UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PATRICK COLLINS, INC.
DBA ELEGANT ANGEL
8015 Deering Ave
Canoga Park, CA 91304,

No. 12-cv-3507 (BSJ)

Plaintiff,

-against-

DOES 1-45,

Defendants.

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DEFENDANT DOE NO. 41'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO SEVER AND DISMISS ACTION AS TO DEFENDANTS DOE 2 THROUGH 45 AND QUASH SUBPOENAS

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REPLY MEMORANDUM OF LAW

Defendant Doe No. 41 ("Doe 41"), by his attorneys Ray Beckerman, P.C., respectfully submits this reply memorandum of law in further support of his motion for an Order (a) pursuant to Rules 20(a) and 21 of the Federal Rules of Civil Procedure, severing and dismissing the action as to defendants Doe Nos. 2 through 45 on the ground that plaintiff Patrick Collins, Inc. dba Elegant Angel ("Plaintiff") improperly joined said defendants in this action, (b) pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure, quashing the subpoenas issued under the Court's May 16, 2012 *ex parte* discovery order seeking disclosure of the identities of defendants Doe Nos. 2 through 45, and (c) granting such other and further relief as may be just and proper.

Plaintiff puts the cart before the horse, arguing that the moving defendant Doe 41's denial of infringing activity is not a basis to quash a subpoena. Plaintiff disregards the fact that our motion first seeks severance and dismissal of Does 2 through 45 based on misjoinder, and then seeks the quashing of the subpoena as to those defendants on the ground that there is no basis for Plaintiff to seek the identities of those defendants once they have been dismissed from this case.

With respect to the propriety of joinder here, Plaintiff's opposing memorandum omits any discussion of the import of the Second Circuit's decision in Nassau County Association of Insurance Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir. 1974). In Nassau County, the Court held that joinder was improper under Rule 20(a)(2) because

> there has been no showing of a right to relief arising from the same transaction or series of transactions. No allegation of *conspiracy or other concert of action* has been asserted. *No connection at all between the practices engaged in by each of the 164 defendants* has been alleged. Their actions as charged were separate and unrelated, with terminations occurring at *different times* for *different reasons* with regard to different agents.

Nassau County, supra, 497 F.2d at 1154 (italics added). As shown in our initial memorandum of law, Plaintiff's conclusory allegations of cooperation or concerted action between the Doe defendants are wholly implausible given the anonymous and automated operation of the BitTorrent protocol. See, e.g., In re Bittorrent Adult Film Order & Copyright Infringement Cases, 2012 WL 1570765 at *11 (E.D.N.Y. May 1, 2012) (as the BitTorrent protocol operates automatically and invisibly while uploading and downloading pieces of a media file between users' computers, a BitTorrent "user plays no role in these interactions").

Not surprisingly, Plaintiff's opposing memorandum of law likewise fails to address *any* of the cases from this Circuit cited in our initial memorandum of law holding that joinder of multiple BitTorrent defendants in a single case is improper and requires severance and dismissal as to all defendants other than Doe no. 1. Digital Sins, Inc. v. Does 1-245, 2012 WL 1744838 (S.D.N.Y. May 15, 2012) (McMahon, J.) (applying Nassau County, supra); SBO Pictures, Inc. v. Does 1-20, 12 Civ. 3925 (S.D.N.Y. Jun. 4, 2012) (Scheindlin, J.) (Appendix A hereto) ("Most importantly, in this Circuit, the allegation that defendants have merely committed the same violation in the same way does not satisfy the standard for permissive joinder because there are 'no litigation economies to be gained from trying what are in essence [twenty] different cases together' and there is no evidence that the Doe defendants conspired or coordinated their activities in any way"); Zero Tolerance Entertainment, Inc. v. Does 1-45, 2012 WL 2044593 (S.D.N.Y. Jun. 6, 2012) (Scheindlin, J.); Combat Zone Corp. v. Does 1-34, 12 Civ. 4133

(S.D.N.Y. Jun. 18, 2012) (McMahon, J.) (Appendix B hereto) ("Accessing a single swarm at different periods of time to download a movie for one's personal use on one's personal computer appears to me to fall within th[e] rule" of Nassau County, supra"); Malibu Media, LLC v. Does 1-14, 12 Civ. 4136 (S.D.N.Y. Jun. 12, 2012) (Stanton, J.) (Appendix C hereto); Malibu Media, LLC v. Does 1-7, 12 Civ. 2952 (S.D.N.Y. Jun. 15, 2012) (Cote, J.) (Appendix D hereto); In re Bittorrent, supra, 2012 WL 1570765 (Brown, M.J.); Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 at *1 (E.D.N.Y. May 31, 2012) (Lindsay, M.J.) (Appendix E hereto) (report and recommendation adopted by Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 (E.D.N.Y. Jul. 12, 2012) (Bianco, J.) (Appendix F hereto)).

Instead, Plaintiff purports to rely on cases which (a) ignore the import of Nassau County, supra, (a) were decided *ex parte*, and/or (c) did not even involve the issue of joinder.

For instance, neither of the Michigan cases cited by Plaintiff addresses, let alone applies, the controlling authority of Nassau County, supra. In Patrick Collins, Inc. v. Does 1-21, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012), Magistrate Judge Randon disregarded the substantial likelihood that pieces of the movie copied or uploaded by any individual Doe went not to the other Doe defendants but to one or more of the potentially thousands who participated in a given swarm *who are not parties to the lawsuit*. See Hard Drive Productions, Inc. v. Does 1-188, 809 F.Supp.2d 1150, 1163 (N.D. Cal. 2011). See also Patrick Collins, Inc. v. Does 1-44, 2012 WL 1144854 at *6 (D.Md. Apr. 4, 2012) ("While each alleged infringer may have received pieces of plaintiff's copyrighted work from various other swarm members, there is no evidence of any connection between the alleged infringers").

Attempting to buttress his reliance on Patrick Collins, Inc. v. Does 1-21, Plaintiff falsely (and oddly) claims that the decision was issued "with the assistance of a computer-literate

law clerk" (Opposing Memo, p. 5) when the assistance was actually provided by a law student intern. Patrick Collins, Inc. v. Does 1-21, supra, 2012 WL 1190840 at *1 n.2. In any event, there is no reason to believe that the vast majority of judges who have addressed the joinder issue in BitTorrent cases and have come to a different conclusion than Magistrate Judge Randon were not "computer literate" or lacked the assistance of "computer literate" law clerks.

The other Michigan decision, Third Degree Films v. Does 1-36, 2012 WL 2522151 (E.D.Mich. May 29, 2012), acknowledged that the fact that there were "only 36 defendants" -- a small number in relation to the thousands of others who may have participated in the swarm -- and the 69 day timespan between the first and last transmissions logged by the plaintiff's investigator made it "unlikely that contemporaneous peers involved two defendants", Third Degree, supra, 2012 WL 2522151 at *6, 8, yet disregarded the significance of this in a decision clearly at odds with Second Circuit law. See Nassau County, supra, 497 F.2d at 1154 ("Their actions as charged were separate and unrelated, with terminations occurring at *different times* for different reasons with regard to different agents") (italics added). The Michigan district court in Third Degree also labored under the misguided view that the exchange of pieces of a movie through BitTorrent constitutes an "enterprise", which ignores the automated and "invisible" nature of the BitTorrent protocol, where "the user plays no role" in the exchange. See In re BitTorrent, supra, 2012 WL 1570765 at *11.

Likewise, none of the cases from this District cited by Plaintiff -- Digital Sin, Inc. v. Does 1-176, __ F.R.D. __, 2012 WL 263491 (S.D.N.Y. Jan. 30, 2012), Media Products v. Does 1-40, 12 Civ. 3630 (S.D.N.Y. Jun. 12, 2012); Combat Zone v. Does 1-33, 12 Civ. 4132 (S.D.N.Y. Jul. 18, 2012); Arista Records, LLC v. Does 1-33, 08 Civ. 3048 (S.D.N.Y. Jul. 31, 2008); Third Degree Films, Inc. v. John Does 1-217, 11 Civ. 7564 (order issued under In re

Adult Film Copyright Infringement Litigation, 2012 WL 1003581 (S.D.N.Y. Mar. 26, 2012)); and Combat Zone v. Does 1-63, 11 Civ. 9688 (order based on In re Adult Film Copyright Infringement Litigation, 2012 WL 1003581 (S.D.N.Y. Mar. 26, 2012)) -- discussed or applied the Second Circuit's joinder standards of Nassau County, supra.

Plaintiff's reliance on Digital Sin v. Does 1-176, supra; Media Products v. Does 1-40, supra,; Combat Zone v. Does 1-33, supra; and Arista Records, LLC v. Does 1-33, supra, is further misplaced as those decisions were issued *ex parte* on the plaintiff's unopposed motion for early discovery. Moreover, the Court in Media Products v. Does 1-40 expressly stated that it was making no decision on whether joinder was appropriate and would revisit the issue at a later date. Likewise, the Court in Digital Sin v. Does 1-176 expressly stated that it remained open to reconsidering the joinder issue at a later date, i.e., a severance motion by a defendant. Plaintiff's reliance on Combat Zone v. Does 1-33 and Arista Records, LLC v. Does 1-33 is even more bizarre as joinder was never raised as an issue in those cases.

Plaintiff's citation to two other cases before Judge McMahon of this Court -- Pearson Education, Inc. v. Mehrotra, 10 Civ. 2825 (S.D.N.Y.) and Media Products, Inc. v. Does 1-59, 12 Civ. 125 (S.D.N.Y) -- likewise lends no support for joinder here. Pearson Education did not even involve BitTorrent and there is no indication in the case docket (Appendix G hereto) that misjoinder was ever an issue. Plaintiff's reliance on Media Products, Inc. v. Does 1-59 -- described in the opposing memorandum as "precedent in the SDNY for joinder of John Does" (Opposing Memo, p. 4) -- is misleading for several reasons. (1) While Judge McMahon issued a handwritten, one page preliminary ruling on April 12, 2012 stating that the plaintiff had made "a preliminary showing of proper joinder under Fed. R. Civ. P. 20", the ruling was without prejudice to any severance motion that may be made by defendants. (See Appendix H hereto).

(2) This preliminary ruling was superseded by reasoned and detailed decisions by Judge McMahon in two other BitTorrent cases -- Digital Sins, Inc. v. Does 1-245, supra, 2012 WL 1744838, and Combat Zone Corp. v. Does 1-34, supra – both reflecting Judge McMahon's evolving view that joinder of multiple defendants in such cases is improper. (3) Mr. Meier voluntarily discontinued Media Products, Inc. v. Does 1-59 as to all defendants on May 30, 2012. (See case docket annexed hereto as Appendix I). (4) Judge McMahon expressly admonished Mr. Meier[1] in her decision in Combat Zone Corp. v. Does 1-34, supra, against relying on any preliminary orders that she had issued in other cases.

> First, counsel argues that I should permit these defendants to be joined because I have been inconsistent on this issue, citing a 2008 case involving the recording industry and a 2010 case involving the publishing industry. To which I say, with Justice Holmes, that a foolish consistency is the hobgoblin of little minds. Counsel suggests that the earlier cases were incorrect; I might well conclude the same if confronted with them today, armed with considerably more knowledge and precedent than was before me back in 2008 and 2010. Plaintiff's counsel should take no comfort from any preliminary order issued in an earlier case.

Combat Zone Corp. v. Does 1-34, supra, 12 Civ. 4133 (Appendix B hereto).

Our initial memorandum of law sets forth the unfairness, prejudice and inefficiency to both the defendants and the court system caused by joining the defendants in a single action, as recognized by numerous courts, including this one. Plaintiff attempts to counter these obvious concerns by frivolously arguing that some defendants might want to litigate all of their disparate defenses in a single action. Then, in a manner suggesting a quote from a court opinion, or at least a neutral commentator, Plaintiff's attorney inserts into his opposing memorandum of law in this case (at pages 6-7) a lengthy single-spaced self-serving block quote

[1] Mr. Meier represented the plaintiffs in Media Products, Inc. v. Does 1-59, supra, Digital Sins, Inc. v. Does 1-245, supra, and Combat Zone Corp. v. Does 1-34, supra.

from a memorandum of law submitted in another BitTorrent case in Massachusetts by a Doe defendant purportedly represented by Marc Randazza, Esq. Said attorney has sued hundreds of BitTorrent users in the last year *on behalf of copyright holder plaintiffs*[2] which raises the question of how and why he came to be making a motion, purportedly on behalf of a Doe defendant in that case, that clearly goes against the interests of the defendants in that case.

"It is improper to join defendants who are unrelated either factually or legally." DirectTV, Inc. v. Armellino, 216 F.R.D. 240, 240 (E.D.N.Y. 2003). In arguing that the moving defendant Doe 41 does not have standing to seek severance and dismissal as to all misjoined defendants, Plaintiff and its counsel seeks to escape the consequences of their own impropriety and conveniently ignore the fact that courts have granted motions seeking the same relief in countless other BitTorrent cases. Indeed, the Court is expressly authorized to grant such relief *sua sponte*. See Fed. R. Civ. P. 21 ("On motion or *on its own*, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party") (italics added).

As the requirements for permissive joinder are not met here, the action should be severed and discontinued as to Does 2 through 5.

Finally, the assertion by Plaintiff's counsel, Mr. Meier, that he "does not employ abusive practices" (Opposing Memo, p. 2) reflects, at best, a case of amnesia. Mr. Meier is no stranger to such practices. Indeed, while representing plaintiffs in a sexual harassment lawsuit against entertainers Siegfried & Roy, Mr. Meier was sanctioned $37,415.00 in September 2011 on account "of the subjective bad faith demonstrated by Plaintiffs arguments and method of litigating this case." Preiss v. S & R Production Co., 2011 WL 4402952 at *4 (D.Nev. Sep. 20, 2011). These included:

[2] A sampling of the cases in which Mr. Randazza has *represented copyright holder plaintiffs in BitTorrent cases*, including in obtaining default judgments against defendants, is reproduced in Appendices J through M hereto.

> Plaintiffs use of thinly veiled threats (Dkt. # 36, Ex. F, email from Mike Meier dated July 30, 2010; Ex. G, email from Mike Meier dated June 4, 2010), use of tabloid media to pressure Defendants (id., Ex. D, National Enquirer article), dishonesty with this Court (compare id., Ex. C, offer to settle for $500,000, with Dkt. # 38, Opp. at 8:6–7 (Mr. Meier's communications do not discuss any dollar amount"), Plaintiffs continued arguments that they managed to deprive this Court of jurisdiction over this case, and other conduct as described in Defendants motion and accompanying exhibits.

Preiss, supra, 2011 WL 4402952 at *4 n.2.

Before Mr. Meier embarked on his current representation of pornographic content owners, including Plaintiff here, he defended Doe defendants in BitTorrent cases. Before switching sides last year,[3] he was interviewed in a Virginia newspaper about the high rate of misidentification of defendants and the tactics employed by the plaintiffs' attorneys in these cases.

> "The error rate is considerable," said Mike Meier, a Washington, D.C.-area lawyer handling a number of these cases.
>
> * * *
>
> Meier acknowledges the country's long-standing copyright laws but said the [pornographic content plaintiffs'] lawyers' tactics have been too aggressive.
>
> "In my opinion, they are bill collectors for the movie industry," he said. "They're basically extorting money.

[3] Screenshots of Mr. Meier's website, before and after the switch, are viewable at http://fightcopyrighttrolls files.wordpress.com/2011/11/meierbefore.jpg and http://fightcopyrighttrolls files.wordpress.com/2011/11/meierafter.jpg, respectively.

> "Do I like their methods? No, not really," he said. "But I don't know what I would do if the shoe was on the other foot."

See Tim McGlone, *Porn industry sues anonymous Hampton Roads users*, THE VIRGINIAN-PILOT, Sep. 4, 2011, available at <http://hamptonroads.com/2011/09/porn-industry-sues-anonymous-hampton-roads-users>.

CONCLUSION

Based on the foregoing, the Court should grant the within motion in all respects.

Respectfully submitted,

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