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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

13
14 MALIBU MEDIA, LLC,
15 Plaintiff,
16 vs.

17 JOHN DOE subscriber assigned IP
18 address 67.180.177.80,
19 Defendants.

CASE NO.: 3:16-cv-01005-WHA

Honorable William H. Alsup
Ctmm: No. 8, 19th Floor

**NOTICE OF MOTION BY
DEFENDANT [REDACTED]
FOR AWARD OF ATTORNEYS'
FEES UNDER THE COPYRIGHT
ACT OF 1976; AND
MEMORANDUM**

Date: September 29, 2016
Time: 8:00 a.m.
Ctmm: 8, 19th Floor

Complaint Filed: February 29, 2016
FAC Filed: June 1, 2016
Trial Date: September 5, 2017
FAC Dismissed: July 28, 2016

1 **PLEASE TAKE NOTICE** that on September 29, 2016, at 8:00 a.m. or as
 2 soon thereafter as the matter can be heard before the Honorable William H. Alsup
 3 in Courtroom 8 on the 19th Floor of the above-entitled Court located at 450
 4 Golden Gate Avenue, San Francisco, California, 94102-3483, Defendant
 5 **[REDACTED]** (“Defendant”) will and hereby does move the Court pursuant to
 6 Section 505 of the Copyright Act of 1976, 17 U.S.C. § 505, for an order awarding
 7 Defendant attorney’s fees and costs against Plaintiff MALIBU MEDIA.

8
 9 Defendant seeks attorneys’ fees in the amount of \$40,870.50 and costs in
 10 the amount of \$240.41.

11
 12 This Motion is made on the following grounds:

13
 14 Defendant should be deemed the prevailing party in this action under the
 15 Copyright Act. Plaintiff dismissed the First Amended Complaint against
 16 Defendant solely because Defendant had served Plaintiff with a FRCP Rule 11
 17 Motion showing that the First Amended Complaint had no evidentiary support
 18 and was filed for an improper purpose. Specifically, the allegations against
 19 Defendant in the First Amended Complaint failed to state a claim against
 20 Defendant for copyright infringement, and Plaintiff deliberately ignored
 21 exculpatory evidence offered by Defendant before the pleading was filed.
 22 Plaintiff filed the First Amended Complaint in bad faith for an improper purpose,
 23 *i.e.*, to harass Defendant into settling rather than incur the expense and
 24 embarrassment of defending against a baseless claim of illegally downloading
 25 pornography. By dismissing the First Amended Complaint in these
 26 circumstances, Plaintiff impliedly conceded that it had no merit and was filed for
 27 an improper purpose.
 28

1 Since Plaintiff is “judicially precluded” from re-filing the First Amended
 2 Complaint against Defendant because that would (again) violate Rule 11 and 28
 3 U.S.C. § 1927, and constitute malicious prosecution. Thus, the dismissal of the
 4 First Amended Complaint resulted in a “material alteration” of the legal
 5 relationship between the parties. This makes Defendant the prevailing party even
 6 though Plaintiff dismissed the First Amended Complaint without prejudice. See
 7 Cadkin v. Loose, 569 F.3rd 1142 (9th Cir. 2009), and Buckhannon Bd. & Care
 8 Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 604 (2001).

9
 10 Under the Copyright Act, an award of attorneys’ fees and costs to
 11 Defendant is appropriate because (1) Plaintiff achieved no success in the action,
 12 but Defendant was completely successful in obtaining outright dismissal; (2) the
 13 First Amended Complaint was frivolous and (3) was objectively unreasonable for
 14 lack of evidentiary support and in light of Defendant’s exculpatory evidence; (4)
 15 the Plaintiff was motivated by bad faith in that Plaintiff sought to use a frivolous
 16 claim to exact a settlement; and (5) an award of attorneys’ fees and costs would
 17 serve the purposes of the Copyright Act by deterring baseless claims for
 18 infringement. See In Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. __ (2016),
 19 and Maljack Prods. Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 889 (9th
 20 Cir. 1996.)

21
 22 This Motion is filed concurrently with Defendant’s Motion for Sanctions
 23 against Plaintiff and its counsel Brian Heit and Brenna Erlbaum, which seeks
 24 appropriate sanctions as well as an award of attorneys’ fees and costs. Defendant
 25 does not seek duplicative relief via the two motions.

26
 27 ///

28

1 This Motion is based on this Notice and the following Memorandum, the
2 Declaration of Bruce D. May, all pleadings and record on file in this action, all
3 matters of which the Court may or shall take judicial notice, and such other
4 evidence and argument as the Court may consider.

5
6 Dated: August 11, 2016 STUART KANE LLP

7
8 By: /s/ Bruce D. May

9 BRUCE D. MAY
10 Attorneys for Defendant
[REDACTED]

11 Dated: August 11, 2016 LAW OFFICE OF NICHOLAS RANALLO

12
13 By: /s/ Nicholas Ranallo

14 NICHOLAS RANALLO
15 Attorneys for Defendant
16 [REDACTED]
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1 **I. INTRODUCTION**

2 This is one of thousands of lawsuits filed by the notorious porno copyright
3 troll Malibu Media. The circumstances of this case show an especially egregious
4 abuse of the legal system by Plaintiff and its attorneys. While pretending to
5 consider the mountain of exculpatory evidence presented by defense counsel,
6 Plaintiff's counsel affirmatively concealed that Plaintiff had already filed the First
7 Amended Complaint against Defendant. Defendant then served a Rule 11 motion
8 showing that the First Amended Complaint lacked evidentiary support and was
9 filed for an improper purpose—to harass Defendant into a settlement rather than
10 incur the expense and embarrassment of defending a (baseless) claim of illegally
11 downloading pornography. Plaintiff immediately attempted to “cut and run” by
12 unilaterally dismissing the First Amended Complaint before Defendant had filed a
13 responsive pleading.

14
15 As this Court commented in Malibu Media, LLC v. Doe, No. C 15-04441
16 WHA, 2016 WL 3383758 (N.D. Cal. June 20, 2016), citing Judge Otis Wright's
17 opinion in Malibu Media, LLC v. John Does 1 through 10, 12-3632, 2012 WL
18 53832304, at *3–4 (C.D. Cal. June 27, 2012):

19
20 “The Court is familiar with lawsuits like this one. These lawsuits run a
21 common theme: plaintiff owns a copyright to a pornographic movie;
22 plaintiff sues numerous John Does in a single action for using
23 BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain
24 the identities of these Does; if successful, plaintiff will send out
25 demand letters to the Does; because of embarrassment, many Does
26 will send back a nuisance-value check to the plaintiff. The cost to the
27 plaintiff: a single filing fee, a bit of discovery, and stamps. The
28 rewards: potentially hundreds of thousands of dollars. Rarely do these
cases reach the merits. The federal courts are not cogs in a plaintiff's
copyright enforcement business model. The Court will not idly watch
what is essentially an extortion scheme, for a case that plaintiff has no
intention of bringing to trial....

Many judges have echoed Judge Wright's concerns about the
“troubling pattern” of abuse with regard to Malibu Media and other
owners of copyrights in pornographic videos. See, e.g., Malibu Media
LLC v. Austen Downs, No. 14-707 (S.D. Ohio May 26, 2015) (Judge
Timothy Black); Hard Drive Prods., Inc. v. Does 1–90, No. 11-03825

(ECF No. 18 at 11), 2012 WL 1094653, at *7 (N.D. Cal. Mar. 30, 2012) (Judge Howard R. Lloyd); MCGIP v. Does 1-149, No. 11-02331, 2011 WL 4352110, at *4 (N.D. Cal. Sept. 16, 2011) (Judge Laurel Beeler); On the Cheap, LLC, v. Does 1-5011, No. 10-4472, 2011 WL 4018258 at *11 (N.D. Cal. Sept. 6, 2011) (Judge Bernard Zimmerman); SBO Pictures, Inc., v. Does 1-3,036, No. 11-4220, 2011 WL 6002620, at *8 (N.D. Cal. Nov. 30, 2011) (Judge Samuel Conti).

By this motion, Defendant seeks an award of attorneys' fees and costs as the prevailing party under Section 505 of the Copyright Act of 1976, 17 U.S.C. § 505. Defendant is also filing a separate Motion for Sanctions against Plaintiff and its counsel Brian Heit and Brenna Erlbaum pursuant to the Court's inherent authority based on their bad faith conduct. Defendant does not seek duplicative relief by these two motions.

Under Section 505 of the Copyright Act, a dismissal without prejudice does not make the defendant a prevailing party unless there has been a "material alteration of the legal relationship of the parties." Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001). "[A] defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from re-filing the claim against the defendant in federal court." See Cadkin v. Loose, 569 F.3d 1142 (9th Cir. 2009) (no prevailing party where plaintiff dismisses without prejudice following grant of motion for more definitive statement, following Buckhannon.)

In the instant case, Plaintiff conceded that the First Amended Complaint had no evidentiary support and was filed for an improper purpose by dismissing it immediately after service of Defendant's Rule 11 Motion. Plaintiff is "judicially precluded" from re-filing against Defendant because this would constitute a violation of Rule 11 and 28 U.S.C. § 1927 (forbidding vexatious litigation), as well as the tort of malicious prosecution. See Fabbrini v. City of Dunsmuir, 544

1 F.Supp.2d 1044, 1048 (E.D. Cal. 2008). Thus, Defendant is prevailing party
2 because there has been a “material alteration” in the parties’ legal relationship.

3
4 In exercising discretion to award fees under Section 505, the District Court
5 should focus on whether the claim was “objectively unreasonable,” but also
6 consider the degree of success obtained, the Plaintiff’s motivation, and whether an
7 award would serve the purposes of the Copyright Act. See In Kirtsaeng v. John
8 Wiley & Sons, Inc., 579 U.S. ___, No. 15-375, slip op. at 10 (2016), and Maljack
9 Prods. Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 889 (9th Cir. 1996.)
10 All of these factors weigh squarely in favor of awarding fees to Defendant.

11 12 **II. SUMMARY OF MATERIAL FACTS**

13 As elaborated below, Plaintiff and its attorneys Brian Heit and Brenna
14 Erlbaum filed a First Amended Complaint against Defendant on June 1, 2016,
15 despite having been advised by defense counsel as follows: Defendant denied ever
16 downloading any of Plaintiff’s films; a forensic examination of Defendant’s
17 computers found no evidence of illegal downloading; Defendant was out of town
18 on one of the dates in question; and dozens of other people had equal access to the
19 Defendant’s Comcast internet account allegedly used to download Plaintiff’s
20 films. (Bruce May Decl. ¶¶ 6-8, 11-12, 16, and Decl. of Michael Kunkel attached
21 thereto as part of Exhibit L.) In the process, Plaintiff’s counsel Brian Heit
22 affirmatively misled defense counsel by concealing that he had already filed the
23 First Amended Complaint, while pretending to consider the exculpatory evidence.
24 His partner Brenna Erlbaum signed the First Amended Complaint. (Bruce May
25 Decl. ¶¶ 20-34.)

26
27 Defendant rents one room in a 4 bedroom house in [REDACTED] that he
28 shares with three other roommates. Defendant, his roommates, and all their

1 friends and visitors shared one Comcast account for internet access. (Bruce May
2 Decl. ¶¶ 3-4.)

3
4 The Amended Complaint filed against Defendant on June 1 contained the
5 same junk science and rank speculation that Plaintiff relies on in essentially all of
6 its cases. Plaintiff alleged that its “investigator” in Germany accessed a Comcast
7 internet account attributed to Defendant’s [REDACTED] address and concluded
8 that someone had sent “pieces” of some of Malibu Media’s porno films through
9 the Comcast router on three specific days in 2014-15 using BitTorrent file sharing
10 software. Plaintiff made no claim that Defendant downloaded or viewed any of
11 their films, but only that pieces of certain films had been uploaded through that
12 Comcast router on the dates in question.

13
14 **A. Defendant Never Downloaded Any Of Plaintiff’s Films, And A**
15 **Forensic Exam of His Computer Confirmed This.**

16 At his own expense, Defendant and his attorney arranged for a forensic IT
17 expert (Setec Investigations) to examine the laptop computer, external hard drive,
18 and cell phone that Defendant had used during the period in question. (Bruce
19 May Decl. ¶¶ 9-10.) Using state-of-the-art forensic software, Setec found no
20 evidence of any of Plaintiff’s films on any of Defendant’s devices, and no
21 evidence that an “eraser” program had been run on any of the devices. (Bruce
22 May Decl. ¶¶ 11-12.)

23
24 **B. Defendant Was Out of Town On The Date of Alleged**
25 **Infringement.**

26 The First Amended Complaint alleged that the infringement occurred on
27 December 28, 2015, and two other dates. Defendant was with [REDACTED]
28 [REDACTED] for the holidays and could not possibly have accessed the Comcast

1 account on December 28, 2015. (Bruce May Decl. ¶¶ 7, 29.)

2

3 **C. Numerous Other Persons Had Access To The Comcast Account.**

4 Defendant had 7 roommates who also had access to the Comcast account

5 during the period of alleged infringement. (Bruce May Decl. ¶ 8, and Ex. A.)

6 Defendant can identify at least 30 friends and visitors who had access to the

7 Comcast account during the same period, and is aware of at least 50 other persons

8 he cannot identify but who had access to the Comcast account because they were

9 friends or visitors of his roommates. (Bruce May Decl. ¶ 8, and Ex. A.)

10

11 **D. Plaintiff And Its Counsel Were Informed Of This Exculpatory**

12 **Evidence Before They Filed The Amended Complaint.**

13 On May 2, 2016, defense counsel wrote to Plaintiff's attorney Brian Heit,

14 and advised him that Defendant had never downloaded any files from Malibu

15 Media, and was in [REDACTED] at the time of the alleged infringement on

16 December 28, 2016. Defense counsel also explained that all of Defendant's

17 roommates and their friends, acquaintances, and visitors had access to the Comcast

18 account, and neighbors or passersby could also have accessed that account. (Bruce

19 May Decl. ¶ 8.)

20

21 **E. Counsel For Plaintiff Concealed That He Had Already Filed The**

22 **Amended Complaint While Pretending To Consider The**

23 **Exculpatory Evidence.**

24 In a phone conversation on May 13, 2016, Mr. Heit assured defense counsel

25 that he and his client had "no intention of suing any non-infringer," that they "did

26 not plan on coercing [Defendant]," that "they were not questioning [Defendant's]

27 honesty," and that "[Plaintiff] always considers the financial condition of any

28 defendant before suing them." (Bruce May Decl. ¶ 17.) In a later conversation,

1 Mr. Heit assured defense counsel that he and his client “had no intention of suing
2 [Defendant] if there’s no evidence on his computer.” (May Decl. ¶ 23.)

3
4 In the conversation on May 13, Mr. Heit asked for the names of Defendant’s
5 roommates. Defense counsel responded that he and Defendant were not
6 comfortable disclosing the names of his roommates since that was an invasion of
7 their privacy, but if Mr. Heit served another subpoena on Defendant asking for that
8 information he would have to respond accordingly. Mr. Heit agreed to this
9 suggestion, and defense counsel agreed that he would accept service on
10 Defendant’s behalf. (Bruce May Decl. ¶ 18.)

11
12 Mr. Heit never served any such subpoena. Instead, on June 2, defense
13 counsel was alarmed to receive an email from Mr. Heit stating: “I have conferred
14 with my client and will be filing an amended complaint tomorrow. Please let me
15 know if I should send the waiver of service over to you and if [Defendant] is
16 interested in resolving this case at this stage.” (Bruce May Decl. ¶ 20, Exhibit B
17 [emphasis added].)

18
19 The statement by Mr. Heit in his June 2 email that Plaintiff intended to file
20 the Amended Complaint “tomorrow” (meaning June 3) proved to be false, though
21 defense counsel did not discover this until more than a week later. In fact, Plaintiff
22 had already filed the Amended Complaint on June 1, 2016, and Mr. Heit concealed
23 this from defense counsel.

24
25 Defense counsel immediately called Mr. Heit on June 3 to express his
26 concern. In that conversation, Mr. Heit demanded a copy of any forensic report
27 prepared by defendant’s expert Setec Investigations. Defense counsel responded
28 that he had not asked Setec to prepare a written report in order to keep costs down.

1 (Bruce May Decl. ¶ 22.) Mr. Heit then demanded that Defendant turn over a copy
2 of the hard drive from his computer so that Plaintiff could search its entire
3 contents. (Bruce May Decl. ¶ 26.)
4

5 Defense counsel spoke to Mr. Heit again on June 7, while still unaware that
6 Plaintiff had already filed the Amended Complaint on June 1. In that conversation,
7 Mr. Heit reiterated his demand that Mr. May produce a mirror image of the entire
8 hard drive so that Mr. Heit and his client could examine it. (Bruce May Decl. ¶
9 26.) Mr. Heit did not suggest or offer any limitations on that examination, so his
10 proposal would have allowed Plaintiff complete access to the entire hard drive on
11 Defendant's computer. (Bruce May Decl. ¶ 26.)
12

13 In that conversation on June 7, defense counsel told Mr. Heit that Defendant
14 would never agree to such a blatant invasion of his privacy, but they would agree
15 to have a qualified neutral third party forensic IT specialist inspect the mirror
16 image of Mr. May's hard drive solely for the titles or hash values of the Malibu
17 Media files at issue, and for evidence that an eraser program had been used on that
18 drive. (Bruce May Decl. ¶ 27.)
19

20 In that conversation on June 7, Mr. Heit responded that he will "probably"
21 not sue Defendant, but he "would not make any commitment." (Bruce May Decl.
22 ¶ 28.) At that time, Mr. Heit knew that the First Amended Complaint had already
23 been filed, but he concealed this from defense counsel. Mr. Heit then made
24 additional demands for information from Defendant, without any assurances that
25 Plaintiff would refrain from suing if the evidence was provided. Mr. Heit
26 demanded to see a plane ticket, bank records, and cashed checks to prove that
27 Defendant was out of town at the time of the alleged infringement on December
28 28, 2015. (Bruce May Decl. ¶ 29.)

1 Defense counsel then wrote to Mr. Heit on June 7, still unaware that Plaintiff
2 had already filed the Amended Complaint, and stated as follows:

3 Even though I feel that Malibu Media does not have sufficient
4 basis to sue [Defendant], and that I have already provided more
5 information than required, I have a final proposal:

6 [Defendant] will agree to have the mirror image of his hard
7 drive inspected by a qualified independent third party forensic IT firm
8 selected by mutual agreement, at Malibu Media's expense, pursuant to
9 a stipulated protective order approved by Judge Alsup and enforceable
10 by contempt, with the search strictly limited to titles and hash values
11 of the Malibu Media materials listed in the Complaint, and on the
condition that Malibu Media will refrain from taking any legal action
against him if the inspection shows no such evidence. The mirror
image will be used for no other purpose and will be returned to
[REDACTED] on completion of the inspection. This offer is conditioned
upon Malibu Media refraining from naming [Defendant] as a
defendant

12 Please call me to discuss this proposal. If you and your client
13 decline, this will only reinforce that Malibu Media and you and your
14 firm have no reasonable basis for naming [Defendant] as a defendant
15 in this action or accusing him of copyright infringement. You and
your firm will violate Rule 11 if you name [REDACTED] as a defendant,
and expose you and your client to liability for malicious prosecution.
(Bruce May Decl. ¶ 30, Exh. C.)

16 Despite this offer and these warnings, Plaintiff and his counsel proceeded to
17 serve the First Amended Complaint. At Plaintiff's request, Defense counsel
18 agreed to waive service, making Defendant's response due on August 15, 2016.
19 (Bruce May Decl. ¶¶ 35, 42.)
20

21 **F. Plaintiff's Discovery Requests.**

22 On July 15, 2016, Plaintiff's counsel served discovery requests that were
23 blatantly overbroad and inappropriate. Plaintiff demanded production of the
24 entire hard drive from Defendant's computer; records of all internet browser use
25 by Defendant in the prior three years; records of all computer software and all
26 video games used by Defendant in the prior three years; all credit card and bank
27 statements relating to the purchase of any computer or software in the prior three
28

1 years or relating to Defendant's whereabouts on the dates of alleged infringement;
 2 records of all cloud-based storage by Defendant in the last three years; and "all
 3 documents you intend on using at trial or hearing in this matter." (Bruce May
 4 Decl. ¶¶ 47-48, Ex. J.)

5
 6 Plaintiff also served Interrogatories with the following compound question
 7 that was clearly intended to embarrass Defendant and invade his privacy: "Have
 8 you ever watched X-rated, adult or pornographic movies (collectively "adult
 9 content?") If so, when was the last time you watched adult content, how often do
 10 you watch adult content, which studios do you prefer, and what type of movies do
 11 you prefer?" (Bruce May Decl. ¶ 49, Ex. K.)

12
 13 **G. Defendant's Rule 11 Motion.**

14 On July 22, 2016, Defendant served an extensively documented Rule 11
 15 Motion, demanding dismissal of the First Amended Complaint and attorneys' fees
 16 and costs. (Bruce May Decl. ¶¶ 50-51, Ex. L.)

17
 18 Six days later on July 28, 2016, Plaintiff unilaterally filed notice of
 19 dismissal of the First Amended Complaint without prejudice, and without
 20 explanation.

21
 22 In "meet and confer" communications leading up to this motion, Plaintiff's
 23 counsel asserted that they and their client were entitled to sue Defendant based
 24 solely on the fact that the Comcast account was in his name, that they had no
 25 obligation to consider any exculpatory evidence, and that they filed the First
 26 Amended Complaint because the Court required them to sue within 35 days after
 27 learning the name of the Comcast account holder. (Bruce May Decl. ¶¶ 54-55 and
 28 Exhibit O.)

III. DEFENDANT IS THE PREVAILING PARTY BECAUSE THE REQUEST FOR DISMISSAL RESULTED IN A “MATERIAL ALTERATION” OF THE LEGAL RELATIONSHIP BETWEEN THE PARTIES

In Cadkin v. Loose, 569 F.3d 1142 (9th Cir. 2009), plaintiffs filed suit in federal court alleging State law claims for copyright and trademark infringement of certain musical works. Over a period of years, the district court granted successive motions to dismiss the original and two amended complaints based on federal preemption under the Copyright Act, lack of specificity in the pleadings, and waiver by failure to assert federal copyright claims. 569 F.3d at 1146, 1149-50. With each motion, the district court allowed plaintiffs leave to amend. Before the final motion to dismiss was heard, Plaintiffs lodged notice of voluntary dismissal under FRCP Rule 41(a) which the district court entered without comment. The court then awarded attorneys’ fees to the defendant, and plaintiffs appealed.

The Ninth Circuit held that under Section 505 of the Copyright Act, “prevailing party status turns on whether there has been a ‘material alteration of the legal relationship of the parties.’” 569 F.3d at 1144, quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 604 (2001). The court noted that in Oscar v. Alaska Dep’t of Educ. & Early Dev., 541 F.3d 978, 981 (9th Cir. 2008), it had held that dismissal without prejudice does not alter the legal relationship of parties for the purposes of entitlement to attorney’s fees under a comparable fee shifting statute.

But the Ninth Circuit also noted that in Miles v. California, 320 F.3d 986 (9th Cir. 2003), it held that dismissal of a claim under the Americans with Disabilities Act (ADA) without prejudice to plaintiff’s right to seek relief in state

1 court did confer prevailing party status on the defendant. This was so because
 2 “[t]he dismissal eliminates the federal ADA claim from further proceedings in
 3 federal court and thus has changed the legal relationship of Miles with respect to
 4 the State.” 320 F.3d at 989, citing Oscar, supra, 541 F.3d at 982. The Ninth
 5 Circuit then concluded: “Because the plaintiffs in this lawsuit remained free to re-
 6 file their copyright claims against the defendants in federal court following their
 7 voluntary dismissal of the complaint, we hold the defendants are not prevailing
 8 parties and thus not entitled to the attorney’s fees the district court awarded them.”
 9 569 F.3d 1145. “Miles and Oscar, taken together, compel the conclusion that a
 10 defendant is a prevailing party following dismissal of a claim if the plaintiff is
 11 judicially precluded from re-filing the claim against the defendant in federal court.
 12 That is not the circumstance here, so [defendants] are not prevailing parties and
 13 the district court erred in awarding them attorney’s fees.” 569 F.3d at 1150.

14
 15 The facts in Cadkin are distinguishable from the instant case, and the
 16 rationale in that case and Buckhannon supports the conclusion that Defendant
 17 should be deemed the prevailing party in this case. This is the only logical
 18 conclusion considering that Plaintiff effectively admitted that the First Amended
 19 Complaint has no evidentiary support and was filed for an improper purpose by
 20 dismissing the pleading immediately after being served with Defendant’s Rule 11
 21 Motion.

22
 23 Plaintiff would be “judicially prevented” from re-filing the First Amended
 24 Complaint against Defendant for several reasons. Re-filing would violate Rule
 25 11. Re-filing would also violate 28 U.S.C. 1927 which forbids attorneys from
 26 “multipl[y]ing proceedings in any case unreasonably and vexatiously.” Re-filing
 27 would also violate the Court’s inherent authority to prevent baseless litigation.
 28 See Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); Roadway Express, Inc. v.

1 Piper, 447 U.S. 752, 764-766 (1980).

2
3 Re-filing would also constitute the tort of malicious prosecution under
4 California law since the circumstances surrounding the dismissal make clear that
5 Plaintiff dismissed the First Amended Complaint because it lacked evidentiary
6 support and was filed for an improper purpose. “[A] party’s voluntary dismissal is
7 considered a favorable termination for the opposing party unless there is a reason
8 for the dismissal not having to do with the merits of the action.” Fabbrini v. City
9 of Dunsmuir, 544 F.Supp.2d 1044, 1048 (E.D. Cal. 2008), citing MacDonald v.
10 Joslyn, 272 Cal. App. 2nd 282, 289 (1969), and Haight v. Handweiler, 199 Cal.
11 App. 3rd 85, 89 (1969); see also Jaffe v. Stone, 18 Cal.2d 146, 150 (1941) (“If [the
12 prior dismissal] is of such a nature as to indicate the innocence of the accused, it is
13 a favorable termination sufficient to satisfy the requirement [for malicious
14 prosecution.]”)

15
16 Miles v. California, supra, 320 F.3d 986 (9th Cir. 2003) makes clear that the
17 “material alteration of the legal relationship” need not be a complete bar to re-
18 filing in order to make the defendant a prevailing party. As noted above, the
19 Ninth Circuit held in Miles that dismissal of a federal claim without prejudice to
20 seeking relief for the same wrong in state court was sufficient to confer prevailing
21 party status on the defendant. See 320 F. 3d at 989.

22
23 In Riviera Distributors, Inc. v. Jones, 517 F.3d 926 (7th Cir. 2008), plaintiff
24 Rivera sued defendant Midwest for copyright infringement. Rivera later conceded
25 that it lacked the evidence to prove its claim, but hoping to acquire better evidence
26 in the future, it requested dismissal without prejudice. The District Court instead
27 dismissed the case with prejudice. (Id. at 927.) On appeal, the Seventh Circuit
28 held that defendant was the prevailing party under the Copyright Act. As the

1 Court stated: “Midwest obtained a favorable judgment.” That this came about
 2 when Riviera threw in the towel does not make Midwest less the victor than it
 3 would have been had the judge granted summary judgment or a jury returned a
 4 verdict in its favor. Riviera sued; Midwest won; no more is required. See Mother
 5 & Father v. Cassidy, 338 F.3d 704, 708 (7th Cir.2003) (dismissal under Rule
 6 41(a)(2), with prejudice, after a plaintiff gives up makes the defendant the
 7 prevailing party).” 517 F.3d at 928.

8
 9 In the instant case, it is crystal clear that Plaintiff dismissed the First
 10 Amended Complaint because Plaintiff knew the claim had no merit, and not
 11 because of some procedural defect or strategic choice. By unilaterally dismissing
 12 the pleading immediately after being served with the Defendant’s Rule 11 Motion,
 13 Plaintiff and its counsel effectively admitted that the First Amended Complaint
 14 was without evidentiary support and was filed for an improper purpose. There is
 15 utterly no other explanation for the Plaintiff’s decision to “cut and run.”

16
 17 By the same token, Plaintiff and his counsel would be forbidden from re-
 18 filing the First Amended Complaint since that would be a second and more
 19 egregious instance of baseless litigation. Since Plaintiff would be “judicially
 20 precluded” from re-filing the First Amended Complaint in federal court,
 21 Defendant is the prevailing party under Cadkin and Buckhannon.

22
 23 **IV. DEFENDANT SHOULD BE AWARDED ATTORNEYS’ FEES**
 24 **UNDER THE COPYRIGHT ACT BECAUSE THE FIRST AMENDED**
 25 **COMPLAINT WAS “OBJECTIVELY UNREASONABLE” AND WAS**
 26 **FILED FOR AN IMPROPER PURPOSE**

27 The U.S. Supreme Court recently addressed the standards for awarding
 28 attorneys’ fees under Section 505 of the Copyright Act. In Kirtsaeng v. John

1 Wiley & Sons, Inc., 579 U.S. ___, No. 15-375, slip op. at 4 (2016), the Court began
 2 by noting that prevailing defendants and plaintiffs should be treated the same, and
 3 that “defendants should be ‘encouraged to litigate [meritorious copyright defenses]
 4 to the same extent that plaintiffs are encouraged to litigate meritorious claims of
 5 infringement.” 579 U.S. ___, No. 15-375, slip op. at 4, citing Fogerty v. Fantasy,
 6 Inc., 510 U.S. 517, 527 (1994). The Court then held that a District Court should
 7 give “substantial weight to the objective reasonableness of the losing party’s
 8 position” in deciding whether to award fees under Section 505, though this is not
 9 the controlling factor. 579 U.S. ___, No. 15-375, slip op. at 1.

11 The Court ruled that the District Court should also consider several other
 12 non-exclusive factors: “frivolousness, motivation, objective unreasonableness, and
 13 the need in particular circumstances to advance considerations of compensation
 14 and deterrence.” 579 U.S. ___, No. 15-375, slip op. at 4. Emphasizing objective
 15 unreasonableness in the analysis “both encourages parties with strong legal
 16 positions to stand on their rights, and deters those with weak ones from proceeding
 17 with litigation.” 579 U.S. ___, No. 15-375, slip op. at 6-7. “[W]hen a person
 18 (again, whether plaintiff or defendant) has an unreasonable litigating position, the
 19 likelihood that he will pay to pay two sets of fees discourages legal action.” 579
 20 U.S. ___, No. 15-375, slip op. at 7. As the Court stated:

21 For example, a court may order fee-shifting because of a party’s
 22 litigation misconduct, whatever the reasonableness of his claims or
 23 defenses. See, e.g., Viva Video, Inc. v. Cabrera, 9 Fed. Appx. 77, 80
 24 (CA2 2001). Or a court may do so to deter repeated instances of
 25 copyright infringement or overaggressive assertions of copyright
 26 claims, again even if the losing position was reasonable in a particular
 27 case. See, e.g., Bridgeport Music, Inc. v. WB Music Corp., 520 F. 3d
 28 588, 593–595 (CA6 2008) (awarding fees against a copyright holder
 who filed hundreds of suits on an over-broad legal theory, including in
 a subset of cases in which it was objectively reasonable). Although
 objective reasonableness carries significant weight, courts must view
 all the circumstances of a case on their own terms, in light of the
 Copyright Act’s essential goals. 579 U.S. ___, No. 15-375, slip op. at
 11.

1 In the instant case, all of the factors outlined in Kirtsaeng support an award
2 of attorneys' fees to Defendant. Again, by dismissing the First Amended
3 Complaint immediately after service of the Rule 11 Motion, Plaintiff and its
4 counsel effectively admitted that the claim did not have adequate evidentiary
5 support and was filed for an improper purpose.

6
7 The record also shows litigation misconduct: Plaintiff's counsel Brian Heit
8 affirmatively misled defense counsel by concealing the fact that he had already
9 filed the First Amended Complaint while pretending to consider the exculpatory
10 evidence offered by defense counsel. Mr. Heit then escalated his demands for
11 voluntary discovery, without promising that Plaintiff would dismiss the action. He
12 then served discovery that contained blatantly inappropriate requests including
13 complete access to Defendant's entire hard drive and records of all of Defendant's
14 internet usage, including credit card and bank statements.

15
16 Prior to Kirtsaeng, the Ninth Circuit had held in Maljack Prods. Inc. v.
17 GoodTimes Home Video Corp., 81 F. 3d 881, 889 (9th Cir. 1996), that District
18 Courts should consider five factors in awarding attorneys' fees under the Copyright
19 Act: (1) "the degree of success obtained on the claim," (2) "frivolousness," (3)
20 "motivation," (4) "objective reasonableness of the factual and legal arguments,"
21 and (5) "need for compensation and deterrence." All of these factors also weigh in
22 favor of granting Defendant attorneys' fees.

23
24 Plaintiff achieved nothing via the First Amended Complaint, but Defendant
25 completely achieved his goal which was to have the case dismissed outright. The
26 First Amended Complaint was frivolous and "objectively unreasonable" because
27 merely identifying BitTorrent use at a Comcast account does not prove
28 infringement by the account holder, and Plaintiff's counsel consciously ignored a

1 veritable mounting of exculpatory evidence offered by defense counsel in an effort
 2 to stave off a meritless lawsuit. An award of attorneys' fees would compensate
 3 Defendant for the expense it had to incur defeating this action, and the need to
 4 deter Plaintiff from continued misconduct. .

5
 6 **V. CONCLUSION**

7 Plaintiff and its counsel knew they could not prove infringement by
 8 Defendant. They knew he was not a deep pocket. But they figured he would
 9 cough up a settlement rather than incur the expense and embarrassment of
 10 defending a (baseless) claim of illegally downloading pornography.

11
 12 This case exemplifies what Judge Otis Wright rightly labeled an "extortion
 13 scheme." Malibu Media, LLC v. John Does 1 through 10, 12-3632, 2012 WL
 14 53832304, at *3-4 (C.D. Cal. June 27, 2012). Denying attorneys' fees to
 15 Defendant in these circumstances would allow Plaintiff and its counsel to escape
 16 unscathed, free to try the same "extortion scheme" on some other poor defendant.
 17 Awarding attorneys' fees to Defendant would serve the purposes of the Copyright
 18 Act.

19
 20 Dated: August 11, 2016 STUART KANE LLP

21
 22 By: /s/ Bruce D. May

23 BRUCE D. MAY
 24 Attorneys for Defendant

25 Dated: August 11, 2016 LAW OFFICE OF NICHOLAS RANALLO

26
 27 By: /s/ Nicholas Ranallo

28 NICHOLAS RANALLO
 Attorneys for Defendant

CERTIFICATE OF SERVICE
Malibu Media, LLC v. [REDACTED]
Case No. 3:16-cv-01005-WHA

I certify that on August 11, 2016 the foregoing document: **NOTICE OF MOTION BY DEFENDANT FOR AWARD OF ATTORNEYS' FEES UNDER THE COPYRIGHT ACT OF 1976; AND MEMORANDUM** was served on all parties or their counsel of record through the CM/ECF system if they are registered users, or, if they are not, by serving a true and correct copy at the addresses listed below:

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8/11/2016

Date