

**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**

**ORAL ARGUMENT  
REQUESTED**

**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

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November 7, 2008

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	4
I. DEFENDANTS’ RESPONSES TO PLAINTIFFS’ 56.1 STATEMENTS EITHER DO NOT DISPUTE THEM OR ARE BASELESS, IMPROPER OR UNSUPPORTED .....	5
II. DEFENDANTS DO NOT CREATE ANY MATERIAL OR GENUINE ISSUES OF FACT AS TO WHETHER LIME WIRE ACTED TO PROMOTE COPYRIGHT INFRINGEMENT .....	6
A. Plaintiffs’ Statistical Study Is Valid .....	8
B. Defendants Do Not Dispute The Massive Evidence That They Were Pursuing Known Infringers .....	10
C. Defendants Do Not Raise Any Genuine Dispute as to Lime Wire’s Dependence On Enormous Numbers of Infringing Users of LimeWire. ....	12
D. Defendants Raise No Material Disputes As To Their Lack of Effort To Reduce Infringement .....	14
E. Lime Wire Took Other Actions That Reveal Its Intent. ....	15
III. LIME WIRE DOES NOT DISPUTE THE MATERIAL FACTS THAT DEMONSTRATE THAT DEFENDANTS ARE LIABLE FOR CONTRIBUTORY INFRINGEMENT .....	17
IV. GORTON AND LIME GROUP ARE LIABLE BASED UPON THEIR ACTIONS .....	20
V. PLAINTIFFS HAVE PROVEN DIRECT INFRINGEMENT .....	23
VI. PETITIONERS’ AMICUS BRIEF IS MERITLESS AND BIASED AND SHOULD BE DISREGARDED .....	27
CONCLUSION .....	31

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>A&amp;M Records, Inc. v. Napster Inc.</i> , 239 F.3d 1004 (9th Cir. 2001) .....	20, 27
<i>Abilene Music Inc. v. Sony Music Entertainment, Inc.</i> , 320 F. Supp. 2d 84 (S.D.N.Y. 2003).....	7
<i>AFL Fresh &amp; Frozen Fruits &amp; Vegetables, Inc. v. De-Mar Food Servs. Inc.</i> , No. 06 Civ. 2142, 2007 WL 4302514 (S.D.N.Y. Dec. 7, 2007).....	4, 6
<i>Arista Records, Inc. v. Mp3Board, Inc.</i> , No. 00 CIV. 4660, 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002) .....	25
<i>Atl. Recording Corp. v. Anderson</i> , No. H-06-3578, 2008 WL 2316551 (S.D. Tex. Mar. 12, 2008) .....	26
<i>Century Pacific, Inc. v. Hilton Hotels Corp.</i> , 528 F. Supp. 2d 206 (S.D.N.Y. 2007).....	3
<i>Davis v. State of New York</i> , 316 F.3d 93 (2d Cir. 2002).....	4, 6
<i>Elektra Entertainment Group, Inc. v. Barker</i> , 551 F. Supp. 2d 234 (S.D.N.Y. 2008).....	26, 28
<i>Fonovisa, Inc. v. Napster, Inc.</i> , 3:01-CV-02669, 2002 WL 398676 (N.D. Cal. Jan. 28, 2002).....	20
<i>Goldstick v. Hartford, Inc.</i> , No. 00 Civ. 8577, 2002 WL 1906029 (S.D.N.Y. Aug. 19, 2002) .....	6
<i>Hotaling v. Church of Jesus Christ of Latter-Day Saints</i> , 118 F.3d 199 (4th Cir. 1997) .....	26
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003) .....	18
<i>In re Napster</i> , 377 F. Supp. 2d 796 (N.D. Cal. 2005) .....	26
<i>Island Software and Computer Serv., Inc. v. Microsoft Corp.</i> , 413 F.3d 257 (2d Cir. 2005).....	23

<i>JPMorgan Chase Bank, N.A. v. Fletcher</i> , No. 06-CV-624, 2008 WL 73233 (N.D. Okla. Jan. 7, 2008).....	30
<i>Leibovitz v. Paramount Pictures Corp.</i> , 948 F. Supp. 1214 (S.D.N.Y. 1996).....	7
<i>Long v. Coast Resorts, Inc.</i> , 49 F. Supp. 2d 1177 (D. Nev. 1999).....	30
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986).....	4
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster</i> , 545 U.S. 913 (2005).....	<i>passim</i>
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster</i> , 454 F. Supp. 2d 966 (C.D. Cal. 2006) .....	<i>passim</i>
<i>Motown Record Co., L.P. v. DePietro</i> , No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007) .....	27
<i>Neonatology Assocs. v. Comm’r of Internal Revenue</i> , 293 F.3d 128 (3d Cir. 2002).....	30
<i>National Car Rental Systems, Inc. v. Computer Associates Int’l Inc.</i> 991 F.2d 426 (8th Cir. 1993) .....	26
<i>Oklahoma v. Tyson Foods, Inc.</i> , No. 05-CV-329-GKF-SAJ, 2008 WL 1994914 (N.D. Okla. May 5, 2008) .....	29
<i>Parks v. Lebhar-Friedman, Inc.</i> , No. 04-7133, 2008 WL 3833802 (S.D.N.Y. 2003).....	3, 24
<i>Rus, Inc. v. Bay Indus., Inc.</i> , 322 F. Supp. 2d 302 (S.D.N.Y. 2003).....	3
<i>S.E.C. v. Bear, Stearns &amp; Co. Inc.</i> , Nos. 03 Civ. 2937-45, 2003 WL 22000340 (S.D.N.Y. Aug. 25, 2003) .....	28, 29
<i>Sciotto v. Marple Newtown Sch. Dist.</i> , 70 F. Supp. 2d 553 (E.D. Pa. 1999) .....	29
<i>Toni &amp; Guy (USA) Ltd. v. Nature’s Therapy, Inc.</i> , No. 03 CV 2420(RMB), 2006 WL 1153354 (S.D.N.Y. May 1, 2006) .....	3
<i>Triad Int’l Maint. Corp. v. S. Air Transp., Inc.</i> , 2:04-CV-1200, 2005 WL 1917512 (S.D. Ohio Aug. 10, 2005) .....	30

<i>U.S. v. El-Gabrowny</i> , 844 F. Supp. 955 (S.D.N.Y. 1994).....	30
---	----

**Statutes & Rules**

17 U.S.C. § 106(3) .....	26
Fed. R. Civ. P. 56.....	passim
Local Rule 51.6(d) .....	4
Local Rule 56.1(a), (d).....	5

**Other Authorities**

4 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> §§ 13.01, 13.04 (2008).....	23
6 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> § 39.04 (2008).....	23
Press Release, Computer & Commc’ns Ind. Ass’n, “MPAA ‘Piracy’ Study Flawed and Dangerous, CIAA Says” (Jan. 23, 2008) .....	28
Press Release, Consumer Electr. Ass’n, “Consumer Electronics Association Criticizes Content Industry Fear -- Mongering” (June 21, 2006) .....	28

Plaintiffs (“plaintiffs” or “Record Companies”) submit this reply memorandum in further support of their motion for partial summary judgment on Counts I, II, IV and V of their First Amended Complaint against defendants, Lime Wire LLC, Lime Group LLC (“Lime Group”) and Mark Gorton (“Gorton”) (collectively, “defendants”).<sup>1</sup>

### **PRELIMINARY STATEMENT**

Lime Wire LLC<sup>2</sup> claims that “there are two sides to every story”. That may be true, but unfortunately for defendants, their side of the “story” lacks evidentiary support and strains credulity. Plaintiffs, however, provide the Court with a staggering amount of evidence revealing defendants’ intent to induce -- and defendants’ contribution to -- LimeWire users’ rampant copyright infringement of plaintiffs’ sound recordings.

Because defendants are unable to dispute plaintiffs’ facts, they have instead resorted to asserting baseless objections to plaintiffs’ evidence. Defendants set forth their evidentiary objection in three separate motions (“Lime Wire’s evidentiary motions”). In two of the motions, they challenge the admissibility of over 200 of plaintiffs’ exhibits and cited deposition testimony -- even though defendants themselves cite to and rely on such evidence

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<sup>1</sup> Named defendant, Greg Bildson, has settled the claims against him and submitted a declaration with respect to the issues in this litigation. (*See* Declaration of Gregory L. Bildson, dated September 10, 2008 (“Bildson (9/10/08) Decl.”), attached to Forrest (9/26/08) Decl.). Defendants took Mr. Bildson’s deposition and will no doubt try to paint him as a disgruntled employee with a grudge. But while it is clear that Bildson was not happy at Lime Wire LLC right before he left in September 2008, what comes through clearly in his deposition is that he resigned voluntarily (Forrest 11/07/08 Decl., Bildson Tr. 24:10-25:7) and that he settled with plaintiffs because he “thought the evidence was pretty bad”. (*Id.* 49:19-53:3). Moreover, it is clear that there was a negotiation between Bildson and plaintiffs (*see, e.g.*, 60:20-65:23), and that Bildson was “only concerned about accuracy” with respect to his declaration. (*Id.* at 110:17-14.)

<sup>2</sup> “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. Unless otherwise noted, citations in the form “Ex. \_\_”, “\_\_ Tr. \_\_”, or “\_\_ Aff. \_\_”, etc. are found in Volumes I to XIII of the exhibits to the Declarations of Katherine B. Forrest, dated 7/18/08, 9/26/08 and 11/07/08.

(sometimes the exact *same* evidence). And in their third motion, defendants try to exclude plaintiffs' two expert reports (which are very similar to reports that the U.S. Supreme Court relied on in the *Grokster* case) simply because Dr. Waterman's and Dr. Horowitz's conclusions are devastating for defendants' case.

Lime Wire's evidentiary motions are reminiscent of similar motions made in *Grokster* and rejected *in toto* there, *see Grokster (Remand)*, 454 F. Supp. 2d 966, a fact of which Lime Wire's counsel is well-aware since he was also counsel of record for one of the defendants in *Grokster*.<sup>3</sup> Ultimately, defendants use their evidentiary objections as the sole or primary basis for disputing -- and often not responding at all to -- well over 300 of plaintiffs' statements in the July 18, 2008 Statement of Undisputed Material Facts. What defendants cannot hide, though, is that underneath these meritless objections, there is a massive amount of undisputed evidence supporting plaintiffs' "story".

When defendants *do* directly respond to plaintiffs' statements, defendants' responses are conclusory, argumentative and most significantly, unsupported by citations to any admissible evidence. And when all else fails, defendants simply create their own explanation as to what a witness "meant to say" or what a document "really says". Defendants contend that one of their own witnesses (whom they call "a crazy college kid") "made up" statements in Lime Wire's Offering Memorandum, that a "rogue summer intern" purchased the Google Ad Words campaigns, "rogue forum moderators" assisted LimeWire users with infringement, and that a former employee posted a "bizarre" message that says LimeWire is used for infringement.

When forced to admit they were developing promotions to target Napster users, defendants assert

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<sup>3</sup> Defendants' counsel represented StreamCast (the distributor of the Morpheus P2P software) in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* in both the U.S. Supreme Court, 545 U.S. 913 (2005) ("*Grokster*"), and the district court on remand, 454 F. Supp. 2d 966 (C.D. Cal. 2006) ("*Grokster (Remand)*").

that they were “just brainstorming,” or that they “flatly rejected” the idea, or that although they contemplated the action, it never happened. Defendants’ attempt to rewrite the evidence is irrelevant when the point is to show intent or purpose and the attempt is without support of any kind.

The centerpiece of defendants’ opposition is Mark Gorton’s declaration, which is a long and rambling disquisition that sets out little more than Gorton’s “beliefs”, “hopes”, “dreams”, and “imaginings”. Little of that declaration contains facts based upon Gorton’s personal knowledge and much of it is at odds with undisputed evidence in the record. But more importantly, none of it is supported by concrete evidence.<sup>4</sup>

By contrast, plaintiffs present a straight-forward factually-based story, supported by documents, testimony and declarations: Lime Wire LLC turned its software into one of the largest infringing file-sharing applications in the world by encouraging its users and potential users to infringe music files, and by failing to attempt to take any effective steps to limit or eliminate that infringement. Simply stated, Lime Wire induced and contributed to the infringement of plaintiffs’ sound recordings by LimeWire users and illegally made millions of dollars in the process. No reasonable juror could find otherwise. Accordingly, plaintiffs’ motion for summary judgment should be granted.

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<sup>4</sup> Although a proper declaration should contain facts based on the declarant’s personal knowledge, *see Parks v. Lebhar-Friedman, Inc.*, No. 08-7133, 2008 WL 3833802, at \*1 (S.D.N.Y. 2003) (*quoting* Fed. R. Civ. P. 56(e)(i)), many statements in Gorton’s declaration do not. (*See, e.g.*, Gorton (9/26/08) Decl. ¶¶ 6, 8, 9, 10-11, 25, 27, 29, 63). Also, statements in declarations that are conclusory and/or self-serving or completely unsupported by documentary evidence (*see e.g.* Gorton (9/26/08) Decl. ¶¶ 19, 20, 31, 32, 34, 36-37), should also be disregarded. *See, e.g., Century Pacific, Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 218 (S.D.N.Y. 2007); *Toni & Guy (USA) Ltd. v. Nature’s Therapy, Inc.*, No. 03 CV 2420(RMB), 2006 WL 1153354, at \*4 (S.D.N.Y. May 1, 2006); *Rus, Inc. v. Bay Indus., Inc.*, 322 F. Supp. 2d 302, 307 (S.D.N.Y. 2003).



## ARGUMENT

To defeat a motion for summary judgment, the opposing party must adduce “specific facts showing a genuine issue for trial”. *See* Fed. R. Civ. P. 56(e)(2); *see also* S.D.N.Y. Local Civ. R. 56.1(d). A party may meet its burden only by providing “citation[s] to evidence which would be admissible” in support of its efforts to oppose a motion for summary judgment. *See* S.D.N.Y. Local Civ. R. 56.1(d). The opposing party may not rely on “conclusory statements or mere allegations” in support of its counter-statements, *Davis v. State of New York*, 316 F.3d 93, 100 (2d Cir. 2002), but must designate specific facts showing that there is a genuine issue for trial.” *Id.* (internal quotations omitted). Broad allegations that there is “some metaphysical doubt as to the material facts” are insufficient to defeat a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, counterstatements of material fact that fail to cite “to any evidence in the record, let alone evidence that would be admissible, as required by Local Rule 51.6(d) . . . cannot create disputes of material fact”. *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Servs. Inc.*, No. 06 Civ. 2142, 2007 WL 4302514, at \*4 (S.D.N.Y. Dec. 7, 2007).

Defendants fail to meet the standards set out by the Federal and Local Civil Rules and in the caselaw to defeat plaintiffs’ motion for summary judgment.<sup>5</sup> *First*, defendants’ responses to plaintiffs’ statements do not create a dispute of material fact sufficient to raise a triable issue of fact. (*See infra* I.) *Second*, defendants raise no genuine issue of fact with respect

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<sup>5</sup> *See* Defendants’ Response to Plaintiffs’ Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 (“DRSOF”). In addition to defendants’ 56.1 response and Lime Wire LLC’s memorandum of law (“LW 9/26/08 Mem.”), Mark Gorton and Lime Group have submitted a separate brief (based upon the absurd and baseless notion that even if Lime Wire LLC is liable for secondary infringement, Gorton and Lime Group are not because they are “tertiary” defendants) and nonparty petitioners have filed an *amicus curiae* brief purportedly “in support of neither party”. This memorandum responds to *all* three of the memoranda submitted by Lime Wire LLC, Gorton and Lime Group LLC and *amici*.

to their liability for inducement of infringement. (*See infra* II.) *Third*, defendants raise no genuine issue of fact with respect to their liability for contributory infringement. (*See infra* III.) *Fourth*, plaintiffs do not seek to hold Lime Group and Mark Gorton liable solely because of their relationship with Lime Wire LLC, but because they have induced and contributed to infringement by LimeWire users. (*See infra* IV.) *Fifth*, plaintiffs have proven direct infringement. (*See infra* V.) Finally, the *amicus* brief, which does no more than regurgitate defendants' arguments, is not deserving of any consideration. (*See infra* VI.)

**I. DEFENDANTS' RESPONSES TO PLAINTIFFS' 56.1 STATEMENTS EITHER DO NOT DISPUTE THEM OR ARE BASELESS, IMPROPER OR UNSUPPORTED**

In their response to plaintiffs' statement of material facts -- which plaintiffs support with admissible evidence as required by Local Rule 56.1(a), (d) ("56.1 statement" or "Pls. 7/18/08 SOF")<sup>6</sup> -- defendants do not dispute 245 of plaintiffs' statements. (*See* Attachment A at ¶¶ I, II.)<sup>7</sup> And defendants' sole or primary response to an additional 319 of plaintiffs' statements is an objection to the admissibility of evidence. (*See* Exhibit A at ¶¶ III, IV.) Just as in *Grokster*, these objections are without merit and should be overruled.<sup>8</sup> Once

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<sup>6</sup> In their responses to Lime Wire and Gorton and Lime Group's 56.1 Statements, plaintiffs submitted Statements of Additional Facts ("Pls. (LW) 9/26/08 Add'l SOF"; "Pls. (Gorton) 9/26/08 Add'l SOF").

<sup>7</sup> Often when defendants declare a statement "undisputed", they nevertheless add argumentative, conclusory and unsupported statements, which should be disregarded. (*See, e.g.*, DRSOFF ¶¶ 76, 214, 221, 226, 241, 315.) In other responses, defendants "dispute" plaintiffs' statements, but in fact, dispute only immaterial aspects of plaintiffs' statements leaving the central point undisputed. (*See, e.g.*, DRSOFF ¶¶ 141, 183, 194, 229, 289, 297, 610.)

<sup>8</sup> Contemporaneously with this memorandum, plaintiffs are submitting three memoranda opposing LimeWire evidentiary motions. Rather than repeating them here, plaintiffs respectfully refer the Court to those oppositions. *See* (1) Plaintiffs' Memorandum of Law in Opposition to Defendants' Settlement Related and Pre-August 2003 Objections to Plaintiffs' Exhibits ("Pls. Pre-2003/*Grokster* Opp'n Br."); (2) Plaintiffs' Opposition To Defendants' Objections To Plaintiffs' Exhibits and Depositions Excerpts (Pls. Mot. To Strike Opp'n Br.); and (3) Plaintiffs' Opposition to Defendants' Motion to Exclude Proffered Expert Summary Judgment Evidence

defendants objections are overruled, statements not challenged beyond these evidentiary objections must necessarily be deemed admitted.<sup>9</sup>

Other defendants' responses to plaintiffs' statements are improper on their face. For example, defendants state or respond that "[t]he [transcript/opinion] speaks for itself" or state that they are "unable to dispute or confirm at this time." (See Exhibit A at ¶¶ V, VI.) These "unsupported denials, without more, cannot create disputes of material fact." *AFL Fresh*, 2007 WL 4302514, at \*4. See also *Davis*, 316 F.3d at 100; *Goldstick v. Hartford, Inc.*, No. 00 Civ. 8577, 2002 WL 1906029, at \*1 (S.D.N.Y. Aug. 19, 2002). Such statements are thus deemed admitted or undisputed.

The vast majority of what remains of defendants' responses are conclusory, argumentative and fail to cite to any admissible evidence.

## **II. DEFENDANTS DO NOT CREATE ANY MATERIAL OR GENUINE ISSUES OF FACT AS TO WHETHER LIME WIRE ACTED TO PROMOTE COPYRIGHT INFRINGEMENT**

At all times, defendants have been fully aware of the risk of liability for copyright infringement for their conduct. This awareness was not a coincidence. It resulted from defendants' understanding that their entire business model was based on infringement. Even in his most recent declaration, Gorton freely acknowledges that "[s]ince the beginning of my involvement with P2P technology, I have been aware that the issue of copyright infringement has

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From The Depositions and Reports of Ellis Horowitz, Ph. D, and Richard Waterman, Ph. D. ("Pls. Expert Opp'n Br.").

<sup>9</sup> Dozens of plaintiffs' statements are also supported by citations to other admissible evidence to which defendants do not object. (See, e.g., *DRSOF* ¶¶ 73, 116, 133, 197, 382, 442; *Pls. 11/07/08 Reply SOF* ¶¶ 73, 116, 133, 197, 382, 442.) Because that additional evidence is sufficient to support the statement, regardless of whether the objected-to exhibit is excluded, the statement must be deemed undisputed.

surrounded the technology. (*Id.* ¶ 4; *see also* ¶ 30 (“Since founding LimeWire, I have been aware that my dreams . . . have been thoroughly mixed with copyright infringement”).)

So now, faced with that liability, defendants claim that summary judgment is inappropriate because this case involves issues of copyright infringement and intent. (LW 9/26/08 Mem. at 7.) Under defendants’ analysis, summary judgment could never be granted in a copyright infringement case, and most certainly not in a case involving a P2P system on which massive infringement was induced by the operator of that system. Defendants’ analysis would come as surprise to the *Grokster* courts. Indeed, the *Grokster* case itself involved copyright infringement and intent, and the Supreme Court clearly signaled that summary judgment was appropriate there. *Grokster*, 545 U.S. at 940-41. In fact, on remand, summary judgment was granted. *Grokster (Remand)*, 454 F. Supp. 2d at 999. Moreover, this Court, in the very case defendants cite to support their claim, *Abilene Music Inc. v. Sony Music Entertainment, Inc.*, 320 F. Supp. 2d 84, 88 (S.D.N.Y. 2003), *granted* summary judgment, stating:

“Where none of the material facts are disputed, however, and each party ‘has contended that its case is complete’ by moving for summary judgment, the likelihood that additional, non-cumulative evidence will be presented at trial is slight, and so judgment as a matter of law may be appropriate” (quoting *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1217-18 (S.D.N.Y. 1996)).

Summary judgment is as appropriate here as it was in *Grokster*. To that end, Lime Wire agrees with plaintiffs that the primary focus of the inquiry here should be the three “particularly notable” aspects (or, as defendants say, “significant features”) that the Court in *Grokster* considered dispositive of defendants’ unlawful object: (1) that defendants sought to “satisfy a known source of demand for copyright infringement”, *Grokster*, 545 U.S. at 939; (2) that defendants’ business models depended upon widespread infringement for their revenue and profit, *id.* at 940; and (3) that defendants failed to implement filtering or other mechanisms

that would diminish direct infringement using their software, *id.* at 939. (*Compare* Pls. 7/18/08 Mem. at 8-9 *with* LW 9/26/08 Mem. at 12.). The Court in *Grokster* also considered other evidence -- including internal communications, marketing plans, advertising and software design elements to facilitate infringement (such as a “Top 40” search option) -- that provided additional direct and “unequivocal” indications of an objective to promote infringement. *Grokster*, 545 U.S. at 923-27, 938. All of this evidence -- and more -- is present in this case. (*See* Pls. 7/18/08 SOF ¶¶ 253-401; *see also id.* ¶¶ 140-252.)

**A. Plaintiffs’ Statistical Study Is Valid.**

Plaintiffs’ expert (Dr. Waterman) devised and conducted a statistical study that concluded, *inter alia*, that infringing files make up nearly 99% of LimeWire users’ requested downloads. (Pls. 7/18/08 SOF ¶¶ 104, 109; *see also id.* ¶¶ 103, 106-108, 110.) Plaintiffs do not proffer this study as a “factor” the Supreme Court adopted to determine intent, as Lime Wire contends. Plaintiffs stated only that this massive infringement “points” to defendants’ unlawful purpose and cited the district court in *Grokster* on remand as stating that such a “staggering scale of infringement”, by itself, made it “more likely” that the illegal use of the software was condoned by the defendants. *See Grokster (Remand)*, 454 F. Supp. 2d at 985; Pls. 7/18/08 Mem. at 10. Plaintiffs also pointed out that, like defendants in *Grokster*, defendants here have not offered an alternative study (Pls. 7/18/08 SOF ¶ 111) and “say[ ] nothing about the percentage of files available on the network that are infringing”. The court in *Grokster* interpreted this as a failure to dispute the findings of the plaintiffs’ study. *Grokster (Remand)*, 454 F. Supp. 2d at 985; *see also Grokster*, 545 U.S. at 923; Pls. 7/18/08 Mem. at 10 n.9.

Rather than admit the obvious,<sup>10</sup> defendants have made a motion to exclude Dr. Waterman's statistical study in its entirety based on a laundry list of alleged flaws in methodology (*see* Defs. Expert Mot. Br. at 7-9; *see also* DRSOF ¶¶ 104-110), and contend that, even if the Court finds Dr. Waterman's methodology to be proper, no such study is possible or admissible "given the decentralized nature of LimeWire". (*See, e.g.*, DRSOF ¶ 111.)

Defendants are wrong.

Under established law, Dr. Waterman's study, which provides evidence of massive infringement using LimeWire, is both reliable and admissible. (*See* Pls. Expert Opp'n Br. at 3-21.) Indeed, Dr. Waterman's methodology and protocol are very similar to the statistical studies in *Grokster*, upon which the Supreme Court and the district court on remand in *Grokster* relied. *See Grokster*, 545 U.S. at 952; *see also Grokster (Remand)*, 454 F. Supp. 2d at 985. It is remarkable that defendants would object to the same type of evidence that the *Grokster* courts found to be so compelling and probative. Evidence does not become inadmissible simply because it is devastating. Moreover, defendants' contention that Dr. Waterman's study is not even "possible" since the LimeWire system is decentralized is belied by the studies in *Grokster*, where the defendants also ran P2Ps with decentralized architecture. Ironically, defendants' own expert, Steven Gribble, has found such an analysis "doable" and has published the results of his own statistical studies concluding that the file types stored on the old Napster network and on the Gnutella network that LimeWire utilizes were the same: mp3 (or audio) files. (Gribble Tr.

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<sup>10</sup> Lime Wire itself has acknowledged that *all* its users are seeking infringing copies of sound recordings. (*See* Pls. 7/18/08 SOF ¶ 93; *see also id.* ¶¶ 86-92; 94-96.) 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.*)

139:5-142:16.) Dr. Gribble also found that 94 percent of the data transferred over the Gnutella network are audio or video files, and testified at his deposition that he is unaware of any substantial non-infringing use of the LimeWire network. (*Id.* at 144:4-145:5, 156:19-157:5.)

**B. Defendants Do Not Dispute The Massive Evidence That They Were Pursuing Known Infringers.**

The evidence is overwhelming that Lime Wire targeted and pursued Napster, Kazaa, Morpheus and Grokster users -- all notorious and well-known infringers of copyrighted sound recordings -- as well as music users who might be induced to infringe. (*See* Pls. 7/18/08 SOF ¶¶ 140-177 (Napster); ¶¶ 178-229 (Kazaa, Morpheus, Grokster); ¶¶ 230-251 (music users); *see also* Pls. 7/18/08 Mem. at 11-16.) Yet Lime Wire maintains the opposite, namely that it “did not target Napster users”. (LW 9/26/08 Mem. at 18.) To support this argument, Lime Wire claims, that unlike Grokster, Lime Wire LLC did not name its software “Limester” (*id.* at 18), did not state straight out in any document, “let’s get Napster users by doing this” (*id.* at 19) and did not portray itself with the words, “the next Napster” (*id.* at 20). Saying what Lime Wire did not do does nothing to deal with the evidence of what Lime Wire in fact did.<sup>11</sup>

To avoid the obvious implications of the evidence, defendants make specious arguments. *First*, they claim that, although much evidence shows Napster-focused marketing or promotions, Lime Wire did not actually implement those ideas. (LW 9/26/08 Mem. at 20-22.) But the testimony Lime Wire cites does not support this argument (*see* Pls. 11/7/08 SOF Reply ¶¶ 154, 161, 166-167), and, in any event, it is irrelevant. What is relevant is that Lime Wire planned and considered such promotions and that those plans and considerations “illuminate”

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<sup>11</sup> Lime Wire’s attempt to claim that it did not use the Napster name is both cynical and disingenuous. LimeWire launched *after* Napster was enjoined (Pls. 7/18/08 SOF ¶¶ 44, 144) and the evidence shows that Gorton knew that he had to avoid open and blatant comparisons to Napster. (*See, e.g.*, Gorton 9/26/08 Decl. ¶¶ 18-19; *see also* Pls. 7/18/08 SOF ¶ 125; Pls. 9/26/08 (Gorton) Resp. ¶ 59.)

Lime Wire's purpose. *Grokster*, 545 U.S. at 925 n.7. As the Supreme Court stated, these types of promotions (along with other evidence), show defendants unlawful purpose: "Whether the messages [internal communications and advertising designs aimed at Napster users] were communicated is not to the point on this record." *Id.* at 938.

*Second*, defendants assert that press releases and other materials referred to Napster because including the word "Napster" would garner LimeWire attention and publicity. (LW 9/26/08 Mem. at 19-20.)<sup>12</sup> Invoking the "Napster" name to get attention and publicity for "LimeWire" proves that Lime Wire targeted Napster's infringing users. Lime Wire used "Napster" in its promotions because Napster had customers Lime Wire wanted to lure to its own software. LimeWire could have used a host of other words if all it was after was the general attention of readers, but at that period in time, only "Napster" would get the attention of potential LimeWire users of a mind to infringe.

Similarly, in the single paragraph defendants devote to disputing that Lime Wire pursued infringing users of other P2Ps, like Kazaa, Grokster, Morpheus, etc. (LW 9/26/08 Mem. at 24), defendants' concede that Lime Wire LLC advertised that LimeWire "was better than Morpheus and Kazaa", but argue that it did so in order to promote its software just as "Xerox may claim superiority over Canon". (*Id.*) Exactly. Xerox would claim superiority over *Canon* -- not Goodyear Tire or Kellogg -- to attract *Canon's* customers, *e.g.*, customers looking

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<sup>12</sup> Lime Wire also contends that Lime Wire employees who authored documents and emails plaintiffs cited in their statements explained the documents' true meaning in their depositions (LW 9/26/08 Mem. at 19) and testified that there "never was any effort to attract Napster users" (*id.*). But this is simply not true. The testimony Lime Wire cites to in DRSOFF ¶¶ 150-153, 155 in no way explains a meaning different from the meaning on the face of the document cited. And Barret and Cho do *not* state in their cited testimony that Lime Wire was not trying to target Napster users. (*See* Pls. 11/07/08 SOF Reply ¶¶ 150-153, 155.)



for printers -- just as LimeWire claimed superiority over Morpheus and Kazaa to attract *their* customers, customers looking to infringe music files.<sup>13</sup>

Finally, based upon Gorton's conclusory and unsupported statements (Gorton 9/26/08 Decl. ¶ 20), Lime Wire claims that a "rogue" summer intern independently came up with the idea for the Google AdWord campaign and purchased it "without permission". (LW 9/26/08 Mem. at 21; Gorton 9/26/08 Decl. ¶ 20; DRISO ¶¶ 166, 167, 651.) Lime Wire has produced *no* documentation to support this story, gives no explanation as to how "Lime Group" and "Bildson's" names appeared *as the account holders* (*see* Ex. 82, 102) or how this intern paid for the Google campaign. Indeed, it is hardly likely that a summer intern was responsible since the Google AdWord Campaign was opened in November 2002 and ran through December 2006, and cost over \$85,000. (*See* Ex. 82 at GOOG 106-GOOG 118; *see also* GOOG 001.) Moreover, defendants point to Bildson Tr. 836:6-10 as support for their claim that Lime Wire immediately stopped the Google campaign as soon as it discovered what the intern was doing. But that testimony says no such thing. In a similar vein, Lime Wire simply asserts that Bildson was "kidding" in an email in which he stated that a user's comment that LimeWire has "all but replaced Napster" be used as a user testimonial. (*See* LW 9/26/08 Mem. at 20 n.13; DRISO ¶ 161.) There is no evidence of that.

**C. Defendants Do Not Raise Any Genuine Dispute as to Lime Wire's Dependence On Enormous Numbers of Infringing Users of LimeWire.**

Plaintiffs have shown that Lime Wire distributes the "Basic" version of the LimeWire software for free in order to build a huge userbase that it has monetized over the years

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<sup>13</sup> As for attracting music consumers who might be induced to infringe, Lime Wire's response--that it was not trying to attract those consumers, but rather was trying to "make it easier for people to enjoy their music, period" (LW 9/26/08 Mem. at 25)--speaks volumes as to Lime Wire's intent. In fact, defendants do not dispute in any material way plaintiffs' statements on this point. (*Compare* Pls. 7/18/08 SOF ¶¶ 230-251 *with* DRISO ¶¶ 230-251.)

in various ways: through sales of advertising, paid distribution of bundled software, sales of LimeWire “Pro” (the paid version that Lime Wire LLC advertises as providing “[o]ptimized search results” and faster downloads than LimeWire Basic (Pls. 7/18/08 SOF ¶¶ 56-69)) and, most recently, directing LimeWire users to Lime Wire LLC’s own music store. (*Id.* ¶¶ 413, 456-461.) Lime Wire LLC’s business model with respect to advertising and bundling was exactly the same as that in *Grokster* -- the more that the free LimeWire software was downloaded and used, the larger the market for advertisements and bundled software became and, accordingly, the more money LimeWire would make. Growing LimeWire’s userbase through the free distribution of the “Basic” version of the software similarly created a larger and more attractive market for the sales of the “Pro” version, thereby further increasing Lime Wire LLC’s revenues. (*See id.* ¶¶ 410-413, 417-418; *see also* ¶¶ 408, 413-416, 420, 431-432 (Lime Wire LLC’s income from 2000 to 2006).)

Defendants acknowledge, as they must, that Lime Wire sold advertising and bundled adware and now makes money exclusively from the sales of Pro. (*See* LW 9/26/08 Br. at 25-29.) They argue, however, that Lime Wire’s business model does not depend on infringement because Lime Wire LLC’s revenue does not increase each time LimeWire is used. (*Id.* at 27.) It does not matter, however, whether Lime Wire LLC makes money with each use. What matters is that the more users Lime Wire attracts to its free BASIC LimeWire software, the larger its userbase becomes and the more Pro it sells -- and the greater the opportunities to monetize that userbase. As Lime Wire LLC’s Senior Software Developer Sam Berlin acknowledged, free LimeWire Basic increases LimeWire’s “recognition -- which is a large part of what sells [LimeWire] Pro.” (*Id.* ¶ 419.) In fact, given Lime Wire’s complete inability to show evidence of *any* non-infringing uses of LimeWire (*see infra* 18-19), there is no other way

to account for the dramatic rise in Lime Wire LLC's revenue based exclusively on the sale of Pro. (Pls. 7/18/08 SOF ¶¶ 409-420.)

**D. Defendants Raise No Material Disputes As To Their Lack of Effort To Reduce Infringement.**

Filtering out infringing material and building a business based on infringement are by definition incompatible. That is why defendants have never implemented effective filtering. Despite this, as evidence of its "good faith" efforts to reduce infringement, Lime Wire points to its 2005-2006 "conversion plans" and discussions with several filtering-related companies. (LW 9/26/08 Mem. at 30-31; *see also* Gorton 9/26/08 Decl. ¶¶ 45-61.)<sup>14</sup> This reliance is striking as it is an admission that *no* efforts were made by Lime Wire to reduce infringement prior to the *Grokster* decision. It is also an admission that LimeWire was being used for infringement and that defendants were aware of it well before the *Grokster* decision since, according to them, they "*immediately* began to try to meet with the RIAA and the Record Labels in order to discuss appropriate filtering technologies and ways to further reduce infringement". (LW 9/26/08 Mem. at 30 (*emphasis added*); *see also* Gorton 9/26/08 Decl. ¶ 36.) According to Lime Wire, defendants should *not* be found liable because these discussions were *business* efforts to reduce infringement. But Lime Wire also contends these discussions were "settlement-related" and inadmissible.<sup>15</sup> Lime Wire cannot have it both ways -- these

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<sup>14</sup> Defendants also assert that "[l]ong before the *Grokster* decision", Lime Wire implemented measures to reduce infringement. (LW 9/26/08 Mem. at 29.) That is not true. Lime Wire cites the "intent page", wherein potential users are asked if they intend to use LimeWire to infringe copyright (*see* Pls. 7/18/08 SOF ¶¶ 463-472), and Lime Wire's "strict written policies" (LW 9/26/08 Mem. at 29-32). The "intent page", however, was not implemented until *after Grokster* and it is hardly meant to be effective since a user can immediately click back and change the answer (*see* Pls. 7/18/08 SOF ¶¶ 463-465.) And other than Gorton's declaration (*see* Gorton 9/26/08 Decl. ¶ 31), there is no concrete evidence of any "strict written policies". (*See* LW 9/26/08 at 29.)

<sup>15</sup> *See* Def. Pre-2003/*Grokster* Mem. at 1-5; *see also* Pls. Pre-2003/*Grokster* Opp'n Mem. at 11-24.

discussions cannot be evidence that it has no liability for inducing infringement and at the same time, the basis to settle allegations of existing liability.<sup>16</sup> That defendants are reduced to relying on steps they contemplated post-*Grokster* demonstrates the absence of any steps taken to reduce infringement pre-*Grokster*.

What defendants do *not* dispute here and what is plainly supported by the evidence is (1) that they did not try to implement any filter before the *Grokster* decision (Pls. 7/18/08 SOF ¶¶ 473-501; Gorton 9/26/08 Decl. ¶¶ 35-42; Pls. 9/26/08 (LW) Add'l SOF ¶¶ 1-5, 35-47); (2) that when they finally implemented a filter over a year after the *Grokster* decision, it was an ineffective filter that was turned to “off” by default (*see, e.g.*, Pls. 7/18/08 SOF ¶ 484); and (3) that, although during the 2005-2006 discussions with third parties as to the “conversion plans” defendants proposed several potentially effective methods to reduce or eliminate infringement (*see, e.g., id.* ¶¶ 473, 476, 484-489, 502-509), they have implemented none of them -- not even the plan that required only education of their infringing userbase. (*See id.* ¶¶ 510-516.)

**E. Lime Wire Took Other Actions That Reveal Its Intent.**

There can be little doubt that defendants took steps to make sure that LimeWire had features that attracted music infringers (Pls. 7/18/08 SOF ¶¶ 320-345; 369-401), protected infringers (*id.* ¶¶ 346-368), and provided help to and did not discourage infringers. (*Id.* ¶¶ 252-319.) Defendants’ response -- which is not based on any evidence (*see* DRSOF ¶¶ 252-401) -- is confined to simply making bold proclamations that the features that LimeWire added, such as the “shared directories, ultrapeers, media-player, iTunes integration, display of Bitrate, file type and title, inclusion of genre search categories, like “Top 40”, “had nothing to do with locating

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<sup>16</sup> *See* Pls. Pre-2003/*Grokster* Opp’n Br. at 14-22.

infringing content,” or attracting music infringers. (LW 9/26/08 Mem. at 34.) According to Lime Wire, they reveal “an intent to make LimeWire as user-friendly as possible” (*id.*), and the genre categories are industry standard (*id.* at 35).<sup>17</sup>

Lime Wire’s conclusory statements are not unlike the arguments that were made (and rejected) in the *Grokster* case. In fact, on remand, in the district court in *Grokster*, StreamCast argued that the Morpheus software did not itself identify particular files as Top 40, but the court rejected that argument stating: “[T]he fact remains that StreamCast implemented a feature that made it easier for users to share copyrighted content”. *Grokster (Remand)*, 454 F. Supp. 2d at 987-88. Here, too, the fact remains that Lime Wire implemented numerous features that made it far easier for users to share copyrighted music. (*See, e.g.*, Pls. 7/18/08 SOF ¶¶ 66-68.) Moreover, Bildson states that Lime Wire always understood that its users were primarily interested in obtaining and sharing music files, and accordingly, implemented features to “appeal to, encourage, and facilitate this known usage.” (Bildson 9/10/08 Decl. ¶ 5; *see also id.* ¶¶ 6-10.)

Lime Wire LLC also denies that it encouraged or assisted infringement, but again offers only conclusory statements and no admissible evidence. For example, Lime Wire does not dispute that it set up the LimeWire Forum, that data for the forums is stored on a LimeWire server, that LimeWire selects the users who serve as moderators and superconductors and communicate the policies and that LimeWire can and does hire individuals for the Forums. (*See* DRSOF ¶¶ 253-264.) Instead, LimeWire claims that “several rogue moderators apparently” “did not adhere to Lime Wire’s policies” and that Lime Wire was “ignorant” of this. (LW 9/26/08 Mem. at 37.) Again, Lime Wire provides no supporting evidence for these statements.

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<sup>17</sup> Lime Wire also denies that it took any active steps to block enforcement efforts of copyright holders on the Gnutella network. (LW 9/26/08 Mem. at 35 (citing to DRSOF ¶¶ 346-354)). But its responses are confined to unfounded objections to exhibits and testimony and do not provide citations to admissible evidence in support of these denials.

### **III. LIME WIRE DOES NOT DISPUTE THE MATERIAL FACTS THAT DEMONSTRATE THAT DEFENDANTS ARE LIABLE FOR CONTRIBUTORY INFRINGEMENT**

Plaintiffs have made a clear and unmistakable showing that Lime Wire is liable for contributory infringement. (Pls. 7/18/08 Mem. 30-38; Pls. 7/18/08 SOF ¶¶ 530-602.) In response, defendants make the same meritless arguments they made in their competing motions for summary judgment. (See LW 7/18/08 Mem. at 37-45; Gorton 7/18/08 Mem. at 6-12.) Specifically, Lime Wire contended in its motions and here 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 9/26/08 Mem. at 38-42; Gorton 9/26/08 Mem. at 4; *see also* Gorton 7/18/08 Mem. at 6.) Lime Wire also argues that even if the *Sony-Betamax* doctrine does not provide a "safe harbor", plaintiffs "cannot establish . . . material contribution", an element of contributory infringement. (LW 9/26/08 Mem. at 44-45; Gorton 9/26/08 Mem. at 10.)

In its memorandum in opposition to defendants' motions, plaintiffs set out in detail the reasons that these arguments must be rejected. (*See* Pls. 9/26/08 Mem. at 6-18.) Plaintiffs incorporate that memorandum herein and refer the Court to it for a full response to defendants' arguments on their contributory infringement claim. In short, plaintiffs demonstrated that: *Sony* does *not apply at all* to an infringement claim based on *inducement* -- and, as shown above and in plaintiffs' motion (Pls. 7/18/08 Mem. at 8-29, 33; Pls. 7/18/08 SOF ¶¶ 43, 540), Lime Wire is contributorily liable because it has induced

infringement.<sup>18</sup> (*See* Pls. 9/26/08 Mem. at 7-9.) Even if *Sony* did apply, the *Sony* noninfringing uses defense does not shield Lime Wire's actions where, as here, the record evidence shows *no* "substantial" or "commercially significant" noninfringing uses of LimeWire. (*See id.* at 9-16.) And, plaintiffs not only can, but already have, established material contribution. (*See id.* at 16-18.)

Lime Wire adds to its earlier memorandum in only two ways. It adds a new list of what it dubs "substantial noninfringing uses" (*see* LW 9/26/08 Mem. at 29-41), and maintains that "actual knowledge" that "specific infringing material was available" is necessary for liability. (*Id.* at 42-44.) Like its earlier attempts to show noninfringing uses of LimeWire, Lime Wire LLC's list here does no such thing. Moreover, defendants are simply wrong as to the "knowledge" requirement for contributory infringement.

*First*, Lime Wire failed in its own motion to produce any evidence that its LimeWire software ever has been used for noninfringing purposes. *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003). Plaintiffs' statistical study confirms that LimeWire is used almost exclusively to infringe music files, finding that roughly 93% of the files made available and nearly 99% of the actual download requests by LimeWire's users are infringing. (*See supra* 8-10.) For its part, 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. For example, Lime Wire spent over thirteen pages purportedly providing "examples" of the noninfringing uses for which LimeWire is "capable". (LW 7/18/08 Mem. at 16-29.) Lime Wire, however, described internet sites that do not utilize P2P technology (*id.*

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<sup>18</sup> The Supreme Court's decision in *Grokster* made clear that inducement of copyright infringement is not only an element of a contributory infringement claim, it is a separate claim in and of itself. *Grokster*, 545 U.S. at 934-937.

at 16-18), companies unrelated to Lime Wire 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 generally (*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 has provided *no* proof that they have ever done so.

The purported “substantial noninfringing uses” Lime Wire lists in its opposition brief here (LW 9/26/08 Mem. at 39-41) does no more. All of the listed deposition testimony of plaintiffs’ executives speaks generally about the Gnutella network or P2P networks and technology or to iMesh, QTrax, and Nettwerk Music Group. (*Id.*) *LimeWire* is never specifically discussed and none of the testimony relates to noninfringing uses of *LimeWire*. As Lime Wire itself pointed out, LimeWire is *not* the Gnutella network, and Lime Wire must prove that *LimeWire* -- not the Gnutella network, not iMesh, not another P2P -- is used for substantial noninfringing uses. (*See* LW 9/26/08 Mem. at 8) (must “prove that third parties used *LimeWire*, not the Gnutella network generally”).)

*Second*, Lime Wire fundamentally misconstrues the law on contributory infringement by requiring that “actual knowledge that ‘specific infringing material was available’”. (LW 09/26/08 Mem. at 42.) Not so. Lime Wire bases its claim on the Ninth Circuit’s original decision in *Grokster*. But the Supreme Court unequivocally *vacated* the entire judgment of the Ninth Circuit and remanded the case for further proceedings. *Grokster*, 545 U.S. at 941. In particular, the Court expressly overturned the holding on which Lime Wire relies calling it “error”:



“The Ninth Circuit has read *Sony*’s limitation 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; it read the rule as being this broad, even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product, *unless the distributors had specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information. This view of Sony, however, was error . . . .*”

*Grokster*, 545 U.S. at 933-934 (quotation and citation omitted) (emphasis added).

The *Napster* cases Lime Wire cites also do not stand for the proposition that there is a heightened knowledge standard for contributory infringement. In *A&M Records, Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit confirmed that “[c]ontributory liability requires that the secondary infringer ‘know or have reason to know’ of direct infringement” and concluded that “Napster has knowledge *both actual and constructive*, of direct infringement”. *Id.* at 1020 (emphasis added). In fact, the district court in *Fonovisa, Inc. v. Napster, Inc.*, 3:01-CV-02669, 2002 WL 398676 (N.D. Cal. Jan. 28, 2002) expressly rejected reading *Napster* as having created “a new knowledge standard for contributory infringement,” and held “that had the Ninth Circuit intended that constructive knowledge no longer give rise to contributory liability, the court would have [ ] stated so explicitly.” *Id.*, at \*5. Contrary to Lime Wire’s contentions, therefore, liability for contributory copyright infringement does *not* require actual knowledge of specific acts of infringement.

Plaintiffs have shown that Lime Wire had actual and constructive knowledge of infringement sufficient to meet the requirements of contributory infringement.

#### **IV. GORTON AND LIME GROUP ARE LIABLE BASED UPON THEIR ACTIONS**

In their separate opposition memorandum, Mark Gorton and Lime Group make the same arguments they made in their separate motion for summary judgment. (Compare Gorton 9/26/08 Mem. with Gorton 7/18/08 Mem.) Gorton and Lime Group contend here, as they

did in their motion, 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. There is no support for this notion 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. And bear some responsibility Gorton and Lime Group certainly do. Plaintiffs seek to hold Gorton and Lime Group liable because they have induced and contributed to infringement using LimeWire.

Plaintiffs responded in full to these arguments; that memorandum and additional statement of facts are incorporated herein. (Pls. 9/26/08 Mem. at 25-31; Pls. 9/26/08 (Gorton) Add'l SOF ¶¶ 624-710.) In short, plaintiffs showed that Gorton was personally involved in the actions leading to Lime Wire LLC's liability. He *is* Lime Wire LLC. He exercises control over Lime Wire LLC and benefits from the infringement of LimeWire users. He “ran” the company. (See Pls. 9/26/08 (Gorton) Add'l SOF ¶¶ 661-663.) In fact, in his current declaration, Gorton makes clear that he was (and is) intimately involved in all Lime Wire LLC decisions and has been from its inception. (See Gorton 9/26/08 Decl. ¶¶ 4-6, 10-19, 24-27, 30-42, 45-61.) Gorton also confirms that he was heavily involved in the 2005-2006 proposed Conversion Plans whereby infringing LimeWire users were to be “converted” to law-abiding paying customers. (Gorton 9/26/08 Decl. ¶¶ 45-61; *see also* Pls. 7/18/08 SOF ¶¶ 435-440, 444-453, 502-516.) Likewise, he was involved in filtering decisions. (See *e.g.*, Gorton 9/26/08 Decl. ¶ 36; Pls. 9/26/08 (Gorton) Add'l SOF ¶ 665.) Gorton, as the “final decision-maker”, was knowledgeable about and made technological decisions. (Pls. 9/26/08 (Gorton) Add'l SOF ¶¶ 662-663, 694-697, 701.) Gorton decided that LimeWire's content filter would be set to “off” by default (Pls.

9/26/08 (Gorton) Add'l SOF ¶ 701) and directed that the MagnetMix button be disabled (*see id.* ¶¶ 695-696).

Bildson also confirmed that Mark Gorton functioned as the “ultimate decision maker” at Lime Wire LLC, and that his approval was required for “any major strategic and design decisions”. (Bildson 9/10/08 Decl. ¶ 25.) Bildson has stated that Gorton “directed or approved the choice of a decentralized architecture, the startup wizard, the audio player, the design of the LimeWire filtering system and the decision that the filtering system would be turned “off” by default, the type of filter used, the introduction of ultrapeers, discussions related to the DHT, allocation of developer resources, and the design and operation of the user interface.” (*Id.* ¶ 26.) Moreover, Gorton made decisions regarding Lime Wire LLC’s public relation efforts; and he made the decision to open the LimeWire Store. Gorton also had the authority to hire and fire people at Lime Wire LLC, and was heavily involved in compensation decisions. (*Id.* ¶ 28.)

Lime Group LLC has described (and continues to describe) itself as “home to”, “running” and “operat[ing]” several “Lime” companies, including Lime Wire LLC. (Pls. (Gorton) Add'l SOF ¶¶ 631-632.) 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. 9/26/08 (Gorton) Add'l SOF ¶ 624), and serves as Lime Group’s CEO. (Pls. 9/26/08 (Gorton) Add'l SOF ¶ 626.) Lime Group has consistently performed myriad functions on behalf of Lime Wire LLC (Pls. (Gorton) Add'l SOF ¶¶ 633, 636, 650-657), and the companies shared office facilities. Gorton runs the nominally separate companies he owns, Lime Group, Lime Brokerage, Lime Wire LLC and Tower Research Capital, as part of one large organization. (Bildson 9/10/08 Decl. ¶ 30.) And, according to Bildson, Lime Wire LLC and Lime Group “have been operated as a single

company”. (*Id.* ¶ 31.) In fact, the initial LimeWire software was “substantially developed by employees of Lime Group”. (*Id.*; *see also id.* ¶ 32.)

Clearly, Gorton and Lime Group are defendants in this lawsuit -- and liable -- not because of who they are, but because of what they did.

## V. PLAINTIFFS HAVE PROVEN DIRECT INFRINGEMENT

Direct copyright infringement requires a party to prove (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), by a preponderance of the evidence. *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 13.01, 13.04 (2008); *see also* 6 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 39.04 (2008) (model jury instructions for infringement). In this case, this Court has stated that at this stage in the litigation “it’s not necessary to have more than a single item . . . in order to address the basic liability issues that are what the case is about”. (Dec. 7, 2007 Hearing Tr. 3:24-4:1.) Plaintiffs’ evidence proves direct infringement.

*First*, almost nine months ago, plaintiffs provided to defendants documents proving ownership for thirty sound recordings.<sup>19</sup> Plaintiffs included statements in their 56.1 Statement proving ownership of sound recordings. (*See* Pls. 7/18/08 SOF ¶¶ 97-102.) Defendants respond to those statements by stating that they are “[u]nable to dispute or confirm at this time”. (DRSOF ¶¶ 101-102.) This improper response should be stricken, and plaintiffs’

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<sup>19</sup> Although, the Court made clear that “[t]here is not likely to be a serious dispute about whether the plaintiffs own the copyrights to at least some of the material that is at issue here” since “[t]hat’s not what this case is about” (Dec. 7, 2007 Hearing Tr. 3:16-19), the Court instructed plaintiffs to provide discovery as to “a relatively small subset of copyrighted items” to allow defendants’ to test ownership during the liability phase of the trial, leaving the others for “if, as and when we get to [the] damages phase”. (*Id.* at 3:9-4:10.)

statements deemed admitted and undisputed. *See, e.g., Parks v. Lebhar-Friedman, Inc.*, No. 04-7133, 2008 WL 3833802, at \*5 n.12, \*7 (S.D.N.Y. Aug. 11, 2008).

*Second*, plaintiffs have shown unauthorized<sup>20</sup> copying or distribution of their sound recordings:

- Plaintiffs have obtained judgments against 704 *LimeWire* users, and settled claims against 3,722 *LimeWire* users for infringement. Among these are judgments based upon infringement of at least eleven of plaintiffs thirty sound recordings at issue at this stage of the litigation (Pls. 7/18/08 SOF, Ex. A).<sup>21</sup> (Pls. 9/26/08 (Gorton) Add'l SOF ¶¶ 714-715.)
- Plaintiffs' sound recordings have been downloaded using *LimeWire*. (Pls. (Gorton) Add'l SOF ¶ 712.) Multiple *LimeWire* users have shared *identical* copies of plaintiffs' copyrighted sound recordings. (Pls. 9/26/08 (Gorton) Add'l SOF ¶ 712.) Files were identified as identical based on their 32 character SHA-1 hash. (*See* Decl. of Thomas Sehested (Vol. X) ¶ 5; *see also* Pls. 7/18/08 SOF ¶ 122.) 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.)
- Plaintiffs submitted screenshots from *LimeWire*'s results page, each highlighting one of the downloaded sound recordings at issue and the number of identical copies available via *LimeWire*, *i.e.*, files with identical hashes that were available for download from multiple users via *LimeWire*. (Ex. 50; *see also* Pls. 7/18/08 SOF ¶¶ 103, 119-22; Pls. 9/26/08 (Gorton) Add'l SOF ¶ 711.) Defendants now object to this evidence on the grounds that there is no evidence that the downloaded copies are accurate or that "even one individual used *LimeWire* to request the 30 songs at issue, find those 30 songs, download those 30 songs, or even make those 30 songs available". A declaration describing the process by which the songs were downloaded and verified is submitted herewith. (*See* Minarovich Decl. ¶ 4.)

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<sup>20</sup> Defendants admit that plaintiffs have *not* granted them authorization to copy or distribute their sound recordings. (*See* DR/SOF ¶ 103.)

<sup>21</sup> Because a judgment requires a showing of unauthorized copying or distribution, this evidence also establishes ownership.

- Plaintiffs produced to defendants electronic storage media containing downloaded and verified sound recordings of the over 3,000 copyrighted sound recordings at issue in this litigation. (See Forrest 11/07/08 Decl. ¶ 3; see also Pls. 7/18/08 SOF ¶¶ 119, 120.) Defendants object to this evidence, complaining that plaintiffs did not include the hard drives as an exhibit to their motion and that there is no evidence that the downloaded files are accurate or from LimeWire users. The electronic media storage are submitted herewith as Ex. 4 and include downloaded audio files as well as, a file documenting the download from a LimeWire user.

Further, plaintiffs’ statistical study -- concluding that 93% of files available on LimeWire are unauthorized and that 99% of queries to LimeWire users are for unauthorized files (see Pls. 7/18/08 SOF ¶¶ 104-110) -- is the same type of study accepted by the court in *Grokster* as indicative of “vast” infringement, *Grokster*, 545 U.S. at 922-23.<sup>22</sup> And Lime Wire LLC’s Chief Technology Officer since its inception, Greg Bildson, has testified that he “has no doubt” that all plaintiffs’ test tracks, “have been infringed using LimeWire.” (Bildson 9/10/08 Decl. ¶ 18.)

Plaintiffs evidence more than satisfies their burden to prove direct infringement. As shown above, contrary to defendants’ contention, plaintiffs do not rely solely on a so-called “making available” argument. But, even if plaintiffs relied on that argument, it is neither “the general rule” nor “supported by the great weight of authority”, as defendants contend, that

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<sup>22</sup> Accordingly, defendants contention that circumstantial evidence is insufficient to prove infringement is inapposite. (See LW 9/26/08 Mem. at 11-12.) Moreover, in *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV. 4660, 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002), the single authority relied upon by defendants for this proposition, the court noted that “a copyright holder may not be required to prove particular instances of use by the public when the proof is impossible to produce because the infringer has not kept records of public use.” *Id.*, at \*4. That was the case in *Grokster*, too, where the P2Ps, like LimeWire here, utilized a decentralized architecture, but the Court found that no impediment to accepting a statistical study showing massive infringement. See *Grokster*, 545 U.S. at 922 (“[a]lthough *Grokster* and *StreamCast* do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches.”).

“infringement of the distribution right requires an actual dissemination of the copies”.<sup>23</sup> (See LW 9/26/08 Mem. at 9.) At best, the authorities are split over this question.<sup>24</sup>

Numerous courts have held that making unauthorized copies of sound recordings available for download over a peer-to-peer network violates the copyright owners’ exclusive distribution rights under 17 U.S.C. § 106(3). *See, e.g., Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”); *Atl. Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551, at \*7 (S.D. Tex. Mar. 12, 2008) (holding that “availing unauthorized copies of sound recordings for download using an online file-sharing system . . . constitutes an offer to distribute those works,

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<sup>23</sup> Defendants’ reliance on plaintiffs’ expert’s discussion of the “making available” argument is misplaced. (LW 9/26/08 Mem. at 10.) Plaintiffs’ expert was discussing BitTorrent, a completely different protocol from that underlying LimeWire. (See Pls. 7/18/08 SOF ¶¶ 54-55.)

<sup>24</sup> In fact, defendants’ cited authority does *not* support their position. In *Elektra Entertainment Group, Inc. v. Barker*, the court held that “[t]he offer [] to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display” can violate the distribution right of Section 106(3). 551 F. Supp. 2d 234, 242 (S.D.N.Y. 2008) (internal quotation and citation omitted). Although the *Elektra* court drew an artificial distinction between “making available” and an “offer to distribute” (*id.* at 244-45), the case does not stand for defendants’ proposition that “infringement of the distribution right requires an actual dissemination”. (LW 9/26/08 Mem. at 9-10.) Further, while *National Car Rental Systems, Inc. v. Computer Associates Int’l, Inc.* indeed quotes Professor Nimmer to say that “[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords”, the statements focuses not on whether a work made available for copying was a violation of the distribution right, but whether using software licensed only for internal use to process third-party data, thereby enabling third-parties to benefit from the software, was the equivalent of transferring that software to third parties. 991 F.2d 426 at 432-34 (8th Cir. 1993). Defendants’ reliance on *In re Napster*, 377 F. Supp. 2d 796 (N.D. Cal. 2005), is similarly misleading. The court’s statement that “merely listing a copyrighted musical composition or sound recording in an index of available files falls short of satisfying these ‘actual dissemination’ or ‘actual transfer’ standards” (*id.* at 802), refers solely to the alleged copyright infringement to which Napster exposed *itself* “by indexing MP3 files that its users posted on the Napster network” (*id.* at 801-02). The *In re Napster* court did not disturb the Ninth Circuit’s holding in *Napster* that “Napster users infringed the . . . distribution rights of copyright owners whose works were uploaded . . . via the Napster network.” *Id.* at 806.

thereby violating a copyright owner’s exclusive right to distribution”); *Motown Record Co., L.P. v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007) (“A plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant ‘made available’ the copyrighted work.”); *see also Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”).<sup>25</sup>

## **VI. PETITIONERS’ *AMICUS* BRIEF IS MERITLESS AND BIASED AND SHOULD BE DISREGARDED**

Petitioners’<sup>26</sup> “*amicus curiae*” brief is precisely the type of advocacy submission courts have often afforded very little weight. Despite their claims of objectivity, petitioners are not neutral parties. Indeed, their assertions that the *amicus curiae* brief is provided “in support of neither party”; that *amici* is only interested in “balanced secondary liability standards for copyright that punish bad actors while simultaneously protecting legitimate innovators from the chilling effects of legal uncertainty”; and that “*Amici* offer no view on which parties should prevail” is, at best, disingenuous.

The petitioners are more properly characterized as *amici reus* (“friends of the defendant”) than *amici curiae* (“friends of the court”), as they are partisan entities engaged in extensive lobbying and legal activities that oppose the right of content providers to protect their intellectual property. In truth, petitioners frequently interject themselves into litigation (as

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<sup>25</sup> Lime Wire argues that plaintiffs’ motion for summary judgment on their state law claims should be rejected because those claims require proof of unauthorized reproduction. (*See* LW 9/26/08 Mem. at 45.) As shown here, plaintiffs have established such proof, and their motion on those claims should be granted.

<sup>26</sup> Electronic Frontier Foundation (EFF), Center for Democracy & Technology (CDT), Computer & Communications Industry Association (CCIA), Consumer Electronics Association (CEA), Home Recording Rights Coalition (HRRC), Information Technology Association of America (ITAA), Public Knowledge (PK), Special Libraries Association (SLA) and U.S. Internet Industry Association (USIIA) (collectively, the “petitioners”).



counsel or *amici*) in order to oppose legitimate efforts by content providers to protect their intellectual property. *See, e.g.*, EFF's representation of StreamCast Networks--the company behind the Morpheus peer-to-peer file-sharing software--in *Grokster*, 545 U.S. at 917; *amicus curiae* brief submitted by CEA, CCIA and HRRC to the Supreme Court in *Grokster* (Mar. 1, 2005); *amicus curiae* briefs submitted by CEA, CCIA, ITAA and USIA to the Ninth Circuit in *Napster, Inc. v. A&M Records, Inc.* (Aug. 31, 2000; Sept. 29, 2000); *amicus curiae* briefs submitted by CEA, USIAA and EEF to the Southern District of New York in *Elektra Entertainment Group Inc. v. Barker* (Feb. 23, 2006; Feb. 24, 2006); and *amicus curiae* brief submitted by EFF to the District Court for the District of Arizona in *Atlantic Recording Corp. v. Howell* (Jan. 14, 2008). (*See Ex. 467.*) Further, some of the petitioners have openly exhibited hostility toward content providers. *See, e.g.*, Press Release, Consumer Electr. Ass'n, "Consumer Electronics Association Criticizes Content Industry Fear-Mongering" (June 21, 2006) (referring to CEA's efforts to "protect entertainment electronics from the avarice of the content industry"; "the RIAA's litigious assault on swashbuckling music misappropriators"; "the deficiencies of the vacuous arguments used by the contemporary content industry in its battle against fair use rights"; and the "myopic content industry, fearful of developments that could necessitate change and adaption or lead to a temporary decrease in profit"); Press Release, Computer & Commc'ns Ind. Ass'n, "MPAA 'Piracy' Study Flawed and Dangerous, CIAA Says" (Jan. 23, 2008) (referring to a study commissioned by the movie industry that allegedly contained false information; "[t]he latest revelation should be no surprise. The motion picture industry and [others] that comprise Big Content have repeatedly exaggerated the effects of unauthorized copying while simultaneously denying fair-use rights. . . ."). (*See Ex. 468.*)

Such partisanship bears on the weight a court accords petitioners' submission. *See S.E.C. v. Bear, Stearns & Co. Inc.*, Nos. 03 Civ. 2937-45, 2003 WL 22000340, at \*5-6

(S.D.N.Y. Aug. 25, 2003) (quotation and citation omitted) (denying motion to participate as *amici curiae* because, *inter alia*, “this Court does not believe that [putative *amici*] are seeking to assist the Court in clarifying the issues as an objective, neutral, dispassionate ‘friend of the court’. . . . Conferring *amicus* status on such partisan interests is inappropriate”) (citations and quotations omitted); *Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 555 (E.D. Pa. 1999) (“[T]he petitioner cannot be said to be impartial in the matter before the Court. Petitioner . . . has a specific pecuniary interest in the defendant’s perspective in this particular case, and makes no attempt to present itself as a neutral party. Where amici represent[] business interests that will be ultimately and directly affected by the court’s ruling on the substantive matter before it, amicus participation is not appropriate”) (citation and quotation omitted).

Petitioners’ submission here reveals their extreme bias. It does nothing more than repeat the legal arguments made by Lime Wire. In effect, petitioners simply add pages to defendants’ brief. The Court should not be forced to read defendants’ baseless arguments twice. *Compare* petitioners’ *Amicus* Brief (“*Amicus* Br.”) at 7-14 and 14-17 *with* LW 7/18/08 Mem. at 12-16 and 30-33; *Amicus* Br. at 19-22 *with* LW 7/18/08 Mem. at 33-38; *Amicus* Br. at 14-17 *with* LW 9/26/08 Mem. at 11-14; *Amicus* Br. at 7-11 *with* LW 9/26/08 Mem. at 37-39; *Amicus* Br. at 11-13 *with* LW 9/26/08 Mem. at 42-43; *Amicus* Br. at 13-14 *with* LW 9/26/08 Mem. at 44-45). The petitioners’ brief is nothing more than an improper attempt to extend Lime Wire’s summary judgment papers. *See JPMorgan Chase Bank, N.A. v. Fletcher*, No. 06-CV-624, 2008 WL 73233, at \* 1 (N.D. Okla. Jan. 7, 2008), *see also Oklahoma v. Tyson Foods, Inc.*,

No. 05-CV-329-GKF-SAJ, 2008 WL 1994914, at \*1 (N.D. Okla. May 5, 2008); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999).<sup>27</sup>

The fact that this Court has granted the petitioners' motion to file this brief does not mandate that the Court takes the brief into consideration. With respect to the filing of an *amicus* brief at the appellate level, courts have held that "it is preferable to err on the side of granting leave [to file an amicus brief]" because "[i]f an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief."

*Neonatology Assocs. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002). See also *Triad Int'l. Maint. Corp. v. S. Air Transp., Inc.*, 2:04-CV-1200, 2005 WL 1917512 (S.D. Ohio Aug. 10, 2005).

The Court should disregard petitioners' *amicus curiae* brief. Should the Court consider it, however, the arguments made there -- identical to those made in defendants' briefs on their motions for summary judgment and in opposition to plaintiffs' motion for partial summary judgment -- should be rejected for the same reasons defendants' arguments should be rejected.

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<sup>27</sup> At minimum, it is clear that there is nothing in petitioners' brief that Lime Wire or its counsel was incapable of submitting to the Court itself. That is a fundamental deficiency. See *Bear, Stearns*, 2003 WL 22000340, at \*5-6 (denying *amici* status where neither petitioner "ha[d] a unique point of view that [was] not available to the Court from the parties in the underlying actions"); *U.S. v. El-Gabrownny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994) (same); see also *JPMorgan*, 2008 WL 73233, at \*2 (denying *amici* brief because, *inter alia*, "it does not appear that the proposed amicus possesses unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide").

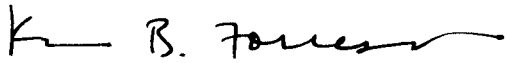
## CONCLUSION

For the reasons set forth above, in plaintiffs' memoranda of law in support of their motion for partial summary judgment, dated July 18, 2008, and in opposition to defendants' motions for summary judgment, dated September 26, 2008, and based upon the facts in the accompanying Plaintiffs' Reply Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1, Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1, dated July 18, 2008, and in Plaintiffs' Additional Facts in their Responses to defendants' two 56.1 Statements, dated September 26, 2008, plaintiffs respectfully request that this Court enter summary judgment on their behalf on Counts I, II, IV and V of their First Amended Complaint.

Dated: November 7, 2008

Respectfully submitted,

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