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**IN TRADEMARK TRIAL AND APPEAL BOARD OF UNITED STATES  
PATENT AND TRADEMARK OFFICE**

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Sophia Stewart,  
Petitioner  
V.

**Cancellation No. 92058387**

Warner Bros Entertainment Inc.  
Registrant.

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Come now Petitioner Sophia Stewart hereby opposes Respondent's collateral estoppels grounds to bar and the motion for summary judgment on the pleadings to dismiss, pursuant to the requirements of *Klinge v. Eikenberry*, 849 F.2d 409 (9<sup>th</sup> Cir. 1988), and *Rand v. Rowland*, 154 F.3d 952 (9<sup>th</sup> Cir. 1998). Pursuant to the last sentence in Fed. R. Civ. P. 12(b), if no evidence is submitted with a motion to dismiss and none is considered by the court, then the motion cannot be treated as a motion for summary judgment. The same is true regarding a motion for judgment on the pleadings. See Fed. R. Civ. P. 12(c). If the Respondent has submitted no evidence in support of a motion to dismiss or a motion for judgment on the pleadings, then the court can not treat the pending motion as a motion for summary judgment. The Respondent's motion was submitted in lieu of an answer, but necessarily relies on matters outside the pleadings, i.e., the decisions issued in two district courts that are not identical

issues to the grounds in the present case of premeditated fraud (admission by conduct) which is a false registration, that is nullified as a matter of law. (1) *Stewart v. Wachowski*, 574 F. Supp. 2d. 1074 (C.D. Cal. 2005), a Criminal Copyright Infringement/RICO case and (2) *Stewart v. Warner Bros. Entm't Inc.*, 12-cv-01875-PMP-GWF (D. Nev. 2012), no parties were ever summoned (nor lawsuit ever took place). The Petitioner withdrew the petition and the action was dismissed. The Respondent in this case was never given notice, the case was never litigated or went to court (the complaint was declared moot), and due process violations were involved. A summary judgment cannot be granted when there is a genuine issue of material fact—that is, when there is a real dispute about any fact that would affect the result of the case. The Respondent instead, have not set out any specific facts in the form of admissible evidence (such as affidavits, declarations, or properly authenticated documents as provided in Rule 56 (e), that contradict the facts shown in the petitioner's affidavits and documented evidence that clearly show there is a genuine issue of material fact for an answer or trial. If no evidence, declarations, affidavits, or answer is submitted in favor of a summary judgment, then no summary judgment should be considered or granted. If the respondent is moving for summary judgment, then it should set forth, in writing, a statement of material facts, not genuinely in issue (supported by specific citation to evidence in the record which Respondent have attached to the motion or statement) which supports the claim for summary judgment. In so doing, this will show the court

those material facts which can be proven with admissible evidence that demonstrate that Respondent are entitled to have judgment entered in their favor, otherwise, the motion for summary judgment or the doctrine of collateral estoppels has no merits. The doctrine of collateral estoppels is not applicable to this proceeding, pursuant to Fed. R. Civ. P. 56 and Trademark Rule 2.129(e). The motion must be denied on all grounds for the following reasons:

Petitioner enters a judicial notice of adjudicative facts , Rule 12, Utah Rules of Evidence (1971) (new evidence) on the Report and recommendation from the U.S. District Court of Utah by Magistrate Evenly J. Furse dated August 8, 2014, thus affirming facts that Petitioner Stewart is the Writer and Owner of the derivative Matrix and Terminator movies. See Exh

The Collateral Estoppel doctrine does not bar the offenses to the trademark fraud claims in this case because of the statement of facts:

1). the present case asserts a different cause of action than both the California case and the Nevada action, which both were dismissed without merits or litigation. The California Case was dismissed without prejudice; therefore Petitioner is not stopped from attempting to assert same counterclaims in subsequent petition to cancel. United States Olympic Committee v. Bata Shoe

Co. , 225 USPQ 340, 342 (TTAB 1984) ( abandonment of application without consent in previous opposition does not operate as collateral estoppels or claim preclusion in subsequent cancellation proceeding between same parties since the two cases involve two distinct marks, and does not operate as issue preclusion because no issues were actually litigated in prior cases.

2). the issue of ownership of the trademark registration, had not been decided or litigated by the U.S. District Court for the central District of California in 2005. No trademark misuse. The issue did not "actually decide".

3). The California case was dismissed because of no discovery etc. and not because of merits, and neither party to this action was awarded a judgment in its favor on the trademark issues.

4). There is evidence that the Respondent never answered the amended complaint nor submitted an affidavit in the 2005 California/Rico case. Warner Bros. Entertainment, Inc. was not a party to the action filed in California case. It was Warner Bros. Studio. The trademark did not exist at the time of the decision.

5). The doctrine of collateral estoppels does not bar Petitioners claims of willful fraud or any of Respondent's trademark defenses or motion for summary judgment, because Petitioner has already given TTAB constructive notice



anointed intellectual property lawyer of the year was Warner Bros. VP and Senior Trademark counsel Avis Frazier-Thomas, who has been a trademark attorney for over thirty years had committed wonton fraud (Treason) on the government under oath. In previous jobs, she has been a trademark examiner with the US Patent and Trademark Office, and a member of the intellectual property department at Times Mirror, which owned the Los Angeles Times ( The Century City bar Association at its annual awards dinner Thursday night honored four lawyers and a local firm, all with entertainment connections. The Respondent committed fraud in procuring its trademark application and registrations.

6). The respondent is not the real owner to the fraudulent registration, and have not make a declaration or affidavit to that fact and so a preclusion would be unjust to the real owner.

7). The U.S. Court of Appeals for the Federal Circuit rules that opposition to trademark is not precluded by prior trademark infringement litigation. In vacating the summary judgment, the Court noted that a trademark infringement act in a district court is not automatically preclusive in an opposition proceeding before the TTAB because it may not be sufficiently applicable to trademark registration to warrant preclusion. In a trademark infringement suit the plaintiff must show actual injury, but in a likelihood of

confusion opposition proceeding, the oppose only needs to show that "he would be damaged by the registration," 15 U.S.C. 1063.

8). Preclusion requires that the issue decided was actually and necessarily decided as part of a valid final judgment. The California case was not decided on merits because it was never prosecuted, the matter was dismissed for failure to prosecute. No valid final judgment. No prejudice.

9). Due process mandates that collateral estoppels not be applied to a party that has not litigated the issue in depute. In other words, every disputant is entitled to a day in court and cannot ordinarily be bound by the negative result of another disputant's suit. Petitioner did not have a full and fair opportunity to litigate the issue decided by the California Court, but on June 25, 2014, the evidence that was denied for eleven years from the California case was finally entered into the Utah District Court.

In order for Collateral Estoppels to apply, four factors must be met:

The issues in the second suit are the same as in the first suit;

The issues in the first suit must have been actually litigated;

The issues in the first suit must have been actually decided;

The issues must have been necessary to the court's judgment.

The issues in the TTAB were not the same as the California Case, because the Court case of Criminal Infringement/RICO were never litigated or decided by a jury. There were due process violations, lack of discovery etc, and these issues were not necessary to the court's judgment, and so were dismissed for failure to prosecute without prejudice. The petitioner ask the courts to denied the summary judgment and cancel Registrant's ENTER THE MATRIX mark pursuant to 37 C.F.R. 2.20, because of the damage to the legal owner. I am the legal owner of the mark The Matrix Serial Number 85243232 and of June 25, 2014 new factually evidence was entered into the Federal District Court of Utah. Petitioner's give Judicial Notice of the Report and Recommendation from the U.S. District Court of Utah 2:07-cv-00552 by Magistrate Evelyn J. Furse dated August 8, 2014 contains sufficient factual matter, accepted as true, and has also submitted an declaration of truth affirming that Collateral Estoppel dismissal cannot succeed based on a TTAB 2(d) issue regarding the issue of likelihood of confusion. The Utah Court Report presents sufficiently different issues and transactional facts to bar the application of preclusion. Matrix is a title that cannot be copyrighted. The question here is how many Trademarks have the word Matrix in it? There are many trademarks with the word Matrix including Matrix Toyota Car. The respondent had no right to fraudulently change the font, amend goods, nor to register the mark with fraud, all under oath with full knowledge being a former examining attorney for the USPTO( with over 30 years

of trademark experience). *Laguna Hermosa Corp. v. United States*, 671 F.3d1284 (Fed. Cir. 2012), . Collateral Estoppel applies when a prior action presents an identical issue, and actually litigates and decides the issue. Also, the judgment in the prior action must require determination of the identical issue, and the stopped party must have been fully represented. The Petitioner sold no rights, made no agreements, nor transferred any assignments with the Respondent. The Federal Bureau of investigations validated the theft of the Petitioner's copyrighted work. The Respondent has deceived the public into thinking that the mark "Enter The Matrix", is actually licensed by the trademark owner. The damage is the injury or wrong that was done to Petitioner's rights, reputation, and property. The damage is the claim for relief. This injury and damage is the violation of a legal right that is deserving of redress. A victim of fraud or deceit is entitled to relief. A claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). These same facts clearly show that Respondent had no rights or ownership to register Enter The Matrix mark. Thus, all facts and acts that involve fraudulent inducement and concealment are not beyond Petitioner's right to cancel the involved registration, nor beyond the scope and duty of this proceeding. Petitioner has addressed the fraud numerous times in the second Amended Compliant and the reply motion to this cancellation. The factual quotations come out of the signed affidavit under oath from the Respondent's own fraudulent amended application to the USPTO. These same factual allegations

constitute deception, fraudulent misrepresentation, and inducement which are the very key definition of fraud, ie Fraud is a deception deliberately practiced in order to secure unfair or unlawful gain (adjectival form fraudulent; ...). The crime of using dishonest methods to take something valuable from another person. . a person who pretends to be. . . Respondent intentionally misled the USPTO to get a mark it was not entitled to. The fact of the lie on the USPTO's application voids its own application as a matter of law. Respondent deliberately concealed their history of misrepresenting the facts of no ownership, no movie specimen, nor rights to the mark "Enter The Matrix". In fact, the mark" Enter The Matrix" was not even a valid mark used in commerce, therefore no statutes of limitation or even priority apply to fraud. The information on the application are considered material facts that were sworn to under oath which makes the USPTO legally liable and complete Abettor to the fraud, if they do not cancel the Respondent's registration, application, omissions, wire transactions, mail transactions, misrepresentations and inducements. These acts also violate the Aunt Jemima Doctrine. **Respondent's Attorney James Weinberger, who is an officer of the court, is no stranger to this type of misconduct. He has prosecuted and defended cases on both sides of the law with the USPTO. He cannot be native as to the facts surrounding Respondent's fraudulent deliberate acts in securing the mark Enter The Matrix. Respondent has not addressed the legal issues in his motions to dismiss, his grounds for summary judgment nor the doctrine of collateral estoppels.** As stated prior, this form of Fraud and theft was

committed by a former government agent that left the USPTO in good standing and induced and employed by Warner Bros just to acquired the fraudulent mark Enter The Matrix by a "Quid Quo Pro Scheme" in violation of Trademark Law. Registrant already had a trademark attorney by the name of Janet Korbin who failed numerous times to secure the Matrix's mark desired, thus the need for Avis Frazier Thomas becoming Warner Brother's Senior Trademark Attorney. Lots of money and a big promotion were given to get this type of service.

Petitioner asserts that the Respondent seeks to continue on the reckless path to delay and avoid answering an affidavit submitted under oath, giving false and misleading statements on the motion and briefs to the USPTO by focusing on citations of law and complaints on Petitioner's standing, among other things that are irrelevant. Respondent failed to answer the Amended Complaint. Failed to give a declaration under oath. All Respondent can offer is delay, and obstructions by quickly putting in a dismissal, a summary judgment and now a collateral estoppel instead of answering the hard core facts. (I) The facts in this cancellation concerns the primary issue that "Enter the Matrix" is not a "Movie," (Emphasis added) as cited on Registrants Fraudulent Application. (II) According to the USPTO filing, a subsequent Application after the previous application under the bogus mark ENTERS THE MATRIX violates the USPTO procedure and constitutes Fraud and a felony. (III) The facts are the "font" (emphasis added) on the Registrant's Fraudulent Application for the term

"ENTER THE MATRIX" was never used in commerce as a "movie" prior to applying for and/or procuring by an insider scheme said deceptive mark which is copied verbatim and pilfered "in whole" from Petitioner's state trademark "The Matrix" which is owned by Stewart. (IV) Further to wit, Petitioner asserts the Respondent has made a "Freudian Slip" on page 5, lines 8 by "Confessing" "Respondent's ENTER THE MATRIX mark to be in "Connection" (emphasis added) with movies, film, and television," when the goods inside the box are a video game, (V) Registrant committed fraud in his/her application that ENTER THE MATRIX was a movie, instead of a video game in connection to a movie. Accordingly, Petitioner hereby invokes the power of law and authority that rests within the Aunt Jemima Doctrine and various Aunt Jemima trademarks to terminate ENTER THE MATRIX that was never in use nor used in commerce or any goods prior to Registrant applying for the application based upon its font, style and kind.

Avis Frazier Thomas being a former USPTO high-ranking examiner, but now employed by Warner Bros. as their Senior Trademark Lawyer knew that she could not allow the Respondent to amend their second Application. Thomas knew that it was intentional fraud when she signed under oath. Registrant placed each word for the mark ENTER THE MATRIX on three separate lines with two different font styles and types with willful intent to fraudulent procure the Petitioner's sole ownership State mark THE MATRIX. When the Respondent filed his/her first Application with the USPTO, La Verne T. Thompson, and USPTO Examining Attorney forewarned the Defendants that to amend the "**resulting**



**Application” constitutes Fraud.** Furthermore, the USPTO Examining Attorney Thompson warned the Respondent on 11/05/02, as follows: “If the applicant is seeking registration under Section 1(a) of the trademark Act, the mark **“WAS IN USE IN COMMERCE”**(Emphasis added”) on or in connection with goods or services listed in the application as the **application filing date.**” 37 C.F.R. Secs. 2.34(a)(1)(i). The undersigned, being hereby **WARNED** that **“willful false statements”** (“emphasis added) and the like statements will jeopardize the **validity of the application or any resulting registration,** declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes that applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. 1041(B), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the **identical form thereof** or in such “near resemblance” (emphasis added thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive, that if the original application was submitted unsigned, that all statements in the original application was submitted unsigned, that all statement in the original application and this submission made of the **“declaration”** signer’s knowledge are true; and all statements in the original application and this submission made on information and belief are believed to be true.” (Dated 12/09/2007)



The Respondent is not allowed to copy verbatim state trademarks out of Petitioner's book "**THE THIRD EYE**" registered and deposited in the US Copyright Office and deceive USPTO by adding the extra word "Enter" to the Petitioner's state trademark "THE MATRIX" and thereafter transfer a fraudulent registration from a "Ghost Writer" named "Rajeev Agrwal," who is not the true owner constituting a violation of 15 U.S.C. §1041(B). Respondent cannot deposit a fraudulent application into the USPTO because of its deceptiveness and then turn around and expect to be rewarded by the USPTO on the grounds of the statute of limitations, collateral estoppels, and a summary judgment. There is no statute of limitations on fraud.

Respondent's arguments in the motion to dismiss were conceived, intended, and used as devices to avoid answering the Amended Complaint under oath with a true affidavit and cannot withstand the challenge of the fraudulent declaration submitted by Avis which is "**ILLUSIONARY**," thus constituting deception and fraud on the USPTO.

Further, Petitioner declare that Respondent have caused damage and injury by getting Amazon to restrain the Plaintiff in her trade from utilizing the mark "THE MATRIX" inside her book "Matrix 4 Evolution" by claiming that both "marks are directly similar," of which, now invokes a "material fact" in dispute. A

motion to dismiss cannot be granted when a Registrant has confessed to material facts in dispute. This is a claim for relief and monetary damages.

All true crimes require two elements. The first is the prohibited act, referred to in law as "**actus reus**". To be a crime this act has to be accompanied by "**mens rea**," criminal intent. The U.S. Supreme Court said in **Morrisette vs. U.S.** that criminal intent involves an "**evil – meaning mind**," variously described with respect to different crimes as "intentional" knowing, fraudulent, malicious etc. Each crime has different *mens rea*. For example the *mens rea* for murder is "malice aforethought." For there to be a crime, the commission of prohibited act and criminal intent (*mens rea*) has to concur in time. (*i.e. Transfer from Ghost Writer*" named "Rajeev Agrwal to Warner Bros. inside USPTO)

A complaint filed in the USPTO attached to an Affidavit can only be rebutted or extinguished with an Affidavit signed under the penalty of perjury, of which the Respondent has failed to timely file. Petitioner objects to Respondent request to collateral estoppels and summary judgment when there are obvious material facts in dispute after the Respondent have confessed to fraud with a signed affidavit under oath. Knowingly and willfully making a "**false**,

**misleading and fraudulent interpretation” and pilfering a Fraudulent mark in violation of Civil Rule 60(a), 60(b)(2), and Penal Code §134 Preparing Fraudulent False Evidence. Plaintiff hereby request that Rule 11 Sanctions still be imposed against James Weinberger because he knew that he was depositing material false statements that were designed to harass and interpose delay within the USPTO mechanism of review in violations of 18 U.S.C. 2, 3, 4, and 1001, while failing to swear under oath or the penalty of perjury after the Petitioner has invoked ownership.**

### CONCLUSION

Petitioner Stewart has already asserted ownership of ENTER THE MATRIX mark in her pleading and affidavit. **“If God is for the truth, then no one can be against the truth, in favor of fraud”** For these reasons, Petitioner pray for relief that the board cancel the fraudulent mark Enter The Matrix and revive the mark The Matrix because the Respondent has not demonstrated that it is entitled to a judgment as a matter of law on any issue. Accordingly, Warner

Bros. Entertainment motion for Summary judgment and collaterally estoppels should be denied.

Submitted /Sophia Stewart/

Sophia Stewart

1 SOPHIA STEWART  
2 P.O. Box 31725  
3 Las Vegas, NV 89173  
4 702-501-5900 (PH)  
5 310-776-7447(F)

6 UNITED STATES PATENT AND TRADEMARK OFFICE  
7 APPEAL DIVISION

8 SOPHIA STEWART

9 ( Owner By Copyrights )

10 Applicant

11 Filed: January 16, 2014

12 Mark:

13 The Matrix

14 IN AND FOR THE COUNTY )  
15 OF LAS IN THE )ss.  
16 STATE OF NEVADA )

17 I, SOPHIA STEWART, declare:

- 18 1. I am the Applicant in the above-entitled matter.
- 19 2. I, Sophia Stewart, affirm by Affidavit under 37 C.F.R. 2.20 that I am the only legal beneficiary  
20 copyright owner, Author and Source Work for The Matrix Movie Trilogies. Sequels, Derivatives  
21 by copyrighted protected work entitled *The Third Eye*, a written work duly registered with the  
22 Library of Congress United States Copyright Office pursuant to the Federal Copyright Act.
- 23 3. I am the Author and Owner of " The Third Eye " original source work, graphics, artwork, special  
24 effects, characters for the derivatives "The Terminator", "The Matrix", " Enter The Matrix  
25 " and " Animatrix " first use in commerce May 1, 1981, November 11, 1983, February 6, 1984,  
26 October 26, 1984, March 31, 1999, May 14, 2003 ( NA ), May 15, 2003 ( Europe ), June 19,  
27 2003 ( Japan ), June 3, 2003.

- 1 4. The protected expression, and source work of "The Third Eye" are covered by certificate of  
2 copyright registration TXU 117 -610, with the United States Copyright Office on May 1,  
3 1981- February 2, 1983 (which was a 6 page movie treatment that came before Cameron's  
4 1982 derivative treatment) and (14 years before 1994 agreement- assignment between  
5 Warner Bros. and Wachowskis Brothers, Andy and Larry, who had no copyrights nor  
6 ownership of the Matrix ever. The theft of the Terminator and Matrix was openly admitted  
7 in a transcript to Judge Morrow in the Federal Courts of California on September 27, 2004  
8 by all defendants. Warner Brothers lied to Judge Morrow by saying they had paid me for  
9 the copyrights in a closed settlement. This document is in the possession of the US Attorney  
10 Office, FBI, DOJ, Task Force, and me. Subornation of perjury and fraud on the USPTO  
11 for Enter The Matrix. An attorney at law causes a client to lie under oath, or allows  
12 another party to lie under oath Title 18 U.S.C. 1622 provides that : Whoever procures  
13 another to commit any perjury is guilty of subornation of perjury, and shall be fined under  
14 this title or imprisoned not more than five years, or both.  
15  
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19 5. Additional work was registered on Creation date November 1983- February 6, 1984 (TXu-  
20 154-281). PAu 3-478-780 Creation Date 2000 effective Registration dated July 20, 2010  
21 "Matrix 4: The Evolution - Cracking the Genetic Codes" consisting of a narrative, preface,  
22 introductions, characters, Matrix Attraction, Hologram Clones, Fourth installment of the  
23 Matrix, and illustrations.  
24  
25 6. Terminator 5, The Hologram Clones, Creation date 2000-February 8, 2013 (PA u 3-654-  
26 515. The war of the New Machines against John Conner and the Rebels.  
27  
28 7. Animatrix, Visual Artwork, Creation date 1981-December 15, 2013 ( PA u 3-699-333 )

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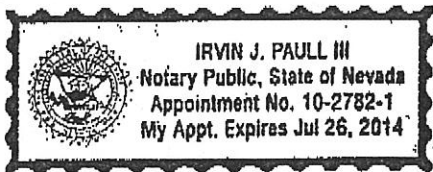
8. In Violation of the Aunt Jemima Doctrine, Warner Bros. has fraudulently procured a Trademark Registration entitled "Enter The Matrix", a derivative that is copyrighted and owned by me. A videos game's Artwork that is based upon "The Third Eye "characters and "Source work".

I declare under the penalty of perjury that all of the foregoing is true and correct to the best of my knowledge, and belief DATED this 16<sup>th</sup> day of January 2014

*Sophia Stewart*  
\_\_\_\_\_  
Sophia Stewart

STATE OF Nevada )  
 ) :ss  
COUNTY OF Clark )

On the 16 day of Affidavit, January 2014, personally appeared before me Sophia Stewart, the signer of the foregoing Affidavit, who duly acknowledged that he executed the same.



*Irvin J. Paull III*  
\_\_\_\_\_  
Notary Public  
My Commission Expires: July 26, 2014


**CERTIFICATE OF MAILING**

I hereby certify that on September 2, 2014, I caused to be mailed via first class U.S. mail, postage pre-paid, and a true and correct copy of the foregoing **OPPOSITION TO REGISTRANT'S MOTION FOR SUMMARY JUDGMENT**

To the following:

Trademark Trial and Appeal Board U.S. Patent and Trademark Office P.O. Box 1451 Alexandria, VA 22313-1451	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Transmission <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Other
JAMES D WEINBERGER, FROSS ZELNICK LEHRMAN & ZISSU PC  866 UNITED NATIONS PLAZA, 6TH FLOOR, NEW YORK, NY 10017 UNITED STATES  jweinberger@frosszelnick.com, eweiss@frosszelnick.com	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Transmission <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Other

Dated: 09/2/14

Submitted,  
  
Sophia Stewart



# EXHIBIT

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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SOPHIA STEWART,

Plaintiff,

v.

MICHAEL T. STOLLER, et al.,

Defendants.

**REPORT AND RECOMMENDATION  
REGARDING DEFAULT JUDGMENT  
AGAINST JONATHAN LUBELL**

Case No. 2:07-cv-552-DB-EJF

Judge Dee Benson

Magistrate Judge Evelyn J. Furse

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**I. Procedural History**

On August 1, 2007, Ms. Stewart filed her Amended Complaint against Defendants Michael T. Stoller, Jonathan Lubell, Dean Webb, Gary Brown, and a number of unidentified John Does for breach of contract, breach of the covenant of good faith and fair dealing, malpractice, civil conspiracy, fraud, breach of fiduciary duty, and conversion. (ECF No. 2.) The Amended Complaint seeks damages of not less than \$150 million. (*Id.*) The Court previously dismissed Ms. Stewart's case as against Defendants Webb, (ECF No. 145), Brown, (ECF No. 254), and Stoller, (ECF No. 267), and denied her leave to amend to name John Doe defendants, (ECF No. 75). Only Jonathan Lubell remains as a Defendant.

The Clerk of Court entered a default certificate against Mr. Lubell on August 28, 2012. (ECF No. 196.) Ms. Stewart then filed a Motion for Default Judgment on September 28, 2012. (ECF No. 200.) On December 4, 2012, District Judge Clark Waddoups<sup>1</sup> granted that motion in

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<sup>1</sup> On May 26, 2009, Judge Clark Waddoups referred this case to Chief Magistrate Judge Brooke C. Wells under 28 U.S.C. § 636(b)(1)(B). (ECF No. 67.) This referral was reassigned to the undersigned Magistrate Judge on May 21, 2012. (ECF No. 191.) Judge Waddoups recused himself on December 13, 2012, and Judge Dee Benson now sits on this case. (ECF No. 234.)

part but declined to enter judgment in the amount Ms. Stewart requested. (ECF No. 219.) Instead, the Order stated “Judgment will be entered against [Mr. Lubell] upon the submission by Plaintiff of evidence to support the amount of damages to be entered in the judgment.” (*Id.*)

As of August 2013, Ms. Stewart had not submitted any evidence to support her request for default judgment against Mr. Lubell. The Court therefore entered an Order to Show Cause directing Ms. Stewart to “inform the Court as to the status of the case and her intentions to proceed,” noting failure to do so would result in a recommendation of dismissal. (ECF No. 257.) Ms. Stewart filed her “Motion for Judicial Notice to Prove Damages and Affidavit of Sophia Stewart” on September 9, 2013. (ECF No. 260.) In that Motion Ms. Stewart asked the Court to take judicial notice of profits related to the films at issue in the California copyright case underlying this malpractice action. (*See id.*) This Court determined it could not take judicial notice of the facts offered by Ms. Stewart and denied that Motion. (ECF No. 270.) Instead, the Court held an evidentiary hearing on damages, pursuant to Federal Rule of Civil Procedure 55(b)(2), on June 25, 2014. (ECF No. 279.)

## II. Legal Standard

Federal Rule of Civil Procedure 55(a) provides for default against a party that “has failed to plead or otherwise defend” itself. Fed. R. Civ. 55(a). Plaintiffs whose claims are not “for a sum certain or a sum that can be made certain by computation” must apply to the court for entry of a default judgment. Fed. R. Civ. P. 55(b). Rule 55(b) empowers courts to conduct hearings to determine the amount of damages, among other things. Fed. R. Civ. P. 55(b)(2)(B).<sup>2</sup> Because

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<sup>2</sup> The Servicemembers Civil Relief Act affects a plaintiff’s entitlement to default judgment, requiring a non-military affidavit. *See* 50 U.S.C. app. §§ 501–597b; Fed. R. Civ. P. 55 Advisory Committee’s Note, 1946 Supplementary Note. Ms. Stewart has provided no evidence regarding Mr. Lubell’s non-military status. However, if a defaulting defendant does not actually serve in the military, failure to file an affidavit does not require the court to set aside the default

EXH2

Ms. Stewart proceeds pro se, the Court construes her pleadings liberally. *See Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003) (citation omitted).

“Once the default is established, defendant has no further standing to contest the factual allegations of plaintiff’s claim for relief.” 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2688 (3d ed. 1998); *see also Olcott v. Del. Flood Co.*, 327 F.3d 1115, 1125 (10th Cir. 2003) (noting default judgment precludes merits-based challenge). The Court takes as true all well-pleaded facts, exclusive of allegations related to the amount of damages. *Patray v. Nw. Pub., Inc.*, 931 F. Supp. 865, 869 (S.D. Ga. 1996) (citation omitted); *DeMarsh v. Tornado Innovations, L.P.*, No. 08-2588-JWL, 2009 WL 3720180, at \*2 (D. Kan. Nov. 4, 2009). “Consequently, before granting a default judgment, the Court must first ascertain whether ‘the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.’” *Chanel, Inc. v. Gordashevsky*, 558 F. Supp. 2d 532, 536 (D. N.J. 2008) (citation omitted); *see also Brack v. Jamison*, No. 05-CV-02658-WYD-CBS, 2007 WL 2914152, at \*3 (D. Colo. Oct. 4, 2007) (citations omitted). “[A] party is not entitled to a default judgment as of right; rather the entry of a default judgment is entrusted to the ‘sound judicial discretion’ of the court.” *Cablevision of Southern Connecticut, Limited Partnership v. Smith*, 141 F. Supp. 2d 277, 281 (D. Conn. 2001) (citation omitted); *see also Brack*, 2007 WL 2914152, at \*2.

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judgment. *See* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2691, at n.14 (3d ed. 1998) (citing *Howie Min. Co. v. McGary*, 256 F. 38 (N.D. W. Va. 1919)); *see also United States v. Hampshire*, 892 F. Supp. 1327, 1332 (D. Kan. 1995) *aff’d*, 95 F.3d 999 (10th Cir. 1996) (“A judgment rendered in violation of the Act is merely avoidable, rather than void, and does not violate due process.” (citations omitted)). Accordingly, the Court proceeds in an effort to bring to a close this now seven-year-old case. The Court also notes the introduction of evidence that Mr. Lubell is deceased. If indeed Mr. Lubell is deceased as the evidence suggests, then Mr. Lubell is not serving in the military.

EXH 3

### III. Recommended Findings of Fact and Conclusions of Law

#### A. Facts

The Court accepts as true the following allegations in Ms. Stewart's Amended Complaint (Am. Compl., ECF No. 2):

Ms. Stewart, a science fiction screenwriter, sent screen treatments and other creative materials to film production companies and film producers and writers in the 1980s. Ms. Stewart owns the registered copyright for these works under the name "The Third Eye" or "Third Eye." In 2003, Ms. Stewart, acting pro se, sued a number of film studios and producers ("the California defendants") alleging the films in the TERMINATOR and MATRIX trilogies infringed her copyrighted works. *Stewart v. Wachowski*, No. CV 03-2873 MMM (VBKx) (C.D. Cal. 2003). That case ("the California action") asserted claims for copyright infringement and declaratory relief in addition to claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO Act").

Sometime around July 2004, Jonathan Lubell contacted Ms. Stewart at her home in Utah to offer his services as an attorney with respect to the California action. Mr. Lubell spoke with Ms. Stewart over the phone from her home in Utah and sent a written fee agreement to Ms. Stewart's home in Utah, where she executed the agreement and paid a retainer fee. Mr. Lubell held himself out as an expert and stated he would assemble a competent legal team to assist with the case—representations upon which Ms. Stewart relied. Gary Brown and Dean Webb thereafter joined Ms. Stewart's California-action legal team. Mr. Lubell, Gary Brown, and Dean Webb drafted Ms. Stewart's first amended complaint in that action. Dean Webb withdrew as Ms. Stewart's counsel in January 2005, and Michael Stoller joined Ms. Stewart's legal team three months later.

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In early 2005, the California defendants served requests for discovery and noticed Ms. Stewart for deposition. Although Ms. Stewart could have attended her deposition as scheduled, her attorneys told opposing counsel Ms. Stewart could not attend and unilaterally continued her deposition. Ms. Stewart's attorneys and opposing counsel attempted to reschedule the deposition, ultimately settling on March 17, 2005. Ms. Stewart did not appear for this deposition, ultimately twice failing to appear for her deposition; and both times unknowingly, as her attorneys never advised her of the depositions. During this time, Ms. Stewart's attorneys also failed timely to respond to the outstanding discovery requests, which included requests for admission. As a result of Ms. Stewart's failure to appear at her deposition, the California defendants filed a motion to preclude her testimony, which the court granted.

Finally, on March 25, 2005, Ms. Stewart's attorneys filed a motion to extend the fact discovery deadline on the basis that Mr. Brown had recently suffered a heart attack, and Mr. Stoller had only just recently joined Ms. Stewart's legal team. The court denied Ms. Stewart's motion, and the California defendants soon thereafter filed a motion for summary judgment. Ms. Stewart's attorneys failed to file a timely opposition to the summary judgment motion. Although the California court found at least one of the California defendants had access to Ms. Stewart's protected works, the court granted summary judgment on the basis of Ms. Stewart's failure to respond to the requests for admission, deeming as admitted facts fatal to Ms. Stewart's case. Ms. Stewart's attorneys also failed to depose any witnesses or present any admissible evidence in support of her claims.

The California court found many failings on the part of Ms. Stewart and her attorneys, including: failing to prosecute the matter diligently, failing to respond to discovery, and failing generally to follow the Federal Rules of Civil Procedure. Finally, the California court dismissed

Ms. Stewart's case in June 2005, ordering Ms. Stewart to pay the California defendants' attorneys' fees and costs.

### **B. Liability**

Accepting the well-pleaded factual allegations of Ms. Stewart's Amended Complaint as true, the Court must still determine whether these unchallenged factual allegations constitute legitimate causes of action. *Chanel*, 558 F. Supp. 2d at 536; *Brack*, 2007 WL 2914152, at \*3. Because this Court exercises diversity jurisdiction over the matter, it applies the substantive law of Utah and federal procedural law. *Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274, 1278 (10th Cir. 2003).

At the June 24, 2014 hearing, Ms. Stewart offered evidence of Mr. Lubell's death. (Ex. 24, ECF No. 282.) Whether a cause of action survives or abates upon the defendant's death constitutes a substantive law question on which Utah law controls. *See* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1952 (3d ed. 1998). As a matter of procedure governed by federal law, Ms. Stewart's reference to Mr. Lubell's death—which does not qualify as a formal suggestion of death made on the record—did not trigger the ninety-day time period for substitution. *Id.* § 1955 at n.9.

#### **i. Malpractice Claims**

An attorney malpractice claim may take different forms, including breach of contract, breach of fiduciary duty, or negligence. *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, ¶ 21, 194 P.3d 931, 937 (citation omitted). Ms. Stewart brings all three, and all three claims survive Mr. Lubell's death. *See Estate of Berkemier v. Hartford Ins. Co.*, 2003 UT App 78, ¶ 13, 67 P.3d 1012 (noting claims based in contract survive death under Utah common law); W.J. Dunn, Annotation, *Abatement or Survival of Action for Attorney's Malpractice or*

EXH 6

*Negligence Upon Death of Either Party*, 65 A.L.R.2d 1211 § 2[a] (1959) (“It has generally been held that a cause of action for malpractice or negligence on the part of an attorney survives his death . . .”).

***Breach of Contract***

In *Christensen*, the Utah Supreme Court set out the elements of each variety of malpractice claim. In malpractice actions framed as breach of contract, “[r]ules of contract, not rules of legal malpractice, govern.” *Id.* at ¶ 24, 194 P.3d at 938. Such claims require: “(1) a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the express promise by the defendant; and (4) damages to the plaintiff resulting from the breach.” *Id.* (quoting *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶32, 70 P.3d 17, 26).

Ms. Stewart executed a legal services contract (“the Contract”) with Mr. Lubell in September 2004. (Ex. 31, ECF No. 282.) Under the Contract, Mr. Lubell and the other Defendants in this action agreed to provide Ms. Stewart with legal services for the California action. Ms. Stewart paid Mr. Lubell and the other Defendant attorneys \$50,000.00. (Am. Compl. ¶ 231, ECF No. 2.) Mr. Lubell, however, failed to provide legal services to Ms. Stewart in the California case, and thereby breached the Contract. For example, Mr. Lubell failed timely to respond to discovery requests or serve discovery requests on the California defendants, (Am. Compl. ¶¶ 85–86, 99, 101, 111, 116–17, 120, 134, 136), failed to depose key witnesses or develop admissible evidence, (*id.* at ¶¶ 160–61), failed to deny requests for admission, (*id.* at ¶¶ 153–54), and failed to respond timely to the California defendants’ motion for summary judgment, (*id.* at ¶¶ 142–47).

As a result of Mr. Lubell’s breach of contract, Ms. Stewart suffered damages in the amount of the \$50,000.00 payment she made to her attorneys, and \$305,235.62 for the California

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defendants' attorneys' fees award, *Stewart v. Wachowski*, No. 2:03-cv-02873-MMM-VBK, ECF No. 152 at 6 (C.D. Cal July 19, 2006), and costs of \$695 ordered by the California court, *id.*, ECF No. 143. An order of the California court found Ms. Stewart's maintenance of that case objectively unreasonable and thus awarded attorneys' fees against Ms. Stewart. *Id.*, ECF No. 150 at 6–7. This finding resulted largely from Ms. Stewart's admissions during discovery. *See id.* at 4–6.

#### ***Negligence & Breach of Fiduciary Duty***

A malpractice claim based on negligence requires: “(i) an attorney-client relationship; (ii) a duty of the attorney to the client arising from their relationship; (iii) a breach of that duty; (iv) a causal connection between the breach of duty and the resulting injury to the client; and (v) actual damages.” *Christensen*, 2008 UT 64, ¶ 22, 194 P.3d at 938 (citations omitted). Similarly, a malpractice claim based on breach of fiduciary duty requires: “(1) an attorney-client relationship; (2) breach of the attorney's fiduciary duty to the client; (3) causation, both actual and proximate; and (4) damages suffered by the client.” *Id.* at ¶ 23, 94 P.3d at 938 (citations omitted). “[T]he elements required to prove both theories of legal malpractice are substantially the same.” *Id.*

The Contract created an attorney-client relationship between Ms. Stewart and the Defendants, including Mr. Lubell. “As fiduciaries, attorneys have a legal duty ‘to represent the client with undivided loyalty, to preserve the client's confidences, and to disclose any material matters bearing upon the representation [of the client].’” *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996) (quoting 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 11.1, at 631 (3d ed. 1989)).

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Mr. Lubell breached his fiduciary duty to Ms. Stewart. Despite an attorney's fiduciary duty "to disclose any material matters bearing upon the representation," *Kilpatrick*, 909 P.2d at 1290, Mr. Lubell did not notify Ms. Stewart of her deposition, resulting in her non-appearance. (*Id.* at ¶¶ 96, 98, 106, 126, 127.) Nor did Mr. Lubell disclose to Ms. Stewart the problems with her case in 2004 and 2005, namely, that her attorneys failed to participate in discovery. (*Id.* at ¶¶ 182–84.)

Mr. Lubell also breached the standard of care he owed to Ms. Stewart as her attorney. "Once an attorney-client relationship is established, the attorney's duty is to "use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake."” *Harline v. Barker*, 854 P.2d 595, 598 (Utah Ct. App. 1993) (quoting *Williams v. Barber*, 765 P.2d 887, 889 (Utah 1988)). This duty of care at least required Mr. Lubell to meet or timely seek extension of relevant case-management and response deadlines. As noted above, Mr. Lubell failed timely to respond to discovery, to respond to the California defendants' motion for summary judgment, and to serve discovery on Ms. Stewart's behalf. (*Id.* at ¶¶ 85–86, 99, 101, 111, 116–18, 120, 134, 136, 142–47.) The California court recounts many of Defendants' discovery failures in its June 14, 2005 order granting the California defendants' motion to preclude Ms. Stewart's testimony. *See Stewart v. Wachowski*, No. CV 03-02873 MMM (VBKx), 2005 WL 6186374, at \*2–3 (C.D. Cal. June 14, 2005).

Regardless of the form a malpractice action takes—breach of contract, breach of fiduciary duty, or negligence—the same standard of causation applies. *Christensen*, 2008 UT 64, at ¶ 25, 194 P.3d at 938. "Under each theory, the client is required to show that absent the conduct complained of—whether it is a breach of an express promise or fiduciary duty by the

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attorney or non-adherence to proper professional conduct—the client would have benefitted.”

*Id.* “Where a default judgment is entered against a defendant in a legal malpractice action, both the issues of the lawyer’s negligence and the merits of the underlying claim are settled in favor of the plaintiff.” *Williams v. Barber*, 765 P.2d 887, 889 (Utah 1988). Thus, all that remains for the Court to determine is the amount of damages that Mr. Lubell owes Ms. Stewart.<sup>3</sup>

## ii. Other Claims

In addition to the malpractice claims, Ms. Stewart brings claims for breach of the covenant of good faith and fair dealing, conversion, fraud, and civil conspiracy. Ms. Stewart cannot recover on a separate claim for breach of the covenant of good faith and fair dealing, because her breach of contract claim redresses the conduct complained of in both claims, and she fails to plead a separate implied promise; thus, the good faith and fair dealing claim duplicates the breach of contract claim. *See Canopy Corp. v. Symantec Corp.*, 395 F. Supp. 2d 1103, 1111 (D. Utah 2005) (applying Utah law and noting that to state separate claims for breach of contract and breach of the implied covenant of good faith and fair dealing plaintiff must “demonstrate some implied promise” apart from contract terms). Ms. Stewart’s conversion claim likewise duplicates her breach of contract claim.

Ms. Stewart’s fraud claim relies upon the same facts and damages as her malpractice claim and is therefore redundant. *See* 1 Ronald E. Madden, Jeffrey M. Smith, & Allison D. Rhodes, *Legal Malpractice* § 8:1 (2014 ed.) (“Because alternative theories often are based on the same factual allegations as a negligence cause of action, such claims frequently are treated as redundant and are disregarded.”); *Carl v. Cohen*, 868 N.Y.S. 2d 7, 7–8 (N.Y. App. Div. 2008) (holding that “fraud claim was duplicative of the legal malpractice”). Ms. Stewart’s civil

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<sup>3</sup> The Court limits its analysis to those underlying claims upon which Ms. Stewart bases her claim to damages on default: copyright infringement.

conspiracy claim is likewise redundant. In any event, Ms. Stewart presents no separate evidence of damages stemming from these claims. Instead, she bases all of her damages from these claims on the lost profits she stood to gain from the California copyright action. Utah law does not permit “double recovery for the same loss.” *Brigham City Sand & Gravel v. Mach. Ctr., Inc.*, 613 P.2d 510, 511 (Utah 1980); *Cook Assocs., Inc. v. Warnick*, 664 P.2d 1161, 1168 (Utah 1983). Therefore, the Court RECOMMENDS the District Court dismiss Ms. Stewart’s second, fourth, fifth, and seventh causes of action.

### C. Damages

On June 25, 2014, the Court held a hearing on damages under Federal Rule of Civil Procedure 55(b)(2)(B). (See ECF No. 279.) At the hearing, and in a subsequent filing, (ECF No. 281 at 1), Ms. Stewart asked this Court for an award of fifteen billion dollars in damages on her claims.

The Court finds Ms. Stewart’s malpractice claims—breach of contract, breach of fiduciary duty, and negligence—entitle to her damages stemming from the money she paid under the Contract, the attorneys’ fees and costs awarded against her in the California action, and lost damages, if any, based on the underlying California copyright case. Ms. Stewart must still prove the damages which she claims and establish their reasonableness under the circumstances. See *Everyday Learning Corp. v. Larson*, 242 F.3d 815, 818 (8th Cir. 2001); see also *OTO Software, Inc. v. Highwall Techs., LLC*, No. 08-cv-01897-PAB-CBS, 2011 WL 3236049, at \*5 (D. Colo. July 5, 2011). However, “[w]hile a plaintiff cannot recover damages that are speculative, an injured party is not required to prove damages with absolute certainty.” *OTO Software*, 2011 WL 3236049, at \*5 (citations omitted); *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985) (noting plaintiff must present “evidence that rises above

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speculation and provides a reasonable, even though not necessarily precise, estimate of damages” (citations omitted)). The court enjoys “considerable latitude in determining the amount of the damages.” *OTO Software*, 2011 WL 3236049, at \*4.

**i. Payments under the Contract**

Prior to the June 25, 2014 Hearing, Ms. Stewart submitted a number of exhibits to the Court. Exhibit 31 consists of the Contract Ms. Stewart executed with Mr. Lubell for legal services related to the California case. (Ex. 31, ECF No. 282.) The Contract required Ms. Stewart to pay Mr. Lubell \$5,000.00 upon execution of the contract to be applied to his hourly billing, with the total amount payable by Ms. Stewart for all hourly billing of all attorneys not to exceed \$50,000.00. At the hearing Ms. Stewart said she borrowed \$50,000.00 to pay her attorneys, although she may have used some of that amount for her own travel, interviews, and appearances. Regarding Mr. Lubell specifically, Ms. Stewart testified that she paid him \$10,000.00.

The Court asked Ms. Stewart what documentation she possesses regarding any payments to Mr. Lubell. Ms. Stewart replied she had already submitted some documentation and would mail additional documentation by June 27, 2014. Although Ms. Stewart filed some of the additional documents the Court requested—pages missing from some of the exhibits submitted ahead of the hearing—as of the date of this Report and Recommendation’s entry, (*see* ECF No. 281), the Court has received no additional documentation of Ms. Stewart’s payments to Mr. Lubell. The Contract provides the only documentary evidence Ms. Stewart submitted regarding such payment. Given the minimal evidence before the Court, and Ms. Stewart’s testimony, the Court RECOMMENDS the District Court award Ms. Stewart \$10,000.00 in damages from Mr. Lubell on this basis.

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**ii. The California Attorneys' Fees Award**

The California copyright case underlying this action resulted in an award of attorneys' fees and costs against Ms. Stewart in the amounts of \$305,235.62 and \$695.00. *Stewart v. Wachowski*, No. 2:03-cv-02873-MMM-VBK, ECF No. 152 (C.D. Cal July 19, 2006). Ms. Stewart referred to costs awarded against her in the California case in the amount of \$305,000.00. Ms. Stewart also said the California defendants have filed liens against her in Utah, Nevada, and California. The Court understands her to refer to the awards noted in the above orders from the California court and takes judicial notice thereof. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (noting federal courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (citations omitted)). The Court thus RECOMMENDS the District Court award Ms. Stewart damages in the amount of \$305,930.62.

In awarding the California defendants their attorneys' fees the court found Ms. Stewart "acquiesced and was complicit in [her attorneys'] conduct by failing to monitor the progress of the case, despite [the fact that she was in possession] of specific information regarding her attorneys' failure to attend to the litigation." *Wachowski*, No. 2:03-cv-02873-MMM-VBK, ECF No. 150 at n.23 (alterations in original). While the California Court made this finding, the facts established by the Amended Complaint in this case do not show culpability by Ms. Stewart. Therefore, the Court does not recommend reducing Ms. Stewart's damages.

**iii. The Underlying California Case**

Ms. Stewart seeks approximately \$15 billion in damages in this case stemming from her attorneys' failures in the California copyright case. (ECF No. 281 at 1.) Ms. Stewart submitted

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documents, (Ex. 19, ECF No. 282), and presented expert witness testimony to support this award. One of these documents consists of a response from a Time Warner Entertainment Company lawyer to a Patent and Trademark Office Action. (Ex. 19 at 1–7, ECF No. 282.) This letter states that the film THE MATRIX took in “more than \$475 million in box office worldwide” and “grossed \$171 million in the United States alone.” (Ex. 19 at 4, ECF No. 282.) The exhibit also includes IMDb<sup>4</sup> printouts with gross profit figures and budget estimates for various TERMINATOR movies. (Ex. 19 at 8–15, ECF No. 282.) Lastly, Ms. Stewart includes a message from an unattributed e-mail address stating sales figures for various MATRIX movies and spinoffs, estimating a “[t]otal of OVER 2.3 BILLION.” (Ex. 19 at 16, ECF No. 282.)

Ms. Stewart also elicited testimony from witnesses Art Teshima (a friend and CPA), Catherine “Katy” Riney (a friend and licensed financial representative), and Jeffrey Castolene (an investment professional), in addition to her own testimony. (See ECF No. 279.) Mr. Teshima and Ms. Riney testified that the movies at issue in the underlying California copyright case enjoyed profits of approximately \$4.9 billion, and Mr. Castolene discussed in general terms the potential interest revenue of the damages Ms. Stewart seeks.

Along with Ms. Stewart herself, Mr. Teshima provided the bulk of Ms. Stewart’s testimony regarding damages. Mr. Teshima stated he relied on Nash—a financial reporting service based in El Segundo, California—and IMDb, along with Box Office Mojo and The Numbers—internet resources like IMDb—in reaching the \$4.9 billion gross profit figure. Ms. Stewart did not submit any documentation from Nash, which Mr. Teshima identified as the most trusted source and the one upon which he relied the most in reaching his gross profit figure. Ms.

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<sup>4</sup> IMDb—an abbreviation of Internet Movie Database—is a web site maintaining an Internet-based database of information related to films and television programs, including actor credits, plot summaries, etc.

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Teshima stated he did not calculate the net profits for the MATRIX and TERMINATOR movie franchises underlying the California copyright case but that the studios reported to Nash a loss of \$.5 billion.

The Court finds Ms. Stewart may not recover damages on this basis. Ms. Stewart presumably seeks profits based on 17 U.S.C. § 504(b), which sets forth remedies for copyright infringement:

**(b) Actual Damages and Profits.**--The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Thus, even assuming the merits of the underlying claim, *see Williams*, 765 P.2d at 889, the California defendants would have been able to establish deductible expenses and the profit not attributable to Ms. Stewart's protected works. Without question, the California defendants incurred deductible expenses in making the TERMINATOR and MATRIX movies. The gross revenue numbers Ms. Stewart provides therefore do not constitute a proper measure of damages in this case as she would not have recovered that much even if her lawyers had not committed malpractice. *See Currin v. Blake Law Firm, LLC*, No. CV105035226S, 2013 WL 3306436, at \*2 (Conn. Super. Ct. June 5, 2013) (finding gross profits an improper measure of damages in default in malpractice case involving an underlying copyright action); *see also Atkin Wright & Miles*, 709 P.2d at 336 (noting damages must be based on reasonable approximations and that "[p]roof of loss of gross income only is an insufficient foundation for proof of amount of damages." (citing *Garcia v. Mountain States Telephone & Telegraph Co.*, 315 F.2d 166, 169 (10th Cir. 1963))). Moreover, the testimony of Mr. Teshima reflects a reported net loss of \$.5 billion,



foreclosing recovery on this basis. Mr. Teshima questioned the accuracy of this number but offered no other estimate in its place. The Court therefore RECOMMENDS the District Court award Ms. Stewart nothing given the evidence in the record tends to show both movie franchises lost money.

#### **iv. Punitive Damages**

Ms. Stewart requests punitive damages on her breach of contract claim. (Am. Compl. ¶ 200, ECF No. 2.) Utah law generally does not allow punitive damages for a breach of contract. *Jorgensen v. John Clay & Co.*, 660 P.2d 229, 232 (Utah 1983) (citations omitted). An exception to the general rule exists “where the breach of contract amounts to an independent tort.” *Id.* (citations omitted). As detailed above, Mr. Lubell’s breach of contract did amount to an independent tort—attorney malpractice based in negligence and breach of fiduciary duty. *See Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.3d 997, 1006 (recognizing breach of fiduciary duty as a tort upon which the trier of fact may award punitive damages).

The Utah Supreme Court has stated that

punitive damages are only appropriate in exceptional cases and are not meant to enhance the compensatory damage award. Rather, punitive damages must serve the interests of society by punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means. Punitive damages, among other things, punish conduct which manifests a knowing or reckless indifference toward, and disregard of, the rights of others.

*Synergetics v. Marathon Ranching Co., Ltd.*, 701 P.2d 1106, 1112–13 (Utah 1985) (citation omitted). This case does not present such an exceptional situation. The undersigned does not believe this case involves the type of outrageous, malicious, knowing, or reckless conduct punitive damages deter and punish. Nor does this case present conduct “not likely to be deterred by other means.” *Id.* The Court therefore RECOMMENDS the District Court not award Ms. Stewart any punitive damages.

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**v. Prejudgment Interest, Attorneys' Fees, and Costs**

"Prejudgment interest may be awarded in a case where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy." *Jorgensen*, 660 P.2d at 233 (citations omitted). As detailed above, damages in this case are not fixed. The Court notes Mr. Castolene's testimony about how much money Ms. Stewart could have earned on the money she should have received from her copyright amounts to a request for prejudgment interest. Either because the Court recommends awarding no monetary damages on the copyright itself for lack of evidence or because prejudgment interest does not apply in cases without a fixed damage amount, the Court RECOMMENDS the District Court deny Ms. Stewart's request for prejudgment interest.

Ms. Stewart had counsel at various times in this case but now proceeds pro se. Although her Amended Complaint requests costs and attorneys' fees, (Am. Compl. ¶ 3 at 38, ECF No. 2), she presented no evidence of either. The Court takes judicial notice of the filing fee of \$350.00 Ms. Stewart paid, (ECF No. 1), and RECOMMENDS the District Court award Ms. Stewart \$350.00 in costs and deny her request for attorneys' fees.

**RECOMMENDATION**

For the reasons set forth above, the undersigned Magistrate Judge RECOMMENDS the District Court enter a FURTHER ORDER on Plaintiff's Motion for Default Judgment (ECF No. 200) and enter judgment against Mr. Lubell as to claims one (breach of contract), three (malpractice), and six (breach of fiduciary duty), and enter damages in favor of Ms. Stewart in the amount of \$315,930.62 plus costs in this case of \$350.00 for a total of \$316,280.62.

Ms. Stewart filed a Motion/Order Requesting Specific Evidence For Damages And Demand For Expedited Award in which she submits pages missing from some of her earlier-

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submitted evidence and again requests a damages award of fifteen billion dollars. (ECF No. 281.) The undersigned RECOMMENDS the District Court dispose of that Motion consistent with this Report and Recommendation.

The Court will send copies of this Report and Recommendation to all parties, who are hereby notified of their right to object. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The parties must file any objection to this Report and Recommendation within fourteen (14) days of service thereof. *Id.* Failure to object may constitute waiver of objections upon subsequent review.

DATED this 8th day of August, 2014.

BY THE COURT:



\_\_\_\_\_  
EVELYN J. FORSE  
United States Magistrate Judge

EXH 18

FD-71 (Rev. 3-05-2003) Complaint Form

NOTE: Hand print names legibly; handwriting satisfactory for remainder. Indices:  Negative  See below

Subject's name and aliases	Character of case 194-LV- (NEW) Corruption of State & Local Public Officials
	Complainant <input type="checkbox"/> Protect Source Sophia Stewart
	Complaint received by SA [redacted] Field Office Las Vegas Telephone # [redacted] <input checked="" type="checkbox"/> Personal <input type="checkbox"/> Telephonic Date 04/14/2006 Time 11:50 am

Address of Subject	Complainant's address and telephone number 9025 W. Desert Inn #107 Las Vegas, NV. 89117 (702)364-2008
	Complainant's DOB [redacted] Sex Female

Subject's Description	Race <input type="checkbox"/> Male	Height	Hair	Build	Birth date and birth place
	Age <input type="checkbox"/> Female	Weight	Eyes	Complexion	Social Security Number
	Scars, marks and other data				

Employer	Address	Telephone
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Vehicle Description

Facts of Complaint

Sophia Stewart wrote the manuscript, "The Third Eye". Stewart is currently involved in a \$2.5 billion copyright lawsuit (related FBI cases 295-NY-U275271, 295-0-25, and 195-SU-0) where she is claiming the makers of the movie "The Matrix", stole her ideas. Stewart now claims the attorney's representing her in this case, have failed to follow basic judicial procedures, to include the presentation of discovery documents, the submission of evidence, meeting deadlines, and attending hearings. Stewart believes she is not receiving her due process of law. Stewart has not been allowed to speak during her court proceedings, as her attorney's have misrepresented the facts fo the case.

2/13/07  
 HER OWN ATTORNEYS DID NOT DO WHAT THEY NEEDED TO DO IN HER CIVIL CASE. FILED SUIT IN CENTRAL DISTRICT OF CALIFORNIA - CHANGED TO JUDGE MORROW (SP?) - FEDERAL.  
 rmz (3) ADVISED TO CALL L.A. FBI REGARDING COPYRIGHT INFRINGEMENT, AS EVERYTHING TOOK PLACE IN LOS ANGELES.  
 SA [redacted] (Complaint received by) 2/13/07

58A-LV-0-66  
 Do not write in this space.

BLOCK STAMP

①  
RAB

b6  
b7C

EXH 19

Complaint Form

230 12

b6  
b7c

NOTE: Hand print names legibly; handwriting satisfactory for remainder.  
Indices:  Negative  See below

Subject's name and aliases  
[redacted] and [redacted]  
of Paramount Studios;  
[redacted]

Character of case  
295B - Copyright Infringement

Complainant  Protect Source  
Sophia Stewart

Complaint received by SA [redacted] RMZ  
Field Office Las Vegas Telephone # [redacted]  
 Personal  Telephonic Date 08/03/2007 Time 4:00 pm

Address of Subject

Complainant's address and telephone number  
9025 W. Desert Inn Road #273  
Las Vegas, Nevada 89117  
Complainant's DOB 02/05/1968 Sex Female

Subject's Description	Race	<input type="checkbox"/> Male	Height	Hair	Build	Birth date and birth place
	Age	<input type="checkbox"/> Female	Weight	Eyes	Complexion	Social Security Number
	Scars, marks and other data					

Employer Address Telephone  
Paramount Studios [redacted]

Vehicle Description

Facts of Complaint  
Sophia Stewart, writer of the "The Third Eye" and "When the Gods Walked the Earth" claims her 4th Amendment right to Due Process has been violated. Stewart, the writer of the "Third Eye", believes copyright laws have also been violated when the ideas from her book "The Third Eye" were stolen and used for the creation and production the of the movie "The Matrix". Stewart, who has publicly been acknowledged as the creator of "The Matrix", now believes her ideas from her recent novel, "When the Gods Walked the Earth", have been stolen and used in the recently released movie "The Transformers". Attached are documents mailed by Stewart supporting her allegations.  
54348\_07.wpd

rmz  
(3)

SA [redacted] RMZ  
(Complaint received by)

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EXH 20

Complaint Form

NOTE: Hand print names legibly; handwriting satisfactory for remainder.

Indices:  Negative  See below

Subject's name and aliases

Wachowski Brothers

Character of case

Copyright infringement  
Civil rights violation

Complainant  Protect Source

Sophia Stewart

Complaint received by SA [redacted]

Field Office NY

Telephone # [redacted]

Personal  Telephonic Date 12/15/03 Time 4:00 pm

Address of Subject

Complainant's address and telephone number

PO Box 165153  
Salt Lake City, UT

Complainant's DOB

02/05/1968

Sex

Female

Subject's Description

Race

Male

Height

Hair

Build

Birth date and birth place

Age

Female

Weight

Eyes

Complexion

Social Security Number

Scars, marks and other data

Employer

Address

Telephone

Vehicle Description

Facts of Complaint

-C- filed a complaint on 07/09/2001, 295B-NY-U275271 Serial 30, in which -C- claimed she was the author of the movie MATRIX and it was stolen by the Wachowski brothers, who are publicly regarded as the true authors of the MATRIX. -C- claimed her 4th amendment right to Due Process was violated during the original investigation. -C- stated an FBI agent named [redacted] (sp?) from the Salt Lake City division had taken documents from -C- as evidence relating to the alleged copyright violation and had agreed to investigate the matter but nothing was ever done by [redacted] also refused to return the documents to -C- after repeated requests. -C- was unable to provide the spelling of [redacted] name or any contact information. -C- also believed [redacted]

rmh

WITH

V. [redacted]

BY [redacted]

DATE 1-14-04

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(Complaint received by)

Recommend send to 295B-NY-U275271  
71-Sophia St. WPA

EXH 21

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From the Desk Of:

**ASAC WILLIAM H. DUFF**  
WHITE COLLAR CRIME BRANCH  
DIVISION 2 - BRANCH "2"  
X2802

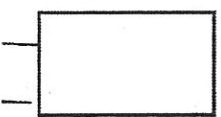


DATE 7/6/01

- ADIC MAWN
- SAC \_\_\_\_\_
- SAC CORDIER
- A/SAC \_\_\_\_\_
- ASAC \_\_\_\_\_
- CDC \_\_\_\_\_
- \_\_\_\_\_

- CSSA [redacted]
- SSA [redacted] (C-1)
- SSA [redacted] (C-2)
- SSA [redacted] (C-3)
- SSA [redacted] (C-4)
- SSA [redacted] (C-8)
- SSA [redacted] (C-12)
- SSA [redacted] (C-14)
- SSRA [redacted] (C-21)
- SSA [redacted] (C-28)
- SSA [redacted] (C-33)
- SSA [redacted] (C-35)
- SSA [redacted] (C-37)

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b7c

RE:

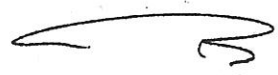
\*\*\*\*\*

Please Expedite       For Info.       Please Handle

For Approval       Please See Me       See Attached

\*\*\*\*\*

*Looks like a 995 E case.*



*EXH 22*



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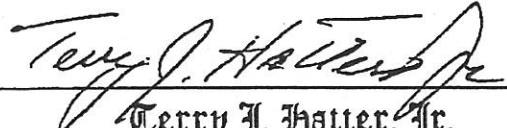
Therefore, it is Ordered that:

Plaintiff shall file a RICO case statement within thirty days of the date this order is filed. The statement shall include facts upon which Plaintiff relied to initiate its RICO claims. Fed. R. Civ. P. 11. This statement shall be in the form of the attached RICO Case Statement and shall state, in detail, all of the information requested in that form. The Court will construe the RICO Case Statement as an amendment to the pleadings.

It is further Ordered that:

Failure to comply with this order will subject counsel to monetary sanctions and/or dismissal of the case. Counsel shall serve a copy of this Order and the RICO Case Statement on all parties.

Date: April 28, 2003

  
Terry J. Hatter, Jr.  
Chief United States District Judge

EX# 23



1 UNITED STATES PATENT AND TRADEMARK OFFICE  
2 APPEAL DIVISION

3  
4 Sophia Stewart

Cancellation No. 92058387

5 V.

6 Warner Bros Entertainment Inc.

**AFFIDAVIT OF NICHOLAS JACKSON**

7  
8 **AFFIDAVIT IN SUPPORT OF CANCELLATION:**

9  
10 This affidavit is in reference to the February 7th, 2014 telephone conversation I had with Kate Chilton  
11 Senior VP of Warner Brothers Entertainment. On February 7th, 2014 I, Nicholas Jackson,  
12 had a telephone conversation with Kate Chilton pertaining to the unauthorized KIA car commercial  
13 distributed during the Super Bowl, called "KIA Enters the Matrix". I explained to Kate Chilton,  
14 that Warner Brothers had no copyrights to the Matrix Movies, and requested that she financially settle  
15 with Sophia Stewart, pertaining to the KIA car commercial, that Warner Brothers licensed to KIA unauthorized.  
16 During our conversation, Kate Chilton explained to me that she offered a settlement to Sophia Stewart in the  
17 amount of \$5-7 million dollars about 5 years ago. I asked Kate Chilton what had developed out of the  
18 settlement offer to Sophia Stewart, at which time Kate Chilton explained to me that Sophia Stewart had  
19 aborted the settlement offer 5 years ago. Subsequently, I asked Kate if Warner Brothers owned the  
20 copyrights to The Matrix Movies, which she explained to me that Warner Brothers does not own copyrights,  
21 but only rights to the green lettering images. From these admissions of facts over the telephone, I concluded  
22 that Warner Brothers owns no copyrights to the Matrix Movies and therefore cancellation of "Enter The Matrix"  
23 Trademark should be granted for lack of valid copyrights in congruence with Matrix Movies.  
24  
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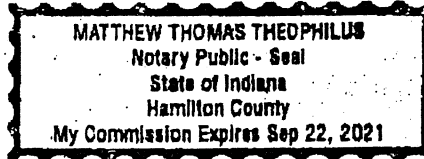
EXH 27

1 I declare under the penalty of perjury that all of the foregoing is true and correct to the best of my  
2 knowledge, and belief DATED this 17th day of February, 2014

3  
4 *Nicholas Jackson*

5  
6 Nicholas Jackson /  
7 Nicholas Jackson

8  
9  
10 *Matthew T. Al*



15 2/18/14

EXH 25

1 **CERTIFICATE OF MAILING**

2  
3 I hereby certify that on this 17<sup>th</sup> day of February 2014, I caused to be mailed via first class U.S. mail, postage pre-  
4 paid, and a true and correct copy of the foregoing **Petition to the Trademark Office** to the following:  
5

6 7 Trademark Trial and Appeal Board 8 U.S. Patent and Trademark Office 9 P.O. Box 1451 Alexandria, VA 22313-1451 10	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Transmission <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Other
11 12 Warner Brothers Entertainment Inc. 13 4000 Warner Blvd., 14 Burbank, CA 91522 15 16	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Transmission <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Other

EXH 26

## TED McBRIDE LAW OFFICES

---

Utah Address (Main)  
4873 South State Street  
Murray, Utah 84107  
Telephone: (801) 531-1030  
Facsimile: (801) 207-1757

[red@tedmbridelaw.com](mailto:red@tedmbridelaw.com)  
[www.tedmbridelaw.com](http://www.tedmbridelaw.com)

New York Address:  
1012 Route 211 East  
Middletown, New York 10941  
Telephone: (845) 703-1111  
Facsimile: (845) 703-1112

October 4, 2011

Gary S. Brown  
**LAW OFFICE OF GARY S. BROWN**  
10640 Wheatland Avenue  
San Fernando Valley, California 91040  
[garysbrown@ca.rr.com](mailto:garysbrown@ca.rr.com)  
[julieareeed@ca.rr.com](mailto:julieareeed@ca.rr.com)

Re: Stewart v. Lubell, et.al.  
United States Federal District Court, District of Utah  
Case No. 2:07-cv-00552

Dear Gary,

Enclosed please find our Attorney Planning and Meeting Report, together with a proposed Scheduling Order for the Court. I have indicated in the pleading that Jonathan Lubell authorized you to act on his behalf for purposes of the conference. I also note that Michael Stoller did not respond to my request to confer. I am sending a copy of these pleadings to both Mr. Lubell and Mr. Stoller.

As I indicated to you on the telephone, I find Sophia's case interesting – both the malpractice claim and her underlying case. I suspect that you, Jonathan and Michael will all concede that her work was strikingly similar to the Matrix. When I initially reviewed Sophia's file, I immediately noticed major flaws in the presentation of her case. I continue to be mystified at why no discovery was directed to the defendants. In fact, if my memory serves me correctly, Warner Brothers got away without ever filing an Answer. In any event, I now need to conduct some of the discovery that wasn't done; namely, deposing the defendants in the underlying case, as well as the three of you. I also plan on deposing Bruce Issacs and David Boren. I indicated in the planning report that I needed to conduct about ten depositions.

Please note that Sophia has authorized me to make the following global settlement demand. She will accept \$5,000,000.00 pursuant to a confidential settlement of all

---

TED McBRIDE LAW OFFICES

EXH 27

*Gary Brown*  
*October 4, 2011*  
*Page 2*

claims, provided, as well, that Warner Brothers agrees to drop its judgment, in exchange for which Sophia would release them as well.

I look forward to hearing from you.

Very truly yours,

**TED McBRIDE LAW OFFICES**

Edward W. McBride, Jr.

---

TED McBRIDE LAW OFFICES

EXH28



Print - Close Window

**From:** Ricoman1968@aol.com  
**Date:** Mon, 9 Aug 2004 10:18:48 EDT  
**Subject:** STEWART v WACHOWSKI  
**To:** garysbrown@comcast.net, Jwlnjpl@aol.com  
**CC:** sophiastewart10@yahoo.com

9 August 2004, Monday, 6:57 a.m., PDT

Dear Gary and Jonathan:

Please advise as to our applying to the Clerk's Office for entry of FRCP 55(a) default upon Andy Wachowski and Larry Wachowski. The period of time to file and serve a response to the summons and first amended complaint has expired, so I recommend that we default these defendants.

At some point we need to discuss Judge Morrow's 4 August 2004 Civil Minute Order requiring the FRCP 26(f) joint status report. How and when should we approach opposing counsel? This is another reason to apply for default on the Wachowski Brothers, and now.

Is there any reply from Thea Bloom's attorneys as to responding or answering the first amended complaint? I believe we should file a certificate of service evidencing service upon her, both individually and on behalf of the community property marital estate.

Please advise as to our filing notices of pending actions in both the federal court about the Wachowski-Bloom marital dissolution case and in the divorce court of the federal RICO and federal Copyright action so that the respective courts are aware of the nature of both suits and the impact upon the subject matter thereof.

Gary, I read your letter to Jonathan last week about the response date to the FRCP 12 motions. Though the motion date was continued to 27 September 2004, does it necessarily mean enlargement to respond? The 4 August 2004 order is silent on that point. Anyway, I would suggest that we finalize, file, and serve our response memoranda as soon as possible, rather than wait for 13 September 2004.

Talk with you soon.

Cordially,

Dean Browning Webb, Esq.

cc: Sophia Stewart

*EXH 29*

**CERTIFICATE OF MAILING**

I hereby certify that on September 2, 2014, I caused to be mailed via first class U.S. mail, postage pre-paid, and a true and correct copy of the foregoing **OPPOSITION TO REGISTRANT'S MOTION FOR SUMMARY JUDGMENT**

To the following:

Trademark Trial and Appeal Board U.S. Patent and Trademark Office P.O. Box 1451 Alexandria, VA 22313-1451	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Transmission <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Other
JAMES D WEINBERGER, FROSS ZELNICK LEHRMAN & ZISSU PC  866 UNITED NATIONS PLAZA, 6TH FLOOR, NEW YORK, NY 10017 UNITED STATES  jweinberger@frosszelnick.com, eweiss@frosszelnick.com	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Transmission <input type="checkbox"/> Hand-delivery <input type="checkbox"/> Other

Dated: 09/2/14

Submitted,  
  
Sophia Stewart