

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

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

Plaintiffs,

v.

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

Defendants.

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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Preliminary Statement.....	1
Argument	5
I. THE UNDISPUTED MATERIAL FACTS SHOW THAT LIME WIRE IS LIABLE FOR CONTRIBUTORY INFRINGEMENT	6
II. LIME WIRE’S MOTION ON VICARIOUS LIABILITY FAILS BECAUSE THERE IS NO SONY “SAFE HARBOR” AND LIME WIRE HAS THE RIGHT AND ABILITY TO CONTROL THE INFRINGING USES OF ITS SOFTWARE	18
III. GORTON AND LIME GROUP ARE LIABLE BASED UPON THEIR ACTIONS	25
IV. PLAINTIFFS HAVE SHOWN DIRECT INFRINGEMENT OF THEIR SOUND RECORDINGS	31
V. DEFENDANTS’ MOTION FOR JUDGMENT ON PLAINTIFFS’ STATE LAW CLAIMS SHOULD BE DENIED	33
VI. GORTON AND THE MJG LW FLP’S MOTION FOR SUMMARY JUDGMENT ON THE FRAUDULENT CONVEYANCE CLAIM FAILS	34
Conclusion	37

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A&M Records, Inc. v. Napster, Inc.</i> , 114 F. Supp. 2d 896 (N.D. Cal. 2000), <i>aff'd in part and rev'd in part</i> , 239 F.3d 1004 (9th Cir. 2001).....	<i>passim</i>
<i>Adobe Sys. v. Canus Prod., Inc.</i> , 173 F. Supp. 2d 1044 (C.D. Cal. 2001)	25
<i>Aram, Inc. v. Laurey</i> , No. 05 Civ. 8380, 2006 WL 510527 (S.D.N.Y. Mar. 1, 2006)	27
<i>Arista Records, Inc. v. Flea World, Inc.</i> , Civ. No. 03-2670, 2006 WL 842883 (D. N.J. Mar. 31, 2006).....	17, 21, 22
<i>Banff Ltd. v. Limited, Inc.</i> , 869 F. Supp. 1103 (S.D.N.Y. 1994).....	19
<i>Capitol Records, Inc. v. Wings Digital Corp.</i> , 218 F. Supp. 2d 280 (E.D.N.Y. 2002)	27
<i>Case v. Fagnoli</i> , 702 N.Y.S.2d 764 (N.Y. Sup. Ct. 1999).....	36
<i>Century Pacific, Inc. v. Hilton Hotels, Corp.</i> , 528 F. Supp. 2d 206 (S.D.N.Y. 2007).....	14
<i>Elliot v. Elliot</i> , 365 F. Supp. 450 (S.D.N.Y. 1973)	35, 36
<i>Gershwin Pub. Corp. v. Columbia Artist Management, Inc.</i> , 443 F.2d 1159 (2d Cir. 1971).....	7, 19, 25
<i>Golden Budha Corp. v. Canadian Land Co. of America</i> , 931 F. 2d 196 (2d Cir. 1991).....	35, 36
<i>Halnat Pub. Co. v. L.A.P.A., Inc.</i> , 669 F. Supp. 933 (D. Minn. 1987).....	27
<i>In re Aimster Copyright Litigation</i> , 252 F. Supp. 2d 634 (N.D. Ill. 2002)	17
<i>In re Aimster Copyright Litigation</i> , 334 F.3d 643 (7th Cir. 2003)	<i>passim</i>

Interscope Records v. Leadbetter,
 No. C05-1149, 2007 WL 1217705 (W.D. Wash. Apr. 23, 2007).....32

Island Software and Computer Serv., Inc. v. Microsoft Corp.,
 413 F.3d 257 (2d Cir. 2005).....31

Lauratex Textile Corp. v. Allton Knitting Mills, Inc.,
 517 F. Supp. 900 (S.D.N.Y. 1981)28

Lechner v. Marco-Domo Internationales Interieur GmbH,
 No. 03 Civ. 5664, 2005 WL 612814 (S.D.N.Y. Mar. 14, 2005)27

Lippe v. Bairnco Corp.,
 249 F. Supp. 2d 357 (S.D.N.Y., 2003).....36

Luft v. Crown Publishers, Inc.,
 772 F. Supp. 1378 (S.D.N.Y. 1991).....27

Mandal v. City of New York,
 No. 02-CV-1234, 2006 WL 3405005 (S.D.N.Y. Nov. 26, 2006).....14

Mathieson v. Associated Press,
 23 U.S.P.Q. 2d 1685 (S.D.N.Y. 1992).....11

Matthew Bender & Co., Inc. v. West Pub. Co.,
 158 F.3d 693 (2d Cir. 1998)..... *passim*

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,
 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004),
vacated, 545 U.S. 913 (2005) *passim*

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,
 454 F. Supp. 2d 966 (C.D. Cal. 2006)5, 11

Microsoft Corp. v. Rechanik,
 249 F. App'x 476 (7th Cir. 2007)32

Musical Prods., Inc. v. Roma's Record Corp.,
 No. 05-CV-5903, 2007 WL 750319 (E.D.N.Y. Mar. 7, 2007).....27

Playboy Enter., Inc. v. Webworld, Inc.,
 991 F. Supp. 543 (N.D. Tex. 1997)19

Playboy Enter. v. Webworld Inc.,
 968 F. Supp. 1171 (N.D. Tex. 1997)20

Polygram Int'l Pub., Inc. v. Nevada/TIG, Inc.,
 855 F. Supp. 1314 (D. Mass. 1994).....21

Shapiro, Bernstein & Co., Inc. v. H.L. Green Co.,
316 F.2d 30419, 20, 25

Shelly v. Doe,
249 A.D.2d 756 (N.Y. App. Div. 1998)36

Shelly v. Doe,
660 N.Y.S.2d 937 (N.Y. Co. Ct. 1997).....36

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417 (1984)..... *passim*

Stumm v. Drive Entertainment, Inc.,
No. 00 Civ. 4676, 2002 WL 5589 (S.D.N.Y. Jan. 2, 2002).....27

Sullivan v. Kodsi,
373 F. Supp. 2d 302 (S.D.N.Y. 2005).....35

Syigma Photo News, Inc. v. High Soc’y Magazine, Inc.,
778 F.2d 89 (2d Cir. 1985).....27

U2 Home Entertainment, Inc. v. Fu Shun Wang,
482 F. Supp. 2d 314 (E.D.N.Y. 2007)32

UMG Recordings, Inc. v. Bertelsmann AG,
222 F.R.D. 408 (N.D. Cal. 2004).....26, 27

United States v. Abel,
258 F.2d 485 (2d Cir. 1958).....14

Wall St. Assoc. v. Brodsky,
257 A.D.2d 526 (N.Y. App. Div. 1999)35

Statutes & Rules

N.Y. Debtor & Creditor Law § 276 (McKinney 2008)34, 35

Other Authorities

Fred von Lohmann, *IAAL: Peer-to-Peer File Sharing and Copyright Law After Napster* (2001)3

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (Matthew Bender & Co., Inc. 2008)8, 19

Plaintiffs (“plaintiffs” or “Record Companies”) submit this memorandum in opposition to the motions of defendants Lime Wire LLC, Lime Group LLC (“Lime Group”), Mark Gorton (“Gorton”), Greg Bildson (“Bildson”) and the M.J.G. Lime Wire Family Limited Partnership (“MJG LW FLP” or the “FLP”) (collectively, “defendants”) for summary judgment on all counts of plaintiffs’ First Amended Complaint (“FAC”).

Preliminary Statement

Defendants do not dispute that the LimeWire software¹ is used for the massive on-going infringement of plaintiffs’ copyrighted works, that they know about the infringement and that they reap substantial financial benefit as a direct result. Indeed, how could they. Nearly 99% of the actual download requests by LimeWire’s users are infringing, and Lime Wire has realized many millions of dollars in profits from this infringement. Defendants’ motions² are based on just a few arguments, unsupported by the record evidence or the law, and further undermined by named defendant Greg Bildson’s recent declaration. Bildson’s declaration, based on his first-hand knowledge as Lime Wire LLC’s long-time Chief Technology Officer and Chief Operations Officer, confirms that, *inter alia*, Gorton instructed the developers of the LimeWire software to design a decentralized filesharing software application in an attempt to avoid liability, and made other design choices aimed at drawing in infringing users and encouraging infringing uses while intentionally avoiding the incriminating knowledge and control readily available to him and Lime Wire LLC. Bildson makes clear that Gorton and Lime Wire knew, understood and encouraged the infringing use

¹ “Lime Wire LLC” refers to the defendant company, “LimeWire” refers to Lime Wire LLC’s software application, and unless stated otherwise, “Lime Wire” includes Lime Wire LLC, Gorton and Lime Group.

² Lime Wire has made one motion and Lime Group, Gorton, the MJG LW FLP and Bildson have made a separate motion for summary judgment. Bildson has since settled the claims against him which will be dismissed. Plaintiffs respond to *both* motions in this memorandum.

of LimeWire, and that there is “no doubt” that plaintiffs’ copyrighted sound recordings were repeatedly infringed. These facts and others in Bildson’s declaration simply confirm the undisputed record evidence, and further support rejecting defendants’ arguments and denying their motions.

First, Lime Wire argues that what it calls “the *Sony-Betamax* safe-harbor” should provide a defense for all defendants on *both* contributory and vicarious infringement claims. That argument is wrong. As shown below, Lime Wire misreads *Sony Corp. of America v. Universal City Studios, Inc.* (“*Sony*”), 464 U.S. 417 (1984). Moreover, even if Lime Wire’s understanding of the *Sony* “substantial” or “commercially significant” noninfringing uses defense were correct, it does not apply where, as here, defendants encourage or induce infringement.³ In all events, there is no evidence of noninfringing uses of LimeWire. Despite almost seven million pages of documents produced and thirty-seven depositions taken, Lime Wire supports its argument almost entirely with outdated articles and disparate declarations that do not even mention LimeWire or its uses. (Lime Wire has even included a declaration, previously submitted to the district court in *Grokster*⁴ in 2002, without changing a word and still displaying the old *Grokster* caption.) Nothing in those articles or declarations or anywhere else in the record shows that LimeWire, launched over eight years ago and used almost exclusively for infringement, is, has been or is likely to be used for “substantial” or “commercially significant” noninfringing uses. (*See infra* I.)

Second, Lime Wire argues that it is not vicariously liable for the day-in day-out overwhelming use of LimeWire for infringement because it does not control LimeWire users. This argument is both irrelevant and deeply disingenuous. Lime Wire targeted Napster (and other

³ The *Sony* defense also is unavailable as a matter of law on a vicarious infringement claim. (*See infra* II.)

⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (“*Grokster*”), 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005).

infringing) users.⁵ It succeeded in drawing in those users, who now employ LimeWire for the same purpose as they once employed Napster or, Kazaa, Morpheus, Grokster, etc. To attract such users, Lime Wire deliberately made design choices to attain Napster-like functionality, while at the same time refusing to act on its knowledge of and ability to control infringing acts in a transparent and ultimately futile attempt to avoid Napster-like liability. But Lime Wire's efforts provide no defense because, as the Ninth Circuit held in *Napster*, "[t]urning a blind eye to detectable acts of infringement for the sake of profits gives rise to liability." 239 F.3d at 1023. Lime Wire has intentionally chosen *not* to limit or eliminate infringing acts of its users -- although these acts are "detectable" and Lime Wire could easily limit or eliminate them. Lime Wire's chosen "plausible deniability"⁶ or willful blindness for the sake of profits must be rejected. (*See infra* II.)

Third, Gorton and Lime Group contend that the Record Companies are advancing a "novel 'tertiary liability' theory" against them. "Novel" that theory may be, but "advanced by the Record Companies", it was not. It is *these defendants* who posit that if LimeWire users are the direct infringers, Lime Wire LLC is the secondary infringer, and they -- Gorton and Lime Group -- are "tertiary" to the infringement. This is an absurd notion nowhere found in the law of secondary infringement. Being a "secondary infringer" does not mean that a person or entity must stand "second" in line to the infringement. It simply means that a person or entity -- no matter where he or it stands in line relative to the direct infringer -- bears some responsibility for the infringement. As support for their "tertiary" theory, Gorton and Lime Group contend that plaintiffs are seeking to hold

⁵ The first ruling against Napster was announced while the LimeWire software was being developed. *A&M Records, Inc. v. Napster, Inc.* ("Napster"), 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

⁶ See Fred von Lohmann, *IAAL: Peer-to-Peer File Sharing and Copyright Law After Napster* (2001). (*See* Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1, dated July 18, 2008, ¶ 606.)

them liable “solely” because of what they are -- CEO and Chairman (Gorton) and owner (Lime Group) of Lime Wire LLC. This is demonstrably untrue. Gorton and Lime Group are hardly the mere figureheads (or so-called “tertiary defendants”) they portray themselves as. The newly-modest Mark Gorton may now say that he did not “run” Lime Wire LLC when he was its CEO (a statement directly at odds with his own sworn deposition testimony), but the facts paint a very different picture of hands-on decision-making and consistent involvement. The same is true for Lime Group, now described as a “silent” and “passive” investor. Lime Group has been and is intermeshed with Lime Wire LLC on a day-to-day basis, sharing, *inter alia*, its owner, its board, its CEO, its office space, its receptionist, and significantly, acting for Lime Wire LLC in ways that led to infringement, including targeting infringing users. Obviously, if Lime Wire LLC is liable (and it is), someone took the actions that make it liable -- and that someone is Gorton, personally and through his companies, Lime Group and Lime Wire. (*See infra* III.)⁷

Defendants’ overarching theme in both of their motions -- that this lawsuit is nothing more than part of the Record Companies’ supposed “goal . . . to prevent the development of any technology -- including the Internet -- that [the Record Companies] perceive, with or without basis, as having any potential to enable infringement”⁸ -- is pure fiction. (It is also at odds with their querulous cry that Lime Wire is “not responsible for Plaintiffs’ failure to protect their own content”⁹ -- a defense

⁷ Almost as afterthoughts, defendant Lime Wire LLC and defendants Gorton and Lime Group make three additional arguments in their memoranda of law (“LW Mem” and “Gorton Mem” respectively): that plaintiffs cannot provide evidence of direct infringement of plaintiffs’ copyrighted works (LW Mem. at 38-40); that plaintiffs’ state law copyright infringement and unfair competition claims should be dismissed (*Id.* at 40); and that plaintiffs cannot prevail on their fraudulent conveyance claim because they cannot prove Gorton’s actual intent. (Gorton. Mem. at 22-33.) Each of those arguments fails. (*See infra* IV, V, VI respectively.)

⁸ LW Mem. at 1; Gorton Mem. at 1.

⁹ LW Mem. at 2.

tantamount to a burglar complaining that the homeowner should have had a better lock.) In case after case, courts, including the United States Supreme Court, have found the Record Companies' claims meritorious. *See e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* ("Grokster"), 545 U.S. 913 (2005); *In re Aimster Copyright Litigation* ("Aimster"), 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.* ("Napster"), 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006). Moreover, as defendants know, the Record Companies have embraced P2P technology and entered into agreements with P2P companies that, unlike Lime Wire LLC, exchange *licensed or authorized* sound recordings.¹⁰ Plaintiffs are not anti-technology or anti-P2P -- indeed, technology is at the core of their business -- but they *are* anti-infringement and anti-piracy, which places them squarely on the side of copyright laws and the innovation those laws are designed to protect and foster.

Argument

Both plaintiffs and defendants have moved for summary judgment. Plaintiffs moved for partial summary judgment against all the defendants (except the MJG LW FLP) on their claims of inducement of copyright infringement, contributory copyright infringement, and their state law claims of common law copyright infringement and unfair competition.¹¹ Defendants have made two motions

¹⁰ *See e.g.,* Plaintiffs' Response to Defendant Lime Wire's 56.1 Statement (*see infra* n.12) at II ¶¶ 50-53.

¹¹ In support of their motion, plaintiffs submitted, pursuant to Local Civil Rule 56.1, a Statement of Undisputed Material Facts ("Pls. 7/18/08 SOF" or "Plaintiffs' 56.1 Statement") and a Memorandum of Law ("Pls. Mem."). Plaintiffs' 56.1 Statement was supported by exhibits ("Pls. Ex. ___") contained in Volumes I to V and deposition transcript and report excerpts ("___ Tr. ___" or "___ Report ___") contained in Volumes VI and VII to the July 18, 2008 Declaration of Katherine B. Forrest in Support of Plaintiffs' Motion for Summary Judgment. Those submissions are incorporated herein.

-- one on behalf of Lime Wire and one on behalf of Gorton, Bildson, Lime Group and the MJG LW FLP. Both of defendants' motions seek judgment on all claims.¹²

Defendants have submitted *no* undisputed material facts that support granting their motions, and the record provides overwhelming support for denying them. In addition, Lime Wire LLC's former Chief Operating Officer/Chief Technology Officer, Greg Bildson, now has provided a declaration.¹³ Because the statements in that declaration only confirm the record citations, the Court may decide defendants' motions with or without reference to them.

I. THE UNDISPUTED MATERIAL FACTS SHOW THAT LIME WIRE IS LIABLE FOR CONTRIBUTORY INFRINGEMENT

Lime Wire contends that it is not liable for contributory infringement of plaintiffs' copyrights because it is "shielded" from liability by the "*Sony-Betamax*" doctrine which, according to Lime Wire, "provides a safe harbor for products capable of substantial noninfringing uses". (LW Mem. at 3; 11-30.) Lime Wire also argues that even if the *Sony-Betamax* doctrine does not provide a "safe harbor", plaintiffs "cannot establish . . . material contribution" by Lime Wire to the infringing conduct. (LW Mem. at 4; *see also* 30-33.)

Both contentions are wrong, but the Court need not even decide them. *First, Sony* does *not apply at all* to a infringement claim based on inducement -- and Lime Wire is contributorily liable because it has induced infringement. (*See infra* I.A.) *Second*, even if *Sony* did apply, the *Sony*

¹² Each of defendants' motions is supported by a Statement of Material Facts Pursuant to Local Rule 56.1(a) ("LW SoF" and "Gorton SoF" or "LW's 56.1 Statement" and "Gorton's 56.1 Statement") and by two memoranda of law ("LW Mem." and "Gorton Mem"). Plaintiffs are responding separately to each of defendants' 56.1 Statements, and include in those responses statements of additional facts (*see* "Pls. (Gorton) Add'l SOF ¶¶ 624-715; Pls. (LW) Add'l SOF ¶¶ 1-53.) Additional exhibits, deposition transcript excerpts and declarations supporting these additional facts are contained in Volumes VIII to X to the Declaration of Katherine B. Forrest in Opposition to Defendants' Motions For Summary Judgment, dated September 26, 2008, submitted herewith.

¹³ The Declaration of Gregory L. Bildson ("Bildson 9/10/08 Decl.") is attached to the Forrest Declaration, dated September 26, 2008, which accompanies this memorandum.

noninfringing uses defense does not shield Lime Wire's actions where, as here, the record evidence indisputably shows *no* "substantial" or "commercially significant" noninfringing uses of LimeWire. (See *infra* I.B.) *Third*, plaintiffs not only can, but already have, established material contribution. (See *infra* I.C.).

A. Even if Sony Otherwise Applied (Which It Does Not), Lime Wire Is Still Liable for Contributory Infringement Because It Induced Its Users' Infringement.

The material contribution facet of contributory liability¹⁴ may be predicated on either one of two prongs: (1) "conduct that encourages or assists the infringement", or (2) the "provision of machinery or goods that facilitate the infringement". *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 706 (2d Cir. 1998). See also *Gershwin Pub. Corp. v. Columbia Artist Management, Inc.* ("Gershwin"), 443 F.2d 1159, 1162 (2d Cir. 1971). Plaintiffs allege that Lime Wire is contributorily liable based on *both* prongs.¹⁵

As even Lime Wire acknowledges (see LW Mem. at 15), *Sony* does *not* apply where, as here, liability is based upon the first prong of the contributory liability test -- inducement or encouragement of infringement. The Supreme Court in *Grokster* held that "where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude

¹⁴ Contributory liability also requires "knowledge of the infringing activity." *Matthew Bender*, 158 F.3d at 706 (quoting *Gershwin*, 443 F.2d 1162). Lime Wire does not dispute that it had such knowledge, and in any event, plaintiffs have shown that Lime Wire had knowledge. (See Pls. Mem. at 30-32; Pls. 7/18/08 SOF ¶¶ 135, 445-446, 124-139, 531, 533, 535, 537-538. Bildson also confirms Lime Wire's knowledge. (See Bildson 9/10/08 Decl. ¶¶ 5, 18, 19 (Lime Wire LLC and Mark Gorton knew and understood that LimeWire was being used for infringement).)

¹⁵ After the Supreme Court's decision in *Grokster*, inducement of copyright infringement is not only an element of a contributory infringement claim, it is also a separate claim in and of itself. *Grokster*, 545 U.S. at 934-937. Count I of plaintiffs' complaint alleges inducement as an independent claim (FAC ¶¶ 65-73), and Count II alleges contributory infringement based, *inter alia*, upon inducement. Plaintiffs have moved for summary judgment on both Counts in their July 18, 2008 motion. (*Id.* ¶¶ 78-86.) Defendants Lime Wire LLC does *not* seek summary judgment on plaintiffs' inducement claim (Count I). (LW Mem. at n.3.)

liability”. 545 U.S. at 935; *see also* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12.04[A][3][b] (Matthew Bender & Co., Inc. 2008).

Overwhelming evidence in the record establishes that Lime Wire has repeatedly encouraged and induced infringement. (*See* Pls. Mem. at II; *see also* Pls. 7/18/08 SOF ¶¶ 140-529.) Plaintiffs have shown, among other things, that: (i) Lime Wire designed services tailor-made for finding, copying, and distributing copyrighted sound recordings, including features to make searching for such sound recordings as easy as possible while omitting or disabling features that could limit infringing uses, (ii) Lime Wire failed to implement readily available filtering or other methods to reduce or stop infringement, (iii) Lime Wire aggressively courted infringing users on Napster, Grokster, Morpheus and Kazaa as the nucleus for expanding their network of like-minded infringers, and then “migrated” those notoriously infringing users and their unauthorized copies of sound recordings to paid versions of LimeWire’s services, and (iv) Lime Wire’s business plans always centered on maximizing the availability of infringing copies of works, which it touted and promoted as the draw for its LimeWire application. (*Id.*)

Bildson confirms this record evidence of inducement. Bildson asserts that Lime Wire,

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In short, Lime Wire cannot escape liability for contributory infringement because it knew of, encouraged and induced infringement. Accordingly, the Court need not even reach Lime Wire's *Sony* or "material contribution" arguments. (LW Mem. at 11-30.)

B. *Sony* Does Not Provide a "Safe Harbor" for Lime Wire.

Lime Wire argues that *Sony* provides an unyielding rule -- a "bright-line 'mere capability' standard" -- that immunizes from all secondary copyright liability the provider of any product that *could* be put to noninfringing use, whether or not it is *actually* put to such use. (LW Mem. 14.) There is no such rule or "bright-line" standard.

Sony extended the patent law doctrine of substantial noninfringing use to the copyright context. The *Sony* Court held that the producer of a product used for infringement would not be liable for contributory infringement "if the product is widely used for legitimate, unobjectionable purposes. 464 U.S. at 442. While the Court added that "it need merely be capable of substantial noninfringing uses", the *Sony* Court itself did not speculate about the *theoretical capability* of the product for noninfringing uses. Instead, it thoroughly analyzed the amount and character of its *actual* uses. *Id.* at 422-45. Thus, although *Sony* did not explain precisely what would qualify as "substantial" or "commercially significant" noninfringing uses in order to allow the provider to evade liability, the Court *did* make it plain that the question is: "how much use?". 464 U.S. at 442.

In re Aimster Copyright Litigation ("*Aimster*"), 334 F.3d 643 (7th Cir. 2003), not discussed by Lime Wire in any detail, provides a thorough analysis of how "substantial" a noninfringing use must be to provide a defense under *Sony*. *Id.* at 649-52. Although Judge Posner in *Aimster* recognized that the definition of substantial noninfringing use in *Sony* could include both

“present or prospective” uses, he nevertheless held that “some estimate of the respective magnitudes of these uses [was] necessary for a finding of contributory infringement”. *Id.* at 649-650. The court dismissed Aimster’s argument -- very much like Lime Wire’s argument here -- that “all Aimster has to show in order to escape liability for contributory infringement is that its file-sharing system *could* be used for noninfringing ways, which obviously it could be because “[t]hat would be an extreme result, and one not envisaged by the *Sony* majority”. *Id.* at 651. The court continued: “It is not enough, as we have said, that a product or service be physically capable, as it were, of noninfringing use.” *Id.* at 653. In that case, the injunction against Aimster was upheld, in part, because Aimster failed to produce *any* evidence that its product had ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses.

An analysis focusing on the product’s *actual* uses also took place in the two cases within the Second Circuit cited by Lime Wire. (LW Mem. at 15-16.) Lime Wire claims that *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693 (2d Cir. 1998) “made it clear that the mere capability of substantial noninfringing uses is all that is required” (LW Mem. at 16), but the court in *Matthew Bender* found and relied on the fact that “the *primary* use of West’s pagination in plaintiffs’ products” was noninfringing and that such use was “standard practice in the legal community”. 158 F.3d at 706-707 (emphasis added). Moreover, the court determined that while the product “might be used *incidentally*” for the infringing uses complained of by the plaintiff, it provided “no easy means” to do so. *Id.* at 707 (emphasis added.) The court went so far as to express skepticism that anyone would use the product in the alleged infringing way at all -- “What customer would want to perform this thankless toil?”. *Id.* at 706.¹⁶ In short, the actual *noninfringing* uses in *Matthew Bender* were

¹⁶ The court also noted that “[t]here is no evidence that [the alleged infringers] have encouraged the users of their product to [use it in an infringing way].” *Id.* at 706.

“substantial [and] predominant”, *id.* at 707 (emphasis added), while the *infringing* uses were speculative.

Similarly, in *Mathieson v. Associated Press*, 23 U.S.P.Q. 2d 1685, 1687-88 (S.D.N.Y. 1992), also cited by Lime Wire, the court relied on the fact that the alleged *infringing* use of the product (or rather, the “potential and capability” of such use) was “purely speculative”. *Id.*

Lime Wire also relies heavily on both the district court and Ninth Circuit’s decision in *Grokster* (see LW Mem. at 3, 31-32), inexplicably insisting that the Supreme Court “did not upset the lower courts’ ruling on this issue [contributory liability]” (*id.* at 3), “never addressed much less reversed, the Ninth Circuit’s decision for defendants on vicarious and contributory liability” (*id.* at n.21), and left the Ninth Circuit’s opinion “still stand[ing]” (*id.*) and “undisturbed”. (*Id.* at 32.). But the Supreme Court in *Grokster* unequivocally *vacated* the entire judgment of the Ninth Circuit and remanded the case for further proceedings.¹⁷ *Grokster*, 545 U.S. at 941. The lower courts’ rulings on contributory infringement and vicarious liability were directly in issue before the Supreme Court and the Ninth Circuit’s judgment was vacated “in full”. *Id.* at 942 (Ginsburg, J., concurring). Indeed, the Supreme Court specifically rejected the Ninth Circuit’s reading of *Sony*, a reading close to Lime Wire’s reading here. *Id.* at 934. The Court stated that the Ninth Circuit “misapplied *Sony*”, when it read *Sony* to mean “that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties’ infringing use of it.” *Id.* at 933-934. Moreover, the Court labeled as “error” the Ninth Circuit’s finding that because the defendants’ “software [was] capable of substantial lawful use, . . . neither company could be held liable, since there was no showing that their software, being without any central server, afforded them knowledge of specific

¹⁷ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006) (granting summary judgment to copyright holders on remand).

unlawful uses”. *Id.* at 934. Defendants’ reliance on the vacated district court and Ninth Circuit’s decisions in *Grokster* is, at best, misguided and their citations to those decisions should be disregarded.

Like *Aimster*, Lime Wire here has failed to produce any evidence that its LimeWire software ever has been used for noninfringing purposes. *Aimster*, 334 F.3d at 653. Lime Wire itself has even acknowledged that *all* its users -- (see Pls. 7/18/08 SOF ¶ 93; see also *id.* ¶¶ 86-92; 94-96) -- are seeking infringing copies of sound recordings.¹⁸ Plaintiffs’ statistical study confirms this massive infringement, finding that roughly 93% of the files made available and nearly 99% of the actual download requests by LimeWire’s users are infringing. (See Pls. 7/18/08 SOF ¶¶ 108-109; see also *id.* ¶¶ 104-107, 110-118.) For its part, Lime Wire has provided *no* evidence that even the remaining 1% is noninfringing. In fact, Lime Wire has provided *no* evidence that LimeWire has been used for noninfringing purposes at all, much less for “substantial” or “commercially significant” noninfringing uses. (See Pls. 7/18/08 SOF ¶¶ 541-602.)

Plaintiffs asked witness after witness in this case to identify noninfringing uses of LimeWire. They could not do so or, at most, speculated that there might have been one or two such uses. (See *e.g.* Pls. 7/18/08 SOF ¶¶ 573-78, 586.) For example, Mark Gorton specifically disclaimed all knowledge of any particular noninfringing uses of LimeWire. (Pls. 7/18/08 SOF ¶¶ 570-571; 547.) Lime Wire’s own expert did not know of any such uses. (*Id.* ¶¶ 593; see also *id.* ¶ 587, 594.) And, Lime Wire fails to identify even one document produced in this case that shows noninfringing uses of LimeWire.

¹⁸ As part of plans in 2005-2006 to “convert” infringers to paying customers, Lime Wire broke its entire user base into four categories -- all of whom were infringing music. (See Pls. 7/18/08 SOF ¶ 135.) Gorton even coined the appellation “Hard Core Pirates” to describe a substantial portion of the LimeWire users. (*Id.*)

Unable to document through the record even trivial levels of actual noninfringing use of its software, Lime Wire has scraped together a group of declarations by a disparate group of individuals to support its motion. The second section of Lime Wire's 56.1 Statement (*see* LW SoF ¶¶ 61-168) is titled "Noninfringing Uses of LimeWire", and most of the over 100 statements in that section are taken directly from statements made in those declarations. Some of the declarants discuss works available for free dissemination over the Internet or peer-to-peer services *generally*, and speculate about how *others* might use peer-to-peer technology lawfully, but *none* provides any evidence that *LimeWire* has been or is used for noninfringing purposes.

The defendants in *Grokster* also submitted such declarations, which Justice Ginsburg in her concurrence called a "motley collection". 545 U.S. at 947 n.3. In fact, at least *three* of the declarants in *Grokster* are declarants here -- Gregory Newby, Brewster Kahle, Richard Prelinger. *Id.* at 946-947. One of the declarations here -- that of Newby -- is exactly the same 2002 declaration submitted in *Grokster* with a new caption slapped on.¹⁹ (*See* Newby Declaration at footer reading "Declaration of Greg Newby in Support of Defendant's Motion for Partial Summary Judgment Case No.: 01-08541 SVW(PJWX) [*Grokster's* case number]"; *see also* heading on p. 1 that includes part of the *Grokster* caption.) In her concurrence, Justice Ginsburg discussed these declarations at length, 545 U.S. at 945-947, concluding that these types of declarations -- "mostly anecdotal evidence, sometimes obtained second-hand, of authorized copyrighted works or public domain works available online and shared through peer-to-peer networks and general statements about the benefits of peer-to-peer technology" -- are insufficient support for the summary judgment motion made there. *Id.* at 946-947. Justice Ginsburg pointed out that the declarants had testified that they, in fact, had *no*

¹⁹ Lime Wire provides nothing that indicates that Newby consented to having his six-year old declaration used in this case.

knowledge of any actual noninfringing uses of the software at issue there. *Id.* at 946-947. Justice Ginsburg criticized the lower courts' failure to "sharply distinguish between uses of [defendants'] software products (which this case is about) and uses of peer-to-peer technology generally (which this case is not about)." 545 U.S. at 948. In this case too, the declarants' statements are not based on any knowledge of any actual uses of LimeWire, and they opine, at best, only on uses of peer-to-peer technology generally. Like the declarations in *Grokster*, the declarations of Marc Freedman, Brewster Kahle, Michael King, Martin Lafferty, Christopher Levy, Greg Newby, Greg Parker and Richard Prelinger, submitted by Lime Wire, provide *no* facts about any actual uses, or even potential uses, noninfringing or not, of LimeWire.²⁰

The remaining statements in the "Noninfringing Uses" section of Lime Wire's 56.1 Statement (*see* LW SoF ¶¶ 61-168) are based on a declaration of one of Lime Wire's attorneys who used LimeWire to search for and download purportedly noninfringing files. (*Id.* ¶¶ 96-99, 155-160, 165-168.) Her methods and conclusions are problematic. *First*, she concluded that song files were "noninfringing" because she "did not see any restrictions on the transfer of the song" on the website she chose to use, but, in fact, for several songs, the website *did* have such restrictions. (*See* Pls. (LWSoF) Resp. ¶¶ 155, 156, 159.)²¹ *Second*, several of the downloaded files were *copyrighted*. (*See id.* ¶¶ 96, 165.) *Third*, in some cases, the file available from LimeWire differed from the file

²⁰ Other statements in Lime Wire's 56.1 Statement are based on media articles (*see e.g.*, LW SoF ¶¶ 100-106, 130, 136, 140-143, 145, 149-152), most of which were published years ago and do not support Lime Wire's statements which are in the present tense. (*See e.g.*, *id.* ¶¶ 100-102, 105-106, 130, 136, 140-143, 145, 149-152.) In any event, *all* of these articles are inadmissible hearsay, *see e.g.*, *United States v. Abel*, 258 F.2d 485, 495 (2d Cir. 1958); *Century Pacific, Inc. v. Hilton Hotels, Corp.*, 528 F.Supp. 2d 206, 217 (S.D.N.Y. 2007); *Mandal v. City of New York*, No. 02-CV-1234, 2006 WL 3405005, at *1 (S.D.N.Y. Nov. 26, 2006), and moreover, provide no evidence of "substantial" noninfringing uses of LimeWire. (*See, e.g.*, Pls. (LW SoF) Resp. Nos. 100-102, 105-106, 130.)

²¹ Perhaps that is why Lime Wire omitted this "authentication" process in the declaration from its 56.1 Statement. (*Compare* LW SoF ¶¶ 96-99, 155-159 *with* Cates Decl. ¶¶ 11, 14-16, 6, 8, 17, 9-10 respectively).

“authenticated” by Lime Wire’s attorney. (*See id.* ¶¶ 97, 99.) In short, these files are more accurately, easily and legally accessed through licensed websites on the Internet. To paraphrase the Second Circuit’s question in *Matthew Bender*, 158 F.3d at 706 -- What customer would want to perform this thankless toil or pay for LimeWire when he or she could just use the Internet? Of course, even if LimeWire had returned these files easily, accurately and with authorization, one search by one person -- Lime Wire’s attorney, no less -- for litigation purposes does not equal “substantial” or “commercially significant” noninfringing uses of LimeWire. In fact, Lime Wire provides no evidence that any LimeWire user, aside from Lime Wire’s own attorney, has ever used LimeWire for any of the purposes it spends approximately one-third of its brief describing.²²

Tellingly, although Lime Wire has promoted its software extensively as a Napster, Kazaa, Morpheus, Grokster-substitute, etc. with Google AdWords and Yahoo! campaigns (*see e.g.*, Pls. 7/18/08 SOF ¶¶ 162-167; 198-216; 234-236), there is *no* evidence of any such promotions or advertisements for any of the potential noninfringing uses discussed in the declarations. In fact, of the 595 unique keywords in Lime Wire’s Google AdWords campaigns, *none* contains any of the words that were subjects of the declarations submitted by Lime Wire as potential “noninfringing uses” of LimeWire -- “Project Gutenberg”, “The Archive”, “Prelinger” or “Prelinger films” or “Prelinger Archives”, “Internet Archive”, “Mark Twain”, “Nine-Inch Nails”, “Skype”, “Grid Casting”, “Joost”, “Pando Networks”, “Jun Group” or “Jun”, “Lake Trout”, “Starting Over”, “The Scene”, “The Hybrid

²² Lime Wire spends over 13 pages purportedly providing “examples” of the noninfringing uses for which LimeWire is “capable”. (LW Mem. at 16-29.) Instead of examples, however, Lime Wire describes internet sites that do not utilize P2P technology (*id.* at 16-18), companies unrelated to LimeWire that have utilized P2P technology in ways Lime Wire does not purport its software to be used (*id.* at 20-23), its MagnetMix service which Lime Wire offered separately from its LimeWire software (*id.* at 20, 26), and the apparent “benefits” of P2P technology. (*Id.* at 26-29.) Lime Wire uses phrases like: “can be found using LimeWire” (*id.* at 17, 20); “it welcomes redistribution by users of the LimeWire software” (*id.* at 8); “also being available by using LimeWire” (*id.* at 20); and “programs like LimeWire” (*id.* at 25) to suggest that LimeWire users have actually used LimeWire to download noninfringing files, yet provides no proof that they have ever done so.

P2P Network”, “Abacast”, “RazorPop”, “Sananda Maitreya”, “Raketu”, “Berklee” or “Berklee College of Music”, “Supreme Court” or “oral arguments” or “Sony”, “China”, “Freenet-China”, “Tiananmen Papers”, “Brand Asset Digital”, “Ellusionist”, “Martin Luther King” or “I Have a Dream”, “U.S. Declaration of Independence” or “U.S. Constitution”. (*See also* Pls. 7/18/08 ¶¶ 596, 599, 600 (no keywords containing words “Shakespeare”, “court files” or “court papers”, “speeches” or “oration”).)

This case could not be more different from *Sony*. Lime Wire does not dispute that its software has been used for copyright infringement or that defendants have known all along that LimeWire’s overwhelming purpose is infringement. And Bildson confirms this. (*See* Bildson 9/10/08 Decl. ¶¶ 5, 18, 19.) LimeWire’s rampant infringing use bears no resemblance to the time-shifting at issue in *Sony*. Lime Wire has provided *no* evidence of “substantial” or “commercially significant” noninfringing uses of LimeWire and no evidence that absolves it of the liability that otherwise follows from its knowing facilitation of, and contribution to massive infringement. These are plainly the circumstances the *Sony* Court envisioned “in which it is just to hold one individual accountable for the [infringement] of another.” *Sony*, 464 U.S. at 434-435.

C. **Lime Wire’s Contention That Plaintiffs Have Failed to Show Material Contribution Is Wrong.**

As shown above, defendants are liable for contributory infringement because they induced and encouraged infringement. (*See supra* I.A.) That is enough to establish defendants’ liability on this claim. *See Matthew Bender*, 158 F.3d at 706. But plaintiffs also have shown that defendants are liable under the alternative prong to a contributory infringement claim, because Lime

Wire materially contributed to its users' infringement by providing the "machinery" that facilitates the infringement.²³ (See Pls. Mem. at 33; Pls. 7/18/08 SOF ¶¶ 43, 540.)

The LimeWire software itself is the "machinery" that has facilitated the infringement by LimeWire users. See e.g., *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634, 651-52 (N.D. Ill. 2002) (holding that Aimster materially contributed by providing "the software and the support services necessary for individual Aimster users to connect with each other"); *Napster*, 239 F.3d at 1022 (holding that Napster "materially contribute[d] to the infringing activity" of its users by providing them with "the site and facilities for direct infringement") (internal quotation marks omitted); cf. *Arista Records, Inc. v. Flea World, Inc.*, Civ. No. 03-2670, 2006 WL 842883, at *15 (D.N.J. Mar. 31, 2006) (holding that flea market "need only provide a central 'hub' for infringing activity to materially contribute to infringement"). In addition to providing the LimeWire software, Lime Wire -- well aware that free music is and was the draw bringing in users (see e.g., Pls. 7/18/08 SOF ¶¶ 126-130, 132) -- intentionally designed its software to make infringement of plaintiffs' sound recordings easy. For example, LimeWire gives its users the ability to search for music by artist and album title or by genre, like "Top 40" or "Classic Rock" (*id.* ¶¶ 67-68), added a Media Player with a playlist to listen to mp3 files (*id.* ¶¶ 330-331; see also 332-336), and integrated its software with Apple's iTunes music software. (*Id.* ¶¶ 337-341; see also Pls. Mem. at 25-27.)

Bildson again provides confirmation of and adds some detail to the record on this point. As shown above (see *supra* at 8-9),

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²³ Lime Wire completely ignores the "inducement" prong of contributory inducement (see *supra* at 7), and appears to conflate or confuse material contribution and "provision of machinery". (See LW Mem. at 30-38.)

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In short, Lime Wire is simply wrong when it claims that plaintiffs cannot establish that Lime Wire has materially contributed to its users' infringement. Plaintiffs have, in fact, established both prongs of the material contribution element of contributory infringement.

II. LIME WIRE'S MOTION ON VICARIOUS LIABILITY FAILS BECAUSE THERE IS NO SONY "SAFE HARBOR" AND LIME WIRE HAS THE RIGHT AND ABILITY TO CONTROL THE INFRINGING USES OF ITS SOFTWARE

The Supreme Court in *Grokster* stated that one "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." 545 U.S. at 930. Lime Wire does not dispute that its business depends on the copying and distribution of plaintiffs' copyrighted works, and that the defendants profit from the business its infringement generates. (See Pls. (Gorton) Add'l SOF ¶¶ 705-710 (showing that Lime Group, Lime Wire, Gorton and the MJG LW FLP all profited).) But Lime Wire contends that it is not vicariously liable because it is shielded from liability by *Sony* (see LW Mem. 11 n.10), and, even absent *Sony*, it does not have the "right and

ability” to control its users. (*Id.* at 33-38.) Lime Wire’s argument based on *Sony* is plainly erroneous, and its claim as to the meaning of “control” is specious and disingenuous.

First, Sony simply does not apply to vicarious liability claims. As the Ninth Circuit in *Napster* unequivocally recognized: “*Sony*’s ‘staple article of commerce’ analysis has no application to *Napster*’s potential liability for vicarious copyright infringement.” 239 F.3d at 1022 (citing *Sony*, 464 U.S. at 434-435; *see also Nimmer & Nimmer, supra*, § 12.04[A][3] (2008) (discussing *Sony* in contributory infringement section only).)

Second, contrary to Lime Wire’s assertions, the “right and ability to control” is not confined to “actual control”. The *ability* to control, even if not acted upon, is sufficient. For example, in *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.* (“*Gershwin*”), 443 F.2d 1159 (2d Cir. 1971), a leading case on vicarious liability, the Second Circuit held that the defendant was vicariously liable because it was “in a position to police the infringing conduct of its artists” despite the fact that it lacked “formal power to control either the local association or the artists for whom it served as agent.” *Id.* at 1163. *Shapiro, Bernstein & Co., Inc. v. H.L. Green Co.* (“*Shapiro*”), 316 F.2d 304, 308-309 (2d Cir. 1963), another leading vicarious liability case, found the defendant liable because it was in a position to control the infringing activity, even if it did not do so. *See also Playboy Enter., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 554 (N.D. Tex. 1997) (“the reluctance of [defendant] to exercise his authority is not determinative of the issue”).²⁴

²⁴ Lime Wire relies on *Banff Ltd. v. Limited, Inc.* (“*Banff*”), 869 F. Supp. 1103 (S.D.N.Y. 1994) for the proposition that “actual control, not power to control is the test”. (LW Mem. at 34.) But Lime Wire misreads *Banff*. *Banff* did not depart from *Shapiro* to establish a new standard requiring actual control (*id.* at 33-34), as Lime Wire contends. All *Banff* did was restate the standard in *Shapiro* adding that, in the case of a parent and subsidiary, there must be “some continuing connection between the two [the parent and subsidiary] in regard to the infringing activity.” 869 F. Supp. 1110. The *Banff* court merely sought to avoid “attach[ing] liability to every parent corporation for the infringing acts of its subsidiaries, *solely* because of the parent-subsidiary relationship”. *Id.* at 1107 (emphasis added). Lime Wire also relies here on the Ninth Circuit’s *Grokster* decision (LW Mem. at 33, 36), but as shown above (*see supra* at 11-12), that decision was vacated in full by the Supreme

Nor is it necessary for Lime Wire to be able to control its *users* or have the ability to “repossess or disable the LimeWire software possessed by its users” to be vicariously liable (LW Mem. 34, 38), as Lime Wire would have the Court believe. Lime Wire need only be able to control the infringing activity or conduct of its users -- and, as shown below, it can. (*See infra* at 21-25.) For example, in *Playboy Enter. v. Webbworld Inc.*, 968 F. Supp. 1171 (N.D. Tex. 1997), an early internet case, the court found defendants (majority shareholder and designer) vicariously liable for the unlicensed posting of copyrighted images on their website. The defendants did not deny that they had “control over the operation” of the website, but argued that they lacked “the right and ability to supervise the conduct of those who initially posted [the infringing] images to the Internet.” *Id.* at 1177. The court specifically rejected that argument, stating:

“That defendants had no control over those responsible for originally uploading the infringing images onto the Internet is not relevant to the issue of defendants’ control over their infringing activity. The only relevant question regarding the element of control is whether defendants had the right and ability to control what occurred on the [defendants’] website.” *Id.*

The “dance hall” cases that provided the foundation for the theory of vicarious copyright infringement support that reasoning. Indeed, as the court in *Shapiro* observed, “the cases are legion which hold the dance hall proprietor liable for the infringement of copyright . . . by a band or orchestra He is liable whether the bandleader is . . . an employee or an independent contractor, and whether or not the proprietor has knowledge of the compositions to be played or any control over their selection”. 316 F.2d at 307-308. These cases indicate that control over the venue for infringement is sufficient to satisfy the control element of vicarious copyright infringement, regardless of whether there existed any actual ability to control the direct infringers. *See also*

Court and Lime Wire’s citations to the Ninth Circuit’s decision are of no import and should be ignored.

Polygram Int'l Pub., Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1326 (D. Mass. 1994) (discussing formulations of control for vicarious liability in such cases: 1) supervision of the “*operation of the place*” where infringing performances occur; or 2) “control over the *content* of the infringing program.” (emphasis added).)

In *Arista Records, Inc. v. Flea World, Inc.*, Civ. No. 03-2670, 2006 WL 842883 (D.N.J. Mar. 31, 2006), the corporate owners and operators of a large flea market were held vicariously liable for the sale of pirated and counterfeit CDs and cassettes by vendors. Among the facts that the court considered critical was that defendants “exhibited control over vendors by prohibiting the sale of certain items (such as animals, explosives, firearms and alcoholic beverages) and limited vendors’ rights to display certain materials, such as pornography.” *Id.* at *10. Indeed, the court noted that “[i]t is difficult to understand how checking the vendors that sell recorded music for counterfeit merchandise is more burdensome than checking for other prohibited goods”. *Id.* n.11. The court held that “a party with the ability to supervise or control infringing activity cannot avoid liability by failing to exercise such supervision or control.” *Id.* at *9.

So too here. The first section of Lime Wire’s 56.1 Statement, titled “The LimeWire Software and How It Works”, describes the LimeWire software in a way intended to convince the Court that Lime Wire does not have the “right and ability” to actually control the LimeWire users. (See LW SoF ¶¶ 1-60.) But Lime Wire does not dispute, because it cannot, that it has the right and ability to limit or eliminate the infringing *conduct* by LimeWire users -- which is what is required to establish vicarious liability. The facts show that Lime Wire monitors and controls some activity by its users and plainly has the ability to control the infringing activity but tries to avoid liability by refusing to exercise that control.

Lime Wire's ability to monitor and control activity of LimeWire's users is demonstrated by filters it has already implemented, in whole or in part, in the LimeWire client. These filters have the ability to remove pornographic and sensitive content from search result. (Pls. 7/18/08 SOF ¶¶ 517-525.) More important, these filters allow a central server that is controlled by LimeWire to monitor and prevent the sharing of files with certain unique hash identifiers (and, in certain iterations of the content filter that have only been partially implemented). (*Id.*) (Lime Wire has also developed a way to prevent files purchased from its LimeWire Store from being shared by LimeWire users. (See Pls. (LW) Add'l SOF ¶¶ 2-6; Pls. 7/18/08 SOF ¶¶ 526-529.) Significantly, despite there being no technological reason to do so, Lime Wire has deliberately reduced its ability to monitor and control activity on the network, by choosing to set the content filter it has implemented to "off" by default and make its operation optional. (Pls. (LW) Add'l SOF ¶ 5; *see also* Pls. 7/18/08 SOF ¶¶ 473-492; *see also infra* at 25 & n.25 (content filter is ineffective for other reasons as well).) Lime Wire also developed and implemented "ultrapeers", which create indexes of hashes that an ultrapeer uses to route queries to relevant "leaves" or other ultrapeers. (Pls. (LW) Add'l SOF ¶¶ 8-9.)

Moreover, Lime Wire has the ability to remotely control features and parameters of the current LimeWire clients, *as currently shipped and installed on users' computers*, through its "SIMPP" mechanism (which propagates viral messages through the Gnutella network). (Pls. (LW) Add'l SOF ¶¶ 14-15, 22; *see* Pls. 7/18/08 SOF ¶¶ 364-368, 388-389.) This "SIMPP" mechanism is not a theoretical ability.

SIMPP can control many features and parameters, like aspects of content filtering, blacklisting certain IP addresses from participation in the network, and blocking out communications with certain other Gnutella clients. (Pls. (LW) Add'l SOF ¶¶ 20; *see also* Bildson 9/10/08 Decl. ¶ 17 (Lime Wire developed IP blocking, which blocks search

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requests from specific IP addresses.) As Lime Wire's own expert recognizes, this mechanism

(Pls. (LW) Add'l SOF ¶¶ 24.)

(Pls. (LW) Add'l SOF ¶ 25.) Lime Wire, however, made design choices as to which parameters it would or would not be able to control through the SIMPP mechanism. (*Id.*) For example, Lime Wire designed SIMPP in such a way that would allow Lime Wire to remotely turn the content filter to "OFF", but *not* to "ON". (Pls. 7/18/08 SOF ¶¶ 490-492.) As one Lime Wire employee warned, when asked about the possible addition to SIMPP of a functionality whereby Lime Wire could remotely define certain file types (such as tax returns, etc.) as "sensitive" and warn users before they make them available for sharing, "[my] only concern about this would be *the potential for court ordered or injunction cases where we would be forced to do this for 'IP rights' holders*". (Pls. (LW) Add'l SOF ¶ 26; *see also* Pls. 7/18/08 SOF ¶ 38.)

Not only could Lime Wire monitor and control infringing activity, but it *believes* it could and intended to do so. (*See* Pls. 7/18/08 SOF ¶¶ 435-440, 444-453, 502-516; *see also* Pls. (LW) Add'l SOF ¶¶ 27-47; Pls. Mem. at 19-24.) As part of its 2005-2006 plans to "convert" this entire user base into legitimate paying customers (*see* Pls. 7/18/08 SOF ¶¶ 435-440, 444-453, 502-516; *see also* Pls. (LW) Add'l SOF ¶¶ 27-47), Lime Wire broke the entire LimeWire user base into four categories - *all* of whom were engaged in music piracy: 25% were considered "hardcore pirates", 25% morally persuadable", 20% "legally unaware" users, and 30% "samplers and convenience users". (*See* Pls. 7/18/08 SOF ¶135.) Lime Wire then made proposals to Napster, Real Networks and iMesh to convert LimeWire's infringing users to legitimate paying subscribers (Pls. 7/18/08 SOF ¶¶ 436-440, 447-453, 502-509; *see also* Pls. (LW) Add'l SOF ¶¶ 32-34.) Those proposals included a "timebombed" code, a

“forced update” and upgraded filtering, all of which Lime Wire touted as methods to effectively limit or eliminate infringing conduct using LimeWire. (*Id.*) Lime Wire also drew up a plan to stop infringement based upon education of its users. (*See* Pls. 7/18/08 SOF ¶¶ 510-516; *see also* Pls. (LW) Add’l SOF ¶¶ 35-36.)

Bildson’s declaration confirms and adds detail to this record as follows:

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Ultimately, Lime Wire chose not to convert LimeWire into an authorized music distributor; not to educate its users, whom it knew were engaging in copyright infringement; not to implement effective filtering to prevent further copyright infringement; not to implement a “timebombed” code or “forced upgrade” to limit or eliminate infringement; and not to further monitor activity. But, as shown above, it *could have* done any or all of these things.²⁶ In other words, it was “in a position” to control the infringing activity of its users. *See e.g., Gershwin*, 443 F.2d at 1163; *Shapiro*, 316 F.2d at 308-309. That is sufficient for liability.²⁷

III. GORTON AND LIME GROUP ARE LIABLE BASED UPON THEIR ACTIONS

Trying to put as much distance as possible between themselves and Lime Wire LLC, Gorton and Lime Group make a separate motion for summary judgment supported by a separate 56.1 Statement (“Gorton SoF”) and a separate memorandum of law. But their attempt to divorce themselves from Lime Wire LLC is in vain.

²⁵ Also, to be effective, the copyright content filtering database :

(Bildson 9/10/08 Decl. ¶ 16),
(*Id.*)

²⁶ This “willful blindness” on Lime Wire’s part is tantamount to knowledge in copyright law. *Aimster*, 334 F.3d at 650.

²⁷ At the very least, summary judgment should not be granted on this claim because the facts as to Lime Wire’s “right and ability to control” the infringement is not undisputed. Whether the actual ability to police infringement exists is largely a question that is specific to the facts of each individual case. *See e.g., Adobe Sys. v. Canus Prod., Inc.*, 173 F. Supp. 2d 1044, 1053 (C.D. Cal. 2001) (“The amount of control necessary to support a finding of vicarious liability is fact-specific.”).

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Gorton and Lime Group contend that all the claims against them should be dismissed because they are based on a “far-fetched” “novel” “tertiary liability theory” seeking to hold them liable for copyright infringement “solely” by virtue of Gorton’s status as an officer or Lime Group’s status as a “passive” or “silent investor” in Lime Wire LLC. (Gorton Mem. at 1-4.) According to defendants, Gorton is just “a former CEO and board member” and Lime Group just “a former shareholder” (*id.* at 1), who knew nothing, did nothing and could do nothing about the overwhelming use of LimeWire for infringement. But defendants mischaracterize plaintiffs’ theory of liability, are wrong on the law and flatly misrepresent the facts.

The only support cited by defendants for their “tertiary” liability concept is easily distinguished. In the *Napster* litigation in 2001, a music producer, Matthew Katz, brought an action against a number of individuals and against Hummer Winblad, an investor in Napster. (See Baker S.J. Decl. at Ex. 31 at 5 (*Katz v. Napster, Inc., In re Napster Copyright Litigation*, C 00-7725 MHP, Mem. & Order (N.D. Cal. 2004)).) Katz made only conclusory allegations against Hummer Winblad, including that its investment in Napster was a basis for liability. On a motion to dismiss, the court held that because Katz did not allege that Hummer Winblad “substantially contributed to a specific act of direct infringement”, the contributory and vicarious infringement claims would be dismissed. In other words, had Katz alleged the traditional tests for contributory or vicarious liability, his claims could have survived.

In contrast, in *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004), plaintiffs also alleged that, *inter alia*, Hummer Winblad, as an investor in Napster, was liable for contributory and vicarious copyright infringement based upon its involvement in Napster. This time, the court denied Hummer Winblad’s motion to dismiss based again on a “tertiary liability” theory, holding that the allegations of control over Napster’s operation were sufficient to state a claim

for secondary infringement since if Hummer Winblad was controlling Napster's operations, it would have had a direct relationship with the directly infringing activities occurring on the Napster system, and the right and ability to control those activities. *Id.* at 412-14.

Gorton -- personally involved in the actions leading to Lime Wire LLC's liability -- "cannot evade liability for copyright infringement by trying to pin the blame on the corporate entity." *Halnat Pub. Co. v. L.A.P.A., Inc.*, 669 F. Supp. 933, 936 (D. Minn. 1987) ("The corporate entity itself could not infringe on plaintiffs' copyrights without some individual or individuals taking action on behalf of the corporate entity to commit the infringements.") It is well-settled that "[a]ll persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers." *Musical Prods., Inc. v. Roma's Record Corp.*, No. 05-CV-5903, 2007 WL 750319, at *1 (E.D.N.Y. Mar. 7, 2007) (quoting *Syigma Photo News, Inc. v. High Soc'y Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985)). See also *Aram, Inc. v. Laurey*, No. 05 Civ. 8380, 2006 WL 510527, *2 (S.D.N.Y. Mar. 1, 2006) ("[i]t is well-established that a corporate officer can be held liable for the infringing acts of his corporation if he personally participated in the acts constituting infringement"); *Lechner v. Marco-Domo Internationales Interieur GmbH*, No. 03 Civ. 5664, 2005 WL 612814, at *6 (S.D.N.Y. Mar. 14, 2005) (same); *Stumm v. Drive Entertainment, Inc.*, 2002 WL 5589, *5-*6 (S.D.N.Y. 2002) ("[a]n individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for the infringement" (citations omitted)); *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 285 (E.D.N.Y. 2002) ("[a]ll persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers" (citations omitted)); *Luft v. Crown Publishers, Inc.*, 772 F. Supp. 1378, 1379 (S.D.N.Y. 1991) (holding 65% owner and president

of company liable as secondary infringer); *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 517 F. Supp. 900, 904 (S.D.N.Y. 1981) (“[a]n individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for the infringement”).

Like the defendants in these cases, Gorton *is* Lime Wire LLC. He exercises control over Lime Wire LLC and benefits from the infringement of LimeWire users. As Gorton acknowledged in his deposition (but denies now (Gorton 56.1 Statement at ¶ 30)), when he was Lime Wire LLC’s CEO, he “ran” the company. (See Pls. (Gorton) Add’l SOF ¶¶ 661-663.) Gorton also was heavily involved in the various 2005-2006 proposed Conversion Plans whereby infringing LimeWire users were to be “converted” to law-abiding paying customers. (Pls. 7/18/08 SOF ¶¶ 435-440, 444-453, 502-516.) Likewise, he was involved in filtering (or, more accurately, non-filtering) decisions. (See *e.g.*, Pls. (Gorton) Add’l SOF ¶ 665.) Gorton, as the “final decision-maker” (*id.* ¶¶ 662-663), was knowledgeable about and made technological decisions. (*Id.* ¶¶ 694-697; 701.) For example, Gorton decided that LimeWire’s content filter would be set to “off” by default (*id.* ¶ 701) and directed that the MagnetMix button be disabled. (See Pls. (Gorton) Add’l SOF ¶¶ 695-696.)

Gorton owned 100% of Lime Group until three days after the *Grokster* decision came down in June 2005. (Pls. 7/18/08 SOF ¶¶ 25, 27; Pls. (Gorton) Add’l SOF ¶ 624.) Gorton also serves as Lime Group’s CEO. (Pls. (Gorton) Add’l SOF ¶ 626.) Lime Group has described (and continues to describe) itself as “home to”, “running” and “operat[ing]” several “Lime” companies, including Lime Wire LLC. (*Id.* ¶¶ 631-632.) Lime Group has consistently performed myriad functions on behalf of Lime Wire LLC including :

(*Id.* ¶¶ 633, 636, 650-657.) The companies shared

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(*Id.*)

¶¶ 637-647.) Tower Research Capital, another of Gorton's Lime companies,

(*Id.* ¶ 644.) Significantly, Lime Group and Lime Wire LLC also share a Chairman and sole director -- Mark Gorton. (*Id.* ¶ 626-628.) This is consistent with Gorton's intention that Lime Wire LLC (*Id.* ¶ 633.)

As to inducing, contributing to, and being vicariously liable for the infringement committed by LimeWire's users, Gorton and Lime Group participated in the actions underlying Lime Wire LLC's liability. Gorton well knew that LimeWire was being used for infringement. (*See e.g.* 7/18/08 SOF ¶¶ 530-538; Pls. (Gorton) Add'l SOF ¶¶ 684, 690-693.) He induced and encouraged such infringement. For example, Lime Group opened ad campaign accounts with Google and Yahoo! on behalf of Lime Wire. (*Id.* ¶¶ 162-167, 198-201, 207-209, 234-235.) These advertising campaigns specifically targeted Napster, Grokster, Kazaa and Morpheus users, as well as other users searching for music and/or mp3s generally. (*Id.*) Gorton knew that Lime Wire LLC was targeting former Napster users and others of a mind to infringe. (*See e.g.* Pls. 7/18/08 SOF ¶ 149, 159-160; Pls. (Gorton) Add'l SOF ¶¶ 659, 683.) Gorton even decided on

(*See* Pls. (Gorton) Add'l SOF ¶ 699.)

Bildson confirms that Mark Gorton was the

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*(Id.)*²⁸

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Clearly, Gorton and Lime Group (through its own actions and through actions taken by Gorton, who did not distinguish between what he did as Lime Group and what he did as Lime Wire (*see e.g.* Pls. (Gorton) Add'l SOF ¶¶ 658-661; *see also* ¶¶ 631-657)), are defendants in this lawsuit not because of who they are, but because of what they did.

IV. PLAINTIFFS HAVE SHOWN DIRECT INFRINGEMENT OF THEIR SOUND RECORDINGS

The record on summary judgment includes a hard drive containing unauthorized copies of all of the over 3000 copyrighted works at issue in this case that were downloaded using LimeWire. (Pls. 7/18/08 SOF ¶¶ 119-120.) Plaintiffs have also submitted a statistical study concluding that 93% of files available on LimeWire are unauthorized and that 99% of queries to LimeWire users are for unauthorized files. (*Id.* ¶¶ 104-110.) In addition, the record includes numerous emails from LimeWire users indicating use of LimeWire for copyright infringement (*id.* ¶ 531); myriad press accounts, many with statements attributed to Gorton or Bildson, describing LimeWire as a widely-known means by which to search for and download unauthorized content (*id.* ¶¶ 168-177, 536-537); and Lime Wire's own acknowledgment that its *entire* user base is infringing sound recordings. (*See id.* ¶ 135.) In the face of all this, Lime Wire nevertheless asserts that plaintiffs cannot show copyright infringement. (LW Mem. p. 38-40.) Not true.

Direct copyright infringement requires a showing of (1) copyright ownership and (2) unauthorized copying or distribution. *Island Software and Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 260-61 (2d Cir. 2005). As to the first requirement, the Record Companies have provided proof of such ownership, including the thirty sound recordings listed in Attachment A to

¶ 34.)

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(Bildson 9/10/08 Decl.

plaintiffs' 56.1 Statement (Pls. 7/18/08 SOF ¶¶ 97-102), which Lime Wire does not dispute. (*See* LW Mem. at 38.)

As to showing infringing copying and distribution, plaintiffs have submitted evidence of such infringement in support of their motion. Plaintiffs have produced to defendants the hard drive with the downloaded sound recordings mentioned above. In addition, screenshots from LimeWire's website show that identical copies, with the identical hashes, of the 30 songs at issue at this stage in this litigation (Pls. 7/18/08 SOF, Exh. A) are available for download from multiple users via LimeWire. (*Id.* ¶¶ 103, 119-22; *see also* Pls. (Gorton) Add'l SOF ¶ 711.) Since plaintiffs' motion was filed, plaintiffs have obtained even further evidence of direct infringement. Plaintiffs' sound recordings have again been downloaded using LimeWire.²⁹ (Pls. (Gorton) Add'l SOF ¶ 712.) Further, multiple LimeWire users have shared *identical* copies³⁰ of plaintiffs' copyrighted sound recordings. (Pls. 7/18/08 SOF ¶¶ 121-123; Pls. (Gorton) Add'l SOF ¶ 712.) Moreover, plaintiffs have obtained judgments against 704, and settled claims against 3,722 LimeWire software users for infringement. Among the judgments against LimeWire users are judgments based upon infringement of at least eleven of plaintiffs' thirty sound recordings at issue at this stage of the litigation. (Pls. (Gorton) Add'l SOF ¶ 714-715; *see also* Pls. 7/18/08 SOF, Exh. A.)

Once again, Bildson confirms what the evidence shows,

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²⁹ Distribution liability evidence is often based on sales, uploads or downloads during litigation. *See e.g., Microsoft Corp. v. Rechanik*, 249 F. App'x 476, 478 (7th Cir. 2007); *U2 Home Entertainment, Inc. v. Fu Shun Wang*, 482 F. Supp. 2d 314, 317-18 (E.D.N.Y. 2007); *Interscope Records v. Leadbetter*, No. C05-1149, 2007 WL 1217705, at *4 (W.D. Wash. Apr. 23, 2007).

³⁰ Files were identified as identical based on their 32 character SHA-1 hash (*see* Declaration of Thomas Sehested (Vol. X) ¶ 5; *see also* Pls. 7/18/08 SOF ¶ 122), since the probability of two files having the same SHA-1 hash (the hash used by LimeWire) through any means other than directly copying that file is 2^{63} or one in $9.22337204 \times 10^{18}$. (*See* Sehested Decl. ¶ 5 n.1.)

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(Bildson

9/10/08 ¶ 18.) Specifically, Bildson reviewed Exhibit 50 (*see* Pls. 7/18/08 SOF ¶¶ 121-123) and the exhibit to the Sehested (DtecNet) Declaration (*see* Pls. (Gorton) Add'l SOF ¶ 712-713), which show multiple copies of plaintiffs' copyrighted sound recordings with identical hashes available on and downloaded using LimeWire. (*Id.*) That review led Bildson -- Lime Wire LLC's Chief Technology Officer since its inception -- to conclude that he "has no doubt" that all the thirty sound recordings at issue at this stage in the litigation, "have been infringed using LimeWire." (Bildson 9/10/08 Decl. ¶ 18.)

V. DEFENDANTS' MOTION FOR JUDGMENT ON PLAINTIFFS' STATE LAW CLAIMS SHOULD BE DENIED

As discussed above (*see supra* III) and in plaintiffs memorandum in support of their partial motion for summary judgment (Pls. Mem. 39-40), plaintiffs' state law claims are brought against Gorton and Lime Group based on *their* actions with respect to copyright infringement. Thus, plaintiffs' claim for common law copyright infringement rests not, as defendants contend, on whether plaintiffs' have shown that Gorton and Lime Group directly infringed plaintiffs' copyrights (*see* Gorton Mem. at 20-21), but on whether there was direct infringement of plaintiffs' copyrights using the *LimeWire* software. There was and still is. Similarly, with respect to the claim for unfair competition, plaintiffs need not show that *Gorton* and *Lime Group* individually are in competition with plaintiffs, as defendants argue, but whether *LimeWire LLC* is in direct competition with plaintiffs. It was and still is. (*See* Pls. 7/18/05 SOF ¶¶ 230-251.) Accordingly, plaintiffs' showing of direct infringement using LimeWire and direct competition between Lime Wire LLC and plaintiffs is sufficient for plaintiffs' to prevail on their common law claims.

VI. GORTON AND THE MJG LW FLP'S MOTION FOR SUMMARY JUDGMENT ON THE FRAUDULENT CONVEYANCE CLAIM FAILS

Under N.Y. Debtor & Creditor Law § 276 (McKinney 2008) (“Section 276”), a conveyance made with “actual intent . . . to hinder, delay or defraud either present or future creditors” is fraudulent. Here, plaintiffs allege that Gorton redirected Lime Wire LLC distributions from defendant Lime Group to the MJG LW FLP, where plaintiffs, in the event of a judgment, could not reach them. (FAC ¶¶ 116-117.) REDACTED

At the time that the amended complaint was filed, plaintiffs were relying on a sworn declaration from Vincent Falco, former Chief Executive Officer of Free Peers. Inc., a company that distributed the peer-to-peer software application BearShare. (Pls. 7/18/08 SOF ¶ 41(c)). In that sworn declaration, Falco recounted that:

“[s]hortly after [Falco] received [his] ‘cease and desist’ letter [from the RIAA after *Grokster* was decided], [he] spoke with Mark Gorton. Mark mentioned to [him] that he had also received a ‘cease and desist’ letter. [Falco] told [Mark] that [he] was worried that if the record companies sued Bearshare, [he] might lose a lot of [his] own money. Gorton told [him] that he was not worried about being sued. He said that he had created a family limited partnership. He put his personal assets in to the family limited partnership so that the record companies could not get his money if they sued him and won. Gorton said that [Falco] should do the same, but [he] didn’t.” (Ex. 10 at ¶ 5.)³¹

Several months later, Gorton himself was deposed and, under oath, confirmed Falco’s testimony in relevant part. Gorton testified that he had been “highly concerned about being sued” and that “one of the benefits . . . [of the MJG LW FLP] was that it did help protect [his] assets in the event of a legal judgment against [him] personally.” (Pls. 7/18/08 SOF ¶¶ 27-31.) Bildson corroborates

³¹ See also Falco Tr. 158:13 - 159:20 (testifying to same conversation with Gorton).

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(Bildson 9/10/08 Decl. ¶ 39.)

Gorton and the FLP contend that they are entitled to summary judgment on plaintiffs' claim of fraudulent conveyance because plaintiffs cannot show that Gorton possessed "actual intent" as required by Section 276. (See Gorton Mem. at 23.) But nowhere do Gorton and the FLP mention Falco or Gorton's testimony. Gorton's own words -- sworn to in his deposition testimony -- establish "actual intent" under Section 276. What better evidence of Gorton's intent could there be? See e.g., *Sullivan v. Kodsi*, 373 F. Supp. 2d 302, 306 (S.D.N.Y. 2005) ("testimony taken from the defendant . . . could be understood by a finder of fact to suggest that [the defendant] intended to fraudulently hide his assets to protect them from his creditors"). See also *Elliot v. Elliot*, 365 F. Supp. 450, 454 (S.D.N.Y. 1973) (holding on a motion to dismiss that if there is an admission acknowledging motivation for the transaction based on a concern that creditors would reach the assets in question, "the conveyance is fraudulent even though the grantor is solvent . . . and even if he receives fair and adequate consideration") (internal citations omitted); *Wall St. Assoc. v. Brodsky*, 257 A.D.2d 526, 529 (N.Y. App. Div. 1999) (finding that an affidavit by a defendant admitting that the transfers in question were "intended to defeat anticipated creditors, including plaintiff" "alone, sufficiently support the pleading requirement for the Debtor and Creditor Law § 276 claim").

At the very least, this is a question of fact for a jury as to Gorton's intent (or his credibility when he now denies that intent) that precludes summary judgment. The Second Circuit has held that "[o]rdinarily, the issue of fraudulent intent cannot be resolved on a motion for summary judgment being a factual question involving the parties' state of mind." *Golden Budha Corp. v. Canadian Land Co. of America*, 931 F. 2d 196, 201-202 (2d Cir. 1991).

Defendants devote several pages of their memorandum to a discussion of “badges of fraud” (*see* Gorton Mem. at 24-33), but because plaintiffs have direct proof of Gorton’s “actual intent”, there is no reason to even consider “badges of fraud.” In fact, Section 276 does not require “badges of fraud” at all. It requires only intent to “hinder, delay or defraud”.³² For example, under Section 276, insolvency or inadequate consideration is irrelevant in the face of evidence of intent, as is the case here. *See e.g., Golden Budha*, 931 F.2d at 201; *see also Elliot v. Elliot*, 365 F. Supp. at 455.

Gorton’s own testimony, bolstered by other evidence³³ indicating that he moved dollars in Lime Wire distributions to the FLP so that plaintiffs could not reach them, is all that Section 276 requires to hold such a conveyance fraudulent. Accordingly, a jury should assess

³² Gorton’s reliance on *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357 (S.D.N.Y., 2003) is misplaced both because the “badges of fraud” are irrelevant here, but also because the court in *Lippe* did *not* find a *single* badge of fraud that would support a finding of fraudulent intent. That is not the case here as even Gorton acknowledges. (Gorton Mem. at 31; *see also* 26, 27.) Gorton also relies on *Case v. Fagnoli*, 702 N.Y.S.2d 764 (N.Y. Sup. Ct. 1999) as a case where the circumstantial factors were “decidedly mixed”, but summary judgment was granted. However, Gorton fails to mention that in that case “[b]oth parties agree[d] that the facts [were] not in dispute” *Id.* at 768. And, *Shelly v. Doe*, 660 N.Y.S.2d 937 (N.Y. Co. Ct. 1997), relied on by Gorton because summary judgment was granted, was later modified by the Appellate Division. *Shelly v. Doe*, 249 A.D.2d 756 (N.Y. App. Div. 1998). The same factors considered by the lower court were considered by the appellate court, which reached the *opposite* conclusion, finding that there *was* “enough indicia of fraud [exists to] warrant a hearing on the factual issues.” *Id.* at 758.

³³ For example, only Gorton’s self-serving declaration supports the “estate-planning” justification given for the conveyance of the Lime Wire distributions. (Gorton SoF ¶¶ 49-52.) No contemporaneous documents have been submitted to shore up Gorton’s statement, and although Gorton mentions his accountant and attorney, neither has come forward to support Gorton’s version of the transfer. Similarly, while it may be true that family limited partnerships had been discussed for years, it is telling that Gorton did not take *any* action until just a few days after the petition for *certiorari* was granted in *Grokster*, and the FLP was not actually established until months later -- three days *after* the U.S. Supreme Court’s *Grokster* decision, unfavorable to P2P companies like Lime Wire, was announced. (*See* Pls. 7/18/08 SOF ¶ 27.) Also, despite the conveyance, Gorton has continued to control, use and benefit from distributions -- which still go to him. In fact, Gorton admits that “he retained a significant amount of control over the shares in [Lime Wire] both before and after the transfer”. (Gorton Mem. at 27.)

Gorton's credibility as to his intent and reasons for the transfer, and summary judgment on this claim should be denied.

Conclusion


For the reasons set forth above and in plaintiffs' responses to defendants' two Rule 56.1 Statements, plaintiffs respectfully request that this Court deny defendants' two motions for summary judgment.

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Respectfully submitted,

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