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BY FAX (212) 805-7927

Hon. Naomi Reice Buchwald, District Judge
U.S. District Court, Southern District of New York
500 Pearl Street
New York, NY 10007

Re: Malibu Media, LLC v. Does 1-5
Case No. 12-cv-2954 (NRB)

Dear Judge Buchwald:

We are the attorneys for defendant "John Doe" a/k/a Doe No. 4 in the above-referenced case. In accordance with paragraph 2(A) of Your Honor's Individual Practices, we request a pre-motion conference regarding a motion to (a) sever and dismiss the action as to Doe defendants numbered 2 through 5 on the ground that plaintiff improperly joined them in this action, (b) vacate the Court's April 30, 2012 *ex parte* discovery order (the "*Ex Parte* Order") to the extent that it authorized plaintiff to serve subpoenas on internet service providers seeking disclosure of said defendants' identities, and (c) quash all subpoenas issued under the *Ex Parte* Order to the extent that they seek disclosure of said defendants' identities.

This action is "part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent." In Re Bittorrent Adult Film Order & Copyright Infringement Cases, 2012 WL 1570765 at *1 (E.D.N.Y. May 1, 2012). Indeed, plaintiff is one of several such purveyors who "have employed abusive litigation tactics to extract settlements from John Doe defendants." Id. at *9.

Last month, in Digital Sins, Inc. v. John Does 1-245, 2012 WL 1744838 (S.D.N.Y. May 15, 2012), Judge McMahon of this Court joined with numerous courts around the country holding that joinder of multiple defendants in BitTorrent cases is improper and requires dismissal and severance as to all but the first defendant, in addition to the quashing of subpoenas seeking the dismissed defendants' identities.

> There is no need for this Court to write another lengthy opinion discussing why plaintiff's theory [of joinder] is wrong. Rather, I adopt and expressly incorporate into this memorandum order the reasoning of Judge Gibney in K-Beech [K-Beech, Inc. v. John Does 1-85, No. 3:11 cv 468, 2011 U.S. Dist. LEXIS 124581, at *2-3 (E.D.V.A. Oct. 5, 2011)]; Magistrate Judge Spero of the Northern District of California in Hard Drive Productions, Inc. v. Does 1-188, No. C-11-01566, 809 F. Supp. 2d 1150 (N.D. Cal. August 23, 2011); several other courts in the Northern District of California, including Diabolic Video Productions, Inc. v. Does 1-2099, 10 Civ. 5865, 2011 U.S. Dist. LEXIS 58351, at *10-11 (N.D. Cal. May 31, 2011); and most especially the comprehensive Report and recommendation of The Hon. Gary R. Brown, U.S.M.J., that was filed just last week in our sister court, the Eastern District of New York, in In re BitTorrent Adult Film Copyright Infringement Cases, No. 11-cv-3995, 2012 U.S. Dist. LEXIS 61447 (E.D.N.Y. May 1, 2012).
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> All of the courts on which this Court relies, and whose reasoning I find persuasive, have concluded that where, as here, the plaintiff does no more than assert that the defendants "merely commit[ed] the same type of violation in the same way," it does not satisfy the test for permissive joinder in a single lawsuit pursuant to Rule 20. In this Circuit, the fact that a large number of people use the same method to violate the law does not authorize them to be joined as defendants in a single lawsuit. See Nassau Cnty. Assoc. of Ins. Agents, Inc. v. Aetna Life & Casualty, 497 F. 2d 1151, 1154 (2d Cir. 1974). For the reasons set forth by Magistrate Judge Brown, there is no basis from the allegations of the complaint to conclude that any of the defendants was acting other than independently when he/she chose to access the BitTorrent protocol. "The bare fact that Doe clicked on a command to participate in the BitTorrent Protocol does not mean that they [sic] were part of the downloading by unknown hundreds or thousands of individuals across the country or across the world." Hard Drive Prods., 809 F. Supp. 2d at 1163. Nothing in the complaint negates the inference that the downloads by the various defendants were discrete and separate acts that took place at different times; indeed, the complaint alleges that separate defendants shared access to a file containing a pornographic film in

> separate and isolated incidents over the course of 59 days. In other words, what we have here is 245 separate and discrete transactions in which 245 individuals used the same method to access a file via the Internet - no concerted action whatever, and no series of related occurrences - at least, not related in any way except the method that was allegedly used to violate the law.

Digital Sins, supra, 2012 WL 1744838 at *2.

Likewise, the dates of alleged downloading provided in the Complaint herein -- 11/23/11, 2/18/12, 11/29/11, 2/3/12 and 12/16/11 -- utterly undermine the allegation that all the five John Does were acting in concert.

It is clear that plaintiff's joinder of multiple Doe defendants in the instant action was improper. We therefore respectfully request that the Court sever and dismiss this action as to Doe Defendants 2 through 5 and that the subpoenas to internet service providers seeking their identities be quashed.

Respectfully yours,

Morlan Ty Rogers

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