UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMUEL BARTLEY STEELE, BART STEELE PUBLISHING, and STEELE RECORDZ, Plaintiffs, v. TURNER BROADCASTING SYSTEM, INC., MAJOR LEAGUE PROPERTIES, INC., TIME WARNER, INC., ISLAND DEF JAM RECORDS, FOX BROADCASTING COMPANY, JOHN BONGIOVI, INDIVIDUALLY AND D/B/A BON JOVI PUBLISHING, RICHARD SAMBORA, INDIVIDUALLY AND D/B/A AGGRESSIVE MUSIC, WILLIAM FALCON, INDIVIDUALLY AND D/B/A PRETTY BLUE SONGS, UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC., SONY/ATV TUNES LLC, KOBALT MUSIC GROUP, A&E TELEVISION NETWORKS, AEG LIVE LLC, VECTOR 2 LLC, BOSTON RED SOX, INC., THE BIGGER PICTURE CINEMA CO., and MARK SHIMMEL MUSIC, Defendants.	Civil Action No. 08-11727-NMG **ORAL ARGUMENT REQUESTED**

THE MOVING DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Turner Broadcasting System, Inc., Major League Baseball Properties, Inc., Time Warner Inc., John Bongiovi (individually and d/b/a Bon Jovi Publishing), Richard Sambora (individually and d/b/a Aggressive Music) and William Falcone (individually and d/b/a Pretty Blue Songs) (collectively the "Moving Defendants") hereby move for an order dismissing the Amended Complaint with prejudice.

The grounds for this motion are set forth in the accompanying memorandum of law.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), the Moving Defendants respectfully request oral argument on this motion.

LOCAL RULE 7.1 CERTIFICATION

I, Scott D. Brown, hereby certify that on February 17, 2009 I conferred with the plaintiffs in a good faith effort to resolve or narrow the issues herein but could not obtain their agreement to the specific relief requested in this motion.

Dated: February 18, 2009

/s/ Scott D. Brown
Scott D. Brown

Dated: February 18, 2009
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule

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CERTIFICATE OF SERVICE

I, Matthew J. Matule, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on February 18, 2009.

Dated: February 18, 2009

/s/ Matthew J. Matule

Matthew J. Matule

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

- x

SAMUEL BARTLEY STEELE, BART STEELE PUBLISHING, and STEELE RECORDZ, Plaintiffs,	:	Civil Action No. 08-11727-NMG
v.	:	
TURNER BROADCASTING SYSTEM, INC., MAJOR LEAGUE PROPERTIES, INC., TIME WARNER, INC., ISLAND DEF JAM RECORDS, FOX BROADCASTING COMPANY, JOHN BONGIOVI, INDIVIDUALLY AND D/B/A BON JOVI PUBLISHING, RICHARD SAMBORA, INDIVIDUALLY AND D/B/A AGGRESSIVE MUSIC, WILLIAM FALCON, INDIVIDUALLY AND D/B/A PRETTY BLUE SONGS, UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC., SONY/ATV TUNES LLC, KOBALT MUSIC GROUP, A&E TELEVISION NETWORKS, AEG LIVE LLC, VECTOR 2 LLC, BOSTON RED SOX, INC., THE BIGGER PICTURE CINEMA CO., and MARK SHIMMEL MUSIC, Defendants.	:	

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MEMORANDUM OF LAW IN SUPPORT OF THE MOVING
<u>DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT</u>

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PRELIMINARY STATEMENT

In an Amended Complaint dated January 30, 2009, pro se plaintiff Samuel Bartley Steele ("Steele") (often referred to by plaintiffs as "Bart") and two "unincorporated business organization[s]," Bart Steele Publishing and Steele Recordz, assert claims for: (i) copyright infringement, and (ii) violations of Massachusetts General Laws Chapter 93A ("Ch. 93A"), against more than a dozen defendants.

Both claims should be dismissed. The copyright claim fails because the mandatory side-by-side comparison of Steele's registered song and the alleged infringing work demonstrates that there is no "substantial similarity" as a matter of law, because the dissimilarities are substantial, and any similarities (which are based on unprotectible expression) are trivial. Indeed, the allegedly infringing Bon Jovi song is not even arguably about the Boston Red Sox or the game of baseball -- the predominant themes of Steele's song.

The Ch. 93A claim fails as a matter of law because, first, there are simply no allegations in the Amended Complaint that describe conduct that could be considered an unfair or deceptive act or practice. To the contrary, the Amended Complaint is, throughout, a statement regarding alleged copyright infringement which, without more, is not a violation of Ch. 93A. Second, a state law unfair or deceptive practices claim based on alleged copyright infringement (even if allegedly willful) is preempted by the federal copyright statute.

The dismissal of the Amended Complaint, moreover, should be final, with no right to amend again. Plaintiffs have already had ample opportunity to explain their position. On December 8, 2008, a Motion to Dismiss was filed (Docket Nos. 17-19), challenging the legal sufficiency of the Complaint. In response, after obtaining three extensions, plaintiffs filed an Amended Complaint which added parties, added and deleted causes of action and damages theories, and added and dropped exhibits, all in an apparent effort to overcome the arguments set forth in the initial Motion to Dismiss.[1] In addition, the Court has the benefit of plaintiffs' 14-page "Plaintiffs' Amended Complaint and Opposition to Motion to Dismiss" dated January 30, 2009 (Docket No. 42) ("Pls.' Opp'n"), which constitutes another lengthy statement of plaintiffs' contentions. The current motion to dismiss the copyright claim, moreover, is predicated on a side-by-side comparison of the works at issue -- no further amendment to the pleadings can affect that analysis.

BACKGROUND FACTS[2]

Steele resides in Chelsea, Massachusetts, and the two additional plaintiffs are "unincorporated business organization[s]" at the same location. (Am. Compl. ¶¶ 1-3.) In early October 2004, plaintiffs released "(Man I Really) Love this Team," a "love anthem" written by Steele for his "beloved Red Sox" (the "Steele Song"). (Id. ¶ 20.)[3] During the month of October, 2004, the Steele Song was publicly performed by Steele's bands outside Fenway Park, and free

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1 For example, in the Amended Complaint, Steele dropped his claim for $400 billion in statutory damages.

2 The facts are taken from the Amended Complaint and are, for purposes of this motion, assumed to be true (unless contradicted by documentary evidence that is properly considered on this motion). By citing to the facts alleged by plaintiffs, the Moving Defendants do not concede or acknowledge their accuracy.

3 Ex. I to the original Complaint was a CD-Rom that contained, among other things, a transcript of the lyrics to the Steele Song.

copies of the song (CDs and sheet music) were handed out at that location. (Id.) The song was also performed at popular bars near Fenway Park, and on Boston area radio and television stations. (Id.) Steele also sent copies to the Red Sox and Major League Baseball. (Id. ¶¶ 20-21.)

Steele subsequently registered the Steele Song with the American Society of Composers, Authors, and Publishers ("ASCAP") (id. ¶ 23), and in 2006 applied for and received a federal copyright registration, Reg. No. PAu3-052-330. (Id. ¶ 28.) Steele also alleges that he copyrighted at that time a "derivative" version of his song entitled "Man I Really Love This Town" (the "Derivative Version"). (Id.) However, the U.S. Copyright Office deposit copy shows otherwise -- the Derivative Version was not sent to the Copyright Office.

In 2006, Turner Broadcasting System, Inc. ("Turner") acquired the rights for seven years to televise on cable television the Major League Baseball post-season playoff series, starting with the 2007 season. (Id. ¶ 25.) To promote the first post-season on Turner cable, on August 31, 2007 Turner announced "a full length promo" featuring rock performer Bon Jovi (the "Turner Promo"). (Id. ¶ 27.) In the Turner Promo, the Bon Jovi band performed the song "I Love This Town" from the band's new *Lost Highway* CD (the "Bon Jovi Song"). (Id.)[4]

Plaintiffs allege that the Turner Promo is "substantially similar to music and expressions of the ideas encompassed in the plaintiff's copyrighted work." (Id. ¶ 30.) All defendants are alleged to have aided, abetted, and assisted in creating the infringing work. (Id.)

LEGAL PRINCIPLES GOVERNING THE COURT'S ANALYSIS OF THE MOTION TO DISMISS

In addressing a motion to dismiss under Rule 12(b)(6), the Court must construe the Amended Complaint in the light most favorable to the plaintiff, and take all factual allegations

[4] As Steele has not included as an exhibit to either version of the complaint a copy of the Turner Promo, it is submitted as Exhibit 1 to the Transmittal Declaration Of Scott D. Brown In Support Of The Moving Defendants' Motion To Dismiss The Amended Complaint ("Brown Decl.").

therein as true (except where, as noted below, those allegations are contradicted by unambiguous documentation referenced in the Amended Complaint). See Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998). To survive a motion to dismiss, allegations "must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007). See also Banco Santander de Puerto Rico v. Lopez-Stubbe (In re Colonial Mortgage Bankers Corp.), 324 F.3d 12, 15 (1st Cir. 2003) (on motion to dismiss, the court need not credit bald assertions or unsupportable conclusions).

Further, as the U.S. Supreme Court recently stated, "courts must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 2509 (2007). See Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988) (recognizing that "when plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading" (internal quotation marks omitted)); see also Beddall, 137 F.3d at 17 (First Circuit affirmed dismissal of complaint based on district court's consideration on a motion to dismiss of a trust agreement, even though that document was not attached to the complaint).

Here, plaintiffs have submitted with their Amended Complaint only one exhibit, a CD-Rom with two audio files (the "Amended Complaint Exhibit") comparing short portions of the Steele Song with short portions of the Bon Jovi Song. With the original Complaint, however, plaintiffs had attached a total of nine exhibits, designated A-I (referred to herein as "Compl. Ex. __"), none of which have been resubmitted by plaintiffs with the Amended Complaint. Nevertheless, the Court should consider, in addition to the facts alleged in the Amended

Complaint and Plaintiffs' Opposition, the documents and materials included as exhibits to both versions of the Complaint.[5]

In addition, the Court should consider materials (such as the Turner Promo) that are incorporated by reference in the Amended Complaint and which constitute an essential part of the allegations. See Tellabs, Inc, 127 S. Ct. at 2509. These include, in addition to the Turner Promo: (i) transcripts of the lyrics of the Bon Jovi Song as they appear on the Turner Promo (Brown Decl. Ex. 2) and on the Bon Jovi album Lost Highway (Brown Decl. Ex. 3), and (ii) the U.S. Copyright Office deposit materials for the Steele copyright (Brown Decl. Ex. 4). For the convenience of the Court in making lyrics comparisons, Brown Declaration Exhibits 5 and 6 present the subject lyrics in side-by-side formats. Finally, transcripts of the lyrics contained on Steele's Compl. Ex. I CD-Rom (submitted with the original Complaint) are also attached to the Brown Declaration as Exhibits 7 and 8.

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT

A straightforward, side-by-side comparison of the two works at issue reveals dramatic dissimilarities and a complete lack of similarity in any copyrightable expression. Accordingly, this Court should find, as a matter of law, that plaintiffs are entirely unable to satisfy the essential element of substantial similarity, as to either lyrics or music, to support their copyright infringement claim. See Johnson v. Gordon, 409 F.3d 12, 17 (1st Cir. 2005) (affirming grant of summary judgment dismissing complaint in music copyright case); O'Neill v. Dell Publish. Co.,

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5 A party's assertion of fact in a pleading is considered a judicial admission to which the party is bound. See Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., 976 F.2d 58, 61-62 (1st Cir. 1992); Diomed, Inc. v. Vascular Solutions, Inc., 417 F. Supp. 2d 137, 141 (D. Mass. 2006); Vallejo Dev. Co. v. Beck Dev. Co., Inc., 24 Cal. App. 4th 929, 946 (Cal. Ct. App. 1994) (plaintiff cannot avoid disadvantageous facts in its complaint, or an exhibit thereto, simply by amending the complaint).

630 F.2d 685, 690 (1st Cir. 1980) (affirming grant of summary judgment to defendants based on the court's review of the two novels at issue and its finding that "an ordinary reasonable person would find no similarity of expression and only a remote semblance of ideas"). See also Tracy v. Winfrey, 282 Fed. App'x 846, 847 (1st Cir. 2008) (unpublished) (affirming motion to dismiss under Rule 12(b)(6) where the "'complaint fails to allege facts sufficient to support a claim of copyright infringement'" (quoting the trial court)).

Steele's Derivative Version has not been registered, as it is not in the Copyright Office deposit copy. (See Brown Decl. Ex. 4.) Thus, the Court lacks subject matter jurisdiction over any infringement claim based on elements found only in the Derivative Version, and not in the registered Steele Song. 17 U.S.C. § 411; see Torres-Negron v. J & N Records, LLC, 504 F.3d 151, 160 (1st Cir. 2007).[6] In addition, the Derivative Version could not have been copied in any event, since plaintiffs affirmatively assert in their opposition that defendants did not have access to the Derivative Version. (See Pls.' Opp'n ¶ 10: "However, the defense did not have access to this new version, only the knowledge that I was recording it." (emphasis in original).) Finally, even if the Derivative Version is analyzed by means of a side-by-side comparison, no reasonable ordinary observer could find substantial similarity.

A. Applicable Standards

From the Amended Complaint, it appears that plaintiffs are basing their copyright infringement claim on the contentions that: (i) the music and lyrics of the Bon Jovi Song infringe the Steele Song (and also perhaps his Derivative Version -- the Amended Complaint is unclear

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6 The Amended Complaint expressly references and relies on the registration (as it must in order to state a claim of copyright infringement). See Am. Compl. ¶ 28 ("Bart submitted his song to the Library of Congress and received Copyright certificate Pau003052330, dated June 30, 2006."). The Court may accordingly, as discussed above, properly consider the Copyright Office deposit copy in evaluating this motion to dismiss. See Fudge, 840 F.2d at 1015; Beddall, 137 F.3d at 17.

on this issue), and (ii) the Turner Promo infringes one or both of Steele's songs. To succeed on this claim, plaintiffs would have to prove: (i) ownership of a valid copyright, and (ii) unauthorized copying of constituent elements of the work that are original. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 813 (1st Cir. 1995). Steele's copyright claim fails the second prong of this test.[7]

1. **Substantial Similarity**

In order to state a legally sufficient claim under the second prong, there must be a showing that the works at issue are "substantially similar." Johnson, 409 F.3d at 18; Lotus, 49 F.3d at 813. Mere allegations of copying alone are not sufficient to state a claim, because not all copying amounts to copyright infringement. Feist, 499 U.S. at 361. For example, copyright law does not protect ideas or concepts. See 17 U.S.C. § 102(b); Johnson, 409 F.3d at 19. Nor does copyright law protect unoriginal expression, including expression that is either (i) commonplace, or (ii) "*scène a faire*" -- "stock" characters, settings, or other standard elements that follow naturally or are indispensable to a particular theme or treatment of a topic. See CMM Cable Rep, Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1522 (1st Cir. 1996).

Without any legal support, Steele tries to avoid the application of the substantial similarity principle. He argues that "similarity . . . is not an issue" (Pls.' Opp'n ¶ 2), that his

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[7] The two "unincorporated business organization" plaintiffs do not own any relevant copyright rights, as the copyright at issue in this case was applied for and issued to plaintiff Steele (Compl. Ex. H). Thus, the two "unincorporated business organization" plaintiffs cannot prosecute a copyright claim and should be dismissed.

The Court should also dismiss these two "unincorporated business organization[s]" (Am. Compl. ¶¶ 2-3) because they are not represented by counsel and cannot proceed pro se or be represented by Steele. See Rowland v. Calif. Men's Colony, 506 U.S. 194, 201-03 (1992); Graves v. Houston, Civ. A. No. 96-12185-MLW, 1997 WL 627557, at *3 (D. Mass. Sept. 16, 1997). See also D. Mass. L. R. 83.4.2(d) ("The court will not recognize the appearance of a firm or professional corporation unless it is accompanied by the appearance of at least one (1) attorney.").

copyright infringement cause of action "does not depend upon a showing of substantial similarity" (id. ¶ 7), and finally that he is entitled to rely on "a lower threshold of similarity." (Id. ¶ 16.) All of these arguments directly conflict with the controlling First Circuit case law, which mandates a substantial similarity analysis and does not provide for any "watered-down" version of that standard. E.g., Johnson, 409 F.3d at 18; Lotus, 49 F.3d at 813.[8]

In comparing works to determine whether they are substantially similar, courts use the ordinary observer -- or "ordinary listener" -- test. Johnson, 409 F.3d at 18. A work is considered substantially similar if, after reading, listening, or viewing the protectible elements of the works at issue side-by-side, an ordinary person of reasonable attentiveness would conclude that the alleged infringer appropriated the plaintiff's protectible expression. See Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 33 (1st Cir. 2001); Johnson, 409 F.3d at 18.

2. Dissection/Side-by-Side Comparison

Importantly, before the requisite side-by-side comparison is made, the works at issue are first dissected to remove (i.e., filter out) all aspects that are not protected by copyright, including concepts, ideas, unoriginal expression, and public domain material. Yankee Candle, 259 F.3d at 34; Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608-09 (1st Cir. 1988).

Once all of the non-protected elements are filtered out, the remaining protectible aspects of a copyright owner's work are compared side-by-side to the allegedly infringing work to determine whether any alleged copying appropriated elements protected by copyright law. See Yankee Candle, 259 F.3d at 34; Concrete Mach., 843 F.2d at 608-09; Johnson, 409 F.3d at 18-19. This ensures that no single author can monopolize elements that should belong in the public

[8] Steele also devotes much effort to contending that defendants had "access" to the Steele Song (but not the Derivative Version). (E.g., Pls.' Opp'n ¶¶ 7, 10.) Neither access nor copying, however, can salvage a copyright infringement claim if the works at issue are not substantially similar.

domain, such as concepts and common expression. See, e.g., Matthews v. Freedman, 157 F.3d 25, 28 (1st Cir. 1998).

B. Substantial Similarity Analysis As To The Bon Jovi Song

1. Music Comparison

The legal insufficiency of Steele's assertion as to the musical elements of the Steele Song compared to the Bon Jovi Song is evident from simply listening to and comparing the two under the ordinary listener standard -- they sound totally different.

Indeed, the original Complaint included a "musicology" analysis that did not even attempt to assert that the music in the Steele Song and the Bon Jovi Song were substantially similar. (See Compl. Ex. C.) It also attached a Boston Magazine article in which the writer judged the music as sounding different. (See id. Ex. G at 85.)

In the Amended Complaint Exhibit, Steele now offers "side-by-side" audio comparisons of a few carefully chosen excerpts of the two works. Tellingly, even when presented in plaintiffs' self-serving format, there is no musical similarity on its face and as a matter of law.[9]

2. Lyrics Comparison

As to the expression contained in the lyrics of the Steele Song and the Bon Jovi Song, the Court also can readily see that there is no shared protectible expression. The lyrics for the Steele Song (Brown Decl. Ex. 8) cheer the Red Sox on to victory, providing numerous, easily identifiable references to the Red Sox and Fenway Park (e.g., "Pesky's Pole," "Yawkey Way," "Rem-Dawg" and "Landsdown[e] Street"), and invite the crowd to cheer along: "Here we go Red Sox, here we go." The chorus commands: "Now get up off your seats, Everybody scream, Man I really love this team."

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[9] No music comparison with the Derivative Version is possible, as Steele has submitted no evidence or contention to indicate that it was ever recorded.

The lyrics to the Bon Jovi Song are completely different. In that song, <u>there is not a single reference to the game of baseball, or even to Boston.</u> Rather, it describes nostalgia for an unidentified hometown and references memories and feeling at home in "this town." (Brown Decl. Exs. 2-3.)[10]

The only lyrical aspects of the songs at issue that Steele asserts to be similar are described as follows: "rhyming 'goin <u>round</u>' 'home<u>town</u>' & '<u>bound</u>' in the 1st and 2nd lines." (Pls.' Opp'n ¶ 21.) The relevant lyrics are as follows:

<u>Steele Song</u>	<u>Bon Jovi Song</u>
Have you heard the news that's goin' 'round? Our Hometown team is series bound (or: there's a great big trophy here in town) Word is out on Yawkey Way Our boys in red have come to play Get up off your seats, Everybody scream Man, I really love this team!	Yeah, let the world keep spinning 'round and 'round This is where it all goes down, down, down That's why I love this town That's why I keep comin' 'round

This is a trivial alleged similarity (as well as one based on commonplace lyrics). The rhyming of "town" and "round" is also used in countless songs in American music, including the traditional childhood favorite "Wheels on the Bus" (lyrics: "the wheels on the bus go round and round, all through the town") (source unknown) and "The Sidewalks of New York" (lyrics: "East Side, West Side, all around the town") (copyrighted 1894, Howley, Haviland & Co.) The use of a rhyming pair also is not protectible because copyright law provides no protection to "fragmentary words and phrases." <u>CMM Cable Rep</u>, 97 F. 3d at 1519-20. Thus, arguments based on "round," "bound," and "home town" must be filtered out (<u>i.e.</u>, ignored) before conducting the side-by-side comparison.

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[10] Curiously, on Steele's website, <u>http://www.myspace.com/chelseacitycouncil</u>, in an entry entitled "Let's Set the Record Straight, Folks . . . ." Steele states categorically that "I never accused Bon Jovi of stealing lyrics or anything." The same website contains links to many of his principal court filings in this lawsuit.

In addition, lyrics such as "I love this team" and "I love this town" are common clichés not deserving of protection. The Court can take judicial notice of the results of searches of the ASCAP and BMI online song databases (available at http://www.ascap.com/ace/search.cfm ?mode=search and http://repertoire.bmi.com/startpage.asp, respectively),[11] which reveal that there are nearly 100 songs that begin with the phrase "I love this ___." (See Brown Decl. Ex. 9 (ASCAP database, 32 songs), Ex. 10 (BMI database, almost 100 entries).)[12] Other songs beginning with the phrase "I love this" on the ASCAP search (Brown Decl. Ex. 9) are, for example: "I love this game" (numbers 9-11), "I love this place" (numbers 23 through 26) and "I love this song" (numbers 27 and 28). On the BMI search (Brown Decl. Ex. 10), eight other songs appear besides the Bon Jovi Song that are titled "I love this town." Steele cannot claim copyright exclusivity on lyrics that contain such commonly used words. See Johnson, 409 F.3d at 24 ("clichéd language and expressions that convey ideas generally expressed in a limited number of stereotypical ways are outside the scope of copyright protection"). See also Matthews v. Freedman, 157 F.3d 25, 28 (1st Cir. 1998) ("Someone who loves me went to Boston" unprotectible); Johnson, 409 F.3d at 24 ("You're the One for Me" unprotectible); CMM Cable Rep, 97 F.3d at 1520 ("If you're still 'on the clock' at quitting time" unprotectible); O'Leary v. Books, No. 08 CV 08, 2008 WL 3889867, at *2 n.6 (N.D. Ill. Aug. 18, 2008) (rejecting alleged similarity based on phrase "guilty as charged").

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11 See, e.g., O'Toole v. Northrop Grumman Corp., 499 F.3d 1218, 1224-25 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."); Coleman v. Dretke, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of information on website); Schaffer v. Clinton, 240 F.3d 878, 885 n.8 (10th Cir. 2001) (taking judicial notice of information available on political website).

12 The Bon Jovi Song appears at number 32 on the ASCAP database, and it also appears on the BMI list. The Steele songs do not appear on these lists because they start with the word "Man."

C. Substantial Similarity Analysis As To The Turner Promo

As noted, the Amended Complaint alleges that the Turner Promo was created (or, in plaintiffs' vernacular, "temp tracked") by Turner in connection with its promotion of the 2007 Major League Baseball postseason. (Am. Compl. ¶¶ 25-27.) The Turner Promo combines (i) the Bon Jovi Song, (ii) video footage of the Bon Jovi band performing the song in concert, and (iii) baseball visuals, e.g., major league ballplayers in action (hitting, pitching, running bases, sliding), cheering fans, and scenes of well-known baseball stadiums on game days. (Brown Decl. Ex. 1.)

The gravamen of Steele's "temp tracking" allegations concerning the Turner Promo is that alleged similarities between his song and the Turner Promo indicate that the latter "was created with my song, that is, that the video images were selected to track my song and its lyrics." (Pls.' Opp'n ¶ 20.) The contention seems to be that Turner, or Major League Baseball, first used the Steele Song to create a montage of visual images, then sought out Bon Jovi to compose a song that could be used with the Turner Promo visual images, thereby allegedly creating a "derivative commercial audio visual work." (See, e.g., id. ¶ 13.)[13]

Viewing the Turner Promo conclusively establishes that Steele's contention does not raise a cognizable claim. The Turner Promo is comprised of images of the Bon Jovi band playing the Bon Jovi Song at an outdoor concert interlaced with footage in and around Major League Baseball stadiums, of baseball players making great plays (e.g., pitching, hitting home runs, sliding into base) and "high-fiving" each other, and fans cheering. Many of the images are taken from games at well-known stadiums around the country and include recognizable visuals of the Twins, Padres, Phillies, Tigers, Braves, Yankees, Brewers, Mets, Indians and Angels, as well as the Red Sox. No rights of Steele are infringed by using such footage in a video promoting the

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[13] Characterizing the Turner Promo or the Bon Jovi Song as a "derivative work" does not in any way change Steele's obligation to prove substantial similarity. See Nimmer on Copyright § 8.09[A].

Major League Baseball postseason. Steele does not own a monopoly on all songs promoting Major League Baseball, and visual images of ball players in action and fans cheering are certainly *scènes a faire*.[14]

Moreover, directly contradicting Steele's argument that the Turner Promo images were selected to track Steele's Song and lyrics, the Turner Promo is instead timed to precisely coincide with lyrics in the Bon Jovi Song. For example:

- When Bon Jovi sings "friendly face" there is a close-up of a smiling face;
- When he sings "walkin' on this street," the video shows crowds walking;
- "pounding underneath my feet" is accompanied by a close-up of stomping feet;
- "keeps spinning round" is matched with a spinning aerial shot of a stadium;
- Where Bon Jovi sings "down, down, down" there are three coinciding images of ball players sliding into bases;
- When Bon Jovi sings "shoutin' from the rooftops," there are fans shouting from high up in the bleachers;
- With "dancin' in the bars," the visual shows images of people dancing in the stadium; and
- A great catch is timed perfectly to "you got it" lyrics.

These match-ups, which are appropriately considered at this stage because they are the essence of the allegedly infringing work, show that the Turner Promo visuals were "cued" from the Bon

[14] See, e.g., Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir 1986) (explaining that depictions of police life in the South Bronx necessarily include images of "drunks, prostitutes, vermin, and derelict cars" which are therefore unprotectible); Hoch v. MasterCard Int'l Inc., 284 F. Supp. 2d 1217, 1223 (D. Minn. 2003) (highway signs, landmarks for geographic identification, etc. on baseball stadium road trip found to be *scènes a faire*).

Jovi Song (which, it must be emphasized again, has nothing whatsoever to do with baseball), not the lyrics in the Steele Song.[15]

D. Alleged Taking Of Steele's "Marketing Concept"

Steele alleges that in 2004 he began working on a "marketing concept" that would permit adaptations of the Steele Song for use in any town. (Am. Compl. ¶ 22.) His concept was for a song that "could work for any teams' hometown advertising market." (Pls' Opp'n ¶ 13.) Steele's Derivative Version, which is identified in the original Complaint as his marketing concept (Compl. ¶ 9), requires modifying the Steele Song by replacing the Red Sox references with (i) the local team's color, (ii) the street on which its stadium is located or with which it is identified (instead of Yawkey Way/Landsdown[e] Street), (iii) the name of the hometown or city, and (iv) the local sports announcer (instead of "Rem-Dawg").

No alleged "copying" of the "marketing concept" can amount to copyright infringement, because, as noted, neither ideas nor concepts are included within the scope of copyright protection. See 17 U.S.C. § 102(b). In addition, there is no credible basis for accusing defendants of having used Steele's marketing concept. The Bon Jovi Song is, as noted, not even about baseball, much less a song tailored for an individual team, and the Turner Promo was used to promote post-season play -- with recognizable visuals of almost one dozen major league teams, it surely was not a specific team's "fight song." And, certainly, Steele did not originate, and cannot claim exclusive rights to, the concept of "fight songs" for individual sports teams.

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15 With respect to the allegations in the original Complaint concerning the use of "Yawkey Way" (e.g. Compl. ¶ 12), as a name it is not protectible by copyright. CMM Cable Rep, 97 F.3d at 1520. Additionally, it is such a famous reference to one of the boundaries of Fenway Park that a reference to it in the context of baseball is *scène a faire*. Certainly Turner was within its rights to have included prominent visuals of the Red Sox -- perhaps the preeminent baseball team in the 2007 postseason -- in its promotional piece.

* * *

In sum, there are no protectible elements in the Steele Song (or even the Derivative Version) that are sufficiently similar to elements in the Turner Promo that rise to the level of protectible expression. See McMahon v. Prentice-Hall, Inc., 486 F. Supp 1296, 1304 (E.D. Mo. 1980) (where there are few and widely scattered alleged coincidences that are trite and insignificant, it "is clear beyond cavil that there is no substantial similarity of expression in the works"). The copyright claim can, and should, be dismissed on this motion to dismiss, with prejudice. See O'Leary, 2008 WL 3889867, at *2-3 (citing Bell Atlantic and granting with prejudice motion to dismiss copyright infringement claim based on substantial similarity analysis of the copyrighted work compared to the alleged infringing work).

II. PLAINTIFFS' CH. 93A CLAIM SHOULD BE DISMISSED AS A MATTER OF LAW

Plaintiffs' Ch. 93A claim (Count II) must be dismissed because (i) the Amended Complaint fails to allege facts sufficient to support the elements of a Ch. 93A claim, and (ii) it is preempted by the federal Copyright Act.

A. The Plaintiffs Have Not Pled -- And Cannot Plead -- The Essential Elements Of A Ch. 93A Claim

Both the Amended Complaint and Plaintiffs' Opposition are devoted almost exclusively, if not entirely, to pleading a copyright infringement claim. To illustrate this point, one need look no further than the first sentence in Plaintiffs' Opposition, which states that "the central issue in this case . . . is the unauthorized, uncompensated use of my song as a 'temp track' for the creation of an audio visual work which was, in turn, used to create the final soundtrack song for the video." (Pls.' Opp'n ¶ 1.) Plaintiffs' Opposition is replete with copyright law references, for example, more than 30 uses of the term "derivative work." Even plaintiffs' protests that defendants have violated rights of ASCAP (e.g., id.: "screwing me the artist, and ASCAP as well") are completely intertwined with the alleged copyright infringement.

There is no specificity in the Amended Complaint as to the particular acts that give rise to the alleged violation of Ch. 93A -- it is merely alleged that "defendants actions are unfair and deceptive acts and practices willfully and knowingly committed." (Am. Compl. ¶ 37.) This is simply not enough to state a legally sufficient claim. While the Moving Defendants are left to speculate, it appears that the only substantive description of alleged "unfair or deceptive" conduct is the assertion that certain defendants registered the Bon Jovi Song with ASCAP "without giving me [Steele] the due credit they know I deserve." (Pls.' Opp'n ¶ 18.) This, in reality, is a claim of "reverse palming off" i.e., alleging failure to give Steele credit as the alleged true author of the Bon Jovi song. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 27 n.1 (2003) (defining reverse passing or palming off as when a "producer so misrepresents someone else's goods or services as his own").

Reverse palming off, however, is a discredited theory upon which to base a claim of unfair competition or deception. In Dastar, the Supreme Court held that an author could not assert a Lanham Act palming-off claim on the theory that the author was not properly credited on an unauthorized work, and that to conclude otherwise would improperly confuse the separate and distinct goals of the copyright statute and the Lanham Act. Id. at 37-38. While Dastar did not involve a Ch. 93A claim, the logic of the decision is both applicable here and compelling. Moreover, it is worth noting that, in the original Complaint, plaintiffs did, indeed, assert a reverse palming-off claim under the Lanham Act, but, in the Amended Complaint, they simply have changed the label for their second count to a Ch. 93A claim, in a transparent effort to avoid the holding of Dastar.

Nor does the Amended Complaint reveal whether plaintiffs are attempting to proceed under Section 9 or Section 11 of Ch. 93A, each of which provides for different remedies and has different procedural and substantive prerequisites. Because they failed to give the pre-lawsuit notice required by Section 9,[16] plaintiffs are presumably attempting to assert a Section 11 claim as parties engaged in business activity. Any claim under Section 11 fails because plaintiffs have not alleged -- and indeed cannot allege -- that the purported unfair and deceptive conduct attained the requisite level of "rascality" to bring it within the statute's proscription. See Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. App. Ct. 1979) (To survive a motion to dismiss, "[t]he objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.").

Henry v. National Geographic Society & NGE, 147 F. Supp. 2d 16, 22 (D. Mass. 2001) is directly on point. In that case, the plaintiff photographer filed suit against a publisher for allegedly using the plaintiff's photographs beyond the scope of an agreed license. Id. at 18. The court granted defendant summary judgment on the Ch. 93A claim, reasoning that the defendant's alleged unlicensed use of the plaintiff's photographs (which the court found were subject to copyright protection) "was not so unscrupulous and intolerable to rise to the level necessary to support a Chapter 93A claim." See also Little, Brown & Co. v. Am. Paper Recycling Corp., 824 F. Supp. 11, 15 (D. Mass. 1993) (rejecting Chapter 93A claim reasoning that the defendants'

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[16] The plain language of Section 9 expressly requires that "[a]t least thirty days prior to the filing of any such action" the plaintiffs must deliver a written demand for relief to the defendants. M.G.L. ch. 93A § 9 (emphasis added). The Supreme Judicial Court has held that "[a] demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved." Spring v. Geriatric Auth. of Holyoke, 475 N.E.2d 727, 735 (Mass. 1985). Moreover, the defect is not curable. See Fulco v. Cont'l Cablevision, Inc., Civ. A. No. 89-1342-S, slip op. at 11-12 (D. Mass. Oct. 30, 1992) (attached hereto as Exhibit A).

actions, "no more than a garden-variety breach of contract," did not "attain a level of rascality" that would support a finding of liability).

In sum, the Amended Complaint fails to allege a legally sufficient Ch. 93A claim.

B. Federal Copyright Preemption

1. Legal Standard

The federal Copyright Act confers exclusive jurisdiction over all copyright infringement claims. 17 U.S.C. §§ 301(1)-(b). Courts apply a "bipartite test" to determine whether a state law claim is preempted by the Copyright Act. See Patricia Kennedy & Co. v. Zam-Cul Enters., Inc., 830 F. Supp. 53, 55-56 (D. Mass. 1993). First, the court must determine whether the work is protected by copyright law. Id. at 55. Second, if the work is protected, the court must determine whether the state law claim incorporates an "extra element" that is qualitatively different from the copyright claim. Id. at 56. If there is no "extra element," the claim is preempted by the Copyright Act. Id. In applying this analysis, courts "focus not upon the label affixed to the state cause of action, but rather upon what plaintiff seeks to protect . . . and the rights sought to be enforced." Id.

2. Preemption Here Is Clear

The Ch. 93A claim is preempted. Several decisions in this district have expressly held that allegations concerning the mere copying and use of a copyrighted work cannot support a violation of Ch. 93A based on unfair competition because these claims are preempted by copyright law. See Patricia Kennedy & Co., 830 F. Supp. at 55-56 (holding that "state law causes of action premised on theories such as misappropriation or unfair competition where the allegations are concerned solely with the copying or replication of protected works of authorship are preempted"); Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 108-09 (D. Mass. 2001) (granting motion to dismiss and holding that Ch. 93A claim was preempted by the Copyright Act); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201, 215 n.6 (D. Mass. 1986) ("To the extent that plaintiff's interest in his copyright is protected by federal copyright law, any cause of action under state law is pre[e]mpted."). Indeed, even where the alleged copying rises to the level of willful or "unscrupulous or commercially immoral" conduct, preemption will still apply and defeat the Ch. 93A claim. Tingley Sys., Inc., 152 F. Supp. 2d at 108-09.

This Court should reach the same result here. Plaintiffs' purported Ch. 93A claim is nothing more than a restyled version of the copyright claim. As to the first factor, the Steele Song is protected by copyright law. As to the second factor, there is no extra, qualitatively different element that distinguishes the Ch. 93A claim from the copyright claim because plaintiffs are only alleging improper copying and use of the song -- the identical right Steele seeks to protect through the copyright claim.

Henry, as noted, a lawsuit by a photographer who challenged the alleged unlicensed use of his photographs, is instructive. 147 F. Supp. 2d at 23. As to the first preemption factor, the court concluded that the photographs constituted a work protected by the Copyright Act. Id. As to the second factor, the court concluded that the plaintiff's Ch. 93A claim sought only "to protect his right to reproduce the . . . photographs" which was equivalent to the right protected by the Copyright Act. Id. See also Patricia Kennedy & Co., 830 F. Supp. at 55-56; Nimmer on Copyright § 1.01(B)(1)(e) (Lexis 2008) (state law claims based on reverse passing off are preempted by the copyright statute). In sum, the Ch. 93A claim is preempted by the federal Copyright Act and should also be dismissed on that basis. See, e.g., O'Leary, 2008 WL 3889867, at *3 (holding that "any potential state law claims . . . were preempted by the Copyright Act").

CONCLUSION

For the foregoing reasons, the Court should grant the Moving Defendants' motion to dismiss the Amended Complaint in its entirety.

Dated: February 18, 2009
Boston, Massachusetts

Respectfully submitted,

/s/ Matthew J. Matule

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CERTIFICATE OF SERVICE

I, Matthew J. Matule, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on February 18, 2009.

Dated: February 18, 2009

/s/ Matthew J. Matule
Matthew J. Matule

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SALVATORE N. FULCO, et al.,
Plaintiffs

v.

CONTINENTAL CABLEVISION, INC., et al.,
Defendants.

CIVIL ACTION
NO. 89-1342-S

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON CHAPTER 93A CLAIMS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON FEDERAL SECURITIES LAW CLAIM, PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON BREACH OF FIDUCIARY DUTY CLAIM, AND DEFENDANTS' MOTION TO STRIKE DEMAND FOR JURY TRIAL

October 30, 1992

SKINNER, D.J.

This case arises from plaintiffs' allegations that defendants used deceptive financial disclosures in furtherance of a fraudulent scheme to buy out plaintiffs' interests in four limited partnerships at prices substantially lower than fair market value. Plaintiff class is composed of more than 1,000 individuals who invested in one of four Massachusetts limited partnerships.[1] The limited partnerships own or owned cable television systems in different geographic markets and are identical in all respects relevant to the motions before this court.

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[1] This dispute, with the exception of federal claims, is governed by Massachusetts law.

Defendant Continental Cablevision, Inc., through a subsidiary owns the corporate general partner of each limited partnership. Defendants Amos Hostetter, Jr. and Timothy Neher are officers and directors of Continental. Hostetter, Neher, Continental, and the subsidiary are referred to as "Continental."

In May 1989, Continental proposed a two step process to buy-out the limited partners. First, the partnerships would redeem all the limited partnership units held by unaffiliated or "outside" limited partners. Second, the partnerships would then sell all remaining assets to four newly created corporate affiliates of Continental. Each transaction needed majority approval of the unaffiliated limited partners. Continental engaged defendant Shearson Lehman Hutton, Inc. to facilitate the buy-out. Shearson, who would receive a contingency fee only if the transaction were approved by the limited partners, issued "fairness opinions" assessing the relative attractiveness of the buy-out proposals. In addition, Continental engaged defendant Malarkey-Taylor Associates, Inc., to prepare an appraisal of the limited partnership cable system assets. Continental solicited the limited partners' approval by distributing four Statements of Information, each statement included the Shearson fairness opinion and an excerpt from the Malarkey-Taylor appraisal. Continental, Shearson, and Malarkey-Taylor are referred to as the "defendants."

A majority of the limited partners of each partnership approved the buy-out transactions in June 1989, and the transactions closed in July 1989. Several individuals on behalf of themselves and the class of limited partners filed suits throughout June

1989 challenging the proposed buy-out. In October 1989, the various actions were consolidated and an amended complaint was filed.

Continental, Shearson, and Malarkey-Taylor have moved for summary judgment on Count X of the consolidated amended complaint (unfair practices under Chapter 93A), Malarkey-Taylor has moved for summary judgment on Count I of the consolidated amended complaint (violation of § 10(b) of the 1934 Securities Act), and plaintiffs have moved for partial summary judgment against Continental on Count IX of the consolidated amended complaint (breach of fiduciary duty). In addition, Continental, Shearson, and Malarkey-Taylor have moved to strike plaintiffs' demand for jury trial on the fiduciary duty and Chapter 93A claims.[2]

I. Motions For Summary Judgment

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Although the moving

[2] In connection with these substantive motions, the parties have filed various motions seeking leave to file extended memoranda in excess of twenty pages, to file reply memoranda, and to file supplemental memoranda and responses. These motions are **ALLOWED.**

party bears the burden of demonstrating the absence of any genuine issue of material fact, this burden may be discharged by the movant pointing out an absence of evidence supporting the nonmovant's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). However, evidence must be viewed in a light most favorable to the nonmovant and all reasonable inferences must be drawn in its favor. See, e.g., United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

A. The Chapter 93A Claims

Chapter 93A declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws Ann. ch. 93A, §2 (West 1984). The statute establishes two causes of action, each with different remedies and different procedural and substantive prerequisites. The Supreme Judicial Court of Massachusetts recently explained:

> General Laws c. 93A, § 9, applies to the consumer, "an individual who participates in commercial transactions on a private, nonprofessional basis." By contrast, G.L. c. 93A, § 11, applies to the business person, "[a]ny person who engages in the conduct of any trade or commerce." Section 11 "was intended to refer to individuals acting in a business context in their dealings with other business persons and not to every commercial transaction whatsoever."

Shawmut Community Bank, N.A. v. Zagami, 586 N.E.2d 962, 966 (Mass. 1992) (citations omitted). In addition to this distinction, the actions differ in two other respects: Treble damages are available only under § 11 and claims under § 9 are subject to a presuit demand letter requirement.

The plaintiffs' consolidated amended complaint alleges only a general claim under

93A, without identifying the specific code section asserted. Nonetheless, in briefs filed with this court, the plaintiffs clearly assert that a claim lies under both § 9 and § 11. Continental, Shearson, and Malarkey-Taylor argue that any Chapter 93A claim asserted by plaintiffs must fail because the buy-out of the limited partnership units was a private transaction among partners, not implicating "trade or commerce" as defined by the statute. Specifically, defendants allege that the § 11 claim fails because plaintiffs were acting as private personal investors. Defendants also argue that the § 9 claim fails because plaintiffs failed to serve a demand notice on defendants prior to initiating suit as required by the statute.

Though I find that the buy-out transactions are within the scope of Chapter 93A, I grant the defendants' motion for summary judgment on the § 11 claim because plaintiffs were not engaged in trade or commerce as defined by the statute and interpreted by Massachusetts courts, and I grant summary judgment on the § 9 claim because plaintiffs failed to comply with the presuit demand letter requirement.

1. Chapter 93A, Section 11

To maintain a claim under § 11, a plaintiff is required to show that both parties to the allegedly unfair transaction were engaged in trade or commerce.[3] The Supreme

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[3] The statute provides, in pertinent part:

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful . . . may, as hereinafter provided, bring an action . . . for

Judicial Court has held that in using the terms "trade or commerce" the legislature "intended to refer specifically to individuals acting in a business context." Lantner v. Carson, 373 N.E.2d 973, 976 (Mass. 1978) (noting that if the phrase "in the conduct of trade or business" were interpreted to apply to any commercial transaction whatsoever, the "persons" covered by § 9 and § 11 would be identical, thereby making § 11 superfluous).

Plaintiffs rightly point out that in 1988 the Massachusetts legislature amended Chapter 93A, to included unfair and deceptive conduct in connection with the purchase and sale of securities. Mass. Gen. Laws Ann. ch. 93A, § 1(b) (West Supp. 1992). At the same time, the legislature amended § 9 to limit recovery to actual damages, but retained treble damages under § 11. The import of these amendments is twofold: First, the transaction involving the redemption of the limited partnership units is within the scope of 93A. Thus, plaintiffs may state a claim under either § 9 or § 11 if the other relevant requirements are satisfied. Galbraith v. Affiliated Banc Corp., No. 90-12546, slip op. at 41 (D. Mass. May 2, 1991); see Alton v. Prudential-Bache Sec., Inc., 753 F. Supp. 39, 42 (D. Mass. 1990). Second, in light of the significant differences in remedies under the two sections, "plaintiffs must take seriously the obligation to allege facts supporting every substantive element of their section 11 claim." Galbraith, slip op. at 42.

> damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Mass. Gen. Laws Ann. ch. 93A, § 11 (West Supp. 1992) (emphasis added).

In this case, the issue is whether plaintiffs, in their capacity as limited partners, and defendants, in their respective corporate capacities, were acting as private, nonprofessional persons in commercial transactions, or as business persons in a business context.[4] Zagami, 586 N.E.2d at 966. The Supreme Judicial Court has articulated several factors relevant to making this determination:

> [W]e assess the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties. Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons (as in the sale of a home), and whether the participant played an active part in the transaction.

Begelfer v. Najarian, 409 N.E.2d 167, 176 (Mass. 1980) (citation omitted).

I find that defendants were acting as business persons in a business context. Continental, through employees and corporate affiliates, planned and implemented a scheme to gain sole ownership of the cable television operations in order to further Continental's corporate interests. Shearson and Malarkey-Taylor were hired and compensated for their technical skills and business expertise. Continental, Shearson, and Malarkey-Taylor played active roles, within their respective lines of business, for business, as opposed to personal, benefit.

In contrast, plaintiffs were acting as passive private investors who took no active

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[4] In a prior opinion, I declined to grant Continental's motion to dismiss the Chapter 93A claims relying primarily on the factual assessment required under Newton v. Moffie, 434 N.E.2d 656 (Mass. App. Ct. 1982) (holding that a careful factual assessment is required to determine if a private transaction between members of the same partnership is actionable under § 11). Since I issued that memorandum, however, the Supreme Judicial Court announced its decision in Zagami, which I believe reframes the analysis.

role in managing the limited partnerships or negotiating, structuring, or implementing the buy-out. Plaintiffs have offered no evidence that they had any active involvement with the management of the limited partnership or the cable business, or that they invested for any reason other than personal benefit. Instead, plaintiffs emphasize the grand scale of the buy-out transaction -- approximately 1200 limited partners were involved in a half-billion dollar sale of four cable television operations. Plaintiffs, however, mistake the scale of the transaction for its character. Passive investors, large or small, are not business persons within the meaning of § 11.

Though the Supreme Judicial Court has not specifically considered whether § 11 is available as a remedy to an investor in a limited partnership, the Court's recent opinion in Zagami indicates that "investors" are not actors in a business context. The Zagami plaintiff, a plumber by trade, owned a piece of commercial real estate where he operated his plumbing business and leased space to several tenants. The plaintiff entered several loan agreements with the defendant bank and a tenant under which the loan proceeds were invested in the tenant's business. The Court denied the plaintiff relief under § 11, reasoning that "if [plaintiff] had been dealing with the bank as a plumber or as a commercial landlord, then he could have proceeded under § 11. But in taking out loans and investing the proceeds, he was acting on a private, nonbusiness basis." Zagami, 586 N.E.2d at 966. Though not directly on point, this holding highlights the importance of determining the character of a plaintiff's involvement in an allegedly unfair transaction. In the case before this court, the plaintiffs were acting as investors, not business persons.

My conclusion is consistent with prior holdings of this court. In Galbraith, supra, a plaintiff, who purchased stock for himself and on behalf of a profit sharing plan, alleged that the defendant corporation and several of its officers violated securities laws by misrepresenting the financial health and future prospects of the corporation. Despite the plaintiff's position as the sole administrator of the profit sharing plan, the court dismissed the claim under Chapter 93A, § 11 because the plaintiff was "acting as an individual making a private investment rather than as a business person." Galbraith, slip op. at 40.

In In re Microcom, Inc. Sec. Litig., No. 90-11504, (D. Mass. May 30, 1991), plaintiff class had purchased the securities of defendant corporation. After stock values plummeted, plaintiffs contended that defendant's failure to disclose certain information violated securities laws and Chapter 93A, § 11. The court summarily denied relief in a footnote, stating "this court does not find this case to fall within Section 11, the commercial provisions of Chapter 93A." Microcom, slip op. at 9.

In sum, viewing the evidence in a light most favorable to the plaintiffs, I find no basis for sustaining an action under Chapter 93A, § 11 because the plaintiffs were not acting as business persons in a business context.

2. Chapter 93A, Section 9

Though plaintiffs' allegations do not support a claim under § 11, the factual allegations concerning the parties' involvement in the buy-out could support an otherwise valid action under § 9. This section applies to "[a]ny person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful . . . ." Mass. Gen. Laws Ann. ch. 93A, § 9 (West 1984). This claim fails, however, because plaintiffs failed to comply with the statutory prerequisites.

The statute requires that the plaintiff serve upon the defendant a written demand for relief at least thirty days prior to filing a suit. Mass. Gen. Laws Ann. ch. 93A, § 9(3) (West Supp. 1992). Indeed, the Supreme Judicial Court has "often held that '[a] demand letter listing the specific deceptive practices claimed is a prerequisite to suit and as a special element must be alleged and proved.'" Spring v. Geriatric Auth., 475 N.E.2d 727, 735 (Mass. 1985) (citations and emphasis omitted).

In this case, several similarly situated individuals separately filed seven suits against the defendants during the last ten days of June 1989. Several complaints did not rely upon Chapter 93A as a basis for relief. Other complaints, however, asserted claims under either the general provisions of Chapter 93A or the specific provisions of Chapter 93A, § 11. No complaint alleged that a demand letter had been served upon the defendants, nor did any complaint specifically raise a § 9 claim. Plaintiffs served defendants with a demand letter on August 25, 1989, approximately two months after the suit was initiated. The actions were consolidated in October 1989, at which time an amended complaint was filed that asserted a claim under general provisions of Chapter 93A. The amended complaint did allege that plaintiffs served demand notice upon defendants at least 30 days prior to filing the amended complaint.

It is well established that "the thirty-day requirement is a prerequisite to an action under § 9, but nothing in the statute makes it a prerequisite to any other remedy available to aggrieved consumers." York v. Sullivan, 338 N.E.2d 341, 346 (Mass. 1975). Where an original complaint is filed on grounds independent of Chapter 93A, no compliance with the statute is necessary. Id. In addition, one Massachusetts court has held that a Chapter 93A claim is not barred where a demand letter was served after the filing of original complaint, which did not raise a 93A claim, but more than 30 days before the 93A claim was first asserted in an amended complaint. Irizzary v. Stonebriar Dev. Corp., 1989 Mass. App. Div. 149, 150 (1989).

The posture of the case before this court is distinguished from both York and Irizzary because, here, plaintiffs did in fact assert a Chapter 93A claim in their original complaints. The issue is whether the presence of the 93A claim in the original complaint bars plaintiffs from later serving a demand letter and raising a 93A, § 9 claim.[5] I conclude that it does.

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[5] Plaintiffs assert that the § 9 claim was first raised in the amended complaint. However, the amended complaint -- in language identical to one of the original complaints -- relies on the general provisions of Chapter 93A. Through out documents filed with this court, plaintiffs assume that the general 93A claim in the amended complaint raises both § 9 and § 11 claims. Accepting that as true, I find that the identical language contained in the original complaint also raised both § 9 and § 11 claims.

Microcom, supra, confronted a situation nearly identical to the one now facing this court. In Microcom, two individuals filed class action suits against Microcom for allegedly manipulating the price of its publicly traded stock. One plaintiff filed a complaint on grounds independent of Chapter 93A; a second plaintiff filed a complaint asserting a claim under the general provisions of Chapter 93A, but did not allege that a demand letter had been served. The two actions were later consolidated and an amended complaint was filed alleging a claim under the general provisions of Chapter 93A. The court dismissed the plaintiffs' 93A claim because plaintiffs failed to serve written demand upon the defendants prior to filing the original complaint. The court reasoned:

> Plaintiffs [] contend that they satisfied the demand requirement, because they served a written demand upon defendants prior to the filing of plaintiffs' consolidated and amended class action complaint. However, this court will not permit plaintiffs to circumvent the demand requirement by the mere filing of an amended complaint. To do so would frustrate the purpose of the demand requirement and essentially eliminate the plaintiffs' obligation to comply with the requirement at all.

Microcom, slip op. at 9.

I agree with the reasoning expressed in Microcom and believe that the decision promotes the goals underlying the demand letter requirement. The Supreme Judicial Court has explained that the demand letter serves two purposes: (1) to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct, and (2) to operate as a control on the amount of damages which the complainant can ultimately recover. Spring, 475 N.E.2d at 736. These interests are best served if a plaintiff files a demand letter before initiating Chapter 93A litigation.

Plaintiffs cannot maintain an action under Chapter 93A, § 9 because a demand letter was not served upon defendants more than 30 days before the 93A claims were first raised.

B. The Federal Securities Law Claim

Defendant Malarkey-Taylor moves for summary judgment on plaintiffs' federal securities law claim under § 10(b) of the Securities Exchange Act of 1934. Malarkey-Taylor argues that plaintiffs have produced no evidence that Malarkey-Taylor acted with scienter. Specifically, Malarkey-Taylor asserts that the evidence is undisputed that in preparing the cable system appraisals it employed the identical methodology and applied similar judgments regarding the cable industry as it had employed for hundreds of other appraisals conducted over a number of years. This evidence, it contends, precludes a finding of bad faith and bars plaintiffs' claim that Malarkey-Taylor violated § 10(b) or aided and abetted Continental's alleged violation of § 10(b).

"Scienter," as applied to § 10(b), refers to a mental state embracing "intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). In addition to intentional conduct, our court of appeals has assumed, without deciding, that recklessness also satisfies the scienter requirement. Hoffman v. Estabrook & Co., 587 F.2d 509, 516 (1st Cir. 1978); Kirby v. Cullinet Software, Inc., 721

F. Supp. 1444, 1449 (D. Mass. 1989). Recklessness has been defined as "carelessness approaching indifference." Id. Thus, plaintiffs' claim may proceed if the evidence raises a genuine issue as to whether Malarkey-Taylor acted either intentionally or recklessly when preparing the appraisals of the limited partnership cable systems.

Noting that securities violation cases generally turn upon a careful analysis of factual allegations, courts have been reluctant, but not unwilling, to grant motions for summary judgment. See Kirby, 721 F. Supp. at 1448; Capri Optics Profit Sharing v. Digital Equip. Corp., 760 F. Supp. 227, 230 (D. Mass. 1991).

> State of mind is difficult to prove and great circumspection is required where summary judgment is sought on an issue involving state of mind. But that does not mean that a party against whom summary judgment is sought is entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim.

Capri, 760 F. Supp. at 230 (quoting Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975)) (citations omitted).

I now view the evidence before me in a light most favorable to the plaintiffs to determine if a reasonable jury could return a verdict in plaintiffs' favor. Because I find that there is a genuine dispute as to whether Malarkey-Taylor acted fraudulently or recklessly when preparing the cable system appraisals, I deny the motion for summary judgment. The appraisals performed by Malarkey-Taylor and incorporated into the Statements of Information were critical ingredients in the alleged scheme to defraud the limited partners. Plaintiffs allege that Malarkey-Taylor "started with Continental's proposed buy-out prices and then in draft after draft worked its purported fair market value numbers lower and lower" until they were low enough to make the Continental's buy-out offers look "good" by comparison. In the Statements of Information, Continental explained the fairness of the transaction, in part, by relying on the relative strength of buy-out price: "the [purchase price] from which the Unit Redemption Price has been derived is greater than the fair market value on a going concern basis of the assets of the Partnership stated in the [Malarkey-Taylor] Appraisal Report."

The engagement letter that retained Malarkey-Taylor to perform valuations of the four cable system partnerships included a schedule showing Continental's proposed buy-out price for each partnership. Anthony Kern, the individual primarily responsible for preparing the Malarkey-Taylor valuations, initially denied having knowledge of Continental's buy-out prices at the time the valuations were prepared. However, the engagement letter contained the handwritten notations of Mr. Kern. The evidence also shows that Mr. Kern was not only aware of the buy-out numbers, but, as he later admitted, he put the numbers into his appraisal spreadsheet so that he could calculate "how far over or under" his purported fair market valuation was in comparison to Continental's buy-out price.

Plaintiffs allege that Malarkey-Taylor first thought that it was expected to corroborate the valuations reflected in Continental's buy-out valuations. Malarkey-Taylor's May 1 cover letter confirms the "reasonableness" of the Continental proposed buy-out prices and reports valuations that only modestly exceed Continental's buy-out price for each cable system [6]

Plaintiffs then argue that "Malarkey-Taylor 'got the message' that Continental wanted appraisal figures much lower than Continental's so as to make Continental's offer appear to the limited partners as a good deal." Malarkey-Taylor produced a steady stream of draft valuations for the cable systems between April 25, 1989 and May 17, 1989, when it arrived at final appraised values for all systems. Each draft was communicated to Continental for comment, and then revised in light of that comment.

In draft, after draft, after draft, the valuations provided by Malarkey-Taylor steadily and consistently declined, without explanation, from initial valuations. On April 28, 1992, Kern produced "finished" valuations of the Cook County and the Will County cable systems. Over the following two week period, Kern, nonetheless, decreased the "finished" appraised value of the Cook County cable system by $4,991,000 and the Will

[6] On May 1, 1989, Mr. Kern provided Continental with the appraised values, shown below, for each cable system. Mr. Kern's cover letter reads in its entirety:

> Following are the spreadsheets for the four regions we appraised. They reflect the most recent information as presented in your April 28th memo. From what we have come up with it is safe to say that the values you developed are certainly reasonable as they do not vary materially from our appraisal.

The appraised values reported by Mr. Kern approximate the buy-out numbers previously provided in the engagement letter:

Cable System	Initial Malarkey Appraisal	Proposed Continental Buy-out Price
Will County	$83,297,000	$82,400,000
Florida	$243,723,000	$242,000,000
Northeast	$102,152,000	$101,376,000
Cook County	$76,328,000	$75,937,000

County cable system by $8,567,000. Kern also decreased the appraised value of the Northeast cable system by $9,470,000 from its May 1 valuation and the Florida cable system by $36,526,000, from its May 1 valuation. The end result was that the final appraised values developed by Malarkey-Taylor and disclosed to the limited partners were now significantly lower than Continental's buy-out price.[7]

Malarkey-Taylor offers no persuasive evidence to rebut the claim that they worked the numbers backwards. During deposition, Kern, himself, was unable to identify any specific data, information or change in assumptions to account for the pattern of declining valuations. Instead, Malarkey-Taylor argues that since it used its standard method of valuation in appraising the limited partnerships, employing the same discount rates and cash flow multiples as used in all of its other appraisal projects, a finding of fraud is precluded.

Malarkey-Taylor's argument is unpersuasive. An appraisal is a complex calculation based on the interaction of numerous factors: discount rates, cash flow multipliers, judgments concerning revenues and expenses, and assumptions regarding the cable industry. An appraisal can be manipulated, upward or downward, by

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[7] Malarkey-Taylor's final appraised values and Continental's actual buy-out price follow:

Cable System	Final Appraisal	Actual Buy-out Price
Will County	$74,739,000	$86,200,000
Florida	$207,197,000	$242,000,000
Northeast	$92,682,000	$103,573,800
Cook County	$71,337,000	$78,087,600

changing any one or more of the multiple inputs. Malarkey-Taylor's use of its standard methodology, including standard rates and multipliers, does not exclude the possibility that the valuations were otherwise manipulated. Indeed, as the facts of this case demonstrate, Malarkey-Taylor produced a pattern of steadily declining valuations in spite of employing its standard methodology and assumptions.

Malarkey-Taylor also argues that mere inaccuracy of projections and opinions, negligence in their preparation, or disagreement as to their reasonableness, is insufficient evidence of scienter to withstand summary judgment. Malarkey-Taylor's argument, while legally sound, is not supported by the facts of this case. Plaintiffs have not alleged mere negligence or mere inaccuracy. Rather, plaintiffs allege, with considerable factual support, that Malarkey-Taylor fraudulently manipulated its valuations of the cable systems.

Malarkey-Taylor's argument that the actual operating results of the cable systems confirmed and, therefore, necessarily exonerated the Malarkey-Taylor valuations is similarly unpersuasive. Where a case presents a genuine issue as to the existence of fraudulent conduct, a defendant is not exonerated merely because the actual results fortuitously confirm the allegedly fraudulent projection. The cases cited by Malarkey-Taylor did not involve allegations of fraud. Estate of Detwiler v. Offenbecher, 728 F. Supp. 103, 138 (S.D.N.Y. 1989) ("Plaintiffs have criticized the [forecast], but have offered no facts demonstrating that [defendants] distributed those projections knowing they were false."); Schwartz v. Novo Industri A/S, 658 F. Supp 795, 798 (S.D.N.Y. 1987) ("The crux of plaintiff's argument is that [defendant] was reckless in failing to project more accurately its earnings given the information available.") Thus, while actual results may, in some cases, undermine a claim of mere recklessness or unreasonableness, I do not agree that actual results negate an otherwise sufficient allegation of fraud.

Finally, Malarkey-Taylor argues that since it did not participate in the preparation of the Statements of Information and did not even see them before they were distributed to the limited partners it cannot be held liable for aiding and abetting Continental's alleged violation of § 10(b). For a defendant to be liable as an aider and abettor of a violation of § 10(b) or rule 10b-5, a plaintiff must prove:

> (1) the commission of a violation of § 10(b) or rule 10b-5 by the primary party; (2) the defendant's general awareness that his role was part of an overall activity that is improper; and (3) knowing and substantial assistance of the primary violation by the defendant.

Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983).

Malarkey-Taylor argues that there is no evidence that it had actual knowledge of any improper activity. Indeed, Malarkey-Taylor asserts that its conduct is entirely inconsistent with scienter. However, from the beginning, Malarkey-Taylor knew that its final appraised valuations would be distributed to and relied upon by the limited partners. The final Malarkey-Taylor appraisal reports stated that they "may be reproduced and/or quoted by [Continental] in connection with the redemption of the interests of the Limited Partners." For the reasons explained above, I conclude that a genuine issue exists as to whether Malarkey-Taylor's result-oriented appraisals demonstrated scienter -- and that is for a jury to decide.

C. The Breach of Fiduciary Duty Claim

Plaintiffs move for partial summary judgment as to liability against Continental for breach of fiduciary duty. Plaintiffs allege that Continental has admitted in sworn affidavits and depositions that the buy-out of the limited partners did not serve any legitimate business purpose and, therefore, that they are entitled to judgment under the decision of Coggins v. New England Patriots Football Club, Inc., 492 N.E.2d 1112 (Mass. 1986). Continental, on the other hand, contends that Coggins is not applicable to transactions arising in limited partnerships and that, at a minimum, there exists a genuine issue as to whether the buy-out transactions served legitimate business purposes. Though I find Coggins to be applicable to this case, the motion is denied because of material disputed facts concerning the purpose of the buy-out transactions.

Wary of the dangers of self-dealing, the Supreme Judicial Court held in Coggins that where a controlling shareholder and corporate director chooses to eliminate public ownership though a freeze-out of minority shareholders, a court should examine the motives and the behavior of the controlling shareholder with the closest scrutiny. Id. at 1117. The Court announced a two step test for determining a breach of fiduciary duty: "[T]he defendants bear the burden of proving, first, that the merger was for a legitimate business purpose, and, second, that, considering totality of circumstances, it was fair to the minority." Id. at 1119. A defendant may be liable even where the merger was properly approved by a majority of shareholders in full compliance with statutory requirements. Id. at 1117.

Though Coggins arose in the context of a close corporation, its reasoning and holding are equally applicable to the case before this court, which arose from a limited partnership. Summarizing breach of fiduciary duty case law, our court of appeals has noted that "[a]lthough most of the cases involve the duty owed by one stockholder of a close corporation to the other stockholders, that duty is based upon the duty imposed upon one partner to another." Wartski v. Bedford, 926 F.2d 11, 13 (1st Cir. 1991) (citations omitted). In fact, the court of appeals expressly cited and implicitly applied the Coggins holding to an alleged breach of fiduciary duty by one partner to another. Wartski, 926 F.2d at 12-14. Accordingly, I conclude that the two step test announced in Coggins applies to the motion before this court.

The question, then, is whether the plaintiffs are entitled to summary judgment under the first prong of the Coggins test: Is there a genuine issue as to whether the buy-out served a legitimate business purpose? Plaintiffs urge me to adopt an interpretation of "legitimate business purpose" that is strictly limited to actions that benefit the corporate or partnership entity itself, apart from and regardless of any benefit conferred on the shareholders or partners. For example, plaintiffs find a Continental admission that the buy-outs furthered no legitimate business purpose in the following evidence: an affidavit of a Continental officer stating that the buy-out transaction affected only partners and that the cable television operations did not change as a result of the buy-outs; and deposition testimony of two Continental officers identifying benefits to the limited and general partners, but not specifically identifying benefits to the partnership itself.

I reject the rigid and mechanical interpretation advanced by plaintiffs. While the presence or absence of a benefit to the partnership entity may be one relevant factor bearing on whether a transaction promoted legitimate business purposes, I cannot agree that a transaction fails the Coggins test simply because the partnership entity itself was not benefited. The interests protected by Coggins and guarded by the "legitimate business interest" test are best served by engaging in a flexible, common-sense inquiry based on the specific facts of a given dispute: Has the defendant demonstrated that the freeze-out served a valid corporate objective unrelated to the personal interests of the majority shareholders? See Coggins, 492 N.E.2d at 1119.

In this case, Continental argues that the buy-out transactions promoted several legitimate business purposes. Continental's counsel stated in deposition that, "The business purpose was to provide the limited partners with an opportunity for liquidity at a time when the tax advantages that the limited partners had previously had were largely used up." The Statements of Information circulated to the limited partners stated:

> In the fall of 1988, the General Partner began to consider whether it was desireable to afford the Limited Partners the opportunity at that time to realize the substantial appreciation in the value of the [cable systems] in view of the fact that the initial investment objectives of the Partnership had largely been achieved. Those objectives included the long-term capital appreciation in the value of the [cable systems] and the generation of tax benefits through losses and investment tax credits . . . . At the time, the General Partner also considered the fact that the Units were illiquid, providing the Limited Partners with few opportunities to

realize the increased value of their investment.

Finally, Continental argues that the buy-out transactions eliminated the expense and burden of complying with reporting and record-keeping requirements associated with the limited partnership form after the dominant goal of achieving tax benefits had been served.

These purposes are not entirely consistent with some testimony previously offered by Continental. For example, a key Continental officer has submitted an affidavit explaining that, "The purpose of each [buy-out transactions] was to effect a redemption of limited partnership interests conveying sole ownership of the Partnership assets to the General Partner." Moreover, the structure of the buy-out transaction, which ultimately forced out all consenting and non-consenting limited partners, is at odds with the goal of merely providing an "opportunity" for liquidity to the limited partners. My role in deciding this motion, however, is not to weigh the evidence and determine the truth of the matter myself, but rather to determine if there is a genuine issue for trial. Whether the business purposes offered by Continental are credible and persuasive, or merely represent a pretext to cover more selfish motives is for a jury to decide with the benefit of a trial.

II. Motion to Strike Jury Demand

Continental, Malarkey-Taylor, and Shearson move to strike plaintiffs' demand for jury trial on both plaintiffs' Chapter 93A and fiduciary duty claims. Plaintiffs have withdrawn their jury demand on the Chapter 93A claim. I need consider the motion only as it bears on the alleged breach of fiduciary duty.[8] Defendants assert that no right to jury trial attaches to plaintiffs' action for breach of fiduciary duty because the action is equitable in nature and seeks an equitable remedy.

The Seventh Amendment provides that, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The phrase "Suits at common law" has been applied to protect legal rights, as opposed to equitable rights and remedies. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564 (1990). The Supreme Court has explained, "To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. . . . The second inquiry is the more important in our analysis." Id. at 565. If plaintiffs' fiduciary duty claim is a legal action, I am constitutionally prohibited from striking the jury demand. I proceed deliberately in light of the oft-quoted admonition: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Id. (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

I turn, first, to the important consideration of whether plaintiffs seek a legal or

[8] Even if Plaintiffs' had not voluntarily withdrawn their jury demand on their Chapter 93A claim, I would not consider the issue since I have already granted summary judgment against Plaintiffs' on the 93A claims.

equitable remedy. This is a substantive, functional inquiry into the nature of the remedy sought. As the Supreme Court has noted, "[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-78 (1962) (rejecting contention that money claim is equitable merely because the complaint was cast in terms of an "accounting," rather than in terms of an action for "damages"). Though the Court has not articulated a formal test for determining the nature of the remedy sought, it has considered at least two factors relevant: is the monetary award restitutionary, such as an action for disgorgement of improper profits; and is the monetary award incidental to or intertwined with injunctive relief? Terry, 494 U.S. at 570-71.

In this case, plaintiffs seek to recover damages equal to the difference between the fair market value of the partnership interests in 1989 and their actual selling price, plus interest. This is a traditional legal remedy as defendants once agreed. During the early stages of this proceeding, Continental's counsel successfully argued against plaintiffs' motion for a temporary restraining order that plaintiffs had a "fully adequate remedy at law for damages, as case after case provide, because if [plaintiffs] think they have an appraiser who can convince a court in their damages case that the money that is paid in this [buy-out] transaction should be higher, they can get a damage result accordingly." Defendants' more recent attempt to convert plaintiffs' damages claim into an equitable accounting is unpersuasive. Though in this case the compensatory damage award may not differ in amount from a restitutionary recovery, this coincidence does not deprive the remedy of its legal character. The compensatory damages claim, moreover, is not "intertwined" with injunctive relief. Plaintiffs do not seek to rescind the buy-out transactions nor to return the parties to the pre-sale status quo. I conclude that plaintiffs seek a legal remedy for compensatory damages.

I now consider whether plaintiffs' action for breach of fiduciary duty is equitable or legal in character. This determination requires a court to "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." Terry, 494 U.S. at 565 (citation omitted). In light of our court of appeals precedent, however, I find it unnecessary to engage in such a historical analysis.

Defendants rely on In re Evangelist, 760 F.2d 27 (1st Cir. 1985) to argue that an action for breach of fiduciary duty is equitable in nature and, thus, not entitled to a trial by jury. Defendants' reading of Evangelist, however, is plainly inconsistent with subsequent precedent of the First Circuit Court of Appeals. Viewed in the proper light, Evangelist presents no bar to plaintiffs' jury demand. First, the primary issue in Evangelist was whether Congress intended (and could intend) to create a statutory judge-tried action allowing a shareholder to sue a company's investment advisor for breach of fiduciary duty. Id. at 29. The decision turned largely on statutory construction and congressional intent, concerns not present here. Second, even in dicta, Evangelist did not bar jury trials on all actions for breach of fiduciary duty. Rather, the court distinguished between an equitable breach of fiduciary duty action, which involved no tortious conduct, personal misconduct, or breach of contract, and a legal breach of fiduciary duty action, which involved violations of some other legal rule, such as a tort or breach of contract. Id. at 29-31.

This reading of Evangelist squares with more recent precedent in which our court of appeals has consistently, though implicitly, supported a plaintiff's right to a jury trial on breach of fiduciary claims involving allegations of fraud or misrepresentation. For example, in Wartski, supra, the plaintiff sued a business partner for breach of fiduciary duty as a director and officer of a corporation and as a partner of a related partnership. The court affirmed the jury award on the breach of fiduciary duty claim expressly noting that questions of fact supporting the fiduciary duty claim were properly submitted to the jury. Wartski, 926 F.2d at 18-20. In Jerlyn Yacht Sales, Inc. v. Roman Yacht Brokerage, 950 F.2d 60 (1st Cir. 1991), plaintiffs appealed from a district court's denial of their motion for a new trial in an action for fraudulent misrepresentation, breach of fiduciary duty, unjust enrichment, and violation of a Massachusetts consumer protection statute. The court and the parties considered the jury instructions and the evidence on the breach of fiduciary duty claim without ever questioning the propriety of jury trial. Id. These cases and others strongly suggest that claims for breach of fiduciary duty that raise tortious conduct or breach of contract are legal actions properly decided by a jury. See also Shane v. Shane, 891 F.2d 976 (1st Cir. 1989) (affirming a jury verdict in action alleging common law fraud, violation of fiduciary duty, and violations of federal securities laws); Catullo v. Metzner, 834 F.2d 1075 (1st Cir.

1987) (reviewing a jury verdict on breach of fiduciary duty claims without questioning the ability of the jury to render such a verdict).

In this case, plaintiffs' surviving claims allege defendants breached their fiduciary duties and violated federal securities laws through a pattern of misconduct, omissions, and misstatements. I find that plaintiffs' action for breach of fiduciary duty is legal in nature and seeks a legal remedy. The motion to strike the jury demand is denied.

III. Conclusion

Accordingly, the defendants' motion for summary judgment on the plaintiffs' Chapter 93A claims (Count X) is **ALLOWED.** Malarkey-Taylor's motion for summary judgment on plaintiffs' federal securities law claim (Count I) is **DENIED.** Plaintiffs' motion for partial summary judgment as to Continental's liability for breach of fiduciary duty (Count IX) is **DENIED.** The motion to strike plaintiffs' demand for jury trial on defendants' breach of fiduciary duty claim is **DENIED.**

Walter Jay Skinner

United States District Judge