UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC., Plaintiffs/Counterclaim Defendants, v. LIME GROUP LLC; MARK GORTON; and GREG BILDSON, Defendants, and LIME WIRE LLC, Defendant/Counterclaim Plaintiff.	ECF CASE 06 Civ. 05936 (GEL)

PLAINTIFFS/COUNTERCLAIM DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

June 20, 2007

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PRELIMINARY STATEMENT

Plaintiffs/Counterclaim Defendants[1] hereby move pursuant to Rules 15(a), 16(b), 19(a) and 21 of the Federal Rules of Civil Procedure to file an amended complaint joining the M.J.G. Lime Wire Family Limited Partnership ("M.J.G. Ltd. Partnership" or "Ltd. Partnership") as a defendant and to include allegations relating to and claims for fraudulent conveyance under Section 276 of the New York Debtor and Creditor Law against Mark Gorton and for unjust enrichment under the common law of New York against the M.J.G. Lime Wire Family Limited Partnership.

Defendants Lime Group LLC, Mark Gorton, Greg Bildson and defendant/counterclaim plaintiff Lime Wire LLC (collectively "defendants") have developed and promoted an Internet file-sharing system ("the LimeWire system") that has become one of the world's most notorious tools for the infringement of plaintiffs' copyrighted sound recordings. Indeed, defendants designed and intended the LimeWire system to be utilized specifically for that unlawful purpose. Although plaintiffs' representatives requested in September 2005 that defendants "cease and desist" from engaging in further unlawful activities, defendants refused to do so, and plaintiffs filed this suit on August 4, 2006.

During the course of discovery, plaintiffs learned that defendant Mark Gorton's unlawful conduct extended well beyond the massive infringement of plaintiffs' copyrighted works—

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[1] Plaintiffs/Counterclaim Defendants are 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. (collectively, "plaintiffs").

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Plaintiffs' motion to amend should be granted, as good cause exists to amend the Complaint. Once in possession of facts to support their additional claims, plaintiffs promptly sought leave to amend. Defendants did not produce the documents that form the necessary basis of plaintiffs' additional claims until April 2007—after the passage of the Court's deadlines for the joinder of additional parties (January 31, 2007) and for the filing of amended pleadings (March 9, 2007). Thereafter, plaintiffs sought additional evidence to support their claims. In May 2007, plaintiffs obtained the Declaration of Vincent Falco, which describes Mr. Gorton's fraudulent scheme to insulate his assets from the record companies.[3]

Moreover, the facts supporting plaintiffs' claims are compelling. Mr. Gorton created a partnership—the M.J.G. Ltd. Partnership, of which he is the general partner—and

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[2] Plaintiffs' proposed Amended Complaint is attached as Exhibit A to the Declaration of Katherine B. Forrest, executed June 19, 2007 ("Forrest Decl."), submitted herewith. Exhibit B to that Declaration is a "blacklined" copy of the Amended Complaint identifying the paragraphs that have been modified in or added to the Complaint, dated August 4, 2006. Plaintiffs' Amended Complaint includes a corrected Schedule A to reflect certain changes in that schedule.

[3] Vincent Falco is the former Chief Executive Officer of Free Peers, Inc., a company that distributed the peer-to-peer software application BearShare. See Forrest Decl. Ex. C (Declaration of Vincent Falco ("Falco Decl.")).

placed his personal assets into the Ltd. Partnership.

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Plaintiffs' claims, accordingly, will withstand a motion to dismiss and therefore are not futile.

Finally, defendants will not be prejudiced by the proposed amendment. Discovery is ongoing, and the parties recently sought jointly to extend discovery for several additional months. In addition, defendants have not yet produced the majority of their responsive documents.

For all of these reasons, plaintiffs respectfully submit that this Court should grant their motion for leave to file an amended complaint to join the M.J.G. Ltd. Partnership as a defendant and to include allegations relating to and claims for fraudulent conveyance under Section 276 of the New York Debtor and Creditor Law against Mark Gorton and for unjust enrichment under the common law of New York against the M.J.G. Ltd. Partnership.

STATEMENT OF FACTS

Plaintiffs filed their Complaint on August 4, 2006. Defendants answered and filed their Counterclaims on September 25, 2006. On October 11, 2006, the Court adopted a Civil Case Management Plan and scheduling order, which provided that joinder of additional

parties could be accomplished until January 31, 2007, and amended pleadings could be filed until March 9, 2007. Defendants subsequently amended their Counterclaims on November 17, 2006. Plaintiffs served document requests on defendants on October 31, 2006. On April 6, 2007, defendants produced documents responsive to the October 31 requests. Plaintiffs have ascertained the following facts through discovery:

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- After the Supreme Court's decision in Grokster, Mr. Gorton spoke to a business acquaintance named Mr. Falco about steps Mr. Gorton had taken to insulate his personal assets from potential judgment creditors. In that conversation, Mr. Gorton said that "he was not worried about being sued", since he had insulated his assets. See Forrest Decl. Ex. C, ¶ 5 (Falco Decl.). He said that he "had created a family limited partnership . . . [and] he had 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". See id.
- The M.J.G. Ltd. Partnership was created on September 1, 2005. Mr. Gorton is the general partner of the Ltd. Partnership, and it is under Mr. Gorton's control. See Forrest Decl. Ex. G (M.J.G. Lime Wire Family Limited Partnership Certificate of Limited Partnership, Initial List of General Partners and Resident Agent of the M.J.G. Lime Wire Family Limited Partnership and Annual List of General Partners

and Resident Agent of the M.J.G. Lime Wire Family Limited Partnership (collectively "Ltd. P'ship Details")).

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ARGUMENT

Once a scheduling order that includes deadlines for the filing of pleadings has been issued, Rule 16(b) of the Federal Rules of Civil Procedure requires that a district judge evaluate a request to amend pleadings upon a showing of good cause. See Fed. R. Civ. P. 16(b); Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., 229 F.R.D. 441, 443 (S.D.N.Y. 2004) (citing Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000)). "While [the good cause] standard may not be as liberal as that provided in Fed. R. Civ. P. 15(a), it is appropriate to

grant an enlargement of a deadline where the moving party has shown 'diligence'." See Permatex, Inc. v. Loctite Corp., No. 03 Civ. 943, 2004 WL 1354253, at *3 (S.D.N.Y. June 17, 2004) (internal citations omitted). Plaintiffs have met the good cause requirement, as set forth below.

Once good cause has been established, the moving party need only "demonstrate that the amendment is proper under Rule 15(a)" of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 15(a); Lincoln v. Potter, 418 F. Supp. 2d 443, 453 (S.D.N.Y. 2006). Under the liberal standards of Rule 15(a), leave to amend "shall be freely given when justice so requires". Fed. R. Civ. P. 15(a). Moreover, an "amendment should normally be permitted". See Nerney v. Valente & Sons Repair Shop, 66 F.3d 25, 28 (2d. Cir. 1995). Thus, a motion for leave to amend should be denied only when the amendment would be futile, prejudicial to the opposing party or there has been undue delay or bad faith on the part of the moving party. Dougherty v. Town of North Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002). As described below, none of those factors is present here.

I. PLAINTIFFS HAVE MET THE RULE 16(B) GOOD CAUSE REQUIREMENT.

As a threshold matter, plaintiffs have met the good cause requirement of Rule 16(b). Plaintiffs served document requests on defendants on October 31, 2006—well in advance of the March 9, 2007 deadline for the filing of amended pleadings. Moreover, plaintiffs diligently sought responses from defendants. Indeed, on March 12, 2007—only days after the entry of the March 8, 2007 Protective Order—plaintiffs requested that defendants produce documents in response to all outstanding requests. Defendants refused to do so. Instead, despite repeated requests, defendants did not produce the documents that form the necessary basis of

plaintiffs' fraudulent conveyance and unjust enrichment claims until April 6, 2007—well after the deadline for amended pleadings had passed.

Moreover, plaintiffs could not have discovered facts sufficient to support their fraudulent conveyance and unjust enrichment claims through their own efforts prior to April 2007.

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Following receipt of this evidence in April, plaintiffs promptly sought additional evidence to support their claims. In May 2007, plaintiffs obtained Mr. Falco's declaration, which describes communications during which Mr. Gorton conveyed his intention to insulate his assets from the record companies. See Forrest Decl. Ex. C, ¶ 5 (Falco Decl.). Plaintiffs have shown diligence in pursuit of their additional claims, and therefore, good cause to amend the Complaint pursuant to Rule 16(b) exists.[4]

[4] See Gaetano Assocs. Ltd. v. Artee Collections, Inc., No. 05 Civ. 3329, 2006 WL 3026080, at *1 (S.D.N.Y. Oct. 25, 2006) (finding good cause where movants "were not aware of the facts pertaining to their counterclaims until well after the deadline for amendment"); Permatex, 2004 WL 1354253, at *3 (same); Topps Co., Inc. v. Cadbury Stani S.A.I.C., No. 99 Civ. 9437, 2002 WL 31014833, at *3 (S.D.N.Y. Sept. 10, 2002) (same); Safeway, Inc. v. Sugarloaf P'ship, LLC, 423 F. Supp. 2d 531, 539 (D. Md. 2006) (same); Sithon Maritime Co. v. Holiday Mansion, 177 F.R.D. 504, 509 (D. Kan. 1998) (same).

II. PLAINTIFFS' AMENDMENT IS PROPER UNDER RULE 15(A).

Plaintiffs' proposed amendment is not only permissible but warranted under Rule 15(a). See Fed. R. Civ. P. 15(a). Plaintiffs' amendment is not futile or prejudicial to defendants; in addition, plaintiffs have not delayed or acted in bad faith. See Dougherty, 282 F.3d at 87.

Plaintiffs' proposed amendment will withstand a motion to dismiss and therefore is not futile. Too, Inc. v. Kohl's Dep't Stores, Inc., 210 F. Supp. 2d 402, 404 (S.D.N.Y. 2002). Plaintiffs' proposed additional claims are based on facts drawn from defendants' own documents and the sworn declaration of a third party, which make clear that Mr. Gorton established the M.J.G. Ltd. Partnership to insulate his personal assets from creditors. See Forrest Decl. Ex. C, ¶ 5 (Falco Decl.); Forrest Decl. Ex. G (Ltd. P'ship Details). Mr. Gorton placed his personal assets into the Ltd. Partnership, which was created on September 1, 2005 (just two months after the United States Supreme Court rendered its Grokster decision), and is under Mr. Gorton's control. See Forrest Decl. Ex. C, ¶ 5 (Falco Decl.); Forrest Decl. Ex. G (Ltd. P'ship Details).

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[5] See N.Y. Debtor and Creditor Law § 276 (2007) (providing that "[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors"); Sullivan v. Kodsi, 373 F. Supp. 2d 302, 306 (S.D.N.Y. 2005).

Moreover, plaintiffs are the very persons that Section 276 of the New York Debtor and Creditor Law intends to protect. A creditor for the purposes of a Section 276 claim is "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent". N.Y. Debtor and Creditor Law § 270; see generally Marcus v. Kane, 18 F.2d 722, 723 (2d Cir. 1927) ("[O]ne who has a legal right to damages capable of enforcement by judicial process, is a creditor. . . . So a claim entered for just compensation as damages for injury makes the claimant a creditor.") (internal citations omitted); Shelly v. Doe, 671 N.Y.S.2d 803, 805 (N.Y. App. Div. 1998) ("[U]nder the Debtor and Creditor Law's broad definition of 'creditor', it is now accepted that in tort cases the relationship of debtor and creditor arises the moment the cause of action accrues."). Thus, for the purposes of their Section 276 claim, plaintiffs are "creditors" of defendants.

As a result, plaintiffs have met the pleading requirements for a Section 276 fraudulent conveyance claim. Because plaintiffs state a claim upon which relief can be granted,

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their Section 276 claim against Mr. Gorton will survive a motion to dismiss and therefore is not futile.

In addition, the facts that support plaintiffs' fraudulent conveyance claim, see supra, p. 4-5, also establish that the M.J.G. Ltd. Partnership was unjustly enriched at the expense of plaintiffs—

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These same facts demonstrate that Mr. Gorton deliberately and consciously effectuated a plan to defraud plaintiffs long before plaintiffs filed suit against him. He created the Ltd. Partnership and placed his assets into the Ltd. Partnership to prevent creditors, such as the record companies, from obtaining his assets, including the ill-gotten gains of defendants' massive copyright infringement. See Forrest Decl. Ex. C, ¶ 5 (Falco Decl.); Forrest Decl. Ex. G (Ltd. P'ship Details).

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In fact, Mr. Gorton went so far as to boast of his unlawful scheme to Mr. Falco, a third party. See Forrest Decl. Ex. C, ¶ 5 (Falco Decl.).

Again, plaintiffs have met the pleading requirements for an unjust enrichment claim under the common law of New York against the M.J.G. Ltd. Partnership. Because plaintiffs state a claim upon which relief can be granted, their unjust enrichment claim will survive a motion to dismiss and therefore is not futile.

Moreover, the proposed amendment will not delay the proceedings or otherwise prejudice defendants. See Silva Run Worldwide Ltd. v. Gaming Lottery Corp., 215 F.R.D. 105, 107 (S.D.N.Y. 2003) (quoting Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993), for the proposition that courts generally evaluate concerns about prejudice in light of "whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the [opposing party] from bringing a timely action in another jurisdiction"). Defendants cannot reasonably argue that they will be prejudiced by the addition of plaintiffs' fraudulent conveyance and unjust enrichment claims or by the addition of the M.J.G. Ltd. Partnership as a defendant. They will not be required to expend significant additional resources in the defense of plaintiffs' new claims. In reality, many of the same parties and documents that are relevant to plaintiffs' existing claims are relevant to plaintiffs' additional claims. Indeed, the documents that form the basis of plaintiffs' additional claims were produced in response to plaintiffs' October 31, 2006, document requests. In addition, plaintiffs have already sought documents from the M.J.G. Ltd. Partnership, in its capacity as a third party.[6] In any event, where, as here, a defendant has unlawfully attempted to hide assets from creditors,

[6] The Ltd. Partnership, however, has refused thus far to produce any documents in response to plaintiffs' April 23, 2007 subpoena. Plaintiffs have "met and conferred" with the Ltd. Partnership and will likely seek to compel documents from the Ltd. Partnership, as it has thus far refused to produce any documents to plaintiffs.

concerns about the expenditure of additional resources in defense of an additional claim should be afforded little weight.

In addition, the case is in the discovery phase, and depositions have not yet commenced. In fact, the parties have stipulated to, and have jointly sought from this Court, approximately a five-and-a-half-month extension to the current Civil Case Management Plan, including approximately a five-and-a-half-month extension to the deadline for discovery. Thus, the addition of two claims to plaintiffs' Complaint, which are a part of defendants' ongoing scheme to profit from their illegal behavior and deprive plaintiffs of recompense for their injuries, is unlikely to delay significantly (if at all) the resolution of the case.

Finally, plaintiffs have not unduly delayed their motion to amend the Complaint. To the contrary, plaintiffs have acted diligently and entirely in good faith. As stated previously, plaintiffs could not have included claims for fraudulent conveyance and unjust enrichment in their initial Complaint.

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Approximately one month later, plaintiffs received Mr. Falco's declaration, which provided additional evidence to support their claims. Thus, once in possession of facts sufficient to support their additional claims, plaintiffs promptly sought leave to amend.

Leave to amend should be granted here because "justice so requires". Fed. R. Civ. P. 15(a). Plaintiffs respectfully submit that failing to do so would merely reward defendants for having embarked upon an unlawful plan to defraud plaintiffs and to secure the ill-gotten gains they had obtained through their massive copyright infringement.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for leave to amend their Complaint to join the M.J.G. Ltd. Partnership as a defendant and to include allegations relating to and claims for fraudulent conveyance under Section 276 of the New York Debtor and Creditor Law against Mark Gorton and for unjust enrichment under the common law of New York against the Ltd. Partnership

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