

## **STATEMENT OF THE CASE**

The district court, in its Memorandum certifying the interlocutory appeal, expressly reconfirmed its Memorandum and Order of February 19, 1999 denying Defendants' Post-Trial Motion, stating that the court did "not agree with Defendants' presentation of the case." Nevertheless, the court stated that an interlocutory appeal would materially advance the ultimate outcome of the litigation, regardless of the outcome on appeal. (JA. 1333-34.)

## **STATEMENT OF FACTS**

Fred Bouchat is an intellectually-challenged individual, who went only as far as the ninth grade in a special education program. (JA.412-13,1312.) As a boy, Bouchat's father taught him to draw and he became an avocational artist, principally drawing super hero characters. Comic book characters often served as models.<sup>1</sup> (JA. 418-20, 424-35, 1379-1403.) He also created his own super heroes and comic book characters (JA. 1404-28) with story lines for each. (JA.441-46, 1429-94.) He also drew some portraits, created metallic art and, in one instance, created a shield for the Fraud Unit of the Maryland Insurance Administration (AMIA®). He has also drawn a variety of sports logos. (JA. 451-58, 1372-77; tr.982-83; Plaintiff-s

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<sup>1</sup> The use of comic book characters as models for what is known as comic book fan art is accepted and encouraged by the comic book industry. (JA449-50, 1362-66.)

Exhibits 90, 104.) Bouchat was very proud of his artwork and showed it to people entering and exiting the State of Maryland office building at 501 St. Paul Place in Baltimore, where he was employed by the State as a security guard, mainly at the front entrance. He exuded a child-like enthusiasm when he showed his artwork to people. (JA. 50-51, 66, 77-81, 93, 246, 252-53; tr.979.)

Bouchat's favorite name for the new team was Ravens because he liked the Ravens of Doom comic book. (JA. 456.) In late November 1995, Bouchat created helmet designs for various teams and designed a football helmet for Baltimore's new team using portions of the Maryland State flag and a bird. (JA. 53, 1341, 1369-71.) Bouchat affixed this design to a model helmet (JA. 460-61, 1355), which he gave to Eugene A. Conti, Jr., Secretary of the Department of Licensing and Regulation (ADLLR@), who kept it on his office credenza until the end of March 1996. (JA. 55-56, 461-62.) Around December 5, 1995, Bouchat did a series of drawings relating to the new team, which he hoped would be named the Ravens, including the subject shield design. (JA. 463-77, 1343, 1345-53.) Bouchat derived his ideas for the shield design from several sources. One was a sign with a large shield with a cross that hangs outside The Maryland Bible Society Store at 11 E. Fayette Street near 501 St. Paul Place (JA. 1358); and, another, a depiction of Batman's cape from a comic book. (JA. 464-67, 1359-60, 1368.) The

AB@ on the design stood for Baltimore; but, because Batman was his favorite comic book character, for A[his] personal self, and ... [he] would have kept this to [him]self, the B for the shield stood for Batman.@ (JA. 419, 467.)

Bouchat drew a series of preliminary shield designs leading up to the one in question. (JA. 463-75, 1339-1340, 1342.) Employees in the building where Bouchat worked saw these and other preliminary shield designs and witnessed their progression towards the final shield design. (JA. 113-15, 248, 262-69, 373-75, 377-78, 1339, 1342.) Bouchat signed these works when he created them. Approximately two weeks after doing so, Andrew Auerbach, an Assistant Attorney General assigned to DLLR, told Bouchat to put a 8 on his works and date them, which he did. (JA. 476-77, Tr. 458-61.) On December 21, 1995, Plaintiff gave Russell Rippel a copy of his shield design on which he made the notation, "Merry Christmas Russ 12-21-95". (JA. 282-84, 476-77, 1336.) Similarly, around Christmas 1995, Bouchat gave a copy to Anthony Walker, the manager of the garage at 9 E. Franklin Street, next to the Bible Store. (JA. 302-08, 1337-38, Tr. 978.) Also, some time around Christmas, he gave a copy of one of his preliminary shield designs to Lena Garrett, a secretary in the building employed by MIA. (JA. 262-69, 1339-40.) She also saw his finished shield drawing around this same time. (JA. 268-69.)

DLLR Secretary Conti asked Karen Napolitano, Director of Public Information at DLLR, to arrange, through her counterpart at the Maryland Stadium Authority (AMSA), for him to take Bouchat to meet with John Moag, the chairman of MSA, to give Bouchat some recognition for his art and have his photograph taken with Moag for a DLLR employee newsletter. On March 28, 1996, the day before the team announced its name, Napolitano received a call that Moag could meet with them later that afternoon. Neither Napolitano nor Conti were available on such short notice; but Deputy Secretary Seman and Marco Merrick, Napolitano's assistant, were. (JA 56-59, 66-67, 479.) Conti, Seman and Merrick surprised Bouchat at his work station. Conti told Bouchat he was going to meet the man who brought the football team to Baltimore. Bouchat did not know of the meeting in advance and did not have his drawings and designs at work that day. (JA. 478-80, 488.) Conti gave Bouchat the miniature helmet that Bouchat had designed and told him to present it to Moag. Seman and Merrick took Bouchat to meet Moag at his law office at Suite 1100, 250 W. Pratt Street, although Bouchat thought he was at the MSA offices. At the meeting, Moag told Bouchat that the team was going to be named the Ravens. Bouchat told Moag about his Ravens drawings. Moag told Bouchat to send his drawings to him, and he would refer them to the Ravens. Moag said that Bouchat could either walk them over or fax them. Moag and

Bouchat, with the helmet, then posed for photographs. On the way out, Bouchat, in a state of excitement, forgot to get the numbers from the receptionist. (JA. 68-69, 72-74, 480-86 , 1354-55.) One of the photographs taken that day appeared in a DLLR newsletter with the caption that read in part, "Mr. Moag accepted the helmet and assured Fred that it would be passed onto Mr. Modell." (JA. 1357.)

Unbeknownst to Bouchat at the time he met with Moag on March 28, 1996, the Ravens occupied the very suite in which he met and discussed his artwork with Moag. David Modell's office was within earshot of Moag's. (JA. 963-64.) During March and April 1996, since the team did not yet have its own office, Moag and his law firm, Patton, Boggs & Blow, provided the new team temporary space in its office at Suite 1100, 250 W. Pratt Street rent-free, although the team would reimburse the firm for out-of-pocket expenses. (JA. 392-95.) MSA offices, which are located in the Warehouse at Camden Yards, a little more than a block away from 250 W. Pratt Street, acted as a mail drop and fax reception facility for the team. MSA received mail and faxes for the Modells, the team and Moag. MSA personnel would sort and open any mail addressed to them and deliver it, often by courier, to Suite 1100, along with faxes it received, including submissions from the public of names and logos. Faxes were sometimes forwarded by fax to Suite 1100. (JA. 317-20, 704-05, 1040, 1577-81, 1587-88; tr. 778-785.) MSA personnel

signed postal return receipts on behalf of Art Modell for mail addressed to him at Camden Yards and then forwarded it on to the new team. (JA. 1587-88.)

During April and March, 1996, mail for Moag, the Modells and the Ravens arrived at Patton, Boggs' front desk from MSA where it was sorted by the receptionist and distributed by internal messenger to personnel of Patton, Boggs or the team. Likewise, Patton, Boggs' personnel in the photocopy room received faxes as they arrived and distributed them to the appropriate persons within Patton, Boggs or the new team. (JA. 394, 400, 956-57, 976.) Modell and the team had use of and access to the entire suite and used the firm's telephone system and photocopy, fax and postage machines in its work room, which was located in the center of the 11<sup>th</sup> floor space. Modell circulated through the suite socializing and had an office in the main part of the office. (JA. 396-99, 963-64, 979, 1512.)

David Modell responded to submissions of names or logos from members of the public that the team or Arthur Modell received via MSA and advised the sender that he would forward their material to NFLP for consideration, which he did. (JA. 1581, 1585.) For example, on March 6, 1996, David Modell responded to submission from Rachel Loewner, stating he would pass on her suggestions to NFLP. (JA. 1588.) The correspondence in evidence from Jason M. Benedict reflects two letters and logos sent to the new team. One was faxed by his mother

"To whom it may concern" at MSA on February 20, 1996. The second submission "To whom it may concern" was mailed on February 29, 1996 to MSA. Benedict received three responses. The first was a February 29, 1996 letter identical to the response Modell sent on March 6, 1996 to Ms. Loewner. The second was from NFLP on March 27, 1996, stating it was returning his submission. The third was a letter from David Modell on April 4, 1996, stating it was returning his submission. (JA. 1577-85.)

The day after his meeting with Moag, Bouchat obtained the telephone and fax numbers of MSA from Richard Feller who worked at 501 St. Paul Place. Bouchat thought the numbers went directly to Moag's office, but the numbers were for the MSA office. Bouchat told Feller he was going to send his drawings to MSA. (JA. 489-91, 1058A-59.) On Monday, April 1, 1996, or Tuesday, April 2, 1996, Bouchat obtained permission from Roger Sullivan, his ultimate supervisor, to use the fax machine to send his drawings to MSA. Jan Drabeck, Bouchat's immediate supervisor, showed him how to use the fax machine. Bouchat told Drabeck at the time that he wanted to use the fax machine to submit his drawings to MSA because they had expressed an interest in his artwork. (JA. 329-32, 489-92.)

On the evening of either Monday, April 1, 1996, or Tuesday, April 2, 1996, Bouchat faxed his works to MSA. He attempted to fax his shield design with his

note to Moag to 333-1527, which was one of the numbers given to him by Richard Feller. Bouchat, however, received a transmission slip which indicated an error in the transmission. Bouchat then entered the other number, 333-1888. This time, he received a fax confirmation that read "1/01 o.k." and which had the fax number on it. Bouchat repeated the process for each of the other drawings and received a fax confirmation for each. He did not know at the time that he could send all of the drawings together and he did not think it important at the time to retain the fax confirmation reports. (JA. 493-500, 1343-46.) About a week or so later, Bouchat told Drabeck that he had, in fact, faxed his drawings. (JA. 332.)

On April 2, 1996, David Modell met with Bruce Burke, an NFLP Vice President and the Creative Design Director, at NFLP corporate headquarters in New York City to discuss the development of the Ravens logo and, thereafter, Modell communicated with Burke concerning the development of the logo. For instance, on April 8, 1996, Modell faxed a memo from Suite 1100 using a Patton, Boggs cover sheet to Burke and Gary Gertzog outlining managerial objectives of the design project. (JA. 1512-18.) Thereafter, Ravens personnel communicated with NFLP concerning the project. (JA. 1572-76.)

There were four stages to the Ravens logo project. Phase I commenced March 25, 1996 and was to be accomplished by April 17, 1996. Phase I included



background research to develop a preliminary design for presentation on April 16, 1996 to David Modell. Phase II involved the further enhancement of designs presented on April 16, 1996, with a view to a presentation to be made on May 3, 1996 to Ravens personnel and consultants in Baltimore as well as focus groups. Phase III involved further refinement with emphasis on uniforms and helmets and was to be completed by May 17, 1996. Phase IV involved further refinement and a selection of the final logos for a public presentation in Baltimore on June 6, 1996. (JA. 352-55, 1073-81, 1516.)

The design team was under extreme pressures in order to meet the tight deadlines imposed by the season's kick-off and NFLP's manufacturers. The design team worked inordinate hours and had a very short window to prepare for first phase presentation. The design team had a little more than two weeks to come up with proposed logos for presentation on April 16th and thereafter refine the direction in which the proposed logos were going by May 3, 1996, when they would be shown in Baltimore. There were many sleepless nights. (JA. 877-78, 1516.)

On March 28, 1996, Kurt Osaki faxed Rhonda Kim photostatic copies of pages from bird books taken from the Berkeley Public Library. (JA. 1519-46, Plaintiff's Exhibit 25b-g.) Kim then scanned some of the designs appearing in the

books into an NFLP computer. The designs embodied in the scans were copied into NFLP work product. Ultimately, the designs copied from the bird books were incorporated into the designs and presentations that NFLP made on April 16, 1996 and May 3, 1996. ( JA. 708-25, 732-43, 869-75, 1495-1511, 1729-42, 1746-1746D; Plaintiff-s Exhibit 27a-f.) NFLP also scanned in a photograph of a raven appearing in the April 4, 1996 Baltimore Sun and incorporated it into their work in progress. (JA. 1547-1549, 1744-44E.) NFLP designers also scanned other magazines and used them as their work product. (JA. 1725-1727, 1743-1743B, 1743D-1743G.)

When the Ravens revealed their logos in June, 1996, Bouchat immediately recognized the logos as his work. (JA. 501-02.) He immediately expressed concern to others. (JA. 328-29.) People who had seen his shield drawing immediately recognized the Ravens shield logo as Bouchat-s design. (JA. 85-87, 98-99, 132, 229B, JA. 255, 266-67, 328-29, 562-63, 1571;Tr. 544.) For instance, Donald Owens, a fiscal examiner in the Market Conduct Unit of MIA, was at home convalescing from an injury and was watching television, when he saw the unveiling of the Ravens=new logo. His immediate reaction was to sit up and look at it closer and say to himself, Athat's Fred's, that was done by the guy on the job.@ (JA. 86.)

## **SUMMARY OF ARGUMENT**

Much of what Defendants advance on appeal is afterthought, including new factual and legal theories. Defendants present a variety of diffuse arguments but have preserved for review only the issue concerning the sufficiency of the evidence of access. Defendants' Rule 50(a) motions and exceptions to jury instructions were very limited and did not preserve the other issues raised on appeal. (JA. 568-78, 727-28, 1095, 1158, 1160, 1167.) In other instances, Defendants complain on appeal but did not object below. The facts recited in the Defendants' brief are construed in a light most favorable to Defendants or are without foundation in the record. Plaintiff, therefore, invites the Court's closest scrutiny of Defendants' factual assertions.

Plaintiff produced substantial evidence that he created his Ravens shield drawing well prior to selection of the team's name and well in advance of the Defendants' design process. Plaintiff corroborated his creation of his Ravens shield design as having taken place in early December 1995 with the testimony of reputable, credible witnesses. Among them were a Deputy Secretary of the Maryland Department of Labor, Licensing and Regulations, Assistant Attorney Generals, Public Information officers, fraud investigators and other responsible

public servants who represented a cross-section of the people who worked in the building where Plaintiff was employed as a security guard.

Plaintiff presented evidence from which a reasonable fact finder could conclude that there was a reasonable possibility of access. Plaintiff did not, and need not, rely solely on striking similarity. Plaintiff's artistic renditions of Ravens' symbols were acknowledged by senior State officials and led to a surprise invitation to meet with John Moag, the head of MSA, a meeting which took place in offices Moag shared with the Ravens and David Modell. Moag told Plaintiff that if Plaintiff would send his works, he (Moag) would refer them to Modell. After the meeting in which the work that is the subject of this case was discussed and invited, as corroborated by the testimony of a State Public Information Officer, Plaintiff faxed his work to Moag at MSA. Corroborated by the testimony of his supervisor and at least one other witness at trial, Plaintiff testified that he faxed the artwork solicited by Moag to MSA offices at Camden Yards. Moag, the Modells and the team used the MSA offices as their agent for receipt of mail and faxes from members of the public; and, as its practice and procedure, MSA forwarded mail and faxes for Moag, Modell and the team to Suite 1100. Given the physical propinquity between Moag and Modell, Modell and the Ravens had an opportunity to see the works after delivery to Suite 1100.

Plaintiff's evidence established a flow of submissions of artwork from members of the public to MSA at Camden Yards, to the office shared by Moag, David Modell and the Team, and then on to NFLP. There was a clear showing of the close relationship between Moag and the Modells. The evidence also clearly revealed the intermediary relationship between the Modells and the Ravens to NFLP and their designers, including direction, management and ultimate control over the NFLP design process by the Ravens. The concurrent relationship of the intermediaries involving overlapping subject matter fulfilled the requirements of intermediary status under Fourth Circuit law. *Towler v. Sayles*, 76 F.3d 579, 582-83 (4th Cir. 1996).

Additionally, both Plaintiff's and Defendants' works shared common mistakes not found in the public domain or anywhere else. Defendants' own expert testified that the raven in the respective shield designs did not resemble a real bird, i.e., was fanciful, and had feet that were the digging claws of a mammal, such as a bear or badger, and contained the very same ornithological mistakes in proportion, wing shape, notches and number of wing feathers and slots. These mistakes did not have sources within Defendants' research materials. Defendants' internal work product contained the same mistakes found in the tail feathers of Plaintiff's shield design, mistakes that were not incorporated into any of the designs that Defendants

made public, so that Plaintiff could have had access to them. The typography of the letter B departed from the type used by professional designers.

In conjunction with this evidence, the jury could consider the extraordinary degree of similarity as additional evidence of access. Plaintiff's drawing and Defendant's logo involve over 20 separate design elements, all of which are virtually identical and are identical in their total arrangement and composition; and the experts for both sides agreed that the two works could not have been done independently of each other and, therefore, someone copied. (JA. 140-50, 1029-31, 995-99.) The evidence of access and close relationships of the intermediaries, when combined with the other probative, circumstantial evidence of access and copying, common errors and striking similarity, fully supports the jury's verdict as well as the district court's findings of the sufficiency of the weight of the evidence.

By contrast, Defendant's designers had no preliminary design work that resembled the shield design and no independent recollection of the dates, times and sequence of design development without reference to NFLP computer records, which contained conflicting, inaccurate and questionable information about dates and times. Defendant's designers had scanned materials into their computers from children's bird books and other sources, manipulated them and presented them as their work product, and thereby violated NFLP's policy.

Assuming the issue concerning lack of originality was preserved, there are multiple levels of originality in the Bouchat shield drawing. While public domain elements are not copyrightable in themselves, the public domain elements at issue are combined with original creative expression, and all of these elements are selected, coordinated, and arranged in such a way as to render the work original. Assuming the coercion issue was preserved, the district court did not abuse its discretion and coerce the jury, because the district court's modified Allen charge and supplemental instruction were balanced, and the time that the jury continued to deliberate after the charge and the instruction indicates no coercive effect.

## **ARGUMENT**

### **STATEMENT OF APPLICABLE STANDARD OF REVIEW**

The standard for review of the district court's rulings on the post-trial motion for judgment is a *de novo* review of the factual record and the law to determine whether the district court erred as a matter of law concerning the sufficiency of the evidence. *Towler*, 76 F.3rd, at 581. The Court will not disturb the district court's decision unless, without weighing the evidence or assessing witness credibility, the Court concludes that reasonable people could have returned a verdict only for defendants. The evidence is reviewed in the light most favorable to Plaintiff, who must be given the benefit of all inferences which the evidence fairly supports. *Id.*

There must be sufficient evidence upon which a jury can properly reach a verdict. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 660-61 (4th Cir. 1993).

The standard of review concerning the originality of Plaintiff's work is whether the work in question, taken as a whole, meets the minimal threshold of original creative expression. *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421, 438-40 (4th Cir. 1986). The district court's decision to give a supplemental jury instruction is reviewed for an abuse of discretion. *Carter v. Burch*, 34 F.3d 257, 264 (4th Cir.1994).

#### **I. THE DISTRICT COURT PROPERLY RULED THAT PLAINTIFF SHOWED SUFFICIENT EVIDENCE OF ACCESS.**

Direct evidence of copying is seldom available to a plaintiff in an infringement controversy. For that reason, courts have generally accepted circumstantial evidence to create a presumption of copying. To raise this presumption, the Plaintiff must show that (1) Plaintiff's and Defendant's works were substantially similar, and (2) there was a reasonable possibility that Defendant had access to Plaintiff's work. *Towler*, 76 F.3d, at 581-83; *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1065 (4th Cir.1988). Plaintiff need not prove a chain of custody to prove a reasonable possibility of access, only that it was reasonably possible that the paths of the infringer and the infringed



work crossed<sup>o</sup> or that the infringer had a reasonable opportunity to view<sup>o</sup> it.

*Towler* , 76 F.3d, at 581, 583.

### **A. Prior Creation.**

In order to buttress their arguments concerning access, Defendants argue that Bouchat did not create his shield drawing in December, 1995. The district court, however, ruled that A[t]he jury had substantial, and quite persuasive, evidence before it that the shield drawing had been drawn in its exact form in 1995.<sup>o</sup> (JA. 1303, 1315.) Bouchat testified that he created and signed the shield drawing around December 5, 1995, some four months before NFLP commenced any design work, and described the process by which he developed his shield drawing. (JA. 463-75.) Some of Bouchat's work-in-progress was introduced into evidence. (JA. 1339, 1342.) Craig Lowery, Chief of Compliance for MOSH , testified that he saw both the Garrett drawing (JA. 1339) and Bouchat's finished shield design (JA. 1343) well before the team announced its name and that he observed the evolution of the shield drawing through its various developmental stages. (JA. 113-14.) Steven Serio, a safety inspector for MOSH testified he first saw Bouchat's finished shield drawing sometime between October, 1995, and February, 1996. (JA. 366-71.) He testified that he saw Bouchat's preliminary work product, when it was a shield approximately one and half inches wide and three inches high, and then saw

that Bouchat had added wings. He also heard Reverend Chandler suggest to Bouchat to enlarge it. (JA. 370, 373-75, 377-78.)

Bouchat testified that about two weeks after he created his shield drawing, Assistant Attorney General Andrew Auerbach told him to put a 8 on his works and date them. Auerbach corroborated Bouchat's testimony. (JA. 476-77, Tr. 458-61.)

Bouchat testified that he gave a copy of the shield drawing (JA. 1337) to Anthony Walker in 1995. (Tr. 978-79.) Walker, in corroboration, testified that Bouchat gave him a copy of the shield drawing in December 1995 around Christmas. (Tr. 653-69, 972.) Russell Rippel corroborated that on December 21, 1995, Bouchat gave him a copy of his shield design and wrote on it the notation, "Merry Christmas Russ 12-21-95". (JA. 282-83, 476-77, 1336.) Lena Garrett testified that Bouchat gave her one of his preliminary drawings and saw his finished shield drawing around this same time. (JA. 268-69.)

Others testified that they saw Bouchat's shield design before the end of 1995: Herbert Smith, an independent businessman who visited MIA (Tr. 176-77, 185); Michael Coulthard, a former police officer and MIA fraud investigator (JA. 226-29); Cheryl Antol, an office manager for the Maryland Attorney General's Office (JA. 236-37); and, Rev. Willie Chandler. (JA. 380-81.) Others working at 501 St. Paul Place who testified they saw his works some time before the naming of the

team in March, 1996, were: Karen Napolitano, the Director of Public Information at DLLR and the person who had arranged for Bouchat to meet with John Moag (JA. 50-53, 62-63); Charles B. Kelly, a Deputy Secretary of DLLR (JA.126); and Robert Stolte, an MIA actuary. (JA. 246-48.) Others who worked there who remember seeing Bouchat's shield drawing sometime before the public unveiling of the Ravens logo in June, 1996, were: Francis X. Pugh of the Maryland Attorney General's Office and Chief Counsel to DLLR (JA. 41-47); Robert Peppersack, a computer programmer for MIA (JA. 561-62); Vernon Bailey, a staff attorney in the Maryland Attorney General's Office assigned to DLLR (JA. 130-33); and Donald Owens. (JA. 82-83.)

Defendants state that the district court noted that the wings on the Bouchat Ashield drawing<sup>o</sup> reflected a much higher level of artistic skill. *See* brief, at 8-9. The court, however, was clearly referring to the wings on the Abird drawing<sup>o</sup> and specifically used that term, not the term shield drawing. (JA. 1293.) The district court carefully distinguished the term Abird drawing<sup>o</sup> from the term Ashield drawing<sup>o</sup>, the one at issue on this appeal. (JA. 1303.)

**B. Bouchat's Meeting With Moag and Moag's Invitation.**

It is undisputed that Bouchat was unexpectedly taken to meet with John Moag, in his role as head of MSA, on March 28, 1996. The meeting, which

resulted in his presenting his Ravens artwork to the person and organization responsible for bringing the team to Baltimore, was a consequence of Bouchat's enthusiasm for the new team. While it was not yet publicly known, at this meeting, Moag informed Bouchat that the team would, in fact, be named the ARavens® as Bouchat had hoped. When he learned of the team's official name, it was natural for Bouchat to raise the subject of his other Ravens= artwork which he did not have with him.

Bouchat met Moag in offices that Moag shared with the Ravens. Bouchat testified at trial that while meeting with Moag on the overlapping subject matter of his Ravens artwork (the helmet), Moag invited Bouchat to send his drawings to him and he would refer them to Modell. (JA. 484.) Bouchat's testimony was corroborated by Marco Merrick, who testified that he remembered generally that there was some conversation between Bouchat and Moag during the meeting on March 28, 1996 in which Bouchat said he did not have his drawings and wanted to submit them. He also remembered some conversation in which Bouchat's getting a fax and phone number was discussed. (JA. 69-70, 72-73.)

Defendants state that Bouchat's account of the meeting is squarely conflict[s] with others present. Brief, at 9-10. This statement ignores Merrick's testimony and mischaracterizes Moag's and Seman's. Moag testified that he did not recall

any discussion about drawings or inviting Bouchat to send his drawings. (JA. 968-69.) Moag's cross-examination established that he had a poor recollection of the events and, for example, testified he shared space with the new team when it first came to Baltimore in November of 1995 and that the team did not share his office the day he met with Bouchat. (JA. 973-75.) Cross-examination of Seman established that he had no recollection of the meeting or surrounding events. (JA. 940-53.) Seman, however, testified that Bouchat had spoken to him about getting his drawings to the Ravens to be used for logos. (JA. 952-53.)

**C. Bouchat's Fax to the Maryland Stadium Authority.**

Bouchat's testimony concerning his faxing of material was corroborated by Jan Drabeck, who testified that Bouchat had obtained permission from Roger Sullivan, the head of General Services, to use the fax machine to send his drawings to MSA.<sup>2</sup> (JA. 339.) Drabeck testified that Bouchat had asked him how to use the fax machine and that he showed Bouchat how to use the fax machine. (JA.329-32.)

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<sup>2</sup>Defendants state that Bouchat changed his testimony from his deposition. (JA. 3322-3325.) Defendants predicate their assertion on a fact not found in the deposition record: that Bouchat testified that he dialed one continuous number: 410-333-1560-333-1818. Defendants are simply supplying the answers to questions that they did not ask at deposition and attempting to put words in Bouchat's mouth. The district court observed that Bouchat does not speak with precision and found that the confusion concerning the area code came about because of the change in the local dialing system to ten digits. (JA. 1312.)

He testified that Bouchat understood how to use the machine and that it was hardly "rocket science". (JA.340.) Bouchat, according to Drabeck's testimony, told Drabeck at the time that he wanted to use the fax machine to transmit his drawings to MSA, because they had expressed an interest in his artwork. Approximately two weeks later, Bouchat confirmed to Drabeck that he had sent his drawings to MSA. (JA. 332.) Additionally, Richard Feller testified that Bouchat told him at the time that he was going to send his drawings to MSA. (JA.1058-59.)

Defendants state that the jury found against Bouchat on the issue of access on two of the three drawings. This is wrong. The jury was not asked an overall question concerning access but rather specific questions. The pertinent question posed to the jury was whether Bouchat proved by a preponderance of evidence that he created in 1995 the same exact drawing as was attached to his copyright application. (JA. 1158-59, 1316-17.)

**D. Evidence that the Fax Was Delivered by MSA to the Office Suite of Moag, the Ravens and Modell.**

MSA was the agent of Moag, Modell and the new team for receipt of mail and faxes, even signing postal receipts for the team and Modells. (JA. 1587.) Plaintiff documented a channel of communication by which MSA sent, as a matter of routine practice and procedure, mail and faxes from MSA's office to the front desk of the offices shared by Moag, Modell and the Ravens or, sometimes in the

case of faxes, forwarded to the fax machine located in the Patton, Boggs work room. (JA. 317-20, 399-400.) Thus, there was evidence that Bouchat's fax made its way from MSA to the receptionist's desk at Suite 1100 or to the fax machine in the work room from where it was delivered. Fed.R.Evid. 406 (Habit; Routine Practice). (ADD. 4.)

Defendants argue that Cline conducted a search of MSA files, which revealed that Bouchat's fax was never received. There was no evidence, however, that MSA had any reason to keep a copy of either Bouchat's submission or any other submission that it received from members of the public. Nor would MSA personnel have any reason to recall a particular submission due to the volume of submissions that it received. Nor is there anything in the record to suggest that Cline ascertained the personal knowledge of each person who worked at MSA in March and April of 1996 who would have been in a position to see Bouchat's work.

Defendants state that Moag testified that he did not want to be a mail drop for the Ravens and that no outside submissions were passed on by MSA or his office to the Ravens, as they were thrown away. Brief, at 13. Clearly, however, MSA was a mail drop for the team and passed on submissions. Moag testified that he did pass on submissions for political reasons. (JA. 966.)

**E. Evidence that the Ravens and Modell Had Access to the Fax.**

Moag was located in close proximity to David Modell and Ravens personnel within Suite 1100. Moag testified that Modell had an office on the 11<sup>th</sup> floor within earshot of his office. David Modell was gregarious and socialized with Moag and his secretary in the office; team personnel used the lunch room in the suite, along with law firm employees, and had general access to Moag and the rest of the suite. The team used the firm's telephone system, copy, fax and postage facilities, and the services of the firm's receptionist and internal mail and fax delivery personnel. (JA. 396-98, 963-64, 979.) Both the Ravens and David Modell had an opportunity to see and take the fax in Suite 1100 and, therefore, Plaintiff established a reasonable possibility of access to it. *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 458 (S.D.N.Y.1965) *aff'd* 360 F.2d 928 (2<sup>nd</sup> Cir.1966)(editor who was employed in office where manuscript was located had an opportunity to see it and thereby had access); *accord Meta-Film Associates, Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1356 (C.D.Cal. 1984); *cf. Moore v. Columbia Pictures Industries, Inc.*, 972 F.2d 939, 942 (8th Cir. 1992)(citing 3 Nimmer on Copyright ' 13.02[A])(reasonable possibility of access can also be established by the corporate receipt doctrine where, by reason of the physical propinquity between the employees, the latter has the opportunity to view the work in the possession of the former).



Given the wording on the Bouchat fax requesting that the drawings be sent to Modell, it could reasonably have been directed to either Moag or Modell or passed on to other Ravens personnel, all of whom, at the time, occupied the same suite. Also, given the prominence of the Ravens= drawing on the fax, and the unusual format of the note written along the sides of the drawing, it is likely that Patton, Boggs= staff would forward this directly to some Ravens= personnel. This note was not the Aclear@ ordinary fax cover sheet and did not follow the format of a letter. While the upper right corner does contain a ATo MR JOHN Moag@ (JA.1344), anyone who looked at the page or read the letter could plainly see that it was ultimately intended to go to Modell for consideration by the Ravens.

If the fax was delivered to Moag, his statement that if Bouchat sent his drawings to him, he would refer them to Modell could reasonably be construed as an invitation for Bouchat to send his works to Moag. Bouchat=s works, therefore, were not unsolicited works sent by a faceless member of the public but, rather, were from someone for whom the Secretary of the DLLR had arranged a unique meeting with Moag. Moag=s statement is an expression of his intent to do a future act, i.e., refer the drawings to Modell, and is evidence that, in fact, Moag acted in conformity with his stated intention to give Bouchat=s drawings to Modell. *Mutual Life Insurance Co. v. Hillmon* , 145 U.S. 285 (1892); *Phoenix Mutual Life*

*Insurance Co. v. Adams*, 30 F.3d 554, 566 (4th Cir.1994); *United States v. Pheaster*, 544 F.2d 353, 374-80 (9th Cir.1976), *cert. denied* 429 U.S. 1099 (1977) (where cooperation of another party is necessary for the intended act); *United States v. Calvert*, 523 F.2d 895, 910 (8th Cir.1975), *cert. denied* 424 U.S. 911 (1976)(Declarant's statement of intention admissible to prove he subsequently acted in conformity therewith, if the doing of that act is a disputed material fact.); *United States v. Stanchich*, 550 F.2d 1294, 1297-98 &n.1 (2d Cir.1977)(Exception to hearsay rule for declarations of present state of mind allows admission of such a declaration not simply to show state of mind but subsequent act of the declarant); Fed.R.Evid. 803(3). (ADD. 4.)

#### **F. The Relationships**

This Court, in *Towler*, 76 F.3d, at 583, states that a "court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer. An intermediary **will** fall within this category, for example, if she **supervises** or works in the same department as the infringer or **contributes creative ideas to him.**" *Towler*, at 583 (emphasis supplied) *citing Moore*, 972 F.2d, at 944-45, and *Meta-Film*, 586 F. Supp., at 1358. *Towler* also instructs that there must be "contact@ between those in the channel through which the work flowed

"during the same period". *Towler* at 583. This Court states: "[A]t a minimum, the dealings between the intermediary and the alleged copier must involve some overlap in subject matter to permit an inference of access." *Towler*, at 583, quoting *Meta-Film*, at 1358. Here, there is not only evidence of a channel of communications through which submissions and materials from the public flowed from MSA at Camden Yards to the Ravens to NFLP, but evidence of a clear, concurrent, and reasonable relationship between the parties to establish a reasonable possibility of access, including the management and direct input in the creative process by David Modell and the Ravens into the design process.

In *Towler*, plaintiff sent a manuscript to SCS Films, a company that was formed after the bankruptcy of Cinecom which had distributed two of writer and director John Sayles' past films. Unknown to Towler, SCS had absolutely no current relationship with Sayles. Towler testified that an employee of SCS, Strain, agreed to forward the manuscript to Sayles. SCS later rejected the manuscript. When Sayles' film, *A Passion Fish*, was released, Towler sued for copyright infringement.

While the court credited Towler's testimony that Strain said she would forward the script to Sayles, the court stated that the plaintiff must introduce evidence from which a jury could draw a reasonable inference that Sayles received

the script. Towler's proof was insufficient because: 1) Sayles had no concurrent contact or relationship with SCS, only a past relationship with Cinecom; 2) Sayles testified that he never dealt with SCS; 3) there was no evidence that other parties, claiming to be intermediaries, had any relationship at the time he was working on his manuscript; 4) there was substantial testimony from Sayles that he began creating the work four months before Towler sent the script; and 5) and, very importantly, the court found that the two works contained only random similarities. The works were not strikingly similar, they were not substantially similar, and the court said the total concept and feel is "completely different." *Id.*, at 584.

In *Towler*, this Court cites *Meta-Film*, which involved a copyright infringement suit for a screenplay or treatment that alleged to be infringed upon by the movie, "Animal House." The court in *Meta-Film* went into a thorough analysis of many of the cases involving intermediary relationships and the elements necessary for proof of access. In *Meta-Film*, the court noted that a number of courts had found access where the alleged infringer and the intermediary as such occupied positions that it would be natural that information possessed by one would be imparted to the other. The court in *Meta-Film* found that in each of the cases where access was found, "an individual in a position to provide suggestions or comments with respect to defendant's work ... **had the opportunity** to view the

plaintiff's work." *Id.* at 1357 (Emphasis supplied); *see also Smith v. Little, Brown & Co.*, at 458, discussed in *Meta-Film*, at 1356.

The court in *Meta Films* also points out approvingly that under certain circumstances, "courts have drawn an inference of access in situations when the individual with knowledge of plaintiff's work and the defendant are not part of a business enterprise, but rather have dealings with one another." *Id.* at 1358. The distinguishing features of this intermediary access are that 1) the intermediary had the ability to provide or contribute creative suggestions, and 2) the dealings between the entities involved overlapping subject matter to permit an inference of access. *Towler*, 76 F.3d at 583.

In *Moore*, the court followed the key elements found in the case law cited by *Meta-Film*. Access was found to exist based on the facts because the intermediary was in a position to provide suggestions (either directly or through another intermediary) and the intermediary had the opportunity to hear the musical work. The court found that, as a matter of law, the district court had erred in holding that the defendants did not have a reasonable opportunity of access. The court, however, concluded there was insufficient evidence that the two musical works were substantially similar.

The criteria set forth in these cases have been met in this case:

**1) Moag and MSA's Relationship to Modell and the Ravens.**

The relationship between MSA and the Ravens and Modells was concurrent and involved some overlap for purposes of *Towler* in subject matter with Moag and MSA and satisfy their intermediary status. MSA selected and passed on to the Ravens submissions of art work that it received from the public to the Ravens and even signed postal return receipts on behalf of Art Modell and the Ravens. The evidence also showed that there was some overlap in subject matter between Moag or MSA, and the Ravens' identity. In addition to the opening and forwarding of design submissions to the Ravens, the team's logos were incorporated into parts of the stadium itself, which required the approval and involvement of MSA. Edward Cline testified that the Ravens' identity was used in many places in the stadium. (Tr.685-88). Arthur Modell testified that at the end of every row of seats in the stadium, Ravens artwork was incorporated or molded into the metal which MSA had to approve. (JA. 344-47.) David Modell testified regarding plans to incorporate a giant raven statue into the stadium but this, too, would require MSA approval. (JA. 1091-92.)

The evidence established at trial supports the intermediary relationship between Moag and the Ravens. Moag had a relationship with the Ravens during the period that Bouchat faxed his works to MSA, the same period when NFLP

designers were beginning their work on the Ravens' identity. Moag had been instrumental in negotiating and arranging for the team to leave Cleveland. Moag had been instrumental in putting together an attractive financial package consisting in part of a new stadium that induced the team to leave Cleveland. When the new team did not have offices, Moag took them into his own law office rent-free.

Finally, there was also evidence that Moag contributed creative ideas to the Ravens. Plaintiff testified that, at their meeting at the offices of Patton Boggs, Moag invited Plaintiff to fax his other Ravens artwork and that Moag told him he would forward it to the Modells and the Ravens. This inference is supported by the DLLR newsletter, which states that Moag assured Bouchat that he would pass the helmet on to Modell. (JA. 1357.)

## **2) Modell and Ravens= Relationship with NFLP**

Separate and apart from the specific channel of communication from MSA to Suite 1100 to NFLP, there was evidence in the record that the Ravens and, in particular, David Modell, contributed creative ideas to the logo design process. (JA 845, 850, 859-60, 880-81, 885, 1076-77, 1080, 1094.)

Additionally, the Ravens and David Modell had overall supervision of the logo development process. (JA. 348-49, 352, 365, 1068-69, 1074, 1080, 1512-18.)

The Ravens and the Modell family were and are partial owners of NFLP. (JA. 876.) NFLP is the marketing and licensing arm of NFL teams to which the teams have assigned their logos. The Baltimore Ravens and Modell, as well as the other NFL teams and their owners, have an interlocking relationship with NFLP, by virtue of the trust assigning the respective team logos and trademarks to NFLP. (JA. 355-62; Plaintiff-s exhibits 84 & 85.)

Bruce Burke and David Modell testified that they met in New York City on April 2, 1996 to discuss the development of the Baltimore Ravens logos. (JA. 849, 1061-62, 1067a-69.) On April 8, 1996, David Modell sent a fax to Burke setting forth managerial direction for the project, including scheduling imperatives. (JA. 1512-18.) David Modell had creative input and expressed design direction for the project when he expressed to Burke a preference for a shield design. (JA. 881-82.) On April 16, 1996, David Modell attended a meeting with NFLP designers in New York City where their designs were presented to him, and expressed his preference as to the direction in which he thought the design process should go. (JA. 1073.) Arthur Modell testified about the close relationship between the Baltimore Ravens and NFLP and that David Modell had overall supervision over the design project, managing the process for the team-s logo group. (JA. 348-49, 352, 365.) The Ravens and



their consultants reviewed and commented on NFLP work product that was presented at the April 16 and May 3, 1996 presentations. (JA. 352-55, 1073-81.) The Ravens had ultimate control over the final selection of the design. (JA. 364-65.) When asked whether he made creative suggestions to NFLP and whether those suggestions were followed, David Modell answered Ayes@ to both questions. (JA. 1094.) If the Ravens had access, it can, therefore, be inferred that NFLP had access. *Towler*, 76 F.3d at 583.

Defendants point to various individuals who testified for the defense, arguing that they were in the channel of communications, but testified that they did not see Bouchat's drawing. Defendants did not base any Rule 50(a) motion on this testimony and have not preserved this contention. *Miller v. Premier Corp.*, 608 F.2d 973, 979n.3 (4th Cir.1979)(The grounds on which a renewed motion for judgment made after the verdict is limited to the grounds of the motion made at the close of the evidence); *Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 866n.1 (4th Cir.1999). Defendants presented no testimony from persons whose jobs necessarily would have involved the handling of the fax, such as, for instance, the receptionist at Patton, Boggs. Moag admittedly had a poor recollection and did not recall at trial that the team occupied his offices at the time in question. (JA. 966, 968-69, 975-76.) While

Defendants point to Beth Henry, Moag's secretary at Patton, Boggs, stating that outside submissions were placed in a separate folder, which was searched for Bouchat's drawings, Henry's testimony is contradicted in three respects. An examination of the file to which Henry made reference reflects that there were only three drawings in the entire file, not volumes of materials. **See Plaintiff's Exhibit 120.** Moag testified that it was his practice to look at some of the drawings and then throw them out. Moreover, why would Bouchat's drawings be in the file, if they were passed on?

Defendants also point to David Cope's testimony to support the proposition that no artwork was forwarded to NFLP after April 1, 1996.<sup>3</sup> While

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<sup>3</sup>On November 4, 1998, the day after the jury returned its verdict, a newspaper article appeared about the case. As a consequence, a person employed by a temporary services agency who had been assigned as a part-time receptionist in early April 1996 to the Ravens' Owings Mills, Maryland, training facility, came forward stating that she saw Plaintiff's shield drawing when it arrived there by fax in early April 1996. She further stated that after April 1, 1996, it was the course and practice of the Ravens to send submissions of artwork received by the Ravens from the public to NFLP. The former temporary services employee stated that she passed the Plaintiff's drawing along to be forwarded to NFLP. (JA. 1247-1253). Thereafter, Plaintiff filed a motion to take the deposition of the temporary services agency for the purpose of identifying witnesses who might corroborate the witness' information. One of the grounds advanced was that the Defendants had failed to identify the Owings Mills facility or persons working there, in response to a specific interrogatory seeking the route after receipt of any submissions of any designs received from the public, as well as persons having contact with any such submissions. (JA. 1243-44). The district court granted the Plaintiff's motion. (JA. 1296-99.)

testifying that he had certain supervisory duties related to the intake of submissions from the public, he testified that he was not involved in the routine, day-to-day handling of the vast number of submissions from the public. (JA. 1036-37.) He also testified that he did not begin his full-time duties with the Ravens until approximately March 18, 1996 and had no involvement with submissions when he first began his duties. (JA. 1036.) Cope testified that the team did not start sending back submissions from the public until approximately April 4, 1996. (JA.1038.) *See also* 4 Nimmer on Copyright, ' 13.02[A], 13-20, 21 (proof of channel of communication should suffice to permit the trier of fact to find access, without any need to directly counter denials of knowledge by those in channel).

**G. Other Copying by NFLP Designers.**

Paula Guibault, NFLP in-house counsel, testified that it would violate the NFLP policy if its designers copied materials from copyrighted books and included them in the presentations to Modell and the team. (JA. 1055-57.) Bruce Burke, NFLP's creative director, testified that it would cause him a lot of concern if NFLP designers scanned silhouettes from published works in a public library into their computers and then incorporated them into the April 16, 1996 presentation to David Modell. (JA. 871, 873, 875.) Clearly, however, this

is what the NFLP designers did. (JA. 708-25, 732-43, 869-75.) The Court need only look at the progression of depictions in Plaintiff's Exhibits 112 b -112g to see that NFLP designers photocopied bird books in the Berkeley, California public library, scanned them into NFLP computers and incorporated the same images into a commercial presentation to David Modell on April 16, 1996 and again on May 3, 1996. (JA. 1495-1511,1729-1742, 1745A-47.) This was part of a practice and pattern of copying other people's work. (JA.1547-50, 1596-97, 1600-1602, 1606-09, 1612, 1620-22, 1632, 1637, 1639, 1725-1747A.)

#### **H. Common Errors in Both Works.**

"[T]he existence of common errors is one of the most persuasive proofs of copying, second only to direct evidence of copying.@ *Hayden, v. Chalfant Press, Inc.*, 281 F.2d 543, 548 (9<sup>th</sup> Cir.1960); *see also Lipton v. The Nature Co.*, 71 F.3d 464, 471 (2<sup>nd</sup> Cir.1995)(six translation errors in defendant's product, which also appeared in plaintiff's work--although some appeared in other sources, supported plaintiff's conclusion that defendant had to refer to plaintiff's book). This Court has held that the existence of errors may create at least a *prima facie* case of copying. *Kramer*, 783 F.2d, at 446. *Kramer*, 783 F.2d, at 446, cites *Callaghan v. Myers*, 128 U.S. 617, 662 (1888), which holds that common mistakes not attributable to the public domain are unmistakable evidence that the subsequent

work was not independently created. *Id.*, at 659-61. Here, Simon Shane, a Doctor of Veterinary Medicine, testified that the two works in question contained the same anatomical errors and were almost comic book caricatures. (JA. 215-25.) Defendants' own expert, an ornithologist, testified that the raven in the respective shield designs did not resemble a real bird, i.e., was fanciful, and had feet that were the digging claws of a mammal, such as a bear or badger, and contained the very same ornithological mistakes in proportion, wing shape, notches and number of wing feathers and slots. (JA. 1654-60, 1665-66, 1668-75.)

None of these ornithological mistakes have a basis in Defendants' research and appear inexplicably from nowhere after April 9, 1996. For instance, the feet do not appear related to the specific source materials from which Kim stated they came. (JA. 745-46, 783-84, 1556-57.) The same unusual feet type that appear in Bouchat's shield drawing appear in the Garrett drawing and other of Bouchat's works-in-progress (JA. 1339, 1342, 1343) appear in the Ravens Bird logo and internal work product. (JA. 1650, 2250.) Additionally, Defendants' internal work product contains the same number of incorrect tail feathers and elongated shape as the tail feathers of Bouchat's shield drawing. (JA. 1654-55, 1657, 1671-72.)

Further, the letter B on the shield in both works is unusual because the upper portion of the letter B in standard professional design typography is generally

always smaller than the bottom. (JA. 142-43.) *Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir.1984)(accused work repeats unexpected departure from normal structure and common errors).

### **I. Striking Similarity.**

While Plaintiff's case does not rely on striking similarity alone to establish copying and access by the Defendants, the degree of similarity and the nature of the works involved constitute compelling and highly probative evidence of access, in conjunction with the other evidence of access in this case. *Id.*, at 901(striking similarity is usually just one piece of circumstantial evidence tending to show access).<sup>4</sup> Unique to any case found by Appellee, the expert testimony presented at trial by both parties concerning the degree of similarity in itself supports an inference of access. The virtual identity of the pictorial works is supported by the expert testimony of both parties, making this case unique to any other addressing striking similarity. Defendants' experts state that because of the identity of the works, there is no reasonable explanation other than copying. Bouchat's expert also states that the only explanation is that Defendants copied

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<sup>4</sup>Defendants state that Plaintiff's counsel argued only striking similarity to the jury as evidence of access. Brief, at 33. The record, however, is that Plaintiff's counsel argued all the evidence of access of which striking similarity was one piece. (JA. 1192-95; Tr. 2165.)

from Bouchat's work, given his prior creation. If there is no reasonable explanation for the striking similarity other than copying, as both parties' experts agree, there is no dispute of fact that the two sets of works could not have been done independently of the other, and the only issue in this case is which party created the work first.

Bouchat presented lay and expert testimony that his shield design and Defendants' shield design were so strikingly similar as to preclude any reasonable possibility of independent creation. Bouchat produced various witnesses, such as Peppersack, Owens, and Smith, all of whom testified that they immediately recognized the Ravens' shield logo as being Bouchat's. From the viewpoint of a design professional, Anders testified that both Bouchat's and Defendants' respective shield designs had approximately 20 distinct design elements. Each of the 20 elements on Defendants' design was identical to the corresponding 20 design elements on Bouchat's shield design, and these 20 design elements in the respective works were arranged in identically the same fashion. (JA. 140-49, 1552-54.) It, therefore, was Anders' professional opinion that, based on the numerosity and arrangement of these strikingly similar features, one of the two works in question had to be the source of the other and that the two could not have been created independently of one another. (JA. 149-50, 1554.) Anders

also concluded that Defendants' shield logo was a direct copy of Bouchat's, except that deceptively Defendants had removed the head, claws, and tail feathers of Bouchat's design. (JA. 168, 1554.)

Defendants' own design experts were also of the opinion that Bouchat's and Defendants' works were so identical that they could not have been created independently of one another. Steven Sheehan, one of Defendants' design experts, testified A[t]here are elements in both designs that are so similar, that are so connected that they would not have been developed independently from one another@. (JA. 1029-31.) Defendants' other design expert, Craig Ziegler, concurred, referring to Bouchat's work as a Adirect copy@. (JA. 995-99.) Although Defendants offered this testimony to contradict Bouchat's prior creation, the District Court found that one could reasonably infer from it that someone copied and that the jury reasonably decided it was the Defendants, given Bouchat's prior creation. (JA. 1317-18.)

**J. Lack of Evidence that NFLP Insulation Policy Was Implemented.**

Defendants point to the testimony of Paula Guibault for the proposition that it was NFLP's policy that its creative people were not to look at unsolicited submissions from the public and that any such materials were to be sent to her for return. Defendants did not base any Rule 50(a) motion on this testimony and



have not preserved this contention. *Miller v. Premier Corp.*, 608 F.2d, at 979n.3.

Gulbault, who became an NFLP employee in February, 1996, testified that she embodied this policy in a March 11, 1996 memorandum, which was circulated to NFLP executives. While she testified in general terms that this policy was made known to some executive corporate officers (JA. 1048-49, 1915), there was no testimony how the policy was implemented. There was no testimony that Kim, Osaki or Renaud were familiar with this policy and followed it. There was no testimony that the policy was given or explained to the designers, particularly independent contractors, such as Osaki and Renaud, or what steps were taken to ensure that its terms were followed. Guibault, significantly, did not testify how, in fact, the drawings received from the public were processed and ended up in her department. (JA. 1045-53.) Guibault was unaware of the practices followed by NFLP designers and did not testify that she conducted any audit or inspection of their practices. (JA. 1055-57.) David Modell's letters that he would pass on suggestions to NFLP was evidence that any policy was not established or long-standing. (JA. 1581, 1588.) Cope's testimony that Ravens personnel looked at submissions from the public was evidence that the insulation policy was not followed. (JA. 1043-44, 1916.)

**K. Evidence that Defendants Did Not Independently Create the Shield Logo.**

The lack of independent creation is a burden of persuasion, not an element of Plaintiff's case, as incorrectly asserted by the Defendants. The establishment of a *prima facie* case creates a presumption of copying which can be rebutted by Defendants' introduction of evidence of independent creation. Defendants must produce evidence to rebut the presumption of copying which is established by a showing of access and substantial similarity. If the Defendants meet their burden of going forward by successfully rebutting the presumption of copying, it is the function of the fact finder to weigh all the evidence, albeit the Plaintiff has the ultimate burden of persuasion that the Defendants copied. *Keeler Brass*, at 1065-1066. *Id.*

The experts on both sides testified that the works could not have been done independently of one another. While Defendants point to the testimony of their designers, the jury could reasonably disbelieve them. Anders testified that the NFLP design work product did not reflect a developmental process and had gaps. (JA. 154-55, 169, 174-75.) Defendants' expert, Ziegler, testified that it was impossible to determine from Defendants' work product the sequence and chronology of their work. (JA. 1000-01.) Defendants had virtually no preliminary work in hard copy form other than that which they generated from computers during this litigation. Defendants cannot point to any preliminary

sketches, as the district court observed, that resembled the shield design A without a good deal of literary license.@ (JA. 1318, 2252-55.)

The only preliminary sketches that Kim identified by reference to her calendar as being done on March 27, 1996 were the first four sheets of Defendants= exhibit 46. (JA. 607, 2252-55). At least one of her preliminary sketches was drawn from a magazine in violation of NFLP policy. (JA. 1596-97, 2252.) Anders testified that Kim=s preliminary sketches had nothing to do with the designs in issue. (JA. 174.) It was not until after Osaki arrived in New York on April 9, 1996 that there was any development of work product that particularly resembled that of Bouchat's shield design. (JA. 773-782 , 1643-48, 2504, 2547.)

In order to establish the dates of their work product, Defendants flooded the record with color printouts from their computer files purporting to reflect the dates and times of last modification and, in some instances, dates and times of creation, of the computer files from which they were printed. (JA. 2288-3104.) There was undisputed evidence, however, that every one of the dates and times reflected in Defendants= Exhibits 49-93, 105-137, 140-157 was inaccurate and questionable. According to Plaintiff's computer expert, David Patschke, and Defendants' own computer expert, Erich Spencer, any dates reflected in computer

files generally were not accurate or reliable to verify or establish time in human terms. (JA. 1126-28, 1144, 1151-52.) Additionally, both Patschke and Spencer testified that the dates and times in each of Defendants's computer files, including those from backup tapes, reflected specific discrepancies and were not accurate. The internal data codes of each of Defendants= computer files, known as postscript codes, contained dates and times of last modification later than those presented by Defendants . (JA. 1096-1125, 1133-43, 1151-52.) Raquel Skidmore, through whom Defendants presented their computer files, conceded reluctantly that there were irregularities and "[t]he dates are a little in question, but the files are the same files." (JA. 811-12.) The dates and times of creation reflected in the computer files of Defendants= trial exhibits 49-93, 105-137 (JA. 2288-3015) are April 22, 1997, later than the dates of last modification, an impossibility. (JA. 1113-14.) While there may not have been evidence of fraud, Defendants computer files are useless to establish dates and times of creation and last modification. Construed in a light most favorable to Plaintiff, the dates and times reflected in Defendants= Exhibits 49-93, 105-137, 140-157 are entitled to no weight on appeal.

Rhonda Kim testified at trial based on Defendants= Exhibits 49-93, 105-137, 140-157. (JA. 630-39, 644-703.) Kim, however, acknowledged at trial that

on approximately 27 occasions during her deposition, she was unable, without looking at her computer files, to answer questions concerning the chronology of the development of the NFLP work product, including the four preliminary sketches she testified she had drawn on March 27, 1996. In response to approximately 50 other questions concerning the chronology of the development of the NFLP work product, she could not remember or did not know. (JA. 746-69.) The jury could reasonably have concluded, therefore, that Kim had no independent recollection concerning the chronology of her work product and that her testimony was based on the questionable computer files. Furthermore, the jury could reasonably be mistrustful of Kim's testimony because she, the chief designer on the project, did not bother to look at her computer files in order to answer questions at deposition and yet testified at trial that she had been shamed by the allegations in this case, that her professional integrity and character had been attacked, that the case was high profile and made her angry and emotional and that she would defend her integrity. (JA. 704-07, 753-54.)

Renaud's first work product appeared on April 8, 1996. (JA. 819, 1643-48.) After comments from Kim, he sent her a second set of drawings on April 10, 1996 that included a frontal view with notches. (JA. 821, 1641-42, 2786-89.) This work product had seven elongated tail feathers, mistakes that are

found in/on the tail feathers of Bouchat's shield drawing. (JA. 1642.) Given the fact that Bouchat did not have access to Renaud's work product, these common mistakes cast doubt on the testimony of NFLP designers.

Defendants state that Kim and Osaki testified to the step-by-step process from concept to finished product. Brief, at 7, 17. The record fails to bear this out. Nowhere is there an articulated progression or concept, either in the testimony or in the documents. Defendants' own expert testified that he could not discern a sequence. (JA. 1000-01.)

The denials of access by Kim, Osaki, Burke and David Modell were so similar in content and theatrical in attitude that the jury could reasonably draw the conclusion that they were rehearsed and staged, particularly given the presence of their witness coach. Emotions appeared to be turned on and off as if on queue. The finger-pointing denigration of Bouchat also gave the impression of rehearsed performance rather than honest testimony. (JA. 704-07, 770, 865-69, 926-27, 1081-83.) When combined with documentary evidence of the existence of a "party line" in the Ravens' dealings with the outside world in similar situations (JA. 1518), it was reasonable for the jury to have an unfavorable view of the credibility of these witnesses. Finally, Defendants' computer presentation in the court room and the testimony about NFLP's array of

sophisticated scanners that were abundantly used in violation of NFLP policy on this project to copy other people's copyrighted work demonstrated just how easy it was for NFLP designers to have used Bouchat's work without even a thought.

## **II. THE DISTRICT COURT DID NOT ERR IN ADOPTING STRIKING SIMILARITY.**

Defendants have incorrectly sought to frame this case as one in which the only evidence of access is that of striking similarity. There is sufficient evidence of access in this case, separate and apart from the doctrine of striking similarity, so that the Court need not reach this question. Nevertheless, the court, in *Selle*, at 910-02, stated that although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable. Plaintiff has made this showing and would qualify under *Selle* for application of striking similarity, given the other evidence of access, the degree and intricacy of the similarity and the unexplained common errors shared by the works.

In *Ty, Inc. v. G.M.A. Accessories*, 132 F.3d 1167 (7th Cir. 1997), the Seventh Circuit clarified its decision in *Selle*, stating that it did not read *Selle* to conflict with *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988). Nor did the court view *Selle* to hold that no matter how closely works resemble each other, the plaintiff must produce some other evidence of access. In *Ty*, the court

considered two virtually identical, fanciful pigs, neither of which could be attributable to anything in the public domain. The court emphasized that two closely identical works can be powerful evidence of copying when they are unlike anything that is in the public domain. *Ty*, at 1170.

The *Ty* decision underscores how important the particular facts are to the applicability and probative value of the striking similarity doctrine.<sup>5</sup> The works in *Ty*, the fanciful pigs, are much closer to the works in this case, the fanciful ravens, than are the literary work and jingle at issue in *Towler* or *Takeall*. The fanciful raven created by Bouchat is virtually identical to Defendants' raven, but not to anything in the public domain and contains common errors. The facts in Bouchat's case are exactly the type of situation where striking similarity is highly probative of access. *Selle*, at 904.

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<sup>5</sup>Defendants state that the district court ignored *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1 (1<sup>st</sup> Cir. 1996), a case Defendants cite as rejecting striking similarity. Brief, at 32, 35, 47-48, 50. Neither party cited this case in the district court. *Grubb* did not address the issue of striking similarity or even use that term, and Defendants grossly overstate certain dicta from that case. The works involved in that case, which are displayed in the index to that case, were not substantially similar, and the court placed great emphasis on the fact that defendants there established creation prior to the alleged submission by reference to computerized time sheets to which plaintiff there stipulated. *Grubb*, 88 F.3d, at 3-4.



Striking similarity as evidence of access must be reasonable in light of all of the evidence. *Gaste*, at 1068. In *Selle*, striking similarity alone was insufficient proof of access, because the musical scores could have had a common source in the public domain, were not intricate and did not contain suspicious elements, such as common mistakes. As in *Towler*, the *Selle* court found that the works were not strikingly similar. In *Ty*, on the other hand, the striking similarities to the plaintiff's work were not similar to any common sources or a real pig. An ordinary observer would be suspicious of the degree of similarity in much the same way that the lay witnesses in this case believed that Defendants had copied Bouchat's works or that the experts in this case concluded that the two works could not have been done independent of one another.

Defendants argue that the district court instructed the jury to disregard Defendants' voluminous evidence of independent creation in the face of striking similarity and now take exception to the question on the jury verdict form (JA. 1238) asking whether the Ravens shield logo was so strikingly similar to the Plaintiff's shield drawing that there was no reasonable possibility of independent creation. Brief, at 49. Defendants, however, did not object to the verdict sheet. *Levy v. Kindred*, 854 F.2d 682, 685 (4th Cir.1988)(absent exceptional circumstances, an appellate court will not consider an issue raised for the first

time on appeal). While the district court told the jury about this question in its instructions (JA. 1186), the court did not give any instruction concerning striking similarity, and the Defendants did not request one. *Id.* The court did not instruct the jury that it could infer access from striking similarity as the trial court in *Gaste* , at 1067. Moreover, the court asked a second question, separate and apart from striking similarity, whether Plaintiff proved that NFLP did not independently create the work. (JA. 1238.)

### **III. PLAINTIFF'S WORK QUALIFIES FOR COPYRIGHT PROTECTION.**

Defendants contend that the district court should have dismissed Bouchat's claim because his work lacks sufficient originality. Brief, at 51-52. This issue was not raised or decided below. (JA. 727-28, 568-78, 1095, 1160).<sup>6</sup> *Levy*, 854 F.2d , at 684-685. Substantively, Defendants' argument is without basis in copyright law or under the law set forth by this Court. Defendants' analysis is flawed as a work must be reviewed as a whole, not just reviewed or analyzed part by part. *M. Kramer* at 439. While public domain elements are not

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<sup>6</sup>Defendants challenged the validity of Plaintiff's copyright registration for the first time after the conclusion of the trial, contending that Plaintiff obtained his copyright registration by fraud. The court, however, ruled that there was no evidence of fraud. (JA. 1309-1311.) Defendants do not appeal this ruling.

copyrightable in themselves, the public domain elements at issue are combined with original creative expression. The various elements are selected, coordinated, and arranged in such a way as to render the work original. *Id.*, at 438-440; *Feist Publications, Inc. v. Rural Tel. Service. Co.*, 499 U.S. 340, 345-46, 348 (1991).

Bouchat's shield drawing involved the selection of specific public domain elements, such as the botony cross, a shield shape, the word ARAVENS, and the letter AB. Defendants did not use these random elements alone but, rather, copied the creative variations on these elements, copied the original wings and wing flourishes on the AB, and copied Bouchat's precise selection, coordination, and arrangement of all of these elements. The extent of copying of the original components of borders, shading, notches, and creative flourishes is remarkable. The complexity of the selection, coordination, and arrangement of creative and public domain elements reveals an unmistakable level of originality far above the minimal level required for copyright protection.

Defendants attempt to distort the district court's ruling by stating that the district court Aexplicitly rejected Bouchat's claim that original expression can be found in selection and arrangement. Brief, at 52. What the court actually stated, in rejecting Defendants' contention that Bouchat's registration was fraudulent;

*see note 6 supra*; was that the court did not agree with Plaintiff's contention that he correctly stated that he was claiming a copyright interest in the entire work, i.e., in the selection and arrangement of the various elements contained therein... in the copyright application form. (Emphasis added) (JA. 1309.)

Defendants argue that the district court improperly found that the work was a derivative work. Brief, at 52. Below, however, Defendants argued that the work was a derivative work. *See* Defendants' post-trial memorandum, at 17-18 (Paper # 106, 11/12/98). Defendants also state that the jury found that NFLP created the Bird logo. The jury, however, found only that Bouchat did not meet his burden of proving that he created the exact same Bird drawings as in his copyright registration for those works. (JA.1314-17.)

Defendants express various concerns about the instructions; Brief, at 23-25, 51; and state that they preserved their objection to the "original arrangement" charge. Brief, at 25n.9. At best, this objection (JA. 1167) is nothing more than a general, unclear objection that did not advise the court or the Plaintiff of the arguments now advanced. *Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 514 (4th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987) (distinct and specific objection required); FedR.Civ.P 51; *Hardware Mutual Casualty Company v. Jones*, 363 F.2d 627, 631 (4th Cir.1966), *quoting Palmer v. Hoffman*, 318 U.S.

109, 119-120 (1943)(general exception to jury instructions insufficient).

Moreover, the objection to instructions is unrelated to the Defendants' third argument urging that the trial court erred in not dismissing for lack of originality. Brief, at 51-52.

#### **IV. THE DISTRICT COURT DID NOT COERCE A VERDICT.**

Defendants claim error and coercion resulting from the district court's "exhorting" the jury to reach a verdict. Defendants ground their claim of error upon the court's modified "Allen charge" on Friday, October 30, 1998, and a second supplemental instruction on Tuesday, November 3, 1998. A party must object, however, to an instruction before the jury retires, stating distinctly the matter objected to and the grounds of the objection. *See Fed.R.Civ.P 51. (ADD. 3)*. Defendants did not object to the first supplemental instruction. (JA. 1202.) Similarly, Defendants expressed only a general objection to the second supplemental instruction, opposing any further deliberation. (JA. 1206-08). *But see United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir.1970)(there is no right to a hung jury). Defendants made no other comments before the jury retired to deliberate other than "No, the defense doesn't want to say anything". (JA. 1211.) Defendants, therefore, waived any particularized attack on the

instructions and waived any objection they may have had. *Estate of Larkins*, 806 F.2d, at 514; *Hardware Mutual*.

Notwithstanding, the district court did not abuse its discretion in giving the supplemental instructions, because the instructions conformed to the mandate of Fourth Circuit law, and the length of deliberation after the supplemental instructions and the different verdicts reached confirm that there was no coercive effect. *United States v. Cropp*, 127 F.3d 354, 359 (4th Cir.1997) *cert. denied*, 522 U.S. 1098 (1998); *see also Sawyers*; *United States v. Martin*, 756 F.2d 323, 327 (4th Cir.1985)(*en banc*); *United States v. Burgos*, 55 F.3d 933 (4th Cir.1995).

The district court concluded its Allen charge on Friday, October 30, 1998, at 2:10 p.m. and thereafter the jury continued to deliberate until 5:00 p.m. (JA. 1202-03.) Later that day, the jury advised the court that it desired to return on Tuesday. On Tuesday, November 3, 1998, the jury sent another note at approximately 12:15 p.m., in response to which the court completed its supplemental instruction at 1:25 p.m. (JA. 1211.) At approximately 4:30 p.m., the jury responded to the court's inquiry concerning scheduling and advised that it was making progress. At 5:10 p.m., the jury reached a verdict. (JA. 1218-19, 1231.)

The court told the jury on October 30, 1998 that the court was not suggesting that anyone surrender his or her conscientious belief about the case and that the court did not want an agreement on a verdict unless each individual could agree upon it and conclude that the verdict was correct based on the evidence and the law as the court had instructed. (JA. 1200.) The court, while instructing the minority on any given question to listen carefully to the majority to see if they could conscientiously go along with the majority, also asked the majority on any given question to listen to the minority, because they could be correct. Above all, the court instructed a second time that no one should and can surrender their honest conviction about the case because of the opinion of someone else just for the purpose of reaching a verdict. (JA. 1200-01.) The court's instruction on November 3, 1998 was likewise balanced.<sup>7</sup> While stating that the jury was bound by the court's instructions, the court "emphasize[d]" that the evaluation of the evidence was for the jury and if "a lack of agreement stems from a conscientious disagreement of what the evidence is or what the evidence persuades you, then that is your business". The court stated that it did not want

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<sup>7</sup>The district court was under an obligation to give a supplemental instruction on November 3, 1998, given that there was a question of whether the court's instructions were binding on the jury. *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 191 (4<sup>th</sup> Cir.1994); *Sawyers*, at 1340.

Anybody to give up his or her conscientious belief of what the evidence establishes . . . .<sup>@</sup> and that there was no legal requirement to reach a verdict. The court added that the deliberations would likely conclude that day if, after reviewing any questions they had about the instructions, there was continued disagreement about the evaluation of the evidence. (JA. 1209-10.)

In *Cropp*, 127 F.3d, at 359, the defendants objected to a second brief charge given by the court because it did not contain all of the required elements of an Allen charge and, further, because it reflected the court's impatience with the jury. This Court rejected the arguments, stating that instructions were to be viewed as a whole, not in isolated segments. *Id.*, at 360. The court noted that the first instruction contained a statement that told both the majority and the minority to consider the views of the other side and not to surrender their firm convictions. Additionally, the second instruction contained a reminder for the jurors not to give up their firmly-held convictions. It further noted that there was nothing in the record to indicate an impatient tone on the part of the court toward the jury, as evidenced by the district court giving the jury replays of evidence it had requested. *Id.* This Court also noted that the jury continued to deliberate for a lengthy period of time after the second instruction and also that the jury returned several different verdicts, including some not guilty and some deadlocked. Thus,



this Court found it unlikely that a jury independent enough to return not-guilty verdicts for some defendants could have been coerced by the court with respect to others. @ *Id.*, at 360.

This Court in *Cropp* based its decision that the jury had not been coerced into reaching a verdict in part upon the fact that the jury deliberated for seven hours after the second charge before rendering a verdict. Citing *United States v. Russell*, 971 F.2d 1098, 1108 (4th Cir.1992), and *Burgos*, 55 F.3d at 940 n.7, this Court stated that although the length of deliberations following an Allen charge is not certain evidence that the jury was not coerced by that charge, lengthy deliberations can reassure a reviewing court that coercion did not occur. *Id.*, at 360. In *Russell*, at 1098, 1108, the court found that three hours of deliberation after a charge was evidence that the jury had not been coerced. Similarly, in *United States v. Martin*, 756 F.2d 323, 327 (4th Cir.1985)(*en banc*), this Court held that since the jury returned a verdict two hours after a modified Allen charge, there was no evidence of coercion.

Here, the district court's instructions were balanced and deferential to those who might be in the minority. *Burgos*, at 936-37( most important factor is a balanced instruction). The jury deliberated approximately four and one-half hours after the second supplemental instruction. The court told the jury that

deliberations would likely conclude that day if, after reviewing any questions they had about the instructions, there was continued disagreement about the evaluation of the evidence (JA. 1209-10) , thereby avoiding any perceived threat that the jury might have that it would be held hostage unless a verdict was reached. The jury reached different verdicts on the different works in question. Further, A[t]here was not the slightest intimation of impatience with the minority, nor any words that could be construed as a threat or even an expression of displeasure. ... suggested ... that the judge's tone of voice and facial expression ... were other than calm or dispassionate.@ *Sawyers*, 423 F.2d, at 1340.

Defendants point to the district court's references to wasted time on October 30, 1998. (JA. 1202.) In *Green v. French*, 143 F.3d 865 (4th Cir.1998), an appeal of a denial of a petition for *habeas corpus*, the trial judge was handed a note which stated:

[w]e have a juror that does NOT believe in Capitol [sic] punishment - The questions asked in jury selection were not understood. She can't think of any reason for the death penalty. Jan Ross.

*Id.*, at 884. After speaking to the jury, the judge received a second note concerning the requirement of a unanimous decision, at which point he spoke to the jury again. Eventually, the judge gave the jury an Allen charge, during the course of which he stated: AAll of us have a considerable amount of time in this

case.@ *Id.*, at 885. In spite of the court's knowledge that there was most likely one holdout, in spite of the court's comment concerning all having a considerable amount of time in the case, this Court upheld the court's charge because the language in question, when read in context, did not "coerce" the capital sentencing jury. *Id.*, at 887-888.

In *Sawyers*, the jury had deliberated for approximately fifteen hours when it sent a note out to the court stating:

We have a juror that stated: "the judge will get all over those that vote not guilty."

This juror has cursed, made slanderous remarks along with another juror throwing chewings [sic] gum. These two jurors are sister-in-law [sic] and want to go home.

The vote is 10 guilty & 2 not guilty.

It is a solid vote and no one will give.

*Sawyers*, 423 F.2d, at 1337.

In response to the note, the trial judge gave the jury an Allen charge. Fifteen minutes later, the jury sent a subsequent note of inquiry out to the court which was in turn answered. One and a half hours later, the jury returned a verdict. In rejecting the contention that the trial court had acted in such a manner as to coerce the two jurors to change their vote, this Court emphasized that the district court twice told the jury not to surrender their individual conscientious

convictions because of the opinions of other jurors or for the mere purpose of returning a verdict. *Id.*, at 1340. Moreover, this Court was of the view that to require continued deliberation after some 15 hours was not unreasonable or coercive for a complex case of lengthy duration (twelve trial days) and numerous documentary exhibits. Likewise, this case was complex, consuming approximately 19 trial days and having approximately 368 documentary exhibits. Here, however, the district court told the jury three times not to surrender their individual conscientious convictions and told the majority to consider the views of the minority.

To the extent that Defendants take umbrage at the court's note to the jury inquiring what it desired to do on November 3, 1998 concerning scheduling, the note was nothing more than an administrative matter and certainly within the sound discretion of the Court in making the inquiry. It was well-balanced and applied no pressure. It was deferential, if anything; and, Defendants simply mischaracterize it.

## **CONCLUSION**

Wherefore, for the aforementioned reasons, Appellee respectfully requests that the order entered February 22, 1999 denying Appellants' post trial motions be affirmed.

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