

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

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MALIBU MEDIA, LLC,	:	
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Plaintiff,	:	Civil Action No.: <u>1:14-cv-00493-TSB</u>
	:	
vs.	:	
	:	
JOHN DOE,	:	
	:	
Defendant.	:	
	:	
	X	

**PLAINTIFF’S RESPONSE IN OPPOSITION TO  
DEFENDANT’S MOTION FOR SANCTIONS**

**I. INTRODUCTION**

Sanctions should not be imposed under 28 U.S.C. § 1927 or this Court’s inherent authority because (1) Plaintiff did not vexatiously multiply the proceedings; (2) Plaintiff’s claim is not frivolous; and (3) Plaintiff did not bring this lawsuit for an improper purpose. In support of his Motion, Defendant erroneously argues (1) Plaintiff vexatiously multiplied the litigation by not litigating; (2) Plaintiff’s claim is “frivolous” for not including Additional Evidence—evidence this Court deemed “immaterial to Plaintiff’s claim”; and (3) Plaintiff brought this suit to “force a settlement”—even though Plaintiff *never* initiated settlement negotiations and the parties only discussed settlement once—at Defendant’s request. Further, Plaintiff dismissed this case in its infancy—before Defendant even filed an answer. The parties never engaged in discovery; there were no summary judgment motions. Any “protracted motion practice” was Defendant’s own doing. For these reasons, as explained more fully below, the Court should not impose sanctions under § 1927 or this Court’s inherent authority.

## II. ARGUMENT

### A. SANCTIONS ARE NOT WARRANTED PURSUANT TO 28 U.S.C. §1927

“Fee awards under § 1927 are not appropriate unless ‘an attorney knows or reasonably should know that a claim pursued is frivolous.’” *Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, No. 13-2484, 2015 WL 873504, at \*12 (6th Cir. Mar. 3, 2015) (quoting *Tareco Props., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir.2003)). “The purpose [§ 1927] is to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy.” *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006). Here, sanctions are not warranted under § 1927 because (1) Plaintiff’s claim is not frivolous and (2) Plaintiff’s actions were not unreasonable or vexatious.

#### 1. Plaintiff’s Claim is Not Frivolous

A claim is “frivolous” if it “should have been patently obvious to Plaintiff’s counsel that the facts alleged did not, as a matter of law, support [the] claim.” *Wilson-Simmons v. Lake Cnty. Sheriff’s Dep’t*, 207 F.3d 818, 824 (6th Cir. 2000); *see also Sure Way Homes, Inc. v. Bank of Am., N.A.*, 2013 WL 6409981, at \*2 (E.D. Mich. 2013) (“The grounds for his Motion are supported by neither fact, nor law, but were nonetheless presented to this Court in a manner that even a first-year law student would recognize as frivolous.”).

Here, Plaintiff’s claim is not frivolous because the facts alleged in Plaintiff’s Complaint support its copyright claim. Indeed, in granting Plaintiff’s Motion for Leave to Serve a Third Party Subpoena, this Court found “‘good cause’ exists for [Plaintiff] to serve a third party subpoena[.]” CM/ECF 4, at p. 1. The first factor in determining whether “good cause” exists is to determine whether Plaintiff established a *prima facie* claim for copyright infringement. *See* CM/ECF 2-1, at p. 6. By, granting Plaintiff’s Motion for Leave, this Court implicitly found that

Plaintiff set forth a *prima facie* case. Thus, it cannot be said that it is “patently obvious” Plaintiff’s claim is supported by neither fact nor law.

Further, as pointed out by defense counsel, undersigned has participated in over 400 lawsuits involving Malibu Media—not one of which has ever been deemed frivolous by a Court. In fact, not a single Malibu Media case has ever been dismissed for failure to state a claim under a 12(b)(6) Motion.<sup>1</sup> Plaintiff has also successfully won cases on the merits of its claim. *See, e.g., 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); *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); *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); *Malibu Media, LLC v. Huseman*, No. 1:13-cv-02695, CM/ECF 43, 50 (D. Colo. Dec. 19, 2014) (resolution by stipulated final judgment following Plaintiff’s filing of a motion for summary judgment).

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<sup>1</sup> *See, e.g., Malibu Media, LLC v. John Doe 1*, 2013 WL 30648 at \*4 (E.D. Pa. 2013) ; *Malibu Media, LLC v. Pelizzo*, 2012 WL 6680387 at \*1 (S.D. Fla. 2012); *Malibu Media v. Roy*, 1:12-cv-00617, CM/ECF 24 (W.D. Mich. Jan 3, 2013); *Malibu Media v. Pratt*, 1:12-cv-00621-RJJ, CM/ECF 31 (W.D. Mich. March 19, 2013); *Malibu Media, LLC v. Killoran*, 2:13-cv-11446-AJT-DRG, CM/ECF 13 (E.D. Mich. Oct. 18, 2013); *Malibu Media, LLC v. Lowry*, 2013 WL 6024371, at \*5 (D. Colo. 2013); *Malibu Media, LLC v. John Does 1-11*, 2013 WL 3732839, at \*4 (S.D.N.Y. 2013); *Malibu Media, LLC v. Harris*, 2013 WL 3780571 (S.D. Ind. 2013); *Malibu Media, LLC v. John Doe*, 2:13-cv-00055-JVB-JEM, CM/ECF 22 (N.D. Ind. August, 16, 2013); *Malibu Media LLC v. Doe*, 2013 WL 3945978 (E.D. Mich. 2013); *Malibu Media LLC v. Gilvin*, 2014 WL 1260110 (N.D. Ind. Mar. 26, 2014); *Malibu Media, LLC v. Sanchez*, 2014 WL 172301 (E.D. Mich. Jan. 15, 2014); *Malibu Media, LLC v. Butler*, 13-cv-02707-WYD-MEH, CM/ECF 31 (D. Colo. April 24, 2014); *Malibu Media, LLC v. Doe*, 2015 WL 574274, at \*1 (M.D. Fla. Feb. 11, 2015); *Malibu Media, LLC v. Doe*, 8:14-cv-01230-TDC, CM/ECF 20, (D. Md. March 16, 2015); *Malibu Media, LLC v. Doe*, 2015 WL 857408, at \*4 (D. Md. Feb. 26, 2015); *Malibu Media, LLC v. Doe*, 2014 WL 7190812, at \*1-2 (D. Md. Dec. 16, 2014); *Malibu Media, LLC v. Doe*, 2014 WL 498467, at \*4 (S.D. Ohio Oct. 6, 2014); *Malibu Media, LLC v. Doe*, 8:14-cv-00649-RWT, CM/ECF 15 (D. Md. March 17, 2015); *Malibu Media, LLC v. Doe*, 1:13-cv-00353-MJG, CM/ECF 76 (D. Md. April 15, 2015); *Malibu Media, LLC v. Adams*, 2015 WL 1811058, at \*1 (M.D. Fla. Apr. 21, 2015); *Malibu Media, LLC v. Whaley*, 2:14-cv-00510-DNF, CM/ECF 26 (M.D. Fla. May 14, 2015).

Plaintiff's prior successes fatally undermine defendant's frivolity argument. "A litigation strategy, perhaps obviously, is not 'unreasonable' or 'frivolous' if it is successful." *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 266 (6th Cir. 2015). Because identical litigation strategies used in this case were successfully implemented in Plaintiff's other cases, those strategies are necessarily not "unreasonable" or "frivolous."

Defendant presents two other erroneous arguments in support of his contention that Plaintiff's claim is frivolous: (1) Plaintiff failed to present additional evidence demonstrating that the subscriber is the infringer, and (2) Plaintiff failed to present evidence Defendant uploaded a complete copyrighted video file.

*i. Plaintiff Was Not Required to Include the Additional Evidence*

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. It is a damned if you do, damned if you don't argument that Plaintiff has attempted to navigate for years. To explain, Defendant cites to *Ingenuity 13 LLC v. Doe*, 2013 WL 765102, at \*4 (C.D. Cal. 2013)—a case that sanctioned an attorney under Rule 11 for not including additional evidence in a Complaint—the very sort of evidence Defendant also deems "coercive."

"Plaintiff fails to allege facts in the Amended Complaint to show how [Defendant] is the infringer, other than noting his IP address, the name of his BitTorrent client, and the alleged time of download. . . .

[However], the Court is not convinced that there is no solution to the problem of identifying the actual infringer . . . 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."

*Ingenuity 13 LLC v. Doe*, 2013 WL 765102, at \*4 (C.D. Cal. 2013). In response to the foregoing opinion, Plaintiff began including a list of all the works downloaded by a defendant's IP Address ("Additional Evidence") in its complaints. However, some courts found that certain titles listed on the Additional Evidence unnecessarily embarrassed defendants, and Plaintiff's attorney in Wisconsin was sanctioned for attaching the Additional Evidence to the complaint. Trying to weave through the decisional authority,<sup>2</sup> Plaintiff began mentioning that it had Additional Evidence but stopped including it.

Here, the Court struck references to the Additional Evidence and stated, "[a]lthough such information may potentially be relevant to the identification of the true infringer at a later stage in the litigation, it is **immaterial to Plaintiff's claim that Defendant infringed its copyrighted works.**" Order CM/ECF 20, at p. 14 (emphasis added.). Significantly, here, on its face, Defendant's argument fails in light of the Court's Order striking the references. Plaintiff was not required to present Additional Evidence at the pleading stage because "**it is immaterial to Plaintiff's claim.**" Thus, Plaintiff's claim cannot be deemed "frivolous" for failing to include this information.

Further, to the extent Defendant asserts that Plaintiff's claim has no basis in fact, this argument likewise fails. Indeed, upon learning Defendant's name, Plaintiff conducted an investigation to ensure that it had a good-faith basis to proceed against Defendant. As part of

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<sup>2</sup> Indeed, several courts approved of the Additional Evidence. See *Malibu Media, LLC v. Marc Wilson*, 1:13-cv-00357-RJJ, CM/ECF 22, at pp. 7:19-25, 8:1-17 ("But more to the point, all of that stuff is, I think, potentially germane to what's going on, especially when we're trying to find out is it this person whose name is associated in at least one place with the IP address or is it somebody else who is misusing the IP address?"); *Malibu Media, LLC v. John Doe 1*, 2013 WL 30648 (E.D. Pa. Jan. 3, 2013) ("Malibu has included this material in order to show a pattern or practice of infringement by Doe 13. It is not suing upon these infringements; it is making an allegation which may become evidence to support its claim to relief."); *Malibu Media, LLC v. John Doe*, 2:13-cv-00055-JVB-JEM, CM/ECF 22, at p. 8 (N.D. Ind. Aug. 16, 2013) ("Exhibit C is not so obviously irrelevant that this Court is prepared to assume Exhibit C was attached for the sole purpose of harassing Defendant[.]").

this investigation, Plaintiff compiled a list of the Additional Evidence. Plaintiff then compared this evidence with information it ascertained about Defendant. Here, the Additional Evidence demonstrates that Plaintiff has a strong claim against Defendant. First, the extent of Plaintiff's Additional Evidence demonstrates that the infringer continuously used BitTorrent for a period of over a year—eliminating the possibility that the infringer was a guest or a passerby.

Second, the 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. Plaintiff's Additional Evidence includes the following photography-related downloads, among others:<sup>3</sup>

- Photoshop Creative Collection - No.11, 2014
- The Naked And The Lens - A Guide To Nude Photography By Louis Benjamin ABEE
- Smart Photography – April 2014
- Lighting Techniques for Photographing Model Portfolios - Strategies for Digital Photographers pdf Gooner
- LeNs - THe Ultimate Guide to Exposure (February 2014)
- The Essential Guide to Portraits 3rd Edition
- The Art of Photography - An Approach to Personal Expression
- Photoshop Creative - Issue 106, 2013
- Black + White Photography Magazine Special Issue 2013 - Photographic Lighting (True PDF)
- 1000 Photoshop Tips and Tricks - Cool Photoshop Effects and Tutorials
- Popular Photography - November 2013.pdf
- Pro Photo - Light - Camera - Action (September 2013)
- Photo Technique - Take Your Sharpest Shot Ever - 15 Pages of Techniques (Autumn 2013)
- Photo Technique - 89 Techniques and Ideas to Enhance your Shots to the Next Level (Spring 2013 (True PDF))
- The Professional Photoshop Book - The Ultimate Guide to Becoming and Expert Photoshop User (Volume 01, 2013)
- Classic Glamour Photography

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<sup>3</sup> Plaintiff is including these references to the Additional Evidence to illustrate the strength of its case against Defendant. Because this case has been dismissed, it cannot be said that Plaintiff is now including the Additional Evidence as "coercion."

- N-Photo the Nikon magazine - RAW Secrets 10 Things They Dont Tell You About Shooting NEF (August 2013)
- Adobe Photoshop CS6 for Photographers 2013
- onOne Perfect Photo Suite 8 (64 bit) (keygen XForce) [ChingLiu]
- Adobe Photoshop CC 14.2 Final Multilanguage [ChingLiu]
- Photodex Proshow Producer V5 0 3297 With Key Tordigger
- Adobe Photoshop Cs5 Extended With Serials Torrent
- Adobe Photoshop Lightroom 4 1 Final 32 64 Bit
- Topaz Photoshop Plugins Bundle 08.08.2013 (32-64 bit) [ChingLiu]
- ADOBE PHOTOSHOP CS6 EXTENDED EDITION by chingliu

The above illustrates that Plaintiff had a solid factual basis to believe Defendant was in fact the infringer. And, that discovery would have likely confirmed that Defendant was in fact guilty. As such, Plaintiff's claim is not frivolous.

ii. *Plaintiff Was Not Required to Provide Evidence Defendant Uploaded a Complete Copy of the Work*

Defendant's only other argument supporting his assertion that Plaintiff's claim is frivolous is that "Malibu fails to present any evidence indicating that John Doe either uploaded, downloaded or even possessed a complete copyrighted video file." CM/ECF 38, at p. 11. This argument likewise fails.

First, it should be noted that this case never progressed into discovery, and Defendant never even filed an answer. At the pleading stage, Plaintiff is not required to "present evidence" and its failure to do so does not render its claim frivolous.

Second, the allegation that Defendant downloaded the entire movie is certainly plausible and almost certainly true because entire the point of using BitTorrent is to download the entire movie. Indeed, the Eastern District of Wisconsin examined this exact issue and found "someone who starts downloading a movie intends to watch the movie, and thus the person will likely

download the full movie,” finding Plaintiff’s claim plausible. *Malibu Media, LLC v. Doe*, 2013 WL 5876192, at \*2 (E.D. Wis. 2013).

Defendant notes that it is possible that he copied only the pieces obtained by the investigator rather than full versions of all nineteen movies. However, the fact that this is possible does not render plaintiff’s claim implausible. Presumably, someone who starts downloading a movie intends to watch the movie, and thus the person will likely download the full movie. This means that there is a nonnegligible probability that a user who has a piece of a file constituting a movie on his computer also has the remaining pieces. It is not certain that the user will have the remaining pieces—perhaps the person changed his or her mind before downloading the full movie or other circumstances prevented the person from downloading the full movie. But at the pleading stage certainty is not required.

*Id.* (Emphasis added). Here, for over nine months, Defendant repeatedly used BitTorrent to download 30 of Plaintiff’s works. Further, Defendant participated in the swarms for Plaintiff’s movies for extended periods of time, and in some instances, days. It only takes a matter of minutes to get a complete copy via BitTorrent.<sup>4</sup> Further, his continued use of BitTorrent evidences the likelihood—and plausibility—the Defendant obtained complete, usable files. It is highly doubtful a person would continuously and repeatedly use a program to obtain only partial, unworkable file fragments.

Third, since “a copyright infringement may occur by reason of a substantial similarity that involves only a small portion of each work,” it is not actually necessary for Defendant to have downloaded and distributed “complete” copies of Plaintiff’s films. *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 624 n.14 (2d Cir. 1982); *see, e.g., Belair v. MGA Entm’t, Inc.*, 831 F. Supp.2d 687, 693 (S.D.N.Y. 2011) (holding that a defendant may infringe on a plaintiff’s work “through literal copying of [only] a portion of it”); *see also Malibu Media, LLC v. Gilvin*, 2014 WL 1260110 (N.D. Ind. 2014) (“[That [Plaintiff’s] investigator . . . was able to

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<sup>4</sup> Indeed, assuming Defendant’s Internet speed was the *slowest* possible speed available at Roadrunner/ Time Warner Cable, which is 2 Mbps per second, a download would take approximately between 6 and 43 minutes, depending on the size of the file being downloaded. Here, Plaintiff estimates that a given file could range between approximately 71 to 455 MB, depending on the video quality.



download bits of Plaintiff's copyrighted movies from [Defendant's IP Address] supports a plausible claim that Defendant infringed on Plaintiff's copyrighted works by copying and distributing *portions* of its movies") (emphasis added). As such, failure to provide evidence that defendant uploaded a complete copy of the work does not render Plaintiff's claim frivolous.

## **2. Plaintiff's Actions Were Not Unreasonable or Vexatious**

Further, § 1927 applies to "those who '**multiply**' the proceedings. This suggests a proliferation and prolongation. The phrase '**unreasonably and vexatiously**' describes conduct that, viewed under an objective standard, evinces the intentional or reckless pursuit of a claim, defense or position (1) that is or should be known by the lawyer to be unwarranted in fact or law or (2) that is advanced for the primary purpose of obstructing the orderly progress of the litigation." *Johnson v. Zimmer Holdings, Inc.*, 73 F. Supp. 3d 814 (E.D. Ky. 2014) (emphasis in original). Here, Defendant fails to explain how Plaintiff "unreasonably and vexatiously" multiplied the proceedings. Defendant points to "repeat extensions," "the order to show cause," and "oppositions to Defendant motions to quash and dismiss" as evidence of such conduct. This is nonsense.

First, Plaintiff filed *only two* motions for extension—both of which sought an extension of time to serve Defendant—and both of which were granted by this Court. *See* CM/ECF 33, at p. 7 (noting "the delay in effecting service prior to February 2, 2015 is not attributable to Malibu Media.").

Second, as explained in Plaintiff's Response to the Court's Order to Show Cause, CM/ECF 29, the Order to Show Cause resulted from undersigned's mistake in inadvertently publically naming Defendant. Defendant's name was publically available for, at most, a few hours on a Friday night. Undersigned immediately realized his mistake and did everything in his

power to rectify it. This was not done to “coerce a settlement” or to “embarrass” Defendant—this was pure human error, for which undersigned has repeatedly apologized. Further, this incident did not “vexatiously multiply the proceedings.” Arguably, *at most*, this prompted Defendant to draft his Motion to Seal and reply thereto. *See* CM/ECF 26 and 30. Though, it should be noted that undersigned corrected this error and the documents were sealed *prior* to Defendant’s Motion being filed. *See id.* “[A]s the Sixth Circuit has also noted, the purpose of sanctions under § 1927 is ‘to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy.’” *Krach v. Lakeside Transp Co.*, 2010 WL 1268049, at \*2 (N.D. Ohio 2010). Undersigned’s mistake was not a “dilatory litigation practice” or “aggressive tactic” but an isolated incident of human error.

Third, Plaintiff’s oppositions to Defendant’s motions cannot seriously be considered “unreasonable or vexatious.” Plaintiff justifiably opposed Defendant’s motions, and these oppositions were *ultimately successful* in defeating Defendant’s motions. Defendant completely fails to articulate how these straight-forward oppositions “were unreasonable or vexatious rather than acceptable litigation tactics.” *Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co.*, 2015 WL 873504, at \*12 (6th Cir. 2015) (refusing to impose § 1927 sanctions because “it is unclear how the Trustees’ petition for a show-cause order, motion to compel discovery, and opposition to a stay of discovery were unreasonable or vexatious rather than acceptable litigation tactics.”).

### **3. Plaintiff’s Voluntary Dismissal Serves the Purposes of § 1927**

Further, “the goal of 28 USC 1927 is not to make a party whole, but to deter and punish. Deterrence relates to what will stop subsequent misconduct.” *Tilmon-Jones v. Boladian*, 581 Fed. Appx. 493, 498 (6th Cir. 2014) (emphasis added). Indeed, the purpose of § 1927 is to dissuade a party from pursuing meritless claims or arguments, and to encourage a party to

dismiss or abandon frivolous arguments. *See id.* Indeed, courts have encouraged a party to voluntarily dismiss a case once it becomes apparent that the case is frivolous. “[B]ecause sanctions can have the effect of chilling vigorous advocacy, **this Court has limited sanctions to the point in time at which plaintiffs should have realized that their claims were frivolous and the lawsuit should have been voluntarily dismissed.**” *Tilmon-Jones v. Boladian*, 581 Fed. Appx. 493, 498 (6th Cir. 2014) (emphasis added); *U.S. ex rel. Jacobs v. Lambda Research, Inc.*, 2015 WL 1948247, at \*3 (6th Cir. 2015) (warning a party to voluntarily dismiss a claim or risk sanctions under § 1927, “[i]f it turns out that [this case] is frivolous or as soon as you discover that it is frivolous or without merit ... you should dismiss it.”).

Thus, even assuming Plaintiff’s claim was frivolous—which it is not—Plaintiff has already voluntarily dismissed the claim. Voluntary dismissal is exactly the sort of action encouraged by § 1927. Entering sanctions for a voluntary dismissal would needlessly punish Plaintiff for employing the exact actions encouraged by § 1927.

#### **4. Any Excessive Costs Were Defendant’s Own Doing**

“Only “**excess**” costs incurred as a result of the multiplicative misconduct are recoverable under Section 1927—not **all** of the attorneys’ fees incurred by a litigant in prosecuting or defending a case. Finally, the only excess costs, expenses and attorneys’ fees awardable are those that have been “**reasonably incurred**” as a result of the wrongful multiplication of the proceedings, thereby imposing a requirement for mitigation.” *Johnson v. Zimmer Holdings, Inc.*, 73 F. Supp. 3d 814 (E.D. Ky. 2014) (citing *In re Ruben*, 825 F.2d 977, 988 (6th Cir.1987)). Thus, even if defense counsel was entitled to recover under § 1927—which he is not for the reasons stated above—his recovery is limited only to the “excessive costs” that he “reasonably incurred” as a result of Plaintiff’s multiplication of the proceedings.

That said, *Plaintiff* did not multiply the proceedings, and if anything, the proceedings were multiplied by *Defendant*. Defendant argues that he “was forced to engage in wasteful, expensive, and protracted motion practice[.]” This is ridiculous. Defendant did not even file an answer. Any “protracted motion practice” was Defendant’s own doing. Indeed, Defendant was particularly aggressive in defending this case. Defendant vigorously opposed even the most basic motions—such as motions for extension of time and notices of supplemental authority. *See* CM/ECF 16, Defendant’s Opposition to Plaintiff’s Motion for Extension of Time; *see also* CM/ECF 19, Defendant’s Opposition to Plaintiff’s Notice of Supplemental Authority; CM/ECF 23, Defendant Opposition to Plaintiff’s Second Motion for Extension of Time.

Further, it was Defendant who filed a Motion to Quash the Subpoena and a Motion to Dismiss. *See* CM/ECF 8 and 23. Plaintiff’s motion practice has been limited to (1) its Motion for Leave to Serve a Third Party Subpoena [CM/ECF 2]; (2) Motion for Leave to file the Summons Under Seal [CM/ECF 21]; and (3) two Motions for Extension of Time to Serve Defendant [CM/ECF 15 and 22]. **All of Plaintiff’s other motions have been responses, replies or sur-replies to Defendant’s Motions.**

Even now, this Opposition results from Defendant’s aggressive motion practice. “In *Kleinmark*, Judge Carr pointedly noted that ‘filing a motion for sanctions after a case has been concluded on its merits [of itself] simply draws out the litigation, resulting in additional costs to the parties and the court.’” *Krach v. Lakeside Transp Co.*, 2010 WL 1268049, at \*4 (N.D. Ohio 2010) (citing *Kleinmark v. St. Catherine's Care Ctr.*, 585 F. Supp. 2d 961, 966 (N.D. Ohio 2008)). Here, Plaintiff’s actions and subsequent dismissal of this case have not “vexatiously multiplied the proceedings.” As such, sanctions should not be imposed.

**B. SANCTIONS ARE NOT WARRANTED PURSUANT TO THIS COURT'S INHERENT AUTHORITY**

“Because of their very potency, inherent powers must be exercised with restraint and discretion.” *Ferron v. Echostar Satellite, LLC*, 658 F. Supp. 2d 859, 863 (S.D. Ohio 2009) aff’d, 410 F. App’x 903 (6th Cir. 2010) (quoting *Chambers v. NASCO*, 501 U.S. 32, 44, (1991)). “Most importantly, the ‘imposition of inherent power sanctions requires a finding of bad faith,’ or conduct ‘tantamount to bad faith.’” *Ferron*, 658 F. Supp. 2d at 863 (citations omitted). Indeed, because sanctions under this Court’s inherent authority require a showing of bad faith or conduct tantamount to bad faith, it is necessarily a stricter standard than sanctions under § 1927. The Sixth Circuit “appl[ies] a three-prong test to determine whether a district court may properly impose sanctions to the extent of attorney fees under this bad faith exception. ‘In order to award attorney fees under this bad faith exception, a district court must find [1] that “the claims advanced were meritless, [2] that counsel knew or should have known this, **and** [3] that the motive for filing the suit was for an improper purpose such as harassment.’”” *BDT Products, Inc. v. Lexmark Int’l, Inc.*, 602 F.3d 742, 752 (6th Cir. 2010) (internal citations omitted) (emphasis added). Here, none of these factors are met; accordingly, sanctions are not warranted pursuant to this Court’s inherent authority.

**1. Plaintiff Claim is Not Meritless**

As stated in section II A 1, *supra*, Plaintiff’s claim not meritless. And, on numerous occasions, Plaintiff has succeeded on the merits of its claims. As such, the first bad faith factor is not met.

**2. Counsel Should Have Known the Claim Was Meritless**

Likewise, the second bad faith factor cannot be satisfied because, as stated above, Plaintiff’s claim has merit.

### 3. Plaintiff Has a Proper Motive in Filing its Lawsuit

Last, the third factor is not met because Plaintiff has a proper motive in filing its lawsuits. Defendant's assertion that Plaintiff's counsel "employed tactics calculated to embarrass and coerce a settlement from Defendant without any intention of taking the case to trial" is without merit. *See* CM/ECF 38, at p. 7.

#### *i. Plaintiff Does Not Coerce Settlements*

First, Plaintiff did not attempt to "coerce a settlement" in this case. **Rather, Defendant is the one who first broached the topic of settlement—not Plaintiff.** Indeed, on July 31, 2014, Defendant e-mailed Plaintiff asking "what the settlement terms are." *See* CM/ECF 8-1, at p. 2. Plaintiff responded that same day indicating that it would settle the case for \$22,500 (or the minimum statutory amount (\$750) for each of the 30 works in this suit). *See* CM/ECF 8-1, at p. 3. On August 1, 2014, Defendant counteroffered with \$449.95. *See* CM/ECF 8-1, at p. 4. Plaintiff rejected this offer on August 4, 2014. *See* CM/ECF 8-1, at p. 10. **Notably, thereafter, the parties engaged in no further settlement negotiations.** Regardless, settlements are not improper but encouraged by the Rules of Civil Procedure and decisional authority.<sup>5</sup>

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<sup>5</sup> The Petition Clause protects Plaintiff's right to resolve litigation through settlement. *See Sosa v. DirectTV*, 437 F.3d 923, 937 (9th Cir. 2006) (holding "the protections of the Petition Clause extend to settlement demands as a class," including those made during and prior to a suit.) *Patrick Collins, Inc. v. John Does*, No. 12-CV-3161, 2012 WL 4321718, \*5 (C.D. Ill. Sept. 18, 2012) ("One person's cottage industry in harassing lawsuits is another person's vigilant defense of property rights. The Work may or may not be pornographic, but [Plaintiff] has alleged that it owns the copyright to the Work and, if so, is entitled to the same protections as the owners of any other copyrighted work . . . . The proliferation of these types of lawsuits would be expected given the alleged infringement by thousands of people. The volume of lawsuits alone does not indicate any impropriety."); Malibu Media – Looking Under the Hood of Infringement, <http://rationalrights.com/?s=malibu+media&submit=Search> (Sept. 15, 2014) ("Malibu Media is by all accounts one of the most active copyright enforcement litigants in the United States with some sources reporting they filed 40% of all copyright suits in 2014. But with 172 suits in Ohio, and 12,000 known infringers, Malibu's prolific filing of complaints is addressing less than 2% of the people stealing their work. Some may complain there are too many copyright suits filed (usually those who are being sued / have been caught) but the ratio of infringers to lawsuits is a disproportionate 70:1. For any other kind of theft, 1 in 70 would lead to the calls for more enforcement, not complaints about excessive enforcement.

Moreover, Plaintiff tries to settle reasonably and takes walk-aways when justified. *See, e.g., Malibu Media, LLC v. Doe*, 2014 WL 1689935, \*5 (D. Colo. April 28, 2014) (“the Court has personally observed Plaintiff’s willingness to settle and/or dismiss cases without payment of *any damages* where the defendant has come forward with exculpatory evidence.”); *Malibu Media, LLC v. Doe*, 2013 WL 4510363, \*3 (D. Colo. 2013) (same); *Malibu Media, LLC v. Does*, 2013 WL 1777710, \*7 n.3 (D. Colo. 2013) (“the Court has also witnessed firsthand the Plaintiff’s willingness to resolve cases without any monetary payment when a Defendant credibly denies infringement”).

ii. *Plaintiff Litigates its Cases*

Defendant’s assertion that Plaintiff never intended to litigate this, or its other cases, is false. Plaintiff regularly attends and participates in a litany of court proceedings throughout the country—including status hearings, 26(f) conferences, settlement conferences, summary judgment hearings, pretrial conferences, etc. Further, Plaintiff has taken well over 200 cases into discovery and is heavily litigating at least half a dozen cases that may go to trial within the next year. Below is just a tiny sampling of cases and decisions illustrating Plaintiff’s legitimate and vigorous litigation efforts.

- *Malibu Media, LLC v. Tashiro*, No. 1:13-CV-00205-WTL, 2015 WL 2371597 (S.D. Ind. May 18, 2015) (after a lengthy evidentiary hearing, Plaintiff proved that two defendants spoiled material evidence and committed perjury. Default judgment was awarded in Plaintiff’s favor).
- *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

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If one in 70 cars were stolen, or if your car were stolen every 70 days, there would be a national call to action.”).

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.).

- *Malibu Media, LLC v. Fitzpatrick*, No 1:12-cv-22767-PAS (S.D. Fla 2013) (Plaintiff was likewise prepared to go to trial on this case. The matter settled on confidential terms mere weeks before the trial date.).
- *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).
- *Malibu Media, LLC v. Doe*, Case No 1:13-cv-06312 (N.D. Ill. 2015) (The parties have litigated this case for nearly two years and recently filed cross-motions for summary judgment, which are currently pending before the Court. This case, too, may progress to trial.).
- *Malibu Media, LLC v. Jesse Raleigh*, No 1:13-cv-360, CM/ECF 86 (W.D. Mich. May 19, 2015) (after hotly contested discovery disputes, the Court agreed to re-open discovery, noting “the record shows that the parties have engaged in discovery focused on building or defending against such a circumstantial case. Their discovery battles have been lengthy, hard-fought, and focused on exactly the fronts one would reasonably expect when rational parties attempt to build or defend a circumstantial case of copyright infringement. . . . What is clear to the Court is that neither side culpably neglected the case. Both sides worked diligently to advance their respective interests”).



iii. Defense Counsel Knows Plaintiff Litigates Its Cases

Further, Defense Counsel is well aware that Plaintiff and its counsel litigate its cases, and any argument to the contrary is disingenuous. Specifically, Defense Counsel insincerely states, “[o]nce a case attracts a court’s scrutiny, [undersigned] bows out from litigating by voluntarily dismissing under Rule 41(a).” Defense Counsel knows this is false. Indeed, in a similar copyright infringement case involving both undersigned and Defense Counsel, in ruling on 16 different discovery motions, Judge Kemp commented on the extent to which the parties had litigate the issues before the Court: “[T]hese motions have resulted in the filing of 255 pages of briefing and exhibits. In fact, the motion for an extension of the expert disclosure deadline (Doc. 25) has resulted in the filing of 166 pages of briefing and exhibits, including three secondary motions....” *Malibu Media v. Ricupero*, Case No. 2:14-cv-821, CM/ECF 67, p. 7 (S.D. Ohio July 14, 2015). Notably, Plaintiff ultimately prevailed in this discovery battle, and Defendant was ordered to produce his hard drive. Further, in that case, undersigned has already deposed the defendant’s neighbors and is in the process of imaging the defendant’s hard drive. Under no circumstances can this be construed as “bow[ing] out from litigating[.]” Defense counsel’s comments are disrespectful and not based in fact.

iv. Plaintiff Has an Absolute Right to Dismiss a Case Before a Defendant’s Answer

Last, Defendant questions Plaintiff’s motive in dismissing this suit. “Mr. Faroniya voluntarily dismissed the claims without explanation[.]” suggesting this dismissal is proof Plaintiff never intended to litigate this case. *See* CM/ECF 38, at p. 9. Not so. Plaintiff has an *absolute right* to voluntarily dismiss a case before a defendant’s answer, and Plaintiff need not provide *any* explanation for doing so. “This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone. He suffers no

impairment beyond his fee for filing.” *D.C. Electronics, Inc. v. Narton Corp.*, 511 F.2d 294, 298 (6th Cir. 1975). “Defendants who desire to prevent plaintiffs from invoking their unfettered right to dismiss actions under rule 41(a)(1) may do so by taking the simple step of filing an answer.” *Aamot v. Kassel*, 1 F.3d 441, 444 (6th Cir. 1993). “Rule 41 empowers plaintiffs to ‘abort a complaint’ and bars the court from interfering. . . .” *EQT Gathering, LLC v. A Tract of Prop. Situated in Knott Cnty., Ky.*, 2012 WL 3644968, at \*3 (E.D. Ky. 2012) (emphasis added).

Here, Plaintiff dismissed this case before defendant filed an answer—exercising its absolute right to do so. Further, Plaintiff’s decision to dismiss a case is privileged.

### III. CONCLUSION

For the foregoing reasons, sanctions should not be imposed pursuant to § 1927 or this Court’s inherent authority.

Dated: August 13, 2015

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 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.

/s/ Yousef M. Faroniya