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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOES 1-19, Defendants.	:	Case No. 12-cv-06945-MAS-DEA Civil Action Motion date: February 4, 2013

BRIEF IN SUPPORT OF NOTICE OF MOTION TO DISMISS/SEVER, FOR A PROTECTIVE ORDER AND/OR AN ORDER QUASHING PLAINTIFF'S NON-PARTY SUBPOENAS

On the brief:

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I. PRELIMINARY STATEMENT

Plaintiff, pornographer MALIBU MEDIA, LLC, is one of the most prolific of the "copyright locusts" that have "descended on the federal courts, exacting low-cost settlements from John Does and then moving on to the next District."[1] After filing hundreds of similar suits nationwide against tens of thousands of unidentified defendants, plaintiff settled in the District of New Jersey and has since burdened our Courts with no less than twenty-three separate actions against at least six-hundred and fifty unidentified defendants. (See Table of Cases, Blaine Dec., at Exhibit A; see also ECF No. 6).

As recently explained by the Fifth Circuit, these plaintiffs carry out their "strategy of suing anonymous users for allegedly downloading pornography illegally, using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars – a tactic that has been employed all across the state and has been replicated by others across the country." Mick Haig Prods. E.K.

[1] See Media Products, Inc. d/b/a Devil's Films v. Does 1-26, 2012 U.S. Dist. LEXIS 125336, *4-*5 (S.D.N.Y. September 4, 2012), where District Judge Harold Baer of the Southern District of New York, in a consolidated opinion encompassing three cases, revisited his decision to grant the plaintiffs' *ex parte* motions for expedited discovery and severed and dismissed all but John Doe 1 from each case. See also Malibu Media v. Does, 12-CV-2949, 12-CV-3810, 12-CV-3818 and 12-CV-3821, ECF No. 10 (S.D.N.Y. August 21, 2012) (severing and dismissing all but John Doe 1 from four MALIBU MEDIA cases due to improper joinder); and Malibu Media v. Does 1-4, 12-CV-2961 (S.D.N.Y August 9, 2012) (severing and dismissing John Does 1-3 due to improper joinder), a true copy of which is attached hereto as Exhibit B.

v. Does 1-160, 687 F.3d 649, 652 (5th Cir. 2012) (upholding sanctions entered against a mass BitTorrent copyright plaintiff's attorney).

Until October of 2012, the Courts of the District of New Jersey forgave these actions, finding that the issue of joinder was premature when raised at the inception of a BitTorrent copyright case.[2] As a result, this District became favorable to other copyright plaintiffs[3] filing suits against thousands of anonymous Does "who may be the bill-payer for the IP address but not the actual infringer." See Media Products, Inc. d/b/a Devil's Films v. Does 1-26, 2012 U.S. Dist. LEXIS 125336, *3 (S.D.N.Y. September 4, 2012). However, on October 10, 2012, the tides changed. District Judge Faith Hochberg - who first condoned the initial joinder of mass unidentified defendants in BitTorrent copyright litigation in this District – invoked the doctrine of improper joinder to sever and dismiss all unidentified defendants except Doe 1. See Amselfilm Productions GMBH & Co. KG v. Swarm 6A6DC, 12-cv-3865-FSH-PS, ECF No. 12 at 2-4 (D.N.J. October 10, 2012).[4] Judge Hochberg held joinder to

[2] See K-Beech, Inc. v. John Does 1-39, 11-cv-4776-FSH-PS, ECF No. 34 (D.N.J. Jan. 6, 2012); Patrick Collins, Inc. v. John Does 1-43, 11-CV-4203-FSH-PS, ECF No. 24 (D.N.J. Jan. 6, 2012).

[3] Examples are Malibu Media, K-Beech, Inc., Patrick Collins, Inc., Third Degree Films, Inc. and West Coast Productions.

[4] A true copy of this unpublished opinion is attached hereto as Exhibit C.

be improper under F.R.C.P. 20 since the Doe "Defendants' only determinable connection to one another is the similar method of distributing the same work, and [their] alleged instances of distribution constitute separate transactions." Id. at 2.

More recently, Magistrate Judge Patty Schwartz applied Judge Hochberg's new holding to MALIBU MEDIA, LLC, severing and dismissing nine Doe defendants and only allowing the case against Doe 1 to proceed. See Malibu Media v. John Does 1-10, 12-CV-7092, ECF No. 6 (D.N.J. November 27, 2012).[5] Despite this, Plaintiff persists with its hollow allegation that John Doe 8, along with eighteen other unrelated individuals, are somehow *jointly and severally liable* even though, at best, they are only guilty of engaging in a similar method of distributing the same work and, at worst, they are innocent.

Through the use of *ex parte* expedited discovery motions and third-party subpoenas served upon internet service providers ("ISPs"), plaintiff now seeks the disclosure of the nineteen Doe defendants' personal identifying information. With this information, plaintiff, by taking advantage of statutory damages and the stigma associated with downloading pornographic movies, will attempt to induce nineteen completely distinct and potentially innocent individuals to settle for an amount roughly

[5] A true copy of this unpublished order is attached hereto as Exhibit D.

equal to the price it would take to retain counsel to mount a defense.

Accordingly, it is respectfully requested that this Court grant John Doe 8 the relief he seeks in his present application for three reasons:

(1) First, Judge Hochberg revisited these issues and recently determined, along with Judge Schwartz, that the joinder of multiple defendants in a BitTorrent copyright infringement action is improper under F.R.C.P. 20(a).

(2) Second, recognizing that mass BitTorrent litigation runs the enormous risk of denying those sued of individualized justice and the ability to defend themselves, dozens of courts across the country are revisiting their prior rulings and holding that joinder of numerous Doe defendants is improper; and

(3) Third, the practice of mass BitTorrent copyright litigation creates immense undue burden and expense, since each Doe Defendant has a unique factual situation in which his or her internet access could have been abused by a friend, family member, neighbor or other person able to manipulate or in close proximity to their IP address.

II. STATEMENT OF FACTS

Plaintiff filed its complaint against nineteen John Doe Defendants on November 7, 2012. (ECF No. 1). The complaint contains two counts: direct and contributory copyright infringement of plaintiff's 16 federally registered pornographic copyrighted movies. (Id. at ¶5). It alleges that each of the nineteen unidentified defendants was properly joined under the theory that they are somehow part of the same series of transactions, because they are jointly and severally liable for one another's conduct, acted in concert, allegedly infringed upon the exact same piece of plaintiff's copyrighted worked and have common questions of law and fact in that plaintiff's allegations against them are the same and the defendants all used the BitTorrent protocol. (Id. at ¶11).

The "hit dates" specified for plaintiff's alleged "siterip" of these 16 movies span over two months: August 17, 2012 (for John Doe 8) to October 19, 2012 (John Doe 19). (ECF No. 1-2). In reality, the nineteen Doe "Defendants' only determinable connection to one another is the similar method of distributing the same work, and [their] alleged instances of distribution constitute separate transactions." See Amselfilm Productions GMBH, supra, 12-cv-3865-FSH-PS, ECF No. 12 at 2.

On or about November 12, 2012, plaintiff filed an *ex parte* motion for expedited discovery seeking leave to serve third-party subpoenas upon ISPs to obtain the identifying information of the individuals connected to the IP addresses referenced in plaintiff's complaint. (ECF No. 4). In support of that application, plaintiff attached the declaration of one Tobias Fieser. (ECF No. 4-4). A cursory review of the federal docket demonstrates that plaintiff has used Mr. Fieser's exact same declaration on multiple occasions; the only difference, contents-wise, being the two supporting exhibits. (Blaine Dec., Exhibit B, which contains true copies of 6 of Mr. Fieser's declarations that were used by plaintiff to obtain expedited discovery in separate case).

On November 15, 2012, plaintiff's *ex parte* motion for expedited discovery was granted. (ECF No. 5).

On or about November 17, 2012, plaintiff served a subpoena upon ISP Comcast, seeking the disclosure of the name, address and telephone numbers of John Does 1-14. (Dec. of John Doe 8, Exhibit A). John Doe 8 then received a letter from Comcast dated December 4, 2012, advising him that plaintiff had filed a copyright infringement lawsuit, that he was identified by Comcast via his assigned IP address, 68.44.117.86, associated with John Doe 8, and that plaintiff was seeking the disclosure of his name, address and other information. (Id. at ¶4). He

was told he had until January 3, 2013, to alert Comcast that he had taken legal action to challenge the subpoena. (Id. at ¶5).

Since plaintiff does not know what exactly John Doe 8 transmitted through the BitTorrent client and cannot state whether John Doe 8 shared this alleged transmission with the 18 remaining unidentified defendants, Plaintiff alleges only that, on August 17, 2012, at 2:11 p.m. E.S.T., John Doe 8 improperly transmitted "a full copy or, or a portion thereof," of one of plaintiff's copyrighted digital media files. (ECF No. 4-4, ¶18 and ECF No 4-6, at Doe 8).

John Doe 8 did not copy or transmit plaintiff's copyrighted works on August 17, 2012, at 2:11 p.m. E.S.T., and was certainly not a part of plaintiff's alleged BitTorrent "swarm." (Dec. of John Doe 8, ¶6). Since it was an afternoon weekday, he was likely away from his home, working at his office. (Id. at ¶6). In addition, John Doe 8 has a "WiFi" wireless internet router at his home. Through his WiFi connection, people in his home and at locations nearby his home can receive his internet connection. If people other than himself used his WiFi connection, they would have John Doe 8's same IP address by receiving an internet signal through his WiFi router. (Id. at ¶7).

Since John Doe 8's WiFi router is normally running, he believes that, on August 17, 2012, it was on. (Id. at ¶8).

John Doe 8 also brings a number of other people's computers to his home to repair them. During the repair process, the computers are often connected to his home WiFi router. If one of these computers was previously configured to use the BitTorrent software at issue in this case to acquire or transmit certain media, and the BitTorrent software automatically ran during the repair process while at his home, then the computer could have received an internet signal through his home WiFi router. (Id. at ¶9).

To the best of John Doe 8's knowledge, no one else in his home has any knowledge concerning the identity of anyone who copied and transmitted plaintiff's copyrighted media or was connected to plaintiff's alleged BitTorrent swarm. (Id. at ¶10).

III. LEGAL ARGUMENT

POINT ONE

DUE TO THE IMPROPER JOINDER OF UNRELATED DEFENDANTS, PLAINTIFF'S CLAIMS AGAINST DEFENDANTS, JOHN DOES 2-19, SHOULD BE SEVERED AND DISMISSED.

Plaintiff improperly joined as defendants 19 unrelated individuals in a strategy consistent with factually identical cases filed across the country attempting to join tens of thousands of unrelated defendants in alleged copyright infringement actions. The overwhelming trend of recent decisions in this District and across the country – particularly in cases brought by MALIBU MEDIA, LLC – is to sever and dismiss all Doe defendants, except Doe 1, due to plaintiff's improper joinder of unrelated defendants. Accordingly, this Court should be guided by the recent opinions by Judge Hochberg and Judge Schwartz, revisit the issue of improper joinder in mass copyright infringement cases like this, and sever and dismiss without prejudice all claims against Does 2-19.

A. Courts of this District have recently held joinder to be improper under since the Doe Defendants' alleged instances of distribution constitute separate transactions and permitting joinder would undermine F.R.C.P. 20(a)'s purpose of judicial economy and convenience.

In January of 2012, Judge Hochberg initially held that the issue of improper joinder was premature.[6] However, with the benefit of experience, she recently revisited this issue and determined that the joinder of unrelated Doe Defendants' is improper, since the alleged instances of distribution constitute separate transactions and the only determinable connection between the defendants is the similar method of distributing the same work. See Amselfilm Productions GMBH, supra, 12-cv-3865-FSH-PS, ECF No. 12 at 2. Accordingly, plaintiff's joinder allegations, standing alone, are insufficient to justify the enormous burden and undue expense of proceeding against 19 defendants who are, in fact, unrelated.

More recently, Magistrate Judge Patty Schwartz applied Judge Hochberg's new holding to MALIBU MEDIA, LLC, severing and dismissing nine Doe defendants and only allowing the case against Doe 1 to proceed. See Malibu Media, supra, 12-CV-7092, ECF No. 6. John Doe 8 respectfully requests that this Court be guided by Judge Hochberg's and Judge Schwartz's experience with

[6] See K-Beech, Inc. v. John Does 1-39, 11-cv-4776-FSH-PS, ECF No. 34 (D.N.J. Jan. 6, 2012); Patrick Collins, Inc. v. John Does 1-43, 11-CV-4203-FSH-PS, ECF No. 24 (D.N.J. Jan. 6, 2012).

mass copyright litigators, like plaintiff, and grant John Doe 8 the relief requested in his within motion.

In so doing, John Doe 8 submits that this Court should revisit the issue of improper joinder and reanalyze the basis for the decision it reached in Malibu Media, LLC v. John Does #1-30, 12-CV-3896-MAS-DEA, ECF No. 23 (D.N.J. December 12, 2012), particularly to the extent that it was guided by Judge Hochberg's prior opinions in K-Beech, Inc. v. John Does 1-39, 11-cv-4776-FSH-PS, ECF No. 34 (D.N.J. Jan. 6, 2012) and Patrick Collins, Inc. v. John Does 1-43, 11-CV-4203-FSH-PS, ECF No. 24 (D.N.J. Jan. 6, 2012). As held more recently by Judge Hochberg in October of 2012, "[w]ithout more connecting them, [19] defendants who have distributed pieces of work at different times cannot be permissively joined in this case." Amselfilm Productions GMBH, supra, 12-cv-3865-FSH-PS, ECF No. 12 at 2, n. 3. The only similarity between these defendants is the plaintiff's belief - based upon its IP address search – that they allegedly engaged in the similar method of distributing the same work over a two month time period, but not necessarily with one another.

This does not mean that joinder of defendants would never be appropriate. Rather,

> [f]or joinder to be appropriate, Plaintiff must show a more definite connection between participants in the swarm, namely that the group of defendants sought to be joined have directly participated in the same transaction. For example, the Plaintiff might be able to

> establish joinder by showing that on a certain date and time, a particular subset of the swarm distributed pieces of the work to a common downloader.
>
> [Id. at 2-3, n.3].

"For permissive joinder in this matter to be appropriate and not to strain judicial resources, there must be a connection between defendants beyond the copyrighted work and method of distribution, namely that defendants were involved in the same transaction with the same downloader at the same time." Id. at 3). Without such a showing, the unique factual circumstances of each individual John Doe Defendant and their specific defenses overpower any perceived utility that plaintiff alleges may be gained through the joinder of these 19 otherwise unrelated defendants.

Here, Plaintiff's sole alleged basis for joinder – its explanation of the "BitTorrent Protocol" – is meritless. In fact, as recognized by Judges Hochberg and Schwartz in their opinions analyzed above, nothing in the BitTorrent Protocol creates a relationship amongst the Defendants. See e.g. Hard Drive Prods., Inc. v. Does 1-188, 2011 U.S. Dist. LEXIS 94319, at *38-39 (N.D. Cal. Aug. 23, 2011) (holding that the relationship created through the BitTorrent protocol does not support joinder); On the Cheap, LLC v. Does 1-5011, 2011 U.S. Dist. LEXIS 99831, at *10 (N.D. Cal. Sept. 6, 2011) (stating

that joinder would violate the "principles of fundamental fairness" and be prejudicial to the defendants).

As Courts considering Malibu Media's suits have recently concluded,

> Under the BitTorrent Protocol, it is not necessary that each of the Does . . . participated in or contributed to the downloading of each other's copies of the work at issue—or even participated in or contributed to the downloading by any of the Does . . . . Any 'pieces' of the work copied or uploaded by any individual Doe may have gone to any other Doe or to any of the potentially thousands who participated in a given swarm. The bare fact that a Doe clicked on a command to participate in the BitTorrent Protocol does not mean that they were part of the downloading by unknown hundreds or thousands of individuals across the country or across the world.
>
> [Malibu Media, LLC v. Does 1-5, 2012 WL 3030300, Case No. 12-cv-1405 (D. Colo. July 25, 2012)].

As further acknowledged by Judges Hochberg and Schwartz, the improper joinder of these John Doe defendants decreases litigation economies by creating a severe strain on judicial resources. Amselfilm Productions GMBH, supra, 12-cv-3865-FSH-PS, ECF No. 12 at 2-3 and n.4; Malibu Media, supra, 12-CV-7092, ECF No. 6. The defenses in these cases "vary greatly and turn on different factual and legal questions, for example, unauthorized access to a wireless router, possibly misidentified Doe defendants and improper venue." Media Products, Inc. d/b/a

Devil's Films, supra, 2012 U.S. Dist. LEXIS 125336, at *8. The Court can also "anticipate additional individualized defenses, such as minimal participation in a swarm . . . and personal jurisdiction, as well as separate motions and discovery disputes." Ibid. "Each Defendant may have different factual and legal defenses, and would then file completely unrelated motions that the Court would have to resolve in one case. Simply associating the correct response and reply to each motion could take significant time before even reaching the merits of potentially unrelated defense." Third Degree Films, Inc. v. Does 1-131, 280 F.R.D. 493, 498 (D. Ariz. 2012).

John Doe 8 presents a perfect example of these individualized factual defenses. He repairs computers at his home. During the repair process, the computers are often connected to his home WiFi router. If one of these computers was previously configured to use the BitTorrent software at issue in this case to acquire or transmit certain media, and the BitTorrent software automatically ran during the repair process while at his home, then the computer could have received an internet signal through his home WiFi router. This defense, like many others, is likely unique from the remaining factual defenses that other Does may raise in this case. Accordingly, after recognizing that each of these Doe Defendants will have their own unique defenses distinct to themselves, only, it

becomes clear that permissive joinder of all 19 unrelated Doe Defendants is improper.

For these reasons, plaintiff cannot meet its burden with respect to demonstrating permissive joinder under F.R.C.P. 20(a). In addition, it is well-established that, in situations like these, even if the plaintiff has satisfied the test for permissive joinder, the Court may exercise its discretion under F.R.C.P. 20(b), 21 and 42(b) in finding that it is proper to sever and dismiss claims against certain parties. Amselfilm Productions GMBH, supra, 12-cv-3865-FSH-PS, ECF No. 12 at 3 (citing Adams v. City of Camden, 461 F. Supp. 2d 263, 271 (D.N.J. 2006), Media Products, Inc. d/b/a Devil's Films, supra, 2012 U.S. Dist. LEXIS 125336, at *8 and Third Degree Films, supra, 280 F.R.D. at 496, 497-99). Here, after considering the fundamental fairness to the parties, the management issues for the Court, and, as recognized by Judge Hochberg, the likelihood that plaintiff's mass copyright cases sre an attempt to save substantial money in filing fees mandated by statute, Amselfilm Productions GMBH, supra, 12-cv-3865-FSH-PS, ECF No. 12 at 3, n.4, it is respectfully requested that the Court exercise its discretion and find that joinder is not warranted.

Therefore, John Doe 8 respectfully requests that this Court acknowledge the undue burden that plaintiff seeks to foist upon the Courts and unidentified Does of this District with its

insistence upon mass copyright litigation, and that it sever and dismiss Does 2-19 from this action without prejudice.

B. There is a general trend in which federal courts across the country are using improper joinder to sever and dismiss numerous John Doe Defendants from mass copyright actions initiated from litigators like MALIBU MEDIA, LLC.

The recent opinions of Judges Hochberg and Schwartz are this District's manifestations the trend across the country – particularly in cases brought by MALIBU MEDIA, LLC – to sever and dismiss all Doe defendants, except Doe 1, due to the improper joinder of unrelated defendants. Through this interplay with copyright plaintiffs, Courts across the country are coming to terms with the process through which mass copyright litigation is being used to induce potentially innocent defendants to settle for the same amount it would likely take to mount a defense.

In the Southern District of New York, Judge Harold Baer has already revisited the issue of improper joinder and severed and dismissed all but John Doe 1 as a defendant from each case. See Media Products, Inc. d/b/a Devil's Films, supra, 2012 U.S. Dist. LEXIS 125336, at *4-*5. Two recent orders filed in August 2012 in the Southern District of New York have reached the same result in 5 MALIBU MEDIA, LLC Cases. (See Exhibits A & B attached hereto). Likewise, courts of the Eastern District of

California have been severing and dismissing on the same grounds in MALIBU MEDIA cases.[7]

Courts of the Middle District of Florida, the District of Colorado, the Central District of California and the Eastern District of Virginia also support dismissal on improper joinder grounds, particularly when MALIBU MEDIA, LLC is the plaintiff. See e.g., Malibu Media v. Does 1-28, Order, ECF No., Case 8:12-cv-01667-JDW-MAP (M.D. Fla. Dec. 6, 2012), (severing defendants because "effective management of these cases will be impractical" and because Malibu was improperly avoiding hundreds of thousands in filing fees),; Malibu Media, LLC v. Does 1-19 & Malibu Media LLC v. Does 1-46, Order, Cases 3:12-cv-335-J-32MCR & 5:12-cv-522-J-UATC-PRL (M.D. Fla. Dec. 13, 2012) (staying case and ordering Plaintiff to brief the issue of joinder); Malibu Media, LLC v. Does 1-14, 2012 WL 3401441, Case No. 12-cv-2071 (D. Colo. August 14, 2012) (holding joinder improper and severing all but Doe 16); Malibu Media, LLC v. Does 1-24, 2012 WL 3400703, Case No. 12-cv-2070 (D. Colo. August 14, 2012) (same); Malibu Media, LLC v. Does 1-5, 2012 WL 3030300, Case No. 12-cv-1405 (D. Colo. July 25, 2012) (same); Malibu Media, LLC v. Does 1-54, 2012 WL 3030302, Case No. 12-cv-1407 (D. Colo. July 25, 2012) (same);

[7] See Media v. Doe, 2012 U.S. Dist. LEXIS 147447 (E.D. Cal. October 12, 2012); Malibu Media, LLC v. John Does 1-12, 2012 U.S. Dist. LEXIS 169964 (E.D. Cal. November 29, 2012); Malibu Media, LLC v. Doe, 2012 LEXIS 146919 (E.D. Cal. October 11, 2012); Malibu Media, LLC v. John Does 1-48, 2012 U.S. Dist. LEXIS 16992 (E.D. Cal. November 29, 2012).

Malibu Media v. John Does 1-10, Civ. No. 1:12-cv-3623-ODW(PJWx), ECF No. 7 (C.D. Cal. June 27, 2012) (same); Malibu Media v. John Does 1-10, Civ. No. SACV 12-649-JST(MLGx), ECF No. 8 (C.D. Cal. June 14, 2012) (concluding that the joinder of 10 John Doe defendants was not appropriate under a BitTorrent Protocol theory); Malibu Media, LLC v. John Does 1–23, __ F.Supp.2d __, 2012 WL 1999640 (E.D. Va. May 30, 2012).[8]

With this general trend in mind, John Doe 8 respectfully requests that this Court join the emerging body of law and, consistent with prior opinions of Judges Hochberg and Schwartz, hold that the joinder of unrelated Doe Defendants' is improper,

[8] In addition to the MALIBU MEDIA cases cited above, a sampling of recent cases across the nation with the same holding include:

- West Coast Productions, Inc. v. Does 1-48, 50-581, ECF No. 21, Order, Civ. No. 5:12-cv-00277-RS-EMT at *8 (N.D. Fla. Dec. 21, 2012) (severing all Does under the discretion of Rule 21 because, among other reasons, "joinder of [a large number of] defendants produces great case management concerns, jeopardizing the court's ability to control the docket if Plaintiff proceeds on the merits");
- West Coast Productions, Inc. v. Swarm Sharing Hash Files, et al., ECF No. 15, Ruling, Civ. No. 6:12-cv-01713 at *3 (W.D. La. Aug. 17, 2012) (severing all Does other than Doe 16 and quashing all subpoenas to ISPs);
- Bubble Gum Productions, LLC v. Does 1-80, 2012 WL 2953309 (S.D. Fla. July 19, 2012) (holding that joinder is improper and severing Does 2-80);
- In re BitTorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765, *9 (E.D.N.Y May 1, 2012)(severing John Does);
- Hard Drive Productions, Inc. v. Does 1-90, 2012 WL 1094653 (N.D. Cal. March 30, 2012) (severing defendants and denying discovery);
- Patrick Collins, Inc. v. John Does 1-23, 2012 WL 1019034 (E.D. Mich. Mar. 26, 2012) (severing defendants and denying discovery);
- Liberty Media Holdings, LLC v. BitTorrent Swarm, 2011 U.S. Dist. LEXIS 126333, *7-9 (S.D. Fla. Nov. 1, 2011) (severing defendants *sua sponte*);
- Liberty Media Holdings, LLC v. BitTorrent Swarm, 2011 U.S. Dist. LEXIS 135847 (S.D. Fla. Nov. 1 ,2011) (severing defendants *sua sponte*); and
- AF Holdings, LLC v. Does 1-97, 2011 U.S. Dist. LEXIS 126225, at 7-8 (N.D. Cal. Nov. 1, 2011) (severing defendants 2-97).

since the alleged instances of distribution constitute separate transactions and the only determinable connection between the defendants is the alleged similar method of distributing the same work (i.e., the BitTorrent Protocol).

POINT TWO

THIS COURT MUST ISSUE A PROTECTIVE ORDER AND/OR QUASH THE SUBPOENA.

Pursuant to the recent rulings of Judges Hochberg and Schwartz, this Court has the authority to quash any subpoena issued in this action by plaintiff to ISPs that seek the information about the identify of any John Doe defendants except John Doe 1. Likewise, many of the litany of cases cited in Point One.B., supra, support the quashing of all non-party subpoenas issued in this case except for those seeking information from John Doe 1.

Indeed, this Court has the discretion under F.R.C.P. 26 to supervise, compel and deny discovery. Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1306 (11th Cir. 2011). Likewise, F.R.C.P. 26(c) gives the Court discretionary power to fashion an appropriate protective order. Farnsworth v. Proctor & Gamble Co., 758 F.2d 1545, 1548 (11th Cir. 1985). With these principles in mind, John Doe 8 respectfully requests that this Court use F.R.C.P. 26(c) to supervise the discovery process by

issuing a protective order and/or quashing plaintiff's non-party subpoenas as to John Does 2-19.

Courts addressing the interplay of Rule 45 and Rule 26(c) have repeatedly confirmed the overarching authority provided in Rule 26(c) to supervise the discovery process in a case to be tried before the Court. See, e.g., Straily v. UBS Financial Servs., Inc., 2008 WL 5378148 (D. Colo. Dec. 23, 2008) (issuing protective order to prevent compliance with subpoena issued from New York); Best Western Intern., Inc. v. Doe, 2006 WL 2091695 at *2 (D. Ariz. July 25, 2006) (denying request for expedited discovery to determine the Doe's identities). In Best Western, the Court stated, "[T]he district court in which an action is pending has the right and responsibility to control the broad outline of discovery." Ibid. (quoting Static Control Components, Inc. v. Darkprint Imaging, 201 F.R.D. 431, 434 (M.D.N.C. 2001)). General discovery issues should receive uniform treatment throughout the litigation. The subpoenas at issue in this case only exist because this Court authorized early discovery pursuant to F.R.C.P. 26. Thus, consistent with the rulings of Judges Hochberg and Schwartz, the Court has the discretion to modify the discovery granted to protect the Doe Defendants.

In addition, even after the disclosure of the Doe Defendants' identifying information, plaintiff will need extensive additional information to identify the actual

copyright infringer, thereby causing additional undue burden and expense to fall upon the Doe Defendants, their family, friends, relatives and other loved ones.

A plaintiff's inaccurate portrayal of the facts required to identify infringers was exposed in Boy Racer, Inc. v. Doe, 2011 U.S. Dist. LEXIS 103550 (N.D. Cal. Sept. 13, 2011). After issuing a similar subpoena and representing to the Court that each IP address corresponds to a defendant, the plaintiff there was required to admit that this information was legally insufficient and only served as the starting point for a far more invasive investigation. As a result, the Court rejected the plaintiff's attempt to expand its discovery beyond its initial representations. Id. at 6-7 (rejecting plaintiff's additional discovery request because "[p]resumably, every desktop, laptop, smartphone and tablet in the subscriber's residence, and perhaps any residence of any neighbor, houseguest or other sharing his interest access, would be fair game.").

Moreover, there is no question that Plaintiff has privacy and proprietary interests over the information sought by the subpoena and may, therefore, move to quash it. See Third Degree Films, Inc. v. Does 1-108, 2012 U.S. Dist. LEXIS 25400 (D. Md. February 28, 2012).

In this case, the Court should exercise its discretion by issuing a protective order and/or quashing plaintiff's non-party subpoenas as to John Does 2-19.

IV. Conclusion

It is respectfully requested that this Court grant John Doe 8 the relief he seeks in his present application for three reasons:

(1) First, Judge Hochberg revisited these issues and recently determined, along with Judge Schwartz, that the joinder of multiple defendants in a BitTorrent copyright infringement action is improper under F.R.C.P. 20(a).

(2) Second, recognizing that mass BitTorrent litigation runs the enormous risk of denying those sued of individualized justice and the ability to defend themselves, dozens of courts across the country are revisiting their prior rulings and holding that joinder of numerous Doe defendants is improper; and

(3) Third, the practice of mass BitTorrent copyright litigation creates immense undue burden and expense, since each Doe Defendant has a unique factual situation in which his or her internet access could

have been abused by a friend, family member, neighbor or other person able to manipulate or in close proximity to their IP address.

Respectfully submitted,

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MATTHEW K. BLAINE, ESQ.

Dated: January 3, 2013