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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.
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Case Numbers: [See above]¹

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

**[PROPOSED] ORDER RE: JOHN
DOES' OMNIBUS MOTION**

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 On July 19, 2012 the John Does whose “Doe numbers” appear on the caption page,
2 above, in the above-entitled actions (“**Moving Parties**”) by and through counsel, made a
3 motion that the Court:

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

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

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

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26 ² Based on the 35 cases Malibu Media has filed nationwide that are over 120 days old as of July
27 17, 2012, ***no John Doe has ever been served by Malibu Media. To put that another way, of the***
28 ***633 John Does Malibu Media has sued nationwide in cases currently over 120 days old,***
precisely zero (0) have been formally served. Exhibit E to Dec’l of Morgan E. Pietz.

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 under seal until such time as the complaint is properly served on that John Doe; (ii) forbids
28 the Plaintiff from using or disclosing any information it has obtained thus far for any

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

12 After due consideration of the papers and the arguments, **THE COURT FINDS AS**
13 **FOLLOWS:**

14 (i) Malibu Media has engaged in abusive litigation tactics in the past and is
15 likely to do so again.

16 (ii) The subpoenas issued by Malibu Media are not “very likely” to reveal the
17 identities of actual defendants.

18 (iii) Based on its history in other Districts, the subpoenas issued by Malibu Media
19 are not “reasonably likely” to result in service of a complaint on actual defendants.

20 (iv) Joinder in this case is impermissible, because the Does did not participate in
21 the same transaction or occurrence; rather, it was merely alleged that they committed the
22 same kind of violation, in the same manner, over an extended period of time. Even if
23 joinder were not impermissible, under the circumstances here, the Court would still
24 exercise its discretion and sever the Does.

25 (v) There is good cause supporting the imposition of a protective order, since the
26 early discovery requested by Malibu Media should not have been granted.

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1 Accordingly, in light of the foregoing, **THE COURT HEREBY ORDERS AS**
2 **FOLLOWS**, with respect to each case filed by Malibu Media that is currently pending
3 before this Court:

4 (1) All John Does other than John Doe Number One are hereby severed, due to
5 misjoinder, and the cases against Does 2-10 are dismissed *without* prejudice.

6 (2) All outstanding subpoenas for any John Does other than John Does Number
7 One are quashed, because Malibu Media’s need for civil discovery does not outweigh the
8 Does’ Constitutional right to anonymity in this instance.

9 (3) Malibu Media may re-file amended complaints, within 30-days, against
10 individual John Does, whose I.P. addresses are alleged, in good faith based some kind of
11 reasonable proof, to originate from this District, after posting the applicable filing fees for
12 each individual action. Failure to re-file within 30-days will result in an automatic
13 dismissal *with* prejudice.

14 (4) For good cause shown, a protective order is hereby entered, pursuant to
15 which Malibu Media and its counsel are directed that in this case, or in any action re-filed
16 against John Doe defendants in this District, that (i) the identity and contact information of
17 each of the John Does be kept confidential and maintained under seal until such time as the
18 complaint is properly served on that John Doe; (ii) Malibu Media may not use or disclose
19 any information it has obtained thus far for any defendants other than John Doe No. 1; (iii)
20 under no circumstance should subscriber telephone numbers and email addresses be
21 requested in any future early discovery requests made in this District; and (iv) the rest of
22 the procedure described in this order shall be followed in all future cases filed in this
23 District.

24 **IT IS SO ORDERED.**

25
26 Dated: _____

By: _____

United States District / Magistrate Judge