UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

CASE NO.: 1:19-cv-01638-YK

ADLIFE MARKETING &
COMMUNICATIONS CO., INC.,

Plaintiff,

v.

KARNS PRIME AND FANCY FOOD LTD.
and AD POST GRAPHICS MEDIA
MARKETING, INC.,

Defendants.

ADLIFE'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF DISMISSAL FOR FAILURE TO PROSECUTE

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TABLE OF CONTENTS

I. INTRODUCTION ... 1

II. THE COURT'S CLEAR ERRORS OF FACT ... 2

a. This Court was mistaken to assume that Adlife did not knowingly comply with discovery or court orders in this case; Adlife did not know the truth about Mr. Liebowitz's failures until November 13, 2020. ... 4

b. The Court was mistaken to conclude that Adlife knew about Mr. Liebowitz's "egregious history of misconduct" and that Adlife learned of that history when served with the decision in *Usherson*; Adlife did not know and was never served with the *Usherson* decision. ... 5

c. The Court was mistaken to conclude that the decision in *Buckingham Bros.* gave Adlife sufficient information to fire Mr. Liebowitz in August of 2020; Mr. Liebowitz never told Ms. Jones the truth about the *Buckingham Bros.* decision, and Mr. Liebowitz advised Mr. Albrizio that *Buckingham Bros*. was an aberration and since Adlife was not notified of *Usherson*, it had no reason to disbelieve Mr. Liebowitz. ... 6

d. The Court was mistaken to conclude that the Adlife cases mentioned in the *Buckingham Bros.* decision were dismissed for misconduct on the part of Mr. Liebowitz that Adlife knew about; those cases were not dismissed because of Mr. Liebowitz's misconduct, they were settled or dismissed for other reasons. ... 8

e. This Court was mistaken to assume that Adlife is a copyright troll; Adlife is a diverse advertising business employing thirty people with only a small percentage of its revenue and personnel devoted to enforcing Adlife's intellectual property rights despite rampant infringement online. ... 9

f. This Court was mistaken to overlook the inherent conflict of interest between Mr. Liebowitz and Adlife about his misconduct in this case and others that led Mr. Liebowitz to take advantage of Adlife *in extremis*. ... 11

III. LEGAL STANDARD ... 12

IV. ARGUMENT ... 13

a. The Court's Mistakes of Fact Require Reconsideration and Vacation of the Dismissal... 13

b. The Court Clearly Erred by Dismissing Adlife's Complaint without a Finding Supported by the Record that Adlife Bore Responsibility for Liebowitz's Actions or Notice to Adlife and a Hearing. ... 13

c. The Court Clearly Erred in its application of *Pouolis* because this Court Lacked the True Facts and Mistakenly Attributed Adlife with Fault; on Reconsideration Liebowitz, not Adlife, should be Sanctioned. ... 14

TABLE OF AUTHORITIES

Cases

Adams v. Trustees of New Jersey Brewery Employees' Pension Tr. Fund,
29 F.3d 863 (3d Cir. 1994).. 13
Comdyne I, Inc. v. Corbin,
908 F.2d 1142 (3d Cir. 1990).. 13
Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.,
843 F.2d 683 (3d Cir. 1988).. 13
Dunbar v. Triangle Lumber & Supply Co.,
816 F.2d 126 (3d Cir. 1987).. 1, 14
Hildebrand v. Allegheny Cty.,
923 F.3d 128 (3d Cir. 2019).. 13
K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.,
No. 3:11-CV-417, 2012 WL 715304 (M.D. Pa. Mar. 5, 2012) 12
Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros,
176 F.3d 669 (3d Cir. 1999).. 12
MyWebGrocer, Inc. v. Adlife Mktg. & Commc'ns Co.,
383 F. Supp. 3d 307 (D. Vt. 2019).. 2, 11
Nat'l Hockey League v. Metro. Hockey Club, Inc.,
427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976) 15
Poulis v. State Farm Fire & Cas. Co.,
747 F.2d 863 (3d Cir. 1984).. 15
Torres v. Gautsch,
304 F.R.D. 189 (M.D. Pa. 2015).. 15
Usherson v. Bandshell Artist Mgmt.,
No. 19-CV-6368 (JMF), 2020 WL 3483661 (S.D.N.Y. June 26, 2020) 1, 6

Statutes

12 V.S.A. § 1041.. 11

Rules

Rule 59(e) of the Federal Rules of Civil Procedure.. 1, 12, 13

Plaintiff ADLIFE MARKETING & COMMUNICATIONS CO., INC. (Adlife), in support of its motion to reconsider the Memorandum and Order dated February 23, 2021, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, states as follows:

I. INTRODUCTION

This Court made a clear error of fact when it attributed the dilatory and sanctionable conduct of attorney Richard Liebowitz in this and other copyright infringement cases around the country, including his outrageous conduct described in *Usherson v. Bandshell Artist Mgmt.*, No. 19-CV-6368 (JMF), 2020 WL 3483661 (S.D.N.Y. June 26, 2020), to Adlife. The Court presumed Adlife knew Mr. Liebowitz's abysmal record and was complicit with him. This was incorrect. The facts set forth in the declarations of Adlife's paralegal Ms. Rebecca Jones, Mr. Joel Albrizio, President and CEO of Adlife, and Mr. Douglas Fleurant, CFO and Executive Vice President of Adlife, demonstrate that Adlife did not know the things this Court presumed Adlife's knew. Mr. Liebowitz kept Adlife in the dark about this case and *Usherson*, until it was too late.

This Court made a clear error of law by not following the requirements of *Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126 (3d Cir. 1987), which requires a district court before entering a "dismissal or default judgment based on an apparent default on the part of a litigant's counsel," first require the party seeking the default to plead with particularity and produce supporting material, and thereafter for the Court to set a hearing on notice from "the clerk of the court [] mail[ed] …directly to the litigant of the time and place of a hearing on any such motion, reasonably in advance of the hearing date."

This Court also made a clear error by applying false facts – ones suggesting Adlife's complicity with Mr. Liebowitz rather than the true facts showing Adlife's ignorance – to the law

of sanctions and in the process concluding, erroneously, that Adlife, rather than Mr. Liebowitz, should be punished. Mr. Liebowitz caused the harm to this Court and Karns, not Adlife. Mr. Liebowitz should pay the price for his dilatory behavior. The true facts show that Mr. Liebowitz was responsible for the delays and failures to produce discovery. It was a manifest error for this Court to hold Adlife responsible. And upon correcting this error, the court should sanction Mr. Liebowitz to compensate Karns and make it whole.

II. THE COURT'S CLEAR ERRORS OF FACT

1. This Court's Memorandum dated February 23, 2021 filed at Doc. No. 59 recited certain matters as fact that are, in truth, not accurate concerning Adlife's awareness of the progress of the litigation in this case, Adlife's participation in the discovery process with its attorneys Richard Liebowitz and James Freeman, the progress of Adlife's litigation in other cases, the actions of Adlife's former counsel Richard Liebowitz and James Freeman taken on behalf of Adlife, the actions of Mr. Liebowitz taken on behalf of his other clients, and the sanctions levied against Mr. Liebowitz by federal courts around the country.

2. The Court appears to have mistakenly lumped Adlife in with Mr. Liebowitz concluding that because Mr. Liebowitz is a "legal lamprey," then so is Adlife. Because the defendant in this case called Adlife a "sophisticated litigator of copyright disputes," (Doc. No. 37 at 1), and because a preliminary filing in an Adlife case (that Mr. Liebowitz was not involved in) referred to Adlife as a "copyright troll," *MyWebGrocer, Inc. v. Adlife Mktg. & Commc'ns Co.*, 383 F. Supp. 3d 307 (D. Vt. 2019), this Court appears to have assumed that Adlife was sophisticated in its own right about its litigation management including its management of Mr. Liebowitz.

3. That was one of the Court's mistakes of fact. Adlife is not sophisticated in matters of litigation. Adlife has no in-house lawyer. And while Adlife does have an in-house paralegal,

Rebecca Jones, Ms. Jones did not access Pacer or follow the progress of Mr. Liebowitz's handling of Adlife's cases online. Rather, Ms. Jones relied on weekly update calls from Mr. Liebowitz on Adlife's cases that he was handling, and Ms. Jones trusted Mr. Liebowitz to keep Adlife truthfully updated on what was happening with Adlife's cases.

4. The true facts are that Mr. Liebowitz lied to Adlife, and Adlife did not know Mr. Liebowitz was lying. Filed with this motion are the declarations of Ms. Jones, Mr. Joel Albrizio, President and CEO of Adlife, and Mr. Douglas Fleurant, CFO and Executive Vice President of Adlife. All three attest to their lack of knowledge regarding Mr. Liebowitz's record of sanctions and misbehavior in this case. All of Ms. Jones' status updates for the relevant period of time are attached to her declaration. All of Messrs. Albrizio's and Fleurant's relevant correspondence are also attached to their declarations. In addition, counsel for Adlife, using a respected and capable ESI consultant, harvested Adlife's emails for these three witnesses, and searched them to confirm that what Adlife says is true. It is true.[1]

5. The declarations of Ms. Jones, Mr. Albrizio, and Mr. Fleurant confirm that neither Mr. Liebowitz nor anyone else at LLF told Adlife that Adlife failed to produce discovery in this case. To the contrary, the declarations of Ms. Jones, Mr. Albrizio, and Mr. Fleurant confirm that Mr. Liebowitz and LLF's Mr. Freeman were provided with Adlife's discovery documents concerning the images at issue in this case and Adlife's copyright registrations before this case was filed, and numerous times thereafter; that Mr. Liebowitz and LLF had all of Adlife's discovery information and documents while this case was pending; that whenever Mr. Liebowitz or Mr. Freeman requested documents or information from Adlife, Adlife immediately provided all of its information and documents to counsel; and that Ms. Jones, Mr. Albrizio, and Mr.

[1] Confirmation was particularly important to the undersigned because Mr. Liebowitz's failure to notify Adlife of the decision in *Usherson* subjects him to potential criminal prosecution for perjury.

Fleurant had no reason to believe that Mr. Liebowitz, Mr. Freeman, or LLF were not managing the case or the discovery in this case until November 13, 2020.

a. This Court was mistaken to assume that Adlife did not knowingly comply with discovery or court orders in this case; Adlife did not know the truth about Mr. Liebowitz's failures until November 13, 2020.

6. This case was filed on September 23, 2019. Before this case was filed, on September 20, 2019, Ms. Jones sent a PDF document listing the thirty-six (36) Adlife copyrighted images that Karns infringed a total of eighty-nine (89) times to Mr. Liebowitz along with a link to a shared folder where all the documents supporting Adlife's claims could be found including all the copyright registration certificates, the images infringed, and the infringements discovered. (Albrizio Dec. ¶ 28; Jones Dec. ¶ 17; Fleurant Dec. ¶ 14)

7. On February 3, 2020, Mr. Liebowitz sent an email to Ms. Jones asking "Karns would like a spreadsheet of the 22 different copyright registrations and the effective date of each registration. Can you kindly put this together? Thank you so much!" Ms. Jones immediately responded and provided the spreadsheet requested. (Jones Dec. ¶ 19, Ex. 6).

8. On February 21, 2020[2], Mr. Liebowitz sent an email with written discovery requests. Ms. Jones reviewed the discovery requests immediately, and on February 25, 2020, she discussed them with James Freeman, an attorney for LLF, and told him that all the documents responsive to Karns' discovery requests were provided to Mr. Liebowitz before the case was filed. Ms. Jones followed up the call with an email to Mr. Freeman and Mr. Liebowitz that attached the Terms of Use document applicable to the images at issue in this case to produce in discovery. (Jones Dec. ¶ 20, Ex. 8).

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[2] The requests had been served on Adlife by Karns on December 23, 2019, but Mr. Liebowitz did not provide them to Adlife until February 21, 2020 when they were already almost 60 days old.

9. On February 26, 2020, Mr. Liebowitz sent an email to Messrs. Fleurant and Albrizio, that asked "Can we get a total count to date of the number of photos used by Karns?" Mr. Albrizio responded the same day that "We already have 59 images. That's a lot of images." (Albrizio Dec. ¶ 31, Ex. 5).

10. On April 13, 2020, Mr. Freeman of LLF sent an email to Ms. Jones that copied Mr. Liebowitz and attached a second set of discovery requests served by Karns on Adlife on March 13, 2020. In the email, Mr. Freeman asked for a telephone call with Ms. Jones. The call was held that afternoon with Ms. Jones, Mr. Albrizio, and Mr. Fleurant in attendance. Adlife provided Mr. Freeman with all the information he requested to respond to the discovery requests from Karns. The next day, April 14, 2020, Donna Halprin, an employee of LLF, sent Mr. Albrizio interrogatory answers to sign by HelloSign, and he electronically signed them. (Albrizio Dec. ¶ 32, Ex. 7; Jones Dec. ¶ 22, Exs. 10-11; Fleurant Dec. ¶ 18, Ex. 6).

11. Ms. Jones received no further updates in this case until Monday, August 3, 2020 when Mr. Liebowitz sent an email asking "Can you kindly gather all the copyright registrations for the Karn's case. See attached Exhibit A. We need to produce this Tuesday." This frustrated Despite the short notice, Ms. Jones dropped what she was doing and resent Mr. Liebowitz and Mr. Freeman the link to the Adlife shared folder containing all the copyright registration certificates for images infringed by Karns. Ms. Jones also sent Mr. Liebowitz an email advising him to give her more notice in future, since that was what their weekly meetings were all about. (Jones Dec. ¶ 23, Exs. 12-13; Fleurant Dec. ¶ 19, Ex. 7).

b. The Court was mistaken to conclude that Adlife knew about Mr. Liebowitz's "egregious history of misconduct" and that Adlife learned of that history when served with the decision in *Usherson*; Adlife did not know and was never served with the *Usherson* decision.

12. On page 9 of Doc. 59 this court ruled that "Plaintiff must have become aware of its counsel's egregious history of misconduct after being served with the sanctions Opinion and Order of June 26, 2020 from the Southern District of New York," referring to the decision in *Usherson v. Bandshell Artist Mgmt.*, No. 19-CV-6368 (JMF), 2020 WL 3483661 (S.D.N.Y. June 26, 2020), in which Mr. Liebowitz was sanctioned, and ordered to serve a copy of that order, either by email or by overnight courier, on every one of his firm's current clients, including Adlife.

13. It appears that Mr. Liebowitz failed to serve Adlife with the *Usherson* decision and then falsely certified that he served Adlife in the July 27, 2020 declaration Mr. Liebowitz filed in *Usherson* in which he claimed he served a copy of the order in *Usherson* on "every one of LLF's clients." Messrs. Albrizio and Fleurant, and Ms. Jones, all carefully and diligently reviewed and searched their email for the period from June 26, 2020 to the present, but none of them ever received an email from Mr. Liebowitz on July 27, 2020 or any other date serving them with the decision in *Usherson*. (Albrizio Dec. ¶¶ 18-19, Ex. 1; Jones Dec. ¶¶ 13-14, Ex. 3; Fleurant Dec. ¶¶ 11-12, Ex. 1). Adlife's counsel independently confirmed this to be true by obtaining and reviewing all of Adlife's emails for Ms. Jones, Mr. Albrizio and Mr. Fleurant. (Rothman Dec.).

c. The Court was mistaken to conclude that the decision in *Buckingham Bros.* gave Adlife sufficient information to fire Mr. Liebowitz in August of 2020; Mr. Liebowitz never told Ms. Jones the truth about the *Buckingham Bros.* decision, and Mr. Liebowitz advised Mr. Albrizio that *Buckingham Bros*. was an aberration and since Adlife was not notified of *Usherson*, it had no reason to disbelieve Mr. Liebowitz.

14. Mr. Liebowitz did not advise Adlife's paralegal, Ms. Jones, about the decision in *Buckingham Bros.* when it came out in August of 2020. Ms. Jones found it on her own on November 16, 2020. (Jones Dec. ¶ 16, Ex. 4). Before that date, the only thing Mr. Liebowitz told

Ms. Jones about *Buckingham Bros.* was what she wrote in her status report about the case on August 21, 2020 which was: "Buckingham Market: Richard requested $30K in Default. Judge questioned that amount (1 image). Richard will write to the Judge and reduce request to $10K." (Jones Dec. ¶ 15, Ex. 2). As a result, the primary contact for case updates with Mr. Liebowitz who had paralegal training and understood the import of the decision in *Buckingham Bros.* did not have the decision in that case and did not know about Mr. Liebowitz's misconduct there until mid-November of 2020.

15. Mr. Liebowitz did not advise Adlife's CEO, Mr. Albrizio, of the *Buckingham Bros.* decision. Mr. Albrizio first learned about the *Buckingham Bros.* decision from another one of Adlife's attorneys at a different law firm who sent Mr. Albrizio a link to an article online about the decision.[3] Mr. Albrizio read the article and immediately emailed Mr. Liebowitz demanding a conversation, to which Mr. Liebowitz wrote back "Yes, this was the case we discussed about.[4] Terrible judge that didn't agree with the $30k in default. We often get $30k on default but this judge is just devaluing copyright laws. Think we ask the Court for $10k?" (Albrizio Dec. ¶¶ 20-21 Ex. 2).

16. Mr. Albrizio then asked Mr. Liebowitz directly about the court's "statements in which he names cases of Adlife." Mr. Albrizio knew at that time that all but one of the five Adlife cases referred to by the Court in footnote 10 of the *Buckingham Bros.* decision had been dismissed because those matters settled, not because the filings in those cases were incorrect as the court in *Buckingham Bros*. concluded. (Albrizio Dec. ¶ 22, Ex. 2). Mr. Fleurant, who was made aware of the Buckingham Bros. decision by Mr. Albrizio, also knew that the court in

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[3] This is the link: https://www.techdirt.com/articles/20200821/10012945159/judge-recommends-copyright-troll-richard-liebowitz-be-removed-roll-court-misconduct-default-judgment-case.shtml.
[4] Mr. Albrizio disputes that any such discussion took place. (Albrizio Dec. ¶ 21).

Buckinham Bros. must have been mistaken because as CFO of Adlife Mr. Fleurant was in charge of settlements so he knew what cases settled, and all but one of the cases mentioned settled. (Fleurant Dec. ¶ 24).

d. The Court was mistaken to conclude that the Adlife cases mentioned in the *Buckingham Bros.* decision were dismissed for misconduct on the part of Mr. Liebowitz that Adlife knew about; those cases were not dismissed because of Mr. Liebowitz's misconduct, they were settled or dismissed for other reasons.

17. On page 9 of Doc. 59 this Court references "numerous dismissals of its own cases" referring to Adlife cases mentioned in footnote 10 of the Buckingham Bros. decision. The Court indicated that these dismissals should have put Adlife on notice of Mr. Liebowitz's misconduct. This Court was mistaken in its assumption because those other cases were settled or dismissed for other reasons that did not indicate misconduct was committed by Mr. Liebowitz. *Adlife Mktg. & Communications Co., Inc. v. Yoder's Meats, Inc*., No. 20-CV-1313, Dkt. No. 5 (E.D. Pa. June 9, 2020) was settled in June of 2020, and no one at Adlife was aware of any problems with that case. The Buckingham Bros. decision faulted Mr. Liebowitz for failing to serve a summons, but the case file shows that service was made on the defendant. (Albrizio Dec. ¶ 38; Jones Dec. ¶ 28; Fleurant Dec. ¶ 24). *Adlife v. Musser's,* No. 1:19-cv-1828, was settled, and Mr. Liebowitz never advised Adlife of any issues in that case, nor did he ever tell anyone at Adlife that he was not admitted to practice in the district. The court's docket provides no indication of problems either. (Albrizio Dec. ¶ 39; Jones Dec. ¶ 28; Fleurant Dec. ¶ 24).

18. *Adlife Mktg. & Communications Co., Inc. v. Tops Markets, LLC*, No. 18-CV-1102, Dkt. No. 5 (N.D.N.Y. Nov. 11, 2018), was settled in March of 2019 when a marketing company knows as Pure Red came forward, indicated that it was the source of the images used by Tops Markets and several other grocery chains, took responsibility for the infringement, and promptly settled with Adlife on behalf of Top's Market and other infringers. (Albrizio Dec. ¶ 40;

Jones Dec. ¶ 28; Fleurant Dec. ¶ 24). *Adlife Mktg. & Communications Co., Inc. v. Wal-Mart.com USA, LLC*, No. 18-CV-3175 , District of Colorado, was one of several claims for infringement Adlife asserted against Wal-Mart. The case was settled in March of 2019 and no one at Adlife knew anything about Mr. Liebowitz's failures to comply with the local rules of the District of Colorado. (Albrizio Dec. ¶ 41; Jones Dec. ¶ 28; Fleurant Dec. ¶ 24). Mr. Liebowitz told Adlife that *Adlife Mktg. & Communications Co., Inc. v. Acme Markets, Inc.,* No. 19-CV-7394 (S.D.N.Y.) was dismissed because Mr. Liebowitz sued the wrong "Acme Markets" because "Acme" is a common corporate name. No one at Adlife had any information to indicate Mr. Liebowitz was lying. (Albrizio Dec. ¶ 42; Jones Dec. ¶ 28; Fleurant Dec. ¶ 24).

e. This Court was mistaken to assume that Adlife is a copyright troll; Adlife is a diverse advertising business employing thirty people with only a small percentage of its revenue and personnel devoted to enforcing Adlife's intellectual property rights despite rampant infringement online.

19. "A copyright troll is a party (person or company) that enforces copyrights it owns for purposes of making money through litigation, in a manner considered unduly aggressive or opportunistic, generally without producing or licensing the works it owns for paid distribution."[5] Adlife is not a copyright troll. Adlife produced and licenses the works it owns. Founded originally by Joel Albrizio, its CEO, as J.M. Albrizio, Inc., an advertising and design agency, Adlife's photographers created hundreds of thousands of images of all varieties of fresh and prepared foods for use in the advertisements and circulars Adlife created for its food business clients. Every image in Adlife's PreparedFoodPhotos.com library was either photographed by Mr. Albrizio or created under his direct supervision. (Albrizio Dec. ¶¶ 2-5).

20. Today, Adlife is a full-service advertising agency. The vast majority of Adlife's revenue comes from print and digital advertising services and social media services. Adlife still

[5] https://en.wikipedia.org/wiki/Copyright_troll

produces color printed grocery circulars. Adlife is one of only a handful of food image libraries in the world that can serve the needs of grocers and food wholesalers for images to feature in these circulars because every image in Adlife's image library was painstakingly color corrected for optimal use in the four-color printing process. Printed color retail circulars continue to be critical to the success of Adlife's clients, but images that are not color corrected cannot be easily used to produce large volumes of color printed circulars on short deadlines for supermarkets. (Albrizio Dec. ¶¶ 6-8).

21. Prior to 2016, 95% of Adlife's total revenue was generated by the creation and distribution of printed circulars and in-store signage. In previous years Adlife employed over 50 people focused solely on the creation and distribution of printed grocery retail circulars, in-store signage and social media services. Today Adlife's business employs thirty people, but the majority are still focused on the graphic design of print and digital advertisements. Only a small number are busy addressing the rampant infringement online that Adlife has experienced. (Albrizio Dec. ¶¶ 9-10).

22. Desktop publishing and the internet have decimated Adlife's business and its investment in its copyrights. The unauthorized copying, display and distribution of Adlife's images has grown exponentially since desktop publishing and internet technologies became affordable in the late 1990s and early 2000s. These technologies allowed almost anyone to steal Adlife images by simply right clicking and copying or scanning Adlife's images and pasting them wherever they liked, including in promotions, without paying Adlife a penny. Adlife has discovered hundreds of infringers of its images online, and every day Adlife discovers more and more infringement. (Albrizio Dec. ¶¶ 10-11).

23. The case of *MyWebGrocer, Inc. v. Adlife Mktg. & Commc'ns Co.*, 383 F. Supp. 3d 307 (D. Vt. 2019), is one example. Here the infringer sued for a declaratory judgment of non-infringement, but the infringer was a blatant infringer of Adlife's images online that Adlife notified that it was infringing on Adlife's copyrights. MyWebGrocer accused Adlife of being a "copyright troll," it is also true that MyWebGrocer stole Adlife's copyrighted images and used them without permission or compensation to Adlife. Adlife counterclaimed for infringement and violations of the Vermont Anti-SLAPP statute, 12 V.S.A. § 1041. The case was ultimately settled confidentially after significant litigation, including the **unreported** decision denying the parties' cross motions for summary judgment[6] and sending the case to trial. (Albrizio Dec. ¶ 37, Ex. 9).

f. This Court was mistaken to overlook the inherent conflict of interest between Mr. Liebowitz and Adlife about his misconduct in this case and others that led Mr. Liebowitz to take advantage of Adlife *in extremis*.

24. By the time Karns filed its motion to dismiss for failure to prosecute, Mr. Liebowitz had towed Adlife 20 miles out to sea in a lifeboat with no provisions and Adlife did not even know it. Adlife was *in extremis*, exactly the situation that the Third Circuit in *Dunbar* warned district courts about that required notice and a hearing before dismissal.

25. Liebowitz did not care. This is obvious even in his final communication to Adlife. Given the chance to come clean about what happened on November 15, 2020, Liebowitz cannot even overcome the conflict inherent in the situation to tell Adlife the whole truth, and instead he made crucial omissions to protect himself:

> On the case against Karns, months ago they did a SJ on the issue that we did not provide proof of actual damages, but we are going for statutory damages, so you do not need to prove actual damages for a statutory damages case. So their motion will likely not

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[6] The decision was not mentioned in the footnote in the *Buckingham Bros.* case and the court there appears not to have been aware of it.

succeed and even if it does you still have the $750-$150,000 for statutory for willful infringement. Our response was put on pause, as I needed to get a local lawyer in Harrisburg which took some time to get. The judge did not set a time limit on when to get a local lawyer in Harrisburg. I thought the parties would do a meditation before having to get a local lawyer in Harrisburg, PA. Instead of trying to in good faith do a mediation they did a motion for lack of prosecution, which has almost no shot of winning as the court never set a time limit to get a local lawyer. In any event, I got a local lawyer late last week to come in and we responded to them and told the judge to require the other side to participate in a mediation. The judge is likely going to set a status conference in the upcoming few weeks to talk about mediation and to talk about new discovery deadlines. Karns never produced any documents in the case so we have a strong argument that they have not engaged in good faith. The case is taking its course. Let me know if you want to jump on the phone to discuss more.

Thank you.

Best,
Richard Liebowitz

(Albrizio Dec. ¶ 34, Ex. 8; Jones Dec. ¶ 25, Ex. 14; Fleurant Dec. ¶ 21, Ex. 8). Within one week after this email, Leibowitz was terminated by Adlife. (Albrizio Dec. ¶ 43; Fleurant Dec. ¶ 25).

III. LEGAL STANDARD

"A motion for reconsideration is governed by Rule 59(e) of the Federal Rules of Civil Procedure, which allows a party to move to alter or amend a judgment within twenty-eight (28) days of entry." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, No. 3:11-CV-417, 2012 WL 715304, at *1 (M.D. Pa. Mar. 5, 2012), *aff'd,* 710 F.3d 99 (3d Cir. 2013). "A judgment may be altered or amended if the party seeking reconsideration establishes at least one of the following grounds: '(1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the court granted the motion ...; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.' *Id*. (quoting *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)). "[A] motion to alter or amend the judgment

of dismissal under Rule 59(e)" provides an "opportunity [for plaintiff] to present its explanation of the delay." *Adams v. Trustees of New Jersey Brewery Employees' Pension Tr. Fund*, 29 F.3d 863, 872 (3d Cir. 1994).

IV. ARGUMENT

a. The Court's Mistakes of Fact Require Reconsideration and Vacation of the Dismissal.

This Court determined that "in evaluating the history of Plaintiff and Mr. Liebowitz's conduct in this case, as well as the relationship between Plaintiff and Mr. Liebowitz in general, the Court does not find that this is the case of 'an innocent client suffering the sanction of dismissal due to dilatory counsel whom it hired to represent it.'" *See* DE 59 at p. 8 (quoting *Adams*, 29 F.3d at 873. "However, there is no record evidence of [Adlife's] involvement or lack thereof, so this conclusion was conjectural and not based on the record." *Hildebrand v. Allegheny Cty.*, 923 F.3d 128, 132 (3d Cir. 2019)

The true facts set forth in the declarations of Ms. Jones, Mr. Albrizio, and Mr. Fleurant show Adlife had no knowledge of Liebowitz's misconduct or control over it. This case is nothing like *Adams* where delays by in-house counsel were to blame. Adlife has no in-house counsel. Adlife has a paralegal who relied upon Mr. Liebowitz to keep Adlife updated, and who diligently provided discovery to Mr. Liebowitz that Mr. Liebowitz failed to produce. This is not *Adams*. This case is also different from cases where the plaintiff bore responsibility for its attorney's misconduct because the plaintiff was personally sanctioned before as in *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1147 (3d Cir. 1990), or where the plaintiff was present at hearings concerning the attorney's misconduct as in *Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 693 (3d Cir. 1988).

b. The Court Clearly Erred by Dismissing Adlife's Complaint without a Finding Supported by the Record that Adlife Bore Responsibility for Liebowitz's Actions or Notice to Adlife and a Hearing.

Faced with the "increasing trend toward the dismissal of legal actions based on dereliction of duty by members of the bar," the Third Circuit laid down the following requirements to protect clients "dependent on their attorneys to protect their interests," because of the "conflict of interest [] almost inherent in such a situation,"

> We conclude that any motion, whether by court or counsel, seeking an effective dismissal or default judgment based on an apparent default on the part of a litigant's counsel be pleaded with particularity and with supporting material and that where the papers demonstrate reasonable grounds for dismissal on that basis the court shall direct the clerk of the court to mail notice directly to the litigant of the time and place of a hearing on any such motion, reasonably in advance of the hearing date. We are confident the district judges have the necessary remedies to prevent any abuse of this procedure.
>
> We think such a procedure will put the client on notice of possible jeopardy to his or her legal interests by counsel's conduct at a time when the client can take appropriate action and when the *Poulis* balance has not been irretrievably struck in favor of the moving party.

Dunbar, 816 F.2d at 129.

Adlife was deprived of notice and a hearing. Adlife was dependent upon Mr. Liebowitz to keep Adlife informed. But Adlife had a conflict of interest with Mr. Liebowitz that Adlife did not know about and that Mr. Liebowitz hid from Adlife. Mr. Liebowitz kept Adlife in the dark. This court assumed Adlife knew what was going on, but Adlife did not, and at the very least, under *Dunbar*, Adlife was entitled to a pleading pled with particularity and notice of a hearing before dismissal could enter.

c. The Court Clearly Erred in its application of *Pouolis* because this Court Lacked the True Facts and Mistakenly Attributed Adlife with Fault; on Reconsideration Liebowitz, not Adlife, should be Sanctioned.

The Third Circuit has identified six factors a court should consider before dismissing an action for failure to prosecute:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to

> discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Torres v. Gautsch, 304 F.R.D. 189, 191 (M.D. Pa. 2015); citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

Adlife was not at fault. The true facts show that factors 1, 3 and 4 favor Adlife. Mr. Liebowitz's conduct was to blame and had the true facts been known would have compelled this Court to sanction Mr. Liebowitz, which are more appropriate than the "drastic sanction" of dismissal. *Poulis*, 747 F.2d at 867–68 ("dismissals with prejudice or defaults are drastic sanctions, termed 'extreme' by the Supreme Court."); quoting *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976).

Changing Mr. Liebowitz's behavior is not relevant in the current dispute where he has been terminated. Liebowitz is no longer Adlife's counsel, and the sanctionable conduct and delays in this case ended upon his termination. After Liebowitz's termination, Adlife and its current counsel, SRIPLAW, actively prosecuted this case in good-faith. The conduct and delays caused by Mr. Liebowitz will not continue.

Meanwhile, any prejudice to Karns was slight. Karns had notice of its conduct that formed the basis of the action in the extensive exhibit to the complaint that identified all the images and uses. Any prejudice by delay can be cured by a brief discovery extension. Karns itself requested a 90-day discovery extension in connection with its third-party complaint. Karns also admitted it failed to produce responsive discovery in this matter. See Karns' Rule 56.1 Statement (DE 31-2), ¶ 23.

Dated: March 15, 2021

Respectfully submitted,

/s/ Joseph A. Dunne

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on March 15, 2021, a true and correct copy of the foregoing document was served by electronic mail by the Court's CM/ECF System to all parties listed below on the Service List.

/s/ Joseph A. Dunne
JOSEPH A. DUNNE

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