No. 22-1451

IN THE
United States Court of Appeals for the Fourth Circuit

SONY MUSIC ENTERTAINMENT, ET AL.,
Plaintiffs-Appellees,

v.

COX COMMUNICATIONS, INC. and COXCOM, LLC,
Defendants-Appellants,

(see full caption on inside cover)

On Appeal from the United States District Court
for the Eastern District of Virginia
No. 1:18-cv-950 (LO/JFA)
Hon. Liam O'Grady

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May 22, 2024

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Plaintiff-Appellees,

and

NONESUCH RECORDS INC.; WARNER BROS. RECORDS INC.; WARNER/CHAPPELL MUSIC, INC.; W.B.M. MUSIC CORP.; UNIVERSAL - POLYGRAM INTERNATIONAL TUNES, INC.; UNIVERSAL - SONGS OF POLYGRAM INTERNATIONAL, INC.; UNIVERSAL POLYGRAM INTERNATIONAL PUBLISHING, INC.; RONDOR MUSIC INTERNATIONAL,

Plaintiffs,

v.

COX COMMUNICATIONS, INC. and COXCOM, LLC,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. _22-1451_   Caption: _Sony Music Entertainment et al. v. Cox Communications, Inc. et al._

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cox Communications, Inc. and CoxCom, LLC
(name of party/amicus)

_____

who is _____Appellants_____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1.   Is party/amicus a publicly held corporation or other publicly held entity?   ☐ YES ☑ NO

2.   Does party/amicus have any parent corporations?   ☑ YES ☐ NO
      If yes, identify all parent corporations, including all generations of parent corporations:

      Cox Communications, Inc. is the parent corporation of CoxCom, LLC. Cox Communications, Inc. is owned by Cox DNS, Inc. and Cox Enterprises, Inc.

3.   Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?   ☐ YES ☑ NO
      If yes, identify all such owners:

12/01/2019 SCC

i

4.   Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?   ☐YES ☑NO
If yes, identify entity and nature of interest:

5.   Is party a trade association? (amici curiae do not complete this question)   ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6.   Does this case arise out of a bankruptcy proceeding?   ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7.   Is this a criminal case in which there was an organizational victim?   ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: __/s/ Christopher J. Cariello_____   Date: _____May 22, 2024_____

Counsel for: __Cox Communications, Inc. and CoxCom, LLC____

ii

Print to PDF for Filing

TABLE OF CONTENTS

iv

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

In the first appeal from the $1 billion judgment in this copyright case, a panel of this Court overturned the verdict and remanded for a new damages trial. This second appeal is about Plaintiffs' litigation misconduct and newly discovered evidence, which surfaced only after judgment was entered and reveals that the initial jury verdict was unfairly procured.

Plaintiffs' copyright claims against internet service providers (ISPs) like Appellant Cox Communications rely on secondary liability: They seek to hold Cox liable for direct infringement by Cox users who allegedly shared or downloaded Plaintiffs' copyrighted songs. But there can be no secondary liability without underlying direct infringement—an element Plaintiffs had to prove at trial.

The foundation of Plaintiffs' supposed proof of direct infringement was a copyright notice system they developed with a company called MarkMonitor. At a high level, MarkMonitor's claimed approach was to first download and create a database of music files available on popular peer-to-peer networks, then attempt to catch users swapping the songs reflected in that database. When it did, MarkMonitor sent an

1

automated notice to that user's ISP, alleging infringement and demanding the ISP take action against its subscriber. These notices are the primary proof Plaintiffs have offered of direct infringement.

Needless to say, the reliability of MarkMonitor's system was all-important, and Cox had every interest in attacking it. But Cox was deprived of the opportunity to scrutinize MarkMonitor's system fully, something it would learn only after judgment was entered. The truth came out when district courts in cases Plaintiffs brought against other ISPs forced Plaintiffs to turn over evidence Plaintiffs had deliberately concealed from Cox.

First, in *Warner Records, Inc. v. Charter Communications Inc.*, Plaintiffs were forced to disclose a project they had commissioned from MarkMonitor in 2016 to *re-download*, from random sources on the internet, the songs purportedly reflected in the MarkMonitor database. Why commission such a project? Because MarkMonitor had *deleted* critical direct-infringement evidence: the original files on which its database was founded. Plaintiffs here—understandably self-conscious about destroying the foundation of their system—kept the project from Cox, defying a district court order compelling evidence of any

2

agreements with MarkMonitor. Then, at trial, Plaintiffs produced a hard drive containing music files that they misrepresented to Cox, the court, and the jury as the *original* files from years earlier.

As it turned out in *Charter*, the concealed 2016 project was directly relevant to the reliability of MarkMonitor's system. The *Charter* court pointedly told Plaintiffs that they "can't commission MarkMonitor to do the investigatory work … without exposing all of MarkMonitor's work on this case to scrutiny." JA___[Dkt.738-31_8]. And lo and behold, the *Charter* evidence ultimately revealed that the 2016 project failed to confirm some of the original entries in the MarkMonitor database. With this laid bare, Plaintiffs in *Charter* were forced to develop an entirely new approach to proving the system's reliability and, thus, direct infringement; they hired a gaggle of new experts, then settled before trial could test this new method. Plaintiffs thus deprived Cox of evidence that would have squarely undermined the reliability of the MarkMonitor notice system and, therefore, Plaintiffs' direct-infringement case.

Second, in *Charter* and *UMG Recordings Inc. v. Bright House Communications LLC*, Plaintiffs confessed that they had failed to

3

disclose the source code embodying key aspects of MarkMonitor's system—code that has never been disclosed to Cox either. Cox still does not know precisely what this code does. But public documents from *Charter* and *Bright House* indicate that the code governs, at least, the process by which MarkMonitor supposedly verified that files it found on peer-to-peer networks matched copyrighted works. The district court in *Bright House* was determined to get to the bottom of this. It summoned MarkMonitor's corporate representative to appear in court and explicitly commanded that "Plaintiffs' counsel SHALL NOT coach [him] in advance." Order at 1-2, *UMG Recordings, Inc. v. Bright House Networks, LLC*, No. 19-cv-710 (M.D. Fla. July 29, 2022), Dkt. 723. Plaintiffs settled the day before that appearance.

Revelations like these are precisely why Rule 60(b) exists. Cox moved for relief from judgment under both Rule 60(b)(2) based on newly discovered evidence and (b)(3) based on misconduct, explaining how the concealment of key evidence prevented Cox from fully attacking the reliability of MarkMonitor's system. And it pleaded with the district court to at least permit Cox discovery into Plaintiffs' misconduct and the withheld evidence. The district court brushed these motions aside

4

in a brief order that misunderstood both the relevant standards under
Rule 60(b) and the underlying record. Most troubling was its one-
sentence statement that Plaintiffs had engaged in no misconduct—
effectively abdicating its responsibility to probe the integrity of a verdict
dubiously procured.

The interests of justice demand a new trial in which Cox will have
the opportunity to test Plaintiffs' evidence of direct infringement. Any
interest in finality is now vastly diminished following this Court's
remand from Cox's first appeal. This Court should therefore reverse the
denial of Cox's Rule 60 motions or, at a minimum, vacate the district
court's decision and direct the court to permit Cox its requested
discovery, followed by appropriate motion practice. The fairness and
integrity of any result in this case depends on it.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331,
1338(a), and it entered judgment on January 12, 2021, JA___[Dkt.723].
In Cox's appeal from that judgment, this Court reversed in part,
affirmed in part, vacated the damages award, and remanded for a new
trial on damages. *Sony Music Ent. v. Cox Commc'ns, Inc.*, No. 21-1168,

5

93 F.4th 222 (4th Cir. 2024).

While that appeal was pending, Cox twice moved for indicative rulings on motions for relief from judgment under Federal Rules of Civil Procedure 60(b) and 62.1(a). JA___, ___[Dkt.737_1;Dkt.748_1]. By order dated March 23, 2022, the district court denied both motions. JA___[Dkt.796_1-6]. Cox timely appealed on April 22, 2022. JA___[Dkt.798_1]; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in denying Rule 60(b)(3) relief from judgment, or at least discovery, where Plaintiffs concealed a 2016 project to generate evidence supporting the copyright notice system that was the foundation of their infringement case and misrepresented that project and other evidence in support of their direct infringement case?

2. Did the district court abuse its discretion in denying Cox discovery in support of its motion under Rule 60(b)(2) and (b)(3) regarding newly discovered source code, embodying a key component of the copyright notice system, that Plaintiffs failed to produce in spite of a

6

discovery order requiring its disclosure?

STATEMENT OF THE CASE

The Music Industry Creates A Copyright Notice Program To Target ISPs.

The music industry initially combated piracy on the internet by targeting those directly responsible for the infringing conduct—the people who downloaded music files or the platforms designed to allow people to exchange them. JA___, ___[Dkt.629_174-180,280-286]. But burying music fans under massive damages awards was unpopular. JA___[Dkt.629_174]. And as file-sharing technology progressed, platforms became more elusive and less likely to be able to pay the huge damages awards the music industry was after. JA___, ___[Dkt.629_228-229;Dkt.630_296]. So the industry shifted, relying on a novel application of secondary copyright liability to target the ISPs that provide general-purpose internet access. JA___[Dkt.629_175-177].

In 2011, the Recording Industry Association of America (a trade group representing Plaintiffs) hired a vendor called MarkMonitor to develop a system supporting this new ISP-focused litigation model. JA___[Dkt.768_5-6]. That system was intended to identify infringing songs being shared on popular "peer-to-peer" file transfer networks.

7

JA___[Dkt.768_5-7]. According to Plaintiffs, MarkMonitor's automated system performed three steps.

Step one was to make a database of songs. The first time MarkMonitor encountered a particular file on a peer-to-peer network, it downloaded it and used software from a company called Audible Magic to see if the file contained a copyrighted song. JA___[Dkt.768_6] (citing JA___, ___, ___[Dkt.637_461-63;Dkt.638_633-34,641-43]). We refer to these files—downloaded between 2012 and 2015 to build MarkMonitor's song database—as the "original database files."

If Audible Magic confirmed that an original database file matched a copyrighted song, MarkMonitor recorded information like the song title and artist, as well as the "hash value" of the original database file. JA___, ___[Dkt.637_439-440,436]. Generally speaking, a "hash value" is a unique string of numbers and letters reflecting a file's contents.

At step two, MarkMonitor was to perform what Plaintiffs and the district court called "infringement verification." JA___[Dkt.768_6]; JA___[Dkt.796_2]. MarkMonitor looked for users sharing files with hash values that matched the values taken from the original database files at step one. JA___[Dkt.768_6]. To be clear, during this step,

8

MarkMonitor did not actually download files and *calculate* hash values to check for a match; it relied instead on hash value metadata—essentially, user-provided labels—purporting to provide the file's hash value. JA___[Dkt.638_580] (Pls.' expert); JA___[Dkt.638_636-637] (MarkMonitor's corporate representative).

We refer to these files—allegedly shared by Cox subscribers—as the "alleged infringing files." When the MarkMonitor software thought it found a hit, it recorded information like the date and time, the user's internet protocol (IP) address, and the metadata for the file that purported to indicate its hash value. JA___[Dkt.638_653-57].

At step three, MarkMonitor's system determined which ISP was associated with the IP address of the allegedly infringing user. JA___[Dkt.637_477]. Then it would automatically generate and send a notice to that ISP alleging that someone at the IP address had infringed. JA___[Dkt.796_2]; JA___[Dkt.637_477]. During the notice period, MarkMonitor's system was generating and sending Cox hundreds of notices per day. JA___, ___[Dkt.630_310,380].

Then came a step four: Sue the ISPs. In 2014, BMG Rights Management, a music publishing company, sued Cox. *See BMG Rights*

9

Mgmt. (US) LLC v. Cox Commc'ns, Inc., 881 F.3d 293, 300 (4th Cir. 2018). After that case settled, dozens of record labels and music publishers brought this case against Cox. Rightsholders have also sued Charter Communications, Bright House Networks, Grande Communications, Frontier Communications, and AlticeUSA.[1]

Every case features essentially the same theory of copyright liability: Once an ISP receives notices in connection with an IP address, the ISP purportedly knows that this internet connection is likely to be used to infringe again, and therefore it is liable for all further infringement. And in every case the music industry seeks hundreds of millions of dollars in damages.

Plaintiffs Conceal Fundamental Aspects Of Their Copyright Notice Program During Discovery And Trial.

It is simple enough to describe the steps of MarkMonitor's process. The devil is in the details, which dictate the system's reliability, the credibility of its generated notices, and ultimately its ability to prove

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[1] *Warner Records Inc. v. Charter Commc'ns, Inc.*, No. 19-cv-874 (D. Colo.); *UMG Recordings, Inc. v. Bright House Networks, LLC*, No. 19-cv-710 (M.D. Fla.); *UMG Recordings, Inc. v. Grande Commc'ns Networks LLC*, No. 17-cv-365 (W.D. Tex.); *UMG Recordings, Inc. v. Frontier Commc'ns Corp.*, No. 21-cv-5050 (S.D.N.Y.); *Warner Records Inc. v. Altice USA, Inc.*, No. 23-cv-576 (E.D. Tex.).

direct infringement. So naturally, Cox sought to probe these details.

But as Cox would ultimately learn based on revelations in lawsuits

against other ISPs, Plaintiffs and MarkMonitor concealed and

misrepresented critical aspects of the system.

The 2016 hard drive. As explained above, MarkMonitor's first

step was purportedly to download the original database files from peer-

to-peer networks and, using Audible Magic, determine if they were

matches for copyrighted works. Plaintiffs said that for any given

copyrighted work, the original database file was downloaded, and this

Audible Magic verification process was completed before MarkMonitor

sent notices alleging infringement. *See, e.g.*, JA___, ___,

___[Dkt.768_6;Dkt.637_477;Dkt.638_571]. To attempt to demonstrate

this step at trial, Plaintiffs relied on a hard drive purporting to contain

the "███,"

JA__[Dkt.739-3_ECF23]—that is, the original database files. *See* Pls.'

Ex. 39 (hard drive).

To bolster the appearance that the hard drive files were

downloaded before notices were sent, MarkMonitor's corporate

representative, Samuel Bahun, paired the hard drive with a

11

spreadsheet made by MarkMonitor reflecting "the records of all the

song files that we downloaded and verified using Audible Magic,"

JA___[Dkt.638_639-43]. *See* JA___[PX11] (Pls.' Ex. 11) (spreadsheet).

Bahun told the jury that this verification happened "[i]n the first step"

of the 2012-2015 process and that the hard drive "contain[ed] all of the

music files related" to "the recordings on this spreadsheet."

JA___[Dkt.638_640-43].

   This was false. After trial and entry of judgment, Cox learned

that the hard drive did not in fact contain the original database files.

Plaintiffs could not produce those files because MarkMonitor had

deleted them. JA___[Dkt.768_ECF7] (Pls.' opposition to Cox's first

Rule 60(b) motion). It turns out that when they "began to contemplate

litigation" in 2016—years *after* the alleged infringement in this case

occurred—Plaintiffs seemingly paid MarkMonitor to go out and look for

new files available on peer-to-peer networks that had hash values

matching those of the original database files. JA___[Dkt.768_9]. We

refer to these 2016 downloads as the "hard drive files."

   The testimony about MarkMonitor's spreadsheet was false, too.

The spreadsheet reflected MarkMonitor's purported verification of ▮

12

██████████████████████████████████████

████████████████████████. *E.g.*, JA___[Dkt.352_10-11] (Pls.'

opposition to Cox's motion for discovery sanctions). It thus did not

reflect verification of the 2016 hard drive files at all.

But Plaintiffs never told Cox, the court, or the jury that the hard

drive files were downloaded from random sources only after the

infringement notices were sent and in order to support Plaintiffs'

litigation strategy. Instead, Plaintiffs falsely represented the 2016 hard

drive as containing the original database files downloaded in 2012-2015,

e.g., JA___, ___, ___, ___, ___[Dkt.538_22;Dkt.739-

3_ECF12;Dkt.629_163,224-225;Dkt.637_515-16], because they were

keen to present the hard drive files as the verified foundation for the

notices they sent to Cox.

Source code. Plaintiffs also failed to disclose critical technical

evidence regarding MarkMonitor's system: the source code that

Plaintiffs admit MarkMonitor used to retrieve and store data from

Audible Magic in the process of building its database. *See* JA___,

___[Dkt.774_3,6] (Pls.' opposition to Cox's first Rule 60 motion).

Plaintiffs have always acknowledged that MarkMonitor never

13

downloaded the alleged infringing files that they contend Cox subscribers were sharing or downloading. *E.g.*, JA___[Dkt.638_580]. Instead, the system relied on the user-provided hash value labels in the metadata attached to each of the alleged infringing files to establish the file's identity. JA___[Dkt.658_2242-2246]. This approach made the source code used to build MarkMonitor's database highly salient. If the source code was fallible, so was the database, and so were the resulting notices sent to Cox.

During discovery, Cox subpoenaed MarkMonitor for "[o]ne copy of each version of [the MarkMonitor] System that was in use" during the time Plaintiffs sent the notices at issue in this case. JA___[Dkt.749-5_ECF13-14]. As Cox's technical expert explained, "[t]he only way to review and analyze the functionality of MarkMonitor's system at each relevant point in time is to access the actual system and the source code." JA___[Dkt.749-8_ECF4]. After MarkMonitor refused to produce any code, a magistrate judge in the Northern District of California agreed with Cox, ordering that MarkMonitor turn it over. JA___[Dkt.749-7]; JA___[Dkt.749-10_5] (Order Granting Mot. to Compel, *Cox Commc'ns, Inc. v. MarkMonitor, Inc.*, No. 19-mc-80050-SK

14

(N.D. Cal. Mar. 7, 2019), Dkt. 14).

MarkMonitor seemingly complied, yet Cox's expert was perplexed: The code was a "███████████████████████████████████ ████████████████████████████████." JA___[Dkt.750-4_76-77]. But MarkMonitor dug in. Its corporate representative, Bahun, falsely testified that the code offered was ████████████████████████ ████. JA___[Dkt.750-1_63]. And MarkMonitor's counsel went even further, insisting that there "is no revision history" for the source code "as MarkMonitor was only running one version during the relevant time period"—i.e., from 2012 all the way to 2015. JA___[Dkt.749-1_2].

MarkMonitor's assurances were false. As Cox would learn only after trial and entry of judgment, MarkMonitor failed to disclose the source code and revision history for two parts of its system called the "File Hash Manager" and "Torrent Manager." JA___[Dkt.749-16_1]. Though it remains unclear what this source code does, both Plaintiffs' expert and a third-party report appear to confirm that the Torrent Manager played a role in confirming ██████████████████████████ ██

JA___[Dkt.750-7_6] & fig. 2; *see infra* 58-59. The missing code therefore

15

appears to be central to the reliability of MarkMonitor's system. But

Cox has never had the opportunity to review the code or assess its

reliability.

<div align="center">***</div>

By concealing the aspects of the MarkMonitor system described

above, Plaintiffs made the jury think Plaintiffs had proof of a

contemporaneously created database of copyrighted works—including

the contemporaneously downloaded files themselves—as well as the

source code underlying the system that created that database. In

reality, Plaintiffs had neither. But the misinformed jury found for

Plaintiffs and awarded $1 billion in damages. JA___[Dkt.669]. The

district court entered judgment in Plaintiffs' favor on January 12, 2021.

JA___[Dkt.723].

Cox Discovers Plaintiffs' Misconduct And Newly Discovered Evidence After Judgment.

Over the following year, Plaintiffs' efforts to conceal the details of

MarkMonitor's system unraveled. Cox learned about what Plaintiffs

had done through public admissions by Plaintiffs' counsel in two

parallel litigations against Charter Communications in the District of

Colorado and Bright House Networks in the Middle District of Florida.

<div align="center">16</div>

See Warner Records Inc. v. Charter Commc'ns, Inc., No. 19-cv-874 (D.

Colo.); *UMG Recordings, Inc. v. Bright House Networks, LLC*, No. 19-cv-

710 (M.D. Fla.).

The 2016 hard drive. In *Charter*, Plaintiffs' counsel publicly

revealed that they had "directed a project in February 2016 to analyze

infringement data from the RIAA Notice Program for the purpose of

informing Plaintiffs' potential litigation strategy in this and other cases

against other ISPs." JA___[Dkt.738-16_2] (Oppenheim Decl., *Charter,*

Dkt. 287-1). Plaintiffs' counsel explained that the project was governed

by a 2016 "Statement of Work." JA___[Dkt.738-16_2]; JA___[Dkt.739-8]

(2016 Statement of Work). It was this project that generated the 2016

hard drive Plaintiffs had relied upon in *Cox*.

This was news to Cox. During discovery, Cox had sought "[a]ll

documents concerning the relationship, agreement, and/or

communications, including the communications, between [Plaintiffs]

and MarkMonitor." JA___[Dkt.75-2_37]; *see also* JA___[Dkt.75-2_34].

When Plaintiffs stonewalled, Cox moved to compel. JA___[Dkt.75_19-

21]. Granting the motion, the district court ordered Plaintiffs to

disclose "the relationships and agreements between the plaintiff[s] and

17

MarkMonitor" that informed "the program at issue in this case."

JA___[Dkt.738-27_73-74]. But Plaintiffs never turned over the 2016

Statement of Work as ordered. Though *MarkMonitor* would later

produce the agreement, it was contained in a batch of 33 other

documents, many unrelated to the litigation. JA___[Dkt.767-1_ECF2-

3]. Cox, relying on Plaintiffs' presumed compliance with discovery

obligations, could not have known its relevance.

Cox also learned from the *Charter* docket that Plaintiffs had

produced to Charter a different version of the hard drive that included

packet capture logs ("PCAP files") showing "when and where each of the

audio files on the drive was downloaded." JA___[Dkt.738-16_3].

Neither Plaintiffs nor MarkMonitor produced these to Cox. *See*

JA___[Dkt.739-8_1]. The same is true of still more evidence the

defendants in *Charter* successfully compelled from Plaintiffs—including

a 2016 "hash report," which apparently reflects that MarkMonitor's

2016 project failed to confirm new files for some of the hash values in its

database. JA___[Dkt.738-15_68-69]; JA___[Dkt.738-16_2-3];

JA___[Dkt.738-31_5]. In ordering production of the hash report, the

Colorado district court admonished Plaintiffs that they could not avoid

18

"exposing all of MarkMonitor's work on this case to scrutiny."

JA___[Dkt.738-31_8].

Plaintiffs never did face full scrutiny of MarkMonitor in *Charter*.

At the summary-judgment stage, after the *Charter* defendants obtained

the evidence that was withheld from Cox, Plaintiffs developed an

entirely new method of making their case. It involved "two different

types of experts—seven audio engineers who engaged in critical

listening, and one who performed both critical listening and waveform

and spectrogram analysis." JA___[Dkt.738-32_13-14]. Plaintiffs then

settled the case before trial. Stip. of Dismissal with Prejudice, *Charter,*

No. 19-cv-00874 (D. Colo Sept. 20, 2022), Dkt. 777.

Source code. In January 2022, just under a year after the

judgment in this case, another bombshell: Plaintiffs' counsel admitted

in both *Charter* and *Bright House* that "MarkMonitor located source

code for File Hash Manager with revision history dating from June 25,

2012 to April 15, 2016," and promised to permit those defendants to

inspect the File Hash Manager and Torrent Manager source code.

JA___[Dkt.749-16_1]. It was the missing source code and revision

history that MarkMonitor's witness and counsel insisted in this case did

19

not exist. *Supra* 13-16. Cox thus never had the chance to evaluate the complete source code used to build MarkMonitor's database of infringing hash values—the very database that served as the linchpin of Plaintiffs' infringement case. And by settling the *Charter* and *Bright House* cases, Plaintiffs once again avoided a test of that code before a court or jury. *See* Order of Dismissal with Prejudice, *Bright House*, No. 19-cv-710 (M.D. Fla. Aug. 2, 2022), Dkt. 741.

The District Court Denies Cox's Motions For Relief From Judgment Or Supporting Discovery.

Cox has still never seen the evidence Plaintiffs withheld—from the hard drive PCAP files, to the "hash report," to the source code. Nor has it had the opportunity to depose Plaintiffs' or MarkMonitor's witnesses regarding that evidence of infringement or the failure to produce it. But not for lack of trying.

After the revelations in *Charter* and *Bright House*, Cox sought to intervene in those actions to obtain "access to a narrow set of materials bearing on the validity of" the judgment in this case. JA___[Dkt.738-2_ECF2] (*Charter* motion) (filed Sept. 21, 2021); *see* Am. Mot. to Intervene, *Bright House*, No. 19-cv-710 (M.D. Fla. Aug. 17, 2022), Dkt. 757. Both courts denied the motions, deferring to the district court

in this action. *See* JA___[Dkt.738-2_PDF38] (*Charter* Order, decided

Nov. 22, 2021) (discovery "should be addressed by the presiding judge or

magistrate judge in [*Cox*]"); Order at 3, *Bright House*, No. 19-cv-710

(M.D. Fla. Nov. 16, 2022), Dkt. 771 (deferring to "a court in a case in

which the Cox companies are parties").

While Cox's appeal from the judgment was pending before this

Court, Cox moved the district court for indicative rulings on two

motions for relief from that judgment under Rule 60(b)—one regarding

the hard drive and cover-up of the 2016 project, the other regarding the

source code. JA___, ___[Dkts.737;738] (filed Dec. 27, 2021); JA___,

___[Dkts.748;749] (filed Jan. 11, 2022); *see* Fed. R. Civ. P. 62.1(a). Cox

also requested the opportunity to do limited discovery as to both topics.

JA___, ___[Dkt.739_30;Dkt.750_3-4]. Cox filed these motions within "a

year of the entry of the judgment," as Rule 60(c)(1) contemplates.

With respect to the 2016 hard drive project, Cox invoked

Rule 60(b)(3), which empowers a court to "relieve a party … from a final

judgment" as a result of "misconduct by an opposing party." Cox's

motion detailed the various ways Plaintiffs had concealed and

misrepresented the 2016 project. And it explained how this misconduct

21

hindered Cox's defense that the MarkMonitor system for identifying

and verifying alleged direct infringement was unproven and

unreliable—permitting Plaintiffs to tout that system based on a false

evidentiary foundation.

With respect to the source code, Cox sought only narrow discovery

in support of its motion under Rule 60(b)(2)—which permits relief based

on "newly discovered evidence"—and Rule 60(b)(3)—based on

misconduct. JA___[Dkt.750_2-4]. Cox explained that the source code

appeared directly relevant to the functioning of MarkMonitor's and

Audible Magic's systems, but acknowledged that it had little insight

into the circumstances of Plaintiffs' nondisclosure and, of course, still

had not been permitted to review the withheld source code itself. *See,

e.g.*, JA___[Dkt.750_13].

On March 23, 2022, the district court issued a brief order denying

both of Cox's motions. JA___[Dkt.796]. Several of its conclusions were

unreasoned. The district court found that "there was no misconduct on

the part of Plaintiffs," JA___[Dkt.796_6], but it did not address any of

the misconduct or misrepresentations Cox detailed. The district court

also asserted without explanation that "the Charter code is not material

22

here." JA___[Dkt.796_6]. And it said nothing at all about Cox's

requests for discovery. JA___[Dkt.796_6].

The bulk of the district court's reasoning was its misplaced view

that evidence pertaining to the 2016 hard drive project "is not material,

nor is it likely to produce a new outcome if the case were retried."

JA___[Dkt.796_6]. The district court accepted Plaintiffs' view that "files

with matching hash values are identical regardless of when

downloaded," such that "the dates of the file downloads" for the hard

drive files "do not matter in the context of this case." JA___[Dkt.796_5].

The district court also concluded that because Cox had received the

2016 Statement of Work from MarkMonitor and had observed

"metadata" indicating that the hard drive files were added to the drive

in 2016, "Cox previously had every opportunity to explore these issues

and ample evidence by which to put on a defense." JA___[Dkt.796_5-6].

Cox timely appealed.

SUMMARY OF THE ARGUMENT

I. The district court erred in denying Cox's motion for relief from

judgment under Rule 60(b)(3) concerning the 2016 hard drive project,

or, alternatively, for discovery into evidence of that project and related

23

misconduct.

A. Plaintiffs, their agents, and their witnesses concealed and
misrepresented the 2016 hard drive project in four separate ways.

1. Plaintiffs concealed the fact of the 2016 hard drive project by
failing to produce the statement of work that governed MarkMonitor's
work on the project. It did so despite a district court order compelling
disclosure of all Plaintiffs' "relationships and agreements" with
MarkMonitor concerning "the program at issue in this case."

2. Plaintiffs further concealed the 2016 hard drive project by
misrepresenting the contents of the hard drive, leading Cox and the
jury to believe that the hard drive files were the original database files
that MarkMonitor downloaded in 2012 through 2015—not in 2016.
MarkMonitor's corporate representative falsely testified that the hard
drive files were "the infringing files" that were downloaded "throughout
the course of the time period we are talking about"—i.e., the 2012-2015
claims period.

3. The misrepresentations about the hard drive files were
compounded by Plaintiffs' and MarkMonitors' failure to produce the
"packet capture logs" showing when and from where MarkMonitor

24

downloaded those files.

4. Two other crucial pieces of evidence were similarly never produced. First, Audible Magic destroyed the logs reflecting MarkMonitor's attempts to verify that the hard drive files contained protected songs. Second, Plaintiffs withheld the "hash report" that would have demonstrated the results of that process—including instances in which Plaintiffs concede MarkMonitor failed to locate and verify some files.

B. The district court erred in concluding that Plaintiffs' misconduct did not prevent Cox from fully presenting a meritorious defense.

1. Cox presented a meritorious defense at trial under Rule 60(b)(3) by attacking the reliability of MarkMonitor's automated system. Plaintiffs' misconduct hampered that defense, because Cox was unable to expose the 2016 hard drive project to the jury, unable to show that Plaintiffs lacked any contemporaneous evidence supporting the reliability of their system, and unable to show how the 2016 project evinced Plaintiffs' own concerns about the reliability of the system.

2. The district court applied the wrong standard and

25

misunderstood the record in denying Cox's motion. It concluded that the withheld evidence was "of no consequence." But it committed legal error by failing to apply the Rule 60(b)(3) standard articulated by this Court, which does not require that withheld evidence be likely to change the result at trial—just that the result was unfairly procured. The court also misunderstood the functioning of MarkMonitor's system in finding that the 2016 hard drive project was immaterial.

C. The interests of justice favor a new trial. Any interest in finality is diminished here because the Court in Cox's previous appeal has already remanded the case for a new trial on damages. At a minimum, the Court should vacate the district court's order and remand to allow Cox to discover the withheld evidence and to probe Plaintiffs' misconduct.

II. The Court should vacate the district court's order and remand to allow Cox discovery in support of its motion under Rule 60(b)(2) and (3) concerning portions of MarkMonitor's source code that were never produced.

A. The district court erred in concluding that the code "is not material here" without allowing Cox to inspect it. The reliability of

MarkMonitor's system was central to both Plaintiffs' case and Cox's defense, and Cox should be allowed the opportunity to examine the code underlying that system.

B. Cox has made a prima facie case for relief under Rule 60(b) and should therefore be granted discovery. Under Rule 60(b)(2), Cox has shown that the source code evidence is newly discovered despite Cox's diligence, and any flaws in that code could undermine the MarkMonitor system's reliability and change the outcome on retrial. Under Rule 60(b)(3), Cox has made a prima facie showing that the verdict was unfairly procured as a result of Plaintiffs withholding evidence and offering false testimony about it. That misconduct warrants further investigation.

STANDARD OF REVIEW

The denial of a Rule 60(b) motion is reviewed for abuse of discretion. *Morgan v. Tincher*, 90 F.4th 172, 177 (4th Cir. 2024). A court abuses its discretion if "it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law." *Id.*

27

ARGUMENT

I. The District Court Abused Its Discretion In Denying Cox Relief From Judgment Or Discovery Regarding The 2016 Hard Drive Project.

A motion under Rule 60(b)(3) does not attack "the merits of a judgment, but instead focuses on whether the judgment was procured by unfair means." *Morgan*, 90 F.4th at 177. Yet in resolving Cox's Rule 60(b)(3) motion regarding the 2016 hard drive project, the district court did not even analyze Plaintiffs' extensive misconduct and misrepresentations. And its ruling that Plaintiffs' concealment had no effect on Cox's defense runs into an undeniable reality: The moment it was exposed in *Charter*, Plaintiffs abandoned their *Cox* playbook entirely.

The district court abused its discretion. Cox "demonstrate[d] misconduct by clear and convincing evidence," *Id*. *Infra* § A. It also showed that this misconduct prevented it from "fully presenting" its "meritorious … defense," *Morgan*, 90 F.4th at 177-78 (citation omitted). *Infra* § B. And at this stage, with the initial judgment vacated, the balance of "policy considerations" regarding "finality" and "justice," *Morgan*, 90 F.4th at 177, favors relief. *Infra* § C. This Court should

28

vacate the district court's erroneous ruling and remand for a new trial
or, in the alternative, limited discovery and appropriate supplemental
motion practice.

A. The district court erred in concluding that Plaintiffs engaged in no litigation misconduct.

A "plaintiff's failure to produce … requested, clearly pertinent
discovery material" is "misconduct under Rule 60(b)(3), irrespective
whether that failure was inadvertent or intentional." *Morgan*, 90 F.4th
at 179. The "even worse sin of knowingly putting on … false testimony'"
is also a well-recognized ground for relief. *Id.* at 181 (quoting
Abrahamsen v. Trans-State Exp., Inc., 92 F.3d 425, 428 (6th Cir. 1996)).
Plaintiffs and their witnesses engaged in both forms of misconduct. The
district court's failure to recognize that these "violations w[ere]
misconduct" constitutes abuse of discretion. *Id.* at 174.

1. Plaintiffs concealed the 2016 Statement of Work.

Plaintiffs blatantly defied the district court's order to produce
their "relationships and agreements" with MarkMonitor concerning "the
program at issue in this case." JA___[Dkt.738-27_73-74]. There was no
ambiguity in the district court's directive: "I mean, if you signed a
contract with them, if you have a written agreement, if you have an

29

understanding, you know, a letter agreement that says you're going to do this, we will pay you this, you provide me with these services, these are your obligations, these are my obligations, that kind of agreement or description of the relationship between MarkMonitor" and Plaintiffs or the RIAA. JA___[Dkt.738-27_73].

The 2016 Statement of Work was precisely this: an RIAA agreement with MarkMonitor to generate the hard drive of audio files that Plaintiffs used in this case as purported evidence of direct infringement. The agreement was between MarkMonitor and the RIAA, the latter of whom Plaintiffs concede was acting as their agent in managing the MarkMonitor program. *See* JA___, ___[Dkt.767-2_79, 82]. The RIAA "worked closely" with Plaintiffs' counsel on that program. JA___[Dkt.738-24_ECF4]. Indeed, one of Plaintiffs' attorneys explained in a declaration that he "directed" the 2016 project. JA___[Dkt.738-16_2]. MarkMonitor was therefore Plaintiffs' agent in this regard, too. *See, e.g.*, Restatement (Third) of Agency § 3.15.

It is undisputed that the 2016 Statement of Work was undertaken "in anticipation of litigation" and called for █████████████████

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30

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████████████████████████ JA___[Dkt.739-8_1]; *see also*

JA___[Dkt.768_9]. It was just the sort of "obviously

pertinent … discovery material in [Plaintiffs'] possession," the

nondisclosure of which would compromise the integrity of a proceeding.

Schultz v. Butcher, 24 F.3d 626, 630 (4th Cir. 1994).

Although Plaintiffs did produce some agreements in response to

the district court's order, *e.g.*, JA___[Dkt.739-9], they failed to produce

the 2016 Statement of Work. And to make matters worse,

MarkMonitor's corporate representative, Bahun, testified under oath

that MarkMonitor "████████████████████████████

████████████████████████." JA___[Dkt.739-3_ECF9]. The

misconduct and deception could not be plainer: Plaintiffs withheld a

document, violated a court order to produce it, and offered false

testimony about whether it existed in the first place.

Plaintiffs have advanced two hollow excuses for this misconduct.

First, they contend the district court's order applied only to agreements

between Plaintiffs and MarkMonitor, not those between the RIAA and

MarkMonitor like the 2016 Statement of Work. JA___[Dkt.768_20].

31

That is wrong. Cox's discovery request explicitly called for agreements signed by "all past and present … agents, representatives, or persons acting on behalf of" the Plaintiffs. JA___[Dkt.738-22_3]. In managing the MarkMonitor projects, the RIAA was one of those agents. *Supra* 30.

Second, Plaintiffs have contended that the district court's order was time-limited to a period ending in 2014, such that they did not need to produce the 2016 Statement of Work. JA___[Dkt.768_10-11]. Again, that is baseless. Plaintiffs' counsel pledged to the district court that Plaintiffs "would not time restrict" their productions of "documents about the reliability of the MarkMonitor system." JA___[Dkt.767-2_65]. And their subsequent production in response to the district court's order included ███████████, refuting any contention that Plaintiffs believed a 2016 agreement to be outside the scope of the order. *See* JA___[Dkt.739-9_1].

Nor are Plaintiffs exonerated, as the district court seemingly thought, by the fact that a later production by MarkMonitor bundled the 2016 Statement of Work with several irrelevant documents. *See* JA___[Dkt.796_5] (district court noting that "Cox received the 2016 SOW"). Plaintiffs were ordered to produce all agreements, pledged to do

32

so, and then (along with the RIAA) produced various agreements

responsive to Cox's requests. *See* JA___; ___[Dkt.739-9_1;Dkt.739_15].

Cox reasonably relied on this avowedly complete production as

comprehensive. And MarkMonitor's Bahun testified that there were █

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JA___[Dkt.739-3_PDF9]. The notion that Cox should nevertheless have

scorched the earth to ensure that Plaintiffs had not flagrantly breached

their discovery obligations turns the ethical norms of discovery on their

head.

In short, Plaintiffs failed to produce obviously relevant evidence,

and this non-production had exactly the effect one would expect: Cox

was left in the dark about the very existence of a project used to

generate evidence that Plaintiffs would rely on to demonstrate

infringement.

2.   Plaintiffs, MarkMonitor, and their witnesses intentionally misrepresented the hard drive's contents.

Plaintiffs intentionally took advantage of their concealment of the

2016 project to misrepresent the contents of a key piece of evidence of

direct infringement in this case: the hard drive maintained by

MarkMonitor. Plaintiffs wanted the jury to believe that the hard drive
contained the original database files from 2012-2015 that MarkMonitor
had downloaded prior to sending any notices. They did not want to
admit that MarkMonitor had in fact deleted those original database
files and that Plaintiffs therefore could not demonstrate the soundness
of that database—the one used to send a quarter of a million
infringement notices to Cox demanding that Cox throw homes and
businesses off the internet. *See* JA___, ___[Dkt.637_480,519].

    So they opted for evasion. Before and during trial, in response to
Cox's challenge to the hard drive's foundation and admissibility,
Plaintiffs and their witnesses offered false argument and testimony
that the hard drive files were the "infringing files, as identified by their
unique hash value, that were the subject of MarkMonitor's
infringement notices." JA___[Dkt.538_22]; *see supra* 11-13. Perhaps
most egregious was the testimony of MarkMonitor's Bahun. Bahun told
the jury that the files on the hard drive *were downloaded* from peer-to-
peer networks "throughout the course of the time period we are talking
about"—i.e., the 2012-2015 notice period. JA___[Dkt.639_709]. But
none of the hard drive files were downloaded during that period; they

34

were all downloaded after the fact, during the 2016 project. *See* JA___

Dkt.768_17-19 & n.9]; JA___[Dkt.739-8_1-2].

Bahun was not the only one. Another of Plaintiffs' witnesses,

David Kokakis, testified that he had "spot checked" the "allegedly

infringing files"—despite the fact that the original database files had

been deleted. JA___[Dkt.629_163]. And Plaintiffs' expert Barbara

Frederiksen-Cross testified that the hard drive files were "the files that

were captured during that downloading step in the process."

JA___[Dkt.637_515]. After that downloading step, she explained, "they

were just copied from the system onto the hard drive."

JA___[Dkt.637_516].

Bahun then leveraged these misrepresentations by touting

MarkMonitor's spreadsheet as reflecting Audible Magic's verification of

the files on the hard drive—when in fact the spreadsheet reflected

purported verifications from the original database files that

MarkMonitor had deleted. *Supra* 11-13 (citing JA___[Dkt.638_640-

643]; JA___[PX11]). The effect of that spreadsheet misrepresentation

was to flatten two separate MarkMonitor verification processes—

neither of which could be fully proven—into one coherent-seeming

35

whole. And when Plaintiffs made a show of playing the hard drive files for the jury, JA___, ___, ___[Dkt.629_223-25;Dkt.638_665-66;Dkt.649_1192-1193], the jury had no idea it was listening to random files from 2016—years after the alleged infringement—rather than the original database files downloaded and purportedly verified through Audible Magic *before* the alleged infringement occurred.

In response to Cox's Rule 60(b) motion, Plaintiffs pointed out that their witnesses sometimes referred to the hard drive's contents as "copies" of the original database files. *E.g.*, JA___[Dkt.637_516]. But this hardly saves Plaintiffs. By dubbing the hard drive files "copies," Plaintiffs' witnesses misleadingly insinuated that the files on the hard drive were copied *directly* by Plaintiffs or MarkMonitor from the *originals* MarkMonitor had downloaded years earlier. If a video archivist told you they were showing you a "copy" of an authentic video in their archive, you would naturally understand that the archivist made a *direct* copy from the archived material—not that they had destroyed the original years ago and then sourced a video from a random user on YouTube. Plaintiffs preyed on that natural understanding, which Bahun's false testimony—and, of course, the

36

concealment of the 2016 project altogether—reinforced.

Again, the district court discussed none of this in denying Cox's motion. It offered only the elliptical assertion that Cox "received the 2016 SOW and knew that the Hard Drive files contained 2016 metadata" and therefore "had every opportunity to explore these issues." JA___[Dkt.796_5]. To be sure, Cox had suspicions based on other metadata associated with the hard drive files, which suggested that the files were somehow *copied* in 2016. Indeed, Cox repeatedly attempted to raise this issue with the district court, including moving in limine to exclude the hard drive given this unclear provenance. JA___[Dkt.489]. What Cox could not have known—because of Plaintiffs' misrepresentations—is whether the files were merely copied *to the hard drive* in 2016 from the true originals or *downloaded for the first time* in 2016.

Bahun purported to answer that very question but did so falsely. He first testified that the files were "*put on th[e] hard drive*" at "the end of 2015, beginning of 2016," JA___[Dkt.639_705-06] (emphasis added)— as the metadata might suggest. But critically—and falsely—Bahun said that some of the hard drive files "were downloaded the first time

37

[MarkMonitor] found a file," whereas others were "downloaded multiple times, you know, throughout the course of the time period we are talking about"—i.e., 2012-2015. JA___[Dkt.639_709]. Frederiksen-Cross told the same fib. JA___[Dkt.637_516].

This lays to rest the notion that Cox knew the true nature of the hard drive files and had "every opportunity to explore [the] issues." JA___[Dkt.796_5-6]. It *did* explore the issue, only to be obstructed by misrepresentations like Bahun's.

3. Plaintiffs and MarkMonitor failed to produce the complete hard drive data.

The district court's conclusion that Cox should have uncovered Plaintiffs' project based on "2016 metadata" on the hard drive also runs into another problem: Plaintiffs *withheld* the evidence that would have shown precisely where the files came from and when they were downloaded. Plaintiffs' deliberate concealment of these "PCAP files" is yet another independent form of misconduct warranting relief.

Recall that when Plaintiffs' and MarkMonitor's 2016 project came to light in *Charter*, the Plaintiffs produced a different version of the hard drive. That *Charter* hard drive contained not just song files, but also the corresponding "packet capture logs," which contain details

38

about how and when the hard drive audio files were acquired on the internet—not just when they were loaded onto the hard drive. *Supra* 18-19; JA___[Dkt.738-16_3]. To this day, Cox has still not had a chance to review these PCAP files.

There is no excuse for this intentional non-disclosure. It is undisputed that as part of the 2016 project, MarkMonitor was required to maintain PCAP files and hand that information over to the RIAA. *See* JA___[Dkt.739-8_1]; JA___[Dkt.738-16_3]. It is also undisputed that this entire project was performed "in anticipation of litigation." JA___[Dkt.739-8_1]; *accord* JA___[Dkt.768_9]. As the *Charter* court noted, Plaintiffs "can't commission MarkMonitor to do the investigatory work and expect to have MarkMonitor present its work and work product at trial without exposing all of MarkMonitor's work on this case to scrutiny." JA___[Dkt.738-31_8]. By withholding the PCAP data, Plaintiffs deprived Cox of its right to discover what MarkMonitor actually did and to scrutinize that system. In failing to recognize (or even address) this misconduct, the district court countenanced precisely the have-it-both-ways unfairness the *Charter* court decried.

39

4. Plaintiffs and MarkMonitor destroyed logs documenting the 2016 project and withheld the "hash report."

It now appears that there were two additional, crucial categories of evidence related to the 2016 project that were purposefully withheld: (1) logs that would have reflected any Audible Magic verification of the hard drive files downloaded in 2016 and (2) a "hash report" showing the results of that process, including instances in which MarkMonitor was unable to confirm an entry from its original database.

The first category—the Audible Magic logs—were destroyed, as Plaintiffs and Audible Magic have confirmed. JA_[Dkt.738-15_110]; JA_[Dkt.738-21_2]. Because it is undisputed that the logs were created in 2016 as part of a project "in anticipation of litigation," JA___[Dkt.739-8_1]; *accord* JA___[Dkt.768_9], Plaintiffs' conduct likely constitutes sanctionable spoliation of evidence, *see Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590-91 (4th Cir. 2001) (defining spoliation as "the destruction or material alteration of evidence or … the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation" or the failure "to give the opposing party notice" if the evidence is not in the party's control).

40

Cox was deprived of the opportunity to investigate and to seek relief for Plaintiffs' spoliation, which could have resulted in exclusion of the 2016 hard drive or an adverse inference instruction against Plaintiffs. *See id.* at 593 (sanctions as "severe" as dismissal available even for "the inadvertent, albeit negligent, loss of evidence"); Fed. R. Civ. P. 37(e) (authorizing sanctions for the failure to preserve electronically stored information).

As to the second category—the "hash report"—that document purports to document the results of the verification process that would have been recorded in the missing logs, including the successes and failures of the 2016 verification project. *Supra* 18-19. Plaintiffs' counsel conceded to the Colorado magistrate judge that there were indeed such failures. JA___[Dkt.738-15_68-69]. The hash report thus would have proved that MarkMonitor's post-hoc project was unable to confirm that certain hash values underlying its infringement notices to Cox actually matched copyrighted works, undermining Plaintiffs' claims of direct and secondary infringement. Armed with this report, Cox not only could have explained to the jury that MarkMonitor had destroyed the original database files—it would have had a new line of argument

41

that the system was not reliable at all and that Plaintiffs could not

establish direct infringement.

B.   The district court erred in concluding that Plaintiffs' misconduct did not hamper Cox's defense.

The district court also erred in finding that Plaintiffs' misconduct

did not prevent Cox from "fully defend[ing] its case." JA__[Dkt.796_5].

1.   Plaintiffs' misconduct hampered a meritorious defense.

To obtain relief under Rule 60(b)(3), a movant must show that it

advanced a "meritorious defense" and that the nonmovant's

"misconduct prevented the moving party from fully presenting its case."

Morgan, 90 F.4th at 177 (quoting *Schultz*, 24 F.3d at 630). A

"meritorious defense" is one that "if believed, would permit either the

Court or the jury to find for the [moving party]." *United States v.*

Moradi, 673 F.2d 725, 727 (4th Cir. 1982). To show that evidence-

related misconduct hindered that defense, the movant need only

demonstrate that the concealed evidence "would have helped [the

movant] bolster its defense." *Schultz*, 24 F.3d at 630; *accord Morgan*,

90 F.4th at 179-80.

The MarkMonitor system and the notices it generated were the

42

foundation of Plaintiffs' case against Cox. Plaintiffs repeatedly touted

the system's automated accusations as unassailable.[2] These notices

were the primary evidence of alleged direct infringement by Cox

subscribers, a required element for each of Plaintiffs' secondary

infringement claims. *See Matthew Bender & Co. v. West Publ'g Co.*, 158

F.3d 693, 706 (2d Cir. 1998); JA___[Dkt.673_2923-2924] (jury

instructions). And Plaintiffs' contention that Cox should have swiftly

terminated tens of thousands of internet connections upon receiving a

couple of MarkMonitor's notices strictly depended on those notices being

reliable.

So Cox made "the reliability of the MarkMonitor system" a key

part of its defense at trial. JA___, ___[Dkt.674_2979, 3006-09] (Cox's

closing); *accord* JA___[Dkt.628_83-84] (Cox's opening). Cox argued, for

example, that when MarkMonitor purported to detect infringement

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[2] *E.g.*, JA___[Dkt.628_40] (Pls.' opening) ("[T]hey are the gold standard in antipiracy work."); JA___[Dkt.674_2944] (Pls.' closing) ("MarkMonitor is the gold standard … precise and meticulous."); JA___[Dkt.674_2945] (same) (relying on expert's opinion "that the MarkMonitor system … prepares and sends accurate notices about that infringement activity that it detects"); JA___[Dkt.674_2950] (same) (telling the jury that there "really can be no doubt" about the "over 270,000 infringement notices")

43

based on its database, it did not "actually do the downloads from the offending subscribers' computers," and therefore did not calculate their hash values—relying only on a user-provided hash value label to conclude that it matched one in MarkMonitor's database. JA___[Dkt.674_3006]; *see supra* 8-9. As a result, "MarkMonitor couldn't tell whether the file possessed by a Cox subscriber was real or fake." JA___[Dkt.674_3008] ("BitTorrent users lie."). Cox similarly sought to attack the reliability of the source code underlying MarkMonitor's system—a challenge hampered by Plaintiffs' nondisclosure, as discussed *supra* 13-16, 19-20 and *infra* 55-64.

That trial defense was meritorious within the meaning of Rule 60: Had the jury agreed that the MarkMonitor system was unreliable, Cox's defense would have "permit[ted] … the jury to find for" Cox on direct infringement by Cox subscribers—and find for Cox on secondary liability, too. *Moradi*, 673 F.2d at 727. And the defense was a substantial one. Indeed, the district court denied Plaintiffs' motion for summary judgment on the issue of direct infringement, JA___[Dkt.610_26], rejecting the notion that the MarkMonitor system— even as falsely portrayed by Plaintiffs—established user infringement

44

as a matter of law. *See Morgan*, 90 F.4th at 180 (noting that movant's

defense "proceeded to verdict in a jury trial" and therefore satisfied

Rule 60(b)(3) because the defense was "not plainly without merit or

subject to judgment as a matter of law"); *Schultz*, 24 F.3d at 630

(defense was a "close question").

The facts Plaintiffs concealed would undoubtedly have "bolster[ed]

[Cox's] defense." *Schultz*, 24 F.3d at 630. Had Plaintiffs produced the

2016 Statement of Work and forthrightly acknowledged the provenance

of the files on the hard drive, Cox could have explained that Plaintiffs

lacked any contemporaneous evidence demonstrating the soundness of

MarkMonitor's hash value database. Cox also could have pointed out

that the very act of attempting to recreate that evidence from random

internet sources was a telling demonstration of Plaintiffs' own concern

that evidence derived from its notice program was lacking.

More significantly, the spoliated verification logs and withheld

hash report would have established that Plaintiffs had every reason to

worry: It turned out that in 2016 MarkMonitor *could not* recreate all of

its database entries, meaning that MarkMonitor had sent notices to Cox

alleging user infringement of works it could not confirm. To be sure,

Plaintiffs could not and did not press claims at trial based on notices that MarkMonitor failed to verify during the 2016 hard drive project. But it had no right to hide the project's failures: Plaintiffs argued that "MarkMonitor is the gold standard … precise and meticulous," JA___[Dkt.674_2944], while concealing all the instances where it was unsuccessful. Had Plaintiffs been truthful, and had they produced all the relevant evidence, Cox would have been able to rebut that "gold standard" argument by showing the jury Plaintiffs' and MarkMonitor's own records.

Plaintiffs recognized the risk all too well. Look at what happened in *Charter*. Plaintiffs there fought tooth and nail to conceal the same evidence they succeeded in burying here. When the *Charter* court ordered them to produce it, Plaintiffs abandoned their reliance on the 2016 hard drive project and spreadsheet to prove the connection to copyrighted works. Instead, Plaintiffs hired a battalion of expert listeners to "conduct a critical listening analysis comparing the audio recordings at issue" to "confirm[] each of Plaintiffs' works was copied." JA___[Dkt.738-32_6]. Again, Cox has not had the chance to obtain and evaluate the evidence grudgingly disclosed in *Charter*. But judging by

46

Plaintiffs' abrupt change of course, the evidence does not just poke holes in their showing—it sinks it.

2. The district court misapplied the law and misunderstood the record in finding that Plaintiffs' misconduct did not harm Cox's defense.

In denying Cox's motion, the district court found that the existence of the 2016 project, the evidence related to it, and the provenance of the hard drive files were all "of no consequence." JA___[Dkt.796_5]. For this it adopted wholesale an argument Plaintiffs made about "unique hash value[s]." *Id.* Citing Plaintiffs' opposition, the district court found that "because hash values are a function of the bits and bytes of a file, a file with a hash value of XYZ123 is identical to any other copy of a file with that same XYZ123 hash value regardless of when downloaded." JA___[Dkt.796_2]. As a result, the district court thought, it would not matter if "files may have been downloaded and verified in 2016." JA___[Dkt.796_5]. As long as the later-downloaded hard drive files had "matching hash values," the files would be "identical regardless of when downloaded." JA___[Dkt.796_5].

This reasoning both fundamentally misapplies the law governing Rule 60(b)(3) motions and misunderstands the record.

47

a. This Court has repeatedly rejected attempts by parties who have engaged in discovery misconduct to argue that had they been honest, they still would have won. For example, *Schultz* was about liability for a boating accident. 24 F.3d at 628. Plaintiff Schultz sued the driver of her own boat, Maass, as well as Spirit Cruises, which operated the larger boat whose wake caused the accident. *Id.* at 628-631. At a bench trial, the district court found that Maass "acted reasonably in slowing his boat" but that the pilot of Spirit's boat was negligent. *Id.* at 629. Following entry of judgment, Spirit learned that Schultz's counsel had failed to produce a "Coast Guard Investigative Report" that "implicated Maass and exonerated" Spirit's boat. *Id.* at 630. The district court denied Spirit's Rule 60(b)(3) misconduct motion on the basis that the report "would not have altered the court's determination as to liability." *Id.* at 631.

This Court reversed, holding "that new evidence does not have to be result altering to warrant a new trial on a Rule 60(b)(3) motion." *Id.* at 631. Unlike Rule 60(b)(2)—which requires a showing that new evidence "would probably have changed the outcome"—Rule 60(b)(3) involves a "more lenient" standard that asks merely whether a

48

judgment was "unfairly procured." *Schultz*, 24 F.3d at 631 (cleaned up) (quoting *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 n.10 (1st Cir. 1988)). Because the withheld report "would have helped Spirit Cruises bolster its defense," it did not matter that the district court—which, recall, was itself the factfinder—had determined that evidence would not change the outcome. *Id.* at 630.

Additional cases bolster this point. *See Morgan*, 90 F.4th at 181 (district court erred by requiring a "show[ing] that … undisclosed evidence would have changed the trial outcome"); *Square Constr. Co. v. Wash. Metro. Area Transit Auth.*, 657 F.2d 68, 72 (4th Cir. 1981) (similar). And indeed, this Court explained in *Square Construction* that it is "more especially true" that evidence need not "be sufficient to alter the district court's judgment" when "the district court is not the initial fact finder, as here." 657 F.2d at 72. The district court here misapprehended that rule, committing an error of law that was a per se abuse of its discretion. That alone requires vacatur and remand.

b. In any event, the district court misunderstood both Plaintiffs' and Cox's trial arguments when it endorsed "hash values" as a panacea for Plaintiffs' extensive misconduct.

49

To begin with, the district court's conclusion cannot be squared with what Plaintiffs did in *Charter*. If it were really true that hash value matching is such an unassailable way to verify every aspect of the MarkMonitor system, Plaintiffs would not have abandoned their prior method of demonstrating their system and hired seven new listening experts in *Charter* after revelation of the 2016 project and related evidence.

The district court also wrongly assumed that hash values are infallible in the context of MarkMonitor's system. It is true that, assuming the same algorithm is used, hash values *themselves* are unique representations of the data that makes up a file. So, if one were to use a computer program to calculate the hash values of identical files, the values would be the same. *E.g.*, JA___[Dkt.637_436-38] (Pls.' expert). Hence the analogy to DNA invoked by the district court. JA___[Dkt.796_5].

But it is unclear whether, or at what steps in its process, MarkMonitor actually *calculated* the hash values of files. JA___[Dkt.658_2242-46] (Cox expert explaining that MarkMonitor did not "perform that computation" before sending infringement notices).

50

For example, its hash-matching process at the infringement verification stage relied upon a peer-to-peer *user's* provision of the file's hash value—that is, it relied on hash value *labels* supplied by someone else. JA___[Dkt.638_580] (Pls.' expert); JA___[Dkt.638_637] (MarkMonitor's Bahun).

If some anonymous user mistakenly transposed a hash value (perhaps for a different song) onto that label, or intentionally tampered with the label, MarkMonitor's hash-matching process would misidentify the file. Both parties' experts agreed that this occurs on peer-to-peer networks. JA___[Dkt.658_2242-46] (Cox's expert explaining that hash value labels can be altered); JA___[Dkt.638_563-64] (Pls.' expert conceding that there were instances where peer-to-peer users "mislabeled" files). It was far from clear on the record before the district court that hash values were as infallible as it thought—and again, Plaintiffs apparently did not think so in *Charter*.

Finally, even the district court's mistaken understanding of the hash values would not cure a separate problem: the spoliation of the logs reflecting MarkMonitor's purported 2016 verification of files through Audible Magic. *Supra* 40-41, 45-46. MarkMonitor's hash-

51

matching process, at most, allowed it only to identify and download hard drive files from the internet whose hash value matched a hash value specified in MarkMonitor's database and notices.

As Plaintiffs' expert conceded, MarkMonitor still "has to go through th[e] separate step" of using Audible Magic to verify that those files contain protected works—an entirely different technological process that does not rely on hash values but rather acoustic elements of the recordings. JA___[Dkt.637_514-18]. But Plaintiffs spoliated evidence of this independent step—evidence that would have further bolstered Cox's defense to infringement. And had that spoliation come to light before trial, Cox would have been entitled to an adverse-inference instruction and potentially even dismissal. *See* Fed. R. Civ. P. 37(e)(2). The district court failed entirely to address this component of Cox's motion, yet again abusing its discretion.

C.   Principles of fairness warrant a new trial or, at a minimum, targeted discovery into the 2016 project and Plaintiffs' misconduct.

Because the district court abused its discretion several times over, this Court should reverse and remand for a new trial on liability (in addition to retrial of damages as ordered in the first appeal). At the

52

very least, given the extent of the misconduct already documented, the

Court should vacate the district court's Rule 60 decision and remand

with instructions to permit Cox to obtain limited discovery into (a) the

evidence Plaintiffs and their agents concealed or destroyed and

(b) Plaintiffs' misconduct in doing so. Cox should then be permitted to

renew its request for relief through appropriate motion practice.

Where the elements of a Rule 60(b)(3) motion have been

established, courts evaluate whether "the interest of justice outweigh[s]

the interest in the finality of judgments." *Morgan*, 90 F.4th at 179.

While acknowledging that finality is an "important consideration," this

Court has explained that "the fairness and integrity of the fact finding

process is of greater concern." *Schultz*, 24 F.3d at 631. The "failure to

produce a requested document" that would have bolstered a defense

"impedes that process and requires redress in the form of a new trial."

Id. And where withheld evidence collides with false testimony, as it

recently did in *Morgan*, this Court has had "little trouble concluding"

that the balance favors a new trial. 90 F.4th at 180. (Recall that

Rule 60(b)(3) provides a new trial if the first verdict was "unfairly

procured," even in cases where courts believe the outcome will be the

same. *Supra* 48-49 (quoting *Schultz*, 24 F.3d at 631).

Second, any interest in finality is at its lowest ebb here, where this Court has vacated the initial judgment and remanded for further proceedings to include a trial. *Cf. Santacruz v. Allstate Tex. Lloyd's, Inc.*, 590 F. App'x 384, 390 (5th Cir. 2014) (per curiam) (unpublished) (authorizing the district court on remand to revisit its ruling refusing one claim "in light of the new procedural posture which will require the setting of a trial date" on a separate claim); *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) (noting that "since a new trial is required," the district court would need to "reconsider[]" its refusal of discovery with "the benefit of our view that discovery should not have been foreclosed").

Even if the Court concludes that the finality of the verdict should be maintained for now, it should nevertheless remand for discovery. Cox remains unaware of the full scope of Plaintiffs' misconduct and the withheld or destroyed evidence. This Court has observed that initial revelations of misconduct as to certain evidence can lead to additional discoveries that further bolster a defense or call into question the fairness of a judgment. *See Schultz*, 24 F.3d at 630. Where the record

54

of misconduct that reaches this Court is not fully developed, the Court

has "remand[ed] th[e] case to the district court with instructions to

permit appropriate discovery with respect to the" issues raised in the

Rule 60(b)(3) motion. *Square Constr.*, 657 F.2d 68, 73. That relief, at

least, is eminently justified here.

II. The District Court Abused Its Discretion In Denying Cox Discovery Regarding Withheld MarkMonitor Source Code.

Independently, and in addition, this Court should vacate and

remand with instructions to grant Cox discovery into Plaintiffs' and

MarkMonitor's failure to disclose source code underlying MarkMonitor's

system, as well the opportunity to inspect the newly discovered source

code evidence itself. In denying Cox's motion under Rule 60(b)(2)

(grounds for "newly discovered evidence") and Rule 60(b)(3) ("fraud …,

misrepresentation, or misconduct"), the district court prematurely

concluded that "the Charter code is not material here." JA___,

___[Dkt.796_4,6]. But if this source code is flawed, so is MarkMonitor's

system, an obviously material issue. *Infra* § A. Because Cox made a

prima facie showing of entitlement to Rule 60(b) relief on two bases,

this Court should remand with instructions to permit discovery in

support of further motion practice. *Infra* § B.

A. The district court erred in concluding that the source code is immaterial without granting Cox the opportunity to review it.

The district court's basis for denying discovery into the newly discovered source code and revision history is belied by its own description of the code's significance. The district court described the code as "relate[d] to how MarkMonitor stored data from Audible Magic's identification of the contents of suspected infringing files." JA___[Dkt.796_5]. It seemed to appreciate that this step, involving Audible Magic's "digital fingerprint technology," was both critical to MarkMonitor's system *and* that it was a distinct step from the hash-value matching process the court thought so compelling (wrongly, as we have explained, *supra* 49-51). JA___[Dkt.796_2-3]. Yet the court declared the source code "not material" without explaining why and without giving Cox the opportunity to review the source code evidence and demonstrate its significance. JA___[Dkt.796_6].

That is error in light of the central importance of MarkMonitor's system to Plaintiffs' infringement claims. The source code has always been a bone of contention in this case. During discovery, Cox sought from MarkMonitor "[o]ne copy of each version of Your System that was

56

in use during Plaintiffs' Claim Period, including all versions of … source code for each, that was used to monitor and/or detect copyright infringement, generate copyright infringement notices, or send copyright infringement notices." JA___[Dkt.749-5_ECF13-14]. It also sought "[a]ll documents concerning the revision history of Your System and the associated source code." JA___[Dkt.749-5_ECF14].

When MarkMonitor refused to produce any source code, a Northern District of California magistrate judge dealt a swift rebuke: "[T]he information sought …, including [the] system versions, revision history, and source code, is relevant and necessary to the underlying litigation." JA___[Dkt.749-10_3]. Plaintiffs "will rely on [MarkMonitor's] software and the data and notices it produced," that district court explained, and "the reliability and accuracy of the technology rests at the heart of … [Plaintiffs'] claims." JA___[Dkt.749-10_4]. It thus ordered MarkMonitor to offer its code for inspection. Of course, as explained above (at 13-16, 19-20), MarkMonitor then proceeded to offer an incomplete version of the code.

The magistrate judge was right about relevance—both parties addressed the source code at trial. Plaintiffs' expert reviewed that

57

source code and claimed to confirm its reliability. JA___, ___[Dkt.750-

6_8-9,20-24] (expert report of B. Frederiksen-Cross); JA___[Dkt.749-

15_423-24] (trial testimony). Cox's expert, by contrast, suspected that

the source code was incomplete, and therefore could not fully assess its

reliability. JA___[Dkt.750-3_4-6] (rebuttal report of N. Feamster);

JA___[Dkt.749-15_2236-37] (trial testimony). Yet neither expert could

possibly have fully evaluated MarkMonitor's reliability, because

MarkMonitor failed to disclose key parts of that code.

Eventually, when Plaintiffs did disclose the complete code in the

Charter and *Bright House* cases, they did so with evident contrition, not

a strident claim of immateriality:

> Plaintiffs' counsel has just learned today that on November
> 4, 2021 MarkMonitor located source code for File Hash
> Manager with revision history dating from June 25, 2012 to
> April 15, 2016. We are informed that MarkMonitor can make
> available a copy of this code for Charter's inspection.
> Plaintiffs' counsel will work with you to ensure that happens
> efficiently and expeditiously. We are investigating this
> further, including to understand why it was not located or
> disclosed earlier, but wanted to share what we do know
> immediately.

JA___[Dkt.749-16] (email from Pls.' counsel). Following this revelation,

Plaintiffs' expert in *Bright House*—the same expert who testified here—

was forced to amend her report to reflect the newly discovered code.

58

Am. to Expert Report of Frederiksen-Cross, *Bright House*, No. 19-cv-710 (M.D. Fla. July 18, 2022), Dkt. 665-1.[3] The public version of that report is extensively redacted, but it concedes that when MarkMonitor downloaded potentially infringing files, they were "then processed by Torrent Manager"—one of the missing portions of code—"to perform an Audible Magic identification." *Id.* at 8.

Cox is entitled to the same opportunity Charter had to review source code at the heart of the MarkMonitor system. The district court had no basis for concluding that the source code was somehow categorically immaterial before permitting Cox that opportunity. Its decision should therefore be vacated as an abuse of discretion.

B.   Cox's prima facie showing under Rule 60(b) merits discovery into the improperly withheld source code.

Because Plaintiffs and MarkMonitor are *still* withholding the source code and revision history, the appropriate relief is to permit Cox limited discovery in support of its Rule 60(b) motion. This is no mere

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[3] Though some of the *Bright House* procedural history is not in the record below because it post-dated Cox's motion, this Court can take judicial notice of the proceedings and the "contents of the record" in that litigation. *United States v. White*, 620 F.3d 401, 415 n.14 (4th Cir. 2010).

fishing expedition. Cox made out a prima facie showing under both

Rule 60(b)(2) and (b)(3), more than justifying its modest request to

review evidence that should have been produced.

Rule 60(b)(2). To obtain relief under Rule 60(b)(2), a movant

must show that "(1) the evidence is newly discovered since the judgment

was entered; (2) due diligence on the part of the movant to discover the

new evidence has been exercised; (3) the evidence is not merely

cumulative or impeaching; (4) the evidence is material; and (5) the

evidence is such that is likely to produce a new outcome if the case were

retried, or is such that would require the judgment to be amended."

Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (quoting

Taylor v. Texgas Corp., 831 F.2d 255, 259 (11th Cir. 1987)).

The first two elements are already satisfied, even without further

discovery. Cox diligently requested source code evidence, MarkMonitor

failed to produce it, and Cox did not discover its existence until nearly a

year after judgment was entered. The code and revision history do not

appear to be cumulative, as they relate to at least one step in

MarkMonitor's process for which no source code was previously

produced, as evidenced by Plaintiffs' expert's amended report in *Bright*

60

House.

Of course, because MarkMonitor concealed this evidence, Cox cannot now definitively demonstrate that the evidence has a material likelihood of altering the result. But, as explained above (at 57-59), if these newly discovered components and versions of MarkMonitor's source code reveal a fault in MarkMonitor's process of constructing a database of allegedly infringing hash values, this absolutely could change the result in this case as to some of the approximately 10,000 works at issue.

Rule 60(b)(3). Even if Cox had not made a prima facie showing that the source code evidence is likely to lead to a different result, discovery would still be justified in support of a Rule 60(b)(3) motion. As explained above (at 48-49), Rule 60(b)(3) does not require "result altering" evidence. *Schultz,* 24 F.3d at 631. The unfair procurement of a judgment based on misconduct is enough.

The problem is not just that the code and revision history were never produced, although that would be enough on its own to warrant inquiry. Rather, MarkMonitor's Bahun—whom Plaintiffs presented as a critical witness at trial—falsely said it did not exist, and there are

61

well-founded concerns that the cover-up extended beyond that.

MarkMonitor started by refusing to produce any source code for its

software, until a magistrate judge rejected its "blank assertions that its

system is reliable." JA___[Dkt.749-10_4]; *see supra* 14-15, 57.

MarkMonitor falsely promised there were no versions beyond the single

incomplete one MarkMonitor provided, all the while ▮▮▮▮▮▮

▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮. JA___[Dkt.750-5_106]; *see*

supra 15. Even after MarkMonitor recognized its failure to turn over

source code to Charter and Bright House, it waited two months to tell

Charter, JA___[Dkt.749-16_1], and never informed Cox.

Then, after Cox filed its Rule 60 motion as to the source code in

this case, the *Bright House* parties and MarkMonitor engaged in nearly

a full year of related motion practice. *See Bright House*, No. 19-cv-710

(M.D. Fla.). The district court there ordered "Plaintiffs *and*

MarkMonitor [to] produce … all correspondence between MarkMonitor

and Plaintiffs' counsel concerning the location/discovery of the Missing

Source Code," and made clear that "[n]o claim of privilege or

confidentiality shall attach." *Bright House*, No. 19-cv-710 (M.D. Fla.

July 13, 2022), Dkt. 660, at 2.

It would later command "Mr. Sam Bahun to appear IN-PERSON in Tampa Courtroom 17," and it specifically stated that "Plaintiffs' Counsel SHALL NOT coach Bahun in advance of this appearance." *Bright House*, No. 19-cv-710 (M.D. Fla. July 29, 2022), Dkt. 723 at 1-2. Four days after that order, on the eve of trial, Plaintiffs settled the *Bright House* case, rather than allow an un-coached Bahun to appear and testify. *Bright House*, No. 19-cv-710 (M.D. Fla. Aug. 1-2, 2022), Dkt. 732, 737, 741.

Because the district court did not permit discovery here, Cox does not have full visibility into this misconduct. But the *Bright House* district court clearly deemed it urgently necessary to uncover for itself what appears to be inappropriate coordination between Plaintiffs' counsel, MarkMonitor, and Bahun regarding the missing source code. That is more than enough to justify allowing Cox to ask the same questions in discovery, particularly where Cox has a meritorious defense—a lack of evidence of direct infringement—that may have been hampered by the concealed evidence. This Court has every ability to right wrongs like this by ordering discovery on remand. *See Square Constr.*, 657 F.2d 68, 73; *supra* 54-55. Fundamental interests in

63

"fairness and integrity," *Schultz*, 24 F.3d at 631, demand that relief

here.

CONCLUSION

The district court's order should be reversed or, at a minimum,

vacated, and the case remanded for a new trial or further discovery in

support of appropriate motion practice.

Respectfully submitted,

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May 22, 2024

ORAL ARGUMENT STATEMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Local Rule 34(a), Cox respectfully states that oral argument is warranted. In light of the number and complexity of the issues raised, Cox believes that oral argument would assist the Court in resolving the appeal.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 11,749 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the

Clerk of the Court for the United States Court of Appeals for the Fourth

Circuit by using the appellate CM/ECF system on May 22, 2024.

I certify that all participants in the case are registered CM/ECF

users and that service will be accomplished by the appellate CM/ECF

system.

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ADDENDUM

Rule 60. Relief From a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

    (1) mistake, inadvertence, surprise, or excusable neglect;

    (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

    (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

    (4) the judgment is void;

    (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

    (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

    (1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

    (2) *Effect on Finality.* The motion does not affect the judgment's

finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.