

EXHIBIT 2

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; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

ECF Case

06 CV 5936 (KMW)(DF)

REPLY DECLARATION OF RITA D. MITCHELL

I, RITA D. MITCHELL, hereby declare as follows:

1. I am admitted to practice before this Court and am associated with the law firm of Willkie Farr & Gallagher LLP (“Willkie Farr”), counsel of record for Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) in the above-captioned action. I submit this Reply Declaration in support of Defendants’ Motion for Partial Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Transcript of Proceedings Held Before the Honorable Kimba M. Wood on February 18, 2011.

3. Plaintiffs in their opposition to this motion assert that “Defendants do not say whether even a single one of the ‘judgments’ that Willkie Farr reviewed *granted an award of statutory damages.*” See Plaintiffs’ Opposition Brief at 4. In addition to the statutory damages-based judgment attached to my original declaration in support of this motion at Exhibit 4, I can further confirm that during the review referenced in my original declaration, I or the other Willkie Farr attorneys working at my direction and under my supervision ascertained that all 678 judgments produced by the RIAA, either on their face or with reference to the corresponding complaints produced by the RIAA, were for statutory damages.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 1, 2011.


Rita D. Mitchell

EXHIBIT 1

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2
3 ARISTA RECORDS LLC, et al,

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4 Plaintiff,

4
5 v. 06 CV 5936 (KMW)

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6 LIME WIRE LLC, et al,

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7 Defendant.

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8 -----x

8 New York, N.Y.
9 February 18, 2011
9 12:10 p.m.

10

10 Before:

11

11 HON. KIMBA M. WOOD,

12

12 District Judge

13

13 APPEARANCES

14

14 MUNGER TOLLES & OLSON, LLP

15 Attorneys for Plaintiff

15 GLENN POMERANTZ

16 KELLY KLAUS

16 JENNIFER PARISER

17

18 WILKIE, FARR & GALLAGHER, LLP

18 Attorneys for Defendant

19 JOSEPH T. BAIO

19 TARIQ MUNDIYA

20 MARY EATON

20 ROGER NETZER

21 JOHN OLLER

21 GREG JOSEPH

22 PAMELA JARVIS

22 TODD COCENZA

23

24

25

1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: Arista Records, LLC v. Lime Wire,
4 LLC. Counsel, state your appearances for the record.

5 MR. POMERANTZ: Glen Pomerantz on behalf of the
6 plaintiffs. With me is Kelly Klaus and Jennifer Pariser.

7 THE COURT: Very good. Thank you.

8 MR. BAIO: Your Honor, Joseph Baio on behalf of the
9 defendants. With me are Tarik Mundiya, John Oller, Mary Eaton
10 and for the subsequent argument, counsel will introduce
11 themselves.

12 THE COURT: Very good. Thank you. I've asked Judge
13 Freeman to be with me so that she can give you her decision on
14 outstanding discovery requests.

15 JUDGE FREEMAN: I have, I believe, somebody correct me
16 if I'm wrong, only two outstanding discovery matters. One,
17 whether there should be any 30(b)(6) depositions based on
18 materials I got from defendant's counsel yesterday and two, the
19 application by defendants to enforce compliance of the subpoena
20 on RIA. Is there anything else that anyone is aware of that
21 I'm forgetting about or is that it? Looks like that's it, I'm
22 seeing nodding heads. On the 30(b)(6) depositions, I've looked
23 at the materials that were submitted, I've looked at the
24 specific questions that were posed to plaintiff representatives
25 where those representatives could not answer the questions and

1 said things like "I don't know." Those questions for the most
2 part seem to be things along the lines of are you aware that
3 any studies were done, are you familiar with any reports or
4 documents. They seem to me to be largely covered by document
5 requests and if there were studies done they would have been
6 asked for, they presumably would have been produced and would
7 have been the subject of another motion.

8 I did not see something that looked really very
9 appropriate for deposition testimony in the first place. I was
10 not persuaded that further depositions would be appropriate at
11 this late stage and I'm going to stick with my ruling that
12 there should be no further 30(b)(6) depositions.

13 With respect to the RIA, I'm very concerned about the
14 ultimate timeliness of the application to me, because as I
15 track the history on this, it's my understanding that what
16 happened was that there was a subpoena served on the RIA back
17 in September, that it was brought to my attention and I ruled
18 on in December that I lacked jurisdiction because that was
19 brought in D.C. and should have been enforced in D.C. subject
20 to any transfer here.

21 There was then a period of time when the RIA was
22 communicating with defendants about a second subpoena that was
23 served on the RIA by defendants in New York, but all of that
24 was not brought to my attention until I believe January 24 and
25 I did not see a good reason why that was the case. Even apart

1 from the timeliness issue, I've looked at the merits of it all,
2 and some of the applications seemed to be moot, as it seems the
3 RIA has already complied with the subpoenas in part, for
4 example the issue about judgments or settlements, that seems to
5 have been taken care of already. There are other matters I did
6 not find compelling in terms of the documents that are being
7 requested outside what has already been produced by the RIA. I
8 gather the RIA has already produced a fair amount of material,
9 and even on the merits I would be inclined to deny this
10 application, and I'm going to do so.

11 I think that covers it for me.

12 THE COURT: Thank you very much. Any questions about
13 the rulings? Okay, good.

14 We'll move, then, to the agenda that I outlined for
15 counsel in our recent conference call. Before I do that, let
16 me ask counsel, is there anything you'd like to raise
17 beforehand?

18 MR. POMERANTZ: Yes, your Honor, if I may. We have
19 had some discussions since the call on Wednesday and I just
20 wanted to fill your Honor in on some of the discussions we've
21 had, because it may expedite things today.

22 First, your Honor had raised further briefing on the
23 issue of the album versus single issue, and asked us to confer
24 on a briefing schedule for additional briefing. We've agreed
25 to the following schedule: We will file a brief next Tuesday.

1 They will respond next Thursday. We will reply next Friday.

2 THE COURT: Very good.

3 MR. POMERANTZ: Second, your Honor, your Honor said we
4 would be starting trial May 2nd. I am requesting now that we
5 not have trial on May 23rd, that is the day my son is
6 graduating from college. The defendants said they do not
7 object to that. I just wanted to alert the Court to that
8 conflict.

9 THE COURT: Okay, let me just check when that is.

10 MR. POMERANTZ: It's not quite a crisis, but I'm hoping
11 your Honor will indulge.

12 THE COURT: It's a slippery slope when you start with
13 a crisis. Let's see. Okay, May 23 is a Monday. We can take
14 that day.

15 MR. POMERANTZ: Thank you, your Honor, appreciate it.

16 THE COURT: Any other conflicts with the May trial?

17 MR. POMERANTZ: Not that I'm aware of from our end.

18 MR. BAIO: None from us.

19 THE COURT: Very good. Thank you.

20 MR. POMERANTZ: Your Honor, at the end of the call on
21 Wednesday, the issue of rebuttal expert reports was raised.
22 I've discussed this with counsel for the defendants. We have
23 agreed we would make the experts available for deposition and I
24 think on that basis they are no longer objecting to the
25 rebuttal reports.

1 MR. BAIO: That's correct, your Honor.

2 THE COURT: All right. And when will those
3 depositions take place?

4 MR. POMERANTZ: We haven't discussed that, your Honor,
5 but we would try to make them available as soon as they're
6 available and the defendant's counsel ready to take them. If
7 your Honor wants to set a deadline, that's fine. Otherwise
8 I'll just work it out with them.

9 THE COURT: I would ask you to work it out and have it
10 be as soon as possible and send me a letter letting me know
11 when they're taking place.

12 MR. POMERANTZ: We will do that.

13 Next, Judge Freeman's order of yesterday or the day
14 before, among other things, asked that Mr. Wells be deposed
15 within five days. He is in Hong Kong next week and we have
16 agreed that his deposition will take place sometime the
17 following week, the week of February 28, which is outside the
18 five days, but because of his unavailability, the parties have
19 agreed to move it beyond that, and we just wanted to be sure
20 that was okay.

21 THE COURT: It's fine with me.

22 MR. POMERANTZ: Another aspect of Judge Freeman's
23 order required us to produce certain documents related to the
24 album-single issue, and asked us to do so by February 23. It's
25 clear from some of our clients that that date is not going to

1 be attainable. We would like to have an opportunity to discuss
2 this with defendant's counsel. This is one of the issues I
3 have not yet had a chance to discuss, I didn't have all of the
4 information, but we are working on an expedited rolling
5 production. We do not believe we would be able to get it done
6 by February 23. But as soon as we know when we're going to get
7 it done, we will discuss it with defense counsel. If we can
8 reach agreement, we will notify Judge Freeman. If not, we'll
9 call Judge Freeman and explain our situation.

10 THE COURT: All right. I'm moving now to the fact of
11 simultaneous issuance of both single and albums. Are most of
12 the works since the date you gave me on the phone, were they
13 mostly simultaneously issued?

14 MR. POMERANTZ: I'm not sure -- I'm sorry, your Honor,
15 I'm not sure I understand the question.

16 THE COURT: Okay. I believe that during the telephone
17 conversation plaintiff's counsel told me that after iTunes
18 became available, there was simultaneous issuance of individual
19 songs and albums.

20 MR. POMERANTZ: In the overwhelming majority of cases,
21 the album and the individual tracks would be released on iTunes
22 on the same day.

23 THE COURT: Now, do you have any agreement among
24 yourselves as to how that should be treated? Song versus
25 album.

1 MR. POMERANTZ: Treated for discovery purposes?

2 THE COURT: No, treated for damages.

3 MR. POMERANTZ: No. We do not have an agreement.

4 That's probably one of the issues we will be briefing.

5 THE COURT: If you don't, then I'd like you to brief

6 that. Can you brief that within three business days?

7 MR. POMERANTZ: That's the briefing we discussed at

8 the outset, your Honor, that we will file next Tuesday, they'll

9 file Thursday, we'll file Friday.

10 THE COURT: I understand. If you're going to follow

11 that schedule, that's fine with me. You limited it to album

12 versus single and now I'm asking you to include the

13 simultaneous issue.

14 MR. POMERANTZ: We intend to do that.

15 THE COURT: Is there anything else?

16 MR. POMERANTZ: No. I guess what we should do is get

17 back to Judge Freeman on Monday, if that's all right with Judge

18 Freeman as far as the February 23rd --

19 JUDGE FREEMAN: Court is closed on Monday.

20 MR. POMERANTZ: We'll do it Tuesday. Ultimately we'll

21 have an agreement, but if not we'll request the opportunity to

22 discuss it with your Honor.

23 JUDGE FREEMAN: Just so you know, I'll be in a

24 settlement mediation all morning on Tuesday. I teach as an

25 adjunct usually Monday evenings, but because Monday is a

1 holiday I'll be teaching on Tuesday, so your best time to reach
2 me is either early in the morning, meaning not later than 9:30
3 or maybe between, maybe up to three in the afternoon, after
4 lunch.

5 MR. POMERANTZ: We'll be in touch with Jamie and find
6 the right time.

7 JUDGE FREEMAN: It may be hard to get me in person if
8 you need me on Tuesday, so just be aware, after lunch or before
9 9:30 in the morning.

10 MR. POMERANTZ: Thank you. That's all we had, your
11 Honor.

12 THE COURT: I think we've dealt with the Bryant issue.
13 Is there anything further that anyone wishes to discuss on
14 that?

15 Moving, then, to where plaintiffs have already
16 recovered from the direct infringer in another lawsuit, do
17 plaintiffs currently have a view of what the universe of those
18 works is?

19 MR. POMERANTZ: No, your Honor, we don't have that
20 information here. We can get that.

21 THE COURT: How would that be obtainable?

22 MR. POMERANTZ: Your Honor, we believe that they would
23 be reflected in the judgments that have been produced in this
24 case as part of Judge Freeman's orders. We have to go back and
25 double check, but that's our recollection.

1 THE COURT: So defendants may have an idea, all right.

2 Mr. Baio, do you have an idea already?

3 MR. BAIO: Yes. It's in the several hundreds. We
4 believe we are continuing to check and compare and it could be
5 more than several hundreds. We think it will be under a
6 thousand.

7 THE COURT: Now, the last day for dispositive motions
8 was December 7. Why are you late in filing this motion?

9 MR. BAIO: Which motion, your Honor? It's not a
10 dispositive motion. It would be either a motion in limine --

11 THE COURT: Well, it would be dispositive of some.

12 MR. BAIO: Yes.

13 THE COURT: Let me make sure that we're -- I'm going
14 to digress here to talk about motions in limine. Different
15 Courts treat different motions as motions in limine. I view
16 them as motions not about the admissibility of something -- I
17 previewed this for you in our phone call -- but rather about
18 Rule 403 considerations, something that may be relevant but as
19 to which its probative value is less than the prejudice it
20 causes. I don't want any substantive motions coming in in
21 limine. So this motion is late and I'm inclined not to allow
22 it at this point.

23 MR. BAIO: Your Honor, may I address that?

24 THE COURT: Yes, you may.

25 MR. BAIO: The judgment documents were only produced

1 to us in mid to late January. In January is when we received
2 the documents?

3 THE COURT: When did you ask for them?

4 MR. COCENZA: It was subject to an order issued by
5 Judge Freeman on December 28 and we caucused with the
6 plaintiffs and attempted to get the documents and they were
7 produced to us throughout December and I believe into January.

8 THE COURT: I believe, then, that I should entertain
9 the motion, but on a very quick schedule. How soon could you
10 file?

11 MR. BAIO: Wednesday, your Honor.

12 THE COURT: Okay, with a two-day turn-around.

13 MR. POMERANTZ: Your Honor, because we have agreed to
14 a schedule that has another brief due on Friday, could we have
15 until the following Monday?

16 THE COURT: Yes. And then any reply by Tuesday.

17 MR. BAIO: Yes, your Honor.

18 THE COURT: Moving to the next topic, which is
19 plaintiff's damage theory and whether plaintiffs have been
20 seeking one statutory damage award per work, per infringer, it
21 appears to me that all of plaintiff's references to its seeking
22 damages under that theory are after Munger Tolles appeared in
23 the case. Is that true?

24 MR. KLAUS: Your Honor, Kelly Klaus. I am not, I just
25 don't know whether the Cravath firm made those statements to

1 Judge Lynch before the summary judgment motion or not. The
2 ones that I am aware of are since we came involved, but I don't
3 know if it was in issue before the summary judgment
4 proceedings.

5 THE COURT: If you were permitted to seek those
6 damages, how would you prove the number of direct infringers
7 per sound recording?

8 MR. KLAUS: Your Honor, we will prove that through the
9 same proof that we will be offering to show where the damage
10 award should be set within the statutory range by work, and
11 that consists of expert testimony from Dr. Waterman, who, based
12 on the only information that we have available, which is survey
13 work that was done by an organization called NPD between 2004
14 and 2007, has actual number of downloads by the survey
15 participants using the Lime Wire system, and he also offers an
16 extrapolation based on that survey population of 10,000 or so
17 households to a much broader population to estimate what the
18 total number of infringements were using Lime Wire during an
19 extended period of time.

20 It's also information from our technical expert,
21 Dr. Horowitz, and from the defendants themselves as to the
22 viral nature and the --

23 THE COURT: As to the what?

24 MR. KLAUS: Viral nature of the software and the
25 program and the downloading through the Lime Wire system, and

1 it will be from testimony from the defendants themselves as to
2 the way their software worked and was intended to work, and
3 then also, your Honor, there is the matter of missing evidence.
4 There was a, we submit, a conscious decision on the part of the
5 defendants to design their system not to maintain information
6 as to how users were using it, what works they were
7 downloading, how many times they were downloading it, and we
8 think as a matter of the instruction that's something the jury
9 may take into account in terms of the defendant's consciousness
10 and awareness that not keeping this information would leave it
11 subject to some level of uncertainty that we submit they should
12 bear.

13 THE COURT: How do you expect your argument on damages
14 flowing from multiple awards based on multiple infringers to
15 mesh with your seeking a maximum award per work?

16 MR. KLAUS: Because one of the factors that the finder
17 of fact is entitled to take into account under the Bryant
18 standard under long-established law is where is the harm to the
19 copyright owner. It also goes to the issue of expenses saved,
20 profits earned by the party who is responsible for the
21 statutory award, so the magnitude of the harm and the magnitude
22 of the expense saved in having effectively granted themselves a
23 license for unlimited distribution of these works we think will
24 be powerful evidence of where within the statutory range the
25 award here should fall.

1 THE COURT: Now, that makes sense. Can I infer from
2 that that you are not seeking particular damages from
3 particular infringers?

4 MR. KLAUS: In this case, your Honor, the only
5 defendants are the secondarily liable Lime Wire defendants.

6 THE COURT: Right.

7 MR. KLAUS: We are not, in this lawsuit, we don't have
8 joined with the defendants each of the other, essentially the
9 very large number of people with whom they are separately
10 jointly and severally liable for all of those awards. I
11 believe the motion that Mr. Baio said he would file next
12 Wednesday, which they said they wanted to file several months
13 ago, is their argument that if there is a particular individual
14 infringer who had settled or had a judgment against it as to a
15 particular work that they infringed on Lime Wire, that that
16 works as an offset to the statutory maximum that would
17 otherwise be available for that infringer's download.

18 THE COURT: Let me check what you have advanced. Mr.
19 Baio, is that your argument?

20 MR. BAIO: It's not that it's an offset, your Honor.
21 It would preclude under the law of damages that they are
22 seeking for that work against us.

23 THE COURT: I thought that was your argument.

24 MR. BAIO: That is our argument.

25 THE COURT: So you need to brief preclusion versus

1 offset.

2 MR. BAIO: We shall, your Honor. And as to what
3 Mr. Klaus was saying, we will be putting on expert testimony to
4 challenge the data that they've used, the methodology that was
5 employed and the scope that they are going to be suggesting,
6 and at the same time it seems to me that what Mr. Klaus is
7 saying is they're not seeking trillions of dollars in this
8 case, because they're not counting each infringement towards
9 the statutory maximum. I think what I heard him suggest is
10 that he would like the jury to know that there was lots of
11 activity in deciding how to set the damage, but the damages
12 maxed out per work at \$150,000. And I see shaking heads, and
13 if they do think differently, that this really is a case
14 involving, I don't know, \$112 trillion I think that's something
15 we should have an understanding about before we launch into the
16 trial.

17 THE COURT: Mr. Klaus?

18 MR. KLAUS: To be very clear, I was disagreeing with
19 what Mr. Baio just said. We think that the way that Section
20 504(c)(1) is written, the case law under it, in particular the
21 Columbia Pictures Television case, Professor Nimmer's treatise,
22 the legislative history, all say that where you've got one
23 individual or entity that separately is responsible with
24 individual particular users for the infringement of those
25 works, that they are subject to a separate statutory award

1 within the range to the maximum for each unit for which that
2 common inducer is separately jointly and severally liable.

3 THE COURT: I would ask that you check the record to
4 see whether that theory was advanced before your law firm came
5 into the case.

6 MR. KLAUS: We will do that, your Honor.

7 THE COURT: Okay.

8 MR. BAIO: Your Honor, a question?

9 THE COURT: Yes.

10 MR. BAIO: On that issue, I'm not sure we have a
11 briefing schedule, and I understand you've asked that the
12 foundational question of whether that had been raised in an
13 earlier period. Certainly if that becomes a live issue, we
14 think that it would benefit the Court and certainly the parties
15 to brief that issue, if they really think --

16 THE COURT: I understand. I take it what you would
17 need to brief is any prejudice to your client.

18 MR. BAIO: Well, it wouldn't only be prejudice, it
19 would be whether under the law -- I mean, that would be one
20 part of it, but under the law whether that theory makes any
21 sense and that the actual minimal damages that they will be
22 seeking are in the \$400 million or billion dollars, because
23 that may be what they actually think this trial is about, and
24 that would be useful to have the parameters of that understood
25 by the Court and the parties. So I guess after the response

1 that you receive as to whether they can raise the issue in a
2 timely manner, if your Honor will be addressing the question of
3 the quantity of the damages and whether they can get multiple
4 150,000 max numbers for each work, we would like the
5 opportunity to brief that.

6 THE COURT: All right. Mr. Klaus, by next Tuesday
7 could you have the answer as to whether this theory was a new
8 theory advanced by your clients as of April?

9 MR. KLAUS: Yes.

10 THE COURT: Okay.

11 MR. KLAUS: And would you like to set a briefing
12 schedule on the issue that Mr. Baio raised now?

13 THE COURT: Yes. What would you propose? Do you want
14 to confer with one another?

15 MR. KLAUS: We can confer with the other side. I
16 believe the question is whether there is prejudice.

17 MR. BAIO: If we can talk to them about a timing, your
18 Honor, maybe the answer first --

19 THE COURT: Why don't you talk now?

20 MR. BAIO: Should we do it now?

21 THE COURT: Yes.

22 (Pause)

23 MR. BAIO: Your Honor, we have an agreement. You will
24 hear from Mr. Klaus on Tuesday with respect to your inquiry.
25 Simultaneous briefs will be filed on that Friday, and responses

1 to the simultaneous filings the following Wednesday.

2 THE COURT: Okay. Thank you.

3 I mentioned in our conference call that I think it's
4 time for everyone to focus on how the trial will take shape.

5 At this point, does plaintiff's counsel know how many witnesses
6 you intend to call on direct, approximately?

7 MR. POMERANTZ: We don't, your Honor. To be fair, our
8 witness list wasn't due for another couple of weeks, but I can
9 give you a sense of the categories of witnesses we are likely
10 to call in our case in chief.

11 THE COURT: All right.

12 MR. POMERANTZ: We think we will call a number of
13 witnesses that will explain the harm caused by Lime Wire.
14 Those witnesses will largely be various employees or former
15 employees of our clients, but there likely will be a few others
16 who are harmed by Lime Wire and related to our clients in some
17 way, such as some creative talent or something of that sort.
18 And that will probably be the largest number of witnesses by
19 sheer number.

20 We also anticipate calling one, more than one,
21 probably a few Lime Wire witnesses in our case, be it -- I'm
22 not sure of the number yet, but I think it will be few in
23 number and then we anticipate that we will be calling our two
24 expert witnesses in our case, the statistician, Dr. Waterman
25 and computer science expert, Dr. Horowitz.

1 That is largely by category who we intend to call. I
2 would like to address the issue of 24 hours which maybe is
3 where your Honor is heading with this question. I did have a
4 chance to think about that time limitation and I had a few
5 questions for your Honor and some thoughts.

6 I understand the 24 hours to mean the amount of
7 questioning time that we have and they also have 24 hours,
8 whether it be in our case or in their case, so we're each on
9 our own clock in each keeping to our 24 hours.

10 THE COURT: That's right. I may have a clock too,
11 just in case.

12 MR. POMERANTZ: You can have as long as you want. I'm
13 assuming when we thought about the 24 hours, we excluded proof
14 of ownership and direct infringement, which is in front of your
15 Honor as summary judgment issues. If that proof needs to be
16 offered at trial, we think all bets are off in terms of the
17 amount of time that we would need to rethink that after we see
18 the results of the summary judgment briefing.

19 But putting that to one side, we then thought about
20 how long will it take for us to put in our case and
21 cross-examine theirs. We understand that the whole point of
22 having an hour limitation is to force us to do it efficiently.
23 We understand. We want to do it efficiently. We think it's
24 better for the jury.

25 THE COURT: It's actually far less intended to police

1 what the lawyers are doing and far more intended to make sure
2 that the jury understands the case.

3 MR. POMERANTZ: We --

4 THE COURT: And is willing to pay attention for a long
5 time.

6 MR. POMERANTZ: We think hopefully this case will be
7 more interesting than many, but we understand the concern. As
8 we started penciling out how long we thought it would take to
9 put on our case absent ownership and absent proof of direct
10 infringement, we think we need more than 24 hours.

11 We have to put on the witnesses I mentioned, deal with
12 ten years of history of Lime Wire, we have to deal with the
13 various elements of statutory damages. We have to deal with
14 fraudulent conveyance, a separate claim we have to prove. We
15 have to deal with the fact that we're dealing with a
16 complicated technology that the jury needs to understand. We
17 need to deal with the fact that they've raised a host of
18 arguments primarily through their experts as to why we haven't
19 been harmed. We need to address that in our questioning of
20 witnesses. So as we penciled out what we would need just to
21 put on our case, we thought it was in the range of 35 hours.

22 THE COURT: On direct alone?

23 MR. POMERANTZ: In our case, correct, your Honor. I
24 would say direct, but, for example, say if we called Mr. Gordon
25 in our case so in effect crossing him in our case, I'm counting

1 those hours as well.

2 THE COURT: Then likely the defense will spend an
3 equal amount of time on cross and you will spend almost an
4 equal amount of time on redirect, they on then recross.

5 MR. POMERANTZ: I'm sorry, I was assuming the 35 hours
6 included all of the questioning we would do in our case in
7 chief.

8 THE COURT: Okay. So that's direct and redirect.

9 MR. POMERANTZ: Correct or cross and recross that we
10 do in our case, correct.

11 THE COURT: Correct. So we're looking at 70 hours for
12 plaintiff's case.

13 MR. POMERANTZ: I have not -- I'm sure they don't yet
14 know precisely the number of witnesses. I'm sure it will
15 depend on who we call in our case as to how long their case is,
16 but my guesstimate is that their case will be somewhat shorter
17 because some of the same witnesses will have already been
18 called in our case. So I was just guessing at 25 hours per
19 side for their case, which would be 60 hours total for each of
20 us, 120 hours divided by 6 is 20 trial days.

21 THE COURT: I see Mr. Baio smiling, but I don't think
22 it's out of happiness.

23 MR. BAIO: I was smiling, your Honor, because I think
24 we just were put at some kind of time disadvantage without
25 having been heard, but the reality is, your Honor, that we want

1 to move this case along and we, having thought about it,
2 believed and I don't want this to prejudice us, if it turns out
3 we need more time, but we really were focusing on the 24 hours.
4 We were looking carefully at our designations and the witnesses
5 that we would call live and our experts and what we think needs
6 to be explained to the jury as a technical matter and we were
7 actually focusing within the constraints that you had mentioned
8 and thought that it was wise, and, frankly, I'm going to try to
9 comply with it even if you were to say I have 35 hours. That's
10 a statement against interest, but I think it's in the interests
11 of our client subject to, as the case develops, something else
12 may be required. But we were focusing on what you had said and
13 think we can live with it.

14 THE COURT: Let me mention something that experienced
15 trial lawyers undoubtedly know better than I do. If a
16 plaintiff takes a lot of time to explain the case, that can be
17 advantageous to the plaintiff. In picking the jury, if we tell
18 a jury that it's going to be a three-to-four-week case, you are
19 less likely to have sophisticated jurors and hence less likely
20 to have jurors who will understand plaintiff's theories of the
21 case. And so I assume that plaintiffs want sophisticated
22 jurors and to get those jurors if you have more than a two-week
23 trial you're going to lose them. Maybe you want to go back and
24 think about that.

25 MR. POMERANTZ: Your Honor, I understand that the jury

1 mix may differ. We actually think in this case we actually
2 will win with a sophisticated or an unsophisticated jury.
3 Stealing is wrong. It's hard to compete against free. Those
4 are pretty simple concepts for anybody to understand.

5 THE COURT: If it's that simple, it shouldn't take
6 more than 24 hours to explain. I'm sorry -- I think it could
7 be --

8 MR. POMERANTZ: Your Honor, the theme is simple, but
9 the harm is not simple to lay out. One of the things we have
10 to show is state of mind of the defendants. Another thing we
11 have to show is lost revenue. Another thing is the conduct and
12 attitude of the parties, which Judge Freeman knows all too
13 well. These are things we're entitled to prove here. It takes
14 time for us.

15 We have many aspects of our business that have been
16 destroyed because of Lime Wire. We have to put this on. We've
17 been at this for four years to get to the conclusion. I think
18 if we ask for 20 trial days in a case of this magnitude that
19 seems to be within a to me a reasonable range and I think our
20 numbers if you divide it by six is 20 trial days. Assuming we
21 get six hours a day of trial time, and I don't know the hours
22 your Honor keeps.

23 THE COURT: If we have jurors who have two-hour
24 commutes and that depends on who is selected it's hard to have
25 more than a five-hour trial day.

1 MR. POMERANTZ: Your Honor, whether it turns out to be
2 20 days or 25 days --

3 THE COURT: I'm saying if we start at ten and end at
4 five, we still only get five hours.

5 MR. POMERANTZ: I understand what your Honor is
6 saying.

7 We had a detailed discussion going through various
8 parts of our story and when we added up those hours we came to
9 approximately 35. I can't tell you if it will be shorter or
10 may take a little longer, but that's our best guess at this
11 time and we're hoping to request that you would instead of the
12 24-hour limit, that you would consider extending that to a 60
13 hour per side --

14 THE COURT: It would be unreasonable for me to pick a
15 precise number now. I would hope that you could put on a good
16 case in 24 hours. If as you go along it appears that
17 everything that you're eliciting is necessary for your client
18 to elicit and that you have the jurors' attention, I'm
19 certainly likely to permit more time, given everything you've
20 just said. I may from time to time at sidebar mention to you
21 if certain jurors have fallen asleep or are making shopping
22 lists. So the answer is I will consider up to the 35 hours
23 you've requested for direct and redirect.

24 MR. POMERANTZ: Thank you, your Honor. Appreciate
25 that.

1 THE COURT: And I'll be very grateful if defense
2 counsel sticks to 25 or 24.

3 MR. BAIO: We'll strive for that and hopefully
4 accomplish it, your Honor.

5 THE COURT: Okay, thank you.

6 With respect to outstanding claims, what is the
7 status, if any, of the unjust enrichment and vicarious
8 liability claims?

9 MR. POMERANTZ: Your Honor, we do intend to -- I think
10 we sent a letter to your Honor in September setting forth the
11 claims that we intend to try and we still intend to do those.
12 I don't think those claims as we thought about it, including
13 the fraudulent conveyance claim as well, would involve proof,
14 additional proof that we wouldn't put on already for the damage
15 claim on the inducement claim, but we do think that we will be
16 trying certain liability claims as well as the damage claim on
17 the copyright inducement.

18 THE COURT: All right. I'd like to review the
19 schedule. We've typed it up for you so that you don't have to
20 write the days down, the dates down. This is the schedule that
21 I'd like to follow as we move towards trial and for trial.
22 You'll notice that there are times set down for motions in
23 limine. You may know by the dates on this schedule what
24 motions in limine you want to make or you may not know yet. It
25 may depend on how the trial evidence comes in, so I will

1 entertain motions in limine whenever they are appropriate.

2 Do counsel have any questions at this point about the
3 schedule?

4 MR. POMERANTZ: Your Honor, with respect to in limine
5 motions, there are certain evidence or argument that we think,
6 for example, would be impermissible for them to raise without
7 first getting a ruling from your Honor. For example, in their
8 opening statements. Typically --

9 THE COURT: Such as?

10 MR. POMERANTZ: I don't have any particular one in
11 mind, your Honor, but I know some of the in limine motions we
12 were thinking about are probably not 403 motions, and so I'm
13 thinking about how to raise the issue, I certainly can raise it
14 with defense counsel, but assuming we disagree, how under your
15 view of in limine motions, how do we raise the issue that we
16 don't think they should be able to cite to certain evidence or
17 make certain arguments in their opening statement, at least
18 absent a ruling from your Honor?

19 THE COURT: Well, could you confer with one another
20 right now and see if you can come up with examples? Then I can
21 help you if I have some examples.

22 (Pause)

23 MR. POMERANTZ: Your Honor, here's an example of one.
24 They, through their expert testimony, they have tried to say
25 that we were not harmed because a Lime Wire user, if they

1 didn't go to Lime Wire would go to some other illegal service,
2 and we think that that argument as a matter of law should not
3 be permitted in this case, that if you didn't go to the drug
4 dealer on corner one, you would go to the drug dealer on corner
5 two. We think it's inconsistent with the various elements of
6 Bryant, which among other things looked to deterring this kind
7 of behavior by the defendant and others. And so it's an issue
8 where they have put a lot of prominence on that in their expert
9 reports, and we think it presents a legal question whether your
10 Honor would permit that kind of evidence and argument in this
11 case.

12 THE COURT: That is the kind of argument that should
13 have been raised in motions, not as a motion in limine, but
14 during the motion practice. Now, when is the first time you
15 learned of this?

16 MR. POMERANTZ: I'm not sure how you would raise it,
17 your Honor, it's not a dispositive motion, it's a matter they
18 shouldn't be allowed to argue certain motions or evidence at
19 trial.

20 THE COURT: Motion to exclude reference to X?

21 MR. POMERANTZ: In most courtrooms that would be
22 considered an in limine motion your Honor, I think, that would
23 be my experience.

24 THE COURT: Why don't we just say that we have a
25 different kind of animal here.

1 MR. POMERANTZ: Right.

2 THE COURT: It's an animal as to which counsel need to
3 know when we're going to go to trial, the witnesses need to
4 know and it's a case with so many lawyers on each side that new
5 motions, I don't mean this pejoratively, can be thought of
6 every day by creative minds and can be shoehorned in as motions
7 in limine. I would like to have you file by sometime next week
8 any motion as to which you are currently on notice that the
9 other side intends to make an argument and you intend to oppose
10 it as a matter of law.

11 MR. POMERANTZ: And, your Honor, excluded from that, I
12 take it, would be 403 motions?

13 THE COURT: Right.

14 MR. POMERANTZ: And Daubert motions?

15 THE COURT: Daubert should be raised sooner than then,
16 I think. Oh, yes, much sooner.

17 MR. POMERANTZ: Than?

18 THE COURT: Than before trial or in trial.

19 MR. POMERANTZ: No, I was assuming that Daubert would
20 be filed on the same schedule as the in limine schedule.

21 THE COURT: Yes. Let's see. When are your expert
22 depositions?

23 MR. POMERANTZ: I think we're all done with, except
24 for the rebuttal --

25 MR. BAIO: We are, your Honor, they're done, but we

1 have these two rebuttal --

2 THE COURT: When do they conclude?

3 MR. POMERANTZ: Actually, your Honor, we have one
4 that's going to be scheduled for next Monday.

5 THE COURT: Okay. So any Daubert motions should be
6 filed by Friday of next week.

7 MR. POMERANTZ: Your Honor, we're really batting up a
8 lot into next week.

9 THE COURT: Okay. Let's say, then, I'm afraid these
10 may require a hearing, so we can't let too much time slip. How
11 about Tuesday, March 1. Let's say Wednesday, March 2nd.

12 MR. POMERANTZ: That's fine, your Honor.

13 THE COURT: Gives you a little more time and then for
14 responses, Tuesday, March 8, any reply March 10, and then I
15 will try to have a hearing the following week if we need
16 hearings.

17 MR. POMERANTZ: That's fine, your Honor, thank you.

18 THE COURT: And I'll let you know. As soon as I see
19 the papers, I'll let you know where we stand. All right.

20 MR. POMERANTZ: Your Honor for non-Daubert non-403
21 motions, if we want to raise any, we ought to do it by the end
22 of next week?

23 THE COURT: What's left?

24 MR. POMERANTZ: For example, the issue I just raised
25 with your Honor. I mean, in a sense you could call it Daubert

1 because it is coming in through their experts, but it's
2 probably broader than just that because it would go to argument
3 they may make, maybe testimony they would have a fact witness
4 give. We don't think that's legally relevant or admissible.

5 THE COURT: All right. Now, we have a schedule for
6 that, is that right?

7 MR. POMERANTZ: That's what I was asking, your Honor,
8 whether we do have a schedule. I think your Honor had said
9 next week and you were asking if we could file it by Friday.

10 THE COURT: Yes. Well, I think that's reasonable, so
11 that would be by Friday the 25th, and any response by
12 March 3rd, any reply by March 7.

13 MR. POMERANTZ: Thank you, your Honor.

14 MR. BAIO: And just so I understand your Honor, that
15 motion, those motions are if we believe that there are things
16 that should not be coming up in the opening, and we will
17 identify them for you, that's fine.

18 MR. POMERANTZ: Thank you.

19 THE COURT: Right. And if they are points where you
20 are on notice that the other side intends to present that
21 theory at trial, if you now have notice of that, don't bring it
22 up later in a motion in limine. It should be brought up next
23 Thursday.

24 MR. BAIO: Okay.

25 THE COURT: Okay. And please try to meet to agree as

1 to when what has been brought up so that your two judges don't
2 need to wade through the record.

3 I have two items left. The last is the motion to
4 disqualify and we were due to have roughly ten minutes of oral
5 argument per side. This is the point in a case when I should
6 ask are the parties engaged in any settlement discussions and
7 is there anything the Court can do to assist. Let me begin by
8 asking defense counsel, are there any settlement discussions?

9 MR. BAIO: Your Honor, there are not settlement
10 discussions that are going on at this point. Perhaps that's in
11 part because we have been engaged so much in the actual
12 exchange of information and depositions and the like. We
13 always remain amenable to talk about settlement, but right now
14 nothing is happening, in this case.

15 THE COURT: I'm going to throw something out that
16 didn't make sense to me when I was in practice, but apparently
17 works in some cases. Some big firms assign separate people to
18 deal with settlement and those people are not working on the
19 last-minute litigation work. I don't know if you could do
20 that, but I would like to urge anything I can to see if you can
21 settle this rather than spend the probably millions of dollars
22 that are still left to be spent trying the case and then
23 appealing any decision.

24 MR. BAIO: We are prepared to try whatever
25 alternatives your Honor thinks work. I have in fact used that

1 technique and it's worked.

2 THE COURT: Okay. Is this a good time for you to talk
3 with one another about how to set up a mechanism for
4 settlement? You could either use the services of the current
5 magistrate judge on the case or another magistrate judge on the
6 case or a mediator that the Court provides or someone of your
7 own choosing or just lawyers face-to-face. Yes?

8 MR. POMERANTZ: Your Honor, I'm trying to answer your
9 question without breaching any confidentiality agreements, but
10 the parties have a mechanism in place. While it is true that
11 what Mr. Baio says, that no discussions are currently underway,
12 clearly the parties have made efforts in the past and have a
13 mechanism in place.

14 THE COURT: Well, do you have a mechanism that is
15 satisfactory to each side and one that can be triggered right
16 away?

17 MR. POMERANTZ: For our side we have a satisfactory
18 mechanism in place.

19 MR. BAIO: Any mechanism that doesn't work is not
20 satisfactory to us, so there are impediments to the mechanism
21 that's been used; location, attention of the mediator, other
22 various matters, your Honor. So it hasn't really stimulated
23 much of anything. Again, I realize we can't force different
24 mechanisms on people, but that mechanism has not worked.

25 MR. POMERANTZ: Your Honor, again, I'm trying not to

1 breach agreements. I think what I should do is talk to Mr.
2 Baio off line here. Some of what he just said is news to me,
3 so I think we should probably talk and see where we get.

4 THE COURT: Would it be possible for you to talk to
5 one another here in court and then to have me come back when
6 you're ready to tell me where you stand or do you need a lot of
7 extra time?

8 MR. POMERANTZ: Well, I probably, your Honor, should
9 have consultation not just with Mr. Baio, but with my clients.
10 So in order to have a beneficial discussion with your Honor it
11 probably makes sense to let us have a little time and then if
12 your Honor wants to have another discussion to talk then.

13 THE COURT: Okay. We could have a conference call on,
14 say, is Tuesday too soon? How about, let's see, how about
15 Thursday?

16 MR. POMERANTZ: Thursday of next week? I'm sure that
17 would be fine on our end.

18 THE COURT: Okay. Thursday I have sentencings and
19 conferences that will take my time from, well, until 2:00. So
20 why don't we say 2:30 for a conference call and I'll ask
21 plaintiff's counsel to set that up. And that will be a
22 conference call to my chambers, 805-0258. That's on Thursday,
23 the 3rd of April. I'm sorry, the 3rd of March.

24 MR. POMERANTZ: February 24?

25 THE COURT: I'm sorry. Yes, you're right.

1 February 24th. I have different impediments that day. I'd say
2 2:15 p.m. would work on Thursday, February 24. Would anyone
3 like to raise anything before we have argument on the motion to
4 disqualify?

5 MR. BAIO: Not us, your Honor.

6 MR. POMERANTZ: No, your Honor.

7 THE COURT: Judge Freeman is going to get back to her
8 other work. Please have a seat. Who wishes to argue on behalf
9 of plaintiffs?

10 MR. BAIO: The defense, Mr. Gregg Joseph, will be
11 arguing.

12 THE COURT: And Mr. Klaus?

13 MR. KLAUS: Thank you, your Honor. I know that your
14 Honor had set aside a limit amount of time for argument, so I
15 will be brief but try to cover the main points and if there are
16 questions that your Honor has, please do ask them.

17 Your Honor, we start from the proposition that the
18 defendants have cited no case, not one, and we are not aware of
19 one, in which you have a situation where the same lawyer was
20 involved centrally in the same case on the other side and had a
21 very significant role, and thereafter went to work for another
22 law firm where not only that law firm is on the other side of
23 the case from that lawyer's former client, but that attorney
24 has a close and continuing relationship with the same lawyers
25 who are leading the matter against his former clients. We

1 think that what -- there is a lot of back and forth about the
2 Second Circuit's decision in *Hempstead Video*, and whether a
3 screen may be effective, and it is not the case that we are
4 saying screens are never effective, but *Hempstead Video* makes
5 clear that a screen can only be effective in an appropriate
6 case and on convincing facts. And we think that the facts here
7 simply don't satisfy their obligation to rebut the presumption
8 of shared confidences between the two -- between the plainly
9 disqualified lawyer and between the firm to whom the conflict
10 is imputed under the otherwise applicable rules.

11 THE COURT: May I interrupt for a moment? I asked in
12 the conference call we had a few days ago whether either party
13 wanted Mr. Korn to be present to testify so that his
14 credibility could be tested, and the answer counsel gave me was
15 no, that both parties accept the truth of what Mr. Korn said in
16 his affidavit.

17 Are you aware of any case in which it was conceded
18 that the same lawyer who worked on the same case previously and
19 who does much of his other work with the same lawyers now
20 working on the case at his new firm says he has heard no
21 confidences and disclosed no confidences?

22 MR. KLAUS: Yes, your Honor. That's in a sense the
23 *Chang* case from the Second Circuit, which although vacated by
24 the Supreme Court on the question of the immediate
25 appealability of a disqualification order, the underlying

1 rationale was not contested, and I believe that in that case, I
2 think what the Second Circuit said was the attorney in question
3 who had been with the plaintiff's law firm had not -- and this
4 is significant -- had not had as appreciable a role in that
5 plaintiff's case as Mr. Korn had in this case where he was by
6 his own statement the senior associate at the Cravath firm for
7 nearly a year on the case.

8 But in the Chang case the Second Circuit said we don't
9 doubt the good faith, we don't doubt the integrity of the
10 lawyer in saying that he hasn't shared, will not share with the
11 lawyers on the other side, but the Court said we can't accept
12 it, because the risk, your Honor, is not simply that there is
13 an advertent or an intentional disclosure of the confidential
14 information, the risk that the Chang case, the risk that Judge
15 Rakoff's opinion in the -- I believe I may not be pronouncing
16 it correctly -- the Panebianco case, is the risk of even
17 inadvertent disclosure, it's the fact that the lawyer is in the
18 same office with the same people --

19 THE COURT: But we are looking at this at this point,
20 I believe at least two years after Mr. Korn left Cravath. If
21 during those first two years there has been no inadvertent
22 disclosure, which I take it is conceded, how likely is it that
23 from here on out, particularly when this bright light has been
24 shone on Mr. Korn on this issue for Willkie, how likely is it
25 that we have to anticipate that there will be a risk of

1 inadvertent disclosure in the future?

2 MR. KLAUS: Your Honor, from the time that he's been
3 gone, Willkie's representation here started this time in
4 approximately June, so it's about the last seven months we're
5 talking about, and to be clear, Mr. Korn does not say, we do
6 not concede, because we simply do not know whether there have
7 been inadvertent disclosures.

8 THE COURT: But you've had the opportunity to depose
9 everyone in question, right?

10 MR. KLAUS: We've had the opportunity to depose Mr.
11 Korn and two of the attorneys from the defendant's counsel who
12 have had in the past and up through the present time a
13 continuing working relationship. We've put the question to Mr.
14 Korn as to did you have or did you communicate anything. What
15 he has said is he doesn't know. He didn't recall doing it. He
16 certainly said in his declaration he thinks he has never shared
17 confidential information, but the problem is given his -- given
18 the extent of his involvement in the case, your Honor, it
19 doesn't take much if one is in one's office and casually
20 talking, as we know has happened that there have been
21 discussions that the lawyers, some of whom are present in the
22 courtroom today, many of whom are among the significant number
23 of lawyers at Wilke Farr who are working on this case have
24 mentioned the case to him.

25 There are individuals who have -- we have seen them in

1 the documents that we have submitted -- who were not sent the
2 screening memo that Willkie sent three months after undertaking
3 the representation of Mr. Gordon, that there are individuals
4 who are not copied on those memos, who through no apparent ill
5 will or attempt to gain unfair advantage have sent Mr. Korn
6 things because they were simply not on the distribution list.

7 The Chang case, the Ponebianco case, the numerous
8 other cases that we've cited, your Honor, all recognize is that
9 the realities of a law firm, the realities of litigation and
10 the realities of the way that information travels between
11 people who are in a collegial relationship and who talk,
12 because for better or for worse, your Honor, most of what our
13 lives are consumed with is our work, that that information can
14 go back and forth and that there can be knowing glances, shrugs
15 of the shoulders, a roll of the eyes or a smile or a nod, but
16 even if unintentional may communication information that is
17 confidential information that our clients who employed Mr. Korn
18 have a right to expect not to be shared or who at a minimum had
19 the right to be notified in advance of the potential issues so
20 that the issue could, if there was a disagreement, your Honor,
21 it could have been presented to the Court months and months ago
22 rather than at this juncture.

23 And I will just, I will, unless your Honor has any
24 other questions, I will sum up on the point of the prejudice
25 argument which we anticipated will be made by the defendants,

1 which was made and which we think this is a problem and a
2 situation of their own making. Wilke Farr recognized in 2008
3 when they were first approached about undertaking to represent
4 the defendants in this case, Mr. Korn immediately said you
5 ought to know, I was a senior associate on this case.
6 Immediately when Mr. Mundiya mentioned the fact that he had
7 been contacted by the general counsel at Tower to undertake the
8 representation related to this case, he said that there was an
9 issue. That was the time, not only they were going to try to
10 rely on a screening to put an immediate effective screening in
11 place, but the time to tell the plaintiffs about it.

12 THE COURT: Is there a legal requirement that
13 plaintiffs be told at that point?

14 MR. KLAUS: There is not under New York law, there is
15 not a legal requirement that they be told, but, your Honor, if
16 they have not rebutted the presumption of shared confidences,
17 as we say they cannot in these circumstances, as we say they
18 failed to do, even assuming it would be satisfactory in these
19 circumstances, then the only way that they can undertake the
20 representation is with disclosure and consent.

21 THE COURT: Thank you.

22 MR. KLAUS: Thank you, your Honor.

23 MR. JOSEPH: Good afternoon, your Honor. Gregory
24 Joseph, Gregory P. Joseph law offices.

25 Your Honor, let me begin where your Honor began with

1 the concession made on the telephone conference. In paragraph
2 32 of his declaration, Mr. Korn categorically states he has
3 shared no information. Again, in paragraph 38, he addresses
4 the particular allegation being made here, that maybe he did.
5 He categorically says he did not. The test is trial taint.
6 There is no dispute that he categorically has said nothing,
7 which means the Willkie trial team on Lime Wire is in exactly
8 the same position they would be if he were not out there.

9 THE COURT: May I interrupt?

10 MR. JOSEPH: Please.

11 THE COURT: They, Mr. Klaus, said that all they knew
12 is that he does not recall telling anyone anything important
13 about the case.

14 MR. JOSEPH: He categorically states, and I'll just be
15 clear and obviously we all speak with our memory. Paragraph
16 32. "I have not shared and will not share with my colleagues
17 at Willkie any confidential information that I learned in
18 connection with my work for plaintiffs while at Cravath."

19 There's another important, very important statements
20 which are uncontested. He says categorically at paragraphs 13
21 and 28 he doesn't remember any of the specifics. There's
22 nothing to impute if there's nothing he can communicate, so
23 they have not disputed the fact that there has been no
24 communication. They haven't disputed the fact that he does not
25 remember. Your Honor, that is a concession that the

1 presumption of shared confidences has been rebutted.

2 They did take the depositions that Mr. Klaus recited.

3 They were offered anybody they wanted and those are the ones
4 they asked for. So it's not as though anything has been
5 withheld.

6 And let me say that ultimately, the ultimate guardian
7 of a client's confidence is the integrity of the lawyer. Mr.
8 Korn is of unimpeached integrity. So are the members of the
9 Lime Wire team. People have been pristine not to talk about
10 this.

11 He says there have been discussions. The discussions
12 have been at a very high level what they did so they could
13 assess the conflict, how long it had gone on so they could
14 address the screen and associates saying I could do this, but
15 I've got this two-hour commitment to Lime Wire. Nothing about
16 what's going on. Simply whether they could do it.

17 So the firm has acted scrupulously. Mr. Korn has
18 acted scrupulously. We suggest it would be punitive in this
19 case, since the test is trial taint and there has been no taint
20 for the firm to be disqualified.

21 It would also be obviously onerous for the client and
22 onerous for the Court. There are many other issues they raised
23 in the papers that weren't raised by Mr. Klaus here and I don't
24 want to overstay my welcome. I want to address what your Honor
25 would like to hear but, a concession of the truth of the Korn

1 declaration means there is no trial taint. That is the test in
2 Hempstead and that is the governing test.

3 Thank you, your Honor.

4 THE COURT: I have a few questions.

5 MR. JOSEPH: Please.

6 THE COURT: It would appear that Willkie could have
7 done far more with respect to instituting a screen. Can you
8 tell me why more was not done?

9 MR. JOSEPH: Yes, your Honor. Mr. Korn brought no
10 documents with him from Cravath. So the issue of his sharing
11 client confidences had to be a communication from him either
12 orally or in writing.

13 On June 6, which is essentially at the inception of
14 the Tower representation, he's instructed not to do that and he
15 knows that. He volunteers he's not willing to do that on
16 June 6. On the same date, Mr. Mundiya sends an e-mail to
17 Mr. Cocenza, they're the only two people working on the Tower
18 matter, saying Korn is screened off. I would suggest to your
19 Honor that that particular -- and that's, we know that nothing
20 is shared, because we know that's Korn's testimony. It's not
21 until July 21, until hard copy and electronic screens go into
22 effect. Mr. Mundiya thought it had happened as of July 1 --

23 THE COURT: A little slower, please.

24 MR. JOSEPH: I'm sorry. On July 21, the hard copy on
25 electronic screens go into effect. It had been Mr. Mundiya's

1 understanding that followed his July 1 communication, but that
2 was in error. It actually happened on July 21. We have an
3 electronic audit of more than 2,000 pages that shows that prior
4 to that time and subsequently there was never an attempt by Mr.
5 Korn to get access to any of the data that was subsequently
6 screened. It should have been done earlier. It was not.

7 I would suggest to your Honor that it wasn't essential
8 for the Tower matter. The Tower matter was adverse, but not
9 materially adverse under 110(c). Professor Simon in his
10 treatise, I looked at the 2008-2009 version, talks about
11 materially adverse and what he says is that, for example, it
12 would not be materially adverse if you're in a transaction to
13 be negotiating on the other side from a former client if he's
14 peripherally involved as a guarantor lender, which is very
15 similar to what we had in June. It was an asset freeze where
16 it was immediately agreed that Tower's assets were not going to
17 be frozen so they had to negotiate the terms. It would be much
18 like negotiating the terms of a subpoena with a party who is
19 willing to produce but wants it in writing, and it's adverse
20 but it's not materially adverse and "materially" has to mean
21 something in 110(c).

22 So, your Honor, it could have been done earlier, but
23 by the time we got to the Lime Wire case where it's clearly
24 adverse, everything is already in place. So on September 3, in
25 addition to having all of the electronic and hard copy screens

1 in place, a memo goes out to everyone who's billed any time
2 telling them you can't talk to Korn.

3 THE COURT: Why not the whole firm?

4 MR. JOSEPH: Your Honor, there are over 100 screens in
5 place at Willkie, a 622-lawyer firm. If you send out these
6 e-mails to everybody that's uninvolved, you're spamming them.
7 That's Professor Simon's view. That's was what Mr. Minton who
8 was chair of the ethics committee said. We can do that, any
9 firm can do that. But the question is are you materially
10 advancing it or you just making it so that people will stop
11 looking at these because they're getting things that 99 times
12 out a hundred have absolutely no relationship to them.

13 Things are directed, and certainly your Honor
14 mentioned, the antiseptic focus of light. Now these are going
15 out all the time. There's not anybody who's talking about
16 anything but sensitivities and sensibilities are permanently
17 elevated. So everybody is beyond reproach. They have been
18 since the beginning, but now we'll certainly have no
19 possibility of inadvertence.

20 So, your Honor, one could always say it could be more
21 perfect. But I would say, to address one particular point Mr.
22 Klaus made, there is no obligation to quarantine a lawyer off.
23 Rule 111 of the New York State Rules contemplate screens for
24 government lawyers. Nothing in that rule contemplates they
25 have to be screened off and not work with the lawyers. They're

1 just screened off from the matter. Now, that's a different
2 screen because it's a government lawyer, but it's exactly the
3 same concept.

4 Since it's conceded that it's now been three years
5 since he left, he testifies without dispute he remembers no
6 specifics and he categorically states he doesn't remember
7 anybody and everybody has stated they didn't talk to him, your
8 Honor, we don't think there would be any benefit that would
9 serve any public interest or private interest that would be
10 served by disqualifying the firm. Thank you.

11 THE COURT: Thank you very much. Mr. Klaus.

12 MR. KLAUS: Very briefly, your Honor. Mr. Joseph said
13 that it is uncontested that Mr. Korn said he does not recall
14 the specifics of what he did. The devil, of course, is in the
15 details about what is specific and what is not specific. Korn
16 also says in the declaration he testified at his deposition
17 that he was asked twice about the nature of the work that he
18 did while he was at Cravath by Mr. Mundiya, who is one of the
19 lead partners representing the defendants in this case, and he
20 told him the particular claims that he had worked on including
21 the fact that Mr. Korn said he had formulated the fraudulent
22 conveyance claim against the family limited partnership, which
23 not only remains a live matter for trial, your Honor, but was
24 the basis for the asset freeze motion that we had filed and
25 that Willkie was coming in to be involved in.

1 Takes me to my next point, which is Mr. Joseph said
2 that more was not done early on because the work that Willkie
3 was doing advising Tower was not materially related to the Lime
4 Wire litigation.

5 With all due respect to Mr. Joseph, your Honor, the
6 asset freeze issue was being raised before this Court in this
7 very courtroom in this case. The conflict check that Willkie
8 circulated treated my client, Mr. Korn's former clients, as the
9 adverse parties. Mr. Mundiya said he recognized right away
10 that he had to tell Mr. Cocenza not to talk to Jeff Korn about
11 the case, and Mr. Gordon himself, who at that time was the
12 principal owner either directly or indirectly of the Tower
13 entities who was and who remains the managing member,
14 controlling person in the Tower entities, offered testimony in
15 this court that in opposition to the asset freeze motion that
16 the relief that plaintiffs were seeking would have a damaging
17 effect on these entities.

18 We think they were clearly related and the argument
19 that they were not materially related is being raised now to
20 try to excuse the fact that there was not a comprehensive
21 effective screening that was put in place and that the cases
22 say they're supposed to be put in at the first moment that the
23 firm is aware of the conflict. The cases are very clear on
24 that. If you recognize a conflict, if you're going to rely on
25 the screen, you have to put it in place, you have to put it in

1 place immediately.

2 In response to your question, your Honor, about why
3 the memo was not sent to the entire firm, perhaps stated
4 differently not to the entire New York office, the response is,
5 well, that would be treated like spam. I think it would not be
6 if you had an extraordinary situation such as the one you have
7 here. I don't think we've ever heard from the defendants that
8 they've had another comparable case where you've had the same
9 lawyer who is involved in the same case who continues to work
10 with the same people. And we know that even the memo that went
11 out on September 3rd to the limited group didn't reach 22 of
12 the people who have submitted declarations that are attached to
13 Mr. Minton's declaration submitted to your Honor.

14 This is, by any measure, this is a large team.
15 They're a large group of people who have been pulled into this
16 case at Wilke Farr. They're a large group of people who
17 continue to work with Mr. Korn on his other litigation and
18 matters of litigation responsibilities. We submit that the
19 matter and timing of the screen render it ineffective even if
20 one could have an effective screen in a case such as this.

21 THE COURT: I'd like to ask the court reporter if it's
22 possible for you to go back to the first few sentences
23 Mr. Klaus stated in this segment.

24 (Record read)

25 MR. KLAUS: Your Honor, may I correct one thing? Mr.

1 Korn did not say he formulated the fraudulent conveyance claim.
2 I believe he said he participated in the formulation of the
3 fraudulent conveyance claim.

4 THE COURT: Thank you very much. Do you wish to say
5 anything in response, Mr. Joseph?

6 MR. JOSEPH: Your Honor, that's always a dangerous
7 question. May I have just a moment or two?

8 THE COURT: Sure.

9 MR. JOSEPH: Thank you. I will be brief. But to be
10 very clear about what Mr. Korn said, he said he remembered no
11 specifics in paragraph 13, but if you get to paragraph 28, he
12 says that he told Mr. Mundiya "I did not recall anything of
13 substance about my work on the case." That's anything of
14 substance. That I would hope is not too detailed, too lost in
15 the details.

16 And just to be clear, I didn't say the Tower matter
17 was not materially related. I said it was not materially
18 adverse. Adverse, yes, but not materially adverse.

19 And the last point I should have made and I neglected
20 to on the screen issue, the one that wasn't put into place
21 until July 21, that only protected the defendant's information.
22 The plaintiff's information was protected as of day one,
23 because Korn was told don't speak to anyone, don't communicate
24 anything and of course the defendant's information was
25 protected on that oral level also and we know that even though

1 that screen was not implemented immediately it was honored even
2 before it was implemented, because he never accessed anything.

3 Thank you very much, your Honor.

4 THE COURT: Thank you. Would counsel like to raise
5 anything else?

6 MR. KLAUS: No.

7 MR. BAIO: No, your Honor, thank you.

8 THE COURT: Would counsel please order an expedited
9 copy of the transcript? Thank you very much.

10 (Adjourned)

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