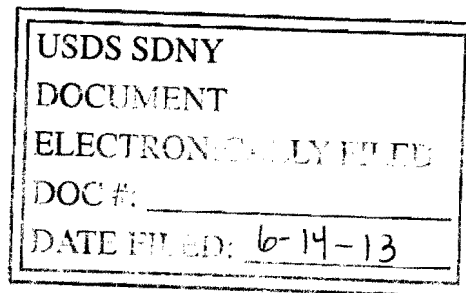


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----x  
CAPITOL RECORDS, LLC,  
SCREEN GEMS-EMI MUSIC, INC,  
COLGEMS-EMI MUSIC, INC.,  
EMI FULL KEEL MUSIC, INC.,  
EMI UNART CATALOG, INC., and  
JONES/TINTORETTO ENTERTAINMENT  
COMPANY, LLC,

11 Civ. 6808 (PKC)

MEMORANDUM  
AND ORDER

Plaintiffs,

-against-

ANTHONY DEFRIES, MAINMAN LTD., and  
MMRX,

Defendants.

-----x  
P. KEVIN CASTEL, District Judge:

Plaintiffs, the owners and exclusive licensees of copyrights to certain music compositions and recordings, brought this action against defendants Anthony Defries, MMRX, and MainMan Ltd. (“MainMan”) claiming, *inter alia*, copyright infringement because defendants marketed, distributed and sold through popular online sites the same works defendants sold to plaintiffs over a decade ago. The Court granted plaintiffs’ motion for default judgment on July 20, 2012. Capitol Records v. Defries, No. 11 Civ. 6808, 2012 WL 3041583 (S.D.N.Y. July 20, 2012). After holding a hearing on damages, the Court entered a final judgment on December 26, 2012. (Docket No. 69.) Defries, proceeding *pro se*, moves to set aside the judgment against himself and MMRX pursuant to Rules 54(c), 55(c) and 60(b), Fed. R. Civ. P.<sup>1</sup> For the reasons explained, the motion is denied.

<sup>1</sup> Throughout the proceedings, plaintiffs have treated MMRX as a d/b/a of Defries. Copies of waiver-of-service forms as well as a copy of the Summons, Complaint, and other documents were mailed to MMRX on September 29, 2011. (Docket No. 25 Ex. B.) Defries asserts no admission has been made as to the status or legal existence of MMRX. (Def. Mem. at 2.) MainMan, a corporate entity and non-natural person, may only appear in the action by an attorney admitted to practice.

## BACKGROUND

Much of the background of this case may be found in the Court’s July 20, 2012 Memorandum and Order, which granted plaintiffs’ motion for default judgment. See generally Defries, 2012 WL 3041583. Plaintiffs allege they are the owners and/or exclusive licensees of certain musical compositions and sound recordings embodying the works of David Bowie, Mick Ronson, Iggy Pop, and John Mellencamp. Id. at \*1. According to plaintiffs, defendants sold whatever interests they had in such recordings and compositions through agreements executed in 1992 and 1996. Id. In the 1992 Agreement, MainMan “irrevocably sold” to plaintiffs “one hundred percent (100%) of its business as a music publishing company including all its right, title and interest in and to (or arising from)” the compositions of David Bowie, Iggy Pop, Mick Ronson, and John Mellencamp listed in Exhibit A to the Complaint. Id. (quoting Compl. ¶¶ 33-34). In the 1996 Agreement, MainMan and affiliated entities sold to plaintiffs—as successors in interest to David Bowie, the original counterparty—“every conceivable right, claim or interest they had in all of the Bowie Recordings at issue herein, including the copyrights in all such works.” Id. (quoting Compl. ¶ 37).

Over a decade later, Defries and MMRX authorized various online retailers to sell the recordings, and consequently to exploit the underlying compositions of these and other works. Id. at \*2. In 2011, plaintiffs filed this action which included claims for copyright infringement of certain recordings and compositions, including but not limited to those defendants sold in 1992 and 1996. Plaintiffs attempted to serve Defries by mail at his last known address. Id. Defries later asserted that defendants had “closed” this address weeks before, and that he never received the packages. Id. at \*3. Still, Defries admitted to receiving an electronic version of the materials, which was missing one page of the complaint. Id. Defries returned

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waiver-of-service forms on behalf of himself and MainMan, after altering the forms to provide 90 days to respond, rather than the applicable 60 days. Id. The Court ordered defendants to respond within the 60-day period. Id. Defendants did not answer or otherwise move. Id. at \*4.

On December 21, 2011, plaintiffs moved for a default judgment. Roughly two months later, Defries filed a declaration asserting that plaintiffs failed to comply with Rule 4(d), Fed. R. Civ. P. Defries also claimed that defendants somehow had retained ownership interests in the works at issue through Mick Ronson, a guitarist, who Defries claimed was a co-author of the works. Id. On July 20, 2012, the Court granted plaintiffs' motion for default judgment as to all defendants. Id. at \*4-8. The Court concluded that the default was willful because Defries evaded or challenged service for months and failed to comply with multiple scheduling orders. Id. at \*7-8. The Court also discussed at length and rejected the contention that Defries had retained ownership interests in the works through Mick Ronson.

Defries then moved to dismiss plaintiffs' claims and to reinsert himself into the action by intervention, pursuant to Rule 24, Fed. R. Civ. P. (Docket Nos. 58, 59.) Defries's "Intervention Complaint" provided greater detail regarding the Mick Ronson co-authorship issue. The Court denied the motion on September 26, 2012. (Docket No. 61.) In November of 2012, the Court held an inquest on damages. Defendants did not appear. On December 26, 2012, the Court entered a final judgment, which included \$50,000 per infringed work in statutory damages (totaling \$9,350,000 for 187 works) as well as attorneys' fees. Defendants failed to file a timely appeal. Defries and MMRX now move to set aside the judgment pursuant to Rules 54(c), 55(c), and 60(b), Fed. R. Civ. P.

DISCUSSION

I. The judgment did not differ in kind from or exceed in amount that demanded in the pleadings.

Rule 54(c), Fed. R. Civ. P., provides “[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” The Rule reflects the policy rationale that:

the defending party should be able to decide on the basis of the relief requested in the original pleading whether to expend the time, effort, and money necessary to defend the action. It would be fundamentally unfair to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should defendant attempt to limit the scope and size of the potential judgment by not appearing or otherwise defaulting, allow the court to give a different type of relief or a larger damage award.

Silge v. Merz, 510 F.3d 157, 159 (2d Cir. 2007) (quoting 10 Charles Alan Wright, Arthur R.

Miller, & Mary Kay Kane, Federal Practice and Procedure, § 2663 (1998) (footnote omitted)).

The judgment does not differ in kind from that demanded in the pleadings. Among other relief, the Complaint demanded statutory damages pursuant to 17 U.S.C. § 504(c) as well as attorneys’ fees pursuant to 17 U.S.C. § 505 and the 1996 Agreement. (Compl. ¶¶ 65-70; 75-79.) The Complaint’s demand clause incorporates the relief sought in the causes of action including, at plaintiffs’ election, statutory damages in the maximum amount allowed by law and attorneys’ fees. See Silge, 510 F.3d at 162 (damages award is confined to the amount in the demand clause). The Court entered a default judgment for \$9,350,000.00 in statutory damages pursuant to 17 U.S.C. § 504(c), attorneys’ fees pursuant to 17 U.S.C. § 505 and the 1996 Agreement, as well as injunctive relief. (Docket No. 69.) The pleadings notified Defries of the claims asserted against him and the nature of the relief sought.

Defries advances numerous arguments, purportedly under Rule 54(c), including that (1) plaintiffs lack standing because they are not the owners of the works at issue; (2) several of the works are pre-1972 recordings not subject to federal copyright protection; and (3) works included in the judgment form a compilation, and thus are not individually protected.<sup>2</sup>

According to Defries, these deficiencies indicate the judgment differs in kind and exceeds in amount what is demanded in the pleadings. (Def. Mem. at 4.)

For the first time, Defries asserts that plaintiffs have no rights in 151 of the works included in the judgment, and thus, lack standing. The principal basis for the contention is that “extracts” of these works from the U.S. Copyright Office as of January 2013, do not list plaintiffs as the “Copyright Claimant.” (Def. Exs. A-D.) Even if Defries were correct, plaintiffs have provided adequate notice of their claims to satisfy the requirements of Rule 54(c).

Defries also asserts that plaintiffs have failed to show that sound recordings included in the judgment were made later than February 15, 1972 and are not part of a compilation. Defries asserts works 11-45,<sup>3</sup> sound recordings on the album *Bowie at the Beeb*, and works 126-27 and 136-141, sound recordings on the album *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*, were created prior to February 15, 1972, and thus, do not qualify for federal copyright protection. (Def. Mem. at 3-4.) In support, Defries annexes two Wikipedia entries indicating songs on the albums were recorded prior to 1972. (Def. Exs. F, G.)

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<sup>2</sup> Defries also asserts that one song is incorrectly titled in Exhibit A to the complaint. Defries claims that “Rock n Roll with Me,” infringement number 68 on the proposed judgment, actually refers to “Rock n Roll Suicide,” which is not included in the pleadings. (Def. Mem. at 4.) Exhibit E, a page from the U.S. Copyright Office website, indicates that “Rock n Roll Suicide” was a track on *Bowie at the Beeb*, an album included in the pleadings. According to Defries, “Rock n Roll with Me” refers to a 1974 recording by Bowie on the album *Diamond Dogs*. Assuming Defries is correct, the Court cannot conclude the judgment differs in kind from that demanded in the pleadings. Defries always had the tools to identify this discrepancy and seek clarification. Rather, he chose to wait until after judgment was entered to contest what appears to be, at best, an inconsequential typo.

<sup>3</sup> This opinion identifies specific infringed works by the handwritten numbers on Schedule A to the proposed judgment.

According to Defries, works 46, 59-68 are part of a “compilation album,” *Bowie at the Beeb* (Def. Ex. E), and therefore, do not qualify for federal protection because plaintiffs “registered them as part of a compilation album rather than as original works or original sound recordings.” (Def. Mem. at 4.) The section of the Copyright Act addressing compilations states:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103. The Court construes Defries’s argument to state that plaintiffs’ copyright interest in the compilation does not, on its own, warrant statutory damage awards for the individual recordings. Plaintiffs’ opposition does not respond to these contentions.

Again, the pleadings put defendants on notice that plaintiffs may elect statutory damages for each recording. (See Compl. ¶ 66 (“The infringement of each such Recording is a separate and distinct act of infringement.”).) Exhibit A to the complaint indicates which recordings were allegedly registered, by providing registration numbers, and which were pre-1972 recordings, by identifying such recordings as “pre-1972” in lieu of registration numbers. Accordingly, the Court concludes the judgment does not violate the mandates of Rule 54(c).

II. The motion to set aside the default judgment under Rules 55(c) and 60(b) is denied.

Pursuant to Rule 55(c), a court “may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).” Rule 60(b) enumerates several grounds for relief from a final judgment including:

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



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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

Defries moves pursuant to Rules 55(c) and 60(b)(1), (3), (4) and (6), Fed. R. Civ. P. “The discretionary relief available under Rule 60(b) is equitable.” Motorola Credit Corp. v. Uzan, 561 F.3d 123, 126 (2d Cir. 2009). When a party brings a motion to set aside a default judgment under Rule 60(b), courts apply the same three “good cause” factors used to assess motions to vacate entry of default under Rule 55(c): willfulness of default, prejudice to plaintiff, and existence of meritorious defenses. See State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 166-67 (2d Cir. 2004). “Although the factors examined in deciding whether to set aside a default or a default judgment are the same, courts apply the factors more rigorously in the case of a default judgment, because the concepts of finality and litigation repose are more deeply implicated in the latter action.” Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993) (citation omitted). Still, the Court notes the preference for resolving litigation on the merits, and thus, “‘good cause’ and the criteria of the Rule 60(b) set aside should be construed generously.” Id. The Rule “strikes a balance between serving the ends of justice and preserving the finality of judgments.” Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986). However, it is “not appropriately invoked to ask a court to revisit an earlier ruling based on the

same facts and law.” Saleh v. Francesco, 11 Civ. 438 (PKC), 2012 WL 1071261, at \*2 (March 30, 2012) (Castel, J.).

### 1. Willfulness

In its July 20, 2012 Memorandum and Order, the Court concluded that the default was willful because Defries evaded or challenged service for months, disregarded multiple scheduling orders, altered waiver-of-service forms, and waited two months before submitting an opposition to the motion for default judgment, but failed to respond to the complaint, appear at any conference, or provide a physical address. Defries, 2012 WL 3041583 at \*7-8. In opposition to plaintiffs’ default motion Defries contended that the address to which plaintiffs mailed the packages containing waiver-of-service forms had “closed” several weeks earlier. Id. at \*3. Defries regurgitates substantially similar arguments on this motion, seeking relief under Rule 60(b)(1), Fed. R. Civ. P.,<sup>4</sup> because defendants “held the belief mistaken or otherwise that service of the Complaint had not been made on them[,] that waiver notices had not been served on them [and/or] that substituted service on a mailbox address was not permitted under [R]ule 4,” Fed. R. Civ. P. (Def. Mem. at 7.) Plaintiffs established their compliance with Rule 4(d), Fed. R. Civ. P., by submitting a sworn declaration and exhibits evidencing that the California Secretary of State website lists the service address as the address of Defries, the in-state agent for a number of corporations. Defries, 2012 WL 3041583 at \*3. Defries claims the service address could not be considered accurate because the California Secretary of State’s website shows the last filing date was 2006 and the site contains disclaimers regarding the accuracy of its

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<sup>4</sup> “The determination of what constitutes excusable neglect is an equitable one; accordingly, the Court considers all relevant circumstances ‘including [1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.’” Katz v. Mogus, 07 Civ. 8314 (PKC), 2012 WL 263462, at \*3 (S.D.N.Y. Jan. 25, 2012) (alterations in original) (quoting Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 365-66 (2d Cir. 2003)).



information. To the extent the instant motion asks the Court to revisit its Rule 55(c) analysis, it fails.

Defries also claims to have been suffering from severe health issues at the time plaintiffs served the complaint. Defries says he received treatment in South Africa and was prescribed medication which produced “dizziness, loss of cognitive abilities and memory, fatigue, confusion, stress, internal bleeding” etc. (Def. Mem. at 9.) The instant motion annexes a redacted letter from a treating physician in South Africa, which states that Defries “presented with a massive upper gastro-intestinal haemorrhage;” “[o]n 7-12 a repeat gastroscopy was done;” and “he was discharged on 9-12-11.” (Def. Ex. H.) The annexed physician’s letter refers to treatment received in December 2011—after the deadline for filing an Answer. Defries made several submissions to the Court during the period such “life threatening” health issues were supposedly taking place, but did not ask for an extension of time to answer the complaint due to such personal health issues. (According to plaintiffs, Defries filed no less than five letters, oppositions and applications with the Court between November 2011 and July 2012 (Pl. Mem. at 19).) Defries has previously asserted that urgent family medical emergencies and business concerns required his attention in Europe and Africa around this time period. He did not, however, supply evidence to substantiate personal health issues when he opposed the default, and offers no explanation why he did not seek to retain counsel or secure an extension of time on this basis. The Court’s determination that the default was willful remains undisturbed.

## 2. Meritorious Defenses

“In order to make a sufficient showing of a meritorious defense in connection with a motion to vacate a default judgment, the defendant need not establish his defense

conclusively, but he must present evidence of facts that, if proven at trial, would constitute a complete defense.”<sup>5</sup> State St., 374 F.3d at 167 (internal quotation marks and citation omitted).

Pursuant to Rule 60(b)(6), Defries revives the argument that defendants acquired rights to many of the works at issue through Mick Ronson. Relief is available under Rule 60(b)(6) in “extraordinary circumstances or where the judgment may work an extreme and undue hardship.” Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986) (internal quotation marks and citation omitted). Rather than recreate the convoluted argument here, the Court puts forth Defries’s summary of his contentions:

(a) Mick Ronson died in 1993 . . . (b) he was party to an employment agreement similar to that entered into by Bowie and never had any claim to the works at issue as they were works made for hire and owned by MainMan (c) for this reason he never claimed or asserted any claim to a copyright interest in those works (d) he died before Bowie ever acknowledged his co-creation and co-authorship in those works (e) as the employer of both creators and authors to the works in question MainMan and ultimately Defries was the sole copyright owner until they transferred to Bowie his but not the Ronson share of that ownership in 1975 and 1996 (f) the MainMan Defries chain of title is described in the Motion/ Intervention (g) Defries only became aware of the Ronson interest in those works in or about 2010 (h) claims of ownership have been made (k) Defendants did not knowing[ly] transfer or sell those rights under any of the 1975/1992/1996 agreements relied upon by the Plaintiffs.

(Def. Reply at 8.) Defries asserts that “[a] transfer or sale of one author’s interests does not affect the rights of the remaining author” and defendant “is the owner of the coauthor rights in said works” due to the work for hire agreements with Ronson. (Def. Mem. at 11.) Defries admits that since Ronson has died, “[n]o direct enquiry can now be made of Ronson as a coauthor concerning his intentions at the time of creating those works.” (Def. Mem. at 13-15), and instead offers three exhibits to substantiate Mick Ronson’s co-authorship, two Wikipedia

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<sup>5</sup> The Court rejects Defries’s unsupported contention that plaintiffs acted in violation of the Sherman Act.

entries and a third article in which Bowie, Mellancamp, and a music producer acknowledge Ronson's contributions to the works of Bowie and Mellancamp. (Def. Exs. J, K, L.)

The Court thoroughly considered and rejected a substantially similar version of this argument, for which Defries supplied no supporting evidence, in its July 20, 2012 Memorandum and Order. Defries, 2012 WL 3041583 at \*6-7. "Rule 60(b) does not allow litigants to 'get a second bite at the meritorious defense apple by submitting new evidence [defendants] apparently possessed all along during the earlier proceedings when the district court . . . w[as] specifically reviewing the legal arguments implicated by the new evidence.'" Saleh, 2012 WL 1071261 at \*3 (quoting State St., 374 F.3d at 174) (alterations in original).

Further, deficiencies discussed in that opinion remain. For instance, this motion does not offer evidence of facts substantiating that *Defries* (or MMRX) came to have any interests in the copyrighted works at issue. In its prior opinion the Court explained that even if interests in the works "accrued to one of the defendants by an unstated mechanism, that defendant must be MainMan." Defries, 2012 WL 3041583 at \*6. Defries now asserts that rights derived from work for hire agreements between MainMan affiliated companies and Ronson were "subsequently assigned to MainMan SAAG (a Swiss domiciliary company) and thereafter in 2007 to Diego Foundation (a Lichtenstein Trust) and ultimately became personal property of Defendant as primary beneficiary. As a result Defendant is the owner of the coauthor rights in said works." (Def. Mem. at 11.) Defries also refers the Court to his "Intervention Complaint," filed on September 24, 2012, which somewhat inconsistently asserts that companies owned or controlled by Defries or Defries, "in his personal capacity," had contracts with recording artists including Ronson. (Docket No. 59 ¶ 6.) The evidence offered with this motion does not support these assertions. (Defries's reply, which is stylized as a Declaration submitted under the penalty

of perjury, does not explain in any detail how Defries acquired interests in the works, but rather refers the Court to his other submissions for this information.) There are no extraordinary circumstances here, and there is no basis to deviate from the previous analysis of this issue. See Defries, 2012 WL 3041583 at \*6-7.

### 3. Prejudice

Defries argues plaintiffs will not be prejudiced by vacating the default judgment because there has been no continued use, sale or distribution of the works, and in any case, plaintiffs did not suffer significant financial losses. Delay alone is an insufficient basis to establish prejudice. New York v. Green, 420 F.3d 99, 110 (2d Cir. 2005). “Something more is needed. For example, delay may thwart plaintiff[s]’ recovery or remedy. It also may result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.” Id. (internal quotation marks and citation omitted). Here, the delay caused by vacating in the judgment may thwart plaintiffs’ recovery because defendants have engaged in a pattern of obstructive litigation tactics throughout the proceedings. As the Court has noted, “the facts here demonstrate that Defries is an ‘obstructionist adversary,’ making this a case in which ‘[d]efault procedures . . . provide a useful remedy’ and ‘play a constructive role in maintaining the orderly and efficient administration of justice.’” Defries, 2012 WL 3041583 at \*8 (quoting Enron, 10 F.3d at 98) (alteration in original). Plaintiffs have expended significant time and resources in obtaining the default judgment and subsequently proving damages. Such expenses include costs incurred responding to Defries’s untimely, repetitive, and meritless submissions. There is no reason to believe that going forward defendants would substantially

comply with this Court's scheduling and discovery orders in order to obtain a resolution on the merits.<sup>6</sup> Thus, Defries has failed to show a lack of prejudice.

4. Plaintiffs have not engaged in fraud warranting equitable relief under Rule 60(b)(3)

The Court may relieve a party from a final judgment under Rule 60(b)(3) due to fraud. "However, a Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits." Fleming v. New York Univ., 865 F.2d 478, 484 (2d Cir. 1989). Further, the movant must show the "conduct complained of prevented the moving party from fully and fairly presenting his case." State St., 374 F.3d at 176 (internal quotation marks and citation omitted). Defries's motion does not support the conclusion that plaintiffs engaged in fraud, misrepresentation, or misconduct, or that such conduct prevented defendants from presenting their case.

As discussed above, Defries puts forth numerous arguments purportedly under Rule 54(c), Fed. R. Civ. P. According to Defries, these deficiencies warrant relief under Rule 60(b)(3), (4). Defries asserts that plaintiffs have no rights in 151 of the copyrighted works included in the judgment because "extracts" of these works from the U.S. Copyright Office as of January 2013, do not list plaintiffs as the "Copyright Claimant." (Def. Exs. A-D.) According to Defries, this means plaintiffs are not the registered owners of the works, and consequently plaintiffs have failed to show in the pleadings their ownership and registration of the works, which is necessary to secure a judgment under the Copyright Act. For instance, compositions 136-144 list RCA Records or BMG Records as the "Copyright Claimant." (Def. Ex. D.) Recordings 1-10 identify David Bowie as the "Copyright Claimant." (Def. Ex. A.)

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<sup>6</sup> Cf. Order of April 26, 2013 (Docket No. 78) (denying "Motion to Suppress" the entire transcript of the November 27, 2012 hearing on damages).

Plaintiffs explain that 37 C.F.R. § 202.17(e)(iii) provides that the appropriate renewal claimant is “[t]he author(s) of the work, if still living.” Thus, a claimant is not necessarily the work’s owner or exclusive licensee. Plaintiffs annex a sample renewal registration form, which reflects that EMI Publishing filed the renewal registration, though David Bowie is listed as the “renewal claimant.” (Pl. Ex. 2.) In his reply, Defries asserts that the works were created for MainMan “as works for hire” and belonged entirely to MainMan until 1975, when, by agreement, Bowie received a fifty percent interest. Thus, according to Defries, 37 C.F.R. § 202.17(e)(2)(ii) applies, and the proper renewal claimant is “[t]he person who, on the applicable day, was the copyright proprietor.”

Plaintiffs have proven their ownership interests or rights as exclusive licensees through sworn affidavits and exhibits. (E.g., Ashby Aff. ¶¶ 3-4, 7-9, 12; Cyrana Aff. ¶¶ 7-9, 20-21; McMullan Decl. ¶¶ 2, 4; see also Pl. Ex. 1.) Indeed, many of the works at issue are those that defendants *sold* to plaintiffs directly or as successors in interest to David Bowie. The evidence submitted does not refute the chain of title established by plaintiffs during the course of the litigation. Moreover, that Defries admits he contacted plaintiffs in order to exploit his alleged co-authorship interests in the works (Def. Mem. at 12-13) belies the assertion that plaintiffs lack ownership interests. The evidence offered on this motion is not sufficient to show plaintiffs’ perpetrated a fraud. Further, nothing impeded Defries from fully presenting this argument during the litigation. Exhibit A to the complaint lists U.S. Copyright Registration numbers for each of the allegedly infringed works. Defries could have answered the complaint or raised these concerns in his motion to vacate the default.

The motion lays out additional points under Rule 54(c) and later incorporates parts by reference, making it somewhat unclear which arguments are also asserted under Rule



60(b). To the extent Defries argues that the other grounds pressed under Rule 54(c) warrant relief under 60(b)(3), the Court disagrees. Defries cannot show that he was prevented from presenting such arguments during the course of litigation. Exhibit A to the complaint clearly identifies each recording with a U.S. Copyright Registration number or alternatively designates the recording as “pre-1972.” Plaintiffs’ memorandum in support of their damages’ request also makes plain that plaintiffs elected to pursue a statutory damage award for each individual composition and recording.<sup>7</sup> (Docket No. 52 at 15-16.) At no time when the Court was considering these issues did Defries press that it would be improper to award damages on a per song basis where, purportedly, the works formed part of a compilation or individual recordings on a registered album were created prior to 1972.

Defries could have raised such concerns in the context of the litigation, default motion, or inquest on damages. Though on this motion Defries asserts that “a defaulting Defendant is not at liberty to challenge, dispute or participate in” a damages inquest (Def. Reply at 2), the case law in this circuit anticipates a defaulting defendant’s ability to appear at such a proceeding. Cement & Concrete Workers Dist. Council Welfare Fund, Pension Fund, Annuity Fund & Training Fund & Other Funds v. Metro Found. Contractors Inc., 699 F.3d 230, 234 (2d

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<sup>7</sup> In support of this position, plaintiffs cited Judge Wood’s opinion in Arista Records LLC v. Lime Group LLC, No. 06 Civ. 5936, 2011 WL 1311771 (S.D.N.Y. Apr. 4, 2011), which concluded that: “Neither the Copyright Act, nor any judicial decision, stands for the proposition that, because an individual work is included, at one point in time, on an album, a plaintiff is entitled to only one award for the infringement of any of the works that happen to have been included on that album. Accordingly, if Plaintiffs issued a sound recording as an individual track during the time that it was infringed on the LimeWire system, Plaintiffs can recover a statutory damage award for that sound recording.” Id. at \*4 (footnote omitted). Arista Records considered the language of 17 U.S.C. § 504(c)(1), which provides for statutory damages and states that “for the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.” The opinion then distinguished the Second Circuit’s opinion in Bryant v. Media Rights Prods., Inc., 603 F.3d 135 (2d Cir. 2010), which held that statutory damage awards should be granted on a per album basis. As Judge Wood explained, the Second Circuit’s analysis focused on whether the copyright holder issued the works separately or together as a unit. Arista Records, 2011 WL 1311771 at \*2. Therefore, the Copyright Act did not bar a plaintiff from recovering statutory damages on a per recording basis where such recordings were issued as individual tracks, even though at some point in time the recordings were also part of an album or compilation. Id. at \*3. At the inquest the Court heard testimony that the recordings Defries takes issue with were exploited by plaintiffs as individual tracks. (11/27/12 Tr. at 33; see also McMullan Decl. ¶ 5.)

Cir. 2012) (while a defaulting party is deemed to have conceded well pleaded allegations of liability, it is “afforded the opportunity to contest the amount claimed” at an evidentiary proceeding on damages); see also Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 172 (2d Cir. 2001) (noting defendants did not appear at February 9, 2000 inquest on damages after entry of default judgment). Defries does not dispute receiving notice of the inquest.

Affording special solicitude to Defries as a *pro se* litigant, the Court notes it may have been more appropriate for Defries to advance these arguments under Rule 60(b)(1). Had Defries claimed his failure to present any of these arguments at an appropriate point in the litigation was due to mistake or excusable neglect the Court’s “good cause” analysis would remain the same. Under Rule 60(b)(1), “when a party demonstrates a lack of diligence in defending a lawsuit, a court need not set aside a default judgment.” State St., 374 F.3d at 177 (affirming district court’s refusal to vacate default judgment where defendants argued new evidence established a meritorious defense under Rule 60(b)(1), but failed to defend against default judgment with sufficient diligence). Defries has consistently pursued an obstructionist strategy. Defries offers no explanation why he did not put forth such arguments and documents during his earlier purported attempts to defend against the default judgment.

5. The judgment is not void under Rule 60(b)(4)

According to Defries, the judgment is void under Rule 60(b)(4) because it violates Rule 54(c) for the above-stated reasons. The Court has concluded the judgment does not violate Rule 54(c). A judgment is void under 60(b)(4), “only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.” Grace v. Bank Leumi Trust Co. of N.Y., 443 F.3d 180, 193 (2d Cir. 2006) (internal quotation marks and citation omitted). “[I]f the underlying judgment is void, it is a *per*

*se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)." State St., 374 F.3d at 178 (internal quotation marks and citation omitted).

The motion cites to case law from this District holding that the Court's subject matter jurisdiction is limited to claims arising from registered copyrights. E.g., Lewinson v. Henry Holt & Co., LLC, 659 F. Supp. 2d 547, 559 (S.D.N.Y. 2009) (noting "registration is a jurisdictional precondition for bringing an infringement action in federal court" (citing 17 U.S.C. § 411(a)). The Supreme Court has since concluded that § 411(a) does not restrict a federal court's subject matter jurisdiction. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010). In any case, the Court concludes the works included in the judgment have been registered and it had subject matter jurisdiction over the action pursuant to 28 U.S.C. §§ 1331, 1338(a). Further, there is no evidence before the Court on this motion that the proceedings violated the due process of law. The Court concludes the judgment is not void under Rule 60(b)(4).

### III. MMRX

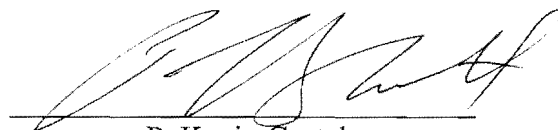
The complaint alleges that "[u]pon information and belief, MMRX is either a d/b/a for Defries or it is a legal entity through which Defries does business." (Compl. ¶ 20.) Plaintiffs mailed waiver-of-service forms to MMRX along with Defries and MainMan on September 29, 2011. (Docket No. 18 (Farkas Decl. ¶ 4, id. Ex. B).) However, Defries only returned waiver-of-service forms on behalf of himself and MainMan. (Id. ¶ 7; id. Ex. E.) If MMRX is a d/b/a of Defries, then it is nothing more than a name Defries uses to conduct business and this Court's denial of the motion to set aside the judgment as to Defries encompasses MMRX. If MMRX is a corporate entity, a separate judicial person, then the motion is a nullity as to it because, as a non-natural person, it may only appear in the action by a

filing by an attorney admitted to practice. See Lattanzio v. COMTA, 481 F.3d 137, 139 (2d Cir. 2007) (per curiam) (noting a lay person may not represent a corporate entity).

CONCLUSION

For the reasons stated herein, the motion to set aside the default judgment (Docket No. 73) is DENIED.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'P. Kevin Castel', is written over a horizontal line.

P. Kevin Castel  
United States District Judge

Dated: New York, New York  
June 14, 2013