

Plaintiffs' claims in connection with this matter. In order to meet the deadlines imposed by this schedule, however, Plaintiffs need Defendant to comply with his outstanding discovery obligations. In that respect, and as described below, Defendant has failed to comply with outstanding document requests, to submit adequate expert reports and to make his experts available for depositions. Plaintiffs are also waiting for the United States District Court for the District of Rhode Island to rule on a pending motion to compel production of a computer located in that jurisdiction. When and if that production is ordered, additional discovery may be required.²

First, on May 13, 2009, the Court ordered Defendant to produce certain documents and CDs. Despite repeated requests from undersigned counsel for Plaintiffs, Defendant did not produce those items until the afternoon of June 1, 2009—*after* the scheduled close of discovery in this case. Plaintiffs are currently reviewing those items—some of which may well require expert analysis—and they note that these items may require additional discovery (including expert supplements) prior to trial. Defendant has also refused to produce other relevant documents for which Plaintiffs are likely to file a motion to compel.

Second, Defendant disclosed two proposed experts on March 30, 2009 and a third proposed expert on April 10, 2009—more than a week after the deadline established by the Court. After receiving those disclosures, Plaintiffs contacted Defendant's counsel and objected to the disclosures on the grounds that they failed to comply with Rule 26 of the Federal Rules of Civil Procedure. After counsel conferred regarding the issue in an effort to avoid unnecessary

² This additional discovery may include the potential completion of the deposition of the defendant after Plaintiffs' review of the very recently produced and yet-to-be produced materials.

motion practice, Defendant's counsel agreed to supplement the disclosures by May 11, 2009. Defendant, however, did not provide any supplements by that agreed-upon date. Ultimately, despite not having the supplemental disclosures but mindful of the current scheduling order in the case, Plaintiffs noticed the depositions of Plaintiffs experts for the last week of May 2009 and issued subpoenas for documents from those experts. Defendant, however, did not produce the experts for depositions on the noticed dates or on any date prior to the close of discovery on May 30, 2009. Nor did any of Defendant's experts produce any of the documents sought by the subpoenas. Finally, on May 29, 2009, the last business day before the close of discovery, Defendant supplemented two of his three expert disclosures—at least one of which remains wholly inadequate.³ If Defendant's expert testimony is not excluded due to Defendant's non-compliance with this Court's deadlines, Plaintiffs must receive the subpoenaed documents and must be permitted to depose Defendant's experts in order to prepare adequately for a trial of this case.

Third, Defendant has selected as one of its three proposed experts an individual who resides in the Netherlands. According to Defendant's most recent disclosure, this proposed expert witness plans to provide expert opinion testimony on a wide range of possible topics—including such diverse matters as peer-to-peer file sharing networks, alternatives to file sharing networks to obtain digital music, the business models of the various Plaintiff recording companies, the financial impact of file sharing on the recording industry, and even the litigation

³ Plaintiffs are likely to file a motion to strike Defendant's proposed experts on numerous grounds, including the facts that their reports are insufficient under Rule 26 and Defendant's refusal to produce those experts for depositions during the discovery period.

tactics and strategies of the Plaintiffs in other unrelated cases. Defendant has proposed that any deposition of this proposed expert witness occur telephonically—in the manner previously used in this case for minor third-party out-of-state witnesses. But given the potential breadth of this proposed expert testimony, as well as the large number of documents that would be part of a deposition of this expert, a telephonic deposition is impractical. Defendant, who selected a proposed expert who resides outside of the United States, should be compelled to produce this expert (as well as his other two proposed experts) in this District for a deposition.

Finally, a motion to compel the production of one of the computers on which Defendant engaged in the infringing activity is currently pending in the United States District Court for the District of Rhode Island. See Capitol Records Inc. et al. v. Alaujan, Misc. No. 08-104T (D.R.I.). When and if that motion is granted, the items sought may also require expert analysis and/or require additional discovery. Assuming that computer is produced promptly, Plaintiffs believe that they will be able to go forward with trial on July 20th.

Accordingly, Plaintiffs respectfully request that, assuming the Court adheres to its Revised Scheduling Order, the Court also impose the following modifications to the discovery schedule in this case:

1. Requiring Defendant to produce supplemental expert reports in compliance with Rule 26(a)(2) for each of its experts no later than June 5, 2009; and
2. Requiring Defendant to make all of his experts available for depositions in Boston or Cambridge, Massachusetts on or before June 26, 2009.
3. Allowing Plaintiffs to supplement its expert disclosures, and to disclose any potential rebuttal experts on or before July 1, 2009.

Respectfully submitted,

SONY BMG MUSIC ENTERTAINMENT;
WARNER BROS. RECORDS, INC.;
ATLANTIC RECORDING
CORPORATION; ARISTA RECORDS,
LLC; AND UMG RECORDINGS, INC.

By their attorneys,

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Dated: June 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 2, 2009.

/s/ Daniel J. Cloherty