Appeal No.: 16-11767-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERTO ROLDAN, Appellant,

V.

MALIBU MEDIA, LLC, Appellee.

On Appeal from the
United States District Court
For the Middle District of Florida

Reply Brief for Appellant, ROBERTO ROLDAN

Attorneys for Appellant:

Cynthia Conlin, Esq.
Cynthia Conlin, P.A.
1643 Hillcrest Street
Orlando, FL 32803
Tel. 407-965-5519
Florida Bar No. 47012

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, ROBERTO ROLDAN, certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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MALIBU MEDIA, LLC (PARTY)
MOODY, JR., JAMES S.
PAGAN JR., ESQ., TONY
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PILLAR LAW GROUP, APLC
REED, ESQ., JENNIFER
ROLDAN, ANGEL
ROLDAN, ROBERTO (PARTY)
SHATZ, ESQ., DANIEL

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I. Malibu Media's facts are inaccurate or are misleading

Pursuant to the Eleventh Circuit Rules,

> A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such.

11th Cir. R. 28-1(i)(ii). Contrary to this requirement, several of the facts asserted by Malibu Media in its Statement of the Case are inaccurate or misleading.

To begin, Malibu Media's statement, "Malibu became the first Plaintiff to ever try a BitTorrent copyright infringement case" [Response Brief at 12] is misleading. The "Bellwether" trial to which it refers was not a trial on the merits of a copyright infringement action but rather. *See* transcript of June 10, 2013, bench trial, *Malibu Media, LLC v. Does 1, 6, 13, 14*, Case No. 2:12-cv-02078-MMB (E.D. Pa.) [Doc. 205] Pg 11:10-22. *Id.* Rather, the issues therein were confined solely to damages, as the Does had admitted to copying Malibu Media's works via BitTorrent.

Second, Malibu Media alleges that it "makes substantially all of its money through subscription sales." (Response Brief, 12). This, however, is a contested allegation that has not been proven on the record.

Third, Malibu's allegation that its movies were "repeatedly

infringed at Defendant's parents' home" [Response Brief at 13] is another unproven, contested allegation.

Fourth, Malibu Media claims that "Roberto Filed a Frivolous and Vexatious 281-page motion to dismiss" and it "spent scores of hours trying to understand these documents' relevancy." (Response Brief at 15). However, Malibu Media had already seen, and responded to, the 250-page exhibit attached to the motion to dismiss, as it was merely a document filed in previous civil actions. It was originally filed three months prior in the District of Maryland in a consolidated group of related *Malibu Media* cases, Case Nos. 1:14-cv-0223 [Doc. 9], 1:14-cv-0257 [Doc. 10], and 1:14-cv-00263 [Doc. 10] (all Mar. 28, 2014). It had also already been filed a month prior in the Southern District of Florida. *Malibu Media v. John Doe*, case no. 1:14-cv-20393-cma, Doc. No. 9 (S.D. Fla, May 22, 2014). Therefore, Malibu Media's statement that it "spent scores of hours" is disingenuous because any such hours had been already spent. *Id.* at Doc. No. 17. Furthermore, Roberto's contentions therein were not frivolous, as Malibu Media did employ an expert with a contingency fee relationship [Doc. 16-3 at 5; Doc. 16-4 at 6], did use evidence from an unlicensed investigator [Doc. 21 at 14-18], and, clearly, allegations of an IP address are NOT enough to identify an individual [Doc. 25 at 3].

Fifth, Malibu Media explains that Roberto admitted to using BitTorrent (Response Brief at 16). However, admitting to having used

BitTorrent is not admitting to ever downloading Malibu Media's content. BitTorrent is a legal program used to exchange many files; it is simply software.

Sixth, Malibu Media's statement that it "took seriously" Roberto's defense (Response Brief at 16) is disingenuous as shown in its discovery requests propounded (Vol. 3, Doc 42-1 – Pg 582-601), which asked absolutely nothing about that defense.

Seventh, Malibu Media improperly tries to deflect its own wrongful actions of suing an innocent person without sufficient evidence by blaming *Roberto* for *allowing* Malibu Media to sue him. (Response Brief at 17-18). Malibu Media had plenty of opportunity to ask for, but *never asked* for, any of Roberto's additional evidence in discovery. (*See* Vol. 3, Doc 42-1). Malibu Media conveniently omits the fact that the evidence Malibu Media references — his bank records, class syllabi, school transcripts — was *never requested* in discovery. Malibu Media's discovery requests asked for completely different, unrelated items, which were not relevant to or outside the scope of the lawsuit, which is why Roberto rightfully objected to same. Roberto had also not collected this additional evidence at the time he provided his initial disclosures, which at the time he thought were sufficient. His additional evidence was collected later. Furthermore, this evidence was not withheld but served on January 15, 2015 (Response Brief at 18) — *within 46 days* of the discovery deadline (Doc. 30), leaving Malibu Media plenty of time — 46 days

— to conduct additional discovery.

As demonstrated above, Malibu Media failed to adhere to the high standard of professionalism required pursuant to 11th Cir. R. 28-1(i)(ii).

II. Roberto Preserved These Issues for Appeal

Malibu Media argues that Roberto waived the issues of whether the district court should have ruled on his summary judgment or whether the district court erred in dismissing him without prejudice. However, because Roberto raised these issues, or at least the elements that support these legal theories, before the district court, Roberto preserved the issues for appeal. Additionally, Roberto did not have an opportunity during the telephonic hearing to object when the court stated it would dismiss Roberto without prejudice. Nonetheless, this Court should consider these issues on appeal because they involve pure questions of law, and failure to review them would result in manifest injustice.

A. By twice asking the court rule on the summary judgment motion or requesting dismissal with prejudice, Roberto preserved these issues for appeal.

Malibu Media argues Roberto waived the issues of whether the district court abused its discretion in refusing to rule on Roberto's motion for summary judgment and whether the district court abused its discretion in dismissing Roberto without prejudice conditioned upon his testimony being truthful because Roberto's counsel did not object at the hearing on Roberto's motion for order to show cause

against Malibu Media, when the court dismissed Roberto without prejudice. However, a court of appeals may address any issue raised sufficiently for the trial court to rule on it, so long as the issue is supported by the record, even if the trial court did not consider the issue. *Degelmann v. Advanced Med. Optics, Inc.*, 659 F.3d 835, 840 (9th Cir. 2011).

Furthermore, "[a]rguments made on appeal need not be identical to those made below, however, if the elements of the claim were set forth and additional findings of fact are not required." *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) (citing *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n. 10 (5th Cir. 1976); *Maynard v. General Electric Co.*, 486 F.2d 538, 539 (4th Cir. 1973)); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim [on appeal]; parties are not limited to the precise arguments they made below.")

"Therefore when a party raises new contentions that involve only questions of law, an appellate court may consider the new issues." *Vintero*, 675 F.2d at 515 (citing *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693-94 (9th Cir. 1980); *Foster v. United States*, 329 F.2d 717, 718 (2d Cir. 1964); *N. Am. Leisure Corp. v. A B Duplicators, Ltd.*, 468 F.2d 695, 699 (2d Cir. 1972)).

Roberto preserved the issues for appeal, because he specifically asked the court to rule on the motion for summary judgment or dismiss

him *with* prejudice in the motion that prompted that hearing wherein the court dismissed Roberto without prejudice: his motion for order to show cause (Vol. 4, Doc. 75 – Pg 14). Therein, Roberto asked the court to "enter a final judgment, on the merits, in Roberto's favor as to the first amended complaint . . . by granting Roberto's motion for summary judgment or entering a dismissal with prejudice, and declaring Roberto "prevailing party[.]" Vol. 4, Doc. 75 – Pg 14. Additionally, in his memorandum in opposition to Malibu Media's motion for leave to substitute party defendant, Roberto again asked the court to rule on his motion for summary judgment. Vol. 3, Doc. 54 – Pg 19-20. Therein, Roberto alerted the court that "[Malibu Media] admitted that it had indeed sued the wrong person," and argued that he was entitled to be determined prevailing party because Malibu Media "caus[ed] him to incur the costs of defending this case and falsely accus[ed] him of downloading Plaintiff's obscenities," and therefore requested a ruling on the motion for summary judgment. Vol. 3, Doc. 54 – Pgs 16, 19. By twice asking the court to rule on his motion for summary judgment or alternatively to dismiss him *with prejudice*, Roberto preserved these issues for appeal.

B. Roberto preserved the issue of whether the court erred in dismissing him without prejudice

Furthermore, issues raised for the first time in post-judgment motions are preserved for appeal. *Instone Travel Tech Marine & Offshore v. Int'l Shipping Partners, Inc.*, 334 F.3d 423, 431 (5th

Cir. 2003). If the district court exercises its discretion to consider an issue on the merits that is raised for the first time in a motion for reconsideration, such an issue is preserved and subject to appellate review. *Gerhartz v. Richert*, 779 F.3d 682 (7th Cir.), *cert. denied*, 136 S. Ct. 319 (2015). Roberto filed a motion for clarification on order of dismissal. Vol. 4, Doc. 93 – Pg 1. Therein, Roberto requested that the Court dismiss him with prejudice, because "[a] dismissal 'without prejudice' this late in the litigation causes a prejudice to him because he loses his standing to be determined a 'prevailing party.'" Vol. 4, Doc. 93 – Pg 4. The Court ruled on Roberto's request: "The Court denies Roberto Roldan's request to dismiss him with prejudice." Vol 4., Doc. 98 – Pg 3. Then, after the Court entered an order dismissing the case with prejudice, Roberto again filed Defendant's Motion for Clarification or, in the Alternative Motion to Reopen Case for Entry of Dismissal with Prejudice. Vol. 4, Doc. 116 – Pg 1. The Court considered his request, then denied it, "to the extent the motion seeks a reopening of the case or the addition of Roberto Roldan as a defendant, it is DENIED." Vol. 4, Doc. 117 – Pg 2. The court's decision to consider Roberto's argument preserved the issue for appeal.

C. Counsel was deprived of the opportunity to object to the dismissal without prejudice at the hearing.

Where the district court does not allow an opportunity to object, the claimant is not precluded from arguing the issue on appeal. *See*

Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1296 (11th Cir. 2002). "Where a party **has the opportunity to object**, but remains 'silent or fails to state the grounds for objection, objections . . . will be waived for purposes of appeal, and this court will not entertain an appeal based upon such objections unless refusal to do so would result in manifest injustice.'" *Id.* (emphasis added) (quoting *United States v. Page*, 69 F.3d 482, 492–93 (11th Cir. 1995)); *see also Seaboard Air Line R. Co. v. Horowitz*, 277 F.2d 738, 738 (5th Cir. 1960) (finding that the instructions were not subject to review where it was not contended that the appellant was deprived of an opportunity for making objections); Fed. R. Crim. P. 51 ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."); Fed. R. Civ. P. 51(c)(2)(B) ("An objection is timely if . . . a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.").

Importantly, the hearing was held via telephone conference. Vol. 4, A811. Proper decorum mandates that attendees do not speak over each other or out of time; otherwise, the telephone conference would be unworkable. Speaking out of turn or interrupting the court, especially during a telephonic hearing, is simply not acceptable court decorum. *See, e.g.*, Vol. 4, A820 ("MR. LIPSCOMB: Your Honor, this

is Mr. Lipscomb. If I may respond? THE COURT: No. Mr. Lipscomb. Mr. Lipscomb, I'm not asking for a response.") Here, the court did not provide counsel for Roberto an opportunity to interject an objection to the dismissal without prejudice, as demonstrated by the course of the hearing. The first part of the telephone conference consisted entirely of discourse between the court and Malibu Media's attorney, without any request for input from Roberto's attorney, about why Malibu Media removed Roberto as a Defendant from the complaint. Vol. 4, A814-A818. The court did not pause to consider Roberto's position and did not ask for Roberto's input; rather, it immediately moved into a discussion with counsel for Malibu Media as to whether they would be adding Roberto's mother as a defendant.

> [THE COURT:] Mr. Lipscomb, I'm going to accept your amended complaint as an amendment to the complaint so that both the son and the father are Defendants; and I haven't looked, did you make the mother a Defendant as well?
>
> MR. LIPSCOMB: We did not.

Vol. 4, A818:4-7.

Without pausing or seeking input from Roberto's attorney, the court ruled and *sua sponte* indicated that he would dismiss Roberto if Malibu Media would like:

> All right. Then I'm going to make your amended complaint an amendment to the complaint so the son and the father are both Defendants. If you now want to dismiss the son, and make your dismissal contingent upon his information being true, then if it turns out later not to be true

> something can be done about that.

Vol. 4, A818:12-17.

Without pausing to allow objections from any parties, the court immediately went into a discussion about the need for mediation,

> The next question is, Ms. Conlin seems to think that mediation is fruitless, and I don't want the parties to spend even more money on attorneys than are necessary. They've already spent a lot of money in this case. Does anyone think that mediation is fruitless?

Vol. 4, A818:20-24. The only time the court sought input from counsel for Roberto was when he asked, "I don't understand your position why you can't mediate your claimed fees and costs?" Vol.4, A823:10-11.

Counsel for Malibu Media did not ask to dismiss Roberto until the very end of the hearing, at which point, the court accepted its request for dismissal and immediately adjourned without allowing any opportunity for opposing counsel to object.

> MR.LIPSCOMB: . . . I so stipulate[1] to dismissing, and conditioned upon his testimony proving to be truthful.
>
> THE COURT: All right. I'll include that.
>
> MR. LIPSCOMB: **That would be currently a dismissal without prejudice.**

[1] Counsel's use of the word stipulate was misleading, as stipulation requires an agreement between opposing counsel, and counsel for Roberto never agreed to a dismissal of Roberto without prejudice. Instead, Roberto requested the court to "enter a final judgment, on the merits, in Roberto's favor as to the first amended complaint... by granting Roberto's motion for summary judgment or entering a dismissal **with** prejudice, and declaring Roberto "prevailing party[.]" (Vol. 4, Doc. 75 – Pg 14).

> THE COURT: **All right. I'll include that in the order.** All right. I look forward to the trial in this case. It should be interesting. **We're adjourned. Thank you.**

Vol. 4, A825:9-17 (emphasis added).

As seen by the court's order followed immediately by adjourning the hearing, counsel for Roberto was not given an opportunity to object at the hearing. In an effort to preserve the issue for appeal, Roberto filed a motion for clarification shortly after the hearing. Vol. 4, Doc. 93. Therein, Roberto made the objections that dismissal should not have been without prejudice as Roberto would lose his opportunity to be made prevailing party. Vol.4, Doc. 93 – Pg 5. Because Roberto did not have the opportunity to object at the hearing, he is not precluded from arguing these issues on appeal.

D. ***Arguendo*, even if Roberto failed to preserve the issues, the ends of justice would be met by considering these issues on appeal.**

Nonetheless, should this Court find that Roberto failed to properly raise these issues in the district court below, this Court should still consider these issues. "[T]he decision whether to consider an argument first made on appeal is left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984) (internal quotations and citations omitted). "In the exercise of that discretion, appellate courts may pass on issues not raised below if the ends of justice will best be served by doing so." *Fed. Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d

815, 817–18 (11th Cir. 1991). "Specifically, [the Eleventh Circuit] will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). "Any wrong result resting on the erroneous application of legal principles is a miscarriage of justice in some degree." *Id.* (citations omitted).

1. The failure to rule of Roberto's motion for summary judgment was a miscarriage of justice that involves a pure question of law on appeal.

Here, neither party has raised new factual questions, a situation that might justify refusal to hear a new issue. *Fed. Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815, 818 (11th Cir. 1991) (citing *In re Daikin Miami Overseas, Inc.*, 868 F.2d 1201, 1207 (11th Cir. 1989)). Instead, this Court must simply decide a pure question of law, whether the district court had a duty to enter summary judgment for Roberto where Malibu Media failed to come forward with any evidence to demonstrate the essential elements of its copyright infringement cause of action, and — in fact — acknowledged that the evidence corroborated Roberto's innocence. Vol. 3, Doc. 53 – Pg 4, ¶ 9. Malibu Media had adequate time for discovery and was unable to adduce any evidence that Roberto was the infringer. Vol. 3, Doc. 53 – Pg 4, ¶¶ 8, 9. Furthermore, Malibu Media admitted and the court acknowledged, "[Malibu Media] represents in this Motion that the deposition testimony corroborates [Roberto's] evidence submitted in support of

his Motion for Summary Judgment demonstrating that he did not have access to the IP address affiliated with the alleged infringement during the relevant time period." Vol. 4, Doc. 58 – Pg 1.

Furthermore, Roberto has suffered a miscarriage of justice due to the district court's refusal to grant his motion for summary judgment. Roberto has been denied the right to an adjudication on the merits, to clear his name and seek attorney's fees in compensation for the expense incurred in defending his name against Malibu Media's unfounded accusations. As such, this Court should consider this issue on the merits, and find that the district court committed an error of law resulting in a miscarriage of justice in refusing to grant Roberto's motion for summary judgment.

2. Dismissing Roberto without prejudice conditioned upon his testimony being truthful was a miscarriage of justice that involves a pure question of law on appeal.

The district court committed a clear error of law in granting the dismissal without prejudice conditioned on the defendant telling the truth. Vol. 4, Doc. 90 – Pg 2. "The court may not impose conditions on the nonmoving party to protect the plaintiff from the consequences of the dismissal." 8-41 Moore's Federal Practice - Civil § 41.40 (citing *Cross Westchester Dev. Corp. v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989) (district court could not dismiss on condition that non-moving defendant waive statute of limitations defense to RICO claim once action was refiled in state court)). Furthermore, the

effect of conditioning Roberto's dismissal upon his testimony being truthful, in effect, shifts the burden of proof onto Roberto when it belongs on Malibu Media. As such, this issue involves a pure question of law that would result in injustice if it goes unaddressed. Therefore, this Court should exercise its discretion to address this issue on appeal.

III. The court erred in denying Roberto's motion for summary judgment

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For purposes of a motion for summary judgment, it did not matter whether Malibu Media questioned Roberto's veracity, or that that Roberto came forward with conclusive proof that he did not commit the infringements. Rather, what mandates summary judgment in favor of Roberto is that Malibu Media failed to come forward with evidence to prove the elements of a copyright infringement cause of action against Roberto.

Moreover, when district court granted Malibu Media extra time to conduct discovery, instead of coming back with evidence that Roberto infringed its copyright, Malibu Media came back with evidence corroborating Roberto's innocence; precisely for this reason, the Court should have granted Roberto's motion for summary judgment.

Finally, after the district court granted Malibu Media's motion to add party defendant Angel Roldan and denied Malibu Media's motion to drop Roberto Roldan, the district court should have granted Roberto's motion for summary judgment. Failure to do so was an abuse of discretion.

IV. The court erred in allowing Malibu Media to amend its complaint to substitute Angel for Roberto as a defendant

"Prejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided." *Campbell v. Emory Clinic,* 166 F.3d 1157, 1162 (11th Cir.1999). After Roberto had incurred much expense in defending the action, discovery had closed, and Roberto's summary judgment motion had already been filed, it was an abuse of discretion to grant Malibu Media's eleventh-hour motion to amend and substitute party defendants. *See Sys. Unlimited, Inc. v. Cisco Sys., Inc.*, 228 F. App'x 854, 857 (11th Cir. 2007) (citing *Maynard v. Bd. of Regents ex rel. Univ. of S. Fla.,* 342 F.3d 1281, 1287 (11th Cir. 2003) ("Because we conclude that Maynard has failed to show good cause for the eleventh hour amendment, we find that the district court did not abuse its discretion by enforcing its timetable for disposition of the case."). Malibu Media did not have "just terms" to amend or supplement its pleading. Malibu Media had possessed evidence of Roberto's innocence

since the beginning of the case[1] yet waited to move the court to substitute party defendants or even consider conducting relevant discovery until after Roberto had moved for summary judgment. Finally, after Roberto moved for summary judgment and presented his exculpatory evidence to the court, Malibu Media was forced to sit up and take note of his position, and evidence, and moved to amend the complaint.

Malibu Media cites to *Archer v. Mead Corp.*, 998 F. Supp. 2d 1262, 1274 (N.D. Ala. 2014) and *McGuffie v. Mead Corp.*, 998 F. Supp. 2d 1232, 1247 (N.D. Ala. 2014), indicating that the court therein stated "[substitution] is the wiser answer to the problem of expediting trials and avoiding the unnecessary delay and expense of requiring an action to be started anew where a substitution is desired though the subject matter of the actions remains identical." However, a review of these cases reveals that *it was the parties* therein who

[1] Malibu Media issued a summons to Roberto at the St. Petersburg address (Doc. 10). It hired a process server who, before serving Roberto elsewhere, was told Roberto did not live there. Doc. 13 at 1, Affid. of Process Server, Ana Castillo (stating, "INFORMED THE DEFENDANT DOES NOT RESIDE HERE. SERVED AT ANOTHER LOCATION"). On June 27, 2014, Roberto filed a motion to dismiss stating in part that he "did not actually reside in the home where the Internet connection existed for the subject IP address." Doc. 16 at 3. On July 28, 2014, Roberto served in his initial disclosures documented proof he resided in Tampa — not St. Petersburg — throughout the entire period of alleged downloads, including his lease, housing report, and utility bills. On August 15, 2014, Roberto filed an answer and included an affirmative defense that he "has not infringed Plaintiff's work as alleged in Plaintiff's complaint, nor has Defendant even attempted to download Plaintiff's work. Defendant is not the account holder associated with the I.P. address, nor does he live at the address associated with the I.P. address." Doc. 27 at 5-6.

made this statement in their joint status reports – not the court.

If Malibu Media's substitution is upheld, and defendants having little more than a loose association with a multi-user IP address are forced to incur substantial expense in defending their name against Malibu Media's claims, all while Malibu Media is granted unchecked freedom to build its case on the dime of a wrongly sued defendant dime until Malibu Media finally gets the right defendant, Federal Rule of Civil Procedure 8 would be stripped of its force. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (holding that Rule 8 requires a complaint to state facts that demonstrate a plausible right to relief). Malibu Media cannot be allowed to run through each member of a household, at the defendants' expense, until it gets it right. The Federal Rules of Civil Procedure demand a higher standard before a defendant can be forced to incur the expense of litigation. Too often it is cheaper for an innocent defendant to settle early with Malibu Media rather than incur the expense of defending himself in court. Procedural structures must be adhered to prevent abuse of the judicial system. After an innocent defendant, improperly sued by Malibu Media without sufficient evidence to rise to a plausible level of culpability, choses to defend himself, it is manifestly unjust to allow Malibu Media to substitute him out and avoid paying for the expenses he incurred, as if he had never been sued. Allowing such substitution condones Malibu Media's ineptitude throughout the lawsuit. The

district court failed to take note of the prejudice it was incurring upon Roberto by allowing the amendment (or supplement), and thereby abused its discretion.

V. The Court abused its discretion by dismissing Roberto without prejudice when Roberto had expended significant time and resources and lost the right to be named prevailing party as a result.

Malibu Media cites to *McCants* for the proposition that "in most cases a dismissal should be granted unless the defendant will suffer clear legal prejudice, other than the mere prospect of a subsequent lawsuit, as a result." Response Brief at 26 (citing *McCants v. Ford Motor Co.*, 781 F.2d 855, 856-57 (11th Cir. 1986)). However, that same case also holds that "[a] plaintiff ordinarily will not be permitted to dismiss an action without prejudice under Rule 41(a)(2) after the defendant has been put to considerable expense in preparing for trial, except on condition that the plaintiff reimburse the defendant for at least a portion of his expenses of litigation." *McCants*, 781 F.2d at 860. Because Roberto was put to considerable expense in defending this case, Malibu Media should not have been allowed to dismiss this case without prejudice.

Malibu Media argues that defendant "should not receive prevailing party fees if the copyright holder 'acted in an objectively reasonable manner.'" Response Brief at 36 (citing *Malibu Media, LLC v. Pelizzo*, 604 Fed. Appx. 879, 881 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 690 (2015)). Then, Malibu Media begins analyzing the

Fogarty factors.[2] (Response Brief at 36). However, the question here on appeal is not whether Roberto should have been awarded attorney's fees as a prevailing party. Instead, this appeal is addressed to whether the court erred in dismissing Roberto without prejudice, because he was denied the substantial right to be deemed prevailing party and thereafter seek attorney's fees. As such never happened, the district court never had the opportunity to address the *Fogarty* factors, required for a determination of whether a party should be granted attorney's fees as prevailing party under the Copyright Act. Therefore, there are no factual determinations on record for this Court to consider whether Malibu Media's argument, that it was objectively reasonable in bringing its lawsuit, is even correct. Regardless, this argument is immaterial to the issue on appeal and should be disregarded.

A. Roberto was prejudiced by the dismissal without prejudice

Malibu Media argues that Roberto suffered no legal prejudice as a result of the dismissal without prejudice, because "Roberto never deposed any individual and largely spent most of the discovery process objecting to Plaintiff's attempts to receive documents collaborating his denial." (Response Brief at 38). However, the crucial question

[2] Although such analysis is immaterial to the current issues on appeal, Malibu Media clearly misstated the holding in *Pelizzo* (Response Brief at 27). The court therein merely found that the district court did not abuse its discretion in finding that Malibu's subjective motivation for filing suit was not improper or that the suit was not frivolous, the first two *Fogerty* factors, and when it denied an award of attorney's fees based thereon. *Pelizzo*, 604 F. App'x at 881.

[in determining plain legal prejudice] is, would the defendant lose any substantial right by the dismissal." *Pontenberg v. Boston Sci. Corp.*, 252 F.3d 1253, 1255 (11th Cir. 2001) (citing *Durham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967)).

By dismissing Roberto without prejudice, Roberto lost the right to be determined prevailing party and to move for attorney's fees under the Copyright Act, which a ruling on the merits would have provided.[3] *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (holding that an enforceable judgment on the merits is necessary to permit an award of attorney's fees); *McRae v. Rollins College,* No. 6:05cv1767, 2006 WL 1320153, at *3 (M.D. Fla. May 15, 2006) ("A dismissal without prejudice does not support a finding that a defendant was a prevailing party.").

B. The district court erred in dismissing Roberto conditioned on his testimony being truthful.

"[A] district court by definition abuses its discretion when it makes an error of law." *W.R. Huff Asset Mgmt. Co. v. Kohlberg, Kravis, Roberts*, 209 F. App'x 931, 934 (11th Cir. 2006) (quoting *Koon v. United States,* 518 U.S. 81, 100 (1996)). "When exercising its discretion in considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for Rule 41(a)(2)

[3] This requirement seems to have changed in the recent Supreme Court decision *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1646, 194 L. Ed. 2d 707 (2016) ("The Court now holds that a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed.")

exists chiefly for protection of defendants." *Fisher v. Puerto Rico Marine Mgmt., Inc.*, 940 F.2d 1502, 1503 (11th Cir. 1991). Malibu Media's citation to *McCant* for the proposition that it is no bar to a voluntary dismissal that a plaintiff gains a tactical advantage in a future litigation, says nothing about the conditions that may be attached to that voluntary dismissal by the court. By failing to keep in mind the interests of Roberto, the defendant, and instead only considering the interests of Malibu Media, the plaintiff, the district court abused its discretion.

VI. The District Court abused its discretion in failing to sanction Malibu Media for violating an order requiring it not to drop Roberto as a defendant

First, Malibu Media argues that the court correctly found that it did not violate the court order requiring it to maintain Roberto as a party. (Response Brief at 39-42). However, a review of the transcript of that hearing indicates that the court found that Malibu Media's second amended complaint was insufficient to comply with the court's order. "Mr. Lipscomb, you filed an amended complaint, but you only list one Defendant, contrary to my order that Mr. Roberto Roldan was not to be dismissed." (Vol. 4, A814:11-13). Herein, the Court explicitly states that the amended complaint did not comply with the court's order. In fact, the district court had to construct a remedy to make Malibu Media compliant with its order, "I'm going to accept your amended complaint as an amendment to the complaint so that both the son and the father are Defendants." Vol. 4, A818:4-6;

see also Vol. 4, Doc. 90 – Pg 2. The court's remedy was not requested by Malibu Media but crafted by the court *sua sponte*.

Malibu Media argues that the order did not require it to plead that Roberto infringed and that by simply maintaining Roberto in the caption, it was maintaining Roberto as a "nominal defendant," which it argues technically complied with the court's order. As it did in the court below, Malibu Media misuses the term "nominal defendant." Roberto was not and could not be a "nominal defendant" because he did not have any funds, assets, or property belonging to Angel Roldan. A nominal defendant, also known as a "relief defendant," "is a concept that has arisen in case law involving government agencies seeking an extension of claims against wrongdoers to in rem relief against wrongfully taken or ill-gotten assets." *In re Mouttet*, 493 B.R. 640, 657-58 (Bankr. S.D. Fla. 2013) (citation omitted).

The "paradigmatic" nominal defendant is a "trustee, agent, or depository." *S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (citation omitted). A nominal defendant is made "part of a suit only as the holder of assets that must be recovered in order to afford complete relief." *Id.* at 1293 (citation omitted). A person may be named a nominal defendant only where he "(1) has received ill-gotten funds, and (2) does not have a legitimate claim to those funds." *Id.*

To explain its "nominal defendant" theory, Malibu Media cites to *Career Network, Inc. v. Wot Servs., Ltd.*, No. 6:10-CV-1826-ORL-31,

2011 WL 397906, at *1 (M.D. Fla. Feb. 3, 2011), which is actually very illustrative as to this issue in the instant case. Response Brief at 39. In *Career Network*, an Internet defamation case, the plaintiffs wished to amend their complaint to "substitute" an individual named David Raynard for Stadler as a Defendant because they determined that Raynard, not Stadler, was the person posting under a certain Internet screen name. 2011 WL 397906, *2. Similarly, here, Malibu wished to amend its complaint to "substitute" Angel Roldan for Roberto because it surmised that Angel, not Roberto, was the person connected to a relevant IP address (Doc. 53). In *Career Network*, this mistaken identity argument was — just like here — exactly why the movant reasoned that Stadler should qualify as a "nominal defendant." In this very analogous scenario, Judge Presnell concluded that "Stadler would not qualify as a nominal defendant," and explained: "As things now stand, the Plaintiffs cannot assert a viable claim against him. However, he was sued because the Plaintiffs sought to recover damages from him. His role in this case is not like that of, for example, the disinterested stakeholder in a garnishment action." *Id*. Like Stadler, Roberto was sued because Malibu Media sought to recover damages from him. He is not a disinterested stakeholder or any sort of holder of assets. He is not a nominal defendant, nor can he be.

Naming someone as party in the caption but not in the body of the complaint1 is not the same thing as making him a "nominal defendant." Even nominal defendants must be included in the body of

the complaint, as the whole reason to include them is to obtain equitable relief against them (usually to obtain the assets they are holding).

Based upon a review of the full explanation of a nominal defendant in *Career Network*, Roberto did not meet the test. He was not a depositary or stakeholder and entering final judgment in his absence would not be unfair to Malibu Media, since Malibu Media agreed that the evidence corroborates that Roberto did not commit the infringement. Vol 4., A815:13-19. Therefore, Malibu Media clearly violated the court order and should have been sanctioned. *See Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 692 (11th Cir. 2010) (holding that plaintiffs' claims were so frivolous that the district court necessarily abused its discretion when it denied sanctions under Rule 11).

Next, Malibu Media argues that compliance with the court order would have violated Rule 11 and Florida's bar rules. However, the court apparently did not find any merit in this argument as evidenced by its order constructing a remedy that forced Malibu Media to continue its allegations of infringement against Roberto by construing the Second Amended Complaint as a supplement to the First Amended Complaint. Vol. 4, Doc. 90 – Pg 2.

Lastly, Malibu Media alleges that maintaining Roberto as a nominal defendant evinces a good-faith effort to comply with the court's order, justifying a finding of no contempt. However, Malibu

Media's attempts to convince the court that it maintained Roberto as a nominal defendant, when case law clearly demonstrates he does not fit the definition, evinces the opposite: bad faith.

The transcript from the hearing on Roberto's motion for sanctions demonstrates that the court did not find Malibu Media complied with its order requiring it to not drop Roberto as a party. Rather, the court had to construct a remedy of making the second amended complaint a supplement to the first amended complaint in order to make Malibu Media compliant with its order. Having found that Malibu Media's Second Amended Complaint did not comply with its order, the Court abused its discretion in failing to issue sanctions requested by Roberto.

VII. The court abused its discretion in refusing to reopen the case and dismiss Roberto with prejudice

Malibu Media argues that there was absolutely no reason for the District Court to reopen the case and dismiss him with prejudice, because "Roberto Roldan was never determined to be innocent, nor was his testimony ever found to be true." Response Brief at 42. However, Malibu Media misstates the burden of proof. It is well established that the party initiating a civil action has the burden of proof. *See, e.g., McCormick on Evidence,* Vol. 2, CA. 36 § 337 (1999). "Initially, the burden of production is with the plaintiff; if the plaintiff does not meet its burden of production, it has also failed to make out its prima facie case, and thus loses." 3 Patry on Copyright

§ 9:36. The burden of proof has never been on Roberto to prove his innocence. As argued by Roberto in his Motion for Clarification or in the Alternative Motion for Final Judgment of Dismissal with Prejudice,

> Because Malibu Media concededly did not have enough evidence to find Roberto liable for the claims it had raised against him — and because it clearly did not have enough evidence — its claims against Roberto should be dismissed with prejudice, on the merits, and Roberto should be declared prevailing party, thereby enabling him to file a motion for costs and attorney's fees.

Vol. 4, Doc. 116 – Pg 12.

In a case where Malibu Media never came forward with affirmative evidence demonstrating Roberto's culpability for infringement and even stated the evidence corroborated Roberto's innocence, the district court had a duty to render a judgment on the merits. The district court's refusal to reopen the case to do so was an abuse of discretion.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation pursuant to Rule 32(a)(7)(B), Federal Rules of Civil Procedure, because it contains 6175 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I certify that this brief complies with the typespace requirements of Rule 32(a)(5) and the requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface, Size 12 Courier New, which is 10 points per inch. This brief has been prepared using Microsoft Word for Mac 2010, Version 14.5.3.

Attorney for Appellant:

Cynthia Conlin, P.A.
1643 Hillcrest Street
Orlando, Florida 32803-4809
Tel. 405-965-5519
Fax 405-545-4395
www.conlinpa.com

/s/ Cynthia Conlin, Esq.
[X] CYNTHIA CONLIN, ESQ.
Florida Bar No. 47012
Cynthia@cynthiaconlin.com
[ ] JENNIFER DAWN REED, ESQ.
Florida Bar No. 104986
Jennifer@cynthiaconlin.com
Secondary Email for Service:
Jeff@cynthiaconlin.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **August 18, 2016** a true and complete copy of the foregoing brief was served onto M. KEITH LIPSCOMB, ESQ., EMILIE KENNEDY, ESQ., DANIEL SHATZ, ESQ., JASON COOPER, ESQ., and JESSICA FERNANDEZ, ESQ., Attorneys for Appellee, via email at Klipscomb@lebfirm.com, Ekenedy@lebfirm.com, Dshatz@lebfirm.com, Jcooper@lebfirm.com, Jfernandez@lebfirm.com, and Copyright@lebfirm.com.

Attorney for Appellant:

Cynthia Conlin, P.A.
1643 Hillcrest Street
Orlando, Florida 32803-4809
Tel. 405-965-5519
Fax 405-545-4395
www.conlinpa.com

/s/ Cynthia Conlin, Esq.
[X] CYNTHIA CONLIN, ESQ.
Florida Bar No. 47012
Cynthia@cynthiaconlin.com
[ ] JENNIFER DAWN REED, ESQ.
Florida Bar No. 104986
Jennifer@cynthiaconlin.com
Secondary Email for Service:
Jeff@cynthiaconlin.com