

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/Counterclaim Defendants,

v.

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

Defendants.

ECF CASE

06 CV. 5936 (GEL)

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' OBJECTIONS TO PLAINTIFFS'  
EXHIBITS FILED AS PART OF PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT  
AND DEFENDANTS' MOTION TO STRIKE**

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COME NOW, Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) and file this Memorandum of Law in Support of Defendants’ Objections to Plaintiffs’ Exhibits Filed as Part of Plaintiffs’ Opposition to Defendants’ Motions for Summary Judgment and Defendants’ Motion to Strike, and respectfully show the Court as follows:

**I. DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ EXHIBITS**

Plaintiffs’ Response relies upon numerous inadmissible exhibits. However, the Court may consider only admissible evidence. *Riisna v. Am. Broad. Cos.*, 219 F. Supp. 2d 568, 571 (S.D.N.Y. 2002). Therefore, Defendants file these objections to Plaintiffs’ exhibits and move to strike them from the summary judgment record.<sup>1</sup> The admissibility of these exhibits is properly before the Court at this stage of the proceedings. “The principles governing admissibility of evidence apply equally on a motion for summary judgment as in trial.” *Bazak Int’l Corp. v. Tarrant Apparel Group*, 378 F. Supp. 2d 377, 391 (S.D.N.Y. 2005).

Defendants object to Plaintiffs’ exhibits as follows:

Exhibit No.	Exhibit Description	Objection
327	Webpage: Abacast>>Hybrid P2P Technology	Authenticity <sup>2</sup> , Hearsay <sup>3</sup>
329	Download.com webpage	Authenticity, Hearsay
330	Gnutelliums.com webpage	Authenticity, Hearsay
331	Plan for LimeWire / Napster Conversion	Inadmissible settlement offer, Fed. R. Evid. 408. <sup>4</sup> See Settlement

<sup>1</sup> This Motion is being filed in addition to other motions filed by Defendants addressing their objections to Plaintiffs’ summary judgment evidence.

<sup>2</sup> See Section IV.A *infra* for the argument and authority on authenticity objections.

<sup>3</sup> See Section IV.B *infra* for the argument and authority on hearsay objections.

<sup>4</sup> Defendants incorporate their previously-filed Memorandum of Law in Support of Defendants’ Settlement Related and Pre-August 2003 Objections to Plaintiffs’ Exhibits to Their Motion for Partial Summary Judgment and Defendants’ Motion to Strike Plaintiffs’ Exhibits (“Settlement Related and Pre-August 2003 Objections”), which

Exhibit No.	Exhibit Description	Objection
	Process	Related and Pre-August 2003 Objections”
332	Webpage: Project Gutenberg Homepage	Authenticity, Hearsay
333	Webpage: Apple.com>>iLife>>iMovie	Authenticity, Hearsay
334	Article: <i>Digital Alexandria</i>	Authenticity, Hearsay
335	Article: <i>Newsmaker: fighting to protect copyright ‘orphans’</i>	Authenticity, Hearsay
336	Article: <i>Internet Archive stores 40 billion web pages</i>	Authenticity, Hearsay
337	Linspire Press Release>>Microsoft and Lindows Settle Trademark Case	Authenticity, Hearsay
338	Cates Declaration electronic backup: <i>The Adventures of Huckleberry Finn</i> , etc.	Hearsay
339	University of Virginia Library>>Collections>>Access and Conditions	Authenticity, Hearsay
340	Webpages from <a href="http://www.gutenberg.org">www.gutenberg.org</a>	Authenticity, Hearsay
341	Webpages, including: Gary Overacre>>Portfolio	Authenticity, Hearsay
342	String Cheese Incident’s “Magic Carpet Ride” (electronic backup to Cates Declaration showing song properties and length)	Hearsay
343	Webpage: Archive.org>>	Authenticity, Hearsay
344	Tea Leaf Green’s “Gasaholic” and “Garden III”	Hearsay
345	Webpage: Archive.org>>	Authenticity, Hearsay
346	Webpage: NIN Ghosts IV	Authenticity, Hearsay
347	Webpages, including: Archive.org>>	Authenticity, Hearsay
348	Webpages, including: Skype>>Download	Authenticity, Hearsay
349	Webpages, including: Grid Networks>>Download and Install	Authenticity, Hearsay

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outlines the basis for not admitting a variety of exhibits based on Fed. R. Evid. 408. Those objections are incorporated herein for all purposes.

Exhibit No.	Exhibit Description	Objection
	GridCasting in Windows XP	
350	Webpage: Joost>>Knowledge Base	Authenticity, Hearsay
351	Webpage: Joost>>Welcome to Joost Beta	Authenticity, Hearsay
352	Article: <i>Will Pando Solve Your Digital Media Problems (Like It Solved Mine)?</i>	Authenticity, Hearsay
353	Webpages, including: Pando Homepage	Authenticity, Hearsay
354	Webpage: DCIA Newsletter (December 6, 2004)	Authenticity, Hearsay
355	Webpages regarding: Lake Trout	Authenticity, Hearsay
356	Webpage: TV.com>>Starting Over>>Show Summary	Authenticity, Hearsay
357	Webpage: Jungroup Homepage	Authenticity, Hearsay
358	Webpage: Sananda Maitreya>>Music Store	Authenticity, Hearsay
359	Webpage: Sananda Maitreya>>Press Releases	Authenticity, Hearsay
360	Webpage: Raketu>>Description	Authenticity, Hearsay
361	Article: <i>CNR.com Beta Goes Live – The Easy Way To Get Linux Software</i>	Authenticity, Hearsay
362	Webpage: Winzip.com>>Download	Authenticity, Hearsay
363	Webpages, including: Download.com>>Open Office	Authenticity, Hearsay
364	Webpages, including: America’s Army Homepage	Authenticity, Hearsay
365	Webpages, including: Berklee Shares Homepage	Authenticity, Hearsay
366	Webpage: Outraged Moderates>>About Us	Authenticity, Hearsay
367	Webpage: Outraged Moderates>>Government Document Library	Authenticity, Hearsay
368	Webpage: Outraged Moderates>>How to Use P2P Networks	Authenticity, Hearsay
369	Webpage: Nine Inch Nails – The Slip	Authenticity, Hearsay
370	Webpage: Creative Commons International>>United States	Authenticity, Hearsay

<b>Exhibit No.</b>	<b>Exhibit Description</b>	<b>Objection</b>
371	Webpages, including: Nine Inch Nails Homepage	Authenticity, Hearsay
372	Webpage: Widespread Panic>>Q&A	Authenticity, Hearsay
373	Webpages, including: Nugs.net>>FAQ>>General Questions	Authenticity, Hearsay
374	Webpage: Vida Blue>>Multimedia	Authenticity, Hearsay
375	Webpage: Nugs.net>>Download	Authenticity, Hearsay
376	Webpage: Jamendo>>Music>>Albums>>Listen	Authenticity, Hearsay
377	Webpages regarding: Tryad	Authenticity, Hearsay
378	Webpages, including: Converse>>Terms and Conditions	Authenticity, Hearsay
379	Webpage: Marquis Music>>Alfie Zappacosta	Authenticity, Hearsay
380	Webpage: Epitonic>>The American Analog Set	Authenticity, Hearsay
381	Webpage: Music.download.com>>Appleseed Cast	Authenticity, Hearsay
382	Webpages regarding: <i>Down and Out in the Magic Kingdom</i>	Authenticity, Hearsay
383	Webpages regarding: "I Have a Dream" speech	Authenticity, Hearsay
384	Webpages regarding: The Declaration of Independence	Authenticity, Hearsay
385	Webpages regarding: The Constitution of the United States	Authenticity, Hearsay
386	Cates Declaration electronic backup: <i>Hamlet</i> and <i>Macbeth</i>	Hearsay
387	Webpages regarding: The complete works of William Shakespeare	Authenticity, Hearsay
391	E-mail from A. Kumar to K. Catillaz and e-mail from K. Catillaz to K. Catillaz	Inadmissible settlement offer, Fed. R. Evid. 408. <i>see</i> Settlement Related and Pre-August 2003 Objections
428	Lime Wire LLC Draft Offering	Pre-August 2003 document

Exhibit No.	Exhibit Description	Objection
	Memorandum (April 2001)	therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
429	E-mail from J.K. Barret to <a href="mailto:mrichter@limegroup.com">mrichter@limegroup.com</a> attaching employee spreadsheet	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
431	Lime Wire Offering Memorandum Draft Cover Letter to Potential Investors	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
441	E-mail from M. Gorton to Peer	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
442	E-mail from M. Gorton to J.K. Barret	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
443	E-mail from P. Toland to M. Gorton	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
444	E-mail from P. Toland to M. Gorton	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
448	E-mail from M. Gorton to G. Bildson	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
453	Letters from M. Gorton to S. Thadani, A. Arago, G. Bildson, C. Rohrs and A. Fisk	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections
456	Lime Group Performance Appraisal of S. Cho by M. Gorton and G. Bildson	Pre-August 2003 document therefore irrelevant; <i>see</i> , Settlement Related and Pre-August 2003 Objections

Exhibit No.	Exhibit Description	Objection
458	E-mail from M. Gorton to N. Lovejoy with attached document (LimeWire: Working with the Record Industry)	Inadmissible settlement offer, Fed. R. Evid. 408; <i>see</i> , Settlement Related and Pre-August 2003 Objections
459	E-mail from M. Gorton to L. Tunberg	Privileged. Under the terms of the Stipulation and Protective Order dated March 8, 2007 in this case, Defendants have requested that this document be returned on grounds of privilege and removed from the record.
460	E-mail from M. Gorton to K. Catillaz	Discussions of inadmissible settlement offer, Fed. R. Evid. 408; <i>see</i> Settlement Related and Pre-August 2003 Objections

**II. DEFENDANTS’ OBJECTIONS TO PROFESSOR ELLIS HOROWITZ’S TESTIMONY**

Defendants object to the proffered deposition testimony of Prof. Ellis Horowitz for the reasons outlined in Defendants’ Memorandum of Law in Support of Defendants’ Motion to Exclude Plaintiffs’ Proffered Expert Summary Judgment Evidence From the Depositions and Reports of Ellis Horowitz Ph.D. and Richard P. Waterman Ph.D. which is incorporated herein by reference.

**III. ARGUMENT & AUTHORITY**

**A. Rule 901: Authentication**

Federal Rule of Evidence 901 requires authentication or identification as a condition precedent to admissibility. FED. R. EVID. 901. Rule 901(a) further requires Plaintiffs to submit sufficient evidence to support a finding that the documents on which they rely are what Plaintiffs claim that they are. *United States. v. Ruggiero*, 928 F.2d 1289, 1303 (2d Cir. 1991). Plaintiffs attempt to authenticate their summary judgment evidence via the Declaration of Katherine B.

Forrest, an attorney for the law firm representing Plaintiffs. However, this is insufficient to authenticate the documents to which Defendants object on the basis of authenticity. Furthermore, it is questionable whether Ms. Forrest has personal knowledge sufficient to authenticate these documents. Specifically, for Exhibits 327, 329–30, 332–337, 339–341, 343, 345–85, and 387, Ms. Forrest declares that these exhibits, which are printouts of web sites, were printed “at [her] direction and under [her] supervision” on specific dates. *See* Declaration of Katherine B. Forrest, attached to Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment. These printouts are not properly authenticated. *See Novak v. Tucow, Inc.*, No. 06-CV-1909 (JFB), 2007 WL 922306, at \* 5 (E.D.N.Y. 2007) (“While plaintiff’s declaration purports to cure his inability to authenticate the documents printed from the internet, he in fact lacks the personal knowledge required to set forth with any certainty that the documents obtained via third-party websites are, in fact, what he proclaims them to be. . . . [plaintiff] proffers neither testimony nor sworn statements attesting to the authenticity of the contested web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages, such exhibits cannot be authenticated as required under the Rules of Evidence.”).

**B. Rules 801-803: Hearsay**

Hearsay is not admissible pursuant to Federal Rule of Evidence 802. FED. R. EVID. 802. However, numerous of Plaintiffs’ exhibits contain hearsay, out-of-court statements offered to prove the truth of the matter asserted. FED. R. EVID. 801. Specifically, Exhibits 327, 329–30, 332–337, 339–341, 343, 345–85, and 387 are screen shots of various webpages, which this Court classifies as hearsay. *See FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 303 (S.D.N.Y. 2008) (Holwell, J.) (holding that a printout of a website was inadmissible hearsay). Even though Exhibits 338, 342, 344, and 386 are printouts from files referenced in the Cates



Declaration, Plaintiffs offer them to prove the truth of the matter asserted, which makes them hearsay. FED. R. EVID. 801.

Furthermore, Plaintiffs have not set forth the foundation to meet any of the hearsay exceptions contained in Rule 803. FED. R. EVID. 803. By way of example, Rule 803(6) provides an exception for business records. However, to meet the business records exception, Plaintiffs must provide testimony from the custodian of records or another qualified witness demonstrating that the documents were “kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the [record].” *Parker v. Reda*, 327 F.3d 211, 214-15 (2d Cir. 2003). Plaintiffs have failed to set forth a foundation for the business record exception, or any other exception provided in Rule 803. Therefore, the documents to which Defendants object on the basis of hearsay should be excluded.

Defendants anticipate that Plaintiffs will attempt to argue that some of the statements to which Defendants object on hearsay grounds are admissions by a party-opponent. Rule 801(d)(2)(D) provides that “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” is not hearsay. FED. R. EVID. 801(d)(2)(D). “In order to introduce evidence of an out-of-court statement as nonhearsay under Rule 801(d)(2)(D), a party must lay a sufficient foundation by establishing ‘(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency.’” *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 129 (2d Cir. 2005) (citing *Pappas v. Middle Earth Condo. Ass’n*, 963 F.2d 534, 537 (2d Cir. 1992)). Plaintiffs have not established that the documents to which Defendants object herein are nonhearsay. Therefore, they should be excluded. *See id.*

### **C. Expert Reports**

Expert reports that are neither sworn nor verified are not competent summary judgment evidence. *Winstead v. Ga. Gulf Corp.*, 77 Fed. App'x 267, 271 (5th Cir. 2003); *see also Major v. Astrazeneca, Inc.*, Nos. 5:01-CV-618 (Lead) (FJS/GJD), 5:01-CV-1736 (Member) (FJS/GJD), 2006 WL 2640622, at \*6 (N.D.N.Y. 2006) (stating that the report was not proper summary judgment evidence because it was not notarized or dated). The expert reports attached to the deposition of Ellis Horowitz, Ph.D. are neither sworn nor verified and are not admissible summary judgment evidence.

### **V. CONCLUSION**

Plaintiffs' Motion for Partial Summary Judgment relies upon exhibits that are not relevant, have not been properly authenticated, and contain hearsay. The Exhibits and the testimony objected to within this Memorandum of Law are inadmissible and must be excluded. Defendants request that the Court sustain Defendants' objections and grant this Motion to Strike.

Dated: November 7, 2008.

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*Attorneys for Defendants*

## CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 7th day of November, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via email.

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