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**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

MALIBU MEDIA, LLC,) Case No.: 2:12-cv-01260-MCE-JFM
)
Plaintiff,) Magistrate Judge John F. Moulds
)
vs.)
) COMBINED REPLY IN SUPPORT OF
) OMNIBUS MOTION FOR A PROTECTIVE
18 JOHN DOES 1-13,) ORDER, MOTION TO SEVER AND
) MOTION FOR RECONSIDERATION
)
)
)

JOHN DOES #2, 5, & 8 REPLY TO PLAINTIFF’S OPPOSITION

Movants, the ISP subscribers associated with “John Does” 2, 5, 8, & 12¹ through undersigned counsel, hereby submit this Combined Reply in support of their separate motions (ECF Nos. 17 & 19). These Does sought substantially the same relief in their original, separately filed motions, including 1) Reconsideration of this court’s order authorizing early discovery; 2) Protective Orders; and 3) Recommendations of Severance as to Does 2-13. Does 2,5, 8, & 12 have consolidated their reply in order to avoid unnecessary duplication of argument.

¹ John Doe # 12 joined in the motion of Does # 2 & 5 on September 20, 2012. ECF No. 25.

1
2 **I. Introduction**

3 Most of the pertinent issues regarding this motion have been briefed thoroughly, and the
4 instant reply will narrow its focus to a few key points. First, Plaintiff has not established that
5 joinder of these 13 unrelated individuals in this suit is appropriate, nor that the complaint could
6 withstand a motion to dismiss for improper joinder. Plaintiff ignores the recent decisions from
7 the Eastern District of California that have dealt with precisely the requests at issue here – each
8 of which rejected early discovery beyond Doe #1.

9 Second, Plaintiff has failed to establish that its requested discovery is likely to identify
10 the infringer and, therefore, good cause for early discovery has not been established. Plaintiff
11 fails to cite to the applicable 9th Circuit standard for early discovery, and has not established that
12 the requested discovery is likely to identify the infringer.

13 Finally, Plaintiff has not refuted several of the crucial allegations made in Doe #'s 2 & 5
14 original brief regarding improper litigation tactics (ECF No. 17). These allegations establish in
15 detail the type of harassment, embarrassment, and undue burden and expense that the Movants
16 face if the instant requests are not granted.

17 **II. Argument**

18 **A. PLAINTIFF HAS NOT ESTABLISHED THAT MASS JOINDER IS**
19 **APPROPRIATE**

20 1. Plaintiff's Theory of Joinder has Been Rejected Repeatedly in this District.

21 As noted in Doe #8's original motion (and totally ignored in Plaintiff's opposition
22 thereto), multiple judges in the Eastern District of California have recently rejected the exact
23 theory of mass joinder presented by Plaintiff herein. Plaintiff's opposition states that "numerous
24 courts in California have held that joinder is proper..." however Plaintiff ignores the fact that the
25 Eastern District of California does not appear to be one of them. It is true that Judge Delaney
26 initially allowed mass joinder in two cases, though she has since explicitly rejected her prior
27 position. Specifically, she found that Does have "correctly asserted that the mass joinder of
28 unrelated defendants is improper under Federal Rule of Civil Procedure 20." *Smash Pictures v.*

1 *Does I-590*, 2:12-cv-00302 (ECF Doc. 21 at 2)(E.D. Cal. June 14, 2012). District Judge Mendez
2 adopted the recommendations of Judge Delaney and dismissed all but Doe #1. In addition,
3 Judges Brennan and Newman have each denied discovery, except as to Doe #1, in similar
4 BitTorrent infringement cases, noting that improper joinder appears “endemic” to Plaintiff’s
5 cases. None of these decisions are mentioned in Plaintiff’s opposition, and Plaintiff offers no
6 reason why this court should diverge from others in this district on the issue.

7
8 2. Plaintiff’s Claims Do Not Involve the Same Transactions or Occurrences and Will Not
9 Promote Judicial Efficiency

10 Plaintiff’s opposition forwards an interpretation of Rule 20 that would, in essence, allow
11 any defendant or any claim, from the Big Bang to the present day, to be joined in a single suit in
12 the interest of “judicial efficiency.” Indeed, Plaintiff argues that all Does in this case are part of
13 the same transaction or occurrence because the offending file at some time originated from a
14 single individual (“the initial seeder”). According to Plaintiff, then, all infringements of this file
15 from Day 1 through the present day are properly joined in this action, since they originated from
16 the same work. Plaintiff goes so far as to argue that “Time Lapse is Irrelevant,” and that all Does
17 are properly joined in this action even though Plaintiff’s own evidence shows that they allegedly
18 accessed the offending file at vastly different times. For example, Doe #1 is alleged to have
19 accessed the file on May 1, 2012, whereas Doe #8 is accused of accessing the file months
20 earlier, on February 28.

21 Plaintiff’s argument is incorrect. First, the “logical relationship” test noted by Judge
22 Randon and cited by Plaintiff throughout is not the law from this circuit. In the Ninth Circuit,
23 the bar is higher. “The ‘same transaction requirement of Rule 20 refers to ‘similarity in the
24 factual background of a claim; claims that arise out of a systematic pattern of events’ and have a
25 **very definite logical relationship.**” *Hubbard v. Hougland*, 2010 U.S. Dist. LEXIS 46184 (E.D.
26 Cal. Apr. 5, 2010) (emphasis added); citing *Bautista v. Los Angeles County*, 216 F.3d 837, 842-
27 843 (9th Cir. 2000). Here, while there may be a “logical relationship,” as noted by Judge
28

1 Randon, the logical relationship is nebulous--consisting of an unknown number of theoretical
2 connections between unknown participants.

3 More importantly (and contrary to Malibu Media's assertions), the "time lapse" between
4 the alleged infringements **does** matter for joinder purposes. See, e.g. *Malibu Media v. John Does*
5 *1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, pp. 5-6 ("The loose
6 proximity of alleged infringements (March 5, 2012-April 12, 2012) does not show that these
7 Defendants participated in the same swarm"). At least one Court has gone so far as to hold that
8 the "transactional relatedness" test is only satisfied in online download cases when parties are
9 downloading a file *at the same time*. *DigiProtect USA Corp. v. Doe*, 2011 U.S. Dist. LEXIS
10 109464, 8-9 (S.D.N.Y. Sept. 26, 2011) (for defendants to be part of same "swarm," a user must
11 have "downloaded the movie from the same website during overlapping times" with another
12 member of the swarm); see also *Raw Films, Inc. v. Does 1-32*, 2011 WL 6840590, at *2 (N.D.
13 Ga. Dec. 29, 2011) ("Downloading a work as part of a swarm does not constitute 'acting in
14 concert' with one another, particularly when the transactions happen over a long period of time;"
15 time span of 4 months); *Liberty Media Holdings, LLC*, 2011 WL 5190106, at *3 (S.D.
16 Fla. Nov. 1, 2011) (same; time span of two months); *Liberty Media Holdings, LLC v. BitTorrent*
17 *Swarm*, 2011 WL 5190048, at *2-4 (S.D. Fla. Nov. 1 2011) (same; time span of two months).
18 Here, plaintiff has not alleged that plaintiff's were downloading files at the same time so there
19 really is no "swarm," and therefore no basis for "swarm joinder."

20 Even if the court is persuaded that Plaintiff meets the technical requirements of Rule 20,
21 Rule 21 nonetheless allows a court "on motion or on its own, the court may at any time, on just
22 terms, add or drop a party. The court may also sever any claim against a party." Fed. R. Civ. P.
23 21. District courts have wide discretion in exercising its powers under Rule 21 and action is
24 needed in the instant case to prevent prejudice to the 59 unrelated individuals accused in this
25 action. The Ninth Circuit has found that "even once [the Rule 20(a)] requirements are met, a
26 district court must examine whether permissive joinder would 'comport with the principles of
27 fundamental fairness' or would result in prejudice to either side." *Coleman v. Quaker Oats*
28

1 *Company*, 232 F.3d 1271, 1296 (9th Cir.2000); *see also Acevedo v. Allsup's Convenience Stores,*
2 *Inc.*, 600 F.3d 516, 521-522 (5th Cir. 2010) (“even if the test is satisfied, district courts have the
3 discretion to refuse joinder in the interest of avoiding prejudice and delay, ensuring judicial
4 economy, or safeguarding principles of fundamental fairness.”)

5 As recently recognized by a judge in Florida’s Southern District “allowing the permissive
6 joinder of all 31 Doe Defendants would prejudice the Defendants due to the logistical burdens
7 that would arise in the course of litigation.” *AF Holdings v. Does 1-31*, 1:12-cv-20922-UU (S.D.
8 Fl. August 7, 2012)(ECF Doc. 32 at pg. 18). The Northern District of California has recognized
9 these precise concerns, and noted that “Even if joinder of the Doe Defendants in this action met
10 the requirements of Rule 20(a) of the Federal Rules of Civil Procedure, the Court finds it is
11 appropriate to exercise its discretion to sever and dismiss all but one Doe Defendant to avoid
12 causing prejudice and unfairness to Defendants, and in the interest of justice.” *Hard Drive*
13 *Productions, Inc. v. Does 1-188*, 809 F.Supp.2d 1150, 1164 (N.D. Cal. 2011).

14 The court in *Hard Drive* noted a number of facts that would prejudice the Doe
15 defendants. “First, permitting joinder in this case would undermine Rule 20(a)'s purpose of
16 promoting judicial economy and trial convenience because it would result in a logistically
17 unmanageable case.” *Id.* The court goes on to note that each Doe would likely have unique
18 defenses, “creating scores of mini-trials involving different evidence and testimony,” and,
19 finally, determines that permissive joinder of the Doe defendants “does not comport with the
20 ‘notions of fundamental fairness,’ that are required. *Id.* In doing so, the court aptly described
21 the logistical nightmare that would ensue.

22 “The joinder would result in numerous hurdles that would prejudice the
23 defendants. For example, even though they may be separated by many miles and
24 have nothing in common other than the use of BitTorrent, each defendant must
25 serve each other with all pleadings—a significant burden when, as here, many of
26 the defendants will be appearing pro se and may not be e-filers. Each defendant
27 would have the right to be at each other defendant's deposition—creating a
28 thoroughly unmanageable situation. The courtroom proceedings would be
unworkable—with each of the 188 Does having the opportunity to be present and
address the court at each case management conference or other event. Finally,
each defendant's defense would, in effect, require a mini-trial. These burdens

1 completely defeat any supposed benefit from the joinder of all Does in this case,
2 and would substantially prejudice defendants and the administration of justice.”
3 Id.

4 The court in *Hard Drive* was correct that the mass joinder of unrelated individuals, even
5 if technically allowable under Rule 20, would result in serious prejudice to the Doe defendants
6 and create a thoroughly unmanageable case for this court and the putative defendants. As such,
7 Movant respectfully requests that this court recommend severance of Does 2-13.

8 **B. THIS COURT SHOULD RECONSIDER ITS PRIOR ORDER AUTHORIZING
9 EARLY DISCOVERY**

10 Plaintiff purports to cite the standard for early discovery, though they omit one element
11 that is essential in the Ninth Circuit – that the requested discovery must be likely to identify the
12 Doe Defendant. See *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Here, as described
13 at length in the original motion, Plaintiff’s requested discovery is not likely to identify Doe
14 Defendants. Plaintiff’s opposition states that the requested discovery must only be “reasonably
15 calculated to lead to the discovery of admissible evidence.” (Doc. 19 at 8). Although this may
16 accurately state the requirements for information to be *relevant*, it does not accurately state the
17 Plaintiff’s burden when seeking expedited discovery into the identity of “John Doe” defendants.

18 As noted in a similar BitTorrent case in the Northern District, in the context of early
19 discovery “the court asks whether the requested discovery is ‘very likely’ to reveal the identities
20 of Doe defendants.” *Hard Drive Productions v. Does 1-90*, 5:11-cv-03825-HRL (Doc.
21 18)(Order Denying Application for Leave to Take Expedited Discovery)(N.D. Cal. Mar. 30,
22 2012)(citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Plaintiff here has conceded
23 (as it must) that the IP address holder is not necessarily the Doe defendant, though it has
24 proposed no means by which it might gain the identity of the defendant, beyond the instant
25 subpoena. As another Plaintiff was forced to admit, a Plaintiff may need “**nothing less than an
26 inspection of the subscriber’s electronically stored information and tangible things,
27 including each of the subscriber’s computer and the computers of those sharing his
28 network**” in order to determine the identity of the infringer. *Boy Racer, Inc. v. Does 1-52*, 2011
WL 7402999 (N.D. Cal. 2011) (emphasis added). As such, Plaintiff has failed to satisfy a

1 requirement for early discovery, and Movants respectfully request that this court vacate its prior
2 order authorizing such discovery.

3 **C. MOVANTS HAVE ESTABLISHED ENTITLEMENT TO A PROTECTIVE**
4 **ORDER**

5 Each Movant's original motion detailed the substantial burdens that a Doe defendant
6 must face if their request for a protective order is not granted herein. Plaintiff decries what they
7 describe as "guilt by association," while trying to sidestep the fact that the harshest words from
8 either brief were **from a district court judge** and directly precisely to Malibu Media. Judge
9 Wright cautioned Malibu Media that "The federal courts are not cogs in a plaintiff's copyright-
10 enforcement business model. The Court will not idly watch what is essentially an extortion
11 scheme..." *Malibu Media, LLC v. John Does 1-10*, 2012 U.S. Dist. LEXIS 89286 at *8-9 (C.D.
12 Cal. June 27, 2012).

13 Moreover, with respect to the abusive litigation tactics described in the Declaration of
14 Morgan E. Pietz (ECF No. 17-2), Plaintiff's opposition simply dodges two of the most damning
15 allegations. Notably, Plaintiff has no retort at all to "Abusive Litigation Tactic Number One"
16 (ECF No. 17-2, p. 6) which is Mr. Pietz's charge that Malibu Media has repeatedly violated the
17 Notice of Related Cases Rule in multiple districts, in the hopes that it can convince at least some
18 Judges to bite on plaintiff's theory of mass joinder. *See* ECF No. 24, pp. 16-18.

19 Further, Malibu Media also misses the point as to why "Abusive Litigation Tactic
20 Number Four" (ECF No. 17-2, p. 9-11), which concerns taking discovery beyond the four
21 corners of the complaint, is improper in this case. Obviously, Malibu Media has been permitted
22 to issue certain subpoenas. Mr. Pietz did not suggest that issuing subpoenas alone is abusive.
23 Rather, Mr. Pietz's point is that where, as here, early discovery was authorized on the condition
24 that "(B) Plaintiff, Malibu Media, LLC, may only use the information disclosed for the sole
25 purpose of protecting its rights in pursuing this litigation;" (ECF No. 13, p. 6) it is inappropriate
26 to use the subpoenas issued (subject to that condition) to try and collect on unrelated allegations
27 that are not alleged in the complaint. As Mr. Pietz's declaration, and Exhibit D thereto show,
28 Malibu Media routinely uses subpoenas as a jumping off point to begin settlement conversations

1 about claims that are not alleged in the complaint, and therefore not subject to Rule 11. Further,
2 as shown in a declaration filed by Mr. Pietz more recently, this business of using subpoenas to
3 take Malibu Media's collection efforts well beyond the four corners of the complaint has not
4 been an isolated incident for Ms. Kushner's office. *See, e.g., Malibu Media v. John Doe*, S.D.
5 Cal. Case No. 3:12-cv-1135-LAB, ECF No. 17-2, pp. 7-10) (Declaration of Morgan E. Pietz).

6
7 **III. CONCLUSION**

8 For the reasons described in Movants' original Motions for Protective Order, Motion to
9 Sever, and Motion for Reconsideration and described herein, Movants respectfully request that
10 this Court grant their motion for a protective order and/or reconsider their prior order authorizing
11 early discovery as to the 13 unrelated individuals implicated herein.

12
13
14 Respectfully Submitted,

September 20, 2012

15
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of September, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system and served on all of those parties receiving notification through the CM/ECF system.

By: /s/Nicholas Ranallo

Nicholas Ranallo

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