Case No. 14-11795-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MALIBU MEDIA, LLC

Plaintiff-Appellee,

v.

LEO PELIZZO

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLEE'S MOTION FOR ATTORNEYS' FEES AND COSTS

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Case No. 14-11795-AA
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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), counsel for Appellees Malibu Media, LLC certify that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the this matter, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Ferreiro, Francisco J., *Attorney for Defendant/Appellant*
2. Field, Brigham, *Owner of Malibu Media, LLC*
3. Field, Collette, *Owner of Malibu Media, LLC*
4. Kennedy, Emilie, *Attorney for Plaintiff/Appellee*
5. Lipscomb, Eisenberg & Baker, P.L., *Attorney for Plaintiff/Appellee*
6. Lipscomb, M. Keith, *Attorney for Plaintiff/Appellee*
7. Malibu Media, LLC, *Plaintiff/Appellee*
8. Malloy & Malloy, P.L., *Attorney for Defendant/Appellant*
9. Pelizzo, Leo, *Defendant/Appellant*
10. Seitz, the Honorable Patricia A., *Presiding District Judge*
11. Simonton, the Honorable Andrea M., *Presiding Magistrate Judge*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1, Appellee, Malibu Media LLC, has neither a parent corporation nor a publically held corporation that owns more than 10% of its stock.

Appellee, Malibu Media, LLC ("Appellee" or, as referenced in the district court, "Plaintiff" or "Malibu"), by and through undersigned counsel, and pursuant to Fed. R. App. P. 38, 28 U.S.C. § 1927, and this Court's inherent authority to sanction frivolous and vexatious litigation, hereby moves for entry of an Order awarding Appellee's attorneys' fees and costs incurred in defending this appeal filed by Appellant, Leo Pelizzo ("Appellant" or, as referenced in the district court, "Defendant" or "Pelizzo"), and states:

I. INTRODUCTION

Defendant's instant appeal is an unreasonable and vexatious continuation of litigation over attorneys' fees that was disposed of in a well-reasoned and evenhanded manner by the district court below. As set forth in more detail in Appellee's Brief, each of Defendant's arguments on appeal is frivolous and entirely without merit. Given this fact, Defendant's insistence on continuing to pursue this case simply has the effect of needlessly multiplying the proceedings before the trial and appellate courts. Under these circumstances, and as further set forth below, sanctions in the form of an award of attorneys' fees and costs should be imposed on Defendant and his counsel.

II. LEGAL STANDARD

Under Federal Rule of Appellate Procedure 38, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or

notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." An appeal is considered frivolous when the arguments advanced are "entirely without merit." *Dawes-Ordonez v. Forman*, 418 Fed. Appx. 819, 821 (11th Cir. 2011). "Rule 38 sanctions have been imposed against appellants who raise 'clearly frivolous claims' in the face of established law and clear facts." *Farese v. Scherer*, 342 F.3d 1223, 1232 (11th Cir. 2003), *quoting Misabec Mercantile, Inc. De Panama v. Donaldson, Lufkin & Jenrette ACLI Futures, Inc.*, 853 F.2d 834, 841 (11th Cir. 1988). Additionally, both an attorney and his or her client may be held jointly and severally liable for appellee's fees and costs in defending a frivolous appeal. *Taiyo Corp. v. Sheraton Savannah Corp.*, 49 F.3d 1514 (11th Cir. 1995).

Under 28 U.S.C. § 1927, "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . 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 attorneys' fees reasonably incurred because of such conduct." For a court to justify an award of sanctions under 28 U.S.C. § 1927, "three conditions must be satisfied: (1) the attorney must engage in unreasonable and vexatious conduct, (2) that conduct must have multiplied the proceedings, and (3) the amount of sanctions must bear a financial nexus to the excess proceedings." *Barnhart v. Lamar Adver. Co.*, 523 F. Appx. 635, 638 (11th

Cir. 2013). An attorney engages in unreasonable and vexatious conduct when the conduct is "so egregious that it is tantamount to bad faith." *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1282 (11th Cir. 2010). "Bad faith is an objective standard that is satisfied when an attorney knowingly or recklessly pursues a frivolous claim." *Peer v. Lewis*, 606 F.3d 1306, 1314 (11th Cir. 2010).

III. ARGUMENT

As argued in detail below, the arguments set forth in Appellant's Initial Brief are entirely without merit, and have unreasonable and vexatiously multiplied these proceedings, thus warranting an award of attorneys' fees and costs in favor of Plaintiff.

A. Defendant's Arguments on Appeal Are Entirely Without Merit

1. The Court Properly Analyzed the *Fogerty* Factors

a. The Court properly considered the purposes of the Copyright Act.

Defendant's argument that the district court failed to consider whether awarding attorneys' fees would further the purposes of the Copyright Act is nonsensical and meritless given the district court's careful application of the *Fogerty* factors. Consistent with the principles of *Fogerty*, the parties to this case argued and briefed each of the four *Fogerty* factors at length in the district court. The district court's subsequent evaluation and balancing of these factors with respect to the parties' claims and defenses is what kept its determination "faithful

to the purposes of the Copyright Act." *See Mitek Holdings, Inc. v. Arce Eng'g Co.*, 198 F.3d 840, 842-43 (11th Cir. 1999) ("The touchstone of attorney's fees under § 505 is whether imposition of attorney's fees will further the interests of the Copyright Act, i.e., by encouraging the raising of objectively reasonable claims and defenses, which may serve not only to deter infringement but also to ensure 'that the boundaries of copyright law [are] demarcated as clearly as possible' in order to maximize the public exposure to valuable works."), *quoting* Fogerty, 510 U.S. at 526-27; *Diamond v. Am-Law Publ'g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984) (holding that the "principle purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them.").

It follows from the above that "the imposition of a fee award against a copyright holder with an objectively reasonable litigation position will generally not promote the purposes of the Copyright Act." *Luken v. International Yacht Council, Ltd.*, 581 F.Supp.2d 1226 (S.D. Fla. 2008) (emphasis added), *quoting Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121-22 (2d Cir. 2001). Here, the district court specifically found Plaintiff's litigation position to be reasonable [Doc 53, Pg 10-12], thus making an award of fees under § 505 contrary to the purposes of the Copyright Act.

Defendant's argument that the district court failed to consider the purposes of the Copyright Act is thus entirely lacking in merit, and warrants an award of attorneys' fees and costs in favor of Plaintiff. *See also* Appellee's Brief, Argument, § I(A).

b. <u>The Court properly considered the factors of frivolousness and bad faith</u>.

Defendant's argument that the District Court erred by considering factors such as "frivolousness" and "bad faith" is misplaced and also entirely without merit. First, when analyzing a fee award under § 505, the four factors in *Fogerty* are to be considered as a "guide" and therefore not mandatory, nor all inclusive. *See Fogerty*, 510 U.S. at 535 ("We agree that such factors may be used to guide courts' discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner.").

Second, "frivolousness" actually is a *Fogerty* factor. And, "bad faith" is intrinsically aligned with two additional factors: "objective unreasonableness" and "motivation." Indeed, considerations of "bad faith" are analyzed in nearly every fee award under § 505 in the Eleventh Circuit. *See e.g., Thompkins v. Lil' Joe Records, Inc.*, 02-61161-CIV, 2008 WL 896898 (S.D. Fla. Mar. 31, 2008) ("Plaintiff's argument under Waterson was not frivolous, was not raised in bad faith, and raised an issue of first impression in this Circuit"); *Brewer-Giorgio v.*

Bergman, 985 F. Supp. 1478, 1482 (N.D. Ga. 1997) ("After careful consideration, the court finds no indication that Plaintiffs brought these claims in bad faith or with any malicious intent" analyzing under Fogerty's motivation factor); *Lil' Joe Wein Music, Inc. v. Jackson*, 06-20079-CIV, 2008 WL 2688117 (S.D. Fla. July 1, 2008) ("The undersigned … finds that Plaintiff's action in dismissing its claims …indicate questionable good faith … although the undersigned declines to make an express finding of bad faith" analyzing under *Fogerty*'s motivation factor). *See also* Appellee's Brief, Argument, § I(C).

The issues of frivolousness and bad faith are thus without question proper factors for consideration by the District Court. This is, therefore, another specious argument raised by Defendant on appeal, and merits the sanction of fees and costs.

c. <u>There is no presumption in favor of Defendant</u>.

Defendant's argument that the district court was required to apply a presumption in favor of Defendant when determining fees is clearly wrong and frivolous under applicable law. Defendant extrapolates this "requirement" from cases that rely on non-binding, minority opinions and that are otherwise distinguishable. The argument also ignores the clear weight of decisional authority on the issue, in which courts in <u>every</u> Circuit save the Seventh Circuit—and including the Eleventh Circuit—have held that no presumption in favor of copyright defendants exists. "[T]he 7th Circuit presumption in favor of awarding

fees to a prevailing defendant is non-binding authority." *Klein & Heuchan, Inc. v. CoStar Realty Info., Inc.*, 8:08-CV-1227-T-30EAJ, 2011 WL 6097980 (M.D. Fla. Dec. 7, 2011). "[I]n this particular case there is no need to award fees in order to deter nuisance suits as this Court has already found that [plaintiff's] claims were brought in good faith and were neither frivolous nor objectively unreasonable." *Id*. *See also* Appellee's Brief, Argument, Section II(B).

Thus, even a cursory review of decisional law on this subject should have alerted Defendant of the fact that his presumption argument is contrary to the state of the law. Consequently, Defendant's argument is frivolous, and warrants an award of attorneys' fees and costs in favor of Plaintiff.

2. The Court Did Not Abuse Its Discretion By Relying on Clearly Erroneous Findings of Fact

Defendant's argument that the district court abused its discretion by relying on clearly erroneous findings of fact is another frivolous argument that ignores applicable law and the record. As further set forth in Appellee's Brief, Argument, Section II(D), each of Defendant's claims of abuse of discretion is entirely without merit.

First, Pelizzo's argument that the district court failed to examine the "temporal context" of the case is meritless. Both the Report and Recommendation and the district court's opinion carefully examined the record events and progression and found that the "temporal context" weighed in favor of Malibu.

See e.g., Doc 53, Pg 8 ("These repeated attempts to contact Defendant pre-suit supports a conclusion that Plaintiff's motivation in bringing this suit was proper"); *Id., and additional citations in* Appellee's Brief, Argument, Section II(D)(1).

Second, Defendant's argument that the Report and Recommendation failed to consider the impact of a dynamic versus static IP address was aptly characterized by the district court as "unpersuasive." *See* Doc 58, Pg 5. Indeed, the district court explained, "Plaintiff's subpoena and exhibits attached thereto instructed Hotwire Communications to produce documents sufficient to identify the true name, telephone number and e-mail address of each person who was assigned one of the IP addresses set forth in Exhibit A'' on February 26, 2012 at 5:37 PM." *Id*. While the IP address may have been dynamic, Malibu's subpoena to Pelizzo's ISP stated the exact time that the infringement occurred. At that exact time, whether the IP address was dynamic or not, it was assigned to an account holder which Hotwire represented was Pelizzo. Pelizzo does not explain how the district court's ruling was incorrect, or otherwise would have changed the outcome of the fee award.

Third, Defendant's argument that the district court abused its discretion by "omitting any discussion of "access" fails as both untimely and meritless. Defendant failed to raise this argument below, and the Eleventh Circuit has "repeatedly held that 'an issue not raised in the district court and raised for the first

time in an appeal will not be considered by this court." *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994), *quoting* Depree *v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991); *see also* Appellee's Brief, Argument, Section II(D)(3).

Even if timely, Defendant's argument fails because the record demonstrates that the district court considered whether Malibu pled a plausible claim for copyright infringement, and in doing so, implicitly considered whether Malibu had a reasonable belief that Pelizzo accessed its works at the time it filed its complaint. No court has ever found that a copyright holder alleging infringement through an IP address has failed to plausibly allege access. Instead, courts hold the opposite. "While there is a possibility that a third party has somehow gained access to Defendant's IP address, the more likely explanation is that it is Defendant who is distributing Plaintiff's works." *Malibu Media LLC v. Doe*, 13-12178, 2013 WL 3945978 (E.D. Mich. July 31, 2013). *See also* Appellee's Brief, Argument, Section II(D)(4).

Finally, Plaintiff's allegations that Defendant was the infringer were plausible and well-supported, and were found to be so by the district court. "[T]aking the allegations in the light most favorable to Plaintiff, the Complaint adequately states a claim of copyright infringement." [Doc 16]. *See also* Plaintiff's Response Brief, Section II(D)(5). Plaintiff's complaint has also survived summary judgment, *see Malibu Media, LLC v. Fitzpatrick*, 1:12-CV-

22767, 2013 WL 5674711 (S.D. Fla. Oct. 17, 2013); has been the basis of a summary judgment award in Plaintiff's favor, s*ee Malibu Media v. Bui*, 1:13-cv-163 (W.D. Mich. July 21, 2014); and its allegations have even prevailed at trial, s*ee Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779, 788 (E.D. Pa. 2013) ("Malibu has satisfied its burden of proof with substantial evidence and deserves a large award.") Thus, the district court did not abuse its discretion in finding that Malibu's claims were reasonable and brought in good faith.

In conclusion, Defendant's appeal should be considered frivolous, since the arguments advanced therein are "entirely without merit." *Dawes-Ordonez v. Forman*, 418 Fed. Appx. 819, 821 (11th Cir. 2011). Rule 38 sanctions are, therefore, appropriately imposed against appellant and his counsel, who raise clearly frivolous claims in the face of established law, clear facts on the record, and a proper evaluation of same in the district court. *See, e.g.*, *Harris N.A. v. Hershey*, 711 F.3d 794, 803 (7th Cir. 2013) ("Any competent attorney should have understood that Hershey's briefs and argument simply failed to address the applicable law and relevant evidence. His briefs and argument were exercises in obfuscation and confusion, with repeated and vague assertions of the need to hear all the evidence and look to all the circumstances."); *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1580-81 (Fed. Cir. 1991) ("We consider only the propriety of the instant appeal, and it must be concluded that in choosing to appeal

a discretionary decision of the district court for which no arguable basis for reversal could be shown and in making deceptive, distorted, illogical and irrelevant arguments in support of the appeal, State has overreached."); *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 892-93 (5th Cir. 1985) (imposing sanctions against litigant and counsel under Rule 38 and § 1927 for filing "meritless, vexatious, [and] unreasonable appeal.")

B. Appellant's Counsel Unreasonably and Vexatiously Multiplied the Proceedings

This case began with conversations and e-mails from Plaintiff's counsel advising Defendant and his counsel not to spend any money. Doc 47, Pg 10; Docs 47-12 and 47-13. Plaintiff's counsel made further efforts to save Defendant money by agreeing to and drafting the parties' Rule 26(f) Report and both motions to enlarge the time within which Defendant had to respond to the complaint. This was done while the key deposition of Defendant's Internet Service Provider ("ISP"), Hotwire Communications ("Hotwire") was pending. Doc 47, Pg 10 and Doc 47-6, Pg 2, since Plaintiff believed a settlement was likely following the deposition. Doc 22, Pg 1. Based on the results of the deposition, Plaintiff did, in fact, offer to dismiss the lawsuit contingent upon both parties signing mutual releases. Doc 47-6, Pg 2. Notwithstanding Plaintiff's counsel's efforts and the parties' agreement to reduce fees, Defendant countered with a demand for payment of $17,500 in fees in return for agreeing to a dismissal with prejudice. Doc 47-14,

Pg 1. A five-hour mediation ensued devoted to the issue of attorneys' fees. A week after the mediation, Plaintiff offered to pay Defendant $13,000 in fees, which Defendant's counsel rejected, as he claimed that his client's attorneys' fees at that time had purportedly ballooned to $24,000. Docs 47-15, 47-16 and 47-17.

Thereafter, Plaintiff filed a motion to dismiss with prejudice, Doc 37, which the Court granted. Defendant's counsel then filed his motion for attorneys' fees, which was extensively briefed, evaluated and adjudicated by U.S. Magistrate Judge Andrea Simonton in the district court for an award of fees of $6,815.50 to Defendant pursuant to 28 U.S.C. § 1927. *See* Doc 53. Not content to stop there, Defendant's counsel then filed objections to the Magistrate's Report and Recommendation on the fees issue that, again, was extensively briefed, evaluated and adjudicated, this time by U.S. District Judge Patricia Seitz, who overruled all of Defendant's objections. *See* Doc 58.

Still not content to stop, Defendant's counsel now brings the instant appeal that, as argued above, is wholly lacking in merit. In sum, a call and e-mail advising Defendant's counsel not to spend money have turned into lengthy and vexatious proceedings before the district and appellate levels of this Circuit that are a complete waste of the parties', attorneys' and the courts' time and resources. *See Bonfiglio v. Nugent*, 986 F.2d 1391, 1394 (11th Cir. 1993) ("Flagrant abuse of the

judicial process can enable one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.").

Defendant's counsel pursued his claim for attorneys' fees through two well-reasoned opinions in the district court that denied the bulk of the claim. Defense counsel now either rehashes or brings other arguments to the appellate court not made before the trial court – all of which are entirely without merit. Accordingly, the fact that defense counsel is "[c]ontinuing to pursue this case under these circumstances . . . [is] unreasonable and vexatious, and ha[s] the effect of multiplying the proceedings, warranting sanctions under Section 1927." *Sada v. City of Altamonte Springs*, 2012 WL 503840, at *9 (M.D. Fla. 2012). *See also Braley v. Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1987) ("At the appellate level the bringing of the appeal itself may be a sanctionable multiplication of proceedings. Consequently, in an appropriate case the court may assess the entire costs of litigation on appeal as 'excess costs' under § 1927 or as 'just damages' under Fed. R. App. P. 38."); *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985) (awarding sanctions under § 1927 because appeal "vexatiously multiplied proceedings"); *Limerick v. Greenwald*, 749 F.2d 97, 101 (1st Cir. 1984) ("When an attorney fails to take an objective look at his case and appeals simply because the rules allow him to appeal, he commits a wrong against the courts and against the parties who must respond to his appeal.").

IV. CONCLUSION

For the foregoing reasons, Appellee respectfully requests entry of an award of Appellee's attorneys' fees and costs it has incurred during these proceedings, assessed jointly and severally against the Appellant and his counsel. To the extent the Court finds some, but not all, of Appellant's arguments frivolous or vexatious, Appellee respectfully requests entry of an award of Appellee's attorneys' fees and costs attributable to such arguments. *See Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987) ("It would be strange if by the happenstance of including one colorable (though losing) claim amidst an ocean of frivolous ones, a litigant could ward off all sanctions.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2014, I electronically filed the Appellee's Motion for Attorney's Fees and Costs with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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