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

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| VIRTUS INC.,<br><br>Plaintiff,<br><br>-against-<br><br>ORCHARD ENTERPRISES NY, INC.,<br><br>Defendant. | No. 1:26-cv-01883-MMG |

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY**

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Defendant Orchard Enterprises NY, Inc., by its attorneys, Shapiro Arato Bach LLP, respectfully submits this memorandum of law in opposition to plaintiff Virtus Inc.'s motion for a preliminary injunction and expedited discovery.

## PRELIMINARY STATEMENT

Orchard and Virtus are parties to a music distribution agreement under which, for the past 11 years, Orchard has distributed sound recordings that Virtus owns. According to Virtus's own written statements, Virtus was "very happy with [the] business partnership" (*see infra* p. 9), but the relationship soured when Virtus decided almost one year ago that Orchard should drastically discount its distribution fee. By December 1, 2025 it was clear that Orchard would not agree to Virtus's exorbitant demands. Virtus nevertheless waited until April 14, 2026 to bring this motion, which seeks preliminary injunctive relief on the erroneous ground that the parties' agreement had terminated ten and one-half months earlier, on June 30, 2025.

The Court should not grant Virtus the "extraordinary and drastic remedy" of a preliminary injunction which would effectively terminate the parties' contractual relationship.

Virtus has no likelihood of success on the merits. The agreement provides that it terminates on [REDACTED] and/or when Orchard fully recoups an advance it previously paid to Virtus. Virtus contends this "and/or" language means it could terminate the agreement: (A) on [REDACTED], standing alone; (B) upon recoupment, standing alone; or (C) in the unlikely event that both circumstances happen simultaneously, such that Virtus could terminate the agreement in June of 2025, when Orchard had recouped the advance. Virtus's contractual interpretation is belied by the contract read as a whole and the agreement's negotiation history, during which the parties agreed to extend the term of the agreement for a [REDACTED] to at least [REDACTED]. In addition, for the reasons explained below, Virtus *literally concedes* that its profferred

contractual interpretation is *contrary* to the parties' intent and the "history of the parties' agreements." Motion at 12.

There is also no irreparable harm. Virtus *waited for* months to seek preliminary relief and cannot explain why there is an emergency now. That alone negates any irreparable harm. In addition, Virtus's *prior statements extolling Orchard's praises*, including that Virtus was "very happy with our business partnership" (*see infra* p. 9), belie the two isolated supposed harms it conjured up for this motion and for which Orchard is not responsible. Virtus's prior statements also demonstrate that Virtus's real gripe is over Orchard's unwillingness to lower its distribution fee to what Virtus demanded. That is a purely monetary issue, involving no irreparable harm.

The balance of the equities also overwhelmingly favors Orchard. Virtus acted improperly and unfairly during the contract negotiations, by secretly altering the provision at issue and concealing the wording changes upon which it now relies. At worst, Virtus intentionally omitted redlining markings to trick the Orchard into agreeing to its changed phrasing. And at best, even accepting Virtus's contention that its concealment was inadvertent, Virtus unfairly introduced the appearance of ambiguity into a contract where there was none.

The public interest also will be disserved by the granting of any preliminary relief both because it will reward Virtus for its misdeed and allow Virtus to leverage emergency procedures to extract better business terms.

Virtus also fails to show "good cause" for expedited discovery. Virtus's delay precludes the granting of its discovery, especially because the Court can resolve this motion based solely on Virtus's lack of irreparable harm, a subject for which no discovery is needed. Virtus also has failed to identify a single fact it seeks to discover that is not already in its possession and has not explained how the evidence it seeks would help it establish its contentions.

For each of the above reasons, the Court should deny Virtus's motion in its entirety.

## STATEMENT OF FACTS

Orchard is a music distribution company. Cplt. ¶¶ 11-12. Virtus owns the copyrights to sound recordings made by the recording group Los Temerarios (the "Recordings"). Declaration of Mayra Alba ("Alba Decl.") ¶ 3.

The Distribution Agreement

Orchard and Virtus are parties to a Digital Distribution Agreement, dated as of May 19, 2015 (the "Agreement"). *Id*. at ¶ 8 and Ex. A. Under the Agreement, Orchard distributes the Recordings; collects revenue from those distribution activities; and remits to Virtus the revenue Orchard collects, less Orchard's distribution fee and other expenses. Alba Decl. Ex. A. ¶ 4. The Agreement provides for Orchard to pay Virtus advances against Virtus's anticipated earnings under the Agreement, and Orchard is entitled to recoup those advances against the earnings otherwise payable to Virtus. *Id*. ¶ 5A.

The Agreement's term has always revolved around a set number of years. As originally written, the Agreement was to terminate [REDACTED] after Virtus had delivered the Recordings to Orchard, although Orchard could extend the term if Orchard had not yet recouped its advances. Alba Decl. Ex. A ¶ 2. The Agreement was set to terminate [REDACTED], and the parties amended the Agreement in 2019 (the "2019 Amendment") to extend the term for another [REDACTED]. Declaration of Jason Pascal, sworn to on May 5, 2026 ("Pascal Decl."), ¶¶ 4–5; Alba Decl. Ex. C. The 2019 Amendment extended the Agreement's term "until the later of: (a) [REDACTED], and (b) the end of the quarter-annual period during which all advances under the Agreement are fully and completely recouped." Alba Decl. Ex. C ¶ 1 (emphasis in original).[1]

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[1] All emphases are emphasis added unless otherwise noted.

The 2022 Amendment

The parties again amended their Agreement in 2022 (the "2022 Amendment") to again provide for an extended term.[2] The negotiations began in earnest on March 24, 2022 (not in May, as Virtus misleadingly implies (Alba Decl. ¶¶ 18-19)). Pascal Decl. ¶ 7, Ex. 1. Jason Pascal of Orchard emailed Mayra Alba of Virtus that day and proposed two extension options: [redacted]. Pascal Decl. ¶ 7, Ex. 1.

Alba responded the very next day and readily agreed to extend the Agreement for another five years, until [redacted]. After explaining she was "interested in [redacted]," Alba summarized the relevant terms as follows:

[redacted]

Pascal Decl. ¶ 7, Ex. 2.

A few days later, on April 2, 2022, Alba reiterated Virtus's agreement to extend the Agreement's term for an additional five years:

[redacted]

Pascal Decl. ¶ 7, Ex. 3.

On April 6, 2022, Alba confirmed the five-year extension for a third time:

[redacted]

[2] The parties amended the Agreement in 2017 and 2021 as well, although those amendments did not alter the Agreement's term. Alba Decl. ¶¶ 11-13, 17, Exs. B and D.

Pascal Decl. ¶ 7 Ex. 4. [REDACTED] *Id.*[3]

Orchard sent Virtus a draft amendment on May 2, 2022. Alba Decl. Ex. E. The draft incorporated each of the previously confirmed deal points, including the agreed-upon [REDACTED] extension through [REDACTED]. *Id.* Tracking the language from the 2019 Amendment, which also extended the Agreement's term for a [REDACTED], the draft provided that the term would be extended "until <u>the later of</u>: (a) [REDACTED], and (b) the end of the accounting period during which all advances under the Agreement are fully and completely recouped" (the "Term Extension Provision"). *Compare id.* Ex. E ¶ 1 with *id.* Ex. C ¶ 1.

[REDACTED] Pascal Decl. ¶ 9.

Virtus sent Orchard a mark-up of the draft amendment later that day. Virtus's mark-up changed the Term Extension Provision by deleting "<u>the later of</u>," and changing "and" to "and/or," so that the Term Extension Provision read: "until: (a) [REDACTED], and/or (b) the end of the accounting period during which all advances under the Agreement are fully and completely recouped." *Id.*, Ex. F ¶ 1. [REDACTED] Virtus

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[3] [REDACTED] Pascal Decl. ¶ 7, Exs. 1–4.

redlined this and its other proposed changes to the draft, so that all its changes were clearly identified in redline form. *Id*. Ex. F.

On May 6, Orchard reverted with a further mark-up. *Id*. Ex. G. Orchard rejected Virtus's change to the Term Extension Provision (*id*. ¶ 1) [REDACTED]. *Id*. ¶ 2(b)(x). Orchard redlined this and its other proposed changes, such that all its proposed changes were clearly identified. *Id*. Ex. G.

Virtus sent back another draft that evening, accompanied by a cover email stating "**[t]his**"—singular—"will be very important to us and will still have Orchard covered. What do you think? Can we move forward to sign?" *Id*. ¶¶ 26, 28 and Ex. H. Consistent with the cover email's reference to a *single* change, Virtus's draft included just one redlined substantive change. *Id*. Ex. H. [REDACTED]

[REDACTED]

[REDACTED]

*Id.* at ¶ 2(b)(x).[4] That change was not "beneficial" to Orchard, as Virtus falsely claims (Alba Decl. ¶ 26; Motion at 6); it was *detrimental* to Orchard, [REDACTED]

[REDACTED]. But it was consistent with the substance of Virtus's cover email: [REDACTED]

[4] The Recoupment Provision appears in red text in Virtus's May 6 draft, but Virtus did not add the provision to its draft. Rather, Orchard reinserted the Recoupment Provision in its own prior draft of the 2022 Amendment, and Virtus's subsequent draft retained all the redlining contained in that prior draft. *Compare* Alba Decl. Ex. G *with id.* Ex. H. Thus, the red text contained in the Recoupment Provision in Virtus's May 6 draft reflects Orchard's prior proposed changes to that provision (Ex. H ¶ 2(b)(x)), and Virtus's change appears in blue within that provision. *Id*.

Virtus made another change to the draft amendment: it again deleted "the later of," and changed "and" to "and/or" in the Term Extension Provision (Alba Decl. Ex. H ¶ 1), but **Virtus concealed those changes from Orchard by not redlining them** (*id.* ¶ 27). Thus, unbeknownst to Orchard (Pascal Decl. ¶ 12–13), Virtus's draft provided the following term extension:

> Notwithstanding anything contained within the Agreement, the parties agree that the Term of the Agreement is hereby extended, without interruption, until: (a) , and/or (b) the end of the accounting period during which all advances under the Agreement are fully and completely recouped.

*Id*.

On May 10, Orchard sent Virtus a further draft of the 2022 Amendment. Alba Decl. Ex. I. Because Orchard did not understand Virtus had again changed the Term Extension Provision, Orchard made no further changes to that provision (Pascal Decl. ¶ 14), and the parties signed a version of the 2022 Amendment that included the language Virtus slipped in. Alba Decl. Ex. J.

Virtus's Delay in Seeking Preliminary Injunctive Relief

Virtus notified Orchard on May 6, 2025, of Virtus's belief that the Agreement's term was soon to end (Alba Decl. Ex. K), allegedly because Orchard was going to recoup its advance during the quarter ending June 30, 2025 (*id.* ¶¶ 31, 35).

The parties then began discussing a new potential deal (*id.* ¶¶ 38-39), but Virtus could not reasonably have understood Orchard's "willingness to negotiate … as a concession and acknowledgement that the Term of the []Agreement was over," as Virtus now claims. *Id*. ¶ 38. To the contrary, Orchard repeatedly told Virtus that Orchard disputed Virtus's position:

- On May 6, Orchard disputed that the Agreement could terminate before , explaining that "recoupment alone doesn't end the term." *Id*. Ex. K.

- On May 7, Orchard's in-house counsel stated, "it's quite clear that the Orchard never agreed to an earlier-of term length." Pascal Decl. Ex. 18.

- On May 21, Orchard explained "we do not believe that there is any reasonable argument that the term ends upon recoupment. But that doesn't stop us from negotiating an amendment that would benefit everyone." *Id*. Ex. 19.

- On May 30, Orchard told Virtus "[w]e're ready to move forward despite this issue, but we are clear and confident as to our rights." *Id*. Ex. 20.

- On December 2, 2025, Orchard reiterated "I want to be clear that our position on the current agreement has not changed; we are confident that the agreement remains active and enforceable through [REDACTED] . . . ." *Id*. Ex. 21.[5]

The parties' negotiations ended no later than December 2, 2025, after Virtus escalated its financial demands and then concluded there was nothing further to discuss after Orchard proposed different terms. Pascal Decl. ¶ 22.

In addition, a supposed "six-month grace period" Virtus "offered" to Orchard, ostensibly "permitting Orchard to continue to commercially exploit the Recordings while the parties attempted to negotiate a new agreement," ended on December 31, 2025. Alba Decl. ¶¶ 37, 41.

Virtus nevertheless did not file this action until March 6, 2026 (Dkt. No. 1), months after Orchard declined Virtus's demand. Virtus waited even longer, until April 14, 2026, to file its motion for a preliminary injunction and expedited discovery (Dkt. No. 14)—almost a year after Orchard first told Virtus on May 6, 2025, that Orchard disputed Virtus's position; ten and one-half months after the Agreement supposedly terminated on June 30, 2025; and four and one-half months after the parties' negotiation ended on December 2, 2025.

[5] Virtus also wrongly contends that no one "at the Orchard raised any contention that … Virtus had misled Orchard when it sent the incorrectly redlined draft of the amendment on May 6, 2022." Alba Decl. ¶ 34. Not true. Orchard's in-house counsel said the following in his May 7 email to Virtus: "any arguable ambiguity in this language was slipped into a redline sent to us with the relevant edits ***hidden*** …." Pascal Decl. Ex. 18 (emphasis in original).

<u>The further lack of irreparable harm</u>

Virtus contends that Orchard's continued unauthorized exploitation of the Recordings is causing Virtus supposed harm because of "Orchard's ongoing and persistent failure to adequately monitor and protect the Recordings" and "pervasive and long-standing failure to either provide accurate [writer, producer and performing artist] credits" or "correct misattributions" of the same "in a timely manner." Alba Decl. ¶¶ 48, 54. Virtus contends these supposed "harms" are so significant they "must be mitigated immediately and urgently" by effectively terminating the parties' relationship now. Motion at 1, 3, 16-17.

Virtus, however, sang a different tune back in May and December 2025, when Ms. Alba told Orchard:

- "**[W]e would love** to" "**renew** it [the current contract]." Pascal Decl. ¶ 24; Alba Decl. Ex. K (May 6)
- "Please know that **I have no intention of terminating the contract**. On the contrary, **I am very happy with our business partnership and would prefer to extend it**." "**I would love to retain Orchard as the distribution company**—not just for this catalog, but also for upcoming content from Virtus." Pascal Decl. ¶ 25, Ex. 8 (May 22).
- "**I have no intention of leaving**," *Id*. (May 22); and
- "The Los Temerarios catalog has demonstrated consistent growth and remains one of the strongest and most stable Latin catalog assets in the industry." Alba Decl. Ex. L (Dec. 1).

As demonstrated below (*see infra* Section A), and as confirmed by the above concessions, Orchard has not caused any of the alleged harms.

Virtus made clear in its same pre-suit communications that its concerns were solely monetary. Those concerns revolved around Orchard's distribution fee, which Virtus initially felt should be lowered from [REDACTED] (and which Virtus then proposed slashing to [REDACTED]) because Virtus claimed to have learned that Orchard offered that rate to certain other clients. As Virtus explained in May 2025:

- "To renew [the Agreement,] we are not considering this time another advance, but to consider a royalty of ███ to Orchard." Alba Decl. Ex. K.
- "Now that the advance is nearly recovered, it felt natural to request a rate adjustment." Pascal Decl. ¶ 26, Ex. 8.
- "That said, I've come across information indicating that The Orchard offers an ███ rate to some clients. I don't see why Virtus wouldn't merit the same consideration." *Id*.
- "With all of this in mind—and beyond any legal interpretation—I kindly request that the rate be reduced to ███, with no further advance, and I'm happy to extend the term of the agreement." *Id*.

## ARGUMENT

### I. VIRTUS FAILS TO ESTABLISH ANY OF THE ELEMENTS NEEDED TO OBTAIN PRELIMINARY INJUNCTIVE RELIEF

The Court should deny Virtus's request for the "extraordinary and drastic remedy" of a preliminary injunction because Virtus has failed to establish the requisite elements: "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also* Motion at 10. Virtus cannot make the requisite showing under either the ordinary standard for a preliminary injunction or the heightened standard, which applies here, under which Virtus must establish a "clear" or "substantial" likelihood of success on the merits and make a "strong showing" of irreparable harm. *New York ex rel. Schneiderman v. Actavis, PLC*, 787 F.3d 638, 650 (2d Cir. 2015).[6]

[6] Under the ordinary standard, Virtus must establish: (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. *Schneiderman*, 787 F.3d at 650.

The heightened standard applies here because Virtus's injunction is "mandatory," *i.e.*, seeks to alter the status quo or the parties' last uncontested status. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018); *Schneiderman*, 787 F.3d at 650; *see also* Motion at 18-19. The parties' last uncontested status was that immediately preceding Virtus's May 2025 email explaining its belief that the Agreement was coming to an end. Alternatively, the last uncontested status occurred during the supposed "grace period" Virtus claims to have voluntarily extended to Orchard, based on Virtus's interpretation of the Agreement.

*Asa v. Pictometry Int'l Corp.*, upon which Virtus relies (Motion at 18-19), is not to the contrary. The court entered a preliminary injunction requiring the parties to *continue* their relationship under the contract in dispute, rather than allowing one party to terminate that agreement. 757 F. Supp. 2d 238, 246-47 (S.D.N.Y. 2010). That is precisely what Orchard seeks here, a continuation of the parties' contractual relationship during the pendency of this action.

### A. Virtus Cannot Establish Irreparable Harm Given Its Months-Long Delay And Failure To Demonstrate Actionable Harm, Much Less Any Harm Not Compensable By Monetary Damages

The Court should deny Virtus's motion based solely on Virtus's lack of irreparable harm because irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction" and must be satisfied before the remaining requirements need be considered. *Gov't Emps. Ins. Co. v. Patel*, 166 F.4th 280, 291 (2d Cir. 2026) (cleaned up). Indeed, even in this putative copyright infringement case, there is no presumption of harm, and Virtus "must show that, on the facts of [its] case, the failure to issue an injunction would *actually* cause irreparable harm." *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010) (emphasis added).

Virtus cannot establish the requisite irreparable harm because (1) it delayed in seeking preliminary relief; (2) the harm it alleges is either generalized and presumed by Virtus to exist or, where specific, not connected to Orchard's supposed unauthorized distribution and illusory; and (3) its pre-suit communications negate any showing of irreparable harm and demonstrate that Virtus sought to terminate the Agreement for monetary reasons. *See*, *e.g*., *Shapiro v. Cadman Towers, Inc.,* 51 F.3d 328, 332 (2d Cir. 1995) (stating that irreparable harm requires "an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages") (cleaned up).

1. Virtus's Delay Refutes Any Claim of Irreparable Harm

Virtus's delay in seeking a preliminary injunction negates any showing of irreparable harm. As demonstrated above, Virtus waited to seek preliminary injunctive relief for (1) almost a year after Orchard first told Virtus on May 6, 2025 that Orchard disputed Virtus's position; (2) ten and one-half months after the Agreement supposedly terminated on June 30, 2025; and (3) four and one-half months after Virtus walked away from the parties' negotiations on December 2, 2025.[7] This delay negates any ability of Virtus to demonstrate irreparable harm. Indeed, "it is well established that a court must consider a plaintiff's delay in seeking relief" because "delay, standing alone, may preclude preliminary injunctive relief." *Coscarelli v. ESquared Hospitality LLC*, 364 F. Supp. 3d 207, 222 (S.D.N.Y. 2019) (cleaned up).

"[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months," *Skillz Platform Inc. v. Voodoo Sas*, 2026 WL 717220, at *4

[7] Because Virtus was on notice for months of Orchard's position that the Agreement could not terminate before [redacted], Virtus cannot start the delay clock only as of January 1, 2026, once the "grace period" it supposedly extended to Orchard expired. Regardless, even if the delay clock started as late as January 1, 2026, Virtus still waited far too long (over three- and one-half months) to seek preliminary relief.

(S.D.N.Y. Feb. 12, 2026), because such delay "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276–77 (2d Cir. 1985) (denying relief based on, among other things, delay of ten weeks); *see also Life Techs. Corp. v. AB Sciex Pte. Ltd.*, 2011 WL 1419612, at *7 (S.D.N.Y. Apr. 11, 2011) (finding delay of three months negates irreparable harm from alleged infringement). Virtus has plainly waited too long to obtain preliminary relief.

2. The Harms Virtus Points to Are Vague or Speculative

The supposed harms Virtus identifies are either improperly generalized or illusory. Virtus contends it will suffer irreparable harm in the absence of preliminary relief because Orchard's alleged "infringement impairs Virtus's ability to control the channels through which the Recordings are distributed and further develop the market for the Recordings." Alba Decl. ¶ 46; Motion at 1, 3, 15. That generalized contention is just another way of explaining presumed harm from alleged continued infringement, which is no longer actionable in this Circuit. *See Salinger*, 607 F.3d at 82.

Nor is it correct that Orchard's continued distribution prevents Virtus from releasing and scheduling new recordings. Alba Decl. ¶ 46; Motion at 1, 3, 16. Virtus can continue to exploit and release new recordings, with Orchard distributing those works, just as Orchard has done for the last 10-plus years under the Agreement.

Orchard's alleged continued unauthorized distribution also cannot harm Virtus based on "Orchard's failure to police third party infringements" on the Roblox platform or to "maintain and ensure accurate credits." Motion at 16-17; Alba Decl. ¶¶ 48, 54. *First*, to the extent Virtus suffered any harm from either third-party posts on the Roblox platform or a platform's inaccurate

crediting, such purported harm did not flow from Orchard's alleged *unauthorized* exploitation, which is the gravamen of Virtus's claims. Rather, both alleged events occurred while Orchard was an *authorized* distributor of the Recordings (Alba Decl. ¶¶ 49, 52, 54), with the inaccurate crediting issue allegedly continuing for years (Alba Decl. ¶ 54).

*Second*, the claimed harms were caused by third parties for which Orchard is not responsible. Virtus falsely contends Orchard failed in its obligation to "monitor[] and protect[] the Recordings against unlawful copyright infringement, which is a key function and duty of an exclusive distributor of master recordings." Motion at 16; Alba Decl. ¶ 53. But Paragraph 4 of the Agreement expressly covers "Orchard's Obligations," and those obligations do not include protecting against third-party infringement (or mistaken credits). *See* Alba Decl. Ex. A, ¶ 4.[8]

Moreover, far from "causing harm on a daily basis" (Alba Decl. ¶ 48), these supposed issues were isolated and contained. The "credit" issue of which it complains (*id*. at 9-10) is limited to a single digital platform, Apple Music (Pascal Decl. ¶ 34); it does not extend to multiple platforms, as Virtus falsely alleges (Alba Decl. ¶¶ 54-56). Virtus identifies just one example of Orchard's supposed "failure" to "monitor[] and protect[]" the Recordings from third-party infringement—the alleged posting of a livestream on the Roblox platform. Motion at 9.

The Apple credit issue is also of Virtus's own making. As detailed in the Pascal Declaration, the Apple credit issue arose because over the years, Virtus has changed the credits

[8] "Orchard's Obligations" are limited to

The 2019 Amendment includes some additional obligations regarding Orchard's distribution of physical product, but none relate to policing infringement or credits. Alba Decl. Ex. C.

accompanying its various recordings, and Apple does its own online research and reserves the right to change credits at its discretion to those it contends are more accurate. *Id*. ¶ 32.

And Roblox maintains it did not stream the recordings about which Virtus complains and that the streaming came from a different source. *Id*. ¶ 37. Virtus, moreover, provides no details regarding supposed communications from either Roblox or Apple declining to communicate with Virtus. Alba Decl. ¶¶ 50-55. Virtus never reported this supposed hurdle to Orchard (Pascal Decl. ¶ 39) and it is belied by communications Virtus shared with Orchard showing that Roblox responded to Virtus with a question that Virtus did not answer (*id*. ¶ 36, Ex. 9).

Furthermore, [REDACTED] Orchard nevertheless voluntarily assisted Virtus regarding the asserted Roblox and Apple credit issues, as a courtesy and good business partner, and kept Virtus informed of its efforts. Pascal Decl. ¶¶ 30, 37.

*Third*, Virtus's current complaints are belied by its repeated pre-suit communications expressing how much Virtus wished to continue working with Orchard and how satisfied Virtus was with Orchard's services. Virtus even asked to expand the relationship. As Virtus's representative stated:

> I have no intention of terminating the contract. On the contrary, I am very happy with our business partnership and would prefer to extend it." "I would love to retain Orchard as the distribution company—not just for this catalog, but also for upcoming content from Virtus."

Pascal Decl. Ex. 8.

Virtus's cited preliminary injunction cases do not support Virtus's requested injunction because, unlike Virtus's paltry, if not non-existent showing of harm, the plaintiffs in the cited cases made concrete showings of specific, non-speculative, and quantifiable harm:

- In *WPIX, Inc. v. ivi, Inc.*, the defendant's unauthorized Internet retransmission of copyrighted television programming threatened "to destabilize the entire industry" because such unauthorized "retransmissions … would devalue [plaintiff's] programming by reducing its 'live' value and undermining existing and prospective retransmission fees, negotiations, and agreements." 691 F.3d 275, 285–86 (2d Cir. 2012). The defendant also was unable to pay damages. *Id*. at 286.

- *Asia TV USA Ltd. v. Kamran Int'l Trade Ltd.* involved a foreign defendant likely to evade any money judgment. 2018 WL 6313215, at *10 (E.D.N.Y. Sept. 25, 2018), *report and recommendation adopted*, 2018 WL 6313180 (E.D.N.Y. Dec. 3, 2018).

- The defendant in *Muze, Inc. v. Digital On-Demand, Inc.* was poised to poach a valuable contract from the plaintiff, damaging its "reputation as a leader in its field." 123 F. Supp. 2d 118, 131 (S.D.N.Y. 2000).

- Film producers in *Hounddog Prods., L.L.C. v. Empire Film Grp., Inc.*, risked losing a unique, one-time opportunity and hence suffering irreparable and hard-to-calculate harm where their distributor failed to meet its contractual requirements; as the court observed, a "lost opportunity to capitalize on the public's interest in the film…is, by its nature, irreparable." 826 F. Supp. 2d 619, 632–33 (S.D.N.Y. 2011).[9]

3. Any Dispute Over Distribution Fees or Infringement Is Easily Quantified and Compensable by Money Damages

Virtus also cannot establish the requisite irreparable harm because its own communications reveal this is a dispute over money (*e.g.*, Orchard's distribution fee), and "[c]ourts must pay particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for [the] injury." *WPIX*, 691 F.3d at 285 (cleaned up). As the emails cited above demonstrate (*see supra* p. p. 10) Virtus brought this lawsuit because it wants to pay Orchard a lower distribution fee—[REDACTED] [REDACTED]. That is quantifiable, compensable harm.

[9] *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.* involved the issuance of a permanent injunction upon a finding of patent infringement. 702 F.3d 1351, 1364 (Fed. Cir. 2012).

Even Virtus's claimed infringement is compensable by money damages. If Virtus prevails in its copyright claim, Virtus is entitled to recover either (1) its actual damages plus Orchard's profits attributable to the alleged infringement; or (2) statutory damages. 17 U.S.C. § 504. Each is readily quantifiable. Virtus's actual damages will equal the difference between the revenues Orchard remits to Virtus under the Agreement and the higher amount of revenues, if any, Virtus can prove it would have received for a different distribution deal in the open market, under which Virtus would pay a lower distribution fee. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 163 (2d Cir. 2001). Orchard's profits attributable to the alleged infringement will equal the revenues Orchard collects for exploiting the Recordings, less Orchard's costs. 17 U.S.C. § 504(b). Statutory damages, if applicable, will be those which the jury awards.

**B. Virtus Is Not Likely To Succeed, And Raises No Serious Questions, On The Merits**

1. The Distribution Agreement's Plain Language Extends the Term Through at Least [REDACTED]

By its plain meaning, the Distribution Agreement is in force until at least [REDACTED]. The 'Extension of Term' clause states that the Agreement will terminate on "(a) [REDACTED], and/or (b) the end of the accounting period during which all advances under the Agreement are fully and completely recouped." Alba Decl. Ex. J ¶ 1. The term was thus extended to at least [REDACTED] [REDACTED], or longer, to the extent Orchard still has not recouped its advance.

Virtus contends that "and/or" unambiguously means only one thing: A or B or both, such that "the term described in the 2022 Amendment extends until '[REDACTED]' (A), or recoupment (B) or both." Motion at 13. But elsewhere in its memorandum, Virtus concedes that the Agreement *cannot* terminate on "A" standing alone. Specifically, Virtus claims the Agreement terminated on June 30, 2025, when Orchard had "fully and completely recouped" its

"last advance," (*i.e.*, (B)), because "*[t]he history of the parties' agreements . . . reflects that the parties intended for Orchard to be fully protected* ***so long as the term of the Agreement does not end before recoupment is realized***." Motion at 12. Thus, Virtus concedes that arriving at the specified date (*i.e.*, (A)), standing alone, was *not* intended. There is no way to reconcile that conceded party intent with Virtus's contention that "and/or" means the Agreement can terminate on [REDACTED], even if Orchard is not then recouped. That is because, as Virtus concedes, the Agreement and the Term Extension Provision are to *guard against* that result.

Virtus either ignores or obfuscates this fatal flaw inherent in its contractual interpretation. It details the supposed "B" and "both" situations, and says nothing about the "A" situation. Thus, Virtus explains how (1) "the unambiguous and plain language provides that recoupment, by itself, may end the term of the []Agreement"—the "B" situation (Motion at 12); and (2) "[r]ecoupment could have happened during the accounting period ending [REDACTED] in which case the term would end on [REDACTED] and the last day of the accounting period in which recoupment occurred"—the "both" situation (*id*. at 12-13).[10] Virtus also complains that Orchard's interpretation blocks the "B" situation and renders "the recoupment language … meaningless" because, under Orchard's interpretation, "the term of the Agreement would continue until [REDACTED] regardless of whether recoupment had occurred." *Id*. at 14.

But Virtus says nothing about how, under its interpretation, the term of the Agreement also could terminate on [REDACTED], even if Orchard remains unrecouped, the "A" situation.

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[10] Virtus's "both" situation, moreover, can occur only if Orchard were to recoup its advance in the accounting period between [REDACTED]. The Court should not interpret the provision as Virtus contends simply because the "both" situation could hypothetically occur in this single setting. To the contrary, "it is a well-established principle of New York contract law that a contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties." *Coscarelli*, 364 F. Supp. 3d at 225 (cleaned up).

That is because Virtus has already explained that the Agreement is intended to "fully protect" Orchard against the Agreement "end[ing] before recoupment is realized." Motion at 12.

Paragraph 2(c)(i) of the 2022 Amendment confirms the point, when it says "[f]or the avoidance of doubt … the Term of the Agreement will in no event end earlier than the end of the monthly accounting period during which all advances paid by Orchard (including, without limitation the [REDACTED]) are fully and completely recouped." Alba Decl. Ex. J ¶ 2(c)(i). That clause does not create a requirement inconsistent with the Extended Term Provision, as Virtus wrongly contends (Motion at 13); the clause confirms what the Extended Term Provision already says. *Whitebox Relative Value Partners, LP v. Transocean Ltd.*, 2020 WL 7406063, at *5 (S.D.N.Y. Dec. 16, 2020), *judgment vacated on other grounds, appeal dismissed*, 2022 WL 288183 (2d Cir. Feb. 1, 2022) ("[T]he phrase 'for the avoidance of doubt[]' indicat[es] that it is merely a clarification of what the language […] already conveys.").

Virtus is, in any event, wrong that "and/or" has one fixed meaning of "A or B or both." The article it cites makes the opposite point: "When *and/or* is used in a contract, the term is typically interpreted in the manner effectuating the intent of the parties as gathered from the entire contract" and when that intent is not entirely clear, "courts look to parol evidence when determining" it. Ira P. Robbins, *"And/or" and the Proper Use of Legal Language*, 77 MD. L. REV. 311, 328–29 (2018). *See also In re Mills' Estate*, 89 N.Y.S.2d 201, 202 (N.Y. Sur. 1949) (finding the term to apply in the disjunctive sense based on intent inferred from surrounding context); *Arnell Const. Corp. v. New York City Sch. Const. Auth.*, 144 A.D.3d 714, 717–18 (N.Y. App. Div. 2016) (finding term to be ambiguous); *Gatt v. BCRE 15 Union Square W. LLC*, 41 N.Y.S.3d 449 (N.Y. Sup. Ct. 2016) (finding term ambiguous and looking to extrinsic evidence to interpret it); *Application of Seneca Falls Cent. Sch. Dist.,* 459 N.Y.S.2d 689, 693–95 (Sup. Ct.

1983) (finding term ambiguous); *Essex Cnty. Bd. of Sup'rs v. Civ. Serv. Emp. Ass'n, Inc., Essex Cnty. Ch.,* 67 A.D.2d 1047, 1048 (N.Y. App. Div. 1979) (same); *Hicks v. Haight,* 11 N.Y.S.2d 912, 914–15 (N.Y. Sup. Ct. 1939) (same); *In re Brooklyn Tr. Co.*, 295 N.Y.S. 1007, 1017–19 (N.Y. Sup. Ct. 1936) (same).

Because Virtus concedes that, based on party intent, the "and/or" phrase cannot mean "A or B or both," its interpretation of the Term Extension Provision fails as a matter of law.

2. The Extrinsic Evidence Uniformly Favors Orchard

Virtus's interpretation also fails based on the extrinsic evidence, which is all in Orchard's favor. As set forth above, before they exchanged written drafts of the 2022 Amendment, the parties already had agreed that the amendment would (1) extend the term of the Agreement for five years, through [REDACTED]; (2) provide for a [REDACTED] advance payable to Virtus, and (3) include [REDACTED]. *See supra* p. 4; Pascal Decl. ¶ 7, Exs. 1–4. Orchard's interpretation of the 2022 Amendment tracks each of these previously agreed upon points; Virtus's interpretation tracks two of them (the advance and [REDACTED]) but departs from the other. This is yet another reason Orchard's interpretation should prevail.

Virtus's May 6, 2022 cover email attaching its deceptive May 6 draft also supports Orchard's interpretation. The cover email states "[t]his will be very important to us and will still have The Orchard covered," and Virtus contends those words put Orchard on notice of the changes to the Term Extension Provision that Virtus concealed. Motion at 6; Alba Decl. ¶¶ 27-28. In other words, Virtus contends its revised Extended Term Provision "still ha[s] The Orchard covered." But the only way the Extended Term Provision can "cover" Orchard is if the provision *prevents* the Agreement from terminating unless Orchard has recouped its advance. As set forth above, under Virtus's contractual interpretation, the provision does not cover Orchard in this

way, because under that interpretation, Virtus can terminate the agreement on [REDACTED], standing alone, and even if Orchard remains unrecouped. This is another reason Virtus's contract interpretation fails.

Any remaining ambiguity necessarily means Virtus cannot demonstrate a likelihood of success on the merits. *See Coscarelli*, 364 F. Supp. 3d at 225–26 ("given the unresolved ambiguity, Plaintiffs have not shown a likelihood of success on the merits").

### C. The Balance Of Equities Tips In Orchard's Favor

Virtus cannot demonstrate, as it must, that the balance of equities tips decidedly in its favor. As with the merits question, Virtus cannot meet its burden if the Court finds the 2022 Amendment is ambiguous. *Id.*

In addition, starting in May 2025 and for the next seven months, while Virtus was attempting to negotiate a new deal, Virtus never once mentioned the supposed harms upon which it now seeks to rely. It instead came forward with a clear ask: a lower distribution fee, which it claimed it deserved only because its representative allegedly had "come across information indicating that Orchard offers [the more favorable] rate to some clients." Pascal Decl. Ex. 8. The Court should, accordingly, not credit Virtus's conjured-for-litigation supposed harms.

Virtus, moreover, previously gave Orchard a supposed six-month "grace period" to continue to distribute the Recordings beyond the Agreement's alleged termination date. Virtus cannot demonstrate any meaningful hardship from the continuation for another short while of the parties' 11-plus-year relationship. *See also Givenchy SA v. William Stuart Industries*, 1986 WL 3358, at *6 (S.D.N.Y. Mar. 10, 1986) (finding no harm in requiring plaintiff to continue 15-year contractual relationship for the pendency of the action).

If an injunction issues, it will irreparably harm Orchard by permanently—and in difficult-to-measure ways—impairing Orchard's ability to exploit the Recordings. If the Court were to

enjoin Orchard from distributing Virtus's recordings, Orchard would have to remove the Recordings from online platforms like Spotify, YouTube, and Apple. Such a removal could cause the platforms to remove valuable data and information associated with the Recordings, such as play- and viewcounts, reviews, and listener comments, as may be applicable. Followers of the artist may also be lost, and the Recordings could disappear from playlists the platforms share with their users. These data and features help fuel consumer engagement with the works and, in turn, streams and sales of the works. Thus, even if the injunction were extinguished in the future, and Orchard redelivered the Recordings to such platform, it is possible that none of the data could be re-connected to the Recordings. As a result, an injunction, even if later reversed, would "negatively impact Orchard's ability to successfully exploit the [R]ecordings in the future in ways that would be difficult to quantify." Pascal Decl. ¶ 40.

### D. It Is Against The Public Interest To Grant Preliminary Injunctive Relief Under The Circumstances Present Here

Devoting just one sentence to the topic, Virtus asserts that the public has an interest in protecting copyright owners' rights. Motion at 19. But Virtus's argument is circular: it presupposes Virtus will show that the Agreement terminated, such that Orchard's continued distribution of the Recordings infringes Virtus's copyrights. That supposition is incorrect for reasons enumerated above. *See supra* Section B.

Regardless, the public interest will not be served by the requested preliminary injunction, for the same reasons the balance of hardships tips in Orchard's favor. The public interest will not be served by allowing Virtus to use the drastic relief of a preliminary injunction to extract more favorable financial terms for the distribution of the Recordings. Nor will the public interest be served by granting preliminary relief based on supposed harm Virtus manufactured for this

dispute, after extolling Orchard's distribution services and stating how much it wished to continue with Orchard, so long as Orchard cut its distribution fee.

Virtus also acted improperly and unfairly when it negotiated the now disputed language in the 2022 Amendment, by concealing from Orchard that Virtus had altered the Term Extension Provision. As a result of that concealment, Orchard executed the 2022 Amendment without rejecting Virtus's final changes to that provision, which is the only reason Virtus has been able to file this action and seek preliminary relief. The public interest will be disserved if Virtus is rewarded for its misdeed with preliminary injunctive relief.

### E. Any Injunction Must Be Supported By a Bond

If the Court were to grant Virtus its requested relief, Virtus should be required to post a bond under Rule 65(c) of the Federal Rules of Civil Procedure. Should the Court be inclined to grant such relief, Orchard respectfully requests an opportunity to demonstrate the losses it would suffer from an improvidently granted preliminary injunction so that the Court may order the posting of a bond "in an amount that the court considers proper." Fed. R. Civ. P. 65(c). *See*, *e.g.*, *Hutzler Mfg. Co., Inc. v. Bradshaw Int'l, Inc.*, 2013 WL 12623259, at *2 (S.D.N.Y. Mar. 28, 2013) (addressing amount of Rule 65(c) bond through supplemental briefing following granting of motion for a preliminary injunction).

## II. THERE IS NO GOOD CAUSE SUPPORTING EXPEDITED DISCOVERY

The Court should deny Virtus's request for expedited discovery for the same reasons Virtus's request for injunctive relief fails: Virtus fails to demonstrate either irreparable harm, including because of its delay, or a likelihood of success on the merits. *N. Atl. Operating Co. v. Evergreen Distributors, LLC*, 293 F.R.D. 363, 369–70 (E.D.N.Y. 2013); *Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 402 (S.D.N.Y. 2011).

Virtus demonstrates no reason why at this late stage—nine-plus months into the alleged infringement and four- and one-half months since Virtus walked away from the parties' negotiations—Virtus now needs emergency depositions and document productions.

Nor has Virtus demonstrated that discovery is needed to "enable the court to judge the parties' interests and respective chances for success on the merits at a preliminary injunction hearing," *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig*., 2014 WL 12959675, at *2 (S.D.N.Y. July 23, 2014), or that "essential facts are in dispute" for discovery to illuminate, *Fengler v. Numismatic Americana, Inc*., 832 F.2d 745, 747 (2d Cir. 1987). To the contrary, the Court can resolve this motion based solely on Virtus's lack of irreparable harm.

Even with respect to the merits, Virtus has neither identified a single fact it seeks to discover not already in its possession nor explained how the evidence it seeks would help it establish its contentions. Virtus seeks discovery regarding the negotiation of the 2022 Amendment but, based on the allegations of its Complaint and the contentions in Ms. Alba's declaration, Virtus already possesses the parties' negotiation history, and Virtus is not entitled to Orchard's attorney-client privileged internal communications. Virtus has thus not identified a "concrete basis" for the discovery it seeks. *Litwin*, 865 F. Supp. 2d at 402. That Virtus has already submitted a fully briefed motion supported by a declaration and exhibits, and seeks discovery only conditionally, if the Court rejects its contractual interpretation, further disfavors granting expedited discovery. *Vortexa Inc. v. Cacioppo*, 2024 WL 2979313, at *16 (S.D.N.Y. June 12, 2024); *Russell Reynolds Assocs., Inc. v. Usina*, 2023 WL 3270344, at *2 (S.D.N.Y. May 5, 2023). Virtus also fails to raise any issues around witness availability, asset transfer, or any of the other usual reasons expedited discovery is granted. *Compare Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (granting expedited discovery because defendants were foreign

entities who could easily hide their assets); *Suber v. VVP Servs.*, 2021 WL 1101235, at *10 (S.D.N.Y. Mar. 23, 2021) (same) and *Mitra v. State Bank of India*, 2005 WL 2143144, at *7 (S.D.N.Y. Sept. 6, 2005) (denying request for expedited discovery because there was no indication witnesses would be unavailable for depositions at a later date). Finally, Virtus has not even provided the Court or Orchard with the actual discovery it seeks, leaving Court and Orchard to infer its scope of inquiry from a single vague sentence.

**CONCLUSION**

For the foregoing reasons, Orchard respectfully requests that the Court deny in its entirety Plaintiff's Motion for a Preliminary Injunction and for Expedited Discovery and grant such further relief as the Court deems just and proper.

Dated: May 5, 2026
New York, New York

Respectfully submitted,

/s/ Cynthia S. Arato

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**WORD COUNT CERTIFICATION**

Pursuant to Local Civil Rule 7.1 and Section II.B of the Court's Individual Rules & Practices, the undersigned certifies that this brief contains 8,422 words and complies with the Court's formatting rules.

/s/ Cynthia S. Arato
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