

1 Morgan E. Pietz (SBN 260629)
2 THE PIETZ LAW FIRM
3 3770 Highland Ave., Ste. 206
4 Manhattan Beach, CA 90266
5 mpietz@pietzlawfirm.com
6 Telephone: (310) 424-5557
7 Facsimile : (310) 546-5301

8 Attorneys for Person Alleged to be John Doe No. 5

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 MALIBU MEDIA, LLC, a California limited
12 liability company,

13 Plaintiff,

14 v.

15 JOHN DOES 1 through 10,

16 Defendants.

Case No.: CV-12-3614-GHK-Ex

Assigned to Hon. George H. King
Referred to Hon. Charles F. Eick

**DECLARATION OF MORGAN E.
PIETZ RE: MALIBU MEDIA'S
ABUSIVE LITIGATION TACTICS**

[Pursuant to L.R. 83-7 and
Fed. R. Civ. Proc. 26(c)(1),
for violations of L.R. 83-1.3]

Hearing Date: Monday July 30, 2012
Hearing Time: 9:30 a.m.
Hearing Court: 650

DECLARATION OF MORGAN E. PIETZ

RE: MALIBU MEDIA'S ABUSIVE LITIGATION TACTICS

I, Morgan E. Pietz, hereby declare as follows:

1. I am an attorney duly admitted to the practice of law in the state and federal courts of the State of California.

2. I am the attorney principally responsible for the representation of three different individuals who all separately received letters from their Internet service providers ("ISPs") regarding a subpoena issued by Malibu Media, LLC ("**Malibu Media**") in connection with a lawsuit pending in the Central District of California. I have reviewed all of these letters personally.

3. The letters from the ISPs explain that the ISPs have been served with a subpoena issued by Malibu Media. The letters further explain that Malibu Media alleges in the lawsuit that someone used a particular Internet Protocol ("**I.P.**") address at a particular date and time, to download a copyrighted work owned by Malibu Media. The letters also explain that according to the ISPs' records, one of the I.P. addresses at issue in the lawsuit can be 'associated' with my clients' cable/fiber-optic/dial-up Internet account. Finally, the letters inform my clients that they have, generally, 30 days within which to file a motion to quash this subpoena, or file a motion seeking an extension of time in which to file such a motion, or else the ISP will turn their personal information over to Malibu Media, LLC.

4. It should be noted that my clients do not admit to actually being the person who used the I.P. address specified in the ISP letter to allegedly download a copyrighted work owned by Malibu Media. Rather, *since my clients happen to pay the Internet bill*, unless they do something about the subpoena, namely file a motion to quash, then they face the unhappy prospect of having their personal contact information turned over to Malibu Media. As will be explored later in this case, no doubt, in the age of home networks, wireless routers, viruses, Trojan horses, etc. there is no guarantee that the person who allegedly downloaded a copyrighted work even resides in my clients' household. It

1 could be a neighbor, or even someone controlling my clients' computers computer without
 2 them knowing it. Nonetheless, on occasion, I refer to my clients as John Doe No. 5, or 6.
 3 This is for ease of reference only. Just because I refer to them as such is not intended to be
 4 an admission that my clients *actually are* the John Doe alleged in the complaint.

5 5. I represent the following clients in the following cases, all of which were
 6 filed by Malibu Media this year in the Central District of California:

7 a. John Doe No. 5, *Malibu Media v. John Does 1-10*, 2:12-CV-3614-
 8 GHK-Ex, filed April 26, 2012;

9 b. John Doe No. 10, *Malibu Media v. John Does 1-10*, 2:12-CV-3615--
 10 DDP-JCGx, filed April 26, 2012,

11 c. John Doe No. 9, *Malibu Media v. John Does 1-10*, and 2:12-CV-
 12 3622-DSF-JEM.

13 6. Each of these three individuals above ("**Clients**") wish to proceed
 14 anonymously, so I will not refer to any of them by name.

15 **(a) Plaintiff Malibu Media, LLC: Serial Copyright Infringement Plaintiff**

16 7. I am familiar with the plaintiff in this action, Malibu Media, LLC. In
 17 addition to the clients noted above, from this District, I also represent other John Doe
 18 clients being sued by Malibu Media outside of the Central District of California. Malibu
 19 Media is a serial copyright infringement plaintiff. According to a PACER search I
 20 performed on June 18, 2012, *so far this year, Malibu Media has filed 203 copyright*
 21 *infringement lawsuits in 18 federal judicial districts across the country*. Please find
 22 attached hereto as Exhibit A a true and correct copy of my search results from this PACER
 23 search, which shows all of Malibu Media's pending cases in the federal courts as of June
 24 18, 2012. The search term for the party was "Malibu Media."

25 8. According to my PACER search, *28 of the 203 copyright infringement*
 26 *cases filed by Malibu Media this year are currently pending in the Central District of*
 27 *California*. Thus, as of June 18, 2012 (more cases are filed everyday) this District is tied
 28

1 for the lead with the United States District Court for the District of Colorado, which
 2 currently also has 28 pending copyright cases filed by Malibu Media.

3 **(b) All of the 28 Cases Are Similar, if Not Identical, in Several Key Respects**

4 9. As shown by Exhibit A, a review of the PACER search results for the 28
 5 cases filed by Malibu Media so far this year in this District reveals that the cases appear to
 6 have been filed in three waves:

7 a. On February 27, 2012, Malibu Media filed its first two infringement
 8 cases in this district, with another case filed the following day. The original, low-
 9 numbered case, 2:12-CV-1642-RGK-SS, filed February 27, 2012, was assigned to Judge
 10 R. Gary Klausner, with discovery referred to Magistrate Suzanne H. Segal.

11 b. On April 26, 2012, Malibu Media filed 13 more copyright
 12 infringement cases in this District, including all three of the cases where I represent the
 13 Clients described above.

14 c. On May 29, 2012, Malibu Media filed 11 more copyright
 15 infringement cases in this District. (That day, Malibu Media also filed three more cases in
 16 the Eastern District of California.)

17 10. Based on a review of the dockets, including cursory review of the complaint,
 18 and cursory review of the motion for early discovery, for at least one case from the three
 19 “waves” of cases, a, b, and c, described above, the following appears to be true:

20 a. Each case utilizes essentially an identical complaint: each case is filed
 21 exclusively against John Doe defendants; the complaint provides the same background
 22 information on BitTorrent, alleges the same two causes of action for copyright
 23 infringement against John Doe Defendants 1-10. Then, as attachments to the complaint,
 24 there are tables which assign Doe numbers to I.P. addresses, and show which I.P.
 25 addresses supposedly downloaded which copyrighted works on which dates.

26 b. In each case, Malibu Media moved for early discovery on the strength
 27 of essentially the same supporting declarations from the same technical expert, one Mr.
 28 Tobias Fieser of IPP Limited. I am familiar with Mr. Fieser. He is an expert who has been

1 utilized by other plaintiffs in so-called “copyright troll” cases where plaintiffs filed a
 2 copyright infringement lawsuit as a means to use the court’s subpoena power to obtain an
 3 easy settlement. A quick Internet search, conducted June 28, 2012, revealed that he has
 4 offered similar declarations to the ones he provided in this case in: *E.g., K-Beech, Inc. v.*
 5 *John Does 1-18*, E.D. Mi. Case No. 11-cv-15226; *Patrick Collins, Inc. v. John Does 1-26*,
 6 W.D.N.C. Case No. 11-cv-0394.

7 c. Several of the complaints appear to be completely identical clones of
 8 one another, where the only difference between them whatsoever, is the I.P. addresses of
 9 the John Does. This tracks with what I was later told by Plaintiff’s counsel, that some of
 10 the cases involve the same cryptographic “hash tag.”

11 d. It appears that in almost every case, Malibu Media is represented by
 12 the same attorney: Leemore Kushner, of the Kushner Law Group, is either the only
 13 attorney of record (later cases), or has made a subsequent appearance (February cases), in
 14 cases filed in all three groups. (I did notice that Ms. Kushner had not yet appeared in one
 15 of the February cases).

16 11. After Malibu Media refused to definitively state whether it had indeed filed
 17 even a single Notice of Related Cases, under my supervision, I had my office staff check
 18 the docket for all 28 cases Malibu Media filed in this district and note, in a new column on
 19 Exhibit A, whether a Notice of Related Cases was filed. My staff performed this review of
 20 the 28 dockets on June 27, 2012, and as of then, Malibu Media did not file a Notice of
 21 Related Cases in any of the 28 cases it filed in this District.

22 12. As of when I finalized this declaration, on June 29, 2012, I still have not seen
 23 a Notice of Related Cases come across the ECF system for the case I have appeared in, 12-
 24 cv-3614.

25 **(c) The Cases Involve the Same Group of Copyrights at Issue**

26 13. Attached hereto as Exhibit B is a true and correct summary table showing the
 27 copyrighted works at issue in the 28 cases filed by Malibu Media in this District. This
 28 table was prepared by my office staff, under my direct supervision, based on my specific

1 instructions, and double-checked by me personally. This table was prepared by
 2 downloading from PACER the “Report on the Filing of an Action Regarding a Copyright”
 3 for each of the 28 cases filed by Malibu Media in this District. By looking at this table,
 4 one can see the overview of what copyrights are at issue in which of the 28 cases filed by
 5 Malibu Media in this District. I would be happy to provide copies of all of the “Reports on
 6 the Filing of an Action Regarding a Copyright” for the 28 cases, upon request.

7 14. Based on looking at the detailed information provided in the exhibits to the
 8 complaints, it appears that most of the works at issue were first published in 2009 and
 9 2010, and registered with the copyright office either late last year or early this year.

10 **(d) Abusive Litigation Tactic Number One: Failure to File Notices of**
 11 **Related Cases**

12 15. Notwithstanding the apparent similarities noted above between the 28 cases
 13 Malibu Media has filed so far this year in this District, cases from each group appear to
 14 have one more thing in common: *in none of the cases did Malibu Media file a notice of*
 15 *related cases*. See L.R. 83-1.3. Accordingly, it appears that Malibu Media’s cases are
 16 assigned to 30 different Judicial Officers of this District.

17 16. Attached hereto as Exhibit C, is a true and correct copy of my complete meet
 18 and confer email chain on the Notice of Related Cases issue with Plaintiff’s counsel
 19 Leemore Kushner. As detailed therein, Ms. Kushner refused to file Notices of Related
 20 Cases in Malibu Media’s cases in this District, contending that checking the box on the
 21 civil case cover sheets was sufficient. Although Ms. Kushner promised to file a Notice of
 22 Related Cases in just the two cases I am involved in (which I said was insufficient), as of
 23 the finalizing of this declaration, one week later, she had not done so.

24 17. I happen to know, from listening to a recorded oral argument of a motion
 25 heard in a Malibu Media case filed in the Eastern District of Pennsylvania, (E.D. Pn No.
 26 CV-12-20840-MMB) that at least in Pennsylvania, when Malibu Media filed multiple
 27 cases in the same District, it did the Court the courtesy of noticing the cases as related so
 28 they could be assigned to the same Judge. The recording to which I refer is available at

1 this website: [http://dietrolldie.com/2012/05/23/hearing-audio-file-for-malibu-media-v-](http://dietrolldie.com/2012/05/23/hearing-audio-file-for-malibu-media-v-john-does-1-14-212-cv-02084-eastern-district-pa-troll-christopher-fiore-14-may-12/)
 2 [john-does-1-14-212-cv-02084-eastern-district-pa-troll-christopher-fiore-14-may-12/](http://dietrolldie.com/2012/05/23/hearing-audio-file-for-malibu-media-v-john-does-1-14-212-cv-02084-eastern-district-pa-troll-christopher-fiore-14-may-12/), and,
 3 more specifically, at this link (which requires signing up for “DropBox” to access):
 4 http://dl.dropbox.com/u/81004257/Hearing_02084%28PA%295-14-2012.mp3

5 **(e) Abusive Litigation Tactic Number Two: Use of Professional**
 6 **“Negotiators” to Extract Settlements for Alleged Infringement**

7 18. On June 13, 2012, I attempted to contact counsel for Malibu Media via email
 8 to ask what its settlement demand is in this case.

9 19. On June 14, 2012, Ms. Kushner told me via email that the next day, either
 10 she or her client, with whom she authorized me to speak, would be getting back to me with
 11 a settlement demand. When nobody called on Friday, I followed up with Ms. Kushner first
 12 thing Monday morning June 18, 2012.

13 20. Later on June 18, 2012, I received a voice message from a woman named
 14 Elizabeth Jones, who called me from a 786 (Miami) area code. In her voice message, Ms.
 15 Jones identified my client’s case number and Doe number, and explained that she was
 16 given my information by Ms. Kushner who authorized me to speak with her and that “we
 17 handle the settlement communications.”

18 21. I called Elizabeth Jones back later that day, June 18, 2012, and she answered.
 19 I asked her what company she was with and she said “we work with Malibu Media.” I
 20 asked her if she was an employee of Malibu Media, and she responded that “we work in
 21 relation with them.” I asked her if she worked for an independent company that handled
 22 Malibu Media’s settlement communications, and if so, what was the name of her company.
 23 She repeated that “we work with Malibu Media.” I asked her to please explain what she
 24 meant by “we” when she said “we work with Malibu Media” because this sentence seemed
 25 to imply that she did not actually work for Malibu Media and was therefore not the “client”
 26 with whom I had been authorized to speak. She responded that it seemed like I was not
 27 really calling because I was serious about a settlement, but that she “handled” Malibu
 28 Media’s settlement communications. Later in this conversation, Ms. Jones admitted to me

1 that she fielded settlement calls from “20 to 30 counsel per day,” and when I asked how
 2 long she had been doing this line of work she answered for “a couple years.” Based on her
 3 answers during our phone call, as well as my experience in similar copyright infringement
 4 cases, I concluded that Ms. Jones is likely a third party “negotiator” to whom Malibu
 5 Media outsources its collection efforts.

6 22. On Monday June 25, 2012, at 12:05 p.m., Elizabeth Jones called me again to
 7 follow up on our prior discussion. She explained that she understood I had more than one
 8 case pending with Malibu Media and asked me to identify what John Does I was
 9 representing. Before answering, I pressed her again to please clarify what her exact
 10 capacity was in connection with this case. I asked her if she was an attorney, and she said
 11 no. After explaining that I did have more than one of these cases, I asked her if I could
 12 contact her about all of them, and did she work for a third party company that handled
 13 negotiations for Malibu Media. This time, she explained that yes she did work for such a
 14 company, and that “we” have a “Joint Sharing Agreement” with “Zero Tolerance, Third
 15 Degree, Patrick Collins, K-Beech, Malibu Media, Raw Films, and Nu-Corp.” I asked her
 16 to repeat that so I could write it down, and she did. She also offered that I could contact
 17 her directly to negotiate for any of those plaintiffs.

18 23. At no time during either of my conversations with Elizabeth Jones, the non-
 19 attorney, third party “negotiator,” did she ever indicate that she considered our
 20 conversation to be confidential or that I should treat it as such. Similarly, I also did not
 21 invoke confidentiality. Neither Ms. Jones nor I ever used the word confidential, or any
 22 word like it, at any point in our two conversations.

23 **(f) Abusive Litigation Tactic Number Three: Material Misrepresentation**
 24 **by the Settlement Negotiator as to the Range of Statutory Damages**

25 24. During my conversation with Elizabeth Jones, Malibu Media’s settlement
 26 negotiator, on June 18, 2012, she told me that Malibu Media’s settlement demand for my
 27 client was \$19,500. She explained that Malibu Media sought “the minimum statutory
 28 damages for each work of \$750 per work,” and that in the case of my client, John Doe No.

5, there were “a total of 26 registered hits.” At first, I did not realize that what Malibu Media’s settlement “negotiator” told me is actually incorrect. The actual statutory damage *minimum*, for innocent infringement, is \$200 per work. 17 U.S.C. § 504(c)(2). Eventually, it dawned on me that this statement was incorrect; however, I doubt that a non-lawyer speaking to “Elizabeth Jones,” or even a lawyer unfamiliar with copyright law, would catch this small but important misrepresentation.

(g) Abusive Litigation Tactic Number Four: Use of the Court’s Subpoena Power to Try and Collect on Claims That Are Not Alleged in the Complaint and Go Beyond the Scope of this Litigation

25. After Ms. Jones explained Malibu Media’s settlement demand to me during our phone conversation on June 18, 2012, wherein she said my client was liable for “a total of 26 registered hits,” I told her that this did not sound right to me. I explained that I thought my client was alleged to have infringed less works of authorship than 26. So I pulled the complaint while we were on the phone together, confirmed, and then explained to Ms. Jones that, per Exhibit C of the complaint, my client was alleged to have infringed on only 15 copyrighted works. I further explained that by my math, applying the \$750 “minimum” figure, worked out to \$11,250, not \$19,500. At this point, I asked Ms. Jones to please double check that to make sure that she had the right case and Doe number, because I could not understand why the demand was \$19,500, and I thought perhaps she had my client mistaken with someone else.

26. Ms. Jones confirmed that she was sure we were talking about the correct case and Doe, and confirmed the \$19,500 figure was not a mistake. She explained to me that although the complaint alleged a siterip for 15 registered works, on April 1, 2012, *according to her records*, there had been “a second siterip 2 days later” for 11 more works. ***I explained that I was trying to settle the claims that were actually alleged in the Complaint***, and that according to Exhibit C of the Complaint, my client had allegedly infringed 15 works of authorship, not 26. She again reiterated that according to her records, there was a “second siterip” on April 3, 2012, and that because of this, the

1 settlement demand was going to be \$19,500 to settle Malibu Media's claims, and that she
2 "could send me a declaration" about the second siterip. I then asked her if any settlement
3 had to be all-or-nothing, meaning was it possible for my client to pay \$11,250 to settle
4 only those claims actually alleged in the complaint? She responded that "it is all or
5 nothing" and that if my client wanted to settle he/she would have to pay the full \$19,500.
6 At this point, I said that since I didn't know anything about the "second siterip" not alleged
7 in the complaint, it was hard for me to know what to make of this demand, and I asked her
8 to please send me the declaration she had mentioned. She said she would do so.

9 27. During my conversation with Elizabeth Jones, Malibu Media's negotiator, on
10 June 18, 2012, I also asked her what the next steps would be if my client did not pay the
11 \$19,500 demanded for settlement. She said that the next step would be "service," and that
12 "as the case goes on, the settlement number will go up." She further explained that if "our
13 side has to do more work on the case," the value will go up. I asked her to explain what
14 she meant by the next step being service, and she explained that after information is
15 disclosed they would be sending letters asking whether we would accept service. I replied
16 that it was my understanding that Malibu Media had filed over 200 lawsuits, against
17 thousands of John Doe defendants, and that it had served essentially none of them, so I
18 asked her if she had any experience settling claims with defendants who had actually been
19 served. She responded that she *had* accepted settlement for defendants who had been
20 served. I asked her how many, to which she responded "I am not the one on trial here."
21 Then I asked her whether she was new to the company and if she really knew what she was
22 doing, which is when she explained to me that she fields calls from "20 to 30 counsel per
23 day" and, when prompted, explained that she had been doing this for "a couple years." I
24 asked her if she could tell me, based on her extensive experience, out of how many cases
25 she had handled, had she accepted a settlement from someone who had already been
26 served with a complaint. She responded "every case is different."

27 28. Before hanging up with Elizabeth Jones, I reiterated that I would like her to
28 send me the declaration she had mentioned about the "second siterip." I asked her how

1 long it would take her to send me this declaration, and she said that it would be sent to me,
2 by Ms. Kushner, within 24-48 hours. I asked her for her email address so I could follow
3 up, and she insisted that any email contact should go through Leemore Kushner. Then I
4 thanked her for her time and hung up.

5 29. After waiting the requisite 24-48 hours and not receiving the Declaration
6 Elizabeth Jones had promised me, I emailed Plaintiff's counsel Leemore Kushner to follow
7 up. Attached hereto as Exhibit D is a true and correct copy of the "Declaration" that was
8 sent to me by Ms. Kushner, along with cover email. This Declaration, which was executed
9 by Malibu Media's technical expert, purports to provide details about the "second siterip,"
10 which is not alleged in the complaint but which supposedly occurred on April 3, 2012. For
11 reference, the complaint in this case, 12-cv-3614, was filed on April 26, 2012.

12 **(h) Abusive Litigation Tactic Number Five: Overbroad Subpoena Seeking**
13 **Phone Numbers and Emails**

14 30. On May 1, 2012, Magistrate Brown, of the Eastern District of New York,
15 issued a report and recommendation that was specifically addressed to Malibu Media. In
16 the discovery order part of the report, Judge Brown directed that "Under no circumstances
17 are plaintiffs permitted to seek or obtain the telephone numbers or email addresses of these
18 individuals." The plaintiffs to whom Judge Brown was referring specifically include
19 Malibu Media.

20 31. Three days later, on May 4, 2012, Malibu Media filed its request for early
21 discovery in this action, 12-cv-3614, seeking to obtain by subpoena the telephone numbers
22 and email addresses of John Does who allegedly reside in this District.

23 **(i) Attorney's Fees and Costs in Connection with this Motion**

24 32. Malibu Media has forced this firm to do what Malibu Media supposed to do
25 when it filed all 28 of its cases in this District: explain why they are all related. In order to
26 do this for Malibu Media, this firm had to become somewhat familiar with all 28 of Malibu
27 Media's cases, which was obviously research intensive. I myself, and my office staff,
28 some of whom I pay hourly, have been working intensively on this motion for a week.

1 Based on my time records, I have spent 37.8 hours of my own attorney time researching
2 how Malibu Medias cases are related, preparing these motion papers, and my staff's
3 efforts, and the service of courtesy copies. My billing rate is \$300 per hour. Total
4 attorneys fees are \$11,340.

5 33. In addition, I have to pay my staff for 19.7 hours of their time this week
6 spent working on this project. My staff checked the docket for each of Malibu Media's 28
7 cases, and pulled courtesy copy information for over 30 Judicial Officers. I pay my staff
8 \$35 an hour. Total out of pocket staff cost \$689.50.

9 34. I estimate that I will have approximately \$150 in PACER charges associated
10 with pulling all of Malibu Media's documents from PACER. We have pulled copyright
11 reports for all 28 cases, plus numerous complaints, filed by Malibu Media here and in
12 other courts. However, because the PACER statement does not cycle through until the end
13 of the month, and all of this research was conducted in June, I cannot yet be certain of the
14 final number.

15 35. Thus, the sum total of this firm's attorneys fees and costs incurred in
16 connection with this motion is \$12,179.50

17 36. Attached as Exhibit E hereto is a true and copy of the letter this firm is
18 concurrently sending to every Judicial Officer in this District currently presiding over the
19 28 cases filed by Malibu Media. A similar letter noting that this firm is asking the Court to
20 stay the return date of the subpoenas issued to the ISPs will be going out to the ISPs today
21 as well.

22 I declare under penalty of perjury under the laws of the United States of America
23 that the foregoing is true and correct.

24
25 Executed on June 29 2012, at Manhattan Beach, California.

26 /s/ Morgan E. Pietz

27 Morgan E. Pietz