

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*.

---

On Appeal from the United States District Court  
for the Eastern District of Virginia  
Case No. 1:18-cv-950  
(The Honorable Liam O’Grady)

---

**PAGE-PROOF BRIEF OF PLAINTIFFS-APPELLEES**  
**(PUBLIC VERSION—REDACTED)**

---

Matthew J. Oppenheim  
Scott A. Zebrak  
Jeffrey M. Gould  
OPPENHEIM + ZEBRAK, LLP  
4530 Wisconsin Ave. NW, 5th Fl.  
Washington, D.C. 20016  
(202) 480-2999  
matt@oandzlaw.com

Catherine E. Stetson  
Jo-Ann Tamila Sagar  
Michael J. West  
HOGAN LOVELLS US LLP  
555 Thirteenth St. NW  
Washington, D.C. 20004  
(202) 637-5491  
cate.stetson@hoganlovells.com

July 29, 2024

*Counsel for Plaintiffs-Appellees*

---

## 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 v. Cox Communications, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Bad Boy Records LLC  
(name of party/amicus)

who is Appellee, 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:  
Bad Boy Records LLC is a joint venture in which BB Investments LLC, an indirectly wholly-owned subsidiary of Warner Music Group Corp., holds a 50% interest. Bad Boy Records, which is not publicly traded, holds the remaining 50% interest in Bad Boy Records, LLC. Warner Music Group Corp. is a publicly traded company with more than ten percent of its stock owned by AI Entertainment Holdings LLC and certain affiliates, which are not publicly traded.
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:

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/ Catherine E. StetsonDate: 7/29/2024Counsel for: Bad Boy Records LLC

## 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 v. Cox Communications, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sony Music Entertainment, et al. (see attachment)

(name of party/amicus)

who is Appellees, 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:

Appellees are wholly-owned, indirect subsidiaries of Sony Group Corporation, a publicly traded company organized under the laws of Japan

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:  
Sony Group Corporation

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/ Catherine E. Stetson

Date: 7/29/2024

Counsel for: (see attachment)

**United States Court of Appeals  
for the Fourth Circuit**

**Disclosure Statement  
Addendum**

Short Title: Sony Music Entertainment v. Cox Communications, Inc.  
Case No. 22-1451

Name of parties:

(Note: the parties listed below are all affiliates of Sony Group Corporation, which is not a party to this appeal)

- Sony Music Entertainment
- Arista Music
- Arista Records, LLC
- Laface Records LLC
- Provident Label Group, LLC
- Sony Music Entertainment US Latin LLC
- Volcano Entertainment III, LLC
- Zomba Recordings LLC
- Sony Music Publishing (US) LLC, f/k/a Sony/ATV Music Publishing LLC
  - Note that EMI Al Gallico Music Corp. and EMI Algee Music Corp., plaintiffs below, were merged into Sony/ATV Music Publishing LLC effective 3/31/2020.
- EMI April Music Inc.

- EMI Blackwood Music Inc.
- Colgems-EMI Music Inc.
- EMI Consortium Music Publishing Inc., d/b/a EMI Full Keel Music
- EMI Consortium Songs, Inc., d/b/a EMI Longitude Music
- EMI Feist Catalog Inc.
- EMI Miller Catalog Inc.
- EMI Mills Music, Inc.
- EMI Unart Catalog Inc.
- EMI U Catalog Inc.
- Jobete Music Co. Inc.
- Stone Agate Music
- Screen Gems-EMI Music Inc.
- Stone Diamond Music Corp.

## 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 v. Cox Communications, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

UMG Recordings, Inc., et al. (see attachment)

(name of party/amicus)

who is Appellees, 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:  
Appellees are indirect subsidiaries of Universal Music Group, N.V., a Dutch public limited company. Vivendi SE and Compagnie de Cornouaille SAS are publicly-traded companies organized under the laws of France and own more than 10% of Universal Music Group N.V.'s stock. No other publicly traded company owns more than 10% of Universal Music Group N.V.'s stock.
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:  
Universal Music Group, N.V.



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/ Catherine E. Stetson

Date: 7/29/2024

Counsel for: (see attachment)

**United States Court of Appeals  
for the Fourth Circuit**

Disclosure Statement  
Addendum

Short Title: Sony Music Entertainment v. Cox Communications, Inc.  
Case No. 22-1451

Name of parties:

(Note: the parties listed below are all affiliates of Universal Music Group, N.V., which is not a party to this appeal)

- UMG Recordings, Inc.
- Capitol Records, LLC
- Universal Music Corp.
- Universal Music - MGB NA LLC
- Universal Music Publishing Inc.
- Universal Music Publishing AB
- Universal Music Publishing Limited
- Universal Music Publishing MGB Limited
- Universal Music - Z Tunes LLC
- Universal/Island Music Limited
- Universal/MCA Music Publishing Pty. Limited
- Music Corporation of America, Inc. d/b/a Universal Music Corp.
- Polygram Publishing, Inc.

- Songs of Universal, Inc.

## 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 v. Cox Communications, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Warner Records Inc. f/k/a Warner Bros. Records Inc., et al. (see attachment)  
(name of party/amicus)

who is Appellees, 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:  
  
Appellees are wholly-owned, indirect subsidiaries of Warner Music Group Corp., which is a publicly traded company with more than ten percent of its stock owned by AI Entertainment Holdings LLC and certain of its affiliates, which are not publicly traded companies.
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:

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/ Catherine E. Stetson

Date: 7/29/2024

Counsel for: (see attachment)

**United States Court of Appeals  
for the Fourth Circuit**

Disclosure Statement  
Addendum

Short Title: Sony Music Entertainment v. Cox Communications, Inc.  
Case No. 22-1451

Name of parties:

(Note: the parties listed below are all affiliates of Warner Music Group Corp., which is not a party to this appeal)

- Warner Records Inc. f/k/a Warner Bros. Records Inc.
- Atlantic Recording Corporation
- Elektra Entertainment Group Inc.
- Fueled by Ramen LLC
- Roadrunner Records, Inc.
- Warner Chappell Music, Inc. f/k/a Warner/Chappell Music, Inc.
- Warner-Tamerlane Publishing Corp.
- W Chappell Music Corp. d/b/a WC Music Corp. (f/k/a WB Music Corp.)
- W.C.M. Music Corp. f/k/a W.B.M. Music Corp.
- Unichappell Music Inc.
- Rightsong Music Inc.
- Cotillion Music, Inc.
- Intersong U.S.A., Inc.

TABLE OF CONTENTS

	<u>Page</u>
DISCLOSURE STATEMENTS.....	i
TABLE OF AUTHORITIES.....	xvii
INTRODUCTION .....	1
STATEMENT OF JURISDICTION.....	5
STATEMENT OF THE ISSUES.....	6
STATEMENT OF THE CASE .....	6
A. The RIAA And MarkMonitor Administer A Copyright-Infringement Notice Program From 2012 To 2015 .....	6
B. MarkMonitor Downloads Copies Of The Infringing Files In 2016 .....	11
C. Cox Receives The 2016 SOW And Hard Drive During Discovery .....	12
D. Cox Repeatedly Tries And Fails To Exclude The Hard Drive .....	15
E. Cox Receives Source Code From MarkMonitor And Audible Magic .....	21
F. Cox Loses At Trial, Appeals, And Files Back-To- Back Rule 60(b) Motions .....	23
G. This Court Remands <i>Sony v. Cox</i> For A New Trial On Damages.....	29
SUMMARY OF THE ARGUMENT.....	30
STANDARD OF REVIEW.....	32
ARGUMENT .....	33

TABLE OF CONTENTS—Continued

	<u>Page</u>
I. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING COX’S FIRST RULE 60(b) MOTION.....	33
A. The District Court Did Not Abuse Its Discretion In Concluding That Cox Failed To Show Misconduct .....	34
1. Cox Possessed The 2016 SOW .....	34
2. Cox Knew That The Hard Drive’s Files Contained 2016 Metadata .....	38
3. Cox’s Other Accusations Fail .....	43
B. The District Court Acted Within Its Discretion In Concluding That Plaintiffs’ Alleged Misconduct Did Not Hinder Cox’s Ability To Fully Present A Defense.....	45
1. Cox Had All The Evidence That It Now Claims It Lacked At Trial .....	46
2. The Allegedly “Concealed” Evidence Did Not Hamper Cox’s Defense .....	49
C. Principles Of Fairness Do Not Warrant A New Trial Or Discovery .....	52
II. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING COX’S SECOND RULE 60(b) MOTION.....	54
A. The District Court Did Not Abuse Its Discretion In Denying Relief Under Rule 60(b)(2) .....	55
B. The District Court Did Not Abuse Its Discretion In Denying Relief Under Rule 60(b)(3) .....	58



**TABLE OF CONTENTS—Continued**

	<u>Page</u>
CONCLUSION .....	60
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

Page(s)**CASES:**

<i>BMG Rights Mgmt. (US) LLC v. Cox</i> , 881 F.3d 293 (4th Cir. 2018).....	11
<i>Bowman v. Norfolk S. Ry. Co.</i> , 66 F.3d 315 (4th Cir. 1995).....	49
<i>Diaz v. Methodist Hosp.</i> , 46 F.3d 492 (5th Cir. 1995).....	46
<i>Grynberg v. BP P.L.C.</i> , No. CV 08-301 (JDB), 2016 WL 11472270 (D.D.C. Mar. 1, 2016) .....	54
<i>H. K. Porter Co. v. Goodyear Tire &amp; Rubber Co.</i> , 536 F.2d 1115 (6th Cir. 1976).....	53, 54
<i>Karak v. Bursaw Oil Corp.</i> , 288 F.3d 15 (1st Cir. 2002) .....	46, 47
<i>Mayfield v. NASCAR, Inc.</i> , 674 F.3d 369 (4th Cir. 2012).....	32
<i>Metlyn Realty Corp. v. Esmark, Inc.</i> , 763 F.2d 826 (7th Cir. 1985).....	59
<i>Morgan v. Tincher</i> , 90 F.4th 172 (4th Cir. 2024) .....	<i>passim</i>
<i>Nansamba v. North Shore Med. Ctr., Inc.</i> , 727 F.3d 33 (1st Cir. 2013) .....	46, 47
<i>Pearson v. First NH Mortg. Corp.</i> , 200 F.3d 30 (1st Cir. 1999) .....	53
<i>Richardson v. Nat’l R.R. Passenger Corp.</i> , 49 F.3d 760 (D.C. Cir. 1995).....	59

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Schultz v. Butcher</i> , 24 F.3d 626 (4th Cir. 1994) .....	34, 55
<i>Sony Music Ent. v. Cox Commc’ns, Inc.</i> , 93 F.4th 222 (4th Cir. 2024) .....	5, 29, 53
<i>Square Constr. Co. v. Washington Metro. Area Transit Auth.</i> , 657 F.2d 68 (4th Cir. 1981).....	53
<i>Tunnell v. Ford Motor Co.</i> , 245 F. App’x 283 (4th Cir. 2007) .....	46
<i>United States v. Larman</i> , 547 F. App’x 475 (5th Cir. 2013) .....	9
<i>United States v. Thomas</i> , Nos. 5:12-cr-37 et al., 2013 WL 6000484 (D. Vt. Nov. 8, 2013).....	9
<i>Werner v. Carbo</i> , 731 F.2d 204 (4th Cir. 1984).....	33
<b>STATUTES:</b>	
17 U.S.C. § 512(i)(1)(A).....	11
18 U.S.C. § 2258C(a).....	9
28 U.S.C. § 1291.....	5
28 U.S.C. § 1331.....	5
28 U.S.C. § 1338(a) .....	5
Copyright Act, 17 U.S.C. § 101 <i>et seq.</i> .....	5
<b>RULE:</b>	
Fed. R. Civ. P. 60(b)(3) .....	33, 45, 58, 59

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<b>OTHER AUTHORITIES:</b>	
Elaine Barker, Nat’l Inst. of Standards & Tech., U.S. Dep’t of Com., Special Pub. 800-175B, Guideline for Using Cryptographic Standards in the Federal Government: Cryptographic Mechanisms (2020) .....	9
12 Moore’s Federal Practice - Civil § 60.43 (2024).....	47
Adam Volle, <i>Metadata</i> , Britannica (last updated June 28, 2024), <a href="https://www.britannica.com/technology/metadata">https://www.britannica.com/technology/metadata</a> .....	14

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.*

---

On Appeal from the United States District Court  
for the Eastern District of Virginia

Case No. 1:18-cv-950

(The Honorable Liam O’Grady)

---

**PAGE-PROOF BRIEF OF PLAINTIFFS-APPELLEES  
(PUBLIC VERSION—REDACTED)**

---

**INTRODUCTION**

After a weeks-long trial, a federal jury found that Cox willfully and materially contributed to its subscribers’ rampant infringement of Plaintiffs’ copyrighted works. Months later, while its appeal was pending in this Court, Cox filed back-to-back motions in the District Court under Federal Rule of Civil Procedure 60(b). Cox railed about supposed lies it was told in discovery, accused witnesses of lying under oath, accused Plaintiffs’ counsel of suborning those lies, and charged that evidence was spoliated. The District Court rightly rejected Cox’s motions.

Cox's first Rule 60(b) motion accused Plaintiffs of concealing evidence. Plaintiffs proved direct copyright infringement at trial with evidence generated by MarkMonitor, a leading copyright-infringement-detection company. MarkMonitor operates by identifying an infringing file by its distinct "hash value"—an identifier even more unique than DNA—and then using that hash value to spot acts of infringement. From 2012-2015, MarkMonitor used these unique hash values to detect Cox's subscribers repeatedly infringing Plaintiffs' musical works embodied in those files. In 2016, MarkMonitor then downloaded copies of the infringing files (identified by the same unique hash value) involved in this case. Plaintiffs provided Cox these files on a hard drive during discovery, well before trial.

Cox now claims that it was kept in the dark about the fact that the hard drive's files were downloaded in 2016. The record shows otherwise. Twenty months before trial, Cox received from MarkMonitor the 2016 Statement of Work between the Recording Industry Association of America and MarkMonitor. Cox's counsel stated under oath, in a discovery motion filed before trial, that he knew the hard drive files may have been downloaded in 2016. And [REDACTED]

[REDACTED]

[REDACTED]. Cox's failure to examine the evidence in its possession—whether out of strategy or sloppiness—does not establish any misconduct on Plaintiffs' part.

Cox's post-trial sound and fury also fails because this evidence would not have helped Cox—even if Cox had made more use of the evidence at trial. Because these 2016 files match the infringing files by “hash value,” they are not just copies of those earlier files; they *are* those files. It makes no difference when they were downloaded.

Cox's second Rule 60(b) motion concerns a portion of MarkMonitor's source code that neither Plaintiffs *nor* Cox had during the trial below. That portion of code concerns the communication between two different systems—one from MarkMonitor and one from Audible Magic, an audio recognition service, for which Cox had the full source code. In 2021, in connection with a different case in federal court for the District of Colorado, MarkMonitor found an additional portion of its code. Some of the Plaintiffs in this case are also involved in the Colorado case, and as soon as the Colorado plaintiffs learned of this evidence, they disclosed it to the Colorado court and offered to make it available to the defendants

in that case—who are represented by some of the same lawyers defending Cox.

This later-found code is the basis of Cox's second Rule 60(b) motion. Implicitly acknowledging that it could not satisfy the requirements of Rule 60(b)(2) or (b)(3) outright, Cox instead asked the District Court to authorize post-trial discovery so Cox could dig into this belatedly discovered portion of MarkMonitor's source code. Even if post-trial discovery were permissible, however, Cox failed to prove that it was warranted here. Cox had more than enough evidence to mount its defense; a portion of additional source code would have made no difference. And Cox utterly failed to show any misconduct on *Plaintiffs'* part, as Rule 60(b)(3) requires. Cox thus cannot make a colorable claim for relief under Rule 60(b).

The District Court rightly grasped all of this in disposing of Cox's Rule 60(b) motions. Judge O'Grady's order accurately states and applies the law. He acted well within his discretion in concluding that Cox had failed to show that Plaintiffs committed misconduct and that Cox was unable to fully prepare its defense. And he similarly acted well within his discretion in denying Cox's request for post-trial discovery.



Cox lost this case, in a fairly litigated trial where it had every opportunity to defend itself. Cox (and its appellate counsel) clearly regret some of its trial team's decisions. But Rule 60(b) does not provide a pathway to re-try a case with the benefit of hindsight. The District Court correctly recognized this. This Court should affirm.

### **STATEMENT OF JURISDICTION**

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a), because the action arose under the Copyright Act, 17 U.S.C. § 101 *et seq.* The District Court entered judgment on January 12, 2021. JA\_\_[Dkt.723]. Cox appealed; this Court affirmed in part, reversed in part, vacated the damages award, and remanded for a new trial on damages. *See Sony Music Ent. v. Cox Commc'ns, Inc.*, No. 21-1168, 93 F.4th 222 (4th Cir. 2024).

While Cox's appeal was pending, Cox filed two motions 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]. The District Court denied both motions on March 23, 2022. JA\_\_[Dkt.796\_1-6]. Cox appealed on April 22, 2022. JA\_\_[Dkt.798\_1]. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether the District Court properly exercised its discretion in denying Cox's first Rule 60(b) motion, where Cox had the evidence it now claims was wrongly withheld.

2. Whether the District Court properly exercised its discretion in denying Cox's second Rule 60(b) motion and request for post-trial discovery, where Cox conceded that it could not show that newly discovered evidence was material, or would have likely changed the outcome of the trial, and where Cox failed to show that Plaintiffs engaged in misconduct.

## STATEMENT OF THE CASE

### **A. The RIAA And MarkMonitor Administer A Copyright-Infringement Notice Program From 2012 To 2015.**

Over a decade ago, the record-company Plaintiffs authorized their trade association, the Recording Industry Association of America (RIAA), to commence an anti-piracy program to combat ongoing, rampant internet infringement of their musical works over peer-to-peer (P2P) networks.<sup>1</sup> The RIAA responded by hiring MarkMonitor, a respected

---

<sup>1</sup> P2P protocols allow individual users ("peers") to download and upload music files directly from and to multiple users simultaneously.

anti-piracy company with expertise in detecting intellectual property infringing activity over peer-to-peer networks. JA\_\_[Dkt.637\_418; Dkt.638\_610-611]. RIAA engaged MarkMonitor to identify instances of such infringement, and provide notice to the relevant internet service providers (ISPs), as provided for under the Digital Millennium Copyright Act (“DMCA”). JA\_\_[Dkt.637\_418:3-13].

RIAA and MarkMonitor’s relationship was governed by a series of contractual agreements. In 2011, RIAA and MarkMonitor entered into a “Master Agreement.” *See* JA\_\_[PX3]. This Master Agreement set the framework for RIAA to enter into project-based “Statements of Work” (SOW) with MarkMonitor. *See id.* The following year, RIAA and MarkMonitor entered into an SOW for MarkMonitor to run a “P2P notice program” (the “Notice Program”). JA\_\_[PX4\_1] (2012 SOW). The Notice Program’s purpose was to provide notice to ISPs of specific instances of

---

JA\_\_[Dkt.629\_203; Dkt.637\_445-453]. They also do not rely on a single central repository that can be targeted or shut down. JA\_\_[Dkt.629\_281-282]. Peers can be identified only by their Internet Protocol (IP) addresses, which are assigned and known only by their Internet Service Providers (ISPs), like Cox. JA\_\_[Dkt.629\_284-285]. This process exponentially increases the efficiency and volume of online piracy—and thus fosters a staggering amount of infringement. JA\_\_[Dkt.629\_276-278].

infringement so that the ISPs could take appropriate action. RIAA and MarkMonitor entered into identical SOWs in 2013 and 2014. *See* JA\_\_[PX5] (2013 SOW); JA\_\_[DX87] (2014 SOW).

The Notice Program ran from January 2012 through March 31, 2015. MarkMonitor's implementation of the Notice Program included three steps: (1) file verification, (2) infringement verification, and (3) notice to the ISPs.

File Verification. The first step in the Notice Program involved MarkMonitor identifying and verifying infringing files being shared on peer-to-peer networks. To do so, MarkMonitor searched for potentially infringing files on these networks. The first time it found a potentially infringing file, it downloaded the full file. MarkMonitor then used software from Audible Magic, a leading content-recognition service, to identify the file's contents. JA\_\_[Dkt.637\_461-467].

Every file has a unique hash value, which is a system-generated alphanumeric string that, essentially, is a mathematical representation of a given digital file's contents. JA\_\_[Dkt.637\_436-440]; *see also* Br. 8 (agreeing that a hash value is a "unique string of numbers and letters reflecting a file's contents"). A file's hash value depends on that

particular file’s contents—meaning that any change to the file’s contents, no matter how small, will result in that file having a different hash value. JA\_\_[Dkt.637\_438]. And this makes hash values exceptionally reliable: The federal government uses hash values for secure communications,<sup>2</sup> and in federal criminal law to detect and combat child pornography.<sup>3</sup> As Plaintiffs’ expert explained at trial: “There is about a one in a trillion-trillion chance mathematically as an abstract possibility that two files with . . . different contents could generate the same hash. That’s 1 followed by 24 zeros.” JA\_\_[Dkt.637\_507]. Hash values are “more reliable than DNA (in that the likelihood of two individuals coincidentally sharing the same DNA is greater than the likelihood that more than one file will have the same [hash] value).” *United States v. Thomas*, Nos. 5:12-cr-37 et al., 2013 WL 6000484, at \*3 (D. Vt. Nov. 8, 2013).

---

<sup>2</sup> See Elaine Barker, Nat’l Inst. of Standards & Tech., U.S. Dep’t of Com., Special Pub. 800-175B, Guideline for Using Cryptographic Standards in the Federal Government: Cryptographic Mechanisms, at 14 (2020).

<sup>3</sup> See 18 U.S.C. § 2258C(a) (authorizing the use of “hash values . . . associated with a specific visible depiction” of child pornography to help “stop the online sexual exploitation of children”); *United States v. Larman*, 547 F. App’x 475, 479-480 (5th Cir. 2013) (per curiam) (evidence consisting mainly of hash values sufficient to support criminal child-pornography conviction).

For each file verified as a match to one of Plaintiffs' copyrighted works, MarkMonitor identified the file's unique hash value, and then logged that value and other identifying information in a database. JA\_\_[Dkt.637\_439-440, 462-463, 466-467; Dkt.638\_641]. MarkMonitor and the RIAA referred to this database as the "Verified Hash Database." JA\_\_[PX5\_12].

Infringement Verification. At the second step of the Notice Program, MarkMonitor would search peer-to-peer networks to find users actively distributing infringing files, using the Verified Hash Database to identify and verify instances of infringement. JA\_\_[Dkt.637\_467-470]. MarkMonitor captured this information in "evidence packages." JA\_\_[Dkt.637\_474-476].

Notice. At the last step in the Notice Program, MarkMonitor sent notices of confirmed instances of infringement to ISPs, including Cox. JA\_\_[Dkt.637\_476-477]. These notices quickly added up: Between February 2013 and November 2014 alone, MarkMonitor sent Cox 163,418 infringement notices. JA\_\_[Dkt.638\_667]; *see also* Br. 9 (acknowledging that Cox received "hundreds of notices per day" during the notice period).

**B. MarkMonitor Downloads Copies Of The Infringing Files In 2016.**

In December 2015, months after the Notice Program concluded, a federal jury found Cox contributorily liable for its subscribers' infringements of musical works on peer-to-peer networks. *See BMG Rights Mgmt. (US) LLC v. Cox*, 881 F.3d 293, 300 (4th Cir. 2018). The DMCA provides a "safe harbor" for ISPs from secondary liability for their users' copyright infringement, provided that an ISP can show that it had adequate policies and enforcement practices in place to address repeat infringers' use of its systems. 17 U.S.C. § 512(i)(1)(A). Cox, however, could show no such thing: The evidence and testimony at the *BMG* trial confirmed Cox's exceedingly poor practices concerning copyright infringement, removing the statutory shield from liability. The *BMG* jury's resulting verdict was the first time an ISP had been held liable for such claims.

In early 2016, Plaintiffs began to contemplate similar litigation against Cox. The Notice Program had already generated copious evidence of direct infringement on Cox's network. MarkMonitor had not, however, retained the infringing files themselves, and for good reason;

MarkMonitor had no need to retain an infringing file once it had analyzed the file and identified its unique hash value.

RIAA and MarkMonitor entered into a new SOW in late January 2016. JA\_\_[2016 SOW]. Under the 2016 SOW, which stated that it was being entered into “in anticipation of litigation,” [REDACTED]

[REDACTED]. *Id.* MarkMonitor then [REDACTED]

[REDACTED] *Id.* The 2016 SOW also instructed MarkMonitor [REDACTED]

[REDACTED] *Id.*

**C. Cox Receives The 2016 SOW And Hard Drive During Discovery.**

In 2018, Plaintiffs sued Cox for contributory and vicarious infringement. *See* JA\_\_[Dkt.1].

Early on, Cox served Plaintiffs with requests for production of documents related to MarkMonitor. *See* JA\_\_[Dkt.75]. At a January 2019 hearing, Plaintiffs agreed that they would produce MarkMonitor-



related documents for the years 2012 through 2014 (the “Claims Period”). Plaintiffs also agreed to produce documents from 2010-2014 that pertained to MarkMonitor’s reliability, and to produce agreements with MarkMonitor showing Plaintiffs’ “relationships with MarkMonitor” “[a]s it relates to this program,” that is, “the MarkMonitor program that was involved in sending notices to Cox.” JA\_\_[Dkt.767-2\_64-67].

Cox subsequently received document productions from Plaintiffs, RIAA, and MarkMonitor. This discovery included, as relevant here:

MarkMonitor Agreements. RIAA and MarkMonitor provided Cox with copies of the 2011 Master Agreement and the 2012, 2013, and 2014 SOWs. JA\_\_[Dkt.767-1\_2]. On or before March 26, 2019, Cox received the 2016 SOW from MarkMonitor itself. JA\_\_[Dkt.767-1\_2-3].

MarkMonitor Spreadsheet. Plaintiffs also provided Cox with a spreadsheet identifying confirmed infringing files. JA\_\_[PX11]. The MarkMonitor Spreadsheet identified, among other things, [REDACTED]

[REDACTED] JA\_\_[Dkt.739-3\_PDF23]. This information was [REDACTED]

[REDACTED] *See id.*

The Hard Drive. In February 2019, Plaintiffs provided Cox with a hard drive containing “copies of the infringing files” that Cox subscribers downloaded and distributed (the “Hard Drive”). JA\_\_[Dkt.767-4]. As MarkMonitor’s corporate representative Samuel Bahun explained in a sworn declaration, [REDACTED]

[REDACTED] JA\_\_[Dkt.739-4\_PDF23]. The metadata on the Hard Drive’s files [REDACTED]

[REDACTED] See JA\_\_[Dkt.365-1\_2].<sup>4</sup>

Hard Drive Directory. Plaintiffs also provided to Cox a spreadsheet [REDACTED]  
[REDACTED] JA\_\_[Dkt.739-3\_PDF23]; JA\_\_[PX16]. This spreadsheet served as a directory to the Hard Drive. Cox and its experts thus had every opportunity to listen to or analyze the library of infringing files at issue in this case.

---

<sup>4</sup> Metadata is “data about informational aspects of other data. For example, the date and time of a text message is metadata, but the text of that message is not.” Adam Volle, *Metadata*, Britannica (last updated June 28, 2024), <https://www.britannica.com/technology/metadata>.

#### D. Cox Repeatedly Tries And Fails To Exclude The Hard Drive.

Cox’s trial counsel understood during the discovery period that the files on the Hard Drive were from 2016. And in the months leading up to trial, Cox used that fact to try—repeatedly—to attack or exclude the Hard Drive. The District Court rejected every attempt.

1. In August 2019, Cox moved to preclude Plaintiffs’ use of the MarkMonitor Spreadsheet. See Dkt. 239. During briefing, one of Cox’s trial counsel submitted a declaration explaining that he had reviewed the metadata of the files contained on the Hard Drive and learned that the files [REDACTED]. JA\_\_[Dkt.365-1\_2]. Cox’s counsel explained that he understood “that the [REDACTED] generally reflects when the format or contents of the file were last altered, [REDACTED] [REDACTED].” JA\_\_[Dkt.365-1\_3]. Cox accordingly argued that “all of the files on the hard drive were [REDACTED]  
[REDACTED]  
[REDACTED].”  
JA\_\_[Dkt.365\_12].

At the September 2019 hearing on Cox's motion, Plaintiffs explained in response that the Hard Drive files matched the works in suit, insofar as the respective hash values were identical. *See* JA\_\_[Dkt.433\_55]. The Magistrate Judge asked the key question: whether it mattered *when* "that file was downloaded." *Id.* Plaintiffs explained that the answer was no; because "[a] hash is the hash," the download "could have been done at any time" with the same result. *Id.*

Accordingly, the Magistrate Judge denied Cox's motion. *See* Dkt. 419; JA\_\_[Dkt.433\_75-78].

2. Three weeks later, Cox tried again to exclude the Hard Drive, on the same basis. *See* Dkt. 488. Cox argued in a motion *in limine* that [REDACTED]

[REDACTED]

[REDACTED] JA\_\_[Dkt.739-2\_5].

[REDACTED] Cox continued, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* (emphasis in

original).

Plaintiffs responded that “Cox’s argument about the date contained in the metadata of the music files is meaningless.” JA\_\_[Dkt.538\_23]. Plaintiffs reiterated what they had explained at the September hearing: “Files with the same hash value are identical and have the same contents, regardless of when downloaded and reviewed.” *Id.*

The District Court denied Cox’s motion, explaining that the Hard Drive’s admissibility “will be determined at trial.” JA\_\_[Dkt.738-7\_3].

3. The Hard Drive first came up at trial during the testimony of Barbara Frederiksen-Cross, Plaintiffs’ technical expert. On cross-examination, Frederiksen-Cross explained that the Hard Drive files “are the files associated with the known infringing hashes, the ones that have been verified.” JA\_\_[Dkt.637\_515]. Cox’s counsel asked whether the files are the ones that were “downloaded[ ] [and] matched” at the File Verification stage. JA\_\_[Dkt.637\_516]. Frederiksen-Cross responded, “Yeah. A copy of those files are on the hard drive.” *Id.*

Cox’s counsel then pressed Frederiksen-Cross as to why the Hard Drive Directory did not list any files downloaded from Gnutella, one of the peer-to-peer platforms Cox subscribers used to infringe. Frederiksen-Cross explained that her “understanding of this file is it represents a copy

for the hashes that was downloaded from various sources. It is not my understanding that this corresponds to every file downloaded from each network, but, rather, *represents each hash that was provided in the notices.*” JA\_\_[Dkt.637\_529-530] (emphasis added). On redirect, Frederiksen-Cross was asked whether files with “the same hash value[] will . . . have the same contents regardless whether I pull it off today, or pull it off a year ago, or a year from now.” JA\_\_[Dkt.638\_599]. Frederiksen-Cross confirmed that “[t]he contents will be the same regardless of when you pull it, unless there has been some damage to the file.” *Id.*

Plaintiffs later admitted the Hard Drive itself into evidence through the testimony of MarkMonitor’s Samuel Bahun. Bahun first walked the jury through the MarkMonitor Spreadsheet, explaining that it contained “the records of all of the song files that we downloaded and verified using Audible Magic.” JA\_\_[Dkt.638\_639]. Bahun then turned to the Hard Drive Directory, explaining that “this is another Excel file that we provided that details . . . all of the song files that we provided on the drive.” JA\_\_[Dkt.638\_644]. When asked whether “these song files

correlate by hash to the song files in [the MarkMonitor Spreadsheet],” Bahun responded, “Yes.” *Id.*

After Plaintiffs moved to admit the Hard Drive, Cox objected that the Hard Drive was not “a complete set of everything that was downloaded.” JA\_\_[Dkt.638\_644-645]. The District Court overruled Cox’s objections and admitted the Hard Drive into evidence. *See* JA\_\_[Dkt.638\_648].

Bahun testified that the Hard Drive contained “the song files that were downloaded from the corresponding peer-to-peer networks.” *Id.* Plaintiffs asked why the Hard Drive did not contain song files from one particular peer-to-peer network. Bahun responded that, “[a]t the time when we loaded these songs onto the drive, there are a lot of songs that we can find that exist on multiple networks. So I believe that there was just overlap of a lot of those songs.” JA\_\_[Dkt.638\_651]. When asked by Cox’s trial counsel when the “hard drive [was] created” and when the “songs [were] put on that hard drive,” Bahun acknowledged that he could not say “for certain,” but he thought “it was the end of 2015, beginning of 2016, around that time frame.” JA\_\_[Dkt.639\_705-706]. Cox’s counsel

asked: “So that would have been two years after the end of the notice period here?” JA\_\_[Dkt.639\_706]. Bahun answered, “Yes.” *Id.*

Cox’s counsel then moved (again) to strike the Hard Drive, arguing (again) that “[i]t was identified as copies of the recordings that were downloaded, but it obviously was made two years after they were downloading the files.” *Id.* The District Court denied the motion, explaining that “[j]ust the timing of when it was made doesn’t make it any more or any less reliable unless you can establish that.” *Id.*

The District Court provided Cox with plenty of latitude to convince the jury that something was wrong with the Hard Drive, though, inviting Cox to “probe further.” JA\_\_[Dkt.639\_707]. Cox launched into a confused line of questioning, including asking Bahun “where” these files were “when you put them” on the Hard Drive. JA\_\_[Dkt.639\_708]. Bahun responded, “[o]ne of our systems . . . where we would have stored the files.” *Id.* Cox’s counsel asked when these files went “onto” MarkMonitor’s “system.” *Id.* Bahun responded that he did not “understand the question.” *Id.* Cox’s counsel responded that he “just wanted to know when they were stored on your system, wherever they were stored.” *Id.* Bahun said, “I don’t know the exact date. I mean, they



would have been different dates.” *Id.* Cox’s counsel asked whether the files “would have been stored on the system when they were first downloaded from the Internet—from a peer-to-peer network?” *Id.* Bahun responded, “Possibly some of them. I don’t recall the specific details. I mean, . . . they are the files based on the hash value, you can determine that.” *Id.* Cox’s counsel inquired: “Some of them were downloaded the first time you found a file, and some of them were downloaded at other times?” JA\_\_[Dkt.639\_709]. Bahun responded: “Yes.” *Id.* Bahun reiterated that “some files are downloaded multiple times, you know, throughout the course of the time period we are talking about.” *Id.*

At this point, Cox renewed its objection to the admission of the Hard Drive, which the District Court again denied. *Id.*

**E. Cox Receives Source Code From MarkMonitor And Audible Magic.**

During discovery, MarkMonitor made its proprietary source code available for review by Cox’s expert. MarkMonitor’s counsel told Cox that “[t]here is no revision history” for the code, which would capture changes to the code at different points in time. JA\_\_[Dkt.749-1\_2]. MarkMonitor’s counsel also stated that the code “represents the source

code for the version of MarkMonitor's system during the relevant time period." JA\_\_[Dkt.749-1\_3].

Cox's expert inspected MarkMonitor's code in April 2019. JA\_\_[Dkt.750-3\_4]. The expert noted that, in his opinion, the source code

[REDACTED] JA\_\_[Dkt.750-3\_10]. He gave two examples: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] JA\_\_[Dkt.750-3\_10-11].

Cox asked MarkMonitor's corporate representatives about MarkMonitor's code at their depositions. MarkMonitor's Rule 30(b)(6) witness on the source code, Slawomir Paszkowski, testified that

[REDACTED]

[REDACTED]

[REDACTED] JA\_\_[Dkt.750-5\_106]. Bahun, for his part, stated that [REDACTED]

[REDACTED]

[REDACTED] JA\_\_[Dkt.750-1\_63].

Cox also received and reviewed Audible Magic's source code in addition to MarkMonitor's. [REDACTED]

[REDACTED] JA\_\_[Dkt.750-3\_4].

**F. Cox Loses At Trial, Appeals, And Files Back-To-Back Rule 60(b) Motions.**

The case went to trial in December 2019. After twelve days of trial, the jury found Cox liable for willful contributory and vicarious copyright infringement of over ten thousand of Plaintiffs' copyrighted works. JA\_\_[Dkt.669\_1-2]. The jury awarded Plaintiffs a total of \$1 billion in statutory damages. JA\_\_[Dkt.669\_2]. The District Court entered judgment on January 12, 2021, JA\_\_[Dkt.723], and Cox appealed, JA\_\_[Dkt.732].

While Cox's appeal was pending, Cox filed two separate motions for indicative rulings under Rules 60(b) and 62.1. See JA\_\_[Dkt.737\_1; Dkt.739] (Dec. 27, 2021) (first Rule 60(b) motion); JA\_\_[Dkt.748\_1; Dkt.750] (Jan. 11, 2022) (second Rule 60(b) motion). Both motions were purportedly prompted by developments in other litigations against different ISPs. See *Warner Records Inc. v. Charter Comm'cns, Inc.*, No. 1:19-cv-00874-RBJ-MEH (D. Colo.); *UMG Recordings, Inc. v. Bright House Networks, LLC*, No. 8:19-cv-00710-MSS-TGW (M.D. Fla.). These

cases involved some of the same plaintiffs that sued Cox in this case. Plaintiffs' counsel is the same across all three cases; there is also overlap among the defense teams.

Cox's first Rule 60(b) motion concerned the 2016 SOW, Hard Drive, and related information (first Rule 60(b) motion). In November 2020, Plaintiffs' counsel in this case filed a declaration in *Charter* explaining that, pursuant to the 2016 SOW, MarkMonitor downloaded audio files in 2016 and stored them on a hard drive, which was made available to the defendants. *See* JA\_\_[Dkt.738-16\_1-3]. This declaration also explained that the hard drive contained "PCAP files (also known as 'packet capture logs') showing when and where each of the audio files on the drive was downloaded," *see* JA\_\_[Dkt.738-16\_3], and that Plaintiffs' counsel had created a "Hash Report" that included a summary analysis of the data generated as part of this project. JA\_\_[Dkt.738-16\_2-3]. Subsequent filings in *Charter* also noted that Audible Magic had not preserved logs containing information related to this project. *See* JA\_\_[Dkt.738-15\_102-110].

Over a year after the *Charter* declaration was filed—and nearly a year after judgment was entered in this case—Cox filed its first Rule

60(b) motion in the District Court below, arguing that Plaintiffs had committed misconduct by purportedly representing that the Hard Drive's files were the same files downloaded during the Infringement Verification process. JA\_\_[Dkt.739]. Cox argued that Plaintiffs had "repeatedly denied" that the Hard Drive files were from 2016—"lies" that allowed Plaintiffs to "fend off" "challenges to the admissibility of key pieces of evidence," including the MarkMonitor Spreadsheet and the Hard Drive. JA\_\_[Dkt.739\_1-2]. Cox identified various instances of purported misconduct by Plaintiffs, and argued that this asserted misconduct went to the heart of its case. JA\_\_[Dkt.739\_25-28].

Cox filed its second Rule 60(b) motion a few weeks later. This one concerned MarkMonitor's source code. In January 2022, Plaintiffs' counsel in the *Charter* case alerted the opposing ISP's counsel in writing that they had "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." See JA\_\_[Dkt.749-16\_1]. Counsel stated that they were "investigating this further, including to understand why it was not located or disclosed earlier, but wanted to share what we do know immediately." See *id.*

Cox's second Rule 60(b) motion argued that the *Charter* disclosure "may warrant further relief under Rule 60(b)(2) and/or Rule 60(b)(3)." JA\_\_\_[Dkt.750\_1]. Cox conceded that it could not show whether this code would be "likely to produce a new outcome" if the case were completely re-tried, a requirement under Rule 60(b)(2). JA\_\_\_[Dkt.750\_16-17] (quotation marks omitted). Cox also recognized that it lacked evidence that *Plaintiffs* had committed misconduct under Rule 60(b)(3). JA\_\_\_[Dkt.750\_17-18]. So Cox requested discovery instead. JA\_\_\_[Dkt.750\_16-18].

In their responsive briefs, Plaintiffs explained that Cox's motions were meritless. With respect to the first Rule 60(b) motion, Plaintiffs noted that Cox failed to meet even the threshold requirements for post-judgment relief: Cox's motion was untimely because it re-argued issues Cox already raised and lost, and was based on disclosures that were made prior to the entry of judgment, *see* JA\_\_\_[Dkt.768\_13-14], and Cox could not show that a new trial would lead to a different result, JA\_\_\_[Dkt.768\_26-27]. Plaintiffs also explained that Cox failed to prove any alleged misconduct; Plaintiffs, their counsel, and their third-party witnesses met their obligations and told the truth. JA\_\_\_[Dkt.768\_15-22].

Cox also failed to demonstrate prejudice; as Plaintiffs reiterated, download dates do not matter, because files with matching hash values are identical regardless of when they are downloaded. JA\_\_[Dkt.768\_22-25].

With respect to Cox's second Rule 60(b) motion, Plaintiffs noted that Cox conceded it could not satisfy the requirements for relief. *See* JA\_\_[Dkt.774\_16-24]. Plaintiffs also explained that discovery in service of a post-judgment motion was inappropriate; the issues that Cox sought to explore were merely cumulative given the evidence that Cox already had, and would not, in any event, impact the *contents* of the infringing files on the Hard Drive that supported Plaintiffs' claims. JA\_\_[Dkt.774\_24-27].

The District Court held oral argument on both Rule 60(b) motions in March 2022. JA\_\_[Dkt.797\_1-61]. Judge O'Grady, who "remember[ed] the case well," asked pointed questions about Cox's claims. JA\_\_[Dkt.797\_61, 13-14, 58]. During argument, Cox's counsel admitted that Cox received the 2016 SOW before trial: "MarkMonitor actually produced the Statement of Work, and that's true, and we looked at it." JA\_\_[Dkt.797\_16]. Cox's counsel also acknowledged that "[p]rior to trial,

we tried to—we challenged the hard drive’s foundation because it was being offered to support notices sent between the 2012 and 2014 timeframe, though its metadata, Your Honor may remember, said that it was created in 2016.” JA\_\_[Dkt.797\_19].

The District Court denied both of Cox’s Rule 60(b) motions. JA\_\_[Dkt.796\_1-6]. As to Cox’s first motion, the District Court explained that infringing files are identified “by their unique hash value.” JA\_\_[Dkt.796\_5]. The fact “[t]hat these files may have been downloaded and verified in 2016—after the Claims Period—is of no consequence” because, “as fully explained at trial, files with matching hash values are identical regardless of when downloaded.” *Id.* The District Court further noted that “Cox received the 2016 SOW and knew that the Hard Drive files contained 2016 metadata.” *Id.* And the District Court recognized that “Cox previously had every opportunity to explore these issues and ample evidence by which to put on a defense.” JA\_\_[Dkt.796\_5-6].

As for the second Rule 60(b) motion, pertaining to the newly discovered portion of MarkMonitor’s code, the District Court explained that the portion of code “relates to how MarkMonitor stored data from Audible Magic’s identification of the contents of suspected infringing



files.” JA\_\_[Dkt.796\_5]. The District Court found that portion of code “not material here,” holding, “[g]iven the ongoing litigation in the similar case in the District of Colorado, Defendants may well be rethinking and reevaluating their previous trial strategies.” JA\_\_[Dkt.796\_6]. But “the Court does not doubt that Defendants received a full and fair trial here.” *Id.* “The jury had ample and relevant evidence by which to render their verdict.” *Id.*

For all these reasons, the District Court held that the “newly discovered evidence is not material, nor is it likely to produce a new outcome if the case were retried.” *Id.* The District Court also separately found “no misconduct on the part of Plaintiffs.” *Id.* It accordingly concluded that Cox was “not entitled to relief from judgment.” *Id.*

**G. This Court Remands *Sony v. Cox* For A New Trial On Damages.**

This Court held Cox’s Rule 60(b) appeal in abeyance pending this Court’s resolution of Cox’s direct appeal. *See* Dkt. 24 (June 7, 2022). In February 2024, this Court affirmed the jury’s willful contributory liability verdict and reversed the jury’s vicarious liability verdict. *See Sony*, 93 F.4th at 241. This Court vacated the jury’s damages award and remanded for a new trial on damages. *Id.*

## SUMMARY OF THE ARGUMENT

I. The District Court acted well within its broad discretion in denying Cox's first Rule 60(b) motion concerning the date the Hard Drive's audio files were downloaded.

A. The District Court correctly concluded that Cox failed to show that Plaintiffs, their counsel, or any of Plaintiffs' witnesses committed any misconduct. Cox obtained the 2016 SOW during discovery. Cox also knew during discovery that the Hard Drive files were from 2016. Cox's accusations of misconduct misconstrue the record and reality.

B. The District Court also correctly concluded that any alleged misconduct did not hamper Cox's ability to fully present a defense. Again: Cox had the 2016 SOW. Cox knew that the Hard Drive files were from 2016. Cox cross-examined Plaintiffs' witnesses on both points extensively at trial. As Plaintiffs' witnesses explained, the reason the 2016 SOW did not matter is because the timing of the *downloads* did not matter: because the hash values of the Hard Drive files were identical to the hash values of the original infringing files, and, accordingly, the audio contents are *identical* to those original files.

C. The interests of justice do not warrant a new trial or discovery—quite the opposite, in fact. It would be unjust to overturn the jury’s verdict when Cox had all the evidence it now falsely claims it lacked in its possession before trial, and thoroughly questioned witnesses about it at trial. As for Cox’s request to “discover” the evidence it already had, Cox has failed to make even a colorable showing for relief.

II. The District Court also acted well within its broad discretion in denying Cox’s second Rule 60(b) motion.

A. The District Court correctly concluded that the portions of the source code that MarkMonitor found in 2022 were “immaterial,” and would not have likely led to a different outcome under Rule 60(b)(2). The missing source code concerned how MarkMonitor communicated with the Audible Magic software. It had nothing to do with how MarkMonitor actually identified a potentially infringing file; that verification process was performed by *Audible Magic’s* source code. Moreover, Cox received the output of this process: the MarkMonitor Spreadsheet. Cox thus had more than enough information to challenge MarkMonitor’s process for constructing the Hash Database. In any event, Cox concedes that it cannot satisfy Rule 60(b)(2)’s requirements outright; its motion only

requested permission to conduct discovery to see if it *could* meet those requirements. Because Cox could not make a colorable showing for relief under Rule 60(b)(2), the District Court properly exercised its discretion in denying Cox's request for discovery.

B. The District Court also acted well within its discretion in denying relief under Rule 60(b)(3). Rule 60(b)(3) authorizes relief where *a party* commits misconduct. Plaintiffs had nothing to do with MarkMonitor's failure to initially find and produce the missing portion of source code; but, importantly, Plaintiffs' counsel disclosed MarkMonitor's discovery of the code within hours of learning of it. Cox's suggestion that Plaintiffs engaged in some sort of "cover up" is baseless. And Cox concedes that it cannot show that this evidence would have helped its defense, or altered the outcome of the case in any way. The District Court correctly concluded that post-trial discovery is unwarranted.

### STANDARD OF REVIEW

Rule 60(b) relief is an "extraordinary remedy that should not be awarded except under exceptional circumstances." *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012). A Rule 60(b) order "will not be

disturbed on appeal absent a showing of abuse of that discretion.” *Werner v. Carbo*, 731 F.2d 204, 206 (4th Cir. 1984); *see* Br. 27 (same).

## ARGUMENT

### I. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING COX’S FIRST RULE 60(b) MOTION.

Cox brought its first motion under Rule 60(b)(3), which applies where the opposing party committed “misconduct.” Fed. R. Civ. P. 60(b)(3). To qualify for such relief, a party “must: (1) ‘have a meritorious [claim or] defense’; (2) demonstrate misconduct by clear and convincing evidence, and (3) show that ‘the misconduct prevented the moving party from fully presenting its case.’ ” *Morgan v. Tincher*, 90 F.4th 172, 177 (4th Cir. 2024) (citation omitted). If the party can satisfy those demanding factors, “the court must weigh the competing policy considerations regarding (1) the finality of judgments, and (2) justice being done, in the context of all the facts, to determine in the court’s discretion whether relief under the Rule is appropriate in a given case.” *Id.*

The District Court concluded both that Cox had failed to show “misconduct on the part of Plaintiffs” and that Plaintiffs had not

prevented Cox from “fully defend[ing] its case.” JA\_\_[Dkt.796\_5-6]. Nothing about those conclusions comes close to an abuse of discretion. This Court should affirm.

**A. The District Court Did Not Abuse Its Discretion In Concluding That Cox Failed To Show Misconduct.**

**1. Cox Possessed The 2016 SOW.**

1. Cox argues that Plaintiffs “conceal[ed]” the 2016 SOW, leaving Cox “in the dark.” Br. 31, 33. But MarkMonitor produced the 2016 SOW to Cox in early 2019, during discovery. And Cox’s counsel “looked at it.” JA\_\_[Dkt.797\_16]. Cox thus appears to be arguing that Plaintiffs committed misconduct by not *themselves* producing another copy of the same document. But Cox identifies no case where a court found that a party engaged in misconduct by failing to produce a document that the opposing party already had received. Cox’s cited cases (at Br. 29, 31) instead involve evidence that was not disclosed *at all* until after the plaintiff had “finished presenting his evidence” at trial, *Morgan*, 90 F.4th at 175, or that came to light after the trial, *see* Brief for Appellees at 3-4, *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994), 1993 WL 13015096. Plaintiffs did not commit misconduct by not *re*-producing to Cox a document Cox already possessed.

2. Moreover, to the extent Cox thought any misconduct was afoot, it knew or should have known that by March 2019, when MarkMonitor gave Cox the 2016 SOW. If Cox was vexed by receiving a document from one source rather than another, it could have raised any issue regarding Plaintiffs’ purported discovery obligations at that time. (Since Cox already had the document, though, there would be nothing to compel.)

Cox could have argued in 2019, for example, what it argues now about Plaintiffs’ obligation to produce all agreements between MarkMonitor and Plaintiffs “[w]ith respect to . . . the program at issue in this case.” JA\_\_[Dkt.738-27\_73-74]. The Plaintiffs could have explained that the 2016 SOW is a contract between MarkMonitor and RIAA, not between MarkMonitor and the Plaintiffs. *See* JA\_\_[2016 SOW]. And the parties could have litigated in 2019 whether the 2016 SOW is or is not an agreement relating to “the program at issue in this case.” JA\_\_[Dkt.738-27\_73-74]. Plaintiffs could have explained in 2019 that the “program at issue in this case” was the *Notice Program*, which was governed by the 2012, 2013, and 2014 SOWs directing MarkMonitor to “scan for peer to peer . . . infringements, send corresponding notices to internet service

providers . . . and provide related services.” JA\_\_[PX4\_1].<sup>5</sup> Plaintiffs also would have explained in 2019 that the 2016 SOW was different in kind;

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]. JA\_\_[2016 SOW]. It does not even contain the words

[REDACTED] or [REDACTED]

Cox also belatedly argues that Plaintiffs themselves should have disclosed the 2016 SOW in keeping with their “pledge[ ] to the district court that Plaintiffs ‘would not time restrict’ their productions of ‘documents about the reliability of the MarkMonitor system.’ ” Br. 32 (quoting JA\_\_[Dkt.767-2\_65]). Had Cox timely made this argument, Plaintiffs would have explained that this statement was directed at documents from *before* the Claims Period that related to MarkMonitor’s *reliability*. See JA\_\_[Dkt.767-2\_66] (Plaintiffs’ counsel, on the very next page of the hearing transcript that Cox quotes, answered in the affirmative after the Court asked “Is that what you indicated? That

---

<sup>5</sup> Cox’s trial counsel similarly understood the relevant “program” to be MarkMonitor’s Notice Program. See JA\_\_[Dkt.767-2\_74-75] (Cox’s counsel referring to “the copyright infringement notices program”).



otherwise you were going from 2012 to 2014, but for documents *relating to the reliability* of the way that MarkMonitor generated the notices and sent the notices, *you were going back to 2010.*”) (emphasis added). The 2016 SOW is neither: It was issued before the Claims Period and is not about reliability.

Nor does Plaintiffs’ production of [REDACTED] prove that the 2016 SOW fell within the discovery order. Br. 32. The 2018 document is [REDACTED]  
[REDACTED] [REDACTED]. JA\_\_[Dkt.739-9\_1-2]. Plaintiffs’ disclosure of this document confirms that they met their obligation to disclose Plaintiffs’ agreements with MarkMonitor from outside the Claims Period that relate to the “program at issue”: the Notice Program.

Finally, Cox highlights a declaration from MarkMonitor’s Bahun stating that [REDACTED]  
[REDACTED] Br. 33 (quoting JA\_\_[Dkt.739-3\_PDF9]). Again, if Cox wanted to plumb this purported deception, the time to do it was in 2019. In any event, Cox rips this statement from its context. Bahun’s declaration explains that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] JA\_\_[Dkt.739-3\_PDF9]. After quoting these provisions, Bahun explained that [REDACTED]

[REDACTED] *Id.* Read in context, Bahun was explaining that [REDACTED]

[REDACTED].

## **2. Cox Knew That The Hard Drive's Files Contained 2016 Metadata.**

Cox argues that Plaintiffs misrepresented the date on which the Hard Drive's audio files were downloaded from the internet. Br. 33-38. This argument is also completely untethered from the record, and the District Court rightly rejected it.

Here are the facts. Over a year before trial, Cox knew that the metadata for the audio files on the Hard Drive showed that those files were [REDACTED]. As Cox explained in a September 2019 sworn declaration, Cox knew that this metadata [REDACTED]

[REDACTED].

JA\_\_[Dkt.365-1\_3].

Plaintiffs never denied this. To the contrary, Plaintiffs and their witnesses explained on at least three separate occasions during the course of this case that the Hard Drive's audio files were copies of the files detected during the Notice Program, based on each file's unique hash value, and that it did not matter when the files were downloaded from the internet.

At the hearing on Cox's first motion to preclude use of the MarkMonitor evidence at trial, Plaintiffs' counsel explained that the downloads "could have been done any time" because "[a] hash is the hash." JA\_\_[Dkt.433\_55]; *see supra* p. 16. In response to Cox's motion *in limine* seeking the same relief, Plaintiffs again explained that "Cox's argument about the date contained in the metadata of the music files is meaningless" because "[f]iles with the same hash value are identical and have the same contents, regardless of when downloaded and reviewed." JA\_\_[Dkt.538\_23]. And at trial, Barbara Frederiksen-Cross, Plaintiffs' technical expert, testified that the Hard Drive contains "files associated with the known infringing hashes." JA\_\_[Dkt.637\_515]. Expanding on this point, Frederiksen-Cross explained that the Hard Drive contains "a copy" of the files that were "downloaded[ ] [and] matched" as part of the

Notice Program. JA\_\_[Dkt.637\_516]. She further testified that any file with a particular hash value will be identical to any other file with that same hash “regardless of when you pull it [from the internet].” JA\_\_[Dkt.638\_599]. Bahun testified that the Hard Drive contained “the song files that were downloaded from the corresponding peer-to-peer networks.” JA\_\_[Dkt.638\_648]. And he testified that files were loaded onto the Hard Drive around “the end of 2015, beginning of 2016.” JA\_\_[Dkt.639\_705-706].

Cox argues that Plaintiffs committed misconduct by evading the date the files were downloaded. That is wrong: Plaintiffs and their witnesses evaded nothing. Cox simply failed to ask questions about the Hard Drive during depositions, and then asked vague and ineffective questions during trial.

Cox now argues that “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.” Br. 34 (quoting JA\_\_[Dkt.639\_709]). But Bahun was explaining when the files were downloaded as part of the Notice Program. As he explained, MarkMonitor downloaded the suspected infringing file the

first time it found it; then, after verifying that the file was infringing, MarkMonitor logged and maintained that file's unique hash value in a database. JA\_\_\_[Dkt.638\_629-630, 633-635]. Bahun followed up by explaining that some files "are downloaded multiple times, you know, throughout the course of the time period we are talking about." JA\_\_\_[Dkt.639\_709]. As to the Hard Drive itself, Bahun explained that the files on the Hard Drive "are the files based on the hash value." JA\_\_\_[Dkt.639\_708].

This colloquy is a far cry from "clear and convincing" evidence of misconduct, *Morgan*, 90 F.4th at 177—much less of any misconduct on Plaintiffs' part. Again, Cox *knew* that the files [REDACTED]

[REDACTED]. Cox's counsel asked questions of Bahun about that at trial. Bahun answered truthfully. And the judge and jury heard everything that Cox elicited. If Cox's trial counsel thought the colloquy required clarification, it could have used further cross-examination to explore it. Cox cannot now turn to Rule 60(b) as a mulligan for its failed trial strategy.

Cox's other "evidence" of misconduct is just as contrived and just as stale. For example, Cox now attacks Frederiksen-Cross—an outside expert who does not work at MarkMonitor—for her trial testimony that these files "were just copied from the system onto the hard drive." Br. 35 (quoting JA\_\_[Dkt.637\_516]). Cox omits the first two words of Frederiksen-Cross's statement: "I imagine." JA\_\_[Dkt.637\_516]. Cox now argues that Bahun "flatten[ed] two separate MarkMonitor verification processes," Br. 35, by representing that the Hard Drive's files were the files verified during "'the first step' of" the Notice Program, Br. 12 (quoting JA\_\_[Dkt.638\_640]). But Bahun explained both steps at trial, noting that MarkMonitor has "copies of the songs" identified in the MarkMonitor Spreadsheet, and that "these song files correlate by hash to the song files" in the MarkMonitor Spreadsheet. JA\_\_[Dkt.638\_643-644]. Cox also now takes issue with Plaintiffs' representation in opposition to Cox's motion *in limine* "that the hard drive files were the 'infringing files.'" Br. 34 (quoting JA\_\_[Dkt.538\_22]). Yet in the same document, Plaintiffs explained that the Hard Drive contains "*copies* of the works in suit." JA\_\_[Dkt.538\_22] (emphasis added).

Finally, Cox contends that Plaintiffs’ and their witnesses’ repeated references to these files as “copies” were misleading because the jury could have thought that “the files on the hard drive were copied *directly* by Plaintiffs or MarkMonitor from the *originals* MarkMonitor had downloaded years earlier.” Br. 36. Not so. Plaintiffs repeatedly explained at trial that they were copies *based on the hash value*. See *supra* pp. 18-21. And as Plaintiffs’ witnesses fully explained at trial—and Cox did not dispute—files with the same hash value are identical, regardless of when they are downloaded. See *supra* pp. 26-28; *infra* p. 50. The Court and the jury were under no illusions that the audio files were the result of MarkMonitor copying previously downloaded files. To the extent Cox thought the Court and the jury were confused, Cox’s trial counsel could have used further cross-examination to clarify.

### **3. Cox’s Other Accusations Fail.**

Finally, Cox argues that Plaintiffs failed to disclose various other evidence related to the 2016 downloading project, complaining about “PCAP files,” Audible Magic logs, and a “hash report.” See Br. 38-41. PCAP files are “packet capture logs” that identify when the Hard Drive files were downloaded from the internet. See JA\_\_[2016 SOW\_1]. The

Audible Magic logs reflected information generated by Audible Magic [REDACTED]  
[REDACTED]. *See supra* p. 12. And the “hash report” represented a summary analysis of the data generated as part of the 2016 downloading project. *See supra* p. 24.

The 2016 SOW that Cox received in discovery [REDACTED]  
[REDACTED]. *See* JA\_\_[Dkt.767-1\_2-3]; JA\_\_[2016 SOW\_1]  
([REDACTED]  
[REDACTED]); JA\_\_[2016  
SOW\_2] ([REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]). Cox failed to follow up on the information before trial.

Cox’s arguments for why the PCAP files and hash report should have been disclosed rest on statements made by the *Charter* court in 2021. *See* Br. 18-19, 39, 41. But statements made years later by a different judge in a different case, in the context of its own discovery proceeding, have zero bearing on Plaintiffs’ disclosure obligations in *this* case in 2019.



Nor was there any misconduct related to the Audible Magic logs. As explained, this 2016 evidence was not responsive to the discovery order to produce evidence related to the 2012-2015 notice program. *See supra* pp. 35-36. In any event, Rule 60(b)(3) is concerned with “misconduct by an *opposing party*.” (Emphasis added); *see infra* p. 59. The Audible Magic logs were in Audible Magic’s possession, *see* JA\_\_[Dkt.738-15\_110], and Plaintiffs played no part in Audible Magic’s handling of those logs.

**B. The District Court Acted Within Its Discretion In Concluding That Plaintiffs’ Alleged Misconduct Did Not Hinder Cox’s Ability To Fully Present A Defense.**

This Court can also affirm the District Court’s order for the independent reason that Cox fully presented its case. *See Morgan*, 90 F.4th at 177 (to qualify for Rule 60(b) relief, a party must both “demonstrate misconduct” and “show that the misconduct prevented the moving party from fully presenting its case”) (quotation marks omitted). First, the District Court acted well within its broad discretion in holding that Cox was able to fully defend its case: “Cox received the 2016 SOW and knew that the Hard Drive files contained 2016 metadata,” and so “Cox previously had every opportunity to explore these issues.”

JA\_\_[Dkt.796\_5-6]. Second, even if Cox had *not* this had this information in front of it, the lack of this evidence did not hinder Cox's defense.

**1. Cox Had All The Evidence That It Now Claims It Lacked At Trial.**

Relief is not available under Rule 60(b)(3) where "a party is able to fully prepare and present his case notwithstanding the adverse party's misconduct." *Tunnell v. Ford Motor Co.*, 245 F. App'x 283, 288 (4th Cir. 2007) (per curiam) (citing *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21-22 (1st Cir. 2002)). And as many courts have recognized, a party is able to fully prepare its case where the party either has or has access to the allegedly concealed information. *See, e.g., Tunnell*, 245 F. App'x at 288; *Nansamba v. North Shore Med. Ctr., Inc.*, 727 F.3d 33, 41 (1st Cir. 2013) (same, where "the plaintiff, through her attorneys, had *in her possession* . . . all the medical records that she now claims should have been submitted to the district court"); *Diaz v. Methodist Hosp.*, 46 F.3d 492, 497 (5th Cir. 1995) (same, where the party "had independent access" to the allegedly concealed information and could have discovered that information through a "more focused effort"). "Rule 60(b) should not reward the lazy litigant who did not adequately investigate his or her

case, or who did not vigorously cross-examine a witness.” 12 Moore’s Federal Practice - Civil § 60.43 (2024).

That common-sense rule resolves this issue. MarkMonitor provided Cox with the 2016 SOW. *See* JA\_\_[Dkt.797\_16]. That document explains

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] JA\_\_[2016 SOW]. Cox also knew, early in discovery, that the Hard Drive files [REDACTED]

[REDACTED]. JA\_\_[Dkt.365-1\_2].

Cox thus “had at [its] fingertips” evidence that would have allowed it to determine that the Hard Drive files were in fact downloaded in 2016 and then to use that fact as part of its defense. *Nansamba*, 727 F.3d at 41. Indeed, all Cox had to do to learn this fact was ask MarkMonitor’s corporate representative about it. Cox’s failure to do so does not entitle it to a do-over. *See Karak*, 288 F.3d at 22 (“Rule 60(b)(3) is designed to afford protection against judgments that are unfairly obtained” and such protection is not available to a party whose “pursuit of the truth was

hampered” by “his own reluctance to undertake an assiduous investigation (including pretrial discovery).”).

All of Cox’s excuses regarding its trial counsel’s failings fall flat. Cox complains that the 2016 SOW was “bundled . . . with several irrelevant documents” and would have required “scorch[ing] the earth” to uncover. Br. 32-33. That is hardly the case. The 2016 SOW was provided as part of a production consisting of 33 documents, comprising a total of 240 pages. JA\_\_[Dkt.767-1\_2-3]. In any event, Cox’s trial counsel admitted he had seen the 2016 SOW. JA\_\_[Dkt.797\_16]. He instead argued that he “didn’t ask a question about [the document] because we didn’t understand it.” *Id.* Cox’s counsel could simply have asked about a document they found confusing.

As to the 2016 metadata, Cox’s argument on appeal flatly contradicts Cox’s trial counsel’s statements in the District Court. On appeal, Cox argues that the metadata merely “suggested” to Cox “that the files were somehow *copied* in 2016,” and that “what [it] 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.” Br. 37 (emphasis in original).

But after Cox’s trial counsel first spotted the 2016 metadata during discovery, Cox’s counsel told the District Court that [REDACTED] [REDACTED]. JA\_\_[Dkt.365-1\_3] (emphasis added). And counsel specifically argued that these files might have [REDACTED] [REDACTED]. JA\_\_[Dkt.365\_12] (emphasis added). Whether for strategic reasons or through lack of diligence, Cox’s trial counsel opted not to further investigate those facts.

## **2. The Allegedly “Concealed” Evidence Did Not Hamper Cox’s Defense.**

The District Court also did not abuse its discretion when it independently concluded that any alleged misconduct did not prevent Cox from “receiv[ing] a full and fair trial.” JA\_\_[Dkt.796\_6]. At the threshold, Cox’s failure to fully examine the 2016 SOW and the Hard Drive files “undermin[es] their supposed significance.” *Bowman v. Norfolk S. Ry. Co.*, 66 F.3d 315 (4th Cir. 1995).

Cox’s theories for how its defense was hindered only confirm that this evidence is insignificant. Cox noticeably does *not* argue that knowing that the Hard Drive files were downloaded in 2016 would have allowed it to argue that Plaintiffs lacked evidence of overwhelming direct

copyright infringement on Cox's internet service from 2012-2015. Cox instead contends that it could have argued "that Plaintiffs lacked any contemporaneous evidence demonstrating the soundness of MarkMonitor's hash value database." Br. 45.

That is a red herring. The "soundness of MarkMonitor's hash value database" does not turn on when the Hard Drive files were downloaded because, again, "as fully explained at trial, files with matching hash values are identical regardless of when downloaded." JA\_\_[Dkt.796\_5]. Cox also argues that it could have used the Audible Magic logs and hash report to show that MarkMonitor can be "unsuccessful." Br. 45-46. But as Cox concedes, Plaintiffs did not assert claims at trial based on works that could not be identified in 2016. *See id.*

Finally, Cox argues that the plaintiffs' litigation strategy in *Charter* suggests that this allegedly missing evidence would have helped Cox's defense in this case. Br. 46-47. That is pure speculation. *Charter* was a different case with different facts in a different court at a different time brought against a different ISP. Any given plaintiffs' trial strategy in another case has no bearing on whether the District Court abused its discretion in concluding that Cox's defense *in this case*—the one the

District Court oversaw from day one—was not hindered by any alleged misconduct.

The District Court correctly grasped all this when it concluded that this evidence “is of no consequence.” JA\_\_[Dkt.796\_5]. Cox contends that this conclusion is wrong on both the law and the facts. *See* Br. 47. Cox is mistaken.

On the law, the District Court did not “misapprehend” the principle that Rule 60(b)(3) movants need not show the withheld evidence would have altered the outcome. Br. 48. In arguing otherwise, Cox seems to be suggesting that any mention of consequences suggests an improper focus on the outcome. That is wrong: The District Court’s conclusion that the allegedly concealed evidence “is of no consequence” is just another way of saying that it “would [not] have helped” Cox’s case. *Morgan*, 90 F.4th at 179.

On the facts, Cox argues that “the record” does not support a conclusion “that hash values were . . . infallible” because “it is unclear whether, or at what steps in its process, MarkMonitor actually *calculated* the hash values of files.” Br. 50-51. That is wrong again. Bahun testified that MarkMonitor “calculate[d] the SHA-1 hash of each individual song

file” identified as infringing. JA\_\_[Dkt.638\_641]. And Frederiksen-Cross’s testimony makes clear that this process took place during the File Verification stage. *See* JA\_\_[Dkt.637\_461-463]. Cox also raises the specter of users mislabeling a file with the wrong hash. Br. 50-51. But Cox stressed this “dishonest peers” argument at trial. *See* JA\_\_[Dkt.658\_2208-10, 2217-21, 2230-33, 2243-44, 2245-46] (Cox’s technical expert); JA\_\_[Dkt.674\_3008] (closing argument: “BitTorrent users lie.”). The District Court did not abuse its discretion in rejecting a warmed-over version of this losing argument.

**C. Principles Of Fairness Do Not Warrant A New Trial Or Discovery.**

Because the District Court acted well within its broad discretion in denying Cox’s Rule 60(b)(3) motion on two independent grounds—that Plaintiffs did not commit misconduct, and that Cox was able to fully defend itself—this Court need not “weigh the competing policy considerations regarding (1) the finality of judgments and (2) justice being done.” *Morgan*, 90 F.4th at 177. In any event, those policy considerations also favor affirmance. Cox argues that “any interest in finality is at its lowest ebb here” given this Court’s ruling on the direct appeal. Br. 54. That is simply not so. This Court affirmed the jury’s



liability verdict, remanding for a new trial solely on damages. *Sony*, 93 F.4th at 241. It would be manifestly *unjust* to overturn the jury's liability verdict based on evidence that Cox indisputably possessed during trial, yet now falsely asserts it lacked. In reality, Cox either failed to comprehend it or competently pursue it. Either way, Cox fails to establish its claim here for post-trial relief.

Cox's alternative request for discovery fares no better. Rule 60(b) does not by its terms permit discovery. And this Court has never squarely addressed discovery under Rule 60(b).<sup>6</sup> Other courts, however, have held that Rule 60(b) discovery is permissible only where "the record evidence demonstrates a 'colorable' claim" for relief, *Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 35 (1st Cir. 1999), or where the movant can make a *prima facie* showing for relief, *see H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1122 (6th Cir. 1976) (requiring "some

---

<sup>6</sup> Even *Square Construction*, which Cox cites (Br. 54-55) as the lone example from this Court remanding for limited discovery under Rule 60(b), did not directly address this issue. This Court instead assumed the existence of the document at issue and applied the traditional Rule 60(b)(3) test. *See Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68, 73 (4th Cir. 1981). Only after the plaintiffs cleared that threshold did the Court remand for limited discovery to confirm whether the document in fact existed. *See id.*

proof to establish” the alleged claims). Moreover, in light of “the public interest of the judiciary in protecting the finality of judgments,” *id.* at 1118, post-judgment discovery must be “restrictive” and “limited to situations where the discovery sought is directly relevant to proving the applicable basis for relief from judgment.” *Grynberg v. BP P.L.C.*, No. CV 08-301 (JDB), 2016 WL 11472270, at \*2 (D.D.C. Mar. 1, 2016) (quotation marks and citations omitted).

Cox cannot meet this standard. The record amply supports the District Court’s conclusion that Plaintiffs committed no misconduct and that the supposedly concealed evidence (which Cox, in fact, had) would not have bolstered Cox’s case. Even now, Cox does not identify anything it lacked; it merely speculates that there might be more. The District Court did not abuse its discretion in declining to grant Cox’s extraordinary request to go on a post-judgment fishing expedition.

## **II. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING COX’S SECOND RULE 60(b) MOTION.**

Cox’s second Rule 60(b) motion concerned MarkMonitor’s discovery of code in late 2021, relating to how MarkMonitor communicated with Audible Magic and stored data from Audible Magic’s identification of a

file. *See* JA\_\_[Dkt.796\_5]; *supra* pp. 28-29. MarkMonitor could not locate, and therefore did not disclose this portion of source code—to either Plaintiffs *or* Cox—during discovery in this case several years ago.

Even on its appeal, Cox concedes that it “cannot now definitively demonstrate that the evidence has a material likelihood of altering the result” of the trial. Br. 61; *see also id.* at 63 (arguing that Cox’s defense “may have been hampered”). Cox tries to skirt its admitted inability to satisfy either Rule 60(b)(2) or Rule 60(b)(3) outright by asking for discovery. This Court should affirm the District Court’s denial of that request.

**A. The District Court Did Not Abuse Its Discretion In Denying Relief Under Rule 60(b)(2).**

Among other things, “a party seeking a new trial under Rule 60(b)(2) must show that the missing evidence was of such a material and controlling nature as would probably have changed the outcome.” *Schultz*, 24 F.3d at 631 (quotation marks and brackets omitted). The District Court did not abuse its discretion in concluding that Cox failed to make this showing. *See* JA\_\_[Dkt.796\_6] (holding that “the newly

discovered evidence is not material, nor it is likely to produce a new outcome if the case were retried.”).

Cox offers no real argument that the portion of source code is material or would have likely changed the outcome of this lengthy jury trial. Cox merely speculates that the missing portion of code might have the potential to “reveal a fault in MarkMonitor’s process of constructing a database of allegedly infringing hash values.” Br. 61.

Cox is grasping at straws. First, Cox’s insistence that this code is materially important clashes with its actions during discovery. Cox’s expert flagged [REDACTED] [REDACTED] JA\_\_[Dkt.750-3\_10]. The expert [REDACTED]. See JA\_\_[Dkt.750-3\_10-11]. Neither relates to how MarkMonitor communicated with Audible Magic. The fact that Cox’s expert did not view the MarkMonitor-Audible Magic communication process as warranting comment is strong evidence that this evidence is immaterial.

Cox’s expert’s disregard for this portion of the MarkMonitor process also makes sense. The newly discovered source code relates only to how MarkMonitor interacted with Audible Magic. It does not govern how Audible Magic actually identified a potentially infringing file. That is

governed by Audible Magic’s source code, which was disclosed to Cox and reviewed by its expert. *See supra* pp. 21-23. The MarkMonitor Spreadsheet, which records the files MarkMonitor identified as infringing using Audible Magic’s software, captured the output of this process. And copies of these files, based on their hash value, were produced to Cox. Cox thus had several avenues by which it could have tried to attack MarkMonitor’s “hash value database.” *See supra* pp. 35-36, 43. Cox’s failure to do so at trial belies its argument on appeal that this missing code is “highly salient.” Br. 14.

Cox’s speculation about this code’s materiality instead relies primarily on the fact that the *Bright House* plaintiffs’ expert amended her report to account for this code when it came to light. *See* Br. 58-59. But that simply does not bear, at all, on the materiality of the code or whether it was likely to change the outcome of *this* trial. The District Court did not abuse its discretion in concluding that Cox failed to carry its burden under Rule 60(b)(2). For the same reasons, the District Court did not abuse its discretion in denying Cox’s discovery request. *See supra* pp. 53-54.

**B. The District Court Did Not Abuse Its Discretion In Denying Relief Under Rule 60(b)(3).**

Cox's alternative request for relief under Rule 60(b)(3) is equally meritless. Rule 60(b)(3) authorizes relief where there has been "misconduct *by an opposing party*." (Emphasis added). But *Plaintiffs* had nothing to do with *MarkMonitor's* failure to uncover a portion of its proprietary source code during discovery in this case—as Cox's brief itself confirms. See Br. 15 (accusing MarkMonitor's witness of "falsely testif[ying]," and accusing "MarkMonitor's counsel" of "insisting that there 'is no revision history' for the source code"); *id.* at 19-20 (arguing about "the missing source code and revision history that MarkMonitor's witness and counsel insisted in this case did not exist"). Indeed, within hours of MarkMonitor informing the *Charter* plaintiffs that it had discovered this code, plaintiffs' counsel informed the *Charter* parties. See *supra* p. 25. In light of these unique circumstances, the District Court did not abuse its discretion in concluding that "there was no misconduct on the part of Plaintiffs." JA\_\_[Dkt.796\_6].

Cox's argument to the contrary is meritless. Cox argues that Bahun "falsely" testified that no additional code existed. Br. 61-62. But Bahun was not MarkMonitor's 30(b)(6) witness on the source code. Consistent

with that, Bahun [REDACTED]

[REDACTED]

JA\_\_[Dkt.750-1\_63] (emphasis added). MarkMonitor’s later discovery of this code proved Bahun’s belief to be wrong on this point. A belief being wrong is not false testimony. Even if Bahun *had* testified “falsely,” moreover, he was not “an opposing party,” Fed. R. Civ. P. 60(b)(3)—he was a third-party witness. And alleged misconduct by a non-party witness is not grounds for relief under Rule 60(b)(3). *See Richardson v. Nat’l R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995); *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 833 (7th Cir. 1985).

Cox also tries to tie Plaintiffs to MarkMonitor by insinuating that Plaintiffs might be involved in a “cover-up.” Br. 61-62. That is false. Cox’s accusations are belied by the fact that Plaintiffs acted swiftly in the *Charter* case when they learned that portions of source code had surfaced.<sup>7</sup>

Cox also admits it cannot show that its defense was hindered by any alleged misconduct; it argues only that its defense “*may* have been

---

<sup>7</sup> Cox also sees conspiracy in the *Bright House* settlement. Br. 62. The idea that the dozens of parties involved in that case hashed out a

hampered.” Br. 63 (emphasis added). But even that halfhearted assertion is baseless: For all the reasons this code is immaterial, it would not have helped Cox’s defense. *See supra* pp. 56-57. The District Court thus did not abuse its discretion in concluding that Cox had received a “full and fair trial.” JA\_\_[Dkt.796\_6]. Nor did the District Court abuse its discretion in denying Cox’s discovery request. *See supra* pp. 53-54.

### CONCLUSION

For the foregoing reasons, the District Court’s order should be affirmed.

Respectfully submitted,

July 29, 2024

Matthew J. Oppenheim  
Scott A. Zebrak  
Jeffrey M. Gould  
OPPENHEIM + ZEBRAK, LLP  
4530 Wisconsin Ave. NW, 5th Fl.  
Washington, D.C. 20016  
(202) 480-2999  
matt@oandzlaw.com

/s/ Catherine E. Stetson  
Catherine E. Stetson  
Jo-Ann Tamila Sagar  
Michael J. West  
HOGAN LOVELLS US LLP  
555 Thirteenth St. NW  
Washington, D.C. 20004  
(202) 637-5491  
cate.stetson@hoganlovells.com

*Counsel for Plaintiffs-Appellees*

---

settlement for fear of having an outside witness testify about a portion of source code is pure fiction. The District Court did not abuse its discretion in refusing to order discovery on such flimsy grounds.



## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,361 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word for Microsoft Office 365.

July 29, 2024

/s/ Catherine E. Stetson  
Catherine E. Stetson

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of July, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system

/s/ Catherine E. Stetson  
Catherine E. Stetson