

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA**

MALIBU MEDIA, LLC	
Plaintiff,	
v.	Case No. 1:13-cv-00205-WTL-MJD
KELLEY TASHIRO	Hon. Mark J. Dinsmore
Defendants	
<b>RESPONSE MEMORANDUM IN OPPOSITION TO: PLAINTIFF’S MOTION FOR ENTRY OF AN ORDER REQUIRING DEFENDANT TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE ENTERED AGAINST HER FOR SPOLIATION OF EVIDENCE AND PERJURY (ECF DOC. 76)</b>	

**I. Introduction**

After failing to find evidence that justified it dragging Kelley Tashiro through months of painful and expensive litigation,<sup>1</sup> Malibu attempts put the cart before the horse and seek extraordinary relief – a premature adjudication that Tashiro has lied about her innocence.<sup>2</sup> It does so with absolutely no evidence that Kelley Tashiro committed perjury or spoliated evidence. Even if Malibu did, somehow, connect Kelley Tashiro to BitTorrent activities, no spoliation occurred. The files are still there; Malibu’s expert just didn’t bother looking. Further, Kelley Tashiro told the truth in her interrogatory answers. Thus, the Motion must fail.

Malibu wholly relies upon an incompetent declaration based on a less than full analysis of Tashiro’s turned-over hard drives. Incredibly, Malibu has filed its Motion without a single iota of evidence that Kelley Tashiro that knew of, or did, anything. As demonstrated below, the Motion

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<sup>1</sup> The Court may recall the averment of the Complaint that stated the bill payer for the internet account is the “most likely infringer,” not the for certain infringer. Comp., ¶ 24 (ECF Doc. 1).

<sup>2</sup> Malibu’s request is fundamentally absurd. If granted, any time that any party believes a discovery statement to be untrue, it will run to the Court seeking sanctions. This is not the purpose of discovery. Trial is where the truthfulness of statements is decided.

should be denied and matter allowed to proceed forward, without sanctions, and the veracity of Kelley Tashiro's story decided by a jury, not prematurely ruled upon today.

## **II. Governing Law**

No Court should enter sanctions for perjury when there is no reason to believe the Court has been misled or deceived by supposed perjured testimony. *United States ex rel. Johnson v. Goldstein*, 158 F.2d 916 (7th Cir. 1947). Even if there is an untruthful statement, when harmless, or inadvertent, such statements can go without sanctions. *Villa v. City of Chicago*, 1986 U.S. Dist. LEXIS 17022, 7 (N.D. Ill. Dec. 2, 1986).

When asserting spoliation, a party is required to put on "clear and convincing evidence" that the opposing party intentionally destroyed evidence. *Rodgers v. Lowe's Home Ctrs., Inc.*, 2007 U.S. Dist. LEXIS 7405, 2007 WL 257714, at \*7 (N.D. Ill. 2007), *see also*, *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997). In fact, when the discussion is about the deletion of files from a USB device,<sup>3</sup> it is important to consider whether or not an individual made use of a commercial wiping device that purposefully overwrites data. *Mintel Int'l Group, LTD. v. Neerghen*, 2010 U.S. Dist. LEXIS 2323, 25 (N.D. Ill. Jan. 12, 2010).

## **III. Argument**

Malibu has failed to provide any explanation, rising above pure speculation, as to why it believes that Kelley Tashiro committed perjury. Further, Malibu has failed to put on "clear and convincing evidence" that Kelley Tashiro spoliated evidence. Malibu should not be allowed to put the cart before the horse and have this case, essentially, adjudicated today. Indeed, Malibu can present its arguments to a jury (insofar as the Rules allow), instead of attempting to obtain sanctions with absolutely no evidence. The Motion should be denied.

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<sup>3</sup> The external hard drive discussed in Paige's declaration is a USB connected device.

- A. The entirety of the extraordinary Motion rests upon the declaration of Patrick Paige, which should not be considered, as it is incompetent

As a threshold matter, the declaration of Patrick Paige cannot be considered by this Court; thus, the Motion must fail. The entirety of the Motion is based upon the declaration of Mr. Paige. The declaration relies upon a report. A review of the docket indicates that no such report – supposedly an Exhibit A to the declaration – has been filed. Further, Mr. Paige states that one of Tashiro’s hard drives was unable to be imaged. On the face of his declaration, Paige did not examine that drive and simply cannot make such a statement; it’s certainly not made from his personal knowledge. Accordingly, Paige’s declaration is incompetent - unsupported or based upon hearsay – and the Motion must fail.

- B. Paige’s affidavit is based upon a, possibly purposeful, half-baked analysis of the drives turned over by Tashiro, which if properly performed, would actually indicate Tashiro’s innocence in this matter

To begin with, while he does not come out and say it, there is not a single mention of a Malibu work being found on Tashiro’s computers. See ECF Doc. 76-1. Instead, Paige attempts to suggest that Malibu’s works “*could have*” been deleted from the hard drive the night before. *Id.* ¶ 28. Apparently, Paige did not bother to check to see if any of Malibu’s works were actually ever on the drive. In the alternative, he may have done so, and discovering no evidence of infringing activity, chose to simply say Malibu files ‘could’ have been amongst deletions, a half-truth. Had Paige done a full analysis, he would not only find that, with certainty, no infringing works were deleted, but also that any deleted torrent-related file is at least four years old.

As explained by the Declaration of Delvan Neville, attached hereto as Exhibit A, the hard-drive examined had an NTFS file system. Decl. Neville, Exh. A, ¶ 7. Thus, even if a file/directory is deleted, it actually still resides on the drive; only its entry in the Master File Table is removed. *Id.* ¶

¶ 10, 11. An analogy might be to consider a card catalog in a library. If a card is removed from the catalog, the book still remains wholly intact on the shelf. However, for this analogy to work, we would have to assume that a missing card informs the librarian that he/she can throw the book away, *if and when he/she needs the space*. Here, however, the librarian never needed the space, and in fact, never moved any books around after the card was removed.

As admitted by Paige, the deletion of files occurred only the night before the drive was turned over, making it is impossible for any deleted file to have been overwritten. *Id.* at ¶ 16. Accordingly, every single deleted file was still on the hard drive, and fully recoverable. *Id.* at ¶ 17, 24. When all files were catalogued, both deleted and un-deleted, anything bearing even a passing suggestion of resemblance to a possible Malibu work was examined. *Id.*, ¶¶ 18, 22. Mr. Neville went so far as to even pull screen images for potential matches, and confirmed that no Malibu files were on the computer. *Id.* ¶ 18(d).

As indicated, Mr. Paige's affidavit is incomplete. Not only are all of the files fully accessible on the hard-drive (thus, no spoliation occurred)<sup>4</sup>, but, also, his pure speculation, to wit, that deleted files "could" contain infringing files, without any attempt to ascertain the validity of such a bold statement is troubling and calls the credibility of his report into question.

- C. Even if Paige's declaration were considered, it provides absolutely no reason to believe that Tashiro deleted files or committed perjury

Perhaps the most incredible allegation in the Motion is the fact that it repeatedly states that "Defendant \_\_\_\_\_ed . . . " where the blank is any number of verbs such as install, download, delet[e], and so on. However, such accusations are based upon a tremendous logical leap. Even if Paige's affidavit were properly supported, and not half-baked, nothing in it says that Kelley

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<sup>4</sup> It is also worth noting that neither Mr. Paige or Mr. Neville report any attempt to "wipe" the drive. See, *Mintel Int'l Group, LTD.*, 2010 U.S. Dist. LEXIS 2323, 25.

Tashiro did anything or knew anything. This Court should not be irrationally reaching to connect dots that aren't there, let alone do so when sanctions are being requested in an attempt to have this matter prematurely adjudged.

Making the Motion all the more troubling, counsel for Malibu goes so far as to say, "*Undersigned* will take it a step further: the files were likely in these folders and that is likely why they were deleted." Motion, p. 2. Apparently, Counsel for Malibu is joining in on the factual averments and conclusions that name Kelley Tashiro as the person deleting files, despite her deposition testimony clearly denying the same. Exh. C, p. 8:19-20. However even Attorney Nicoletti doubts the veracity of the statements, and actually suspects that Charles Tashiro infringed and spoliated evidence.<sup>5</sup> See Exh. B. Yet, Malibu refused to withdraw the current Motion. See, Fed. R. Civ. P. 11.

There is not a single, solitary, averment in the Motion, or Paige's declaration, that points a finger at Kelley Tashiro. There is mere speculation as to why certain things may have been done or not done. The declaration, as it must, does not even purport to explain who did anything. There is more rampant speculation about what Tashiro might have known, or not known. However, as indicated above, when the drive is actually examined, it becomes clear that Tashiro's story checks out. Further, not a single file has been removed from the drive, no attempt at wiping the computer has occurred, and thus, no spoliation took place, as indicated by Tashiro in her deposition. See, *Mintel Int'l Group, LTD.*, 2010 U.S. Dist. LEXIS 2323, 25.

D. Examining each purported allegation of  
perjury individually is  
indicative of the absolute lack of merit in the Motion

As demonstrated above, Malibu brought this extraordinary motion without basis. Examining each of its allegations, in turn, serves to bring the Motion's lack of merit to light.

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<sup>5</sup> This is most certainly not admitted, or even thought of, by Kelley Tashiro.

Further, even if any answer was untruthful, which they are not, any incorrect statement was inadvertent and does not serve as support for sanctioning.

1. “Outside of this lawsuit, [she has] no knowledge of BitTorrent”

Malibu does correctly parrot Tashiro’s response to interrogatories 13 and 14. However, nothing in the entire Motion, the incompetent declaration of Paige, or otherwise, provides a reasonable explanation as to why Malibu believes Kelley Tashiro knew about BitTorrent prior to this suit. Does Malibu rely upon BitTorrent files from four years ago, on a hard drive with another person’s name on the directory, that has been sitting in a closet for who knows how long? See Exh. A, ¶ 19; Exh. C, p. 4:17-21. If so, not only should the motion be denied, but it should have never been brought in the first place; rampant speculation is utterly inadequate support for sanctions and pre-judging a case. A review of the Motion will show that there is not a single *supported* statement that Kelley Tashiro actually knew of BitTorrent prior to the initiation of this suit. The Motion must fail.

2. [Tashiro had] no knowledge of any BitTorrent Client . . . installed on one of the Computer Devices”

First of all, nothing in Malibu’s Motion, or its support, indicates that Kelley Tashiro knew of any BitTorrent clients installed on *anything* in her home. Secondly, Paige’s declaration speaks to the analysis of a hard-drive directory that appears to belong to N.C. Tashiro; that is, N. Charles Tashiro, not Kelley Tashiro. Exh. A, ¶ 5.<sup>6</sup> Further, the drive, not used for torrent activity (or any other activity) for several years, sat in a closet, and had not been seen by Kelley Tashiro for, likely, as long as Malibu has existed. Exh. C., p. 4:17. Malibu has failed to put on any competent

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<sup>6</sup> Despite Counsel for Malibu’s suggestions that it was Charles Tashiro that infringed, merely having your name on a root directory a drive with BitTorrent files from before Malibu’s existence does not suggest that Malibu works were infringed. Nothing in this Response should be construed to suggest that Charles Tashiro infringed upon Malibu’s works.

evidence that controverts what is apparent; Kelley Tashiro was truthful in her responses to Interrogatories. In fact, her deposition backs up the claim. See, Exh. C.

3. She never downloaded a BitTorrent file  
nor visited a Bittorrent website

Again, nothing is put forth that Kelley Tashiro, versus any other person, made use of BitTorrent. Her sworn deposition testimony suggests that she still doesn't even understand what BitTorrent is. Exh. C., p. 7: 16-24. The bookmarking of sites is easily explained as research during the pendency of this case. The *most*, if anything, that can be taken from Paige's declaration is that someone, not necessarily Kelley Tashiro, did seek out torrent files, before Malibu even existed. Despite filing a scurrilous and scandalous Exhibit C with its Complaint, Malibu is not bringing (time barred) actions for any works it does not own. This stretch is not sufficient to hold Kelley Tashiro in contempt of court for allegations Malibu simply cannot support.

4. Tashiro has never used an internet browser  
to search for Bittorrent files

Grasping at straws, Malibu begins engaging in blatant mischaracterizations of Tashiro's answers. Kelley Tashiro simply did not state that she never searched for BitTorrent files or sites, but rather that any activity that appeared to look that way was based upon her research for this case. Motion, Exh. B, Interrog. 20. Further, again, nothing – other than rampant conjecture – suggests that Kelley Tashiro used any browser for such activities. In fact, an actual examination of the drive, that Malibu has crowned as its smoking gun, actually supports Tashiro's interrogatory answer. Malibu's desperate attempt to sanction Kelley Tashiro for answering honestly and truthfully should be denied.

5. She has never, essentially, used the  
internet to infringe copyrights

For the same reasons as shown above, there is no reason to connect Kelley Tashiro to activities that took place over four years ago. Malibu has failed even to attempt providing anything other than pure speculation that connects Tashiro to the use of BitTorrent. This attempt, a Hail Mary pass to save Malibu's case, should not result in sanctions that pre-judge Tashiro.

#### **IV. Conclusion**

For the reasons stated above, the Motion should be denied. In a desperate attempt to salvage a case it has no evidence to support, Malibu has failed to provide any reason to believe that Tashiro has committed perjury. Further, Mr. Paige's affidavit is not only without support, it is incontrovertibly based upon a half-done analysis, that when fully performed, shows all files are still present, no attempts at "wiping" were made, and no evidence was actually spoliated.

Respectfully submitted,

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<b>Certificate of Service</b>
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I certify that on March 28, 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