UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MALIBU MEDIA, LLC

Plaintiff,

v.

Jesse Raleigh,

Defendant.

Civil Action Case No.1:13-cv-00360-RJJ
Hon. Robert J. Jonker

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DEFENDANT'S RESPONSE TO MOTIONS BY ATTORNEYS LIPSCOMB AND FERNANDEZ TO WITHDRAW AS COUNSEL FOR PLAINTIFF

COMES NOW Defendant, Jesse Raleigh, and submits this Response to the Motions (Doc.s 143 & 144) filed by Attorney Keith Lipscomb ("Lipscomb") and Attorney Jessica Fernandez

("Fernandez") to withdraw as counsel for Plaintiff. Importantly, said motions also seek "a sixty (60) day extension of all case deadlines to retain substitute counsel." Defendant now responds as follows:

1. First, it must be pointed out that, contrary to W.D. Mich. LcivR 7.1(d), neither Lipscomb nor Fernandez made any attempt to contact Defendant's counsel in order to obtain concurrence as to the relief being requested. Indeed, immediately after being served with the motions under consideration, Defendant's counsel Derek Wilczynski called the offices of Lipscomb, Eisenberg & Baker, but could not be put in contact with either Lipscomb or Fernandez. Hence, Defendant is, as of this writing, without a proper understanding of the nature of the breakdown in the relationship between Plaintiff Malibu Media and two of its many attorneys. This Court could deny the motions (perhaps without prejudice) on the basis of failure to comply with LR 7.1(d), alone.

2. Second, it is Defendant's understanding that Lipscomb, Eisnberg & Baker serve(d) as national counsel for Plaintiff Malibu Media in its for-profit campaign of prosecuting copyright infringement actions. It is also Defendant's understanding that Plaintiff has filed thousands of such suits and has many hundreds of such suits that are pending. Obviously, if Lipscomb and Fernandez have a conflict that prevents them from continuing to represent Plaintiff in this suit, then that same conflict should prevent them from continuing to represent Plaintiff in <u>any</u> suit. Undersigned counsel are aware of only three cases (including this one) where Lipscomb and Fernandez have moved to withdraw. Perhaps those are the only cases where these lawyers have appearances, but in any event, it would seem to be an appropriate condition for granting their motions that they certify to this Court that they have moved to withdraw from *every* case in which they represent Malibu Media, and not just in those cases where dispositive motions are about to be heard or in which trials are looming.

3. Third, when Fernandez and Lipscomb were admitted to practice before this Court, they consented to be bound by the Michigan Rules of Professional Conduct, except to the extent that

an exclusion from those rules has been adopted by this Court. W.D. Mich. LcivR 83.1(j). Lipscomb and Fernandez have cited a Florida rule that appears to be analogous to MRPC 1.16(b)(4), being the rule that typically applies when a lawyer has not been paid for his or her services. One wonders, however, how that puts Lipscomb or Fernandez in any different position than the hundreds (perhaps more) of attorneys who are representing defendants in Malibu Media cases, and who have little or no hope of being fairly compensated for their services, but who are motivated primarily by their revulsion to a system where innocent parties are coerced into paying some $6,000 to settle spurious lawsuits by the prospect of spending much more than that in attorneys' fees to demonstrate the suits' lack of merit. If Lipscomb and Fernandez are now feeling a pain that they have helped to visit on hundreds of other attorneys across the nation, we are not unsympathetic, but see it as no justification for further inconveniencing Defendant.

4. Fourth, Plaintiff's Michigan-based attorney, Paul Nicoletti, never withdrew from this case, and has been served through the ECF system with all filings. After the filing of the motions now under consideration, Mr. Nicoletti contacted the undersigned, affirmatively stating that he would be the individual arguing on behalf of Plaintiff the three motions that are currently slated to be heard on May 2, 2016. More importantly, commencing on Thursday, April 21, 2016, Mr. Nicoletti engaged in negotiations (on behalf of Plaintiff Malibu Media) with Defendant (through counsel) regarding the settlement of the instant matter. Although, initially, said negotiations were to be concluded by Friday, April 22, 2016, they wound up extending until Tuesday, April 26, 2016, at which time Mr. Nicoletti, on behalf of Plaintiff Malibu Media, sent a final email rejecting Defendant's demand for a sum certain to conclude this case. Consequently, Defendant (and his counsel) are decidedly flabbergasted by Mr. Nicoletti's most recent filing (Doc. 148), in which Mr. Nicoletti claims to have ceased representing Plaintiff Malibu Media at the time that Lipscomb and

Fernandez made their appearances. Contrary to that statement, Defendant's counsel are aware that Mr. Nicoletti has represented Malibu Media, in this very case, as recently as yesterday.

Moreover, this Court has a rule expressly addressed to situations where counsel has an office that is a great distance from the courthouse. That is, W.D. Mich. 83.1(f) gives this Court the discretion, under those circumstances, to require the retention of local counsel who "shall have both the authority and responsibility for the conduct of the case should lead counsel be unavailable for any appearance, hearing or trial." Hence, it is decidedly convenient for Malibu Media that not only did Mr. Nicoletti forget to tell this Court that he no longer represented Malibu Media (assuming, despite contrary facts, that to be true), but that Lipscomb and Fernandez also both forgot to apprise this Court of the same. It was by dint of those consistent lapses that this Court was left with the false impression that there was no need to exercise its authority under LR 83.1(f) and require the retention of local counsel, thus putting this case in its present posture where Florida counsel do not want to incur the expense of coming to Michigan, and Plaintiff may or may not need additional time to retain new counsel.

5. Fifth, Defendant sees no reason why Lipscomb's and Fernandez's motions to withdraw could not be determined **after** the hearing in front of Judge Jonker on the two competing Motions for Summary Judgment and Defendant's *Daubert* motion. All three of those motions are scheduled to be heard next Monday, after which we will be in a much better position to know whether, and how much, additional time might be necessary for Plaintiff to find an attorney willing to take its case to trial. Certainly, if Defendant's Motion for Summary Judgment is granted, Defendant would be amenable to some measure of delay in entering the separate Judgment required under Fed. R. Civ. 58(a). All of the writing and documentary evidence in support and in opposition to the three substantive motions has already been done and has already been submitted. Judge Jonker

and his staff have, clearly, already reviewed the motions (see Doc. 138), and will have expended considerable efforts in preparing to rule on them.

Furthermore, Defendant has endured more than should reasonably be imposed on a person who did not do what he is accused of doing by Malibu Media, and he has waited a long time for the relief he expects to obtain next Monday. Neither Malibu Media nor Lipscomb and Fernandez gave much thought to how inconvenient it was to Defendant Raleigh (and his family) to have to: (1) retain counsel to defend this case; (2) attend depositions; (3) answer interrogatories; (3) have his computers, external hard drives, iPads, cloud storage, and gaming console scrutinized by Plaintiff's examiner; (4) have his passwords to confidential information gratuitously included in publicly available filings; (5) be falsely and publicly accused of being a serial copyright infringer; and (6) be falsely and publicly accused of being a perjurer and spoliator. Now-- when this case has reached the "put-up-or-shut-up" phase of the proceeding, and Plaintiff is required to have a sufficient factual basis for its claims against Defendant or have its case dismissed-- now Defendant is asked to endure the pendency of this case for at least two extra months because waiting until after Monday would be mildly inconvenient to Plaintiff, Lipscomb and Fernandez. Clearly, Defendant sees it differently.

6. Finally, Defendant is of the view that, if Plaintiff is to be given any uniform extension of all case deadlines in this matter, the same should be conditioned on Plaintiff posting a bond to secure the payment of Defendant's costs and attorneys fees recoverable under 17 U.S.C. § 505 at the conclusion of this case. Defendant has no way of knowing why money has become an issue between a California pornographer and its Florida attorneys, but suspects that he may one day be holding a judgment against Malibu Media for a sum in excess of $200,000.00, and despite the millions Malibu has squeezed out of the victims of its campaign, all of the assets of Malibu Media will have vanished like smoke in the wind.

BRIEF IN SUPPORT OF RESPONSE

Attorney withdrawal issues are committed to the court's discretion. *Brandon v. Blech*, 560 F.3d 536, 537 (6th Cir. 2009).

The consequences of not following this Court's rules (e.g., LR 7.1[d]), not informing this Court that Plaintiff (perhaps) was not represented by local counsel, and in (just today) making representations to this Court that are contrary to the known facts, all appear to be matters to be addressed withing this Court's sound discretion. See, e.g., Fed. R. Civ P. 11.

"[F]ederal district courts have inherent power to require plaintiffs to post security for costs." *Simulnet E Assocs v Ramada Hotel Operating Co*, 37 F3d 573, 574 (9th Cir., 1994). The matter of requiring security rests in the discretion of the district judge. *Urbain v. Knapp Brothers Manufacturing Company*, 217 F.2d 810 (6th Cir. 1954), cert. denied 349 U.S. 930 (1955). "The cases establish that a court may require security for costs when the plaintiff's claim is of dubious merit, plaintiff lacks financial responsibility, and defendant will incur substantial expense." *Soo Hardwoods, Inc v Universal Oil Products Co*, 493 F Supp 76, 77 (WD Mich, 1980). There is no defect in including attorneys's fees in the costs to be secured where there is a statute allowing the recovery of such fees to the prevailing party. Cf., Smoot v Fox, 353 F.2d 830, 834 (6th Cir., 1965).

Here, the submissions currently to be decided on May 2, 2016 demonstrate that Malibu Media's claim against Defendant are dubious. There is no dispute that Defendant has incurred, and will incur substantial costs and attorneys' fees. 17 U.S.C. permits the recovery of attorneys' fees to the prevailing party. And the breakdown between Malibu Media and its counsel over money suggests that Plaintiff lacks financial responsibility.

RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests: (1) that no decision on the Motions to Withdraw be made until after the hearings on the three motions currently set to be heard on May 2, 2016; (2) that no uniform extension of case deadlines be granted unless and until Plaintiff posts a bond in the amount of $200,000.00 to secure the payment of costs and fees already incurred and to be incurred; (3) that Defendant be awarded attorneys' fees associated with responding to the instant 11th-hour motions (which evince a substantial inability or unwillingness to comply with this Court's current scheduling order) pursuant to Fed. R. Civ. P. 16; and (4) such other conditions and/or consequences deemed appropriate by this Court to prevent further burden to Defendant from any conflict between Plaintiff and its attorneys.

Respectfully submitted,

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