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 MAG. JUDGE: RAY KENT

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DEFENDANT'S ANSWER IN OPPOSITION TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES

NOW COMES Defendant, Jesse Raleigh, by and through undersigned counsel, and for his Answer in opposition to Plaintiff's Motion for Extension of Time to File a Response to Defendant's Motion for Attorneys' Fees (Doc. 163), states as follows:

Defendant opposes any extension of time to file the given response, for the reasons set forth with more particularity in the Brief in Support of this Answer.

BRIEF IN SUPPORT OF
DEFENDANT'S ANSWER IN OPPOSITION TO
PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO FILE
RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEYS' FEES

STATEMENT OF FACTS

Pending before this Court (Doc. 163) is Plaintiff Malibu Media's *twelfth* motion for an extension of time to perform some act for which the deadline was established either by this Court or by the Rules of Civil Procedure (see Docs 13, 24, 35, 36, 41, 79, 102, 103, 106, 143, 144). Although this Court and every lawyer practicing before this Court understands that, from time to time, extensions are necessary in order to even out the flow of work, avoid scheduling conflicts, or otherwise address unforeseen circumstances, in the instant case Malibu Media has evinced extreme recidivism in its penchant for being unprepared. Simply stated, Malibu Media is again trying to play Defendant Raleigh, and this Court, as fools.

The motion for which Plaintiff seeks additional time to Answer (Doc. 160) was filed on Jun 7, 2016 pursuant to Fed. R. Civ. P. 54, and pursuant to that Rule, Defendant had only 14 days from the May 24, 2016 Judgment (Doc. 158) to put together a motion seeking attorneys' fees under 17 U.S.C. § 505, covering three years of litigation. Defendant was able to do so, and did file his motion on time.

By contrast, Plaintiff has 17 days to file a Response to said motion under the Court Rules. Plaintiff's new counsel filed his appearance *on the same day* that the Motion for Attorneys' fees was filed, giving him 17 full days by which to file its Response. Moreover, as this Court is aware (see Doc. 157), Plaintiff's new counsel was passively monitoring this case since before it was dismissed for failure to comply with the Court's April 29, 2016 Order (Doc. 153). Even as of this writing, Plaintiff still has two and a half

days to prepare a Response to the Motion for Attorneys' fees, and Plaintiff's claim that it needs time to study the time records submitted Attorneys Wilczynski and Herweyer is specious, as explained herein.

Accordingly, Plaintiff does not need 31 days to prepare an Answer and Brief on the question of whether Defendant is entitled to recover Attorneys' fees under 17 U.S.C. § 505, when the only questions are: (1) whether Defendant prevailed; and (2) whether this Court should exercise the discretion bestowed by 17 U.S.C. § 505 and award the fees. Even if this Court answers both of those questions in the affirmative (which Defendant hopes it will), Plaintiff would still be entitled to submit evidence and contest the appropriateness of the value of the services for which compensation is sought (see Fed. R. Civ. P. 58[d][2][C]).

ARGUMENT

Legal Standard. Defendant agrees with Plaintiff that, pursuant to Fed. R. Civ. P. 6(b), this Court has the discretion to extend the time within which an act may or must be done, provided that there is *good cause*. Where Defendant parts ways with Plaintiff is on the question of whether Plaintiff has established *good cause* for the extension it is requesting. Here, Plaintiff's new counsel argues that: (1) he is new to the case and needs more time to review all of the case filings; and (2) Mr. Wilczynski just submitted the details of his time records six days ago. As explained below, these are not the kind justifications that establish good cause under Rule 6(b). See *Nafziger v McDermott Int'l, Inc*, 467 F3d 514, 521 (CA 6, 2006) (holding that similar reasons, "taken either individually or as a whole, hardly compel a finding of good cause").

I. THE ONLY QUESTION PRESENTLY BEFORE THIS COURT IS WHETHER DEFENDANT IS ENTITLED TO ATTORNEYS' FEES AND COSTS, AND PLAINTIFF WILL STILL GET A CHANCE TO CONTEST THE VALUE OF SERVICES FOR WHICH COMPENSATION IS SOUGHT.

Pursuant to Rule 54, a party moving for attorneys' fees awardable under a statute must, at the time of so moving, "state the amount sought or provide a fair estimate of it." Fed. R. Civ. P. 54(d)(2)(B)(iii). Therefore, when Defendant moved for attorneys' fees he complied with that rule by submitting the client log of Attorney Herweyer and an estimate of Attorney Wilczynski's time. The details of Attorney Wilczynski's time and costs were supplied later by way of an affidavit (Doc. 162). Nevertheless, pursuant to Fed. R. Civ. P. 54(d)(2)(C), upon Plaintiff's request, this Court must provide an opportunity for evidentiary submissions on the amounts that Defendant is requesting, and also provides that this Court can bifurcate the question of liability for attorneys fees from the question of the appropriate amount of the fees.

Here, Defendant submitted the reasonable estimate of the fees he is requesting so as to comply with the terms of Rule 54, but specifically asked that this Court decide the question of liability for the fees first, and if Plaintiff is liable for them, to then provide Plaintiff with an opportunity (whether by hearing or otherwise) to contest the amount. Consequently, Plaintiff's new counsel has no need to presently be scrutinizing Defendant's counsels' time records. Instead, Plaintiff's counsel should be evaluating whether Defendant is the prevailing party and whether this Court should exercise its discretion under 17 U.S.C. § 505 to determine that Plaintiff is liable for attorneys' fees.

Those are hardly questions on which Plaintiff should need 31 days to brief, particularly since the United States Supreme Court just ruled that the mere fact that a copyright action was objectively reasonable (a dubious proposition in the instant case)

does not give rise to a presumption that a prevailing defendant is not entitled to attorneys' fees under 17 U.S.C. § 505. See *Kirtsaeng v John Wiley & Sons, Inc*, ___US___ (2016) ("objective reasonableness can be only an important factor in assessing fee applications—not the controlling one. As we recognized . . . , §505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions").

Given that Plaintiff will still get a chance to submit evidence (and contest the validity of Defendant's evidence) as to the amount of attorneys' fees, Plaintiff's claim that its counsel needs extra time in order to scrutinize the time entries for Defendant's counsel does not constitute "good cause" for an extension under Rule 6(b).

II. THE FACT THAT PLAINTIFF'S NEW COUNSEL JUST RECENTLY APPEARED IN THIS CASE IS NOT "GOOD CAUSE" FOR AN EXTENSION OF THE TIME TO RESPOND TO THE INSTANT MOTION UNDER RULE 54.

When this case first began, Defendant's counsel advised Plaintiff's counsel that Defendant was almost two hundred miles away from where the alleged infringements supposedly occurred at the time of the alleged infringements. Plaintiff's counsel insisted that Defendant make efforts to track down receipts or other proofs that he was in Grand Rapids at the time, and then had a good laugh at Defendant's expense, admitting to Defendant's counsel in Magistrate Judge Brenneman's ante-room that, because the downloading could possibly have been done remotely, no amount of proofs regarding an alibi would suffice to get Plaintiff to simply drop the case against Defendant.

Since then, Defendant's counsel have advised Plaintiff's counsel (at every opportunity) that each time Plaintiff has insisted on putting Defendant through one

imposition after another, that Defendant would be seeking attorneys' fees and costs when this case was over. On one occasion Attorney Nicoletti actually laughed, and expressed how every defense attorney in a case brought by Malibu Media makes the same "threat" and nothing ever comes of it.

Moreover, despite the repeated warnings regarding where this case was heading, Plaintiff never accepted the proofs as they came in that Defendant was not the infringer. For example: the infringer used a Windows computer and Defendant's devices are all Apple; the infringer used QbTorrent and Defendant uses U-Torrent; none of the Defendant's devices contained any of Plaintiff's files or media, or any of the files or media described in Plaintiff's "expanded surveillance" but Defendant's devices had not been purged of torrent files; Plaintiff had photographic evidence and metadata establishing that Defendant's phone was in Grand Rapids taking pictures when the infringement was happening in Petoskey; Defendant's wifi was not password protected and could have been used by anybody within ranger; and there was ample proof that many other individuals were in range of Defendant's wireless router and could have downloaded Plaintiff's pornography.

Nonetheless, Plaintiff did not pursue this case in a manner reasonably calculated to determine whether Defendant was the infringer. Instead, Plaintiff's prosecution of this case was clearly designed to pressure Defendant into paying a "ransom" in order to be rid of the inconvenience of the case. For example, Plaintiff insisted on having its expert examine Defendant's iPads and his Playstation2 gaming console, when these items could not have been used to perform the alleged torrent-based infringement. Defendant sent external hard-drive back-ups to Plaintiff, only to have them returned, with Plaintiff insisting on having the original hard drives. When Plaintiff examined the

original hard drives, it then screamed and howled that it needed to examine the external hard drives (the same ones it had sent back). In publicly available filings, Plaintiff called Defendant a liar, a perjurer and a spoliator of evidence-- on no proof whatsoever except for the fact that there was no evidence that Plaintiff was the infringer. Plaintiff also made Defendant's cloud storage passwords public for no fathomable reason other than to inconvenience Defendant.

But at every turn, and after every bad-faith use of the civil justice system to harass and embarrass and inconvenience Defendant (and his counsel), Plaintiff and its counsel were given fair warning: "we're going to be asking for attorneys' fees." Defendant expressly asked to be awarded attorneys' fees with both of his motions for Summary Judgment. When we were in front of Magistrate Judge Kent on the second of Plaintiff's spurious motions for sanctions, Attorney Wilczynski expressly advised that Defendant intended on prevailing and would be seeking attorneys' fees. So here we are-- Defendant has prevailed and is seeking attorneys' fees. And Plaintiff now claims that, because it has retained a new attorney, that it needs more than 17 days to come up with an answer to the questions as to whether Defendant prevailed and whether the Court should exercise its discretion to award attorneys' fees.

Respectfully, Defendant and his counsel fail to see where the great mystery is here, or how it is that Plaintiff's new counsel cannot come up with an answer even in the time remaining. Attorney Herweyer was on vacation (in Petoskey, Michigan of all places) up to and including Monday, June 20, 2016. Attorney Wilczynski's mother passed away on Friday evening, June 17, 2016, and her funeral was held on Monday June 20, 2016. Plaintiff's new counsel filed his motion for an extension of time last night at approximately 8:38 pm, yet Defendant was able to put together the instant

response to that motion the very next day (and the total number of attorneys in both law firms, combined, is three).

Consequently, Plaintiff knew that this motion was coming, and was warned over and over again that this day was coming. Plaintiff's new counsel only has to address two simple questions (whether Defendant prevailed and, if so, how this Court should exercise its discretion), and Plaintiff's counsel even has a newly minted U.S. Supreme Court decision making his job much simpler (albeit harder on his client). Plaintiff's new counsel has had 15 days so far, and even the two days remaining should be enough time for Plaintiff's new counsel to respond. Consequently, the proffered reasons that Plaintiff's new counsel has only recently appeared in this case is not "good cause" under Rule 6(b) to extend the time for responding to Defendant's motion for attorneys' fees.

III. THIS COURT EXPRESSLY STATED IF THIS CASE WERE TO PROCEED, PLAINTIFF WOULD NEED LOCAL COUNSEL.

In its May 24, 2016 Order Dismissing Case (Doc. 157), this Court noted that Plaintiff has been accommodated over and over again and that its last chance "came with an explicit time fuse[, a]nd the fuse has burned." The order also described some communications to the Court by a new attorney from California who was "considering an eleventh hour appearance" but whose efforts were "woefully inadequate in light of the history of this case." In addition, this Court unequivocally stated: "were this case to proceed, the Court would certainly require that Plaintiff retain local counsel given the history of this case. LCivR 83.1(f)." (Doc. 157, p 2).

Yet here we are, with a new attorney from California asking for an extension of time without any real good cause (see, *supra*), and without any local counsel--only the suggestion that one will be retained and make his or her appearance sometime in the

near future. One would have thought that, given the clear language of the May 24, 2016 order and the fact that the California attorney was already representing the interests of Plaintiff at the time, the retention of local counsel would have been a matter of sufficient priority to have accomplished it by June 22, 2016.

Malibu Media has filed thousands of cases like this, but apparently is only prepared to take default judgments against those who are too scared or too poor to put up a defense, or perhaps is prepared to negotiate with those defendants who know they are the actual infringers. What it is clearly not prepared to do, however, is put is actually use the discovery process to find out the truth, or to act reasonably in the face of evidence contrary to its allegations, or follow this Court's instructions when told that it is time to put up or shut up (so to speak).

This is the same tactic employed by Malibu Media at every turn in this case. When boxed into a corner, either by looming deadlines, adverse evidence, or this Court's scheduling Orders, Malibu's attorneys have consistently asked for eleventh hour concurrence in Motions to Extend Time, have ignored this Court's Orders (for example, even though the Court ordered, at various times, the parties to jointly file status reports, Malibu instead filed its own status report in violation of the Court's Order), or simply have not produced documents (such as Patrick Paige's reports) on a timely basis.

The Court, for good reason, ordered Malibu Media to have local counsel, and Malibu has given no heed to the Court and taken the position it should be allowed to flaunt this Court's rulings. Malibu's counsel, Brian Heit, has only been admitted to practice in this Court since May 24, 2016 (based on a phone call to the clerk's office) and initially displayed his ignorance of this Court's local rules, having emailed counsel for the defense on June 20, requesting more time to respond to Defendant's motion, and

assuming that the Motion was due on June 21. (See, Exhibit A, email from Brian Heit to Lincoln Herweyer and Derek Wilczynski). Even Ionesco's submissions in the theatre of the absurd eventually came to an end. It is time for the Court to put a stop to Malibu Media's theatre of the absurd, deny Malibu's motion, and allow Raleigh's motion to be heard.

CONCLUSION and RELIEF REQUESTED

WHEREFORE, Defendant Jesse Raleigh respectfully request that this Court DENY Plaintiff's request for an additional two-weeks to file an Answer to his Motion for Attorneys' fees, and instead require that Plaintiff submit an Answer by this Friday, being June 24, 2016, or risk having the issue decided without input from Plaintiff.

Respectfully submitted,

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Dated: June 22, 2016