

file any Motions for Summary Judgment to and including July 6, 2009, with any responses due on July 13, 2009.

Finally, in light of the fact that the trial in this matter is currently scheduled to commence in less than six weeks, Plaintiffs respectfully request that this Court order the Defendant to submit any response to this Motion on or before Monday, June 15, 2009.

I

BACKGROUND

On February 23, 2009, this Court established a schedule for the completion of discovery in this matter. See DE 759. According to that schedule, any experts were to be disclosed on or before April 1, 2009, any rebuttal experts were to be disclosed on or before May 1, 2009, and all discovery was to be completed on or before May 30, 2009. Id.

As explained in both Plaintiffs' Motion to Exclude Defendant's Rule 26(a)(2) Witnesses (See DE 841) and in Plaintiffs' Submission in Response to the Court's Scheduling Order of May 28, 2009 (See DE 837), Defendant ignored these court-imposed deadlines. With respect to the expert deadlines, defense counsel produced several "reports," one of which was nearly two weeks late and *all* of which (as defense counsel has acknowledged) failed to comply with the disclosure requirements of Rule 26(a)(2). See DE 841 at 2 & Exhibits A-C. Defendant also failed to produce those experts or any responsive documents at depositions that were properly noticed by the Plaintiffs in May. Id. at 3. In addition, Defendant waited until June 1, 2009, *after* the close of discovery, to produce to the Plaintiffs a host of new documents that the Plaintiff had requested back in the Fall of 2008 and that the Court ordered to be produced—leaving Plaintiffs without an ability to conduct any depositions in connection with those late-produced materials. Defendant has also refused to produce other relevant documents responsive to Plaintiffs' discovery requests. See DE 842.

On May 28, 2009, the Court issued a Revised Scheduling Order in this case. See DE 833. That Revised Order reiterated that all discovery was to close on May 30, 2009, and set a trial date in this case for July 20, 2009. The Court also established a deadline of June 23, 2009 for any motions for summary judgment.

On June 2, 2009, Plaintiffs submitted a Response to the Court's Revised Scheduling Order. See DE 837. In that Response, the Plaintiffs did not object to the proposed trial date, but they stated that, in order to meet the Court's revised deadlines, they would require some modification of the discovery schedule in order to ensure that Defendant complied with his discovery obligations. Id.

Since that date, Plaintiffs have repeatedly attempted, without success, to reach an agreement with the Defendant regarding the outstanding discovery required to prepare this case adequately for trial. Accordingly, Plaintiff hereby moves for an Order modifying the discovery deadlines in this case in order to permit the Plaintiff to complete the discovery necessary to prepare for the trial of this matter on July 20, 2009.

II

SUMMARY OF OUTSTANDING ISSUES

A. Expert Discovery

To date, Defendant has not disputed that he failed to comply with the Court's Order of February 23, 2009, regarding expert disclosures. Accordingly, as Plaintiffs have argued elsewhere, those experts should be excluded from testifying in this case. See DE 841; see also Wilson v. Bradlees of New England, 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. April 28, 2006).

However, in the event that the Court does not exclude these experts from testifying, Plaintiffs must have an opportunity to conduct discovery of these experts through the production of previously requested documents and depositions prior to trial. Moreover, given the Defendant's blatant disregard for the Court's prior scheduling Order, Defendant should be ordered to produce these experts and the previously subpoenaed documents in a prompt manner in the District of Massachusetts at a date, time and location chosen by the Plaintiffs. Indeed, given that the Plaintiffs properly sought discovery from these experts during the discovery period, it would be fundamentally unfair for the Court to allow these supposed experts to testify in this case without first giving the Plaintiff an opportunity to conduct the discovery to which they are entitled.

Moreover, given the Defendant's refusal to produce his experts and the subjects on which they might testify, Plaintiffs necessarily need additional time to determine whether they will require any rebuttal expert witnesses. Again, this adjustment to the schedule is entirely the fault of the Defendant, who has failed repeatedly to comply with the Court's previously issued scheduling Order.

B. Discovery Relating to Recently Disclosed Documents and Recently Raised Defense

In addition, as noted in Plaintiffs' prior submission in response to the Court's Revised Scheduling Order, Plaintiffs will require one additional day of deposition of the Defendant. See DE 837 at n.2. Despite a document request dating back to the Fall of 2008 and a Court Order requiring production in May 2009, the Defendant did not produce documents that are directly relevant to this case (including CDs containing copies of the illegally downloaded songs) until June 1, 2009—*after* the close of discovery. Not surprisingly, many of these late-produced documents present important questions relating to the precise manner and scope of the

Defendant's infringing activity. Defendant should not be permitted to benefit from his wrongful refusal to produce these clearly relevant documents during the discovery period. Plaintiffs should be permitted to complete the deposition of the Defendant by questioning him regarding these late-produced documents.

In addition, as the Court knows, the Defendant has recently attempted to assert a "fair use" defense to his infringing activity. Plaintiffs contend that this eleventh hour defense has been waived by the Defendant, and that this defense is baseless as a matter of law and fact. If, however, the Court permits Defendant to proceed with this defense, Plaintiffs must be permitted to depose the Defendant regarding the nature and scope of his supposed "fair use" of Plaintiffs' copyrighted material.

C. Summary Judgment Schedule

Finally, in light of the Defendant's late disclosure of documents and the above-referenced need for additional discovery, Plaintiffs respectfully request that the date for the filing of any Summary Judgment Motions be extended to and including July 6, 2009, with any responses due on July 13, 2009. While such a briefing schedule is necessarily expedited and compressed, it has become necessary in light of Defendant's repeated non-compliance with his discovery obligations.

III

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an Order modifying the discovery schedule in this case as follows:

1. Requiring Defendant to produce all previously requested documents relating to his experts and to their make all of those experts available for depositions in the District of Massachusetts at the dates and locations selected by the Plaintiffs on or before July 3, 2009.¹
2. Allowing Plaintiffs to supplement their expert disclosures and to disclose any potential rebuttal experts on or before July 10, 2009.
3. Authorizing Plaintiffs to complete their deposition of the Defendant on or before July 3, 2009.
4. Extending the time for the filing of any Motions for Summary Judgment to and including July 6, 2009, with any responses due on July 13, 2009.

Moreover, in light of the tight time constraints that are the subject of this Motion, Plaintiffs respectfully request that the Defendant be ordered to submit any response to this Motion on or before June 15, 2009.

¹ Although Plaintiffs' June 2nd submission proposed June 26th as a cut-off date for the completion of expert depositions, that date has now become less feasible in light of Defendant's continued refusal to produce any of his experts for depositions or any documents relating to those experts, as well as the fact that Plaintiffs' counsel will be engaged in a trial in the District of Minnesota commencing June 15, 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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Attorneys for Plaintiffs

Dated: June 11, 2009

RULE 7.1(A) CERTIFICATION

Undersigned counsel for the Plaintiffs hereby certifies that he has conferred with Charles Nesson, counsel for the Defendant, regarding the various issues presented in the foregoing Motion and has attempted in good faith to resolve or narrow the issues presented herein.

/s/ Daniel J. Cloherty

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 11, 2009.

/s/ Daniel J. Cloherty