



On or around March 29, 2011, Keith Popham (“Popham”) received a letter at his address of 1527 Doyle Rd. SE, Cedartown, GA 30125 (“Georgia Address”) that was intended for “Robin Popham.” Doc. 7, Exhibit C. Robin Mason, whose former married name is Robin Popham, has not lived at the Georgia Property for several years. Docs. 7, Exhibit A. Therefore, Popham forwarded the letter to Mason. Doc. 7, Exhibit C. The letter notified Mason of the Prior Action, that her personal information was being subpoenaed, and that she could challenge the subpoena within a certain period of time. Doc. 7, Exhibit C.

Mason and Popham jointly retained Chintella on or around March 30, 2011 to, *inter alia*, inform Plaintiff that neither of them committed the infringement and whether there was anything that they could do – other than paying a settlement – to prevent Plaintiff from filing a second lawsuit in Georgia. Exhibit A. On April 7, 2011, Mason notified Plaintiff that she was willing to allow Plaintiff to inspect any computer(s) that she owned at the time of the alleged infringement. Exhibit A. Plaintiff did not respond. Exhibit A.

On April 19, 2011, Mason sent Plaintiff an affidavit stating under oath that her correct name was Robin Mason – not Robin Popham – and that her ex-husband Keith Popham lived at the Georgia Address at the time of the alleged infringement, not her. Doc. 7, Exhibit C; Doc. 8, Exhibit D. The affidavit also stated that she

knows nothing about a movie titled *Teen Anal Nightmare 2* among other facts. Id. Popham sent a similar affidavit on the same day in order to help out his ex-wife but Plaintiff did not respond to either affidavit. Doc. 8, Exhibit D. Plaintiff did not dismiss John Doe #868 from the Prior Lawsuit approximately two months later. Prior Action, Doc. 128.

Plaintiff commenced this action on August 25, 2011 against “Robin Popham,” alleging that she lives at the Georgia Address; ¶ 2, downloaded and uploaded *Teen Anal Nightmare 2* using the bittorrent protocol, ¶ 26, and “continues” to commit copyright infringement. ¶ 20. Chintella received notice of this action the following day<sup>1</sup> and sent a courtesy e-mail to Plaintiff’s current counsel (“Morgan”), stating that Plaintiff’s prior counsel (“DGW”) should have given her important documents and/or correspondence regarding Popham and Mason (such as the affidavits) but no response was received.

Chintella notified Popham and Mason and they authorized him to provide Morgan with copies of their prior correspondence with DGW and any other facts; for example, to give Plaintiff another opportunity to inspect any computer(s) or to provide any other exonerating evidence that Plaintiff might want. Exhibit A. On September 22, 2011, Chintella sent Morgan a copy of the correspondence sent to

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<sup>1</sup> Chintella receives daily notices of any copyright case filed in Georgia from a service provided by a third party via the Internet.

DGW and reiterated the offer to permit Plaintiff to inspect Mason and/or Popham's computer(s). Exhibit A. In response, Plaintiff stated that it would only communicate regarding settlement because Chintella was not "counsel of record." Exhibit A. The settlement offer was \$5,000, one-sided, and non-negotiable. Exhibit A.

Plaintiff refused to explain why it would only discuss settlement, and specifically why being "counsel of record" was a prerequisite to discussing the case overall, except settlement. Exhibit A. Plaintiff did not respond when Chintella assured it that he was authorized to discuss the case with it.<sup>2</sup> Exhibit A. Chintella notified Popham and Mason of this response (or lack thereof) and that they would need to pay a larger retainer to litigate the entire case before he could do any more work. Exhibit A.

Before further retaining Chintella, in a handwritten letter dated September 27, 2011, Mason notified Plaintiff – yet again – that she has not lived at the Georgia Address for years. Doc. 7, Exhibit A. Nevertheless, Plaintiff applied for a clerk's entry of default on November 15, 2011 certifying that it served "Robin Popham" at the Georgia Address. Doc. 6.

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<sup>2</sup> See generally Georgia Rule of Professional Conduct 1.2(c): "A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives in informed consent."

On or around November 18, 2011, Popham and Mason retained Chintella again to fully litigate this action. Doc. 7. The entry of default was set aside on December 5, 2011, Doc. 13, and Mason filed her Answer on December 18, 2011, which, yet again, notified Plaintiff of Mason's correct name and that she did not live at the Georgia Address, etc..

On December 16, 2011, Mason asked Plaintiff why it was pursuing her since she has not lived at the Georgia Address. Exhibit A. Plaintiff's only response was to make another settlement offer for \$2,000 with the other terms remaining non-negotiable. Exhibit A.

On December 19, 2011, the parties conducted their Rule 26 conference. Before doing any work on the Joint Report, Mason asked Plaintiff again why it was pursuing her? Exhibit A. Plaintiff's only response was that it has conducted a reasonable inquiry into the facts of its case. Exhibit A.

On December 20, 2011, Mason told Plaintiff stating that she would agree to amend the Complaint to list Popham as the defendant since he at least lived at the Georgia Address. Exhibit A. Plaintiff did not respond to this suggestion, but simply stated that its settlement offer was non-negotiable and that it would not "waste further time or resources corresponding with you except where we need to file something with the court before the end of the year." Exhibit A.

On December 22, 2011, Plaintiff filed the Joint Preliminary Report and Discovery Plan (“Joint Report”). Doc. 16. Plaintiff continued to assert in the Joint Report that “Robin Popham” was the defendant’s proper name<sup>3</sup> and that she currently lives at the Georgia Address. Joint Report, page 6, Answer to Question 5(a), (c). Plaintiff also continued to allege that “Robin Popham” downloaded *Teen Anal Nightmare 2* and that she “continues” to do so. Joint Report, pages 2-3. Mason informed Plaintiff once again that that she not live at the Georgia Address and that her ex-husband was living there, etc.. Defendant’s Answer to Question 1.

On January 11, 2012, Mason identified DGW as an interested party in this action even though Plaintiff did not previously failed to do so. Docs. 2 & 18.

On January 18, 2011, Plaintiff increased its settlement demand to \$2,500 and still insisted on non-negotiable terms. Exhibit A.

On January 27, 2012, Plaintiff served Mason with interrogatories and requests for production. Docs. 20 & 21.

On February 9, 2012, Mason sent Plaintiff a copy of her marriage certificate as evidence that her name was not Robin Popham, a title insurance document showing that she owned property in Alabama at the time of the alleged

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<sup>3</sup> The parties must inform the Court of a party’s correct name. See Question 5(d).

infringement, and a bank statement mailed to her residence in Alabama during that time period. Exhibit A.

On February 27, 2012, Mason responded to Plaintiff's interrogatories and requests for production. Doc. 24.

On February 28, 2012, the parties conducted a phone conference and during which Plaintiff stated that it was unwilling to withdraw its case against Mason and that it intended to depose Mason. Exhibit A.

On March 6, 2012, Mason served Plaintiff with interrogatories and requests for production. Doc. 27.

On March 8, 2012, the parties conducted another telephone conference and Mason again asked why Plaintiff continued to pursue her. Exhibit A. Plaintiff stated that it was suing Mason for contributory copyright infringement based on the theory that Popham or another third person committed a "direct" infringement using her Internet account. Exhibit A. This was the first time that Plaintiff mentioned this theory of contributory infringement.<sup>4</sup> Nothing in the Joint Report mentions anything about a third person being liable for "direct" infringement. In fact, Plaintiff states that it did not intend to amend its pleadings. Joint Report, page

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<sup>4</sup> Mason's position was that the only "contributory" infringement being alleged was due to how the bittorrent protocol simultaneously uploads and downloads data.

7, Answer to Question # 6. During this conference, Plaintiff also stated that it still wanted supplemental responses to its discovery. Exhibit A.

As a direct result of this conversation: (1) Mason began working on a motion for judgment on the pleadings that would challenge the sufficiency of this arguably un-plead theory of contributory infringement; (2) began/continued to work on supplemental responses to Plaintiff's discovery; and (3) continued to work on discovery to serve on Plaintiff and all other aspects of the case.

On March 20, 2012, Plaintiff suddenly offered to settle for confidentiality only (no payment of money), although the remaining terms of the agreement were still non-negotiable. Exhibit A.

Two days later, Mason served Plaintiff with requests for admissions that she had been working on. Docs. 25 & 28.

On March 29 2012, Plaintiff threatened to "call the judge" if Mason did not accept the settlement offer. Exhibit A. Mason offered to settle the case for an amount less than the total legal work performed on the case thus far. Exhibit A. Plaintiff responded by stating that: "Your demand appears to be nothing short of extortion and a violation of the rules of professional conduct. We are contemplating what action to take." Exhibit A. Mason also reiterated that she

would provide supplemental responses to Plaintiff's discovery upon request.

Exhibit A.

Plaintiff did not respond whether it still wanted supplemental responses, but instead stated that it would call and schedule a phone conference with the Court if it did not have "settlement by Monday:" "We look forward to the settlement agreement or we will go to the judge." Exhibit A.

On March 29, 2012, Plaintiff also stated that it was not working on responses to Mason's discovery and would not provide responses. Exhibit A.

On April 2, 2012, instead of attempting to schedule a conference with the Court, Plaintiff filed a motion to dismiss without prejudice, with each side responsible for its costs and expenses. Doc. 29.

### **Argument and Citation to Authority**

Ordinarily, a dismissal pursuant to Rule 41(a)(2) should be granted unless the defendant will suffer "legal prejudice" other than the prospect of a subsequent lawsuit. McCants v. Ford Motor Co., Inc., 781 F.2d 855, 856-57 (11th Cir. 1986). See also Fisher v. Puerto Rico Marine Mgmt., Inc., 940 F.2d 1502, 1503 (11th Cir. 1991) (stating that a dismissal *without prejudice* is not a matter of right.). When deciding whether to dismiss a case *with or without* prejudice a Court can consider any evidence of "bad faith." See Carrier Corp. v. G.W. Martin, Inc., CIV 108-

CV-1003-CC, 2009 WL 1649587 (N.D. Ga. May 27, 2009) (Cooper, J.). Failing to conduct a “reasonable inquiry” into the facts of one’s case can sometimes rise to the level of bad faith. Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998). Cf. Bus. Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 548 (1991) (Rule 11 imposes an “affirmative duty to conduct a reasonable inquiry in to the facts”). A person does not conduct a reasonable inquiry when they exhibit a “deliberate indifference to obvious facts.” Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1294 (11th Cir. 2002). Failing to conduct even a “minimal investigation” is insufficient. Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996); Jones v. Int’l Riding Helmets, Ltd., 145 F.R.D. 120, 124 (N.D. Ga. 1992) (Evans, J.) aff’d, 49 F.3d 692 (11th Cir. 1995); Graf v. Inglett & Stubbs Int’l, Ltd., 1:10-CV-01407-JOF, 2010 WL 4810240 (N.D. Ga. Nov. 19, 2010) (Forrester, J.). A Court can also consider how much time was available for investigation or whether factual development required discovery, Jones at 695, and how sophisticated a company is regarding copyright infringement. Bus. Guides at 552.

If a Court allows a plaintiff to dismiss their case, it should “weigh the relevant equities and do justice between the parties in each case, imposing such costs and attaching such conditions to the dismissal as are deemed appropriate.”

McCants at 857. A Court should only impose conditions that “alleviate the harm caused to the defendant.” LeCompte v. Mr. Chip, Inc., 528 F.2d 601, 604-05 (5th Cir. 1976);<sup>5</sup> Spencer v. Moore Bus. Forms, Inc., 87 F.R.D. 118, 119 (N.D. Ga. 1980) (Shoob, J.) (holding that the “equities of the plaintiff are not a subject for consideration under the rule”); Fisher at 1503 (“Rule 41(a)(2) exists chiefly for protection of defendants”).

When imposing conditions a Court should consider the “countless elements, traditionally called upon to underpin our concepts of reasonableness and fairness.” Am. Cyanamid Co. v. McGhee, 317 F.2d 295, 298 (5th Cir. 1963) (specifically holding that a Court can consider the number of prior dismissals). Ordinarily, a dismissal *without prejudice* should not be granted “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,” including reasonable attorneys’ fees. McCants at 860; Parrish v. Ford Motor Co., 299 F. App’x 856, 861 (11th Cir. 2008) (remanding with instructions to award costs and expenses in accordance with McCants); LeCompte at 603 (stating that the “usual conditions attached to a voluntary dismissal involve . . . paying costs or expenses.”). This Court has explained that the twin purposes of Rule 41(a)(2) are

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<sup>5</sup> In Bonner v. Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) the Court adopted as precedent all Fifth Circuit decisions existing on September 30, 1981.

to “fully compensate the defendant for reasonable expenses incurred before dismissal and to deter vexatious litigation.” Bishop v. W. Am. Ins. Co., 95 F.R.D. 494, 495-96, & fn. 4 (N.D. Ga. 1982) (Murphy, J.).

Before ruling on a Rule 41(a)(2) motion, a Court should conduct a hearing so that “the views and claims of the defendant may be asserted.” Diamond v. United States, 267 F.2d 23, 25 (5th Cir. 1959). A Court should also state its findings of fact and conclusions of law. Iraola & CIA, S.A. v. Kimberly-Clark Corp., 232 F.3d 854, 861-62 (11th Cir. 2000).

### **Argument and Citation to Authority**

Mason does not argue that a dismissal *per se* would cause her “legal prejudice.” Rather, she argues that any dismissal should be conditioned upon Plaintiff paying most if not all of her costs, expenses, and reasonable attorneys’ fees.

#### **A. Conditioned Upon Payment of Costs, Expenses, and Attorneys’ Fees**

Plaintiff should not be allowed to dismiss its case except upon the condition that it pays most if not all of Mason’s costs, expenses, and attorneys’ fees. In McCants at 860, the Court remanded the case with instructions for the trial court to “reimburse the defendant for at least a portion of his expenses of litigation.” The Court reasoned that the defendant had “obviously” incurred considerable litigation

expense because “discovery had proceeded and that interrogatories had been served, objected to, and answered to *some extent*. Depositions had been taken.” Id at 860 (emphasis added). See also Parrish at 861; LeCompte at 603.

In this case, Mason has incurred considerable legal expense and should be awarded most if not all of her costs, expenses, and attorneys’ fees. Like the Defendant in McCants, discovery has proceeded to some extent. Although no depositions have been taken, Mason was forced to fight against these allegations first in the Prior Action and then in response to the entry of default even though Plaintiff served “Robin Popham” at the Georgia Address after knowing that she did not live there. Moreover, Mason was forced to conduct discovery notwithstanding her willingness to consent to an amendment of the Complaint to list Popham or another third party. Since Mason was only given the option of a non-negotiable settlement, her options were to essentially to pay Plaintiff or else face long protracted litigation. She was forced to respond to Plaintiff’s discovery and was served her own discovery as well.<sup>6</sup>

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<sup>6</sup> To the extent that Plaintiff argues that the Court should not award costs, expenses, and attorneys’ fees because Mason’s responses to discovery were insufficient, Plaintiff objects to the introduction of this evidence since Plaintiff has not filed a motion to compel. See Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 552 (5th Cir. 1980) (“An objection to an interrogatory is not passed on by a court unless a motion to compel . . . is made.”) (overruled on other grounds).

Overall, Plaintiff stated that it would not withdraw the lawsuit against Mason and that it intended to take her deposition despite her repeated efforts to allow Plaintiff to inspect any computer(s), even when the Prior Action was still pending in D.C.

She and her ex-husband provided Plaintiff with affidavits over a year ago but Plaintiff did not respond to any of these alternatives to costly litigation. Rather, it commenced this action against an incorrectly named defendant, stated that it did not intend to amend its pleadings, and subsequently arguing an un-plead theory of contributory infringement resulting in more time and expense incurred by Mason. Based on these facts as well as those stated above, it would be within the Court's discretion to require Plaintiff to pay most if not all of her costs, expenses, and reasonable attorneys' fees.

Any award should not be limited to what was unnecessary in this litigation.

It is true that in McCants at 860 the Court stated:

. . . expenses awarded might be limited to those incurred in discovering information and researching and pressing legal arguments that will not be useful in the later suit.

However, immediately preceding this statement the Court qualified its statement to apply when **“a subsequent similar suit between the parties is contemplated.”**

In this case, it is extremely unlikely that Plaintiff will re-file its case against Mason

since it received exculpatory evidence from Mason and Popham over a year ago considering that it now fighting to dismiss its lawsuit without paying any costs or expenses whatsoever. In any event, the Plaintiff's intentions are something that the Court can determine at a hearing on whether to allow a dismissal. Diamond at 25.

Lastly, since further litigation against Mason would likely expose Plaintiff to sanctions (if not already), it would be within the Court's discretion to dismiss this case **with prejudice** and require Plaintiff to pay for most if not all of Mason's costs, expenses, and attorneys' fees. See e.g. Brooks v. State Bd. of Elections, 173 F.R.D. 547, 550 (S.D. Ga. 1997) (Edenfield, J.).

#### **B. Evidence of Bad Faith**

An condition imposing costs, expenses, and attorneys' fees would be appropriate especially considering Plaintiff's failure to conduct a reasonable inquiry into its case. See Worldwide at 1255; Jones at 124; Graf at \*5. In Worldwide, the Eleventh Circuit found that Rule 11 sanctions were appropriate because the plaintiff did not even conduct a "minimal investigation:"

Had Bass contacted Delta's president, Dr. Peter Gerone, or any other official at Delta, he would have learned that Gerone was already on record \*1255 as having told Block that McGreal's letters would have no effect on Delta's relationship with Worldwide, that Gerone considered the reports to be "ancient history," and that Gerone saw Worldwide as a legitimate importer with

whom he intended to continue the same business relationship.

Id at 1254. The Court in Jones reached the same result:

The most minimal investigation, such as checking International's certificate of incorporation, would have revealed the 1986 incorporation date. *A more extensive investigation might have been needed* to discover possible relationships between International and a previously incorporated manufacturer. Plaintiff's counsel, however, has provided this court with no evidence that he even attempted to determine whether Mr. Plastino's allegations of no relationship were correct.

**Notwithstanding the information provided Plaintiffs by the retailer and the “confidential informant” implicating International, Plaintiffs' counsel was on notice that International might not have been in existence at the time the helmet worn by Jessica was manufactured.** Under Rule 11, *therefore, counsel bore the responsibility of conducting a reasonable inquiry as to whether International was a proper party to the suit.* Plaintiffs' counsel failed to conduct such a reasonable inquiry, rendering Rule 11 sanctions not only appropriate, but mandatory.

(Emphasis added). Finally, the Court in Graf v. Inglett & Stubbs Int'l, Ltd., 1:10-CV-01407-JOF, 2010 WL 4810240, \*5 (N.D. Ga. Nov. 19, 2010) (Forrester, J.)

reached the same result:

The court recognizes . . . that Defendant's counsel was diligent in informing Plaintiffs' counsel of the complete set of facts and set out quite clearly and correctly the impact the prior proceedings would have on the instant complaint. *Defendant's counsel . . . provided Plaintiffs' counsel with numerous opportunities to review the basis*

*for Plaintiffs' complaint and reassess. Plaintiffs' counsel obviously did not do this.* Thus, at least after Defendant's counsel sent its Rule 11 "safe harbor" letter, Plaintiffs' counsel was aware of the problems with the complaint.

(emphasis added). Compare In re Mroz, 65 F.3d 1567, 1573-74 (11th Cir. 1995)

("There was nothing known to Glatter at that time he signed the complaint to lead him to believe that the factual allegations were frivolous.") (emphasis added).

As discussed above, Plaintiff has ample time and opportunity to investigate the facts of its case but failed to conduct even a minimal investigation. Despite the affidavits and other correspondence sent to Plaintiff both during the Prior Action and this litigation, Plaintiff brought this actions against "Robin Popham," alleging that she downloaded the pornographic movie titled *Teen Anal Nightmare 2* and continues to do so, warranting in injunction. Plaintiff continued to rely on these faulty allegations in the Joint Report, even stating that it did not intend to amend its pleadings and that the parties' names were correct. It was not only until after forcing Mason through approximately a year of litigation that it now seeks to dismiss this action.

Since Mason and Popham were willing to provide any exculpatory information without the compulsion of legal process, Plaintiff could have simply "contacted" Mason and/or Popham to seek more information rather than refusing to respond altogether. See Worldwide at 1254. Another alternative would have

been do simply check the property records to see if Mason even owned property in Georgia or the marriage records to see if she was still married to Popham – i.e., to investigate her “possible relationship[]” with Popham, who, after all, stated under oath that he lived at the Georgia Property. Jones at 124. In short, there were a multiple ways that Plaintiff could have investigated its case as early as when the Prior Lawsuit was pending in D.C. Rather, Plaintiff ignored Mason’s communications demanded thousands of dollars in settlement money on non-negotiable terms, and threatened to contact the Court if a settlement was not accepted.

Even if the Court does not find that Plaintiff acted in “bad faith,” the above facts are at least “evidence” of bad faith and it would be more than within the Court’s discretion to dismiss this action **with prejudice** and to require Plaintiff to pay Mason’s costs, expenses, and reasonable attorneys’ fees.

### **C. Other Factors**

The Court should also consider that Plaintiff is a “sophisticated corporate entity that has been prosecuting copyright infringement actions. Bus. Guides at 933. Plaintiff’s case is part of an “outbreak of similar litigation” across the country. Raw Films, Inc. v. Does 1-32, 1:11-CV-2939-TWT, 2011 WL 6840590 (N.D. Ga. Dec. 29, 2011) (Thrash, J.). Thus far, Plaintiff has sued ten defendants

all on the same date. See case numbers 1:11-cv-02851 (N.D.); 3:11-cv-00118 (M.D.); 2:11-cv-00226 (N.D.). As shown by Plaintiff's behavior in this case, one of the dangers of these types of cases is "extracting settlement amounts that exceed the value of the Work and the litigation." Raw Films at footnote 5. Plaintiff has continually attempted to extract thousands of dollars from Mason under a threat of costly litigation.

An award of costs, expenses, and reasonable attorneys' fees is supported by the fact that a related action – the Prior Lawsuit – was previously dismissed. See ASX Inv. Corp. v. Newton, 183 F.3d 1265, 1268 (11th Cir. 1999):

It does not follow that there is no limit at all on the number of [Rule 41(a)(2)] dismissals.... While there is no precise digital answer, the mere repetition of such occurrence may, in and of itself, become so oppressively prejudicial as to require the sound conclusion that even once more is too much. This along with countless elements, traditionally called upon to underpin our concepts of reasonableness and fairness, goes into the process of sound discretion of the trial court, as 41(a)(2) says, "as the court deems proper."

### **Conclusion**

It would be more than within the Court's discretion to only permit Plaintiff to dismiss this action upon the condition that it pay for most if not all of Mason's costs, expenses, and reasonable attorneys' fees.

This 16 day of April, 2012:

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404-579-9668  
No Fax Number  
[bchintell@gmail.com](mailto:bchintell@gmail.com)

**BLAIR CHINTELLA**

*/s/ Blair Chintella*  
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