

# **EXHIBIT 3**

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October 19, 2007

The Honorable Gerard E. Lynch  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: Extension of Deadlines in Stipulated and Amended Civil Case Management Plan;  
*Arista Records LLC, et al. v. Lime Wire LLC, et al.*, No. 06 CV 5936 (GEL)

Dear Judge Lynch:

Pursuant to Rule 2.F of the Court's Individual Practices, the parties respectfully submit this joint letter<sup>1</sup> to request a pre-motion conference and a Rule 16 Case Management Conference regarding a scheduling dispute that counsel have been unable to resolve through the meet and confer process. The parties would prefer an in-person conference, if convenient for the Court. The parties' dispute concerns the length of the extension of deadlines the parties will need to complete fact and expert discovery.

## **I. The Position of the Defendants and Counterclaim Plaintiff**

### **A. Background**

Plaintiffs are the record labels self-described as the producers, manufacturers, distributors, sellers, and licensors of the vast majority of commercial sound recordings in the United States. They filed this lawsuit just over a year ago, alleging that Defendants Lime Group LLC, Mark Gorton, and Greg Bildson and Defendant/Counterclaim Plaintiff Lime Wire LLC (collectively, the "Defendants") are secondarily liable for "massive infringement" of Plaintiffs' copyrighted sound recordings. The alleged underlying direct copyright infringement was purportedly committed by individual computer users who use Defendant Lime Wire's popular peer-to-peer ("P2P") Internet file-sharing software. All Defendants answered Plaintiffs' complaint, denying Plaintiffs' accusations and raising, among others, the defenses of the LimeWire software's substantial non-infringing uses and Plaintiffs' copyright misuse. Defendant/Counterclaim Plaintiff Lime Wire also asserted counterclaims against Plaintiffs under sections 1 and 2 of the Sherman Antitrust Act and under New York state law. The gravamen of Lime Wire's counterclaims (and Defendants' copyright misuse defense) is Plaintiffs' continued

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<sup>1</sup> For convenience and with consent of Plaintiffs' counsel, this joint letter is submitted on defense counsel's letterhead and over his signature.

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anticompetitive efforts to foreclose Lime Wire from the market and to squelch or delay the exciting new P2P technology that threatens Plaintiffs' dominance over the music industry.

Recently, Plaintiffs broadened the case, adding a new party and new claims. In their First Amended Complaint, filed September 20, 2007, Plaintiffs joined the M.J.G. Lime Wire Family Limited Partnership ("MJG") as a defendant. Plaintiffs added a claim for fraudulent conveyance against MJG and against Defendant Mark Gorton. Plaintiffs have just begun document discovery on these claims, serving a document request on September 11, 2007.

The breadth of the issues in this complex copyright and antitrust case has necessitated extensive discovery efforts and will require more. The parties have made initial disclosures pursuant to Rule 26 and propounded interrogatories. Plaintiffs have served 86 requests for production on Defendants. Defendants have served 264 individual requests for production on Plaintiffs.

To respond to Plaintiffs' first set of requests, defense counsel promptly instituted a process to collect all potentially responsive documents. Among other efforts, Defendants interviewed all persons employed by Lime Wire at the time and copied from 40-50 hard drives of all current and past employees, all data even arguably related to the work that Lime Wire does or to the issues in this lawsuit. Defendants also collected Lime Wire's entire mail server for analysis and review. Defendants further collected the potentially responsive records of former employees. Thereafter, Defendants retained a vendor at great expense to cull from the collected electronic data all of the unreadable material, such as computer programs. The vendor then searched the remaining, readable data for various search terms. Then, a team of defense attorneys began the process of reviewing the documents and electronic files yielded by that search and preparing the responsive, non-privileged documents for production. To date, Defendants have produced images of more than 1 million pages of documents and approximately 100 gigabytes ("GB") of data (containing more than 22 GB of zip files that expand to approximately 10 times their size), which roughly equates to more than 29 million pages.

Plaintiffs have likewise produced a vast number of documents. Initially, Plaintiffs began by producing a limited amount of documents relevant only to their infringement claims, not Lime Wire's antitrust counterclaims. Plaintiffs sought a stay of antitrust discovery. Although this Court denied the requested stay on February 8, 2007, Plaintiffs have been slow to produce documents relevant to the antitrust/copyright misuse claims, even documents previously produced in other antitrust matters and presumably simple to copy and send to Defendants.

Tremendous document discovery remains underway. Both sides have many more documents to produce. Assuming a tactical optimism, Plaintiffs proclaimed last month that they could complete their production—of the documents they have chosen to produce—by October 15, 2007. Defendants were highly, and rightly, skeptical that such a unilaterally-circumscribed production schedule could be met. Plaintiffs produced over 430,000 pages of documents in the two weeks prior to October 15 and another 150,141 pages on October 16 and they appear not to

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be finished. Moreover, no privilege logs unique to this case have been produced, allowing Defendants little time to review and challenge privilege assertions should that be necessary, once they are produced.

As expected in a case of this magnitude, a number of disputes have arisen during the course of discovery. After conducting countless meet-and-confers beginning in March 2007 and continuing to this date, the parties have successfully resolved some disputes; yet, several substantial issues remain. Chief among the outstanding disputes is whether all Plaintiffs must search for documents responsive to Lime Wire's requests. Two Plaintiff groups have taken the position that, in essence, Lime Wire must content itself with documents produced by these Plaintiffs in earlier years in other antitrust matters in response to different document requests. Although the parties have tried for months to negotiate an accommodation on this issue, their efforts have recently come to an impasse. Another issue still under negotiation is search terms. The parties have not even reached an agreement on the list of terms that they each need to search and which terms will be presented to the Court for consideration. As a result, these and other issues will have to be decided by the Court. Once decided, the parties will have to have their respective e-discovery vendors run additional searches for more potentially responsive documents that will then have to be reviewed for responsiveness and privilege.

To date, only a few, minor oral depositions have been taken. No party or party employee depositions have been taken. Numerous third-party document subpoenas, issued by both sides, are currently outstanding.

Under the present scheduling order and by agreement of the parties, the interim deadlines for expert designations and reports are due in less than six weeks, on November 26, 2007. Rebuttal reports are due shortly thereafter, on December 14, 2007. The cutoff for fact discovery is December 20, 2007. Dispositive motions are due on January 31, 2008. Despite diligent efforts to comply, Defendants cannot reasonably meet the present deadlines and suspect that, posturing aside, Plaintiffs cannot either. A prodigious number of documents remain to be produced and critical issues about the scope of discovery must still be resolved, some by court order. In addition, privilege logs will have to be reviewed and if any disputes exist, those will require resolution. Once all of the outstanding disputes are determined and productions complete, the parties will need time to digest the available material in order to prepare for and take depositions. The expert witnesses will likewise require time to review the produced documents, review the still-to-be-taken deposition transcripts, and prepare their reports. Moreover, Plaintiffs have recently proposed a grueling—and unrealistic—deposition schedule. Without agreement or leave of Court as required by Fed. R. Civ. P. 30a, Plaintiffs wish to take the depositions of 14 Lime Wire employees over six weeks, leaving little to no time for Defendants to prepare witnesses for deposition, much less conduct their own depositions before the discovery cutoff on December 20, 2007. *See* Exhibit 1, Plaintiffs' counsel's September 20, 2007 letter. None of the depositions will be completed before the expert deadline on November 26, 2007. *See id.* Simply put, additional time is needed to complete fact and expert discovery.

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During the parties' meet and confer sessions, there was some discussion of completing fact discovery and then turning to expert discovery when all of the documents and deposition transcripts are available for review. Plaintiffs ultimately rejected that solution. Plaintiffs have agreed to a one-month extension of the expert deadline. Defendants believe that fact discovery should be extended for at least six (6) months and the expert and dispositive motion deadlines should come after the close of fact discovery. Defendants also believe that a time should be allocated for addressing privilege issues in an amended Case Management Plan. Because the parties could not reach an accord, this issue is presented to the Court for a decision.

**B. Scheduling Orders May Be Modified for Good Cause.**

District courts "generally have considerable discretion to extend deadlines contained in pretrial orders." *Elliott Assocs., L.P. v. Republic of Peru*, No. 96 Civ. 7917 (RWS), 96 Civ. 7916 (RWS), 1997 WL 436493, at \*3 (S.D.N.Y. Aug. 1, 1997). Federal Rule of Civil Procedure 16(b) provides that courts may grant such extensions upon a showing of good cause: "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge. . ." FED. R. CIV. P. 16(b).

Good cause to modify a scheduling order may be shown if a party cannot, despite due diligence, reasonably meet the schedule. *Vilkhu v. City of New York*, No. 06-CV-2095 (CPS) (JO), 2007 WL 2713340, at \*5 (E.D.N.Y. Sept. 13, 2007); *see also* Fed. R. Civ. P. 16(b) advisory committee's note (explaining that a "court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension."); *AMW Material Testing, Inc. v. Town of Babylon*, 215 F.R.D. 67, 71 (E.D.N.Y. 2003) (denying request for extension made after the discovery deadline because the requesting parties' failure to take depositions was part of a deliberate strategy). The requisite good cause is based on factors such as the diligence of the party requesting the extension, the bad faith of the party opposing the extension, the phase of the litigation, and prior knowledge of and notice to the parties. *Vilkhu*, 2007 WL 2713340, at \*5; *see Elliott*, 1997 WL 436493, at \*3 (extending the discovery deadline because delays in the document production would have prevented depositions from being taken before the discovery cutoff). Good cause exists here.

**C. There is Good Cause to Extend the Pre-Trial Deadlines In This Case.**

Despite Defendants' diligence, the current discovery and expert deadlines cannot reasonably be met for several reasons. First, Plaintiffs have not provided all of the documents and discovery responses Defendants need to proceed to expert discovery and to take and defend depositions. Second, the parties are still negotiating the terms which should be employed to locate responsive documents. Once an agreement is reached, both sides will have a great deal of work to do to search, review, and produce additional documents. Third, even if all of the needed documents were produced tomorrow, Defendants and their experts would not have time to digest them, prepare reports, and take and defend depositions prior to the existing cutoffs.

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As explained in detail below, these circumstances demonstrate good cause to modify the scheduling order. Unlike the parties seeking an extension in *AMW Material*, Defendants have made every effort to obtain the discovery they need and, when it became apparent that they could not meet the current schedule, they requested an extension. They did not wait until the deadlines had expired to seek relief. *See AMW Material*, 215 F.R.D. at 71. Moreover, unlike the moving party in *Elliott* who sought a 90 day discovery extension to take several depositions after failing to pursue discovery vigorously, Defendants have not delayed and are not seeking an unnecessarily long extension. *See Elliott*, 1997 WL 436494 at \*3. To the contrary, as shown below, the additional time requested by Defendants here is modest given the overwhelming amount of discovery remaining and the nature of the case. As a result, Defendants have established good cause and an extension of the deadlines in the scheduling order is warranted.

**1. Plaintiffs Have Delayed Or Refused To Provide Critical Discovery.**

Despite Defendants' earnest efforts to request documents at an early stage of the case, Plaintiffs have delayed producing certain, readily available responsive documents and have refused to produce others. The following examples are illustrative of Plaintiffs' dilatory and/or obstructionist discovery tactics designed to tax Defendants' limited resources:

*a. Unilateral Refusal to Search for Highly Relevant and Responsive Documents.* While Plaintiffs collectively predicted that their document productions would be "complete" by October 15, 2007, this is not reality. Despite both: 1) this Court's earlier ruling that antitrust discovery would not be stayed, pending the resolution of Plaintiffs' motion to dismiss; and 2) Defendants' argument that documents related to antitrust claims are also relevant to Defendants copyright misuse defense, two of the corporate level plaintiffs, the EMI and UMG plaintiffs, boldly proclaim that they need not comply with this Court's previous order by searching for (let alone producing) certain highly relevant documents they alone deem to be related only to counter-Defendant's antitrust claims. They claim that Defendants must be satisfied with only the stale documents previously produced in old antitrust lawsuits or investigations including the *Hummer Winblad* case and the DOJ and New York Attorney General's investigations (the "Prior Antitrust Matters"). Both EMI and UMG take the untenable position that all documents in existence prior to February 2006 that are potentially related to antitrust matters were produced in the Prior Antitrust Matters; therefore, neither of them must search for any such documents prior to February 2006. UMG, in an attempt to appear slightly less obstreperous and slightly less disdainful of the discovery process (despite the fact that it filed this lawsuit) has deigned to provide documents for what it terms a "stub" period—that of February 2006 until November 2006. Notably, EMI and UMG's co-conspirators, Warner and Sony, have taken neither of these untenable positions and have agreed to search for and provide documents responsive in *this* case.

The parties intend to brief this issue for the Court in their upcoming joint letter regarding discovery. If Lime Wire's position is accepted and if the Court again rules that Plaintiffs must participate in discovery, it will take further time for the EMI and UMG plaintiffs to locate and

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produce the requested documents that, to date, they have made no effort to locate. Proceeding to expert discovery and depositions without EMI's and UMG's complete productions will lead to inefficient and inequitable results because the experts will not be able to render any real opinions absent this and other critical evidence.

**b. *Delays in Producing Prior Productions and Refusals to Produce Other Critical Information Related to the Prior Antitrust Matters.*** In their initial requests, Defendants requested, among other items, information related to the Prior Antitrust Matters, including all documents produced in those matters. *See, e.g.*, Exhibit 2, Defendants' First Request for Production to Plaintiff Arista Records LLC at Nos. 92, 200, and 229. After Plaintiffs' request for a stay of antitrust discovery was denied in early February 2007, plaintiffs agreed to produce the documents that they had previously produced in the Prior Antitrust Matters. Plaintiffs did not, however, produce those documents promptly despite the presumable ease of copying existing CDs of documents. Although the Warner plaintiffs provided their first installment of documents previously produced in the Prior Antitrust Matters on March 6, 2007, EMI did not begin their production until June 26, 2007. Other installments from the plaintiff groups' prior productions trickled in throughout the summer. The last installment was provided on August 2, 2007. And, while these prior document productions are important, Plaintiffs have yet to produce some of the most critical information related to those matters. For example, the Plaintiffs involved in the *Hummer Winblad* litigation, EMI and UMG, have still not produced certain critical documents, such as sealed pleadings and evidence that, following a motion to compel, ultimately led the judge in that case to conclude that there was sufficient evidence of material misrepresentations to the DOJ that justified the piercing of EMI's and UMG's attorney client and work product privileges.<sup>2</sup> Lime Wire has sought this information in order to decide whether it wishes to seek similar relief in this case.

Plaintiffs have also not explained (despite Defendants' repeated requests) how the documents produced in the Prior Antitrust Matters are sufficiently responsive to the current document requests, such that no other documents need be produced. In that regard, counsel for the Defendants have repeatedly asked Plaintiffs' counsel to provide the necessary information they believe will assist in making that determination, such as the actual document requests or Civil Investigative Demands/subpoenas, and correspondence regarding the negotiations of the scope of these productions. Plaintiffs have not disputed that this information is relevant in determining whether these documents are truly responsive to all of Defendants' requests, yet they have not produced it. Plaintiffs should disclose from where these documents were collected, and provide evidence about the scope of these prior productions.

**c. *Overly Restrictive Searches for Responsive Documents.*** All plaintiffs have restricted their searches to a limited number of self-termed "selected" custodians. *See* Exhibit 3, Plaintiffs' counsel's June 8, 2007 letter, p. 3, no. 10. Plaintiffs have advised that they

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<sup>2</sup> Notably, the DOJ reopened its investigation after learning of the *Hummer Winblad* Court's order. Additionally, this order was ultimately vacated as part of a confidential settlement.



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each selected a limited number of custodians who are most likely to have responsive documents and have searched only those custodians' computers and paper documents for responsive documents. Defendants have requested the names of the selected custodians and organizational charts to help determine if sufficient and correct custodians were selected. To date, Defendants have only received quite limited organizational charts from only three plaintiffs and all Plaintiffs have just recently produced the names of the custodians whose records were searched. That information remains insufficient since Plaintiffs failed to disclose any information about the custodians. Additionally, Defendants have asked for confirmation that Plaintiffs are searching the records of former employees as well. Plaintiffs will not say.

**d. *Numerous Individual Disputes Still Exist Regarding Plaintiffs' Productions to Date.*** In addition to the above-enumerated overarching issues, several issues pertaining to individual requests also exist, two of which are addressed below for illustrative purposes. A more complete list of the outstanding discovery disputes is contained in defense counsel's letter dated September 28, 2007 attached hereto, as Exhibit 4.

(i) Proof of ownership: Plaintiffs must prove, among other things, that they own valid copyrights in each of the works for which they claim copyright infringement. *See Fonar Corp. v. Domenick*, 105 F.3d 99, 103-04 (2d Cir. 1997) (holding that one element of copyright infringement is proof of the ownership of a valid copyright). At the outset of the case, Defendants requested evidence of ownership of the 3,000 works upon which Plaintiffs' claims are based. *See* Exhibit 2. Although approximately 11 months have passed, Plaintiffs have still not produced the requested ownership documents that are central to their claims. Indeed, Plaintiffs counsel represented on a conference call as recently as September 27, 2007 that they are still "working out" the format they will use to prove ownership. Plaintiffs believe that it will "likely" be a declaration, but do not know "the form that such a declaration will take." Without Plaintiffs' having produced document one on this topic, even if Plaintiffs suddenly produced all of these documents, Defendants and their experts cannot realistically meet the time constraints contained in the current Case Management Plan.

(ii) Agreements with other P2P companies: After months of negotiation (that served to prevent Defendants from going to the Court while time to complete discovery remained), Plaintiffs recently confirmed that they refuse to produce the agreements they have made with all P2P companies that are now distributing their content over the Internet and competing in the market Lime Wire sought to enter. They also refuse to produce communications and correspondence related to the negotiations of these agreements, all of which are relevant to Lime Wire's claims that the Labels have concertedly refused to license their works to anyone except to their "pet" companies.

**e. *Partial Disclosure Responses and Interrogatory Answers.*** Plaintiffs have unreasonably limited their Rule 26 disclosures and their answers to interrogatories. For instance, rather than identify all persons with knowledge of relevant facts, Plaintiffs chose to identify only persons with the "most" knowledge within Plaintiffs' parent organizations. Similarly, in



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response to interrogatories seeking identification of persons with knowledge, Plaintiffs restricted their answers to Plaintiffs' and their respective parents' *current* employees with the "most" knowledge. *See, e.g.*, Exhibit 5, Plaintiffs Capitol Records, Inc.'s, Priority Records LLC's and Virgin Records America, Inc.'s Consolidated Responses and Objections to Defendants' First Set of Interrogatories at General Obj. 6, Nos. 9, 10, 14. Defendants need a complete list of persons with knowledge so that they can determine which individuals to depose. Defendants raised these and other deficiencies in Plaintiffs' interrogatory responses at the parties' first meet and confer and continued to press for the information thereafter, including by recent letter. *See* Exhibit 6, Defense counsel's September 21, 2007 letter to Plaintiffs' counsel. Plaintiffs, however, have failed to correct these deficiencies.

**2. Both Sides Must Still Apply New Search Terms and Review More Documents.**

Even in the absence of the above-described disputes, both sides still have a tremendous amount of work to do to complete their document productions. Given the volume of documents still to be reviewed, Defendants could not meet Plaintiffs' decreed deadline of October 15, and do not believe that they can complete their document production currently underway before the discovery cutoff. Similarly, whole new searches, and the attendant work, remain to be done.

To locate the documents—unique to this case—that have already been produced, each party crafted its own list of search terms and searched the documents it collected for mentions of those terms. *See* Exhibit 7, Defense counsel's June 6, 2007 e-mail and attachment; Exhibit 8, Plaintiffs' counsel's June 7, 2007 letter. Notably, the different plaintiff groups selected different search terms. Subsequently, each side asked the other to conduct more searches using additional terms. *See* Exhibit 9, Plaintiff's counsel's letter of June 20, 2007; Exhibit 10, Defense counsel's letter of June 20, 2007. Some additional terms have been accepted; others refused. Negotiations over the search terms continue to this day. *See, e.g.*, Exhibits 11-15, Letters dated August 3, 2007, August 20, 2007, August 23, 2007, September 3, 2007, and September 13, 2007, respectively. Assuming that a final agreement can be reached on the search terms this week, the parties would have fewer than 10 days before the expert deadline to conduct more searches using the new, agreed terms, to review the documents located by the searches, and to produce the responsive, non-privileged documents found. Although no one can predict how many documents will be located by the new searches, it will unquestionably be a substantial number, for each party. It is highly unlikely that even a sizeable team of attorneys working relentlessly will be able to complete this task before the current expert deadline.

**3. The Parties And Experts Need Time To Review All Of The Documents Produced.**

Even if all of the requested documents were produced to Defendants immediately, Defendants and their experts would not be able to complete their review of the documents before the approaching deadlines.

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The parties have been conducting a “rolling production,” providing documents as they become ready. Plaintiffs bragged that the last installment of their production would be produced by October 15, 2007. It was not. Even assuming there were no disputes over discovery and that all documents rendered by new search terms were produced immediately, Defendants and their experts would have less than two weeks to review the final installment of Plaintiffs’ production—likely to be substantial—before providing expert reports and beginning depositions.

No doubt Plaintiffs will claim that this is no hardship to Defendants since other installations of documents have already been provided. Such a claim would ignore the realities. First, regardless of the timing of the production, no significant depositions have been taken. Without an extension of the current deadlines, the expert witnesses must prepare their reports without the benefit of relevant testimony. Additionally, Defendants do not have unlimited resources. They have focused their discovery efforts on reviewing and producing millions of their own documents to Plaintiffs. When all of Defendants’ documents are produced, Defendants intend to make reviewing Plaintiffs’ productions their primary focus. The task of reviewing and synthesizing Plaintiffs’ production to date is, alone, a monstrous undertaking. Indeed, the DOJ investigation that Plaintiffs assert is similar to this case lasted close to four years. If the DOJ, with hordes of attorneys and the resources of the federal government behind them, cannot investigate and form conclusions about Plaintiffs’ anticompetitive activities in a year or even two, Defendants and their experts can hardly be expected to do so. Further, in the *Hummer Winblad* copyright and antitrust litigation, discovery was conducted over at least two years, but was not complete and expert reports had still not been exchanged when the case settled in November 2006. Yet under the current schedule, Defendants’ experts are expected to digest millions of pages of material—the bulk of which was not produced until late summer—in a matter of one to four months in order to prepare reports by November 26, 2007. Reviewing such a vast amount of material in so short a time is not feasible and certainly would not yield meaningful reports. The lack of deposition testimony will make those reports even less useful.

In sum, Defendants have worked diligently to take and respond to discovery in this dispute. In sharp contrast to Plaintiffs, Defendants have bent over backwards to fulfill their discovery obligations. Despite their best efforts, Defendants cannot reasonably meet the current deadlines due to the sheer volume of documents in this complex case and the variety of disputes—both reasonable and unnecessary—that have arisen during the course of discovery. For these reasons, Defendants respectfully submit that good cause exists to extend the deadline for fact discovery in the Court’s June 18, 2007 scheduling order by at least six (6) months and set the deadline for expert discovery and dispositive motions after that. A proposed Amended Civil Case Management Plan reflecting the extended deadlines requested by Defendants is attached as Exhibit 16.

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## II. The Position of Plaintiffs/Counterclaim Defendants

### A. Background

Plaintiffs oppose Defendants' request to extend the schedule and disagree with their characterization of the discovery issues recited in support of that request. We will address each discovery dispute in detail below. These disagreements, however, are not really about whether Defendants have had access to adequate documentary discovery or whether they have had sufficient time to review and digest those materials under the current scheduling deadlines. Rather, the issue before the Court is Defendants' tactical maneuvering geared towards delaying ultimate resolution of this matter.

Defendants' tactics cannot obscure the fact that, with diligence, the current scheduling order could be met and, at most, only a short extension is warranted. As such, we would ask the Court to enter the proposed final schedule, attached as Exhibit C, which would provide the Defendants with a one-month extension.

Moreover, we also respectfully request that the Court resolve all pending discovery issues addressed in this joint letter, and, to that end, hereby request the entry of a protective order pursuant to Fed. R. Civ. P. 26(c) with respect to the discovery at issue in these disputes. Rule 26(c) authorizes the Court, upon a showing of "good cause," to grant a protective order to "protect a party or person from . . . undue burden or expense". Fed. R. Civ. P. 26(c). "In determining whether to issue a protective order, and the form any such order should take, the court must "compare the potential hardship to the party against whom discovery is sought, if discovery is granted, with that to the party seeking discovery if it is denied". G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529, 533 (S.D.N.Y. 2001); see also Quinby v. WestLB AG, No. 04 Civ. 7406, 2006 WL 2597900, at \*11 (S.D.N.Y. Sept. 5, 2006) (stating that courts may issue protective orders under Rule 26(c) to effectuate determinations under Rule 26(b)(2) that "the burden or expense of production outweighs its potential benefits"); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 283 (S.D.N.Y. 2003) (noting that "requests that run afoul of the Rule 26(b)(2) proportionality test may subject the requesting party to protective orders under Rule 26(c)").

As discussed in detail below, each issue that Defendants have raised have either been resolved or have simply been manufactured for the purpose of giving rise to the appearance of numerous disputes. Plaintiffs have, in good faith, conferred numerous times with Defendants in an effort to resolve these issues to no avail.<sup>3</sup> Plaintiffs have thus far provided Defendants with

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<sup>3</sup> Plaintiffs have attached (as Exhibit D) a certification that we have, in good faith, conferred with Defendants in an effort to resolve these disputes without court action.

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voluminous discovery and, as such, contend that the provision of additional material would impose an “undue burden [and] expense” on Plaintiffs while simultaneously conferring little benefit on Defendants other than to delay the resolution of this case. Fed. R. Civ. P. 26(c); see also Jones v. Goord, No. 95 CIV. 8026, 2002 WL 1007614, at \*14-\*17 (S.D.N.Y. May 16, 2002) (Lynch, J.) (denying motion to compel discovery on grounds that “the burden of the proposed discovery far outweighs its likely benefit for resolving the issues before the court” where party from whom discovery was sought had already provided a “vast amount of material” and the “suggested benefits” of additional material would “prove elusive”). Thus, Plaintiffs have “good cause” to seek a protective order, and the Court should grant such an order.

The need for a protective order has become apparent, as Defendants have sought to complicate this case unnecessarily through endless discovery. Plaintiffs’ copyright claims are not particularly complicated – following as they do on the heels and as the direct lineal descendants of similar claims in Grokster and, before that, Napster. As Plaintiffs, our goal has always remained the same: to resolve this matter as swiftly as possible. The first schedule presented to this Court situated the parties at the point of trial readiness this very month – October 2007. Instead of being trial-ready, the parties are now engaged in a dance in which Plaintiffs seek to do what is required to go to trial as soon as possible, and Defendants have thrown virtually every possible discovery impediment in our way – starting with truly massive document requests (264 separate requests which, with subparts, number some 500), and continuing with persistent requests for more (more search terms, more custodians, more documents), while simultaneously conceding that they have not even reviewed the approximately 6.5 million pages of Plaintiffs’ documents that have been produced.

At every turn, Defendants use the antitrust counterclaims – which are the subject of Plaintiffs’ pending motion to dismiss – as justification for additional party discovery, for facially overbroad third-party subpoenas, for the number of depositions they claim to need, and ultimately for the delay of this case. As such, it may well be that it is time for the straightforward copyright claims originally brought by Plaintiffs to be severed from the antitrust counterclaims. As time has passed, it has become clear that the conduct that gives rise to Plaintiffs’ claims of infringement of sound recordings is demonstrably unrelated to the allegation that Plaintiffs have engaged in anticompetitive conduct with respect to the licensing (or failure to license) hashes for their sound recordings.<sup>4</sup> Notably, the very same technology that Lime Wire claims as the centerpiece of its antitrust claims (a hash-based filtering technology) is now claimed in a separate patent suit brought by Altnet against Lime Wire to be itself infringing on a third-party’s patents. (See Exhibit A.) Accordingly, the counterclaims (construed most generously) relate to technology that a third-party claims Lime Wire itself has no right to exploit.

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<sup>4</sup> Hashes act as identifiers for digital files.

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Severance now will allow this case to proceed to quick resolution. We would like to raise such a possibility with the Court at the scheduling conference.<sup>5</sup>

As litigants, we cannot force Defendants to produce documents faster or to stop manufacturing discovery issues that have no true bearing on the merits of the case – but we now ask this Court to do so. We respectfully request that this Court put an end to this “death by a thousand cuts” and afford Defendants only minimal relief from the current schedule – which itself is a five-month extension of the original schedule in this case – imposing a schedule that requires the parties to be trial-ready by May 1, 2008, even assuming inclusion of the counterclaims. This proposed schedule, attached as Exhibit C, would give Defendants a one-month extension, but would also put an end to further maneuverings for more time, and would allow the parties to move swiftly towards resolution of this matter.

It is clear that Defendants wish to make discovery an end unto itself, with the result being that the parties will never reach the merits of the case. In aid of this goal, Defendants have manufactured a number of discovery disputes that are intended to obscure the actual state of discovery: far from being dilatory, we have in fact reviewed approximately fifteen million pages of documents; we have produced approximately 6.5 million pages (4.5 million pages are of new materials; two million pages relate to previously-produced antitrust productions that Lime Wire specifically requested (the “Prior Productions”)); we substantially completed our production by the beginning of October – we now have produced all but a small amount of material.<sup>6</sup>

Our document production is based on very substantial efforts to identify the right universe of responsive materials. Over the course of the last six months, we have reviewed the files of approximately sixty-five custodians. Because a massive amount of material (approximately 1.7 terabytes) is in electronic form, the parties have agreed to apply search terms to materials. Our search term lists consisted of 138 separate search terms, including terms as broad as “P2P”, “peer to peer”, “filter”, “price w/i 7 internet”, “price w/i 7 online”, and “Lime\*”.

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<sup>5</sup> Plaintiffs would also direct the Court’s attention to the Second Circuit’s recent decision in In re Elevator Antitrust Litigation, 06-3128-CV, 2007 WL 2471805 (2d Cir. Sept. 4, 2007), which is attached as Exhibit B. In that decision, the Second Circuit, applying the standard set forth in the Supreme Court’s decision in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), stressed that “[t]he potentially enormous cost of fact discovery” should be weighed when considering whether to dismiss an antitrust complaint. Elevator Antitrust, 2007 WL 2471805, at \*6 n.4. Here, Plaintiffs have borne a tremendous financial burden in proceeding through antitrust fact discovery, and such hardship should not be extended longer than absolutely necessary – a point, Plaintiffs would respectfully suggest, that has now been reached.

<sup>6</sup> Defendants make reference to the alleged fact that Plaintiffs “bragged” that we would “complete” our productions on October 15, 2007. JL at 9. Notably, however, Defendants do not state when and where Plaintiffs made such claims. This is because Plaintiffs never stated that our productions would be “complete” on October 15, 2007. Rather, Plaintiffs have consistently told Defendants that our production would be “substantially complete” on October 15, 2007. See, e.g., Exhibit E, Plaintiffs’ counsel’s September 13, 2007 email. It was. Of the documents Defendants have received, 90.7 percent of them were received before October 15, 2007. We do not anticipate producing a substantial amount of material from this point forward.

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Anticipating substantial completion of our production, on September 20, 2007, we sent Defendants a proposed deposition schedule for fourteen current and former Lime Wire employees.<sup>7</sup> Defendants have refused to schedule a single deposition, and refuse even to provide an estimate for when their production will be substantially complete.

Reading Defendants' joint letter-brief (the "JL"), one would think Defendants have only recently received documents (and then only recycled and "stale", JL at 5, materials such as the Prior Productions that they claim never to have apparently requested and do not want), and that we have stonewalled them in various discovery disputes. The facts are to the contrary. As we discuss in detail below, the first productions occurred more than five months ago – by the end of July, 2.6 million pages had been produced, by the end of August, an additional 1.5 million pages, and by the end of September, an additional 1.9 million pages; what Defendants complain about as recycled or "stale", JL at 5, are in fact materials they specifically requested. We have also conferred with Defendants on a variety of issues more than eighteen times. See, e.g., Exhibits 3, 8, 11-15, F-H.

Until we refused to join with Defendants in requesting a lengthy extension to the schedule (we did agree to a one-month extension), we believed we were on a path that would bring few, if any, discovery issues to the Court's attention. Suddenly, however, Defendants have refused to negotiate to resolution the remaining issues and instead have dug back through what is now ancient history in this case (for example, the Rule 26 disclosures and interrogatory responses served over twelve and seven months ago, respectively) and come up with numerous alleged issues. Now, Defendants claim that they are entitled to significant additional discovery from Plaintiffs (despite their concession in this letter that they have not even completed their review of the 6.5 million pages they already have), JL at 8-9, arguing, inter alia, that Plaintiffs' custodian lists are deficient, that disputes exist over search terms and that Plaintiffs have not provided any documents proving ownership of works at issue – we discuss these issues below.

In further support of their position, Defendants also claim that numerous document subpoenas are outstanding. See JL at 3. Defendants fail to state, however, that they only began serving their third-party document subpoenas on September 14, 2007, nearly a full year after the Court's entry of the initial Case Management Order. In contrast, Plaintiffs served their first third-party document subpoena on December 8, 2006. The majority of these allegedly outstanding document subpoenas were served by Plaintiffs, and they are well in hand and will imminently be resolved. Similarly, Defendants point out that only a "few, minor" depositions have been taken, JL at 3, but Defendants have not noticed a single deposition, even with

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<sup>7</sup> It is unclear why Defendants believe this request violates Fed. R. Civ. P. 30(a), as it was, in fact, an effort to comply with the requirement that more than ten depositions be taken only by written agreement of the parties. Fed. R. Civ. P. 30(a)(2). The individuals listed in Plaintiffs' letter never received a deposition subpoena because Defendants refused to provide written agreement. Certainly as to the first 10 deponents there is no credible reason why our request was inadequate; they are now on notice that we would like to depose not only these fourteen but perhaps also a few others.



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Plaintiffs' invitation to do so. There is still time for the depositions we have proposed to occur without modifying the schedule.

The record in this case does not justify an extension.

**B. Defendants Have Failed to Establish "Good Cause" to Modify the Scheduling Order.**

**1. Applicable Legal Standard.**

Modification of a scheduling order requires a showing of "good cause". In re Orange Boat Sales, 239 B.R. 471, 474 (S.D.N.Y. 1999). "To demonstrate good cause, the party seeking a modification must show that the relevant deadline could not reasonably be met despite that party's diligence." Id. (citations omitted, emphasis added). Generally, federal courts will maintain "strict adherence to discovery cut-off dates, absent a showing of good cause". Id. The amount of discovery required to prosecute and defend this case is not large. Defendants have imposed a non-merits based discovery burden on themselves by asking for the production of millions of pages of material that even they know is, at most, only tangentially relevant and cannot assist their trial preparation. They then use this self-created problem to argue that they need even more time to review it. Taking discovery requires understanding your case and making choices towards its preparation. We should not be burdened with Defendants' failure (or tactical choices) in this regard.<sup>8</sup>

**2. Defendants' Inability to Adhere to the Schedule Does Not Provide "Good Cause" for Modification.**

Contrary to Defendants' assertions, we do not have a "tremendous amount of work to do to complete [our] document production[ ]". JL at 8. As discussed above, Plaintiffs have substantially completed our document production. Conversely, the fact that Defendants "do not believe that they can complete their document production currently underway before the

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<sup>8</sup> Defendants cite three cases in support of their position: Vilku v. City of New York, No. 06-CV-2095, 2007 WL 2713340 (E.D.N.Y. Sept. 13, 2007); Elliot Assocs., L.P. v. Peru, Nos. 96 CIV. 7917, 96 CIV. 7916, 1997 WL 436493 (S.D.N.Y. Aug. 1, 1997); and AMW Materials Testing, Inc. v. Town of Babylon, 215 F.R.D. 67 (E.D.N.Y. 2003). None of these cases supports Defendants' position. The movant in Vilku, for example, alleged that it had learned new facts requiring additional discovery and, in addition, reasonably claimed to have misunderstood whether the discovery at issue fell under expert discovery (which had not yet closed) or fact discovery (which was closed). Vilku, 2007 WL 2713340 at \*5. Neither situation exists here. Defendants cite Elliot Associates for the proposition that delays in document production that affect depositions may justify the extension of discovery; however, that case involved the complicated scheduling of foreign depositions pursuant to the Hague Evidence Convention. There has been no suggestion of such complicated deposition scheduling in this case. Finally, Defendants favorably cite the fact that they have asked for an extension before the deadline expired, in accord with AMW Materials. However, the mere fact that Defendants had the foresight to bring this motion before discovery had actually closed does not, in and of itself, establish "good cause" to support Defendants' requested extension.

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discovery cutoff”, JL at 8 (emphasis added), is not grounds for “good cause” under Rule 16, as this impending failure is due to their own lack of diligence in the discovery process. In re Orange Boat Sales, 239 B.R. at 474-75. We believe that, as experienced litigation counsel, if ordered to do so, Lime Wire will add resources as needed to complete their productions quickly. Indeed, if they want or need to turn over documents unreviewed, we will stipulate to a non-waiver of attorney-client privilege. Defendants can meet this schedule. They choose not to.

**3. Defendants’ Purported Discovery Disputes Are Manufactured to Extend Discovery and Do Not Establish “Good Cause”.**

Defendants contend that the mere existence of discovery disputes establishes “good cause” that warrants an extension to the schedule. That is not so and could not be so under the Federal Rules. Whether taken collectively or individually, the issues – addressed in turn below – do not establish “good cause”.<sup>9</sup>

***a. Application of Additional Search Terms and Review of Additional Documents.***

Defendants assert that discussions relating to, and the actual application of, a “final” set of search terms necessitate additional discovery time. This is not the case.

We have already applied 138 terms to our electronic materials. In addition to these entirely sufficient and expansive terms, the parties have been negotiating the application of additional search terms. To be clear, there are certain search terms that the parties are still negotiating, but the parties are in substantial agreement as to the vast majority of search terms and, in any event, even application of a limited number of additional terms will not impede completion of our production to Defendants.

***b. Additional Time Required to Review Documents Already Produced.***

Defendants claim that the “parties and experts need time to review all of the documents produced”. JL at 8. Plaintiffs and our experts do not need additional time; Defendants and their experts apparently do. Plaintiffs have already completed their review of the documents Defendants had produced as of October 15, 2007, and we anticipate that our experts’ reports could be completed in short order. That Defendants have failed to complete their review of produced documents and to retain experts in a timely manner does not establish the “good cause” necessary to extend discovery.

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<sup>9</sup> Defendants make reference to and attach a letter discussing additional alleged disputes. As an initial matter, the vast majority of the issues raised in Defendants’ September 28, 2007 letter had not been raised at any point during the parties’ “meet and confer” sessions, despite the fact that the parties met and conferred numerous times over the course of the last four months. Setting aside for the moment the propriety of raising issues that were not discussed at any “meet and confer” sessions (see Individual Practices in Civil Cases, Gerard E. Lynch, United States District Judge, September 13, 2006 at ¶2.F; Fed. R. Civ. P. 37(a)(2)(A)), Defendants’ inclusion of such issues – many of which are non-issues – can be for one reason only – to make the Court believe that differences between the parties’ positions in discovery are far greater than the reality. That is not “good cause”.

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Defendants rely on the assertion that the discovery period in the Prior Antitrust Matters lasted for considerably longer than discovery is scheduled to last in this case. JL at 9. The discovery period in unrelated matters should have no bearing on the schedule for this case. If, however, the schedules in other matters were relevant and indicative of the need for a lengthened schedule in this case, the appropriate time to have raised that concern was before the entry of the most recent Scheduling Order. Defendants did not do so. In fact, the December 20, 2007 deadline was selected expressly at Defendants' request; Plaintiffs' preference, instead, was to conclude discovery by November 13, 2007. No doubt Defendants have always believed that the mere presence of the antitrust counterclaims in this case provided an automatic ticket to a very lengthy schedule. We ask this Court to prove that assumption wrong.

Defendants also contend that their lack of "unlimited resources" prevents them from both reviewing Plaintiffs' production and producing their own documents. JL at 9. This is not credible. First, of course, the volume of discovery is a direct response to Defendants' own document request, which consisted of 264 individual requests with dozens and dozens of subparts. Defendants knew the schedule the parties were under when they served such a request. It is ironic that Defendants claim both that the discovery they have received to date is too "monstrous", JL at 9, and yet somehow that we have not yet given them enough! Defendants have what they need now, in their possession. That they are unaware of that fact demonstrates their lack of diligence in reviewing what they have, rather than constituting any reflection on our production efforts.

Second, as to resources available: there are numerous temp lawyer and temp paralegal firms that could immediately assist Lime Wire. Considering the well-known commercial success of Lime Wire and its principals, it is clear that money is not the issue.

***c. Provision of Documents Proving Ownership.***

Defendants argue that Plaintiffs have failed to provide evidence of ownership for the approximately 3,000 works that currently form the basis for Plaintiffs' claims, asserting that Plaintiffs have failed to produce "document one" on this topic. JL at 7. In fact, on February 21, 2007, Plaintiffs produced to Defendants copies of the United States Copyright Office Form SR certificates of registration for all works identified in the First Amended Complaint. "A certificate of registration from the United States Register of Copyrights constitutes prima facie evidence of the valid ownership of a copyright." Hamil America Inc. v. GFI, 193 F.3d 92, 98 (2d Cir. 1999); 17 U.S.C. § 410(c) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate"). Again, this is about delay – not because Defendants really doubt ownership.<sup>10</sup>

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<sup>10</sup> Because Defendants cannot seriously contest Plaintiffs' ownership interest in the tracks at issue, Defendants' sudden interest in disputing ownership can only be about increasing the burden associated with discovery. Against

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The September 27, 2007 discussion to which Defendants refer regarding ownership, JL at 7, involves the provision of additional evidence, in the form of a declaration attesting to ownership. Interestingly, until the September 27, 2007 “meet and confer” session, Defendants had specifically agreed to “table” the issue of ownership declarations until a later date. The fact that this issue was suddenly revived days before this JL is indicative of Defendants’ efforts to manufacture any issue possible to give the impression of significant outstanding discovery disputes. Regardless, the “issue” that Defendants reference is moot. It is Plaintiffs’ burden to establish ownership, and we have agreed, to the extent necessary, to provide additional documentary and/or testimonial evidence in that regard.

***d. Provision of Agreements With Other P2P Companies.***

Defendants have also raised for the first time a claim that Plaintiffs have refused to produce the agreements they have made with all P2P companies. JL at 7. Plaintiffs are not entirely clear as to what Defendants are referring. Plaintiffs have agreed to produce all agreements between Plaintiffs and P2P companies that are now distributing their content over the Internet (with the exception of settlement agreements) in the files of their custodians. These agreements either have already been produced, or will be produced in short order as part of our remaining production. In addition, to the extent that relevant documents relating to these agreements were located within any custodian’s files, they would have been (or will be) produced.

***e. Rule 26 Disclosure Responses and Interrogatory Responses.***

Defendants also claim that Plaintiffs’ Rule 26 disclosures and Interrogatory Responses (served on October 24, 2006 and March 9, 2007, respectively) are insufficient. These arguments are really about whether we have given them the proper names of document custodians (both the Rule 26 disclosures and the interrogatories relate to providing names of certain categories of persons). We have. Not including the numerous custodians whose files were included as part of the Prior Productions, we have produced documents from the files of sixty-five people. Defendants’ litany of claims about the adequacy of our identification of knowledgeable people is without merit. This issue is simply akin to the old culinary practice of throwing spaghetti against the wall to see what sticks. None sticks here.

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this backdrop, Plaintiffs would like to raise the possibility of deferring ownership issues until after the Court has made a determination of liability. See, e.g., *In re Napster, Inc. Copyright Litig.*, No. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at \*12 n.5 (N.D. Cal. June 1, 2005) (discussing the bifurcation of liability and damages). Similarly, courts have used other methods to balance the need of proving ownership with the tremendous burden such proof can occasion. For example, the parties might “test” the underlying liability questions in this case using a small subset of the copyrighted files, and then turn to large-scale proof of file ownership at a later stage of the litigation, if necessary. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 5 & n.1 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994) (approving “test case” procedure “[f]or convenience and to avoid untoward discovery expenses with respect to largely duplicative matters”).

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With respect to our Interrogatory Responses, Defendants' demand that Plaintiffs canvass each and every employee to provide a comprehensive list of "all" possible persons with knowledge, including third parties outside of Plaintiffs' control,<sup>11</sup> is neither reasonable nor tenable. Instead, Plaintiffs have responded fairly to Defendants' interrogatory request, identifying those employees with the most knowledge. "The slim chance" that a party might "discover relevant information outside the core group of persons listed" by Plaintiffs "does not justify the effort" that would be required to provide this additional voluminous information. In re Priceline.com Sec. Litig., 233 F.R.D. 83, 87 (D. Conn. 2005). Having already provided a thorough list of all current, most knowledgeable employees, listing additional names would not serve any useful purpose and would merely increase Plaintiffs' burden. See Barrows v. Koninklijke Luchtvaart Maatschappij, 11 F.R.D. 400, 401 (S.D.N.Y. 1951). Defendants already have 6.5 million pages of documents from Plaintiffs. If they reviewed those documents, they could see whether there are any employees who should have been additional custodians whose documents should have been searched. However, there is no reason to make Plaintiffs search the documents of additional employees before Defendants have reviewed the documents they have already received, and have any basis for arguing that additional custodians' documents should be searched.

With regard to Rule 26 disclosures, Defendants mischaracterize the nature of Plaintiffs' obligations. Contrary to Defendants' assertion, Rule 26 does not require parties to identify "each individual likely to have discoverable information", as Defendants' partial quotation of the rule suggests, see Defense counsel's September 21, 2007 letter, but, more narrowly, requires identification only of "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses". Fed. R. Civ. P. 26(a)(1)(A) (emphasis added). Plaintiffs' Rule 26 disclosures, indeed, identify these very individuals, rendering Defendants' claim entirely without merit.

*f. Alleged Delay or Refusal to Provide Critical Discovery.*

Defendants' claims regarding delays in providing the Prior Productions are also baseless. First, Defendants have been in possession of substantially all of both UMG's and Warner's Prior Productions for approximately five months; they received Sony BMG's Prior Productions two months ago. They also concede that they received significant portions of EMI's Prior Productions approximately three months ago.<sup>12</sup>

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<sup>11</sup> Equally without merit is Defendants' contention that Plaintiffs' custodian lists are somehow deficient. Defendants offer no support for this position, only speculation, which is insufficient. Defendants also take issue with the production of organizational charts. However, Plaintiffs agreed to produce relevant current and historical organizational charts. Defendants have now received relevant organizational charts for all four record companies. In the same vein, Defendants contend that they "have asked for confirmation that Plaintiffs are searching the records of former employees as well". JL at 7. Plaintiffs do not know to what "meet and confer" Defendants are referring (as Defendants have, again, not specified the relevant "meet and confer"), and have no knowledge of this request.

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Second, Defendants imply that proof of Plaintiffs' needless delays is found in how long it took to produce these materials. Defendants claim that these documents are "presumably simple to copy and send to Defendants". JL at 2. This argument is about a resolved issue. By their own concession, Defendants have had these productions for months. In any event, whatever additional time productions may have taken was due to the fact that many documents were subject to confidentiality and/or non-disclosure agreements with third parties that had to be resolved (as they have been). To accomplish this, Plaintiffs sent 115 letters to third parties before production of documents found in the Prior Productions.

Further, Defendants now complain even about getting these Prior Productions – as if we had unilaterally chosen to overload them with what they dismissively refer to as "stale" documents. JL at 5. In fact, Defendants asked for these productions by name and in their entirety. See Defendants' First Request for Production of Documents, Request Nos. 91 and 201. In addition, a number of Defendants' own document requests were copied virtually word-for-word from the document requests in the Hummer Winblad litigation, and the documents produced in the Hummer Winblad litigation in response to those requests are sufficient in response to nearly identical requests now. For example, Request Nos. 258-264 of Defendants' First Request for Production of Documents are nearly verbatim copies of Request Nos. 40-46 of Hummer Winblad's First Set of Requests for Production of Documents.

Despite their oft-repeated claims that they are being overwhelmed with documents, in connection with UMG and EMI, Defendants claim that they in fact want more. Defendants have, in particular, already received almost a million pages of materials responsive to their antitrust claims from UMG and EMI. Defendants simultaneously label such documents as "stale", JL at 5, admit that they have not reviewed them, and complain that they want more. They have shown neither need nor entitlement. We have invited Lime Wire to tell us if there is anything they believe is missing from those productions. They have not. EMI and UMG are the recipients of particularly unfair characterizations regarding the adequacy of their productions. EMI is, in fact, the smallest of the Plaintiff record companies, but has produced by far the largest amount of any of the record companies in connection with making its Prior Productions (over 600,000 pages). It is certainly true that EMI has refused to produce more – against the background of its previous productions, that is entirely reasonable. Moreover, with respect to UMG, in addition to the Prior Productions, UMG has voluntarily provided even more documents (encompassing a period post-dating the Prior Antitrust Matters) to Defendants. Both UMG and EMI should be able to rest on productions made to date unless Lime Wire makes a showing of good cause for more.

Comparisons of UMG and EMI's efforts to those of Warner and Sony BMG with respect to the so-called antitrust productions are inapposite. UMG and EMI, which were parties to the Hummer Winblad litigation (Sony BMG and Warner were not), made significantly more

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<sup>12</sup> Plaintiffs have now received all of EMI's production. On October 15, 2007, we learned that a small portion of EMI's Prior Production – totaling 143 pages – had not yet been produced. These pages were produced on October 15, 2007.



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comprehensive productions as part of that litigation (and provided Defendants with those entire productions). Thus, the fact that Warner and Sony BMG did more here simply reflects that position.

Defendants also attempt to cast aspersions on UMG and EMI by indicating that the District Court in the Hummer Winblad case ordered them to produce otherwise privileged documents. While Defendants mention – in a footnote – that the order was ultimately vacated, they falsely imply that it was vacated only because of a confidential settlement. That is not true. In the Hummer Winblad case, the District Court ordered plaintiffs UMG and EMI, and defendant Bertelsmann, to produce otherwise privileged communications. UMG and EMI appealed the Court's ruling, and the Ninth Circuit issued an emergency stay of the ruling. While UMG and EMI's appeal was pending, the District Court granted their motion for sanctions against defendant Hummer Winblad for spoliation of evidence. Hummer Winblad then settled the underlying matter. The Ninth Circuit ultimately reversed the ruling against Bertelsmann, finding that the District Court ruling applied the wrong legal standard – the same erroneous standard applied in ruling against UMG and EMI – and that it had misapplied and misconstrued key facts. UMG Recordings, Inc. v. Bertelsmann AG (In re Napster Copyright Litig.), 479 F.3d 1078 (9th Cir. 2007). As part of UMG and EMI's settlement with Hummer Winblad, the District Court vacated and depublished its ruling against them, noting in the process that it would in any event have had to revisit that ruling given the Ninth Circuit's reversal of the Bertelsmann ruling. Defendants' letter also asserts that the U.S. Department of Justice "reopened its investigation" after learning of the District Court's order in the Hummer Winblad case. However, the DOJ simply conducted an inquiry, which it closed without taking any action.

In addition, in their litany of complaints regarding the sufficiency of Prior Productions as a whole, Lime Wire ignores the plainly relevant fact that the document productions in the Prior Antitrust Matters were sufficient for other entities, including the New York Attorney General's Office and the U.S. Department of Justice, to conduct extensive investigations into much of the same alleged conduct raised in the counterclaims. Since none of these entities found that any of the record companies were involved in anticompetitive activity, it is unclear precisely what additional materials Defendants need, or what they expect to find.

### **C. Conclusion**

We respectfully request that this Court assist us in bringing this litigation to an orderly close, resolve the pending discovery issues set forth herein, adopt the proposed scheduling order attached as Exhibit C, and grant our request for a protective order pursuant to Fed. R. Civ. P. 26(c).

### **III. Defendants' and Counterclaim Plaintiff's Request for a Separate Reply**

Defendants provided their portion of this joint letter to Plaintiffs on October 1, 2007. Due to the need for haste, Defendants requested Plaintiffs' response by the end of the week. Yet,

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Plaintiffs did not return their final opposition section for over two weeks. Because the current expert deadline is less than six weeks away and Defendants urgently need relief, Defendants have foregone the opportunity to include a reply in this joint letter to avoid the delays inherent in their preparing a reply and Plaintiffs' preparing a surreply. Defendants wish to put this joint letter and the issue of the length of the needed extension before the Court as soon as possible. Defendants believe, however, that a reply to Plaintiffs' arguments and comments would be helpful to the Court. Accordingly, Defendants request permission to file a reply in a separate document that the Court may review after it begins its consideration of this joint letter.

Additionally, the parties are now in the process of preparing a joint letter brief regarding the outstanding discovery disputes—disputes that Plaintiffs now say they want decided based on *this* joint letter. Defendants believe that to rule on the discovery disputes, however, the Court needs further detail. The discovery dispute joint letter brief that the parties are currently preparing will also address the eleventh-hour request for a protective order Plaintiffs made above. Accordingly, Defendants respectfully request that the Court rule on the pending discovery issues only after the complete briefing is submitted.

#### **IV. Plaintiffs/Counterclaim Defendants' Response to Defendants' and Counterclaim Plaintiffs' Request for a Separate Reply and Separate Briefing on Discovery Issues.**

Defendants' requests for a separate reply and additional briefing regarding discovery issues, respectfully, should be denied. Defendants contend that drafting such papers is no longer feasible, given Plaintiffs purported "delay" in providing a response to Defendants' draft letter. Defendants ignore the fact that Plaintiffs, over the course of the last two weeks – and despite our firm belief that no further discovery is necessary – have been diligently working with Defendants to reach agreement, where possible, on these issues so as to avoid the need for filing this joint letter at all. Despite these good faith efforts, the parties were unfortunately unable to reach an agreement. More importantly, Defendants could have raised many of the purported discovery issues set forth in this letter at anytime during the past several months. Instead, Defendants waited until October 1, 2007 to seek relief from the schedule, rather than seek an early resolution of these issues. Plaintiffs' request for additional briefing is nothing more than a delay tactic, intended once again to extend discovery needlessly. Indeed, the relevant facts are now before the court. Defendants have already addressed, at some length in this letter, the various discovery issues they intend to raise with the Court – rather than delay these decisions to another day, we respectfully request that the Court decide these issues now. Should, however,

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the Court grant Defendants' request to submit a separate reply, Plaintiffs would request that they be granted permission to file a separate surreply, which could be submitted in short order.

Respectfully submitted,

*Charles S. Baker / by J. D. Cohen*  
Charles S. Baker, *pro hac vice* *pro hac vice*  
*with permission*

cc: Katherine Forrest, *via e-mail*