IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH R. DOLEN aka Author "Mabel White"	§	Civil Action No.: **8:09-cv-02120-SDM-AEP**
Plaintiff,	§	
	§	
v.	§	
	§	**Judge: Steven D. Merryday**
JULIE RYALS aka THE DESIGN SHOPPE, & JANE DOE LIBEL CYBERSTALKER	§	
	§	**JURY DEMANDED**
Defendants.	§	

DEFENDANTS' MOTION FOR ATTORNEY'S FEES PURSUANT TO LOCAL RULE 4.18; F.R.C.P, RULES 54(d)(2) AND 68; 17 U.S.C. § 505 AND 15 USC § 1117(a).

Defendants/Counterclaim Plaintiffs Mary Joanne Kidd (hereafter referred to as "Joanne Kidd"), Jeffery A. Kidd ("Jeffery Kidd") and Mary Harvey ("Mary Harvey)(jointly referred to herein as "Kidds") and Julie Ryals ("Ryals") (referred to together with the Kidds as "Defendants") by and through their undersigned attorneys moves this Court pursuant to Local Rule 4.18, and F.R.C.P. Rules 54(d)(2) and 68 under the authority of 28 U.S.C. §1927, 17 U.S.C. § 505 and 15 USC § 1117(a), to sanction Plaintiff Deborah R. Dolen aka Mabel White (hereafter "Plaintiff" or "Dolen") and award the Defendants prevailing party attorney's fees against Plaintiff Deborah R. Dolen, and as grounds therefore would show as follows:

FACTS IN SUPPORT OF THIS MOTION

Plaintiff brought many claims in this suit under various legal theories, including primarily claims under the Lanham Act (15 USC §§ 1114 *et seq*) and the Copyright Act (17 U.S.C. § 101 *et seq)*, as well as state law business disparagement claims.[1]

Plaintiff filed this suit in Houston, Texas and then filed for bankruptcy in Houston, asserting that any counterclaims would be barred. The bankruptcy court explained to Ms. Dolen that claim based on pre-bankruptcy filing could be barred, but claims based on her post-bankruptcy filing activity would not be barred. The District Court in Houston likewise explained this distinction to Dolen before *sua sponte* transferring this case to this Court.

Plaintiff took no discovery until ordered by this Court to ask Ms. Ryals a single interrogatory, namely who owns the website bustedscammers.com. That is the full extent of the discovery taken by Plaintiff.

As has been fully briefed in the Kidd's granted Motion for Judgment on the Pleadings (Dkt 95), Plaintiff dismissed all of her claims against the Kidds on or about June 17, 2010 by filing a Second Amended Complaint which did not list the Kidds as defendants, albeit not in compliance with Rule 41.[2] Thus it is clear that the Kidds were prevailing parties on all claims asserted against them.

Plaintiff's copyright infringement claims against Ryals was likewise dismissed on or about June 17, 2010 by the filing a Second Amended Complaint which simply dropped those claims. Thus it is clear that Ryals is the prevailing party on the Copyright claims.

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[1] The suit was originally filed in the Southern District of Texas, Houston Division, asserting Texas state law claims as well as the Lanham Act and Copyright Infringement claims. The Complaint was then amended a first time in Texas. After the case was *sua sponte* transferred to this Court, the Complaint was amended a second time and two additional attempts to amend were made. While it was not entirely clear, it appears that Plaintiff sought to either replace or augment the Texas state law claims with Florida state law claims. Because Defendants rely upon the federal statutory basis for awarding attorney's fees and costs, this distinction is of no moment but is referenced solely to insure that the basis of the claims brought by Plaintiff are fully understood.

[2] Plaintiff later attempted to add them back into the suit, but the motions for leave to amend again were denied.

All of Plaintiff's remaining claims against the other remaining Defendant, Ryals, were dismissed with prejudice at trial pursuant to F.R.C.P. Rule 50 at the close of Plaintiff's case in chief. (Dkt 164). Thus Ryals is clearly the prevailing party as to each of Plaintiff's claims against her as well.

I. Plaintiff's vexatious litigation tactics warrants The Award Of Attorney's Fees

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §1927. Moreover, the Court's inherent powers allow the award of attorney's fees. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991) (court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, even though the American rule prohibits fee-shifting in most cases). Moreover, when a litigant is manifestly unreasonable in assessing its claims, while continuing to assert those claims in court, an inference of bad faith, whether grounded in wrongful intent, recklessness, or gross negligence, is proper. *See Eltech Systems Corp. v. PPG Indus., Inc*, 903 F.2d, 805, 811 (Fed. Cir. 1990).

A. History of the Case

A review of the history of this case shows just how regularly Plaintiff sought to multiply the proceedings in this case is.

The case started normally, with Dolen's filing of the suit. However, nothing after that point was usual.

Dolen initially filed for bankruptcy and asserted that any counterclaims were barred before they were even brought, listing of the Defendants and their counsel as creditors even

though they had made no claim that Dolen owed them anything prior to the filing of the bankruptcy, and Dolen seeking sanctions against Defendants for filing answers despite her claim that doing so would violate her automatic bankruptcy stay.

After Defendants' counsel agreed to accept service and filed Defendants' answers and counterclaims and summary judgment motions (all without getting formal service of any kind), Dolen then took great efforts to have process servers give each of the Defendants personal service late at night or early in the morning, followed by taunting emails seeking to instill fear in each of them. Thus Dolen's malicious intent was clear from the start!

Dolen additionally filed a state bar grievance against Defendants' counsel (which was summarily denied before counsel was even served with the grievance) in an effort to force him to withdraw and filed several motions to disqualify, each of which were denied. After the case was transferred to Florida, Dolen sought to have counsel for Defendants sanctioned for practicing law without a license, despite counsel having obtained permission from the Court to appear and having agreed to file a motion for admission pro hac vice if the then pending motions were not dispositive when ruled upon.

Dolen also filed multiple motions for sanctions and motions to strike in both Houston and Florida in response to most motions filed on behalf of Defendants, each of which were denied.

Dolen further filed multiple amended complaints, each of which was rambling and difficult to follow, and for which two leave of court to file were denied. Notably, in her various amended complaints, Dolen also asserted that differing defendants and non-parties had various identities and took various acts, attributing the alleged "bad acts" to different people at different times.

Moreover Dolen threatened to dismiss this suit and refile in Florida state court if the Court would allow her to and made demands varying from $5,000 to over $7 million.

In addition, as shown in part in the motion for protective order (Dkt 140), Dolen went to great lengths to try this case in the media rather than in Court.

When Defendants refused to pay her anything and insisted on trial if a settlement could not be reached, Plaintiff initially refused to cooperate with Defendants' counsel to prepare a joint pretrial order. Instead, Plaintiff filed her own version without any of Defendants' input, despite having a copy of the draft from Defendants' counsel and a request that she provide her portions so that a joint pretrial order could be prepared. See Dkt. 105, 106 and 115. Moreover, having initially agreed to try the case to the Magistrate Judge, Dolen withdrew that agreement upon Defendants' acquiescence. See Dkt 137.

In addition, Dolen has changed addresses repeatedly during the course of this litigation. Some of that was Dolen in fact moving. However, in each instance, Dolen did not provide the Court with her true address, but rather falsely alleged that she lived at what proved to be rented post office boxes. While that dishonesty might be overlooked, Dolen apparently failed to pay for the post office boxes so that on at least four occasions during this litigation, the address she at that time had of record resulted in mail being returned as undeliverable with no forwarding address provided, as shown by the various entries in the docket regarding mailings from the court being returned. To compound the problem, Dolen at various times demanded service by mail, then email, then mail again, complaining that whatever service was used was at that time unacceptable to her. In that regard, it is noted that the latest demand was for service via regular mail. Therefore, this motion will be forwarded in that fashion rather than via email.

Notably, all of these acts occurred after Dolen was expressly told by Defendants' counsel even before an answer was filed that she had sued the wrong parties and that she needed to find the right parties if she wanted to pursue her allegations. Yet she wholly failed to adduce any evidence of who had allegedly done any of the alleged acts she complained of, resulting in a dismissal at the close of her case at trial.

Simply put, none of the actions in this case were taken with an eye toward proving any of the allegations that Dolen made, but rather were apparently for the sole purpose of harassing Defendants in an effort to extort them into paying her to go away. If that isn't vexatious and unreasonably multiplying litigation, nothing is! As a result, all of Defendants attorney's fees and costs should be awarded.

B. The Eleventh Circuit test

The Eleventh Circuit has established criteria with which to assess Plaintiff's action as follows: (1) whether the Plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to a trial on the merits. *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1189 (11th Cir. 1985); *Turner v. Sungard Business Sys., Inc.*, 91 F.3d 1418, 1422 (11th Cir.1996). In this case, Plaintiff wholly failed to establish a prima facie case; each defendant made several offers of judgment (detailed further below) and made settlement offers in mediations before both the party agreed upon mediator (Mary Lau) and the Magistrate Judge; and the court dismissed the clams against the Kidds prior to trial and the claims against Ryals at the close of plaintiff's case. This case meets all of the criteria under prevailing 11th Circuit law.

Applying these criteria, the Defendants submit Plaintiff's claim is exactly the type of "burdensome litigation having no legal or factual basis" which Congress sought to prevent by allowing an award of attorneys' fees to the prevailing defendant.

II. The Copyright Act Provides for The Award Of Attorney's Fees

The Copyright Act expressly provides for the award of attorney's fees and costs to the prevailing party. 17 U.S.C. § 505. As the Fifth Circuit concluded, in copyright cases "although attorney's fees are awarded in the trial court's discretion, they are the rule rather than the exception and should be awarded routinely." *Micromanipulator Co. Inc. v. Bough*, 779 F.2d 255, 259 (5th Circuit 1985). *Fermata International Melodies v. Champions Golf Club*, 712 F. Supp. 1257, 1264 (S.D. Tex. 1989).

In this case, Dolen asserted that Ryals infringed on undisclosed copyrights. Dolen arguably attempted to drop the copyright infringement allegation on April 22, 2010, when she filed her motion for leave to file a Second Amended Complaint. Dkt. 66. However, Dolen was not granted leave to file that Second Amended Complaint. *See* order denying the motion for leave, Dkt. 72. Moreover, although the motion for leave was filed on April 22, 2010, the Second Amended Complaint was not filed at that time, making it impossible to know that the Copyright claims were being dropped. On May 4, plaintiff again sought leave to file the Second Amended Complaint. Dkt 76. In fact, as shown in the Opposition to the Motion for Leave (Dkt. 81), one of the bases for the opposition was that it was unknown what allegations were going to be added!

It was not until June 17, 2010 that the Second Amended Complaint was finally lodged (Dkt 88)[3], at which time it first became apparent that Dolen had abandoned her Copyright infringement claim. Thus it is clear that Dolen maintained her copyright claim at least until June

[3] This filing was authorized by an order on May 24, 2010, Dkt. 87.

17, 2010, despite not even having the mandatory prerequisite application for copyright registration! 17 USC § 411(a); *Reed Elsevier Inc. v. Muchnick,* 559 U.S. ___, 176 L. Ed. 2d 18, 130 S. Ct. 1237, 1243 & n.2 (2010).

Because the allegations of copyright infringement were so intertwined and undefined that it was impossible to separate them from the remainder of the claims brought by Dolen, all of the actions taken prior to the copyright claims being withdrawn, including filing an answer with the affirmative defenses that Dolen had not even sought to obtain a copyright registration as required to maintain a cause of action for copyright infringement. See Ryals Answer to Second Amended Counterclaim, ¶¶101, 107-110. Moreover, Dolen was completely unable to identify what work was allegedly copied or where the alleged copy existed!

Nevertheless, it is clear that Dolen sought to assert an ill-fated copyright claim and that Ryals prevailed on that claim when Dolen voluntarily abandoned the claim on June 17, 2010. As the prevailing party on the Copyright claim, Ryals should be awarded her reasonable attorney's fees and costs. 17 U.S.C. § 505.

III. The Lanham Act Provides for The Award Of Attorney's Fees

A. The basis for fees under the Lanham Act

The Lanham Act expressly provides that "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 USC § 1117(a).

Notably, the Lanham Act did not initially have this provision. As a result, in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719-20 (1967), decided eight years before the fee provision was added to the Lanham Act, the Supreme Court held that attorneys' fees could not be awarded in cases under the Act. Congress then "fixed" the Lanham

Act by adding 15 USC § 1117(a), but it never explained what an "exceptional" case was in the context of a Lanham Act case.

The Circuits have tried to figure it out on their own, with what Defendants will characterize as mixed results. For purposes of this motion, only the Fifth and Eleventh Circuits, where there case has been presented at the trial court level, are discussed with more particularity herein.[4]

The Fifth, and Eleventh Circuits require prevailing defendants, as well as prevailing plaintiffs, to prove that their opponent litigated in bad faith, or that the suit was a fraud. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 527-28 (5th Cir. 2002); *Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305, 1320 (11th Cir. 2001); *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1335-36 (11th Cir. 2001) (per curiam). The Fifth Circuit adds that a court considering a prevailing defendant's application for an award of attorneys' fees should "consider the merits and substance of the civil action when examining the plaintiffs' good or bad faith." *Procter & Gamble Co. v. Amway Corp.*, *supra*, 280 F.3d at 528. The Eleventh Circuit,

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[4] The Fourth, Sixth, Tenth, and D.C. Circuits apply different tests of exceptionality depending on whether it was the plaintiff or the defendant who prevailed. In those circuits, a prevailing defendant "can qualify for an award of attorney fees upon a showing of 'something less than bad faith' by the plaintiff," such as "economic coercion, groundless arguments, and failure to cite controlling law." *Retail Services Inc. v. Freebies Publishing*, 364 F.3d 535, 550 (4th Cir. 2004); *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 808-09 (D.C. Cir. 1987). In the Tenth Circuit the prevailing plaintiff has to prove that the defendant acted in bad faith, while the prevailing defendant need only show "(1) . . . lack of any foundation [of the lawsuit], (2) the plaintiff's bad faith in bringing the suit, (3) the unusually vexatious and oppressive manner in which it is prosecuted, or (4) perhaps for other reasons as well." *National Ass'n of Professional Baseball Leagues, Inc. v. Very Minor Leagues, Inc.*, 223 F.3d 1143, 1147 (10th Cir. 2000). The Sixth Circuit asks whether the plaintiff's suit was "oppressive." *Eagles, Ltd. v. American Eagle Foundation*, 356 F.3d 724, 728 (6th Cir. 2004). The Second Circuit follows the Fifth and Eleventh Circuits. The First, Third, Eighth, and Ninth Circuits, like the Second and the Eleventh, do not distinguish between prevailing plaintiffs and prevailing defendants nor do they require a showing of bad faith.

does not distinguish between prevailing plaintiffs and prevailing defendants nor does it require a showing of bad faith.

Regardless, for whatever reason (perhaps out of malice, incompetence or in an effort to punish her friend, Angela Ludke's ex (Jeff Kidd) through litigation or simply because there was no evidence even arguably supporting any of the alleged claims, Dolen simply did not bother to go out and adduce any evidence. Whatever Dolen's motivations, however, the result was the same. Dolen forced Defendants to spend hundreds of thousands of dollars in legal fees to defend themselves against what proved to be nothing more than mere threats, conjecture, and allegations. Such an act is an abuse of the legal system and the Court's resources, and is sanctionable against Dolen under the inherent powers of the Court discussed in *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991). Therefore, the Court, in its discretion, is urged to award Defendants their attorneys' fees as the prevailing party.

If Congress had wanted courts to apply an abuse of process standard in assessing attorney's fees under the Lanham Act (or under other statutes that provide for fees in "exceptional" cases, like in patent infringement cases), then it would have said so, and would have amended the Act to provide for attorney's fees where the losing party was guilty of abuse of process in suing or defending the claim. But that is not what Congress did. Instead, Congress used the term "exceptional cases", meaning "unusual" or "not typical." Congress thus provided for attorneys' fees in cases in which the losing side's prosecution or defense of the case was merely unusual or atypical when judged against ordinary or typical cases, a far lower bar than amounting to an "abuse of process."

B. This case is "unusual" and "atypical"

The review of the history of this case above under the vexatious litigation discussion shows this case is both unusual and atypical. Beyond the procedural abnormalities in this case noted above, Plaintiff consistently threatened criminal prosecution (including in the original complaint), threatened to place the domain name JulieRyals.com on a foreign server where it could not be reached and then load the website with pornographic material in order to bring ridicule and embarrassment on Ryals. Plaintiff further made it clear that she did not care who really owned bustedscammers.com or was posting on various chat room boards about Plaintiff; she was going to attribute every perceived "bad act" to Ryals and/or Mary Harvey and/or Joanne Kidd on a rotating and sometimes joint basis. Plaintiff went so far as to boast in media interview with her author persona just before trial started that she would "win the trial the old fashioned way", "with witnesses" and "without any evidence" ostensibly by giving whatever testimony she thought she needed to get a jury's sympathy.

When coupled with the vexatious litigation strategies, Plaintiff's clear ill intent to profit despite having no evidence and no way to prove Defendants did anything wrong, this is clearly an unusual and atypical case warranting an attorney's fees award under the Lanham Act provisions.

IV. **Offers of Judgment**

"At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. …If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, he offeree must pay the costs incurred after the offer was made." F.R.C.P. Rule 68 (a), (d).

On January 26, 2009, before being formally served and before even answering the original complaint, Ryals made an offer of judgment to Dolen. That offer is shown in **Exhibit A** hereto. Following Dolen's bankruptcy filing and her allegations that any liability that might flow from the offer of judgment was discharged (which Defendants deny), Ryals and the Kidds each, on July 7, 2009, served renewed and new, respectively, offers of judgment on Dolen. Those offers are shown in **Exhibits B and C** hereto.

Ryals' offer expressly included a permanent injunction against referring to Deborah Dolen or "Mabel White" on any website owned by Ryals, such injunction to be personal to Ryals and would not apply to any third party owned website hosted by Ryals or any posting on Ryals' website by any third party which references Deborah Dolen or "Mabel White". The Kidds' offer likewise included a permanent injunction against referring to Deborah Dolen or "Mabel White" on any website owned by any of the Defendants.

Dolen did not accept any of those offers. Moreover, Dolen did not obtain favorable rulings on any of her claims, much less the injunctive relief offered in the offers of judgment. Thus, her results were far worse for her than the relief offered from the start in the offers of judgment. As a result, Dolen "must pay the costs incurred" thereafter.

As shown in the attached as **Exhibit D**, counsel's declaration regarding the appropriate fees and costs, what is normally considered to be costs totals $6,922.43. However, because Dolen insisted on pursuing copyright claims until June 17, 2010, the costs are significantly higher. The copyright statute expressly notes that, even without offers of judgment, the court may award a reasonable attorney's fee …**as part of the costs**. 17 U.S.C. § 505. Thus, from January 26, 2009 through at least June 17, 2010, Defendants' attorney's fees are part of the costs in this litigation. For this time period, the attorney's fees incurred total $97,256.67. **Exhibit D,**

¶ 19. Defendants thus contend that they are entitled to add this amount to the traditionally considered costs of $6,922.43, "as part of the costs" under the applicable statute, for a total of $104,179.10.

CONCLUSION

The Defendants request this Court enter judgment against Plaintiff Deborah R. Dolen aka Mabel White for the attorneys' fees and costs incurred in this Court in defending against these meritless and claims and vexatious litigation strategy due to the Plaintiff's willful and intentional failure to comply with the requirements of the law set forth herein. The attorneys' fees of $211,056.67 and costs of $6922.43 plus and estimated $1200 incurred in preparing this motion total $218,189.10.

The Defendants further request this Court find that the Defendants are the prevailing parties under the statutory claims asserted by the Plaintiff, and award the Defendants their reasonable attorney's fees and costs incurred against Dolen under both the copyright statute and the Lanham Act.

Finally, Defendants request an award of their costs, including attorney's fees, pursuant to F.R.C.P Rule 68 and the copyright statute since Plaintiff's results were worse than was offered in their various offers of judgment.

In support of this motion, attached as **Exhibit D**, is counsel's declaration regarding the appropriate fees and costs.

Dated: May 5, 2011

Respectfully submitted,

/s/ Kent A. Rowald /s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR ATTORNEY'S FEES PURSUANT TO LOCAL RULE 4.18; F.R.C.P, RULES 54(d)(2) AND 68; 17 U.S.C. § 505 AND 15 USC § 1117(a)** has been served on Plaintiff, Deborah Dolen via email, both with and without electronic receipt requested, as she has requested at various times throughout this proceeding, on May 5, 2011.

/s/ Kent A. Rowald /s/

Kent A. Rowald