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Los Angeles Superior Court
SEP 19 2012
John A. Clarke, Clerk
By A. C. ROMAN Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LIGHTSPEED MEDIA CORPORATION,

Plaintiff,

v.

JESSE NASON,

Defendant.

Case No.: NC057950

[Assigned to Hon. Michael P. Vicencia]

DEFENDANT'S NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT

MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: November 14, 2012
Hearing Time: 8:30 a.m.
Hearing Dept.: G

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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LIGHTSPEED MEDIA CORPORATION,

Plaintiff,

v.

JESSE NASON,

Defendant.

Case No.: NC057950

[Assigned to Hon. Michael P. Vicencia]

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING PLAINTIFF TO FURNISH SECURITY

[Cal. Code Civ. Proc. 1030]

MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: November 14, 2012
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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 14, 2012, at 8:30 am or as soon thereafter as the matter can be heard in Department G in the above-entitled Court, located at 415 West Ocean Blvd., Long Beach, CA 90802, the motion of defendant JESSE NASON (the "**Defendant**") for an order requiring plaintiff to furnish security under Cal. Code Civ. Proc. § 1030 will be heard. Defendant further moves for a stay of proceedings pending payment of the undertaking.

The motion will be made on the grounds that the plaintiff in this action, LIGHTSPEED MEDIA CORPORATION resides out of state and is a foreign corporation (Arizona) and there is a reasonable possibility that the moving defendant will obtain judgment in the action.

This motion will be based on this notice of motion, on the supporting memorandum of points and authorities, the declaration of Jesse Nason, the Declaration of Morgan E. Pietz, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Respectfully submitted,

Dated: September 19, 2012

THE PIETZ LAW FIRM

By: _____

Morgan E. Pietz
Attorney for Defendant Jesse Nason

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION AND SUMMARY[1]

Plaintiff Lightspeed Media Corporation is an Arizona pornographer—specializing in "barely legal" teenage girls—that has gotten into a new line of business recently: abusing the Court's subpoena power to extort "settlements" from Internet users across the country.[2] Pulling the strings in this scheme is plaintiff's counsel, "Prenda Law" f/k/a "Steele Hansemeier PLLC," ("Prenda"), one of, if not *the* main law firm masterminding this effort nationally. Together, Prenda and a handful of pornographers have precipitated what one federal judge recently called a "nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals." 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"). The heart of this case, and others like it, is this: pay Prenda, or else be "named" in a meritless lawsuit accusing you of viewing hardcore pornography.

In the face of what another federal judge recently termed a "stiffening judicial headwind,"[3] whereby federal courts are becoming increasingly skeptical of Prenda's coercive copyright infringement lawsuits, which never reach the merits,[4] Prenda has switched tactics. Since the alarm has been raised in the federal courts, including by federal judges in this district,[5] Prenda has tried dressing up its usual copyright claims in state law clothing, in the hopes of receiving more favorable treatment in state courts. Instead of pleading copyright infringement against multiple John Doe defendants like it used to do,[6] Prenda is now trying out lawsuits where it sues a single

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[1] Sections I through III in this memorandum are identical to the corresponding sections in the memorandum offered in support of Defendant's concurrently filed demurrer.

[2] http://www.zdnet.com/hacker-hater-meet-the-star-client-of-porns-most-prolific-copyright-lawyer-7000002703/

[3] *Pacific Century Int'l., Ltd. v. John Does 1-37*, – F. Supp. 2d –, 2012 WL 1072312 (N.D. Ill. Mar. 30, 2012).

[4] *See AF Holdings v. Does 1-135,* N.D. Cal. Case No. 5:11-cv-0336-LHK, Dkt. 43-1, 2/24/12. In that case, Judge Koh ordered counsel here, Mr. Brett Gibbs, to disclose a list of cases where Prenda and its predecessor had initiated mass infringement litigation against John Doe defendants. Of the 118 cases they filed, against a staggering 15,878 Doe defendants, they had served zero Does. As far as the undersigned is aware, since then, Prenda has served perhaps a handful of people ever, including Mr. Nason. Dec'l. of Morgan E. Pietz, Exhibit F (listing 118 cases and stating "no defendants have ever been served")

[5] *E.g., Malibu Media v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, Dkt. No. 7, 6/27/12, ("The Court is familiar with lawsuits like this one. . .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.")

[6] While it is unclear if he was merely making the statement out of force of habit, or if the underlying facts of this case really do arise from BitTorrent activity, Prenda's "of counsel" overseeing this matter, Mr. Brett Gibbs, himself referred to this case as one involving a "Bittorent download," Dec'l. of Morgan E. Pietz, Exhibit E, p. 2.

named defendant, for state law claims which bear a striking similarity to, and are preempted by, claims under the Copyright Act. The next step, as shown by Prenda's M.O. in other recent cases[7] and its allegations here about a "community of hackers,"[8] will be that Prenda seeks to amend the complaint, and take discovery from Internet Service Providers ("**ISPs**") as to new, unknown John Doe "co-conspirators." Essentially, Prenda's complaints against single named defendants like Mr. Nason are used solely to establish a beachhead, from which multiple unknown "co-conspirators" may then be identified. Prenda has "technical experts" who log the I.P. addresses used to download its clients' porn movies. Use of the Court's subpoena power to identify the "the account holders associated with those IP addresses" (Complaint ¶ 19), all of whom Prenda will then threaten to "name" in a pornography lawsuit, provides the grist for Prenda's national "settlement" mill.[9]

Here, however, Prenda has gone a step too far. Prenda's "of counsel" who filed this case, Mr. Brett Gibbs, has essentially admitted in writing to a federal court that Prenda has no "reasonable basis" for bringing this lawsuit against Mr. Nason.[10] Prenda obtained Mr. Nason's contact information from a similar case it filed in Illinois.[11] Prior to the Illinois Supreme Court stepping in and issuing a supervisory order quashing Predna's subpoenas,[12] Mr. Nason's ISP identified him to Prenda as someone who paid for Internet access that was used to download Lightspeed content. Complaint ¶ 19. Thus, all Prenda really knows for sure about Mr. Nason is that he happened to pay the Internet bill for his household, and that the Internet access he pays for was used improperly by someone—but that someone may or ***may not*** be Mr. Nason. In an age when most homes have routers and wireless networks and multiple computers share a single I.P. address, the actual downloader using Mr. Nason's I.P. address improperly could be a teenage son

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[7] E.g., *Guava, LLC v. Case*, Circuit Court of Cook County, IL, docket at: https://w3.courtlink.lexisnexis.com/cookcounty/Finddock.asp?DocketKey=CABC0L0AAHDGD0LD

[8] Note in particular Complaint at ¶¶ 12, 20, 29, 34, 39, 45, 54.

[9] After Prenda obtains a John Doe "co-conspirator's" name and contact information from an ISP, that person will be turned over to Prenda's staff of "settlement negotiators" who send letters, make harassing phone calls, including robocalls illegal in California, and demand quick settlements of around $3,000. At least bill collectors generally collect on valid debts.

[10] Dec'l. of Morgan E. Pietz, Exhibit J (status report filed by Brett Gibbs in *Hard Drive Prod's. v. Doe*, N.D. Cal. Case No. 22-1566, Dkt. No. 29, 11/11/11). *See* Section III(c), *infra.*

[11] *Lightspeed Media v. John Doe*, Circuit Court of St. Clair County, IL, No. 11 L 683.

[12] *AT&T Internet Services et al. v. Hon. Robert P. LeChien*, Ill. S. Ct. No. 114334, June 27, 2012.

with a laptop, an invitee, a hacker, ***or any neighbor using an unencrypted wireless signal***. Thus, "there is a reasonable likelihood that the [defendants] 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). Indeed, as one judge observed in another of these cases, "***Plaintiff's counsel estimated that 30% of the names turned over [by] the ISP's are not those of the individuals who actually downloaded or shared copyrighted material.***" *Digital Sins, Inc. v. Does 1-176,* -- F.R.D. --, 2012 WL 263491, at *3 (S.D.N.Y. Jan. 30, 2012.

Accordingly, although the mere fact that someone happens to pay the Internet bill may be enough *justify discovery*, federal courts are suggesting, and plaintiff's counsel has admitted, that this fact alone is not enough to conclude, for the purposes of Rule 11(b)(3) or C.C.P. § 128.7(b)(3), that the person who pays the bill is actually the illegal downloader. However, if the question of whether there is a "reasonable basis" to name and serve the person who merely pays the Internet bill is a close one on the usual facts, here, Prenda's conduct is beyond the pale. Prior to being forced to file a responsive pleading and bring these motions, Mr. Nason provided Prenda with credible evidence that it was not actually him who used a "hacked" password to access Lightspeed content. Mr. Nason had his iTunes account hacked by an unknown intruder who exploited Mr. Nason's unsecured wireless network *on the very same day* as the wrongful activity alleged in the complaint, and Mr. Nason shared the emails with Prenda to prove it. Dec'l of Jesse Nason. This evidence, plus Mr. Gibbs' prior remarks, clearly show that Prenda's basis for continuing this lawsuit is objectively ***un***reasonable. In short, Prenda is now maliciously prosecuting a claim its own attorney has basically admitted there was no "reasonable basis" to bring in the first place, despite Mr. Nason's credible evidence showing Prenda that it has the wrong man. In its zeal to try and establish a beachhead from which to start issuing subpoenas to "co-conspirators," Prenda appears to have forgotten about Cal. Code Civ. Proc. § 128.7(b)(3).

Since the complaint is not actually designed to be tested on the merits, only to serve as a jumping-off point allowing the issuance of additional subpoenas to ISPs, it is not surprising that Prenda's complaint fails to state a single valid cause of action. Prenda's negligence claim—

predicated on the theory that ordinary individuals have a *duty* to pornographers and other content owners to maintain a secured wireless network, so as to guard against potential infringement by interlopers—is particularly frivolous. It has been summarily dismissed by courts of multiple jurisdictions. Prenda's purported Computer Fraud and Abuse Act claim, which is a newer twist, fails because mere copying of content—here, pornography—even if the information is valuable, does not constitute "damage," which is defined for CFAA purposes as "impairment to the integrity or availability of data, a program, a system, or information." *Sam's Wines & Liquors, Inc. v. Hartig*, 2008 U.S. Dist. LEXIS 76451 (N.D. Ill. Sept. 24, 2008) (dismissing CFAA claim because allegation of unauthorized copying of customer list did not satisfy "damage" requirement of CFAA); *see also, e.g., Cassetica Software, Inc. v. Computer Scis. Corp.*, 2009 U.S. Dist. LEXIS 51589, *10 (N.D. Ill. June 18, 2009) (There is no "damage" under the CFAA unless the violation caused a diminution in the completeness or usability of the data on a computer system.) The state law claims for conversion, unjust enrichment, and breach of contract are clearly preempted by the Copyright Act; it is not even a close call. And the purported cause of action for breach of contract fails to allege the existence of an *enforceable* agreement, or a meeting of the minds.

While most litigants deserve the benefit of the doubt at the outset of proceedings, Prenda does not.[13] This is particularly true since Prenda never really gets very far beyond the outset of proceedings—it just moves around the country, from court to court, playing the same tricks. Prenda's litigation abuses are well chronicled.[14] If this Court does not deal decisively with Prenda, lawsuits like this one will proliferate in this jurisdiction. Defendant respectfully requests

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[13] Indeed, if most of Prenda's clients were acting *in propria persona*, they would be a text book example of a "vexatious litigant" under California law. *See* Cal. Code Civ. Proc. § 391(b)(3) ("repeatedly files unmeritorious motions. . .conducts unnecessary discovery.")

[14] Several Arts Technica articles have highlighted the federal bench's tepid reception for Prenda Law's campaign, including: Judge eviscerates IP lawyer: "I accepted you at your word" (http://arstechnica.com/tech-policy/2011/03/judge-eviscerates-p2p-lawyer-i-accepted-you-at-your-word/); Judge administers another beatdown to P2P lawyer, severs cases (http://arstechnica.com/tech-policy/2011/04/judge-administers-another-beatdown-to-p2p-lawyer-severs-cases/); Settle up: voicemails show P2P porn law firms in action (http://arstechnica.com/tech-policy/2011/04/settle-up-voicemails-show-p2p-porn-law-firms-in-action/); Judge: don't bring me any more anonymous file-sharing lawsuits (http://arstechnica.com/tech-policy/2011/05/judge-dont-bring-me-any-more-anonymous-file-sharing-lawsuits/); BitTorrent users don't "act in concert," so judge slashes mass P2P case (http://arstechnica.com/tech-policy/2011/08/bittorrent-users-dont-act-in-concert-so-judge-slashes-mass-p2p-case/).

that his demurrer be sustained and plaintiff be required to post an undertaking to secure payment of Mr. Nason attorneys' fees prior to filing an amended complaint (Cal. Code Civ. Proc. 1030).

II. PROCEDURAL HISTORY: THE "PRIOR ACTION" IN THE SOUTHERN DISTRICT OF ILLINOIS IS STILL PENDING

This lawsuit began, in seemingly straightforward fashion, as a complaint for similar causes of action,[15] against only one anonymous John Doe defendant, filed December 14, 2011, in the Superior Court of St. Clair County, Illinois, styled *Lightspeed Media Corporation v. John Doe,* No. 11 L 683 ("*Lightspeed I*").

Here, Prenda alleges, "19. Through a separate case arising in a different state, Plaintiff sought, and received, a court order demanding that various ISPs who issued the hacking IP addresses divulge the personal information of those account holders associated with those IP addresses. 20. Through this prior suit, Plaintiff was able to discover that Defendant's IP address—was one of the hacking IP addresses identified by Arcadia through the process described above." Complaint ¶¶ 19–20.

Although Prenda describes *Lightspeed I* as a "*prior* suit," in actual fact, *Lightspeed I* is still being litigated today. As usual, in *Lightspeed I,* Prenda sought leave of court to issue subpoenas to the ISPs to identify "co-conspirators." After receiving the green light from Judge LeChien to issue subpoenas to the ISPs, Prenda began issuing so many "co-conspirator" subpoenas—6,600, for subscribers all over the country—that it caught the attention of the nations large ISPs, prompting them to intervene in the case in an attempt to quash theses subpoenas. After Judge LeChien refused to allow the ISPs to file motions to quash, the ISPs pursued an interlocutory appeal to Illinois Supreme Court.

On June 27, 2012, the Illinois Supreme Court took the extraordinary step of issuing a supervisory order over *Lightspeed I,* and directed Judge LeChien to allow the ISPs to file their motions to quash. *AT&T Internet Services et al. v. Hon. Robert P. LeChien*, Ill. S. Ct. No. 114334, June 27, 2012. Prenda responded on August 3, 2012, by naming certain ISPs as defendants in the

[15] The only difference in causes of action is that in Illinois, the final cause of action was for civil conspiracy, which California does not recognize as a separate cause of action, whereas, here, the final claim is for negligence.

case. The ISPs then removed to federal court. Prenda again tried to seek authorization to issue new subpoenas, on an emergency basis, this time in federal court. The ISPs opposed that motion and filed motions to dismiss for failure to state a claim. Prenda finally got around to serving the original lead defendant in *Lightspeed I*, Mr. Anthony Smith, on August 20, 2012. Mr. Smith filed a motion to dismiss for failure to state a claim in *Lightspeed I* on September 18, 2012, finally putting the case at issue, nine months after it was first filed. [16]

III. ANALYSIS OF THE FACTUAL BASIS FOR THIS COMPLAINT

(a) The Key Factual Allegation of the Complaint: Someone Used Mr. Nason's Internet Protocol ("IP") Address to Download "Content"

(1) Technical Background on IP Addresses

As Magistrate Judge Gary Brown of the Eastern District of New York explained, "An IP address provides only the location at which one of any number of computer devices may be deployed, much like a telephone number can be used for any number of telephones." *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, pp. 6–8 ("*In re: Adult Film Cases*"). "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***. . .Thus, it is no more likely that the subscriber to an IP address carried out a particular computer function – here the purported illegal downloading of a single pornographic film – than to say an individual who pays the telephone bill made a specific telephone call." *Id.*

Thus, it is incorrect to ***simply assume*** that the person who pays for Internet access is actually the person who used the IP address assigned to that account to illegally download pornography. *Malibu Media, LLC v. John Does 1-11*, 2012 U.S. Dist. LEXIS 94648 (D.D.C. July 10, 2012) ("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." *Digital Sins, Inc. v.*

[16] Much of the procedural history of the "prior action" is set out in the ISPs opposition to Prenda's *ex parte* request for emergency discovery, attached as Exhibit G to the Dec'l. of Morgan E. Pietz. *Lightspeed I* is now styled *Lightspeed v. Smith et al.*, S.D. Ill. Case No. 3:12-cv-00889-GPM-SCW.

Does 1-176, -- F.R.D. --, 2012 WL 263491, at *3 (S.D.N.Y. Jan. 30, 2012 ("***Plaintiff's counsel estimated that 30% of the names turned over [by] the ISP's are not those of the individuals who actually downloaded or shared copyrighted material.***")

The correlation between the billing contact for an account assigned a given IP address, and an illegal downloader who used that IP address improperly is particularly dubious where, as here, the IP address in question was open for use by anyone joining an ***unencrypted*** wireless network, including neighbors, or even someone in a van parked outside.[17] Dec'l. of Jesse Nason ¶¶ 2–3.

(2) The IP Address Allegation in the Complaint

In relevant part, the Complaint states, "On information and belief, Defendant was assigned IP address 98.159.82.80 from Bel Air ***and was in control of it*** during all relevant times, including, but not limited to, on November 4, 2011 at 16:34:00 (UTC), which was the date and time that Defendant hacked Plaintiff's website and content per Arcadia's observations." Complaint ¶ 21 (emphasis added). This "**IP Address Allegation**" is essentially the factual underpinning of the entire complaint, i.e., the allegation that Mr. Nason actually ***is*** the person who supposedly did the purportedly wrongful deeds alleged therein.

(b) The IP Address Allegation is Insufficient as a Matter of Law to Serve as a Factual Basis for this Complaint

What does it mean to be "in control" of an IP address at a certain date and time? If two people with two computers are using the Internet at the same time, on the same wifi network (which would mean they share and are both "in control" of the same IP address) and one person is reading the *Los Angeles Times* online, while the other illegally downloads hardcore pornography, is the former liable for the activity of the latter? At a minimum—and setting aside myriad other problems with each of Prenda's claims—to survive demurrer, Prenda must allege that the defendant was in ***exclusive*** control of the IP address, or allege some theory for how he should be otherwise responsible. Thus, a special demurrer lies for uncertainty as to the allegation that serves as the factual underpinning for the entire complaint.

[17] Other major sources for Prenda's false positives include, but are not limited to: (i) the illegal downloader was not the person who pays the bill, but a family, member, neighbor, invitee, etc.; (ii) IP spoofing; (iii) error by plaintiff's technical experts.

(c) In Light of Prenda's Past Admissions and the Evidence Proffered by the Defendant to Prenda, there is no Objectively Reasonable Basis for Prenda to Believe the Truth of the IP Address Allegation

In a prior federal case, plaintiff's counsel here, Mr. Brett Gibbs, addressed a key point: the process by which Prenda (known back then as Steele Hansemeier) determines whether there is a good faith basis to allege that a given ISP customer is actually a John Doe defendant who committed an illegal download. In a status report he submitted attempting to explain to the court why Prenda had not yet served anyone, he stated,

> "While Plaintiff has received the Subscriber's identifying information, the Subscriber has refused to communicate with Plaintiff's counsel whatsoever, despite numerous good-faith efforts by Plaintiff's counsel to meet and confer with him. Although a subscriber and doe defendant will often be one-and-the-same, it can be the case that they are different people. In cases, such as the present action, where the subscriber completely refuses any form of communication with Plaintiff's counsel, ***limited additional discovery is often needed to confirm that the subscriber may be named as a Doe Defendant***. Plaintiff is aware that the Court is very hesitant to grant expedited investigate discovery with respect to a nonparty. However, the tenor of the Court's prior orders suggests to Plaintiff's counsel that the Court is primarily concerned with the intrusive nature of forensic discovery with respect to the subscriber's digital devices. Plaintiff believes it can address the Court's concerns by filing a motion for leave to serve a deposition subpoena on the subscriber that will at least compel the subscriber to testify about the nature of his home network. ***Only if the deposition fails to reveal the information Plaintiff requires to form a reasonable basis to determine whether the subscriber is—or is not—the Doe Defendant*** would Plaintiff contemplate requesting leave from the Court to take what may be more intrusive discovery. Obviously, Plaintiff cannot proceed in this litigation against the Subscriber if the Subscriber adopts an ostrich posture with respect to the litigation. After making its determination as to the

correct Defendant, Plaintiff will effectuate service." *Hard Drive Prods., Inc. v. Doe*, N.D. Cal. Case No. 11-cv-1566-JCS, Dkt. 29, 11/11/11 (emphasis added). Essentially, Mr. Gibbs admits that in order to have a good faith basis to allege that an Internet subscriber is actually a Doe defendant, Prenda needs to know more than that the person happens to pay the bill—additional discovery is required. Here, ***Mr. Gibbs made no attempt to determine, through any kind of additional discovery*** whether "the subscriber," Mr. Nason, "is—or is not—the Doe Defendant" who actually used a given IP address to download pornography.

The "reasonable basis" Mr. Gibbs was referring to, of course, is the requirement that, "after an inquiry reasonable under the circumstances," an attorney certify that "the factual contentions," in any pleading signed by an attorney, "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. Proc. 11(b)(3); *cf.* Cal. Code Civ. Proc. § 128.7(3) ("The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"); *see also Malibu Media, LLC v. John Does 1-9*, M.D. Fl. Case No. 8:12-cv-669-SDM, Dkt. 25, 7/6/12, p. 7 ("procedural safeguards, such as ***Fed. R. Civ. P. 11***, ensure that Plaintiff proceeds in good faith when identifying a John Doe as a defendant in this case") (emphasis added); *Discount Video Center, Inc. v. Does 1-29*, D. Mass. Case No. 1:12-cv-10805, Dkt. No. 40, 8/24/12 (Doe's Motion to Dismiss) (quoting admissions by plaintiff's lawyer in another case from court transcript).[18]

Here, by his own admission, not only did Mr. Gibbs ***not*** have a reasonable basis to bring this lawsuit in the first place, but now, as a result of the evidence Mr. Nason proffered in an attempt to resolve this matter, Mr. Gibbs really should know better. The complaint should be dismissed per Mr. Gibbs' duty under Cal. Code Civ. Proc. § 128.7(b)(3). Mr. Nason used an

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[18] "THE COURT: And ***I assume the reason you haven't sued the subscribers is because you don't believe you have a good-faith basis under Rule 11 to assert*** at the moment – or at least not at this moment, but at the moment when you filed the complaint – ***a claim directly against them***.
MR. CABLE: Against them, right.
THE COURT: Because of the uncertainty as to on any given case as to whether the infringer was the subscriber, --
MR. CABLE: Uh-huh."

unencrypted wireless network. And he proffered credible evidence that an unknown person breached the integrity of his wireless network and began making unauthorized charges on Mr. Nason's password-protected iTunes account on the very same day as the alleged 'password hacking' occurred, as alleged in the complaint.

If Mr. Gibbs and Lightspeed wish to keep maliciously prosecuting this lawsuit, despite this prior admission, and the credible evidence proffered by Mr. Nason, Lightspeed should be required to post an undertaking to secure a future award of attorneys' fees, per Cal. Code Civ. Proc. § 1030.

IV. PLAINTIFF SHOULD BE REQUIRED TO POST AN UNDERTAKING

(a) Legal Basis for Requiring Out of State Defendant to Post Undertaking

California Code of Civil Procedure § 1030 provides, in relevant part,

> "(a) ***When the plaintiff*** in an action or special proceeding resides out of the state, or ***is a foreign corporation***,[19] the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of ***costs*** and ***attorney's fees*** which may be awarded in the action or special proceeding. For the purposes of this section, "attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract.
>
> (b) The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is ***a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding***. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.

[19] Per paragraph 2 of the complaint, Lightspeed Media Corporation is an Arizona corporation with its principal place of business in Arizona.

(c) If the court, after hearing, determines that the grounds for the motion have been established, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees."[20]

(b) There is a Reasonable Possibility Mr. Nason Will Obtain Judgment

Although, to the undersigned's knowledge, Prenda has yet to take a single one of its nearly two hundred multiple-defendant illegal downloading cases to trial, if it were to do so here, it would undoubtedly lose.

At a minimum, it is *extremely difficult* to determine what computer was used to commit a supposed wrongful download, much less who happened to be using the computer at that time. Where, as here, the purported illegal downloader made his IP address available via an unsecured wireless network, proving who is responsible for an infringing download is nearly impossible.

As Mr. Gibbs admitted, simply knowing that someone happened to pay the Internet bill is not enough for there to be an objective, "reasonable basis" to believe that this person is necessarily the unknown defendant who should be named and served with the complaint. Accordingly, rather than file this lawsuit *against Mr. Nason*, what Mr. Gibbs should have done was file it against an unknown John Doe. If Prenda then wanted to conduct discovery from Mr. Nason in order to try and ascertain whether Mr. Nason was truly the John Doe who illegally downloaded Lightpseed pornography, that would at least be somewhat defensible, notwithstanding the fact that it was precisely to prohibit this kind of discovery, in this very case (or, at least, its parent), that the Illinois Supreme Court took the rare step of intervening by supervisory order. Dec'l. of Morgan E. Pietz, Exhibit G (ISPs motion recounting the history of abusive discovery by Prenda in the "prior action").

Taking Prenda's conduct truly beyond the pale, however, is the refusal to dismiss this case against Mr. Nason, notwithstanding the fact that Mr. Nason proffered credible evidence that he had an intruder on his wireless network causing havoc—indeed stealing Mr. Nason's own iTunes password—on the very day of the supposedly wrongful conduct alleged in the complaint. Dec'l.

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[20] *See also* Cal. Code Civ. Proc. § 1030(e) regarding the imposition of a stay of proceedings pending posting of the undertaking.

of Jesse Nason, Exhibit A (the iTunes email chain); Dec'l. of Morgan E. Pietz, Exhibit E (email chain proffering Exhibit A iTunes emails to plaintiff's counsel).

As noted above, Cal. Code Civ. Proc. § 128.7 requires that "after an inquiry reasonable under the circumstances," an attorney certify that "the allegations and other factual contentions," in any pleading signed by an attorney, "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Giving Mr. Gibbs the benefit of the doubt about whether he could make such a certification at the time of filing the complaint (and notwithstanding his prior comments to federal court indicating that knowing *only* that someone pays the bill is not enough to conclude they are the illegal downloader, and that further inquiry is required), in light of the evidence proffered to him by the undersigned, he can really no longer maintain such a certification in good faith.

Generally, when Prenda takes depositions, they go fishing for admissions that people have a *secured* wireless network, thereby limiting the universe of potential downloaders to only people with the password. Here, as verified by Mr. Nason, the opposite is true: Mr. Nason had an unsecured wireless network where no password was required, meaning the universe of potential people who could be the true defendant is much larger.

Simply put, Prenda has no evidence to support the IP Address Allegation of the complaint, and what evidence there is, shows that Mr. Nason is not the true defendant who really committed the purportedly wrongful downloads alleged in the complaint.

(c) Attorneys' Fees are Appropriate

Thanks to Mr. Gibbs' cavalier approach to Cal. Code Civ. Proc. 128.7(b)(3), Mr. Nason, a math teacher, has now been publicly accused—albeit, wrongfully—of downloading "barely legal" teen pornography. In short, Mr. Nason's reputation is now soiled, and it is going to be hard for him to get rid of the stink of this lawsuit, win or lose. The mere allegation that someone watches "teen" pornography is incredibly embarrassing and goes to a "matter of a highly sensitive and personal nature, including one's own sexuality." *Next Phase Distrib., Inc. v. Doe*, 2012 U.S. Dist. LEXIS 27260, 4-6 (S.D.N.Y. Mar. 1, 2012) ("***This Court notes the highly sensitive nature and***

privacy issues that could be involved with being linked to a pornography film"); *citing Third Degree Films v. Doe*, 2011 U.S. Dist. LEXIS 128030 (N.D. Cal. Nov. 4, 2011) ("***An allegation that an individual illegally downloaded adult entertainment likely goes to matters of a sensitive and highly personal nature, including one's sexuality***"); *see also* In re: Complaint of Judicial Misconduct (Kozinski), 575 F.3d 279, 283–84 (3rd Cir. 2009) (public allegation that Judge Kozinski maintained "a publicly accessible website featuring sexually explicit photographs and videos. . .amounted to a disregard of ***a serious risk of public embarrassment***. . .and can reasonably be seen as having ***resulted in embarrassment to the institution of the federal judiciary*).**

In light of Mr. Gibbs' prior admissions in the *Hard Drive Prod's.* status report[21] and particularly in light of the evidence proffered by Mr. Nason,[22] if Mr. Gibbs refuses to dismiss this complaint, at least as against Mr. Nason, then he should be severely sanctioned.

Sanctions are particularly appropriate because this is not a one-time issue. The question of whether Prenda should be able to get away with similarly besmirching the names of the other 15,000+ people in its "settlement collection" database, based *on nothing more than the fact that these people paid the Internet bill*, is an issue of import to many other people similarly situated to Mr. Nason.

In addition to the obvious basis for attorneys' fees sanctions under Cal. Code Civ. Proc. 128.7(b), it should also be noted that since all of Prenda's state law claims are really copyright infringement claims dressed up in state law clothing, and thus preempted by the Copyright Act, that attorneys' fees will be available to the prevailing party under the Copyright Act's attorneys fees provision, 17 U.S.C. § 505, for the successful defense of a preempted claim.

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[21] Exhibit J to Dec'l. of Morgan E. Pietz

[22] Exhibit A to Dec'l. of Jesse Nason (evidence); *see also* Dec'l. of Morgan E. Pietz, Exhibit E (proffering).

V. CONCLUSION

For the foregoing reasons, defendant Jesse Nason respectfully requests that the Court sustain his demurrer and require Lightspeed, an out of state defendant, to post an undertaking to secure payment of Mr. Nason's attorney's fees prior to being allowed to refile an amended complaint. In addition, proceedings should be stayed pending the posting of such an undertaking.

Respectfully submitted,

Dated: September 19, 2012

THE PIETZ LAW FIRM

By: _____

Morgan E. Pietz
Attorney for Defendant Jesse Nason

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 3770 Highland Avenue, #206, Manhattan Beach, California 90266.

On September 19, 2012, I served the foregoing document described as **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING PLAINTIFF TO FURNISH SECURITY; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Brett L. Gibbs, Esq.
Of Counsel to Prenda Law Inc.
38 Miller Avenue, #263
Mill Valley, CA 94941

Attorney for Plaintiff
Lightspeed Media Corporation

[X] (BY U.S. MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Manhattan Beach, California.

[ ] (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee and/or to the addressee personally.

[X] (State) I certify (or declare) under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 19, 2012, at Manhattan Beach, California.

Leslie M. Rudolph

LESLIE M. RUDOLPH