Case No. 16-11767

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MALIBU MEDIA, LLC

Plaintiff-Appellee,

v.

ROBERTO ROLDAN

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

APPELLEE'S RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), counsel for Appellee Malibu Media, LLC 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 this matter, 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:

1. Conlin, Esq. Cynthia, Attorney for Defendant/Appellant
2. Cynthia Conlin P.A. Attorneys for Defendant/Appellant
3. Field, Collette, Owner of Malibu Media, LLC
4. Kennedy Esq., Emilie, Attorney for Plaintiff/Appellee
5. Malibu Media, LLC, Plaintiff/Appellee
6. Moody, the Honorable James S., Presiding District Judge
7. Pillar Law Group, APLC Attorneys for Plaintiff/Appellee
8. Reed Esq., Jennifer, Attorney for Defendant/Appellant
9. Roldan, Roberto, Defendant/Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1, Appellee, Malibu Media, LLC, has neither a parent corporation nor a publically held corporation that owns more than 10% of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff believes the briefs and the record adequately present the factual and legal arguments raised in this case and, therefore, does not request an oral argument. Plaintiff will, of course, participate in any oral argument the Court believes will aid in its adjudication of this matter.

STATEMENT OF ISSUES

1) Whether Roberto waived the ability to raise the issues of his dismissal without prejudice and the District Court's denial of his Motion for Summary Judgment because he failed to object during the District Court's hearing on the issues.
2) Whether the District Court properly exercised its discretion in deferring ruling on Defendant's Motion for Summary Judgment until after ruling on Plaintiff's Motion to Substitute.
3) Whether the District Court properly exercised its discretion in granting in part Plaintiff's Motion to Substitute Defendants and allowing Plaintiff to add Defendant Angel Roldan.
4) Whether the District Court properly exercised its discretion in dismissing Defendant Roberto Roldan without prejudice and without any conditions requiring Plaintiff to pay his costs or fees.
5) Whether the District Court properly exercised its discretion in finding Plaintiff did not violate its Order and therefore should not be held in contempt.
6) Whether the District Court properly exercised its discretion in refusing to reopen the case.

STATEMENT OF THE CASE

1. Malibu is Being Damaged by BitTorrent Copyright Infringement

According to GQ Magazine, Malibu produces "perhaps the world's most sophisticated cinema erotica." Doc. 21, Pg. 3. To do so, it spends millions of dollars a year producing content, and millions more each year to run its business. *Id*. Malibu cannot compete against free copies of its works. *Id*. So, on June 10, 2013, Malibu became the first Plaintiff to ever try a BitTorrent copyright infringement case. *Id.* at 4. The "Bellwether" case ended with final judgments in Plaintiff's favor against all three defendants. *Id.* "The evidence . . . Malibu presented was persuasive that it had suffered real damages . . . [from] BitTorrent infringement." *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 2013 WL 3038025, *8 (E.D. Pa. June 18, 2013). Each month, approximately 80,000 U.S. residents use BitTorrent to steal Malibu's movies. *Id*. at 2.

2. Malibu Makes Substantially All of Its Money Through Subscription Sales

Malibu distributes its product through a subscription based website, www.x-art.com. Doc. 3-2. It makes the *overwhelming* majority of its revenue and profit from subscription sales. *Id.* Its litigation efforts are aimed at deterring infringement and obtaining reasonable compensation *from infringers*. *Id.* at 3. Malibu has no desire to settle with innocent subscribers. *Id.* Courts notice: "moreover, the Court has personally observed Plaintiff's willingness to settle

and/or dismiss cases without payment of *any damages* where the defendant has come forward with exculpatory evidence." *Malibu Media, LLC v. John Doe*, Civil Action No. 13-CV-00307, Doc. 36, at p. 5, (D. Colo. 2013) (emphasis in the original). "I emphasize that Malibu is not what has been referred to in the media and legal publications, and in the internet blogosphere, as a 'copyright troll'." *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 2013 WL 3038025, *1 (E.D. Pa. 2013). Further, "many internet blogs commenting on this and related cases ignore the rights of copyright owners to sue for infringement, and inappropriately belittle efforts of copyright owners to seek injunctions and damages." *Id*.

3. Plaintiff's Movies Were Repeatedly Infringed at Defendant's Parent's Home

Plaintiff's investigator obtained evidence establishing that an individual used the IP address 96.58.134.12 to illegally download and distribute forty (40) of Plaintiff's copyrighted works beginning on August 18, 2013 and continuing until November 7, 2013. Doc. 1-2, *see also* Doc. 21, P. 3. During the same time period, Plaintiff also detected that 2,500 other third-party copyrighted works, including movies, television shows, music, and software, were similarly pirated ("Plaintiff's Additional Evidence"). Doc. 44, P. 1.

On November 27, 2013, Plaintiff thus filed a copyright infringement action naming the John Doe subscriber assigned IP address 96.58.134.12 [Doc. 1], and, in order to obtain the John Doe's identifying information, obtained leave of court on

December 9, 2013 to serve a third party subpoena on Bright House Networks ("Bright House"), the internet service provider overseeing the infringing IP address Doc. 44.

Bright House correlated the infringing IP address to Angel and identified Angel as the subscriber of the IP address 96.58.134.12 during the period of recorded infringement. *Id*. Plaintiff promptly commenced an investigation and discovered that Angel had a son, Roberto. *Id.* at P. 2. Roberto, through social media, expressed interests in music, movie and TV shows. *Id*. These very same interests directly correlated to the files downloaded on Plaintiff's Additional Evidence. *Id*. And because LexisNexis's Accurint database identified Roberto as residing at Angel's house until January of 2014 (i.e., after the infringement ended), Plaintiff established a reasonable prima facie basis for believing that Roberto was the most likely infringer. *Id*. On or about April 3, 2014, Plaintiff thus amended its complaint to name Roberto as the defendant. Doc. 8.

4. Roberto Filed a Frivolous and Vexatious 281-page motion to dismiss

Roberto's defense strategy began with a "Motion to Dismiss Action with Motion to Strike Inadmissible Evidence from Complaint with Incorporated Memorandum of Law." Doc. 16. Although the motion included a sentence stating that "[Roberto] did not actually reside in the home where the Internet connection existed for the subject IP address" [Doc. 16], the motion did not corroborate or

further discuss this highly relevant issue. Instead, and in a desperate hope to enflame the Court and discredit, shame, or embarrass Plaintiff, the motion focused on four incorrect assertions: (1) "allegations pertaining to an IP address are not enough to identify an infringing individual"; (2) "Malibu Media's case is based on unlawfully obtained information which is inadmissible as evidence"; (3) Plaintiff has a contingent fee relationship with a witness; and (4) Plaintiff engages in private investigation without a license. *Id*. Roberto did not substantiate these erroneous factual allegations or otherwise articulate why they could ever warrant dismissing or striking Plaintiff's complaint. Rather than refer to rules of evidence, address the applicable legal standards of Rules 12(b) and (f), focus on relevant issues, or set forth any coherent legal argument, Roberto "supported" his motion by filing over 250 pages of irrelevant material. Doc. 16-1–16-27. Incredibly, Roberto did not cite to the overwhelming majority of the exhibits, underscoring their sheer randomness and irrelevancy. Indeed, it appears that Roberto filed 250 pages of exhibits for the sole purpose of distracting and disparaging Plaintiff. Plaintiff spent scores of hours trying to understand these documents' relevancy. Ultimately, this Court denied the motion, ruling that "Defendant has not established grounds for dismissal." Doc. 25.

5. Roberto Admitted He is a BitTorrent User

Roberto admitted in his interrogatories that he is a BitTorrent user and has used BitTorrent ever since he was in high school. Doc. 43-1, P. 3. He also stated that he used the BitTorrent client uTorrent to obtain files through the BitTorrent protocol, the same BitTorrent client that was used in this case to infringe Plaintiff's movies. *Id*.

6. Roberto Purposefully Withheld Exculpatory Evidence

Plaintiff took seriously Roberto's barely-mentioned and uncorroborated "I didn't live there" defense. Accordingly, Plaintiff requested further information, and on June 28, 2014, Roberto provided a lease and utility bills for a residence 40 minutes away from his parents' home. Doc. 67, P. 4. Since Roberto lived only a short 40-minute drive from his parents' house and admitted to BitTorrent use and overlapping interests with the recorded infringements, Plaintiff suspected that Roberto had been living at both his parents' house and his nearby college apartment. *Id.*

On August 6, 2014, to get to the bottom of Roberto's defense, Plaintiff requested production of all documents that would indicate that Roberto was "not at [his] residence or within the control of [his] IP address at or around the time of infringement." Doc. 54-2. Unbeknownst to Malibu, Roberto possessed a substantial amount of such exculpatory evidence including: (1) Roberto's USF

class schedule; (2) Roberto's work stubs; (3) Roberto's bank records; (4) Roberto's class syllabi and school transcripts; and (5) two notarized affidavits from Roberto's friends executed in August of 2014 (collectively, "Roberto's Exculpatory Evidence"). Doc. 37-1:15. However, instead of providing Malibu with this information, when Roberto's discovery responses came due, Roberto requested an after-the-fact extension of time to respond. Doc. 67. P. 5. And even with the extension, Roberto failed to timely respond by the multiple enlarged discovery dates. Indeed, Malibu did not receive a response to its document requests until late November 2014, and then Roberto objected to each and every one of Plaintiff's requests. Doc. 67-1.

7. Plaintiff First Received Evidence that Roberto Was Not the Infringer In January 2015

For reasons not apparent (and perhaps in a bad faith attempt to increase his fees and protract the litigation), Roberto sat on documents tending to prove he was not the infringer for months, and only first produced same on January 19, 2015, in connection with his motion for summary judgment (which, incidentally, had been drafted months prior). Doc. 36.

These documents included an affidavit from his roommate, and friend, a class schedule, work stubs, bank records, and transcripts - all of which call into question whether Roberto had access to the infringing IP address during the time period of infringement. *See e.g.* Doc. 37. Prior to January 15, 2015, the only

documents Defendant produced relating to his residence during the time of infringement were his lease and utilities bill on November 21, 2014. *See* Doc. 37-2-3. Significantly, although Defendant's affidavit was signed on September 5, 2014, Defendant withheld all of this evidence until January 15, 2015 – and then filed his motion for summary judgment four days later. Doc. 37, P. 8 (Defendant's affidavit notarized September 5th, 2014 but not filed until January 20, 2015).

8. Defendant's Counsel Made It Clear to Plaintiff She Was After Fees

Upon receiving evidence that called into question whether Roberto was the infringer, Plaintiff immediately tried to limit discovery to avoid unnecessary expense. Doc. 44. Roberto's counsel, however, indicated that she would continue to increase her fees even further and would not stop working on this case unless paid off; she expressly told undersigned that she would insist upon traveling to Germany for the purpose of deposing Plaintiff's witnesses unless Plaintiff paid her $25,000.00. *See* Doc. 43-3.

9. The District Court Found Roberto's Motion for Summary Judgment Premature

The District Court correctly withheld ruling on Roberto's Motion for Summary Judgment on the basis that "Malibu should have a fair opportunity to discover information relevant to the Motion and will delay ruling on the Motion to allow completion of discovery." *See* Doc. 45. Specifically, the District Court withheld ruling until after the discovery period ended. *Id*.

10. Plaintiff Deposed Roberto and His Parents

Plaintiff deposed Roberto and his parents, Gladys Roldan ("Gladys") and Angel, on February 17, 2015, and elicited testimony that largely corroborated Roberto's claim that he did not reside at Angel's home and did not have access to the instrumentality of infringement during the relevant period of time. Doc. 53, P. 4. The deposition testimony did not, however, refute the fact that large quantities of illegal downloading of copyrighted works, including 40 of Plaintiff's works, occurred using the IP addressed assigned to Angel from August 18, 2013 through November 7, 2013. *Id*. Moreover, the deposition testimony implicated Angel as the likely infringer, insofar as the testimony established that Angel had the means, access, and motive to commit the infringement at issue. *Id*. The deposition testimony established, inter alia, (1) that Roberto had previously used a PC desktop computer in Angel's home to utilize the µTorrent BitTorrent client—the identical client used to infringe Plaintiff's copyrights; (2) that Angel regularly utilized the PC desktop computer during the period of infringement; (3) that Angel resided in his home during the relevant period of time and was often home during the day; (4) that Angel, like Roberto, has interests such as popular TV shows, games, and music that closely correspond with Plaintiff's Additional Evidence; and (5) that, according to Angel's wife, Angel's wireless internet was password-protected throughout the period of infringement – ruling out the possibility of a neighbor. *Id*.

Consequently, although the deposition testimony largely exculpated Roberto, it by equal force implicated Roberto's father Angel. *Id*. at P. 5.

11. Plaintiff Sought Leave and Filed an Amended Complaint Against Angel Roldan

Plaintiff sought leave to substitute Roberto's father Angel as the defendant. *See* Doc. 53. This Court allowed Angel's addition, but stated it "will not permit Plaintiff to drop Roberto…." Doc. 58. The Order did not require Plaintiff to allege Roberto infringed. *Id*. On March 5, 2015, Plaintiff filed a Second Amended Complaint, retaining Roberto as a nominal defendant. Doc. 61. On March 24, 2015, Roberto's attorney filed an Answer and Counterclaim, falsely alleging Plaintiff is "continuing to litigate against Roberto without sufficient facts…." Doc. 68. Since Plaintiff did not allege Roberto infringed, the Counterclaim's unjustified allegations violated Rule 11. On March 26, 2015, counsel conferred, and Roberto's attorney withdrew the Counterclaim, representing it was "filed in error." Doc. 72. Amazingly, two days later, Roberto's attorney requested Plaintiff file a Third Amended Complaint alleging Roberto infringed. Everyone acknowledged doing so would violate Rule 11. Roberto's attorney expressed frustration at being unable to plot a course toward becoming the prevailing party. Roberto then moved for Plaintiff to be held in civil contempt for not pleading a cause of infringement against Roberto. *See* Doc. 75. Plaintiff filed a Motion for Sanctions against

Roberto's attorney for vexatiously multiplying the proceedings under 28 U.S.C. 1927. *See* Doc. 67.

12. The Court Held a Hearing and Dismissed Roberto Without Prejudice, Roberto's Counsel Did Not Object

On April 24, 2015 the District Court held a hearing on Roberto's Motion for an Order to Show Cause and Plaintiff's Motion for Sanctions. Doc. 89. At the hearing, the Court found Roberto was still a party to the action. Doc. 90. And, the Court explained its reasoning for its Order requiring Roberto to remain a party. Specifically, the Court stated "the reason I wanted Roberto Roldan left in is until you took the deposition of Angel Roldan, as far as I know, he could always point the finger back at the son, right?" Appellant's Appendix, Transcript at 815. The District Court also stated, "[i]f 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." *Id*. at 818. Later in the hearing, the District Court asked Plaintiff whether it wished to stipulate to dismissing Roberto and Plaintiff stated that it did, conditioned on Roberto's testimony being truthful and the dismissal being without prejudice. *Id*. at 825. Roberto's counsel did not object. *Id*. The District Court then entered an Order dismissing Roberto Roldan as a party to the action without prejudice; denying as moot Defendant's Motion for an Order to Show Cause and Defendant's Motion for Summary Judgment; and taking Plaintiff's Motion for Sanctions under advisement. *See* Doc. 90.

13. Plaintiff and Angel Roldan Settled the Claims

On January 21, 2016 Plaintiff settled its claims against Angel Roldan and a Notice of Settlement was filed. Doc. 114. The Court entered a 60 day order of dismissal and found all pending motions moot. Doc. 115.

14. Roberto Filed a Motion for Clarification and/or to Reopen the Case

On March 21, 2016 Roberto filed a Motion for Clarification and/or to Reopen the Case to allow Roberto to be dismissed with prejudice. Doc. 116. The District Court clarified that Roberto was dismissed without prejudice and properly denied reopening the case. Doc. 117.

SUMMARY OF THE ARGUMENT

Plaintiff Malibu Media brought this action against Defendant Roberto Roldan because an IP address tracing to Roberto's parents' home was used to infringe 40 of Plaintiff's movies over the course of several months. Plaintiff sued Roberto because it had evidence that the infringer was also downloading through BitTorrent popular movies, music and TV shows that were identical to movies, music and TV shows that Roberto publicly admitted to liking on social media. And, public databases listed Roberto as still residing at his parent's residence.

Plaintiff's allegations were not far off the mark. Indeed, Roberto admitted to using BitTorrent – and in fact used the very same BitTorrent client that was used to infringe Plaintiff's works. However, after months of filing frivolous motions,

stalling, and creating delays in discovery, Roberto produced documents that supported his defense that he was not at his parent's house during the time of infringement. Four days after Roberto produced this evidence, he moved for summary judgment. In his summary judgment motion, he produced an affidavit prepared and signed months earlier – showcasing that he and his counsel deliberately withheld exculpatory evidence from Plaintiff throughout the course of discovery.

The District Court properly withheld ruling on Roberto's Motion for Summary Judgment and allowed Plaintiff to depose Roberto and his parents. The depositions revealed that Roberto had installed BitTorrent on the family computer in his parents' home and Roberto's father, Angel Roldan, likely used it to infringe Plaintiff's movies. Realizing this, Plaintiff moved to substitute defendants. The District Court correctly granted this motion in part and allowed Plaintiff to add Angel as a defendant. Plaintiff then moved to dismiss Roberto and the District Court granted the dismissal without prejudice, conditioned on Roberto's testimony being truthful. This dismissal was well within the District Court's discretion. Roberto's attorney, present at the hearing, did not object. Roberto now appeals the District Court's ruling because it prevented him from seeking his attorney's fees. However, Roberto's failure to object during the hearing on these issues now waives his ability to raise the issues on appeal. Regardless, each of the District

Court's orders that are called into question were correctly made and not an abuse of the District Court's discretion.

ARGUMENT

A. Roberto Waived His Arguments by Failing to Object to the District Court's Dismissal Without Prejudice

"This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Cummings v. Dep't of Corr.*, 757 F.3d 1228, 1234 (11th Cir. 2014). "The reason for this prohibition is plain: as a court of appeals, we review claims of judicial error in the trial courts. If we were to regularly address questions -- particularly fact-bound issues -- that districts court never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

Prior to dismissing Roberto, the District Court held a hearing in which it heard oral argument on whether Plaintiff's Second Amended Complaint was proper and whether the parties should attend mediation. Transcript of Hearing, Appellant's Appendix 824. At the hearing, all parties' counsel were present. *Id.* And, the District Court specifically stated to Roberto's counsel: "Well, now that you understand that [Roberto is] a party and may or may not be dismissed, you agree that mediation can include any claims you have, right?" *Id.* at A824:3-5.

The District Court further stated to Roberto's counsel: "[y]our client is still a party as to the existing complaint." *Id*. at A824:15-16. Then the District Court said to Roberto's counsel: "[Plaintiff's counsel] is going to decide whether or not to voluntarily dismiss [Roberto]." *Id*. at A824:24-25. At no point did Roberto's counsel object. Instead, Roberto's counsel remained silent throughout the entire proceeding. After the district court entered its order dismissing Roberto, Roberto's counsel simply said, "Thank you, your Honor." *Id*. at A825:9.

After the hearing, Roberto's counsel sought clarification of whether the District Court dismissed Roberto with or without prejudice, and asked that it construe the dismissal as a dismissal with prejudice. Doc. 93. Roberto sought clarification of the District Court's written order that stated "Plaintiff's counsel stipulated on the record that it agrees to dismiss Roberto Roldan without prejudice conditioned upon his testimony being truthful. Therefore, the Court dismisses Roberto Roldan as a party to this action." Doc. 90.

Ruling on Roberto's Motion for Clarification the District Court properly denied Roberto's delayed request for a dismissal with prejudice. Specifically, the Court stated:

> In his Motion for Order to Show Cause Roberto Roldan argued that Plaintiff dropped him as a defendant in contravention of this Court's order. Counsel for all parties participated in the hearing. On April 27, 2015, this Court entered an order which: (1) dismissed Roberto Roldan as a party to this action based on the Plaintiff's counsel's agreement to dismiss him without prejudice on the

> condition that his testimony proves truthful, (2) denied Roberto Roldan's motion for summary judgment as moot, and (3) took Plaintiff's Motion for Sanctions under advisement (the "Order"). **Ms. Conlin made no objections to the Court's ruling at the time of the hearing.**

Doc. 98 at *2 (emphasis added).

Because Roberto's counsel made no objections to the Court's ruling at the time of the hearing, Roberto has waived his right to raise these issues on appeal. "Too often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them. We cannot allow [a party] to argue a different case from the case she presented to the district court." *Irving v. Mazda Motor Corp*., 136 F.3d 764, 769 (11th Cir. 1998).

1. Roberto Waived the Issue of Whether the District Court Should Rule on His Summary Judgment Motion

Roberto argues the District Court "refused" to grant his summary judgment motion. This argument conspicuously ignores that the District Court correctly denied Defendant's motion as moot because it dismissed Defendant. Doc. 90. At no point in any of his filings did Roberto ask the Court to rule on his summary judgment motion in lieu of being dismissed. And, as set forth above, at the hearing in which Plaintiff stipulated to Roberto's dismissal, Roberto's counsel remained silent. *See* Hearing Transcript Appellate Index A811-A828; *see also* Doc. 98.

After failing to object at the hearing, Roberto filed his Motion for Clarification but still did not object to being dismissed – only whether the

dismissal was with or without prejudice. Doc. 93. At no point did Defendant ask to be reinstated in the case or for the Court to hear the issue of his summary judgment motion. For these reasons, Roberto has waived the issue on appeal.

2. Roberto Waived the Issue of Whether the District Court Correctly Dismissed Him Without Prejudice and Without Conditions

Just as Roberto failed to object to the denial of his summary judgment motion, Roberto waived the ability to object to his dismissal without prejudice. Roberto's counsel's silence at the hearing acquiesced consent. "It simply will not do for counsel to preserve an error for appellate review without giving the trial court a reasonable opportunity to render a decision upon the same objection. Thus, we conclude that when a defendant has had an opportunity to object …and fails to do so his consent …may be implied." *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir. 1987).

Roberto attempted to cure this waiver with a Motion for Clarification disguised as a Motion for Reconsideration [Doc. 93]. However, Motions for Reconsideration do not preserve a waived argument that was not raised at the proper time. *See Garcia v. United States (in Re Garcia)*, No. 01-945-CIV-GOLD, 2002 U.S. Dist. LEXIS 23962, at *2 (S.D. Fla. Oct. 31, 2002) ("In order to demonstrate clear error, defendants must do more than simply restate their previous arguments, and any arguments defendants failed to raise in the earlier motion will be deemed waived"); *Zodiac Grp. Inc. v. Axis Surplus Ins. Co.*, No.

12-80299-Civ-SCOLA, 2013 U.S. Dist. LEXIS 12017, at *3 (S.D. Fla. Jan. 29, 2013) ("any arguments the party failed to raise in the earlier motion will be deemed waived … A motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made"); *Frye v. Ulrich GmbH & Co. KG*, No. 3:08-cv-158-MEF, 2010 U.S. Dist. LEXIS 81611, at *6 (M.D. Ala. Aug. 11, 2010) ("[Defendant] was required to raise its objection to personal jurisdiction in the same pre-answer motion as its challenge to service of process. It failed to do so, and as a result, it cannot raise its objection to personal jurisdiction now. The Court will deny the motion to reconsider.")

Defendant's failure to object at the hearing when Plaintiff moved to dismiss without prejudice constitutes waiver and therefore Defendant's dismissal is not properly raised on appeal.

B. The District Court Properly Denied Roberto's Summary Judgment Motion as Moot

1. The District Court Properly Held Roberto's Summary Judgment Motion In Abeyance

"The law in this circuit is clear: the party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion." *Jones v. City of Columbus*, 120 F.3d 248, 253 (11th Cir. 1997). "It may thus be an abuse of discretion to rule on a motion for

summary judgment while denying a motion to defer ruling pending the completion of outstanding discovery." *Synovus Bank v. Vessel ACCU V*, No. 11-0116-WS-B, 2012 U.S. Dist. LEXIS 21994, at *3 (S.D. Ala. Feb. 22, 2012). "This court has often noted that summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery… If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials." *Snook v. Tr. Co. of Ga. Bank, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988).

Here, the District Court properly withheld ruling on Roberto's Motion for Summary Judgment because the documents, which Roberto relied upon in his motion, were only provided to Malibu four days prior to the filing of the motion. Malibu had not had the opportunity to take discovery regarding the documents. As set forth above, it would have been an abuse of discretion to **not** allow Malibu the opportunity for discovery. "Malibu should have a fair opportunity to discover information relevant to the Motion and will delay ruling on the Motion to allow completion of discovery." Doc. 45.

2. The District Court Properly Ruled on Plaintiff's Motion to Amend Prior to Ruling on Defendant's Motion for Summary Judgment

"Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion." *Chudasama v. Mazda*

MotorCorp., 123 F.3d 1353, 1367 (11th Cir. 1997). "[W]e recently held that it was an abuse of discretion for a district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend." *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988). "Given the policy of liberality behind Rule 15(a), it is apparent that when a motion to amend is not even considered, much less not granted, an abuse of discretion has occurred." *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987).

In this case, the District Court correctly considered and ruled on Plaintiff's Motion to Substitute a Party Defendant and amend the complaint prior to ruling on Defendant's Motion for Summary Judgment. Roberto relies on *Oravec v. Sunny Isles Luxury Ventures L.C.*, 469 F. Supp. 2d 1148, 1169-70 (S.D. Fla. 2006) for the notion that "if the Court is convinced that no reasonable jury could return a verdict in [Plaintiff's] favor, the Court has a duty to grant summary judgment." *See* Appellant Brief at *27-28 (citing *Oravec v. Sunny Isles Luxury Ventures L.C.*, 469 F. Supp. 2d 1148, 1169-70 (S.D. Fla. 2006)). However, here, the District Court was not convinced that Roberto was innocent or telling the truth. Indeed, as set forth above, Roberto's dismissal was "conditioned upon his testimony being truthful." Doc. 90. Moreover, in *Oravec*, the District Court first ruled on a pending Motion to Amend prior to deciding summary judgment. *Oravec,* 469 F. Supp. At 1164 (S.D. Fla. 2006) ("the Court denied leave to amend because the

proposed amendment was based on anticipated copyrights which had yet to issue.") Procedurally, the District Court ruled in the same order as in *Oravec*, with the difference being that the District Court properly found merit in Malibu's Motion to Substitute Defendants. After properly granting Plaintiff's Motion to Substitute, Defendant's Motion became moot. Doc. 90. The District Court's rulings were not an abuse of discretion.

C. The District Court Correctly Substituted Angel Roldan as a Defendant for Roberto Roldan

Under Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only with … the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). It is reviewed under the court's abuse of discretion. *Thomason v. One West Bank*, 2014 U.S. App. LEXIS 23565, *9 (11th Cir. 2014); *Moore v. Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) ("The decision as to whether justice requires the amendment is committed to the district court's sound discretion.") (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Cranberg v. Consumers Union of U.S., Inc.*, 756 F.2d 382, 392 (5th Cir.), *cert. denied*, 474 U.S. 850 (1985)).

Similarly, Rule 21, which governs amending parties to an action, is construed permissively. *See Pretty Punch Shoppettes, Inc. v. Creative Wonders, Inc.*, 750 F. Supp. 487, 493 (M.D. Fla. 1990) ("[B]oth Rules 15 and 21 are to be

interpreted liberally under the Federal Rules of Civil Procedure."). It is also reviewed under the abuse of discretion standard, *Vickers v. Georgia*, 567 Fed. Appx. 744, 748 (11th Cir. 2014) (citing *Estate of Amergi ex rel. Amergi v. Palestinian Auth*., 611 F.3d 1350, 1356 (11th Cir. 2010)).

"As we have observed, the abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make." *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001). The abuse of discretion standard, however, "[does] not require district courts . . . read the minds of litigants to determine if information justifying an amendment exists*." Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994). Indeed, the permissive nature of Rule 15 is favored. *Id.*; *Taitt v. IRS*, 2004 U.S. Dist. LEXIS 17292, *3 (E.D. Mich. 2004).

Here, the District Court carefully considered Plaintiff's Motion and Defendant's opposition.

> Plaintiff asserts that the deposition testimony demonstrates that Roberto Roldan downloaded BitTorrent software to a PC desktop computer that Angel Roldan regularly used during the period of the alleged infringing downloads. Further, Angel Roldan's wireless internet router was password-protected throughout the period of the alleged infringement. Therefore, Plaintiff asserts that Angel Roldan is the likely infringer and would like to substitute him as the party defendant.

Doc. 58.

"[T]he Court agrees with Plaintiff that that the subject matter of the action remains identical and much of the Plaintiff's completed discovery efforts apply to its potential causes of action against Angel Roldan. The Court therefore will permit Plaintiff to amend its complaint to add Angel Roldan as a defendant to this case." *Id*.

Because the claims Plaintiff brought against Roberto will be identical to the claims Plaintiff seeks to bring against Angel, Plaintiff had "just terms" for obtaining leave to substitute Angel in place of Roberto. Proceeding in this fashion would best comport with Rule 1's mandate that controversies be decided justly, speedily, and inexpensively. *Accord, e.g., Archer*, 998 F. Supp.2d at 1274–75 ("[S]ubstitut[ion] of parties is the wiser answer to the problem of expediting trials 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."); *McGuffie v. Mead Corp*., 998 F. Supp. 2d 1232, 1247 (N.D. Ala. 2014) (same). Indeed, requiring Plaintiff to dismiss Roberto and then file an entirely new case against Angel would have needlessly create additional administrate work for the Court since the new case would likely relate back. *See, e.g*., Middle District of Florida L.R. 1.04 ("Whenever a case, once docketed and assigned, is terminated by any means and is thereafter refiled without substantial change in issues or parties, it

shall be assigned, or reassigned if need be, to the judge to whom the original case was assigned."). Moreover, requiring a dismissal and refiling would also unnecessarily cause the parties to duplicate efforts and incur repetitive costs. To be sure, much of the discovery had already taken by Plaintiff and many of the resolved and pending motions in the current lawsuit were wholly applicable to a new suit against Angel. Doc. 149. The District Court correctly allowed Plaintiff to substitute Angel because otherwise it would needlessly force the parties to start anew, raise the same issues and claims, and the same sort of motions and arguments will be re-filed and readdressed. Roberto, by and through his counsel, has already interfered with the administration of justice by unnecessarily withholding exculpatory evidence for several months. The District Court's ruling was in the interests of justice and again, not an abuse of discretion.

1. Roberto Was Not Prejudiced By the Addition of Angel Roldan as a Party

"Prejudice exists if the party to be dismissed is indispensable and the presence of the party provided the other side with a tactical advantage in the litigation." *Luxor Agentes Autonomos De Investimientos, Ltda. v. Intertransfers, Inc.*, 2016 U.S. App. LEXIS 979, *5 (11th Cir. 2016). Here, Roberto was not prejudiced by the addition of Angel as a party. Importantly, as set forth above, the District Court did not even dismiss Roberto when it added Angel as a defendant.

Roberto was not dismissed until the April 24th hearing on Plaintiff's request – and as set forth above – Roberto's counsel did not object at the time.

D. The District Court Correctly Dismissed Roberto Without Prejudice

"[I]n 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." *McCants v. Ford Motor Co*., 781 F.2d 855, 856-57 (11th Cir. 1986). "The court's power to dismiss a cause is an inherent aspect of its authority to enforce its orders and insure prompt disposition of law suits. The standard of review on appeal from the dismissal of a lawsuit is abuse of discretion." *Dynes v. Army Air Force Exch. Serv*., 720 F.2d 1495, 1499 (11th Cir. 1983). "Because the abuse-of-discretion standard allows a 'range of choice' for the district court, if no clear error of judgment has been demonstrated, we must affirm." *Marfut v. City of N. Port*, No. 09-13790, 2010 U.S. App. LEXIS 12365, at *6-7 (11th Cir. June 16, 2010).

"Rule 41(a) expressly contemplates situations in which the district court may, in its discretion, dismiss an action without prejudice even after the defendant has moved for summary judgment. Indeed, a voluntary dismissal by leave of court under Rule 41(a)(2) after a summary judgment motion is filed is deemed to be without prejudice unless otherwise ordered." *Pontenberg v. Bos. Sci. Corp.*, 252 F.3d 1253, 1258 (11th Cir. 2001).

The Eleventh Circuit has ruled that a defendant in a peer-to-peer copyright infringement action should not receive prevailing party fees if the copyright holder "acted in an objectively reasonable manner and in a manner that served the purposes of the Copyright Act: compensation and deterrence." *Malibu Media, LLC v. Pelizzo*, No. 14-11795, D.C. Docket No. 1:12-cv-22768-PAS (11th Cir. Mar. 26, 2015). In this case, after Roberto filed a frivolous Motion to Dismiss, admitted to using BitTorrent, unreasonably withheld exculpatory evidence, and then refused to attend mediation, the District Court chose to dismiss Roberto without prejudice (and to take under advisement his attorney's vexatious litigiousness). *See* CM/ECF 90. Other courts have ruled similarly in like circumstances. *See, e.g., Malibu Media, LLC v. Shekoski*, No. 2:13-cv-12217-VAR-RSW, CM/ECF 33 (E.D. Mich. May, 15, 2015) (in a similar case and under similar circumstances, dismissing a defendant without prejudice, over defendant's objections and claims of prejudice).

1. Roberto Was Not Prejudiced by a Dismissal Without Prejudice

Roberto did not suffer any plain legal prejudice by a dismissal without prejudice. The Eleventh Circuit has found "legal prejudice" in the context of a dismissal without prejudice, "because it was 'uncertain, as a matter of future court decision, whether [the plaintiff would] be allowed to bring the second suit.'" *Versa Prods. v. Home Depot, USA, Inc.*, 387 F.3d 1325, 1328 (11th Cir. 2004) citing *Le*

Compte v. Mr. Chip, Inc., 528 F.2d 601, 605 (5th Cir. 1976). "Plain legal prejudice' is, for example, more clearly shown where the defendant has filed a counterclaim prior to the time that plaintiff has moved to dismiss, a circumstance which is specifically covered by the language of the Rule." *Tyco Laboratories, Inc. v. Koppers Co*., 627 F.2d 54, 1980 U.S. App. LEXIS 15246, 30 Fed. R. Serv. 2d (Callaghan) 261 (7th Cir. Wis. 1980). "We do not think that the discovery has been so extensive, however, as to be tantamount to the "plain legal prejudice" which will preclude dismissal." *Id*.

In *Pontenberg v. Bos. Sci. Corp*., 252 F.3d 1253, 1256 (11th Cir. 2001) the Eleventh Circuit found no legal prejudice even when a defendant had "had invested considerable resources, financial and otherwise, in defending the action, including by preparing the then pending summary judgment motion." *Id*. "[N]either of these circumstances, 'alone or together, conclusively or per se establishes plain legal prejudice requiring the denial of a motion to dismiss." *Fretwell v. Kan. City Life Ins. Co*., 643 F. Supp. 2d 1317, 1328 (N.D. Fla. 2009). Moreover, the Eleventh Circuit has found no plain legal prejudice when "there was no evidence in the record of bad faith on the part of plaintiff's counsel in failing to move to amend the complaint and assert the new claim in a timely manner." *McCants v. Ford Motor Co.*, 781 F.2d 855, 859 (11th Cir. 1986) ("According to the defendant, the great costs it has incurred in defending this suit so far, in

combination with the loss of the defense, together require us to find an abuse of discretion in the district court's decision to grant a dismissal without prejudice. We reject this argument.")

Here, Plaintiff moved to substitute defendants as soon as it was able to take Angel Roldan's deposition and it learned that Roberto may not have been the infringer. Had Roberto provided Plaintiff with its key exculpatory evidence earlier, Plaintiff would have dismissed him earlier. Regardless, at all times Plaintiff acted in good faith. And, Roberto's discovery in this action had been relatively limited. Roberto never deposed any individual, and largely spent most of the discovery process **objecting** to Plaintiff's attempts to receive documents collaborating his denial. For these reasons, Robert suffered no legal prejudice from the dismissal. And, Roberto does not have to worry about future actions because Plaintiff settled its claims with Angel. Doc. 114.

2. The District Court Correctly Dismissed Defendant Conditioned Only On His Testimony Being Truthful

"[I]t is no bar to a voluntary dismissal that the plaintiff may obtain some tactical advantage over the defendant in future litigation." *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986). As set forth above, the District Court correctly dismissed Defendant with the only condition being that his testimony is truthful. Because of Defendant's actions in this case, Defendant's conduct did not warrant a dismissal with fees and costs.

E. The District Court Correctly Found that Malibu Media Did Not Violate a Court Order and Therefore There Was No Contempt

1. Malibu Media Did Not Violate an Order

The District Court's Order prohibited Plaintiff from dropping Roberto as a party. Significantly, it did not require Plaintiff plead Roberto infringed. Doc. 58 at p. 2. The District Court found that Plaintiff did not violate this order because it considered Roberto a party after Plaintiff filed its Second Amended Complaint. Doc. 90.

Roberto argues his nominal party status is disallowed under Eleventh Circuit jurisprudence. *See* Doc. 75 at p. 3–6. This notion is incorrect. The Eleventh Circuit readily permits nominal parties, typically defined as "a party who, having some interest in the subject matter of a lawsuit, will not be affected by any judgment but is nonetheless joined [or retained] in the lawsuit…." *Career Network, Inc. v. Wot Servs., Ltd*., No. 6:10-cv-1826, 2011 WL 397906, *2 (M.D. Fla. Feb. 3, 2011); *see also, e.g., Seminole Tribe of Fla. v. Fla. Dept. of Revenue*, 750 F.3d 1238, 1243 (11th Cir. 2014) (holding individual officers may be nominal defendants in a suit against a state); *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing*, 427 F.2d 325, 327 (5th Cir. 1970) (holding formal parties may remain nominal parties even though not implicated in the remaining claims); *In re Wiand*, No. 8:10-cv-71, 2011 WL 4530203, *3, n.8 (M.D. Fla. Sept. 29, 2011) (observing

that a nominal defendant with no interest in the subject of litigation, may still be included as a party to aid in the adjudication).

Nothing in this Court's Order clearly, definitely, or unambiguously directs Plaintiff to plead Roberto infringed. "Parties cannot be held in contempt unless they have violated a clear, definite, and unambiguous" directive. *Doe, 1-13 ex rel. Sr. 1-13 v. Bush*, 261 F.3d 1037, 1059 (11th Cir. 2001); *see, e.g., Riccard v. Prudential Ins. Co.*, 307 F. 3d 1277, 1297 (11th Cir. 2002) ("The injunction prohibited Riccard from filing … against 'Prudential, its affiliates, or subsidiaries.' The attorneys who have represented Prudential in its struggles with Riccard are not Prudential, nor are they its affiliates or subsidiaries. The injunction said nothing about Prudential's attorneys. For these reasons, we conclude that it did not clearly and unambiguously prohibit Riccard from filing with bar associations ethical complaints against those attorneys."); *Schiff v. Grenough*, No. 8:11-mc-45, 2012 WL 5493646, *4 (M.D. Fla. Oct. 22, 2012) (declining to find civil contempt where the court's directive lent itself to different interpretations so was neither clear nor unambiguous).

2. Compliance With the Court Order In Good Faith Would Have Been Impossible

"[T]here can be no contempt finding where compliance with an order would require a party to violate the law." *In re Marriage of Kneitz*, 793 N.E.2d 988, 992–93 (Ill. App. Ct. 2003) (discussing this obvious but rarely implicated rule of law);

cf. Brown v. Crawford County, 960 F.2d 1002, 1008 (11th Cir. 1992) (holding district courts are prohibited from enacting local rules requiring a party to circumvent the Federal Rules of Civil Procedure). If this Court's Order required Plaintiff to plead Roberto infringed—which it did not—the Order would have impermissibly required Plaintiff to violate Rule 11 and Florida's bar rules. *See* Fed. R. Civ. P. 11(b)(3); Fla. R. Prof. Cond. 4–3.1. Consequently, Plaintiff's noncompliance would be excused. *See In Re Managed Care*, 756 F.3d 1222, 1234 (11th Cir. 2014) ("[T]he law is clear that invalidity of the underlying order is a defense to a civil contempt citation"); *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978) (same).

3. The Court Correctly Found There Was No Contempt

A party should not be found in civil contempt unless he "knowingly and willfully violated a definite and specific court order." *In re Dorado Marine, Inc.*, 343 B.R. 711, 713 (M.D. Fla. 2006) (emphasis supplied). "Context is often important to meaning, and so it is here." *Riccard v. Prudential Ins. Co. of Am.*, 307 F.3d 1277, 1297 (11th Cir. 2002). "Conduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance." *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990). Here, Plaintiff retained Roberto as a nominal defendant in good faith to comply with this Court's Order. Assuming arguendo the

District Court required Plaintiff to allege Roberto infringed, Plaintiff's good faith precludes a finding of willfulness or the imposition of contempt sanctions. *See, e.g., Delta Sigma Theta Sorority, Inc. v. Bivins*, No. 2:14-cv-147, 2015 WL 1400435, *2 (M.D. Fla. Mar. 26, 2015) ("Generally, conduct that evinces substantial but not complete compliance with a court's order may be excused in a contempt proceeding if it was made as part of a good-faith effort at compliance.").

F. The District Court Correctly Refused to Reopen the Case Against Roberto Roldan

"Courts possess discretion in determining whether to reopen a case. In addition, 'a motion to reopen is less favorably received after the court has rendered its decision, even if formal findings of fact and conclusions of law have not been made and judgment entered.'" *Aronowitz v. Home Diagnostics, Inc.*, No. 93-06999-CIV, 2010 U.S. Dist. LEXIS 58691, at *15 (S.D. Fla. June 11, 2010) (internal citations omitted). Here, the District Court dismissed Roberto conditioned on his testimony being truthful. Later in the case, Plaintiff settled its claims with Angel Roldan. Roberto Roldan was never determined to be innocent, nor was his testimony ever found to be true. There was absolutely no reason for the District Court to reopen the case and dismiss him with prejudice. For these reasons, the District Court did not abuse its discretion in denying Roberto's motion.

CONCLUSION

For the foregoing reasons, Malibu respectfully requests this Court affirm the District Court's dismissal without prejudice of Roberto Roldan, without condition to pay his fees and costs.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I electronically filed the Appellee's Brief with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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