

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

MALIBU MEDIA, LLC,

Plaintiff,

v.

John Doe subscriber assigned IP address
65.189.10.120,

Defendant.

No. 1:14-cv-00493-TSB

**DEFENDANT’S REPLY IN SUPPORT OF HIS MOTION FOR SANCTIONS PURSUANT
TO 28 U.S.C. § 1927 AND/OR THE COURT’S INHERENT AUTHORITY**

By continuing to prosecute a complaint he had no intention of taking to trial, Plaintiff’s counsel, Mr. Faroniya, abused the judicial process, harassed the Defendant and wasted the resources of the Court. That conduct unnecessarily and vexatiously multiplied these proceedings.

A. Sanctions are Warranted Under 28 U.S.C. § 1927.

1. Plaintiff’s Focus on the Merits is Misplaced.

The focus of sanctions under 28 U.S.C. § 1927 is on abuse of court processes, rather than the merits of the litigation.¹

“[A] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Chambers* 501 U.S. at 44-45. As the Supreme Court noted, to impose this requirement in every instance may have the effect of causing a delay in the proceeding that improperly rewards the offending party. “Interpreting the proceedings on the merits to conduct sanctions hearings may serve only to reward a party seeking delay. *Chambers*, 501 U.S. at 56.”

First Bank v. Hartford Underwriters Ins. Co., 307 F.3d 501, 516 (6th Cir. 2002).

Nonetheless, the arguments raised in opposition by Mr. Faroniya focus on the merits of the claims, and this misses the point of § 1927.² *See* 28 U.S.C. § 1927; *Legair v. Circuit City Stores*, No. 01-cv-00985, 2006 U.S. Dist. LEXIS 7351, *2-3 (S.D. Ohio Feb. 3, 2006) (citing *Kapco Mfg. Co. v. C & O Enters.*, 886 F.2d 1485, 1496 (7th Cir. 1989)) (“Sanctions can be imposed to deter future conduct, compensate the opposing party, and/or punish for unreasonable or vexatious conduct.”).

¹ A dismissal filed under either Fed. R. Civ. P. 41(a)(1)(A)(i) [Doc. 36] or (ii) is self-executing and strips the district court of jurisdiction over the merits.

² Mr. Faroniya addresses his conduct only so far as to characterize the allegations as “nonsense”. *See* Doc. 39 p. 9.

In particular, Mr. Faroniya spends several pages discussing how the case was not frivolous. *See* Doc. 39 pp. 2-4. Such an analysis is better suited for sanctions under the Court's inherent authority rather than § 1927. Although frivolous pleadings are a hallmark of bad faith litigation, the Court need not find that a claim is frivolous in order to sanction an attorney under §1927. *Kapco*, 886 F.2d at 1493 (whether pleading has merit is irrelevant to determining whether attorney's conduct unnecessarily prolonged litigation for purposes of harassment). Additionally, even a complaint that survives a motion to dismiss does not preclude a finding that it was filed for improper purposes and that it was sanctionable under § 1927. *Id.*

2. The Tactics and Behavior of Counsel for Plaintiff Warrant Sanctions.

The real issue herein is the attorney's conduct, and whether the attorney "multiplied" the proceedings. 28 U.S.C. § 1927; *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997). Therefore, the Court must review the tactics and behavior of Mr. Faroniya, rather than the outcome of the litigation—actual or potential, to determine whether sanctions are appropriate under § 1927. *See e.g. Clark v. Walt Disney Co.*, 748 F.Supp.2d 792, 797 (S.D. Ohio 2010) (*citing Business Guides, Inc. v. Chromatic Comm. Enterprises, Inc.*, 498 U.S. 533, 553 (1991)) ("Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded.").

As a general rule, attorneys violate § 1927 if they unreasonably and vexatiously multiply proceedings through bad faith or intentional conduct, thereby increasing the cost of the proceedings to the opposing party. This Circuit has found "vexatiously multiplying proceedings" to include conduct where "an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of non-frivolous claims." *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986). This Circuit has also held that § 1927 sanctions are appropriate where "an attorney has engaged in some sort of conduct that, from an objective standpoint, 'falls short of the obligations owed by the member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Holmes v. City of Massillon*, 78 F.3d 1041, 1049 (6th Cir. 1996) (quoting *In Re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987)). *See also, Baulch v. Johns*, 70 F.3d 813, 816-17 (5th Cir. 1995) (waste of scarce judicial resources and increased legal fees charged to parties underlies § 1927 sanctions).

At the outset, Defendant questioned Mr. Faroniya's resolve to litigate given Malibu Media's established strategy of drawing out litigation through various extensions to coerce a settlement before voluntarily dismissing to avoid an adverse resolution on the merits. *See e.g.* Doc. 8 pp. 3-4 (collecting cases); Doc. 38. A tactic which this Court has acknowledged. *Malibu Media v. Ramsey*, No. 14-cv-00718-TSB, ECF No. 15 p. 15 (S.D. Ohio May 26, 2015) ("Given the sheer number of actions Malibu Media files and its penchant for voluntary dismissal, the Court questions whether an alternative sanction would protect the integrity of the pretrial process."). And one which Mr. Faroniya has admitted to. Doc. 39 p. 4 ("Because identical litigation strategies used in this case were successfully implemented in Plaintiff's other cases, those strategies are necessarily not "unreasonable" or "frivolous."").

By continuing to prosecute a complaint he had no intention of taking to trial though repeatedly represented it would when questioned, Mr. Faroniya abused the judicial process, harassed the Defendant and wasted the resources of the Court. This is evidenced by the fact this matter was dismissed even though Mr. Faroniya was standing on 1) the denial of Defendant's motions to quash and dismiss; and 2) the strength of his "due diligent [*sic*] investigation," confirming "that Defendant indeed was responsible for infringing Plaintiff's 30 works." [Doc. 28 p. 2].³

The dismissal at the eleventh hour was a tacit acknowledgement that Plaintiff could not prevail on its claim at trial and that it should not have been granted the early discovery in the first instance. It is also proof that Mr. Faroniya's intent was to drag out these proceedings as far as he could, cause the Defendant to incur significant attorney's fees and costs, and harass and intimidate the Defendant into settling. Thus, from the time the complaint was filed through dismissal, Mr. Faroniya's prosecution of this matter was an unnecessary, vexatious and bad faith multiplication of these proceedings.

3. The Plaintiff Set the Law in Motion and Misled the Court and the Defendant of its Intention to Litigate. All Costs Therefore were in Excess and Reasonably Incurred.

Mr. Faroniya argues "[a]ny 'protracted motion practice' was Defendant's own doing." *See* Doc. 39 p. 1. This too is incorrect.

As the party "haled into court," the Defendant has the right to vigorously defend himself against the Plaintiff's claims. Vigorous and zealous advocacy is a necessary component of our

³ *Cf.* Mr. Faroniya's newfound ambivalence regarding Defendant's guilt. "And, that discovery would have likely confirmed that Defendant was in fact guilty." *See* Doc. 39 p. 7.

judicial system. When a plaintiff's claim succeeds, that usually means that a defendant engaged in wrongful conduct. Yet, "[t]he defendant ha[s] the right to resist [a plaintiff's] claim and if [the] plaintiff[] wished to establish [its] right it was necessary for [it] to resort to litigation." *Ritter v. Ritter*, 381 Ill. 549, 554 46 N.E.2d 41, 44 (Ill. 1943). Furthermore, by initiating the lawsuit, the Plaintiff must be held to accept, to some degree, the costs and risks of litigation. *See e.g. Eastin v. Bank of Stockton*, 66 Cal. 123, 127, 4 P. 1106, 1109-10 (1884) ("The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights,—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege." (citation and internal quotation marks omitted)).

Because Def "excess" costs reasonably incurred as a result of the multiplicative misconduct are recoverable under Section 1927— all of the attorneys' fees incurred by a litigant in defending a case.

We believe that Ridder's counsel, Mr. Brannon, should be liable for excess costs resulting from his initial filing and persistent assertion of meritless claims, conduct that amounted to unreasonable and vexatious multiplication of the proceedings.

...

Mr. Brannon's unreasonable and vexatious behavior began with the filing of the complaint and persisted throughout the pendency of the case, the magistrate judge did not abuse his discretion by awarding the full amount of attorney fees incurred by counsel separately retained by Springfield to defend the case against the individual officers.

Ridder v. City of Springfield, 109 F.3d 288, 298-99 (6th Cir. 1997).

Where an attorney's unreasonable and vexatious conduct "began with the filing of the complaint and persisted throughout the pendency of the case," this court affirmed the district court's finding that the attorney was liable under § 1927 to pay attorney fees that began to accrue when the complaint was filed.

Garner v. Cuyahoga County Juvenile Court, 554 F.3d 624, 645 (6th Cir. 2009). *See also Legair v. Circuit City Stores*, No. 01-cv-00985, 2006 U.S. Dist. LEXIS 7351, *2-3 (S.D. Ohio Feb. 3, 2006) (citation omitted) ("Sanctions [under § 1927] can be imposed to deter future conduct, compensate the opposing party, and/or punish for unreasonable or vexatious conduct."); *Smith v. Detroit Fed'n of Teachers*, 829 F.2d 1370, 1378-1379 (6th Cir. 1987) (observing that § 1927 sanctions are "penal in nature"); *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 647 (6th Cir.

2006) (“[W]e have previously observed that sanctions imposed under § 1927 or pursuant to a court’s inherent authority are punitive.”).

Here, the Defendant seeks damages for harms suffered directly because of Mr. Faroniya’s initiation of a lawsuit neither he nor his client intended to fully litigate.

4. Plaintiff’s Voluntary Dismissal under 41 Serves the Purposes of § 1927

Mr. Faroniya’s analysis limits the applicability of § 1927 to his conduct in terms of the voluntary dismissal alone. In doing so, he fails to address his conduct leading to up to the dismissal. *See* Doc. 38 pp. 7-10.

Regardless, the underlying purpose of Rule 41(a)(1)(i) is to permit a plaintiff to withdraw his suit at time when there is no prejudice to another party. Despite any “absolute right” Plaintiff had to dismiss, a desire to avoid adverse judgment is not a legitimate justification for dismissal without prejudice, nor does it divest the district court of jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990).

Again, Mr. Faroniya’s voluntary dismissal unequivocally established the untruth of Malibu Media’s allegations against the Defendant, and his pursuit of litigation he never intended to see through caused the Defendant substantial financial injury. Such conduct falls nothing short of harassment and evidences bad faith and vindictive intent.

Neither Mr. Faroniya nor the Plaintiff disclosed a reason for seeking such dismissal, asserting the decision to dismiss the case is privileged. *See* Doc. 39 p. 18. Yet, Mr. Faroniya puts the decision to dismiss squarely at issue when he stated: “in every case, before serving the subscriber, Plaintiff determines whether it has a good faith basis to do so.” [Doc. 14 p. 4] and that his “due diligent [*sic*] investigation” [Doc. 28 p. 2], confirmed “that Defendant indeed was responsible for infringing Plaintiff’s 30 works.” *Id.*

“If the Court has concerns that Plaintiff does not intend to litigate, Plaintiff welcomes the opportunity to provide the Court with a full status report and explanation as to its choice to proceed against Defendant, proceed against another individual in Defendant’s household, or not proceed, after it receives Defendant’s identity.”

Doc. 14 p.6

Mr. Faroniya’s refusal to disclose the rationale behind this decision only lends further credence that the dismissal was done because the case was brought for frivolous reasons and to avoid an adverse ruling. *See e.g. Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir.

1987) (“The obligation to answer for one’s act accompanies the act; a lawyer cannot absolve himself of responsibility by dismissing his client’s suit.”)

B. Sanctions under the Inherent Authority of the Court.

When sanctions are not expressly authorized by 28 U.S.C. § 1927 or the Federal Rules, a district court may invoke its inherent power⁴ to award attorneys’ fees and costs against parties or attorneys who “act in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Chambers*, 501 U.S. at 45-46. However,

“the court must find *something more* than that a party knowingly pursued a meritless claim or action at any stage of the proceedings. Examples of “something more” include: a finding that the plaintiff filed the suit for purposes of harassment or delay, or for other improper reasons, a finding that the plaintiff filed a meritless lawsuit and withheld material evidence in support of a claim, or a finding that a party was delaying or disrupting the litigation or hampering enforcement of a court order.

Metz v. Unizan Bank, 655 F.3d 485, 489 (6th Cir. 2011).

In this Circuit, “bad faith” is a requirement for the use of the district court’s inherent authority, *Runfolo*, 88 F.3d at 375 (citation omitted), but this Circuit has also upheld the use of such sanctions for conduct that “was tantamount to bad faith.” *Mann*, 1997 U.S. App. LEXIS 12482, *20, 1997 WL 280188 *5 (quoting *Roadway Express*, 447 U.S. at 767), and “even in the absence of a specific finding of bad faith.” *Plabell Ruben Products*, 858 F.2d at 320, citing with reservations *Grinnell Bros., Inc. v. Touche Ross & Co.*, 655 F.2d 725 (6th Cir. 1981).

First Bank v. Hartford Underwriters Ins. Co., 307 F.3d 501, 519 (6th Cir. 2002). *See also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (While a finding of subjective bad faith on part of the plaintiff is not necessary, “if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney’s fees incurred by the defense.”).

⁴ Included among the Court’s inherent authority is the ability to impose pre-filing restrictions on harassing and vexatious litigators. *See, e.g., Filipas v. Lemons*, 835 F.2d 1145 (6th Cir.1987) (noting courts have authority to impose restrictions on harassing and vexatious litigators); *Feathers v. Chevron U.S.A.*, 141 F.3d 264, 269 (6th Cir. 1998) (affirming courts ability to impose pre-filing restrictions in matters with a history of vexatious litigation); *Wrenn v. Vanderbilt Univ. Hosp.*, 50 F.3d 11 (6th Cir. 1995) (“This court has the authority to enjoin harassing litigation under its inherent authority and the All Writs Act, 28 U.S.C. § 1651(a) ...”). Plaintiff and its counsel have filed hundreds of cases, including this one, in this District alone. None have gone to trial. Rather, most are voluntarily dismissed or end in default judgments of one kind or another. More so, all are brought without regard to guilt, but rather to harass and extort settlement. Given the sheer volume of cases brought, this Court would be well within its power, should it chose, to declare Malibu Media to be a harassing and vexatious litigator and impose restrictions. *See, e.g., Chance v. Todd*, 74 Fed. App’x. 598 (6th Cir. 2003) (affirming district court’s decision to impose pre-filing restrictions on a harassing plaintiff after only four previously frivolous lawsuits); *Marbly v. Kay*, 238 F.3d 422 (6th Cir. 2000) (affirming district court’s decision to impose pre-filing restrictions on a harassing and vexatious litigant after eight duplicative lawsuits).

Advocacy simply for the sake of burdening an opponent with unnecessary expenditures of time and effort warrants recompense for those outlays. *Garner*, 554 F.3d at 645. Most federal circuit courts agree that a litigant's filing of a frivolous lawsuit for an improper purpose constitutes bad faith and warrants sanction. *See, e.g., BDT Prods., Inc. v. Lexmark Intern., Inc.*, 602 F.3d 742, 752 (6th Cir. 2010); *Thomas v. Tenneco Packaging Co., Inc.*, 293 F.3d 1306, 1320 (11th Cir. 2002); *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1108 (9th Cir. 2002); *Batson v. Neal Spelce Assocs., Inc.*, 805 F.2d 546, 550 (5th Cir. 1986); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). *See also, Galanis v. Szulik*,

[T]he Court will invoke its inherent powers to sanction the plaintiff and his counsel for filing a frivolous lawsuit for an improper purpose. It is apparent that this action was filed to extort a quick settlement from Szulik and intimidate him into releasing potential claims against Galanis in the North Carolina litigation. ... In addition to sanctioning plaintiffs for their misconduct, an award of reasonable attorneys' fees and expenses will help defray the costs incurred by Szulik in defending against this frivolous action.

Galanis v. Szulik, 841 F. Supp. 2d 456, 461 (D. Mass. 2011).

1. Plaintiff's Claim Remains Meritless.

To date, Plaintiff has filed 4,585 actions against thousands of individuals. Of those, Mr. Faroniya is responsible for this and 400 similar actions. Plaintiff and its counsel's concern in each of these actions has little to do with separating infringers from innocents. Rather, there is an express disregard for such a distinction. The focus instead is on implementing a litigation strategy that stacks the odds in favor of greed over guilt.

As such, Plaintiff's bad faith continues to exist.

a. Mr. Faroniya Rests on Plaintiff's "Merits".

Mr. Faroniya's first contention is that "on numerous occasions, Plaintiff has succeeded on the merits of its claims" and as such, this action could not have been frivolous. *See* Doc. 39 p. 13. Mr. Faroniya cites several cases, none involving him, that were "won on the merits." *Id.* pp. 15-16.

- *Malibu Media, LLC v. Winkler*, No. 13-cv-03358, 2015 WL 4245820 (D. Colo. July 14, 2015) (granting summary judgment in Plaintiff's favor regarding the infringement of 28 of its films).

Much like Plaintiff's Bellweather trial (cited below), Plaintiff's parenthetical is not entirely accurate. It is true that Plaintiff prevailed on a motion for summary judgment ... that went *unopposed* by the *pro se* defendant. ECF No. 58.

- *Malibu Media LLC v. Bui*, No. 1:13-cv-00162, CM/ECF 40 (W.D. Mich. May 14, 2014) (granting summary judgment in Plaintiff's favor regarding the infringement of 57 of its films).

Though Plaintiff prevailed on summary judgment, the issue of damages was to be resolved by trial. ECF No. 40. Plaintiff dismissed the matter two months later with prejudice and with the stipulation that each party to bear its own attorneys' fees and costs. ECF No. 45.

- *Malibu Media, LLC v. John Does*, 950 F. Supp. 2d 779 (E.D. Pa. 2013) (where Plaintiff won the first ever BitTorrent copyright infringement trial).

"A single trial almost two years ago against three defendants, all of whom admitted to liability and two of whom settled as to damages prior to trial, is of little relevance to the present inquiry." *Malibu Media v. Ramsey*, No. 14-cv-00718-TSB, ECF No. 15 p. 17 n.12 (S.D. Ohio May 26, 2015).

b. Mr. Faroniya Made No Reasonable Investigation as to the Actual Infringer's Identity Before Filing Suit.

Defendant argues that references to Plaintiff's Additional Evidence are improperly "coercive," but that without them Plaintiff's claim is "frivolous." CM/ECF 38, at p. 11.

Doc. 39 p. 4.

Defendant made no such argument. In fact, the only reference to the "Additional Evidence" appears in the factual and procedural section of Defendant's motion for sanctions. *See* Doc. 38 p. 2. What Defendant did argue was an "IP address alone identifies only a subscriber, not an infringer. ... To identify John Doe as the Defendant without any basis greater than his name on his cable bill is the very definition of recklessness and vexatiousness." *See* Doc. 38 pp. 10-12. In support, Defendant cited to *Ingenuity 13 LLC v. John Doe*, No. 12-cv-8333, 2013 U.S. Dist. LEXIS 17693 (C.D. Cal. Feb. 7, 2013). Mr. Faroniya, in turn, cites it as an excuse "to illustrate the strength of its case."

Four things are worth noting here. First, if the case was so strong, why was it dismissed? Second, Plaintiff states this is a \$22,500 claim. *See* Doc. 39 p. 14. Mr. Faroniya surely must have put that much time into the matter. So again, why was it dismissed?

Third, Mr. Faroniya states "[b]ecause this case has been dismissed, it cannot be said that Plaintiff is now including the Additional Evidence as 'coercion.'" *See* Doc. 38 p. 6 n. 3. Indeed, Mr. Faroniya's inclusion of the Additional Evidence is both coercive and retaliatory. Plaintiff's dismissal

was without prejudice. By introducing the “Additional Evidence” here, Plaintiff can refer to the record in a new action without running afoul of the Court’s previous order. *See* Doc. 20 p. 14.

Lastly, the type of “Additional Evidence” proffered by the Plaintiff has little in common with the sort of technical investigation suggested by the *Ingenuity* court.

Further, the Court is not convinced that there is no solution to the problem of identifying the actual infringer. Here, since Plaintiff has the identity of the subscriber, Plaintiff can find the subscriber's home address and determine (by driving up and scanning the airwaves) whether the subscriber, (1) has Wi-Fi, and (2) has password-protected his Wi-Fi access, thereby reducing the likelihood that an unauthorized user outside the subscriber's home is the infringer. In addition, since Plaintiff is tracking a number of related copyrighted videos, Plaintiff can compile its tracking data to determine whether other copyrighted videos were downloaded under the same IP address. This may suggest that the infringer is likely a resident of the subscriber’s home and not a guest. And an old-fashioned stakeout may be in order: the presence of persons within the subscriber’s home may be correlated with tracking data—the determination of who would have been in the subscriber’s home when the download was initiated may assist in discovering the actual infringer.

Such an investigation may not be perfect, but it narrows down the possible infringers and is better than the Plaintiff’s current investigation, which the Court finds involves nothing more than blindly picking a male resident from a subscriber's home. But this type of investigation requires time and effort, something that would destroy Plaintiff’s business model.

Ingenuity 13 LLC, 2013 U.S. Dist. LEXIS 17693, *10-11. *Cf.* Plaintiff’s Additional Evidence: a list of files downloaded by unknown individuals.

In fact, the only thing that Plaintiff’s Additional Evidence is indicative of is that a subscriber, at one point, used his own Internet connection. It does nothing to rule out the infringer as being a neighbor, a long-term guest of a neighbor or the Defendant (such as an exchange student or relative), etc. Nor is such a showing indicative of guilt.

Case in point, when this litigation began Defendant was identified by the Plaintiff as being under 35 and “working (or is studying to work within) the health care space.” *See* Doc. 8-1 p. 8. Photography was only a “hobby.” *Id.*

Now he’s a professional photographer.

[T]he subjects of the third party works further implicate Defendant as the infringer. Indeed, upon learning Defendant’s name, Plaintiff discovered that Defendant is a professional photographer.

Doc. 39 p. 6.⁵

⁵ Among the Additional Evidence are several references to Photoshop. Despite the name, Photoshop is just as likely, if not more so, to be used by graphic designers as opposed to those with an interest in photography.

This is still incorrect.⁶

c. Mr. Faroniya Instituted and Litigated this Action with No Evidence of Infringement.

When Mr. Faroniya brought this case, the sole piece of evidence that an infringement occurred in Plaintiff's possession was a single PCAP file. Plaintiff's films can vary in file size from 327MB to 1263MB. By way of example, a torrent for a 700MB sized movie has files that can range in size from 32kB to 64kB. At 32kB, the run-time of any one piece would be 241 milliseconds. At 64kB, 482 milliseconds. Plaintiff's case therefore is premised upon the blink of an eye.

Again, the *Ingenuity* court directly addressed the inherent flaws with this sort of "snapshot observation."

The first problem is how Plaintiff concluded that the Defendants actually downloaded the entire copyrighted video, when all Plaintiff has as evidence is a "snapshot observation." (AC ¶ 23.) This snapshot allegedly shows that the Defendants were downloading the copyrighted work—at least at that moment in time. But downloading a large file like a video takes time; and depending on a user's Internet-connection speed, it may take a long time. In fact, it may take so long that the user may have terminated the download. The user may have also terminated the download for other reasons. To allege copyright infringement based on an IP snapshot is akin to alleging theft based on a single surveillance camera shot: a photo of a child reaching for candy from a display does not automatically mean he stole it. No Court would allow a lawsuit to be filed based on that amount of evidence.

What is more, downloading data via the Bittorrent protocol is not like stealing candy. Stealing a piece of a chocolate bar, however small, is still theft; but copying an encrypted, unusable piece of a video file via the Bittorrent protocol may not be copyright infringement. In the former case, some chocolate was taken; in the latter case, an encrypted, unusable chunk of zeroes and ones. And as part of its prima facie copyright claim, Plaintiff must show that Defendants copied the copyrighted work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). If a download was not completed, Plaintiff's lawsuit may be deemed frivolous.

Ingenuity 13 LLC, 2013 U.S. Dist. LEXIS 17693, *6-8.

2. Plaintiff and its Counsel Place Greed over Guilt.

Plaintiff's cases adhere to a strict playbook. The goal is not to determine guilt, but to force a settlement. In general terms, all of Plaintiff's matters can be outlined as thus:

1. Use a sliver of evidence as the basis for suit and move for early discovery.

[At which point, defendant is notified by his ISP of suit.]

⁶ At the Court's direction, undersigned can provide the Defendant's true age and profession for *in camera* review.

2. Wait for defendant or his counsel to initiate contact and inquire about a settlement.

[Defendant is then notified of the statutory maximum and Plaintiff's willing to settle for the minimum. Defendant is now faced with three choices: 1) financial ruin he loses; 2) financial ruin and humiliation if he litigates; 3) fight.]

3. If no settlement agreement is reached, amend the complaint to name the defendant.

[Defendant, regardless of guilt, must now contend with the stress that friends, family or employers may stumble across this public filing]

4. Move to extend the time to complete service repeatedly.

[This serves two purposes in hopes of facilitating settlement: 1) to hang the suit over defendant's head; and 2) to draw out defendant's litigation expenses.]

5. Serve the defendant. If no defendant does not default, move on to discovery.

6. Discovery tactics include: 1) move to extend the time to complete expert reports repeatedly; 2) depose neighbors.

[Again, the extensions are to draw out the litigation. The depositions are to publicly shame a defendant.]

7. Voluntarily dismiss the matter at any point before trial.

3. Mr. Faroniya Never Intended to Take this Matter Beyond Pre-trial Litigation.

Lastly, Mr. Faroniya proffers six cases which did not go to trial as proof that he fully intended to go to trial here.⁷ More so, Mr. Faroniya did not represent Plaintiff in any of these matters. Truth is Plaintiff's cases end in two ways: voluntary dismissal or default judgment.

Without plumbing the depths of each citation, and even assuming these matters are relevant to proving he intended to litigate here, the following require clarification:

- *Malibu Media, LLC v. Harrison*, No. 1:12-cv-01117-WTL-MJD (S.D. Ind. 2015) (after three years of litigation and nearly 400 docket entries, Plaintiff eventually discovered that Defendant withheld material evidence and committed perjury at an evidentiary hearing. This case ultimately settled just three weeks before trial—after the parties already participated in a final pretrial conference and submitted trial materials, such as jury instructions and motions in limine.).

It is accurate that on July 20, 2015, Keith Lipscomb moved⁸ to sanction Harrison for his “proven perjury.” ECF No. 334 p. 14. (“This Court should be filled with righteous outrage. The fraud and perjury is 100% provably and independently verifiably true.”).

⁷ NONE of Plaintiff's 4,585 cases have gone to jury—hence the “tiny sampling”. See Doc. 38 p. 15.

⁸ Plaintiff's filings that day also included 10 motions in limine and 8 miscellaneous motions and submissions to the court.

However, despite the intimation above, there was no finding by the court that Harrison withheld evidence or committed perjury. Instead, the court held it would not resolve the motion for sanctions until after the jury trial scheduled for August 23, 2015.

Notwithstanding this “100% provably and independently verifiably true” evidence of Harrison’s guilt and the all but assured hundreds of thousands in damages and attorney fees to follow, the case abruptly ended on August 11, 2015 with a walk-away settlement that each party bear its own attorneys’ fees and costs. ECF No. 383.

- *Malibu Media v. Ricupero*, No. 2:14-cv-821, ECF No. 67 (S.D. Ohio July 14, 2015)

Mr. Faroniya cites this matter as evidencing that undersigned “knows Plaintiff litigates its cases”. This is true. Undersigned knows that Mr. Faroniya will engage in pre-trial litigation in matters where an answer has been filed and voluntary dismissal is unavailable.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Motion for Attorney’s Fees Pursuant to 28 U.S.C. § 1927 and the Court’s inherent authority be granted.

Dated: August 27, 2015

Respectfully submitted,

/s/ Jason E. Sweet

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CERTIFICATE OF SERVICE

I hereby certify that on this August 27, 2015 I filed the foregoing document through the Court’s CM/ECF system, which will serve the documents on all counsel of record who have consented to electronic service.

/s/ Jason E. Sweet