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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC, a California limited liability company,

Plaintiff,

v.

JOHN DOES 1 through 10,

Defendants.

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

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

MEMORANDUM IN SUPPORT OF JOHN DOE'S MOTION FOR SANCTIONS RE: MALIBU MEDIA'S REPEATED VIOLATIONS OF NOTICE OF RELATED CASES RULE

[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

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I. INTRODUCTION AND SUMMARY

What one Federal Magistrate recently described, as "a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent," recently hit the Central District with a vengeance. *See In re: Bittorrent Adult Film Copyright Infringement Cases*, E.D.N.Y. Case No. 11-3995, docket no. 39, May 1, 2012 ("*Adult Film Cases*"). However, because of plaintiff Malibu Media LLC's ("**Malibu Media**") repeated, willful violations of this District's Notice of Related Cases rule, L.R. 83-1.3, the extent of the whiteout may not yet be fully apparent.

So far this year, plaintiff Malibu Media, LLC, has filed 28 complaints in the Central District of California alleging mass copyright infringement by roughly 280 John Doe defendants, each of whom is identified only by an I.P. address. Declaration of Morgan E. Pietz, ¶¶ 7, 10(a), Exhibit A. In each case, Malibu Media sought early discovery to issue subpoenas to ISP's that would purportedly assist Malibu Media in effecting service, on the strength of highly similar declarations from the same technical expert. *Id.*[1] As a direct result of Malibu Media's failure to file Notices of Related Cases in any of these cases, ***there are currently 11 different Judges, and at least that many Magistrates in this District, who are all currently considering whether or not the exact same 15 copyrights have been infringed***. Of the 28 cases, 22 allege infringement of essentially the same group of 27 copyrighted adult films, although the other six cases are one-offs, involving only a single film. *See* Exhibit B to Declaration of Morgan E. Pietz.

Notwithstanding the obvious similarities between all 28 of the copyright infringement cases it filed in this District, ***Malibu Media has not filed a single Notice of Related Case*** in any of its cases now pending here. Malibu Media's repeated refusal to fix this problem, as well as its plainly incorrect position as to why it should not have to, clearly rise to the level of willful, reckless or grossly negligent conduct. Moreover, this is

[1] Malibu Media has filed over 200 similar cases nationwide, this year alone. Exhibit A to Declaration of Morgan E. Pietz.

no "inadvertent" mistake. Rather, it is a calculated attempt by Malibu Media to try and fly under the radar, hedge its bets, and select judges perceived as giving favorable treatment. Further, Malibu Media's attempt to circumvent the Court's Notice of Related Case rule is part of a pattern of "abusive litigation tactics" that is common in these kinds of cases.

II. FACTUAL AND PROCEDURAL BACKGROUND

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

Malibu Media has filed ***28 mass copyright infringement cases so far this year*** in this Judicial District. Exhibit A to Declaration of Morgan E. Pietz. ***Malibu Media did not file a single Notice of Related Cases*** along with the complaints for any of its 28 cases. Declaration of Morgan E. Pietz ¶ 11. Further, after being pressed on this issue by this firm, Malibu Media has refused to remedy the error. Exhibit C to Declaration of Morgan E. Pietz. Malibu Media has filed over 200 similar actions in various Judicial Districts around the country so far this year. Exhibit A to Declaration of Morgan E. Pietz.

All 28 cases for mass copyright infringement Malibu Media filed in this District are similar, if not identical, in several key respects. They all allege copyright infringement against unnamed John Doe defendants (usually 10 defendants per case). In each case, Malibu Media moved for early discovery on the strength of essentially the same supporting declarations from the same technical expert, one Mr. Tobias Fieser. Several of the complaints appear to be completely identical clones of one another, where the only difference between them whatsoever, is the I.P. addresses of the John Does. In every case, Malibu Media is represented by the same attorneys: Leemore Kushner, of the Kushner Law Group, and/or Adam M. Silverstein (SBN 197638) of Cavalluzzi & Cavalluzzi.[2] Declaration of Morgan E. Pietz ¶¶ 9–11.

[2] It appears that Ms. Kushner may be taking over for Mr. Silverstein. Mr. Silverstein was counsel of record for cases filed in February. Ms. Kushner has been counsel of record for cases filed in April and May, and has made a subsequent appearance in at least one of the February cases.

(b) Due to Malibu Media's Failure to File Notices of Related Cases, Multiple Judges of this District Are Currently Presiding Over Cases that Involve the Exact Same Copyrights at Issue in Cases Assigned to Other Judges

Malibu Media has stated, in writing, that it attempted to comply with the Notice of Related Cases rule by filling out the Civil Case Cover sheets to indicate appropriate relations between cases. Even if this policy were sufficient for the purpose of L.R. 83-1.3 (it is not), the reality of how cases are currently spread out across this District belies the argument. For example, Judge Fischer is currently assigned one case with 26 copyrights at issue (12-4653) and a second case with only one, different copyright at issue (12-3622). The 26-copyright case over which Judge Fischer presides appears to be identical, at least as to the copyrights at issue, to seven other cases presided over by Judge Anderson (12-4651 and 12-3617), Judge Carter (12-0652), Judge Collins (12-3619), Judge Real (12-3620), Judge Guilford (12-0647), and Judge Morrow (12-4649). Similarly, there are currently four Judges of this District presiding over seven different cases that all have the exact same 15 copyrights at issue: Judge Wu (12-4657, 12-4660 and 12-4654); Judge Fees (12-4661 and 12-4658); Judge King (12-3614); and Judge Pregerson (12-3615). ***All of the 15 copyrights at issue in the seven cases being heard by Judges Wu, Fees, King, and Pregerson are also at issue in the seven cases being heard by Judges Fischer, Anderson, Carter, Collins, Real, Guilford, and Morrow.*** *See* Exhibit B to the Declaration of Morgan E. Pietz. To put that another way, there are currently 20+ Judicial Officers in this District who may be asked to determine the validity and possible infringement (on the same legal theory) of the exact same 15 copyrights.

This is lunacy. Moreover, it is precisely to avoid this kind of duplication of judicial labor that the District enacted the Notice of Related Cases rule in the first place.

The details of which films are involved in which cases, and how the same movies overlap across Malibu Media's cases, can be seen clearly in Exhibit B to the Declaration of Morgan E. Pietz. Essentially, the 28 copyright infringement cases Malibu Media has filed in this District all involve the same group of 34 copyrighted works. Of these 28 cases, 22

cases allege infringement of essentially the same group of 27 copyrighted adult films, give or take a few different movies in each case. There are also other six cases that are one-offs, involving only a single, different film that is not at issue in any of the other cases. Notably, there are nine different copyrighted works that are *each* at issue in 20 or more of Malibu Media's lawsuits in this District.[3] Setting aside the six one-off lawsuits, each of Malibu Media's 25 main copyrights are at issue in an *average* of 15.88 different lawsuits currently pending in this District. *See* Exhibit B to Declaration of Morgan E. Pietz.

(c) Attempt to Meet and Confer on this Issue in Good Faith: Malibu Media Was Given Three Chances to Fix This Error On Its Own

Earlier this month, this firm was retained by an individual who received a letter from an ISP, which explained that his/her contact information was being sought through a subpoena issued to his/her ISP by Malibu Media, on authorization from this Court. Later, more people contacted this firm about similar cases Malibu Media has filed in this District. This firm was surprised, after reviewing a few of the complaints, to notice that each of Malibu Media's cases in this District that it reviewed appeared to be assigned to different Judicial Officers. Further checking of a few dockets revealed why: Malibu Media was not filing Notices of Related Cases, in any of its cases.

On Thursday June 21, 2012, at 9:06 a.m., this firm brought the obvious violation of this Court's Notice of Related Cases rule, L.R. 83-1.3, to the attention of Malibu Media's counsel Leemore Kushner. A complete copy of this meet and confer email exchange is attached as Exhibit C to the Declaration of Morgan E. Pietz. This firm noted why it believed Local Rule 83-1.3 was being violated, and asked that Malibu Media correct the mistake within two business days, on threat of filing this sanctions motion. Exhibit C to Declaration of Morgan E. Pietz.

[3] The nine copyrighted works that are *each* at issue in more than 20 of Malibu Media's lawsuits pending in this District are: *Carlie Beautiful Blowjob, Carlie Leila Strawberries and Wine, Katka Cum Like Crazy, Katka Sweet Surprise, Leila Sex on the Beach, Megan Morning Bath, Mina's Fantasy, Tiffany Teenagers in Love, Tori the Endless Orgasm.*

A day and a half later, on Friday June 22 at 3:56 p.m., Ms. Kushner responded via email, writing,

> "Your research is largely incorrect. Indeed, there are several cases filed by Malibu Media in the Central District that were filed as related cases per the Civil Cover Sheets filed in each individual case. Whether or not a case is related depends on whether the same unique hash value is at issue in the suit. Notwithstanding our attempt to relate certain cases, however, there are some judges in the Central District who disagree that the cases are related. Just this morning, Judge Anderson declined to transfer a case that is before him to another court, stating in his order that the cases are unrelated.
>
> That said, it appears that we inadvertently did not relate the two cases you specifically mention below: Case Nos. 12-3614 and 12-3615, both of which relate to the same hash value, and I will therefore file a Notice of Related Case in those two cases. . . . " *Id.*

This email is notable for three reasons. First, Malibu Media admits that certain of its cases are indeed related, namely those cases that involve the "same unique hash value."[4] Second, Malibu Media contends that checking the box on the civil case cover sheet is sufficient to comply with this Court's Notice of Related Cases Rule. Third, Malibu Media indicates that after having failed to file Notices of Related Cases along with the complaints, *it has then subsequently attempted to have certain of its cases related,* including, apparently, one attempt to get in or out of Judge Anderson's courtroom.

[4] Practically speaking, to say that cases involve "the same unique hash value" means that the defendants in that case all allegedly downloaded not just the same copyrighted work, but *the exact same uniquely identified electronic copy of that work.* In other words, Malibu Media argues that the test for related case purposes is not did these people download the same movie, but rather, did they download the same exact file/copy of that movie.

By reply email of later that day, at 5:13 p.m., this firm responded with the following points: (i) that filing civil case cover sheets was not sufficient to comply with the Notice of Related Cases rule; (ii) that since all of the cases involved the same group of copyrights, Malibu Media needed to file a Notice of Related Cases for all 28 cases, not just ones involving the same "unique hash values"; (iii) asked Malibu Media to please clarify whether it had filed even a single Notice of Related Cases, in any of its 28 actions in this District; (iv) noted that there was some contradiction as to whether the failure to file a notice of related cases in all of the cases was inadvertent, or whether Malibu Media believed it was not required to do so; and (v) explained why it appeared that Malibu Media was "violating the notice of related case rule on purpose in an attempt to both fly under the radar and hedge [its] bets." The email concluded by demanding again that Malibu Media file Notices of Related Cases in all 28 of its cases, and gave Malibu Media an additional 72 hours in which to do so, on threat of this sanctions motion.

Attorneys for the two sides then connected on a phone call. During this phone call, during which counsel for Malibu Media reiterated the position explained above: filing the civil case cover sheets was sufficient, and only cases with the same "hash tag" were related. Counsel for the Moving Party reiterated, as a final attempt, that this firm was trying to give Malibu Media an opportunity to remedy this error, which was unfair to the Courts of this District. Counsel for Malibu Media responded that this firm's insistence on pressing this point and threat of a frivolous sanctions motion were only further evidence that this firm's clients are guilty.

III. LEGAL BASIS FOR SANCTIONS DUE TO VIOLATION OF LOCAL RULE 83-1.3

The Local Rules for the Central District of California, effective June 21, 2012, provide, in relevant part,

> "**L.R. 83-1.3 Notice of Related Cases**
>
> **L.R. 83-1.3.1 Notice**. At the time a civil action (including a notice of removal or bankruptcy appeal) ***is filed,***

> ***or as soon as known thereafter***, the attorney shall file and serve on all parties who have appeared a Notice of Related Case(s), stating whether any action previously filed or currently pending in the Central District and the action being filed appear:
>
> (a) To arise from the same or a closely related transaction, happening or event; or
>
> (b) To ***call for determination of the same or substantially related or similar questions of law*** and fact; or
>
> (c) ***For other reasons would entail substantial duplication of labor if heard by different judges***; or
>
> (d) To ***involve the same*** patent, trademark or ***copyright***, ***and one of the factors identified above in a, b or c is present***.
>
> The Notice of Related Case(s) shall also include a brief factual statement setting forth the basis for the attorney's belief that the action qualifies for related case transfer.
>
> The Notice of Related Case also shall be served concurrently with service of the complaint." L.R. 83-1.3.1 (emphasis added).

Compliance with the Notice of Related Cases rule is a continuing duty.

> ***"L.R. 83-1.3.3 Continuing Duty***. It shall be the continuing duty of the attorney in any case promptly to bring to the attention of the Court, by the filing of a Notice of Related Case(s) pursuant to L.R. 83-1.3, all facts which in the opinion of the attorney or party appear relevant to a determination whether such action and one or more pending actions should, under the criteria and procedures set forth in L.R. 83-1.3, be heard by the same judge." L.R. 83-1.3.3.

The Local Rules also contain an enforcement provision,

> "**L.R. 83-7 Sanctions - Violation of Rule.** The violation of or failure to conform to any of these Local Rules may subject the offending party or counsel to:
>
> (a) monetary sanctions, if the Court finds that the conduct was ***willful, grossly negligent, or reckless***;
>
> (b) the imposition of costs and attorneys' fees to opposing counsel, if the Court finds that the conduct rises to the level of ***bad faith and/or a willful disobedience*** of a court order; and/or
>
> (c) for any of the conduct specified in (a) and (b) above, ***such other sanctions as the Court may deem appropriate*** under the circumstances." L.R. 83-7 (emphasis added).

Case law specifically supports the imposition of sanctions for a violation of the Central District's Notice of Related Cases Rule. *Financial Consulting and Trading Int'l Inc. v. Frederick P. Wich, et al.,* 2011 U.S. Dist. LEXIS 88817 (C.D. Cal. August 9, 2011) (Case No. CV 11-6204-DSF-AGRx) (ordering party "to show cause in writing why they should not be sanctioned for failure to file a Notice of Related Case.")

In addition, the Federal Rules of Civil Procedure direct the Court to deny discovery "to protect a party from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).

IV. THE 28 CASES ARE RELATED: SAME COPYRIGHTS, SAME LEGAL CLAIMS, AND SUBSTANTIAL DUPLICATION OF JUDICIAL EFFORT IF THEY ARE TO BE HEARD SEPARATELY

Per L.R. 83-1.3.1(d), where a case "involve[s] the same. . .copyright" as another case in this District, and "one of the factors identified above in a, b or c is present," the case should be deemed related. While (a) (same transaction, etc.) is not relevant based on the different facts unique to each John Doe, both (b) (similar questions of law and fact),

and (c) (judicial economy) certainly are. Is there any reason whatsoever that over 20 different Judicial Officers within this District should be considering whether the same 15 copyrights are valid and have been infringed on the same theory? Since Malibu Media has refused to remedy its failure to file Notices of Related Cases on its own, it is clear that if the requested sanctions are not granted there will be "substantial duplication of labor" by all of these Judicial Officers considering the same copyrights. L.R. 83-1-3.1(c). Judicial economy considerations also favor relating the six one-off cases that involve only a single copyright not at issue in other cases in this District, in light of the similarity of the complaints, same technical expert, and common issues likely to arise in those cases too. *Id.*

Further, all 28 cases "call for determination of the same or substantially related or similar questions of law" as well as procedural issues, although the facts and legal defenses will be different for every John Doe. L.R. 83-1.3.1(b). In theory, all of the cases will involve determinations of the validity of the same copyrights, as well as determinations about whether these copyrights have been violated.[5] More importantly, to the extent it is not happening already, thanks to Malibu Media, the Courts of this District are about to be deluged with a flood of John Doe motions to quash, many filed *pro se*. In addition, taking a cue from the way other Districts including the Northern District of California, and Eastern District of New York, have recently handled these kinds of cases, there are likely to be multiple John Doe motions to sever, based on each Doe's different factual scenario and different legal defenses. *Hard Drive Production, Inc. v. Does 1-90* N.D. Cal. Case No. 11-3825, docket no. 18, March 30, 2012 ("*Hard Drive Prods*") (denying early discovery and severing all John Does other than John Doe No. 1); *In re: Bittorrent Adult Film Copyright Infringement Cases*, E.D.N.Y. Case No. 11-3995, docket no. 39, May 1, 2012 ("*Adult Film Cases*") (Quashing subpoenas and dismissing all defendants other than John Doe No. 1). In short, there is no good reason not to assign and/or refer all of these cases to

[5] This is in theory because in reality Malibu Media is likely to never serve any of the John Does. Thus, the substantive law of copyright infringement is not likely to actually be reached.

the same Judicial Officers, especially for proceedings that occur prior to service of complaints.

As Malibu Media's attorney Leemore Kushner argued to Judge John A. Kronstadt (12-1647) in opposition to a motion to quash,[6] in one of the three cases Malibu Media filed in this District in February,

> "Here, ***Plaintiff will have to establish the same legal claims concerning the validity of its copyrights and the infringement of the exclusive rights reserved to Plaintiff as copyright holder***. Furthermore, Plaintiff alleges that the Defendants utilized the same BitTorrent file-sharing protocol to illegally distribute and download its copyrights and, consequently, factual issues related to how BitTorrent works and the methods used by Plaintiff to investigate, uncover, and collect evidence about the infringing activity will be essentially identical for each Defendant. *See id.* at 343 ("In each case, the plaintiff will have to establish against each putative defendant the same legal claims concerning the validity of the copyrights in the movies at issue and the infringement of the exclusive rights reserved to the plaintiffs as copyright holders.")." Cal. C.D. Case No. 2:12-cv-1647-JAK-JEM, docket no. 17, p. 11.

Assuming, arguendo, that everything Malibu Media argues above is correct[7] it would apply with equal force to all of the John Does it has sued, regardless of what case number. In short, how can Malibu Media make the argument above in opposition to a motion to quash,

[6] Apparently, the deluge of pro se motions to quash subpoenas has already begun.

[7] Moving Party notes that although plaintiff may ***try*** to use identical methods to collect evidence of infringement from different John Does, a uniform approach is unlikely to work. When it comes to proving a crucial point, namely whether the person who pays the cable/Internet bill for a household is actually the person who allegedly downloaded one of Malibu Media's copyrighted works, each different John Doe defendant will present a completely different factual scenario.

and then argue now that the claims in its various lawsuits in this district do not "call for determination of the same or substantially related or similar questions of law"? It should be judicially estopped from doing so.

In sum, it could not be more clear that Malibu Media should have filed a Notice of Related Cases for all of its 28 cases in this District, per L.R. 83-1.3.1(b)-(d).

V. WILLFULNESS: MALIBU MEDIA'S REPEATED VIOLATIONS OF THE NOTICE OF RELATED CASES RULE ARE PART OF A PATTERN OF "ABUSIVE LITIGATION TACTICS" TYPICAL OF COPYRIGHT TROLLS

(a) Not Filing Notices of Related Cases is Part of Malibu Media's Strategy

The first and most important thing to understand about copyright troll lawsuits like the 28 Malibu Media has filed in this District is that the ***plaintiffs file them knowing full well, in advance, that they will likely never serve any of the John Does with a complaint***.[8] *See, e.g., See Hard Drive Prods.*, at p. 6, fn 4 ("According to this court's research. . .69 mass copyright infringement cases ha[ve] been filed in this district. Of those, plaintiff obtained early discovery in 57 cases and issued subpoenas to obtain subscriber information for more than 18,000 IP addresses. No defendant has been served in any of these cases."); *Adult Film Cases*, *supra*, at p. 10 ("The plaintiffs seemingly have no interest in actually litigating cases, but rather have simply used the Court and its subpoena power to obtain sufficient information to shake down the John Does.") In short, this is not really a lawsuit: it is a settlement collection business,

Since plaintiffs do not intend to actually try these cases, the profitability of this business depends on only two things: (i) obtaining early discovery quickly and painlessly for as many John Does as possible; and (ii) abusing the Court's subpoena power for as

[8] Counsel for the Moving Party challenges Malibu Media to answer the following questions under oath in its opposition papers: in the 200+ federal copyright infringement lawsuits Malibu Media has filed so far this year against thousands of John Does, how many defendants has Malibu Media served? Of the people it served, if any, how many were unrepresented individuals who accepted service voluntarily after receiving a demand letter from Malibu Media? 29 of Malibu Media's lawsuits have been pending for over 120 days, so one would expect that if Malibu Media is actually litigating in good faith, the number will be more than a token few.

long as possible. As long as the plaintiff can run subpoenas to the ISP's seeking contact information for enough John Does, it is virtually ensured of a profitable business model. The calculus is as follows: based on sheer numbers and simple inertia, plaintiffs know that if they can run enough subpoenas, many John Does will not file motions to quash. Once enough subpoenas are out, plaintiffs are assured that they will start to receive contact info for John Does that can be turned over to the plaintiffs' aggressive "negotiators." Based on the explicit threat of associating ones name with a pornography lawsuit, plaintiffs know that many people will simply pay a modest amount to settle and make the matter go away, even if some of them did not download the movies at issue. As long as the early discovery gravy train stays on the tracks, and there are enough John Does sued, the mass infringement plaintiff can count on a brisk settlement business.

Increasingly, courts are catching on to this "shake down" scheme and refusing to participate. *Adult Film Cases*, at p. *2 (dismissing complaints filed by Malibu Media and noting that use of "negotiators" and other "abusive litigation tactics" was a course of conduct that, '"indicates that the plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them. ***The plaintiffs*** seemingly have no interest in actually litigating the cases, but rather simply ***have used the Court and its subpoena power to obtain sufficient information to shake down the John Does***."') *quoting Raw Films, Ltd. v. Does 1-32*, 2011 WL 6182025, at * 2 (E.D. Va. Oct. 5, 2011); *see also, e.g., Pacific Century Int'l., Ltd. v. John Does 1-37*, N.D. Ill. Case No. 12-cv-1057, docket no. 23, p. 7, March 30, 2012 (surveying recent orders and noting a "stiffening judicial headwind" with respect to mass copyright infringement cases.) Increasingly, Courts are denying motions for early discovery, quashing subpoenas, dismissing complaints, and severing John Does. *See, e.g., Hard Drive Prods., supra*, March 30, 2012, at p. 11 (denying early discovery and severing Does 2-90); *Adult Film Cases*, *supra*, May 1, 2012, at pp. 23-26. Notably, ***after dealing with a couple of cases involving hundreds of John Does each, the Northern District of Texas appears to have pioneered the approach of appointing attorneys*** **ad litem** ***to the***

represent the interests of John Doe defendants prior to granting early discovery. *E.g., Mick Haig Prods., E.K., v. Does 1-670*, N.D. Tex. 10-cv-1900, docket no 4, October 25, 2010 (appointing representatives of the Electronic Frontier Foundation as attorneys ad litem to represent the interests of the John Does in connection with plaintiffs early discovery motion; case subsequently voluntarily dismissed); *Harmony Films Ltd. v. Does 1-739*, N.D. Tex. Case No. 10-cv-2412, docket no. 7, February 7, 2011 (vacating order granting leave to take early discovery and entering ordering to show cause as to why court should not appoint attorneys ad litem to represent the Does' interests; John Does 2-739 subsequently severed).

In the face of the aforementioned "stiffening judicial headwind," and with the two primary objectives of the copyright troll in mind, it is easy to see why it would be very tempting for a plaintiff like Malibu Media to forgo the filing of Notices of Related Cases. As shown in the Northern District of Texas, if a plaintiff shoots for the moon and seeks to sue hundreds of John Does in the same Court at the same time, closer scrutiny of plaintiff's *unopposed* early discovery application is more likely. Since the profitability of Malibu Media's business depends on its unopposed motions for early discovery being granted as a matter of course, there is a clear advantage to trying to fly under the radar and not draw too much attention. Attention might result in closer scrutiny, possibly the appointment of attorneys *ad litem*, and, heaven forbid, possibly an opposition to the early discovery motion. Similarly, by not filing Notices of Related cases and spreading the cases out to many Judges, Malibu Media does not have all of its valuable subpoena eggs riding in the same basket. Often, when Courts figure out what Malibu Media is really up to, they pull the plug on this abuse of process. By spreading the cases out, Malibu Media diversifies the risk that its entire Central District settlement business operation will be halted all at once.

Finally, and most appallingly—and per the letter from Malibu Media's counsel there appears to be evidence this may be actually happening—failing to file the Notices of Related Cases permits Malibu Media to try and later seek transfers to Courts where it likes how things are going. Such behavior is clearly a form of forum shopping. *See* Exhibit C

to Declaration of Morgan E. Pietz (Plaintiff's counsel wrote, "***Notwithstanding our attempt to relate certain cases***, however, there are some judges in the Central District who disagree that the cases are related. Just this morning, Judge Anderson declined to transfer a case that is before him to another court, stating in his order that the cases are unrelated.")

(b) Malibu Media's Purported Justification for Not Filing Notices of Related Cases is a Legal Position that is Clearly Reckless or Grossly Negligent

Notwithstanding the powerful incentives explained above, even if the Court takes Malibu Media at its word as to why it did not file Notices of Related Cases, Malibu Media's purported explanation of its failure to file the notices and subsequent refusal to fix this problem when asked, is clearly also sanctionable in its own right. Malibu Media has filed over 200 lawsuits this year in various courts across the nation. Many of these courts, including each District in California, have related case rules. In Pennsylvania, other lawyers that represent Malibu Media apparently file notices of related cases. Declaration of Morgan E. Pietz ¶ 17. One would think that having practice filing so many complaints, Malibu Media would have the local rules down pat.

Simply put, checking the box on the civil case cover sheet and listing case numbers there just does not cut it. The Notice of Related Cases, which is a separate document, is *required* to "include a brief factual statement setting forth the basis for the attorney's belief that the action qualifies for related case transfer." L.R. 83-1.3.1 There is no room for such a disclosure on the civil case cover sheet. Further, as explained in the factual section above, the end result of however Malibu Media filled out its civil case cover sheets clearly makes no sense. ***There are currently 11 different Judges in this District, and at least that many Magistrates, who are all currently considering the exact same 15 copyrights.*** Although there is no easy way to tell without reviewing all of the complaints, based on the combination of copyrights at issue, it appears different Judges are assigned to cases involving the same hash tags, notwithstanding Malibu Media's contention that such a principle guided their filling out of civil case cover sheets.

Further, the Notice of Related Cases rule imposes a continuing duty, so when counsel for the Moving Party called Malibu Media on this issue, it should have simply filed the Notices of Related Cases, as requested and required by rule. L.R. 83-1.3.3.

In short, even if the Court takes Malibu Media at its word that the failure to file Notices of Related Cases was not willful, the purported excuses its offers to justify its failure are clearly reckless or grossly negligent.

(c) The Court Should Grant the Unusual Sanctions Requested in Order to Curb Malibu Media's Pattern of "Abusive Litigation Tactics"

No doubt, Malibu Media will object to being tarred with same brush as other pornographers that sue thousands of people for copyright infringement. However, based on evidence collected by this law firm, it is apparent that Malibu Media is running the complete copyright troll playbook. Declaration of Morgan E. Pietz ¶¶ 15–31. The failure to file Notices of Related Cases is part of a pattern of abusive litigation tactics that is unfair both to the John Doe Defendants and the Courts.

(1) Using Subpoena Information to Collect on Claims that Go Beyond What Was Authorized by the Order Granting Early Discovery: Malibu Media Tried to Collect on Claims Not Alleged in the Complaint

When counsel for the Moving Party contacted Malibu Media's "negotiator," regarding John Doe No. 5, in 12-cv-3614, one thing the negotiator said was simply astounding. In this case, according to the attachments to the complaint, John Doe No. 5 is alleged to have infringed on 15 of Malibu Media's copyrighted works. Notwithstanding this fact, the negotiator insisted that if John Doe No. 5 wished to settle, he/she would have to pay for the infringement *of 26 copyrighted works*. When asked whether it would be possible to settle *only* those claims actually alleged in the complaint, or whether it was all or nothing, the negotiator said it had to be all or nothing. Declaration of Morgan E. Pietz ¶ 26.

As explained by the negotiator, and as confirmed in a subsequent declaration sent to counsel for the Moving Party, (Exhibit D to Declaration of Morgan E. Pietz) Malibu Media

contends that there was a "second siterip" that occurred, involving 26 rather than 15 copyrighted works, two days after the siterip actually alleged in the complaint. To be clear, the siterip actually alleged in the complaint is alleged to have occurred on April 1, 2012. And the "second siterip," according to the subsequently-sent declaration from Malibu Media's "technical expert" allegedly occurred on April 3, 2012. The complaint in this action was filed on April 26, 2012, so there does not seem to be any good reason why, if the claims related to the "second siterip" were legitimate, they could not have been included in the complaint. Perhaps Fed. R. Civ. Proc. 11(b) provides the answer? Declaration of Morgan E. Pietz ¶ 29.

When the Court granted Malibu Media's early discovery request for permission to issue subpoenas to the ISP's, it stated in the order, "This discovery is subject to a protective order restricting Plaintiff's use of the discovery to use ***for purposes of this litigation only***." C.D. Cal. Case No. 12-cv-3614, docket no. 6, May 10, 2012 (emphasis added). Attempting to collect on claims of infringement not actually alleged in the complaint would appear to go beyond using the subpoena information "for purposes of this litigation only." One wonders how many other John Does have found out, upon speaking with Malibu Media's "negotiator," that Malibu Media intends to hold him or her liable for additional claims of which he or she was previously unaware?

This attempt to take early discovery beyond the confines of the complaint would be one thing if Malibu Media were a normal party litigating in good faith. However, in view of Malibu Media's nationwide settlement operation, wherein it is likely to communicate with thousands of unrepresented John Does, this kind of over-reach is significant. Many unrepresented people simply may not appreciate that they are not under any legal obligation to pay claims on which they have not actually been sued.

Under the circumstances of these cases, this kind of behavior is clearly an "abusive litigation tactic."

(2) Use of Same Third Party "Negotiator" Company as Other Notorious Copyright Trolls

Malibu Media's "negotiator" also let slip another fact that provides valuable insight into Malibu Media's cases and the way copyright trolls do business. After being pressed repeatedly about what her precise capacity was in connection to this litigation (*i.e.*, not an attorney, not working for Leemore Kushner's office, but not an employee of Malibu Media) the "negotiator" finally explained that she worked for an independent company that had a "Joint Sharing Agreement" to provide similar negotiation services for the following entities, and that I could speak to her about lawsuits filed by any of these plaintiffs:

- Zero Tolerance [Entertainment, Inc.]
- Third Degree [Films]
- Patrick Collins [Inc.]
- K-Beech [Inc.]
- Raw Films [Inc.]
- NuCorp [Ltd.]

The above is a near-complete list of the world's most notorious copyright trolls. Thus, it is no surprise that, according to this negotiator, she handled "calls from 20 to 30 counsel per day," and had been so employed for "about two years." Collecting settlements is big business; why *not* outsource? Declaration of Morgan E. Pietz ¶¶ 18–23.

However, as Magistrate Judge Gary R. Brown explained "The most persuasive argument against permitting plaintiffs to proceed with early discovery arises from the clear indicia, both in this case and in related matters, that ***plaintiffs have employed abusive litigations tactics to extract settlements from John Doe defendants***." *Adult Film Cases*, *supra*, at p. 16. One of the "indicia" to which Magistrate Brown was referring was the use, by Patrick Collins and K-Beech (see above) of "self-described 'Negotiator[s]'" to extract settlements. As Magistrate Judge Brown explains,

> John Doe #16's experience [who tried to prove his innocence to a "Negotiator" to no avail] directly mirrors that of

> defendants in a separate action by plaintiff K-Beech regarding *Gang Bang Virgins*, as well as another action filed by Patrick Collins, Inc. relating to a film entitled *Cuties*. *See K-Beech, Inc. v. Does 1-85*, 2011 U.S. Dist. LEXIS 124581, at *6 (E.D.Va. Oct. 5, 2011) ("Some defendants have indicated that the plaintiff has contacted them directly with harassing telephone calls, demanding $2,900 in compensation to end the litigation") and *Patrick Collins, Inc. v. Does 1-58,* 2011 U.S. Dist. LEXIS 120235, at *6 (E.D.Va. Oct. 5, 2011) (same); *cf. Raw Films, Ltd. v. Does 1-32,* 2011 WL 6182025, at *2 (E.D.Va. Oct. 5, 2011)(same). [fn6, In these cases, counsel for K-Beech and Patrick Collins, Inc. was directed to show cause why Rule 11 sanctions should not be imposed for this conduct, but ultimately sanctions were not imposed.]" *Adult Film Cases*, *supra*, at p 9.

Magistrate Brown further concluded, that "***I find counsel for K-Beech has already engaged in improper litigation tactics in this matter, and find it highly probable that Patrick Collins Inc. and Malibu will likely engage in similar tactics if permitted to proceed with these mass litigations. Such conduct cannot be condoned by this Court***." *Id.* at p. 17 (emphasis added).

In short, based on the past record of the third-party "Negotiators" being used here, who provide services pursuant to a "Joint Sharing Agreement" to some of the world's most notorious copyright trolls, it seems clear that more "abusive litigation tactics" are likely in store for the John Does of this District.

(3) Knowingly Requesting an Overbroad Subpoena

On May 1, 2012, Magistrate Brown, of the Eastern District of New York, issued a report and recommendation that was specifically addressed to Malibu Media. It stated,

> "***Plaintiffs in Malibu 26, Malibu 11*** *and Patrick Collins* may serve subpoenas pursuant to Rule 45 of the Federal Rules of Civil Procedure on the ISPs to obtain the name, address, and Media Access Control address for each Defendant designated as John Doe 1 in each action to whom the ISP assigned an IP address. ***Under no circumstances are plaintiffs permitted to seek or obtain the telephone numbers or email addresses of these individuals***, or to seek or obtain information about any potential John Doe defendant other than John Doe 1. Plaintiff's counsel is directed to attach a copy of this Order to the subpoena." *Adult Film Cases, supra*, at p. 24.

Three days later, on May 4, 2012, Malibu Media turned right around and sought permission from Courts in this District to obtain exactly what Magistrate Brown had just ordered it not to seek: John Doe telephone numbers and email addresses. *See, e.g., Malibu Media, LLC v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3614, docket no. 4-5, May 4, 2012, at p. 5. Notwithstanding the obvious collateral estoppel issue, this is further evidence of a willful or reckless disregard for judicial resources. Malibu Media ought to know better than to ask for phone numbers and emails, because that issue has already been litigated and finally resolved in another court. This, too, is an "abusive litigation tactic."

(4) Misrepresentation by "Negotiator" as to Range of Statutory Damages

One other abusive litigation tactic employed by Malibu Media is the way that its "Negotiator" explains Malibu Media's settlement demand. According to Malibu Media's negotiator, at the outset of a case Malibu Media seeks "only the minimum statutory damages for each work of $750 per work." The actual statutory damage *minimum*, for innocent infringement, is $200 per work. 17 U.S.C. § 504(c)(2). While counsel for the Moving Party caught this misstatement, which is material, one wonders how many unrepresented John Doe defendants will fail to appreciate that finer point of copyright law? Declaration of Morgan E. Pietz ¶ 24.

(5) Use of Same "Technical Expert" as Other Notorious Copyright Trolls

"Negotiators" are not the only thing that Malibu Media shares with other notorious copyright trolls. Malibu Media's "technical expert" in all 28 cases it filed in this District, one Mr. Tobias Fieser of "IPP", is also a veteran of these kinds of cases. *E.g., K-Beech, Inc. v. John Does 1-18*, E.D. Mi. Case No. 11-cv-15226; *Patrick Collins, Inc. v. John Does 1-26*, W.D.N.C. Case No. 11-cv-0394. Declaration of Morgan E. Pietz ¶ 10(b).

In sum, it should be clear that Malibu Media is on the same program as other notorious copyright trolls.

VI. MALIBU MEDIA SHOULD BE JUDICIALLY ESTOPPED FROM ARGUING THAT JOHN DOE DOES NOT HAVE STANDING TO BRING THIS MOTION

A common argument of copyright trolls is that John Does do not have standing to bring motions prior to service of the complaint. However, the First Amendment to the United States Constitution provides a privilege protecting anonymous communication. *See Call of the Wild Movie, LLC v. Does 1-1,062*, D.D.C. Case No. CV-10-455 (Docket No. 40 filed March 22, 2011 at p. 21) ("file-sharers are engaged in expressive activity, on some level, when they share files on BitTorrent, and their First Amendment rights must be considered before the Court allows the plaintiffs to override the putative defendants anonymity by compelling production of the defendants' identifying information.") Thus, the John Does have standing to see that this right is protected.

More fundamentally, it is simply not fair to allow Malibu Media to threaten to drag my clients into this lawsuit, by abuse of the Court's subpoena power, and then turn around and argue that John Does have no standing. The John Does received standing as soon as Malibu Media sought to obtain their contact information. Further, if John Does have no standing to litigate this case, then who can ever stand up to Malibu Media's abusive litigation tactics? Malibu Media should be estopped from even making the argument. Further, as an officer of the Court, with a duty of candor to the tribunal, counsel for the Moving Party simply cannot let Malibu Media's clear wasting of judicial resources go unchecked.

Further, in similar matters, there has been no question as to the standing of the John Does. *Patrick Collins Inc. v. Does*, No. 10-cv-04468-LB, 2011 U.S. Dist. LEXIS 89833, *2 (N.D. Cal. Aug. 12, 2011) (Order granting provisional permission for Doe Defendants to proceed anonymously.) (citing, *Liberty Media Holdings, LLC v. Does* 1-62, 2011 U.S. Dist. LEXIS 51526, *6 (S.D. Cal. May 12, 2011). See also, *Arista Records LLC v. Doe*, 2008 U.S. Dist. LEXIS 34407 (D.D.C. April 28, 2008) (Does have standing to quash subpoenas to third parties.)

VII. HOW TO REMEDY MALIBU MEDIA'S FAILURE TO FILE NOTICES OF RELATED CASES AND OTHER "ABUSIVE LITIGATION TACTICS"

The mess created by Malibu Media's willful refusal to comply with this Court's Notices of Related Case rule may require a little creativity to clean up.

In addition to paying monetary sanctions and attorneys fees, Malibu Media should be required to file Notices of Related Cases in all 28 cases in this District, and to strictly comply with this rule in the future, so as to facilitate possible transfer of related cases to the same Judicial Officers. In addition, in light of Malibu Media's other abusive litigation tactics, the Moving Party requests an order staying the return date of the subpoena issued to the ISP, as to the Moving Party only, pending the filing and consideration of a motion to quash the subpoena.

Further, in light of Malibu Media's willful violation of the Notice of Related Cases rule, and the other "abusive litigation tactics" detailed herein, the Court may wish to consider granting temporary relief. For example, this Court, or any Judicial Officer tasked with handling these cases, might consider setting a hearing on an order to show cause, on an expedited timeframe, as to whether the return dates for ***all*** subpoenas authorized by the Courts of this Judicial District should be stayed, and Malibu Media's further settlement solicitation efforts prohibited temporarily, pending consideration of regular noticed motions affecting the rights of the John Doe defendants.[9] In connection with such a

[9] Some of the subpoenas, for the cases filed on April 26, 2012, appear to have return dates of this weekend, as well as Monday July 1, 2012.

hearing, it would be useful to hear from Malibu Media whether it has served a single defendant in any of the 200+ cases it currently has pending nationwide. It should be noted in this regard that of Malibu Media's 200+ cases nationwide, 29 of them are over 120 days old, as of June 29, 2012. *See* Exhibit A to Declaration of Morgan E. Pietz.

Undoubtedly, to the extent it is not happening already, the various Judicial Officers in this District handling these cases will soon be barraged with motions from John Doe defendants, many acting *pro se*, seeking to quash subpoenas, sever their cases, etc. If these motions to quash and sever are all set on regular notice, a manifest injustice affecting 280 people (all of whom are alleged by Malibu Media to be residents of this Judicial District) will already have occurred. If it takes the Court a few months to fully consider how to handle Malibu Media's abusive litigation tactics, Malibu Media should not be getting rich on improperly-obtained settlements in the meantime.

VIII. CONCLUSION

Malibu Media's initial failure and subsequent refusal to file Notices of Related Cases was not "inadvertent." Rather, it is one of many willful, "abusive litigation tactics" employed as part of a strategy focused on maximizing the profitability of the John Doe "shake down" business. Had Malibu Media properly filed Notices of Related Cases, there is a better chance that its 28 lawsuits pending in this District would have been more quickly exposed for what they really are: an abuse of the legal process. For the foregoing reasons, this Court should grant this sanctions motion, order the relief requested, and send a clear message to Malibu Media that its "abusive litigation tactics" will not be tolerated in the Central District of California.

Respectfully Submitted,

June 29, 2012

/s/ Morgan E. Pietz

Morgan E. Pietz
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Attorney for the Person Alleged to be John Doe No. 5