UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MALIBU MEDIA, LLC,	)	
	)	
Plaintiff,	)	Civil Case No. 8:13-cv-03007-JSM-TBM
	)	
v.	)	
	)	
ROBERTO ROLDAN,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MOTION FOR LEAVE TO SUBSTITUTE PARTY DEFENDANT AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, Malibu Media, LLC ("Plaintiff"), by and through undersigned Counsel and pursuant to the Court's inherent authority, the applicable Case Management and Scheduling Order [CM/ECF 25], and Federal Rule of Civil procedure 15 (with additional support from Federal Rule of Civil Procedure 21), respectfully moves for entry of an order allowing Plaintiff leave to amend its operative complaint in order to substitute Angel Roldan ("Angel") as the party defendant in place of the current party defendant, Roberto Roldan ("Roberto"). Stated otherwise, Plaintiff respectfully requests leave of Court so that it may add Angel to and drop Roberto from this action. In support thereof, Plaintiff states as follows:

I. SUMMARY

Plaintiff seeks leave to amend its operative complaint to name Angel as proper party defendant instead of his son, Roberto. Discovery recently made available to Plaintiff corroborates Roberto's claims that, although he is a former BitTorrent user (*i.e.*, copyright infringer), he did not reside in Angel's house or have access to Angel's internet during the period of infringement. It thus now appears that the infringer was Angel. Indeed, during the period of infringement Angel both resided in his home and had access to the instrumentalities of

infringement—his wireless internet and a PC desktop computer located in his residence. Further, Angel is linked to the infringements by additional corroborating evidence adduced by Plaintiff. Plaintiff, therefore, respectfully requests leave to substitute father Angel in place of son Roberto.

II. FACTUAL BACKGROUND

1. ***Plaintiff files suit and proceeds against Roberto.*** In or around November of 2013, Plaintiff obtained evidence establishing that an individual used the IP address 96.58.134.12 to illegally download and distribute forty (40) of Plaintiff's copyrighted works beginning on August 18, 2013 and continuing until November 7, 2013. *See, e.g.*, CM/ECF 36-2. During the same time period, Plaintiff also detected that 2,500 other third-party copyrighted works, including movies, television shows, music, and software, were similarly pirated ("Plaintiff's Additional Evidence").

2. On November 27, 2013, Plaintiff thus filed a copyright infringement action naming the John Doe subscriber assigned IP address 96.58.134.12 [CM/ECF 1], and, in order to obtain the John Doe's identifying information, obtained leave of court on December 9, 2013 to serve a third party subpoena on Bright House Networks ("Bright House"), the internet service provider overseeing the infringing IP address [CM/ECF 5].

3. Bright House correlated the infringing IP address to Angel and identified Angel as the subscriber of the IP address 96.58.134.12 during the period of recorded infringement. Plaintiff promptly commenced an investigation and discovered that Angel had a son, Roberto, whose public interests via social media corresponded with Plaintiff's Additional Evidence. And because LexisNexis's Accurint database identified Roberto as residing at Angel's house until January of 2014 (*i.e.*, after the infringement ended), Plaintiff established a reasonable *prima facie* basis for believing that Roberto was the most likely infringer. On or about April 3, 2014, Plaintiff thus amended its complaint to name Roberto as the defendant [CM/ECF 8].

4. ***Roberto admits to BitTorrent activity but, by and through his attorney, sits on and withholds his exculpatory evidence.*** Upon being named in this action, Roberto retained the representation of Cynthia Conlin, Esq. ("Conlin") who promptly (and frivolously) moved to dismiss Plaintiff's complaint under Rule 12(b)(6) [CM/ECF 16]. Although Conlin's motion to dismiss claimed that Roberto was not residing at Angel's residence during the period of infringement, Conlin did not provide or identify any evidence to support that representation. On August 1, 2014, the Court outright denied Conlin's motion, finding Plaintiff's allegations sufficient and Roberto's evidentiary arguments unsupported and premature [CM/ECF 25].

5. Discovery quickly commenced, through which Roberto indeed admitted that he had used the µTorrent BitTorrent client—the *identical* client used to infringe Plaintiff's copyrights—to illegally download and distribute copyrighted works [CM/ECF 36-2; 42-1]. Roberto again insisted, however, that he did not reside at or engage in BitTorrent activity from Angel's residence during the infringement period. To substantiate these otherwise self-serving contentions, Conlin provided, on Roberto's behalf, a lease and utility bills relating to a residence 40–45 minutes away from Angel's home and pertaining to the period of recorded infringement.

6. In light of Roberto's close proximity to Angel's home, as early as August 6, 2014, Plaintiff requested production of additional evidence from which one could reasonably conclude that Roberto, who only lived a short driving distance from Angel's home, would nevertheless not have had access to Angel's home or to the instrumentality of infringement. Conlin objected and declined to produce any additional evidence. Necessarily, then, the case continued.

7. Interestingly, Plaintiff would later come to learn that around this same time Conlin actually *had* obtained additional exculpatory evidence that tended to show that Roberto would have been unavailable and physically incapable of committing the infringements using Angel's internet (namely, affidavits from two of Roberto's friends, Roberto's class schedule,

work stubs, bank records, and school transcripts). For reasons not apparent (and presumably in a bad faith attempt to increase her fees and protract the litigation), Conlin sat on these documents for months, and only first produced same on January 19, 2015, in connection with her motion for summary judgment (which, incidentally, had been drafted months prior) [CM/ECF 36].

8. The Court denied Roberto's motion for summary judgment, ruling that same was prematurely filed given that Plaintiff had not yet had an opportunity to depose Roberto or his parents, and had not yet been able to test the veracity of Roberto's recently-provided exculpatory evidence [CM/ECF 45].

9. ***Deposition testimony corroborates Roberto's denials of wrongdoing and instead implicates Angel as the likely infringer***. Plaintiff deposed Roberto and his parents, Gladys Roldan ("Gladys") and Angel, on February 17, 2015,[1] and elicited testimony that largely corroborated Roberto's claim that he did not reside at Angel's home and did not have access to the instrumentality of infringement during the relevant period of time. The deposition testimony did not, however, refute the fact that large quantities of illegal downloading of copyrighted works, including 40 of Plaintiff's works, occurred using the IP addressed assigned to Angel from August 18, 2013 through November 7, 2013. Moreover, the deposition testimony implicated Angel as the likely infringer, insofar as the testimony established that Angel had the means, access, and motive to commit the infringement at issue. The deposition testimony established, *inter alia*, (1) that Roberto had previously used a PC desktop computer in Angel's home to utilize the µTorrent BitTorrent client—the *identical* client used to infringe Plaintiff's copyrights; (2) that Angel regularly utilized the PC desktop computer during the period of infringement; (3) that Angel resided in his home during the relevant period of time and frequently worked part-

[1] These depositions were originally scheduled for Friday, February 13, 2015, but were pushed back until after President's Day weekend to accommodate Roberto's parents' work schedules.

time on an "as needed" basis; (4) that Angel, like Roberto, has interests that closely correspond with Plaintiff's Additional Evidence; and (5) that, according to Angel's wife, Angel's wireless internet was password-protected throughout the period of infringement.[2] Consequently, although the deposition testimony largely exculpated Roberto, it by equal force implicated Angel.

III. LEGAL MEMORANDUM

Where a plaintiff has presented underlying facts or circumstances that may warrant relief, the plaintiff "ought to be afforded an opportunity to test his claim on the merits," and the Federal Rules require district courts to "***freely grant***" leave to amend unless the plaintiff's request to amend is made for an improper purpose. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave [to amend] sought should, as the rules require, be 'freely given'"); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319 (11th Cir. 1999) ("unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial"). This standard applies with equal force where, as here, leave is sought in order to substitute parties. *See Pretty Punch Shoppettes, Inc. v. Creative Wonders, Inc.*, 750 F. Supp. 487, 493 (M.D. Fla. 1990) ("***Under Rule 15, parties may be added or dropped when an amendment is made to a complaint as a matter of course***. The text of Rule 21 does not indicate that it is the only mechanism for dropping or adding parties to a lawsuit [and, in any case,] both Rules 15 and 21 are to be *interpreted liberally* under the Federal Rules of Civil Procedure."); *see also* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, <u>*on just terms*</u>, add

[2] Undersigned candidly notes that, during his deposition and after going off the record to consult with his attorney, Angel (self-servingly) disputed and denied this fact.

or drop a party."); *Archer v. Mead Corp.*, 998 F. Supp.2d 1262, 1274–75 (N.D. Ala. 2014) ("There is plainly no reason why a substitution of parties cannot be made under Rule 21, in the discretion of the court and in the interest of justice, in situations not covered by Rule 25").

Here, the evidence Plaintiff obtained during the February 17, 2015 depositions indicates that the actual infringer was Angel and corroborates Roberto's claim that "while it may be true that someone uploaded [Plaintiff's] videos from the IP address in question, such person was not [Roberto]" [CM/ECF 36]. And because the claims Plaintiff brought against Roberto will be identical to the claims Plaintiff seeks to bring against Angel, Plaintiff has "just terms" for obtaining leave to substitute Angel in place of Roberto. Proceeding in this fashion would best comport with Rule 1's mandate that controversies be decided justly, speedily, and inexpensively. *Accord, e.g.*, *Archer*, 998 F. Supp.2d at 1274–75 ("[S]ubstitut[ion] of parties is the wiser answer to the problem of expediting trials and avoiding the unnecessary delay and expense of requiring an action to be started anew where a substitution is desired though the subject matter of the actions remains identical."); *McGuffie v. Mead Corp.*, 998 F. Supp. 2d 1232, 1247 (N.D. Ala. 2014) (same). Indeed, requiring Plaintiff to dismiss Roberto and then file an entirely new case against Angel would needlessly create additional administrate work for the Court since the new case would likely relate back. *See, e.g.*, L.R. 1.04 ("Whenever a case, once docketed and assigned, is terminated by any means and is thereafter refiled without substantial change in issues or parties, it shall be assigned, or reassigned if need be, to the judge to whom the original case was assigned."). Moreover, requiring a dismissal and refiling would also unnecessarily cause the parties to duplicate efforts and incur repetitive costs. To be sure, much of the discovery already taken by Plaintiff and many of the resolved and pending motions in the current lawsuit are and would be wholly applicable to a new suit against Angel. *See, e.g.*, CM/ECF 149. Stated differently, if the Court needlessly forces the parties to start anew, the same issues and

claims will arise, and the same sort of motions and arguments will be re-filed and readdressed. Roberto, by and through Conlin, has already interfered with the administration of justice by unnecessarily withholding exculpatory evidence for several months. Requiring Plaintiff to re-file a new suit against Angel will cause substantially more delay, further frustrating Plaintiff's pursuit of justice.

Through the instant motion, Plaintiff therefore requests leave to amend its complaint to substitute-in Angel as the applicable party defendant. Plaintiff makes this request expeditiously, and well within fourteen (14) days of learning of the new evidence supporting the requested amendment, as prescribed by the Court. *Accord* CM/ECF 25, the applicable Case Management and Scheduling Order ("If evidence arises during fact discovery that would support a motion to amend a pleading, the moving party shall file a motion to amend within fourteen (14) days of learning of the evidence"). Again, Plaintiff's motion is not being filed for an improper purpose or on any of the recognized bases upon which the requested leave may be denied—*i.e.*, undue delay, bad faith, dilatory motive on the part of movant, repeated amendments, undue prejudice, or futility. *Forman*, 371 U.S. at 182. To the contrary, through the instant motion Plaintiff seeks to rectify the undue delay caused by the dilatory motives of Conlin, Roberto, and Angel (all of whom have unnecessarily waited over a year to come forward with evidence tending to exculpate Roberto and implicate Angel). *Cf.* Fed. R. Civ. P. 1 (mandating that federal proceedings be "administered to secure the *just*, *speedy*, and *inexpensive* determination of every action and proceeding"); *Archer*, 998 F. Supp.2d at 1274–75 (noting that substituting parties is more justiciable and efficient than dropping a party and refiling a new lawsuit to add a new party). The requested leave to amend to substitute Angel in place of Roberto as the named defendant will thus put this case back on track and towards achieving a remedy for Plaintiff.

Accordingly, Plaintiff respectfully requests that the instant motion be granted. *See, e.g.*, *Weaver*, 169 F.3d at 1319 (11th Cir. 1999) ("unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial"); *Parkervision, Inc. v. Qualcomm Incorporated*, No. 3:11-cv-719, 2012 WL 612818, *1 (M.D. Fla. 2012) (granting leave to amend where request was timely under Court's scheduling order and where no prejudice was found); *Pretty Punch Shoppettes, Inc.*, 750 F. Supp. at 493 (noting that parties may be substituted as a matter of course when leave to amend is granted).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order (1) granting Plaintiff leave to amend its operative complaint to drop Roberto Roldan and add Angel Roldan as the named defendant so that it may proceed with its case and (2) awarding to Plaintiff any additional and further relief as the Court deems just and proper under the circumstances. A proposed order is attached for the Court's convenience.

Dated: February 19, 2015

Respectfully submitted,

LIPSCOMB EISENBERG & BAKER, PL

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ *Daniel C. Shatz*

CERTIFICATE OF CONFERRAL

I hereby certify that I conferred with Bradford Patrick, Esq. (Angel's attorney) and Cynthia Conlin, Esq. (Roberto's attorney) on February 18, 2015 and February 19, 2015, respectively. Neither Mr. Patrick nor Ms. Conlin object to Roberto's dismissal from this action. Mr. Patrick does, however, object to the addition of Angel. Ms. Conlin, to the extent she has standing to do so, likewise objects to Angel's addition.

By: /s/ *Daniel C. Shatz*