UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAVA RECORDS LLC, a Delaware limited liability company; WARNER BROS. RECORDS INC., a Delaware corporation; CAPITOL RECORDS, LLC, a Delaware limited liability company; UMG RECORDINGS, INC., a Delaware corporation; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; ARISTA RECORDS LLC, a Delaware limited liability company; BMG MUSIC, a New York general partnership; ATLANTIC RECORDING CORPORATION, a Delaware corporation; MAVERICK RECORDING COMPANY, a California joint venture; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; VIRGIN RECORDS AMERICA, INC., a California corporation; and MOTOWN RECORD COMPANY, L.P., a California limited partnership, Plaintiffs, -against- AUDREY AMURAO, Defendant.	Civil Action No.: 7:08-CV-03462-CLB **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Dated: March 31, 2009

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Plaintiffs respectfully move under Rule 56(c) for summary judgment against Defendant Audrey Amurao ("Defendant") on the grounds that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. As demonstrated below, Defendant downloaded and installed the LimeWire peer-to-peer file sharing program ("LimeWire") on her computer and used LimeWire to download (copy) and upload (distribute) Plaintiffs' copyrighted sound recordings to other peer-to-peer users over the Internet. Specifically, Defendant has infringed 54 of Plaintiffs' copyrighted sound recordings listed on Exhibit A to the Complaint (the "Exhibit A Recordings") and an additional 25 of Plaintiffs' copyrighted sound recordings listed on Schedule 1 (the "Schedule 1 Recordings"). (Copies of Exhibit A and Schedule 1 are attached as Exhibits 6 and 7, respectively, to Plaintiffs' Statement of Material Facts.) Although Defendant has infringed potentially hundreds of Plaintiffs' copyrighted sound recordings, Plaintiffs are limiting the relief they seek to finding that Defendant has infringed the 54 Exhibit A Recordings and the 25 Schedule 1 Recordings (collectively, the "Copyrighted Recordings"); awarding Plaintiffs minimum statutory damages of $750 for 34 of the Copyrighted Recordings, for a total amount of $25,500; and enjoining Defendant from further infringing Plaintiffs' copyrights.

BACKGROUND

Plaintiffs are recording companies that own or control exclusive rights to copyrights in sound recordings. Since the early 1990s, Plaintiffs and other copyright holders have faced a massive and exponentially expanding problem of digital piracy over the Internet, through online media distribution systems (or "file sharing programs") such as LimeWire. The United States Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). As a

direct result of piracy over these file sharing networks, Plaintiffs have sustained and continue to sustain devastating financial losses and layoffs of thousands of employees in the music industry.

On June 1, 2005 at 11:57 p.m. EDT, a third party retained by Plaintiffs, MediaSentry, detected an individual at Internet Protocol ("IP") address 162.83.166.67, using LimeWire on the Gnutella file sharing network to distribute Plaintiffs' copyrighted sound recordings. Approximately 528 digital audio files were being distributed from a "shared" folder on this person's computer to millions of other users on the network. A significant number of these 528 audio files were Plaintiffs' copyrighted sound recordings, including popular recordings by well-known artists, including Billy Joel, Sheryl Crow, and Phil Collins. Using publicly available information regarding the assignment of IP addresses, MediaSentry determined that Verizon Internet Services, Inc. ("Verizon") was the Internet Service Provider that had assigned IP address 162.83.166.67 to one of its customers on June 1, 2005.

With this information, Plaintiffs filed a "Doe" lawsuit and obtained an order for expedited discovery to determine the identity of the account holder responsible for the IP address at issue. *Capitol Records, Inc. v. Does 1-29*, Case No. 05-01 298 (HHK) (D.D.C.). In response to Plaintiffs' Rule 45 subpoena, Verizon identified Defendant's father, Rolando Amurao, as the person to whom IP address 162.83.166.67 was registered at the time of infringement. Although Mr. Amurao initially took responsibility for the infringement, Plaintiffs were unable to resolve the matter and initiated a lawsuit against Mr. Amurao under the Copyright Act styled *Lava Records LLC v. Amurao*, No. 07-cv-3221-CLB (S.D.N.Y.). During the course of that lawsuit,

and despite receiving significant misinformation from Mr. Amurao,[1] Plaintiffs ultimately discovered Mr. Amurao's adult daughter, Audrey Amurao, the Defendant in this case ("Defendant"), was, in fact, the responsible party.

Immediately after learning of this deception, Plaintiffs attempted again to resolve the infringement, this time by way of a global settlement with Mr. Amurao and Defendant. After their efforts failed, and within weeks of discovering that Defendant was the direct infringer, Plaintiffs moved to dismiss their lawsuit against Mr. Amurao and filed this lawsuit against Defendant. (Compl., Doc. No. 1.)[2] As demonstrated below, Plaintiffs' limited discovery in this case—a short deposition of Defendant and a forensic examination of Defendant's computer hard drive—has confirmed Defendant's infringement of the Exhibit A Recordings as observed by MediaSentry on June 1, 2005. This discovery has also shown that Defendant continued to use LimeWire after June 1, 2005 to infringe additional sound recordings owned or controlled by Plaintiffs, including the 25 Schedule 1 Recordings. Based on the undisputed material facts in the record demonstrating Defendant's infringement, Plaintiffs now move for summary judgment.

STATEMENT OF FACTS

Pursuant to Local Civil Rule 56.1(a), Plaintiffs have contemporaneously filed a Statement of Material Facts on Motion for Summary Judgment ("SOF"). The SOF contains references to relevant exhibits, copies of which are attached to the SOF. A version of the SOF without factual references appears below.

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[1] Some of the details of Plaintiffs' significant efforts to get to the truth of this matter are detailed in Plaintiffs' Letter Request dated November 24, 2008 and exhibits thereto (attached hereto as Exhibit A), which was submitted to the District Judge and Defendant's counsel, seeking an Order compelling Defendant to produce her computer hard drive for forensic examination.

[2] The matter with Mr. Amurao is still pending on his request for fees.

I. Defendant Used The LimeWire Online File Sharing Program To Download And Distribute Plaintiffs' Copyrighted Sound Recordings.

A. Defendant Downloaded And Distributed The 54 Copyrighted Sound Recordings Listed On Exhibit A To Plaintiffs' Complaint.

1. On June 1, 2005 at 11:57 p.m. EDT, MediaSentry detected an individual at Internet Protocol ("IP") address 162.83.166.67 using the LimeWire online file sharing program on the Gnutella file sharing network to distribute Plaintiffs' copyrighted sound recordings. (SOF ¶ 1.) At the time, this person was distributing 528 digital audio files from a "shared" folder on her computer to millions of other users on the Gnutella network. (*Id.*)

2. Exhibit B to Plaintiffs' Complaint (*see* Doc. No. 1) is an index showing the contents of this person's LimeWire shared folder. (SOF ¶ 2.) When installing LimeWire, a user creates a shared folder on their computer to store files downloaded from other users on the Gnutella network and to distribute files to other users on the network. (*Id.*) Exhibit A to Plaintiffs' Complaint, which is a subset of Exhibit B to the Complaint, lists 54 of Plaintiffs' copyrighted sound recordings which were contained in this person's shared folder. (*Id.*)

3. On June 1, 2005, MediaSentry initiated the process of downloading each of the 528 digital audio files stored in this person's shared folder. (SOF ¶ 3.) This process allowed MediaSentry to obtain the metadata of each digital audio file in the shared folder and to ensure that there was an actual file being distributed. (*Id.*) Had it chosen to do so, MediaSentry could have downloaded complete copies of any of the audio files listed in the shared folder. (*Id.*)

4. MediaSentry downloaded complete copies of ten sound recordings as a sample of the 528 digital audio files that were being distributed from Defendant's shared folder on June 1, 2005. (SOF ¶ 4.) MediaSentry's system log file shows the proof of Defendant's distribution of these 10 sound recordings. (*Id.*) Downloading and storing complete copies of all 528 digital audio files being distributed from Defendant's computer would consume an extraordinary

amount of bandwidth and computer resources and would not be practical, and in many instances may not be feasible. (*Id.*)

5. The metadata associated with the 528 digital audio files stored in the shared folder shows that the files were downloaded from other users on the Internet. (SOF ¶ 5.)

6. MediaSentry determined that Verizon was the Internet Service Provider that had assigned IP address 162.83.166.67 to one of its customers on June 1, 2005. (SOF ¶ 6.)

7. Verizon identified Rolando Amurao of 1376 Midland Avenue, Floor 3, Apt. 313, Bronxville, NY 10708 as the subscriber to whom IP address 162.83.166.67 had been assigned on June 1, 2005. (SOF ¶ 7.)

8. Since May 2004, Defendant Audrey Amurao, Mr. Amurao's adult daughter, has resided at 1376 Midland Avenue, Floor 3, Apt. 313, Bronxville, NY 10708. (SOF ¶ 8.)

9. On June 1, 2005, Defendant owned a Dell desktop computer (the "Computer") that was connected to the Internet through Rolando Amurao's Internet account with Verizon at 1376 Midland Avenue, Floor 3, Apt. 313, Bronxville, NY 10708. (SOF ¶ 9.)

10. Defendant's Computer has always been connected to the Internet at this location and, up until the fall of 2006, the Computer remained running at all time. (SOF ¶ 10.)

11. Defendant downloaded and installed the LimeWire file sharing program on her Computer on or before November 24, 2004. (SOF ¶ 11.) Defendant began using LimeWire to download music right after she installed the program to her Computer. (*Id.*) Defendant used LimeWire on her computer to download the 528 copyrighted sound recordings on Exhibit B to Plaintiffs' Complaint, including each of Plaintiffs' 54 copyrighted sound recordings listed on Exhibit A to Plaintiffs' Complaint. (*Id.*)

B. The Forensic Examination Of Defendant's Computer Confirmed Defendant's Infringement Of The 54 Exhibit A Recordings And Showed That Defendant's Infringement Continued After June 1, 2005, Including Defendant's Infringement Of The 25 Copyrighted Sound Recordings Listed On Schedule 1.

12. In February 2009, Plaintiffs performed a forensic examination of Defendant's computer hard drive. (SOF ¶ 12.)

13. The forensic examination shows that LimeWire was installed on the Defendant's computer on or before November 24, 2004, and was configured with the user profile named "Audrey Ann Amurao." (SOF ¶ 13.)

14. The LimeWire program on Defendant's Computer was configured to store the files downloaded through the Gnutella network into the "My Music" shared folder associated with the "Audrey Ann Amurao" user profile. (SOF ¶ 14.)

15. The LimeWire program on Defendant's Computer was also configured to share the contents of the "My Music" and "My Documents" folders associated with the "Audrey Ann Amurao" user profile. (SOF ¶ 15.)

16. Defendant's Computer hard drive contained over 1300 sound recordings, including several hundred MP3 files. (SOF ¶ 16.) These sound recordings are stored in multiple user-created subfolders in the "My Music" folder associated with the "Audrey Ann Amurao" user profile, including, for example, an "80's Music" subfolder and a "Ballads & Mellow" subfolder. (*Id.*) Defendant created these subfolders in order to organize the music she downloaded according to genre. (*Id.*)

17. All of the sound recordings listed in Exhibit A to Plaintiffs' Complaint were found in the user-created subfolders contained in the My Music shared folder associated with the "Audrey Ann Amurao" user profile on Defendant's Computer. (SOF ¶ 17.)

18. Exhibit C to the report of Plaintiffs' forensic expert, Dr. Doug Jacobson, lists several hundred sound recordings that were downloaded to Defendant's Computer *after* June 1, 2005, the date MediaSentry observed the distribution of the sound recordings on Exhibit B through IP address 162.83.166.67. (SOF ¶ 18.)

19. The sound recordings listed on Exhibit C to Dr. Jacobson's report are a subset of the 1300 sound recordings that were found on Defendant's Computer during the forensic examination. (SOF ¶ 19.) Schedule 1 is a list of 25 of the sound recordings from Exhibit C to Dr. Jacobson's report; all 25 of the sound recordings listed on Schedule 1 were downloaded to Defendant's computer after June 1, 2005. (*Id.*)

20. Defendant used LimeWire to download all of the 1300 copyrighted sound recordings found on Defendant's Computer, including the 25 sound recordings on Schedule 1. (SOF ¶ 20.)

21. Defendant continued to download sound recordings on LimeWire to her Computer after June 1, 2005 through at least October 11, 2006. (SOF ¶ 21.) The forensic examination demonstrates that Defendant downloaded the following sound recordings listed on Schedule 1 on the dates and times indicated:

a. June 6, 2005 – Bon Jovi, "Livin' on a Prayer" (8:12:55 PM);
b. June 6, 2005 – Bon Jovi, "It's My Life" (8:22:06 PM);
c. June 6, 2005 – Air Supply, "Even The Nights Are Better" (11:55:34 PM);
d. June 7, 2005 – Bette Midler, "From a Distance" (12:01:42 AM);
e. June 27, 2005 – Shania Twain, "You're Still The One" (9:25:06 PM);
f. June 27, 2005 – Bonnie Raitt, "I Can't Make You Love Me" (10:05:42 PM);
g. June 29, 2005 – Shania Twain, "Forever and for Always" (12:20:02 PM);
h. July 6, 2005 – Kelly Clarkson, "Breakaway" (10:04:19 AM);
i. July 6, 2005 – Kelly Clarkson, "A Moment Like This" (10:04:39 AM);
j. July 23, 2005 – A-Ha, "Take On Me" (8:59:28 AM);

k. August 3, 2005 – The Killers, "Somebody Told Me" (12:58:40 PM);

l. August 10, 2005 – Faith Hill, "The Way You Love Me" (9:16:27 PM);

m. August 19, 2005 – Rick Astley, "Never Gonna Give You Up" (9:09:06 PM);

n. August 19, 2005 – 98 Degrees, "I Do (Cherish You)" (9:13:24 PM);

o. August 19, 2005 – K-Ci & JoJo, "Tell Me It's Real" (9:31:42 PM);

p. August 21, 2005 – Incubus, "I Miss You" (12:18:46 PM);

q. September 4, 2005 – Foreigner, "I Want to Know What Love Is" (1:54:42 PM);

r. September 4, 2005 – Robert Miles, "Children" (1:58:14 PM);

s. September 4, 2005 – Rihanna, "Pon De Replay" (2:16:49 PM);

t. October 25, 2005 – Kenny G, "Songbird" (11:01:24 PM);

u. November 13, 2005 – The Cranberries, "Ode To My Family" (4:28:04 PM);

v. March 21, 2006 – Yeah Yeah Yeahs, "Maps" (12:31:37 AM);

w. April 9, 2006 – Michael Buble, "Home" (4:00:09 PM);

x. April 9, 2006 – Michael Buble, "Save the Last Dance For Me" (4:29:50 PM);

y. July 12, 2006 – Chicago, "Will You Still Love Me?" (12:46:51 AM). (*Id.*)

22. Defendant never paid for any of the sound recordings she downloaded with LimeWire. (SOF ¶ 22.)

23. LimeWire uses the Gnutella peer-to-peer file sharing network, which allows users of the network to share files with one another. The whole purpose behind peer-to-peer networks is to share files with other users. (SOF ¶ 23.)

24. Because the LimeWire application on Defendant's Computer was configured to share files with other users, Defendant was distributing all of the 1300 sound recordings contained in each of the subfolders within the "My Music" folder on her Computer – including Plaintiffs' Exhibit A Recordings and Schedule 1 Recordings – to other LimeWire users. (SOF ¶ 24.)

25. LimeWire cannot be used to listen to music that is stored on another computer in the Gnutella network; in order to listen to music that was stored on another computer, the file must be downloaded to the user's computer. (SOF ¶ 25.)

26. Defendant knew about the widely publicized Napster peer-to-peer file sharing program in the late 1990s, understood Napster to be a program for downloading music over the Internet, and understood that Napster was shut down because Napster was "impeding on record sales." (SOF ¶ 26.) Defendant later learned about the LimeWire file sharing program and downloaded, installed, and used LimeWire on her computer. (*Id.*)

II. Plaintiffs Own And Properly Registered The Copyrighted Recordings On Exhibit A And Schedule 1.

27. Plaintiffs are the owners or licensees of valid copyrights in the 79 sound recordings on Exhibit A and Schedule 1. (SOF ¶ 27.)

28. Plaintiffs' copyright registrations for these 79 sound recordings on Exhibit A and Schedule 1 were effective prior to the date Defendant was caught distributing them to other Internet users. (SOF ¶ 28.)

29. Plaintiffs also placed copyright notices on each of the compact disc containers and on the surface of each of the compact discs containing the 79 sound recordings on Exhibit A and Schedule 1, as provided in Section 402 of the Copyright Act. (SOF ¶ 29.)

30. Defendant did not have Plaintiffs' authorization to copy, download, or distribute any of the 79 copyrighted sound recordings on Exhibit A and Schedule 1. (SOF ¶ 30.)

SUMMARY OF THE ARGUMENT

Plaintiffs' evidence shows that Plaintiffs own or control the copyrights to the 79 Copyrighted Recordings and that Defendant violated Plaintiffs' reproduction and distribution rights in these works by using LimeWire to download the Copyrighted Recordings and to distribute the Copyrighted Recordings to other users on the Gnutella network over the Internet. Based on Defendant's infringement of Plaintiffs' reproduction and distribution rights under 17 U.S.C. § 106(1) and (3), Plaintiffs are entitled to an award of statutory damages under 17 U.S.C.

§ 504(c) and injunctive relief under 17 U.S.C. § 502. Although Defendant was illegally distributing hundreds of copyrighted sound recordings, as a matter of equity, Plaintiffs have decided to pursue damages on only 34 of these recordings. Therefore, Plaintiffs request an Order finding that Defendant has infringed all 79 Copyrighted Recordings, awarding Plaintiffs minimum statutory damages of $750 for 34 of the Copyrighted Recordings, for a total amount of $25,500, and enjoining Defendant from further infringing Plaintiffs' copyrights.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UNDER RULE 56(c) BECAUSE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

A. Standard of Review.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Doro v. Sheet Metal Workers' Int'l Ass'n*, 498 F.3d 152, 155 (2d Cir. 2007). The moving party bears the burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has met its burden, the non-moving party must "go beyond the pleadings" and designate specific facts to support or defend each element of the cause of action, showing there is a genuine issue for trial. *Id.* at 324. The nonmovant may only defeat a summary judgment motion by demonstrating, through submissions of concrete evidence, that "a reasonable juror could return a verdict in [that party's] favor." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988) (quotation omitted); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) ([T]he "non-moving party may not rely on conclusory allegations or unsubstantiated speculation.").

B. Summary Judgment Is Appropriate Because There Are No Issues of Material Fact Concerning Defendant's Infringement.

The Copyright Act grants the copyright owner of a sound recording the exclusive rights to, among other things, "reproduce the copyrighted work in copies or phonorecords" and "distribute copies or phonorecords of the copyrighted work to the public." 17 U.S.C. § 106(1), (3). In order to prevail, Plaintiffs must prove (1) that they own the copyrights in the sound recordings and (2) that Defendant copied or distributed those sound recordings. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *see also Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) ("A successful claim of copyright infringement pursuant to the Copyright Act, 17 U.S.C. § 501 et seq., requires proof that (1) the plaintiff had a valid copyright in the work allegedly infringed and (2) the defendant infringed the plaintiff's copyright by copying protected elements of the plaintiff's work."). "Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant." 4 M. & D. Nimmer, Nimmer on Copyright § 13.01, at 13-5 & n.4 (2002) ("Nimmer").

Copyright infringement is a strict liability offense; Plaintiffs need not demonstrate Defendant's intent to infringe, or even knowledge of infringement, in order to prove copyright infringement. *Lipton*, 71 F.3d at 471 (intent to infringe is not required under the Copyright Act); *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) ("Copyright infringement actions, like those for patent infringement, ordinarily require no showing of intent to infringe."); *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) ("The defendant's intent is simply not relevant [to show liability for copyright infringement]: The defendant is liable even for 'innocent' or 'accidental' infringements."); *Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co.*, 807

F.2d 1110, 1113 (2d Cir. 1986); 4 Nimmer § 13.08, at 13-279 ("In actions for statutory copyright infringement, the innocent intent of the defendant will not constitute a defense to a finding of liability.").

Summary judgment is required here because there is no genuine issue as to any material fact: Plaintiffs own valid copyrights in the Copyrighted Recordings for which recovery is sought and Defendant used an online media distribution system to reproduce and distribute the Copyrighted Recordings without Plaintiffs' authorization. Thus, Plaintiffs are entitled to judgment as a matter of law on their copyright claim.

II. PLAINTIFFS OWN THE COPYRIGHTS TO THE COPYRIGHTED RECORDINGS AT ISSUE.

Plaintiffs seek summary judgment for Defendant's infringement of Plaintiffs' copyrights in the 79 Copyrighted Recordings. Plaintiffs are the owners or licensees of valid copyrights in these 79 Copyrighted Recordings. (SOF ¶ 27.) The Copyrighted Recordings have all been registered with the U.S. Copyright Office and the copyright registrations for each of the Copyrighted Recordings were effective prior to the date on which Defendant was observed infringing them. (*Id.* ¶ 28.) Defendant further admits the validity of Plaintiffs' ownership of the Exhibit A Recordings, and admits that she has no evidence to dispute Plaintiffs' ownership of the Schedule 1 Recordings. (*Id.* ¶ 27.) Consequently, there is no genuine issue of fact as to the ownership or validity of Plaintiffs' copyrights in the 79 Copyrighted Recordings. *See Hamil Am., Inc. v. GFI, Inc.*, 193 F.3d 92, 98 (2d Cir. 1999) ("A certificate of registration from the United States Register of Copyrights constitutes prima facie evidence of the valid ownership of a copyright").

Thus, Plaintiffs have established the first element of their infringement claim.

III. DEFENDANT VIOLATED PLAINTIFFS' COPYRIGHTS BY REPRODUCING THE COPYRIGHTED RECORDINGS WITHOUT AUTHORIZATION.

Downloading copyrighted sound recordings on a peer-to-peer network without authorization of the copyright holder constitutes an unlawful reproduction of the work in violation of the Copyright Act. 17 U.S.C. § 106(1); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (affirming summary judgment against the defendant who had used KaZaA to download copyrighted sound recordings over the Internet); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) ("[M]aking . . . a digital copy of [copyrighted] music . . . infringes copyright."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights."); *MGM Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1034-35 (C.D. Cal. 2003) (holding that users who download copyrighted music violate the copyright owner's exclusive reproduction right); *see also Sony Pictures Home Entm't, Inc. v. Lott*, 471 F. Supp. 2d 716, 722 (N.D. Tex. 2007) (citing *Aimster* and *Napster* regarding unauthorized downloading of copyrighted files as violating reproduction rights); *UMG Recordings v. Mp3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); *United States v. ASCAP*, 485 F. Supp. 2d 438, 444 (S.D.N.Y. 2007) ("the downloading of a music file is . . . a method of *reproducing* that file").[3]

Here, Defendant downloaded and installed the LimeWire file sharing program on her Computer. (SOF ¶¶ 11, 13.) LimeWire was configured on Defendant's Computer in connection

[3] *See also Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & N. W. Nexus, Inc.*, 983 F. Supp. 1167, 1173 (N.D. Ill. 1997) (holding reproduction rights infringed where web page administrator copied copyrighted clip art onto hard drive of web service provider's computer and, from there, copied the clip art onto defendant's web page); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 931-32 (N.D. Cal. 1996) (holding infringing copies made each time Sega computer program files uploaded to or downloaded from computer bulletin board service); 2 Nimmer § 8.08 [A][1], at 8-115 ("[T]he input of a work into a computer results in the making of a copy, and hence . . . such unauthorized input infringes the copyright owner's reproduction right.").

with the user profile named "Audrey Ann Amurao." (*Id.* ¶ 13.) The LimeWire program on Defendant's computer was configured to store those files she downloaded into the "My Music" shared folder associated with the "Audrey Ann Amurao" user profile. (*Id.* ¶ 14.) LimeWire cannot be used merely to listen to music that is stored on another computer in the Gnutella network; in order to listen to music that was stored on another computer, the file must be downloaded to the user's computer. (*Id.* ¶ 25.) Defendant never paid for any of the sound recordings she downloaded with LimeWire. (*Id.* ¶ 22.)

Defendant used LimeWire to access the Gnutella file sharing network to download all 79 Copyrighted Recordings. (*Id.* ¶¶ 11, 20.) First, Defendant used LimeWire to download the 528 sound recordings listed in Exhibit B to the Complaint, including specifically the 54 Exhibit A Recordings. (*Id.* ¶ 11.) During Plaintiffs' forensic examination, all 54 of the Exhibit A Recordings were found in subfolders created by Defendant to organize music she downloaded to her My Music shared folder. (*Id.* ¶¶ 16-17.) Second, Defendant continued using LimeWire after June 1, 2005, the date MediaSentry observed Defendant's infringement of the Exhibit A Recordings. (*Id.* ¶¶ 18, 21.) Specifically, Defendant continued to use LimeWire from approximately June 2005 through at least July 2006 to download copyrighted music over the Internet, including specifically the 25 Schedule 1 Recordings. (*Id.* ¶¶ 20, 21.)

Defendant's downloading constitutes an unlawful reproduction of Plaintiffs' Copyrighted Recordings in violation of 17 U.S.C. § 106(1). *See Gonzalez*, 430 F.3d at 893 (upholding summary judgment where the defendant downloaded copyrighted sound recordings over the Internet); *ASCAP*, 485 F. Supp. 2d at 444.

IV. DEFENDANT VIOLATED PLAINTIFFS' COPYRIGHTS BY DISTRIBUTING ALL 79 OF THE COPYRIGHTED RECORDINGS WITHOUT AUTHORIZATION.

Defendant violated Plaintiffs' right of distribution by disseminating copies of Plaintiffs' Copyrighted Recordings to others over the Internet and by making Plaintiffs' Copyrighted Recordings available to others for download on the Gnutella network. As explained below, both actions violate Section 106(3) of the Copyright Act.

A. Defendant Distributed The Copyrighted Recordings In Violation Of The Copyright Act.

Section 106(3) of the Copyright Act grants a copyright owner the exclusive right to "distribute" copies of copyrighted works to the public by any means of transfer of ownership or by rental, lease or lending. 17 U.S.C. § 106(3). A person violates a copyright holder's distribution right by making an actual, unauthorized dissemination of a copyrighted work. *Perfect 10, Inc. v. Google, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (unauthorized "actual dissemination" of copyrighted work violates the distribution right in section 106(3)); *Aimster*, 334 F.3d at 647 (unauthorized "transfer" of copyrighted work violates distribution right); *see also Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401 (S.D.N.Y. 2002). Here, it is undisputed that Defendant distributed Plaintiffs' Copyrighted Recordings in violation of the Copyright Act.

First, Defendant distributed nine of the Copyrighted Recordings listed on Exhibit A from the LimeWire shared folder on her computer to MediaSentry. (SOF ¶¶ 1-4, 9-11, 15, 17.) MediaSentry's system log file shows the proof of Defendants' distribution of these nine sound recordings on or about June 1, 2005. (SOF ¶ 4.)[4]

[4] Plaintiffs have decided to pursue only nine of the ten sound recordings which Defendant distributed to MediaSentry on June 1, 2005.

Second, Plaintiffs can also establish distribution of all 79 of Plaintiffs' Copyrighted Recordings through circumstantial evidence. In fact, in these types of cases, circumstantial evidence is often necessary because online "piracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder" and LimeWire does not allow copyright holders to observe distribution from one user to another. *Warner Bros. Records, Inc. v. Payne*, 2006 U.S. Dist. LEXIS 65765, *10 (W.D. Tex. July 17, 2006); *see also Lott*, 471 F. Supp. 2d at 719, 722 (granting summary judgment on circumstantial evidence of infringement); *RCA Records v. All-Fast Sys. Inc.*, 594 F. Supp. 335, 338 (S.D.N.Y. 1984) (actual copying by defendant for plaintiffs' investigator established "a strong inference . . . that the [defendant] would and did do exactly the same copying for [others]").

Here, the evidence shows that Defendant disseminated copies of all 79 Copyrighted Recordings to other users on the Internet. Specifically, MediaSentry initiated downloads of all of the 528 digital audio files stored in Defendant's shared folder on June 1, 2005, including each of the 54 Exhibit A Recordings, and could have downloaded any of the 528 files had it chosen to do so. (SOF ¶ 2, 3.) MediaSentry also completed ten of the downloads as a sample of the files that Defendant was distributing, including nine of the Exhibit A Recordings. (*Id.* ¶ 4.) All 54 Exhibit A Recordings were in Defendant's shared folder on the computer on June 1, 2005, and all 79 Copyrighted Recordings were still in Defendant's shared folder and being shared with other users until at least the fall of 2006. (*Id.* ¶ 1-2, 16-10.) The whole purpose behind peer-to-peer networks is to share files with other users, and Defendant's shared folder was configured to share files with everyone on the Gnutella file-sharing network. (*Id.* ¶¶ 11, 15, 23.) Defendant started downloading copyrighted music to her computer and storing it in her shared folder shortly after she installed LimeWire to her Computer on or before November 24, 2004, and these files

remained in Defendant's shared folder for years. (*Id.* ¶¶ 11-12, 16-17, 21.) As a result, the record as a whole points in but one direction—*i.e.*, that Defendant disseminated copies of all 79 Copyrighted Recordings to other Gnutella users in violation of Plaintiffs' distribution right.

B. Defendant Also Made Plaintiffs' Copyrighted Recordings Available To Others On The File Sharing Network In Violation Of The Copyright Act.

By definition, a person who possesses the exclusive right to distribute works also possesses the exclusive right to make works available for copying by others. This is precisely what the Supreme Court held in *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, several "Authors" sued "Print Publishers" (newspapers) and "Electronic Publishers" (including NEXIS) for making the Authors' copyrighted articles available for download on online databases like NEXIS. *Id.* at 487. The Print Publishers had a license to "reproduce or distribute" the articles only as part of a compilation. *Id.* at 498. There was no allegation or proof of any actual transfer of files to the public in *Tasini*; rather, the Authors alleged only that the Publishers had "placed copies of the [articles] . . . into three databases" where they were "retrievable" by the public, and that the Authors' distribution right had been infringed "by the inclusion of their articles in the databases." *Id.* at 487. The Supreme Court agreed, and held that "the Electronic Publishers infringed the Authors' copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors . . . [and] that the Print Publishers infringed the Authors' copyrights by authorizing the Electronic Publishers ***to place the Articles in the Databases*** . . . ." *Id.* at 506 (emphasis added); *see also Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (holding that making unauthorized copies of works available for distribution to others violates the copyright holder's distribution right); *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 637-38 (D. Md. 2006)

(relying on *Tasini* and holding that an online publisher violated a copyright owner's distribution right "by making available unauthorized copies of Plaintiff's publications" online).

Thus, a person violates a copyright holder's distribution right by making copyrighted sound recordings available to others for download on a peer-to-peer network without authorization from the copyright holder. *See* 17 U.S.C. § 106(3); *Tasini*, 533 U.S. at 506; *Perfect 10*, 487 F.3d at 718-19 (confirming that a defendant who makes actual files available for distribution, not just links to files, "distributes" them); *Napster*, 239 F.3d at 1014 ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *Gonzalez*, 430 F.3d at 889 ("[P]eople who post or download music files are primary infringers."); *Lott*, 471 F. Supp. 2d at 721-22 (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist. LEXIS 53654, *19 (S.D. Tex. Mar. 12, 2008) ("[M]aking copyrighted works available for download via a peer-to-peer network contemplates 'further distribution,' and thus constitutes a violation of the copyright owner's exclusive 'distribution' right under 17 U.S.C. § 106(3)."); *Maverick Recording Co. v. Harper*, Case No. 5:07-cv-026-XR, slip op. at 10 (W.D. Tex. Aug. 7, 2008) ("The fact that the Recordings were available for download is sufficient to violate Plaintiffs' exclusive rights of reproduction and distribution. It is not necessary to prove that all of the Recordings were actually downloaded; Plaintiffs need only prove that the Recordings were available for download due to Defendant's actions.") (attached as Exhibit B); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, *12-13, n.38 (E.D. Pa. 2007) ("A plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant 'made available' the copyrighted work.").

Here, Defendant used LimeWire to download music over the Internet and stored that music in subfolders contained within the shared folder on her Computer. On June 1, 2005, Defendant's shared folder contained 528 digital audio files, including all 54 Exhibit A Recordings. (SOF ¶¶ 1-2.) In February 2009, Defendant's shared folder contained over 1300 sound recordings, including all 54 Exhibit A Recordings and all 25 Schedule 1 Recordings. (*Id.* ¶¶ 16-17, 20.) The LimeWire program on Defendant's computer was configured to share those files she downloaded into the "My Music" shared folder associated with the "Audrey Ann Amurao" user profile. (*Id.* ¶ 15.) As a result, all of the 1300 sound recordings contained in each of the subfolders within Defendant's "My Music" folder on her Computer—including the Exhibit A Recordings and Schedule 1 Recordings—were being distributed to other LimeWire users. (*Id.* ¶ 24.) This distribution violates Plaintiffs' exclusive right of distribution under Section 106(3) of the Copyright Act. *See Tasini*, 533 U.S. at 506; *Napster*, 239 F.3d at 1014; *Anderson*, 2008 U.S. Dist. LEXIS 53654, at *19; *Harper*, No. 5:07-cv-026-XR, slip op. at 10 (Ex. B).

For all of these reasons, the Court should enter summary judgment for Plaintiffs with respect to all 79 Copyrighted Recordings.

V. PLAINTIFFS ARE ENTITLED TO STATUTORY DAMAGES RESULTING FROM DEFENDANT'S COPYRIGHT INFRINGEMENT.

The Copyright Act provides that once copyright infringement has been established:

> [T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally.

17 U.S.C. § 504(c)(1). *See also Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1114 (2d Cir. 1986) (noting that upon proof of infringement, a copyright "owner may elect to

recover – instead of actual damages and profits – statutory damages under § 504(c)(1) for those works whose copyrights were registered at the time the infringement occurred").

Here, having established Defendant's infringement of Plaintiffs' reproduction and distribution rights, Plaintiffs elect to recover such statutory damages under section 504(c)(1). Plaintiffs need not prove any actual damages in order to be entitled to an award of statutory damages. Plaintiffs may elect statutory damages "whether or not adequate evidence exits as to the actual damages incurred by plaintiffs or the profits gained by defendants." *See Cable/Home Commc'n Corp. v. Network Prods, Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (citing *Nimmer* § 14.04[A]); *see also Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113-14 (2d Cir. 2001 (affirming award of statutory damages because the award was "within the statutory range" and, thus, within the jury's "discretion"); *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc*, 259 F.3d 1186, 1194 (9th Cir. 2001) ("A plaintiff may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant's profits.") (citing *Nimmer* § 14.04[A]).

The appropriate statutory damages for non-willful infringement range from a minimum of $750 per work to a maximum of $30,000 per work. *See* 17 U.S.C. § 504(c)(1). When, as in the present case, Plaintiffs elect statutory damages, they may not receive less than the minimum statutory damages amount specified in the Copyright Act for each infringed work. The Court is "constrained . . . by the specified maxima and minima" set forth in the Copyright Act. *Krypton Broad.*, 259 F.3d at 1194 (internal quotation marks and citation omitted); *Gonzales*, 430 F.3d at 893; *Maverick Recording Co. v. De Rosa*, Civ. No. 1:05-cv-5861 (DGT/RML), slip op. at 3 (E.D.N.Y. Apr. 23, 2007) (attached as Exhibit C); *Sony Music Corp. v. Scott*, No. 03-CV-6886-

BJS, slip. op. at 2 (S.D.N.Y. Feb. 18, 2005) (attached as Exhibit D); *Lava Records, LLC et al. v. Ates et al.,* Case 3:05-cv-01314-RGJ-KLH (July 11, 2006, W.D. La.) (attached as Exhibit E).

Plaintiffs have proven that they own the copyrights in the Recordings and that Defendant infringed those copyrights. Because Plaintiffs have conclusively established their claim for copyright infringement against Defendant, they are entitled to an award of minimum statutory damages.

To facilitate a final disposition of this case on the instant Motion, Plaintiffs seek only the minimum amount of statutory damages prescribed by the Copyright Act: an award of $750 for 34 of the Copyrighted Recordings, for a total of $25,500. Courts routinely award minimum statutory damages in these types of copyright cases, as they must, when granting a motion for summary judgment. *See, e.g., Gonzalez,* 888 F.3d at 893; *Anderson*, 2008 U.S. Dist. LEXIS 53654, at *26; *Sony BMG Music Entm't v. Bell*, Case No. A-04-CA-1055-SS (W.D. Tex. June 6, 2006) (attached as Exhibit F); *Scott*, No. 03-CV-6886-BJS, slip. op. at 2 (Ex. D); *Ates*, Case 3:05-cv-01314-RGJ-KLH, slip op. at 7 (Ex. E). In addition, hundreds of courts throughout the country, including this Court, have awarded minimum statutory damages when ordering default judgment for Plaintiffs.[5] Plaintiffs seek the same here in the summary judgment context, in the interests of efficiency and economy for both the Court and the parties. Accordingly, Plaintiffs are entitled to minimum statutory damages without presenting any evidence of damages, and

[5] *See, e.g., Ortiz-Gonzalez v. Fonovisa*, 277 F.3d 59, 63-64 (1st Cir. 2002); *Sony BMG Music Entertainment v. Carlin*, No. 5:05-CV-00918-GLS-GHL, slip op. at 1 (N.D.N.Y. Feb. 15, 2006) (attached as Exhibit G); *Atlantic Recording Corp. v. Burgess*, No. 05CV3182 RMB, slip op. at 1 (S.D.N.Y. Feb. 15, 2006) (attached as Exhibit H); *Motown Record Co. v. Armendariz,* 2005 U.S. Dist. LEXIS 32045, *5 (W.D. Tex. Sept. 22, 2005) (explaining that "[a]n award of statutory damages does not require an evidentiary hearing" because defendant's default by itself establishes a basis for the requested statutory damages); *Sony BMG Music Entertainment v. Armas*, 2005 U.S. Dist. LEXIS 11236, at *9 (D. Or. Apr. 18, 2005); *Atlantic Recording Corp. v. Cappiello,* No. 04CV4645, slip op. at 1 (DGT) (E.D.N.Y. Feb. 11, 2005) (attached as Exhibit I).

further evidence of or discussion on damages sustained as a result of Defendant's copyright infringement is unnecessary in the instant case.

VI. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION UNDER SECTION 502 OF THE COPYRIGHT ACT.

The Copyright Act provides:

> Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a); *see also Pacific & Southern Co. v. Duncan,* 744 F.2d 1490, 1499 n.17 (11th Cir. 1984). Injunctions are routinely issued pursuant to the mandate of Section 502, because "the public interest is the interest in upholding copyright protections." *Autoskill Inc. v. Nat'l. Educ. Support Sys.,* 994 F.2d 1476, 1499 (10th Cir. 1993); 4-14 Nimmer § 14.06 ("[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriation of the skills, creative energies, and resources which are invested in the protected work''); *Scott*, No. 03-CV-6886-BJS, slip. op. at 4 (Ex. D). Further, "the balance weighs strongly in favor of Plaintiffs where all that is requested is that Defendant comply with the Copyright Act." *Ates*, No. 05-1314, slip op. at 8 (Ex. E).

Plaintiffs respectfully submit that, as a matter of law, they are also entitled to a permanent injunction against Defendant. In this case, the entry of an injunction is "necessary to preserve the integrity of the copyright laws which seek to encourage individual efforts and creativity by granting valuable enforceable rights." *Atari Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 620 (7th Cir. 1982) (preliminary injunction); *Morley Music Co. v. Café Continential, Inc.*, 777 F. Supp. 1579, 1583 (S.D. Fla. 1991) ("A Plaintiff is entitled to a permanent injunction in a copyright action when liability has been established and where there is a threat of continuing violations"). As copyright holders, Plaintiffs are entitled to avoid

the irreparable damage that will occur if Defendant (and others like her) continues to infringe upon Plaintiffs' copyrights. Irreparable harm is presumed in copyright infringement actions. *American Metro. Enters., Inc. v. Warner Bros. Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968) ("A copyright holder in the ordinary case may be presumed to suffer irreparable harm when his right to the exclusive use of the copyrighted material is invaded."). Once irreparable injury is presumed, injunctive relief is appropriate because damages alone are not an adequate remedy. Thus, as in *Napster*, an injunction in this case "is not only warranted but required." *Napster*, 239 F.3d at 1027. Indeed, such injunctions are "regularly issued" because of the strong public interest in copyright protections. *Arista Records, Inc. v. Beker Enters.*, 298 F. Supp. 2d 1310, 1314 (S.D. Fla. 2003).[6]

The scope and history of Defendant's infringement more than warrant the requested injunction, as demonstrated by Plaintiffs' evidence that Defendant downloaded and distributed Plaintiffs' copyrighted sound recordings over a four-year period. (SOF ¶ 11, 13, 18-21.) Absent an injunction, there is nothing to stop Defendant from downloading and distributing more of Plaintiffs' copyrighted sound recordings through an online media distribution system. Injunctive relief therefore is required to prevent further irreparable harm.

Accordingly, Plaintiffs seek entry of an injunction, as requested in the Complaint. (Compl. ¶ 27.) Specifically, Plaintiffs ask for an injunction providing:

> Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the

[6] Additionally, pursuant to the equitable powers provided under 17 U.S.C. § 503(b) (2000), this Court has the power to order the destruction of all infringing copies in Defendant's possession as part of a final order or decree. *See Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

> Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, to distribute (*i.e.*, upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

(Compl. at 6-7.) Just as courts throughout the country (including courts in this jurisdiction) have awarded minimum statutory damages when ordering default judgment for Plaintiffs, *see supra* Part V, they have also adopted Plaintiffs' language regarding injunctive relief. *See id.*

In light of the massive scope and nature of Defendant's infringement, the public interest, and the need to protect Plaintiffs' copyrighted works, the requested injunction prohibits infringement of all copyrighted sound recordings owned by Plaintiffs. Broad injunctions such as this are regularly entered in copyright infringement cases. *See, e.g., Gonzalez,* 430 F.3d at 893 (affirming lower court's injunction preventing the defendant from further infringement of Plaintiffs' copyrighted sound recordings); *Sony Music Entertainment, Inc. v. Global Arts Productions,* 45 F. Supp. 2d 1345, 1347-48 (S.D. Fla. 1999) (enjoining defendants from infringing any of the copyrighted works owned by Plaintiff, including, but not limited to, those listed in the complaint).

For the same reasons, and because Plaintiffs continually create new works – works that would be vulnerable to infringement and require litigation if the injunction were limited to existing works – the requested injunction follows standard practice in copyright cases by covering works to be created in the future. *See Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1392 (6th Cir. 1996) ("The weight of authority supports the extension of injunctive relief to future works."). The injunction would not, of course, prohibit Defendant from utilizing the Internet for legitimate, noninfringing purposes.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court grant summary judgment in their favor and against Defendant Audrey Amurao on Plaintiffs' claim for copyright infringement regarding the 79 Copyrighted Recordings. Plaintiffs respectfully request that the Court award Plaintiffs minimum statutory damages for 34 of the Copyrighted Recordings, in the total amount of $25,500, injunctive relief as prayed for in the Complaint, and such further relief as the Court deems just and proper.

Dated: March 31, 2008

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 31, 2009, a copy of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served upon Defendant via email and United States Mail as follows:

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