").

Even absent Petitioner's concession, it is obvious that Petitioner has not alleged a *prima facie* mail or wire fraud violation. To do so, Petitioner must identify a *specific fraudulent statement*. *See Jus Punjabi, LLC v. Get Punjabi Inc.*, 2015 WL 2400182, at *5 (S.D.N.Y. May 20, 2015) (dismissing mail and wire fraud claims where "plaintiffs d[id] not specify statements they claim[ed] were false or misleading"), *aff'd sub nom. Jus Punjabi, LLC v. Get Punjabi US, Inc.*, 640 F. App'x 56 (2d Cir. 2016). But while the Petition generally asserts that consumers were misled, *see, e.g.*, Mem. at 5, it nowhere purports to identify a specific false statement made by any Respondent, much less "the contents of the [allegedly fraudulent] communications, who was involved, where and when they took place, and . . . why they were fraudulent" as would be required to meet the requirements of Rule 9(b). *Knoll v. Schectman*, 275 F. App'x 50, 51 (2d Cir. 2008).

The Petition likewise fails to identify any facts supporting other elements of the mail or wire fraud predicate acts, including, for instance, a scheme to defraud or scienter (*i.e.*, fraudulent intent).[6]

2. The Petition fails to demonstrate the elements of causation and injury, as required to state a prima facie RICO claim.

The Petition also fails to demonstrate any viable theory of RICO causation or injury.

To satisfy the RICO statute's "injury" requirement, a "concrete injury to the individual's business or property must be alleged"; reputational harm alone is not enough. *Black v. Ganieva*, 619 F. Supp. 3d 309, 348 n.23 (S.D.N.Y. 2022), *aff'd*, 2023 WL 2317173 (2d Cir. Mar. 2, 2023). And the losses to one's business or property must be "quantifiable and non-speculative." *See Nygard v. Bacon*, 2021 WL 3721347, at *5 (S.D.N.Y. Aug. 20, 2021). To plead causation, a party must show that a RICO predicate offense is not only a "but for" cause of the alleged concrete injury, but also the proximate cause. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 463–64 (2006). In other words, a party seeking relief under the civil RICO statute must show that "the alleged violation led *directly* to the plaintiff's injuries." *Id.* at 461 (quoting *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 274 (1992)) (emphasis added). "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010).

[6] *See Williams v. Affinion Grp., LLC*, 889 F.3d 116, 124 (2d Cir. 2018) ("The elements of mail or wire fraud are (i) a scheme to defraud (ii) to get money or property (iii) furthered by the use of interstate mail or wires. . . . A 'scheme to defraud' is 'a plan to deprive a person of something of value by trick, deceit, chicane or overreaching.'"); *New York State Cath. Health Plan, Inc. v. Acad. O & P Assocs.*, 312 F.R.D. 278, 297 (E.D.N.Y. 2015) ("A showing of intentional fraud, or 'reckless indifference to the truth' is necessary to satisfy 'the requisite knowledge and criminal intent' element of mail fraud."); *see also Brookhaven Town Conservative Comm. v. Walsh*, 258 F. Supp. 3d 277, 286 (E.D.N.Y. 2017) ("[A] generalized profit motive that could be imputed to any company . . . has been consistently rejected as a basis for inferring fraudulent intent.").

The only injury the Petitioner purports to identify is unspecified "diminishing revenues." Mem. at 5. That assertion is neither concrete nor quantified; instead, the Petition simply theorizes that "[s]treaming and licensing is a zero-sum game" in which "[e]very time a song 'breaks through,' it means another artist does not." *See* Pet. ¶ 19; *see also* Mem. at 5 (asserting that the alleged scheme artificially boosted the popularity of "Not Like Us," which in turn supposedly "reduced the popularity of Petitioner's music," which in turn allegedly diminished Petitioner's revenues). The Petition does not cite any evidence that Drake's music became less popular, let alone purport to identify by how much. In fact, Drake was the second most popular artist on Spotify in the U.S. in 2024, behind only Taylor Swift.[7]

Even had Petitioner identified a concrete, quantified reduction in Petitioner's revenues, however, Petitioner's causation theory is not cognizable under, and fails to set forth a *prima facie* claim for, civil RICO. Because the Petition fails to account for the wide array of intervening factors that could have caused any revenue decline, the attenuated chain of causation that it asserts lacks the direct, proximate causal relationship required to state a RICO claim. *See Anza*, 547 U.S. at 459 (rejecting RICO causation theory that plaintiff suffered a "loss of sales resulting from [defendant's] decreased prices for cash-paying customers," because plaintiff's "lost sales could have resulted from factors other than petitioners' alleged acts of fraud. Businesses lose and gain customers for many reasons."); *Petroff Amshen LLP v. Alfa Rehab PT PC*, 2021 WL 960394, at *4 (E.D.N.Y. Mar. 15, 2021) (a party asserting RICO must "put forth facts to demonstrate that the [injury] was 'directly caused by [the] alleged racketeering activity."), *aff'd*, 2022 WL 480475 (2d Cir. Feb. 17, 2022).

[7] Spotify, *Revealed: The Top Artists, Songs, Albums, Podcasts, and Audiobooks of 2024* (Dec. 4 2024), https://newsroom.spotify.com/2024-12-04/top-songs-artists-podcasts-audiobooks-albums-trends-2024/ (last visited Dec. 19, 2024).

At bottom, Petitioner's RICO theory suffers from multiple, independent legal and factual failings. Because the Petition does not demonstrate a meritorious civil RICO claim, it cannot warrant burdening Spotify with pre-action discovery under CPLR 3102(c).

B. The Petition likewise fails to demonstrate a *prima facie* cause of action under NY GBL Sections 349 or 350/350a.

Petitioner's claims under GBL Sections 349 and 350/350a fare no better. Under both Sections 349 and 350/350a, Petitioner must demonstrate the same elements: (1) the act or practice at issue was consumer-oriented; (2) it was deceptive or misleading in a material way; and (3) plaintiff was injured as a result of the alleged deception. *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co.*, 37 N.Y.3d 169, 176 (2021).

Petitioner fails to demonstrate these elements for much the same reasons that it fails to demonstrate the elements of its civil RICO claim. As described above, Petitioner fails to identify any *specific* misleading misrepresentation or omission allegedly made by any of the Respondents, as it must to state a claim. *Wright v. Publishers Clearing House, Inc.*, 372 F. Supp. 3d 61, 66–67 (E.D.N.Y. 2019) (dismissing Section 349 claim because the sources plaintiff relied upon were vague and plaintiff's allegations lacked specific information about the alleged misrepresentation). And the Petition does not show that Respondents' conduct "*directly* cause[d] the plaintiff's injury." *Medisim Ltd. v. BestMed LLC*, 910 F. Supp. 2d 591, 607 (S.D.N.Y. 2012) (emphasis added). As explained above, the Petition does not establish any decline in the popularity of Drake's music, and even if Petitioner *could* show such a decrease, there are no facts sufficient to causally link it to the success of "Not Like Us" or to suggest that the declining popularity of Drake's music *was the direct result of* any alleged deception, rather than a host of other plausible factors. *See Tears v. Boston Scientific Corp.*, 344 F. Supp. 3d 500, 516 (S.D.N.Y. 2018) (dismissing a Section 349

claim because plaintiff "failed to allege facts connecting his alleged injury with [defendant's alleged deceptive act]").

Because Petitioner has not met its burden to demonstrate any elements of the Sections 349 and 350/350a claims, *i.e.*, "a meritorious cause of action," the Petition should be denied. *Holzman*, 271 A.D.2d at 347.

II. Pre-Action Discovery Should Also Be Denied Because the Information Sought from Spotify Is Not Material or Necessary.

Even had the Petition pled a meritorious cause of action (which it has not), the Petition can only be granted if "the information sought is material and necessary to the actionable wrong." *Id.* This requirement has been narrowly interpreted by courts, resulting in CPLR 3102(c) being used primarily to identify unknown defendants where a petitioner has been harmed in a legally cognizable way, but lacks the ability on its own to identify the perpetrator. *See, e.g.*, *Delgrange v. RealReal, Inc.*, 182 A.D.3d 421, 421 (1st Dep't 2020) (affirming order requiring website to disclose the identity of the person who posted for sale items stolen from petitioner); *Leff v. Our Lady of Mercy Acad.*, 150 A.D.3d 1239, 1240 (2d Dep't 2017) (affirming order requiring school to disclose the names of individuals who provided intimate photograph of high school student); *Alexander v. Spanierman Gallery, LLC*, 33 A.D.3d 411, 412 (1st Dep't 2006) (similar, regarding the identity of the purchaser of a stolen sculpture); *Cohen v. Google, Inc.*, 25 Misc. 3d 945, 952 (Sup. Ct. N.Y. Co. 2009) (compelling disclosure of the identity of anonymous blogger who published allegedly defamatory statements on website).[8]

[8] Indeed, the cases cited by Petitioner, *see* Mem. at 7–8, fall into this narrow category. *See Stewart v. New York City Transit Auth.*, 112 A.D.2d 939, 940 (2d Dep't 1985) (affirming decision granting pre-action discovery where it "was necessary to identify prospective defendants, as well as to determine the form or forms which the action should take"); *Application of Dack*, 101 Misc. 2d 490, 503 (Sup. Ct. Monroe Co. 1979) (permitting petitioner alleging newspapers had published defamatory statements about him to "examine the newspaper reporters who interviewed the

Here, the discovery that the Petition seeks from Spotify is plainly not for the purpose of identifying any defendants. *See* Pet. at Ex. B. Petitioner purports to already know of a supposed arrangement between Spotify and UMG and its relevant terms, as well as payments UMG has allegedly made to third-parties for the promotion of "Not Like Us" on Spotify. *Id.* ¶¶ 7–8, 11–12, 17–18; Mem. at 5. Thus, even accepting Petitioner's position at face value, the evidence that it seeks is not for purposes of "framing" a claim, but instead for the purpose of *proving* Petitioner's claims or identifying new theories of liability. That is precisely the sort of discovery that CPLR 3102(c) does not permit. *Compare Holzman*, 271 A.D.2d at 347 (denying petition seeking to inspect a bus on which petitioner slipped and fell where petitioner already could "identify the defendants, the bus route, and the time and place of the accident" and therefore, had "sufficient information to frame his complaint"), *and White v. New York City Transit Auth.*, 198 A.D.3d 557, *1 (1st Dep't 2021) (similar), *with Lemon Juice v. Twitter, Inc.*, 44 Misc. 3d 1225(A), *5, *7 (Sup. Ct. Kings Co. 2014) (compelling Twitter to produce identity of account owner so that petitioner could identify the appropriate party against whom to assert claim for intentional infliction of emotional distress); *see also Champion v. Metro. Transit Auth.*, 70 A.D.3d 587, 588 (1st Dep't 2010) (compelling discovery of the identity of motor vehicle operator where identity of the operator was necessary for "framing" the complaint but denying request to inspect respondent's vehicles and plows).

Indeed, the discovery sought from Spotify is the kind one would expect to see *following* the filing of a lawsuit, whether in the form of party or third-party discovery. Courts frequently deny pre-action discovery petitions where the requested information is more appropriately sought

witnesses and wrote the articles containing the alleged defamatory statements for the purpose of identifying additional defendants" but denying broader discovery requests).

through normal discovery channels. *See, e.g.*, *Est. of Gallagher by & through Gallagher v. Cath. Foreign Mission Soc'y of Am., Inc.*, 64 Misc. 3d 943, 951 (Sup. Ct. Westchester Co. 2019) (CPLR 3102(c) cannot be used to obtain information that "can be obtained through normal discovery channels once an action has been commenced"); *see also Bishop v. Stevenson Commons Assocs., L.P.*, 74 A.D.3d 640, 641 (1st Dep't 2010) (denying petition seeking names of employees at a facility where petitioner's property was damaged because petitioner failed to explain why he could not commence an action against the facility "and determine, in the course of discovery, whether any intentional torts might have been committed by the individual employees").

What Petitioner is seeking to do here, then, is to bypass the normal pleading requirements attendant to civil litigation—including, notably, the heightened pleading standards applicable to civil RICO claims alleging mail and wire fraud, *see* Section I.A, *supra*—and obtain by way of *pre-action* discovery that which it would only be entitled to seek were it to survive a motion to dismiss. This subversion of the normal judicial process should be rejected.

CONCLUSION

For the foregoing reasons, Spotify respectfully requests that the Court deny the Verified Petition in full as against Spotify.

Dated: New York, New York
December 20, 2024

Respectfully submitted,

COVINGTON & BURLING LLP

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 202.8-b of the Uniform Civil Rules for The Supreme Court and The County Court, I certify that this document contains 4,541 words, excluding the parts of the document that are exempted by Rule 202.8-b(b).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
December 20, 2024

By: */s/ Jonathan M. Sperling*

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