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, GREG BILDSON, and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP Defendants, and LIME WIRE LLC, Defendant/Counterclaim Plaintiff.	06 Civ. 05936 (GEL)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP'S MOTION TO DISMISS THE CLAIM AGAINST IT IN PLAINTIFFS' FIRST AMENDED COMPLAINT

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I. INTRODUCTION

This lawsuit is part of Plaintiffs/Counter-defendants' ("Plaintiffs")[1] continuing efforts to squelch in its incipiency a technology that threatens Plaintiffs' market dominance. Plaintiffs—the worlds' largest record companies—filed this lawsuit against Defendant/Counter-plaintiff Lime Wire, LLC ("Lime Wire") and Defendants Lime Group, LLC ("Lime Group"), Mark Gorton ("Gorton"), and Greg Bildson ("Bildson"), seeking to hold Defendants secondarily liable for copyright infringement. In their suit, Plaintiffs attack the software that Defendant Lime Wire developed that employs peer-to-peer ("P2P") technology to permit computer users around the world to publish and share files broadly over the Internet, without the limits and delays of traditional post, telefacsimile, and email. Ignoring the software's many valuable uses, Plaintiffs mischaracterize it as merely a "tool for infringement" and claim Defendants should be held liable for any misuse computer users make of the technology.

All Defendants contest Plaintiffs' allegations. Defendant/Counter-plaintiff Lime Wire also filed antitrust counterclaims. Lime Wire seeks to recover for the harms caused by Plaintiffs' various anticompetitive schemes, including Plaintiffs' efforts to bar Lime Wire from the market. Plaintiffs moved to dismiss and also to stay discovery on Lime Wire's antitrust claims. This Court denied the requested stay and ordered that discovery on the antitrust claims proceed.

Unable to avoid discovery on Lime Wire's antitrust claims and eager to increase the pressure on Defendants, Plaintiffs have now raised the stakes. Plaintiffs amended their complaint, with leave, to add a harsh new claim against an existing party and to join an uninvolved third party. Specifically, Plaintiffs' amended complaint asserts a cause of action for

[1] Plaintiffs/Counter-defendants are Arista Records LLC, Atlantic Recording Corporation, BMG Music, Capital 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.

fraudulent conveyance against Gorton. Plaintiffs allege that Gorton's authorizing the issuance of dividends as Lime Wire's director was part of a scheme to hide assets from Plaintiffs. The amended complaint also drags in a family limited partnership that received those dividends as a Lime Wire shareholder, Movant M.J.G. Lime Wire Family Limited Partnership (the "Limited Partnership"). Plaintiffs claim that the Limited Partnership has been unjustly enriched by its receipt of dividends from Lime Wire.

Plaintiffs, however, have not stated a claim against the Limited Partnership for unjust enrichment for which relief can be granted. Accordingly, the Limited Partnership moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiffs' unjust enrichment claim on the following grounds: (1) Plaintiffs' unjust enrichment claim seeks recovery for the alleged infringement of Plaintiffs' copyrights and, thus, is preempted by the Copyright Act; and (2) unjust enrichment is quasi-contractual and, therefore, (a) requires a relationship or direct dealings between the parties and Plaintiffs have not alleged—and cannot allege—any such connection between them and the Limited Partnership; and (b) must be in the nature of a contractual, not a tort, wrong, and Plaintiffs' claim sounds—loudly—in tort.

II. PLAINTIFFS' ALLEGATIONS

The following background is taken from Plaintiffs' First Amended Complaint for Federal Copyright Infringement, Common Law Copyright Infringement, Unfair Competition, Conveyance Made with Intent to Defraud and Unjust Enrichment (the "FAC"). Although Plaintiffs' allegations are hotly contested, they will be taken as true, as required, for purposes of this Rule 12(b)(6) motion. *See American Fin. Int'l Group-Asia, L.L.C. v. Bennett*, No. 05 Civ. 8988(GEL), 2007 WL 1732427, at *2 (S.D.N.Y. June 14, 2007) (noting that factual allegations in the complaint must be accepted as true for purposes of a motion to dismiss).

A. The Original Parties and Claims

Plaintiffs are major record companies. They "produce, manufacture, distribute, sell, and license the vast majority of commercial sound recordings in this country." FAC at ¶ 1. Defendants include Lime Wire, Lime Group, and two of Lime Wire's officers, Gorton and Bildson (collectively, the "Original Defendants"). *Id.* at ¶¶ 30, 31, 34, 35. Gorton is the Chief Executive Officer ("CEO") of Lime Wire, the director of Lime Wire, and CEO of Lime Group. *Id.* at ¶¶ 34, 63. Bildson is the Chief Technology Officer and Chief Operating Officer of Lime Wire. FAC at ¶ 35.

Plaintiffs claim that the Original Defendants designed, promoted, marketed, distributed, sold, supported and maintained a software and network system known as "LimeWire" (hereinafter, the "LimeWire system"). FAC at ¶ 39. The LimeWire software is a P2P file-sharing program that permits individual computer users to connect via the Internet and transfer files from one user's hard drive to another's. *Id.* at ¶ 40. Plaintiffs allege that millions of copies of their copyrighted sound recordings have been distributed as a result of Lime Wire users' sharing of music files. *Id.* at ¶¶ 2, 45, 58. Plaintiffs allege, under a number of theories, that the Original Defendants are secondarily liable for the direct copyright infringement allegedly committed by LimeWire users. FAC at ¶¶ 65-114.

B. Plaintiffs' New Allegations and Claims

The Limited Partnership, the third-party that Plaintiffs have pulled into this suit, is a family limited partnership. FAC at ¶ 32. It is currently the largest shareholder of Lime Wire. *Id.* at ¶ 32. Defendant Gorton is the general partner of the Limited Partnership. *Id.* at ¶ 61.

Prior to September 2005, Lime Group was the largest shareholder of Lime Wire. FAC at ¶ 59. As such, Lime Group received the bulk of the dividends made by Lime Wire in the normal

course of business. *Id.* at ¶ 59. According to Plaintiffs, in September 2005, the Limited Partnership purchased Lime Group's interest in Lime Wire. *See id.* at ¶ 62. Subsequently, the Limited Partnership received six attendant Lime Wire dividends in varying amounts. FAC at ¶ 62.

Plaintiffs allege that these funds—which they carefully avoid calling by their true name, *dividends*—were fraudulent transfers. FAC at ¶ 64. Although nothing changed in September 2005 except the identity of the shareholder receiving Lime Wire's dividends (*id.* at ¶ 116, 122), Plaintiffs divine a nefarious purpose in Gorton's authorizing, as Lime Wire's director, the corporate distributions. *See id.* at ¶ 116. Plaintiffs point to the fact that the Supreme Court's *Grokster* opinion[2] predated the dividends in issue. FAC at ¶ 60. Largely on the strength of timing, Plaintiffs plead that the dividends issued to the Limited Partnership were somehow part of a scheme by Gorton to insulate his assets from a possible judgment for Plaintiffs. *Id.* at ¶¶ 60, 64, 116.

Critically, Plaintiffs claim no contact, much less a relationship, between them and the Limited Partnership. *See generally* FAC. To the contrary, in their Memorandum of Law in Support of Motion for Leave to File an Amended Complaint, Plaintiffs stated that they first ascertained *through discovery in this case* that the Limited Partnership was created, that Gorton is its general partner, and that the Limited Partnership became Lime Wire's largest shareholder and received dividends. Motion for Leave at 4-5, 7.

For causes of action, Plaintiffs claim that Gorton's actions constitute a fraudulent conveyance under § 276 of the New York Debtor and Creditor Law and that the Limited Partnership was unjustly enriched by its receipt of the Lime Wire dividends. FAC at ¶¶ 115-18,

[2] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 545 U.S. 913 (2005).

121-24. This Motion will show that Plaintiffs' unjust enrichment claim must be dismissed pursuant to Rule 12(b)(6); evidence, at a later stage, will show that Plaintiffs' fraudulent conveyance claim must also be dismissed.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). Instead, "[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, -- F.3d --, 2007 WL 1989336, at *5 (2d Cir. July 11, 2007) (quoting *Bell Atlantic*, 127 S.Ct. at 1965). The plaintiff must make a "'showing,' not a blanket assertion," of his entitlement to relief. *American Fin.*, 2007 WL 1732427, at *2 (quoting *Bell Atlantic*, 127 S.Ct. at 1965 n.3). "The court's function is 'not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient.'" *Levy v. Verizon Info. Servs., Inc.*, -- F. Supp. 2d --, 2007 WL 2122050, at *5 (E.D.N.Y. July 25, 2007) (quoting *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)).

B. Plaintiffs' Unjust Enrichment Claim Is Not Viable.

1. Plaintiffs' unjust enrichment claim is preempted by the Copyright Act.

At its core, Plaintiffs' unjust enrichment claim seeks recovery for the Original Defendants' alleged secondary liability for infringement of Plaintiffs' copyrighted sound recordings. Plaintiffs' claim against the Limited Partnership cannot exist independent of the

alleged acts of infringement; but for these acts, the Limited Partnership could not have been "unjustly enriched." The law is well-established that state law claims are preempted by the Copyright Act when used to remedy claims of copyright infringement. As a result, Plaintiffs' claim for unjust enrichment must be dismissed.

a. *The Copyright Act Creates an Exclusive Federal Cause of Action.*

Section 301(a) of the Copyright Act expressly preempts:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.

17 U.S.C. § 301(a). The Second Circuit recognized the application of the preemption doctrine to the Copyright Act in *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004). Relying on the U.S. Supreme Court's preemption opinion in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), the Second Circuit extended the complete preemption doctrine to "any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action." *Id.* at 305. The Copyright Act "does just that." *Id.* As a result, "state law claims that are substantively redundant of Copyright Act claims are preempted." *Sharp v. Patterson*, No. 03 Civ. 8772(GEL), 2004 WL 2480426, at *7 (S.D.N.Y. Nov. 3, 2004).

The Second Circuit has established a two-prong test for Copyright Act preemption of state law claims. The Copyright Act exclusively governs a claim when:

> (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106.

Briarpatch, 373 F.3d at 305; *see also Orange County Choppers, Inc. v. Olaes Enters., Inc.*, -- F. Supp. 2d --, 2007 WL 2161777, at *8 (S.D.N.Y. July 27, 2007). These requirements for preemption are met where the essence of the state law claim lies in copyright infringement and the claim does not contain "extra elements that make it qualitatively different" from a copyright infringement claim. *Briarpatch*, 373 F.3d at 305.

To determine whether a claim meets this standard, the court must determine "what the plaintiff seeks to protect, the theories in which the matter is thought to be protected and the rights sought to be enforced." *Id.* at 306 (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716-17 (2d Cir. 1992)); *see also Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 462 (S.D.N.Y. 1999) ("Whether a state law claim is preempted depends on whether it is derivative of a copyright claim or is based on an 'extra element' beyond those of a copyright claim."). The Second Circuit has taken a restrictive view of what "extra elements" can transform an otherwise equivalent state law claim into one that is qualitatively different from a copyright infringement claim. *See, e.g., Briarpatch*, 373 F.3d at 306 (awareness, intent, and enrichment are insufficient "extra elements" for claim to survive preemption); *cf. CVD Equip. Corp. v. Precisionflow Technologies, Inc.*, No. 02 Civ. 0651, 2007 WL 951567, at * 2 (N.D.N.Y. Mar. 27, 2007) (mem. opinion) (allegations of former employees' misappropriation of intellectual property through fraud, deception, or abuse of fiduciary relationships added sufficient extra elements). Where a plaintiff seeks to remedy acts of copyright infringement by asserting a theory under state law, the claim is preempted by the Copyright Act. Thus, a plaintiff is precluded from asserting state law claims that are derivative of claims for copyright infringement, as the exclusive remedy for such claims has been established by the Copyright Act.

b. *Unjust Enrichment Claims Derivative of Alleged Acts of Infringement Are Preempted By The Copyright Act.*

Unjust enrichment claims are frequently preempted by the Copyright Act. The Second Circuit has applied the preemption doctrine to state law claims of unjust enrichment. *Briarpatch*, 373 F.3d at 306 (unjust enrichment claim preempted by the Copyright Act); *see also Phillips v. Audio Active Ltd.*, -- F.3d --, 2007 WL 2090202, at * 12 (2d Cir. July 24, 2007) (remanding the question of whether an unjust enrichment claim was preempted by the Copyright Act, noting: "We think it likely, without deciding, that [it is]."); *Brown v. Perdue*, 117 Fed. App'x 121, 123 n.3 (2d Cir. 2006) (summary order) (recognizing the existence of but not addressing the question of "whether all state law claims of unjust enrichment are preempted by federal copyright law"). In the *Briarpatch* case, the plaintiff limited partnership owned the rights to the movie "The Thin Red Line." *Briarpatch*, 373 F.3d at 300. The general partners sold these movie rights to defendant producer Phoenix. *Id.* Rather than distributing the proceeds to the partnership, the general partners kept the money for themselves in the accounts of a personal corporation. *Id.* The partnership and its limited partner sued the general partners, their personal corporation, Phoenix, and the author of the movie for unjust enrichment, among other claims. *Id.* at 300-01.

After discussing the requirements for the preemption of a state law claim, the Second Circuit noted that the plaintiffs' unjust enrichment claim against Phoenix applied to "The Thin Red Line" project, "the heart of which is a motion picture based on a screenplay, which was derived from a novel." *Id.* at 306. The motion picture, screenplay, and novel were all works protected by the Copyright Act. *Id.* (citing 17 U.S.C. §§ 102, 103). As a result, the unjust enrichment claim fell within "the broad ambit" of subject matter categories in the Copyright Act, meeting the first requirement for preemption. *Id.* Moreover, by asserting a claim of unjust enrichment, plaintiffs sought to protect their alleged interests in "The Thin Red Line" under the

theory that Phoenix had been unjustly enriched by turning the novel and screenplay into a motion picture without compensating plaintiffs or obtaining their permission. *Id.* Thus, the right that plaintiffs sought to enforce was within the "general scope of copyright;" specifically, the right of adaptation, or the right to prepare derivative works under 17 U.S.C. § 106(2). *Id.*

The *Briarpatch* court determined that the basic elements of an unjust enrichment claim do not go far enough to make the claim "qualitatively different" from an infringement claim. *Id.* at 306-07. Under New York law, an unjust enrichment claim requires proof that: "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Id.* at 306. In *Briarpatch*, the act that satisfied the second and third elements of unjust enrichment was the alleged infringement of plaintiffs' adaptation rights in the movie. *Id.*; *see also Orange County*, 2007 WL 2161777, at *9 (counterclaim defendant's inducement of the reproduction and distribution of copyrighted designs was act relied on for unjust enrichment claim). The only potential "extra element" of plaintiffs' claim was defendant Phoenix's enrichment. *Briarpatch* 373 F.3d at 306. According to the court, the enrichment element "limits the scope of the claim but leaves its fundamental nature unaltered." *Id.* Thus, the potential "extra element" of enrichment was insufficient and the Copyright Act preempted plaintiffs' unjust enrichment claim against Phoenix. *Id.* At 306-07 (citing 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.01[B] [1] [g] (2003) ("[A] state law cause of action for unjust enrichment or *quasi* contact should be regarded as an 'equivalent right' and hence, preempted insofar as it applies to copyright subject matter.")). Importantly, the Second Circuit also recognized but did not resolve the question of whether the Copyright Act preempted plaintiffs' unjust enrichment claim against the defendant personal corporation, which received the proceeds of the allegedly infringing sale

of plaintiff's movie rights. *Id.* at 307 (remanding the issue due to the lack of briefing on the claim).

Likewise, district courts in the Second Circuit have consistently found state law unjust enrichment claims to be preempted by the Copyright Act. *See, e.g., Orange County*, 2007 WL 2161777 (dismissing a preempted unjust enrichment claim in an action for infringement of pictorial, graphic, and sculptural works); *Chivalry Film Prods. v. NBC Universal, Inc.*, No. 05 Civ. 5627(GEL), 2006 WL 89944 (S.D.N.Y. Jan. 11, 2006) (dismissing a preempted unjust enrichment claim in an action for infringement of plaintiff's screenplays); *Freeplay Music, Inc. v. Cox Radio, Inc.*, 409 F. Supp. 2d 259 (S.D.N.Y. 2005) (dismissing a preempted unjust enrichment claim in a dispute over synchronization rights); *Sharp*, 2004 WL 2480426 (dismissing a preempted unjust enrichment claim in a copyright action over literary works). For example, in *Chivalry Film*, the plaintiff asserted claims of copyright infringement, racketeering, unjust enrichment, unfair competition, and common-law fraud. *Chivalry Film*, 2006 WL 89944, at *1. This Court noted that in spite of the lengthy complaint, "[t]he gravamen of plaintiff's action lies in copyright infringement." *Id.* The essence of plaintiff's complaint was the infringement of his screenplays by the popular "Meet the Parents" and "Meet the Fockers" movies and the defendants' resulting enrichment. *Id.* His unjust enrichment claim sought recovery for "the same acts that constitute the alleged infringement of copyright." *Id.* at *2. Citing to *Briarpatch* and *Weber*, the Court dismissed the unjust enrichment claim as preempted by federal law. *Id.* (citing *Briarpatch*, 373 F.3d at 306; *Weber*, 63 F. Supp. 2d at 462).

c. *Plaintiffs' Claim Is Derivative and Therefore Preempted By The Copyright Act.*

As in *Briarpatch* and *Chivalry Film*, Plaintiffs' unjust enrichment claim seeks to enforce the same rights as their claims for copyright infringement. Plaintiffs' allege that the Limited

Partnership was unjustly enriched by (1) Gorton's transfer of assets to the partnership, and (2) the receipt of shareholder disbursements from Lime Wire. FAC at ¶ 124. These "benefits" were received at Plaintiffs' expense "as creditors of [the Original] Defendants." *Id.* However, Plaintiffs' assertion that they are "creditors" hinges on their claims of copyright infringement against the Original Defendants, making their claim substantively redundant of their Copyright Act claims.

Although the Limited Partnership is not itself charged with copyright infringement, as in *Chivalry Film*, the gravamen of Plaintiffs' action lies in copyright infringement. Plaintiffs brought the current action "to stop [the Original] Defendants' massive and daily infringement of Plaintiffs' copyrights." FAC at ¶ 1. They have alleged the "making and distributing [of] unlimited copies of Plaintiffs' sound recordings without paying Plaintiffs anything." *Id.* The subject matter of this action is Plaintiffs' sound recordings, "works of authorship" protected by the Copyright Act. *See* 17 U.S.C. 102(7). Furthermore, by asserting this claim of unjust enrichment against the Limited Partnership, Plaintiffs are seeking "to protect the gains that [Gorton] unjustly derived from these unlawful actions." FAC at ¶ 4. This is but an allegation of damages derived from copyright infringement. Plaintiffs are attempting to enforce their rights of reproduction and distribution by recovering profits from the Limited Partnership. The exclusive remedy for such claims is provided by the Copyright Act. *See* 17 U.S.C. § 106(1), (3). As a result, Plaintiffs' claim meets the requirements for preemption set forth in *Briarpatch* and *Chivalry Film*.

Additionally, Plaintiffs' unjust enrichment claim alleges no additional elements that make it qualitatively different from a federal copyright claim. As in *Briarpatch* and *Orange County*, the act that Plaintiffs rely on to satisfy the elements of unjust enrichment is the Original

Defendants' alleged inducement and infringement of Plaintiffs' copyrighted works. The unjust enrichment claim thus rises or falls with Plaintiffs' allegations of copyright infringement. The Limited Partnership did not receive a benefit at Plaintiffs' expense unless copyright infringement occurred. Equity and good conscience could not possibly require the Limited Partnership to disgorge its dividends unless copyright infringement occurred. Plaintiffs have not stated a claim for which relief can be granted unless copyright infringement occurred. Accordingly, the fundamental nature of Plaintiffs' claim is substantively redundant of their claims under the Copyright Act. Consequently, Plaintiffs' unjust enrichment claim is preempted by the Copyright Act and must be dismissed.

2. Plaintiffs have not pled and cannot plead basic requirements of the quasi-contractual claim of unjust enrichment.

Even if it were not preempted by the Copyright Act, Plaintiffs' unjust enrichment claim must still be dismissed because Plaintiffs have not pled all of the applicable requirements.

Unjust enrichment is a quasi-contractual remedy. *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 333 (S.D.N.Y. 2003); *see Michele Pommier Models, Inc. v. Men Women NY Model Mgmt., Inc.*, 14 F. Supp. 2d 331, 338 (S.D.N.Y. 1998), *aff'd* 173 F.3d 845 (2d Cir. 1999). "Quasi-contract is an obligation imposed by law, in the absence of a valid and enforceable contract, because of the conduct of the parties or some special relationship between them to prevent unjust enrichment." *Capital Distribution Servs. Ltd. v. Ducor Express Airlines, Inc.*, 440 F. Supp. 2d 195, 208 (E.D.N.Y. 2006); *Reading Int'l*, 317 F. Supp. 2d at 334 (recognizing that unjust enrichment is "an alternative to contract, where a contractual relation has legally failed"). For example, when parties have bargained, but failed to create an enforceable contract, for instance because of noncompliance with some formal requisite of contract law, and one party has conferred a benefit on the other, that party may seek recovery in quasi-contract.

Capital, 440 F. Supp. 2d at 208. Conversely, when there is an actual agreement between the parties, unjust enrichment is precluded. *See Winne v. The Equitable Life Assurance Soc. of the U.S., AXA*, 315 F. Supp. 2d 404, 417 n.7 (S.D.N.Y. 2003) (recognizing that it is "well established that unjust enrichment . . . pertains in cases of 'quasi contract' and cannot be applied to vary the terms of an actual agreement.").

The quasi-contractual nature of unjust enrichment gives rise to at least two requirements relevant to a motion to dismiss. First, the unjust enrichment plaintiff must have had—and must plead—direct dealings or some sort of quasi-contractual relationship with the defendant. *See Jet Star Enters., Ltd. v. Soros*, No. 05 Civ. 6585(HB), 2006 WL 2270375, at *5 (S.D.N.Y. Aug. 9, 2006) (citations omitted); *Reading Int'l*, 317 F. Supp. 2d at 334; *see also C.V. Starr & Co. v. American Int'l Gr., Inc.*, No. 06 Civ. 2157(HB), 2006 WL 2627565, at *3 (S.D.N.Y. Sept. 14, 2006). Second, to give rise to unjust enrichment, the conduct in issue must be in the nature of a contractual wrong, not a tort. *See Capital*, 440 F. Supp. 2d at 208.

a. *The Relationship Requirement*

Again, the elements of an unjust enrichment claim are "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch*, 373 F.3d at 306. An unjust enrichment claim also requires some type of direct dealing or actual, substantive relationship between the plaintiff and the defendant. *In re Motel 6 Sec. Litig.*, No. 93 Civ. 2183(JFK), 93 Civ. 2866(JFK), 1997 WL 154011, at *7 (S.D.N.Y. Apr. 2, 1997); *see also Czech Beer Importers, Inc. v. C. Haven Imports, LLC*, No. 04 Civ. 2270(RCC), 2005 WL 1490097, at *7 (S.D.N.Y. Jun. 23, 2005).

> While the elements of the unjust enrichment claim . . . do not explicitly spell out such a requirement, those elements imply a

> more substantive relationship, or greater connection, between a defendant and plaintiff . . . The requirements that the defendant be enriched at plaintiff's expense and that good conscience necessitate that defendant make restitution to plaintiff, clearly contemplate that a defendant and plaintiff must have had some type of direct dealings or an actual, substantive relationship.

In re Motel 6, 1997 WL 154011, at *7. Because there were no factual allegations that plaintiffs had a substantive connection to the defendants, the *In re Motel 6* court dismissed plaintiffs' unjust enrichment claim. *Id.*

The *Czech Beer* decision illustrates the application of the relationship requirement. In that case, plaintiff, a beer distributor, sued another beer distributor for causing plaintiff to lose the renewal of its contract with a foreign brewery. *Czech Beer*, 2005 WL 1490097, at *1. Plaintiff alleged that in obtaining the new contract, defendant was unjustly enriched by the receipt of plaintiff's intellectual property and the good will plaintiff created for the product. *Id.* The court dismissed plaintiff's unjust enrichment claim under Rule 12(b)(6), reasoning:

> [a]lthough Plaintiff recites the elements of unjust enrichment and asserts that they have been met by allegations in the complaint . . . Plaintiff has failed to allege that a contractual or quasi-contractual relationship existed between Plaintiff and Defendant. Unjust enrichment is a quasi-contractual remedy, and its elements cannot be removed 'from the context in which they must be viewed: as an alternative to contract, where a contractual relationship has legally failed.'

Id. at *7 (quoting *Reading Int'l*, 317 F. Supp. 2d at 333-34). In the case on which *Czech Beer* relies, *Reading International*, this Court likewise dismissed an unjust enrichment claim when the plaintiffs had "not alleged that they had a contractual or quasi-contractual relationship with defendants, and in fact [had] alleged no prior course of business dealings with defendants whatsoever." *Reading Int'l*, 317 F. Supp. 2d at 334.

Unjust enrichment's requirement of a quasi-contractual relationship has been found equally applicable when the claim is accompanied by a fraudulent conveyance cause of action. For example, the *Jet Star* plaintiff sued two individuals, Deutsche Bank, and a trust for fraudulent conveyance and unjust enrichment. *Jet Star*, 2006 WL 2270375, at *1. The plaintiff in that case had previously obtained a default judgment against another party. *Id.* When it attempted to collect on its default judgment, the plaintiff found that as a result of a series of convoluted transactions, the judgment creditor "was no more." *Id.* at *2. The Plaintiff then attempted to recover from others on claims of unjust enrichment and fraudulent conveyance. *Id.* at *1. Because the plaintiff failed to show the existence of "a contractual or quasi-contractual relationship" with Deutsche Bank, or even that it had any kind of direct dealings with the Bank, plaintiff's unjust enrichment claim was dismissed on summary judgment. *Id.* at *5.

No doubt Plaintiffs will try to escape the application of the relationship requirement in this case by citing the position of some courts that state that no such requirement exists.[3] ***See, e.g.***, *Dreieck Finanz AG v. Sun*, No. 89 Civ. 4347(MBM), 1989 WL 96626, at * 4 (S.D.N.Y. Aug. 14, 1989) (opining that neither a contract nor direct dealings between the parties are required); *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16, 863 N.E.2d 1012 (2007) (agreeing that privity is not required, but a connection is); *State v. Daicel Chem. Indus., Ltd.*, -- N.Y.S.2d --, 2007 WL 1932809 (N.Y.A.D. 1 Dept. July 5, 2007) (following *Sperry*). Those cases generally discuss the requirement of a connection between the parties to an unjust enrichment claim in terms of privity, focusing more on the directness of the benefit conferred

[3] They may also reference unjust enrichment cases that do not speak to the relationship requirement and, thus, are not instructive on this point. *See, e.g. MDO Development Corp. v. Kelly*, 726 F. Supp. 79, 85 (S.D.N.Y. 1989) (ruling after bench trial that employee embezzler and his wife were liable for unjust enrichment as joint owners of home purchased with stolen money, but not discussing any relationship requirement).

and the elements requiring that a plaintiff be enriched at the defendant's expense.[4] *See Sperry*, 8 N.Y.3d at 215-16. Significantly, even though those cases appear to take a position contrary to the one more consistently adopted by the Southern District of New York and applied by this Court at least twice, the results of the cases are generally similar. *Compare Reading Int'l*, 317 F. Supp. 2d at 333-34 (dismissing unjust enrichment claim when no quasi-contractual relationship or prior course of dealing was alleged), *and Shady Records, Inc. v. Source Enters., Inc.*, No. 03 Civ. 9944(GEL), 2005 WL 14920, at *22 (S.D.N.Y. Jan. 3, 2005) (holding that in the absence of a quasi-contractual relationship, there is no basis for an unjust enrichment claim), *and Jet Star*, 2006 WL 2270375, at *5, *with Sperry*, 8 N.Y.3d at 215-16 (affirming dismissal of unjust enrichment claim), *and Daicel Chem.*, 2007 WL 1932809, at *3 (same).

Despite their apparent rejection of the relationship requirement, the courts holding that no privity is needed typically insist on a connection between the parties. *See, e.g.*, *Sperry*, 8 N.Y.3d at 215-16; *Daicel Chem.*, 2007 WL 1932809, at *3. Indeed, in its recent *Sperry* decision, New York's highest state court stated that although privity is not required, the connection between the parties cannot be "too attenuated to support a claim." *Id.* at 216. In that case, the court determined that the connection between tire purchasers and the producers of chemicals used in the rubber-making process was "simply too attenuated" to support an unjust enrichment claim. *Id.; see also Daicel Chem.*, 2007 WL 1932809, at *3 (finding end-users of products too attenuated from the producers of the chemicals used to make the products). Similarly, the Second Circuit recently noted that while some courts hold that an unjust enrichment claim cannot

[4] Those cases generally involve one of two types of factual scenarios that are not relevant here. The first type deals with unjust enrichment defendants who actively participated in the underlying wrong and/or were actively participating in an apparent hiding of assets. *See, e.g. Dreieck*, 1989 WL 96626, at *1-4 (involving defendants who allegedly participated in the underlying fraud and/or were apparently trying to hide assets). The second type involves indirect purchasers, that is, ultimate consumers suing manufacturers of a product they purchased through a retailer. *See, e.g., Sperry*, 8 N.Y.3d at 215-16.

lie absent privity, the issue did not arise when the plaintiff and defendant had no prior dealings, but their mutual, thieving financial advisor transferred money *directly* from the plaintiff's account to the defendant's, to cover a shortfall. *Newbro v. Freed*, No. 06-1722-CV, 2007 WL 642941, at *2 (2d Cir. Feb. 27, 2007) (summary order). Thus, even when courts do not specifically require a contractual relationship or direct dealings, they generally search for a connection between the plaintiff and defendant or a direct transfer of funds. Accordingly, under both this Court's analysis and the "attenuation" approach, the effect is the same; the parties to an unjust enrichment claim must have a direct connection.

In this case, Plaintiffs do not meet the requirements of this Court's or the *Sperry* Court's approach. First, although Plaintiffs provide a formulaic recitation of the elements of unjust enrichment and allege facts attempting to meet them, Plaintiffs divorce those elements from the context in which they must be viewed: as an alternative to contract. Plaintiffs have alleged no direct dealings between them and the Limited Partnership, much less facts that would give rise to a quasi-contractual relationship. Indeed, Plaintiffs' FAC does not include a single allegation concerning any relationship between them and the Limited Partnership. *See generally* FAC. Plaintiffs do not claim to have met with the Limited Partnership representative. They do not claim to have transacted any business with the Limited Partnership. Plaintiffs do not claim that the Limited Partnership was an active participant in any wrongdoing. Moreover, Plaintiffs do not claim that any funds were transferred directly from them to the Limited Partnership. They do not even claim that they knew of the existence of the Limited Partnership before the filing of this lawsuit. To the contrary, in their motion for leave to file the FAC, Plaintiffs admit that they first learned about the Limited Partnership and its status as a Lime Wire shareholder as a result of discovery in this case. In sum, Plaintiffs have not alleged a single fact to indicate that they had

any relationship, dealings, or direct connections with the Limited Partnership whatsoever. As a result, Plaintiffs' FAC does not state a claim for unjust enrichment.

b. *The Requirement of a Contractual Wrong*

Because unjust enrichment sounds in quasi-contract, to state a claim under that theory, a plaintiff must allege a contractual wrong, not a tort. *See Capital*, 440 F. Supp. 2d at 208; *see also Shady Records, Inc. v. Source Enters., Inc.*, 351 F. Supp. 2d 74, 78-79 (S.D.N.Y. 2004) (determining that an unjust enrichment claim was not stated when "[t]here was nothing quasi-contractual about the relations" between the parties in a copyright dispute). Claims of asset transfers to avoid creditors sound in tort and do not state unjust enrichment claims. *See Capital*, 440 F. Supp. 2d at 208; *see also Federal Nat'l Mortgage Ass'n v. Olympia Mortgage Corp.*, No. 04 CV 4971(NG)(MDG), 2006 WL 2802092, at *6 (E.D.N.Y. Sept. 28, 2006) (dismissing complaint when the allegations of wrongdoing, including transfers of proceeds obtained from fraud to company principals, were "not consistent with quasi-contractual liability," but sounded in tort).

The *Capital* decision is instructive. The plaintiff in that case made a contract with the defendant for the transportation of cargo. *Capital*, 440 F. Supp. 2d at 198. Although the plaintiff paid for four flights, the defendant only provided two. *Id.* Thereafter, the defendant transferred money to a variety of people, including family members of the company's principal. *Id.* at 199-201. The *Capital* plaintiff sued for breach of contract, fraudulent conveyance, unjust enrichment, and other claims. *Id.* at 202. The court determined that a number of the transfers constituted fraudulent conveyances and granted summary judgment on those claims. *Id.* at 204-06. The court, however, was mindful that the transfer of assets from the contract-breaching defendant to family members to prevent the plaintiff from collecting a judgment "is more in the

nature of a tort than a contractual wrong." *Id.* at 208. Although that conduct, when proven, was found to support a fraudulent conveyance claim, it did not create quasi-contractual liability on the part of the transfer recipients. *Id.*

The allegations in the present case present a more compelling case for dismissal than *Capital*. Like the *Capital* defendants, the Limited Partnership is alleged to have been unjustly enriched by receiving transfers from the purported wrongdoer. Like the *Capital* plaintiff, Plaintiffs here allege that the payments were made to defeat creditors, namely Plaintiffs. In *Capital*, the court determined that such a claim did not sound in contract, but in tort—even though the underlying wrongdoing allegedly giving rise to liability in that case was a breach of contract. Plaintiffs' allegations in this case are even more obviously tort-based. Here, the underlying claims allegedly giving rise to liability are themselves torts. Unlike *Capital*, there is no contract involved in this case at all. As such, Plaintiffs' claim against the Limited Partnership is more clearly outside the purview of unjust enrichment than *Capital*'s. Because Plaintiffs' claim against the Limited Partnership sounds in tort, not contract, it does not give rise to quasi-contractual liability and, thus, cannot state a claim for unjust enrichment.

C. Leave to Replead Should Be Denied.

As the Original Defendants have themselves argued, under Federal Rule of Civil Procedure 15(a), leave to amend "shall be freely given when justice so requires." FED R. CIV. P 15(a). Unlike the standard case, however, Plaintiffs should not be given leave to replead if this motion is granted.

Leave to amend may properly be denied on the basis of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice, or futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). While some of the other

factors may also be relevant, the futility factor alone precludes leave to amend in this case. Here, further amendment would be futile because Plaintiffs cannot cure the defects described above. For instance, no corrective amendment will change the nature of Plaintiffs' case and the source of their damages, *i.e.*, no corrective amendment will prevent preemption. Plaintiffs cannot satisfy the elements of unjust enrichment without relying on their allegations of copyright infringement. As a result, the fundamental nature of their unjust enrichment claim will remain in copyright and preempted by federal law. Moreover, Plaintiffs cannot amend their pleadings to fulfill unjust enrichment's requirement of a relationship or direct dealings between the parties, because there were no such relationships or dealings. Indeed, Plaintiffs admit in their Motion for Leave to Amend that they did not even learn about the Limited Partnership until discovery in this case. Accordingly, Plaintiffs cannot cure the defects in the unjust enrichment allegations and leave to amend should be denied as futile.

IV. CONCLUSION

For all the foregoing reasons, Defendant M.J.G. Lime Wire Family Limited Partnership respectfully prays that this Court grant its Motion to Dismiss the First Amended Complaint and dismiss Plaintiffs' claim against it without leave to replead.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 16, 2007 the foregoing pleading was filed by means of the Court's ECF system. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via email.

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