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Putative John Doe No. 7 in 12-cv-4649-RGK-SS
Putative John Doe No. 4 in 12-cv-4653-RGK-SS
Putative John Doe No. 4 in 12-cv-4656-RGK-SS
Putative John Doe No. 4 in 12-cv-4660-RGK-SS
Putative John Doe No. 9 in 12-cv-0650-RGK-SS (Santa Ana)

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 Numbers: [See above][1]

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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

[1] This document is being filed on July 19, 2012, on behalf of Putative John Doe No. 4 in 12-cv-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.

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I. INTRODUCTION AND SUMMARY

These actions are an attempt by Malibu Media to improperly use this Court's subpoena power, and the social stigma associated with pornography, to leverage easy settlements out of John Does, many of whom did not download the movies at issue. Based on its past track record, plaintiff Malibu Media, LLC appears to have "no interest in actually" serving anyone or "litigating the case, but rather simply have ***used the Court and its subpoena power to obtain sufficient information to shake down the John Does***" for an easy settlement. *In re: BitTorrent Adult Film Copyright Infringement Cases,* 2012 U.S. Dist. LEXIS 61447 (E.D.N.Y. May 1, 2012) (Case No. CV-11-3995-DRH-GRB, Dkt. No. 39) ("*In re: Adult Film Cases*") (comprehensive report and recommendation of Magistrate Judge Gary R. Brown addressing similar cases filed by Malibu Media, among others).

Nationwide, as of July 17, 2012, Malibu Media has 35 cases pending that are at least 120-days old. In these 35 cases, Malibu Media has sued 633 John Does for copyright infringement. As of July 17, 2012, in the 35 cases over 120-days old, ***Malibu Media has formally served precisely zero (0) out of 633 John Does/Defendants***. Out of these cases, a total of three unrepresented individuals have been *named*, and one person's lawyer accepted service pending adjudication of that person's motion to quash. In all the other cases over 120-days old, Malibu Media either: (i) voluntarily dismissed remaining John Does (meaning those who had not already settled) *without* prejudice at or near the service deadline; (ii) sought leave of Court for an extension of time for service, or simply ignored[2] the service deadline altogether; or (iii) in two cases, where Malibu Media apparently did not like the Judge it was assigned, it simply dismissed the case without prejudice prior to even requesting early discovery. *See* Exhibit E to Dec'l of Morgan E. Pietz; *see also*

[2] Malibu Media appears to have taken the 'ignore the service deadline' approach in two of the three 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, 12-cv-1675, plaintiff's counsel Leemore Kushner filed a voluntary dismissal as to the remaining Does on July 11, 2012.

Appendix 1 (collection of all 35 docket reports for Malibu Media's cases older than 120 days, downloaded from PACER).

These hard numbers belie Malibu Media's representation, which it makes repeatedly, to courts across the country, when applying for early discovery, "that the discovery sought will facilitate identification of the defendants ***and service of process***. Kushner Decl. at ¶ 4." (emphasis added). *E.g.,* C.D. Cal. Case No. 12-3614, Dkt. No. 4-5, p. 2, li. 13½–14½ (proposed order granting early discovery); *cf.* C.D. Cal. Case No. 1642, Dkt. No. 4, ¶ 8, 2/27/123 (Dec'l of A. Cavaluzzi). While the subpoenas requested by Malibu Media in these cases might *theoretically* "facilitate" service, in *actuality*, based on Malibu Media's track record in its 35 cases over 120-days old, the subpoenas *never* do.

Accordingly, the subpoenas should be quashed, because they are not "reasonably likely" to effectuate service of the complaint. *Patrick Collins, Inc. v. Doe*, 2012 U.S. Dist. LEXIS 36232 (D. Ariz. Mar. 19, 2012); *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999); *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002) *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004). Here, "it is evident that ***expedited discovery will not lead to identification of the Doe defendants or service of process***. ***Indeed, the fact that no defendant has ever been served in one of these mass copyright cases*** belies any effort by plaintiff to allege that the discovery *will* lead to identification of and service on the Doe defendants." *Hard Drive Productions, Inc. v. Does 1-188*, 809 F. Supp. 2d 1150 (N.D. Cal. August 23, 2011) (Case No. 11-cv-01566, Dkt. No. 18, at p. 11) ("*Hard Drive Prods.*") (emphasis added) (severing all Does other than Doe No. 1, quashing outstanding subpoenas, and dismissing cases against severed Does without prejudice).

The second fallacy plaintiff is in the business of perpetuating—quite profitably—is the notion that whomever happens to pay the cable/Internet bill for a household is likely to be the same person who downloaded plaintiff's copyrighted pornographic film. In an age when most homes have routers and wireless networks and multiple computers share a single I.P. address, the infringer could be a teenage son with a laptop, an invitee, or a

hacker down the street. Thus, "there is a reasonable likelihood that the [the Does] may have had no involvement in the alleged illegal downloading that has been linked to his or her IP address." *Malibu Media, LLC v. John Does 1-11*, 2012 U.S. Dist. LEXIS 94648 (D.D.C. July 10, 2012).

Even if Malibu Media were really interested in litigating this case on the merits, the subpoena should still be denied because it is not "very likely" or even "reasonably likely" that the person whose information is sought from the ISP (*i.e.*, the subscriber who happens to pay cable/Internet the bill) would actually be the particular defendant alleged to have infringed plaintiffs' copyright. Thus, the rights of innocent people are likely at stake, and the subpoena at issue here fails under *Gillespie's* "very likely" standard, and also fails the service and motion to dismiss tests of *Sony Music* and *Semitool*.

Further, perhaps "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."[3] As explained in the Declaration of Morgan E. Pietz, ***the plaintiff here is running the complete playbook of copyright troll abusive litigation tactics***. Specifically, the plaintiff: (i) is using the same "settlement negotiators" as other notorious copyright trolls; (ii) using subpoena information to collect on claims that go beyond the complaint; (iii) willfully violating courts' notice of related case rules to try and fly under the radar; (iv) seeking John Doe phone numbers and email addresses despite a court order telling Malibu Media not to do so anymore; (v) misrepresenting the range of potential damages. Declaration of Morgan E. Pietz re: Abusive Litigation Tactics ¶¶ 15–31.

Recently, many other courts have considered these kinds of cases and determined how best to deal with them: quash the subpoenas, sever and dismiss, without prejudice, all of the Does other than Doe No. 1, and enter a protective order. The Moving Parties respectfully request that this Court do the same by granting this motion. *In re: Adult Film Cases, supra*.

[3] *In re: Adult Film Cases, supra,* at pp. 16–17.

II. THESE CASES ARE PART OF THE "NATIONWIDE BLIZZARD OF CIVIL ACTIONS BROUGHT BY PURVEYORS OF PORNOGRAPHIC FILMS ALLEGING COPYRIGHT INFRINGEMENT"

As most are aware, a few years ago, the music recording industry and mainstream Hollywood movie studios launched an aggressive litigation campaign targeting individuals who used file sharing websites like Napster and BitTorrent. The Recording Industry Association of America ("**RIAA**") and music and movie studios essentially pioneered these kinds of lawsuits, whereby a copyright owner files a lawsuit against multiple John Does, then seeks Court permission to subpoena that subscriber's identity from his or her Internet Service Provider.

These cases are different.

The key difference is that unlike the RIAA and mainstream studios, the plaintiffs in these cases file these lawsuits knowing full well, in advance, that they are not likely to ever take any of these cases to trial or even name and serve the John Doe defendants. *In re: Adult Film Cases, supra,* at p. 10 (noting of Malibu Media and others "The plaintiffs seemingly have no interest in actually litigating the case, but rather simply have used the Court and its subpoena powers 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).

The fact that these lawsuits involve copyrighted works with obvious pornographic titles is also significant. As Judge Wright recently explained in one of the Central District of California Malibu Media cases now assigned to this Court,

> "The Court is familiar with lawsuits like this one. *AF Holdings LLC v. Does 1-1058*, No. 1:12-cv-48(BAH) (D.D.C. filed January 11, 2012); *Discount Video Center, Inc. v. Does 1-5041*, No. C11-2694CW(PSG) (N.D. Cal. filed June 3, 2011); *K-Beech, Inc. v. John Does 1-85*, No. 3:11cv469-JAG (E.D.

> Va. filed July 21, 2011).[4] These lawsuits run a common theme: plaintiff owns a copyright to a pornographic movie; plaintiff sues numerous John Does in a single action for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff. The cost to the plaintiff: a single filing fee, a bit of discovery, and stamps. The rewards: potentially hundreds of thousands of dollars. Rarely do these cases reach the merits.
>
> The federal courts are not cogs in a plaintiff's copyright-enforcement business model. ***The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial***. By requiring Malibu to file separate lawsuits for each of the Doe Defendants, Malibu will have to expend additional resources to obtain a nuisance-value settlement—making this type of litigation less profitable. If Malibu desires to vindicate its copyright rights, it must do it the old-fashioned way and earn it." *Malibu Media v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, p. 6. (emphasis added).

Essentially, in these kinds of cases, the "Plaintiff seeks to enlist the aid of the court to obtain information through the litigation discovery process so that it can pursue a non-judicial remedy that focuses on extracting 'settlement' payments from persons who may or may not be infringers." *Hard Drive Prods.*, *supra*, at p. 11.

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[4] Malibu Media has a "Joint Sharing Agreement" to use the same "settlement negotiator" company as AF Holdings LLC and K-Beech, Inc. Declaration of Morgan E. Pietz ¶ 22.

III. MALIBU MEDIA HAS A HISTORY OF "SHAKING DOWN" JOHN DOES FOR AS LONG AS POSSIBLE AND THEN VOLUNTARILY DISMISSING THE CASE WITHOUT PREJUDICE PRIOR TO SERVING ANYONE

The proof that this is a non-judicial settlement business and not a good faith lawsuit seeking vindication of a legal right is in the numbers.

Since Malibu Media would not answer the question of 'how many Does has it served?' under penalty of perjury, despite this firm repeatedly challenging it to do so, this firm pulled the dockets for the 35 cases filed by Malibu Media, nationwide, that are at least 120-days old as of July 17, 2012. The results of this research reveal why Malibu Media was not anxious to answer this question. *See* Appendix 1.

As noted above, the short answer to the question as to number of Does served appears to be zero. In the 35 cases where Malibu Media has already passed the 120-day limit for service mandated by Fed. R. Civ. Proc. 4(m), not a single Doe has ever been formally served. The only exception, is that one John Doe's lawyer accepted service pending consideration of a motion to quash set later this month. Exhibit E to Dec'l of Morgan E. Pietz; Appendix 1, p. 77.

In two judicial districts, the Eastern District of Virginia, and the Eastern District of New York, where all of Malibu Media's cases were assigned to the same Judicial Officer, that Judicial Officer has essentially shut down Malibu Media's settlement operation. The Judges in both of those districts, Magistrate Gary R. Brown in New York, and Magistrate Thomas Rawles Jones, Jr., in Virginia, severed all Does other than Does No. 1, and quashed the outstanding subpoenas. *See* Appendix 1 at pp. 78–101, 117–130; *In re: Adult Film Cases*, *supra*; *Malibu Media, LLC v. John Does 1-23,* E.D. Va. Case No. 12-cv-0159, Dkt. No. 10, 4/3/12 (consolidated report and recommendation dealing with seven Malibu Media cases).[5]

[5] Judge Jones' order on the Malibu Media cases in the Eastern District was relied primarily on on Judge Gibney's October 13, 2011 amended memorandum order in *K-Beech, Inc. v. Does 1-85*, Civil Action No. 3:11-cv-469 (E.D. Va.). As noted above, Malibu Media and K-Beech share the same notorious "settlement negotiators." Dec'l of Morgan E. Pietz ¶¶ 18-23.

Setting aside the 14 cases in these two districts, of the 21 remaining cases over 120-days old: (i) in 12 of them, Malibu Media filed a voluntary dismissal of remaining Does at or near the service deadline; (ii) in 6 of them, Malibu Media sought at least one request for an extension of time in which to (supposedly) effect service of process; and (iii) in 2 of them, after the case was assigned to a Judge Malibu Media did not like, Malibu Media simply dismissed the complaint without prejudice before ever filing a request for early discovery. In a few other cases, it appears that Malibu Media has essentially ignored the service of process deadline altogether. *E.g.*, C.D. Cal. Case Nos. 12-cv-1642 and 12-cv-1647.

One of the two[6] examples of what appears to be Judge shopping was carried out by Malibu Media's counsel in this action: Ms. Leemore Kushner. On February 9, 2012, Malibu Media, through its counsel Adam Silverstein, filed a complaint in the Southern District of California, Case No. 12-cv-0358. Discovery in that case was referred to Magistrate Judge William Gallo. Somewhat unusually, Malibu Media did not file a request for early discovery in that case within the first two months. On May 21, 2012, Magistrate William Gallo issued an order denying Prenda Law's discovery request in a similar case entitled *Millenium TGA, Inc. v. Tyree Paschall*, S.D. Cal. Case No. 12-cv-0792, Dkt. No. 5, 5/21/12. Accordingly, on June 8, 2012, Leemore Kushner filed a request for voluntary dismissal without prejudice in the Malibu Media case then pending before Magistrate Judge Gallo. *Malibu Media v. John Does 1-13*, S.D. Cal. Case No. 0358, Dkt. No. 7, 6/8/12.[7]

Malibu Media's tactics of never serving anyone are entirely consistent with the tactics of other notorious mass infringement plaintiffs, like AF Holdings LLC and Hard

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[6] The other Judge Malibu Media apparently sought to avoid was Judge Rudolph Contreras of the D.C. District.

[7] One troubling aspect of this kind of Judge shopping is that since the Does are identified in the complaint only by I.P. address, their I.P. addresses can simply be included in a new complaint that goes back to the wheel and is assigned to a different judge. Unless close attention is paid to the I.P. address attachments, nobody will ever know that a given Doe (or, more accurately, a give I.P. address) was previously sued in one Judge's court, but is now being sued before a different Judge.

Drive Productions, Inc.—with whom Malibu Media shares its notorious "settlement negotiators."[8] *Hard Drive Prods., supra,* at p. 6, n. 4 ("According 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."); *AF Holdings LLC v. Does 1-1,058*, 12-cv-0048-BAH, Dkt. No. 8-1, 3/02/12 p. 11 (memorandum of law submitted by non-party ISPs) (plaintiff's counsel Prenda Law "has declared that in none of its 118 multi-Doe actions filed during the last two years. . .has a single Defendant been served. Plaintiff's counsel simply moves from court to court seeking authorization to serve subpoenas for the broadest number of subscribers. . .without using the information gathered for the purpose of litigating any case on the merits.")

IV. THE SUBPOENAS SHOULD BE QUASHED BECAUSE THEY FAIL ON THE *GILLESPIE* AND *SEMITOOL* FACTORS

(a) Standard for Assessing the Propriety of Subpoenas in File Sharing Cases

Generally, a court may authorize early discovery before the Rule 26(f) conference for "good cause." *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Id.* When considering good cause in cases involving uncovering the indentity of anonymous John Does, courts consider whether: (1) the plaintiff can identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to locate the elusive defendant; (3) the plaintiff's suit against defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of being able to identify the defendant through discovery such that service of process would be possible. *Patrick Collins, Inc. v. Doe*, 2012 U.S. Dist. LEXIS 36232 (D. Ariz. Mar. 19, 2012); *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D.

[8] Dec'l of Morgan E. Pietz ¶¶ 18-23.

573, 578-80 (N.D. Cal. 1999); *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004). These four factors bearing on whether there is good cause sufficient to grant early discovery are sometimes referred to as the "*Semitool* factors" or the "*Sony Music* factors."[9]

However, where, as here, the discovery at issue implicates the First Amendment right to anonymous speech—and the law is clear that online file sharing is a form of anonymous speech that should be afforded limited First Amendment protection[10]—slightly higher scrutiny is required. When the First Amendment is at issue, courts should also "ask whether the requested early discovery is 'very likely' to reveal the identities of the Doe defendants." *Gillespie v. Civiletti,* 629 F.2d 637, 642–43 (9th Cir. 1980).

For the same reasons that early discovery should not have been granted in the first place, the outstanding subpoenas should now be quashed, because they are, by definition, unduly burdensome, and fail the requisite First Amendment balancing.

(b) The Subpoenas are not "Very Likely" to Reveal the Identities of Defendants Because Plaintiff's Theory of the Case Rests on a "Tenuous Assumption"

Contrary to the incorrect assertion in plaintiff's unopposed papers seeking early discovery, it is hardly "unanimous" that courts permit early discovery in cases like these, and Malibu Media's representations to the contrary, in an *unopposed* early discovery request, are incorrect.

In reality, numerous courts have applied the *Gillespie* "very likely" standard and

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[9] The Ninth Circuit's *Semitool* factors largely track with the Second Circuit's *Sony Music* factors.

[10] *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004) (surveying case law and concluding "that the use of P2P file copying networks to download, distribute, or make sound recordings available qualifies as speech entitled to First Amendment protection."); *Call of the Wild Movie, LLC v. Does 1-1,062*, D.D.C. Case No. CV-10-455, Dkt. No. 40, 3/22/2011, 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."); *see also In re: Anonymous Online Speakers*, 661 F.3d 1168, 1174–76 (9th Cir. 2011) (noting different Constitutional standards applied to different kinds of anonymous speech).

denied early discovery and/or quashed subpoenas in other mass copyright infringement cases just like this one, where pornographers sought to subpoena John Doe contact information from ISPs. *AF Holdings LLC v. Does 1-96*, N.D. Cal. No. 11-cv-3335-JSC, Dkt. No. 14, 9/27/11, p. 6 ("*AF Holdings*") (denying requested early discovery because it was not "very likely to enable Plaintiff to identify the doe defendants."); *Hard Drive Prods., supra,* at pp. 4–6 (denying early discovery because "It is abundantly clear that plaintiff's requested discovery is not 'very likely' to reveal the identities of the Doe defendants."); *AF Holdings, LLC v. John Doe*, D. Min. Case No. 12-cv-1445, Dkt. No. 7, 7/5/12 (denying early discovery because "the requested discovery was 'not very likely' to reveal the identity of the alleged infringer.").

The same result was also reached Magistrate Judge Brown of Eastern District of New York in an increasingly well-known case involving a few of the most notorious copyright trolls, including Malibu Media. *In re: Adult Film Cases*, *supra*, at p. 23 ("the Court is not inclined to grant the broad early discovery sought by Malibu and Patrick Collins.") As noted by Judge Brown, who was assigned all of the adult film mass infringement cases in the Eastern District of New York, "***the assumption that a person who pays for Internet access at a given location is the same individual who allegedly downloaded a single sexually explicit film is tenuous, and one that has grown more so over time***." *In re: Adult Film Cases*, *supra*, at p. 6 (emphasis added). As Judge Brown further explained, this is due, in part, to the proliferation of home networks and wireless routers, a single IP address may support multiple Internet users.[11] *Id.* Thus, "it is no more likely that the subscriber to an IP address," who is the person who becomes the unfortunate

[11] Carolyn Thompson writes in an MSNBC article of a raid by federal agents who kicked down the door of a home that was linked to downloaded child pornography. The identity and location of the subscriber were provided by the ISP. The desktop computer, iPhones, and iPads of the homeowner and his wife were seized in the raid. Federal agents returned the equipment after determining that no one at the home had downloaded the illegal material. Agents eventually traced the downloads to a neighbor who had used multiple IP subscribers' Wi-Fi connections (including a secure connection from the State University of New York). *See* Carolyn Thompson, *Bizarre Pornography Raid Underscores Wi-Fi Privacy Risks* (April 25, 2011), http://www.msnbc.msn.com/id/42740201/ns/technology_and_science-wireless/

target of the copyright troll's collection efforts, "carried out a particular computer function – here the purported illegal downloading of a single pornographic film – than to say an individual who pays the phone bill made a specific telephone call." *Id.* "Most, if not all, of the IP addresses will actually reflect a wireless router or other networking device, meaning that while the ISPs will provide the name of its subscriber, ***the alleged infringer could be the subscriber, a member of his or her family, an employee, invitee, neighbor or interloper***." *Id.* at. p. 8. Thus, Judge Brown also denied the broad early discovery requested by Malibu Media and others in that case. *Id.* at. p. 23.

(c) The Subpoenas are Not "Reasonably Likely" to Effectuate Service on Defendants Because Malibu Media Has Shown Through Past Conduct That It is Not Interested In Service or Reaching the Merits

Courts in both the Second and Ninth Circuits agree that in John Doe online infringement cases, it must be "reasonably likely" that the discovery requested will help *effectuate service on a defendant*. *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004) (surveying "cases evaluating subpoenas seeking identifying information from ISPs" and concluding that subpoena must be "sufficiently specific to establish a ***reasonable likelihood*** that the discovery request would lead to ***identifying information that would make possible service upon particular defendants*** who could be sued in federal court.") (emphasis added); *New Sensations, Inc. v. Does*, 2011 U.S. Dist. LEXIS 94909 (N.D. Cal. Aug. 24, 2011) ("In determining whether there is good cause to allow expedited discovery to identify anonymous internet users named as doe defendants, courts consider whether:. . .(4) the plaintiff has demonstrated that there is a ***reasonable likelihood of being able to identify the defendant through discovery such that service of process would be possible***.") (emphasis added) *citing Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999).

Here, "As discussed above, it is evident that ***expedited discovery will not lead to identification of the Doe defendants or service of process. Indeed, <u>the fact that no defendant has ever been served</u> in one of these mass copyright cases belies any effort by***

plaintiff to allege that the discovery will lead to identification of and service on the Doe defendants." *Hard Drive Prods.*, *supra*, at p. 11 (emphasis added). In reality, here there is ***little to no chance***, most of the John Does will be served, much less a "reasonable likelihood" that the subpoenas will lead to service on actual defendant's who infringed plaintiff's copyright. *See id.*

(d) The Complaint Cannot Withstand a Hypothetical Motion to Dismiss Because Joinder is Impermissible

Although the Constitutional right is a limited one, these cases do implicate the First Amendment privilege to anonymity, which extends to online file sharing. *Sony Music, supra,* at 566 (surveying case law and concluding "that the use of P2P file copying networks to download, distribute, or make sound recordings available qualifies as speech entitled to First Amendment protection."); *Call of the Wild Movie, LLC v. Does 1-1,062*, D.D.C. Case No. CV-10-455, Dkt. No. 40, 3/22/11 at p. 21 ("file-sharers are engaged in expressive activity, on some level, when they share files on BitTorrent,"); *see also In re: Anonymous Online Speakers*, 661 F.3d 1168, 1174–76 (9th Cir. 2011) (noting different Constitutional standards applied to different kinds of anonymous speech).

Thus, as Judge Howell explained, John Does' "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." *Call of the Wild Movie, LLC, supra*, at p. 21. In performing this kind of analysis, "the lowest bar that courts have used is the motion to dismiss or good faith standard. *See, e.g., Columbia Ins. Co. v. seescandy.Com, 185 F.R.D. 573 (N.D. Cal. 1999)*; *In re Subpoena Duces Tecum to America Online, Inc.,* 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. Ct. 2000) (reversed on other grounds)." *In re: Anonymous Online Speakers*, *supra*, at p. 1075.

Accordingly, in evaluating these cases, courts must require that in order to obtain discovery of a John Does' identity, ***the plaintiff's complaint must be able to withstand a hypothetical motion to dismiss.*** *Hard Drive Prods., supra,* pp. 3, 8–10 (plaintiff must show that its "suit against defendant could withstand a motion to dismiss."); *see also*

Patrick Collins v. John Does 1-54, 2012 U.S. Dist. LEXIS 36232, *8 (D. Ariz. Mar. 19, 2012).

Here, there is an obvious flaw with plaintiff's complaint such that it should be dismissed: all of the John Does other than John Doe No. 1 are impermissibly joined. As explained in further detail in Section V, joinder here is not permissible. Accordingly, the Court should follow the lead of Magistrate Judge Brown, who held that early discovery should be denied because "While the plaintiff has alleged that it owns a valid copyright and that defendants copied the copyrighted work, the court concludes that the complaint could and should be dismissed for misjoinder as to all but a single Doe defendant." *In re: Adult Film Cases., supra,* at p. 18; *citing Diabolic Video Prods. v. Does 1-2099*, 2011 U.S. Dist. LEXIS 58351, *9 (N.D. Cal. May 31, 2011).

(e) Plaintiff's "Abusive Litigation Tactics" Also Support Vacating the Early Discovery Order "On the Basis of Fundamental Fairness"

As noted above, Magistrate Judge Brown of the Eastern District of New York has explained that perhaps,

> "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. Indeed, this may be the principal purpose of these actions, and these tactics distinguish these plaintiffs from other copyright holders with whom they repeatedly compare themselves. *See, e.g., K-Beech*, Pl. Mem. in Opp. at 3, DE (arguing that this decision "will affect the rights of intellectual property holders across all segments of society"). While not formally one of the *Sony Music* factors, these facts could be viewed as ***a heightened basis for protecting the privacy of the putative defendants***, or simply grounds to deny the requested

> discovery on the basis of fundamental fairness." *In re: Adult Film Cases, supra,* at p. 16.

The plaintiff here is actually one of the three plaintiffs Judge Brown was specifically describing: Malibu Media, K-Beech, and Patrick Collins. *Id.* at p. 17 ("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.")

One of the main tactics that Judge Brown found so "improper" was the use of "settlement negotiators" whom, notwithstanding a John Doe's protestations of innocence, "offer to settle with Doe defendants so that they can avoid digging themselves out of the morass plaintiff is creating." *Id.* at. pp. 8–9, 17, *citing On The Cheap, LLC v. Does 1-5011*, -- F.R.D. --, 2011 WL 4018258, at *4 (N.D. Cal. Sept. 6, 2011). As one court explained of K-Beech, "Some defendants have indicated that the plaintiff has contacted them directly with harassing telephone calls, demanding $2,900 in compensation to end the litigation." *K-Beech, Inc. v. Does 1-85*, 2011 U.S. Dist. LEXIS 124581, at *6 (E.D. Va. Oct. 5, 2011).

Seven of the most notorious copyright trolls, including the plaintiff here, all employ the same third party company, based in Miami, to provide these harassing, "settlement negotiator" services, pursuant to a "Joint Sharing Agreement." Declaration of Morgan E. Pietz ¶¶ 18–23. Specifically, "Zero Tolerance, Third Degree, Patrick Collins, K-Beech, Malibu Media, Raw Films, and Nu-Corp," all pool their resources to extract settlements as efficiently as possible. *See id.* ¶ 22.

The plaintiff will no doubt protest that there is nothing wrong with seeking to settle civil actions. However, as Judge Brown correctly explains,

> "It would be unrealistic to ignore the nature of plaintiffs' allegations – to wit: the theft of pornographic films – which distinguish these cases from garden variety copyright actions. Concern with being publicly charged with downloading pornographic films is, understandably, a common theme among the moving defendants. As one woman noted in *K-Beech*, "having my name

> or identifying or personal information further associated with the work is ***embarrassing, damaging to my reputation in the community at large and in my religious community***." Mtn. to Quash, ¶5, DE [7]. Many courts evaluating similar cases have shared this concern. *See ,e.g., Pacific Century Int'l, Ltd. v. Does 1-37,* – F. Supp. 2d –, 2012 WL 1072312, at *3 (N.D. Ill. Mar. 30, 2012) ("the ***subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle***"); *Digital Sin,* 2012 WL 263491, at *3 ("This concern, and its potential impact on social and economic relationships, could ***compel a defendant entirely innocent of the alleged conduct to enter an extortionate settlement***") *SBO Pictures,* 2011 WL 6002620, at *3 (defendants "whether guilty of copyright infringement or not-would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded. This creates ***great potential for a coercive and unjust 'settlement'"***). . . .
>
> The Federal Rules direct the Court to deny discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. Proc. 26(c)(1). ***This situation cries out for such relief.***" *Id.* at. pp. 17–18.

Moreover, here, in addition to (i) the use of the infamous Miami-based "settlement negotiator" company, there is ample evidence of other "abusive litigation tactics" employed by Malibu Media: (ii) using subpoena information to collect on claims that go beyond the complaint; (iii) willfully violating courts' notice of related case rules to try and fly under the radar; (iv) seeking John Doe phone numbers and email addresses despite a court order telling plaintiff not to do so; and (v) misrepresenting the range of potential damages. Declaration of Morgan E. Pietz re: Malibu Media's Abusive Litigation Tactics ¶¶ 15–31.

Federal Rule of Civil Procedure 1 requires that disputes be resolved in a manner that is "just" as well as speedy an inexpensive. Fed R. Civ. Proc. 1. Further, as noted by Judge Brown, this situation "cries out" for relief to protect the John Does from "annoyance, embarrassment, oppression or undue burden." Fed. R. Civ. Proc. 26(c)(1). In light of plaintiff's abusive litigation tactics, the Court should refuse to lend its imprimatur to what is essentially a quasi-extortionate settlement business that leverages the stigma of pornography to "shake down" the John Does for easy money.

V. JOINDER IS NOT PERMISSIBLE AND, EVEN IF IT WERE, THE COURT SHOULD STILL EXERCISE ITS DISCRETION AND SEVER THE DOES

(a) Standard for Joinder

Federal Rule 20(a)(2) provides that defendants "may be joined" if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. Proc. 20(a)(2).

"However, ***even if the test is satisfied, district courts have the discretion to refuse joinder*** in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521-522 (5th Cir. 2010) (internal citations omitted); *accord* 4-20 Moore's Federal Practice - Civil § 20.02.

(b) Defendants Merely "Committed Same Type of Violation in the Same Way," Which is Not Enough to Satisfy Transactional Relatedness Test

Judge McMahon of the Southern District of New York recently addressed joinder in a case quite similar to this one, as follows,

> "There is no need for this Court to write another lengthy opinion discussing why plaintiff's theory is wrong. Rather, I adopt and expressly incorporate into this memorandum order the reasoning of Judge Gibney in *K-Beech* [*Inc. v. John Does 1-85,* No. 3:11-cv468, 2011 U.S. Dist. LEXIS

124581, at *2-3 (E.D. [Va.] Oct. 5, 2011)][12]; Magistrate Judge Spero of the Northern District of California in *Hard Drive Productions, Inc. v. Does 1-188*, No. C-11-01566, 860 F. Supp. 2d 1150 (N.D. Cal. August 23, 2011)[13]; several other courts in the Northern District of California, including *Diabolic Video Productions, Inc. v. Does 1-2099*, 10 Civ. 5865, 2011 U.S. Dist. LEXIS 58351, at * 10-11 (N.D. Cal. May 31, 2011); and most especially the comprehensive Report and Recommendation of the Hon. Gary R. Brown, U.S.M.J., that was filed [on May 1, 2012] in our sister court, the Eastern District of New York, in *In re: BitTorrent Adult Film Copyright Infringement Cases,* No. 11-cv-3995, 2012 U.S. Dist. LEXIS 61447 (E.D.N.Y. May 1, 2012).[14]

All of the courts on which this Court relies, and whose reasoning I find persuasive, have concluded that where, as here, the plaintiff does no more than assert defendants 'merely commit[ed] the same type of violation in the same way,' it does not satisfy the test for permissive joinder pursuant to Rule 20. . . .what we have here is 245 separate and discrete transactions in which 245 individuals used the same method to access a file via the Internet—no concerted action whatever, and no series of related

[12] (finding "the mere allegation that defendants used [BitTorrent] to copy and reproduce the Work … on different days and times, over a three month period" insufficient to support joinder);
[13] (collecting cases)
[14] *See also Boy Racer Inc. v. Does 1-60*, 11-cv-01738-SI, 2011, 2011 U.S. Dist. LEXIS 92994, at *4 (N.D. Cal. Aug. 19, 2011) (finding misjoinder because "Plaintiff [did] not plead facts showing that any particular defendant illegally shared plaintiff's work with any other particular defendant"); *AF Holdings LLC v. Does 1-97*, 2011 U.S. Dist. LEXIS 78636, *4 (N.D. Cal. July 20, 2011) (holding that even though BitTorrent protocols differ from previous peer-to-peer platforms, joinder is improper); *Raw Films, Ltd. v. Does 1-32*, 2011 U.S. Dist. LEXIS 114996, *2-7 (E.D. Va. Oct. 5, 2011); *Patrick Collins, Inc. v. Does 1-58*, U.S. Dist. LEXIS 120235, *2-7 (E.D. Va. Oct. 5, 2011); *Hard Drive Productions, Inc. v. Does 1-30*, 2011 U.S. Dist. LEXIS 119333, *6-10 (E.D. Va. Oct. 17, 2011).

occurrences—at least, not related in any way except the method that was allegedly used to violate the law." *Digital Sins, Inc.*, *supra*, at p. 2–3.

In short, across the country, there is a "stiffening judicial headwind" that is severing John Does from pornography lawsuits such as this one like leaves on fall day. *See Pacific Century Int'l., Ltd. v. John Does 1-37*, N.D. Ill. Case No. 12-cv-1057, Dkt. No. 23, p. 7, 3/30/2012.

Further, plaintiff's strategy of never/seldom naming or serving any defendants effectively precludes consideration of joinder at a later stage of this case. Deferring a ruling on joinder, "encourages Plaintiff[] … to join (or misjoin) as many doe defendants as possible. . .Postponing the issue of joinder to a day that in all likelihood will never come only serves to aid Plaintiffs' attempt to avoid filing fees. While Plaintiffs are certainly entitled to vindicate their rights, they must play by the Federal Rules in doing so." *See Arista Records, LLC v. Does 1-11*, 2008 U.S. Dist. LEXIS 90183, at *16,17 (N.D. Ohio 2008) (citation omitted).

As to those John Does who are severed, the case against them should be dismissed *without* prejudice, the subpoenas seeking their information should be quashed, and the plaintiffs given 30-days to refile a new, individual complaint against each severed Doe, after paying the filing fee. *See In re: Adult Film Cases*, *supra*, p. 23–25; *Digital Sins, Inc.*, *supra*, at p. 2–3; *see also Digital Sins, Inc.*, *supra*, at p. 7 ("Because I have severed and dismissed all of the claims against the defendants, I hereby, *sua sponte*, quash any subpoena that may be outstanding to any Internet service provider seeking information about the identity of any John Doe other than John Doe 1. Plaintiff is directed to send a copy of this order within 24 hours of its issuance to any and every internet service provider who has been served with a subpoena for any information concerning any other John Doe defendant.").

(c) John Does Accessing the Same File Days, Weeks or Months Apart Are Not Part of the Same Transaction or Occurrence

The plaintiffs' bar for the John Doe pornography "shake down" industry generally

rally behind one 2011 decision: *Call of the Wild Movie, LLC* v. Does 1-1,062, D.D.C. Case No. 10-cv-0455-BAH, Dkt. No. 40, 3/22/11. In that decision, Judge Howell, who is perhaps one of the most knowledgeable members of the federal judiciary on online file sharing lawsuits due to her honor's prior career as a lobbyist and technical consultant for the RIAA, essentially gave mass infringement lawsuits the green light. The *Call of the Wild* Court held that the claims against the Doe defendants were "logically related" because "Each putative defendant is a ***possible*** source for the plaintiffs' motion pictures, and may be responsible for distributing the motion pictures to the other putative defendants, who are also using the same file-sharing protocol to copy the identical copyrighted material." *Id.* at p. 10.

While it is ***possible*** that the John Does here may have shared the same file with one another, it may not be ***probable,*** and whether the latter is required or the former will suffice is an open question, since it does not appear any Court of Appeals has ever addressed the issue directly.[15] However, as these lawsuits proliferate around the country, increasingly, courts are requiring mass infringement plaintiffs to "offer evidence justifying joinder of the Doe Defendants." *E.g. Malibu Media v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, p. 5. Particularly where, as here, the alleged infringements are spread out over a period of time,[16] courts have held that joinder of multiple Does is inappropriate. *E.g., Raw Films, Inc. v. Does-1-32*, 2011 WL 6840590, at *2 (N.D. Ga. Dec. 29, 2011). As the ISPs have argued to Judge Howell, "Even assuming,

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[15] In a recent case, Bright House Networks, LLC; Cox Communications, Inc., Verizon Online, LLC, SBC Internet Services, Inc., and Comcast Cable Communications, LLC, have all intervened and asked Judge Howell to quash subpoenas or else certify the issue for appeal. *AF Holdings LLC v. Does 1-1,058*, 12-cv-0048-BAH, Dkt. No. 8-1, 3/02/12 p. 11 (memorandum of law submitted by non-party ISPs).

[16] *E.g.*, picking a case before this Court at random, in C.D. Cal. Case No. 12-cv-3614, John Doe No. 3 is alleged to have participated in a swarm transaction and downloaded 11 infringing works on 2/6/2012 at precisely 12:59:21. Over two months later, on 4/12/2012 at 04:38:16, John Doe No. 9 was supposedly participating in that same swarm transaction, when s/he downloaded 15 copyrighted works. ***How two different people, who were completely unaware of each other, downloading <u>different movies</u>, over <u>two months apart from one another</u>, are supposedly part of the same "transaction" strains credulity***.

arguendo, that the 'same series of transactions' included automatic file-sharing among users who are unaware of each other, ***it does not necessarily follow that users who may have shared excerpts of the same film days, weeks, or even months apart are part of that "same series***." *AF Holdings LLC v. Does 1-1,058*, 12-cv-0048-BAH, Dkt. No. 8-1, 3/02/12 p. 11 (memorandum of law submitted by non-party ISPs). Thus, many courts have held, like Judge Wright in one of the cases now before this Court, that,

> "The loose proximity of alleged infringements (March 5, 2012-April 12, 2012) does not show that these Defendants participated in the same swarm. As discussed above, a downloader may log off at any time, including before receiving all the pieces of the copyrighted work. Without evidence that these Does acted in concert, joinder is improper—the Doe Defendants should be severed and dismissed under Federal Rule of Civil Procedure 21." *Malibu Media v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, pp. 5–6; *see, e.g., fn 17, supra.*

Any Court adopting the *Call of the Wild* approach, rather than the approach apparently preferred in California, New York, and Texas, is likely to become a destination forum for this kind of lawsuit.

(d) Joinder is Also Impermissible Because Does Within the Same Case Have Different Copyrights at Issue, Different Factual Circumstances, and Different Legal Defenses

The second part of the joinder analysis—common questions of law or fact—also militates against joinder. Although Malibu Media's cases in this District all involve the same general group of about 35 or so copyrights (so the cases are related), in any individual case, there are different copyrights at issue as between the different Doe defendants (which favors severance of each Doe). For example, sticking with the previous example from fn. 17, in Case No. 12-cv-3614, John Doe No. 3 is alleged to have

downloaded 11 movies (on 2/15/12), and John Doe No. 9 is alleged to have downloaded 15 movies (on 4/12/2012). Further, each Doe will have entirely different factual circumstances and legal defenses. Just as every household or business would have different facts regarding who has access to a telephone, so too are the facts unique with respect to each Doe's Internet access situation.

(e) Even if Joinder Were Permissible, The Court Should Still Exercise its Discretion and Sever the Does in Light of This Plaintiff's Abusive Litigation Tactics and the Burden on the Courts, the ISPs and the Does

For all of the reasons noted above, including Malibu Media's "abusive litigation tactics," the Court should exercise its discretion and sever the Does, even if it finds joinder permissible. *See Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521-522 (5th Cir. 2010) (internal citations omitted).

There is also one more excellent reason for the Court to exercise its discretion and sever the Does: filing fees. If Courts refuse to consider severance prior to service, and allow plaintiffs like the one here to keep filing hundreds of lawsuits (mis-)joining multiple John Does, the Courts are essentially losing out on millions of dollars in filing fees. The *In re: Adult Film Cases* court recently noted that it appeared that just in that district, three plaintiffs had avoided paying over $100,000 in filing fees. "If the reported estimates that hundreds of thousands of [John Doe] defendants [in mass infringement cases] have been sued nationwide, plaintiffs in similar actions may be evading millions of dollars in filing fees annually. Nationwide, these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees." *In re: Adult Film Cases, supra*, p. 23.

VI. PROTECTIVE ORDER SHOULD BE ENTERED

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. Proc. 26(c)(1). ***This situation cries out for such relief***." *In re: Adult Film Cases*, *supra*, at p. 18.

As one judge observed in another of these cases, "***Plaintiff's counsel estimated that 30% of the names turned over to the ISP's are not those of the individuals who actually downloaded or shared copyrighted material.***" *Digital Sin, Inc. v. Does 1-176,* -- F.R.D. --, 2012 WL 263491, at *3 (S.D.N.Y. Jan. 30, 2012). Since the likelihood that innocent people are being sucked into the "the morass plaintiff is creating," is so high, the Court should employ some stringent safeguards in the form of a protective order that does the following:

First, since service is unlikely to begin with, even on John Doe No. 1, the Court should order that any subscriber whose information is turned over to by an ISP should be maintained under seal and not publicly disclosed by plaintiff until such time as service of the complaint is perfected on that John Doe. If the Court denies the rest of this motion, it should do this, at least, for all Does, and if it grants the motion, it should do this for Does No. 1.

Second, if the Court does grant this motion, sever all Does other than John Does No. 1, and dismiss the complaint against the rest of the Does without prejudice, then the plaintiff should be forbidden form using or disclosing any information it has already obtained for John Does other than John Doe No. 1. *First Time Videos, LLC v. Does 1-46,* S.D. Tex. Case No. 11-cv-4431, Docket No. 21, 6/8/12 (plaintiff First Time Videos, LLC "may not use the information it has received; it must destroy it.")

Third, the plaintiff and its counsel should be ordered ***not*** to request subscriber email addresses or telephone numbers in any future early discovery requests they make in this District. *In re: Adult Film Cases*, *supra*, at p. 24 ("Under no circumstances are plaintiffs [including Malibu Media] 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.")

Fourth, the plaintiff and its counsel should be ordered to comply with the procedure established in this case, and strictly comply with any applicable notice of related case rule,

and only file any future cases against individual John Does who are reasonably alleged to reside in this District. *Id.* at p. 25.

VII. MOVING PARTIES HAVE STANDING

Invariably, the final refuge of a pornographer who sues (but never serves) hundreds or thousands of John Does is the argument that the John Does do not have standing to do anything about this "shake down" scheme. However, a party has standing to challenge a subpoena issued to a third party when the party has a personal or proprietary interest in the information sought by the subpoena. *See Washington v. Thurgood Marshall Acad.*, 230 F.R.D. 18, 21 (D.D.C. 2005). Further, in light of the First Amendment privilege for anonymous speech noted above, there is standing to try and protect the anonymity of the Does on that account as well. Finally, plaintiff should be judicially estopped from arguing that the John Does do not have standing or that they are not defendants, because the plaintiffs complaint alleges that the John Does are defendants. In short, the plaintiff dragged the Does into this "morass," so they should not now complain when the Does seek to protect themselves. In BitTorrent mass infringement cases, courts routinely hold that John Does have standing to challenge the subpoenas and protect their right to anonymity.[17]

VIII. COURTS ARE INCREASINGLY ENDORSING "THE SENSIBLE PROTOCOL ADOPTED BY JUDGE BROWN" IN THESE CASES

Malibu Media is now apparently in the habit of trying to mitigate the damage done by Magistrate Brown's seminal order and report in *In re Adult Film Cases*, *supra*, by arguing that this order has subsequently been "rejected" by Magistrate Thomas E. Boyle, who also sits in the Eastern District of New York, and who supposedly "reached the opposite result" in a later case, "finding in a case similar to this that joinder is proper, and

[17] *See, e.g. Hard Drive Productions, Inc. v. Does 1-188* No. C-11-01566 2011 WL 5573960 (N.D. Cal. 2011) (order granting Doe's motion to quash); *Boy Racer, Inc. v. Does 1-60*, No. C-11-01378 (N.D. Cal. August 19, 2011.) (Dkt. 24) (order granting Doe defendant's motion to quash and dismissing case without prejudice); *Ingenuity13*, 2:11-mc-00084-JAM-DAD (Doc 24) (granting two pending subscriber motions to quash); *NuImage, Inc., v. Does 1-3932* No. 2:11-cv-00545 (M.D. Fla. May 23, 2012) (Doc. 244) (order granting Doe's Motion to Quash or, in the alternative, to Sever and Dismiss); *In re: Adult Film Cases*, *supra*, p. 13.

denying a doe defendant's motion to quash the subpoena." Plaintiff's Opp'n to Doe 5's Motion for Sanctions re: Malibu Media's Repeated Violations of Notice of Related Cases Rule, C.D. Cal. Case No. 12-cv-3614, Dkt. No. 20, p. 6, 7/16/12. To put it as charitably as possible, this argument by Malibu Media is a material mischaracterization of Judge Boyle's June 19, 2012, order, and this argument is either on the line or beyond it with respect to the duty of candor to the Court.

In reality, Judge Boyle did not "reject" Magistrate Brown's order whatsoever, or find that 'joinder was proper.' What Judge Boyle actually held with respect to the permissibility of joinder was that "At this point in the action, it is premature to make such a determination." What really happened was that the *pro se* Doe defendant making a motion to quash and sever in Judge Boyle's court did not follow Judge Boyle's instructions that s/he properly identify herself or himself by Doe number to the Court. Accordingly, after acknowledging that courts had previously gone both ways on joinder, but that "that Magistrate Brown issued a thorough Order and Report and Recommendation on May 1, 2012 in four other cases involving the same subject matter," Judge Boyle denied the motion for severance in his case, on the theory that since the Doe did not properly identify himself, s/he did not have *standing* to interfere with the subpoena or seek severance. However, Judge Boyle's recommendation that the Does motion be denied was "without prejudice to renewal [of Doe's motion] after service of process is complete as to any defendant." *Malibu Media v. John Does 1-13*, E.D. Va. Case No. 12-cv-1156, Dkt. No. 26, 6/19/12 (Boyle, J.).

In short, Judge Boyle did not "reject" Judge Brown's decision, or even reach the question severance—Judge Boyle denied a *pro se* Doe motion for failure to follow instructions, and Malibu Media is clearly grasping at straws.

In fact, quite to the contrary of what Malibu Media would have the Court believe, Courts across the country are increasingly endorsing the "sensible protocol adopted by Magistrate Judge Brown." *Digital Sins, Inc.*, *supra*, at p. 8 (reviewing prior cases, explicitly adopting "most especially the comprehensive Report and Recommendation of

the Hon. Gary R. Brown," and ordering that, in the future, "***any effort to take discovery prior to service must follow the sensible protocol adopted by Magistrate Judge Brown*** in *In re: []Adult Film [] Cases.*"); *see also, e.g., Patrick Collins, Inc. v. Doe*, 2012 U.S. Dist. LEXIS 75986, 2-3 (E.D.N.Y. May 31, 2012) (citing *In re: Adult Film Cases* and finding "that ***for the reasons set forth in the well-reasoned decision of Magistrate Judge Gary R. Brown*** dated May 1, 2012, plaintiff has not satisfied the requirement of establishing that defendants participated in the same "transaction" or "occurrence" within the meaning of Fed. R. Civ. P. 20."); *Zero Tolerance Entm't, Inc. v. Doe*, 2012 U.S. Dist. LEXIS 78834 (S.D.N.Y. June 5, 2012) (severing all Does other than Doe No. 1 and ***explicitly "adopt[ing] the procedures of Judge McMahon and Magistrate Judge Brown***"); *Malibu Media, LLC v. Doe*, 2012 U.S. Dist. LEXIS 96351 (E.D. Cal. July 10, 2012) (citing *In re: Adult Film Cases* and denying early discovery for all Does other than Doe No. 1); *Patrick Collins, Inc. v. Doe*, 2012 U.S. Dist. LEXIS 96350 (E.D. Cal. July 10, 2012) (same); *Malibu Media, LLC* v. Doe, 2012 U.S. Dist. LEXIS 96333 (E.D. Cal. July 10, 2012) (same); *Malibu Media, LLC v. Doe*, 2012 U.S. Dist. LEXIS 94705 (E.D. Cal. July 6, 2012) (same); *Malibu Media, LLC v. John Does 1-11*, 2012 U.S. Dist. LEXIS 94648 (D.D.C. July 10, 2012) (issuing protective order and citing *In re: Adult Film Cases* for proposition that "there is a reasonable likelihood that the Movant may have had no involvement in the alleged illegal downloading that has been linked to his or her IP address").

IX. CONCLUSION

Judge McMahon of New York's Southern District aptly concluded, "I am second to none in my dismay at the theft of copyrighted material that occurs every day on the Internet. However, there is a right way to litigate and a wrong way to litigate, and so far this way strikes me as the wrong way." *Digital Sins, Inc.*, *supra*, at p. 8. The same can be said here. For the foregoing reasons, the Moving Parties respectfully request that the Court sever all Does other than Does No. 1, dismiss the complaints against them, quash their outstanding subpoenas, and enter a protective order directing Malibu Media and its counsel to comply with Judge Brown's "sensible protocol" in future cases filed in this District.

Respectfully submitted, July 19, 2012,

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