

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

MALIBU MEDIA, LLC,  
  
Plaintiff,

v.

ROBERT DARE,  
  
Defendant.

**CASE NO. 0:14-cv-61957**

**PLAINTIFF'S MOTION TO WITHDRAW CONSTRUCTIVE ADMISSIONS**

Plaintiff, Malibu Media, LLC ("Plaintiff"), by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 36(b), moves for the entry of an order permitting the withdrawal of constructive admissions to Defendant Robert Dare's ("Defendant") First Request for Admissions and accepting in place the responses attached hereto as Exhibit "A". Plaintiff files this memorandum in support.

**I. INTRODUCTION**

This motion should be granted because doing so would promote the presentation of the merits of this case and Defendant would not be prejudiced. On August 3, 2015, defense counsel served it First Request for Admissions ("Requests") on Plaintiff. However, despite Plaintiff's counsel's express instructions, a paralegal failed to calendar the deadline. In short, and critically, Plaintiff did not intend to admit the Requests. Under these circumstances, and for the reasons set forth herein, permitting withdrawal of the admissions is *required* under Rule 36 and Eleventh Circuit law. First, the Requests improperly negate the heart of Plaintiff's case by demanding admission that Plaintiff has no evidence to support its copyright infringement claim. Such Requests are improper in light of Plaintiff's extensive production of evidence against Defendant.

Defendant's Requests also seek admission of facts which Plaintiff has either already denied or which Defense counsel knew Plaintiff would deny because defense counsel had propounded on Plaintiff nearly identical requests in other cases. Both Plaintiff's evidence against Defendant and its denials of the allegations listed in the Requests are extensively documented in numerous court filings, e-mails and teleconferences between the parties, and Plaintiff's discovery responses. In other words, the Requests were not real searches for admission but are instead merely a procedural mechanism through which defense counsel routinely harasses Plaintiff with the intent of increasing Plaintiff's litigation costs. Since defense counsel knows Plaintiff's real responses, Defendant cannot possibly be prejudiced by withdrawal of these admissions. For the forgoing reasons, as explained more fully below, this Court should grant the instant motion.

## **II. LEGAL STANDARD**

Under Rule 36(b) a Court may permit withdrawal or amendment of an admission "if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Fed. R. Civ. P. 36. Although district courts are entitled to broad discretion in managing pretrial discovery matters, when deciding a motion to withdrawal constructive admissions, Federal Rule of Civil Procedure 36(b) specifies, "*exactly* how that discretion is to be exercised." *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1263 (11th Cir. 2002) (emphasis added). As such, the Eleventh Circuit requires "district courts [to] apply a 'two-part test' in deciding whether to grant or deny a motion to withdraw or amend admissions." *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1264 (11th Cir. 2002). "First, the court should consider whether the withdrawal will subserve the presentation of the merits, and second, it must determine whether the withdrawal will prejudice the party who obtained the admissions in its presentation of the case." *Id.* "Rule

36(b)'s two-part test is much more than merely hortatory; it emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.” *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1265 (11th Cir. 2002) (internal quotation marks omitted). “A district court abuses its discretion under Rule 36(b) in denying a motion to withdraw or amend admissions when it applies some other criterion beyond the two-part test—or grossly misapplies the two-part test—in making its ruling.” *Perez* at 1265.

### III. ARGUMENT

#### A. Defendant Used Rule 36 for an Improper Purpose

The Eleventh Circuit describes Rule 36 as “a time-saver, designed ‘to expedite the trial and to relieve the parties of the cost of proving *facts that will not be disputed at trial.*’” *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1268 (11th Cir. 2002), quoting 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2252 (2d ed.1994). As such, Requests for Admission should be “related to the types of time-saving matters addressed in *Perez*, such as admitting that a document is authentic, or that an exhibit is an accurate copy of the original, etc.” *F.D.I.C. v. B & A Title Servs. Corp.*, No. 12-24258-CIV, 2013 WL 5814506, at \*3 (S.D. Fla. Oct. 29, 2013). In that sense, “Rule 36 is not a discovery device, and its proper use is as a means of avoiding the necessity of proving issues which the requesting party will doubtless be able to prove.” *Pickens v. Equitable Life Assur. Soc. of U. S.*, 413 F.2d 1390, 1393 (5th Cir. 1969) (emphasis added).

Since requests for admission are intended to be used for “time saving matters” as described above, requests regarding “central facts in dispute are beyond the proper scope of the rule [...] [and] have consistently been held improper.” *Pickens v. Equitable Life Assur. Soc. of*

*U. S.*, 413 F.2d 1390, 1393 (5th Cir. 1969). When a party serves requests for admission which “uses the rule to harass the other side or ... with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements [of a claim] ... the rules time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources.” *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1268 (11th Cir. 2002).

In the instant case, Defendant deliberately used his Requests as a weapon. First, none of Defendant’s Requests relate to the authentication or accuracy of documents. Second, Plaintiff has repeatedly denied these Requests in other BitTorrent cases against the same defense counsel, and more importantly, Plaintiff has denied the substance of Defendant’s Requests throughout this case in its motions, teleconferences, e-mails, and discovery responses. For the Court’s convenience, a detailed chart listing every Request and the respective instances of denials both in the instant case and in past cases with defense counsel is attached hereto as Composite Exhibit “B.” Defense counsel’s improper tactic is undeniable because Exhibit “B” proves that defense counsel knew with certitude that Plaintiff would deny many of Defendant’s Requests. As such, Defendant’s “continued service of the same requests for admissions in the face of these denials was an abuse of Rule 36.” *Perez* at 1269.

Additionally, on September 4, 2014, after a court-ordered teleconference regarding Plaintiff’s interrogatory responses, Plaintiff served its Amended Responses to Defendant’s Interrogatories wherein Plaintiff expressly advised Defendant that it was unaware that Defendant served *any* Requests for Admission. *See* Plaintiff’s Amended Responses to Defendant’s First Set of Interrogatories, attached hereto as Exhibit “C” (“To the best of Plaintiff’s knowledge, Defendant has not served his First Set of Requests for Admission.”). Despite being advised that Plaintiff was unaware of the Requests, at no time during the court-ordered teleconference or

thereafter did defense counsel ever advise Plaintiff that Requests had been served. As such, Defendant knew that Plaintiff's error would lead to admission of essential elements to this case. Such litigation tactics are improper, and expressly disfavored by the Eleventh Circuit.

**B. Withdrawal of Plaintiff's Constructive Admissions is Required Under Rule 36 and Eleventh Circuit Law**

- i. Withdrawal of Plaintiff's Constructive Admissions Would Promote Presentation of the Merits of the Action Because Defendant's Requests Seek Admissions on Issues Central to Plaintiff's Claim

"The first prong of the two-part test from Rule 36(b) calls for a determination of whether 'the presentation of the merits will be subserved' by allowing a withdrawal or amendment of the admissions." *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1266 (11th Cir. 2002). "This part of the test is ... satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case[.]" *Id.* The first prong of Rule 36(b)'s test protects the overall interest and goal in resolving each case based on the merits. Indeed, the first prong prevents a "grossly unjust" result allowing a party "to escape potential liability because of [a party's] inadvertence[.]" *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 230 F.R.D. 682, 686 (M.D. Fla. 2005) (Court permitted withdrawal of constructive admissions); *See also Reid v. McNeil*, N2015 WL 5755898, at \*6 (M.D. Fla. Sept. 29, 2015) (Court withdrew constructive admission after a party's improper "use of Rule 36 would surely frustrate the Court's goal that justice be done[.]"). As such, Courts have consistently permitted withdrawal of constructive admissions when the requests related to issues central to any claim and particularly when "the requests closely followed the allegations of the complaint." *Riquelme v. United States*, 2009 WL 1405179, at \*3 (M.D. Fla. May 19, 2009).

In applying this first part of the Rule 36(b) test, Your Honor has held that when requests for admission "go to the very heart of the merits" of a case by asking a party to "admit that it has

no evidence to support the various allegations of its claims[,]” the first prong is satisfied because “withdrawal of admissions would aid in the ascertainment of the truth and development of the merits.” *Chen v. Cayman Arts, Inc.*, 2011 WL 2580769, at \*3 (S.D. Fla. June 29, 2011). Courts have also noted that use of constructive admissions in support of a motion for summary judgment establishes “their significance and [demonstrates] that the merits would surely be promoted if the admissions were to be withdrawn.” *F.D.I.C. v. B & A Title Servs. Corp.*, No. 12-24258-CIV, 2013 WL 5814506, at \*3 (S.D. Fla. Oct. 29, 2013) (Court withdrew constructive admissions after party satisfied the *Perez* test).

In the instant case, in addition to improperly using his Requests as a litigation weapon, Defendant also attempts to negate Plaintiff’s copyright infringement claim by serving Requests which state that Plaintiff has “no evidence” of infringement. For example, Defendant seeks admission that: (1) Plaintiff has no evidence connecting Defendant to the infringement; (2) Plaintiff cannot prove Defendant infringed Plaintiff’s works; and (3) Plaintiff cannot prove Defendant downloaded a complete copy of the works.

**Request No. 1:** You have no evidence to connect Defendant directly to the alleged downloads.

**Request No. 3:** You have no evidence that Defendant downloaded a complete copy of the works.

**Request No. 4:** You cannot prove that Defendant downloaded a complete copy of the works.

**Request No. 5:** You have no evidence that Defendant uploaded any bits of any of the works to any other BitTorrent user other than IPP International UG.

**Request No. 6:** You cannot prove that Defendant uploaded any bits of any of the works to any other BitTorrent user other than IPP International UG.

Defendant’s Requests attack the central elements of Plaintiff’s copyright infringement claim because they seek admission that Plaintiff “has no evidence” and therefore “cannot prove” infringement. These points are so essential to Plaintiff’s copyright infringement claim that during discovery Plaintiff produced extensive electronic evidence which directly denies any

statement that it has “no evidence.” Specifically, Plaintiff produced: (1) PCAPs demonstrating that Defendant’s IP address infringed numerous pieces of Plaintiff’s works; (2) the MySQL log file wherein each log entry correlates to a PCAP; (3) the .torrent files for each work infringed; (4) the infringing copies of Plaintiff’s works; and (5) Plaintiff’s Additional Evidence of third party infringements which occurred through Defendant’s IP address. Plaintiff even subpoenaed, and successfully obtained five separate notices of infringement that Comcast sent to Defendant regarding the ongoing use of BitTorrent on his internet. Further, in response to Defendant’s Interrogatory No. 18 which sought all evidence that “prove[s] that Defendant, Robert Dare, and no one else committed the infringements[,]” Plaintiff again reiterated *all of its evidence* against Defendant. Plaintiff’s response included an explanation of the electronic evidence produced, correlations between Defendant’s interests and Plaintiff Additional Evidence, and Defendant’s high-level of computer knowledge. All of the foregoing supports Plaintiff’s claim and makes clear that Plaintiff would deny any request seeking admission that it “has no evidence.” Indeed, Plaintiff has so much evidence that summary judgment should be entered in its favor.

ii. Defendant’s Requests Contain Several Known Factual Inaccuracies Which, If Left Uncorrected, Will Prevent Presentation of the Merits of this Case Through Truthful Testimony

Defendant’s Requests seek admissions of factual inaccuracies regarding BitTorrent technology and Excipio’s infringement detection system – issues which are paramount to the presentation of the merits of this case. For example, Defendant’s admissions inaccurately assume that: (1) a BitTorrent user can only open and utilize a file once all of the bits of a digital media file have been downloaded; (2) Excipio uncovered the identities of the initial seeders of Plaintiff’s works; (3) Excipio’s system records the interaction between Defendant’s IP address

and other peers in each swarm; and (4) Plaintiff knows the identities of all users who have transacted with Defendant's IP address.

**Request for Admission No. 8:** A single bit of a movie file by itself is unusable, as a user cannot view the part of the movie included in one bit but can only view the entire movie after receiving all the bits that make up the entirety of the file.

**Request for Admission No. 10:** IPP International UG uncovered other users interacting with IP Address 98.249.146.169.

**Request for Admission No. 11:** You initiated lawsuits against other users interacting with IP Address 98.249.146.169.

**Request for Admission No. 12:** You received settlement payments or other recovery from other users interacting with IP Address 98.249.146.169.

**Request for Admission No. 19:** You have uncovered members uploading your copyrighted works on peer-to-peer file sharing sites in the past.

**Request for Admission No. 21:** IPP International UG has uncovered IP address(es) on peer-to-peer file sharing sites that were uploading or downloading your copyrighted works which IP address(es) were discovered to be members of xart.com or x-art.com.

**Request for Admission No. 37:** As indicated in the Amended Complaint, paragraph 13, a bit torrent user can only open and utilize a file once all of the bits of a digital media file are received by the bit torrent user.

Since Plaintiff learned of Defendant's BitTorrent infringing transactions through the use of Excioio's system, it is paramount that a jury be provided with all accurate facts about how BitTorrent and Excipio's system works. Specifically, the jury must know what BitTorrent is, how BitTorrent works, and what Excipio's infringement detection system records. Failing to withdraw each of the constructive admissions for the requests above will obstruct this, lead to confusion, and prevent the presentation of the merits of the case.

Defendant's Requests also improperly seek admission of other known factual inaccuracies relating to Plaintiff's webpage, the actual damages Plaintiff has suffered as a result of infringement of its works, and copyright notices on the pirated copies of Plaintiff's works.

**Request for Admission No. 17:** At the time of the alleged downloads, all the works did not each individually contain notices of 18 U.S.C. § 2257 compliance, although the website on which they were published did have such a notice (at <http://www.x-art.com/legal/>).



**Request for Admission No. 18:** The statutory damages that you seek in this action are more than what would make you whole, meaning to compensate you for any actual damages incurred.

**Request for Admission No. 34:** You have received promotional material(s), brochure(s), advertisement(s), sales material(s), and/or pricing schedule(s) from IPP International UG.

**Request for Admission No. 35:** You have received promotional material(s), brochure(s), advertisement(s), sales material(s), and/or pricing schedule(s) from Excipio.

**Request for Admission No. 36:** You have the ability to see which movies your members have viewed and/or downloaded on xart.com and/or x-art.com.

**Request for Admission No. 39:** The digital movie files, as allegedly downloaded by IP address 98.249.146.169, do not contain a copyright notice.

Through testimony, Plaintiff and Excipio will expose the obvious factual inaccuracies or clarify the statements made in Defendant's Requests. Such truthful testimony is necessary and required to promote presentation of the merits of the case. *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1266 (11th Cir. 2002) ("[G]ranted the motion to withdraw the admissions would have certainly aided in the ascertainment of the truth and the development of the merits.") Indeed, without withdrawal of these admissions, at trial the jury will be presented with blatantly false statements and then subsequent truthful witness testimony. This will lead to confusion. As such, withdrawal of Plaintiff's constructive admissions is required.

iii. Defendant Is Not Prejudiced by Withdrawal or Amendment of the Admissions Because Defense Counsel is Aware That Plaintiff Always Denies These Requests

The second part of the Rule 36(b) test "requires the court to ascertain whether the non-moving party would be prejudiced by a withdrawal or amendment of admissions." *Perez* at 1266. "A party's decision to not take any discovery based on admitted requests does not constitute the prejudice contemplated by *Perez*." *F.D.I.C. v. B & A Title Servs. Corp.*, 2013 WL 5814506, at \*3 (S.D. Fla. Oct. 29, 2013). And, "[a] passed discovery deadline] is not sufficient reason to deny withdrawal." *Broad. Music, Inc. v. Bisla & Bisla, LLC*, 2012 WL 5387890, at \*4 (M.D. Fla. Nov. 2, 2012). "Merely being deprived of judgment or being forced to go to trial is [also] not such

prejudice [that] will prevent withdrawal of admissions.” *Hicks v. Pezold Mgmt., Inc.*, 2010 WL 5475810, at \*3 (M.D. Ga. Dec. 30, 2010). Instead, the prejudice contemplated “relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.” *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 230 F.R.D. 682, 687 (M.D. Fla. 2005).

Here, Defendant is not prejudiced because there is no unavailability of witnesses nor a sudden need to obtain evidence with respect to the admission. Further, Plaintiff’s prior denials in other cases and present denials in the instant case guarantee that no prejudice exists.

*a. Defense Counsel Knew of Plaintiff’s Prior Denials*

In at least three other Malibu Media BitTorrent copyright cases wherein defense counsel represented doe defendants, defense counsel served substantially similar – if not identical – requests for admission. Each time, Plaintiff timely responded to and denied many of the requests. A few examples are listed below. See Composite Exhibit “B” for a complete list of prior denials.

**Request No. 5:** You have no evidence that Defendant uploaded any bits of any of the works to any other BitTorrent user other than IPP International UG.

- *Malibu Media, LLC, v JOHN DOE subscriber assigned IP address 66.176.59.75*; Civil Action Case No. 1:14-cv-20393-CMA – In response to Defendant’s Request for Admission No. 6, Plaintiff denied this exact request.
- *Malibu Media, LLC, v Roberto Roldan*; Civil Action Case No. 8:13-cv-03007-JSM-TBM – In response to Defendant’s Request for Admission No. 4, Plaintiff denied this exact request.
- *Malibu Media, LLC, v William Sharp*; Civil Action Case No. 8:14-cv-02138-VMC-MAP – Response to Defendant’s Request for Admission No. 5, Plaintiff denied this exact request.

**Request No. 6:** You cannot prove that Defendant uploaded any bits of any of the works to any other BitTorrent users other than IPP International UG.

- *Malibu Media, LLC, v JOHN DOE subscriber assigned IP address 66.176.59.75*; Civil Action Case No. 1:14-cv-20393-CMA – In response to Defendant’s Request for Admission No. 7, Plaintiff denied this exact request.

- *Malibu Media, LLC, v Roberto Roldan*; Civil Action Case No. 8:13-cv-03007-JSM-TBM – Response to Defendant’s Request for Admission No. 5, Plaintiff denied this exact request
- *Malibu Media, LLC, v William Sharp*; Civil Action Case No. 8:14-cv-02138-VMC-MAP – In response to Defendant’s Request for Admission No. 6, Plaintiff denied this exact request.

**Request No. 7:** You pay, or did pay, IPP International UG at least in part on a contingency-fee basis.

- *Malibu Media, LLC, v JOHN DOE subscriber assigned IP address 66.176.59.75*; Civil Action Case No. 1:14-cv-20393-CMA – In response to Defendant’s Request for Admission No. 8, Plaintiff denied this exact request.
- *Malibu Media, LLC, v Roberto Roldan*; Civil Action Case No. 8:13-cv-03007-JSM-TBM – Response to Defendant’s Request for Admission No. 6, Plaintiff denied this exact request
- *Malibu Media, LLC, v William Sharp*; Civil Action Case No. 8:14-cv-02138-VMC-MAP – In response to Defendant’s Request for Admission No. 8, Plaintiff denied this exact request.

**Request No. 9:** You have made copies of one or more of your works available on BitTorrent sites.

- *Malibu Media, LLC, v JOHN DOE subscriber assigned IP address 66.176.59.75*; Civil Action Case No. 1:14-cv-20393-CMA– Response to Defendant’s Request for Admission No. 10, Plaintiff denied this exact request.
- *Malibu Media, LLC, v Roberto Roldan*; Civil Action Case No. 8:13-cv-03007-JSM-TBM – Response to Defendant’s Request for Admission No. 8, Plaintiff denied this exact request

**Request No. 10:** IPP International UG uncovered other users interacting with IP Address 98.249.146.169.

- *Malibu Media, LLC, v William Sharp*; Civil Action Case No. 8:14-cv-02138-VMC-MAP – In response to Defendant’s Request for Admission No. 10, Plaintiff denied this exact request.

In light of Plaintiff’s prior denials, Defense counsel has known throughout the course of this litigation that Plaintiff would deny these Requests yet again. Accordingly, Defendant cannot in good faith argue that Defendant’s reliance on these admissions has caused him any prejudice.

*b. Defendant is Not Prejudiced Because in the Instant Case, Plaintiff Denied These Requests in its Responses to Defendant’s Discovery, Telephonic Conferences, E-mails, and Numerous Filings*

Defendant cannot possibly be prejudiced because in the instant case Plaintiff has consistently denied the substance of Defendant’s Requests through motions, numerous conferral

e-mails, telephonic conferences, and in Plaintiff's responses to discovery. *See* Composite Exhibit "B" for a complete list of prior denials.

**Request for Admission No. 7:** You pay, or did pay, IPP International UG at least in part on a contingency-fee basis.

**Request for Admission No. 9:** You have made copies of one or more of your works available on BitTorrent sites.

**Request for Admission No. 20:** IPP International UG only gets paid for its services in uncovering alleged infringement if you get money from the alleged infringer.

**Request for Admission No. 23:** You have no evidence of Defendant's hobbies as referenced in paragraph 27 of the Amended Complaint (Doc 08).

**Request for Admission No. 24:** You have no evidence of Defendant's other interests as referenced in paragraph 27 of the Amended Complaint (Doc 08).

**Request for Admission No. 25:** IPP International UG has previously uncovered the initial seeder to a torrent involving your copyrighted works.

**Request for Admission No. 32:** IPP International UG and/or Excipio participated in the swarm creation of one or more of the torrents from which the alleged downloads occurred.

**Request for Admission No. 33:** The only evidence you have to connect Defendant to the alleged infringements are the IP address 98.249.146.169 and the additional evidence.

For example, Defendant's Request for Admission Nos. 9, 25, and 32 seek admissions that Plaintiff seeded its copyrighted works on BitTorrent, knows the identity of the initial seeder, and that it participated in swarm creation, respectively. However, in Plaintiff's Response to Defendant's Interrogatory No. 4, timely served on July 13, 2015, Plaintiff expressly noted, "Plaintiff, Excipio, and IPP did not seed the works nor were they participants during swarm creation. Therefore, Plaintiff cannot determine the identity of the initial seeder." *See* Exhibit "C," p. 2. This point was again reiterated to defense counsel in e-mails dated August 11, 14, and 25, and again during a telephonic conference with defense counsel on August 20, 2015. Defendant's Request for Admission No. 7 and 20 seeks admission that IPP is paid on a contingency basis. However, during a telephonic conference on August 20, 2015, Plaintiff advised defense counsel that it pays IPP a flat monthly fee for IPP's infringement detection

services. And, on September 4, 2015, Plaintiff produced its agreement with IPP which proved this fact. Defendant's Request for Admission Nos. 23 and 24 seek admission that Plaintiff has no evidence regarding Defendant's hobbies or interests. However, in Plaintiff Motion to Extend Discovery [CM/ECF 49], Plaintiff provided, among other things, a detailed outline of Defendant's educational background and interests in computers, technology, and cloud based technology. These topics were also addressed in Plaintiff's Supplemental Response to Defendant's Interrogatory No. 18, and again at Defendant's deposition.

Courts have frequently held that when a party has, throughout the course of litigation, denied "the substance of the factual allegations" in the Requests, the second prong of the *Perez* test is satisfied. *See Reid v. McNeil*, 2015 WL 5755898, at \*5 (M.D. Fla. Sept. 29, 2015). *See also Perez* at 1267-68 (11th Cir. 2002) ("Because [Defendant] knew from the very beginning—and continued to be made aware—[of these denials,] he would have suffered no prejudice." Accordingly, the second prong of the test is satisfied."); *See also Hicks v. Pezold Mgmt., Inc.*, 2010 WL 5475810, at \*2 (M.D. Ga. Dec. 30, 2010) (Court permitted withdrawal of constructive admissions when "the requested admissions are essentially the opposite of the allegations in [the] Complaint and [the] interrogatory responses."). In this case, defense counsel has "known throughout the entirety of this litigation that [Plaintiff] disputed the substantive factual allegation[s] contained in the Requests for Admission," and that Plaintiff would deny them again. *Reid v. McNeil*, 2015 WL 5755898, at \*6 (M.D. Fla. Sept. 29, 2015). Accordingly, the second prong of the test is satisfied.

### **C. CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests this Court grant Plaintiff's Motion to Withdraw Constructive Admissions.

Dated: October 28, 2015

Respectfully submitted,

LIPSCOMB EISENBERG & BAKER, PL

By: /s/ M. Keith Lipscomb

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#### **CERTIFICATE OF CONFERRAL**

Plaintiff, by and through undersigned counsel, pursuant to Fed. R. Civ. P. 37(a)(1), hereby certifies that on October 23, 2015, Plaintiff conferred with defense counsel through e-mail in a good faith effort to resolve the issues raised in this Motion. Defense counsel stated that she would not consent to the relief requested herein.

By: /s/ M. Keith Lipscomb

#### **CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 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/ M. Keith Lipscomb