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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
Putative John Doe No. 4 in 12-cv-4660-RGK-SS
11 Putative John Doe No. 9 in 12-cv-0650-RGK-SS (Santa Ana)

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

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

15
16 Plaintiff,

17 v.

18 JOHN DOES 1 through 10,

19
20 Defendants.

Case Numbers: [See above]¹

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

**JOHN DOES' OMNIBUS MOTION
THAT THE COURT: (1) QUASH
OUTSTANDING SUBPOENAS; (2)
SEVER ALL DOES OTHER THAN
JOHN DOES NO. 1; AND (3) ENTER A
PROTECTIVE ORDER**

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

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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.

NOTICE OF MOTION

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL

PLEASE TAKE NOTICE that the putative John Does whose “Doe Numbers” appear on the caption above, in the above-entitled actions (“**Moving Parties**”) by and through counsel, both individually and collectively, hereby make a motion that the Court:

(1) ***Quash all outstanding subpoenas*** in the instant action, and in all related actions pending in this District, pursuant to Fed. R. Civ. Proc. 45(c)(3), which were originally authorized by Courts of this District and issued by the Plaintiff to the ISPs, and which seek the contact information for John Does other than John Doe No. 1. The subpoenas should be quashed on the grounds that:

(A) Plaintiff’s *ex parte* application for early discovery was granted without any interested parties being afforded an opportunity to present any facts or make any arguments as to the propriety of the subpoenas.

(B) Had the Does’ interests been properly represented, the flaws in Plaintiff’s early discovery request would have been made apparent. Namely, the subpoenas are not “very likely” to reveal the identities of the defendants, the subpoenas are not “reasonably likely” to effectuate service on defendants, and the plaintiffs complaint would not withstand a hypothetical motion to dismiss because the Does are impermissibly joined. *Hard Drive Productions, Inc. v. Does 1–90*, N.D. Cal. Case No. CV-11-3825, Dkt. No. 18, 3/30/2012, p. 13; *In re: BitTorrent Adult Film Copyright Infringement Cases*, E.D.N.Y. Case No. CV-11-3995-DRH-GRB at p. 13 (Docket No. 39 filed 5/1/2012) (“*In re: Adult Film Cases*”). The subpoenas seek personally identifiable information that is subject to a Constitutional privilege protecting the anonymity of Internet activities, and that this Constitutional right is not outweighed by the needs of the Plaintiff to effectuate service of the complaint for copyright infringement, since it is unlikely that plaintiff will ever serve anyone or see this case through to the merits.²

² Based on the 35 cases Malibu Media has filed nationwide that are over 120 days old as of July 17, 2012, ***no John Doe has ever been served by Malibu Media. To put that another way, of the***

1 (C) There is evidence that Plaintiff has employed “abusive litigation
2 tactics” in the past and is likely to continue to do so, which threatens to unduly burden
3 innocent people with something that borders on extortion. *Id.*; Declaration of Morgan E.
4 Pietz ¶¶ 15-34.

5 (2) **Sever all of the John Doe defendants, other than John Does No. 1** from the
6 instant action, and from all related actions pending in this District, pursuant to Fed. R. Civ.
7 Proc. 21. The Court should decide the permissive joinder issue now, sever all of the Does
8 other than Doe No. 1, and dismiss the claims against the other Does without prejudice, on
9 the following grounds:

10 (A) Defendants merely “committed the same type of violations in the
11 same way” which is not enough to satisfy the transactional relatedness test. *E.g., Digital*
12 *Sins, Inc. v. John Does 1-245*, S.D.N.Y. Case No. 11-cv-8170, Dkt. No. 18, 5/15/12, p. 3.

13 (B) John Does accessing the same file days, weeks or months Apart
14 are not part of the same “transaction or occurrence.” *E.g., Malibu Media v. John Does 1-*
15 *10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, p. 5.

16 (C) There are different “questions of law or fact” between the different
17 Does in the same cases, because Does in the same action are alleged to have downloaded
18 different copyrighted works, and each Doe has different factual scenarios and legal
19 defenses, *see* Fed. R. Civ. Proc. 20(a)(2)(B).

20 (D) Even if joinder were permissible, the Court should still exercise
21 its discretion and sever the Does in light of plaintiff’s “abusive litigation tactics” and the
22 burden on the Courts, the ISPs and the Does. *See Acevedo v. Allsup's Convenience Stores,*
23 *Inc.*, 600 F.3d 516, 521-522 (5th Cir. 2010).

24 (3) **Enter a protective order**, pursuant to Fed. R. Civ. Proc. 26(c)(1), which
25 requires that in this action, or in any action re-filed against the Does: (i) that the identity
26 and contact information of each of the John Does be kept confidential and maintained

27 **633 John Does Malibu Media has sued nationwide in cases currently over 120 days old,**
28 **precisely zero (0) have been formally served.** Exhibit E to Dec’l of Morgan E. Pietz.

1 under seal until such time as the complaint is properly served on that John Doe; (ii) forbids
2 the Plaintiff from using or disclosing any information it has obtained thus far for any
3 defendants other than John Doe No. 1; (iii) directing the plaintiff and its counsel to *not*
4 request subscriber telephone numbers and email addresses in any future early discovery
5 requests they make in this District; and (iv) directing Plaintiff and its counsel to comply
6 with this procedure detailed in this order in all future cases filed in this District. This
7 protective order is sought on the ground that “The Federal Rules direct the Court to deny
8 discovery “to protect a party or person from annoyance, embarrassment, oppression, or
9 undue burden or expense.” Fed. R. Civ. P. 26(c)(1). This situation cries out for such relief.”
10 *See In re: Bittorrent Adult Film Copyright Infringement Cases*, E.D.N.Y. Case No. 11-
11 3995, p. 18, docket no. 39, May 1, 2012; *see also First Time Videos, LLC v. Does 1-46*,
12 S.D. Tex. Case No. 11-cv-4431, Docket No. 21, June 8, 2012 (plaintiff First Time Videos,
13 LLC “may not use the information it has received; it must destroy it.”)

14 (4) In connection with the relief requested above, the Plaintiff should be
15 permitted to re-file amended complaints, within 30-days, against individual John Does,
16 whose I.P. addresses are alleged, in good faith based some kind of reasonable proof, to
17 originate from this District, after posting the applicable filing fees for each individual
18 action. Failure to re-file within 30-days should result in an automatic dismissal *with*
19 prejudice.

20 Moving Parties rely on this Notice of Motion, the concurrently filed Memorandum
21 of Points and Authorities, the Declaration of Morgan E. Pietz; the pleadings and records on
22 file herein; and on such further evidence as the Court may admit at the hearing on this
23 matter.

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Respectfully submitted, July 19, 2012,

/s/ Morgan E. Pietz

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