IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MALIBU MEDIA, LLC Plaintiff, v. JOHN DOE subscriber assigned to IP Address 24.14.81.195, Defendant.	Case No. 1:13-cv-06312 The Hon. Geraldine S. Brown

MOTION TO BAR TESTIMONY OF IPP INTERNATIONAL UG AND FOR AN ORDER REQUIRING MALIBU TO SHOW CAUSE WHY IT AND ITS COUNSEL SHOULD NOT BE SANCTIONED PURSUANT TO §1927 & THIS COURT'S INHERENT AUTHORITY

Now Comes JOHN DOE subscriber assigned to IP Address 24.14.81.195 ("Doe"), by and through counsel, Jonathan LA Phillips, who moves this Court to Bar the Testimony of IPP International U.G. and for an Order Requiring Malibu to Show Cause Why It and Its Counsel Should Not Be Sanctioned Pursuant to § 1927 and This Court's Inherent Authority. In support of the same, Doe states to the Court as follows:

I. Introduction

Malibu Media, LLC (hereinafter "Malibu") makes use of a contingent-fee witness who unlawfully engages in private detective operations in the State of Illinois. The blatant ethical violations by Malibu's counsel in allowing such behavior are compounded by the likely violation of the Federal Antigratuity Statute by counsel or Malibu. For these reason, IPP should not be allowed to offer any testimony in this case. Further, Malibu should be ordered to show cause why Malibu and Attorney Schulz should not be sanctioned for the abusive litigation tactics that resulted in the vexatious multiplication of these proceedings.

II. Governing Authority

A. Compensation to both expert and lay witnesses is forbidden

Many Courts have held that any testimony of an expert witness who is being paid a contingency fee should be excluded. *Straughter v. Raymond*, 08-cv-2170 CAS (CWx), 2011U.S. Dist. LEXIS 53195, *7-8 (C.D. Cal. May 9, 2011), *citing Ouimet v. USAA Casualty Ins. Co*., No. EDCV 00-00752 -VAP, 2004 U.S. Dist. LEXIS 31199 (C.D. Cal. Jul. 14, 2004) (excluding expert's testimony, in part, because it would run directly afoul of Rules of Professional conduct due to the fact the compensation was dependent upon the outcome of the case)*; Followwill v. Merit Energy Co*., No. 03-CV-62-D, 2005 WL 5988695, at *1 (D. Wyo. Apr. 11, 2005)*; Farmer v. Ramsay*,159 F. Supp. 2d 873, 883 (D. Md. 2001) (granting motion to strike reports of expert retained under contingency fee arrangement*), aff'd on other grounds, 43 Fed. App'x 547 (4th Cir. 2002)*; *cf. Accrued Fin. Servs., Inc. v. Prime Retail, Inc.,* 298 F.3d 291, 300 (4th Cir. 2002) (holding that party was improperly offering expert testimony for contingent fee in violation of public policy); *contra Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. Nov. 16, 1988) (noting, in an opinion's dicta, that involved a party being his own expert, that such a blatant ethical lapse does not require "that the evidence obtained in violation of the rule is inadmissible.").

This Circuit has adopted the American Bar Association's Model Rules of Conduct, including Rule 3.4(b). Local Rule 83.50. This rule provides that "[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law." Model Rule of Prof'l Conduct 3.4(b) (2006). Comment three to the Rule explicitly recognizes that [t]he common law rule in most jurisdictions is . . . that it is improper to pay an expert witness a contingent fee. Model Rule of Prof'l Conduct 3.4 cmt. 3. The Local Rule also refers to the Rules of Professional Conduct for the State of Illinois. Under the Illinois Rules of Professional conduct, in addition to above, it is improper for an attorney to hire, or to recommend or acquiesce in his client hiring, an agency to provide an expert witness where the agency's compensation is contingent upon the outcome of the matter. *See, Ill. State Bar Ass'n*

Advisory Opinion on Professional Conduct 86-3 (Opinion 86-3 Jul. 7, 1986) (citing to Rules 7-109(c); 1-102(a)(2)) (emphasis added).

The Seventh Circuit has held that payment is improper as to lay witnesses. *See, Hamilton v. General Motors Corp.*, 490 F.2d 223, 228-229 (7th Cir. 1973) (holding that paying fact witnesses for testimony is against public policy and refusing to allow payment for testimony); *see also, Compensating Fact Witnesses,* 184 F.R.D. 425, 427. *Hamilton* echoed a fundamental common law principle, quoting *Willison on Contracts*:[1] "As it is the duty of a citizen, when required to do so, to testify in court concerning facts within his knowledge for the compensation allowed him by law, a bargain to pay one who is amenable to process a further sum for his attendance as a witness is invalid both on grounds of public policy and for lack of consideration."

Additionally, the Federal Antigratuity Statute makes it a crime, punishable with time in prison, to "corruptly . . . offer, or promise [] anything of value to any person . . . with intent to influence testimony under oath. . . [at] a trial, hearing, or other proceeding." 18 U.S.C. §§ 201(b)(3). The statute also makes it a crime to give or promise anything of value for testimony under oath. 18 U.S.C. §§ 201(c)(2) (failing to require a require "corruptly.")

B. Witness types

Lay, or fact, witnesses cannot testify as to opinions if they are based upon "scientific, technical, or other specialized knowledge within the scope of 702." Fed. R. Evid. 701(c). The Rules are meant to ensure that, unless an expert, witnesses cannot opine and are only able to testify as to first-hand knowledge. Fed. R. Evid. 701(a), Notes of Advisory Committee On Proposed Rules. Rule 702 specifically notes that certain persons can be qualified to opine with the requisite

[1] 14 *Williston on Contracts* § 1716 (3rd ed. 1972); *See also, Restatement of Contracts* § 552(1) (1932); 6A Corbin, Contracts § 1430 (1952); Calamari & Perillo, Contracts § 369 (1970).

knowledge, skill, and experience if their scientific, technical, or other specialized knowledge will help the trier of fact. Fed. R. Evid. 702.

C. Illinois Private Detective law

The Illinois Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 (the "Detective Act") governs the licensure and activities of Private Detectives. 225 ILCS 447/3, *et seq*. The Detective Act defines a Private Detective to be any person:

> who by any means, including,. . . electronic methods, engages in the business of, . . . , or makes investigations for a fee . . . to obtain information relating to . . .
>
> (2) The identity, habits, conduct, . . . , knowledge, . . . , transactions, acts, reputation, or character of any person . . . by any means, manual or electronic.
>
> (3) The location . . . of lost or stolen property.
>
> (4) The truth or falsity of any statement. . . .
>
> (6) Securing evidence to be used before any court, board, or investigating body. . . .

225 ILCS 447/5-10. A private detective agency is simply a business that employs private detectives. *Id.* It is unlawful for any non-licensed person or agency to engage in the functions of a private detective. 225 ILCS 447/10-5.

D. § 1927 and this Court's inherent authority to sanction

Congress has provided that "any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 19 U.S.C. § 1927. In fact, courts can issue sanctions under this rule sua sponte. *See, e.g. Jolly Group, Ltd. v. Medline Industries, Inc.*, 435 F.3d 717 (7th Cir. 2006), *reh'g denied*. Sanctions under 28 U.S.C. § 1927 can only be leveled against counsel. 28 U.S.C. § 1927. However, the purpose of all these forms of sanctions is to prohibit frivolous litigation and abuses by attorneys. *Kapco Mfg. Co., Inc. v. C & O Enterprises, Inc.*, 886 F.2d 1485, 1490 (7th Cir. 1989). Pursuing claims without sufficient factual

basis is grounds for such sanctions. See, Id. at 720. Whether or not a claim in a pleading has merit is irrelevant to a determination as to whether or not the filing was for the purposes of harassment, and thus, sanctionable. *Kapco Mfg. Co., Inc.*, 886 F.2 1485 at 1493. Conduct should consist of either subjective or objective bad faith. *Pac. Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113 (7th Cir. 1994). However, it need not consist of actual malice to issue § 1927 sanctions. *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 227 (7th Cir.1984).

Additionally, this Court has a "well-acknowledged" inherent power to levy sanctions in response to abusive litigation practices against counsel and litigants. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). In fact, the existence of other rules' or statutes' sanctioning schemes do not supplant the Court's inherent power. *Chambers v. Nasco*, Inc., 501 U.S. 32, 46 (1991) ("These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than the other means of imposing sanctions."). Thus, even behavior not covered by 28 U.S.C. §1927 remains sanctionable under the Court's inherent authority if it consists of abusive litigation practice.

III. Application

A. IPP's background and its relationship with Malibu

IPP International, U.G., a.k.a, *incorrectly*, IPP, Ltd., (hereinafter "IPP") is a company based in Hamburg, Germany. It provides services that involve the "track[ing] and monitor[ing of] illegal propagators within [BitTorrent] networks around the clock whilst simultaneously pursuing several thousand file versions."[2] IPP has provided information to Malibu that has resulted in thousands of people being sued throughout the United States. Pursuant to Malibu's response to an issued

[2] *Services*, IPP International, *available at*, http://www.ippint.de/index.php?option=com_content&view=article&id=3&Itemid=3 (last accessed Jan. 10, 2014).

interrogatory, it is has become clear that IPP is being paid not only contingent upon successful resolution of this case for Malibu, but also based upon the extent of the proceeds.

> Please identify all . . . business entities that have an interest, financially, or otherwise, in this litigation, including, . . . forensic consultants, and/or witnesses, . . . and specifically and in detail describe the nature of the interest
>
> Response to Interrogatory No. 1: . . . IPP International UG, is a fact witness who will testify that its technology detected that a person using Defendant's IP address was downloading and distributing Plaintiff's copyrighted works. **Pursuant to an oral contingency fee agreement, IPP International UG is entitled to a small portion of the proceeds from the resolution of this case in consideration for the services it provides.**

Plaintiff's Responses to Defendant's First Set of Interrogatories, Resp. 1. (attached hereto as Exhibit A)(emphasis added). In fact, in a Response to an Interrogatory in another Malibu case, it was seemingly revealed that M. Keith Lipscomb, a Malibu attorney "negotiated the terms of [Malibu]'s agreement with IPP International UG. *Malibu v. Hinds, et al.*, Case No. 1:12-cv-01117-WTL-MJD, Exh. C to Def't Michael Harrison's Brief in Support of Motion to Compel Discovery (ECF Doc. 151-3)(S.D. Ind. Jan 9, 2014).

B. If IPP is a lay witness, the admitted "oral contingency fee agreement" is not only unethical, it is illegal and should result in the barring of any IPP testimony

In its Rule 26(a) disclosure,[3] Malibu listed IPP as a "third party fact witness." Such a characterization is suspect at best – as IPP is almost certainly an expert witness. See Pltf's Fed. R. Civ. P. 26(a) Disclosures (attached hereto as Exhibit B). However, assuming, *arguendo*, that IPP is a fact witness, its testimony should be barred.

To begin with, it is a violation of federal law, punishable by imprisonment, to offer to pay for testimony. 18 U.S.C. §201(c)(2). If done "corruptly," there is also a violation of §201(b)(3) of the same statute. Such testimony is patently against public policy. *Hamilton*, 490 F.2d at 228-229. To allow such testimony into this tribunal would be manifestly unjust. At this time, it is not known

[3] As well as the above noted Interrogatory Response.

whether Attorney Schulz, Malibu, or some other unidentified third-party is paying for the testimony, but it remains unethical and illegal. For this reason, the testimony should be barred.

C. If IPP is actually an expert witness, its testimony should be barred for the blatantly unethical practice of allowing it to share in the proceeds based upon the outcome of the case

Malibu has claimed that IPP is a "fact" witness.[4] See Exhs. A & B. However, such a statement is contrary to the Rules of Evidence. To begin, IPP is not a person. It does not possess first-hand knowledge of anything under Federal Rule of Civil Procedure 701, as it has no knowledge of any kind. For that reason alone, IPP isn't a witness, some employee or agent of it likely is.

Assuming, however, that the allegedly lay witness is actually some employee – perhaps declarant Tobias Feiser (ECF Doc. 2-4), agent, or owner of IPP, even that person cannot be a lay witness. IPP would simply be an agency supplying the witness. The actual witness would not have personally observed anything. At a maximum, "IPP Limited[5] downloaded one or more bits" – useless, encrypted, chunks of ones and zeros. Comp. ¶ 9. With this, IPP purports to be able to produce a witness to testify that "a person using Defendant's IP address was downloading and distributing Plaintiff's copyrighted works." See, Exh. A. IPP has no personal knowledge that a movie was downloaded or distributed by Defendant. At the best it knows of a few select instances of encrypted, useless ones and zeroes being unlawfully monitored. Indeed, if IPP were to supply a witness testify to anything, he would be testifying pursuant to its scientific and technical knowledge, pursuant to Rule of Evidence 702. For this reason, IPP, if allowed to provide someone to testify, would have to do so as an expert witness.

[4] Such a statement is likely intended for the purposes of making discovery burdensome on Doe defendants, as has been demonstrated in this matter, as well as to prevent the need for drafting an expert report under Fed. R. Civ. P. 26.
[5] A repeated deceptive misstatement of identity in the Complaint. Further, this misstatement is echoed in the apparently incorrect/deceptive Declaration of Tobias Feiser in support of the Motion for Leave to Take Discovery Prior to Rule 26(f) Conference. (ECF Doc. 2-4, ¶ 4).

On the face of its discovery responses, Malibu states that IPP is being paid on a contingent basis. Exh. A. IPP will make money only if this case is resolved positively for Malibu. Further, the amount of money IPP will make is contingent on the proceeds received in settlement or collected in judgment. See Exh. A (IPP is entitled to a "portion of the proceeds"). IPP is actually a business, an agency, supplying an expert witness in this case. Such an arrangement is unethical under this Court's Local Rules, the American Bar Association's Model Rules of Professional Conduct and the Illinois Rules of Professional Conduct. Even construed in the best possible light for Malibu, and its counsel, IPP's testimony would be so incredibly suspect of consisting of perjury, misstatement, or deceptiveness that it simply should not be allowed as evidence.

Even a cursory review of *Tagatz v. Marquette University* case shows that it does not apply to the situation at hand. 861 F.2d 1040 (7th Cir. Nov. 16, 1988). Firstly, the mention of a complete disregard of ethical rules not necessarily resulting in the exclusion of evidence is mere dicta. *Id.* at 1042. The Court even notes that there was no objection to the testimony being offered – thus the statement did not bear on the holding of the Court. *Id.* Further, that case involved an individual wishing to testify on his own behalf, not a third-party investigator/witness. *Id.* The statement was a mere comparison of a self-interested-party to interested-third-party, i.e contingency fee, expert witness. *Id*. That situation is nothing like the case at hand which involves a foreign, unlicensed detective agency that engages in unlawful activities to gather data, that lies about its name in *ex parte* proceedings, and that will be illegally paid a contingent fee for its testimony.

D. Compounding all other concerns, IPP's alleged investigation was in violation of Illinois' Private Detective laws

IPP is not a licensed private detective in this State.[6] Despite this fact, IPP uses its technology to detect certain activities by establishing electronic TCP/IP connection with Doe. Comp. ¶ 8. In fact, IPP allegedly downloaded data from Doe. Comp. ¶ 9. IPP allegedly did this this for an extended amount of time. Comp., Exh. A. Further, IPP admittedly engaged in "surveillance" of Doe. Comp. ¶ 15. Explicitly, IPP engaged in this surveillance to attempt to study the habits and likely conduct of the Defendant. Comp. ¶ 16. The surveillance is meant to identify an infringer. Comp. ¶ 16. It will use the evidence to testify at trial. Exhibit A. Further, Tobias Feiser, submitting a declaration in support of an *ex parte* motion for early discovery explicitly notes that IPP provides "forensic investigation services" and "monitors" networks. (ECF Doc. 2-4).

On the face of Malibu's own pleadings and declarations, IPP is making use of electronic means to gather information on the identity of infringers, their habits and conduct, for use in a court proceeding. All of these activities are unlawful unless performed by a licensed private detective. 225 ILCS 447/5-10. Accordingly, not only is it unethical for counsel to put forth IPP testimony and illegal under federal law to pay IPP for testimony, but also, IPP's activities to generate the testimony are unlawful.

E. Attorney Schulz and Malibu should be sanctioned pursuant to § 1927 and this Court's inherent authority

This litigation is part of a tsunami of lawsuits, well over one-thousand in a few years, that have been judicially characterized by the abusive use of shame and embarrassment to force early settlements. Here, within the Seventh Circuit, Malibu and Attorney Schulz have been recognized to be litigating in an abusive manner. *See, Malibu Media, LLC v. Reynolds,* 2013 U.S. Dist. LEXIS 31288 at *18-23 (discussing cases that have recognized the power of lawsuits alleging illegal downloading of pornographic movies "to shame defendants into settlement agreements where

[6] Counsel for Defendant has run multiple searches on the Illinois Department of Professional Regulation's website with variations of IPP for both Detective and Detective Agency licenses. None were found.

they may otherwise have a meritorious defense"). After citing to the above case in discussing similar concerns, the Western District of Wisconsin stated that "these internet copyright cases already give off an air of extortion . . . " *Malibu Media LLC v. Does*, Case No. 3:13-cv-00207-wmc (ECF Doc. 31, p. 9) (W.D. Wis. Sept. 10, 2013) (stating that Malibu's denials "did not pass the smell test, and any denial of improper motive by [Schulz] does not pass the laugh test"), *see also, Malibu Media LLC v. Does*, Case No. 2:13-cv-00536-RTR (ECF Doc. 34) (E.D. Wis. Dec. 12, 2013) (issuing similar sanctions against Attorney Schulz alone). In that particular order, the Court sanctioned Malibu and Attorney Schulz for activities that furthered such extortion – the filing of scandalous Exhibit C's, as occurred in this case. *Id*. Here, in the Northern District of Illinois, within five days of filing a Complaint, Judge Kapala ordered Malibu to show cause why it should not be sanctioned for doing the same thing. *Malibu Media, LLC v. Doe*, Case No. 3:13-cv-50287 (ECF Doc. 2 Sept. 13, 2013). It is evident that Malibu and Attorney Schulz are no strangers to abusive litigation tactics.

With this history in mind, it should not be surprising that Attorney Schulz's activities are meant for the purposes of vexatiously and unreasonably multiplying proceedings and engaging in abusive tactics in this case. In fact, the entirety of the proceedings in this case are resultant of the early discovery – as that is the only way that Doe was connected to the alleged activity. Thus, if that early discovery, or the filing of the Complaint was abusive or unreasonable and vexatious, then all of the proceedings since the filing are those "vexatious multipli[cations]" of proceedings.

The grant of early discovery was based upon the unethical conduct of Attorney Schulz in either sharing a fee with IPP, or otherwise allowing her client to pay an expert a contingency fee. In fact, if Attorney Schluz were paying IPP, then the conduct was not just unethical, but illegal.

The *ex parte*[7] motion for early discovery was supported with Attorney Schulz knowingly filing the Feiser declaration based upon unlawful, unlicensed, activities of IPP. This activity alone is violative of Rule of Professional Conduct 3.3(d). Illinois Rule of Professional Conduct 3.3(d); American Bar Ass'n Rule of Professional Conduct 3.3(d) ("[i]n an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). Yet, none of the facts mentioned in this Motion appear to have been brought up to the tribunal – not even the misidentification of the company Feiser works for. *See also,* Fed. R. Civ. P. 11.

The entirety of this litigation is abusive, and the purpose of §1927 sanctions is to prevent such abuse. *Kapco Mfg. Co., Inc.* 886 F.2d at 1490. Even if the declaration of Feiser has merit, or the claims would substantiated if this improper evidence were introduced, the purpose of the behavior was still harassment. Accordingly, regardless of merit, all activities in this case are sanctionable as harassment. *Kapco Mfg. Co., Inc.*, 886 F.2 1485 at 1493.

The totality of the behavior, the Rules of Professional Conduct flaunted, and the laws broken, all are indicative of bad faith. Regardless of whether the Court considers this behavior to subjective or objective bad faith, both are sufficient for § 1927 sanctions. *Pac. Dunlop Holdings, Inc.*, 22 F.3d 113. While no malice is required under *Knorr Brake Corp.*, Doe would echo the sentiment of the Western District of Wisconsin in submitting that any suggestion that motive was not improper by Attorney Schulz is laughable. 738 F.2d at 227.

With regards to this Court's inherent power, that power is to prevent abusive litigation practices. *Roadway Express, Inc.*, 447 U.S. at 765. The foregoing makes it abundantly clear that Malibu and Attorney Schulz are engaging in abusive litigation practices. Along with the unethical

[7] Notably, with the Motion for early discovery, Attorney Schulz was bound by Illinois Rule of Professional Conduct 3.3(d) and American Bar Ass'n Rule of Professional Conduct 3.3(d) which states

conduct of counsel and Malibu, someone is paying a witness in violation of a law punishable by time in prison. This Court has the authority, irrespective of all other sources of authority to sanction, to punish such behavior. For these reasons, it is appropriate to Order Malibu and Attorney Schulz to show cause why they should not be sanctioned, as well as to pay for the attorney's fees and costs of Doe in defending this abusive litigation.

V. Conclusion

For the foregoing reasons, JOHN DOE subscriber assigned to IP Address 24.14.81.195 respectfully requests that this Honorable Court:

A. Issue an Order barring any and all testimony and evidence from IPP International U.G., aka IPP Limited, or any of its employees, agents, contractors, or owners, in these proceedings;

B. Issue an Order requiring Malibu Media, LLC to show cause why it, and its counsel, Attorney Schulz, should not be sanctioned for their respective activities and behavior;

C. If such sanctions are awarded, issue an Order requiring Malibu Media, LLC or Attorney Schulz to pay the costs, including attorney's fees and expenses, for all unreasonably and vexatiously multiplied proceedings, to wit, the entirety of the case after early discovery; and

D. Any other relief this Court deems equitable and just at this time.

Respectfully submitted,

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Certificate of Service

I certify that on January 13, 2014 a copy of the foregoing has been filed with the Clerk of the Court via the Court's ECF filing system, thereby serving it upon all counsel of record.

/s/ Jonathan LA Phillips