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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; ARISTA MUSIC, fka BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY MUSIC ENTERTAINMENT, fka SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME GROUP LLC; LIME WIRE LLC; MARK GORTON; GREG BILDSON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

ECF Case

06 CV 5936 (KMW)(DF)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE CERTAIN PURPORTED EXPERT TESTIMONY BY GEORGE STRONG

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PRELIMINARY STATEMENT

Plaintiffs' *Daubert* motion to exclude certain testimony from Defendants' damages expert, George Strong, falls far short of the standard in this Circuit to preclude expert testimony. Strong – a CPA and a Certified Management Consultant with a degree in economics from Yale, and an MBA from Harvard – is an experienced damages expert at Cornerstone Research, Inc., one of the nation's premier consulting firms. Strong is also accredited in business valuation and financial forecasts by the American Institute of Certified Professional Accountants. He has testified as an expert in countless cases over the last twenty years, many of them including complex intellectual property disputes and involving the music and entertainment industry. Ignoring those credentials and experience, which readily satisfy the Second Circuit's liberal construction of the expert qualification requirements under *Daubert*, Plaintiffs assert that Strong is not qualified to render expert opinions on the music industry or to offer any criticism of the methodologies and analysis undertaken by Plaintiffs' expert, Dr. Richard Waterman. Neither challenge has any merit.

Strong is a damages expert. He is not required to be an expert in the music industry – Defendants have retained a separate expert on the music industry – in order to provide his opinions on issues relevant to the jury's determination of statutory damages: the revenues lost by Plaintiffs resulting from Defendants' conduct and the profits earned and expenses saved by Defendants from that conduct. Strong is also qualified to critique Dr. Waterman's statistical analysis of the volume of allegedly infringing downloads on LimeWire, a core component of Plaintiffs' damages case, given Strong's own experience and familiarity with statistical methodologies as part of his prior damages work.

Plaintiffs' objections to the reliability of Strong's opinions are likewise insufficient to warrant exclusion under *Daubert*. In his report, Strong calculates the profits earned and

expenses saved by Defendants that are attributable to the infringements at issue in this case. That analysis, *which uses Plaintiffs' own estimates of the total number of LimeWire downloads*, derives amounts that are many multiples smaller than the unquantified "millions" that Plaintiffs claim. While Plaintiffs argue that Strong's methodology with respect to "expenses saved" is flawed and that his assumptions are speculative, those arguments are for the jury and cannot justify excluding the opinions under *Daubert*.

Strong's opinion that file sharing on LimeWire had a minimal, if any, impact on Plaintiffs' revenue declines is grounded in research performed by Strong into actual evidence of activity after the LimeWire shutdown, analysis of shutdowns of other p2p sites, analysis into whether files shared on LimeWire were substitutive or complementary (well-established economics concepts), as well as review of the extensive literature and other studies concerning the impact of file sharing. This unquestionably complies with *Daubert*. Similarly, Strong's conclusion that there is no causal link between the infringements on LimeWire and the declining revenues suffered by Plaintiffs is grounded in facts and data, including data published by Plaintiffs and their trade organizations (the RIAA and the IFPI), industry data, Plaintiffs' own SEC filings, and documents produced from Plaintiffs' own files and the files of third parties.

Plaintiffs have retained an expert, Professor Liebowitz, who disagrees with Strong's conclusions. Professor Liebowitz asserts that one factor and one factor alone – file sharing – is the explanation for the record industry's declining revenues and that none of the other multiple events that were at play during LimeWire's lifetime had any impact. Strong, on the other hand, will testify that there were multiple causes of the record companies' declining revenues and that file sharing on LimeWire was not, and could not have been, the cause of this entire decline. Plaintiffs have already conceded that "Defendants can argue that other factors like 'the economic

recession,' 'bankruptcies of record wholesalers and retailers' and 'increased competition for spending on leisure' . . . contributed to Plaintiffs' decline in revenues." (Reply In Support Of Plaintiffs' Motion *In Limine* To Preclude Defendants Argument That Other Illegal Services Would Have Induced Infringement of Plaintiffs' Copyrights If Lime Wire Had Not, filed March 7, 2011, [Dkt. No. 604] at 3). Strong's opinions, which will undoubtedly assist the trier of fact, do just that.

Ultimately, then, the question of whether Professor Liebowitz or George Strong are correct presents a quintessential battle of the experts for the jury to evaluate. It cannot and should not be resolved on a *Daubert* motion. Plaintiffs' Motion should be denied.

BACKGROUND

A. Strong's Background and Experience

George Strong, of Cornerstone Research, Inc., is a damages expert from one of the nation's premier consulting firms. He holds a bachelor's degree in economics from Yale University, an MBA from Harvard University, and a JD from the University of San Diego School of Law. (*See* Mundiya Decl., Ex. A (Jan. 14, 2011 Expert Report of George Strong) ("Report") at ¶¶ 1-3.)[1] Strong is also a certified public accountant, a certified management consultant, and is accredited in business valuation and certified in financial forensics by the American Institute of Certified Public Accountants. (*Id.*)

Strong was retained by Defendants to serve as a damages expert. He has testified in over one hundred cases, more than thirty of them on damages in intellectual property cases. These cases frequently raise issues of lost profits or revenues. (Report, Ex. A; Mundiya Decl., Ex. B

[1] "Mundiya Decl., Ex. __" refers to the exhibits attached to the concurrently filed Declaration Of Tariq Mundiya In Support Of Defendants' Brief In Opposition To Plaintiffs' Motion To Preclude Certain Purported Expert Testimony By George Strong.

(02/14/11 Deposition of George Strong) ("Dep.") at 15:3-16:25.) Strong has authored several publications on copyright issues, participated in numerous conferences, and regularly engages in complex damage calculations in copyright cases. (Report, Ex. A.) Given his background in economics, and his testimonial experience in damages cases, Strong is qualified to provide opinions on why music sales and revenues have declined and whether they are attributable to file sharing in general, or LimeWire in particular.

Defendants submitted the Strong Report (Mundiya Decl., Ex. A) on January 14, 2011, and made him available for deposition on February 14. Within hours of completing Strong's deposition, and within a day of completing Professor Sinnreich's deposition,[2] Plaintiffs submitted a report authored by Stanley Liebowitz, a professor at the University of Texas. The infirmities in Professor Liebowitz's report are numerous. However, mindful of the Second Circuit standard under *Daubert*, Defendants have chosen to expose those flaws and unreasonable assumptions through the testimony of Strong and Professor Sinnreich, as well as through vigorous cross-examination.

B. Strong's Expert Opinions

Strong was retained to address two factors relevant to the jury's determination of statutory damages for the sound recordings at issue – namely, the revenues lost by Plaintiffs as a result of Defendants' conduct and the expenses saved and profits earned by Lime Wire. (Report ¶ 4.) Strong, among other things, concluded that:

- ***The findings of Plaintiffs' expert Dr. Richard Waterman regarding the volume of infringement of the works were unsupported, inflated, and provided a wholly insufficient basis to determine Plaintiffs' lost sales or profits.*** (Report, Section V.) Strong, who frequently applies statistical methodologies in his damage analyses similar to those employed by Dr. Waterman (Dep. at 15:3-16:22), concluded that Dr. Waterman's

[2] Professor Aram Sinnreich is, as Plaintiffs' concede (Pls.' Br. at 10-11), Defendants' record industry expert.

conclusions regarding the number of downloads were grossly inflated and did not serve as a proper basis for computation of sales or profit losses. (Report ¶¶ 25-37.)

- ***The effect of file sharing in general on recorded music sales was minimal and the impact of LimeWire was even smaller.*** Applying basic economic principles applicable to substitution and complementary goods, and relying upon academic literature, public filings issued by Plaintiffs themselves, market research reports, financial statements, analyst calls with investors, industry reports, government studies, and even data relied on by Plaintiffs (*see, e.g.*, Dep. at 110:8-112:19; Report ¶¶ 38-52), Strong concluded that the effect of file sharing, as a whole, on music sales would be small. Strong specifically examined the impact on the record labels of *LimeWire's file sharing* in the context of at least eleven other p2p file sharing programs which users could have turned to in the absence of LimeWire. (*See* Report ¶ 54.) Reviewing data available through Alexa, a service that monitors website activity, Strong demonstrated that the shutdown of LimeWire did not reduce file sharing or increase music sales. (Report ¶¶ 63-75; Dep. at 166:5-169:12.) It is thus not surprising that Plaintiffs appear *not* to have raised a *Daubert* challenge to Strong's opinion that the effect of LimeWire on record company revenues was minimal. (Report, Section VII.)

- ***There was no causal link between the use of LimeWire to infringe Plaintiffs' works and any purported declines in revenue.*** Strong concluded that there had been no demonstration that harm was caused by file sharing generally or LimeWire in particular. (Report ¶¶ 77-110; Dep. at 129:6-13.) Strong demonstrated, after analyzing vast amounts of industry data, that market and technological shifts other than p2p file sharing had driven a transformation in the recorded music industry that was unconnected to the use of LimeWire. Strong ultimately concluded that multiple causes, unrelated to file sharing on LimeWire, were responsible for the decline in physical sales. (Report ¶ 110; Dep. at 250:16-251:3.)

- ***Lime Wire's expenses saved were based on a hypothetical license negotiation, and profits attributable to the works was between $2 and $6 million.*** [redacted] Strong also performed an analysis of the "expenses saved" by LimeWire, showing that the expenses saved would be those royalties LimeWire would

[3] In determining actual damages under the copyright statute, 17 U.S.C. 504(b) makes clear that, to the extent lost profits are claimed as a basis for recovery, the "copyright owner is entitled to . . . any profits of the infringer that are attributable to the infringement." As Strong notes, one cannot make an arbitrary determination that every penny of the defendant's profit is attributable to the defendant's infringement but rather must carefully examine the financial performance of the defendant to determine what portion of profits are "attributable to" the infringement at issue. (Report ¶ 128 n.278.)

have been able to pay and that a rational economic actor such as LimeWire would not have agreed to any royalty greater than its expected profits (in a range of $2 million or $6 million). (Report ¶¶ 143-45.)

ARGUMENT

THE COURT SHOULD DENY PLAINTIFFS' MOTION TO PRECLUDE CERTAIN PORTIONS OF STRONG'S EXPERT TESTIMONY

A. The Standards Under Federal Rule Of Evidence 702

"The decision to admit expert testimony is left to the broad discretion of the trial judge[.]" *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995). That discretion is guided by Fed. R. Evid. 702. Because "[t]he Rules of Evidence provide a liberal standard for the admissibility of expert testimony," *United States v. Dukagjini*, 326 F.3d 45, 52 (2d Cir. 2003), "rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Advisory Comm. Note, 2000 Amendment.

Given that Rule 702's qualification requirement "must be read in light of the liberalizing purpose of the Rule," *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985), "[c]ourts within the Second Circuit have liberally construed expert qualification requirements when determining if a witness can be considered an expert." *Cary Oil Co. v. MG Ref. & Mktg., Inc.*, 2003 WL 1878246, at *1 (S.D.N.Y. Apr. 11, 2003) (citations and quotations omitted); *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 2006 WL 2128785, at * 5 (S.D.N.Y. July 28, 2006) ("[A]n expert should not be required to satisfy an overly narrow test of his own qualifications.") (alteration in original). No single factor or credential controls; instead, the "court should look at the totality of the witness' qualifications in making this assessment." *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 259 (E.D.N.Y. 2007); *Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (Posner, J.) ("The notion that [*Daubert*] requires particular credentials for an expert witness is radically unsound.").

The testimony of a qualified expert is presumed admissible. *See In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007) ("[T]he assumption the court starts with is that a well qualified expert's testimony is admissible."); Fed. R. Evid. 702, Advisory Comm. Note ("[A] review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule . . . ."). Such testimony is admissible so long as it "rests on a reliable foundation and is relevant." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592, 597 (1993). *Daubert*'s "test of reliability is 'flexible,'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), and a trial court must focus "solely on [the expert's] principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. "As the Second Circuit has noted, district courts should presume expert evidence is reliable." *UMG Recordings, Inc. v. Lindor*, 531 F. Supp. 2d 453, 456 (E.D.N.Y. 2007) (citing *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995)). In accordance with that principle, an expert's methodology is "reliable" and, therefore, admissible where it is "consistent with the approach used by experts in the field." *Arista Records, Inc. v. Flea World, Inc.*, 2006 U.S. Dist. LEXIS 14988, at *43 n.14 (D.N.J. Mar. 31, 2006).

Expert testimony satisfies the relevance prong of *Daubert* when it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Figueroa v. Boston Scientific Corp.*, 254 F. Supp. 2d 361, 365 (S.D.N.Y. 2003). "[B]ecause the federal rules emphasize 'liberalizing expert testimony, doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions.'" *United States v. Jakobetz*, 955 F.2d 786, 797 (2d Cir. 1992) (quoting 3 Weinstein & Berger, Weinstein's Evidence § 702[03] at 730 (1989)). "The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations." *Id.*

B. Strong Is Qualified To Rebut Dr. Waterman's Analysis.

Plaintiffs assert that Strong cannot testify about the myriad flaws in Dr. Waterman's analysis and conclusions because of his "lack of expertise on statistical and survey techniques and his meager knowledge of the relevant technologies." (Pls.' Br. at 9.) Plaintiffs' attacks on Strong are misplaced. At most, they go to the weight of his testimony and not its admissibility. Strong testified that he frequently employs statistical methodologies in assessing damages. (Dep. at 15:3-16:22.) He also testified [redacted]

Plaintiffs' attack on Strong's qualifications on survey techniques (Pls.' Br. at 8) is also misguided. Strong testified that he has experience in evaluating and analyzing surveys and regularly uses them as part of his damage analyses. (Dep. at 26:2-27:23 ("I've been called upon in prior cases to look at whether survey methodologies . . . comport with reality, are reasonable, the assumptions are reasonable, the conclusions are reasonable . . . . Then of course I do assess the conclusions of surveys and whether they make sense in the real world.").)

Finally, Plaintiffs challenge Strong's opinions because he is not a "technology" expert and could not provide a technical explanation why files "that have matching names for song titles would not actually be a match." (Pls.' Br. at 8.) Although Defendants have retained Professor Gün Sirer to explain the technical aspects of such "spoof" files, that does not mean Strong is not qualified to testify, from an economic perspective, that music downloaded from LimeWire and other p2p sites is not a perfect substitute for legally purchased music because of

"spoofs" and other technological impediments. Even Plaintiffs' economist expert Professor Liebowitz – no technology expert – testified that [redacted]

C. Strong Is Qualified To Testify About The Music Industry Or Music Technologies As Part Of His Opinion That Plaintiffs Did Not Suffer Harm Caused By LimeWire.

Plaintiffs assert that Strong is not qualified to testify about the music industry or technologies related to music because he has "never worked in the music industry, he has never studied in the music industry in his academic pursuits, he has never published anything in the music industry." (Pls.' Br. at 9.) Plaintiffs' arguments are unavailing. Strong need not be an expert in the recorded music industry, or otherwise have expertise in the underlying music services (whether legal or illegal), in order to testify about the extent of harm suffered by the recorded music industry due to file sharing (Report, Section VI) or LimeWire (Report, Section VII). Nor is such specialized expertise necessary for Strong to opine that Plaintiffs have not established a causal link between any declines in revenue and the infringements using LimeWire (Report, Section VIII).

Strong – a damages expert testifying in a damages trial – will be analyzing the extent of harm to Plaintiffs caused by a series of events over the last ten years. He does not need to be an expert in the industry in which Plaintiffs operate in order to provide those opinions. Courts

routinely recognize that damages experts are frequently called upon to testify as to the economic harm suffered and are not required to have specific industry experience in order to testify about the harm caused by identifiable events.[4] *See Regal Cinemas, Inc. v. W & M Props.*, 90 F. App'x 824, 833 (6th Cir. 2004) (holding that expert who was a certified public accountant, business appraiser, and director of litigation support group of an accounting firm, and had testified in at least 50 cases, did not require experience in movie theater industry to opine on movie theater's lost profits, in particular where party also offered a separate expert in the movie theater industry); *Amigo Broad. v. Spanish Broad. Co.*, 2006 WL 5503872, at *3 (W.D. Tex. Apr. 21, 2006) ("expert need not have specialized experience in a particular industry to be qualified to testify on the issue of damages").

Plaintiffs also ignore the fact that Strong has opined on damages (whether it be lost profits or reasonable royalties) in several cases involving the music and entertainment industry. (*See, e.g.*, Report, Ex. A (at entries 12, 13, 14, 26); Dep. at 326:24-334:9.) Strong is thus clearly qualified to issue opinions on the lack of harm suffered by the Plaintiffs based upon his review of data, industry publications, news articles, Plaintiffs' own public filings, and studies conducted by other experts. Indeed, his discussions of the history and structure of the industry (Report ¶¶ 13-24, 78-80), and the changes in the industry over the time LimeWire was in existence, provide necessary context for Strong's conclusions, which, in turn, will assist the jury in understanding the various factors that must be taken into account in determining whether Plaintiffs suffered lost revenues resulting from Defendants' conduct. (*See* Dep. at 23:14-24; *see also Celebrity Cruises Inc. v. Essef Corp.*, 434 F. Supp. 2d 169, 192 (S.D.N.Y. 2006) ("[I]t is appropriate for an expert

[4] Professor Liebowitz, who testified [redacted]

to offer background evidence underlying his opinion and such evidence need not be independently admissible.") (internal citations omitted); *United States v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001) (allowing expert testimony in case involving extortion by labor coalition, which "gave the jury background that would enable them to understand how coalitions functioned").

D. Strong's Testimony On Causation Is Reliable, Based Upon Sufficient Facts Or Data, And Will Assist the Jury.

Strong analyzed numerous sources – including academic literature, market research data, Plaintiffs' own financial statements and disclosures, industry reports, and government studies – to form his expert opinion on a critical question, namely the extent to which Plaintiffs' sales and profits would be higher in a world without LimeWire. Based on his analysis, Strong concluded that there is significant evidence that music downloaded using file sharing technology, including LimeWire, had a very small, if any, proven impact on music sales. (Report ¶¶ 7, 38-76; Dep. at 128:17-129:13.) Strong opined that the declines in CD sales over the last decade, and in record company revenues generally, were the result of various economic, market, and technological factors unrelated to file sharing in general and LimeWire in particular. (Report ¶ 9; Dep. at 205:18-206:10, 250:16-251:3.)

Plaintiffs contend, based on selective references to Strong's Report and deposition transcript, that his causation testimony is "unreliable," "based on speculation," and fails to offer "independent opinion or analysis." (Pls.' Br. at 11.) As demonstrated below, Plaintiffs' quibbles with Strong's opinions on causation reflect nothing more than a disagreement with his conclusions. While not surprising, Plaintiffs' disagreement is insufficient to meet their burden under *Daubert*. *See Discover Fin. Servs. v. Visa U.S.A., Inc.*, 582 F. Supp. 2d 501, 506 (S.D.N.Y. 2008) (denying *Daubert* motion because, "[t]o the extent Defendants disagree with the

conclusions [plaintiff's expert] reaches, their experts can testify about their contrary interpretations, and Defendants can challenge [his] conclusions on cross-examination.")

1. Strong's Opinions Are Reliable.

Plaintiffs argue that Strong's analysis is "unreliable" because he "failed to control for the impact of file sharing" as a potential cause of the declines in music sales and revenues starting in 1999-2000. (Pls.' Br. at 12-13.) Specifically, Plaintiffs assert that Strong did not examine how each of the alternative causes he identified impacted music sales and revenues before the emergence of file sharing, and that "file sharing is an obvious candidate to explain the significant declines the record industry began to experience starting in the 1999-2000 period." (*Id.*) That argument is misconceived.

Unlike Professor Liebowitz, who attributes virtually all of the industry wide declines to file sharing, Strong's analysis was not designed to, nor did it need to, isolate a single cause for those declines. Rather, Strong considered vast amounts of evidence – identified in pages of source materials (*see* Report, Ex. B (11-page list of all documents considered by George Strong and cited in 298 footnotes throughout his Report)) – relating to many factors that had an impact, collectively, on music sales since 2000, and concluded that it was those factors, as opposed to file sharing generally or LimeWire specifically, that accounted for the declines. As Strong repeatedly explained at his deposition:

> [T]he specific question is . . . what was the impact of LimeWire on the decline in revenues. And there are a whole host of other factors that, as we [have] seen that have impacted music company revenues *that have nothing to do with LimeWire*. So whether it is, you know, factor 1, factor 2 or factor 3 viewed individually as opposed to what the aggregate amount of it is, is not, didn't seem to be appropriate for my attention.

(Dep. at 250:16-251:3 (emphasis added); *see also id.* at 205:18-206:10 ("I'm looking at the ability to take all of these individual effects, unbundling, competition, change in distribution,

change in big box sales versus, you know, etc. . . . [s]o if there were just a focus of studying on one . . . I don't think that would speak to the issue at hand here which is to understand how all of those things caused a decline in sales and whether there is anything left over that could be attributable to P2P file-sharing"). Accordingly, there was no need to "control for the impact of file sharing" and the absence of any such control in Strong's analysis does not undermine the reliability of his opinions. *See Johnson & Johnson*, 2006 WL 2128785 at *6 (alleged failure by expert to account for major variables between two companies went to weight not admissibility); *Patel v. Verde Valley Med. Ctr.*, 2009 WL 5842048, at *3 (D. Ariz. Mar. 31, 2009) (arguments concerning expert's failure to account for other causes of lost profits "should more properly [be] present[ed] to the jury, as they go to weight and not to admissibility").[5]

[5] *R.F.M.A.S., Inc. v. So*, 2010 WL 4341331 (S.D.N.Y. Oct. 12, 2010), cited by Plaintiffs (Pls.' Br. at 13), is inapposite. In that case, causation testimony by plaintiffs' two damages experts was excluded because the court found that other than asserting defendant's alleged infringement, neither expert "actually investigated *any* other possible causes" for the decline in plaintiffs' sales. *R.F.M.A.S., Inc.*, 2010 WL 4341331 at *22.

By contrast, Defendants – through Strong – will show that *many causes* over the last decade worked together to affect revenues of the record companies and that file sharing through LimeWire had a minimal impact on those declining revenues. These different approaches need not be resolved now; the jury should be entitled to evaluate whether Strong or Professor Liebowitz presents the more credible theory. This is a classic battle of the experts that should be resolved by the jury at trial, not on a pre-trial *Daubert* motion. *See Maiorana v. U.S. Mineral Prods. Co.*, 52 F.3d 1124, 1135 (2d Cir. 1995) (trial courts "should not arrogate the jury's role in evaluating the evidence and the credibility of expert witnesses by simply choosing sides in the battle of the experts") (quotations omitted); *Schwaber v. Hartford Accident and Indem. Co.*, 2007 WL 4532126, at *4 (D. Md. Dec. 17, 2007) ("[P]laintiff's evidence merely establishes a classic duel between competing experts, and judging the credibility of experts falls squarely within the province of the jury.") Nor is it appropriate "to preclude expert testimony simply because additional contradictory evidence exists." *Adani Exps. Ltd. v. AMCI (Export) Corp.*, 2008 WL 4925647, at *4 (W.D. Pa. Nov. 14, 2008).

2. Strong Has Not Ignored Any Relevant Factors.

Plaintiffs identify three purportedly "relevant variables" that Strong is alleged to have ignored. (Pls.' Br. at 13-14.) None of those variables renders Strong's opinions inadmissible.

First, Plaintiffs assert that Strong's causation opinions lack reliability because he did not consider LimeWire's "share of the peer-to-peer" market or the "extent to which Lime Wire was responsible for the infringement of Plaintiffs' works" relative to other p2p services. (Pls.' Br. at 14.) Plaintiffs are wrong. Strong expressly included data in his report reflecting LimeWire's popularity vis-à-vis other file sharing sites. (*See* Report, Ex. 1.) However, he also testified at his deposition that it was the pervasive and readily-available existence of other sites, rather than LimeWire's "market share," that was most relevant to his analysis. (Dep. at 175:2-18.) In

particular, Strong's analysis demonstrated – in a section of his report that Plaintiffs do *not* challenge on any grounds (*see* Pls.' Br. at 18) – that, given the numerous p2p alternatives to LimeWire, most, if not all, LimeWire users would have turned to alternatives other than purchasing music if LimeWire did not exist. (Report ¶¶ 53-75.) Indeed, Strong demonstrated – using historical data from other shutdowns and analysis of web traffic after the shutdown of LimeWire in October 2010 – that file sharing was not reduced, nor did music sales increase, because LimeWire users simply migrated to the proliferation of other p2p sites. In that context, LimeWire's specific market share did not have any particular relevance to Strong's analysis. (*See* Dep. at 175:5-13 ("so if [Lime Wire's] market share had been high, then there would be more people displaced to other p2p sites").[6]

Second, Plaintiffs contend that Strong "did not attempt to measure the total decline in Plaintiffs' revenues or sales" and, therefore, did not know "the full extent to which Plaintiffs have been harmed economically." (Pls.' Br. at 13-14.) But Plaintiffs offer no explanation for why Defendants need to "measure" the total decline in sales and revenues in order to identify the causes of those declines. Likewise, that Strong did not "measure the magnitude" of the impact of the alternative causes on music sales and revenues (Pls.' Br. at 16) does not in any way undermine his opinion that those alternative factors were a substantial cause of any decline. It is remarkable that Plaintiffs fault Defendants' experts for failing to quantify the impact of the various causes, when Plaintiffs themselves testified [redacted] Courts have held that experts opining on

[6] We note that Professor Liebowitz – unlike Strong – [redacted]

causation need not quantify the particular effect of any single factor. *See UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 1003 n.9 (E.D. Cal. 2004) (finding that it "is not necessary for the expert to quantify the [impact]; his characterization of [it] as 'substantial' is sufficient to make his opinion relevant").[7]

Finally, Plaintiffs' assertion that Strong did not consider the impact of illegal file sharing on the price of music reflects a misunderstanding of Strong's opinions. (Pls.' Br. at 14.) Strong did consider the impact of illegal file sharing on the price of music because he testified that, in the absence of LimeWire, users would have gone to one of the widely-available and proliferating p2p sites rather than purchase music and, therefore, LimeWire had a minimal impact on record company revenues (which, ultimately, depend upon the price of music sold to consumers). (Report ¶¶ 53-75; Dep. at 168:12-169:12.)

3. Strong Did Not Ignore "Critical Facts" About The Decline In Music Sales.

Plaintiffs cherry-pick two of the numerous alternative factors identified in Strong's report as causing a decade-long decline in record industry sales – lower distribution costs and "unbundling" of music – and argue that his entire analysis should be excluded because neither of those two factors adequately explain the decline. (Pls.' Br. at 15.) Plaintiffs' myopic approach not only mischaracterizes Strong's analysis, but it also fails to provide any basis for exclusion.[8]

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[7] *See also Abrams v. Ciba Specialty Chems. Corp.*, 2010 WL 779276, at *7 (S.D. Ala. Mar. 2, 2010) ("Daubert does not inflexibly demand quantification of expert opinions in order for them to be admissible."); *VSI Holdings, Inc. v. SPX Corp.*, 2005 U.S. Dist. LEXIS 45979, at *48 (E.D. Mich. Apr. 12, 2005) (failure to quantify "goes to weight and not admissibility.").

[8] *Brooks v. Outboard Marine Corp.*, 234 F.3d 89 (2d Cir. 2000) (Pls.' Br. at 16), is clearly distinguishable. There, expert testimony concerning causes of a boating accident was found unreliable because the expert "had never seen the actual boat or motor either in person or in photographs, had never spoken to either of the boys involved in the accident, was unaware of the dimensions of the boat and the placement of the seats in relation to the motor, did not know precisely what happened and where the boys were positioned in the time immediately

[redacted] Over the course of the decade that LimeWire was in existence, Strong opines that many factors worked in tandem to impact revenues, and at varying times some factors had more impact or prominence than others. Thus, unbundling in the iTunes era obviously had a greater impact than before iTunes. (*See* Report ¶¶ 87-92.) The impact of competition from DVD sales may have had a greater impact in the 2003-2007 period when DVD sales were on the increase than when DVD sales were not growing as quickly. [redacted]

Plaintiffs understandably try to distance themselves from their own statements, in which *they* specifically identified the cause of declining sales *as something other than piracy*. (*See e.g.*, Mundiya Decl., Ex. E, (Oct. 30, 2009 Sony Music Group analyst conference call) at 4 ("Although revenues were favorably impacted by sales of Michael Jackson catalog product, Music segment sales decreased primarily *due to the accelerated decline in the physical music market brought on by the worldwide economic slowdown and the impact of appreciation of the yen.*") (emphasis added).)[9]

Plaintiffs are free to raise at trial any contrary conclusions they draw from each of the alternative factors identified by Strong as to the cause of the record industry's declining sales.

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preceding the accident, and had never attempted to reconstruct the accident and test his theory." *Id.* at 92.

9 [redacted]

However, "that [Plaintiffs] disagree with [Strong's] conclusions as to the import or potential value of alternative explanations does not support their incorrect assertion that he 'ignored' them altogether." *Abrams*, 2010 WL 779276 at *6.[10]

4. Strong's Opinions Are Sufficiently Grounded In Facts And Data.

Plaintiffs' attacks based on the supposed lack of "empirical" or "factual" basis for Strong's Report (Pls.' Br. at 16-17) are without merit.

Plaintiffs assert that Strong has no empirical basis for his conclusion that the stimulated demand for complements of music (such as concerts and merchandising) brought about by digital distribution of music, including file sharing, conferred a benefit on record companies. (Pls.' Br. at 16-17.) Yet, Plaintiffs ignore that Strong's conclusions rely primarily upon Plaintiffs' own public statements and SEC filings. (*See* Report ¶¶ 113-18 (citing Sony Corp. FY 2009 Form 20-F, filed June 28, 2010).)

Equally unavailing is Plaintiffs' claim that Strong does not have a factual foundation for his opinions concerning the lower costs of digital distribution and the increased competition in music promotion and distribution. (Pls.' Br. at 17.) Once again, Plaintiffs' own statements and disclosures form the core basis for Strong's conclusions. (*See* Report ¶ 94.) Indeed, even the Plaintiffs' CFOs have admitted [redacted] In addition, Strong reviewed and drew from various other sources, including music industry publications, news articles, equity analyst reports, and internet commentary. (*See*

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10 Plaintiffs' assertion that Strong failed to analyze "trends" in the context of the alternative causes identified in his analysis is belied by the record. (Pls.' Br. at 15-16.) As is evident from the face of his report, Strong gathered, reviewed, and synthesized a substantial amount of market, economic, and industry data all of which points to a decade-long decline for which there are valid explanations other than file sharing in general and LimeWire in particular. (Report, Ex. B, ¶¶ 77-110; Dep. at 205:18-206:10, 250:16-251:3.)

Report ¶¶ 93-100.) This is precisely the type of data that courts routinely recognize as being suitable for reliance by an expert. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 524-25 (2d Cir. 1996) (finding expert affidavit "was laid on a proper foundation" where he reviewed studies and reports concerning subject matter of his opinions); *Nobody In Particular Presents, Inc. v. Clear Channel Commc'ns*, 311 F. Supp. 2d 1048, 1120 (D. Colo. 2004) (expert's opinion sufficiently reliable because it was based on "economic data" and "his research of industry materials regarding the industry's categorization of rock music").

In any event, as with Plaintiffs' other objections, "[t]o the extent the [Plaintiffs] have any questions about the weight or the sufficiency of the evidence upon which [Strong] relied, or the conclusions generated therefrom, those questions can be asked on cross-examination." *Park W. Radiology v. Carecore Nat'l LLC*, 675 F. Supp. 2d 314, 326 (S.D.N.Y. 2009).

5. Strong Applied His Expertise On Issues Relating To Causation And Damages.

Plaintiffs assert that Strong did not employ "any analytical methodology" or use his "own specialized knowledge," but rather relied "uncritically" on conclusions drawn by others. (Pls.' Br. at 19.) That argument is without merit and ignores both his Report and testimony.

Strong applied his significant expertise and experience in economic theory and its real world applications in the context of damages – which, as he testified, involves "many disciplines, including . . . accounting, financial analysis, some economics, a little statistics, some marketing knowledge" – to arrive at his *own* conclusions about, among other things, the causes of the decline in record industry sales and revenues since 2000. (*See* Report at ¶¶ 4-12; Dep. at 29:17-30:18.)

Strong examined – from an economics standpoint – the causal relationship between file sharing and recorded music sales, the differing characteristics of music downloads as contrasted

against music sold on physical media (such as CDs), and concluded that those products are not close substitutes, but, rather, complementary goods, *i.e.*, downloads do not replace CD purchases and, in fact, can stimulate such purchases. (*See* Report ¶¶ 43-52; Dep. at 137:15-144:4; 220:25-223:16.) That analysis, and his review of relevant academic literature, supported Strong's opinion that the overall effect of LimeWire on Plaintiffs' sales is small. (Report ¶¶ 53-76.)

Strong's methodology in forming his own opinions, based on the vast amount of information he considered, comes well within the ambit of the standards for admissibility under *Daubert*. *See, e.g.*, *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005) (district court did not abuse discretion in allowing expert testimony based on, *inter alia*, books, press releases, and newspaper articles); *Eclipse Elecs. v. Chubb Corp.*, 176 F. Supp. 2d 406, 412 (E.D. Pa. 2001) (an expert "may rely on the research, studies and expertise of others, so long as they are of the sort of information regularly relied on by experts in the field").

Plaintiffs' other purported criticisms do not establish otherwise.[11] (Pls.' Br. at 18-19.) For instance, Plaintiffs' argument that Strong failed to offer a "professional opinion on the relative merits" of the various studies cited in his report or "satisfy" himself that the studies were reliable misinterprets the applicable inquiry under *Daubert*. (Pls.' Br. at 18.) There is no such requirement under *Daubert*, and Plaintiffs point to none in the case law.[12] Even Professor Liebowitz testified [redacted]

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11 Plaintiffs' reliance on *R.F.M.A.S., Inc.* is, once again, misplaced. (Pls.' Br. at 19.) The court there excluded testimony from the plaintiff's two damages experts because, among other flaws, they based their conclusions solely on "the set of assumptions that plaintiff directed them to employ and the circumscribed universe of data available to them." 2010 WL 4341331 at *22. Plaintiffs do not allege, nor can they, any such circumstances here.

12 Contrary to Plaintiffs' assertion, Strong testified that in conducting his analysis, he did satisfy himself that the results of the various studies he considered were "consistent" and that the assumptions used were reasonable and adequate. (*See* Dep. at 155:4-12; 163:14-24.)

[redacted][13] In all events, issues concerning the reliability of sources relied on by an expert witness go to weight, not admissibility. *See Park W. Radiology*, 675 F. Supp. 2d at 326.

In short, Strong's opinions will substantially assist the jury's understanding of the essential issue of causation: would sales of music have been higher absent LimeWire, and did LimeWire (as opposed to the many other factors at work during LimeWire's existence) cause any revenue losses? *See In re Zyprexa*, 489 F. Supp. 2d at 283 ("Freely admitted is expert testimony that is likely to substantially assist the average person in understanding the case – even if it simply explains facts and evidence already in the record.").

E. Strong's Testimony On The Expenses Saved By LimeWire Is Grounded In Well-Established Law And Is Neither Speculative Nor Unreasonable.

Plaintiffs criticize Strong's calculation of "expenses saved" (though not his profit calculations) and, in particular, his application of the "hypothetical negotiation" framework. (Pls.' Br. at 19-24.) Stripped of its rhetoric, Plaintiffs' argument boils down to three complaints: (1) Strong fails to establish that resort to a "hypothetical negotiation" is necessary or appropriate (Pls.' Br. at 22-23); (2) Strong incorrectly applies the "hypothetical negotiation" framework (*id.* at 20-22); and (3) Strong's assumptions are "speculative" and "unreasonable" (*id.* at 23-24). None of those arguments is sufficient to undermine Strong's opinions, much less warrant their exclusion under *Daubert*.

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13 *See Johnson & Johnson*, 2006 WL 2128785 at *7 n.4 (rejecting *Daubert* challenge where "any argument as to lack of publication would also apply to [movant's expert] because his report also lacks citations to academic studies supporting his methodology."); *Abbott Labs v. Sandoz, Inc.*, 2010 WL 4012493, at *28 (N.D. Ill. May 24, 2010) (rejecting *Daubert* challenge, noting that "Abbott shows that Sandoz's criticisms of Dr. Davis – for failing to perform hands-on testing . . . apply equally to its own expert, Dr. Chambliss.").

First, Plaintiffs argue that resort to a "hypothetical negotiation" is not necessary because "Plaintiffs have been licensing their music for years." (Pls.' Br. at 23.) That argument misses the point. Reference to actual licenses or negotiations is rarely utilized by experts in the field, and has been viewed with increasing skepticism by courts, given the variability of factors that may affect the outcome of such negotiations. (*See* Dep. at 304:23-306:19 ("comparability is now an increasingly high standard to achieve in order to use other actual licenses"); *see also Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 871 (Fed. Cir. 2003) ("comparisons to other licenses are inherently suspect because economic and scientific risks vary greatly").

In particular, Strong noted at his deposition that "the ability to use prior actual licenses or even negotiations" is even less appropriate "if there is a threat of litigation hanging over the head of one of the parties" because such negotiations are viewed "as not being representative." (Dep. at 305:18-22.) Indeed, this Court, among others, has recognized this very limitation on the use of actual offers or licenses in setting damages for infringement. *See Alpex Computer Corp. v. Nintendo Co.*, 1994 WL 139423, at *9 (S.D.N.Y. Mar. 18, 1994) (Wood, J.) ("In this context, involving on-going infringement and the significant threat of litigation, [prior] offers to license a patent deserve little evidentiary weight in determining damages.").

Second, Plaintiffs disagree with Strong's application of the "hypothetical negotiation" framework. Putting aside that a party's disagreement with an expert's opinion or assumptions provides no basis for exclusion (*see supra* at 17-18), Plaintiffs' criticisms of Strong's report are unavailing. For example, Plaintiffs assert that Strong's analysis is flawed because he focused solely on "Factor 15," and "ignored" the 14 other factors, set forth in the *Georgia-Pacific* decision. (Pls.' Br. at 20-21.) Not true. Strong "looked at all the factors, but factor 15 is the . . . most important [because it] subsumes all the other factors within it . . . ." (Dep. at 299:16-20.)

In any event, Strong's focus on the "hypothetical negotiation" contemplated by factor 15 was entirely appropriate given that his analysis sought to identify the upper bounds of the range of reasonable royalties that Lime Wire would have be willing pay in such a negotiation – and not a specific value. (Report ¶¶ 143-45; Dep. at 310:13-18.) Because the remaining *Georgia-Pacific* factors would only affect placement of damages within that range, there was no need for a factor-by-factor analysis. (*Id.*)

Plaintiffs also claim that Strong incorrectly focused on Lime Wire's actual, rather than anticipated, profits in determining the maximum amount Lime Wire would be willing to pay in a hypothetical negotiation. (Pls.' Br. at 21.) That is a distinction without a difference. (*See* Dep. at 303:16-304:7 ("In terms of actual sales that were made, that's probably the most persuasive evidence of what one could have reasonably anticipated."); *see also Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1568 (Fed. Cir. 1984) ("Evidence of the infringer's actual profits generally is admissible as probative of his anticipated profits.").[14]

Finally, Plaintiffs attack the assumptions underlying Strong's "hypothetical negotiation" analysis as "speculative" and "unreasonable." (Pls.' Br. at 23.) As an initial matter, "a claim that the assumptions relied on by an expert are unfounded is generally an argument that goes to the weight rather than the admissibility of the evidence." *MacQuesten Gen. Contracting, Inc. v. HCE, Inc.*, 2002 WL 31388716, at *2 (S.D.N.Y. Oct. 22, 2002). Plaintiffs' contradictory arguments make no sense. They assert that Strong gave "no consideration" to *why* "Plaintiffs would have agreed to" a license deal with Defendants based on his calculation of Lime Wire's

[14] In cases where expected profits are considered, courts have limited them to projections that existed at the time the alleged infringement began. *See Interactive Pictures, Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001). Accordingly, Plaintiffs' reference to internal Lime Wire business plans and projections from 2005 and later (LeMoine Decl., Exs. 5, 6, 7, 8) – five years *after* Lime Wire is alleged to have begun infringing Plaintiffs' copyright – have little bearing on the analysis.

expenses saved. (Pls.' Br. at 23.) Yet, on the very next page, Plaintiffs excoriate Strong for offering a rationale as to *why* the "record companies would likely be willing to agree to such a license." (*Id.* at 24.) Either way, Plaintiffs' arguments go nowhere. Strong did not need to consider "the nature and scope of the license," or "how many copies of Plaintiffs' works would have been made" or "whether such a license would have caused substantial harm to Plaintiffs' existing lines of business." (*Id.* at 23.) As Strong explained, he was not "trying to put a specific number on [the royalty payment] within zero to $6 million, for example. . . [and so he] didn't really need to" consider such factors. (Dep. at 320:5-8.)[15]

Moreover, with respect to why Strong believed that Plaintiffs would agree to accept a license fee that was based on Lime Wire's "expenses saved," he explained that because "licensing revenues typically carry very low variable or incremental cost" to the copyright owner, "the entire amount of the $6 million" received as license fees from Lime Wire "would have been incremental [and] to that degree that is attractive because it is a net positive" to Plaintiffs. (Dep. at 311:20-312:24.) Further, given that his analysis was predicated on "a hypothetical negotiation where one presumes both parties have to consummate a deal," and that there "is a limit to the amount of profit that can be . . . secured," he properly concluded that in such a hypothetical negotiation, "both parties would be rational in accepting the deal." (Dep. at 318:19-319:2.) Plaintiffs may not agree with that outcome, but that disagreement is immaterial for purposes of exclusion under *Daubert*. (*See supra* at 17-18.)

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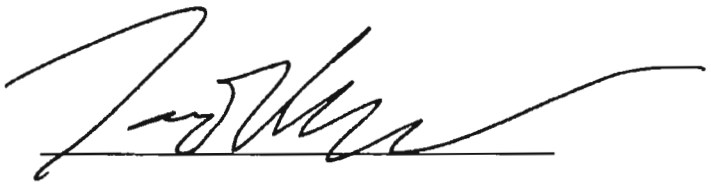
15 (*See also* Dep. at 320:14-17 ("because I have articulated an upper bound and not a specific point estimate within the zero to 6 million, I don't think [such factors] would have been relevant").)

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion to Preclude Certain Purported Testimony by George Strong.

Dated: New York, NY
March 8, 2011

WILLKIE FARR & GALLAGHER LLP



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