

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

K-Beech, Inc.,

Plaintiff,

versus 3:11CV469

John Does 1-85, et al.

Defendants

before: HONORABLE JOHN A. GIBNEY, JR.  
United States District Judge

October 24, 2011  
Richmond, Virginia

Gilbert F. Halasz, RMR  
Official Court Reporter  
U. S. Courthouse  
701 East Broad Street  
Richmond, Virginia 23219

(804) 916-2248

APPEARANCES

Leonard Paris, Esq.

David W. O'Bryan, Esq.

1 THE CLERK: Case number 3:11 CV 469.

2 K-Beech, Inc. versus John Does 1 - 85.

3 With 3:11 CV 531, Patrick Collins, Inc. versus

4 John Does 1 - 58.

5 With case number 3:11 CV 535, Raw Films, Ltd.

6 versus John Doe 1.

7 Mr. Leonard Paris represents the plaintiff

8 counsel in each case, Mr. David W. O'Bryan.

9 Are counsel ready?

10 MR. PARIS: Yes.

11 THE COURT: Good morning, Mr. Paris. It is an

12 honor to have you here.

13 MR. PARIS: A pleasure to be here.

14 THE COURT: Great to see you. How have you

15 been?

16 MR. PARIS: Doing fine. Thank you.

17 THE COURT: Have you got Mr. Blank back at work

18 yet?

19 MR. PARIS: Mr. Blank was just given the award

20 of leader of the bar among 30 participants.

21 THE COURT: Right.

22 MR. PARIS: And I asked him if he would please

23 not do anything else, and to come back to work so we

24 can get back in business.

25 THE COURT: Well, he is a lucky fellow, and he

1 is lucky to have you as a partner.

2 MR. PARIS: I appreciate that.

3 THE COURT: We are here today on this question  
4 of reconsidering the severance order and determining  
5 whether the conduct is sanctionable in this case.

6 Go ahead.

7 MR. PARIS: If I could say preliminary, I have  
8 known Mr. O'Bryan professionally for over 40 years.  
9 He now shares space in my office, and has been with  
10 me since several years ago.

11 He has been a pillar of the community, served as  
12 delegate in the house of delegates in the State of  
13 Virginia. He has never had a complaint, bar  
14 complaint, filed against him. He has never been  
15 sanctioned in any court for any reason whatsoever.

16 I would submit to The Court that this type of  
17 action has been filed in the Eastern District of  
18 Virginia in Alexandria before. I think there are  
19 four cases here, three with you and one with Judge  
20 Payne. These cases have been filed, as I understand  
21 it, all over the country. I don't know anything  
22 about it. I don't know the merits of the case. But  
23 I am here to tell you, if Your Honor please,  
24 Mr. O'Bryan would never do anything to dishonor The  
25 Court or to do anything that would cause him to be

1 sanctioned.

2 THE COURT: I am very familiar with  
3 Mr. O'Bryan's character. I have no doubt that that  
4 is true. And I am not going to -- I have taken a  
5 look at the materials that were filed by Mr. O'Bryan  
6 and by --

7 MR. PARIS: Amicus curiae?

8 THE COURT: Yes. The amicus.

9 MR. PARIS: I don't know those folks.

10 THE COURT: It seems while I disagree with their  
11 view on who should be -- whether you can join all  
12 these people as a defendant in one case, it looks  
13 like there is an argument that can be made both ways,  
14 and so there is nothing sanctionable there.

15 Let me just tell you what really got my concern  
16 in this case, Mr. Paris. The fact that they sue all  
17 these people and then they, as soon as somebody shows  
18 up to make any kind of defense, they get non-suited  
19 or voluntarily dismissed. And to me it just looks  
20 like they are trying to cherry pick the defendants  
21 that are easy to settle with, and then not having any  
22 interest in actually having the case resolved, but in  
23 settling cases. Candidly, I don't really think that  
24 is necessarily Mr. O'Bryan's doing, but more the  
25 clients. And I don't know whether there is, you

1 know, conflict between Mr. O'Bryan and his clients at  
2 this stage.

3 One of the things that might weigh in on that is  
4 how the clients have conducted this litigation  
5 elsewhere. I am sure there are these kinds of cases  
6 pending all around the country.

7 Do you know anything about that, Mr. Paris?

8 MR. PARIS: I don't know anything about it,  
9 Judge. I am here for Mr. O'Bryan. He can probably  
10 answer your questions.

11 THE COURT: All right.

12 Well, let's hear from Mr. O'Bryan.

13 MR. PARIS: Yes, sir.

14 THE COURT: Mr. O'Bryan, it is a rare defendant  
15 who gets to have a lawyer represent him and get to  
16 represent himself as well. But you are that lawyer  
17 today.

18 MR. O'BRYAN: I am honored. Thank, Your Honor.

19 To answer The Court's question, that is part of  
20 the strategy that was used across the country. When  
21 these motions are filed, they are filed by the same,  
22 generally by the same, a lot of the same lawyers --  
23 about half a dozen to a dozen lawyers all over the  
24 country -- who file these same motions.

25 THE COURT: File the lawsuits, or file the

1 motion?

2 MR. O'BRYAN: File the motions.

3 THE COURT: Motion to sever?

4 MR. O'BRYAN: Yes, sir.

5 There are a number of anonymous motions that  
6 come in. These motions are all over the internet.  
7 These people go on the internet, clip and paste  
8 paste, and send them in. I was noting in some of the  
9 language in The Court's order we talked about the  
10 \$2,900. That is a figure that is on the internet  
11 that is passed around among these people.

12 THE COURT: Does -- did your client make  
13 settlement demands on any of these people?

14 MR. O'BRYAN: The way that the case proceeds is  
15 we filed the suit, Your Honor, and entered the order  
16 allowing us to get the internet information from the  
17 internet providers, Verizon and so forth. It takes  
18 about 30 to 60 days for them to do that.

19 Part of the process that they use is when they  
20 do it is they notify their customers that a subpoena  
21 has been requested. That at that point we start  
22 getting phone calls from these folks to settle these  
23 cases. We don't -- we have no idea who they are at  
24 that point. They are contacting us because they have  
25 been contacted --

1 THE COURT: By --

2 MR. O'BRYAN: -- by Verizon or Comcast or  
3 whoever. And we settle some of them.

4 THE COURT: Who makes, once you get in contact  
5 with one of these people, who handles the settlement  
6 discussions, you or the client?

7 MR. O'BRYAN: The client.

8 THE COURT: All right.

9 Handled by the client's legal department, or  
10 you? Do you tell them there is somebody to call  
11 and --

12 MR. O'BRYAN: They have employees who do it. I  
13 don't think they are lawyers.

14 THE COURT: Do they have, does your client call  
15 up these people once they get some idea who they are?

16 MR. O'BRYAN: Normally what happens is a group  
17 of them will, they will initiate the contact. And  
18 then probably roughly half of them, a certain portion  
19 of that, are never found by the internet provider.  
20 About 15 percent of them never are found. And then  
21 after that they will write a letter and contact them,  
22 just like you would in any civil litigation.

23 THE COURT: So let me see if I have this  
24 straight.

25 What happens in these cases is that, except for



1 the people -- let's leave the people who call you  
2 out.

3 You find out the identity of some people. And I  
4 take it your client then gets that from you, as is  
5 their right. And then the client calls up the newly  
6 identified people and says, will you settle this  
7 case?

8 MR. O'BRYAN: That's correct. Or write a  
9 letter.

10 THE COURT: Or write a letter.

11 And do you know what the demand is?

12 MR. O'BRYAN: There is no demand initially.  
13 Most of these cases settled in the \$3,000 range.

14 THE COURT: How do they get to that number?

15 MR. O'BRYAN: That number was gotten to by  
16 experience with the folks in charge of this, law firm  
17 out of Florida. They have experience with these  
18 kinds of cases, and the settlement figures they are  
19 receiving in this cases are at the extreme low end of  
20 the settlement value of the cases, the broad range of  
21 cases that they have.

22 THE COURT: You say there is a firm in Florida  
23 that is in charge of all this. What do you mean by  
24 that?

25 MR. O'BRYAN: Well, they are counsel for the

1 industry. For the industry. And they affiliate with  
2 the lawyers locally.

3 THE COURT: They are not on your pleadings,  
4 though.

5 MR. O'BRYAN: No, sir.

6 As far as dismissing of the movants, when they  
7 file a --

8 THE COURT: Whose idea is that?

9 MR. O'BRYAN: That is part of the strategy, Your  
10 Honor, because they have learned from experience that  
11 these people bring in issues that are unrelated and  
12 so forth. They are willing to file an individual  
13 suit against them. And what happens is, it is  
14 cheaper in the long run to take a voluntary dismissal  
15 and come back and file an individual case against the  
16 individual who is filing the motion. And we are  
17 happy to file suit against them. In fact --

18 THE COURT: Have you done that?

19 MR. O'BRYAN: In this case we are in the process  
20 of doing it, but we are interrupted by The Court's  
21 order. Because we have started preparing to do that.

22 THE COURT: I don't think my order precludes you  
23 from filing individual law suits against anybody.

24 MR. O'BRYAN: I mean, it threw things into an  
25 uproar as to how we should proceed.

1 THE COURT: Do you have -- let me tell you the  
2 situation that I am sort of looking at in this,  
3 Mr. O'Bryan.

4 Your client -- either from the client itself or  
5 through this law firm in Florida -- what is the name  
6 of the law firm?

7 MR. O'BRYAN: Lipscomb Ellis. They are  
8 considered -- I have gone on the internet and looked  
9 them up -- they have been voted the best copyright  
10 lawyers in Florida. I deal with Keith Lipscomb.

11 THE COURT: So Lipscomb and Ellis, who are also  
12 the client, issues directions in this case. And  
13 essentially gets somebody either at Lipscomb Ellis or  
14 the client gets information from you and takes it  
15 from there. And I don't want to put you in a  
16 position of having to disclose confidences in order  
17 to represent yourself in this, but it seems to me  
18 there is a tension between you and the clients  
19 because what I see in these cases is that somebody  
20 doesn't want to get these cases really heard.  
21 Because I haven't seen any sign of any of these  
22 individuals being sued. Not here in Virginia, at  
23 least. Have they been sued somewhere else?

24 MR. O'BRYAN: They are sued all over the  
25 country.

1 THE COURT: As individuals?

2 MR. O'BRYAN: Yes, sir.

3 What happens is these people come in and say, we  
4 want an individual sued. What they really mean is we  
5 want no suit. What --

6 THE COURT: I think the problem with that  
7 argument, Mr. O'Bryan, is this. Their motive is  
8 irrelevant. If they have a right to be sued  
9 individually, they have a right to be sued  
10 individually. And if it is more costly to the movie  
11 producers, so be it. Why can't they sue Big Torrent  
12 itself, or whoever it is?

13 MR. O'BRYAN: Your Honor, these are  
14 international. They set up in Somalia and when you  
15 try to go after somebody there they move to Chad or  
16 somewhere else. They are impossible -- they are  
17 outside of the jurisdiction of any court. So this is  
18 the only alternative this industry has. I mean, this  
19 industry has a real problem, Your Honor. They are  
20 losing a hundred thousand of these a month, or half  
21 of. Happening all across the country. It is a  
22 massive problem. What the company is trying to do is  
23 enforce its copyrights.

24 THE COURT: I don't understand. You have said  
25 in your papers that you -- that the company has

1 voluntarily dismissed the defendants and moved to  
2 sever in order to cause future John Does not to move  
3 to sever. I don't see how that --

4 MR. O'BRYAN: They learned. After a while  
5 that -- and in fact in this particular case -- they  
6 have learned because there are gentlemen's  
7 agreements with certain lawyers across the United  
8 States that they will not automatically file these  
9 severance motions, which are just delaying tactics  
10 and really frivolous.

11 THE COURT: Again, it is not -- no, they are not  
12 frivolous. They are not frivolous. They are  
13 legitimate motions. And, in fact, I granted one, or  
14 granted a bunch of them. So they are not frivolous.  
15 I could be wrong about it. Maybe the Fourth Circuit  
16 will tell me that. But they are not frivolous  
17 motions. They have a right to be sued individually.

18 MR. O'BRYAN: And we are willing to sue them  
19 individually.

20 THE COURT: Your affidavit says, and I am  
21 quoting here, "The labor and expense associated with  
22 the Big Torrent peer-to-peer copyright litigation may  
23 make it prohibitively expensive to sue IP addresses  
24 prior to knowing that any particular IP address  
25 resolved to a solvent individual who could be

1 served." What does that sentence mean?

2 MR. O'BRYAN: It means, Your Honor, that  
3 basically this whole approach to these cases is a  
4 winnowing process. And we start out with a large  
5 group and get down to a smaller and smaller group.  
6 We dismiss cases for a number of reasons. We have  
7 run into law enforcement agencies doing this stuff,  
8 and for legitimate reasons. And we dismiss them. We  
9 don't sue anybody in the armed services. We don't  
10 sue well-known politicians. We are not in the  
11 business of doing that kind of thing.

12 THE COURT: I assume you don't sue people who  
13 are innocent, whose --

14 MR. O'BRYAN: That's correct. Once we get the  
15 name, the process is to contact them.

16 THE COURT: Who does that contacting?

17 MR. O'BRYAN: The client.

18 And to start investigating, because as The Court  
19 knows, we are not going to try to get blood out of a  
20 turnip.

21 THE COURT: I understand.

22 MR. O'BRYAN: So, it is a winnowing process,  
23 Your Honor. The industry has found, and courts have  
24 agreed, it is a legitimate way to proceed. It's cost  
25 effective from an administration of justice. In

1 these cases instead of hundreds of cases being filed  
2 there have been three cases filed. And then for  
3 whatever individual cases that have to be filed as a  
4 result of motions being filed we are --

5 THE COURT: Do you think it is proper to join  
6 all of these defendants in one case?

7 MR. O'BRYAN: It has been done in many, many  
8 courts.

9 THE COURT: Do you think it is proper?

10 MR. O'BRYAN: Yes, sir.

11 THE COURT: If you think it is proper, and I  
12 assume then your client thinks it is proper.

13 MR. O'BRYAN: Yes.

14 THE COURT: And this law firm, Lipscomb law firm  
15 in Florida, thinks it is proper.

16 MR. O'BRYAN: Yes, sir.

17 THE COURT: If that is the case, then why do you  
18 voluntarily dismiss the people who have moved to  
19 sever as opposed to litigating that issue with them  
20 and resolving it?

21 MR. O'BRYAN: Because they have found through  
22 experience that they bring in extraneous issues.

23 THE COURT: Like what?

24 MR. O'BRYAN: I don't know. I have been told  
25 extraneous issues are brought in, and it was just not

1 feasible from a financial standpoint to go ahead and  
2 spend a lot of time and money on those motions, to go  
3 ahead and let the person get out of the joint group  
4 and come back and file an individual. They get their  
5 individual --

6 THE COURT: Okay. Well, my view on this,  
7 Mr. O'Bryan, is there is no sanctionable conduct as  
8 to the joinder of these people because, although I  
9 disagree with this view, and the folks at Steel  
10 Handmeyer have made a, you know, a decent argument  
11 that all these folks ought to be joined, the issue  
12 that remains to me is whether these lawsuits are  
13 brought for an improper purpose, namely not  
14 necessarily litigating the issues, but rather when  
15 anybody shows any sign of fighting the case to drop  
16 them out so that you can -- so that somebody can  
17 squeeze some money out of the remaining defendants.  
18 I note that in -- let's just talk about one of these  
19 cases. There is a case called, that you brought,  
20 called K-Beech versus John Doe 1 through 30. I think  
21 that is before Judge Payne.

22 And in that one -- it is number 3:11 CV 468 --  
23 there have been no responsive pleadings by Does 1, 3,  
24 24, 26 and 30 have been dropped from the case.

25 Do you know why those were dropped?



1 MR. O'BRYAN: They were settled.

2 THE COURT: Okay. And then in the Patrick  
3 Collins case. Defendants 3, 5, 8, 52 have counsel in  
4 them. All of those were voluntarily dismissed.  
5 Sorry. 52 was not voluntarily dismissed, but I think  
6 that is because I entered an order telling you you  
7 couldn't do that.

8 As soon as a lawyer showed up, they were  
9 dismissed, except for Doe 40. Was that another one  
10 where there was a settlement?

11 MR. O'BRYAN: I would think so, Your Honor. Not  
12 sure on that one. Most of -- most of those dismissed  
13 were settled.

14 THE COURT: In Raw Films Doe 1 through 32;  
15 number 3, 11 CV 532. On September 27 you voluntarily  
16 dismissed Doe 4. I assume that is a settlement, is  
17 that right?

18 MR. O'BRYAN: I would think so, Your Honor.

19 THE COURT: On the 29<sup>th</sup> Doe 3 filed a motion  
20 to sever saying that he or she lived in  
21 Charlottesville and this law suit wasn't proper here.  
22 And that the plaintiff had refused to dismiss those  
23 three from the case and so they moved to sever. And  
24 then four days later they were voluntarily dismissed.  
25 That doesn't make sense to me.

1 MR. O'BRYAN: I don't recall that from memory.

2 THE COURT: Okay. Well --

3 MR. O'BRYAN: But in the cases that were  
4 voluntarily dismissed, in these cases that we are  
5 here on we had already started the preparation to  
6 file the individual suits.

7 THE COURT: What is so hard about filing these  
8 individual suits?

9 MR. O'BRYAN: We have to get affidavits.

10 THE COURT: Why do you have to get affidavits to  
11 file a law suit? That is not in the Federal Rules  
12 anywhere.

13 MR. O'BRYAN: It is procedure that we follow.  
14 We try to put it altogether before we do --

15 THE COURT: Who have you sued individually?

16 MR. O'BRYAN: We have one suit that is pending  
17 now in this court with the another judge.

18 THE COURT: Is that Judge Spencer's case, a  
19 single John Doe?

20 MR. O'BRYAN: Yes, sir.

21 That is one where they wanted -- there was a  
22 lawyer involved, and they wanted a separate suit, and  
23 then it ended up that they settled the suit with the  
24 the lawyer for more than --

25 THE COURT: The lawyer was the defendant?

1 MR. O'BRYAN: No, the lawyer was representing a  
2 defendant.

3 THE COURT: Oh.

4 MR. O'BRYAN: But the case was settled after the  
5 individual suit was filed.

6 THE COURT: But there wasn't a name of a party  
7 in that case. That was also a John Doe.

8 MR. O'BRYAN: Right. Yes, sir.

9 But the system that has been designed, to me it  
10 looks like it is pretty effective in being the least  
11 expensive way to proceed. My clients have a huge  
12 problem with these internet pirates. They are out  
13 there stealing, they are copying product.

14 THE COURT: I understand there is a big problem,  
15 but there is also a rule regarding severance that is,  
16 you know, or joinder, rather, that may not be helping  
17 you in these cases. It seems to me like you say in  
18 your papers that you, like your client, like to sue a  
19 number of defendants in one case because it is too  
20 expensive otherwise. And that you want to settle  
21 with the defendants through a mass suit because it is  
22 otherwise too hard to get the cases done with all of  
23 the expenses. And that you voluntarily dismissed the  
24 defendants who insist on being sued separately in  
25 order to prevent people from using the right to be

1 sued individually or asserting their right to be sued  
2 individually.

3 And that you voluntarily dismiss cases because  
4 it is too expensive to fight the motion to sever.

5 MR. O'BRYAN: Your Honor, the theory is when  
6 they raise their hand and say, I want an individual  
7 suit, we give them the individual suit.

8 THE COURT: I understand what the theory is. I  
9 don't see the practice of it too much.

10 MR. O'BRYAN: That is what we do. We are just  
11 beginning in this district. These are the first  
12 suits we filed.

13 THE COURT: Well, I suppose in a sense when they  
14 ask to be let out you are giving them what they want,  
15 aren't you?

16 MR. O'BRYAN: What they say they want, Your  
17 Honor, but the reality is in the long run they don't  
18 want it. But they say they do to get out of the  
19 case. So we say if you raise your hand and you want  
20 it, we will give it to you even though it is not as  
21 efficient to do it that way.

22 THE COURT: I think that your client in these  
23 cases -- I believe what you are saying to me,  
24 Mr. O'Bryan -- I believe that that is your  
25 understanding of the process. I am not so convinced

1 that your clients are not trying to put the squeeze  
2 on people. And I think that there is a conflict  
3 between you and the producers in this case at the  
4 sanctions level. And I think that -- I have taken a  
5 look at the rules of ethics, and it seems to me that  
6 the rules are pretty clear that when a lawyer's  
7 personal interest -- I am not saying you are doing  
8 anything wrong -- but when a lawyer's personal  
9 interest puts him in a quandary with his clients'  
10 interests, that they need -- the client needs  
11 separate counsel.

12 And the other aspect of this is that right now  
13 your client -- I don't know what, and I should not  
14 know -- what confidential information your client has  
15 given you that you are not giving. It may be there  
16 is none. It may be there is a lot out there and you  
17 can't tell me the answer to that because it is  
18 confidential information. I think your client needs  
19 to have independent -- needs to make that decision  
20 independently. And I think that before we resolve  
21 this thing your client needs to come back with the  
22 independent counsel for themselves on the sanctions  
23 issue. And, again, the only sanctions issue left is  
24 the manner of conducting the litigation, whether the  
25 lawsuits are filed for an improper purpose, which

1 does not include actually litigating the cases to a  
2 conclusion but rather just squeezing money out of  
3 these people.

4 So why don't we set this for about a month out.  
5 That will give your client some time to find somebody  
6 to come represent them if they choose. If they  
7 choose not to, I can't force them to hire a lawyer.  
8 So if they choose not to, they will have to deal with  
9 the consequences of that themselves.

10 How do you all look on December 1<sup>st</sup>?

11 You okay then?

12 MR. O'BRYAN: Yes, sir.

13 THE COURT: Mr. Paris?

14 MR. PARIS: December 1st is agreeable, Judge.

15 What time?

16 THE COURT: All right. Let's do it at  
17 9:00 o'clock.

18 And, Mr. O'Bryan, I will enter an order saying  
19 that you can't represent your client in these three  
20 cases because of the conflict on this issue. If the  
21 case goes forward, obviously you can continue to  
22 represent your client.

23 And I am not suggesting that you have done  
24 anything improper in appearing today.

25 But what we will do is, I will ask you to be

1 sure that a copy of that is forwarded to your client.

2 And, Mr. Paris, your response to that as well.

3 MR. PARIS: Yes, sir.

4 THE COURT: How are you doing on compliance with  
5 the order to notify?

6 MR. O'BRYAN: We sent notice out last week, Your  
7 Honor.

8 THE COURT: We will be getting a copy.

9 MR. O'BRYAN: We filed under seal with The Court  
10 copies of all the letters we sent.

11 THE COURT: I appreciate it.

12 I appreciate your candor in this case.

13 MR. O'BRYAN: Thank you, Your Honor.

14 THE COURT: We will work this out on  
15 December 1<sup>st</sup>. Okay.

16 MR. O'BRYAN: Thank you, Your Honor?

17 THE COURT: Thank you.

18 Mr. Paris, good to see you.

19 Now, do you share an office now with Mr. Paris,  
20 O'Bryan?

21 MR. O'BRYAN: I used to be his partner, but now  
22 solo. I rent space.

23 THE COURT: Are you still doing -- you at one  
24 time were doing sort of a state-wide practice. Are  
25 you still doing that?

1 MR. O'BRYAN: No, sir. I retired from that in  
2 2000.

3 THE COURT: Okay.

4 Well, it is good to see both of you, and thank  
5 you both for coming today.

6 HEARING ADJOURNED

7

8 THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

9 GILBERT FRANK HALASZ, RMR

10 OFFICIAL COURT REPORTER

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