

Exhibit B

07T9ARIH

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 ARISTA RECORDS LLC, ET AL.,

4 Plaintiffs,

5 v.

06 CV 5936 (KMW)

6 LIMEWIRE LLC, ET AL.,,

7 Defendants.

8 -----x

New York, N.Y.
July 29, 2010
9:36 a.m.

10 Before:

11 HON. KIMBA M. WOOD

12 District Judge

13 APPEARANCES

14 MUNGER, TOLLES & OLSON, LLP
15 Attorneys for Plaintiffs

15 BY: GLENN POMERANTZ
16 KELLY KLAUS

16 JENNIFER PARISER
17 JONATHAN BLAVIN

18 WILSON, SONSINI, GOODRICH & ROSATI
18 Attorneys for Defendants

19 BY: MICHAEL SOMMER
19 JESSICA MARGOLIS

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1 Q. Let's change subjects. You understand that the motion that
2 we filed was one of the things the Court may be considering is
3 whether you're the kind of person who would transfer assets to
4 protect them against a legal judgment.

5 You understand that, right?

6 A. I'm not sure what the Court considers.

7 Q. Well that's what you said you wrote paragraph 32 to
8 address, was to show that you're not the kind of person who
9 would transfer assets in order to protect them against a legal
10 judgment, right?

11 MR. SOMMER: Objection to the form.

12 THE COURT: Sustained. I recall the testimony.

13 Q. I want to look into this question with you, Mr. Gorton.

14 You created five family partnerships and transferred
15 assets into those family partnerships on June 30, 2005,
16 correct?

17 A. Correct.

18 Q. I want to look at one of those family partnership
19 agreements with you. It's behind tab 5.

20 MR. POMERANTZ: And Mr. Nickels, if you can put up the
21 first page.

22 Q. Do you have that family partnership agreement in front of
23 you?

24 A. Yes.

25 Q. And you see that it's dated June 30, 2005?

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1 A. Yes.

2 Q. And this particular family partnership is called the MJG
3 LimeWire Family Limited Partnership.

4 Do you see that?

5 A. Yes.

6 Q. And if you could turn to the page after page 10 of 10.

7 If you look at the bottom, they're numbered. And
8 there's one that says 10 of 10. And then there's a page right
9 after that called schedule A.

10 If you could pull up schedule A.

11 A. Yes.

12 Q. Do you have schedule A in front of you?

13 A. Yes.

14 Q. And it should also be on your screen, Mr. Gorton.

15 A. I see it.

16 Q. And you see that this shows that this particular family
17 limited partnership possessed 87.1 percent of the ownership
18 interest of LimeWire LLC.

19 Do you see that?

20 A. Yes.

21 Q. So you transferred ownership of LimeWire to this family
22 partnership on June 30, 2005, correct?

23 A. Yes.

24 Q. Now, this particular family partnership has a general
25 partner and a bunch of limited partners, correct?

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1 A. Yes.

2 Q. And that's indicated at the bottom of the same page,
3 schedule A.

4 Do you see that -- you're the general partner,
5 correct?

6 A. Yes.

7 Q. You're the only general partner, right?

8 A. Yes.

9 Q. And you understand that the general partner of these
10 limited partnerships is the one who decides everything for the
11 family partnership, correct?

12 MR. SOMMER: Objection to the form.

13 Q. That's your understanding of what your role is as general
14 partner?

15 THE COURT: I'll permit it.

16 THE WITNESS: The general partner manages the
17 partnership.

18 Q. Has total control over it, correct?

19 A. Has -- I'm not sure if total is completely accurate, but,
20 you know, all substantive operating control, yes.

21 Q. And then there's a bunch of limited partnerships all with
22 the last name Gorton, do you see that?

23 A. Yes.

24 Q. And that's you, your wife, and your two children, correct?

25 A. Yes.

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- 1 Q. And you understand that the limited partners are basically
2 the beneficiaries of the limited partnership, correct?
3 A. I'm not sure of the technical meaning of the word
4 beneficiary.
5 Q. That's fine. They are the limited partners, correct?
6 A. Yes.
7 Q. Then if we turn to tab 6, this is another limited
8 partnership. This was one is called the MJ Gorton Family
9 Limited Partnership.
10 Do you see that?
11 A. Yes.
12 Q. And it was also created on June 30, 2005.
13 Do you see that?
14 A. Yes.
15 Q. And if you'll turn to the next page, you'll see that this
16 particular family partnership has one hundred percent of the
17 ownership interest in LimeGroup, correct?
18 A. Yes.
19 Q. And so on June 30, 2005 you transferred a hundred percent
20 of the interests in LimeGroup from yourself to this particular
21 family partnership, correct?
22 A. Yes.
23 Q. And you are the general partner of this family partnership
24 as well?
25 A. Yes.

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1 Q. And you, your wife, and your children are the limited
2 partners, correct?

3 A. Yes.

4 Q. Now, your testimony is that you made these kinds of asset
5 transfers on June 30, 2005 for estate planning purposes,
6 correct?

7 A. Correct.

8 Q. And you didn't do so, you say, so that you could shield
9 those assets from any judgment that the record companies may
10 receive, correct?

11 A. Correct.

12 Q. That's your testimony?

13 A. Yes.

14 Q. Let's test it.

15 Do you know a gentleman by the name of Vinnie Falco?

16 A. Yes.

17 Q. Mr. Falco ran another peer-to-peer service called
18 BearShare, correct?

19 A. Yes.

20 Q. And at one point in time you spoke to Mr. Falco about your
21 family partnerships, didn't you?

22 A. Correct.

23 Q. Let me show you how Mr. Falco described that conversation.

24 Turn to tab 7 and you'll see a declaration that

25 Mr. Falco has submitted in this case.

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1 And if you turn to the last paragraph, paragraph 5,
2 here's what Mr. Falco said.

3 "Shortly after I received my cease and desist letter,
4 I spoke with Mark Gorton. Mark mentioned to me that he also
5 received a cease and desist letter. I told him that I was
6 worried that if the record companies sued BearShare, I might
7 lose a lot of my own money. Gorton told me that he was not
8 worried about being sued. He said that he had created a family
9 limited partnership. He put his personal assets into the
10 family limited partnership so that the record companies could
11 not get his money if they sued him and won. Gorton said that I
12 should do the same, but I didn't."

13 You were shown that statement during your deposition,
14 correct?

15 A. Yes.

16 Q. Ms. Forest questioned you at the time, correct?

17 A. Yes.

18 Q. And she asked you about that paragraph, correct?

19 A. Correct.

20 Q. Let's see what you said in response. If we could play
21 that. Let me just say before you play it.

22 You testified that that conversation occurred outside
23 of the RIAA offices, correct?

24 A. No.

25 Q. When you were there visiting the RIAA, correct?

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1 A. I believe that conversation occurred inside the RIAA
2 office.

3 Q. Inside. But it was just you and Mr. Falco talking before
4 you went into your meeting or he went into his meeting,
5 correct?

6 A. Yes.

7 Q. And you discussed your family partnerships, correct?

8 A. Yes.

9 MR. POMERANTZ: Now let me show what the witness said.
10 (Audio recording played)

11 Q. Now, Mr. Gorton --

12 THE COURT: Could you just reference the page.

13 MR. POMERANTZ: I'm sorry. That is the deposition at
14 page 77, lines 7 through 16.

15 THE COURT: Thank you.

16 MR. POMERANTZ: It's cited in our brief.

17 Q. Mr. Gorton, Mr. Falco wasn't the only person who provided
18 sworn testimony about your desire to shield assets through the
19 family partnerships, was he?

20 A. That's correct.

21 Q. You know a Mr. Bildson, correct?

22 A. Correct.

23 Q. And you worked very closely with Mr. Bildson for many years
24 at LimeWire, correct?

25 A. Reasonably closely.

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1 Q. I'm sorry?

2 A. Reasonably closely.

3 Q. He was the chief technology officer and the COO of
4 LimeWire, correct?

5 A. Yes.

6 Q. And you spoke with him frequently, correct?

7 A. Yes.

8 Q. Let's look at what Mr. Bildson said in his sworn testimony
9 in this case. That's behind tab 8. And what I am focusing on
10 is the last paragraph of his declaration, which is paragraph
11 39.

12 MR. POMERANTZ: Mr. Nickels, if you can pull that up.

13 Q. Here's what Mr. Bildson said under oath.

14 "On many occasions I spoke with Vincent Falco, the
15 principal of BearShare. I knew BearShare to be a file sharing
16 client used to facilitate the exchange of popular sound
17 recordings. In the spring of 2006, Mr. Gorton asked me to talk
18 to Mr. Falco in order to dissuade him from settling claims for
19 copyright infringement with the plaintiffs. I phoned Mr. Falco
20 from any desk with Mr. Gorton present. And during this
21 conversation, Mr. Gorton took the phone from me and began
22 talking to Mr. Falco. I heard Mr. Gorton tell Mr. Falco that
23 he had protected his assets from liability for copyright
24 infringement by setting up a family partnership. Mr. Gorton
25 then encouraged Mr. Falco to do the same."

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1 Now, you don't deny that you were at Mr. Bildson's
2 desk when you spoke with Mr. Falco, correct?

3 A. The conversation that I had with Mr. Falco was in the RIAA
4 office. It was not in Mr. Bildson's desk.

5 Q. Didn't you have a conversation with Mr. Falco while you
6 were at Mr. Bildson's desk?

7 A. It was -- I mean I have at one point in my life had a
8 conversation on the phone with Mr. Falco from Brett Bildson's
9 desk, but the contents of that conversation are absolutely
10 nothing like what's presented here.

11 Q. So, you admit you had a conversation with Mr. Falco from
12 Mr. Bildson's desk, but you deny that you said what Mr. Bildson
13 says in his declaration, correct?

14 A. Yes.

15 Q. Now, is it your position that at the time you created these
16 family partnerships in 2005 you did not believe that LimeWire
17 or you personally would be sued for copyright infringement? Is
18 that your position?

19 A. Yes.

20 Q. And you've stated that under oath previously, correct?

21 A. That's possible.

22 Q. Well, let's look at tab 2. This is a declaration you
23 submitted back at the time of the summary judgment motions.
24 And let's look at tab -- paragraph 7 of your declaration.

25 Paragraph 7 you state under oath that, "At the time
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- 1 these transactions took place, I did not believe that LimeWire
2 or I would be sued for copyright infringement," right?
3 That's what you said under oath at the time of the
4 summary judgment motions, correct?
5 A. Correct.
6 Q. That's not a true statement, is it?
7 A. That is a true statement.
8 Q. Well, isn't it a fact that at the time you created LimeWire
9 you knew there was a significant risk that you would be sued?
10 A. No.
11 Q. Let's look at a document from that time period. Let's look
12 at the business plan, tab 9.
13 Do you see in the bottom of this e-mail that you were
14 asking Jesse to send you a copy of the original LimeWire
15 business plan.
16 Do you see that?
17 A. I'm sorry. I see the e-mail on the screen, yes -- I see
18 it's also the first page of this tab. Okay. Yes.
19 Q. Do you see that?
20 And so you were asking Jesse to send you a copy of the
21 original LimeWire business plan, right?
22 A. Yes.
23 Q. And Jesse responded at the top by saying "attached."
24 Do you see that?
25 A. Yes.

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1 States, "Mark Gorton, the chief executive of
2 LimeGroup, a brokerage firm that makes LimeWire, a file sharing
3 alternative to Grokster, said he was likely to stop
4 distributing LimeWire in reaction to the ruling."

5 Do you see that?

6 A. I'm sorry. I was reading other stuff.

7 Yes.

8 Q. Did you tell the New York Times on June 28 that you were
9 likely to stop distributing LimeWire?

10 A. I don't recall.

11 Q. But, in fact, you didn't stop distributing LimeWire,
12 correct?

13 A. No.

14 Q. You kept distributing it, correct?

15 A. Yes.

16 Q. And you transferred much of your personal assets to the
17 family partnerships three days later, correct?

18 A. Correct.

19 Q. Let's look at the timing of these events just to get it
20 down. I'm going to show you a timeline that's going to appear
21 on your screen.

22 I just have on there two dates: 2000 and 2010.

23 Do you see that?

24 A. Yes.

25 Q. And that's basically the time period in which you were
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1 distributing LimeWire, correct?

2 A. Maybe started 2001, but, okay, ballpark.

3 Q. Around that time period.

4 Let's put up the two Grokster decisions that we were
5 just talking about.

6 In December -- December 10, to be precise, 2004, the
7 Supreme Court announced that it was going to review the Ninth
8 Circuit's decision in Grokster.

9 Do you see that?

10 A. Mm-hmm.

11 THE COURT: You have to answer yes or no.

12 THE WITNESS: Yes. Sorry.

13 Q. And you were aware of that news, correct?

14 A. At some point.

15 Q. And then about six months later, on June 27, 2005, the
16 Supreme Court issued its ruling in Grokster.

17 Do you see that?

18 A. Yes.

19 Q. Now, let's look about what you did in terms of creating the
20 family partnerships. Let's put those two events on the screen.

21 So, you first met with the lawyer that helped you to
22 create the family limited partnerships on January 7, 2005,
23 correct?

24 A. That's possible.

25 Q. Well that's correct, isn't it?

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1 A. I don't specifically recall the date.

2 Q. Let me refresh your memory. If you could look at tab 2,
3 which is your declaration, filed back at the time of the
4 summary judgment motion.

5 Turn to paragraph 6.

6 Do you see in the second sentence that you say that
7 you met with Kenneth Rubenstein on January 7, 2005?

8 A. Yes.

9 Q. Does that refresh your recollection that that's the first
10 time you met with Mr. Rubenstein?

11 A. Yes.

12 Q. And that was less than 30 days after the Supreme Court
13 announced that it was going to review the Ninth Circuit's
14 decision in Grokster, correct?

15 A. Correct.

16 Q. And then if we can go back to the timeline.

17 And you see that then three days after the Supreme
18 Court issued its ruling in Grokster, you went ahead and created
19 the partnerships and transferred your assets, correct?

20 A. Correct.

21 Q. Now your testimony is that the creation of those family
22 limited partnerships had nothing to do with the Grokster case,
23 correct?

24 A. Correct.

25 Q. Had nothing to do with your concern about your assets being

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1 subject to a legal judgment, right?

2 A. Correct.

3 Q. And your testimony is that it's just coincidence that these
4 family partnerships happened to be created immediately after
5 the two critical events in the Grokster case in the Supreme
6 Court, correct?

7 A. Correct.

8 Q. Now, let's talk a little bit about the lawyer who assisted
9 you here, Mr. Rubenstein. Why did you choose him in particular
10 to help you set up these limited partnerships?

11 A. He was recommended -- there was a friend of mine knew his
12 brother who worked at Kaye Scholer who recommended him.

13 Q. And your testimony is that you went to Mr. Rubenstein in
14 January of 2005 just to receive traditional estate planning
15 advice, correct?

16 A. Correct.

17 Q. You didn't go to him for asset protection advice? Is that
18 what you're saying?

19 A. Correct.

20 Q. Now when you saw Mr. Rubenstein in 2005, were you aware
21 that he wasn't just your ordinary estate planning lawyer?

22 MR. SOMMER: Objection to the form.

23 THE COURT: Sustained.

24 Q. Did you know that he had expertises beyond estate planning?

25 A. When I first met him I don't think I really particularly --

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- 1 I mean I asked a friend for -- I said I was thinking about
2 doing some estate planning, could he recommend somebody. He
3 asked around and got a recommendation. I didn't really know
4 very much about him.
- 5 Q. Were you aware that he specializes in asset protection?
6 A. I think when I met him I didn't know much about him.
- 7 Q. Well, you were aware that his firm holds itself out as the
8 preeminent asset protection law firm in the United States?
9 A. I'm not aware of that.
- 10 Q. Let me see if I can refresh your recollection about what
11 you knew about Mr. Rubenstein. Let's go to his website. And
12 let me go to -- open the page -- it's behind tab 29. I'll also
13 put it up on the screen.
- 14 See if you can pull up the practice concentrations.
15 You see under the heading practice concentrations that
16 the first thing that Mr. Rubenstein says is that, "We are proud
17 of our reputation as the preeminent asset protection law firm
18 in the United States."
19 Do you see that?
- 20 A. Yes.
- 21 Q. Were you aware of that reputation at any time when he was
22 representing you?
23 A. No.
- 24 Q. Let's go to another part of his website, tab 30.
25 MR. POMERANTZ: Again, at the beginning, if you can
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1 pull up that top, Mr. Nickels, so we can see it.

2 Q. What Mr. Rubenstein says here is, "You've worked hard to
3 get where you are. You've accumulated wealth that you want to
4 protect from creditors and litigants."

5 Do you see that?

6 A. Yes.

7 Q. And one of the things you wanted when you went to
8 Mr. Rubenstein was to protect your wealth from certain
9 litigants. Wasn't that true?

10 A. No, I mean if you look at the next sentence it says, "And
11 eventually pass it on to your heirs with as little possible
12 paid in taxes."

13 Q. Right. What it says is "and eventually pass it on."

14 In other words, this is directed to somebody who has
15 concerns about creditors and litigants, right?

16 A. Again, I'm not sure who their website is --

17 Q. Well let's go to another part of his website.

18 Let's go to tab 31. He has an article he publishes on
19 his website that says, "Who needs asset protection."

20 And you see in the middle, the very first item that he
21 lists under those who need asset protection are those who are
22 facing a lawsuit.

23 Do you see that?

24 MR. SOMMER: Objection, your Honor, if we can
25 establish whether he saw this at the time.

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1 THE COURT: Sustained.

2 MR. POMERANTZ: Your Honor, that's not my point of --
3 I'm not trying to establish if he saw it.

4 I'm trying to show that what he actually did here maps
5 out perfectly with what Mr. Rubenstein proposes to clients
6 publicly if what they really want to do is protect their
7 assets.

8 THE COURT: I understand. But no useful information
9 can come from questioning this witness on this particular
10 document unless he saw it.

11 MR. POMERANTZ: I'll move off this document.

12 Q. Were you aware of what Mr. Rubenstein's website address
13 was?

14 A. Yes.

15 Q. What is his website address?

16 A. Asset lawyer dot com.

17 Q. So his address was not estate planning lawyer dot com,
18 right?

19 MR. SOMMER: Objection.

20 THE COURT: Sustained. It's argument.

21 Q. And you understood that wealthy people go to Mr. Rubenstein
22 if what they want is to protect their assets, correct?

23 A. I'm not sure I know what everyone goes to him for.

24 Q. Well turn to tab 32. This is a profile of
25 Mr. Rubenstein's. And there's a picture.

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1 Is that the Mr. Rubenstein that advised you?

2 A. Yes.

3 Q. And you see in the fourth paragraph of his background that
4 he says that he created various trust laws in the country of
5 Antigua.

6 Do you see that?

7 MR. SOMMER: Same objection, your Honor. If he saw it
8 at the time, it's relevant; otherwise, it's not.

9 THE COURT: Sustained.

10 Q. Were you aware at the time you were working with
11 Mr. Rubenstein that he created the laws of Antigua with respect
12 to asset protection?

13 A. I'm not aware of this.

14 Q. Let me show you tab 33 -- behind tab 33. It's another part
15 of Mr. Rubenstein's website and I want to spend a little time
16 on this one because I think it parallels so closely what you
17 did here, Mr. Gorton.

18 This is a section called case histories. And
19 Mr. Rubenstein describes two case histories that he was
20 actually involved in at the bottom, one called The Case of the
21 Big Hearted Socialite and the other is the case of Boris.

22 Do you see those two, the reference?

23 MR. SOMMER: I'm objecting. If Mr. Pomerantz wants to
24 argue this to you when we have argument, I will not object.
25 But it's not appropriate for this witness unless he's seen it

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1 before.

2 MR. POMERANTZ: Your Honor, that's not at all what I'm
3 trying to do here. And I need Mr. Gorton's testimony to fill
4 in the story. Here's what I would like to do.

5 One of these examples, The Case of the Big Hearted
6 Socialite, tells the advice that Mr. Rubenstein gave to Sarah,
7 his client in that situation, to protect her assets. And he
8 goes through a multistep schedule that he did.

9 And what I want to show is that what he did for Sarah
10 is exactly what Mr. Gorton did here.

11 THE COURT: That's fair argument. But you'll need to
12 limit your questions to the knowledge this witness has about
13 Sarah.

14 MR. POMERANTZ: I intend to do that.

15 And your Honor, just so that you know, I'm going to
16 focus on just the first example, The Case of the Big Hearted
17 Socialite.

18 I have included behind tab 33 the other one. And I
19 would encourage your Honor to look at the other one because --
20 and when you look at the other one, remember that
21 Mr. Rubenstein wrote the laws of Antigua.

22 THE COURT: I understand the argument.

23 Yes.

24 MR. SOMMER: Your Honor, my objection is he's
25 perfectly free to elicit from Mr. Gorton what steps were taken

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1 for him. And then in argument he can equate it to Sarah, The
2 Big Hearted Socialite, if he wants. But to use The Big Hearted
3 Socialite as a framework for questioning the witness, I think
4 is improper.

5 THE COURT: Well, in any event, I'm going to sustain
6 on the basis that this witness should be testifying only to
7 what he knew about.

8 Q. So Mr. Gorton, could you turn to The Case of the Big
9 Hearted Socialite. And I won't have you read it because I
10 understand what the Court's direction is here.

11 But I do want to pull up one paragraph, the paragraph
12 that begins, "Sarah retained us."

13 MR. POMERANTZ: Mr. Nickels, if you could bring that
14 up.

15 Q. Just by way of background, Mr. Gorton, so you understand,
16 Sarah lends her car to her stable hand, Luke.

17 THE COURT: I'm sorry, Mr. Pomerantz. You've got, I
18 think at this point, we should take a break for the court
19 reporter and for everyone, and let me ask you to frame your
20 questions in terms of what this witness knows.

21 If you want to direct me to read something in
22 evidence, I will.

23 MR. POMERANTZ: Your Honor, what might be helpful,
24 because I don't need to do this, is if during the break, your
25 Honor had a chance just to read the one paragraph I have here,

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1 I will not then direct him specifically to this paragraph. All
2 I'll ask him to say is what he did. And your Honor can draw
3 the conclusion as to how that compares as to what Sarah did.

4 MR. SOMMER: Can we just check on timing, and I'm not
5 trying to limit Mr. Pomerantz. He told me an hour,
6 hour-and-a-half was his anticipated direct. We're beyond that,
7 and I'm just trying to find out how much longer we have.

8 MR. POMERANTZ: I would say less than an hour.

9 THE COURT: All right. Let me just remind you that
10 you need to elicit from this witness what he knows, not have
11 him read from exhibits he hasn't seen before.

12 I will do the reading that you've asked me to do.

13 MR. POMERANTZ: Thank you, your Honor.

14 THE COURT: That's okay. We'll take a ten minute
15 break.

16 (Recess)

17 THE COURT: You may.

18 MR. POMERANTZ: Your Honor in order to expedite this,
19 I would like to request that the documents in this binder,
20 including the excerpts from Mr. Rubenstein's website, be made
21 part of the record on the motion. And I believe this Court has
22 the right to take judicial notice of the website, and I can
23 give your Honor some citations. But just so that we don't have
24 to try to get them into evidence, we would request that these
25 exhibits be included with the other documents that are part of

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1 the record on the motion.

2 THE COURT: Have you discussed this with Mr. Sommer?

3 MR. POMERANTZ: No, I have not.

4 THE COURT: Let me ask you to discuss it briefly with
5 him.

6 (Pause)

7 MR. SOMMER: Let me just confer with my colleague for
8 a second.

9 (Pause)

10 MR. SOMMER: Your Honor, certainly with respect to the
11 ones that have been used so far, like the website stuff which I
12 already said I don't mind him arguing from, obviously those can
13 be before you.

14 My only hesitation is since I never got this binder
15 before this morning, I don't know what else is in there that we
16 haven't covered. So maybe if we just go document-by-document
17 at the end, I'll just tell Mr. Pomerantz if I have an objection
18 to any of them. I doubt I will on the ones I have seen
19 already.

20 THE COURT: I'll ask you to confer during the next
21 break.

22 MR. POMERANTZ: May I proceed, your Honor.

23 Q. Mr. Gorton, did Mr. Rubenstein devise a three-part strategy
24 for you to protect your assets?

25 MR. SOMMER: Objection.

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1 THE COURT: Sustained.

2 Q. With the assistance of Mr. Rubenstein, you created family
3 limited partnerships, correct?

4 A. Correct.

5 Q. And you created more than one family limited partnership,
6 correct?

7 A. Correct.

8 Q. And you put different assets into different family limited
9 partnerships, correct?

10 A. Correct.

11 MR. SOMMER: Mr. Gorton, I think the microphone.

12 THE WITNESS: Sorry.

13 Q. And you understood that by making the -- by transferring
14 the assets into these limited partnerships, that that would
15 protect the assets from future legal judgments such as a
16 judgment by the record companies, correct?

17 A. Over time, I learned that there were some benefits in that
18 way.

19 Q. When you say "in that way," you understood that if you
20 moved an asset from your own possession to technically being
21 owned by a family limited partnership, that that may protect
22 that asset from a legal judgment?

23 MR. SOMMER: Can we just establish timeframe, your
24 Honor, because I think that may be relevant.

25 THE COURT: Sustained.

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1 Q. You understood that prior to creating the family limited
2 partnerships on June 30, 2005, correct?

3 A. I had some knowledge of this.

4 I also will say that these protections of which you
5 speak are by no means absolute.

6 Q. But you were aware of those kinds of protections before you
7 created the family limited partnerships on June 30, 2005,
8 correct?

9 A. I learned some of that.

10 Q. And you chose to put your assets into different limited
11 partnerships, correct?

12 A. Correct.

13 Q. And that was based on advice you received from
14 Mr. Rubenstein, correct?

15 A. Correct.

16 Q. Did you understand that the reason for putting different
17 assets into different family partnerships was so that those
18 assets would have better protection against litigation risk?

19 A. I don't believe that that's -- that's just not true.

20 Q. Let me see if I can refresh your memory.

21 MR. POMERANTZ: Can we put up tab 34, Mr. Nickels, go
22 to the second page. And at the bottom, there's a -- the second
23 paragraph under the heading the structure of the asset
24 protection plan. Can you bring that up?

25 MR. SOMMER: Same objection, your Honor. This is from
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1 the Rubenstein website.

2 THE COURT: Sustained.

3 MR. POMERANTZ: Your Honor, I just want to see if it
4 refreshes his memory as to what he did.

5 THE COURT: You can have him read it to himself.

6 Q. Do you see in the second paragraph underneath the structure
7 of the asset protection plan, could you just read that
8 paragraph to yourself.

9 A. Okay.

10 (Pause)

11 Q. Did you understand at the time that you created your family
12 limited partnerships that by placing different assets into
13 different family limited partnerships, that you would be
14 mitigating your litigation exposure?

15 A. No.

16 Q. Now -- we can put this document down.

17 When Mr. Rubenstein assisted you in creating the
18 family limited partnerships, he made you the general partner of
19 each of those limited partnerships, correct?

20 A. Correct.

21 Q. And you understood that by making you the general partner
22 of the limited partnerships and transferring the assets into
23 the limited partnerships, that that allowed you to control
24 everything but own nothing, correct?

25 A. That's not true.

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1 Q. Again, let's go back to tab 34. I'm just going to have you
2 read it to yourself.

3 But if you turn to the second page.

4 MR. SOMMER: I'm sorry, your Honor. There was no
5 failure of recollection in that answer.

6 THE COURT: Sustained.

7 Q. Did Mr. Rubenstein ever tell you that by controlling the
8 family -- let me start over again.

9 Did Mr. Rubenstein or anyone ever tell you that by
10 being the general partner of the family limited partnerships
11 you would control everything but own nothing?

12 MR. SOMMER: If he could distinguish between
13 Mr. Rubenstein and someone else, I won't object.

14 THE COURT: I think -- I'm going to sustain. I think
15 what you ought to try to elicit was what this witness
16 understood.

17 Q. At the time that you became the general partner of each of
18 the family partnerships, did you understand that you would
19 control all of the assets in the family partnership but would
20 own none of those assets?

21 A. So by establishing the family partnership with me as the
22 general partner, I mean my ownership stake would be as both a
23 general partner and as a limited partner and then the limited
24 partnership would directly own assets. And my children would
25 also be able to get an interest in that partnership financed by

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1 loans from the partnership to allow them -- me to start the
2 process of transferring assets to them over time while still
3 maintaining control over the children's assets.

4 Q. Let me go to a third part of the family partnerships that
5 you created.

6 You understood that an additional benefit of creating
7 the family partnerships was estate planning, correct?

8 A. I mean I think it was the primary benefit.

9 Q. Well, you understood that if you were able to claim that
10 estate planning was the purpose for creating the family
11 partnerships, that that would be a defense to a fraudulent
12 conveyance claim?

13 MR. SOMMER: Objection.

14 THE COURT: Overruled. Do you want it read back?

15 THE WITNESS: Yes, please.

16 (Record read)

17 THE WITNESS: So, if you're -- what timeframe are you
18 talking about?

19 Q. At the time you created the family partnerships.

20 A. I knew almost nothing about the concept of fraudulent
21 conveyance at that time.

22 Q. Since that time, do you understand that if you claim that
23 you created these family partnerships for estate planning
24 purposes you could try to use that as a defense to a fraudulent
25 conveyance claim?

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1 MR. SOMMER: Objection to the extent it calls for
2 discussion with counsel.

3 MR. POMERANTZ: You can exclude the discussions you
4 had with counsel.

5 MR. SOMMER: Your Honor, if his understanding is his
6 communications with us about the law on fraudulent --

7 THE COURT: I will permit him to testify to his
8 understanding, but I think this should be the last question
9 along this line.

10 THE WITNESS: I'm sorry. Could you read back the
11 question.

12 THE COURT: I think the question should be: As you
13 sit here now, do you have an understanding as to whether if you
14 claim that you created the family partnerships for estate
15 planning purposes, that might be a defense to a fraudulent
16 conveyance claim?

17 Do you have any understanding as to that now?

18 THE WITNESS: I'm not sure I really understand what
19 the -- how the test for fraudulent conveyance is.

20 THE COURT: I'll permit you to question further on it.

21 Q. Well do you understand that if you claim that you created
22 the family partnerships for estate planning, that that helps
23 you in this case?

24 A. Since I created the partnerships for estate planning, I
25 mean -- that may help me, I mean I don't really know.

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1 Q. Well, you say that for years you were thinking about estate
2 planning, right?

3 A. That is true.

4 Q. But you didn't actually take a step to go see a lawyer to
5 do anything about estate planning until 2005, right?

6 A. I mean probably, you know, in 2004, but okay.

7 Q. And the lawyer you chose was Mr. Rubenstein, right?

8 THE COURT: Let's not go over the -- I think we're
9 getting to argument.

10 MR. POMERANTZ: I'll move on.

11 Q. Did you ever understand that it would be better for you if
12 you created the family limited partnerships before the record
13 companies actually commenced their lawsuit against you?

14 A. I mean these things were not related and, in fact, one of
15 the family limited partnerships was created after the lawsuit
16 was commenced.

17 Q. Five were created June 30, 2005, correct?

18 A. Correct.

19 MR. POMERANTZ: Your Honor, there's other parts to the
20 website that are in here. I would just put -- refer the Court
21 to them, and I will not question Mr. Gorton about them. But
22 they are illuminating I think on the issues here.

23 THE COURT: I will read them, if they're in evidence.

24 I take it there is no objection on the website. So
25 I'll read them.

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1 MR. POMERANTZ: That just, in terms of the binder,
2 that goes through tab 36.

3 THE COURT: Thank you.

4 MR. POMERANTZ: Those are all portions from
5 Mr. Rubenstein's website.

6 THE COURT: Thank you.

7 Q. Now, Mr. Gorton, were you aware that your counsel told us
8 and told the Court last week that you would be calling
9 Mr. Rubenstein to come here and testify today?

10 A. Yes.

11 Q. And were you aware that they also told us that they would
12 be waiving privilege and providing us with some additional
13 documents?

14 A. Yes.

15 Q. And then were you aware that 72 hours ago or less we heard
16 that you had decided not to call Mr. Rubenstein as a witness?

17 A. Correct.

18 Q. And you understand that you chose not to provide us with
19 documents that might show what happened between you and
20 Mr. Rubenstein?

21 MR. SOMMER: Objection. We chose not to waive
22 privilege.

23 THE COURT: Sustained.

24 Q. Were you aware of that?

25 MR. SOMMER: The question -- sustained.

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1 THE COURT: I'm sustaining the objection. So go
2 ahead.

3 Q. You are telling the Court the reasons why you created the
4 family limited partnerships, correct?

5 A. Correct.

6 Q. And that's based upon discussions you had with
7 Mr. Rubenstein, correct?

8 A. Well, my -- my motivation for creating the partnerships
9 predate -- I mean led me to, you know, seek someone who could
10 help me with estate planning, which led me to Mr. Rubenstein,
11 which led to the family limited partnerships.

12 MR. POMERANTZ: Your Honor, I do not believe that it
13 is fair or permitted under the law for Mr. Gorton to testify as
14 to the reasons why he created the family limited
15 partnerships --

16 THE COURT: Well, you can ask -- I'm sorry. Go ahead.

17 MR. POMERANTZ: -- and then withhold the
18 communications he had with Mr. Rubenstein that would reveal the
19 true intent.

20 There is law in this circuit, including the Bilzerian
21 case, where once a party affirmatively chooses to put their
22 state of mind in evidence on an issue where the basis of that
23 is legal advice that they received, in part or in whole, that
24 they have to make a choice at that point.

25 And I believe that either they must waive the

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1 privilege, give us the privilege communications, allow us to
2 examine Mr. Gorton on that, or they can't put his intent, his
3 state of mind about why he created the limited partnerships as
4 affirmative evidence in the case in connection with this
5 motion.

6 THE COURT: I'll review your legal argument and the
7 case law when I have it in front of me.

8 MR. POMERANTZ: All right, your Honor.

9 I'll move past that issue.

10 MR. SOMMER: Your Honor, would you like me to comment
11 on that now or --

12 THE COURT: If you want to you can.

13 MR. SOMMER: First of all, we have not affirmatively
14 put anything before your Honor. It's been Mr. Pomerantz's
15 witness to this point.

16 Second of all, the witness --

17 THE COURT: Your witness did testify. But go ahead.

18 MR. SOMMER: But what his testimony was, was that his
19 motivation to engage in estate planning is what led him to
20 Mr. Rubenstein. He wasn't advised by Mr. Rubenstein to find
21 Mr. Rubenstein. He talked about talking to accountants and
22 others, who urged him to do some estate planning. And that's
23 why he sought a recommendation. And that's how he got to
24 Rubenstein. And he has testified that the structure, not the
25 intent, the structure was developed by Rubenstein.

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1 There is no advice-of-counsel defense here. There's
2 simply a structure that was prepared by an estate lawyer, and
3 the intent of the witness was to engage in estate planning.

4 We can brief the issue for your Honor, but I don't
5 even think it's a close call.

6 THE COURT: Thank you. Go ahead.

7 MR. POMERANTZ: Thank you, your Honor. I have a
8 response, but I'll put that off to briefing later on.

9 Q. Could you turn to tab 18 in the binder.

10 MR. POMERANTZ: Mr. Nickels, if you could put up the
11 first page.

12 Q. This is the order that we have asked the Court to enter in
13 support of our motion for a freeze of assets.

14 Have you had an opportunity to review it?

15 A. Yes.

16 Q. I just want to ask you a few questions about the order
17 that's being proposed here.

18 You understand that in section one that we are asking
19 that the defendants in this case be restrained and enjoined
20 from doing certain things directly or indirectly.

21 Do you see that?

22 A. Yes.

23 Q. And then if you go to the next page, in A, basically what
24 we're looking for is something that would prohibit the
25 defendants from disposing of assets, including the following.

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