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6 Putative John Doe No. 10 in 12-cv-3615-RGK-SS
7 Putative John Doe No. 9 in 12-cv-3622-RGK-SS
8 Putative John Doe No. 7 in 12-cv-4649-RGK-SS
9 Putative John Doe No. 4 in 12-cv-4653-RGK-SS
10 Putative John Doe No. 4 in 12-cv-4656-RGK-SS
11 Putative John Doe No. 4 in 12-cv-4660-RGK-SS
12 Putative John Doe No. 9 in 12-cv-0650-RGK-SS (Santa Ana)

13 **UNITED STATES DISTRICT COURT**
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 MALIBU MEDIA, LLC, a California limited
15 liability company,

16 Plaintiff,

17 v.

18 JOHN DOES 1 through 10,

19 Defendants.

Case Numbers: [See above]¹

Assigned to Hon. R. Gary Klausner
Referred to Suzanne H. Segal

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

Hearing Date: August 20, 2012
Hearing Time: 9:00 a.m.
Hearing Room: 850, Roybal

26 _____
27 ¹ This document is being filed on July 19, 2012, on behalf of Putative John Doe No. 4 in 12-cv-
28 4656-RGK-SS. By Monday July 23, 2012, this document will be filed on behalf of all of the
additional Putative John Does identified above.

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

5 5. I represent the putative John Does identified on the caption page, above.

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

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

9 7. I am familiar with the plaintiff in this action, Malibu Media, LLC. In addition
10 to the clients noted above, from this District, I also represent other John Doe clients being
11 sued by Malibu Media outside of the Central District of California. Malibu Media is a serial
12 copyright infringement plaintiff. According to a PACER search I performed on June 18,
13 2012, *so far this year, Malibu Media has filed 203 copyright infringement lawsuits in 18*
14 *federal judicial districts across the country*. Please find attached hereto as Exhibit A a true
15 and correct copy of my search results from this PACER search, which shows all of Malibu
16 Media's pending cases in the federal courts as of June 18, 2012. The search term for the
17 party was "Malibu Media."

18 8. According to my PACER search, *28 of the 203 copyright infringement cases*
19 *filed by Malibu Media this year are currently pending in the Central District of California*.
20 Thus, as of June 18, 2012 (more cases are filed everyday) this District is tied for the lead
21 with the United States District Court for the District of Colorado, which currently also has 28
22 pending copyright cases filed by Malibu Media.

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

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

27 a. On February 27, 2012, Malibu Media filed its first two infringement
28 cases in this district, with another case filed the following day. The original, low-numbered

1 case, 2:12-CV-1642-RGK-SS, filed February 27, 2012, was assigned to Judge R. Gary
2 Klausner, with discovery referred to Magistrate Suzanne H. Segal.

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

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

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

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

18 b. In each case, Malibu Media moved for early discovery on the strength
19 of essentially the same supporting declarations from the same technical expert, one Mr.
20 Tobias Fieser of IPP Limited. I am familiar with Mr. Fieser. He is an expert who has been
21 utilized by other plaintiffs in so-called “copyright troll” cases where plaintiffs filed a
22 copyright infringement lawsuit as a means to use the court’s subpoena power to obtain an
23 easy settlement. A quick Internet search, conducted June 28, 2012, revealed that he has
24 offered similar declarations to the ones he provided in this case in: *E.g., K-Beech, Inc. v.*
25 *John Does 1-18*, E.D. Mi. Case No. 11-cv-15226; *Patrick Collins, Inc. v. John Does 1-26*,
26 W.D.N.C. Case No. 11-cv-0394.

27 c. Several of the complaints appear to be completely identical clones of
28 one another, where the only difference between them whatsoever, is the I.P. addresses of the

1 John Does. This tracks with what I was later told by Plaintiff’s counsel, that some of the
2 cases involve the same cryptographic “hash tag.”

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

8 11. After Malibu Media refused to definitively state whether it had indeed filed
9 even a single Notice of Related Cases, under my supervision, I had my office staff check the
10 docket for all 28 cases Malibu Media filed in this district and note, in a new column on
11 Exhibit A, whether a Notice of Related Cases was filed. My staff performed this review of
12 the 28 dockets on June 27, 2012, and as of then, Malibu Media did not file a Notice of
13 Related Cases in any of the 28 cases it filed in this District. On June 27, 2012, after my staff
14 performed the review noted above, Malibu Media filed five more cases in the Central
15 District – no notices of related cases were filed in the new cases either.

16 12. Ultimately, after filing a sanctions motion seeking to compel Malibu Media to
17 live up to its continuing duty to file a notice of related cases, the Court deemed all of the
18 cases pending in the Central District related and transferred them to Judge Klausner.

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

20 13. Attached hereto as Exhibit B is a true and correct summary table showing the
21 copyrighted works at issue in the 28 cases filed by Malibu Media in this District, as of June
22 26, 2012. This table was prepared by my office staff, under my direct supervision, based on
23 my specific instructions, and double-checked by me personally. This table was prepared by
24 downloading from PACER the “Report on the Filing of an Action Regarding a Copyright”
25 for each of the 28 cases filed by Malibu Media in this District. By looking at this table, one
26 can see the overview of what copyrights are at issue in which of the 28 cases filed by Malibu
27 Media in this District. I would be happy to provide copies of all of the “Reports on the
28 Filing of an Action Regarding a Copyright” for the 28 cases, upon request.

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

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

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

11 16. Attached hereto as Exhibit C, is a true and correct copy of my complete meet
12 and confer email chain on the Notice of Related Cases issue with Plaintiff's counsel Leemore
13 Kushner. As detailed therein, Ms. Kushner refused to file Notices of Related Cases in
14 Malibu Media's cases in this District, contending that checking the box on the civil case
15 cover sheets was sufficient. Although Ms. Kushner promised to file a Notice of Related
16 Cases in just the two cases I am involved in (which I said was insufficient), she did not do
17 so.

18 17. I happen to know, from listening to a recorded oral argument of a motion heard
19 in a Malibu Media case filed in the Eastern District of Pennsylvania, (E.D. Pn No. CV-12-
20 2084-MMB) that at least in Pennsylvania, when Malibu Media filed multiple cases in the
21 same District, it did the Court the courtesy of noticing the cases as related so they could be
22 assigned to the same Judge. The recording to which I refer is available at this website:

23 [http://dietrolldie.com/2012/05/23/hearing-audio-file-for-malibu-media-v-john-does-1-14-
24 212-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, more specifically,
25 at this link (which requires signing up for "DropBox" to access):

26 http://dl.dropbox.com/u/81004257/Hearing_02084%28PA%295-14-2012.mp3

27 /

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

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

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

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

14 21. I called Elizabeth Jones back later that day, June 18, 2012, and she answered. I
15 asked her what company she was with and she said “we work with Malibu Media.” I asked
16 her if she was an employee of Malibu Media, and she responded that “we work in relation
17 with them.” I asked her if she worked for an independent company that handled Malibu
18 Media’s settlement communications, and if so, what was the name of her company. She
19 repeated that “we work with Malibu Media.” I asked her to please explain what she meant
20 by “we” when she said “we work with Malibu Media” because this sentence seemed to
21 imply that she did not actually work for Malibu Media and was therefore not the “client”
22 with whom I had been authorized to speak. She responded that it seemed like I was not
23 really calling because I was serious about a settlement, but that she “handled” Malibu
24 Media’s settlement communications. Later in this conversation, Ms. Jones admitted to me
25 that she fielded settlement calls from “20 to 30 counsel per day,” and when I asked how long
26 she had been doing this line of work she answered for “a couple years.” Based on her
27 answers during our phone call, as well as my experience in similar copyright infringement
28

1 cases, I concluded that Ms. Jones is likely a third party “negotiator” to whom Malibu Media
2 outsources its collection efforts.

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

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

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

22 24. During my conversation with Elizabeth Jones, Malibu Media’s settlement
23 negotiator, on June 18, 2012, she told me that Malibu Media’s settlement demand for my
24 client was \$19,500. She explained that Malibu Media sought “the minimum statutory
25 damages for each work of \$750 per work,” and that in the case of my client, John Doe No. 5,
26 there were “a total of 26 registered hits.” At first, I did not realize that what Malibu Media’s
27 settlement “negotiator” told me is actually incorrect. The actual statutory damage *minimum*,
28 for innocent infringement, is \$200 per work. 17 U.S.C. § 504(c)(2). Eventually, it dawned

1 on me that this statement was incorrect; however, I doubt that a non-lawyer speaking to
2 “Elizabeth Jones,” or even a lawyer unfamiliar with copyright law, would catch this small
3 but important misrepresentation.

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

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

18 26. Ms. Jones confirmed that she was sure we were talking about the correct case
19 and Doe, and confirmed the \$19,500 figure was not a mistake. She explained to me that
20 although the complaint alleged a siterip for 15 registered works, on April 1, 2012, *according*
21 *to her records*, there had been “a second siterip 2 days later” for 11 more works. ***I explained***
22 ***that I was trying to settle the claims that were actually alleged in the Complaint***, and that
23 according to Exhibit C of the Complaint, my client had allegedly infringed 15 works of
24 authorship, not 26. She again reiterated that according to her records, there was a “second
25 siterip” on April 3, 2012, and that because of this, the settlement demand was going to be
26 \$19,500 to settle Malibu Media’s claims, and that she “could send me a declaration” about
27 the second siterip. I then asked her if any settlement had to be all-or-nothing, meaning was it
28 possible for my client to pay \$11,250 to settle only those claims actually alleged in the

1 complaint? She responded that “it is all or nothing” and that if my client wanted to settle
2 he/she would have to pay the full \$19,500. At this point, I said that since I didn’t know
3 anything about the “second siterip” not alleged in the complaint, it was hard for me to know
4 what to make of this demand, and I asked her to please send me the declaration she had
5 mentioned. She said she would do so.

6 27. During my conversation with Elizabeth Jones, Malibu Media’s negotiator, on
7 June 18, 2012, I also asked her what the next steps would be if my client did not pay the
8 \$19,500 demanded for settlement. She said that the next step would be “service,” and that
9 “as the case goes on, the settlement number will go up.” She further explained that if “our
10 side has to do more work on the case,” the value will go up. I asked her to explain what she
11 meant by the next step being service, and she explained that after information is disclosed
12 they would be sending letters asking whether we would accept service. I replied that it was
13 my understanding that Malibu Media had filed over 200 lawsuits, against thousands of John
14 Doe defendants, and that it had served essentially none of them, so I asked her if she had any
15 experience settling claims with defendants who had actually been served. She responded
16 that she *had* accepted settlement for defendants who had been served. I asked her how
17 many, to which she responded “I am not the one on trial here.” Then I asked her whether she
18 was new to the company and if she really knew what she was doing, which is when she
19 explained to me that she fields calls from “20 to 30 counsel per day” and, when prompted,
20 explained that she had been doing this for “a couple years.” I asked her if she could tell me,
21 based on her extensive experience, out of how many cases she had handled, had she accepted
22 a settlement from someone who had already been served with a complaint. She responded
23 “every case is different.”

24 28. Before hanging up with Elizabeth Jones, I reiterated that I would like her to
25 send me the declaration she had mentioned about the “second siterip.” I asked her how long
26 it would take her to send me this declaration, and she said that it would be sent to me, by Ms.
27 Kushner, within 24-48 hours. I asked her for her email address so I could follow up, and she
28

1 insisted that any email contact should go through Leemore Kushner. Then I thanked her for
2 her time and hung up.

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

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

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

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

21 **(i) Abusive Litigation Tactic Number Six: Malibu Media's History of Never**
22 **Serving Any John Does**

23 32. As of mid-July, 2012, I had filed at least four motions challenging Malibu
24 Media to disclose, under penalty of perjury, how many John Does it has served nationwide.
25 However, as far as I am aware, Malibu Media has yet to answer this question, in any forum.

26 33. Accordingly, on July 17, 2012, I endeavored to try and answer this question on
27 my own. To begin this process, I ran an updated search of all cases Malibu Media has filed
28 nationwide on PACER and exported the results as a spreadsheet. As of July 17, 2012, this

1 number had risen to 237 cases nationwide, meaning Malibu Media has filed about 30 new
2 cases nationwide since last I checked about one month ago. After sorting the data by date
3 filed, I highlighted on the spreadsheet the 35 cases that were over 120-days old as of July 17,
4 2012. I then directed my staff to pull the docket reports for each of these 35 cases, and I
5 reviewed each one of dockets myself, filling in the final two columns on the spreadsheet with
6 my results. A true and correct copy of this spreadsheet I prepared in this fashion is attached
7 hereto as Exhibit E. I collected all of the docket reports for these 35 cases into a tabbed
8 Appendix 1, organized by case number and district.

9 34. As noted in Exhibit E, Malibu Media has not formally served a single John
10 Doe defendant in any of the 35 cases it has filed that are at least 120 days old, as of July 17,
11 2012. In most cases, Malibu Media: (i) voluntarily dismissed remaining John Does (meaning
12 those who had not already settled) *without* prejudice at or near the service deadline; (ii)
13 sought leave of Court for an extension of time for service, or simply ignored² the service
14 deadline altogether; or (iii) in two cases, where Malibu Media apparently did not like the
15 Judge it was assigned, it simply dismissed the case without prejudice prior to even requesting
16 early discovery.

17
18 I declare under penalty of perjury under the laws of the United States of America that
19 the foregoing is true and correct.

20
21 Executed on July 19, 2012 at Manhattan Beach, California.

22
23 /s/ Morgan E. Pietz

24 Morgan E. Pietz, Declarant

25
26 _____
27 ² Malibu Media appears to have taken the ‘ignore the service deadline’ approach in two of the three
28 cases over 120-days old currently pending in this District. Cases in this District numbered 12-cv-
1642 and 12-cv-1647, appear to be ripe for a motion to dismiss for failure to prosecute. As to the
third case pending here over 120-days old, plaintiff’s counsel Leemore Kushner filed a voluntary
dismissal as to the remaining Does on July 11, 2012.