REDACTED VERSION
-COMPLETE VERSION FILED UNDER SEAL

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. 05936 (KMW) ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION FREEZING DEFENDANTS' ASSETS

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I. INTRODUCTION

By this motion, Plaintiffs seek a preliminary injunction imposing an immediate freeze on all of Defendants' assets to prevent them from any further attempts to insulate their ill-gotten gains from a future judgment. The Court has found Defendants Lime Wire LLC ("Lime Wire"), Mark Gorton ("Gorton"), and Lime Group LLC ("Lime Group") liable for inducing infringement of Plaintiffs' copyrights (and related state law claims). (May 25, 2010 Amended Opinion & Order ("Order").) Plaintiffs will be entitled to substantial damages, totaling hundreds of millions of dollars, or even billions, because of the massive infringing conduct for which these Defendants are liable. Plaintiffs bring this Motion because Defendants' past conduct and admissions in this action reveals their unmistakable fraudulent intent to dissipate assets necessary to satisfy, even in small part, the Court's final judgment. In short, an asset freeze is required in order to ensure that Plaintiffs recover at least some of the monetary compensation they are entitled to as redress for the catastrophic infringing conduct the liable Defendants have caused.

There is abundant evidence showing that an asset-freeze injunction must be entered here. Gorton — Lime Wire's "ultimate decisionmaker" (Order at 53) — and the other Defendants have engaged in a series of fraudulent actions to place his and the other liable Defendants' assets beyond the Court's remedial power. Gorton has conveyed significant assets (including nearly 90% of Lime Wire's ownership interests) to an entity that he openly hopes will be beyond the reach of this Court — Defendant M.J.G. Lime Wire Family Limited Partnership ("Lime Wire FLP"). From [redacted], Gorton transferred [redacted] in cash distributions from Lime Wire to Lime Wire FLP. In addition, [redacted] Plaintiffs suspect that many more [redacted] have been transferred since [redacted] leaving Lime Wire itself with only a pittance of funds to cover any final judgment in the case. Courts routinely issue preliminary injunctions freezing a defendant's assets in precisely these circumstances. *See, e.g., Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 86-87 (2d Cir. 1996);

Arista Records LLC v. Usenet.com, Inc., No. 07-civ-8822 (HB) (Doc. No. 306) at 11, 21 (S.D.N.Y. Feb. 2, 2010) (attached as Ex. 1 to the Declaration of Kelly M. Klaus ("Klaus Decl.")).

This Court has ample authority under the Federal Rules of Civil Procedure and New York law to preserve Lime Wire's assets, and the traditional equitable factors all strongly favor the issuance of an injunction. Specifically:

Likelihood of Success on the Merits: Plaintiffs are overwhelmingly likely to succeed on the merits of their claims, or at the very least have raised sufficiently serious questions on the merits. With respect to Defendants Lime Wire, Lime Group, and Gorton, the Court already has found these Defendants liable as a matter of law for the inducement of copyright infringement, common law copyright infringement, and unfair competition. Regarding Defendant Lime Wire FLP, Plaintiffs are very likely to succeed in proving that Gorton possessed an "actual intent" to defraud creditors under N.Y. Debt. & Cred. Law § 276 by transferring funds to Lime Wire FLP (among other entities), and that the partnership has been unjustly enriched by these illegal conveyances.

There is no real question as to Gorton's fraudulent intent in undertaking these conveyances. A mere three days after the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster Ltd.,* 545 U.S. 913 (2005), which Gorton told the *New York Times* threatened Lime Wire's very existence, he transferred to Lime Wire FLP his Lime Wire ownership interests. During Gorton's deposition, he readily acknowledged that he was "highly concerned about being sued" and that a primary reason he transferred these interests was to "protect the assets in the event of a legal judgment against me personally." Gorton's deceitful intent has been independently corroborated by two witnesses, Vincent Falco and Greg Bildson, in their sworn declarations. Realizing the legal implications of his admission, Gorton has since sought to obfuscate the issue by filing a declaration with self-serving, contradictory statements as to his motivations. Gorton's transparent attempt to change his testimony does nothing to undermine the substantial evidence in the record demonstrating his clear intent to frustrate a legal judgment in this case.

Irreparable Harm: Plaintiffs also are irreparably harmed by Gorton's transparent intent to frustrate a judgment on the merits in this case through dissipating Lime Wire's illegally obtained

property. Although Plaintiffs' cumulative damages resulting from Defendants' staggering infringement will in a likelihood never be fully redressed, Gorton's unashamed attempt to protect assets derived from Defendants' illegal conduct constitutes irreparable injury.

Balance of Hardships: The balance of hardships decidedly favor Plaintiffs. Whereas Plaintiffs may be deprived of any monetary recovery in the absence of an injunction, Defendants will suffer no conceivable hardship if the Court freezes their illicit gains. Defendants have no right to use the profits of an illegal enterprise to continue supporting their unlawful activities or for personal uses.

Public Policy: Finally, public policy strongly supports the issuance of an injunction where, as is the case here, massive infringement has been established. There is no conceivable social utility in allowing Defendants to continue the facilitation of widespread illegality.

The Court therefore should grant immediate relief enjoining Defendants, and anyone acting in concert with them, from transferring or otherwise disposing of any existing or future assets in their possession, custody, or control, as described in greater detail in the Proposed Order submitted concurrently herewith, attached hereto as Exhibit A.

II. BACKGROUND

A. Gorton's Intentional Efforts To Protect Lime Wire's Illegal Gains From Judgment

Gorton, Lime Wire's mastermind and principal beneficiary, has devised a practically incoherent system of intertwining corporate entities and partnerships to protect the assets of his highly successful illegal enterprise.

Gorton founded Lime Wire in June 2000. (Order at 4; SUF ¶ 15; Ex. 1; Gorton (Vol. VII) Tr. 31:3-5.[1]). He appointed himself as Lime Wire's Chief Executive Officer ("CEO"), a position he held

[1] So as not to burden the Court by submitting voluminous evidence multiple times, Plaintiffs cite herein where possible to the evidence submitted in support of the parties' motions for summary judgment. If the Court prefers, Plaintiffs can submit the cited evidence again upon request. Documents (or excerpts) cited herein ("Ex. _") are contained in Volumes I - XIV of the Exhibits to the Declarations of Katherine B. Forrest. Excerpts from deposition testimony ("Tr. _") and Declarations ("Decl.") cited herein are arranged alphabetically by the witness or expert's last name and are contained in Volumes VI, VII and X, respectively, of the Exhibits to the Forrest Declarations. References to Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1, dated July 18, 2008, and Statement of

from its inception until 2007. (SUF ¶ 16; Gorton (Vol. VII) Tr. 10:18-25; *see also* Ex. 2.) During the time that Gorton was CEO, he "ran" Lime Wire and was involved in the company's day-to-day operations. (Order at 53; SUF ¶ 17; Gorton (Vol. VII) Tr. 11:2-5; Bildson Decl. 9/10/08 ¶¶ 30-38[2]; Rohrs (Vol. X) Tr. 15:23-16:7.) Gorton appointed himself, and to this day remains, the sole board member, Director, and Chairman of Lime Wire. (SUF ¶¶ 18, 19; Ex. 3 at LW DE 486246; Gorton (Vol. VII) Tr. 68:23-25.) Lime Wire has earned significant profits from its facilitation of enormous infringement. From 2004 to 2006, Lime Wire's annual revenue grew from nearly $6 million to an estimated $20 million. (Order at 36; SUF ¶¶ 420, 432; Exs. 252, 263.) In June 2005, Lime Wire valued itself at $41.28 million; by 2007, it valued itself at $118.5 million. (Ex. 407 at LW DE 1651025; Ex. 465.)

As Greg Bildson, the Chief Technology Officer and Chief Operating Officer of Lime Wire, testified, Gorton ran and controlled several "nominally separate companies" which he operated "as part of one large organization." (Bildson Decl. 9/10/08 ¶ 30.) Gorton has described the ownership structure of these companies as "complicated" and "convoluted." (SUF ¶ 30; Gorton (Vol. VII) Tr. 27:19-23, 40:25-41:5.) Lime Wire was a wholly owned subsidiary of Lime Group. (SUF ¶ 24; Ex. 6; *see also* Ex. 408.) Lime Group owned 87.1% of Lime Wire, with Gorton owning *100%* of Lime Group. (SUF ¶¶ 25, 625; Gorton (Vol. VII) Tr. 15:13-21, 17:19-21.) Lime Group described itself as an "umbrella organization" that "run[s]," "operates" and is "home" to Lime Wire. (SUF ¶¶ 631-632; Ex. 413; *see also,* Exs. 414-418.) From June 28, 2002 until June, 24, 2005, Lime Group (and Gorton as its sole owner) received distributions from Lime Wire amounting to at least [redacted] (SUF ¶ 706; Ex. 463; *see also* Ex. 408.)

[redacted]

Additional Material Facts, dated September 26, 2008, are cited as "SUF ¶ _."

[2] The Declaration of Gregory L. Bildson was submitted as Exhibit 1 to the Declaration of Katherine B. Forrest, Dated December 5, 2008, in Opposition to Defendants' Motion to Strike the Bildson Declaration, for a Protective Order and for a Stay ("Bildson Decl. 9/10/08 ¶ __").

[redacted] As the Court noted in its Order, Lime Wire was well aware that users were committing massive copyright infringement through its services. (Order at 33.) It was thus with great interest that Lime Wire closely followed the copyright infringement lawsuit filed against its peer-to-peer competitor, Grokster. [redacted] Days before the Supreme Court issued its decision in *Grokster,* 545 U.S. 913, Gorton himself was quoted in the *New York Times* as stating that "[i]f the Supreme Court says it is illegal to produce [P2P file-sharing] software, Lime Wire the company will cease to exist." (Ex. 201.)

On June 30, 2005, three days after the Supreme Court issued its ruling in *Grokster*, Gorton [redacted] (Ex. 323.) That same day, Gorton transferred Lime Group's interests in Lime Wire (which owned 87.1% of Lime Wire) to Lime Wire FLP, a Nevada limited partnership that operates under the sole control of its general partner, Gorton.[3] (SUF ¶ 27; Ex. 7 at LW F 000014; Ex. 8; SUF ¶ 29.) As Gorton openly acknowledged at his deposition, he was "highly concerned about being sued" and "one of the benefits" of this transfer was "to protect the assets in the event of a legal judgment against me personally." (SUF ¶ 31; Gorton (Vol. VII) Tr. 77:4-78:4 (further noting "benefit in terms of protection against judgments"); *see also* Ex. 10 at ¶ 5; Falco (Vol. VI) Tr. 158:13-159:20.) For the year ending 2005, Lime Wire declared in its tax return total assets of [redacted] of that in cash. (Ex. 262.) From [redacted], Lime Wire FLP (the beneficiaries of which are Gorton, his wife and his two children) received [redacted] in cash distributions directly

[3] Also three days after the *Grokster* decision was announced, Gorton's 100% ownership interest in defendant Lime Group was transferred to the M.J. Gorton Family Limited Partnership, also a Nevada limited partnership that operates under the sole control of its general partner, Gorton. (Ex. 9 at LW F 000167.)

from Lime Wire. (Ex. 465; Klaus Decl., Ex. 4 (Gorton Tr. at 127:3-11).) [redacted] Although it is likely that the partnership and Gorton's family members have received from Lime Wire many [redacted] defendants have produced no records for that time period.

Gorton's admission that he transferred these funds to "protect" them from a "legal judgment" is independently corroborated by the sworn declarations of two witnesses. Vincent Falco, the former Chief Executive Officer of Free Peers, Inc., a company that distributed the peer-to-peer software application BearShare, testified that Gorton told him that he "put his personal assets into the family limited partnership so that the record companies could not get his money if they sued him and won" and "that [Falco] should do the same, but [he] didn't." (Ex. 10 at ¶ 5; *see also* Falco (Vol. VI) Tr. 158:13-159:20.) Greg Bildson likewise testified that Gorton told him that he had "protected his assets from liability for copyright infringement by setting up a family partnership." (Bildson 9/10/08 Decl. ¶ 39.)

B. The Court's Summary Judgment Order

On May 11, 2010, this Court issued its order (amended on May 25) on the parties' summary judgment motions, holding Defendants Lime Wire, Lime Group, and Gorton personally liable for inducement of copyright infringement, common law copyright infringement, and unfair competition. Plaintiffs established that Lime Wire "intentionally encouraged direct infringement" by end users. (Order at 29.) The overwhelming evidence demonstrated that:

- Lime Wire software was used "overwhelmingly for infringement," (*id*. at 31), and allowed for infringement on a "massive scale" (*id.* at 33);
- Lime Group, Lime Wire, and Gorton knew about "the substantial infringement being committed" by Lime Wire users (*id.* at 32, 34);

- Lime Wire marketed its software to Napster users, who were known copyright infringers, and promoted the software's infringing capabilities (*id.* at 33-34);
- Lime Wire "actively assisted infringing users" in their infringement efforts (*id.* at 36), and tested the Lime Wire software by searching for copyrighted material (*id.* at 35);
- Lime Wire failed to implement any meaningful technological barriers or design choices aimed at diminishing infringement (*id.* at 38);
- Lime Wire's business model depends on a "massive user population generated by" the Lime Wire software's "infringement-enabling features" (*id.* at 37).

The Court also denied Defendants' motion for summary judgment on Plaintiffs' fraudulent conveyance claim against Gorton under N.Y. Debt. & Cred. Law § 276, and unjust enrichment claim against Lime Wire FLP. In support of Defendants' motion, Gorton submitted a declaration in which he stated, in plain contradiction to his earlier deposition testimony, that he did "not conceive of this plan of utilizing family limited partnerships in order to avoid any potential legal exposure from being sued by the Plaintiffs in this lawsuit or anyone else" but rather did so for "estate and tax planning" purposes. (Declaration of Mark Gorton in Support of Defendants' Motion for Summary Judgment, dated July 18, 2008 ("Gorton Decl.") ¶¶ 6-7.) The Court held, however, that Gorton's deposition testimony and Falco's declaration created an "issue of fact as to Gorton's intent when" he established Lime Wire FLP. (Order at 56.)

C. Range Of Potential Statutory Damages

As an alternative to their actual damages, Plaintiffs seek statutory damages under the Copyright Act for Defendants' unlawful infringement. (First Amended Complaint ¶¶ 74, 87, 99). For each act of infringement the Court may award statutory damages ranging from $750 to $30,000, and where the "infringement was committed willfully," up to $150,000. *See* 17 U.S.C. § 504(a)(2)-(c). In granting summary judgment on Plaintiffs' inducement claim, the Court already has in effect made a finding of "willfulness." This "circuit has defined 'willfulness' in the context of § 504 as a defendant's actual or constructive knowledge 'that its actions constitute an infringement.' . . . . Thus, in order to prove

willfulness, a plaintiff must show that the defendant knew or should have known that its conduct constituted copyright infringement." *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991). In its Order, the Court found that Defendants unquestionably knew that Lime Wire users were committing massive copyright infringement, and that Defendants encouraged and intentionally induced such infringement. (*See, e.g.*, Order at 31 (evidence "establish[es] that LW *intended* to encourage infringement by distributing LimeWire" given in part "LW's awareness of substantial infringement by users"); *id*. at 33 (discussing "evidence that LW knew that LimeWire users were committing copyright infringement"); *id*. ("The massive scale of infringement committed by LimeWire users, and LW's knowledge of that infringement, supports a finding that LW intended to induce infringement.").)

The amount of statutory damages awarded in this case easily could be in the hundreds of millions of dollars (if not over a billion dollars). In *UMG Recordings, Inc. v. MP3.Com, Inc.*, No. 00 CIV. 472 (JSR), 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000), where the court found that the defendant MP3.com had engaged in willful infringement though limited the statutory damages to $25,000 per CD infringed given various mitigating factors (not present here), the plaintiff, a *single* record company, was awarded $53.4 million in statutory damages. *Id*. at *1, *6; Klaus Decl., Ex. 3 (November 16, 2000 Final Judgment and Order) (Doc. No. 162) (awarding damages). Here, there are *four* record company Plaintiffs, and *thousands* more infringed works at issue.

III. ARGUMENT

A. The Legal Standards That Govern This Motion

1. The Court Possesses Ample Authority To Freeze Defendants' Assets Under The Federal Rules And New York State Law

It is well settled that a "preliminary injunction may issue to preserve assets as security for a potential monetary judgment where the evidence shows that a party intends to frustrate any judgment on the merits by making it uncollectible." *Pashaian*, 88 F.3d at 86-87 (citations omitted); *see also Republic of Philippines v. Marcos*, 806 F.2d 344, 356 (2d Cir. 1986) (preventing transfer or encumbrance of properties that would place them beyond reach or prevent their reconveyance); *In re Feit & Drexler*,

Inc., 760 F.2d 406, 416 (2d Cir. 1985) ("[E]ven where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant intended to frustrate any judgment on the merits by transferring [their] assets") (quotations and citations omitted); *Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Services of Va.*, 144 F. Supp. 2d 241, 248 (S.D.N.Y. 2001) ("Preliminary injunctions" are "appropriate to thwart a defendant from making a judgment uncollectible.").

The Court has ample authority to grant such relief under the Federal Rules of Civil Procedure. The Court may freeze Defendants' assets for a potential judgment through a Rule 65 preliminary injunction. *See, e.g., Mason Tenders Dist. Council Pension Fund v. Messera*, 1997 WL 223077, at *4 (S.D.N.Y. May 7, 1997) ("[T]he United States Supreme Court and the Second Circuit have made Rule 65 available to secure assets for the ultimate judgment."). Similarly, Rule 64 grants the Court the power to exercise "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in action" which are "available under the circumstances and in the manner provided by the law of the state in which the district court is held." New York law expressly authorizes such a remedy.[4]

In *Arista Records LLC v. Usenet.com, Inc*., 633 F. Supp. 2d 124 (S.D.N.Y. 2009), for example, the major record companies brought suit against Defendants Usenet.com, Inc. ("Usenet"), Sierra Corporate Design, Inc. ("Sierra"), and Gerald Reynolds, Usenet and Sierra's director and sole shareholder, for widespread infringement of their copyrights through Defendants' "USENET" network of computers. The court granted the plaintiffs' motion for summary judgment for direct infringement, inducement of infringement, contributory infringement, and vicarious infringement, holding Reynolds

[4] New York's attachment statute provides that an attachment may be granted "where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when: . . . 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or re-moved it from the state or is about to do any of these acts . . . . " N.Y. C.P.L.R. § 6201; *see also Winchester Global Trust Co. v. Donovan*, 58 A.D.3d 833, 834 (N.Y. App. Div. 2009) (preliminary injunctive relief is proper where party's uncontrolled sale or disposition of assets "would threaten to render ineffectual any judgment which the plaintiff might obtain").

personally liable as well. *Id*. at 147-59. Shortly thereafter, based on evidence that defendant Reynolds was "taking steps to dissipate his assets," including "transfer[ing] assets to his wife" and "mov[ing] to a large residence in Florida, unencumbered by any mortgages and protected from liens by Florida law," (Klaus Decl., Ex. 2, Magistrate's Amended Report and Recommendation, *Arista Records LLC v. Usenet.com, Inc*., No. 07-civ-8822 (HB) (Doc. No. 306) at 11, 21 (S.D.N.Y, Feb. 2, 2010)), the court granted a preliminary injunction pursuant to Rule 64 and New York state law enjoining Usenet and Reynolds (Sierra was in bankruptcy) from "[d]issipating or transferring" their "funds, assets or revenue of any kind until such time as any monetary judgment award to Plaintiffs in this case has been satisfied," noting that the plaintiffs would "suffer irreparable harm unless the requested relief is granted." (Klaus Decl., Ex. 1, Preliminary Injunction Against Defendants Usenet.com, Inc. and Gerald Reynolds to Preserve Assets and Order to Show Cause Re: Appointment of Receiver, *Arista Records LLC v. Usenet.com, Inc*., No. 07-civ-8822 (HB) (Doc. No. 255) at 1-2 (Aug. 19, 2009).)[5]

In harmonizing the standards applicable to these procedural mechanisms, courts have identified three prerequisites to the granting of a preliminary injunction freezing a defendant's assets: "(1) that the

[5] Independent of its authority under the Federal Rules, the Court also has a "great deal of discretion" in "fashioning a remedy pursuant to its inherent equitable powers." *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 570 (S.D.N.Y. 2008). Courts repeatedly have rejected the suggestion that the Supreme Court's decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308 (1999) divests the Court of its equitable authority to freeze assets. There, the Supreme Court held that the "District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages." *Id*. at 333. The Court, however, made a critical distinction between general, unsecured creditors and those, like Plaintiffs, possessing equitable interests in the property at issue and seeking equitable relief. *Id*. at 324-26. "Indeed, courts since *Grupo Mexicano* have found that where plaintiffs seek both equitable and legal relief in relation to specific funds, a court retains its equitable power to freeze assets." *Quantum*, 144 F. Supp. 2d at 250 n.9; *see also In re Comverse Technology, Inc. Derivative Litigation*, 2006 WL 2568461, at *1 (E.D.N.Y. Aug. 31, 2006) ("[Plaintiffs'] claims are equitable in nature, and therefore an injunction seizing the . . . Defendants' assets derived from their alleged wrongful conduct may be proper"); *Motorola, Inc. v. Abeckaser*, 2009 WL 1362833, at *4 n.4 (E.D.N.Y. May 14, 2009) (*Grupo Mexicano* "distinguishable" from "an action to recover damages for willful violations of the trademark provisions of the Lanham Act"); *Adelphia Communications Corp. v. Rigas*, 2003 WL 21297258, at *5 (S.D.N.Y. June 4, 2003) (distinguishing case where "plaintiff here seeks not only money damages, but also equitable relief"). Moreover, unlike *Grupo Mexicano*, here "plaintiffs have already prevailed on their claims," and "their entitlement to judgment in an amount yet to be determined is certain rather than speculative." *Motorola*, 2009 WL 1362833, at *4 n.4.

defendant may be unable to satisfy a final monetary judgment; (2) that the final relief requested is equitable in nature; (3) that the frozen assets are related to the subject matter of the action." *Mason Tenders*, 1997 WL 223077, at *8. Each of these threshold requirements is readily satisfied here: (1) there is a high probability that Defendants will be unable to satisfy a final judgment in this case given the massive amount of infringement liability at issue; (2) Plaintiff possess clear equitable interests in the property at issue; and (3) the assets sought to be frozen are the direct proceeds of Defendants' illegal conduct that is the subject matter of this action.

2. The Preliminary Injunction Standard

To obtain preliminary injunctive relief, Plaintiffs must establish: (1) "either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation"; (2) that they are "likely to suffer irreparable injury in the absence of an injunction"; (3) "the balance of hardships tips" in their "favor" ("decidedly" so where there are "serious questions going to the merits"); and (4) the "'public interest would not be disserved' by the issuance of a preliminary injunction." *Salinger v. Colting*, ____ F. 3d. _____, 2010 WL 1729126, at *9 (2d Cir. April 30, 2010). The "'serious questions' standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

Here, Plaintiffs make a showing that satisfies either of these formulations.

B. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims, Or Have Raised Sufficiently Serious Questions Going To The Merits

1. The Court Has Held As A Matter Of Law That Defendants Lime Wire, Lime Group, And Gorton Are Liable For Inducement Of Copyright Infringement, Common Law Copyright Infringement, And Unfair Competition

The Court already has held that Defendants Lime Wire, Lime Group, and Gorton personally are liable as a matter of law for inducement of copyright infringement, common law copyright infringement, and unfair competition. Plaintiffs clearly have met their burden of demonstrating a likelihood of success

on the merits as to these claims. *See, e.g.*, *LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 51, 54 (2d Cir. 2004) (because "district court did not err in granting summary judgment," it "also did not err in concluding that plaintiffs demonstrated a likelihood of success on the merits"); *Conversive, Inc. v. Conversagent, Inc*., 433 F. Supp. 2d 1079, 1094 (C.D. Cal. 2006) (same). As noted, in *Arista Records LLC v. Usenet.com, Inc.*, the court granted the plaintiffs' motion for a preliminary injunction freezing the defendants' assets after it granted the plaintiffs' summary judgment motion finding the defendants liable as a matter law for direct and secondary infringement. 633 F. Supp. 2d at 147-59.

The holding of Defendants Lime Wire, Lime Group, and Gorton already liable as a matter law presents an especially forceful case for the issuance of a preliminary injunction. There not only is a substantial risk that Gorton will continue to dissipate Defendants' assets to frustrate a future judgment in this case, as described in greater detail below, but it is unquestionably the case that the threatened assets at issue are the direct proceeds of an already-adjudicated illegal business. Plaintiffs possess undeniable legal and equitable interests in these assets to compensate them for the substantial damages caused by Defendants' unlawful conduct. Under the Copyright Act's statutory damages regime, a final judgment against Defendants for the massive infringement of Lime Wire users easily could be in the hundreds of millions of dollars (if not over a billion dollars).

2. Plaintiffs Are Likely To Succeed In Establishing That Gorton Is Liable For Committing Fraudulent Conveyances Under N.Y. Debt. & Cred. Law § 276 And Lime Wire FLP Has Been Unjustly Enriched

With respect to Gorton's transfers of ownership interests and cash to Lime Wire FLP (among other entities), Plaintiffs are very likely to succeed, or at the very least have raised sufficiently serious questions on the merits of their claims, that such transfers constituted fraudulent conveyances under N.Y. Debt. & Cred. Law § 276, and that because of them, Lime Wire FLP has been unjustly enriched.

Section 276 declares fraudulent "[e]very conveyance made . . . with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors." To succeed on a claim under this provision, a plaintiff need only show "actual intent to defraud creditors on the part of the transferor." *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 594 F. Supp.

2d 308, 330 (E.D.N.Y. 2009); *see also Posner v. S. Paul Posner 1976 Irrevocable Family Trust*, 12 A.D.3d 177, 179 (N.Y. App. Div. 2004) ("the motion court did expressly find that the conveyance was done with the actual intent to hinder, delay or defraud the Estate as the Trust's creditor. That is all section 276-a requires.").

The record overflows with evidence of Gorton's "actual intent" to defraud creditors by protecting Lime Wire's unlawful profits from a legal judgment, including his very own words on the matter. Gorton viewed the *Grokster* decision as the legal death knell of Lime Wire, stating in a prominent *New York Times* article that the case threatened Lime Wire's very "exist[ence]." A mere three days after the opinion was issued—the same day Gorton conceded in an email that the case "put the Lime Wire business in flux"—he transferred his 100% ownership interest in Lime Group (which in turn owned 87.1% of Lime Wire) to Lime Wire FLP. Even if one were to suspend reality and view the timing of such transfers and the issuance of the *Grokster* opinion as nothing more than coincidence, Gorton *admitted* during his deposition that he was "highly concerned about being sued" and "one of the benefits" of these transfers was to "protect the assets in the event of a legal judgment against me personally." (SUF ¶ 31; Gorton (Vol. VII) Tr. 77:4-78:4.) Gorton stated the same thing to both Vincent Falco and Greg Bildson, both of whom independently corroborated Gorton's fraudulent intent in sworn declarations. (Ex. 10 at ¶ 5; *see also* Falco (Vol. VI) Tr. 158:13-159:20; Bildson 9/10/08 Decl. ¶ 39.) And from [redacted] Lime Wire FLP (*i.e.*, Gorton and his family) received [redacted] dollars in cash distributions from Lime Wire. [redacted] (Ex. 465; Klaus Decl., Ex. 4 (Gorton Tr. at 127:3-11).)

The only contrary evidence of intent Gorton has offered are the self-serving statements in his post-deposition declaration that he did "not conceive of this plan of utilizing family limited partnerships in order to avoid any potential legal exposure from being sued by the Plaintiffs in this lawsuit or anyone else" but rather did so for "estate and tax planning" purposes. (Gorton Decl. ¶¶ 6-7.) Gorton's declaration does nothing to diminish Plaintiffs' strong likelihood of success on the merits in proving his

actual fraudulent intent. As the Court correctly held in denying Defendants' motion for summary judgment on Plaintiffs' fraudulent conveyance and unjust enrichment claims, Gorton's self-serving statements are insufficient to establish his intent as to why he established the family partnership. (Order at 56.) And in fact, courts repeatedly have rejected similar self-serving statements from a defendant accused of dissipating assets with the intent of frustrating a plaintiff's efforts to collect a judgment. For example, in *In re Manshul Const. Corp.*, 2000 WL 1228866 (S.D.N.Y. Aug. 30, 2000), the plaintiffs sought to freeze the assets of a number of defendants under, *inter alia* laws, N.Y. Debt. & Cred. Law § 276. *Id*. at *1-2. The court held that with respect to one of the defendants, "evidence of actual fraudulent intent" included an accountant's testimony that the defendant "told him he transferred funds because of the pending claims," no different than the testimony of Falco and Bildson here. *Id*. at *47. The Court rejected the defendant's testimony that "he made the transfers, not in order to defraud, hinder or delay his creditors and [the corporation's] creditors, but as part of an overall estate and tax plan" as "not credible" and "not supported by the documentary evidence." *Id*.; *see also Kreisler Borg Florman General Const. Co., Inc. v. Tower 56, LLC*, 58 A.D.3d 694, 696 (N.Y. App. Div. 2009) (holding on summary judgment that "transfer of the property evinced actual intent to defraud" and rejecting "defendants' cryptic and conclusory explanation for the transfer" as "not dispel[ing] its fraudulent nature"). Here, the evidence of actual intent is even stronger. The Court not only has Falco and Bildson's testimony, but Gorton's own admissions conceding to the fraudulent nature of the transfers.

Indeed, in the context of summary judgment, Gorton's self-serving statements would be insufficient to controvert his prior deposition testimony. It is "well settled in the Second Circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded" on summary judgment. *Hay v. Burns Cascade Co., Inc.*, 2009 WL 414117, at *6 (N.D.N.Y. Feb. 18, 2009) (citing *Mack v. United States*, 814 F.2d 120, 124 (2d Cir. 1987) (citing *Mack v. U.S.*, 814 F.2d 120, 124 (2d Cir. 1987). If Gorton, "who has been examined at length on deposition, could raise an issue of fact simply by submitting an affidavit that, by omission or addition, contradicted his own prior testimony, this would greatly diminish the utility" of procedures like "summary judgment" for "screening out sham issues of fact." *Id*.; *see also Lisowski v. Reinauer Transp. Co., Inc*., 2009 WL 763602, at *6 n.5

(E.D.N.Y. Mar. 23, 2009) (the "court is highly skeptical of a declaration purporting to 'clarify' deposition testimony in which the declarant states that he 'meant to convey' something other than his testimony").

Here, Plaintiffs need not establish liability as a matter of law with respect to Gorton's actual intent, but must only show a likelihood of success on the merits, or serious questions going to the merits. The evidence in the record overwhelmingly demonstrates Gorton's clear intent to abscond with funds to frustrate Plaintiffs' efforts to collect a legal judgment in this case, and is more than sufficient to warrant a preliminary injunction freezing Lime Wire FLP's assets pursuant to section 276. *See, e.g.*, *Kontogiannis*, 594 F. Supp. 2d at 331 (granting motion for preliminary injunction to freeze assets under section 276 where "the record is sufficient at this preliminary stage to show that [defendants] actually intended to defraud creditors . . . when they effected the transfers at issue"); *Experience Hendrix, LLC v. Chalpin*, 461 F. Supp. 2d 165, 172 (S.D.N.Y. 2006) (granting motion for preliminary injunction where "plaintiff is likely to prevail on the actual fraud theory" under section 276); *Bank of China, New York Branch v. NBM L.L.C.*, 192 F. Supp. 2d 183, 188, 191 (S.D.N.Y. 2002) (granting preliminary injunction to prevent defendant from transferring assets where plaintiff presented "'evidentiary facts' demonstrating that defendants have taken steps to dispose of, transfer, or secrete property, and that they have done so with the intent to defraud"; rejecting defendants' responses as "insufficient to credibly refute the Bank's detailed and factually grounded allegations that defendants have acted with an intent to defraud"); s*ee also Quantum*, 144 F. Supp. 2d at 249 (granting motion freezing assets given "unquestionably sufficiently serious questions to litigate"); *Sullivan* v. *Kodsi*, 373 F. Supp. 2d 302, 306 (S.D.N.Y. 2005) ("testimony taken from the defendant . . . could be understood by a finder of fact to suggest that [the defendant] intended to fraudulently hide his assets to protect them from his creditors").

Plaintiffs also are likely to succeed on their unjust enrichment claim against Lime Wire FLP. To establish a claim for unjust enrichment, a plaintiff "must prove that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff." *Dolmetta v. Uintah Nat'l Corp*., 712 F.2d 15, 20 (2d Cir. 1983). Here, Lime Wire FLP clearly received asset distributions at

Plaintiffs' expense, given that any assets fraudulently conveyed to Lime Wire FLP cannot be used to satisfy a future judgment against Lime Wire, Lime Group, and Gorton. Moreover, equity and good conscience require that such distributions be used to satisfy any judgment against these defendants, given that Gorton plainly intended to defraud Plaintiffs by transferring the assets to Lime Wire FLP.

C. Plaintiffs Will Likely Suffer Irreparable Harm In The Absence Of An Injunction Given Defendants' Clear Intent To Frustrate A Legal Judgment In This Case

Under settled law, Plaintiffs are likely to suffer irreparable harm in the absence of an injunction preserving Defendants' assets.

Irreparable harm exists where "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). Accordingly, a demonstration of a defendant's "intent to frustrate any judgment on the merits" qualifies as a showing of "irreparable harm." *Sea Carriers Corp. v. Empire Programs, Inc.*, 2006 WL 3354139, at *5 (S.D.N.Y. Nov. 20, 2006); *see also Algonquin Power Corp., Inc. v. Trafalgar Power Inc*., 2000 WL 33963085, at *18 (N.D.N.Y. Nov. 8, 2000) ("demonstration of intent to frustrate a judgment will be found to satisfy the requirement of a showing of irreparable harm") (citing *Signal Capital Corp. v. Frank*, 895 F. Supp. 62, 64 (S.D.N.Y.1995)); *Motorola*, 2009 WL 1362833, at *4 (a "plaintiff's showing that a defendant's actions are likely to render a judgment uncollectible qualifies as a showing of irreparable harm"); *Chalpin*, 461 F. Supp. 2d at 169-70 (irreparable injury showing satisfied where "there is substantial reason to believe that defendants, unless enjoined, will continue to attempt to frustrate plaintiff's efforts to collect the judgment"); *Gelfand v. Stone*, 727 F. Supp. 98, 102 (S.D.N.Y. 1989) ("the clear appearance that defendant has made efforts to conceal assets or otherwise place them out of reach of his creditors, combine with his prior conviction to meet the standard set out for finding the strong possibility of irreparable harm").

In *Arista Records LLC v. Usenet.com, Inc*., for example, the court found irreparable harm and issued a preliminary injunction freezing the defendants' assets where there was evidence that the defendant Reynolds was "taking steps to dissipate his assets," including "transfer[ing] assets to his wife"

and "mov[ing] to a large residence in Florida, unencumbered by any mortgages and protected from liens by Florida law." (Klaus Decl., Ex. 2, Magistrate's Amended Report and Recommendation, *Arista Records LLC v. Usenet.com, Inc*., No. 07-civ-8822 (HB) (Doc. No. 306) at 11, 21 (S.D.N.Y. Feb. 2, 2010).)

Similarly here, Plaintiffs face irreparable harm in the form of an actual and imminent threat that Defendants — and more precisely, Gorton — will continue to transfer assets from Lime Wire to private family partnerships or other family members, where such assets will be dissipated. The record shows that, at a minimum, Gorton transferred [redacted] from Lime Wire to Lime Wire FLP, [redacted] By "transferring . . . assets," Gorton "has made it less likely that plaintiffs will ultimately be able to collect from him the damages to which they are entitled." *Motorola*, 2009 WL 1362833, at *3. Indeed, the fact that Gorton "has already" transferred "a substantial asset" makes it "likely he will continue to dispose of other assets in an attempt to render a judgment against him uncollectible, if he is not restrained from doing so." *Id*. Given that Defendants have produced no records for later time periods, Plaintiffs can only assume that many more tens of millions of dollars have been sapped from Lime Wire into such purportedly judgment-proof accounts, leaving Lime Wire itself with only a pittance of funds to cover any final judgment in the case. The fact that the "corporate defendants" Lime Wire and Lime Group are effectively "owned and controlled" by Gorton "suffices to show that absent restraint, he is likely to cause the corporate defendants to dispose of or transfer assets owned by the corporate defendants." *Id*.

Any purported "delay" on Plaintiffs' part in bringing this motion does not undermine the above showing of irreparable harm. First, the relevant inquiry for purposes of irreparable harm is whether Gorton has demonstrated an intent to frustrate a legal judgment in this action. As shown above, the answer to that question is clearly yes. The fact that the evidence of Gorton's fraudulent intent is based upon asset transfers between 2005-2007 does not negate that intent. In *Serio v. Black, Davis & Shue Agency, Inc*., 2005 WL 3642217 (S.D.N.Y. Dec. 30, 2005), for example, the court found irreparable harm on the basis that the defendant "four years" earlier had "concededly disbursed a substantial portion of the funds" and "did so for the evident benefit of the principals of the defendant." *Id*. at *16. The

court noted that this "conduct, although it took place more than four years ago, raises a serious concern that defendant is continuing to drain those funds . . . ." *Id*. And even if any delay existed, it "is not necessarily dispositive, particularly in the absence of any demonstrated prejudice to the defendant." *Id*. at *19. As demonstrated in Section III.D, *infra*, Defendants will suffer no conceivable prejudice by the granting of a preliminary injunction freezing their assets, and certainly suffered no prejudice by any purported delay of Plaintiffs in bringing this motion.

Finally, Plaintiffs filed this motion immediately after the Court issued its summary judgment decision. "[A]ny possible prejudice of that delay is ameliorated by the fact that plaintiffs have established more than a likelihood of success on the merits-they have sought and been granted summary judgment as to [their] infringement and unfair competition claim." *Conversive*, 433 F. Supp. 2d at 1094. Indeed, Defendants are "unable to cite any case in which a preliminary injunction has been denied *after* summary judgment has entered against the party challenging the preliminary injunctive relief." *Elantech Devices Corp. v. Synaptics, Inc.*, 2008 WL 1734748, at *9 (N.D. Cal. Apr. 14, 2008).

Accordingly, given Gorton's clear intent to transfer funds and render a legal judgment in this matter wholly uncollectable, Plaintiffs are likely to suffer irreparable harm in the absence of an injunction freezing Defendants' assets.

D. The Balance Of Hardships Weighs Decisively For Plaintiffs

Gorton has built a highly profitable enterprise upon "massive" copyright infringement at Plaintiffs' expense. Whereas Plaintiffs may be deprived of any monetary recovery for Defendants' illicit conduct in the absence of an injunction, Defendants will suffer no conceivable hardship if the Court freezes their ill-gotten gains. The balance of hardships tips decidedly in Plaintiffs' favor.

"Without an injunction," Plaintiffs "would suffer a hardship" because they are at risk of "not be[ing] paid monies that" that "are justly due and owed" as compensation for the myriad harms Defendants' illegal conduct has caused them. *Quantum*, 144 F. Supp. 2d at 249 ("balance of hardships also tips decidedly in" Plaintiffs' favor). Here, a "judgment of some amount" is more than "likely to be

entered in plaintiff's favor, and plaintiff bears a significant risk that defendant's assets will prove inadequate to satisfy such a judgment." *Serio*, 2005 WL 3642217, at *19.

By contrast, Defendants would suffer no cognizable prejudice if their assets are frozen. Defendants have no right to use the profits of an illegal enterprise, to either further engage in their unlawful activities or for personal uses. *See, e.g., Apple Inc. v. Psystar Corp*., 673 F. Supp. 2d 943, 950 (N.D. Cal. 2009) ("Since [defendant] does not (and cannot) claim any *legitimate* hardships as a result of being enjoined from committing unlawful activities, and Apple would suffer irreparable and immeasurable harms if an injunction were not issued, this factor weighs strongly in favor of Apple's motion."); *Serio*, 2005 WL 3642217, at *19 ("defendant's coyness about its finances implies that it is now relying significantly for its financial health on assets belonging to [Plaintiff]"). Moreover, there would be no material harm to Defendants by having the injunction issue pending final judgment. As detailed in the Proposed Order submitted concurrently herewith, the relief requested would allow Defendants to pay reasonable, ordinary, and necessary living and business expenses and reasonable attorney's fees. The proposed injunction would simply preserve the status quo, freezing Defendants' assets for either Plaintiffs or Defendants, depending upon the scope and extent of the judgment awarded. If, at the end of the day, the judgment is less than Defendants' total assets (albeit a highly unlikely scenario), the injunction will be lifted and the remaining assets "unfrozen" for Defendants' use.

Finally, if Defendants believe and *can in fact prove* that they would suffer hardships as a result of a preliminary injunction, they may propose a bond to the Court. *See, e.g., Int'l Equity Investments, Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 566 (S.D.N.Y. 2006) (the "burden is on the party seeking security to establish a rational basis for the amount of the proposed bond."). *See also Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) ("it has been held proper for the court to require no bond where there has been no proof of likelihood of harm"); *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (for asset freeze preliminary injunction "the bond amount may be zero if there is no evidence the party will suffer damages from the injunction").

E. Public Policy Supports The Freezing Of Defendants' Assets

Public policy considerations also strongly support the issuance of an injunction where, as is the case here, massive copyright infringement has been established. *See, e.g.*, *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc*., 16 F.3d 1032, 1038 (9th Cir. 1994) ("public policy favors the issuance of injunctions in intellectual property infringement lawsuits" where "infringement has been established"); *Echostar Satellite LLC v. Rollins*, 2008 WL 314145, at *6 (S.D.W.Va. Feb. 4, 2008) ("public policy weighs heavily in favor of an injunction, which facilitates the enforcement of statutes such as the Digital Millennium Copyright Act against defendants who have already been shown to have violated them"). In this case, even if the Court considered the question to be otherwise a close one, significant public policy concerns counsel in favor of granting relief to freeze Defendants' assets and to prevent Defendants from further profiting off of their illegal enterprise.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an order enjoining Defendants, and anyone acting in concert with them, from transferring or otherwise disposing of any assets they already possess or will possess in the future, as described in greater detail in the Proposed Order submitted concurrently herewith.

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Los Angeles, CA

Respectfully submitted

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