UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JASON GOODMAN *Plaintiff*, v. ADAM SHARP, TERRANCE O'REILLY, MARGARET ESQUENET, THE NATIONAL ACADEMY OF TELEVISION ARTS AND SCIENCES, AND ACADEMY OF TELEVISION ARTS & SCIENCES, *Defendants*.	21-cv-10627 (VEC)

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR JOINT MOTION TO DISMISS

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I. INTRODUCTION

Defendants Adam Sharp, Terrance O'Reilly, Margaret Esquenet, The National Academy of Television Arts and Sciences, Inc. ("NATAS"), and Academy of Television Arts & Sciences ("ATAS") (collectively, the "Defendants") jointly and severally move to dismiss all claims against them set forth in the Complaint of Plaintiff Jason Goodman ("Plaintiff" or "Goodman").[1] Goodman, the sole owner and employee of Multimedia System Design, Inc. d/b/a "Crowdsource the Truth" ("MSD"), filed this frivolous action in retaliation against Defendants because NATAS and ATAS (together, the "Academies") rightfully sought to enforce their intellectual property rights in another action currently pending before this Court. *Nat'l Acad. of Television Arts & Scis., Inc. v. Multimedia Sys. Design, Inc.*, No. 20-cv-7269 (VEC) (S.D.N.Y. Sept. 4, 2020) ("*Academies v. MSD*"). Although Goodman may be unhappy with the trajectory of the *Academies v. MSD* litigation, such discontent does not create a viable cause of action against any of the Defendants.

As this Court has held, MSD "traffics in wild conspiracy theories," (*id.*, 2021 WL 3271829, at *1 (S.D.N.Y. July 30, 2021)), and this Complaint is merely yet another example. Goodman's baseless claims should be dismissed in their entirety for a variety reasons, namely: (1) Goodman has failed to satisfy the requirements of Article III standing, as the Complaint is wholly devoid of any allegation that Goodman suffered any concrete harm or injury in fact; (2) the *Noerr-Pennington* doctrine precludes Goodman's claims; and (3) Goodman has failed to allege specific facts showing a plausible basis for relief against any Defendant.

[1] It is unclear from the Complaint which causes of action are being asserted against which Defendants. Soley for the purposes of this Motion, Defendants assume that each cause of action is asserted against each Defendant.

II. STATEMENT OF FACTS

A. The Academies' Infringement Case Against MSD

As acknowledged by Goodman in his Complaint, he is the sole owner of MSD. Complaint (Dkt. 1), ¶ 4. In September 2020, the Academies sued MSD regarding its unauthorized use of an image depicting the Academies' EMMY Statuette. *Academies v. MSD*, *supra*. For more than seventy (70) years, the Academies have conferred the famous EMMY Award in recognition of excellence and achievement in television programming. *Id.*, Amended Complaint (Dkt. 62), ¶ 2. On or about June 12, 2020, two weeks before the Daytime EMMY Awards Show aired on CBS, MSD posted its own award show—entitled "Crony Awards"—on YouTube and other platforms. *Id.*, ¶ 29. The show honored countries that refused to lock down and/or minimized the COVID-19 pandemic. *Id.* To market its "Crony Awards" show via social media, MSD, without authorization, created and used an image depicting the EMMY Statuette's winged figure but replaced the Statuette's atom with a depiction of the SARS-CoV-2 virus, as illustrated by the CDC (the "Infringing Image"):

EMMY Statuette Design

Infringing Image

Id., ¶ 30.

The Academies exercised their rights under the Digital Millennium Copyright Act ("DMCA") by issuing a copyright violation notice to YouTube to regarding the Infringing Image.

Id., ¶ 34. Although the Academies tried to resolve this matter without litigation, once MSD filed a DMCA counter notification and refused to withdraw it, which would compel YouTube to reinstate the Infringing Image, the Academies had no choice but to file suit. *Id.*, ¶¶ 36-44.

In response to the Academies' Complaint, MSD filed a partial motion to dismiss, answer, and counterclaims. *Academies v. MSD*, MSD's Motion to Dismiss (Dkt. 11) and MSD's Answer and Counterclaims (Dkt. 12). Eventually, MSD filed an amended answer and counterclaims for tortious interference, declaratory judgment, anti-SLAPP, malicious prosecution/abuse of process, and misrepresentation of infringement. *Academies v. MSD*, MSD's Amended Answer and Counterclaims (Dkt. 45). The Academies then moved to dismiss and/or strike MSD's counterclaims. *Academies v. MSD*, Academies' Motion to Dismiss (Dkt. 46).

In addition to denying MSD's partial motion to dismiss, this Court granted the Academies' motion and dismissed MSD's counterclaims, finding that MSD believed "the best defense is a poorly thought out offense." *Academies v. MSD*, 2021 WL 3271829, *1. MSD voluntarily withdrew its counterclaims for tortious interference and malicious prosecution/abuse of process, acknowledging that they were "mostly or entirely duplicative of the DMCA § 512(f) claim." *Academies v. MSD*, MSD's Memorandum of Law in Opposition to Academies' Motion to Dismiss (Dkt. 50), p. 12. Ultimately, this Court dismissed MSD's counterclaim that the Academies abused the DMCA, holding that MSD failed "to allege any facts from which the Court can reasonably infer that the Television Academies made a knowing and material misrepresentation as required by the DMCA." *Academies v. MSD*, 2021 WL 3271829, at *11.

Subsequently, MSD's counsel filed a motion to withdraw (*Academies v. MSD*, Motion to Withdraw as Attorney (Dkt. 100)), which this Court endorsed. *Academies v. MSD*, Memo Endorsement granting Motion to Withdraw as Attorney (Dkt. 103). The Court also ordered MSD

to obtain counsel. *Academies v. MSD*, Order to Show Cause (Dkt. 131); *Academies v. MSD*, November 14, 2021 Memo Endorsement (Dkt. 134) ("New counsel for Defendant, Multimedia System Design, Inc., must file a notice of appearance no later than December 15, 2021."). MSD failed to comply with this Court's order because new counsel never filed a timely notice of appearance.

Because MSD failed to obtain counsel, the Court ordered MSD to show cause in writing why the Academies should not be entitled to a default judgment if new defense counsel did not file a timely notice of appearance. *Id*. ("If Defendant fails to retain counsel by December 15, 2021, Defendant must, no later than December 31, 2021, show cause in writing why Plaintiffs should not be entitled to a default judgment."). On January 3, 2022, the Court issued an order holding that MSD "failed to show cause by December 31, 2021 why Plaintiff should not be entitled to a default judgment." *Academies v. MSD*, January 3, 2022 Order (Dkt. 140). The Court also ordered the Academies to file a motion for default judgment. *Id*. Pursuant to the Court's order, the Academies' filed a motion for default judgement against MSD which remains pending. *Academies v. MSD*, Academies' Motion for Default Judgment (Dkt. 142).

On February 3, 2022, Goodman filed a motion for leave to intervene. *Academies v. MSD*, Notice of Motion to Intervene (Dkt. 148). On February 4, 2022, the Court denied Goodman's motion, holding that "his interests are already adequately represented in the suit" and MSD's "inability now to retain counsel does not alter that fact." *Academies v. MSD*, Memo Endorsement Denying Motion to Intervene (Dkt. 151), p. 16.

B. Goodman's Frivolous Claims Against Defendants

On or about December 5, 2021, with the possibility of a default judgement being entered against MSD, Goodman sent a *quid pro quo* letter to Defendant O'Reilly, a member of the Board of NATAS. In sum, Goodman threatened that if the Academies did not withdraw their lawsuit

against MSD, Goodman would file a lawsuit against Defendants. Declaration of Mary Kate Brennan ("Brennan Decl."), ¶ 2, Ex. A. Thereafter, on December 9, 2021, Goodman emailed Defendant Esquenet and reiterated his threat that if the Academies did not withdraw their lawsuit against MSD, he would file a lawsuit against Defendants.[2] *Id.*, ¶ 3, Ex. B.

Goodman filed his Complaint on December 13, 2021. Complaint. Riddled with factual and legal inaccuracies, it asserts the same arguments already rejected by the Court in connection with MSD's failed motion to dismiss and counterclaims in the *Academies v. MSD*.[3] *Compare* Complaint *with Academies v. MSD*, MSD's Answer and Counterclaims and *Academies v. MSD*, MSD's Amended Answer and Counterclaims. In addition to alleging superfluous allegations wholly unrelated to his claims against Defendants (*see* Complaint, ¶¶ 15-27, 48-50), the Complaint is also a clear attempt by Goodman to circumvent this Court's order requiring MSD to obtain counsel in that case and relitigate MSD's counterclaims in *Academies v. MSD*, which were previously dismissed by this Court. *See, e.g.*, Complaint, ¶¶ 28-33. It appears that Plaintiff also attempts to challenge Defendants' actions in connection with the prosecution of the *Academies v. MSD* litigation and the Academies' successful dismissal of MSD's counterclaims. *See id.*, ¶¶ 34-40. What is worse, Goodman purports to challenge the Academies' decision to bring suit against MSD and enforce their rights against the Infringing Image, and that Defendants somehow owe "fiduciary and ethical responsibilities" to him, despite the fact that Goodman has no connection whatsoever to the Academies. *See id.*, ¶¶ 41-45.

[2] To the extent Defendants' discussion may implicate F.R.E. 408, Defendants are compelled to do so because of Goodman's extensive (and factually inaccurate) discussion in his Complaint. Complaint, ¶¶ 34-35.

[3] Goodman's wrongful attempt to relitigate the *Academies v. MSD* matter is highlighted by his signature block, where he misidentifies himself as "Defendant, Pro Se." Complaint.

In sum and substance, however, the Complaint is nothing more than a frivolous attempt by Goodman to relitigate MSD's counterclaims against the Academies which have already been dismissed. *See id.*, ¶¶ 61-64. Goodman's first cause of action, brought under 17 U.S.C. § 7102, the "Definitions" section of the Trafficking Victims Protection Act, improperly seeks to dismiss the Academies lawsuit against MSD. *See id.*, ¶ 61 ("The alleged infringement was in fact a parody and should be considered a 'derivative work' as defined in Chapter 1 subsection 101 of the US Copyright Act"); *see also Academies v. MSD*, 2021 WL 3271829, at *11-*12 (dismissing MSD's counterclaims alleging fair use). Goodman's second cause of action seeks treble damages under N.Y. Judiciary Law § 487, despite the fact that Goodman has not plausibly alleged any damage whatsoever. *Id.*, ¶ 65. As detailed below, both fatally flawed claims should be dismissed.

III. LEGAL STANDARDS

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(1)

When a court lacks the statutory or constitutional power to adjudicate a case, it should dismiss the case for lack of subject matter jurisdiction under Rule 12(b)(1). *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 94 (2d Cir. 2011). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). Standing derives from the case-or-controversy requirement of Article III. *Allen v. Wright*, 468 U.S. 737, 750–51 (1984). Because a plaintiff's standing goes to the subject matter jurisdiction of the court, the appropriate vehicle to dismiss a cause of action for lack of standing is Federal Rule of Civil Procedure 12(b)(1). *See Cortlandt Street Recovery Corp. v. Hellas Telecommunications, S.a.r.l.*, 790 F.3d 411, 416-417 (2d Cir. 2015).

Standing to bring suit in federal court under Article III is an "irreducible constitutional minimum" consisting of three elements: 1) injury in fact, 2) causation, and 3) redressability. *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). To maintain a lawsuit, a plaintiff must satisfy each of the elements of the standing inquiry, or the court lacks subject-matter jurisdiction. *Black Lives Matter v. Town of Clarkstown*, 354 F. Supp. 3d 313 (S.D.N.Y. 2018). Where standing is challenged at the pleadings stage, a court must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *United States v. Vazquez*, 145 F.3d 74, 81 (2d Cir. 1998) (internal quotation marks omitted). The Second Circuit has stated that the district court should consider a challenge to subject matter jurisdiction before addressing other grounds for dismissal. *See Rhulen Agency, Inc. v. Alabama Ins. Guaranty Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990).

B. *Noerr-Pennington* Doctrine

The First Amendment guarantees "the right of the people . . . to petition the Government for redress of grievances." U.S. CONST. Amend. I. This right to petition—*i.e.*, *Noerr-Pennington* immunity—extends to protect a party's right to access the courts. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Although originally developed in the antitrust context, courts now apply the *Noerr-Pennington* doctrine more broadly. *See Barbarian Rugby Wear, Inc. v. PRL USA Holdings, Inc.*, No. 06-cv-2652 (JGK), 2009 WL 884515, at *6 (S.D.N.Y. Mar. 31, 2009) ("The doctrine has also been extended to areas outside of the antitrust arena, and has specifically been held to immunize trademark holders from liability for, *inter alia*, sending pre-litigation demand letters and filing lawsuits."). Good faith litigation to protect a valid copyright falls within the protection of the *Noerr-Pennington* doctrine. *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F.3d 754 (S.D.N.Y. 2020); *see also Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 63–66 (1993) (holding an action to protect a valid copyright falls within the protection of the *Noerr-Pennington* doctrine). Courts also have held that the doctrine bars claims brought under Judiciary Law § 487. *See, e.g., Louie's Seafood Rest., LLC*

v. Brown, 199 A.D.3d 790, 793, 157 N.Y.S.3d 509, 512 (2d Dep't 2021) (holding that the *Noerr–Pennington* doctrine applied to a Section 487 claim).

C. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6)

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). A complaint need not "contain detailed or elaborate factual allegations, but only allegations sufficient to raise an entitlement to relief above the speculative level." *Keiler v. Harlequin Enters. Ltd.*, 751 F.3d 64, 70 (2d Cir. 2014). On a motion to dismiss, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the light most favorable to the plaintiff. *Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545. A court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

IV. ARGUMENT

Defendants submit that because Goodman has failed to sufficiently allege an injury in fact, the first element necessary for standing, the case should be dismissed in its entirety. Although the Court need not continue its analysis beyond that issue, Defendants also submit that the *Noerr-Pennington* doctrine precludes Goodman's claims against any Defendant and the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

A. Goodman Lacks Standing to Bring the Claims Set Forth in His Complaint

The standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual

context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Accordingly, standing is not measured by the intensity of the litigant's interest or the fervor of his or her advocacy, nor can it be asserted based on mere setback to the plaintiff's interests. *See Young Advocs. for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215 (E.D.N.Y. 2019). If a litigant, like Goodman, cannot satisfy the first element necessary to establish standing—injury in fact—let alone the subsequent two elements, the case must be dismissed. *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 343 (2d Cir. 2015).

For the purposes of standing, an injury cannot be "conjectural" or "hypothetical." *Lujan*, 504 U.S. at 560. Goodman, however, pleads nothing more than imaginary injuries. In his Complaint, Goodman speculates that the Academies filed their lawsuit against MSD to "exert pressure on [him] and cause him to refrain from broadcasting during the 2020 U.S. Presidential election." Complaint, ¶ 2. Goodman also alleges that his "ability to broadcast on YouTube" has declined as a result of the Academies' enforcement of their rights against the Infringing Image, and that he has incurred substantial legal fees as a result of the *Academies v. MSD* litigation. Complaint, ¶¶ 57-58.[4] But Goodman fails to plead any facts in support of his meritless conclusion; rather, unambiguously, the Academies sued MSD because of its harmful use of the Infringing Image. As sole owner and employee of MSD, Goodman conceded the purpose of the Academies' lawsuit in MSD's dismissal arguments. *Academies v. MS.*, 2021 WL 3271829, at *2 (MSD "does not dispute that the Television Academies have valid copyrights for the Emmy Statuette or that [it] copied the Emmy Statuette," however, it argued that its use was not infringing. . .).

[4] Goodman also alleges that "Defendants chose to sue Plaintiff's corporation . . . to force [Plaintiff] to hire an attorney and punish him financially." Complaint, ¶ 59. This allegation, while entirely confusing, is expressly contradicted by the facts set forth in the *Academies v. MSD* litigation.

Goodman's disingenuous mischaracterization of the *Academies v. MSD* matter in the Complaint fails to establish "a concrete and particularized invasion of a legally protected interest." *Backer*, 788 F.3d at 343.

Moreover, Goodman also alleges that the Academies' decision to enforce their rights against the Infringing Image and bring suit against MSD rather than seek "rapid, no cost settlement harms taxpayers whose funds subsidize the activities of the Defendants." Complaint, ¶ 46; *see also* Complaint, ¶ 47 (alleging that Defendants have violated their mandate of promoting development and leadership in the broadcast television industry). Goodman, however, as sole owner and employee of MSD with no connection to the Academies or Defendants whatsoever, cannot plausibly allege any injury as a result of this conduct. Rather, a plain reading of the Complaint makes clear that the "injuries" Goodman alleges are nothing more than a "mere setback to [his] interests," which is insufficient to confer standing. *See Young Advocs. for Fair Educ.*, 359 F. Supp. 3d at 215. It is evident that Goodman has failed to allege any injury in fact, and the Complaint must be dismissed in its entirety on this basis alone.

Although the Court need not continue its standing analysis, even if Goodman had properly pleaded an injury in fact (which he did not), he also failed to establish the second prong—"a causal connection between the invasion and the alleged injury." *Backer*, 788 F.3d at 343. Goodman's Complaint does not, because it cannot, connect the Academies' efforts to enforce their intellectual property rights with his unsubstantiated claims of coercive attempts to stop him from broadcasting entirely. *See* Complaint, ¶ 3. Rather, the Academies' lawsuit specifically seeks redress from MSD's unlawful use of the Infringing Image. Because there is no injury in fact and no causation, it would be impossible for Goodman to be "redressed by a favorable decision," the third prong

necessary for standing. *Backer*, 788 F.3d at 343. Accordingly, the Court should dismiss Goodman's Complaint in its entirety.

B. The *Noerr-Pennington* Doctrine Bars Goodman's Claims

In the event that this Court should find that Goodman has standing to bring suit against Defendants (which he does not), the Complaint still must be dismissed because it centers on prelitigation and litigation activities in the *Academies v. MSD* matter which are protected by the *Noerr-Pennington* doctrine. First, the doctrine applies not just to filed infringement claims, but also to prelitigation activities such as "threat letters." *Downtown Music Publ'g LLC*, 436 F.3d at 762–63. Here, the Academies' DMCA takedown notice to YouTube is not only a prelitigation activity, but the direct antecedent to the Academies' lawsuit against MSD, which was filed to enforce the DMCA takedown notice pursuant to 17 U.S.C. § 512(g)(2)(C) (requiring copyright owner to "file[] an action seeking a court order to restrain the subscriber from engaging in infringing activity" to avoid reposting). Accordingly, the Academies prelitigation conduct in serving the DMCA takedown notice is protected by the *Noerr-Pennington* doctrine. *Downtown Music Publ'g LLC*, 436 F.3d at 762–63; *Barbarian Rugby Wear, Inc.* 2009 WL 884515, at *3; *DirecTV, Inc. v. Lewis*, No. 03-cv-6241 (CJS), 2005 WL 1006030, at *5 (W.D.N.Y. Apr. 29, 2005) (granting Rule 12 motion to dismiss where "[t]he Court finds that prelitigation activities, such as those engaged in here, are protected by the *Noerr-Pennington* doctrine.").

The Academies' litigation against MSD also is protected by the *Noerr-Pennington* doctrine and no exceptions apply. First, the Academies' suit against MSD is not a "sham" litigation because it is not objectively baseless or an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon. *Primetime 24 Joint Venture v. National Broad. Co.*, 219 F.3d 92, 100–01 (2d Cir. 2000). This Court's refusal to dismiss the Academies' lawsuit confirms the

legitimacy of the Academies' intellectual property infringement case against MSD. *Academies v. MSD*, 2021 WL 3271829. To the contrary, however, this Court's dismissal of MSD's counterclaims against the Academies reveals that the instant litigation, rather than the Academies' litigation against MSD, is a "sham" litigation. *See id.*

Second, the Academies' suit against MSD is not subject to the "corruption" exception, "which applies only where a party has stepped beyond the bounds of zealous advocacy and engages in conduct alleged to be criminal, not just deceptive or unethical." *Louie's Seafood Rest.*, 157 N.Y.S.3d at 512. While Goodman asserts that Defendants engaged in an elaborate scheme adverse to a tax-exempt entity, nothing could be further from the truth. As stated by this Court:

> In June 2020, MSDI used an image of the Emmy Award Statuette holding a model of the COVID-19 virus as part of a video honoring countries that downplayed the seriousness of the COVID-19 pandemic. Plaintiffs, The National Academy of Television Arts and Sciences, Inc. ("NATAS") and Academy of Television Arts & Sciences ("ATAS") (collectively, the "Television Academies"), owners of the Emmy Statuette design, took exception and sued.

Academies v. MSD, 2021 WL 3271829, at *1. Because the *Noerr-Pennington* doctrine applies and neither of its exceptions do, Goodman's Complaint should be dismissed in its entirety.

C. Goodman's Complaint Fails to State a Claim for Relief

Lastly, the Complaint is also subject to dismissal because it fails to allege sufficient facts for the Court to determine whether some recognized legal theory exists on which relief could be awarded. Guised as a "civil action for abuse of process and misconduct by attorneys," Goodman's Complaint (to the extent comprehensible) postures that the Academies (and by extension the other Defendants) should not have sued MSD regarding the Infringing Image. Complaint, ¶¶ 1, 46. This argument contravenes this Court's rulings in *Academies v. MSD* confirming the legitimacy of the

Academies' litigation.[5] Not only did this Court deny MSD's partial motion to dismiss and grant the Academies' motion to dismiss MSD's counterclaims (*Academies v. MSD*, 2021 WL 3271829), it recently refused to permit Goodman to intervene in that lawsuit. *Academies v. MSD*, Memo Endorsement Denying Motion to Intervene.

i. Collateral Estoppel Bars Goodman's Claims

First and foremost, the doctrine of collateral estoppel bars Goodman's claims in their entirety and warrants dismissal of the Complaint for failure to state a claim. As set forth above, this Court in *Academies v. MSD* granted the Academies' motion and dismissed MSD's counterclaims, finding that MSD believed "the best defense is a poorly thought out offense." *Academies v. MSD*, 2021 WL 3271829, *1. Moreover, MSD is presently in default of the claims asserted against it in *Academies v. MSD* and this Court denied Goodman leave to intervene in that action. Confusingly, rather than comply with this Court's order in that action, Goodman has brought a separate suit seeking to relitigate his defenses to the claims asserted against MSD and evade dismissal of MSD's counterclaims.

"To be barred by collateral estoppel, an issue must be identical with one actually litigated, actually decided, and necessary to the holding in a previous action." *Mahmood v. Research in Motion, Ltd.*, 905 F.Supp.2d 498, 502 (S.D.N.Y. 2012) (citing *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288-89 (2d Cir. 2002)). A central inquiry into whether the doctrine applies is whether the party against whom collateral estoppel is asserted seeks to relitigate an issue decided in a previous action, or argues that the issue should have a different result. *Id.* Such is exactly the

[5] Regarding the Academies' copyright claims, this Court held that "Defendant's motion to dismiss Plaintiffs' copyright infringement claim is denied because Defendant's use was not, as a matter of law, either *de minimis* or fair use." *Academies v. MSD*, 2021 WL 3271829, at *7. This Court also denied MSD's motion to dismiss the Academies' trademark claims, holding that "considering the eight *Polaroid* factors together, the Court concludes that Plaintiffs have plausibly alleged a probability of confusion." *Id.* at *11.

case here. A plain reading of the Complaint makes clear that Goodman does nothing more than seek to relitigate MSD's defenses and counterclaims which were previously rejected by this Court. *Academies v. MSD*, 2021 WL 3271829. While Goodman attempts to artfully plead the Complaint here to achieve a different result, it is clear that the issues for which Goodman seeks adjudication herein are "identical" to those that were resolved in the *Academies v. MSD* litigation. Goodman procedurally cannot overturn this Court's ruling denying MSD's motion to dismiss in *Academies v. MSD* by filing a new lawsuit. Rather, had MSD wished to contest the Court's findings it should have brought a timely motion to reconsider under Local Civil Rule 6.3 or take an appeal from a final judgment in that case. 28 U.S.C. § 1291. Thus, the Complaint fails to state a claim because it is barred by the doctrine of collateral estoppel. *Mahmood*, 905 F.Supp.2d at 502.

ii. Goodman Fails to State a Claim Pursuant to the Trafficking Victims Protection Act

On the merits, the Complaint also fails to state a claim. Goodman's first cause of action seeks to dismiss the Academies' suit against MSD under the Trafficking Victims Protection Act ("TVPA"). Complaint, ¶¶ 60-64. Goodman's reliance on the TVPA is, at best, wholly misplaced. The TVPA added to the legal framework to combat human trafficking. *See* 22 U.S.C. § 710 *et seq.*; *see also International and Domestic Law, Office to Monitor and Combat Trafficking in Persons*, U.S. Dept. of State, https://www.state.gov/international-and-domestic-law. Specifically, "[t]o ensure the adequate punishment of human traffickers, the TVPA created four new federal crimes." 75 A.L.R. Fed. 2d 467 (2013). Congress also created a "private right of civil action for the victims of trafficking." *Id*. Yet, the allegations set forth in Goodman's Complaint are

completely unrelated to human trafficking, rendering the TVPA entirely inapplicable. Thus, Goodman's first claim for relief must be dismissed against all Defendants.[6]

iii. Goodman Fails To State A Claim Pursuant To Judiciary Law § 487

Similarly, Goodman's assertion of New York's Judiciary Law § 487 is unavailing. Section 487 imposes civil and criminal liability on any attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." N.Y. Judiciary Law § 487. To establish liability under Section 487, the plaintiff must show that the defendant acted with intent to deceive him or her or the court. *See Gillen v. McCarron*, 126 A.D.3d 670, 671, 6 N.Y.S.3d 253 (2d Dep't 2015); *Cullin v. Spiess*, 122 A.D.3d 792, 793, 997 N.Y.S.2d 460 (2d Dep't 2014); *Dupree v. Voorhees*, 102 A.D.3d 912, 913, 959 N.Y.S.2d 235 (2d Dep't 2013). "Allegations regarding an act of deceit or intent to deceive must be stated with particularity." *Palmieri v. Perry, Van Etten, Rozanski & Primavera, LLP*, 200 A.D.3d 785, 787 (2d Dep't 2021) (internal citation omitted).

Here, Goodman's conclusory allegations are insufficient to state a cause of action alleging a violation of Judiciary Law § 487 by any Defendants and must be dismissed. *Bill Birds, Inc. v. Stein L. Firm, P.C.*, 35 N.Y.3d 173, 179, 149 N.E.3d 888, 892 (2020) (entering judgment as a matter of law for defendants on a Judiciary Law § 487(1) claim where plaintiffs failed to allege that defendants engaged in deceit or collusion during a prior intellectual property lawsuit.). To support his claim, Goodman references an October 25, 2021 hearing in the *Academies v. MSD* litigation regarding his violation of the protective order in that case. Complaint, ¶ 37. Prior to the October 25, 2021 hearing, this Court ordered Goodman to "show cause why he should not be

[6] Separate from his improper reliance on the TVPA, Goodman's first cause of action, seeking a dismissal of the Academies' lawsuit against MSD, hinges on the Infringing Image being a parody. Complaint, ¶ 61. Yet, this Court has already held that MSD's argument that "its use of the Emmy Statuette constitutes parody is unavailing." *Academies v. MSD*, 2021 WL 3271829, *5.

sanctioned for violating the protective order." *Academies v. MSD*, August 25, 2021 Memo Endorsement (Dkt. 112).[7] Enforcing a protective order is not engaging in deceit or collusion and the Complaint fails to plead any other facts demonstrating that any Defendants engaged in deceit or collusion. Therefore, Goodman's insufficiently pled claim brough under Section 487 must be dismissed.

iv. Goodman Fails to State A Claim Against Sharp or O'Reilly in their Individual Capacities

Lastly, at the very least, the Complaint fails to state a claim against Sharp or O'Reilly in their individual capacities as President and Board Chair of NATAS, respectively. *See* Complaint, ¶¶ 5-6. While the allegations asserted against all Defendants are entirely unclear and subject to dismissal for the reasons set forth above, the Complaint is devoid of any allegation that Sharp or O'Reilly engaged in any conduct that is beyond the scope of their duties and responsibilities as President and Board Chair of NATAS. *See Kofinas v. Fifty-Five Corp.*, 2021 WL 603294, at *7 (S.D.N.Y. Feb. 16, 2021) (citing *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 50 (1st Dep't 2012)) ("New York principles of corporate liability shield the Board Members from liability, absent allegations of tortious conduct independent of the Board Members' actions *qua* Board Members). Indeed, such an allegation would be entirely implausible, as the gravamen on Goodman's Complaint is the Academies' decision to bring suit and enforce *the Academies'* rights against the Infringing Image, not Sharp or O'Reilly's rights. Goodman's decision to bring suit against Sharp and O'Reilly, in addition to being a clear attempt at harassment (*see* Brennan Decl., ¶ 2, Ex. A), fails entirely and, at a minimum, the Complaint must be dismissed against Sharp and O'Reilly in their individual capacities.

[7] Both the Academies and MSD submitted briefing on the show cause order and participated in the October 25, 2021 show cause hearing. This Court's ruling remains pending.

V. CONCLUSION

For the reasons and authorities above, Defendants respectfully request that the Court grant their Motion to Dismiss and dismiss Goodman's Complaint in its entirety, with prejudice, together with such other and further relief as this Court may deem just, proper, and equitable.

Dated: February 18, 2022

Respectfully Submitted,

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