NO. 13-2535

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AF HOLDINGS, LLC,
Plaintiff,

v.

SANDIPAN CHOWDHURY.,
Defendant-Appellee,

Appeal of:
JOHN L. STEELE; PAUL A. DUFFY; PAUL R. HANSMEIER,
Interested Parties – Appellants.

On Appeal from the United States District Court
for the District of Massachusetts, No. 1:12-cv-12105-JLT

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ARGUMENT[1]

This Appeal continues to present the straightforward question of whether a district court has any discretion but to vacate a default judgment entered against persons who were never: (a) named as parties; (b) served with process; or (c) alleged to have committed wrongdoing. The answer—since at least as far back as 1885—is no.[2] Chowdhury's Response Brief contains virtually no discussion of the bright-line precedents cited in Appellants' Opening Brief.

To recap: Chowdhury obtained a default judgment against plaintiff AF Holdings, LLC. Then, without notice to Duffy, Steele or Hansmeier or, for that matter, additional judgment debtors Mark Lutz and Prenda Law, Inc., Chowdhury filed a paper with the district court that had the effect of adding these five names to the default judgment. The district court handwrote "allowed" on the paper five days later without a hearing or anything more. The procedures employed by Chowdhury could not be more offensive to Constitutional notions of due process. They also resulted in a void judgment. The district court had no discretion but to vacate that judgment.

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[1] Appellants Opening Brief will be cited as "Applt. Br. at ___." Appellee's Answering Brief will be referred to as the "Response" and will be cited as "Resp. at ___". References to the Federal Rules of Civil Procedure will be referred to as "Rule ___."

[2] *See Thomson v. Wooster*, 114 U.S. 104, 113 (1885) (relief in a decree *pro confesso* is limited to "what is proper to be decreed upon the statements of the bill, assumed to be true").

Chowdhury's alter ego argument may be dismissed for the simple reason that his counterclaims contain zero alter ego allegations. It is axiomatic that Chowdhury may not obtain relief in a default judgment that is unsupported by his claims. Chowdhury's issue preclusion argument suffers from a similar problem. In a default judgment setting, every allegation in a claim is assumed to be true. There is nothing to preclude. Again, the question comes down to whether Chowdhury's allegations state a claim for the relief he seeks to defend on appeal. They do not.

In the end, this Court has a clear mandate: order the district court to delete the names of Paul Duffy, John Steele and Paul Hansmeier from Chowdhury's default judgment against AF Holdings.[3]

I. Chowdhury Leaves the Appellants' Core Arguments Largely Unchallenged

Duffy, Steele and Hansmeier identified four reasons why the judgment against them is void: (1) they were not served with process; (2) they were not designated as parties; (3) they were not alleged to have committed any wrongdoing; and (4) the relief awarded to Chowdhury exceeded the relief sought in his counterclaims. (Applt. Br. at 10–19.) Chowdhury's Response leaves Appellants' identification of errors mostly unchallenged.

[3] The Court may also exercise its supervisory authority to delete the names of Mark Lutz and Prenda Law, Inc. from the judgment.

A. No Service of Process

Chowdhury attempts to solve this bright-line jurisdictional defect by arguing, "[d]ue process does not require service of process where actual notice is provided." (Resp. at 21.) Chowdhury could not be more mistaken. *See Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 23–25 (1st Cir. 1992) ("[A]ctual notice itself, without more, is insufficient to satisfy the requirements of Fed. R. Civ. P. 4(d)(1)."); *see also Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28 (1st Cir. 1988) ("[a]ctual notice and simply naming the person in the caption of the complaint is insufficient to subject a defendant to the jurisdiction of the district court").

The first case Chowdhury relies on for his incorrect proposition, *United States Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), is easily distinguished. *Espinosa* addressed service requirements under the Bankruptcy Rules, which the Supreme Court noted were "procedural" in nature, and "not jurisdictional." *Id.* at 1378. This appeal obviously does not implicate the Bankruptcy Rules. Further, in *Espinosa*, the judgment creditor "forfeited its arguments regarding the validity of service … by failing to raise a timely objection…." *Id.* at 1380. That did not happen here.

Chowdhury completely misconstrues the second case he relies on, *Tuckerbrook Alternative Invs., LP v. Banerjee*, 754 F. Supp. 2d 177 (D. Mass. 2010). Chowdhury reads *Tuckerbrook* for the proposition that "improper service [is] but a mere error

and does not necessarily void [a] default judgment." (Resp. at 22.) Yet, in *Tuckerbrook*, the error referenced by the district court was its conclusion that personal jurisdiction had been established through e-mail correspondence, not whether service was proper. *Tuckerbrook,* 745 F. Supp. 2d at 183. In fact, as was described in *Tuckerbrook*, the district court vacated a prior default judgment as void because of improper service. *Id.* at 179.

Chowdhury's suggestion that Duffy, Steele and Hansmeier "submitted to personal jurisdiction" or "waived the defense" (Resp. at 23) by bringing suit through AF Holdings is outlandish: there is no allegation in Chowdhury's counterclaims that Duffy, Steele or Hansmeier did any such thing. Further, Chowdhury's statement that the "district court identified [Duffy, Steele and Hansmeier] as AF [Holdings'] controlling owners" is a total misrepresentation. (Resp. at 23–24.) The district court did no such thing; in fact, as Chowdhury acknowledges elsewhere in his Response (*e.g.,* Resp. at 26), the district court expressly declined to "unravel the relationship" among Steele, Duffy and Hansmeier, on the one hand—and AF Holdings, on the other. (ADD 002.)

But even if the district court had erroneously applied this label to Duffy, Steele or Hansmeier—and it did not—labeling someone a "controlling owner" is a very far cry from determining that they are an alter ego for personal jurisdiction purposes. *See, e.g., M-R Logistics, LLC v. Riverside Rail, LLC*, 537

F.Supp.2d 269, 279 (D. Mass. 2008) (stating "it is axiomatic that jurisdiction over the individual officers of a corporation may not be based on jurisdiction over the corporation" and listing factors to consider in deciding whether to extend jurisdiction to the officers).

This Court's precedents could not be clearer: actual notice is no substitute for service. *Precision Etchings & Findings, Inc.*, 953 F.2d at 24. Chowdhury did not even attempt service. The judgment is void.

B. No Party Designation

Chowdhury does not dispute that Duffy, Steele and Hansmeier were not designated as parties to his counterclaims. He does not dispute that a judgment entered against someone who is not designated as a party is void. He does not even discuss or attempt to distinguish this Court's holding in *Shank/Balfour Beatty v. Int'l Bhd. Of Elec. Workers Local 99*, 497 F.3d 83 (1st Cir. 2007), discussed in Appellants' Opening Brief (Applt. Br. at 8, 12–13) in which this Court ordered a district court to delete an owner of a joint venture from a judgment, because a judgment entered against a non-party is void. *Shank/Balfour Beatty*, 497 F.3d at 94.

At most, Chowdhury presents his alter ego beliefs for the misguided proposition that owners of a company—as he incorrectly labels Duffy, Steele and Hansmeier, with respect to AF Holdings—are subject to claims asserted against the corporate

entity. (Resp. at 26–27.) Yet, *Shank/Balfour* stands for the very opposite proposition. In *Shank/Balfour*, the district court entered judgment against a joint venture (Shank/Balfour) and one of its owners (Balfour Beatty Construction, Inc.). *Id.* at 89. While Balfour Beatty appeared in the caption of the complaint, it did so only as a member of the joint venture, and not as a party in its own right. *Id.* at 94. On appeal, this Court ordered the district court to delete Balfour Beatty from the judgment, stating that a "judgment cannot be entered against one that is not a party to the case." *Id.*

Here, it is undisputed that Duffy, Steele and Hansmeier were not designated as parties to Chowdhury's counterclaims. Just as in *Shank/Balfour*—where it was irrelevant that Balfour Beatty was an owner of the joint venture—so too is it irrelevant whether Duffy, Steele or Hansmeier are owners of AF Holdings (and they are not). The important question, for purposes of determining whether Chowdhury's judgment is void, is whether Duffy, Steele or Hansmeier were designated as parties to Chowdhury's counterclaims, and none of them were. *Id.* The judgment is void. *Id.*

C. No Allegations of Wrongdoing

Chowdhury fails to identify a single well-pled theory of relief his counterclaims state against Duffy, Steele or Hansmeier. For this reason alone, the judgment against them must be vacated. *See, e.g., Marshall v. Baggett*, 616 F.3d 489 (8th Cir. 2010) (vacating default judgment against corporate officer where there

was no well-pled theory in the complaint to support an assertion that the corporation was an indistinct identity of the corporate officer).

Chowdhury's states that his "counterclaims alleged that AF and its counsel 'appear to be engaged in widespread fraud'." (Resp. at 6, 20.) Yet, AF Holdings' counsel in this action was Daniel Ruggerio, not Duffy, Steele or Hansmeier. Further, neither Duffy, Steele nor Hansmeier are defined in Chowdhury's counterclaims as "AF's counsel." Finally, the mere statement that someone "appear[s] to be engaged in widespread fraud" is plainly insufficient to satisfy the heightened pleading standards applicable to fraud claims. *See* Fed. R. Civ. P. 9(b) (requiring litigants to "state with particularity the circumstances constituting fraud or mistake").

Chowdhury's references to the "evidence" before the district court and his statements in his later filings could not be more irrelevant. (Resp. at 24.) Default judgments are entered on the factual allegations contained in pleadings, not in later-filed papers, "glossaries of key players, aliases & interrelatedness", or other filings. *Banco Bilbao Vizcaya Argentina v. Family Rests. Inc.*, 285 F.3d 111, 114 (1st Cir. 2002) (a default judgment must contain specific, cognizable claim for relief).

D. Mismatched Relief

The judgment is void because the terms of the default judgment differed from the relief specified in Chowdhury's counterclaims.

First mismatch: different parties

The judgment was entered against AF Holdings, Duffy, Steele, Hansmeier, Lutz and Prenda Law, Inc., even though Chowdhury's *ad danmum* clause only sought relief against AF Holdings. In rebuttal, Chowdhury states that he "properly identified Appellants as AF's alias or alter ego" and that the "district court properly applied the judgment against AF under its true names: Steele, Hansmeier and Duffy." (Resp. at 49–50.)

Chowdhury's assertion that he alleged that Duffy, Steele or Hansmeier was AF Holdings' "alias or alter ego" is completely false. Nothing in Chowdhury's counterclaims even hints at such allegations. Unsurprisingly, Chowdhury fails to support his statement with citation to the record. (*See id.*) Chowdhury's suggestion that district courts possess the legal authority to amend a default judgment—without notice to anyone, no less—to add the names of five non-parties has no basis in law. To the contrary, as a matter of law, a default judgment "must not differ" from the relief originally sought. *See* Fed. R. Civ. P. 54(c) ("A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.").

However, all of this is ultimately irrelevant. Chowdhury's rebuttal totally ignores the critical point, which is that his counterclaims—and in particular the *ad damnum* clause in his counterclaims—did not demand relief from Steele, Hansmeier or Duffy (or, for that matter, Prenda Law or Lutz). "[A] default does not expose a defendant to impositions not properly identified before the entry of default." *Hooper-Hass v. Ziegler Holdings, LLC*, 690 F.3d 34, 40 (1st Cir. 2012). The purpose of this construct has been articulated by this Court as follows:

> [A] defendant may reasonably decide, based upon its evaluation of the relief sought, that defending an action is not worth the effort. It would be manifestly unfair if the court were then to award relief not previously specified — relief that, perforce, could not have been included in the defendant's decisional calculus. It follows that a default does not expose a defendant to impositions not properly.

Id. (citing 10 Charles A. Wright et al., Federal Practice and Procedure § 2663, at 166-67 (3d ed.1998)). These considerations are at a zenith when a default judgment is improperly applied to non-parties.

Chowdhury's *ad damnum* clause sought relief exclusively against AF Holdings. Yet, the judgment awarded relief against five additional non-parties. The judgment, thus, exceeded the relief sought in the counterclaims. The judgment is void. "The obvious remedy for this infirmity," as Chowdhury notes, "is for the district court to strike the offending items from the compendium of relief granted." *Hooper-Haas*, 690 F.3d 34 at 41.

Second mismatch: different amount awarded

The second mismatch is that the judgment awarded, "interest as provided by law," even though Chowdhury's counterclaims did not seek any such relief. In *Silge v. Merz*, 510 F.3d 157 (2d Cir. 2007), the Second Circuit determined that a plaintiff, after securing a default judgment, should not be permitted to recover prejudgment interest because such an award would "exceed the amount prayed for in the demand clause [of the plaintiff's complaint]." *Id.* at 158. In its decision, the Second Circuit rejected many of the same arguments asserted by Chowdhury in his Response. The judgment is void.

Third mismatch: damages awarded without proof

Chowdhury's *ad damnum* clause did not seek a sum certain. Chowdhury's efforts to justify the district court's failure to require proof all miss the point. (Resp. 50–53) It does not matter, for example, whether litigants in Massachusetts state court may specify damages ceilings. It also does not matter whether, under certain circumstances, district courts may quantify damages without further inquiry. The key point is that under the circumstances present below—where there was no sum certain stated in Chowdhury's counterclaims—the district court was obligated to do far more than handwrite "allowed without opposition" on Chowdhury's submission. *KPS & Assocs, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 21 (1st Cir. 2003) (holding that district court abused its discretion by failing to look beyond the complaint's *ad damnum* clause); *see also Transatl. Marine*

Claims Agency v. Ace Shipping Corp., 109 F.3d 105, 111 (2nd Cir. 1997) ("While the District Court may not have been obligated to hold an evidentiary hearing, it could not just accept [plaintiff's] statement of the damages.").

There are several questions that remain unanswered as a result of the district court's inadequate inquiry. For example, why was Chowdhury awarded attorneys' fees for the entirety of the litigation, when the attorneys' fees awardable under Section 93 of the Massachusetts Consumer Protection Act, include only those attributable to litigating a Section 93 claim? *See, e.g., Jet Line Services, Inc. v. American Employers Ins.*, 537 Mass. 706, 708–709 (1989) (reducing award of attorneys' fees under G.L.c. 93A, § 11 by amounts extraneous to successful 93A claims). Further, what factors did the district court consider when it decided to accept Chowdhury's request for multiple damages under Section 93A? *See KPS & Assocs*, 318 F.3d at 22–23 (describing findings that must be made before a default judgment will support multiple damages under a Section 93A claim). The district court abused its discretion by failing to conduct an appropriate inquiry into these and other issues.

II. Chowdhury's Defenses Of The District Court's Order Are Unavailing

Chowdhury makes, at most, a limited defense of the grounds on which the district court based its denial of the motions to vacate.

A. Notice of Filings

Duffy, Steele and Hansmeier address Chowdhury's arguments regarding notice in Section I(A), *supra*.

B. Extraordinary Circumstances

In a purely conclusory manner, Chowdhury argues that "Appellants neither demonstrated nor alleged any exceptional circumstances that would warrant Rule 60(b) relief." (Resp. at 23.) To the contrary, Duffy, Steele and Hansmeier demonstrated that the judgment entered against them is void, leaving the district court with no discretion but to vacate the judgment.

Duffy, Steele and Hansmeier address Chowdhury's personal jurisdiction arguments in Section I(A), *supra*.

C. Empty Exercise Doctrine

Chowdhury's defense of the district court's application of the "empty exercise" doctrine misses three key points. First, he fails to distinguish or even discuss the Supreme Court's holding in *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988). As described in Appellants' Opening Brief, in *Peralta* the Supreme Court directly rejected the application of the "empty exercise" doctrine in the context of void judgments. *Id.* at 86–87.

Second, Chowdhury does not cite to a single case in which this Court applied the "empty exercise" doctrine to a void judgment. Indeed, in one of the cases cited by Chowdhury, *Fisher v. Kadant, Inc.*, 589 F.3d 505 (1st Cir. 2009), this Court recog-

nized that void judgments implicate different considerations and expressly stated that nothing in its "discussion of the plaintiffs' Rule 60(b) motion [was] meant to refer to motions under Rule 60(b)(4)." *Id.*, at 512 n.3. Chowdhury cites *Key Bank v. Tablecloth Textile Co.*, 74 F.3d 349 (1st Cir. 1996), for the proposition that "a void judgment will not be set aside if doing so would be a 'futile gesture'". Chowdhury's citation could not be more misleading. In *Key Bank*, the default judgment was set aside because the "notice requirement of Rule 55(b)(2) of Federal Rules of Civil Procedure was not observed," not because the judgment was void. *Id.* at 351. The case did not even discuss the legal standards applicable to void judgment.

Third, setting aside the judgment would not be an empty exercise. Duffy, Steele and Hansmeier each have defenses to raise, including: lack of personal jurisdiction; insufficiency of service of process; and failure to state a claim.

D. Prejudice to Chowdhury

Chowdhury does not cite a single case that requires the designee of a void judgment to discuss "unfair prejudice" to the opposing party. Regardless, the only prejudice that will inure to Chowdhury if Duffy, Steele and Hansmeier are deleted from the judgment will be the removal of three names that had no business being on it in the first place. Deleting the names of Duffy, Steele and Hansmeier will not upset Chowdhury's judgment against AF Holdings—that is, the only entity his counterclaims sought judgment against in the first place.

III. Chowdhury's Alter Ego Argument Fails

The lynchpin of Chowdhury's Response is his delusional belief that Duffy, Steele and Hansmeier are AF Holdings' alter egos.[4] Throughout his Response, Chowdhury repeatedly refers to Duffy, Steele and Hansmeier as AF Holdings' de facto owners, AF Holdings as a "shell company" and AF Holdings as Duffy, Steele and Hansmeier as AF Holdings' "alter egos", as if the district court made these findings. (*E.g.,* Resp. at 1–2, 5, 26.) Quite the opposite: the district court expressly declined to make findings regarding the relationship between Duffy, Steele, Hansmeier and AF Holdings. (*See* ADD 002.)

But Chowdhury's rhetorical tactics cannot overcome the obvious deficit in his pleadings. Chowdhury's counterclaims do not allege that Duffy, Steele and Hansmeier are AF Holdings' alter egos. Default judgments may not go beyond the allegations in the pleadings giving rise to them. *See* Fed. R. Civ. P. 54(c). It cannot be overemphasized that Chowdhury's counterclaims do not even mention Duffy. They reference Hansmeier once, for the proposition that he is Peter Hansmeier's brother. They reference Steele for small handful of unrelated propositions. There is no way to bootstrap these allegations into alter ego liability, regardless of what Chowdhury argues now.

[4] Chowdhury's assertion that Duffy, Steele and Hansmeier "waived" their right to contest his newly-raised alter ego and issue preclusion arguments in their Opening Brief is absurd. The district court did not make any alter ego or issue preclusion rulings.

Even in a non-default judgment setting, Chowdhury's alter ego arguments would face serious problems. Contrary to his apparent belief, Chowdhury cannot use his Response Brief in this Appeal as a substitute for stating alter ego claims, serving process and proving his claims with admissible evidence. For example, Chowdhury cites *Data General Corp. v. Grumman Data Sys. Corp*, 886 F. Supp. 927 (D. Mass. 1994), for the proposition that a court may hold someone vicariously liable for a prior judgment. Yet, in *Data General*, the plaintiff "brought [an] action to recover a judgment," "alleged that the [defendant] [was] vicariously liable" for the prior judgment and prevailed on a motion for summary judgment. *Id.* at 929-31. Not one of these steps was taken here.

Further, "[i]t is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991). This Court has invoked this principle "with a near-religious fervor." *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995). Chowdhury's failure to raise alter ego issues in a timely manner "deprived [this Court] of useful factfinding." *Nat'l Ass'n of Soc. Workers*, 69 F.3d at 627 (1st Cir. 1995). Faced with a record in which the district court expressly declined to "unravel the relationship" between Duffy, Steele, Hansmeier and AF Holdings, this Court cannot be expected to engage in the "notably imprecise and fact-intensive" corporate veil piercing analysis. *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry Co.*, 210 F.3d 18, 26 (1st Cir.

2000). This is not an exceptional case where departure from the procedural default standard is appropriate. *See Nat'l Ass'n of Soc. Workers*, 69 F.3d at 625–29 (discussing factors to consider).

Finally, even a cursory review of Chowdhury's Response demonstrates that his alter ego analysis is deeply flawed. Beginning with the choice of law issue, Chowdhury bizarrely states that his counterclaims were asserted under federal law. They were not. The counterclaim giving rise to Chowdhury's judgment was his Section 93A state law claim. Massachusetts law therefore governs the choice of law issue. In *Harrison v. NetCentric Corp.*, 433 Mass. 465 (2001), the Massachusetts Supreme Judicial Court reaffirmed Massachusetts' long standing "policy that the State of incorporation dictates the choice of law regarding he internal affairs of a corporation." *Id.* at 471. Alter ego liability is a matter of a company's internal affairs. *See Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993). AF Holdings was formed under the laws of the Federation of St. Kitts and Nevis. The laws of St. Kitts and Nevis therefore govern, but Chowdhury did not to attempt to meet his burden of establishing alter ego liability under those laws, much less identify what the standard is.

Things get worse for Chowdhury. He does not even meet his burden of establishing alter ego liability under the laws he mistakenly applied to his analysis. In *Intergen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003), for example, this Court identified three factors to apply for an alter ego analysis. *Id.* at 148–49. In

support of the first factor—whether the entities in question have ignored the independence of their separate operations—Chowdhury largely relies on the findings of another court. The only propositions he attempts to support with citations to the record (to be distinguished admissible evidence) are that a demand letter Chowdhury received instructed payment to be mailed to an office address in Miami Beach, Florida, that Duffy, Steele and Hansmeier have represented AF Holdings in other cases and that Hansmeier appeared as AF Holdings' Rule 30(b)(6) designee in a different case. (*See* Resp. at 31–32.) That is it.

There is nothing in the record addressing the critical issues of whether AF Holdings is operated as a separate entity; whether its funds are commingled with other funds; whether it maintains records or minutes; who owns or controls it; whether it is undercapitalized; whether it is being used as a mere shell; whether it disregards legal formalities; or whether its assets were used for noncorporate purposes. *Intergen*, 334 F.3d at 149. As for the second and third prongs of the *Intergen* analysis, Chowdhury relies *exclusively* on the findings of other courts. (Resp. at 32.) The same criticisms apply equally to Chowdhury's application of Massachusetts law. (*See* Resp. at 33–36.) Contrary to Chowdhury's apparent understanding, findings of other courts are not "evidence."

Worse still for Chowdhury, due process requires a showing that Duffy, Steele and Hansmeier controlled the litigation. The

Ninth Circuit's decision in *Katzir's Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143 (9th Cir. 2004), is instructive. In *Katzir*, a corporation was sued in California state court, it removed the action to federal court and it initially answered and defended the lawsuit. *Id.* at 1146–47. During the pendency of the lawsuit, the corporation suffered financial difficulty, discharged its attorneys and ceased defending the lawsuit. *Id.* at 1147. Default judgment was entered against the corporation for failing to find replacement counsel. *Id.* After entry of judgment, the plaintiff sought to modify the default judgment to add the names of the corporation's sole owner and an alleged successor corporation. *Id.* The district court granted the motion and denied subsequent Rule 60(b) motions to vacate the modified judgment. *Id.*

The Ninth Circuit reversed, holding that adding the names of the corporation's owner and the successor corporation to "a judgment … running only against the corporation without allowing them to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate due process." *Id.* at 1150. The Ninth Circuit assigned significant weight to the fact that the owner was not named in the lawsuit, had no duty to defend the lawsuit and that the corporation did not defend itself beyond the lawsuit's initial stages. *Id.*

All of these factors are present here. AF Holdings initially defended itself against Chowdhury's counterclaims, but appears to have abandoned its defense when its counsel with-

drew. Neither Duffy, Steele nor Hansmeier were named in Chowdhury's counterclaims or had any duty to defend the lawsuit. Just as in *Katzir*, adding the names of Duffy, Steele or Hansmeier to the judgment "would patently violate due process." *Id.*

It also bears mentioning that there is no evidence in the record that Duffy, Steele or Hansmeier controlled the litigation. The sole filing that bears on the issue is the declaration of Daniel Ruggerio, which was attached to Chowdhury's opposition to the various motions to vacate the judgment. The declaration would be inadmissible as evidence in a court proceeding upon multiple, independent levels. It is also untested by cross-examination.

Substantively, though, Mr. Ruggerio's declaration undercuts Chowdhury's alter ego narrative. For example, it identifies "Mark Lutz [as] the owner of AF Holdings LLC," it identifies Mr. Ruggerio as taking direction from Brett Gibbs and it clarifies that Mr. Ruggerio cannot even "recall whether [he] spoke to Paul Hansmeier." While the declaration refers to conversations between Mr. Ruggerio and Duffy and Steele, even taken as true these conversations do not rise to the level of "controlling the litigation." If anything, they reflect the efforts of Duffy and Steele to fill in for Gibbs, who abandoned his client in Spring 2013, as described below.

Finally, Jason Sweet, Chowdhury's counsel in this Appeal, offered testimony that is inconsistent with a finding that Duffy,

Steele or Hansmeier controlled this litigation. During the *Ingenuity13* proceedings referenced throughout Chowdhury's Response Brief, Sweet testified that, "he had a conversation with Mr. Gibbs … regarding AF Holdings where he told me he was national counsel for AF Holdings and that any settlement negotiations were to be made through him. And the local counsel for that case confirmed that he was the one who told me to contact Mr. Gibbs." *See* Transcript of March 11, 2013 Order to Show Cause Hearing *Ingenuity 13 v. Doe*, No. 12-cv-8333 (C.D. Cal.), at 93:19–94:9.

In summary, Chowdhury's alter ego arguments are barred because his counterclaims do not contain allegations sufficient to establish alter ego liability. The district court expressly declined to make fact findings regarding alter ego issues, and it is not this Court's job to find facts. Chowdhury botched the choice of law issue and did not present or satisfy the standards applicable to alter ego showings under the corporation laws of the Federation of St. Kitts and Nevis. The record is devoid of evidence going to the critical issues of ownership and control, flow of funds and corporate affairs for AF Holdings. Finally, Chowdhury makes no showing that Duffy, Steele and Hansmeier controlled the litigation. This Court can easily dismiss Chowdhury's alter ego arguments on numerous independent grounds.

IV. Chowdhury's Issue Preclusion Argument Fails

Chowdhury asks this Court to apply preclusive effect to the findings issued in the very vulnerable sanctions order entered in *Ingenuity 13 LLC v. John Doe*, No. 12-cv-8333 (C.D. Cal).

The *Ingenuity 13* proceedings could not have been more bizarre. The proceedings consisted of a series of district court-initiated orders to show cause that arose after copyright infringement cases were voluntarily dismissed by plaintiffs AF Holdings LLC and Ingenuity13 LLC. Neither Duffy, Steele nor Hansmeier appeared in the cases prior to dismissal.

Nevertheless, the district court ordered their appearances (along with the appearances of five other persons) at a March 11, 2013 order to show cause hearing in Los Angeles, California. *See* Order, *Ingenuity 13 LLC v. John Doe*, 12-cv-8333 (C.D. Cal., Mar. 5, 2013), at ECF No. 66. The March 11, 2013 show cause hearing was focused exclusively on the conduct of Brett Gibbs—the sole counsel of record in the cases at issue. Despite being given only one business days' notice of the hearing, Duffy, Steele and Hansmeier managed to retain counsel, who appeared on their behalf. They also made themselves available to participate at the hearing via telephone. Their counsel was not allowed to participate in the hearings; the district court instructed her to "have a seat."

At the hearing, the district court never called on any of the summoned individuals, including Duffy, Steele or Hansmeier.

Yet, he allowed audience members to deliver unsworn testimony from the public gallery. He appointed counsel for the defendant to serve as a de facto special prosecutor and proceeded to accept unsworn testimony from him as well. At various times during the proceedings, the district court accused attorneys representing copyright holders as being engaged in an extortion scheme. He also proclaimed that it was his "duty to protect the innocent citizens of this district from this sort of legal shakedown, even though a copyright holder's rights may be infringed by a few deviants."

A few days after the hearing, the district court issued an order to show cause against thirteen different businesses and persons, including legal secretaries, technicians, Duffy, Steele and Hansmeier, and companies that were never even parties to the cases. The order to show cause threatened everyone with incarceration, and ordered appearances in Los Angeles on April 2, 2013.

On the advice of counsel, which presciently predicted that the April 2, 2013 hearing would rival the Salem witch trials, Duffy, Steele and Hansmeier invoked their Fifth Amendment privilege against compelled testimony. This decision infuriated the district court, which retaliated by disallowing *any* of the thirteen summoned non-parties from presenting a defense. Indeed, upon learning that he would not be hearing from Duffy, Steele and Hansmeier, the district court proclaimed he was "not interested in legal argument", and stormed out of the

courtroom. The entire spectacle lasted an estimated twelve minutes. No evidence or testimony was presented.

Among those who were present at the hearing, but not allowed to testify, was Mark Lutz, whom the district court had previously identified as AF Holdings' chief executive officer. Lutz specifically identified himself at the hearing as "present", and was prepared to testify about his ownership and control of AF Holdings.

About a month later, on May 6, 2013, the district court issued an order sanctioning Gibbs, AF Holdings, Ingenuity 13, Prenda Law, Duffy, Steele and Hansmeier. The order was full of Star Trek references, but contained virtually no citations to the record or legal authority. *See* Order Issuing Sanctions, *Ingenuity 13 LLC v. John Doe*, 12-cv-8333 (C.D. Cal., May 6, 2013), at ECF No. 130.

The findings in the sanctions order are completely made up. For example, despite never reviewing their tax returns, the district court found that Duffy, Steele and Hansmeier did not pay taxes and referred them to the Criminal Investigation Division of the Internal Revenue Service.[5] The district court made its findings about AF Holdings without ever hearing from Mark

[5] To be clear, Duffy, Steele and Hansmeier have paid every penny of taxes owed since they started working.

Lutz, who it had previously identified as AF Holdings' CEO.[6] Even with respect to basic facts, such as dates, for some unexplained reason the district court just made things up. For example, the district court found that Duffy, Steele and Hansmeier "started their copyright-enforcement crusade in about 2010 through Prenda Law…." Yet, as a matter of public record, Prenda Law was not formed until the end of 2011.

The district court attempted to enlist its fellow district judges in its anti-copyright enforcement crusade by sending a copy of the order to every case involving AF Holdings or Ingenuity 13. Of an estimated hundreds of judges, only four judges took any action upon receiving the order. Of those, none imposed sanctions. Indeed, in one of the cases, a magistrate judge initially ordered AF Holdings to return its settlement proceeds, but was authoritatively reversed on the merits by the district judge.[7] *See* Order re AF Holdings LLC's Objections to Order dated November 6, 2013, *AF Holdings v. Doe*, Nos. 12-cv-1445–1449 (D. Minn., Mar 31, 2014).

The grounds on which sanctions were imposed were actually quite narrow: (1) Brett Gibbs' alleged misrepresentations regarding the size of a house and a non-essential signature on a

[6] Neither Duffy, Steele nor Hansmeier has ever had an ownership interest in AF Holdings.

[7] For reasons that defy explanation, Chowdhury affirmatively represented to this Court that the order reversing the magistrate judge's order was purely procedural in nature. It is plainly not.

copyright assignment; and (2) Brett Gibbs' alleged violation of an order vacating early discovery. The district court noted its disappointment in its inability to identify further justification for imposing sanctions, stating: "Unfortunately, other than these specific instances of fraud, the Court cannot make more detailed findings of fraud."

The district court openly attempted to prevent an appeal of the order by imposing a punitive monetary sanction in the approximate amount of $80,000, which the order stated was "calculated to be just below the cost of an effective appeal." When the sanctioned parties appealed the order anyways, the district court attempted to "buy the pot" by imposing a supersedeas bond requirement of approximately $250,000. The appeal is fully briefed.[8]

It is simply a matter of time before the sanctions order is overturned. A district court is strictly forbidden from imposing punitive sanctions under its inherent power without providing well-defined Constitutional safeguards. *See, e.g., Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994). The district court freely-admitted that its monetary sanctions were "punitive", but it refused to provide Constitutionally-mandated

[8] The district court's conduct goes directly to the Supreme Court's concern that the "contempt power … is uniquely liable to abuse" and that "[c]ontumacy "often strikes at the most vulnerable and human qualities of a judge's temperament," and "its fusion of legislative, executive, and judicial powers summon forth the prospect of the most tyrannical licentiousness." *United Mine Workers*, 512 U.S. at 831 (internal citations omitted).

safeguards. The Ninth Circuit routinely reverses district courts that flout the Constitution in this manner. *See, e.g., Macias v. McGrath*, 439 F.3d 1141 (9th Cir. 2006).

In Chowdhury's view, the *Ingenuity 13* district court's findings are sufficient to foreclose Duffy, Steele and Hansmeier from denying that AF Holdings is their alter ego or that they controlled this litigation. This extreme application of offensive non-mutual collateral estoppel is inappropriate for several reasons.

First, as with his alter ego argument, Chowdhury's issue preclusion argument was not timely raised to the district court. The factors identified by this Court in *National Ass'n of Social Workers* do not "preponderate heavily in favor of considering the issue." *Harvey v. Veneman*, 396 F.3d 28, 45 (1st Cir. 2005). Chowdhury does not attempt to make a showing otherwise even though it is his burden to do so.

Second, issue preclusion has no application in a default judgment setting. Indeed, for purposes of a default judgment, the question is whether Chowdhury's allegations—*taken as true*—support the judgment entered. Stated differently, there is nothing to preclude. Whether issue preclusion would be appropriate in a non-default judgment setting is not before this Court.

Third, Chowdhury's issue preclusion analysis is deeply-flawed. As the party asserting preclusion, Chowdhury bears the

burden of establishing that all of the elements of the doctrine are satisfied. *Hoult v. Hoult*, 157 F.3d 29, 31–32 (1st Cir. 1998). These elements include: (1) identity; (2) actuality; (3) finality; and (4) centrality. In addition, because Chowdhury is seeking to invoke non-mutual offensive issue preclusion, the most "detailed, difficult, and potentially dangerous" form of preclusion. *Jack Faucett Assocs., Inc. v. AT&T Co.*, 744 F.2d 118, 124–25 (D.C. Cir. 1984), he also bears the burden of showing that he could not easily have joined in the earlier action and that application of issue preclusion would not be unfair to Duffy, Steele and Hansmeier. *Parklane Hoisery Co. v. Shore*, 439 U.S. 329, 331 (1979).

As an initial matter, Chowdhury does not even discuss (much less meet) his burden of demonstrating the *Parklane* factors. This alone torpedoes his issue preclusion argument. Even if he had attempted to make such a showing, the "fundamental fairness" factor cannot possibly be satisfied in this case. As described above, the *Ingenuity 13* proceedings were deeply flawed. Neither Duffy, Steele nor Hansmeier were allowed to present a defense, including the critical testimony of AF Holdings' owner, Mark Lutz.[9] The district court brazenly flouted Constitutional safeguards and bright-line Supreme Court and Ninth Circuit precedent. Further, the findings were completely made up—

[9] In no proceeding in which Mark Lutz actually been allowed to testify have Duffy, Steele or Hansmeier been determined to have ownership in or control over AF Holdings.

which, of course, is why Chowdhury is so desperate for preclusive effect in the first instance.

The fairness factor is further undermined because the *Ingenuity 13* decision does not completely foreclose the issues in this litigation. Courts repeatedly decline to apply issue preclusion in these circumstances because the precluded issues will tend to distort the fact finder's consideration of the remaining "open" issues. 18A Wright & Miller § 4465 (collecting cases). The *Ingenuity 13* decision, for example, did not make any findings about Duffy, Steele and Hansmeier's control over Chowdhury's litigation. Thus, there are still issues to be decided. The risk that the fact finder would be influenced by the gratuitous reputational attacks in the *Ingenuity 13* order is plainly significant.

Regarding the traditional four factors, Chowdhury's request would fail for the independent reason that he cannot demonstrate that the findings for which he seeks preclusive effect were "*necessary* to a court's judgment." *United States v. Alaska*, 521 U.S. 1, 13 (1997) (emphasis in original). Clearly, not every finding in the *Ingenuity 13* order was necessary for its determination that Brett Gibbs allegedly made misrepresentations regarding the size of a house and a non-essential signature and allegedly violated a discovery order. For example, the finding that AF Holdings' settlement proceeds were deposited directly into Duffy, Steele and Hansmeier's respective bank accounts (this is completely made up) was clearly not necessary to the district court's grounds for imposing sanctions. Although he

bears the burden of showing that it is, Chowdhury makes no effort to show how the district court's "final outcome hinge[d] on it." *Bobby v. Bies*, 129 S. Ct. 2145, 2152 (2009). The *Bobby* Court held that the party seeking preclusion bears the burden of distinguishing between those "determination[s] necessary to the bottom-line judgment" and those that are nothing more than "a subsidiary finding that, standing alone, is not outcome determinative." *Id.* at 2153.

Chowdhury's only argument regarding centrality is his citation to the order's statement, "It was when the Court realized Plaintiff engaged their cloak of shell companies and fraud that the Court went to battlestations." This statement may have been necessary to the *Ingenuity 13* court's Star Trek theme, but it does nothing to distinguish between findings that were "necessary to the bottom-line judgment," as opposed to merely "subsidiary." Chowdhury has not even identified specific findings for which he seeks preclusive effect, which is an independent reason to reject his argument. *See In re Relafen Antitrust Litig.*, 286 F. Supp. 2d 56, 64 (D. Mass. 2003) ("[T]he Court is not 'required to engage in a 'hunt and peck' exercise to ferret out potentially relevant and necessary findings….'") (citing *Pool Water Prods. V. Olin Corp.*, 258 F.3d 1024, 1033 (9th Cir. 2001).

Regarding identicality, the issue of Duffy, Steele and Hansmeier's control over this case was never even litigated during the *Ingenuity 13* proceedings. For this reason alone, Chowdhury cannot establish that the issues for which he seeks pre-

clusion are "identical *in all respects*" to those issues that were actually litigated and decided in *Ingenuity 13*. *Fagin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999) (emphasis added) (citation omitted). Regarding, actuality, there were no issues litigated in the *Ingenuity 13* proceedings. Instead, as described above, the proceedings to which AF Holdings, Duffy, Steele and Hansmeier were subject consisted of a twelve minute hearing at which no one was allowed to present evidence.

Chowdhury's issue preclusion effort fails in multiple independent respects. It was not timely raised before the district court, it has no relevance in a default judgment context and, in any event, Chowdhury has not come close to satisfying his burden of proof with respect to the elements of offensive non-mutual issue preclusion.

CONCLUSION

This Court should order the district court to delete the names of Paul Duffy, John Steele and Paul Hansmeier from the judgment.

DATED: May 10, 2014

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Certificate of Compliance With Rule 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Paul Hansmeier
May 10, 2014

Certificate of Service

I hereby certify that on May 10, 2014 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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I further certify that on May 10, 2014 I served a copy of the foregoing document on the following parties or their counsel of record by U.S. mail for delivery within 3 days:

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