

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC.,**

**Plaintiffs,**

**v.**

**LIME WIRE LLC; LIME GROUP LLC; MARK GORTON; GREG BILDSON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,**

**Defendants.**

**06 Civ. 5936 (GEL)  
ECF CASE**

**PLAINTIFFS' OPPOSITION TO (1) DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EXHIBITS FILED AS PART OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO STRIKE AND (2) DEFENDANTS' MOTION TO EXCLUDE THE DECLARATIONS OF THOMAS SEHESTED, ANDREW KEMPE, AND KATHERYN COGGON**

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Plaintiffs Arista Records LLC, Atlantic Recording Corporation, BMG Music, Capitol Records, LLC, Elektra Entertainment Group Inc., Interscope Records, LaFace Records LLC, Motown Record Company, L.P., Priority Records LLC, Sony BMG Music Entertainment, UMG Recordings, Inc., Virgin Records America, Inc., and Warner Bros. Records Inc. (collectively, “plaintiffs”) respectfully submit this memorandum of law in opposition to (1) Defendants’ Objections to Plaintiffs’ Exhibits Filed As Part of Plaintiffs’ Opposition to Defendants’ Motions for Summary Judgment and Defendants’ Motion to Strike (“Defs. 11/07/08 Mot. to Strike”), and (2) Defendants’ Motion to Exclude the Declarations of Thomas Sehested, Andrew Kempe, and Katheryn Coggon for Plaintiffs’ Failure to Disclose Factual Witnesses (“Defs. 11/07/08 Mot. to Exclude”).

### **PRELIMINARY STATEMENT**

Not content with the three evidentiary motions to strike they have already filed,<sup>1</sup> defendants have now filed three additional motions.<sup>2</sup> It is now obvious, however, that their earlier motions lacked any legal basis -- defendants withdrew, on reply, almost half of their evidentiary objections. Defendants’ new objections should fare no better. *First*, plaintiffs’ exhibits submitted in response to defendants’ summary judgment motions are properly

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<sup>1</sup> On September 26, 2008, in addition to the two memoranda defendants submitted in opposition to plaintiffs’ motion for partial summary judgment, defendants filed: (i) Defendants’ Objections to Plaintiffs’ Exhibits and Deposition Excerpts to Their Motion for Partial Summary Judgment (“Defs. 9/26/08 Mot. to Strike”), (ii) Defendants’ Settlement Related and Pre-August 2003 Objections to Plaintiffs’ Exhibits to Their Motion for Partial Summary Judgment (“Defs. 9/26/08 Pre-2003/*Grokster* Mot.”), and (iii) Defendants’ Motion to Exclude Plaintiffs’ Proffered Expert Summary Judgment Evidence from the Depositions and Reports of Ellis Horowitz, Ph.D, and Richard P. Waterman, Ph.D (“Defs. 9/26/08 Expert Mot.”).

<sup>2</sup> Defendants’ sixth motion is their Motion to Strike the Bildson Declaration, For a Protective Order, and For a Stay (“Defs. 11/07/08 Bildson Mot.”). As shown in plaintiffs’ memorandum in opposition, which is being filed contemporaneously with this memorandum, defendants’ Bildson motion is based on nothing but unsupported (and untrue) accusations against plaintiffs and their counsel. It is simply a last-ditch attempt to avoid summary judgment.

authenticated and are largely drawn from the very same evidence defendants use to support their motions. (*See infra* I.) *Second*, plaintiffs' declarants were properly offered to rebut defendants' new arguments and one declarant *was* disclosed two years ago. Ironically, defendants themselves submitted *eight* declarations of seven witnesses whom *they* did *not* disclose. (*See infra* II.)

By these motions, defendants continue their strategy of using any tactic to keep the facts from the Court and avoid a decision on the merits in this matter. Defendants' motions should be denied.

## **ARGUMENT**

### **I. PLAINTIFFS' EXHIBITS AND DR. HOROWITZ'S REPORT ARE ADMISSIBLE**

Defendants' latest motion to strike seeks to exclude 74 exhibits and the report and testimony of one of plaintiffs' experts, Dr. Ellis Horowitz, all of which plaintiffs submitted as part of their opposition to defendants' two summary judgment motions. Defendants rely on virtually all the same grounds they raised in their last round of evidentiary briefs. (*See* Defs. 9/26/08 Mot. to Strike (authenticity, hearsay and expert objections); Defs. 9/26/08 Pre-2003/*Grokster* Mot. ("inadmissible settlement offer" and "pre-2003/*Grokster*"); Defs. 9/26/08 Expert Mot. (attempt to strike Horowitz); *see also* Pls. 11/07/08 Mot. to Strike Opp'n Br. at 1-18; Pls. 11/07/08 Pre-2003/*Grokster* Opp'n Br. at 1-7; Pls. 11/07/08 Expert Opp'n Br. at 21-25.) But by their reply memoranda on those motions, defendants withdrew 69 out of their 90 authenticity objections, 50 out of 128 hearsay objections and 14 out of 31 relevance objections. (*See* K. Forrest 12/05/08 Declaration In Support of Plaintiffs' Memorandum in Opposition to Defendants' Motions to Strike/Exclude ("Forrest 12/05/08 Mot. to Strike/Exclude Decl.") ¶ 2.) Defendants also withdrew an objection to the admissibility of Dr. Horowitz's report, yet

apparently repeat that same objection again in this motion. (*Id.*) Defendants' objections in *this* motion, like their earlier objections, are baseless.

**A. Defendants' Authentication Objections Are Baseless.**

As before, defendants challenge many exhibits (*e.g.*, website printouts) that defendants themselves printed and submitted as *their* exhibits, or that *defendants* described in declarations that *they* submitted in support of their motions (*e.g.*, Ex. 362 (from same "Winzip" website as Baker 7/18/08 Decl. Ex. 12); Ex. 363 (from same "openoffice.org" website as Baker 7/18/08 Decl. Ex. 13); Ex. 357 (from same website ("jungroup.com") as Baker 7/18/08 Decl. Ex. 11); Ex. 365 (from same website ("berkleeshares.com") as Baker 7/18/08 Decl. Ex. 22); Exs. 366-368 (printouts from same website ("outragedmoderates.org") as Baker 7/18/08 Decl. Ex. 24)).<sup>3</sup> Indeed, many of the challenged exhibits simply illustrate or add to facts that are stated in defendants' own witness declarations.<sup>4</sup> Defendants have therefore waived their objections with respect to these exhibits. *Cf. Capobianco v. City of New York*, 422 F.3d 47, 55 (2d Cir. 2005) ("[D]efendants waived any objections to the admissibility of the reports by offering them themselves.").

Defendants' remaining authentication objections also lack merit. *First*, under Fed. R. Evid. 901(a), the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims". This requirement "is

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<sup>3</sup> See Baker 7/18/08 Decl. ¶¶ 14, 15, 26 (Defs. Ex. 12, 13, 24).

<sup>4</sup> For example, Ex. 327 is a webpage relating to a statement made in the declaration of Michael King, President of Abacast, Inc., submitted by defendants (King 7/15/08 Decl. ¶ 1.) Ex. 327 shows that the Abacast website stated that Abacast is "better than pure peer-to-peer" and that "the Abacast server continually monitors the network, and changes the distributed streaming hierarchy as necessary to optimize user connections". (See Attachment A hereto at Ex. 327.) Ex. 327 is one of several citations to admissible evidence in Pls. 9/26/08 (LW) Resp. ¶ 7 supporting the fact that centralized search is more efficient and performs better than distributed search using ultrapeers. (See *also, e.g.* Attach. A, at Exs. 338, 342, 344 and 386 (printouts of files referenced in Cates declaration submitted by defendants).)

not a particularly high hurdle”. *United States v. Ford*, 279 F. App’x 68, 69 (2d Cir. 2008) (internal quotations omitted); *see also United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001) (“Rule 901 does not erect a particularly high hurdle, and the proponent of the evidence is not required to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.”) (internal quotations and citations omitted). The authentication requirement is satisfied “if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification”. *See Pugliese v. Verizon New York, Inc.*, No. 05-CV-4005, 2008 WL 2882092, at \*7 (S.D.N.Y. July 9, 2008) (*quoting Dhinsa*, 243 F.3d at 658); *see also Ford*, 279 F. App’x at 69. As shown in Attachment A (“Attach. A”) hereto (which includes plaintiffs’ responses to each of the 74 exhibits to which defendants object),<sup>5</sup> plaintiffs’ exhibits clearly meet this standard. (*See also* Pls. 11/07/08 Mot. to Strike Opp’n Br. at 4-8.)

*Second*, as in their prior motion, defendants contend that the declaration of plaintiffs’ counsel, Katherine B. Forrest, is “insufficient to authenticate the documents to which Defendants object on the basis of authenticity”. (*See* Defs. 11/07/08 Mot. to Strike at 7.) But defendants’ own counsel, Charles Baker, has authenticated more than 100 of defendants’ exhibits in exactly the same way (*see* Baker 7/18/08 Decl.; Baker 9/26/08 Decl.; Baker 11/07/08 Reply

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<sup>5</sup> Defendants’ desperation is never more starkly revealed than in their November 25, 2008 reply on their 9/26/08 Motion to Strike. Forced to withdraw objection after objection, defendants resort to accusing plaintiffs of violating the Court’s individual rules by filing “a 55 page opposition” brief. Of course, defendants only quibble here with plaintiffs’ Attachments A and B, not the brief itself. (*See* Defs. 11/25/08 Reply Mot. to Strike at 9.) This is breathtaking *chutzpah* given the amount of unnecessary paper coming from defendants in this matter (including *two* summary judgment briefs, *two* opposition briefs to plaintiffs’ *single* summary judgment motion, *three* separate motions to strike in September and *three* more in November, and a total of 33 declarations). Paradoxically, defendants have replied to plaintiffs’ oppositions in their *own* Attachments A and B. Thus, by defendants’ reasoning, defendants have submitted a *99 page* reply brief where only 10 pages are permitted by the rules.

Decl.; Baker 11/07/08 Mot. to Exclude Decl.; Baker 11/07/08 Bildson Decl.). Just like Mr. Baker's declarations, Ms. Forrest's declaration, asserting that the exhibits in question are true and correct copies, properly authenticated these documents. *See Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp.*, 262 F. Supp. 2d 50, 57-59 (S.D.N.Y. 2003); *see also* Pls. 11/07/08 Mot. to Strike Opp'n Br. at 7-8. Indeed, Mr. Baker himself authenticates more than 30 of defendants' website printout exhibits<sup>6</sup> -- in many cases without bothering to describe the specific web address or the date of the printout.<sup>7</sup> Moreover, in support of defendants' affirmative motions, Mr. Baker used and authenticated as defendants' exhibits printouts from *the very same websites* that plaintiffs submitted in *rebuttal* -- and which defendants now have the audacity to challenge.<sup>8</sup>

Because Ms. Forrest has sufficient knowledge of these exhibits, her declaration that a document is a true and correct copy of a webpage that was printed from a specific URL "at my direction and under my supervision" on a specific date is proper authentication. *See* Fed. R. Evid. 901(b)(1); *Jarritos, Inc. v. Los Jarritos*, No. C 05-02380, 2007 WL 1302506, at \*10 (N.D. Cal. May 2, 2007) (plaintiff's counsel, by explaining that "he personally typed [the web address] into his Web browser, accessed Defendant's website and printed the page[,] . . . has demonstrated that he has personal knowledge of the exhibit and is an affiant through whom the exhibit could be admitted into evidence"). Importantly, under Fed. R. Evid. 901(b)(4), the authentication requirement also is satisfied if the "[a]pppearance, contents, substance, internal

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<sup>6</sup> *See* Baker 9/26/08 Decl. ¶¶ 61-64, 69-70 (Defs. Exs. 59-62, 67-68); Baker 7/18/08 Decl. ¶¶ 5-32 (Defs. Exs. 3-30).

<sup>7</sup> *See* Baker 9/26/08 Decl. ¶¶ 61-64, 69-70 (Defs. Exs. 59-62, 67-68); Baker 7/18/08 Decl. ¶¶ 5, 13, 16, 17, 20 (Defs. Exs. 3, 11, 14, 15, 18).

<sup>8</sup> *See* Baker 7/18/08 Decl. ¶¶ 13-15, 24, 26 (Defs. Exs. 11-13, 22, 24).

patterns, or other distinctive characteristics, taken in conjunction with circumstances” indicate that the document is what it is claimed to be. *Id.* The appearance of these webpage printouts, and the fact that they contain the web address and the date of the printout, thus provide further authentication. *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002) (exhibits attached to a declaration claiming that the documents were “true and correct copies of pages printed from the Internet that were printed by [declarant] or under his direction” have “met the prima facie burden because the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what [plaintiff] says they are”); *see also Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, No. SACV 06-0827, 2008 WL 1913163, at \*5 (C.D. Cal. Mar. 27, 2008); *United States v. Standring*, No. 1:04CV730, 2006 WL 689116, at \*3 (S.D. Ohio Mar. 15, 2006). Defendants do not contend -- or even assert any facts to support the notion -- that any of plaintiffs’ website printouts do *not* accurately reflect the contents of that particular website at the time of the printout. Their boilerplate authenticity objections should therefore be overruled. *See Perfect 10, Inc.*, 213 F. Supp. 2d at 1154.

*Novak v. Tucows, Inc.*, No. 06-CV-1909, 2007 WL 922306, at \*5 (E.D.N.Y. Mar. 26, 2007), cited by defendants, is readily distinguishable. That case primarily discussed exhibits that were not obtained directly from third-party websites, but through a service called the “Wayback Machine” which is operated on the Internet Archive website. That website archives websites “based upon ‘data from third parties who compile the data by using software programs known as crawlers’”. *Id.* (*quoting* plaintiff Novak’s declaration). The *Novak* court’s primary concern that “the information posted on the Wayback Machine is only as valid as the third-party donating the page decides to make it” and that “the authorized owners and managers

of the archived website play no role in ensuring that the material posted in the Wayback Machine accurately represents what was posted on their official websites at the relevant time” is clearly not present in this case.<sup>9</sup> *Id.*

*Third*, printouts from government websites are official publications and are thus self-authenticating -- no extrinsic evidence of authenticity is required.<sup>10</sup> Fed. R. Evid. 902(5); *see also Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 WL 4183981, at \*7 (N.D. Cal. Sept. 9, 2008) (holding that “federal courts consider records from government websites to be self-authenticating under Rule 902(5)”).

In any event, all of the challenged exhibits that are printouts from websites can be authenticated at trial by the persons who actually went to the websites and took the screen shots, or by the webmasters or creators of the sites. *See, e.g., Am. Ref-Fuel Co. of Niagara, LP v. Gensimore Trucking, Inc.*, No. 02-CV-814C, 2007 WL 2743449, at \*3 n.3 (W.D.N.Y. Sept. 18, 2007) (“[I]n determining whether genuine issues of fact exist for trial, the court has the discretion to consider unauthenticated or otherwise objectionable evidence where it is apparent that the party may be able to authenticate and establish the admissibility of those documents at trial . . . . Here, . . . there is nothing to suggest that plaintiff will not have the opportunity to establish the authenticity and admissibility of [the contested] evidence at trial.”). Here too, there is “nothing

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<sup>9</sup> Plaintiffs’ Exs. 343, 345, 347, and 383 are printouts from the Internet Archive website, but they were not obtained by using the “Wayback Machine” service that raised the *Novak* court’s concern. (*See* Attach. A, Exs. 343, 345, 347, 348.) Further, these exhibits are not offered as evidence of the *contents* of a specific website at a specific time, but to demonstrate that certain text or audio files mentioned in Lime Wire LLC’s 7/17/08 56.1 Statement are available for download from the Internet Archive website. (*See id.*)

<sup>10</sup> *See* Ex. 339 (printout from the website of the library of the University of Virginia which is a corporation that “shall be at all times subject to the control of the General Assembly” (*see* VA Code Ann. § 23-69 (West 2008))); Ex. 385 (printout of the U.S. Constitution from the U.S. Government Printing Office’s website at [www.gpoaccess.gov/constitution/index.html](http://www.gpoaccess.gov/constitution/index.html)).

to suggest” that admissibility could not be established at trial, and thus, the Court may properly rely on this evidence at the summary judgment stage.

Notably, plaintiffs submitted each of the 55 challenged exhibits in opposition to defendants’ motions for summary judgment and in rebuttal to defendants’ arguments made in those motions. As the non-moving party, plaintiffs are entitled to have all reasonable inferences drawn in their favor, and this inference applies particularly to the authentication and admissibility of plaintiffs’ exhibits. *See Commercial Data Servers, Inc.*, 262 F. Supp. 2d at 57 (holding that “[i]n considering the admissibility of documents, the court appropriately draws all reasonable inferences in favor of the opposing party, as it is the burden of the moving party to prove that there is no genuine issue of material fact”); *see also Gucci Am., Inc. v. Ashley Reed Trading, Inc.*, No. 00 CV 6041, 2003 WL 22327162, at \*4 (S.D.N.Y. Oct. 10, 2003) (holding that “[d]rawing all reasonable inferences in [plaintiff]’s favor as the non-moving party . . . Defendants have failed to prove that [plaintiff] is unable to authenticate [the evidence in question]”).

**B. Plaintiffs’ Exhibits Are Not Inadmissible Hearsay.**

Defendants also object to plaintiffs’ exhibits as inadmissible hearsay. For the most part, defendants’ hearsay arguments duplicate those they made in their earlier Motion to Strike (*see supra* n.1), many of which defendants have now withdrawn.<sup>11</sup> (*See* Defs. 11/25/08 Reply Mot. to Strike, Attach. A at Exs. 13, 15, 63, 69, 83, 84, 85, 87, 90, 103, 105, 107, 110,

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<sup>11</sup> For example, defendants withdrew hearsay objections against exhibits offered to demonstrate that websites and other Lime Wire LLC documents were marked with a copyright notice. (*See* Defs.’ 11/25/08 Reply Mot. To Strike, Attach. A at Exs. 105, 149, 299.) Exhibits 338 and 386 are offered to show that the files downloaded by Cates prominently feature the words “Copyright notice”, and accordingly, defendants should withdraw the hearsay objections they make to those exhibits. (*See* Attach. A, Exs. 338, 386.)

114, 115, 119, 122, 129, 130, 133, 149, 157, 165, 174, 175, 192, 211, 225, 232, 240, 241, 247, 249, 255, 257, 260, 281, 286, 299, 300, 304, 305, 306, 307, 308, 313, 315.) Rather than repeat why those arguments are wrong, plaintiffs refer the Court to and incorporate herein plaintiffs' memorandum of law in opposition to defendants' motion. (*See* Pls. 11/07/08 Mot. to Strike Opp'n Br. at 8-14.)

There is, however, one significant difference. Here, plaintiffs submitted many of the exhibits to which defendants now object because they responded directly to defendants' allegedly undisputed facts set out in defendants' two 56.1 Statements. That is, plaintiffs do not offer the challenged exhibits for their truth, but rather to respond to, rebut or clarify statements initially asserted *by the defendants* about the content of those exhibits. (*See, e.g.*, Attach. A at Exs. 332, 338, 339, 344, 345, 348, 349, 350, 351, 353, 357, 362, 363, 364, 365, 366-368, 369, 370, 372, 373, 374, 376, 378, 386.) Indeed, many of the challenged exhibits simply come from websites or files cited to in declarations submitted in support of defendants' allegedly undisputed facts.<sup>12</sup> Defendants cannot submit evidence relating to these websites and files and then prevent the submission of rebuttal evidence drawn from the very same websites and files on the basis of hearsay simply because the website and files are now being offered against them. For example, defendants acknowledge that "Exhibits 338, 342, 344 and 386 are printouts from files referenced in the Cates Declaration", which they submitted in support of their motions for summary

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<sup>12</sup> These declarants' statements discussing the websites or files should be considered adoptive admissions by defendants. *See* Fed. R. Evid. 801(d)(2)(B) & (C) (written assertion is not hearsay if is offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth" or "a statement by a person authorized by the party to make a statement concerning the subject"); *see also Yuan v. Rivera*, No. 96 Civ. 6628, 2000 WL 365036, at \*5 (S.D.N.Y. Apr. 7, 2000) (denying plaintiff's hearsay objection to defendants' proffered exhibit of attorney bills prepared by attorney who had previously represented plaintiff, and to which plaintiff had not previously objected, because it became an "adopted admission").

judgment. (Defs. 11/07/08 Mot. to Strike at 7-8.) Ms. Cates submitted a declaration stating that she downloaded these and other files. In response, plaintiffs printed out screen shots of those very files (provided by defendants themselves on a CD-ROM) to alert the Court to text that appears on those screen shots which is at odds with Cates' statements. (*See Attach. A at Exs. 338, 344, 386.*) But defendants now argue that those exhibits, when cited to by plaintiffs to rebut Cates' declaration statements based on them, constitute inadmissible hearsay. (Defs. 11/07/08 Mot. to Strike at 7-8.) Try as they might, defendants cannot have it both ways.

Defendants' current motion makes one other new -- and clearly erroneous -- claim: that *all* screen shots of webpages are hearsay, and that this Court has so held. (Defs. 11/07/08 Mot. to Strike at 7-8.) Defendants are wrong. If a printout from a webpage is introduced to demonstrate that a certain statement was made on that webpage, it is admissible because it is not offered for its truth. Fed. R. Evid. 801(c). Further, "[t]o the extent . . . images and text [on a printout from a third-party website] are being introduced to show the images and text found on the websites, they are not statements at all--and . . . fall outside the ambit of the hearsay rule". *Perfect 10, Inc.*, 213 F. Supp. 2d at 1155; *see also Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740, at \*5 (N.D. Ill. Oct. 15, 2004). Each of the exhibits defendants challenge that are website printouts are therefore admissible nonhearsay and can be properly relied on by this Court. (*See Attach. A at Exs. 327, 329-330, 332-337, 339-341, 345-385, 387.*)

The ruling in *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 303 (S.D.N.Y. 2008), cited by defendants, is not to the contrary. There, the decision that "a printout of a website showing graphs of salary data for medical billers in the United States as of May 2007 . . . is inadmissible hearsay to show that medical billers in fact earned these salaries", *id.*

at 302, is specific to the circumstances of that case. The printout was submitted on its own, without any “supporting affidavit[]”, and was used to prove the truth of the matter. *See id.* *Medical Billers* simply addresses the admissibility of a particular piece of evidence, based on particular facts. It does not promulgate a general rule on the admissibility of printouts of websites. Moreover, the circumstances there do not exist here -- plaintiffs are not submitting the printouts to prove the truth of the matter.

Finally, even if the proffered evidence *were* considered to be hearsay, a “non-moving party need not produce evidence in a ‘form that would be admissible at trial in order to avoid summary judgment’”. *See Celestino v. Club*, No. 97 CV 3943, 2002 WL 484685, at \*27 (E.D.N.Y. Feb. 19, 2002) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also id.* (“[c]ourts routinely consider . . . documents in deciding summary judgment motions despite the fact that the form of these documents may be hearsay in nature”); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987)). These exhibits were submitted in opposition to defendants’ motions (*see* Attach. A) and courts may consider evidence submitted in opposition to summary judgment that “may not be admissible in its present form”, but is “sufficient to apprise the court that there is important and relevant information that could be proffered to defeat the motion”; and while proffered documents “may ultimately not be admissible at trial”, they can be considered if “the allegations underlying” the documents could be testified to at trial. *Celestino*, 2002 WL 484685, at \*28 n.25 & n.26.

C. **Defendants’ “Pre-2003” and “Settlement Offer” Objections Are Without Merit.**

Defendants challenge the admissibility of 14 pieces of evidence based on the claim that the evidence constitutes an “inadmissible settlement offer” or is “irrelevant” because it predates August 2003. Defendants rely on and cite to the arguments they made in their

September 26 Pre-2003/*Grokster* Motion in which they sought to strike many exhibits on these grounds. (*See* Defs. 11/07/08 Mot. to Strike at 1-6.) Defendants’ arguments were wrong on September 26, and they continue to be wrong here. As set out in plaintiffs’ memorandum in opposition to defendants’ earlier motion (*see* Pls. 11/07/08 Pre-2003/*Grokster* Opp’n Br.), pre-2003 exhibits are *not* offered to impose liability for actions prior to the three-year statute of limitations, but to provide background evidence of intent, etc. (*See id.* at §§ I.B & C; *see also* Attach. A at Exs. 428-44, 453, 456.) Further, defendants have waived any objections on the pre-2003 grounds because they themselves cite to and rely on pre-August 4, 2003 and pre-*Grokster* documents -- sometimes exactly the *same* documents to which they now object. (*See* Pls. 11/07/08 Pre-2003/*Grokster* Opp’n Br. at § I.A; *see also* Attach. A at 448.) As to the argument that some exhibits are “settlement related”, those exhibits plainly are *not* “conduct or statements made in settlement negotiations”. (*See* Pls. 11/07/08 Pre-2003/*Grokster* Opp’n Br. at §§ II.A & B; *see also* Attach. A at Exs. 331, 391, 458, 460.)

**D. The Expert Testimony and Report of Dr. Ellis Horowitz Are Admissible.**

Defendants object to “the proffered deposition testimony of Prof. Ellis Horowitz for the reasons outlined in” their earlier motion to strike Dr. Horowitz’s testimony and report. (*See* Defs. 11/07/08 Mot. to Strike at 6.) In this motion, defendants fail even to hint at which portions of the “proffered” Horowitz testimony they claim is objectionable or why. (*Id.*) Since the rules require defendants to identify and “state[] the specific ground of [their] objection”, (*see* Fed. R. Evid. 103(a)(1)), defendants’ complete failure to do so is sufficient reason to deny their motion. *See* Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence, ¶ 103.12

[1] (Matthew Bender ed. 2008) (“An objection or motion to strike must state the specific ground of the objection or motion.”).<sup>13</sup>

Defendants also reprise their earlier claim that Dr. Horowitz’s report “attached to [his] deposition” is “neither sworn nor verified and [is] not admissible”. (*Compare* Defs. 9/26/08 Expert Mot. at 1 *with* Defs. 11/07/08 Mot. to Strike at 9.) This argument was incorrect (*see* Pls. 11/07/08 Expert Opp’n Br. at 24-25), but now it is also moot: Dr. Horowitz signed an affidavit, filed by plaintiffs on November 7, swearing to the veracity of his report and the opinions stated therein (*see id.* at 25; Forrest 11/07/08 Decl. ¶ 13) -- and defendants have withdrawn their earlier objections on this ground. (*See* Defs. 11/25/08 Reply Mot. to Strike, Attach. B at 9.)

## **II. DEFENDANTS’ MOTION TO EXCLUDE THE DECLARATIONS OF THOMAS SEHESTED, ANDREW KEMPE AND KATHERYN COGGON IS WITHOUT MERIT**

On September 26, 2008, plaintiffs submitted, *inter alia*, declarations of Thomas Sehested, Andrew Kempe and Katheryn Coggon, all of whom provide evidence of direct infringement of some or all of plaintiffs’ sample set of 30 sound recordings (*see* Pls. 7/18/08 SOF, Attachment A). Plaintiffs submitted these declarations in response to defendants’ substantive arguments in their July 18, 2008 summary judgment motions that plaintiffs had not demonstrated, and could not demonstrate, direct infringement of plaintiffs’ works through use of the LimeWire application.

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<sup>13</sup> In their previous motion, defendants argued only that Dr. Horowitz’s opinions about “intent” and filtering methods were inadmissible. (Defs. 9/26/08 Expert Mot. at 21-25.) That argument was and is incorrect (*see* Pls. 11/07/08 Expert Opp’n Br. at 21-24), but in all events, only *one* of the paragraphs defendants have challenged here (*see* Defs. 9/26/08 Expert Mot. at 22 (citing Horowitz Report ¶ 57)) is even mentioned by plaintiffs in their oppositions that are the subject of defendants’ current motion. (*See* Pls. 9/26/08 Resp. to Lime Wire LLC’s 56.1 ¶¶ 1, 23, 41, 44.)

Defendants complain that plaintiffs “ambush[ed]” them with these declarations because “[p]laintiffs never disclosed the identity of these witnesses in their initial or supplemental disclosures as required by Federal Rule of Civil Procedure 26”. (Defs. 11/07/08 Mot. to Exclude at 1.) That is nonsense. *First*, in their initial disclosure, plaintiffs did effectively disclose one of the three declarants -- Kempe from MediaSentry. (*See* Forrest 12/05/08 Mot. to Strike/Exclude Decl., Ex. 492 (Plaintiffs/Counterclaim Defendants’ Initial Disclosures Pursuant to Rule 26(a)(1) of the Fed. Rules of Civil Procedure (“Pls. Initial Discl.”) at 2); *see also infra* at 15 & n.16.) In all events, plaintiffs are entitled to rebut or respond to defendants’ arguments on summary judgment<sup>14</sup> -- and neither Rule 26 nor any other rule cited by defendants provides otherwise. Directly contradicting their argument, defendants themselves submitted declarations of no fewer than *seven* individuals -- one of whom submitted two declarations -- who were not disclosed in defendants’ own Rule 26(a) disclosures. And defendants’ undisclosed declarants were not offered in response to arguments made by the other side, but rather submitted in support of defendants’ *affirmative* arguments on their *direct* case. (*See infra* § II.A.) *Second*, defendants complain that they had no opportunity to depose these declarants, but that is simply not true. Defendants knew about MediaSentry for two years and never asked for or took its deposition. And once they had the other two declarations, defendants could have asked to depose the declarants, but they did not. (*See infra* § II.B.) *Third*, defendants

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<sup>14</sup> Defendants chose to conduct no discovery on direct infringement of plaintiffs’ 30 sound recordings. After plaintiffs informed defendants of the music tracks downloaded using the LimeWire application that they intended to rely on to support their direct infringement claims (*see* Forrest 12/05/08 Mot. to Strike/Exclude Decl., Ex. 495 (Jan. 31, 2008 letter from Teena-Ann Sankoorikal to Joseph Cohen)), defendants served *no* document requests related to these tracks, took *no* depositions of anyone with knowledge of the alleged infringement and asked *no* deponent *any* questions relating to these tracks. (Forrest 12/05/08 Mot. to Strike/Exclude Decl. ¶ 7.) There was no reason to believe that defendants here were going to challenge plaintiffs’ evidence on this issue.

improperly use this motion to argue the merits of the declarations. The Court should disregard these self-serving statements, which are, in any event, meritless. (*See infra* § II.C.)

**A. Plaintiffs Complied With Rule 26 and the Use of the Challenged Witness Declarations Was Substantially Justified.**

Rule 26 requires a party to list individuals “likely to have discoverable information” and “the subjects of that information” that “the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment”. Fed. R. Civ. P. 26(a)(1). Over two years ago, on October 24, 2006, plaintiffs made their disclosures as required “based solely on information reasonably available to Plaintiffs as of the date hereof”. (*See* Forrest 12/05/08 Mot. to Strike/Exclude Decl., Ex. 492 (Pls. Initial Discl. at 1-2).) Plaintiffs’ disclosures *included* a representative of MediaSentry Services, declarant Andrew Kempe’s company.<sup>15</sup> (*See id.* at 2.) In fact, the very first name plaintiffs disclosed was the name of a MediaSentry representative, who was described as having knowledge of infringement (*see id.* at 2) -- and yet defendants now claim that the declaration of a representative of MediaSentry resulted from “intentional and improper withholding of information”. (*See* Defs. 11/07/08 Mot. to Exclude at 4.) Defendants’ arguments with respect to Mr. Kempe and MediaSentry are thus flatly wrong and should be denied.

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<sup>15</sup> Plaintiffs initially listed MediaSentry representative Thomas Carpenter, a “Director” at the company, described as having “knowledge” of “the infringements that have occurred and that are occurring on defendants’ systems/networks”. (*See* Forrest 12/05/08 Mot. to Strike/Exclude Decl., Ex. 492 (Pls. Initial Disc. at 2).) Defendants never requested to take his deposition. (Forrest 12/05/08 Mot. to Strike/Exclude Decl. ¶ 4.) The fact that the name of the representative of MediaSentry was not that of Mr. Kempe is “of no moment”. *See Haritatos v. Hasbro, Inc.*, No. 6:05-CV-930, 2007 WL 3124626, at \*3 (N.D.N.Y. Oct. 23, 2007) (fact that party “did not supplement or amend its disclosures” to change an individual employee of a company to a different employee “is of no moment” because both individuals “derived their knowledge and involvement in this matter from their status as” employees of company; party’s failure to supplement or amend its disclosures and responses did not prejudice plaintiff).

As to the declarations of Coggon and Sehested, Rule 26 does not mandate that parties “disclose” the identity of rebuttal witnesses necessitated solely by new arguments made by their adversaries in the middle of summary judgment proceedings. *Cf. Krause v. Buffalo & Erie Count. Workforce Dev. Consortium, Inc.*, 426 F. Supp. 2d 68, 87-89 (W.D.N.Y. 2005) (“The purpose of mandatory disclosure pursuant to Rule 26 is to enable the parties to more efficiently formulate discovery requests” and “the rules of discovery were not designed to encourage procedural gamemanship”) (internal citation omitted).<sup>16</sup> Defendants made affirmative, dispositive summary judgment arguments based on issues on which they themselves had conducted no discovery (*see supra* notes 14-15; *infra* § II.C.3). Plaintiffs’ submission of witness declarations necessary to respond to those arguments was therefore “substantially justified”. *See* Fed. R. Civ. P. 37(c)(1); *cf. Grdinich v. Bradlees*, 187 F.R.D. 77, 79 (S.D.N.Y. 1999).

As is common with defendants’ accusations, defendants themselves engaged in exactly the same conduct which they now claim should be sanctioned. Defendants submitted declarations of *seven* individuals -- Susan Cates, Marc Freedman, Brewster Kahle, Christopher Levy, Gregory Newby, Elizabeth Weiner and Terry McBride -- in support of their two July 18,

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<sup>16</sup> Although defendants argue that exclusion in this case should be “near automatic”, in fact, “imposition of sanctions under this rule is discretionary”. *Semi-Tech Litig. LLC v. Bankers Trust Co.*, 219 F.R.D. 324, 325 (S.D.N.Y. 2004); *see also In re Frank Santora Equip. Corp.*, 256 B.R. 354, 368-69 (Bankr. E.D.N.Y. 2000) (“[C]ourts within the Second Circuit have rarely imposed such a drastic sanction as evidence preclusion, since they are reluctant to exclude evidence pertaining to the merits of the case.”). Indeed, even if nondisclosure was not “substantially justified”, the preclusion of testimony is not appropriate where the failure to disclose was “harmless”. Fed. R. Civ. P. 37(c)(1); *Grdinich v. Bradlees*, 187 F.R.D. 77, 79 (S.D.N.Y. 1999). Moreover, even if the complaining party could be prejudiced by use of a previously undisclosed witness in opposition to summary judgment, taking the individual’s deposition during the pending motions would overcome such prejudice. *See Krause*, 426 F. Supp. 2d at 89.

2008 summary judgment motions.<sup>17</sup> None of these individuals were “disclosed” on defendants initial or supplemental disclosures. (*See* Forrest 12/05/08 Mot. to Strike/Exclude Decl. Exs. 493 & 494 (Defs. Initial Disclosures; Defs. Supp. Disclosures).) Moreover, *defendants’* use of undisclosed witnesses is entirely unjustified as, unlike plaintiffs’ use of such witnesses merely in rebuttal, defendants’ witnesses support *affirmative* arguments on their *own* motions.<sup>18</sup>

**B. Defendants Failed to Seek Discovery Related to These Declarants.**

In any event, for the sanction provision of Rule 37 to apply, defendants must have suffered harm as a result of the purported Rule 26(a) violation. Fed. R. Civ. P. 37(c); *see also Krause*, 426 F. Supp. 2d at 89; *Fleet Capital Corp. v. Yamaha Motor Corp.*, No. 01 Civ. 1047, 2002 WL 31108380, at \*2 (S.D.N.Y. Sept. 23, 2002) (denying motion to strike witness’s testimony where adverse party was not prejudiced by “technical” non-compliance with Rule 26); *Grdinich*, 187 F.R.D. at 79. There is no harm here.

Although defendants now cry “ambush”, in fact, defendants never once asked for depositions of these declarants -- not even of MediaSentry, despite having known about MediaSentry for over two years. (Forrest 12/05/08 Mot. to Strike/Exclude Decl. ¶ 7.) Nor did defendants request the depositions of Coggon and Sehested. Notably, defendants *did* ask for

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<sup>17</sup> Defendants relied on one of these “undisclosed” declarants again in their September 26, 2008 papers, submitting *another* declaration by Elizabeth Weiner in support of their filings. (*See* Declaration of Elizabeth Weiner in Support of Defendants’ Motion for Summary Judgment.)

<sup>18</sup> Indeed, defendants’ disclosure of 214 individuals, including dozens of largely unidentified “individuals”, like 31 “unknown representatives of”, 13 “representatives of”, 11 “members of” and 5 “operators of” various companies and entities is comical. (*See* Forrest 12/05/08 Mot. to Strike/Exclude Decl. Exs. 493 & 494 (Defs. Initial Discl. & Defs. Supp. Discl.).) Of course, the purpose of the Rule is not to list as many possible ideas as a party can dream up, as defendants did. Rather, the Rule is “designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement”. *See* Fed. R. Civ. P. 26 advisory committee note (1993 amendments). But even listing all these names, defendants still failed to include the seven persons whose declarations they actually submitted.

(and took on October 29, 2008 in the middle of the summary judgment briefing) the deposition of former defendant, Greg Bildson. (See Joint Letter to the Court dated Sept. 17, 2008.) Just as defendants chose not to take the depositions of 75 of the 86 individuals disclosed by plaintiffs in 2006 (see Forrest 12/05/08 Mot. to Strike/Exclude Decl. ¶ 6), defendants chose not to take -- and did not even ask to take -- the depositions of the two declarants about whom they complain. Defendants' purported "inability to cross examine" (see, e.g., Defs. 11/07/08 Mot. to Exclude at 3) is therefore of their own making. See *Krause*, 426 F. Supp. 2d at 89 (denying motion to strike undisclosed witness declaration and noting that prejudice purportedly suffered by defendants could have been overcome if defendants had taken opportunity to depose witness while motions were pending instead of opting for more "drastic" motion to strike).<sup>19</sup>

**C. Defendants Make Factually Incorrect Statements About the Individual Declarations, Which Were Properly Submitted.**

Defendants make a number of factually incorrect statements, assumptions and accusations concerning the three declarations that they seek to strike.<sup>20</sup> These assertions do not

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<sup>19</sup> The *Krause* case, which is instructive here, correctly noted that four factors should be considered in determining whether undisclosed evidence should be excluded: "(1) the proponent's explanation for failing to provide the subject evidence; (2) the importance of such evidence to the proponent's case; (3) the opponent's time needed to prepare to meet the evidence; and (4) the possibility of obtaining a continuance to permit the opponent to meet the evidence." 426 F. Supp. 2d at 88 (citing *Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1988), see also *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006). As was the case in *Krause*, all of these factors weigh in plaintiffs favor, and against exclusion, here: plaintiffs' explanation justifies the use of the evidence (see *supra* § II.A), cf. *Krause*, 426 F. Supp. 2d at 88-89; the evidence is "helpful" to plaintiffs' "opposition to summary judgment", *id.* at 89; any prejudice suffered by defendants for the failure to disclose the witnesses earlier could have been remedied by depositions while the motions were pending, which defendants chose not to "request", *id.*; and defendants did not even investigate the possibility of a continuance for taking such depositions, instead opting for "gamesmanship" and the "drastic" remedy of preclusion, *id.* Thus, as in *Krause*, preclusion is not warranted here.

<sup>20</sup> Defendants also spend two pages of their memorandum arguing against what they characterize as plaintiffs' "likely" argument that the identity of the declarants was "protected by work product immunity". (Defs. 11/07/08 Mot. to Exclude at 6-8.) Where defendants came up with this notion is a mystery as plaintiffs have not and do not claim any work product immunity in this regard.

go to the issue of whether the declarations should be excluded, but they are addressed here to set the record straight.

1. Declaration of Andrew Kempe

As shown above, MediaSentry was the very first entry in plaintiffs' Rule 26 disclosure. (*See* Forrest 12/05/08 Mot. to Strike/Exclude Decl. Ex. 492 (Pls. Initial Discl. at 2); *see also supra.*) Andrew Kempe is the Manager of Technical Account Services for the MediaSentry business unit of Safenet, Inc., formerly MediaSentry, Inc. ("MediaSentry"). (*See* Declaration of Andrew Kempe, dated Dec. 3, 2008 ("Kempe 12/03/08 Decl.") ¶ 1 (attached to Forrest 12/05/08 Mot. to Strike/Exclude Decl., Vol. XIV).)

Defendants contend that because Mr. Kempe was "retained since July 18", but some of the downloads he references date back to April 1, 2004 (Defs. 11/07/08 Mot. to Exclude at 4-5), the "*one* explanation" is that either plaintiffs' factual statement or Kempe's declaration is "false or misleading". (*Id.* (emphasis added).) This inflammatory accusation -- typical for these increasingly desperate defendants<sup>21</sup> -- is false. MediaSentry has been retained by the Recording Industry Association of America ("RIAA") since 2004 to monitor numerous P2P clients, one of which is LimeWire. (Kempe 12/03/08 Decl. ¶ 2.) The purpose of this monitoring was and is to use the results in general anti-piracy litigation. (*Id.*) To respond in this case to defendants' July 18, 2008 summary judgment arguments, plaintiffs asked MediaSentry to search the results yielded by its overall monitoring efforts to determine whether copies of the thirty sound recordings listed in Attachment A to Plaintiffs' Statement of Undisputed Material Facts, dated July 18, 2008 ("Pls. 7/18/08 SOF, Attach. A"), are being shared by LimeWire users (Kempe

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<sup>21</sup> Defendants' 11/07/08 Motion to Strike the Bildson Declaration is littered with such unsupported accusatory statements.

12/03/08 Decl. ¶ 3) and provide plaintiffs with files downloaded, with identical hashes, from at least two different LimeWire users. (*Id.*) Thus, contrary to defendants' gratuitous accusations, there is nothing "false and misleading" about plaintiffs' factual statement nor Mr. Kempe's declaration.

2. Declaration of Thomas Sehested

Mr. Sehested is the co-founder and Chief Executive Officer of DtecNet Software ApS ("DtecNet"). (*See* Declaration of Thomas Sehested dated Dec. 3, 2008 ("Sehested 12/03/08 Decl.") ¶ 1 (attached to Forrest 12/05/08 Mot. to Strike/Exclude Decl., Vol. XIV).) Defendants claim that plaintiffs engaged Mr. Sehested "on July 18, 2008" and that "[f]or more than two months, plaintiffs knew they intended to offer Sehested as a witness". (Defs. 11/07/08 Mot. to Exclude at 2.) Defendants misquote plaintiffs -- plaintiffs stated that Mr. Sehested was retained "[s]ince July 18, 2008". (Pls. 9/26/08 (Gorton) Add'l SOF ¶ 712 (emphasis added).) Mr. Sehested was engaged in this case to respond to defendants' July 18, 2008 summary judgment arguments on direct infringement by gathering evidence as to whether copies of the thirty sound recordings listed in Pls. 7/18/08 SOF Attach. A are being shared by LimeWire users. (*See* Defs. 7/18/08 Mot. for Summary Judgment at 38-40; Sehested 12/03/08 Decl. ¶ 2.) Thus, attached as an Exhibit to Mr. Sehested's September 9, 2008 declaration was a spreadsheet setting out the dates on which Dtecnet used Phex and Bearshare, peer-to-peer clients publicly available for download at <http://www.phex.org> and <http://www.bearshare.com>, to download copies with identical hashes of each of the files listed in Pls. 7/18/08 SOF Attach. A from two different LimeWire users. (Sehested 12/03/08 Decl. ¶ 3.)<sup>22</sup> A copy of a sound recording matching each

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<sup>22</sup> Due to a corrupted data file, DtecNet re-performed this task. (Sehested 12/03/08 Decl. ¶ 3.) Exhibit A to the Sehested 12/03/08 Declaration is an updated spreadsheet presenting the dates on which

hash provided in Pls. 7/18/08 SOF Attach. A is contained in Exhibit B to Mr. Sehested's 12/03/08 declaration.<sup>23</sup> (*Id.*)

Finally, defendants argue that non-disclosure of Sehested cannot be "harmless" because he constitutes a "last minute attempt to cure" an "evidentiary shortfall" on direct infringement and defendants are forced to "take 'as is'" the testimony of a witness whose "methods of gathering evidence" have not been questioned. (Defs. 11/07/08 Mot. to Exclude at 2-3.) This argument, coming from these defendants, is surreal. Mr. Sehested did exactly what defendants' declarant (and counsel) Susan Cates did, although Sehested proved direct infringement using LimeWire while Cates attempted to show that there are "noninfringing" uses of LimeWire. Defendants never named Cates as a witness -- and her "attempt to cure" defendants' "evidentiary shortfall" failed at every level. (*See, e.g.*, Pls. 9/26/08 (LW) Resp. ¶¶ 338, 340-41, 344-45, 369-87.) Plaintiffs pointed out the obvious flaws in Cates' declaration without burdening the Court with separate motions. (*Id.*) In any event, as shown above, Sehested was not a "last minute attempt to cure" anything, but simply a response to defendants' arguments made for the first time on July 18, 2008.

### 3. Declaration of Katheryn Coggon

Defendants argue that Katheryn Coggon, an attorney who has represented several of the plaintiffs in suits against many individual LimeWire users, has been doing so "for the past

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DtecNet downloaded copies with identical hashes of each of the relevant files (*see* Pls. 7/18/08 SOF Attach. A) from two different LimeWire users. (*Id.*)

<sup>23</sup> DtecNet used Wire Shark, a packet capture client publicly available for download at <http://www.wireshark.org>, to document the transfer of those files from the LimeWire user to the DtecNet computer, thus confirming that the file was downloaded from a LimeWire user. (Sehested 12/03/08 Decl. ¶ 4.) The "packet capture" or ".pcap" files contain all the data about the file transfer, including the user's IP address, the P2P client used (*e.g.*, LimeWire), the audio file name, the file hash and the date and time of download. (*Id.*) An example of such files is included as Exhibit C to the Sehested 12/03/08 declaration. (*Id.*)

two years” and therefore could not have justifiably been undisclosed prior to her declaration. (Defs. 11/07/08 Mot. to Exclude at 5.) This also is nonsense. Plaintiffs were not aware of the need to use Ms. Coggon as a rebuttal witness until *after* defendants’ summary judgment motion was filed in July. (*See also supra* §§ II.D.1 & 2.) Moreover, even an alleged failure to disclose a witness is harmless if, as here, the other party is aware of the existence of that witness and their relevant knowledge. *See EMI Music Mktg. v. Avatar Records, Inc.*, 334 F. Supp. 2d 442, 445 (S.D.N.Y. 2004) (failure to formally disclose witness harmless when party was aware of their existence and relevancy); *see also Design Strategies, Inc. v. Davis*, 228 F.R.D. 210, 212 (S.D.N.Y. 2005). Here, Ms. Coggon has brought over 52,000 claims against LimeWire users for copyright infringement over the past several years (*see* Coggon 9/08/08 Decl. ¶ 5), and obtained default or summary judgment against 19 LimeWire users and stipulated judgments against 40 LimeWire users, including on claims for the sound recordings at issue in this case.<sup>24</sup> (*See, id.*; *see also, e.g.*, Forrest 12/05/08 Mot. to Strike/Exclude Decl., Ex. 497 (copies of publicly filed judgments, including, *inter alia*, permanent injunction and damages order dated Nov. 5, 2007 enjoining defendant Quy Huynh from “directly or indirectly infringing Plaintiffs’ rights under federal or state law” utilizing Gnutella P2P Network).) Ms. Coggon’s existence and relevant knowledge could not be unknown to the defendants.

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<sup>24</sup> Indeed, Lime Wire LLC is well aware of plaintiffs’ lawsuits against LimeWire users and has expressed outrage towards the RIAA on numerous occasions for “targeting” LimeWire users by bringing lawsuits and copyright enforcement efforts against LimeWire users such as those referenced in Coggon’s declaration. (*See, e.g.*, Pls. 7/18/08 SOF ¶¶ 302-319; ¶ 311 (complaining of “bullying action”); ¶ 309 (“stealing kid’s [sic] lunch money”); ¶ 311 (stating, “[w]e are outraged that the RIAA is picking on the little guy . . .” and “it’s ludicrous to think that kids [avid music fans] are being sued for enjoying their constitutional right to privacy”); ¶ 314 (“[t]he RIAA is not going to be able to contain this problem.”).) Clearly, defendants -- and the public at large, as these lawsuits received much media attention -- were well aware of these lawsuits.

Defendants argue that because Ms. Coggon's declaration does not include the judgments or settlements themselves, plaintiffs have "eliminated [d]efendants' right to cross-examine Coggon on the grounds for these judgments and settlements and other credibility issues". (Defs. 11/07/08 Mot. to Exclude at 6.) The judgments are a matter of public record (*see, e.g.*, Forrest 12/05/08 Mot. to Strike/Exclude Decl., Ex. 497), and, again, if defendants viewed the "right to cross examine" as important, they should have requested a deposition. *See Krause*, 426 F. Supp. 2d at 89.

**CONCLUSION**

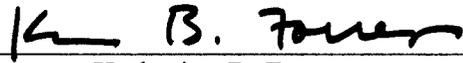
For the foregoing reasons, plaintiffs respectfully request that the Court deny Defendants' Objections to Plaintiffs' Exhibits Filed As Part of Plaintiffs' Opposition to Defendants' Motions for Summary Judgment and Defendants' Motion to Strike, and Defendants' Motion to Exclude the Declarations of Thomas Sehested, Andrew Kempe, and Katheryn Coggon for Plaintiffs' Failure to Disclose Factual Witnesses.

Dated: December 5, 2008

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by



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