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Attorney for Defendant: Mr. Alejandro ("Alex") Galindo

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF

CALIFORNIA WESTERN DIVISION

COLUMBIA PICTURES INDUSTRIES, INC.; AMAZON CONTENT SERVICES, LLC; DISNEY ENTERPRISES, INC.; PARAMOUNT PICTURES CORPORATION; WARNER BROS. ENTERTAINMENT, INC.; UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP; UNIVERSAL TELEVISION LLC; and UNIVERSAL CONTENT PRODUCTIONS LLC,

Plaintiffs,

v.

ALEJANDRO GALINDO and DOES 1-10,

Defendants.

Case No. 2:20-cv-03129-SVW-GJSx

Judge: Hon. Stephen V. Wilson

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS. MEMORANDUM OF POINTS AND AUTHORITIES

Hearing:
June 30, 2021
Time: 2:00
Ctr: 10A

[Declaration of counsel filed concurrently]

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Defendant Alejandro Galindo ("Defendant") hereby responds and objects to Plaintiff's request for sanctions.

1. Introduction

Defendant initially responded to the complaint by asserting innocent copyright infringement. At the time the case was initiated, it was not believed there was a need to plead the 5th amendment based or make objections on this ground given Defendant's assertion of innocent infringement (not typically the kind of case a prosecutor would pursue). However, as the case matured, things were learned through discovery and investigation that forced Defendant to assert his 5th and 14th amendment rights. Specifically:

(1) Finding Defendant's blog discussing the criminal aspects of copyright came after the complaint was filed, answer filed and after initial discovery requests were sent. While it may have been published earlier (per their assertion), it was sent to my firm via a daily email legal publication known as "Lexology" (and not something found by "scouring the internet") as Plaintiff suggests, and after the lawsuit was well underway. In fact, this blog (for lack of a better word), was received in my email box on or around 6/30/2020. **See Vondran Declaration**.

(2) While Plaintiff asserts copyright can always be a crime (citing *18 U.S.C. 2319*), again, Defendant initially asserted innocent infringement, and new issues arose

subsequent to the filing of the answer and responding to discovery requests that warranted invoking of the 5th and 14th amendment. For example, repeated and ongoing allegations about destroying evidence (made a crime under California Penal Code section 135) have been made by Plaintiff at almost every step of this litigation. Defendant has a right to assert his rights to avoid incrimination on these and other grounds. This is not a litigation "tactic" it is the same thing Plaintiff would do if they were in Defendant's shoes.

(3) Subsequent to the filing of the complaint, and responding to initial discovery requests, Defendant also did more research into the persons involved in this lawsuit, in particular, Declarant Jan Van Voorn ("Declarant"). See docket #59 filed on 8/19/20 (months after the lawsuit was filed and initial discovery responses were made). Declarant claimed that Defendant was destroying evidence including email evidence and evidence with the "Telegram" application and made other allegations against Defendant as an IPTV expert. Further research uncovered that Declarant is an actually an advocate for the Motion Picture Association of America ("MPA") and vigorously advocates for criminal penalties for IPTV streamers. This was not known at the time the case was filed, or when initial pleading responses were provided. Defendant asserting a 5th amendment privilege less than 60 days after learning of this is not malicious or in bad faith.

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Instead, it became clear that Plaintiffs were looking at not only obtaining a judgment, but that they were accusing Defendant of a crime of destroying evidence. This theme has persisted through most of this litigation since.

(4) A deeper review of Declarant's activities with MPA, and further research revealed that the pursuit of criminal activity is of extreme importance to the MPA (of which Plaintiffs are members) and statements such as following can be easily find, this time, by scouring the internet:

Jan van Voorn: "I think here in the U.S., we have a really good relationship with all the law enforcement agencies, including the FBI—always very responsive and proactive. I'm very happy with that." https://www.fbi.gov/audio-repository/ftw-podcast-illicit-streaming-021419.mp3/view. **Vondran Declaration – Exh "A."**

Prior to joining the MPA, Jan had a career in Law Enforcement and led teams specialized in investigating and prosecuting organized and computer crimes. https://www.motionpictures.org/people/jan-van-voorn/ **Vondran Decl. – Exh "B**."

Defendant could not have known this early on in the case and asserting his privilege when he first knew of the need to assert it is not a discovery abuse warranting sanctions.

(5) Following the filing of the answer, and initial discovery responses, a new development also arose, further solidifying a sound legal basis for Defendant's application of constitutional rights against potential self-incrimination. Namely, the Covid-19 relief bill (passed on 12/22/20) made streaming copyrighted content

by a digital transmission service a felony subject to 10 years in prison. *See 18 U.S.C. § 2319C.* Under these circumstances, copyright defendants have good grounds for asserting the privilege, especially when the MPA is aggressively lobbying for these laws, presumably because they intend to use them with their law enforcement "relationship" to pursue criminal prosecutions. Again, this could not have been known early on and makes it even more likely that pursuing a criminal case is Plaintiff's plan.

(6) On March 11, 2021, after the complaint was filed, and after the answer filed and discovery responses provided, an article was reviewed on *TorrentFreak* (a popular piracy news site) highlighting yet another criminal prosecution for streaming copyrighted content. The Declarant Van Voorn applauded the criminal conviction noting:

"We applaud law enforcement's efforts to have this case brought to court as well as the conviction achieved today by the public prosecutor," says Jan van Voorn, Executive Vice President and Chief of Global Content Protection for the MPA, referencing the sentencing back in February." **Vondran Declaration – Exh "C**."

In another case involving a criminal prosecution in New York, Van Voorn noted:

"The MPA applauds the work of our global law enforcement partners for putting an end to the piracy operations conducted by Sparks. As the MPA continues to protect the entertainment industry and the creative works it produces, it is gratifying to see such a strong coordinated effort to dismantle one of the world's largest piracy enterprises." **Vondran Declaration – Exh "D**."

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(7) In the spirit of cooperating with discovery in good faith, to the extent possible, counsel for Defendant requested that Plaintiff's agree that this matter be limited to a civil law and that no criminal referrals would be made. Plaintiff counsel stated that would check with their client, but ultimately, would not agree to such a stipulation or to pursue the prosecutor-waiver procedure. While Plaintiff states no referral has been made, they are not willing to add "*nor will one*." This is telling.

For these reasons, it is not difficult to see the *writing on the wall*. The MPAA is looking for another conviction and they want Mr. Galindo to incriminate himself in every way possible, literally teeing up a potential case against him if they can find it. This is not only a *reasonable fear of further litigation*, but also is actually happening. Despite all this, and while continually contending that there is massive destruction of evidence (a potential crime under state law), (mainly due to their "inferences" derived by non-responses to discovery), Plaintiff continues to try to compel and force testimony.

Instead of honoring Defendant's constitutional rights or making any concessions to limit their pursuits to a civil lawsuit, Plaintiff now seeks sanctions against Defendant.

However, the Court should not award sanctions under these circumstances, and against a party that, for good cause objectively verifiable, asserts their legal rights to

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prevent any potential self-incrimination. This is not a case of willful or bad faith discovery "tactics" and does not warrant the imposition of monetary sanctions. Thus, for these reasons Defendant will continue to assert his rights and privileges to avoid potential self-incrimination under the 5th and 14th amendment and is not waiving his rights by explaining his position.

MEMORANDUM OF POINTS AND AUTHORITIES

A. F.R.C.P. 37

Under Rule 37, the court has wide discretion and latitude, but should not impose sanctions absence strong evidence of bad faith. For the reasons noted above, Defendant has cooperated to the extent possible and in good faith. He has not asserted a "blanket" application of the 5th amendment and has responded to questions that would not potentially implicate him. While this is not precisely what Plaintiff wants (respectfully, it appears they want a full packet of information to hand over to a federal or state prosecutor), Defendant's privilege is being lawfully exercised and he should not be punished or sanctioned for that. Naturally, if the court desires to permit adverse inferences, Defendant does not have legal grounds to object to that.

In fact, Defendant was willing to default until he saw additional movies added in the Second Amended Complaint ("SAC"), which he disputes as being infringed and/or being owned by Plaintiffs. Plaintiff only answered the complaint (reserving his rights)

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to address this issue and given the fact that Plaintiff has not appeared willing to end this litigation (until now).

B. Defendant has a Constitutional Right to assert the 5th and 14th amendment

The Fifth Amendment dictates that "no person. . . shall be compelled in any criminal case to be a witness against himself." As the Supreme Court has long held, "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." See *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951).

The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. See *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S. Ct. 16, 17 (1924).

While the privilege may not protect corporations and their custodians of records from producing documents, here, Defendant was sued as an individual, and not a corporation, and while so much talk has been made about deleting evidence from a Telegram application, it is not Defendant who created the setting, and he did not have documents to produce using this application. Moreover, Plaintiff is seeking documents,

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interrogatory responses, computer imaging, and basically forcing Defendant to potentially incriminate himself at every turn, and even if this sought-out evidence did exist, it would be protected from disclosure under the "*act of production*" doctrine.

The "*act of production*" defense arises when the production could implicitly communicate incriminating facts, such as the admission that certain documents exist, are in the possession of the producing party, or are authentic. Whether the existence of documents is a *foregone conclusion* is a question of fact. *United States v. Doe*, 465 U.S. 605, 613-14, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984). *United States v. Sideman & Bancroft, LLP*, 704 F.3d 1197, 1201 (9th Cir. 2013). Here, the facts are certainly in dispute, and Defendant asserts that any forced turnover of computer devices or compelled documents or testimony would be in direct contravention of his legal rights. Defendant contends turning over the requested discovery, the act of doing so, could potentially incriminate him as to various laws.

Courts have recognized that Production of documents may be testimonial because: "[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." Here, it is not a *foregone conclusion* that

documents exist and Plaintiff cannot resolve this question of fact by making a conclusory allegation that they already know certain documents must exist because they have existed in other IPTV cases.

CONCLUSION: The Court should not award monetary sanctions against Defendant for asserting his legal rights. Naturally, adverse inferences are appropriate, but Defendant has already agreed to enter a default if the number of copyrights is agreed on. This is a very simple request that should be addressed. Plaintiff has the availability of large statutory damages upon default, so any further seeking of documents or testimony is not necessary, and the 5th and 14th amendment protections have not, and are not waived.

It should also be noted, Plaintiff's motion was approved for filing on June 2nd, but not actually filed with the Clerk until June 4th, 2021 (the hearing was set for the 30th, leaving little time to respond as this did not result in setting the hearing out 28 days). This provided only a limited amount of time to respond to 20-pages of legal argument with numerous exhibits (over 200 pages in all).

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RESPECTFULLY SUBMITTED

DATED: June 10, 2021

THE LAW OFFICES OF STEVEN C. VONDRAN

By: /s/ Steven C. Vondran

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PROOF OF SERVICE

I am a citizen of the United States and I am employed in Los Angeles, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On June 10, 2021, I served the following documents in the manner described below:

DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST FOR SANCTIONS

BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through THE LAW OFFICES OF STEVEN C. VONDRAN electronic mail system from lisa@vondranlegal.com to the email addresses set forth below pursuant to the parties' previous agreement for electronic service in lieu of personal service. To my knowledge the email was sent and not returned.

On the following part(ies) in this action (counsel for Plaintiffs):

Ms. Julie A. Shepard JShepard@jenner.com
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 10, 2021 in Phoenix, Arizona.

By:/s/ Lisa Vondran
Lisa Vondran, Assistant