UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs, v. NOOR ALAUJAN, Defendant.	Civ. Act. No. 03-cv-11661-NG (LEAD DOCKET NUMBER)

SONY BMG MUSIC ENTERTAINMENT, et al., Plaintiffs, v. JOEL TENENBAUM, Defendant.	Civ. Act. No. 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' MOTION TO EXCLUDE DEFENDANT'S RULE 26(a)(2) WITNESSES

Plaintiffs respectfully submit this Motion to Exclude John G. Palfrey, John Perry Barlow, and Dr. J.A. Pouwelse from testifying on behalf of Defendant. Mr. Barlow should be excluded because his expert disclosure was untimely and all three experts should be excluded because (1) they fail to satisfy the requirements of Fed. R. Civ. P. 26; and (2) notwithstanding the untimeliness and insufficiency of the expert disclosures, Defendant has failed to make his proposed experts available for depositions and failed to provide documents responsive to a subpoena prior to the close of discovery. Accordingly, Defendant's proposed experts should be excluded pursuant to Rule 37(c)(1) for failing to comply with the requirements of Rule 26(a)(2).

BACKGROUND

On February 23, 2009, the Court issued a revised Scheduling Order setting a March 30, 2009 deadline for expert disclosures under Rule 26(a)(2) (Doc. 759). The Court also ordered Plaintiffs to disclose rebuttal experts on or before May 1, 2009, and ordered that all discovery, including expert discovery, be completed by May 30, 2009. (*Id.;* Doc. 833). On March 30, 2009, Defendant purported to disclose two witnesses under Rule 26(a)(2), Dr. J.A. Pouwelse and John G. Palfrey. In connection with these disclosures, Defendant provided reports from Dr. Pouwelse and Mr. Palfrey, copies of which are attached hereto as Exhibits A and B, respectively. On April 10, 2009, ten days after the deadline for Defendant to disclose expert witnesses had passed, Defendant purported to disclose another expert witness, John Perry Barlow. A copy of Barlow's report is attached as Exhibit C. As demonstrated below, all three reports fail to meet the standards of Rule 26(a)(2), which requires, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor" as well as a listing of "the data or other information considered by the witness in forming them." *See* Fed. R. Civ. P. 26(a)(2). The Pouwelse and Palfrey reports, for example, list *topics* on which these witnesses would testify if, permitted, but fail to identify a single actual *opinion* these witnesses claim to have or *the basis* for such opinion. (*See* Exhibit A at 2-4 and Exhibit B at 4.) The Barlow report, in addition to being untimely, fails to identify any *basis* for his opinions and fails to identify *the data* relied on to form such opinions, both of which must be identified under Rule 26(a)(2)(B). (*See* Exhibit C at 2-3.)

On or about April 20, 2009, Plaintiffs' counsel emailed Defendant's counsel and explained, in detail, that the proffered expert reports were insufficient and asked Defendant to supplement the reports. (April 20-22, 2009 Email exchange between Timothy Reynolds and Charles Nesson, attached as Exhibit D.) On April 22, 2009, Defendant's counsel responded,

stating, that he "would go back to each of our experts with your objections and supplement the disclosures." (*Id.*) On or about April 24, 2009, Plaintiffs' counsel and Defendant's counsel spoke, via telephone, regarding Defendant's insufficient expert disclosures. The parties agreed that Defendant would supplement his disclosures, in accordance with Fed. R. Civ. P. 26(a)(1) and, in a follow up telephone conversation on or about April 27, 2009, Defendant's counsel agreed to provide supplemental disclosures by May 11, 2009. Defendant, however, did not provide any supplements by that agreed-upon date.

After Defendant failed to supplement his expert disclosures, as agreed, Plaintiffs noticed and subpoenaed the depositions of Defendant's three experts for May 28 and 29, 2009. Defendant's counsel informed Plaintiffs' counsel that Defendant's expert witnesses would not be appearing for their depositions and the depositions did not occur. Similarly, Defendant's experts failed to 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 the disclosures of Dr. Pouwelse and Mr. Barlow. Despite his assurances to the contrary, Defendant never supplemented Mr. Palfrey's report. The reports of Mr. Barlow and Mr. Palfrey remain wholly inadequate.[1]

This is not the first time Defendant and his counsel have failed to satisfy their obligations to the Court and to Plaintiffs. Throughout this litigation, Defendant and his counsel have treated the Rules as loose guidelines as opposed to dates by which compliance is required. As a result, Defendant and his counsel have delayed proceedings, caused needless motion practice, and increased the cost of this litigation, all in contravention of the letter and spirit of the Rules.

[1] Plaintiffs do not concede that Dr. Pouwelse, Mr. Palfrey and Mr. Barlow are either proper experts or have relevant testimony to this case. In the event the Court does not grant the present Motion to Exclude, Plaintiffs will file motions to strike each of the expert reports on those grounds after Defendant produces full Rule 26 disclosures..

Indeed, the Court has repeatedly warned Defendant's counsel that he is expected to follow the Rules and that "[t]he Court will not hesitate to impose appropriate sanctions," if he continues to flout them. (March 9, 2009 Minute Order); *see also* Feb 23, 2009 Order (Doc. 759) ("familiarity with both the Federal Rules and the Local Rules of the District of Massachusetts is presumed and expected"). As Defendant failed to produce timely and complete disclosures, as required by Rule 26(a)(2), the Court should enter an order excluding his experts.

For these and other reasons set forth more fully below, Plaintiffs respectfully move under Rule 37(c)(1) for an order excluding Defendant's expert witnesses at trial.

ARGUMENT

I. The Court Should Exclude The Testimony of John Perry Barlow Because His Expert Disclosures Were Untimely.

Rule 26(c) provides that disclosure must be made at the time and in the sequence that the court orders. An expert's complete report is due at a specific time during the discovery period in order to allow opposing counsel to depose the expert, if desired, and to allow the opposing party's expert witness time to respond to the opinions expressed in the report, also within the discovery period, so that the plaintiff's counsel will also have an opportunity to explore those opinions before the end of discovery and the deadline for the filing of dispositive motions. *Griffith v. E. Me. Med. Ctr.*, 599 F. Supp. 2d 59 (D. Me. 2009); *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992) (Rule 26 promotes fair play in discovery and at trial).

Indeed, courts do not hesitate to strike experts for failure to meet the deadline for filing expert reports. *See e.g., Wilson v. Bradlees of New Eng., Inc.*, 250 F.3d 10, 20 (1st Cir. 2001) (Rule 37(c)(1) "requires the near automatic exclusion of Rule 26 information that is not timely disclosed"); *DuFresne v. Microsoft Corp.*, 2006 U.S. Dist. LEXIS 57423 (D. Mass. Apr. 28, 2006) (granting motion to strike untimely supplemental expert reports for failure to comply with

scheduling order); *Firefighters' Ins. for Racial Equality v. St. Louis*, 220 F.3d 898, 902 (8th Cir. 2000) (striking expert report which was not provided until a month and a half after the deadline); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324 (5th Cir. 1998) (striking expert testimony after one-week delay in providing expert report).

Here, Defendant disclosed the expert report of John Perry Barlow on April 10, 2009—ten days after the deadline established by the Court in its February 23, 2009 Scheduling Order (Doc. 759). Defendant's delay was not justified. In fact, Defendant's own legal counsel acknowledged neglect in submitting expert reports: "At this point, I have no idea what our disclosures will look like. And they have to be filed TOMORROW. Bad, bad, bad. **We should have been working on this for weeks rather than days**." March 29, 2009 email from Raymond Bilderbeck to Charles Nesson, attached as Exhibit E (emphasis added). For this reason alone, the Court should exclude the testimony of John Perry Barlow.

II. Defendant's Proposed Experts Should Be Excluded For Failure To Comply With Rule 26(a)(2).

The identification of any expert who is retained or specially employed to provide expert testimony must be accompanied by a written report prepared and signed by the witness. Fed. R. Civ. P. 26(a)(2)(B). Among other things, the report must contain the following:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the data or other information considered by the witness in forming them;
> . . .
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition.

Id.; *see also Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este*, 456 F.3d 272, 275 (1st Cir. 2006) (listing Rule 26(a)(2)(B) requirements and affirming district court order precluding party from presenting expert testimony for failure to make timely expert disclosures).

An incomplete disclosure is considered equivalent to a failure to disclose. Fed. R. Civ. P. 37(a)(3).

The purpose of these disclosures is to give opposing parties a reasonable opportunity to prepare an effective cross-examination of the designating parties' expert witnesses and, if necessary, arrange for testimony from other experts. *See* Fed. R. Civ. P. 26(a)(2) advisory committee's note (1993). Courts require disclosing parties to produce detailed and complete reports so as to avoid unfair surprise to opposing parties and to conserve resources. *See, e.g.*, *Krischel v. Hennessy*, 533 F. Supp. 2d 790, 798 (N.D. Ill. 2008) (quoting advisory committee note's language, court found that expert report containing only "sketchy and vague" disclosure of substance of expert's direct examination, and nothing about reasons for expert's opinions, was inadequate); *Giladi v. Strauch*, 2001 U.S. Dist. LEXIS 4645, at * 14-15 (S.D.N.Y. Apr. 13, 2001) (striking expert report which contained a brief statement of ultimate conclusions with no explanation of the bases and reasons therefore, no statement of how the medical records support the conclusion and no explanation of the methodology he utilized to draw his conclusions from the data available to him); *Minn. Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 460 (D. Minn. 1998) (acknowledging that the report requirement serves to eliminate unfair surprise to the opposing party and to conserve resources); *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996) ("the test of a report is whether it was sufficiently complete, detailed, and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced").

F.R.C.P. 37(c)(1) provides that a 'party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted

to use as evidence at trial . . . any witness or information not so disclosed.' As the First Circuit explained in *Lohnes v. Level 3 Communs., Inc.*, 272 F.3d 49, 60 (1st Cir. Mass. 2001):

> The expert disclosure requirements are not merely aspirational, and courts must deal decisively with a party's failure to adhere to them. The Civil Rules provide in pertinent part that a party who "without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence . . . any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1); see also D. Mass. R. 26.4(b)(1) (providing for preclusion of expert witnesses not seasonably identified). We have explained before that Rule 37(c)(1) "clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule, and the required sanction in the ordinary case is mandatory preclusion." *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998).

Moreover, "[t]he First Circuit has said repeatedly that the focus must be on the question whether the party that has failed to meet its Rule 26 obligations has shown substantial justification for that failure." *Peterson v. Scotia Prince Cruises, Ltd*., 222 F.R.D. 216, 217 (D. Me. 2004).

As the First Circuit so aptly put it, "The day has long passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience. The processing of cases must proceed expeditiously if trials are to be held at all." *Damiani v. Rhode Island Hospital*, 704 F.2d 12, 16 (1st Cir. 1983). And as this Court previously admonished Defendant's counsel, "While the Court understands that counsel for the Defendant is a law professor, and that he believes this case serves an important educational function, counsel must also understand that he represents a client in this litigation—a client whose case may well be undermined by the filing of frivolous motions and **the failure to comply with the Rules.**" (Order, Doc. No. 781, Mar. 9, 2009) (emphasis added).

Here, as described below, the reports submitted on March 30, 2009 and April 10, 2009 were incomplete and failed to satisfy Rule 26(a)(2). Indeed, without any explanation or notice, Defendant served purported 'expert reports' lacking any actual opinions and making it impossible for Plaintiffs to analyze the substance, much less the basis, for Defendant's experts' opinions.

Based upon the 'expert reports,' Plaintiffs cannot prepare to examine Defendant's experts and cannot ask their own expert to critique or rebut Defendant's reports. Defendant cannot establish that his failure to provide a statement of the "opinions to be expressed and the basis and reasons therefor" as well as a listing of "the data or other information considered by the witness in forming them," as required by Rule 26(a)(2)(B) was substantially justified or that the error was harmless. The specific shortcomings of each report are outlined below.

1. The Pouwelse Report

The Pouwelse report served on March 30, 2009 fails to satisfy the requirements of Rule 26(a)(2)(B)(i) and (ii). The report identifies a list of *topics* on which Pouwelse would offer testimony (Exhibit A at 2-4), but fails to express a single actual *opinion* on any of these topics or *the basis* for such opinion. Pouwelse, for example, lists subjects such as "the technical characteristics of peer-to-peer file sharing," "the structure of Internet IP addresses," and "the procedures required to be undertaken in order to establish whether a certain computer is being used to make copyrighted works available for download," but fails to identify what "characteristics," "structures," or "procedures" he is referring to, what opinions he has regarding those "characteristics," "structures," or "procedures," or what those opinions might be based on. (Exhibit A at 2.) Expressing a complete statement of the actual opinions and the basis for those opinions is "a vital part of the expert report" that Pouwelse fails to satisfy. *See Krischel*, 533 F. Supp. 2d at 797.

Pouwelse's report also contains vague references to the data considered, such as "[s]cientific research related to peer-to-peer file sharing" and "[r]esearch previously published by me related to file-sharing networks." (Exhibit A at 5, items xii and xiii.) This type of disclosure does not satisfy Rule 26, which requires the witness to identify "the data or other information considered by the witness." *See* Fed. R. Civ. P. 26(a)(2)(B)(ii).

2. The Palfrey Report

Similarly, the Palfrey report served on March 30, 2009 fails to satisfy the requirements of Rule 26(a)(2)(B)(i), (ii), (iv), or (v). Like Pouwelse, Palfrey presents only a list of *topics* on which he would offer testimony, including "how children understand fair use, and how that understanding has changed over time," the "characteristics of digital natives, and their practices and discourses surrounding creativity and copyright," and "the importance in the education of children to communicate principles of behavior which they can understand." (Exhibit B at 4.) The report contains no statement of actual *opinion* and no statement regarding *the basis* for any opinion. The report also fails to identify the data that Palfrey considered, and contains no statement regarding any publications Palfrey has authored in the last 10 years. Finally, the report states that Palfrey has not testified "before a court" as an expert "on this topic" (Exhibit B at 4), but fails to state whether, in the past four years, Palfrey has "testified as an expert at trial or by deposition" on any topic, which is what the rule requires. *See* Fed. R. Civ. P. 26(a)(2)(B)(v).

3. The Barlow Report

The Barlow report served on April 10, 2009 fails to satisfy the requirements of Rule 26(a)(2)(B)(i), (ii), or (iv). If allowed, Barlow claims he would testify that (a) the Internet and peer-to-peer technology "allow us to do that which we, as humans, fundamentally need to do: share art," (b) "the music industry will never be endangered," and (c) "the recording industry must evolve." (Exhibit C at 2-3.) His report, however, fails to offer any *basis* or reason for these opinions other than his "personal experiences" with the Grateful Dead and his "position as a public intellectual," (*id.* at 1-2), fails to identify a single source of data or other information considered, and fails to list Barlow's purported qualifications or list of publications, all of which are required by Rule 26(a)(2).

Defendant has offered no justification, let alone a substantial justification, for the failure to make a proper disclosure by the deadline established by the Court. As established above, Defendant's counsel acknowledged his neglect with regards to the expert reports. Moreover, Defendant has exhibited a pattern of disregarding Rules and orders of this Court. Despite multiple warnings, Defendant continues this practice. Accordingly, the Court should exclude the testimony of Defendant's proposed experts pursuant to Rule 37(a)(3).

Moreover, Defendant's last minute supplements do not save his inadequate expert disclosures. While Defendant finally supplemented the Barlow and Pouwlese reports on May 29, 2009, the last business day before the close of discovery and almost two months after the deadline to submit expert reports, they remain inadequate. (Exhibits F and G).

Defendant never supplemented the Palfrey report, despite his assurances to the contrary. Thus, it remains Defendant's counsel's prediction of the general areas about which Palfrey will opine at trial, as discussed above. Similarly, the **only** additions to Barlow's supplement report are a bald statement that his "positions and experiences qualify [him] to speak about the fairness of peer-to-peer file sharing in the context of the recording industry and the technological environment in which such actions occur" (Exhibit F at ¶ 1) and a statement that he has no publications that must be disclosed. (Exhibit F at ¶ 9).[2] As explained above, these reports do not comply with the requirements of Rule 26(a)(2)(B) because they do not contain a complete statement of all opinions to be expressed, the reasons therefore, or the data or other supporting information considered by the witness in forming the opinion.

[2] Plaintiffs do not concede that the Pouwelse report is proper, but as Defendant has not produced Dr. Pouwelse for an expert deposition or provided the documents he relied on, they are not moving to strike the Pouwelse report at this time. However, Plaintiffs intend to do so once Defendant produces the required expert discovery.

Plaintiffs are substantially prejudiced by Defendant's failure to provide complete expert reports. First, "[n]othing causes greater prejudice than to have to guess how and why an adversarial expert reached his or her conclusion." *Reed*, 165 F.R.D. at 430. Second, without complete reports from Defendant's proposed witnesses, it is not possible for Plaintiffs to prepare to depose these witnesses or cross-examine them at trial. Nor is it possible for Plaintiffs to identify and disclose rebuttal experts, to determine whether rebuttal experts are even necessary, or to complete expert discovery. *See Pena-Crespo*, 408 F.3d at 13 (reiterating that "[t]he failure to provide an expert report that satisfies the specific requirements of Rule 26(a)(2)(B) undermines opposing counsel's ability to prepare for trial") (citation omitted). Finally, Defendant's continued delay and failure to comply with clear rules and Court Orders forces Plaintiffs to expend time and money briefing these issues and continues to delay these proceedings.

Moreover, Defendant has no substantial justification for his delay that would warrant a lesser sanction in this case. This case has been ongoing since August 2007. Defendant's counsel entered his appearance in September 2008, and, at that time, told the Court he wanted "a trial date at the earliest convenience, ideally before the end of October [2008]." (Transcript of September 23, 2009 hearing, p. 13.) Additionally, Defendant has a large team of Harvard Law students helping with his defense, five of whom have entered an appearance in this case in March 2009, and Matthew Feinberg entered his appearance on behalf of Defendant on March 30, 2009. Defendant disclosed these purported expert witnesses over six months ago and had more than sufficient time to complete expert reports.

Furthermore, Plaintiffs informed Defendant's counsel, in writing, of the deficiencies in the expert reports on April 20, 2009 and Defendant's counsel agreed to supplement the reports

by May 11, 2009. Six months after first disclosing these experts, almost two months after the deadline to serve reports, and a month after Defendant's counsel agreed to supplement the reports, Defendant has failed to provide adequate reports. There is no substantial justification for this failure and the experts should be precluded and the reports stricken. Indeed, Defendant's refusal to follow the Rules, which has resulted, and continues to result, in severe prejudice to Plaintiffs, cannot be permitted.

III. Defendant's Experts Should Be Excluded For Failure To Produce Experts And Documents They Relied On Prior To The Close of Discovery.

Federal Rule of Civil Procedure 26(b)(4) allows a party to "depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided." Courts in this Circuit recognize the harm suffered when late expert disclosures preclude depositions. *Flexi-Mat Corp. v. Dallas Mfg. Co.*, 2006 U.S. Dist. LEXIS 19528, at *39, n. 5 (D. Mass. Apr. 11, 2006) (striking supplemental expert report filed after the close of discovery); *Insight Tech., Inc. v. Surefire, LLC*, 2007 U.S. Dist. LEXIS 83632, at *16 (D.N.H. 2007) (striking witness' declaration where the moving party would not have been able to depose him prior to the close of discovery); *Presstek, Inc. v. Creo, Inc.*, 2007 U.S. Dist. LEXIS 24170 at *20 (D.N.H. 2007) (recognizing the harm suffered where supplemental expert disclosure made after deposition of expert witness).

Here, Defendant agreed to supplement his expert reports by May 11, 2009 and, based on that agreement and the insufficiency of the reports, as outlined above, Plaintiffs waited to notice Defendant's experts' depositions. When those supplemental reports were not forthcoming, as agreed, and given the May 30, 2009 discovery deadline, Plaintiffs noticed and subpoenaed the depositions of all three of Defendant's experts on May 28 and 29, 2009, in a final attempt to

learn the experts' opinions. However, Defendant's counsel declined to produce the experts for testimony and informed Plaintiffs' counsel that the experts would not be appearing for their depositions. Therefore, the depositions did not occur. Accordingly, Plaintiffs would suffer additional harm if the present Motion were not granted.

IV. Defendant, His Counsel, Or Both, Should Be Compelled To Pay Plaintiffs' Expenses, Including Reasonable Attorney's Fees, Incurred In Bringing This Motion.

Rule 37 requires, except in limited circumstances, that the Court "**must**, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the . . . attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). Absent finding that opposing party's position was substantially justified, award of expenses is mandatory. *See Notice v. DuBois*, 187 F.R.D. 19, 20 (D. Mass. 1999).

Here, as explained above, Defendant's failure to provide timely and complete expert disclosures is not substantially justified. Therefore, in addition to an order precluding Defendant from calling these purported expert witnesses, Defendant, his counsel, or both, should be compelled to reimburse Plaintiffs' costs, including reasonable attorney's fees, incurred in bringing this motion.

V. Certification Of Conference Under Federal Rule 37 And Local Rules 7.1 And 37.1.

Undersigned counsel hereby certifies under Federal Rule 37(a)(1) and Local Rules 7.1(a) and 37.1(a) that Plaintiffs have attempted in good faith to resolve or narrow the issues presented in this motion. Specifically, and as explained above, Plaintiffs' counsel Timothy M. Reynolds contacted Defendant's counsel by telephone on or about April 17, 2009 and April 20, 2009 to discuss the issues presented in this motion, and to seek complete disclosures from Defendant. On April 20, 2009, Plaintiffs' counsel, Timothy Reynolds, sent an email to Defendant's counsel,

Charles Nesson, explaining the deficiencies and asking him to supplement the expert reports. (Exhibit. D.) Although Defendant's counsel agreed to supplement the reports by May 11, 2009, he failed to do so until May 29, 2009, when he supplemented only the Barlow and Pouwelse reports. The Palfrey report has never been supplemented. Plaintiffs' counsel then contacted Defendant's counsel on June 5, 2009 to confer regarding this Motion and Defendant's counsel stated that he opposed the Motion.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request entry of an Order precluding Defendant's experts, Dr. J.A. Pouwelse, John G. Palfrey, and John Perry Barlow, from testifying at trial and precluding Defendant from using the insufficient expert reports in these proceedings. Plaintiffs also request entry of an Order compelling Defendant, his counsel, or both to reimburse Plaintiffs' costs, including reasonable attorney fees, incurred in bringing this motion, and for such other and further relief as the Court deems appropriate.

Respectfully submitted this 5th day of June 2009.

SONY BMG MUSIC ENTERTAINMENT;
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ARISTA RECORDS LLC; and UMG
RECORDINGS, INC.

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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 5, 2009.

s/ Eve G. Burton