Case 2:12-mc-00632-LDW - Document 1 Filed 10/09/12 Page 1 of 9 PageID #: 1

MISC. 12 0632

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

-against-

MALIBU MEDIA, LLC..

Plaintiff,

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ OCT 0 9 2012

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LONG ISLAND OFFICE

WEXLER, J.

MOTION TO QUASH
SUBPOENA, MOTION FOR
PROTECTIVE ORDER, AND
MOTION TO BE SEVERED
FROM THE CASE BY
DEFENDANT JOHN DOE #5
WITH IP ADDRESS 68.194.16.247

Civil Action No.: 12-cv-01156 -JFB-ETB

JOHN DOES 1-13,	Defendants.
	v

COMES NOW, defendant, JOHN DOE #5 (Internet Protocol Address 68.194.16.247) ("Doe 5" or "Defendant"), by and through the undersigned counsel, who hereby files this combined Motion to Quash Subpoena, Motion for Protective Order, and Motion to be Severed from the Case against MALIBU MEDIA, LLC ("Malibu" or "Plaintiff") and would show as follows.

I. Introduction and Background

- 1. Plaintiff brought the instant suit in the Eastern District of New York against 13 unnamed Doe Defendants, whom are identified only by Internet protocol addresses ("IP Addresses").
- 2. On or about September 28, 2012, Doe 5 received a letter from his Internet service provider Cablevision, informing him that Cablevision had received a subpoena seeking documents identifying Doe 5's name, address, and telephone number.
- 3. Doe 5 has not been served with any complaint.

- 4. This lawsuit is "part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals using a computer protocol known as BitTorrent." *In Re: BitTorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765 (E.D.N.Y. May 1, 2012).
- 5. "While each case is unique, they follow a similar pattern. The plaintiff claims to own title to one or more copyrights in a film, usually a work of adult entertainment, and claims widespread infringement of its copyright(s) by individuals using the popular file-sharing internet protocol known as BitTorrent. Not knowing the names of these individuals, plaintiff sues "Does," each one represented to be the user of one of the IP addresses that plaintiff claims it observed uploading or downloading the copyrighted work. After filing suit, the plaintiff requests that the court let it conduct expedited discovery, by subpoenaing the various [Internet service providers] ... to identify and name the defendants in the action. Ordinarily, such discovery is prohibited by Fed.R.Civ.P. 26(d). However, plaintiff assures the court that if it will permit this "limited" discovery, the plaintiff can subpoena the [Internet service providers] for subscriber information associated with each IP address, and then name and serve the defendants so that the case may go forward." *Hard Drive Productions, Inc. v. DOES 1- 90,* 2012 WL 1094653 (N.D. Cal. March 30, 2012).
- 6. In these suits, third party subpoenas are used to command Internet service providers to turn over identifying information of John Does based on weak allegations of copyright infringement of distasteful and pornographic subject matter. Such efforts are used by plaintiffs to extort and harass defendants, thus persuading defendants to pay settlements with plaintiffs instead of paying for legal assistance while attempting to keep their anonymity and defending against allegations which can greatly damage their reputations.

- 7. At the time of this writing, Plaintiff Malibu Media, LLC has filed over 51 suits in the 2012 calendar year alone, across various district courts, against numerous John Does on similar claims and similarly seeking to use third party subpoenas on Internet service providers to access identifying information based on IP addresses. There are no cases against any specifically identified defendants after the use of the third party subpoena.
- 8. Federal courts have addressed such practices regarding a plaintiff's "attempt to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar." *Righthaven LLC v. Democratic Underground LLC*, No. 2:11-cv-01356 (D. Nev. April 14, 2011). In this practice, "plaintiffs ... file cases with extremely weak infringement positions in order to settle for less than the cost of defense and have no intention of taking a case to trial. Such a practice is an abuse of the judicial system and threatens the integrity of and respect for the courts." *Raylon, L.LC. v. EZ. Tag Corp.*, No. 6:09-cv-00357 (E.D. Tex. March 9, 2011).

II. Motion to Quash Subpoena

- 9. Under Fed.R.Civ.P. 45(c)(3), the Court must modify or quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies, or subjects a person to an undue burden."
- 10. Under Fed.R.Civ.P. 26(c)(1), the Court limits the frequency or extent of discovery otherwise allowed by the Rules, or by local rule, if it determines that... the burden or expense of the proposed discovery outweighs the likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.
- 11. A party has standing to challenge a subpoena issued to a third party when the party has a

personal or proprietary interest in the information sought by the subpoena. Washington v. Thurgood Marshall Acad., 230 F.R.D. 18 (Dist. D.C., 2005).

- 12. Doe 5 has standing to move to quash the subpoena issued to Cablevision because Plaintiff seeks disclosure of personally identifying information considered to be confidential and over which Doe 5 has a personal and proprietary interest. Because the subpoena issued to Cablevision seeks Doe 5's personally identifying information (name, address, and telephone number), Doe 5 has a "personal interest" in the information sought by the subpoena.
- 13. Doe 5's personal identifying information not only constitutes a personal and proprietary interest, it is also privileged and protected matter as the identification of Doe 5 may subject Doe 5 to pay several thousand dollars under the threat of litigation and public exposure.
- 14. Further, the proposed discovery unduly burdens Doe 5 because, if Doe 5's identifying information is turned over by Cablevision, Plaintiff, as part of their business model and systematic practice, will quickly seek several settlements that amount to thousands of dollars each, with no serious intention of naming Doe 5 nor any other Defendants to subsequent suits.
- 15. Such an undue burden should be not shouldered by Doe 5 as the costs to Doe 5 clearly outweigh the frivolous and non-existent benefits of Plaintiff's claim, given their practice and the nature of these suits.
- 16. Doe 5 respectfully requests that the Court grant his motion and quash the subpoena pursuant to Fed.R.Civ.P. 45(c)(3) and Fed.R.Civ.P. 26(c)(1).

III. Motion for Protective Order

17. "A court for good cause shown ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

Farnsworth v. Procter & Gamble Co., 758 F. 2d 1545 (11th Cir. 1985) (quoting Fed. R. Civ. P.

- 26(c) and adding that the district court has "discretionary power to fashion a protective order"). "In addition to requiring good cause, this circuit has also required the district court to balance the interests of those requesting the order." *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, (11th Cir. 1989).
- 18. Good cause exists for a protective order to prevent the disclosure of Doe 5's identifying information because the disclosure Doe 5's identifying information would subject Doe 5 to the annoyance, embarrassment, oppression, and undue burden and expense of being subject to Plaintiff's attempts to try to extract a settlement out of Doe 5.
- 19. Where a subpoena's primary purpose is not to obtain information for use in the litigation but rather to extract money from numerous individuals, any request to identify such individuals is an undue burden. The subpoena's primary purpose here is to leverage settlements for the plaintiff, "allowing the plaintiff to avoid the filing fees for multiple suits and gaining early access en masse to the identities of alleged infringers." *MCGIP*, *LLC v. Doe*, 2011 WL 4352110, (N.D. Cal. September 16, 2011) ("the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle").
- 20. Courts have recognized that in these recent mass-Doe cases based on BitTorrent, "plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them." *K-Beech, Inc. v. Does 1-85*, No. 3:11cv469-JAG (E.D. Va. October 5, 2011).
- 21. As evidenced by the fact that there are no pending cases against any specifically identified defendants as a result of the third party subpoena, the plaintiffs, by design, have no good faith intent of actually naming Doe 5 and actually litigating the cases. Plaintiff simply seeks to use Court devices of third party subpoena and mass-Doe joinder as leverage to seek

settlements.

- 22. Even if Plaintiff had a legitimate claim, their interests do not outweigh the interests of Doe 5 give the nature of their practice, and the Court may allow a severed action to proceed with Doe 5 remaining anonymous.
- 23. For these reasons, Doe 5's identifying information is not relevant to the litigation and disclosure of same would subject Doe 5 to the harassment of multiple demands for settlement payment from Plaintiff, as well as undue expenses, including attorney fees, to fend off Plaintiff's harassment.
- 24. Doe 5 respectfully requests that the Court grant his motion and enter a protective order pursuant to Fed.R.Civ.P. 26(c).

IV. Motion to be Severed from the Case

- 25. Under Fed. R. Civ. P. 20(a)(2), joinder is appropriate only where (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.
- 26. Under Fed. R. Civ. P. 20(b), even where these factors are met, "[t]he court may issue orders--including an order for separate trials to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party."
- 27. Here, the 13 Does are improperly joined in the same action because the claims against the 13 Does do not arise out of the same occurrence, and the Does will have many different questions of law and fact. As alleged by Plaintiff, the 13 Does in this case have accessed the work in BitTorrent at different dates, in different locations, as part of a swarm.

- 28. Different questions of law and fact exist for each Doe, specifically as to the circumstances of the alleged copyright infringement and whether the work was accessed in the manner in which Plaintiff alleges.
- 29. Merely identifying the defendants by IP address and then making allegations of participation in a "swarm" is insufficient for the purposes of joinder and reflects the frivolous nature of Plaintiff's claims against Doe 5 and the other Does in various suits as there are different questions of fact regarding each Doe.
- 30. Continued joinder will prejudice the Defendants and strain judicial economy.
- 31. As another court explained, "The federal courts are not cogs in a plaintiff's copyright-enforcement business model. The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial. By requiring Malibu to file separate lawsuits for each of the Doe Defendants, Malibu will have to expend additional resources to obtain a nuisance-value settlement-making this type of litigation less profitable. If Malibu desires to vindicate its copyright rights, it must do it the old-fashioned way and earn it." *Malibu Media LLC v. Does*, No. 2:12-cv-3623 (C.D. Cal. June 27, 2012).
- 32. Plaintiff should be required to file separate lawsuits for each Doe defendant.
- 33. Further, even if the factors are met, the Court must protect Doe 5 against embarrassment, delay, expense, and other prejudice that arises from including Doe 5 as a party.
- 34. The embarrassment, delay, expense, and other prejudice has been discussed earlier, and is inherent given the nature of Plaintiff's use of third party subpoena to gain identifying information from numerous Does in an attempt to leverage settlements, with no actual intent of using such identifying information to bring Does to trial.
- 35. Doe 5 respectfully requests that the Court grant his motion and sever Doe 5 from this

action pursuant to Fed. R. Civ. P. 20(a)(2) and Fed. R. Civ. P. 20(b).

VI. Conclusion

36. Plaintiff's use of third party subpoena to acquire identifying information from Internet service providers is used in a systematic attempt to leverage settlements from John Does with no intent to bring such Does to trial. Plaintiff's subpoena should be quashed and protective order should be entered because Doe 5 suffers an undue burden. Doe 5 should also be severed from the case due to improper joinder.

WHEREFORE, Defendant "Doe 5" respectfully requests that this Honorable Court enter an Order GRANTING this Motion and:

- 1. QUASHING the subpoena as to "Doe 5";
- 2. ENTERING a PROTECTIVE ORDER, preventing Plaintiff from obtaining further discovery as to Doe 5;
- 3. SEVERING this action; and
- 4. FOR SUCH OTHER AND FURTHER RELIEF that this Court deems just and proper.

Respectfully submitted,

Yogi Patel, Esq. (6423) THE PATEL LAW FIRM LLP Attorney for John Doe #5

136 East 57th St., Suite 1105 New York, NY 10022

212-729-4266 Ext: 101

Dated:

October 9 2012

New York, New York

MALIBU MEDIA, LLC.,	
	Plaintiff,
-against-	
	MOTION TO QUASH
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	PROTECTIVE ORDER, AND
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	<u>68.194.16.247</u>
	Civil Action No.: 12-cv-01156 -JFB-ETB
JOHN DOES 1-13,	US Magistrate Judge: E. Thomas Boyle
	Defendants.
	v
	TON FOR PROTECTIVE ORDER AND MOTION TO BE
SEVERED	
THE PATEL LAW FIRM, LLP	
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Attorney for Plaintiff	
P.O. Box 632134	
Highlands Ranch, CO 80163-2134 Phone: 303-875-5386	
1 Hone. 503-875-5580	Signature (Rule 130-1.1-a)
	Print name beneath Service of a copy of the within is hereby admitted.
	Dated:
PLEASE TAKE NOTICE NOTICE OF ENTRY	
That the within is a certified true copy of a	
duly entered in the office of the clerk of the	within named court on
NOTICE OF COMMUNICATION	
NOTICE OF SETTLEMENT that an order	of which the within is a true come
that an order will be presented for settlement to the HON	of which the within is a true copy one of the judges of the within
named Court, at	one of the judges of the within
on at	M.
	Yours, etc.