UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MALIBU MEDIA, LLC,

Plaintiff,

-against-

JOHN DOES 1-11,

Defendants.

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No. 12-cv-3810 (ER)

DEFENDANT JOHN DOE 1'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR AN ORDER DISMISSING THE COMPLAINT AND QUASHING SUBPOENA ON THE GROUND THAT THE COMPLAINT FAILS TO STATE A CLAIM

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PRELIMINARY STATEMENT

Defendant John Doe 1 ("Doe 1"), by her attorneys Ray Beckerman, P.C., respectfully moves for an Order dismissing the Complaint herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and quashing the subpoena issued under the Court's August 21, 2012 *ex parte* discovery order on the ground that the Complaint herein fails to state a claim, and granting such other and further relief as may be just and proper.

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). A universal characteristic of these cases is the plaintiffs' use of "abusive litigation tactics to extract settlements from Doe defendants." Id. at *9. These tactics include initiating sham legal proceedings based on tenuous allegations against anonymous defendants who deny any wrongdoing, in the hopes of extracting quick and easy settlements from the defendants.

After the suit is filed, the plaintiff moves *ex parte* for leave to take early discovery from internet service providers ("ISPs") seeking the identities of the internet account subscribers who were assigned the IP addresses listed in the plaintiff's complaint.

Once the plaintiff obtains the identities of the IP subscribers through early discovery, the plaintiff's attorney or collection agent contacts the subscribers and demands several thousand dollars from each of them to settle the lawsuit. Subscribers who do not cave in to these demands face the prospects of an uncertain legal battle where the cost of defending the lawsuit will greatly exceed the settlement demand.

To avoid legal fees and the embarrassment of having one's name publicly sullied with accusations of downloading pornography, a defendant will almost always cough up the money and settle the lawsuit *even if the defendant engaged in no wrongdoing*. See, e.g., Pacific Century Int'l, Ltd. v. Does 1–37, __ F.Supp.2d __, __, 2012 WL 1072312 at *3 (N.D.Ill. Mar. 30, 2012) ("the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle"); In re Bittorrent, supra, 2012 WL 1570765 at *10 ("This concern, and its potential impact on social and economic relationships, could compel a defendant entirely innocent of the alleged conduct to enter an extortionate settlement"); SBO Pictures, Inc. v. Does 1-3036, 2011 WL 6002620 (N.D.Cal. Nov. 30, 2011) (a defendant – "whether guilty of copyright infringement or not -- would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded. This creates great potential for a coercive and unjust 'settlement'"); Third Degree Films, Inc. v. Does 1-108, 2012 WL 1514807 at *4 (D.Md. Apr. 27, 2012) ("the practical reality of these types of cases—which, as noted, have proliferated across the country—is that *almost all end in settlement* and few, if any, are resolved on their merits") (italics added).

PROCEDURAL HISTORY

Plaintiff filed this instant action on May 14, 2012 against 11 unidentified defendants alleging that they uploaded and downloaded Plaintiff's pornographic film via the internet utilizing the BitTorrent protocol.

On May 22, 2012, Plaintiff moved *ex parte* for leave to take early discovery.

By Order dated August 21, 2012, this Court *sua sponte* severed and dismissed Doe Defendants 2 through 11 from this action , and granted Plaintiff leave to serve a "subpoena on the ISP of John Doe 1 … to obtain information to identify the Defendant, specifically his or

her name, current and permanent address, and Media Access Control address." The Order requires the ISP to serve John Doe 1 with a copy of the subpoena, a copy of the Order and a Notice to Defendants within 60 days, and provides that John Doe 1 may file a motion contesting the subpoena within 60 days after service of the subpoena.

On August 23, 2012, Plaintiff issued a subpoena to Optimum Online/CSC Holdings, Inc. ("Cablevision"). By letter dated October 3, 2012, Cablevision notified John Doe 1 that her personal information had been subpoenaed by Plaintiff. This motion follows.

ARGUMENT

POINT I

THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

To survive a motion to dismiss pursuant to Federal Rule 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that *the defendant* is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (italics added). Moreover, such factual allegations must be "sufficient 'to raise the possibility of relief above the "speculative level."'" City of Omaha, Neb. Civilian Employees' Retirement System v. CBS Corp., 679 F.3d 64, 67 (2d Cir. 2012) (quoting Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 91 (2d Cir. 2010) and Twombly, supra, 550 U.S. at 555, 127 S.Ct. at 1965).

When determining the sufficiency of a claim under Rule 12(b)(6), the court may consider not only the allegations on the face of the pleading but also "[d]ocuments that are

attached to the complaint or incorporated in it by reference [as they] are deemed part of the pleading." Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007).

Here, the allegations of the Complaint make clear that the defendant whom Plaintiff is suing as "John Doe 1" in this case is the *subscriber* to the internet account which Cablevision assigned IP address 24.45.224.34 @ 2/4/12 17:49. **Plaintiff, however, has no non-speculative basis for asserting that the subscriber of this account was the individual who actually engaged in or participated in the allegedly infringing activity or was even aware of it.**

Paragraph 7 of the Complaint alleges that "[e]ach Defendant is known to Plaintiff only by an IP address." (emphasis added). Paragraph 8 alleges that "[a]n IP address is a number that is assigned by an Internet Service Provider (an "ISP") to devices, such as computers, that are connected to the Internet." Paragraph 9 alleges that "[t]he ISP to which each Defendant subscribes can correlate the Defendant's IP address to the Defendant's true identity." (emphasis added).

The infringement claims asserted against the subscriber here are utterly speculative, and the complaint is thus subject to dismissal, as (1) Plaintiff admittedly does not know who actually committed the alleged infringement (Complaint, ¶ 7), (2) the Complaint alleges no facts supporting an inference that the subscriber -- i.e., the person whose name is on the account and who pays the bill for the account -- is in fact the individual who actually uploaded or downloaded Plaintiff's movie, and (3) the Complaint alleges no basis for holding the subscriber liable for the allegedly infringing conduct of unknown others.

The inference that Plaintiff would like to draw – that a subscriber to an internet account, assigned an IP address through which infringing activity allegedly occurred, is the individual who engaged in such activity – has no basis in logic or reality.

> The complaints assert that the defendants—identified only by IP address—were the individuals who downloaded the subject "work" and participated in the BitTorrent swarm. However, **the assumption that the person who pays for Internet access at a given location is the same individual who allegedly downloaded a single sexually explicit film is tenuous, and one that has grown more so over time**. An IP address provides only the location at which one of any number of computer devices may be deployed, much like a telephone number can be used for any number of telephones…. [I]t is no more likely that the subscriber to an IP address carried out a particular computer function—here the purported illegal downloading of a single pornographic film—than to say an individual who pays the telephone bill made a specific telephone call.
>
> * * *
>
> Most, if not all, of the IP addresses will actually reflect a wireless router or other networking device, meaning that while the ISPs will provide the name of its subscriber, **the alleged infringer could be the subscriber, a member of his or her family, an employee, invitee, neighbor or interloper.**

In re Bittorrent, supra, 2012 WL 1570765 at *3, 5 (emphasis added). See also Malibu Media LLC v. Does 1-5, 2012 WL 2001968 at *1 (S.D.N.Y. Jun. 1, 2012) ("The fact that a copyrighted work was illegally downloaded from a certain IP address does not necessarily mean that the owner of that IP address was the infringer").

> In another recent BitTorrent case, the plaintiff's attorney
>
> estimated that 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material. Counsel stated that the true offender is often the "teenaged son ... or the boyfriend if it's a lady." (1/17/12 Tr. at 16). Alternatively, the perpetrator might turn out to be a neighbor in an

> apartment building that uses shared IP addresses or a dormitory that uses shared wireless networks.

Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 2012 WL 263491 at *3 (S.D.N.Y. Jan. 30, 2012).

The increasing popularity of wireless routers[1] through which unknown interlopers can access subscribers' internet accounts, In re Bittorrent, supra, 2012 WL 1570765 at *3, makes the allegation that the subscribers committed the infringement in this case all the more speculative. The Court should not close its eyes to the significant risk that people innocent of any copyright infringement are being falsely identified as "Defendants" and swept up in these BitTorrent lawsuits. The experience one New York homeowner had last year in the context of a criminal investigation is no less relevant to this civil case.

> It was 6:20 a.m. March 7 when he and his wife were awakened by the sound of someone breaking down their rear door. He threw a robe on and walked to the top of the stairs, looking down to see seven armed people with jackets bearing the initials I-C-E, which he didn't immediately know stood for Immigration and Customs Enforcement.
>
> * * *
>
> Lying on his family room floor with assault weapons trained on him, shouts of "pedophile!" and "pornographer!" stinging like his fresh cuts and bruises, the Buffalo homeowner didn't need long to figure out the reason for the early morning wake-up call from a swarm of federal agents.
>
> That new wireless router. He'd gotten fed up trying to set a password. Someone must have used his Internet connection, he thought.

[1] "While a decade ago, home wireless networks were nearly non-existent, 61% of U.S. homes now have wireless access." In re Bittorrent, supra, 2012 WL 1570765 at *3 n.5 (citing Frederic Lardinois, *Study: 61% of U.S. Households Now Have WiFi*, TechCrunch, Apr. 5, 2012, available at <http://techcrunch.com/2012/04/05/study-61-of-u-s-households-now-have-wifi>).

> "We know who you are! You downloaded thousands of images at 11:30 last night," the man's lawyer, Barry Covert, recounted the agents saying. They referred to a screen name, "Doldrum."
>
> "No, I didn't," he insisted. "Somebody else could have but I didn't do anything like that."
>
> * * *
>
> Within three days, investigators determined the homeowner had been telling the truth: If someone was downloading child pornography through his wireless signal, it wasn't him. About a week later, agents arrested a 25-year-old neighbor and charged him with distribution of child pornography.
>
> * * *
>
> The homeowner later got an apology from U.S. Attorney William Hochul and Immigration and Customs Enforcement Special Agent in Charge Lev Kubiak.

See Carolyn Thompson, *Bizarre pornography raid underscores Wi-Fi privacy risks*, NBC NEWS.com, Apr. 24, 2011, available at http://www.nbcnews.com/id/42740201/ns/technology_and_science-wireless>, cited in VPR Internationale v. Does 1 – 1017, 2011 WL 8179128 at *1 (C.D. Ill. Apr. 29, 2012).

Pornographic content owners like Plaintiff don't apologize for their mistakes. To them, there aren't any since the whole point of their litigation strategy is to extort settlement payments from subscribers of internet accounts whether or not those subscribers committed any infringement. See Zero Tolerance Entertainment, Inc. v. Does 1-45, 2012 WL 2044593 at *1 (S.D.N.Y. Jun. 6, 2012) (Scheindlin, J.) ("early discovery has been used repeatedly in cases such as this one to harass and demand of defendants quick settlement payments, regardless of their liability").

Moreover, suing internet account subscribers as defendants – without any evidentiary basis for claiming that a particular subscriber actually committed the alleged infringement – violates Fed. R. Civ. P. Rule 11's requirement that "the factual contentions [i.e., that this particular subscriber installed a BitTorrent software program onto his or her computer and participated in a BitTorrent swarm to copy and distribute Plaintiff's movie] have evidentiary support . . ." An attorney's signature on a motion or pleading means "that to the best of his or her knowledge, information, and belief there is good ground to support the contentions in the document, both in terms of what the law is or should be and in terms of the evidentiary support for the allegations, and that he or she is acting without an improper motivation." Charles Alan Wright & Arthur R. Miller, *5A Fed. Prac. & Proc. Civ.* § 1335 (3d ed.).

Here, other than an allegation that she resides somewhere in Westchester County, Plaintiff admittedly knows nothing about the subscriber being sued in this action, not even her gender, and has not pleaded any factual content that would allow this Court to draw the reasonable inference that she was the individual who allegedly engaged in either direct or contributory copyright infringement of Plaintiff's pornographic movie. See Next Phase Distribution, Inc. v. John Does 1-27, __ F.R.D. __, __, 2012 WL 3117182 at *5 (S.D.N.Y. Jul. 31, 2012) (rejecting "the assumption that the person who pays for Internet access at a given location is the same individual who allegedly downloaded a single sexually explicit film") (quoting In re Bittorrent, supra, 2012 WL 1570765 at *3); Media Products, Inc. v. John Does 1-26, 2012 WL 3866492 at *1 (S.D.N.Y. Sept. 4, 2012) (in Bittorrent lawsuits, there is a "high probability of misidentified Doe defendants (who may be the bill-payer for the IP address but not the actual infringer)") (emphasis added).

Plaintiff's frivolous designation of the internet account subscriber as the defendant in this case based on the mere possibility that such subscriber *might* have been the infringing individual is exactly the kind of speculative pleading that is barred by Twombly, Iqbal, and their progeny. The Complaint must therefore be dismissed for failure to state a claim.

POINT II

THE SUBPOENAS SHOULD BE QUASHED

Upon dismissal of the Complaint, the Court should quash the subpoena seeking John Doe 1's identity. In connection therewith, Plaintiff should be directed to serve immediately upon Cablevision a copy of the Court's order dismissing the Complaint and quashing the subpoena. Digital Sins, Inc. v. Does 1-245, 2012 WL 1744838 at *6 (S.D.N.Y. May 15, 2012). The Court should also issue a protective order providing that, in the event of inadvertent or other disclosure by Cablevision of documents setting forth John Doe 1's identity, Plaintiff shall destroy such documents and keep such information confidential and not use it for any purpose.

CONCLUSION

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

Respectfully submitted,

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