

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GREGORY SLATE,

Plaintiff,

vs.

**AMERICAN BROADCASTING
COMPANIES, INC., ET AL.,**

Defendants.

Civil Action No. 09-1761 (BAH/DAR)

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Nathan E. Siegel
Chad R. Bowman
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036-5514
Telephone: (202) 508-1100
Facsimile: (202) 861-9888

Counsel for Defendants

Defendants American Broadcasting Companies, Inc. (“ABC”), ABC News/Starwave Partners, and Disney/ABC International Television, Inc. (collectively, “Defendants”) respectfully submit this memorandum of law in support of their motion for summary judgment.

INTRODUCTION

The extensive record in this case makes clear what it is really about. Hundreds of contemporaneous documents and recordings show that ABC entered into an agreement with a non-profit organization, the Police Complaint Center (“PCC”), to pay it a fee and expenses to record video footage for ABC News’s ownership and use in a news story. Throughout the relationship Slate interacted with ABC not as a “independent freelance journalist” but as a principal and employee of the PCC who even helped form the deal. Everyone involved, including Slate, acted in accordance with the entire point of the project – that ABC News would own and use the video without restriction.

After the project was finished, Slate and the PCC’s founder, Diop Kamau, had a bitter falling out. Slate then declared that he personally owned all video that he personally recorded, which he had months earlier turned over to ABC, and demanded that ABC pay again, to him personally. He claimed that he was never an employee of the PCC and that he never executed any agreement transferring rights to the PCC. Thus, in this lawsuit he alleges that about thirty seconds of footage ultimately used in the fifteen-minute news story infringes his “copyrights.”

Summary judgment is warranted on several independent grounds. First, Slate *was* in fact a voluntary PCC employee under the common-law agency test of *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), so any footage he recorded was a “work for hire” and Slate owns no copyright in it. Second, in any event having held himself out as acting as a PCC principal who initiated and undertook this project on behalf of the PCC throughout the entire

course of dealings between these parties, he is equitably estopped from now asserting infringement based on alleged personal ownership.

Third, there is no genuine dispute that the record presents a classic implied license as a matter of law. Slate's own words and deeds repeatedly recognized ABC's rights to use the footage, and his later attempt to "withdraw" or "revoke" merely underscores that he knew exactly what ABC's rights were. This purported "revocation" presents no genuine issue: as a matter of law, any such license supported by consideration is irrevocable.

Finally, the record is so clear regarding ABC's rights that it is also clear that Slate has proceeded through the only avenue he saw open to him, to manufacture a record erasing the PCC from his memory and his life: fabricating evidence, presenting perjured testimony, making numerous misrepresentations to the court, and withholding evidence. His claims are therefore also properly dismissed as barred by the 'unclean hands' doctrine (and also pursuant to this Court's inherent power to dismiss litigation, which is the subject of a separate motion filed concurrently with this one).

STATEMENT OF FACTS

A. SLATE – THE DIRECTOR OF THE POLICE COMPLAINT CENTER

Who Slate was, for purposes of this case, can best be summed up in his own words, written in a November 2007 e-mail drafted by him for a local police department just a few weeks *after* the ABC News investigation at issue in this case had been completed:

I am writing to you in my capacity as Executive Director of the Police Complaint Center (PCC), a National Non-Profit Organization. The PCC is an advocacy organization dedicated to training police organizations on professionalism, racial profiling, customer service and we also advocated for police misconduct victims and conduct hidden camera investigation on behalf of Dateline, 20/20, 60 Minutes, and many other news organizations. Our founder is a former police sergeant and qualified expert witness for federal courts on use of force and racial profiling. Beyond my role as the

executive director of the PCC I also serve as the director of investigators here. I have been award an Emmy and an Edward R. Murrow award for my hidden camera investigations of police misconduct and work as a consultant for police agencies across the country . . . The PCC is currently conducting a national investigation concerns police officials who drink and drive, both on duty and off.

Declaration of Nathan E. Siegel (“Siegel Decl.”) Ex. S-101; *see also* Defendants’ Statement of Material Facts Not Genuinely in Dispute (“SOF”) ¶ 1. The “founder” of the PCC to whom Slate refers to is Diop Kamau. *Id.* ¶ 2. As Slate’s reference to himself as the “Executive Director” in that e-mail illustrates, for many years until the end of 2007 Slate functioned as a principal of the PCC and more importantly held himself out as such to ABC and the rest of the world. *Id.* at *e.g.* ¶¶ 3-8, 15-16, 18, 24, 27, 28, 41, 63, 66, 68, 76-84.

1. Slate was the PCC’s “Washington-based” Director

Many documents Slate himself has produced confirm Slate’s role in the PCC. *See, e.g.*, Dkt. [29-21](#) (“[B]y this time, Greg Slate was the Director and Diop he said was Executive Director . . . He [Slate] gave long tales/stories of how they had association with Court TV, 20/20, Primetime . . .”); (“I’m writing this letter in regards to the business practices of The Police Complaint Center, run by Diop Kamau and Greg Slate . . .”). Slate regularly used a PCC e-mail address, gslate@policeabuse.org, including most of the e-mails he exchanged with ABC between June 2006 and December 2007. SOF ¶ 4. He listed a Washington, D.C. based cell phone number throughout the relevant period, 202-359-6046, which was actually registered to “Diop Kamau.” *Id.* ¶ 5.

Slate further used a PCC mail address, which also helped create the appearance that the PCC had a Washington, D.C. office. While Kamau resides in Tallahassee, Florida, SOF ¶ 2, Slate has lived in and around Washington for some time and routinely used a Washington, D.C. address for the PCC as well as himself, including in correspondence with ABC, *id.* ¶¶ 2, 6. This

address was “1220 L Street N.W., Suite 100-164.” *Id.* In fact, as Slate previously testified in another lawsuit, this was in reality a private post office box – a mail drop at a UPS store. Dkt. 64-2 at 32-33. Documents produced by that location show applications taken out in 2003 for that box, for both “Greg Slate, Police Complaint Center” and “Diop Kamau, PCC.” SOF ¶ 6.¹

2. Slate’s Role as a PCC Tester for News Stories

As Slate’s e-mail quoted above notes, one of his primary activities for the PCC was acting as an undercover tester working in tandem with local news stations. In almost every case, Slate wore a hidden camera, walked into a police precinct, claimed he wanted to file a complaint against an officer, and filmed how police reacted. SOF ¶¶ 8, 10, 16. During 2005- 2007 this resulted in several local news stories, all of which illustrate who Slate was and how he held himself out during the time period relevant here, including stories still posted on Slate’s personal website and Youtube channel:

- KCTV (Kansas City, April 27, 2006) – “We arrived at Independence Police Headquarters, with our undercover tester Greg Slate, from the respected Washington-based Police Complaint Center.” *See KCTV Channel 5 News: Slate talks about police investigations*, www.gregslate.com (beginning at 22 seconds into the excerpted news broadcast) (last viewed August 31, 2011); . <http://www.youtube.com/watch?v=QVLk2gjDzmw> (last visited on August 31, 2011). *See also* Siegel Decl. Ex. S-172.
- CBS-4, (Miami, FL, Feb. 4, 2006) – “38 different South Florida police stations were tested recently by an undercover operative with a hidden camera, working for a police abuse watchdog group.” *See Miami Channel 4 News: Slate exposes racial profiling in Broward County, Florida*, www.gregslate.com.
- KTVI (St. Louis, MO, Feb. 12-15, 2007) – “We go undercover with multiple cameras and microphones, while working with a nationally recognized organization It’s just one example of the kinds of treatment thousands of people have reported each year to the Police Complaint Center, a national organization that has tested departments for 20 years. [Slate (on camera)]: ““We want to see citizens are being treated, and how officers are reacting to citizen

¹ In 2005-2007 Slate listed this as his address when he filed lawsuits, and also used it in property-related transactions during this time. SOF ¶ 7.

complaints.’ Director Greg Slate says he has tested more than 500 departments.” Siegel Decl. Ex. S-173 at 1:54-2:13; Declaration of Chris Hayes at ¶¶ 4-5.

For all these investigations, as well as many more done by investigators at the PCC other than Slate, the PCC consistently charged a fee to news stations for working with them, and often asked them to cover travel expenses incurred by Slate and other testers. SOF ¶ 9. In return, the stations owned the rights to the video filmed. *Id.* Slate has produced no evidence that in any of these PCC investigations the videotape filmed was ever treated by anyone as belonging to him. Indeed, shortly before he left the PCC in December 2007, Slate described these broadcasts to Kamau as “projects I have worked on for the PCC” and noted they were digitized for the PCC website. Siegel Decl. Ex. S-5 at 233:23-239:1 (Kamau Dep.); *id.* Ex. S-164.

When served with an interrogatory asking him to identify any license or other agreement he has ever given to *anyone* relating to rights to video, he replied, “None exist.”² Siegel Decl. Ex. 1 at No. 5. Slate testified that he cannot recall being hired or paid by any news organization except that he recalls receiving some money from a single Fox affiliate, but cannot say what it was for and doesn’t recall ever entering into a license agreement. Dkt. [37-2](#) at 115:22-118:6, 171:15-172:4 (Slate Dep.). Nor has Plaintiff produced any documents in response to numerous discovery requests for evidence of prior license agreements. Dkt. [66-3](#) at Request Nos. 12, 19, 20, 23. Slate never registered *any* of the footage filmed in any PCC investigation as his own

² The first business day after discovery in this case closed, Slate attempted to reverse this answer. On June 20, 2011 he e-mailed to Defendants’ counsel supposed “Supplemental” interrogatory responses, and changed this answer to read, “Plaintiff has had invoice, license and or agreements with KCTV, CBS Miami, KCAL 9, WITI and others during the relevant time period.” Siegel Decl. Ex. S-2 at Int. No. 5; *id.* Ex. S-3. Slate produced no documents supporting this response. The two responses can be directly compared at Siegel Decl. Ex. S-4. He even attached a “Certificate of Service” to this “supplemental” response in which he claimed to have served these responses by mail on the last day of the discovery period, which never happened. Siegel Decl. at ¶ 4. Such an attempt to completely reverse prior testimony cannot be considered for purposes of summary judgment. *Reetz v. Jackson*, 176 F.R.D. 412, 415 (D.D.C. 1997) (“A party should not be allowed to create issues of credibility by contradicting [her] own earlier testimony.”).

with the U.S. Copyright Office, except for the footage he purported to register related to the 20/20 program to try to set up this claim against ABC.

With respect to his history with the PCC, Slate simply professed an enormous memory lapse at his deposition. He testified that he cannot recall if he ever identified himself as working with the PCC, cannot recall if ever sent correspondence out on behalf of the PCC but “can’t be certain” that he did not, and cannot recall being its Director. Dkt. [37-2](#) at 39:11-20, 84:1-86:1, 87:20-88:3, 97:6-12. He does not know what 1220 L Street, Suite 100-164 is, cannot recall if he ever knew, and cannot recall if he ever used it as his address or received mail there. *Id.* at 34:9-13, 39:6-10, 95:17-22. As to the e-mail address gslate@policeabuse.org, Slate cannot recall sending or receiving e-mail at that address, while responding “I couldn’t say with certainty” to the question, “Is it possible you used that e-mail address?” *Id.* at 89:4-90:2.³

B. THE PCC’S JOINT INVESTIGATION WITH ABC NEWS IN 2006

In June 2006, ABC News, the PCC, and a local ABC affiliate station in Cincinnati, WCPO, undertook to do the same complaint-tester story the PCC was widely doing at the time. Glenn Silber, an ABC News producer, negotiated terms with Diop Kamau. SOF ¶¶ 10-11. ABC News paid the PCC a fee of \$3,000, after receiving an invoice from the “Police Complaint Center” at the 1220 L Street address in DC, plus paid out-of-pocket expenses of Slate and one other tester, including airfare, hotel and miscellaneous expenses that totaled approximately \$2,500. *Id.* ¶¶ 12-13. ABC owned any resulting video and it and WCPO were free to use it as they wished. *Id.* ¶ 12.

³ After discovery closed, Slate likewise seems to have tried to change this testimony by admitting in “supplemental” interrogatory responses that he “h[e]ld himself out as an agent” of the PCC – but in 2004 and 2005. Siegel Decl. Ex. S-2. The undisputed facts show that he did so through the end of 2007.

Slate and another tester spent several days working in tandem with an ABC News associate producer, Michael Mendelsohn, and a journalist for WCPO, Philip Drechsler. *Id.* at ¶ 14. Slate turned over whatever he filmed to Mendelsohn. *Id.* at ¶ 4. ABC News concluded the material gathered was not sufficiently newsworthy and never used any of it, while WCPO did air a story on July 9, 2006, which explained:

Greg Slate is the director of the Police Complaint Center in Washington, D.C. It's a watchdog group that monitors how citizens respond to police complaints. . . . Working with Slate the I-Team [WCPO's investigative reporting unit] tested 14 police agencies in the Cincinnati area chosen at random.

See Declaration of Phil Drechsler ("Drechsler Decl.") Ex. 1 at 0:06- 0:18, 1:09-1:16; SOF ¶ 16. These statements reflected how Slate held himself out to WCPO. Drechsler Decl. ¶¶ 3-4; SOF ¶ 15.

After the filming was completed, Slate sent Mendelsohn receipts for about \$346 in additional incidental expenses, which ABC paid to the 1220 L Street address. *Id.* ¶ 17. Slate's only reaction to the WCPO story that he conveyed was to e-mail Mendelsohn, as "Greg Slate, Director": "How are things going? Did you get a chance to see the piece that WCPO did? It was pretty good." *Id.* ¶ 18.

Slate's only professed specific recollection of these events is that he recalls "showing footage that I had shot" to Mendelsohn and having conversations with people from an ABC affiliate, though he can't recall what they were. Dkt. [37-2](#) at 53:1-15 (Slate Dep.). Slate cannot recall the e-mail reacting to the WCPO story, but "couldn't say with certainty" whether someone other than himself sent and received it. *Id.* at 88:7-22, 90:3-15, 91:18-92:22. The same is true with respect to having his expenses paid. *Id.* at 93:1-6, 95:7-16. When asked how ABC or WCPO obtained physical possession of tape that he recorded, Slate posited a possible theory of audio-visual migration from him to Mendelsohn, saying, "I can't be certain about if that, in the

process of the showing [the tape], that the footage left my hard drive and got saved on his hard drive or went from tape to another recording device.” *Id.* at 56:15-21.

C. THE INCEPTION OF THE 2007 INVESTIGATION AT ISSUE HERE

The events leading up to this lawsuit began on April 3, 2007, when Kamau e-mailed a different ABC News producer, Glen Ruppel, with a proposal for a new story, with the same terms used for all the other PCC stories: “We want to send in hidden cameras into bars frequented by police officers to document excessive drinking and inappropriate behavior. Of course we would supply the investigators if ABC can assist with the costs.” SOF ¶ 19. To illustrate an example of police misbehavior, Slate a few days later e-mailed Ruppel a link to a video, saying “Diop asked me to send this to you.” *Id.* ¶ 20. Slate testified that he cannot recall whether he sent this and cannot recall if Kamau asked him to do so. Dkt. 37-2 at 145:10-148:9.

These communications quickly led to an agreement for another joint ABC News-PCC investigation. As between ABC and the PCC there is no dispute about the terms of this agreement, which was essentially the same (other than the dollar amounts) as the 2006 investigation. ABC paid the PCC a fee of \$7,500 plus travel and incidental expenses incurred by Slate and others he held out as PCC-affiliated persons staff (which, as set forth below, ultimately amounted to more than \$10,000). ABC owned any video that was filmed and could use it any way it wanted, while the PCC could also use it on its own website and for training purposes once a story aired. SOF ¶ 21. The agreement proceeded in two stages. First, ABC paid \$2,000 plus expenses for the PCC to make an initial trip to Chicago, to help evaluate whether there was a story to be had. If ABC concluded there was a story, it would pay the additional \$5,500 plus expenses, and would ultimately complete the investigation by filming jointly with the PCC in Chicago. *Id.*

Slate participated in both the formation and implementation of this agreement on behalf of the PCC, as is reflected in hundreds of communications and documents that occurred over the next eight months between Ruppel, Kamau and Slate. All of them reflect the same relationship: Kamau referred to Slate as a PCC staff member, Slate held himself out the same way, and both Slate and Kamau spoke for the PCC when dealing with Ruppel – repeatedly speaking on behalf of “we,” “us,” and “our organization.”

The agreement took shape when on May 23, 2007, Ruppel responded to Kamau’s proposal asking, “other than the production cost of the cameras, and other location expenses such as alcohol purchases, is there anything else we need to budget for?” SOF ¶ 22. Slate then responded directly to Ruppel, “Give me a call when you get a chance and *we* will go over your questions.” *Id.* ¶ 23. Slate’s e-mail signature read, “Gregory A. Slate, Director, Police Complaint Center,” listed the 1220 L Street address as his PCC address, and Slate separately forwarded that e-mail to Kamau. *Id.*⁴ The next day, Kamau e-mailed Ruppel, copying Slate:

As for the cost, I have worked with ABC previously and each time we have worked out a fair agreement in *compensation for my time and that of my staff*. Just prior to 9/11 we were scheduled to shoot a story with ABC. Our agreement was for \$7,500 with two of *my staff* completely available for up to one month shooting the story. . . . Therefore, I am willing to be flexible with the use of *my staff and our time*. Let’s come to some agreement that’s fair and move this along, my suggestion is that we break the investigation into two parts. The scouting can compose a one side of the investigation and the actual surveillance and fieldwork will, once we know what we have. *We can send Greg Slate up to Chicago* for a couple of weeks to see what he can locate by way of police off-duty activities at bars. If Greg comes up with nothing and can’t find any bars (an unlikely scenario) *we can shut this down* without bringing everybody else to Chicago. However if Greg can locate what we know it exists, bars were cops over drink, *we move in with the camera crew* and document the conduct with video.

⁴ Other e-mails from the same time produced by Kamau show Slate using the same address, with name lines such as “Greg Slate, Police Complaint Center,” including an e-mail with a different television station the day before. SOF ¶ 24.

Id. ¶ 25 (emphasis added). Ruppel and Kamau then agreed to the two-stage arrangement and \$7,500 fee, “in compensation for my time and that of my staff.” *Id.* ¶ 26. Ruppel then asked both Slate and Kamau for an invoice for \$2,000 the first stage, to be followed with a second for \$5,500 if they agreed to go to a second stage, and received one for \$2,000 payable to “The Police Complaint Center” at the 1220 L Street address. *Id.* ¶ 27. Ruppel then wrote Slate on June 22, 2007 “I’ve gotten the \$ officially approved and put the invoice in for payment. Since *you* are already in our system, it shouldn’t take too long. Any idea when you can start the surveillance?” *Id.* ¶ 28. Slate responded, “*We* will get with you on Monday with a date.” *Id.*

Once again, Slate testified that he does not recall sending or receiving any of these e-mails. Dkt. [37-2](#) at 148:10-154:7.

D. THE PCC’S FIRST TRIP TO CHICAGO – AUGUST 13-26, 2007

Pursuant to this agreement, Slate traveled to Chicago for about two weeks in mid-August, along with two other persons, named Jack Baird and Mark O’Flahavan. Slate emailed extensively with ABC to make pre-paid travel arrangements. SOF ¶ 29. Slate also asked ABC to provide him a camera, Ruppel Decl. Ex. R4 (“Can you send it to the hotel?”), which was shipped to him in Chicago. *Id.* Ex. R5. All told, ABC paid at least \$6,090 in travel costs for Slate and Baird. SOF ¶ 31. The receipt produced by the hotel at which they stayed shows Slate registered as “Gregory Slate, ABC News.” *Id.*

During that trip Kamau from Florida, Slate from Chicago, and Ruppel in New York communicated with each other regularly to discuss the investigation, including to ask ABC to send more people and extend the stay of the PCC team for a few days. *Id.* ¶¶ 32-33.⁵ The PCC

⁵*See, e.g.*, Siegel Decl. Ex. S-37 (Kamau: “I have been monitoring the bar checks with Greg over the last 24 hours”; Slate: Glenn, I left you a message on your voicemail . . . You definitely need more people to do this right); Ruppel Decl. Ex. R7 (Slate: “we are missing a lot of opportunities to capture important elements of the story that we could get with more people . . . When Jack was changing

team did a lot of filming at a bar (115 Bourbon Street) that Ruppel had previously suggested to Slate and Kamau. *Id.* ¶ 34.

Within the PCC, Kamau testified that as Slate's supervisor he was constantly monitoring Slate by phone from Florida, and the record leaves no room for genuine dispute about that. *Id.* ¶ 33. In addition to the e-mails, the phone records for the cell phone Slate used show that during the last week alone that the PCC team was in Chicago, there were 39 outgoing calls from Slate's phone to the Tallahassee number "850-284-2800" – the same number Kamau asked Ruppel to use. *Id.* Slate even e-mailed Kamau a picture of himself at a Chicago police event and a photo of Baird and O'Flahavan with the humorous note "*you[r]* slave labor working in the rain." *Id.* ¶ 35.

Indeed, Slate's humor was apt because much of the filming on that trip was done by Baird or O'Flahavan, not Slate, because Slate is repeatedly seen in many of the tapes filmed. *Id.* ¶ 36. Consistent with the understanding that this was a PCC project, Slate had both Baird and O'Flahavan execute releases relinquishing any personal rights in anything they filmed *to the PCC* (not to Slate). *Id.* ¶ 30. Those releases also expressly acknowledged that any footage could be used on an ABC 20/20 broadcast. *Id.* In subsequent e-mails to Kamau, Slate boasted of obtaining these releases for the PCC. *Id.*⁶

tape the guy decided to leave so I tailed him to his car."); *id.* Ex. R8. (Slate: "We captured at least 4 cops drinking heavily."); Siegel Decl. Ex. 39 (Kamau, forwarding a photo from Slate. "We believe the gentleman with a beer in his hand is a Chicago police officer."), Ruppel Decl. Ex. R9 (Ruppel to Slate: "I'm talking to Diop and trying to set up our shoot now – hopefully for next week.") (Slate: "I know Diop sent you another email. I am spoke to him just before sending this and *he and I agree* on the above."); Siegel Decl. Ex. S-40 (Kamau: "I'm sure that Greg has been providing you with updates on progress with the investigation . . . I have asked *my guys* to stay over and continue shooting."); *id.* S-41 (Ruppel to Kamau, "Hi . . . I tried calling your number, but it was forwarded to Greg."); Ruppel Decl. Ex. R10 (Ruppel to Slate, "Greg . . . I just had a good chat with Diop earlier today, and just wanted to follow up on one thing we discussed").

⁶ Siegel Decl. Ex. S-5 at 142:16-145:4 (Kamau Dep.); *id.* Ex. S-71 ("Jack signed the contract and I listed the entire month of August as the period he was working *for us*." (emphasis added); *id.* Ex. S-5 at

With respect to all these events, Slate testified that he “has no specific recollection” of a trip to Chicago in August 2007, “cannot specifically recall” whether he filmed at 115 Bourbon Street, “can’t speak for ABC” with respect to whether ABC paid for a trip but “couldn’t say for certain” whether he paid himself, cannot recall receiving a DV camera from ABC, that “he recalls John [Baird] being Chicago at the same time that I was” at some point in 2007, that Baird was “drinking” and “eating” and “doing what John does,” but he but “can’t speak for John” as to what he was doing there and cannot recall observing Baird film any footage. Slate also cannot recall having Baird sign a release and cannot recall writing the e-mail to Kamau in which he claimed he did. Dkt. [37-2](#) at 154:8-165:10, 209:7-17. Similarly, Slate cannot recall seeing O’Flahavan film any footage and “can’t speak for Mark” as to what, if anything, he was doing in Chicago relating to shooting any footage. *Id.* at 205:18-206:4. And generally, Slate only vaguely recalled two conversations with Ruppel before any dispute arose in 2008, one in which Ruppel purportedly expressed concerns about dealing with “outside journalists,” and another concerning the legality of surreptitious recording in Illinois. Dkt. [37-2](#) at 62:13-65:21.

E. ABC AND THE PCC AGREE TO COMPLETE THE INVESTIGATION

Before the end of the August 2007 trip, Ruppel agreed that it was worthwhile to complete the investigation. SOF ¶ 37. Indeed, Kamau had a few days earlier complained that the PCC had not yet received the first check for \$2,000, and emphasized payment was necessary so there would be no doubt that ABC would own all video recorded by the PCC team:

Unfortunately our internal policy will not allow us to release *our ownership of any videos shot* until we have been paid in full for investigative services we are rendering. We are starting to shoot situations and circumstances even though you are not present yet. *So that we don’t have a dispute over ownership* it would be best if we resolve the

220:15-222:24 (Kamau Dep.); *id.* Ex. S-103 at 3 (“I would ask you to look at the releases that he [Mark] and Jack signed that I sent you months ago with the tapes.”).

outstanding payment for the investigation as soon as possible. We have not received the \$2000 check though I know it has been authorized by your office. *If you are sure that ABC is ready to proceed now please have the full payment sent to our Washington office as soon as you can get to it.*

Id. ¶ 38. ABC had in fact mailed the check, made out to “The Police Complaint Center” at the “1220 L Street” address, *id.* ¶ 39, and then paid a subsequent PCC invoice for the remaining \$5,500, *id.* ¶ 40. Ruppel also asked Slate and Kamau to return ABC’s camera, giving him ABC’s Federal Express number. *Id.*

Kamau, Slate and Ruppel then began to plan for the joint return trip to Chicago. Once again, Ruppel dealt with both Kamau and Slate interchangeably as PCC principals. *Id.* ¶ 41⁷ During the first three weeks of September while the next trip was planned, phone records show 198 outgoing calls alone from Slate’s cell phone to Kamau’s phones – an average of almost ten a day. *Id.* ¶ 42. Slate and Ruppel ultimately agreed on the dates Oct. 11-14 for a joint trip, and that Slate might arrive earlier. *Id.* ¶ 43.

⁷ See, e.g., Siegel Decl. Ex. S-46 (Kamau to Ruppel: “I just talked to Greg last night and we think it is best to push back to September for any additional work in the city of Chicago”); *id.* Ex. S-47 (Ruppel to Kamau: “Let’s nail down dates for September . . . perhaps we can conference call with Greg.”); *id.* Ex. S-49 (Kamau to Ruppel: “I want to discuss a few things in preparation for the next shoot. Greg will go into more detail later . . . Not only is there a need for coordinating communication between our investigators . . . My guys can point out where they were”); Ruppel Decl. Ex. R12 (Ruppel to Slate: “Also had a good conversation with Diop earlier—I’m ready to hit the bars with you!”); Siegel Decl. Ex. S-52 (Kamau: “I talked to Greg last night. The week of the 17th is fine . . . Greg will come in any time you need him his preference is earlier even earlier than you if possible.”); *id.* Ex. S-55 (Ruppel: “Do you and Greg think we need to shoot for three nights to get what we want[?]”); *id.* Ex. S-59 (Kamau: “The dates you gave me may or may not have a police related event where alcohol will be consume. I will check with my staff . . . “); *id.* Ex. S-64 (Kamau: “Sorry Glenn, just talked to Greg we are shooting some of our stuff now and I will need Greg . . . “); *id.* Ex. S-67 (Ruppel: “Okay, let’s go for it. I can always send Greg a day or two earlier if that will help. Also give me the travel info.”); *id.* Ex. S-75 (Ruppel: “Just following up from our call. Please let me know what cameras and travel arrangements we’ll need”); Ruppel Decl. Ex. R14 (Slate, “I would suggest moving the dates to a weekend. I know Diop might have suggested that the bars are more crowded on the weekend and therefore more difficult to shoot.”). The phone records even show that on August 29, Slate stopped calling the number “850-284-2800” in Tallahassee, and primarily instead started calling “850-459-3003.” That same day, Kamau e-mailed Ruppel also asking him to start using that number to call him. SOF ¶ 42.

F. THE PCC'S SECOND TRIP TO CHICAGO – SEPTEMBER 26-28, 2007

Shortly after they settled on the timing of the joint October trip, Slate and Kamau convinced ABC on very short notice to authorize another solo PCC trip prior to ABC's arrival in Chicago, to film another event related to a police officer. Ruppel agreed to the second trip, again at ABC's expense. SOF ¶¶ 44-45⁸ Kamau told Ruppel that "we have up to *two other staff members* available for the trip if you need them. *Id.*

Slate discussed with Ruppel what events he would attend, told Ruppel he was bringing a different second cameraman, named Moses Rojas, and again asked ABC to provide additional camera equipment and travel. *Id.* ¶ 46. ABC paid approximately \$ 2,000 in pre-paid travel expenses. *Id.* ¶ 47. Just before he left for Chicago, Slate e-mailed Kamau, "Need to talk strategy with you," and Slate continued to communicate with Ruppel and Kamau during the brief time he was there and reported to both after he returned. *Id.* ¶ 48.⁹

G. THE PCC AND ABC'S FINAL JOINT TRIP TO CHICAGO – OCTOBER 2007

From October 8-14, 2007, Slate and for part of that time another camerawoman he brought, Briana Heard – whom Slate described to Ruppel as "*our* other cameraperson," went to Chicago to work in tandem with a large crew of ABC News journalists. SOF ¶¶ 51-55. Before the trip Slate e-mailed Heard that "I just found out that ABC's senior law and justice

⁸ On September 24 Slate e-mailed Kamau, "Do you want to send this to Ruppel now? Its on the 28th . . . I could shoot all of it with a camera guy . . .". Siegel Decl. Ex.S-76; *see also id.* Ex. S-78 (Slate to Kamau: "if we are going to consider doing the Mette fundraiser on the 28th we should probably start talking about it today."); *id.* Ex. S-147 (Slate to Kamau: "I would like for Glenn to call and get me to tickets to it"). Kamau responded to Slate on Sept. 26, "ABC is ready on Mette." *Id.* Ex. S-80.

⁹ *E.g.*, Ruppel Decl. Ex. R20 ("The Mette fundraiser is stocked with Miller Light and Vodka. We are here now"; "I'm on email all night."); Siegel Decl. Ex. S-139 (to Kamau: "I am concerned that they aren't going to be able to clearly determine what the cops are drinking from the video"); Ruppel Decl. Ex. R23 (to Ruppel: "It was very productive for a 2 day trip.").

correspondent Jim Avila will be flying out today to cover our story,” and told her to call Sunny Antrim at ABC for travel arrangements. *Id.* ¶ 51.

Before they left, Slate again asked ABC to provide a large number of cameras – “we’ll need three hidden cameras and decks that will do okay in low light” as well as “a handycam and some tapes to use.” *Id.* ¶ 52. They agreed Ruppel would provide a “button cam,” and a camera hidden in a woman’s handbag.” ABC then hired a specialist in hidden-camera investigations, Sarra-Jane Piat-Kelly, to provide this equipment and fly to Chicago. Slate used the “button cam,” and Heard used the “purse cam.” *Id.* ¶¶ 53-54. In fact, one of the tapes recorded shows Ms. Piat-Kelly helping Slate put on camera equipment in a hotel room with Ruppel and Antrim. *Id.* ¶ 54; Declaration of Sunny Antrim (“Antrim Decl.”) Ex. A1. Slate testified that he cannot recall using camera equipment in Chicago that did not belong to him. Dkt. [37-2](#) at 208:12-21.

ABC flew Slate to Chicago several days before the ABC team arrived, from where he continued to communicate with Ruppel. SOF ¶ 49. Ruppel had previously e-mailed Kamau what ABC News was interested in capturing during this trip – “3 or 4 intoxicated cops driving home that we can follow” and “my correspondent’s confrontation with a cop on his way to the car,” and Slate was well aware of the plan. SOF ¶ 50. Once everyone arrived more than six different persons (Sunny Antrim, Slate, Heard, Piat-Kelly, and a freelance camera crew hired by ABC News) participated in executing this plan by recording footage, *id.* ¶ 55, and the video each recorded is often functionally indistinguishable. All were frequently filming the same events at the same time from different angles, and their film repeatedly captures each other. For example, video Slate recorded (including video he later purported to copyright) repeatedly show him filming everyone else from ABC News. *Id.* ¶ 56. Likewise, Antrim recorded numerous tapes showing Slate with her in bars, cars, and hotel rooms, *id.* ¶ 57. Heard’s tapes repeatedly show

Antrim and Slate working together *id.* ¶ 58, as do those of Piat-Kelly and the other freelance camera crew, *id.* ¶¶ 59-60.

ABC paid more than \$3,200 in pre-paid air, hotel, and rental car expenses for Slate and Heard for this trip – plus thousands more for camera equipment. *Id.* ¶ 61.

H. THE PCC PROPOSES TO INVESTIGATE POLICE DRINKING IN OTHER CITIES FOR AN ADDITIONAL FEE

The October trip completed all investigative work in Chicago. Shortly thereafter, both Kamau and Slate sought to persuade ABC to enter into a new agreement to expand the investigation beyond Chicago, and to include some local ABC affiliate stations as well – much as had been done in Cincinnati the year before. They had already floated the idea after the August trip. SOF ¶ 62. Once again Kamau and Slate’s proposals were consistently made on behalf of the PCC, both participated in speaking for the PCC, and their proposals largely mirror, and make specific reference to, the terms for the Chicago investigation that had just ended – a fee to the PCC plus travel expenses. *Id.* ¶¶ 62-68.¹⁰

Kamau first proposed to Ruppel, “after discussing matters further with Greg and my investigative staff and board,” that “[b]ecause we have completed our obligation in Chicago we can either stop here or go forward together under new terms. Our fee remains \$7,500 per city but I would like to include a window of adjustment in the event that unforeseen expenses arise such as the additional hours shooting in Chicago required.” *Id.* ¶ 64. Ruppel ultimately organized a

¹⁰ SOF ¶ 63; *see, e.g.*, Siegel Decl. Ex. S-86 (Ruppel to Kamau: “Either Roberta Baskin of WJLA in Washington, DC, or her producer, will call you soon”); *id.* Ex. S-87; Ruppel Decl. Ex. R35 (Slate to Ruppel: “Diop told me to expect calls from ABC in Houston and DC . . . I wanted to make sure you gave them the right number (202) 359-6046.”); Siegel Decl. Ex. S-88 (Kamau to Ruppel, copying Slate: “I am going to have Greg contact Roberta Baskin [a producer at ABC’s affiliate in Washington, D.C.] this morning.”); *id.* Ex. S-90 (Slate to local producer: “*We* will forward project costs and other relevant information today.”) (emphasis added); *see also id.* Ex. S-92 (Kamau to local producers, copying Slate and Ruppel, “Greg should be sending list of costs, etc. in the meantime you may take a look at some of *our work*.”) (emphasis added).

couple of conference calls for potentially interested producers, at which Kamau and Slate made available some stills and clips of footage from the Chicago trips. *Id.* ¶ 65 After Slate e-mailed Kamau that “I e-mailed the stations telling them to expect *our terms* today,” Siegel Decl. Ex. S-91, Slate forwarded a proposal to stations:

We wanted to send you some videos of our previous investigations to give you background on our organization Here are the terms: \$7,500 for 7 days of consulting (this can be broken down into two trips for recon, and one for actual shooting as we did with 20/20 in Chicago or you can research events and bars and we can shoot everything in one trip . . . Our investigator is to be credited as a co-producer on the story Any arrangements short or above 7 days should be made directly through Diop or myself.

Id. Ex. S-142 (emphases added).

Kamau subsequently sent another email modifying the proposal Slate made. SOF ¶ 66. After no affiliates took up the offer, *id.* ¶ 67; *see, e.g.*, Siegel Decl. Ex. S-96 (Slate: Any word from the affiliates”?), the PCC through Slate made one last proposal to try to convince 20/20 alone to enter into a new agreement with the same terms used for Chicago, except for a higher fee:

Diop and I have discussed the reluctance of the affiliates to participate in this story. Both of us agree that this story is much larger than Chicago. Our motivation for working with 20/20 was to deliver a broad story that would address this issue on a national level by focusing on multiple cities. Since none of your affiliates are willing to join you on this story and we clearly need more than we have now this is what we propose: We will shoot in Washington, Baltimore and Philadelphia from now until mid-January. Our fee will be \$11,500.00 this will include the participation of me and at least two of our other under covers. 20/20 will be responsible for rental cars, gas, two roundtrip flights, hotels in Baltimore and Philadelphia and incidentals.

Id. Ex. S-98; SOF ¶ 68. ABC News declined the proposal. *Id.*

After the Chicago trips, Slate also sought reimbursement from ABC for an additional \$1,487 in incidental expenses, such as purchases of tapes and camera batteries, which ABC paid.

Id. ¶ 69.

I. SLATE GIVES THE FOOTAGE THE PCC FILMED IN CHICAGO TO ABC AND THE PCC

The video that Slate, Baird, O’Flahavan and Heard filmed in Chicago was mostly in two formats: roughly 30 “miniDV” cassette tapes and electronic digital files recorded onto a hard drive from a “pen camera” that Slate had purchased in between the August and September trips. SOF ¶ 70. Consistent with the agreement, Slate physically turned over all the tapes of most of the electronic video to ABC directly or to Kamau, who in turn provided it to ABC.¹¹ Dozens of e-mails track these shipments. Slate sent some of the video to Kamau¹², some tapes he physically handed to Sunny Antrim in Chicago, and others he shipped to ABC through its Federal Express account.¹³ SOF ¶ 71. For the digital files, ABC purchased and shipped to Slate at the Washington, D.C. PCC address an external hard drive, and Slate copied the digital files onto the drive and shipped it back. *Id.* ¶ 72; *e.g.*, Siegel Decl. Ex. S-102 (Kamau: “Greg will be fedexing the videotape to you later today”); Ruppel Decl. Ex. R38 (“Did you get the hard drive backup?”). Slate’s communications in the course of these shipments also illustrate how he fostered to ABC the impression that the “1220 L Street” private box was a functioning, PCC Washington office complete with a “mailroom.” Ruppel Decl. R40 (Slate 10/29/07, 5:43 p.m.:

¹¹ *E.g.*, Ruppel Decl. Ex. R49 (Ruppel to Slate, “I also want to make sure I have everything – for instance I don’t have the raw video that includes the clips Diop had sent earlier, of the SUV you followed from a bar, back to the station house, then away.”) (Slate to Ruppel, “You will have to email Diop about that other footage. I don’t have it.”) (Slate to Ruppel, “If we are thinking of the same footage then it would not be with anything you got from me. . . . I sent all of that to Diop after I shot it.”).

¹² *E.g.*, Siegel Decl. Ex. S-57 (Kamau: “I have only had time to go through a handful of the videotapes. What I sent you the other day covers most of what I think you wanted in Chicago.”); *id.* Ex. S-84 (Slate to Kamau, 10/8/07, “Today is the last day you can send me the tapes if I am going to review them with Glenn on Wednesday as promised.”).

¹³ *E.g.*, Antrim Decl. at ¶ 6; Ruppel Decl. Ex. R84 (Antrim to Slate, 10/17/07, “We looked at your tapes from night 3. You had only given me 2 (and Briana only had 2 also) . . . Glenn needs to get your pen cam footage. How can you send that stuff to him?”); *id.* Ex. R40 (Slate to Ruppel, 10/29/07: “I am labeling the last of the tapes to send to you. I should have a tracking number for you in a few hours assuming I am done before the last FedEx pickup.”) (Slate, 10/30/07: “Tracking number for the tapes 863600761232.”); *id.* Ex. R86 (confirming Antrim’s receipt of the tapes).

“As to the hard drive our mail room typically calls me when we get a package but they haven’t.”) (Slate 10/29/07, 4:05 p.m.: “usually the mailroom calls me when a package like that arrives and I haven’t heard anything yet. I’ll check with them in the morning.”).

Discovery has also made clear that when Slate gave this footage to ABC he gave it the original cassette tapes (which ABC still has) and did not retain a copy of almost all of that footage for himself – rather obviously evincing the understanding that the video was ABC’s. When Slate ultimately produced in discovery (after being compelled to do so) all footage he had from Chicago, he produced *none* of the 30 cassette tapes – just a few short clips and still screenshots taken from a handful of them. Almost all the material Slate produced were digital video files from the pen camera hard drive.¹⁴

As a result of these transfers, in late October Ruppel began reviewing the video and he and Slate began exchanging e-mails to discuss what was on it. SOF ¶ 73.¹⁵ In late November Kamau offered to have Slate come to New York to answer any questions Ruppel had about what was depicted on the tapes. *Id.* ¶ 74; *e.g.*, Siegel Decl. Ex. S-106 (“checking with Greg now”); Ruppel Decl. Ex. R49 (Slate to Ruppel, 11/30/07: “I understand that you want me in New York. What days did you have in mind?”). Slate came on December 4, and ABC paid \$194 for Slate’s train fare. SOF ¶ 75.

With respect to all the videos, Slate testified that he cannot recall if he shipped video to ABC on a hard drive; that he recalls ‘showing’ footage to Ruppel in Chicago and New York, but

¹⁴ The reason why is obvious. Physical tapes can be handed over, but short of giving ABC his actual camera Slate had to make a copy of the digital files from its hard drive to transfer them to ABC. Thus, it is largely a product of technical happenstance that Slate retained any video at all and months later could have something to purport to register with the U.S. Copyright Office to bring this lawsuit.

¹⁵ *E.g.*, Ruppel Decl. Ex. R40 (Ruppel: “As I screen the material, I’m sure I’ll have plenty of questions. First up.”); *id.* Ex. R45 (“Ruppel to Slate: “I’ve watched all the tapes . . .”); Siegel Decl. Ex. S-104 (Ruppel to Kamau and Slate, 11/16/07, “So after screening all the tapes, I’ve been trying to trace vehicles to find out who their owners are.”).

“can’t speak for Mr. Ruppel” as to how he came to have footage shot in Chicago; that he “may have” given Ruppel footage, but “I can’t be certain” Dkt. [37-2](#) at 189:10–195:7.

J. SLATE’S OTHER PCC BUSINESS

At the same time that the PCC was working with ABC, Slate continued to conduct other PCC business as well, which further illustrates both his role in the PCC at the time and its work for ABC, which Slate touted to others. He regularly exchanged e-mails (almost always through his gslate@policeabuse.org e-mail account) with Kamau as his boss (even sending him Slate’s “to do” lists), about matters such as conducting finding course instructors on criminal justice issues and communicating with KCTV in Kansas City, for whom the PCC had done stories previously. SOF ¶ 76; *e.g.*, Siegel Decl. Ex. S-150 (“As per Diop’s announcement”, Slate describes a new PCC project); *id.* Ex. S-144 (Kamau: “Greg, I have a task for you.”). Indeed, from Chicago Slate flew to Oregon to conduct a PCC client investigation (“to perform final work *for a client*”), and on September 6 he wrote a 500-word e-mail to Kamau complaining about having been “stranded in another town because of lack of company funds to complete my business trip.” Siegel Decl. Ex. S-154 (emphasis added); *see also* SOF ¶ 77. On October 19, both Slate and Kamau told Ruppel the PCC was undertaking on its own to investigate police drinking in Prince George’s County, with Slate attending a “police costume party.” *Id.* ¶ 78.

On September 16, 2007 the following appeared in an article in the *St. Louis Post-Dispatch*:

But the videos are having an effect, says Greg Slate, director of the Police Complaint Center, a nonprofit police watchdog group in Washington. “It’s really changing how people perceive police officers,” Slate said. Slate’s group has turned catching police wrongdoing into a cottage industry. The group helps people find outlets for their videos. It also hires itself out to news organizations – almost exclusively TV stations – to do undercover stings of local police departments.

Todd C. Frankel, *Feel as if you're being watched? You probably are - especially if you're a police officer interacting with the public*, ST. LOUIS POST DISPATCH, Sept. 16, 2007, at A1.

On September 17, Slate exchanged e-mails with an obviously irate PCC client, trying to appease him by saying:

As I may have mentioned before, *we are currently shooting with 20/20* and their focus I believe can be closely related to your case. I believe any increased pressure from media will better position your lawsuit. *I have just finished shooting with 20/20 in Chicago and we are in discussions to determine what other cities we will bring this investigation to.*"

SOF ¶ 79 (emphases added).

K. SLATE IS FIRED BY THE PCC – DECEMBER 2007

By November 2007, however, the relationship between Slate, Kamau and the PCC began to unravel, ultimately leading to Slate's termination the following month. Throughout his final days with the PCC Slate wrote e-mails referring, over and over, both to himself as a PCC employee and to the PCC's arrangement with and work for ABC News.

On November 7, Slate e-mailed Kamau, "I woke up this morning to a series of text messages one of which told me there is a board meeting but not to worry I'm not being *fired* . . . I find the proposition that anyone thinks there is a case for *firing* me troubling and offensive." He also complained that he had "delayed law school *to work on this DUI stuff.*" SOF ¶ 80 (emphases added). On November 12, Slate e-mailed Kamau asking, "can we have a conference call with Glenn to figure out how he intends *to use us* in the story?" Siegel Decl. Ex. S-124 (emphasis added); *see also* SOF ¶ 81. He also provided to Kamau a list of about \$5,000 in estimated additional expenses he said that "we still haven't recovered" (which he never provided to or asked ABC to pay). Siegel Decl. Ex. S-124. They included payments Slate claimed he had made to Baird, O'Flahavan and Briana Heard, and well as a claimed \$1500 for "my equipment purchase" (presumably the pen camera he bought) and \$350 for a "car tow." *Id.* Kamau accused

him of fabricating expenses, and refused to pay them or submit them to ABC. *Id.* Slate testified that he cannot recall seeking reimbursement for these supposed expenses. Dkt. [37-2](#) at 163:1-9 (Slate Dep.).

The next day, Slate sent Kamau a lengthy e-mail entitled “*Resignation*,” beginning, “I do not believe I will be able to continue in *my capacity at the Police Complaint Center* any longer.” SOF ¶ 82 (emphases added). It also provides an overview in Slate’s own words of his work for the PCC on the ABC story.¹⁶

Slate continued to maintain a relationship with the PCC through December, but it grew increasingly acrimonious. SOF ¶ 83. By December 7 Slate was relinquishing any connection with the “1220 L Street” mailbox, which he characterized in an email to Kamau as “the PCC box,” Siegel Decl. Ex. S-164, and an application from Kamau for that mailbox submitted in mid-December, *id.* Ex. 174 at UPS 01-05. Tellingly, on December 10 Slate stopped using the gslate@policebuse.org email address when communicating with Ruppel, then stopped using with ABC the “1220 L Street” PCC address and the cell phone number registered to Kamau. SOF ¶ 83. Ruppel Decl. Ex. R89.

During this time Slate wrote numerous lengthy e-mails to Kamau defending his work with PCC clients and also asked Kamau for “a letter from the Board and you acknowledging that

¹⁶ The email also references discussions Kamau had been having with Ruppel about how to provide some credit to the PCC when the story ultimately aired. Slate wrote, “if [ABC] decided that they didn’t need to give us any credit for the story, then they should plan on taking complete responsibility for all of the fallout and making sure they got all the details right even though they weren’t there for most of them.” Siegel Decl. Ex. S-103. Kamau had raised with Ruppel the issue of giving some form of credit to the PCC within the story. Ruppel had agreed to give the PCC credit; Ruppel also said he likely would have mentioned Slate as a PCC representative. Siegel Decl. Ex. S-6 at 63:14-66:6 (Ruppel Dep.); *id.* Ex. S-5 at 189:19-190:2 (Kamau Dep.). After Slate was fired and asserted a claim, Kamau asked that Slate not be mentioned in the story and ultimately withdrew any request for the Police Complaint Center to be mentioned, as well as offering a refund of the fee ABC paid. Siegel Decl. Ex. S-116; *see also* Ruppel Decl. ¶ 2; Siegel Decl. Exs. S-123, S-125, S-126; Siegel Decl. Ex. S-6 at 63:14-66:6 (Ruppel Dep.); *id.* Ex. S-5 at 189:19-190:2 (Kamau Dep.).

I have conducted myself with integrity, *been a good employee*, and have not done anything untoward, inappropriate, or unethical.” SOF ¶ 84 (emphasis added). With respect to ABC, Slate noted to Kamau that ‘If this [accusations of misconduct against him] were true, *why would you want anything I have touched or am vouching for going to 20/20?*’” and noted that he had just “turned over all my tapes and went to New York to seal this thing” Siegel Decl. Exs. S-164, S-165.¹⁷ Kamau later informed Ruppel that Slate had been “fired.” SOF ¶ 85.

L. SLATE CONTINUES TO COMMUNICATE AMICABLY WITH ABC NEWS – EARLY 2008

In early 2008, ABC News continued reviewing the results of the project as part of preparing for an eventual news report. Periodically, Ruppel continued to separately correspond with Slate and Kamau by e-mail, asking each questions about various scenes on the footage. SOF ¶ 86; *see also* Ruppel Decl. Ex. R63 (Slate, 1/28/08: Any idea when you’ll air the story?”).

Between April 2007 and March 2008, in hundreds of e-mails and documents exchanged between Slate, Kamau and ABC, there is nowhere any suggestion that ABC’s rights to, or ability to use, footage for which it had paid well over \$20,000 in fees and expenses was contingent upon paying some unknown future amount of money to Slate personally.

M. SLATE PURPORTS TO REGISTER A COPYRIGHT TO CERTAIN FOOTAGE FROM CHICAGO AND PURPORTS TO “WITHDRAW” A LICENSE FOR ABC TO USE FOOTAGE

Unbeknownst to ABC, on March 3, 2008, Slate purported to register certain portions of material filmed in Chicago as his own with the U.S. Copyright Office, the only time in his life that he has ever registered anything. SOF ¶ 87. Almost all of the footage he registered was the electronic digital material he had retained in his possession as a result of technical happenstance

¹⁷*See also* Siegel Decl. Ex. S-166 (“I’ve spent my time talking to Glenn and given him every last tape”); *id.* Ex. S-168 (“I found copies of the short clips Glenn has been asking for an sent them to him”); *id.* Ex. S-164 (referring to PCC’s work with other television stations).

(they have date-based file numbers like “V1011001” [October 11]). *Id.* Less than two weeks later, on March 14, 2008, Slate sent an identical e-mail and certified letter to Ruppel, with the subject line, “*Withdraw of License.*” It began:

This letter is to *withdraw any sort of license*; either express or implied, to use any portion of my footage for any purpose. You are on notice not to use any of the footage I shot in Chicago and that *any license has been revoked*. I have not received any consideration for my services and Mr. Kamau is substantially complicating this matter. *At this point* my footage belongs exclusively to me . . . Please respond . . . and/or return all of my original tapes and footage.

SOF ¶ 88 (emphases added). He also sent the same letter to Kamau. *Id.* ABC declined to pay him. *Id.* ¶ 90. The very same day Slate sent this letter claiming “I have not received any consideration,” he cashed his last \$1,487 expense check from ABC. *Id.* ¶ 89.

N. ABC NEWS’ 20/20 BROADCAST

The video at issue in this case appeared in the second story segment of the May 16, 2008, ABC News broadcast of “20/20,” an hour-long newsmagazine program consisting of three separate news reports. *See also* Dkt. [62-4](#) (DVD copy of broadcast). The entire segment lasted about 15 minutes, *id.* at 13:08-32:30, but the portion of the story involving the ABC News/PCC investigation of Chicago bars appears for two and a half minutes towards the end of the segment. *Id.* at 29:28-32:10. The rest explored other incidents around the country in which police misconduct had been caught on hidden tape.

In his interrogatory response, Slate claims that about 30 seconds of footage appearing in segment was infringing. Siegel Decl. Ex. S-1.¹⁸ Of that 30 seconds, only about ten actually

¹⁸ Slate’s time codes add up to about 40 seconds, but often inflate the actual length of each clip. Using the DVD filed as Dkt. [62-4](#), the clips Slate complains about appear at 29:40-41; 29:43-44; 29:48-49; 29:51-53; 29:55-58, 29:59-30:01; 30:05-09; 30:15-19; 31:38-48; 31:50-53. In his post-discovery “supplemental” interrogatory responses, Slate claimed for the first time that additional “various parts of the 20/20 broadcast contained footage shot and owned by Plaintiff but which have not yet been registered with the U.S. Copyright Office.” Siegel Decl. Ex. S-1 at Int. No. 2. If Slate implies that he still intends to

duplicates footage that can be found anywhere on the registered discs (they are easily identified because the ‘pen camera’ Slate used for this footage contains embedded time codes that can be seen on the video). Dkt. [62-4](#) at 29:48-49, 29:56-58, 29:59-30:00, 30:15-19. However, for purposes of this motion it does not matter whether ten or thirty seconds is at issue. What is more relevant is that one has to strain to identify that footage within the story because it consists of nine very short clips (as brief as one second) that are wholly intertwined with a couple dozen clips of similar events filmed by Antrim, Baird, Piat-Kelly, Heard, Slate and a freelance camera crew lasting a total of 110 seconds – rendering nonsensical the notion that these nine snippets or any 30 seconds were intended to be treated differently. Indeed, twice in the broadcast Slate can be seen clearly in the background in footage filmed by a freelance camera crew as he was filming the same scene they were. SOF ¶ 92; Dkt. [62-4](#) at 31:48-50, 31:53-56.

O. THE COMPLAINT

Count I of the Second Amended Complaint alleges that three related ABC entities committed copyright infringement by incorporating “Chicago footage” allegedly owned and registered by Slate in the 20/20 report, which was broadcast on television, placed on ABC News’ website, distributed for international broadcast, and sold as a DVD. Dkt. [88](#) at ¶¶ 31-37. The Complaint also pleads a claim for contributory copyright infringement alleging that the defendants contributed to each others’ infringement, and unspecified infringement by other subsidiaries and affiliates. *Id.* Count II at ¶¶ 38-40.

register more material and make it the basis of this case, it is far too late for that. More telling, the only footage he might conceivably try to now register would be the very tapes ABC produced to him in discovery.

ARGUMENT

For purposes of summary judgment, a dispute of material fact is *genuine* only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252. A plaintiff’s self-serving or conclusory assertions cannot defeat summary judgment. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Here, summary judgment is warranted on any of four independent grounds, each of which is set forth below.

I. SLATE WAS A VOLUNTEER PCC EMPLOYEE AND THEREFORE DOES NOT OWN ANY “CHICAGO FOOTAGE.”

First, this action should be dismissed for the simple reason that the evidence demonstrates beyond genuine dispute that Slate has never owned the footage at issue. 17 U.S.C.A. § 501(a)-(b); *see also* 3-12 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.02[B] (2002) (“NIMMER”) (“Only the copyright owner, or the owner of exclusive rights under the copyright . . . has standing to bring an action for infringement of such rights.”).

Although initial copyright ownership of an expressive work typically vests in its creator, that is not the case where a work is made “for hire.” 17 U.S.C.A. § 201(b). Works made “for hire” include those “prepared by an employee within the scope of his or her employment,” *id.* at § 101(1), and ownership vests in the first instance with the *employer*, *id.* at § 201(b). For purposes of copyright law, “the term ‘employee’ should be understood in light of the general common law of agency.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 74-41 (1989) (“CCNV”). In analyzing agency for work-for-hire purposes, courts properly look to the

Restatement of Agency factors. *Id.* at 752 n.31.¹⁹ *See also FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 n.1 (D.C. Cir. 2009). The non-exhaustive Restatement factors, taken together, assist in the analysis whether an alleged employee is subject to an employer's control, but "[n]o one of these factors is determinative" and each case can present its own unique grounds for according more or less weight to particular factors. *CCNV*, 490 U.S. at 751-52. Such factors are appropriately evaluated on summary judgment where there is no genuine dispute of material fact, as here. *See, e.g., Roop v. Lincoln College*, No. 09-cv-1051, 2011 WL 924842 at *9 (C.D. Ill. March 14, 2011) (granting summary judgment on copyright ownership issue); *Rouse v. Walter & Assoc.*, 513 F. Supp. 2d 1041, 1065 (S.D. Iowa 2007) (same); *Foraste v. Brown Univ.*, 290 F. Supp. 2d 234, 239, 241 (D.R.I. 2003) (same); *Genzmer v. Public Health Trust of Miami-Dade County*, 219 F. Supp. 2d 1275, 1283 (S.D. Fla. 2002) (same).

Here, Slate worked for the PCC for many years and was its "Director" for most of them. SOF ¶ 3; Siegel Decl. Ex. S-5 at 53:12-57:13, 269:19-21 (Kamau Dep.); *see generally JustMed, Inc. v. Byce*, 600 F.3d 1118, 1126 (9th Cir. 2010) (finding "director" of startup to be an employee for copyright purposes and noting that "formal title indicates that he had broad duties within [company], as well as a relationship with the company that was intended to be permanent"). Slate's conduct is consistent with someone having that title: receiving mail for the

¹⁹ As the *CCNV* Court noted:

Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *See* Restatement § 220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). No one of these factors is determinative.

490 U.S. at 751-52 (citations and footnotes omitted).

PCC, using a PCC e-mail address, using a cell phone paid for by Kamau, staffing cases for PCC “clients,” asking others to execute releases and contracts on behalf of the PCC, and proposing contracts with others on behalf of the PCC, including ABC. The objective record unmistakably shows that he worked under Kamau’s direction, was regularly assigned work by Kamau, and sought permission from Kamau to undertake his activities. For the ABC project he sought reimbursement from the PCC for equipment he used and any payments purportedly made to others who worked with him. The business he undertook for the PCC, such as working with news organizations, were all part of the regular business of the PCC over a period of years.

Just as telling, Slate considered himself to be an employee and held himself out to others as such. SOF, *e.g.* ¶¶ 3-8, 15-16, 18, 24, 27, 28, 41, 63, 66, 68, 76-84. He held himself out as the PCC’s “director” for years and when his relationship with the organization deteriorated, complained that he had been a “good employee”, that he understood he was being “fired,” and would alternatively “resign” from his “capacity” there. Kamau described Slate as, in effect, the organization’s second in command and heir-apparent. Siegel Decl. Ex. S-5 at 57:9-23 (Kamau Dep.). It is well-established that “[t]he understanding of the parties as to the nature of their relationship is also probative of the existence of a conventional master-servant relationship as understood by common law agency doctrine.” *Saenger Org., Inc. v. Nationwide Ins. Licensing Assocs., Inc.*, 119 F.3d 55, 61 (1st Cir. 1997).

The only thing that differentiates Slate from most employees is that he was not paid a salary or benefits – indeed, since he appears to have been paid little if anything at all, this equally differentiates him from independent contractors as well. The Restatement fully provides for this scenario, because it explicitly recognizes that one may be a volunteer employee, so long as a volunteer employee submits oneself to another’s control and that authority is accepted – as

happened here. Restatement (Third) of Agency § 7.07 (2006), *Comment (f)*; Restatement (Second) of Agency § 225 (1958). (“One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services.”). Kamau repeatedly referred to Slate as a “volunteer employee.” Siegel Decl.Ex. S-5 at 75:4-9, 268:15-23 (Kamau Dep.), and the record makes this clear that is exactly what he was. *See also id.* at 54:16-18. As the Third Restatement notes, “[g]ratuitous agency is a common occurrence.” Restatement (Third) of Agency § 1.04 (2006), *Comment (c)*.

By definition, the Restatement factors like benefits and tax treatment are irrelevant to volunteer employment status, and the appropriate balancing of those factors here simply reflects the reality that the PCC was a loose, volunteer-based organization. *See, e.g., Byce*, 600 F.3d at 1126 (discounting certain factors as “entitled to little weight when viewed in light of the way [the company] conducts its business”). *In toto*, Slate resembles conventional employees at more established non-profit organizations, rather than the plaintiff independent contractor in *CCNV*. That plaintiff was a professional sculptor who had no relationship with the defendant non-profit beyond being commissioned to create a single work of art. If *CCNV* had involved that organization’s volunteer “director” who suddenly claimed a personal copyright in everything he had ever written on its behalf, the outcome would likely have been quite different.

Equally significant, Slate’s response to all these facts is to now claim not to remember anything about the organization for which he worked for many years, or any association he may have had with it. Much of this testimony is undoubtedly perjurious, *see generally* Memorandum in Support of Motion to Dismiss for Bad-Faith Conduct of Litigation, but that is beside the point here. Because it is well-established that a claimed lack of memory does not create a genuine dispute of fact, Slate’s testimony is irrelevant for purposes of assessing Defendants’ entitlement

to summary judgment. *See, e.g., FDIC v. Nat'l Union Fire Ins. Co.*, 205 F.3d 66, 75 (2d Cir. 2000) (where party bears burden of proof at trial, “vague denials and memory lapses ... do not create genuine issues of material fact.”); *Edwards v. Metro. Life Ins. Co.*, No. C 10-03755 CRB, 2011 WL 2463241, at *4 (N.D. Cal. June 20, 2011) (“Plaintiffs’ lack of memory does not create a genuine issue of material fact”); *Walker v. Munsell*, No. Civ. A No. 06-867JJB-SCR, 2007 WL 3377202, at *4 (M.D. La. Oct. 1, 2007) (“The Plaintiff attempts to rely on his lack of memory to create a genuine issue of material fact, but this lack of evidence does not satisfy the non-movant’s burden.”), *aff’d*, 281 F. App’x 388 (5th Cir. 2008); *Buczek v. Trans Union LLC*, No. 05-80834, 2006 WL 3666635, at *4 (S.D. Fla. Nov. 9, 2006) (“plaintiff’s stated lack of memory does not operate to create a genuine issue of material fact”).²⁰

II. IN ANY EVENT, SLATE IS EQUITABLY ESTOPPED FROM DENYING HIS RELATIONSHIP TO THE PCC IN ORDER TO SUE ABC FOR INFRINGEMENT.

Alternatively, the Court need not decide whether the footage at issue was a work-for-hire, because Slate’s claim would be barred by the doctrine of equitable estoppel regardless of his technical employment status. “Estoppel is an equitable doctrine invoked to avoid injustice in particular cases,” *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984), and is a well-established affirmative defense to copyright infringement. 4 NIMMER § 13.07 (“[p]rinciples of estoppel applicable elsewhere in the law apply equally to in copyright infringement actions.”); *see also, e.g., Carson v. Dynegy, Inc.*, 344 F.3d 446, 455 (5th Cir. 2003); *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 44 (1st Cir. 2003); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); *Tech 7 Sys., Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 86 (D.D.C. 2009). The defense may properly be resolved on summary

²⁰ Defendants do not know whether Plaintiff intends to rely upon the fabricated letter discussed in their Motion to Dismiss, for any purpose here. If he does, Defendants will address it further then.

judgment, where as here the record provides no basis for any genuine dispute of material fact. *E.g., Carson*, 344 F.3d at 455 (affirming summary judgment on basis of estoppel); *Rouse*, 513 F.2d at 1069 (granting summary judgment on basis of estoppel); *DeCarlo v. Archie Comic Publ'ns, Inc.*, 127 F. Supp. 2d 497, 511 (S.D.N.Y.) (same), *aff'd*, 11 F. App'x 26 (2d Cir. 2001); *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 948 (S.D.N.Y. 1997) (same); *Armento v. City of Asheville Downtown Dev. Office*, No. 1:94CV57, 1996 WL 677119, *8 (W.D. N.C. March 26, 1996) (same).

While the contours of equitable estoppel are flexible, generally “the party claiming the estoppel must have relied on its adversary’s conduct ‘in such a manner as to change his position for the worse,’ and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary’s conduct was misleading.” *Heckler*, 467 U.S. at 59 (citations omitted). The facts of this case bear striking resemblance to, though are even more extreme, than the facts in *Boardman v. County of Spokane*, 61 F.3d 909, 1995 WL 444654, *1 (9th Cir. 1995) (unpublished), in which the Ninth Circuit affirmed the trial court’s grant of summary judgment on the grounds of equitable estoppel. In *Boardman*, the defendant County of Spokane hired a company called Capacitech Corp. to develop software. The company represented that the plaintiff systems analyst was “an employee and principal of the company,” and the plaintiff both knew of these representations and made similar ones to the County himself. *Id.* (citations omitted) After the software was developed, however, the plaintiff sued the County for copyright infringement, claiming ownership on the theory that “he was never formally associated with Capacitech as either an employee or principal, but was an independent contractor.” *Id.* According to the appellate court, the evidentiary record indicated that although “the County believed that it had hired a company with the necessary in-house

experience,” it “was actually dealing with a loose and transient affiliation of individuals and companies.” *Id.* at *3. In affirming summary judgment for the County, the Ninth Circuit therefore found it unnecessary to determine whether Boardman *actually* qualified as an employee under *CCNV* because in any event he was “estopped from denying his employee status in order to claim copyright ownership against the County.” *Id.* at *4.

The same result is appropriate here. Slate held himself out as a PCC principal and employee through interactions with ABC that spanned approximately 18 months. *See, e.g.*, SOF ¶¶ 15-16, 18, 24, 27, 28, 41, 63, 66, 68, 76-84. He represented to ABC that he was the “Director” of the organization and directed ABC to send all correspondence to him at a supposed PCC Washington office, replete with “our mailroom.” He participated in numerous communications, both alone and together with Kamau, on behalf of “we,” “us” and “our.” He repeatedly deferred to and took direction from Kamau. To try to persuade ABC to undertake further investigation, he sent examples of “our previous investigations” by “our organization,” explained “our motivation for working with 20/20” and laid out what “our fee” and other expenses would be for “me and at least two of our other undercovers.” Similarly, with Slate’s knowledge Kamau repeatedly held him out as a member of “my staff” and “our organization,” from his very first proposal: “we can send Greg Slate up to Chicago.”

Now, just as in *Boardman*, long after all work was completed and all fees paid, Slate now asserts that he was never an employee and owns anything he personally filmed. He is estopped from doing so. Indeed, on this record the grounds for estoppel go beyond the specific question of Slate’s employment status. Going back to 2006 the entire arrangement was consistently presented by both Slate and Kamau as one between ABC and the PCC, so ABC reasonably understood that it was entering into an agreement with that organization for its work product.

For purposes of applying equitable estoppel, that is all that matters.²¹ Slate is therefore estopped from asserting his own ownership of any footage for purposes of suing ABC for copyright infringement. *Boardman*, 1995 WL 444654, at *3; *see also, e.g., Mick's at Pa. Ave., Inc. v. BOD, Inc.*, 389 F.3d 1284, 1289 (D.C. Cir. 2004) (“Having represented himself to [plaintiff] when he signed the sublease and guaranty as an officer and shareholder of BOD in order to secure the sublease for BOD, O’Donnell is equitably estopped from claiming otherwise now to avoid liability under the guaranty.”); *Transamerica Ins. Group v. Paul*, 267 N.W.2d 180, 183 Minn. 1978) (finding father of business owner who represented himself as principal of the business to opposing party was equitably estopped from denying role).

ABC’s reliance on these representations was indisputably reasonable; indeed, their quantity and frequency alone would make such reliance reasonable. ABC had previously dealt with the PCC pursuant to the same understanding, and it was consistent with descriptions of Slate and the PCC by numerous other media. All objective indicia such as Slate’s use of a PCC e-mail address and supposed office address were likewise consistent with it. Similarly, ABC plainly relied to its detriment on these representations. If for some reason Slate was not a PCC agent, ABC spent tens of thousands of dollars to enable Slate to create footage for a news story which according to him ABC not only had no right to use, but Slate had every right to sell to any competitor. Dkt. [37-2](#) at 197:14-18. *Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000) (quoting *Heckler*, 467 U.S. at 59). Indeed, as in *Boardman*, the application of estoppel is supported by the reality that discovery now suggests that the PCC may more accurately be

²¹ An organization can offer rights to video footage for any number of reasons – because they are works for hire, or because the persons holding a camera formally transferred any rights to it, or some combination of both. Indeed, after Slate’s first counsel sent a demand letter to ABC, Kamau alleged that Slate had also signed a release and had hacked into the PCC’s computer system to erase it. Siegel Decl. Ex. S-21. This motion does not purport to resolve that issue, for it is wholly unnecessary to do so for purposes of granting summary judgment.

characterized as a “loose and transient affiliation of individuals and companies,” *Boardman*, 1995 WL 444654, at *3, rather than one with an established “Washington, D.C.-based office” as Slate held it out to both ABC and numerous other news organizations.

Moreover, once again Slate’s response to this entire course of conduct is to claim that he does not recall anything about it, which fails to create any genuine dispute. Indeed, it is important to grant summary judgment in cases such as this one; otherwise, copyright law could far too readily be abused by persons who hold themselves out in one manner, only to demand extortionate payments at the last minute.

III. ABC HAS A NON-EXCLUSIVE, IRREVOCABLE LICENSE TO USE THE FOOTAGE AT ISSUE AS A MATTER OF LAW.

Even if Slate owns the copyright to the footage in question and is not equitably estopped from asserting this claim, summary judgment should be entered because ABC has an irrevocable license to use the footage in its news programs. A copyright owner can, either orally or implicitly through conduct, grant a non-exclusive license that precludes a claim of copyright infringement against the licensee. *Atkins v. Fischer*, 331 F.3d 988, 991-92 (D.C. Cir. 2003) (collecting cases); 3-10 NIMMER § 10.03[A][7]; *see also I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (“The concept of an implied nonexclusive license has been recognized not only by *Nimmer*, a preeminent treatise on copyright law, but also by the courts, including this one, which universally have recognized that a nonexclusive license may be implied from conduct.”). The implied license doctrine essentially aims to give effect to transfers of copyright interests where, for one reason or another, all writings or other criteria required to transfer copyright interests may be lacking – with the consequence being that the resulting license is non-exclusive. *Lulirama Ltd. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 882 (5th Cir. 1997); *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997); *Holtzbrinck Publ’g Holdings, L.P. v. Vyne*

Commc'ns, Inc., No. 97 CIV. 1082, 2000 WL 502860, at *6 (S.D.N.Y. Apr. 26, 2000). Courts frequently grant summary judgment in copyright infringement actions by finding an implied license. *See, e.g., Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 956 (11th Cir. 2009); *Lulirama*, 128 F.3d at 883; *Veeck*, 110 F.3d at 753; *Shaver*, 74 F.3d at 777; *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990); *Beeholder Prods., Inc. v. Catona*, 629 F. Supp. 2d 490, 494-95 (E.D. Pa. 2009).

This Circuit follows the same test for an implied license as all others. An implied license arises where ““(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes the particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.”” *Atkins*, 331 F.3d at 991-92 (quoting *Lulirama Ltd., Inc.*, 128 F.3d at 879). On this record, no reasonable jury could find that ABC did not, at a minimum, have a license to use the footage in question.

A. ABC Has an Implied License

Looking at the first two prongs of the test, there is no dispute that ABC requested the creation of the footage in question, and no genuine dispute that Slate provided the footage to ABC, both directly and through Kamau. SOF *e.g.*, ¶¶ 29-40; 44-48; 49-61; 70-72. After all, ABC still has it.

With respect to the last factor of the three-part test, by definition a party asserting infringement always claims that it was not their intent to convey a license. Therefore, intent, courts properly look to “the totality of the parties’ conduct” to evaluate an intent to grant permission. 3-10 NIMMER § 10.03[A][7]. Such intent may be inferred from both words and conduct. *Shaver*, 74 F.3d at 775. So the Court properly looks to the actual, objective evidentiary record of communications and actions during the course of dealings between parties. *Id.* at 777

(rejecting plaintiff's litigation claim that he understood license was conditional as "simply not supported by the record" and affirming summary judgment for defendant). The record here leaves no room for any genuine dispute, and indeed is far more extensive than other cases where licenses have been found to be implied as a matter of law.

Here, Slate's own contemporaneous words repeatedly recognized that ABC could and would use the footage filmed in Chicago based on its arrangement with the PCC. He repeatedly assured Kamau that he had turned over all footage to ABC, told another PCC client that "we [i.e. the PCC] are currently shooting with 20/20"; complained to Kamau that he had "delayed law school to work on this DUI stuff"; asked how ABC "intends to use us in the story"; and asked in response to Kamau's accusations leading to his departure, "why would you [Kamau] want anything I have touched or am vouching for going to 20/20?" – a question that makes no sense if 20/20 had no right to use the footage that was "going to" it. Just as telling, Slate's effort to convince ABC and its affiliates to enter into a new agreement to do a national investigation repeatedly acknowledged the terms of the just-completed deal with ABC-PCC deal: "we will forward project costs"; "\$7,500 for 7 days of consulting (this can be broken down into two trips for recon, and one for actual shooting as we did with 20/20 in Chicago); "our motivation for working with 20/20 was to deliver a broad story" "*Our fee* will be \$11,500.00 this will include the participation of *me* and at least two of *our* other under covers. 20/20 will be responsible for rental cars, gas, two roundtrip flights, hotels" SOF ¶¶ 66; 68; 79-81; 84.

Indeed, the record here includes an unmistakable, contemporaneous recognition that a license existed. On March 14, 2008 Slate sent both Ruppel and Kamau letters entitled "Withdraw of License," that purported to "withdraw any sort of license; either express or implied, to use any portion of my footage." It further emphasized that "any license has been

revoked,” and asserted that “*at this point* my footage belongs exclusively to me” – which can mean nothing other than the footage did not belong “exclusively” to Slate prior to “this point.”

This evidence alone would be sufficient to grant summary judgment, but the record here further includes an extensive record of conduct that matches Slate’s words. Even before the Chicago investigation, the evidence shows that Slate served as a PCC tester who was dispatched to work with news organizations for several years, and the resulting video footage was always broadcast without any complaint or license granted by Slate or registration of any purported copyrights. *See* SOF ¶¶ 8-9, 10-18; 21. This included a prior dealing with ABC, in 2006, in which the PCC was paid and Slate turned over footage to ABC. *Id.* ¶¶ 10-18. Such prior practice alone supports an implied license. *E.g., Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999) (writer who wrote jingles for radio station for seven years without any written agreement, allowing them to air, granted an implied license).

And in 2007, the entire course of dealings in the record demonstrates that Slate understood and intended that ABC could air any footage filmed during this investigation. SOF ¶¶ 20-21; 22-25; 27-32; 41-46; 61-64; 68-69; 71-72. He asked ABC to make and pay for his travel arrangements and camera equipment; sought reimbursement for out-of-pocket expenses; borrowed ABC equipment; and reported to ABC on progress. *Id.* ¶¶ 21-29; 31-32; 41; 44-45; 47; 52-53; 61. Slate secured releases from others stating that all video they filmed could be used by ABC or the PCC – not himself. *Id.* ¶¶ 29-30. He not only turned over footage to ABC, he did so without retaining a copy of much of it, and met with Ruppel at Kamau’s direction to review the footage, the sole purpose of which was to render it more usable for broadcast. And his holding himself out as a principal and employee of the PCC, in addition to supporting an

estoppel defense, is wholly inconsistent with the contention that ABC supposedly would need to enter into some separate deal with him personally.

In fact, about two-thirds of the footage Slate claims was infringed was recorded while he was operating as part of a large ABC News team in which everyone was filming the same events. The notion that there was someone's "Chicago Footage" within the dozens of videotapes collectively filmed that was intended to be owned by any one single person and separately paid for is absurd. His very copyright infringement claim requires the Court to strain to find difficult-to-distinguish clips lasting as little as a second, sandwiched between many other similar clips within a lengthy news story filmed by a more than a half-dozen persons, none of whom contend that ABC has no right to air their "Chicago Footage."

Courts have granted summary judgment on the basis of only a small fraction of the objective evidence of intent presented by this record. For example, in *Effects Associates, Inc. v. Cohen*, a filmmaker asked a production company to create specific special effects footage for a film. 908 F.2d at 555-56. The production company did, and turned the footage over to the filmmaker, without any discussion of rights or written agreement, but after a payment dispute later asserted a copyright infringement claim. *Id.* The Ninth Circuit affirmed summary judgment for the filmmaker, concluding that it was logically inconsistent that the production company would have turned over footage and accepted payment but failed to mean to give permission for the filmmaker to use the footage. *Id.* at 558-59. The same is true here, where the evidence goes far beyond simply turning over footage.

B. The License was Irrevocable as a Matter of Law

Finally, Slate's effort to revoke this license was ineffective as a matter of law. It is well-established that an implied license supported by consideration may not be unilaterally revoked.

Asset Mktg. Sys., Inc. v. Gagnon, 542 F.3d 748, 757 (9th Cir. 2008); *Carson*, 344 F.3d at 451-52; *Lulirama Ltd., Inc.*, 128 F.3d at 882; *Shaver*, 74 F.3d at 777; *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 574 n.12 (4th Cir. 1994). The rationale is simple: A nonexclusive license supported by consideration is a contract, and if it were unilaterally revocable by the licensor the contract would be illusory because the licensee would never have any assurance that it could use what it had paid for. *Lulirama Ltd., Inc.*, 128 F.3d at 882; *see also Shaver*, 74 F.3d at 782.

The record here indisputably demonstrates that this license was supported by consideration, a point rather starkly exemplified by the fact that Slate cashed a \$1,500 check from ABC the same day that he claimed in his “withdrawal” letter that “I have not received any consideration for my services.” There can be no genuine dispute that ABC paid roughly \$10,000 in expenses directly to or for Slate, as well as thousands more for other persons who helped Slate film the footage he would later contend was his own. Moreover, ABC paid \$7,500 in fees to the organization of which Slate was the director at the time the funds were paid, because that was how the parties agreed such consideration would be paid. Indeed, the facts of this case starkly illustrate why the law holds that a license supported by consideration is irrevocable. According to Slate, ABC intended to pay over \$20,000 to enable Slate to create this footage and then sell it to the highest bidder – a proposition whose absurdity and inequity is self-evident. Summary judgment should be entered.

IV. SLATE IS ALSO BARRED FROM PURSUING THIS ACTION BY THE EQUITABLE DOCTRINE OF UNCLEAN HANDS.

Finally, Defendants respectfully submit that, as the record both here and that submitted in support of their Motion to Dismiss for Bad-Faith Conduct of Litigation clearly demonstrates, Slate’s misconduct in attempting to assert his copyright claim, including but not limited to

fabricating evidence and perjuringly erasing from memory evidence of the PCC's role in this dispute, independently warrants its dismissal pursuant to the doctrine of unclean hands.

The doctrine of unclean hands “closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.” *Fogg v. Gonzales*, 492 F.3d 447, 456 (D.C. Cir. 2007) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). Courts have broad discretion to apply the doctrine. *Id.* The defense is properly asserted in copyright cases in those situations, like this one, where “the plaintiff’s transgression is of serious proportions and relates directly to the subject matter of the infringement action,” and it applies “regardless of whether the action is one at law or in equity.” *See* 4-13 NIMMER § 13.09[B]. “[F]alsifying evidence” or “when [a] plaintiff [has] misused the process of the courts” are examples of where the doctrine may properly be applied. *Id.*

Because the doctrine is “peculiarly fact-specific,” *Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services*, 746 F. Supp. 320, 329 (S.D.N.Y. 1990), Defendants hereby incorporate by reference the full record of Slate’s misconduct submitted to the Court as part of Defendants’ Motion to Dismiss for Bad-Faith Conduct of Litigation. Application of the doctrine is particularly appropriate in light of Slate’s fabrication of back-dated correspondence to and purported conversations with ABC and misstatements about his relationship to the PCC – issues that are central to Slate’s copyright infringement claim. 4-13 NIMMER § 13.09[B]; *see, e.g., McCormick v. Cohn*, No. CV 90-0323 H, 1992 WL 687291, at *4 (S.D. Cal. July 31, 1992) (vacating a jury award for copyright infringement damages on the basis of unclean hands where plaintiffs made “clear misstatements regarding their ownership of the copyright before and during litigation,” and engaged in other litigation misconduct), *aff’d*, 17 F.3d 395 (9th Cir. 1994) (unpublished); *Gaye v. Gillis*, 167 F. Supp. 416, 419 (D. Mass. 1958) (dismissing claims for

copyright infringement, breach of contract, and unfair competition on multiple grounds, including unclean hands where plaintiff fabricated a clause in a contract, adding it afterward to the document and then seeking to “conceal the freshness of the typing”); *see also, e.g., Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1371 (Fed. Cir. 2001) (affirming dismissal of patent infringement claims on basis of unclean hands, where plaintiff had “submitted falsified engineering notebooks to the court”).

CONCLUSION

For each and all of the foregoing reasons, summary judgment should be entered for Defendants.

Dated: September 2, 2011

Respectfully submitted,

By: /s/ Chad R. Bowman
Nathan E. Siegel, (D.C. Bar No. 446253)
Chad R. Bowman, (D.C. Bar No. 484150)

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036-5514
Telephone: (202) 508-1100
Facsimile: (202) 861-9888
E-mail: nsiegel@lskslaw.com
E-mail: cbowman@lskslaw.com

Counsel for Defendants