

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

Defendants.

ECF Case

06 CV 5936 (GEL)

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs' combined response to LimeWire's and the Tertiary Defendants' separate Motions for Summary Judgment contains many puzzling arguments. For starters, Plaintiffs assert that the coerced declaration of Greg Bildson magically "undermines" Defendants' motions. But Bildson's Declaration, obtained *ex parte* while Bildson was still Lime Wire LLC's ("LW") Chief Technology Officer and a named defendant,<sup>1</sup> does not refute the legal arguments and facts that Defendants urge in support of their motions. Importantly, Bildson does not claim that LimeWire does not have substantial noninfringing uses, which is the key to the applicability of the *Sony* safe harbor. Bildson also cannot dispute that LW has no knowledge of and does not control what LimeWire users do, essential elements of Plaintiffs' contributory and vicarious infringement claims.

Plaintiffs inexplicably merge the two separate theories of contributory infringement and inducement of infringement into a hybrid "contributory inducement" theory, claiming that under that theory, the *Sony* safe harbor does not apply to claims for contributory

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<sup>1</sup> Defendants have simultaneously moved to strike Bildson's Declaration. See Defendants' Motion to Strike The Bildson Declaration and For The Entry of a Protective Order and Stay. But even if not stricken, Bildson's Declaration is entitled to little, if any, weight given the fact of Bildson's undeniable bias against Defendants as a result of his recent settlement with Plaintiffs in which he agreed to "cooperate" in return for a broad release. Moreover, to the extent the Court considers Bildson's Declaration in determining Plaintiffs' Motion on their inducement claims, given the many controverting declarations, testimony, and other evidence submitted by Defendants, including the declarations of Mark Gorton and Sam Berlin filed in support of this reply that absolutely refute most of Bildson's statements, this Court should deny Plaintiffs' summary judgment motion because Bildson's credibility is now squarely at issue. "It is axiomatic that '[a]ssessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.'" *Caraballo v. City of New York*, No. 05 Civ. 8011(GEL), 2007 WL 1584202, at \*6 (S.D.N.Y. May 31, 2007) (citations omitted). See also *Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007) (because determination of disputed fact turned on witness's credibility, genuine issue of material fact precluded summary judgment); *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 157 (2d Cir. 1998) ("To the extent that these inconsistencies can only be resolved based upon credibility determinations, such questions of witness credibility are to be decided by the jury."); *United States v. Rem*, 38 F.3d 634, 644 (2d Cir. 1994) ("Resolutions of credibility conflicts and choices between conflicting versions of the facts are matters for the jury, not for the court on summary judgment.").

infringement, regardless of whether a product is capable of substantial noninfringing use. Even a casual reading of the *Sony* and *Grokster* opinions reveals that Plaintiffs are wrong.

With respect to Defendants' evidence of the many noninfringing uses of P2P applications, including Lime Wire—and even Plaintiffs concede that P2P applications can be used to distribute music “legitimately”—Plaintiffs argue that Defendants must provide specific examples of LimeWire's use for noninfringing purposes. Plaintiffs' argument that LW must show noninfringing uses of LimeWire specifically, and not P2P networks generally, is no more legitimate than requiring the manufacturer of a VCR to prove that its brand of recorder was specifically used for a noninfringing purpose, when the Supreme Court has already found that these products in general have noninfringing uses.

Unable to produce any evidence that LW is able to control or supervise the searching, sharing, and downloading activities of LimeWire users, Plaintiffs ask this Court to be the first to hold that the “control” element of vicarious liability can be satisfied by showing that a technology vendor could have designed its technology differently. Such an interpretation would effectively empower copyright owners to demand that any technology capable of infringing a copyright be redesigned to their specifications, even at the risk of making the product unsuitable for some of its intended functions. Plaintiffs' expansive view of “control” is foreclosed by *Grokster* and other authorities that require Plaintiffs to show that the *existing* versions of LimeWire afford LW the right and ability to control *the allegedly infringing activities* of LimeWire users.

As for Plaintiffs' common law copyright infringement and unfair competition claims, Plaintiffs do not even attempt to respond in anything other than a halfhearted fashion. The same is true for Plaintiffs' fraudulent conveyance claim, where Plaintiffs ignore the



applicable standard of proof, do not respond to Defendants' arguments as to the relevant considerations, and rely on incompetent and incomplete evidence as "direct proof" of fraudulent intent. Plaintiffs' common law claims as well as their fraudulent conveyance claims—neither of which were properly pleaded—are treated by Plaintiffs as the throwaway claims that they are. The Court should treat them the same way.

Plaintiffs also continue to fail to offer even a single authority to support the extension of liability for copyright infringement to persons whose only relationship is with a secondary infringer and who have no relation to direct infringers. The evidence submitted by both parties shows that Gorton and Lime Group had no relationship with Lime Wire users, and certainly not with any Lime Wire users involved in direct infringement. There is no support for Plaintiffs' request for the Court to take the extraordinary action of imposing tertiary liability on parties twice removed from the acts of direct infringers.

Finally, Plaintiffs complain that Defendants' arguments are tantamount to a burglar complaining that the homeowner should have had a better lock. This sounds witty, but it is an imperfect analogy. That analogy would apply only, if at all, to persons accused of direct infringement—*i.e.*, Lime Wire users that download Plaintiffs' copyrighted works. Defendants have not infringed Plaintiffs' copyrights, have not induced others to do so, lack the ability to control LimeWire users, and have not materially contributed to the infringement of Plaintiffs' copyrights.

## **ARGUMENT AND AUTHORITIES**

### **I. PLAINTIFFS FAIL TO ESTABLISH DIRECT INFRINGEMENT**

The threshold requirement of Plaintiffs' claims is "proof of direct infringement by the primary infringer." *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 801 (N.D. Cal.

2005); *see* LW’s Mot. at 39-40. Evidence of actual distribution of the copyrighted work is required—“merely exposing music files to the internet is not copyright infringement.” *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008).

Plaintiffs argue they have shown direct infringement by “produc[ing] to defendants [a] hard drive” with “downloaded sound recordings.” Ps’ Resp. at 32. Whatever is on this hard drive is irrelevant, as Plaintiffs failed to submit it as summary judgment evidence. *Galabya v. New York City Bd. of Edu.*, 202 F.3d 636, 640 (2d Cir. 2000) (reviewing court may not consider evidence not in the record before the district court); *see* LW’s Resp. at 8.

Nor will Plaintiffs’ evidence of what is purportedly available for download using LimeWire satisfy their burden to establish direct infringement. “The general rule, supported by the great weight of authority, is that ‘infringement of the distribution right requires an actual dissemination of [the copies].’” *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008); *see* LW’s Resp. at 9-10 (citing cases).

Plaintiffs have submitted two new declarations in a last-ditch effort to prove direct infringement. Neither of these witnesses were identified in Plaintiffs’ discovery responses or Rule 26 disclosures, and consequently, their declarations are inadmissible.<sup>2</sup> But even if they were admissible, they fail to prove that either (1) a LimeWire user downloaded the song from another LimeWire user using LimeWire (*i.e.*, violation of reproduction rights); or (2) that each song at issue was actually disseminated by a LimeWire user to a third party without authorization and that it is a duplicate of that song. At best, these declarants establish that allegedly identical files are being made available for downloading by one or more LimeWire users. They do not prove that these files were definitely downloaded from other Lime Wire

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<sup>2</sup> Defendants have concurrently filed a motion to exclude because of Plaintiffs’ failure to disclose these witnesses. *See* Defendants’ Motion to Exclude The Declarations of Thomas Sehested, Andrew Kempe and Kathryn Coggon..

users. As explained by Defendants' computer expert Dr. Steven Gribble, who reviewed these declarations, just because the files may be identical does not establish this fact. "The fact that two users have a file with the same hash implies that the two users possess a file with (likely) the same contents. It does not, however, imply that those two users shared the file with each other, or that one copied the file from the other." Declaration of Dr. Stephen Gribble at ¶ 4(b), filed contemporaneously herewith. Importantly, "[t]here are many different ways that the two users could have ended up with the same, identical file. They could have both obtained it from the same, non-P2P source (e.g., if they both downloaded it from a web site, or possibly from different web sites that happen to have obtained some other way). They could have obtained it from some non-gnutella-P2P network. They could have obtained it from some non-LimeWire Gnutella peer. It could be that this file is available on all of these sources, and each user obtained it using a different source." *Id.* at ¶ 4(c).

Moreover, Plaintiffs' growing collection of default judgments, summary judgments, and stipulated judgments have no bearing on whether a LimeWire user committed direct infringement of Plaintiffs' copyrights.

Finally, Plaintiffs' desperate attempt to elevate random statements (themselves objectionable on numerous levels) pertaining to an awareness that LimeWire could be used for infringing purposes—just like copiers, scanners, recorders, etc.—to proof of actual direct infringement necessarily fails. Evidence that the technical possibility of infringement exists is not proof of infringement. *See* LW's Resp. at 9-10 (citing cases).

In sum, Plaintiffs fail to establish with competent summary judgment evidence that direct infringement of any of their copyrighted sound recordings occurred. Accordingly, this Court should grant Defendants' motion and dismiss Plaintiffs' lawsuit in its entirety.

**II. THE SUMMARY JUDGMENT EVIDENCE ESTABLISHES THAT SUBSTANTIAL NONINFRINGING USES OF LIMEWIRE EXIST, THUS, THE *SONY* SAFE HARBOR APPLIES TO PLAINTIFFS' CONTRIBUTORY AND VICARIOUS INFRINGEMENT CLAIMS**

**A. THE RELEVANT INQUIRY IS WHETHER A SUBSTANTIAL NONINFRINGING USE EXISTS, NOT THE PREVALENCE OF THE SUBSTANTIAL NONINFRINGING USE.**

Both parties agree that in *Sony Corporation of America v. Universal City Studios, Inc.*, the Supreme Court held that the sale of an article of commerce “does not constitute contributory infringement if the product is . . . merely [] capable of substantial noninfringing uses.” *Sony*, 464 U.S. 417, 442 (1984). *See* LW’s Mot. at 12; Ps’ Resp. at 9; *see also New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504 (2001) (stating “*Sony* held that the “sale of copying equipment” does not constitute contributory infringement if the equipment is “capable of substantial noninfringing uses”).

According to Plaintiffs, the Supreme Court made it “plain” that the inquiry regarding substantial noninfringing use “is: ‘how much use?’” Ps’ Resp. at 9 (quoting *Sony*, 464 U.S. at 442). This is a dramatic misstatement of what the *Sony* Court wrote. What the Supreme Court stated was that “in order to resolve [the *Sony*] case we need not give precise content to the question of *how much use* is commercially significant.” 464 U.S. at 442 (emphasis added). In fact, the lower court in *Sony* used such a proportionality approach, and the Court reversed on this very point. *See Sony*, 464 U.S. at 428, 441-42 (explaining that court of appeals had concluded that “VTRs . . . are sold ‘for the primary purpose of reproducing television programming,’” and adopting “mere capability” test in reversing lower court).

Subsequently, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court expressly declined to consider how much noninfringing use would qualify as substantial under the *Sony* rule:

We do not revisit *Sony* further . . . to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and to ***leave further consideration of the Sony rule for a day when that may be required.***

*Id.* at 934 (emphasis added). See *Viacom Int'l Inc. v. YouTube Inc.*, \_\_\_ F.R.D. \_\_\_\_, Nos. 07 Civ. 2103 and 3582(LLS), 2008 WL 2627388, at n.4 (S.D.N.Y. July 2, 2008) (noting that the *Grokster* Court declined “‘to add a more quantified description’ of how much non-infringing use qualifies as substantial under *Sony*”).

Plaintiffs’ reliance on pre-*Grokster* cases to support their position that the Court must weigh the respective noninfringing and infringing uses of LimeWire is misplaced. Plaintiffs rely heavily on dicta in the case of *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003), an appeal of a preliminary injunction. Central to the court’s analysis and affirmance of the injunction, was Aimster’s failure at that stage of the proceedings to present *any* evidence of noninfringing uses. *Id.* at 655; *see id.* at 653 (“Aimster has failed to produce any evidence that its service has ever been used for a noninfringing use.”). The court, however, specifically noted the existence of several possible substantial noninfringing uses that Aimster might develop during the course of the litigation. *See id.* at 652 (identifying five potential noninfringing uses).

The two other pre-*Grokster* cases Plaintiffs point to, *Matthew Bender & Co., Inc. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1988), and *Mathieson v. Associated Press*, 23 U.S.P.Q.2d 1685 (S.D.N.Y. 1992), Ps’ Resp. at 10-11, similarly fail to support Plaintiffs’ position. The fact that the plaintiffs in those cases failed to establish any actual direct infringement—much like Plaintiffs here—does not diminish the import of *Sony*’s holding that liability for contributory infringement will not lie where the product is “capable of

substantial noninfringing uses.” Plaintiffs fail to cite any authority to support their position that the Court must weigh the noninfringing and infringing uses of LimeWire in order to determine if the *Sony* safe harbor applies in this case.

**B. THE RECORD EVIDENCE SHOWS THAT SUBSTANTIAL NONINFRINGEMENT USES OF LIMEWIRE EXIST.**

As described in detail in LW’s Motion, myriad substantial and actual noninfringing uses of P2P networks, including LimeWire, exist. Among these are:

- Superior distribution of public domain works;
- Distribution of creative works by artists and musicians who may otherwise lack an effective distribution channel;
- LimeWire’s MagnetMix service that allows content owners to distribute their content over the Gnutella network;
- Cost-effective distribution of other forms of authorized media;
- Authorized distribution of computer software;
- Distribution of content authorized by Plaintiffs and other copyright holders;
- Plaintiffs’ own use of P2P programs for promoting and tracking the popularity of artists and songs;
- Marketing products and services; and
- The free exchange of political, educational, and other information.

*See* LW’s Mot. at 16-30; *see Grokster*, 545 U.S. at 954 (Breyer, J., concurring) (describing “legitimate noninfringing uses” of P2P networks). Plaintiffs’ insistence that LW must produce evidence of specific examples of noninfringing uses of LimeWire, as opposed to P2P applications generally, is meritless. *See* Ps’ Resp. at 12-16. LW is no more required to produce such evidence than JVC would be to produce evidence of specific noninfringing uses of its brand of video recorders by its users.

LimeWire is plainly capable of (and is being used for) substantial noninfringing uses. A number of the current noninfringing uses of LimeWire are commercial in nature. *See* Prelinger Decl. ¶¶ 6-18 (for-profit business generates leads from wide redistribution). Other current noninfringing uses, although not necessarily “commercial,” are nevertheless “substantial” insofar as they further important public policy goals, such as dissemination of public domain works.<sup>3</sup> *See* Kahle Decl. ¶¶ 8-20. Although invoking *Sony* requires a showing of “mere capability,” the undisputed evidence shows that a number of the actual noninfringing uses are already underway on the global Gnutella network. *See* Cates Decl. ¶¶ 3-5, 11-16 (verifying availability of Gutenberg, MagnetMix and Internet Archive works).

Even if the Court were to accept Plaintiffs’ invitation to consider the amount of allegedly infringing versus noninfringing use of LimeWire, Plaintiffs’ meritless and unreliable “statistical study” does not prove that “nearly 99% of the actual download requests by LimeWire’s users are infringing.” Ps’ Resp. at 12. The “statistics” Plaintiffs tout were the result of a study that was formulated largely by Plaintiffs’ counsel, implemented by a stranger to Plaintiffs’ expert Dr. Waterman (who was never disclosed to Defendants), and the results sorted into “made-up” categories by a lawyer Plaintiffs hired. *See* Ds’ Mot. to Strike Experts at 5-21. Dr. Waterman was little more than a mouthpiece for the trumped up results of a flawed and inadmissible protocol conceived, executed, and analyzed by nonexperts.

Moreover, even if Dr. Waterman’s “statistics” were admissible, they show that 55% of the files downloaded were *noninfringing* ones. *See id.* at n.11. And even if the Court were to accept his regurgitation of the conclusion reached by the lawyer Plaintiffs hired to analyze the study results that “roughly 93% of the files made available” are infringing (Ps’ Resp. at 12), even that leaves 7% that are noninfringing—a percent that would equate to

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<sup>3</sup> There is no requirement that a substantial noninfringing use be commercial in nature.

hundreds of thousands of noninfringing files. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, n.10 (9th Cir. 2004), *vacated on other grounds*, 545 U.S. 913 (2005) (noting that “even at a 10% level of legitimate use, as contended by the Copyright Owners, the volume of use would indicate a minimum of hundreds of thousands of legitimate file exchanges.”). Even Plaintiffs’ expert Dr. Horowitz agreed that Lime Wire could be used for noninfringing purposes. *See* Ex. A, Declaration of Charles S. Baker (“Baker Decl.”).

Finally, Plaintiffs argue that some of Defendants’ evidence is inadmissible because the declarants lack first-hand knowledge regarding the availability of the declarants’ works on the Gnutella network. This objection misses the point. The declarants testified that their works were properly authorized for sharing.<sup>4</sup> *See* Freedman Decl.; Prelinger Decl.; and Kahle Decl.. The declaration of Susan Cates, in turn, establishes that many of these works are available on the Gnutella network. Cates Decl. ¶¶ 3-5, 11-16. Plaintiffs have submitted no controverting evidence. In fact, Plaintiffs’ own expert was unable to avoid finding noninfringing material given that he could only confirm that 45% of his searches resulted in locating infringing content.

Defendants’ summary judgment evidence conclusively establishes that many noninfringing uses of P2P applications, including LimeWire, exist—not to mention the tremendous future potential of P2P networks. Accordingly, LimeWire is entitled to the protection of the *Sony* safe harbor from contributory and vicarious infringement liability.

**C. SONY APPLIES TO CLAIMS FOR CONTRIBUTORY INFRINGEMENT.**

According to Plaintiffs, “*Sony* does *not apply at all* to a [sp] infringement claim based on inducement—and *Lime Wire is contributorily liable because it has induced*

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<sup>4</sup> This testimony is the same quality of testimony that the Supreme Court found dispositive in *Sony*. *See* 464 U.S. at 445 n. 27 (testimony by Mr. Rogers that he had no objection to time-shifting of his program by viewers).



*infringement.*” Ps’ Resp. at 6 (emphasis added); *see also id.* at 7 (“*Sony* does not apply where, as here, liability is based upon the first prong of the contributory liability test – inducement or encouragement of infringement.”). Plaintiffs fail to comprehend that the Supreme Court created a new theory of secondary infringement liability in *Grokster*. Instead, Plaintiffs merge the two distinctly separate theories of contributory liability and inducement liability into one, unheard of, theory of “contributory inducement liability.”

The *Grokster* opinion is widely understood by courts and commentators alike as having created a new theory of secondary infringement liability—namely, inducement of infringement. *See Grokster*, 545 U.S. at 936-37; *see, e.g., Monotype Imaging, Inc. v. Bitstream, Inc.*, 376 F. Supp. 2d 877, 888 (N.D. Ill. 2005) (noting *Grokster* adopted the theory of “intentional inducement of infringement”); *Nimmer on Copyright* § 12.04[A][3][b][ii] (stating that the *Grokster* Court enunciated “a new theory of attempting to induce infringement”); Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1409 (2006) (“the *Grokster* Court reconstructed secondary liability doctrine to impose liability,” and “fashioned custom-made relief for the plaintiffs”). Inducement liability is not merely an extension of contributory infringement liability. It is a new theory of secondary copyright infringement—one that did not exist prior to *Grokster*—with its own unique elements and proof requirements, to which the *Sony* rule does not apply. *See Grokster*, 545 U.S. at 934-35. Although Plaintiffs’ purported inducement evidence may relate to an element of their contributory infringement claims, it has no bearing on whether the *Sony* safe harbor applies to their contributory infringement claims against Defendants.<sup>5</sup>

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<sup>5</sup> To the extent Plaintiffs’ inducement evidence has any bearing on Plaintiffs’ contributory infringement claims, that evidence is largely inadmissible, consisting of stale evidence predating the applicable statute of limitations,

**D. SONY APPLIES TO CLAIMS FOR VICARIOUS INFRINGEMENT.**

Plaintiffs also argue that the *Sony* safe harbor does not apply to claims for vicarious infringement. Ps' Resp. at 19. As courts have recognized, the *Sony* Court used the terms "vicarious" and "contributory" interchangeably, without differentiating between the two theories of liability." *ITSI T.V. Productions, Inc. v. California Auth. of Racing Fairs*, 785 F. Supp. 854, n.12 (E.D. Cal. 1992), *rev'd on other grounds*, 3 F.3d 1289 (9th Cir. 1993); *see also Aimster*, 334 F.3d at 655 (noting that in *Sony*, the Supreme Court "treat[ed] vicarious and contributory infringement interchangeably"). Thus, the rule in *Sony* applies to both contributory and vicarious infringement claims.

In sum, the summary judgment evidence conclusively establishes the existence of substantial noninfringing uses of P2P applications, including LimeWire. Consequently, Defendants are entitled to the protection of the *Sony* safe harbor, and Plaintiffs' claims for contributory and vicarious infringement fail as a matter of law.

**III. PLAINTIFFS' CONTRIBUTORY INFRINGEMENT CLAIMS FAIL BECAUSE NONE OF THE DEFENDANTS MATERIALLY CONTRIBUTED TO ANY LIMEWIRE USER'S INFRINGEMENT OF PLAINTIFFS' COPYRIGHTS**

Regardless of the applicability of *Sony*, Plaintiffs fail to raise a fact issue as to any of the Defendants' alleged material contribution to infringement by a LimeWire user. In order to raise a fact issue regarding their contributory infringement claim, Plaintiffs bear the burden to prove Defendants (1) had knowledge of specific acts of infringement; and (2) "materially contributed" to LW users' infringing conduct. *Gershwin Publ'g Corp. v. Columbia Artists Mgm't, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). The contribution must also "bear a direct

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and more importantly, predating the *Grokster* opinion. Prior to *Grokster*, the conduct Plaintiffs attempt to portray as unlawful was not a basis for the imposition of secondary copyright infringement liability upon the distributor of a product capable of substantial noninfringing use. *See* Ds' Objections at 6-10; *see also Amicus Curiae* Brief of the Electronic Frontier Foundation, *et al*, in Support of Neither Party at 17-19 (citing cases).

relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer.”<sup>6</sup> *Livnat v. Lavi*, 46 U.S.P.Q.2d 1300, 1302 (S.D.N.Y. 1998) (citing *Gershwin*, 443 F.2d at 1162). An alleged contributory infringer “must make more than a ‘mere quantitative contribution’ to the primary infringement.” *Id.* at 1303.

The only argument Plaintiffs advance to establish material contribution by LW is that LW “materially contributed to its users’ infringement by providing the ‘machinery’ that facilitates the infringement.”<sup>7</sup> Ps’ Resp. at 17. It is well established, however, that “merely providing ‘the means to accomplish an infringing activity’” will not suffice. *Livnat*, 46 U.S.P.Q.2d at 1302 (quoting *Sony*, 464 U.S. at 435 n.17). Accepting Plaintiffs’ “machinery” argument would mean that liability would attach in any instance in which but for the “machinery,” infringement would not have occurred. This is not and never has been the legal test for contributory infringement, and was expressly rejected by the Supreme Court in *Sony*. Other courts in this district have rejected this theory as well. *See Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (“[t]he authorization or assistance must bear a direct relationship to the infringing acts”); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 293-94 (S.D.N.Y. 1988) (brokering a real estate deal involving an infringing architectural design held not to be material contribution to infringement).

Unlike the defendants in the “dance hall” cases, who provided “control over the venue for infringement,” (or the “site” and “facilities”) and related support services (parking, advertising, and the ability to exclude), *see* Ps’ Resp. at 20-21, LW provides only the

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<sup>6</sup> With respect to claims for contributory infringement, evidence of inducement may pertain to the “material contribution prong,” but it is not conclusive of the claim and a plaintiff must still prove that the contribution bears a direct relationship to the infringing acts and that the contributory infringer acted in concert with the direct infringer.

<sup>7</sup> Plaintiffs do not contend that Gorton, Lime Group, or the M.J.G. Lime Wire Family Limited Partnership are contributorily liable because they “provided the machinery” to facilitate infringement. Plaintiffs argue only that Gorton and Lime Group—who have no direct relationship or contact with LimeWire users—are liable by virtue of their relationship with LW. *See* Ps’ Resp. at 16-18, 25-31.

software that a user may or may not use to infringe. Unlike the defendants in *Napster* and *Aimster*, LW does not provide either the site or the facility to commit infringement. *See* LW's Mot. at 31-33. Any alleged infringement occurs on the users' computers, which LW does not own, operate, or control. Nor does LW provide any services that afford LW with any knowledge regarding, or control over, the file-sharing activities of LimeWire users. *Id.*; Gribble Decl. ¶¶ 68-81. LW's software distribution no more "materially contributes" to the infringing activities of users than would the sale of tables and chairs to dance hall owners. Just as Xerox and Canon cannot be held secondarily liable for copyright infringement simply because they provide a product capable of being misused for infringement, neither can LW.

Accordingly, merely supplying the "means to accomplish an infringing activity," will not support the imposition of liability for contributory copyright infringement. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001) (quoting *Sony*, 464 U.S. at 436). Instead, "material contribution" requires that the participation in the infringement be substantial, the provided assistance bear a direct relationship to the infringing acts, and the contributory infringer acted in concert with the direct infringer. *Marvullo*, 105 F. Supp. 2d at 230; *Religious Tech. Center v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995); *Demetriades*, 690 F. Supp. 289, 293-94 (S.D.N.Y. 1988). No such evidence exists here.

Additionally, Plaintiffs fail to offer any evidence showing that LW or any of the Tertiary Defendants "acted in concert with the direct infringer." *Livnat*, 46 U.S.P.Q.2d at 1302. *See* Tertiary Ds' Mot. at 8-12; Tertiary Ds' Resp. at 6-10; LW's Mot. at 32-33. Plaintiffs have failed to submit any evidence sufficient to raise a material fact issue as to whether LW and the Tertiary Defendants acted in concert with any LimeWire user that was

directly infringing any of Plaintiffs' copyrighted works.

#### **IV. PLAINTIFFS' CLAIMS FOR VICARIOUS LIABILITY FAIL BECAUSE DEFENDANTS LACK THE RIGHT AND ABILITY TO CONTROL INFRINGING ACTIVITIES OF LIMEWIRE USERS**

Irrespective of whether the protections of *Sony* apply to Plaintiffs' vicarious infringement claims, Plaintiffs cannot satisfy the elements of their vicarious liability claims. Specifically, Plaintiffs cannot show that Defendants have "the right and ability to supervise the infringing activities" of LimeWire users—in other words, the searching, sharing, and downloading of Plaintiffs' copyrighted works. *See LW's Mot.* at 37-38.

Although Plaintiffs burden the record with a mountain of irrelevant evidence relating to whether LW could theoretically control the actions of LimeWire users, Plaintiffs cannot dispute that within the existing LimeWire architecture, LW has no right or ability to control what particular users search for, share, or download.<sup>8</sup> Instead, Plaintiffs strenuously argue that the mere ability to control is sufficient, ignoring decades of law requiring both the right and ability to control the infringing activity. In all of the cases Plaintiffs cite, the alleged secondary infringer first and foremost had the legal right (usually contractually) to control the activities of the infringer. Here, it is undisputed that LW lacks that right.

In an effort to conjure evidence of control where none exists, Plaintiffs point to LW's ability to influence certain characteristics via parameter settings in the LimeWire software generally. LW retains the ability, through a SIMPP mechanism, to remotely fine-tune the networking behavior for all LimeWire users. It also periodically offers updated versions of the software for download. But this evidence is irrelevant to whether LW has the ability to control what LimeWire users search for, share, and download—at most it suggests that LW

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<sup>8</sup> This is in stark contrast to the facts in both *Napster* and *Aimster*, where the defendants had the ability to control their users' file-sharing activities by blocking those users accused of infringement from "logging in" and accessing the network. *See Napster*, 239 F.3d at 1023; *Aimster* 2002 WL 31006142, at \*16.

has some ability to influence the capabilities of *all* LimeWire users as a group, rather than the ability to control or supervise the *infringing* activities of any particular user. “[T]he pertinent inquiry is not whether [LW] has the right and ability to control it[s] *system*, but rather, whether it has the right and ability to control the *infringing activity*. . . . [T]he two are not one and the same.” *Io Group, Inc. v. Veoh Networks, Inc.*, No. CO6-03926 HRL, 2008 WL 4065872, at \*16 (N.D. Cal. Aug. 27, 2008); *see id.* at \*18 (“[for vicarious liability to attach . . . the defendant must have the right and ability to *supervise* and *control* the infringement, not just affect it”) (quoting *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 805 (9th Cir. 2007)); *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1062 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 357 F.3d 1072 (9th Cir. 2004) (finding AOL’s control over general characteristics of its newsgroup servers insufficient to satisfy “control” element).

It is well established that a theoretical ability to control infringement is not sufficient to impose vicarious liability. “[A]ctual control, rather than simply the power to control,” is required. *Banff Ltd. v. Limited, Inc.*, 869 F. Supp. 1103, 1110 (S.D.N.Y. 1994). It is undisputed that LW lacks the right and ability to control users of the LimeWire software. LW’s Mot. at 37-38. The cases Plaintiffs cite do not stand for the proposition that that a product manufacturer is required to reconfigure its product, to the point where it is no longer useful for its intended purpose, in order to police someone else’s copyright.<sup>9</sup>

Plaintiffs argue LW can control LimeWire users’ activities by pointing to certain filters that block pornography or spam. Yet amazingly, Plaintiffs also attack LW’s efforts to

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<sup>9</sup> For example, in *Shapiro, Bernstein & Co. Inc. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963), cited by Plaintiffs, the defendant was a record store owner who retained the right to control its concessionaire who was selling infringing recordings. Similarly, in *Playboy Enterprises, Inc. v. Webworld, Inc.*, 991 F. Supp 543, 552 (N.D. Tex. 1997), *aff’d*, 168 F.3d 486 (5th Cir. 1999), the court found that Webworld, unlike Lime Wire, exercised total dominion over the content of its site and the product it offered its clientele. Moreover, Webworld was found liable because the infringement occurred on its website, which it controlled.

implement an effective copyright filter. Apart from the fact that Plaintiffs cannot have their cake and eat it too, none of this evidence demonstrates that LW has control over what files LimeWire users search for, share, and download. *See Ellison*, 189 F. Supp. 2d at 1062 (concluding that “AOL’s ability to delete or block access to [] postings of infringing material after those postings had already found their way onto AOL’s USENET servers was insufficient to constitute “the right and ability to control the infringing activity”).

Shorn of its irrelevant evidence, Plaintiffs’ Response is left arguing that LW has the right and ability to control the allegedly infringing activities of LimeWire users because LW could redesign the software to enable such control. This expansive reading of the vicarious liability doctrine unmoors it from its respondeat superior foundations, transforming it into an affirmative duty to design technology so as to protect the interests of copyright owners. Plaintiffs’ effort to obtain by judicial fiat what has been denied to them in legislation runs afoul of existing precedent. *See Napster*, 239 F.3d at 1024 (vicarious liability analyses must be “cabined by the system’s current architecture); *Universal City Studios, Inc. v. Sony Corp. of Amer.*, 480 F. Supp. 429, 462 (D.C. Cal. 1979), *aff’d in part, rev’d in part*, 659 F. 2d 963 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984) (rejecting evidence showing that Sony could have added a “jamming” system to the Betamax); *Ellison*, 189 F. Supp. 2d at 1060-62 (AOL lacked control over the infringing activities of its subscribers, notwithstanding the fact that it had the ability to redesign its system).

To sidestep their inability to identify any ability within the limits of the existing LimeWire architecture to block particular users from the Gnutella user network, Plaintiffs suggest that LW could take steps to either (1) disable the software for all LimeWire users; or (2) modify the software to enable such a blocking ability. With respect to the former, there is

“no case in which a defendants’ ‘power to supervise’ was based on his ability to terminate the business.” *Universal City Studios*, 480 F. Supp. at 462. As to the latter, Plaintiffs suggest that LW could and should have designed Lime Wire differently to prevent infringement. This argument suffers from insupportably circular logic: the duty to modify a product only arises once liability has been established, which in turn requires a demonstration that the defendant controls the directly infringing activity. Under Plaintiffs’ view, the *ability* to redesign a product satisfies the “control” element of vicarious liability, which gives rise to liability and a *duty* to redesign the product. The Court should reject Plaintiffs’ attempt to transform the doctrine of vicarious copyright liability into an affirmative duty to design technologies to copyright owners’ specifications. In fact, plaintiffs made exactly this argument before the district court in *Sony*, where it was flatly rejected. 480 F. Supp. at 462 (rejecting as evidence of “control,” Sony’s ability to redesign the Betamax to include a jamming system or remove the tuner).<sup>10</sup> Plaintiffs’ argument regarding the kinds of filtering technologies that LW *could have* built into the Lime Wire software is not only speculative and rife with disputed factual issues, but is irrelevant to the question of control.

LW has a decentralized architecture, and does not maintain central servers that control what LimeWire users are doing. LW does not monitor, and cannot see, what LimeWire users are doing. LW does not have a continuing relationship with LimeWire users, and has minimal, if any, contact with LimeWire users after the product’s distribution.

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<sup>10</sup> The district court also rejected the evidence of a hypothetical jamming system by noting that such a system was not within Sony’s unilateral capabilities. *Universal City Studios*, 480 F. Supp. at 462. Similarly, the development of an effective filtering system is not within LW’s capabilities, as it requires the creation of a database representing Plaintiffs’ works. LW is obviously in no position to assemble such a database (the reproductions of Plaintiffs’ works required to create such a database may itself constitute copyright infringement), and there is no evidence that Plaintiffs have made any effort to make such a master database available to the P2P community or any third party who claims it has “filtering” technology.



Because LW lacks the ability to control LimeWire users' activities, Plaintiffs' vicarious liability claims fail as a matter of law.

**V. PLAINTIFFS FAIL TO ESTABLISH THE ELEMENTS OF THEIR COMMON LAW CLAIMS FOR COPYRIGHT INFRINGEMENT AND UNFAIR COMPETITION AS TO PRE-1972 RECORDINGS**

Both parties agree that under *Capitol Records, Inc. v. Naxos of Amer., Inc.*, 830 N.E.2d 250, 266 (N.Y. Ct. App. 2005), “[a] copyright infringement cause of action in New York consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright.” A common law claim for unfair competition under New York law “requires competition in the marketplace or similar actions designed for commercial benefit,” in addition to unauthorized copying and distribution. *Id.*; see also *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918, at \*12 (S.D.N.Y. Aug. 29, 2002) (“[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff’s property to compete against the plaintiff’s own use of the same property.”) (citation omitted).

Plaintiffs fail to show that any of the Defendants made an “unauthorized reproduction of the work protected by the copyright.” Just as Plaintiffs cannot show and do not allege that Defendants directly infringed any of their copyrights under federal copyright law, Plaintiffs cannot show that Defendants reproduced any of Plaintiffs’ pre-1972 recordings.

The same holds true for Plaintiffs’ unfair competition claim, which also requires an unauthorized distribution. Nor have Plaintiffs submitted evidence sufficient to raise a fact issue as to whether any of the Defendants took and used any of Plaintiffs’ pre-1972 recordings in order “to compete against [Plaintiffs’] own use of the same property.”<sup>11</sup> *Arista*

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<sup>11</sup> In their Motion, Plaintiffs vaguely contend that “Lime Wire has positioned itself in the market for music distribution.” Ps’ Mot. at 39-40. This contention is unsupported by the record evidence and is patently absurd.

*Records*, 2002 WL 1997918, at \*12. Indeed, Plaintiffs fail to even try to explain how any of the Defendants compete with Plaintiffs at all.<sup>12</sup> Plaintiffs fail to and cannot show that any of the Defendants compete with Plaintiffs.

Plaintiffs' failure to adequately plead or prove their common law claims, leads to the inescapable conclusion that these claims "appear to be nothing more than throwaway claims with neither factual substance nor legal support."<sup>13</sup> *Fletcher v. Universal Tech. Inst., Inc.*, No. 6:05CV585 ORL31DAB, 2006 WL 2297041, at \*8 (M.D. Fla. June 15, 2006). Accordingly, the Court should summarily dispose of Plaintiffs' common law claims for copyright infringement and unfair competition as to pre-1972 recordings.

## **VI. PLAINTIFFS FAIL TO PROVIDE A LEGAL OR FACTUAL BASIS FOR IMPOSING TERTIARY LIABILITY ON GORTON AND LIME GROUP**

The record evidence—offered by *both* Plaintiffs and the Tertiary Defendants—demonstrates that the Tertiary Defendants have not had any involvement with, control over, or ability to control or supervise, the activities—infringing or not—of LimeWire users. All of Plaintiffs' evidence relates to the Tertiary Defendants' relationship with LW. *See* Ps' Resp. at 28-31 (arguing that "[a]s 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.").

As described in the Tertiary Defendants' Motion, Plaintiffs advance a novel theory of tertiary infringement liability in this case against Gorton and Lime Group—one in which Plaintiffs seek to impose liability on them by virtue of their relationship to an entity accused

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<sup>12</sup> "Competition" is defined as "[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain *the same business* from third parties." BLACK'S LAW DICTIONARY 302 (8th ed. 2004) (emphasis added).

<sup>13</sup> This is further evidenced by the fact that Plaintiffs devote merely one paragraph to opposing Defendants' Motions for Summary Judgment on Plaintiffs' state law claims. *See* Ps' Resp. at 33.

of secondary infringement, not direct infringement. Tertiary Ds’ Mot. at 1-2. As if to highlight the unprecedented nature of their claims against Gorton and Lime Group, *every single case Plaintiffs cite* involves the imposition of secondary liability on an officer or director *of an entity accused of direct infringement*, not secondary infringement as here.<sup>14</sup>

Nor does the *UMG Recordings* case aid Plaintiffs. *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004), concerned a motion to dismiss at the earliest stages of litigation. According to the court, the defendants did not properly characterize the claims against them as claims for tertiary infringement, because the plaintiffs had “specifically accused defendants of assuming control over Napster’s operations and directing the infringing activities that gave rise to the original Napster litigation.” *Id.* at 412. Thus, “for the purposes of [that] motion” only, the court concluded that the plaintiffs had stated a claim over the individual defendants,” as they were alleged to be “directly responsible for the infringing activity perpetrated by Napster’s online users” and were “alleged to have specifically *ordered* that such activity take place.” *Id.* at 413. The court also reiterated its disfavor towards claims for “‘tertiary infringement’—vicarious or contributory assistance to a vicarious or contributory infringer.” *Id.* at 412.

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<sup>14</sup> See *Halmat Pub. Co. v. L.A.P.A., Inc.*, 669 F. Supp. 933, 934 (D. Minn. 1987) (owners of supper club that infringed plaintiffs’ copyrights); *Musical Prods., Inc. v. Roma’s Record Corp.*, No. 05-CV-5903 (FB) (VVP), 2007 WL 750319, at \*2 (E.D.N.Y. Mar. 7, 2007) (owner and operator of record store that purchased and sold infringing records); *Michael Aram, Inc. v. Laurey*, No. 05 Civ. 8380 (CSH), 2006 WL 510527, at \*2 (S.D.N.Y. Mar. 1, 2006) (owner or officer of company that caused to be made, sold, and distributed infringing hardware); *Lechner v. Marco-Domo Internationales Interieur GmbH*, No. 03 Civ. 5664 (JGK), 2005 WL 612814, at \*1 (S.D.N.Y. Mar. 14, 2005) (president and sole shareholder of company that manufactured and sold infringing sculptures); *Stumm v. Drive Entm’t, Inc.*, No. 00 Civ. 4676 (DC), 2002 WL 5589, at \* 5 (S.D.N.Y. Jan. 2, 2002) (CEO and shareholder of company that manufactured and distributed copyrighted recording); *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 281 (E.D.N.Y. 2002) (president of company that copied and distributed glass masters, stampers, and finished CDs); *Luft v. Crown Publishers, Inc.*, 772 F. Supp. 1378, 1379 (S.D.N.Y. 1991) (president of company that manufactured, distributed, and sold infringing record and tape productions); *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 517 F. Supp. 900, 902 (S.D.N.Y. 1981) (president and head of operations of company that infringed textile design).

Plaintiffs provide no legal or factual support for the unprecedented imposition of tertiary liability on Gorton and Lime Group. The Court should summarily dismiss Plaintiffs' claims against them.

**VII. PLAINTIFFS' INDUCEMENT OF INFRINGEMENT CLAIM AGAINST THE TERTIARY DEFENDANTS FAILS BECAUSE PLAINTIFFS CANNOT SHOW THAT THE TERTIARY DEFENDANTS TOOK ANY AFFIRMATIVE STEPS TO INDUCE INFRINGEMENT**

Under the new theory of inducement of infringement liability announced in *Grokster*, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” 545 U.S. at 936-37. To be liable under this theory, a defendant must have taken “active steps . . . to encourage direct infringement,” such as “advertising an infringing use, or instructing how to engage in an infringing use” that demonstrate “an affirmative intent that the product be used to infringe.” *Id.* at 915.

Plaintiffs do not allege any facts to show that the Tertiary Defendants took active steps to encourage direct infringement. All of the facts offered by Plaintiffs conceivably pertaining to inducement continue to pertain only to LimeWire. *See* Tertiary Ds' Resp. at 6-9; Ps' Mot. at 8-29; Ps' Resp. at 8-9. To distract the Court from the complete absence of evidence that the Tertiary Defendants induced infringement by Lime Wire users, Plaintiffs use “Defendants” and “Lime Wire” interchangeably. But the absence of evidence relating to the Tertiary Defendants is unmistakable. The Tertiary Defendants are entitled to summary judgment on Plaintiffs' inducement of infringement claims.

## **VII. PLAINTIFFS' FRAUDULENT CONVEYANCE CLAIM FAILS BECAUSE PLAINTIFFS FAIL TO SUBMIT COMPETENT SUMMARY JUDGMENT EVIDENCE SUFFICIENT TO GIVE RISE TO AN INFERENCE OF FRAUDULENT INTENT**

Plaintiffs do not dispute that in order to recover on their fraudulent conveyance claim under Section 276 of the New York Debtor and Creditor Law, they are required to prove actual fraudulent intent by “clear and convincing evidence.” *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 639 (2d Cir. 1995). “[F]raudulent intent is rarely susceptible to direct proof.” *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 374 (S.D.N.Y. 2003), *aff'd*, 99 Fed. Appx. 274 (2d Cir. 2004) (citation omitted). Thus, courts have permitted plaintiffs to attempt to prove intent with proof of certain “badges of fraud” that courts have held may give rise to an inference of intent to defraud. *Id.* at 374-75. On the other hand, the absence of these badges of fraud, constitutes evidence that there was no intent to defraud. *Id.* at 375. Actual intent to defraud “is never presumed, and intent to defraud cannot be found ‘based merely on suspicion, conjecture, or doubtful inference.’” *Id.* (citation omitted).

Plaintiffs do not dispute or otherwise controvert the Tertiary Defendants’ discussion and evaluation of the badges of fraud. *See* Ps’ Resp. at 36 (stating that “because plaintiffs have direct proof of Gorton’s “actual intent,” there is no reason to even consider “badges of fraud.”). Plaintiffs’ alleged “direct proof” is anything but, and is woefully inadequate to establish actual fraudulent intent on Gorton’s part.

Plaintiffs rely primarily on the Declaration of Vincent Falco (“Falco Declaration”) to show Gorton’s intent. Falco’s Declaration is problematic on every conceivable level. To say his credibility is suspect would be an understatement. Falco was “Chief Executive Officer of Free Peers, Inc., a company that distributed the peer-to-peer software application BearShare.” Ps’ Resp. at 34. After the record labels threatened suit, Falco entered into a settlement

agreement with them. Falco's Declaration, however, does not constitute clear and convincing evidence of Gorton's intent. *See Tareco Props., Inc. v. Morriss*, No. 6:07-CV-181, 2008 WL 1836377, at \*6 (E.D. Tex. 2008) (the only evidence to support intent under TUFTA claim was an affidavit stating that transferor insisted note be made payable to his father because he did not want assets in his name in order to hide them from creditors, which was "only a mere scintilla of evidence of intent to defraud," and granting summary judgment in favor of defendant on TUFTA claim due to insufficiency of evidence of intent to defraud).

Nor do the two out-of-context snippets from Gorton's deposition provide clear and convincing direct proof of fraudulent intent. *See Ps' Resp.* at 34. What Gorton actually testified was:

[I]f I can just talk about paragraph 5 [of the Falco Declaration] as an entirety here, I might be able to do -- it sort of strikes me that he is mixing a couple of conversations into one here . . . . But I will say that it's clearly inaccurate to me because he said "Gorton told me he was not worried about being sued." And I can absolutely tell you that I was highly concerned about being sued. So "he created a Family Limited Partnership." I mean, I definitely did tell Vinny I had done some estate planning, and that one of the benefits of the estate planning that I had done was that it did help protect the assets in the event of a legal judgment against me personally. But I did not -- I certainly did not tell him that he should do the same. I believe I told him that he might want to talk to a lawyer about this.

Deposition of Mark Gorton at 76-77, excerpts attached as Exhibit B to the Declaration of Charles S. Baker. There is nothing inherently sinister about estate planning. *See Tertiary Ds' Mot.* at 29. Among the recognized benefits of family limited partnerships are asset protection. There is no credible competent summary judgment evidence showing that Gorton "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."<sup>15</sup> *Ps' Resp.* at 43.

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<sup>15</sup> It is of great significance that Falco does not declare that Gorton actually said this, unlike the other statements in his Declaration that Falco claims Gorton allegedly "mentioned," "told," or "said" to him.

Plaintiffs' fraudulent conveyance claim is yet another "throwaway" claim that Plaintiffs failed to properly plead, prove, or otherwise develop. The Tertiary Defendants are entitled to summary judgment on Plaintiffs' fraudulent conveyance claim.

### **CONCLUSION**

For all of the foregoing reasons, Defendants respectfully pray that this Court enter an order granting their respective Motions for Summary Judgment, denying Plaintiffs' Motion for Partial Summary Judgment, and awarding Defendants such other and further relief to which they may be entitled.

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Respectfully Submitted,

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**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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