ERIC M. ACKER (CA SBN 135805)
MORRISON & FOERSTER LLP
12531 High Bluff Drive, Suite 100
San Diego, California 92130-2040
Telephone: (858) 720-5100
Facsimile: (858) 720-5125
eacker@mofo.com

BENJAMIN J. FOX (CA SBN 193374)
MORRISON & FOERSTER LLP
555 West Fifth Street
Los Angeles, California 90013-1024
Telephone: (213) 892-5200
Facsimile: (213) 892-5454
bfox@mofo.com

Attorneys for VERIZON ONLINE LLC
(*Additional Amici and Counsel Listed on Next Page*)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MALIBU MEDIA, LLC,

Plaintiff,

v.

JOHN DOES 1 – 36,

Defendants.

MALIBU MEDIA, LLC,

Plaintiff,

v.

JOHN DOES 1 – 25,

Defendants.

Case Nos. 3:12-cv-1370-LAB-DHB
3:12-cv-00362-LAB-DHB
3:12-cv-01355-LAB-DHB
3:12-cv-01372-LAB-DHB
and related cases:
3:12-cv-01356-LAB-DHB
3:12-cv-00369-LAB-DHB
3:12-cv-01059-LAB-DHB
3:12-cv-01056-LAB-DHB
3:12-cv-01051-LAB-DHB
3:12-cv-01061-LAB-DHB
3:12-cv-01049-LAB-DHB
3:12-cv-01052-LAB-DHB
3:12-cv-01054-LAB-DHB
3:12-cv-01135-LAB-DHB
3:12-cv-01354-LAB-DHB
3:12-cv-01357-LAB-DHB
3:12-cv-01847-LAB-DHB

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND PROPOSED AMICUS CURIAE BRIEF BY VERIZON ONLINE LLC

Date: November 19, 2012
Time: 11:30 a.m.
Place: Courtroom 9, 2nd Floor

Additional Proposed Amici and Counsel:

SBC INTERNET SERVICES, INC.
d/b/a AT&T INTERNET SERVICES

Bart W. Huffman (CA SBN 202205)
LOCKE LORD LLP
100 Congress Ave., Suite 300
Austin, Texas 78701
Telephone: (512) 305-4746
Facsimile: (512) 391-4741
bhuffman@lockelord.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

Verizon Online LLC and SBC Internet Services, Inc. d/b/a AT&T Internet Services (the Internet Service Providers or "ISPs") respectfully seek permission to file the attached amicus curiae brief to further address the "multi-Doe" defendant phenomenon in copyright cases involving sexually explicit films, and the impact these many cases have on ISPs. As the attached brief explains, the cases before this Court are among hundreds of multi-Doe actions filed by plaintiff Malibu Media, LLC, seeking personal information about the ISPs' Internet subscribers.

These cases typically follow a common arc: *First*, plaintiffs file suit against multiple "Does" in a single complaint, without any named defendant. *Second*, plaintiffs apply ex parte for leave to serve subpoenas on the ISPs to obtain the names, addresses, and contact information of Internet subscribers, who may or may not be the persons responsible for allegedly downloading plaintiffs' films without paying for them. *Third*, plaintiffs send demand letters, followed in many instances by telephone calls and other communications, threatening to publicly identify the subscribers as downloaders of pornographic material if the subscribers do not pay the money demanded in "settlement." *Fourth*, a portion of the subscribers, embarrassed by the title of the films and faced with relatively modest settlement demands, pay the money requested, and plaintiffs then dismiss or abandon all remaining claims. The result is a recurring exercise in which the ISPs are required to respond to hundreds of subpoenas seeking information about subscribers located throughout the country, for cases that rarely, if ever, reach their merits.

The ISPs have a significant interest in securing uniformity of decision in these multi-Doe defendant cases and in avoiding the undue burdens that Plaintiff's sought-after discovery imposes on the ISPs. *See, e.g.*, *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (pre-Rule 26 discovery should be denied where discovery "would not uncover [defendants'] identities, or that the complaint would be dismissed on other grounds"); *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 928-29 (7th Cir. 2004) (rejecting argument that a subpoena causes no undue burden merely because "the administrative hardship of compliance would be modest," but considering instead "the rash of suits around the country" and the publicity generated). The record before this Court and the pattern that has developed in Plaintiff's many cases show that the primary goal of

these multi-Doe suits is to extract—for the purpose of collecting mass settlements—the largest amount of subscriber information from the ISPs, at the lowest cost per subscriber, and with minimal judicial oversight.

The attached brief addresses the "good cause" standard for authorizing pre-Rule 26 discovery of the ISPs in multi-Doe actions, the law of misjoinder, and the ill effects caused by these and similar mass-Doe actions. The ISPs respectfully submit that the attached brief may assist the Court in deciding the issues presented and further the administration of justice.

Pursuant to Civil Rule 7.1(e)(5), (8), the ISPs requests permission to file the attached brief and request that the Court order that any response to the brief be filed by November 12, 2012, in advance of the scheduled hearing on November 19, 2012. Counsel for certain of the Doe defendants, Morgan Pietz, Esq., does not oppose this request. Despite requests by counsel for Verizon Online, LLC, Malibu Media's counsel has not informed the ISPs of Plaintiff's position regarding leave to file the attached brief.

Dated: November 5, 2012

MORRISON & FOERSTER LLP

By: /s/ Benjamin J. Fox
Benjamin J. Fox

Attorneys for
VERIZON ONLINE LLC

Dated: November 5, 2012

LOCKE LORD LLP

By: /s/ Bart W. Huffman (with permission)
Bart W. Huffman

Attorneys for SBC INTERNET SERVICES, INC. d/b/a AT&T INTERNET SERVICES

PROPOSED AMICUS BRIEF

INTRODUCTION

These coordinated cases are among many hundreds of recently filed actions that seek information from Internet Service Providers (ISPs) about the ISPs' subscribers. The cases typically involve sexually explicit digital content, target several to several thousand "Does" per action, and follow "a common arc":

> (1) a plaintiff sues anywhere from a few to thousands of Doe defendants for copyright infringement in one action; (2) the plaintiff seeks leave to take early discovery; (3) once the plaintiff obtains the identities of the IP subscribers through early discovery, it serves the subscribers with a settlement demand; (4) the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle…. Thus, these mass copyright infringement cases have emerged as a strong tool for leveraging settlements — a tool whose efficiency is largely derived from the plaintiffs' success in avoiding the filing fees for multiple suits and gaining early access en masse to the identities of alleged infringers.[1]

District courts are increasingly wary that the information sought in these "mass Doe" actions may be used for an improper purpose, with a growing majority of federal courts in California denying leave to conduct discovery of the ISPs, reconsidering earlier ex parte grants of permission to take discovery, or dismissing the actions outright. For example, in 33 separate cases brought by Malibu Media and coordinated for ruling in the Central District of California, District Judge R. Gary Klausner held recently that Plaintiff's complaints and applications to take discovery—which were virtually identical to those filed here—failed to satisfy the requirements for joinder of multiple Does in a single action, and denied Malibu Media leave to take discovery of the ISPs and dismissed all Does except for "Doe 1." *Malibu Media, LLC v. Does 1-10*, 2012 U.S. Dist. LEXIS 152500, at *9-16 (C.D. Cal. Oct. 10, 2012). On October 12, 2012, the court assigned to resolve a similar set of ten cases coordinated in the Eastern District of California reached the same conclusion, recommending that the prior ex parte orders authorizing third-party

[1] *McGIP, LLC v. Does 1-149*, 2011 U.S. Dist. LEXIS 108109, at *11 n.5 (N.D. Cal. Sept. 16, 2011) (citations omitted).

discovery be vacated and the Does dismissed. *Malibu Media, LLC v. Does 1-13*, 2012 U.S. Dist. LEXIS 148215, at *4-7 (E.D. Cal. Oct. 15, 2012) (recommendation and report).

The record before this Court and the pattern that has emerged in Plaintiff's many prior cases shows persuasively that Plaintiff's current requests to obtain the personal information for multiple subscribers in each pending case are not supported by good cause. The names, addresses and contact information for the Internet subscribers are being sought primarily to compile a mailing list for the purpose of demanding payments from the subscribers. Due to the prevalence of unsecured and shared Internet connections, the sought-after information is not a reliable indicator of the true identities of defendants who, according to Plaintiff, may have accessed its films. The broad-brush approach to "settlement" in these cases—and the cumulative burdens that these cases impose on the ISPs, the judiciary and members of the public—warrant a closer look at Plaintiff's routine practice of seeking "emergency" discovery as to dozens of Does per lawsuit. Indeed, these cases raise serious questions about the propriety of Plaintiff using Article III courts to enable pre-service settlement demands, rather than to adjudicate a live case or controversy.

For the reasons discussed herein, the multi-Doe cases should be dismissed or the Doe defendants severed, and permission to conduct discovery of the ISPs should be denied.

LEGAL ARGUMENT

I. PLAINTIFF IN THESE COORDINATED CASES HAS FAILED TO SHOW THAT GOOD CAUSE EXISTS FOR SEEKING DISCOVERY FROM THE INTERNET SERVICE PROVIDERS.

A. The "Good Cause" Standard for Pursuing Pre-Rule 26 Discovery from ISPs for the Purpose of Identifying Potential Defendants.

"As a general rule, the use of 'John Doe' to identify a defendant is not favored," and leave to conduct pre-Rule 26 discovery to identify a "Doe" must be supported by a showing of good cause. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980); *see AF Holdings LLC v. Doe*, 2012 U.S. Dist. LEXIS 104396, at *2-5 (S.D. Cal. July 25, 2012), quoting *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995) (ex parte applications are to be used sparingly, only in "emergency circumstances"). Where, by contrast, "the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery

properly is denied." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352-53 & n.17 (1978).

In *Gillespie*, the Ninth Circuit explained that where (as here) the sought-after discovery "would not uncover the identities" of the defendants, or where "the complaint would be dismissed on other grounds," leave to conduct pre-Rule 26 discovery should be denied. *Gillespie*, 629 F.2d at 642-43; *see also Media Prods. v. Does 1-162*, 2012 U.S. Dist. LEXIS 134226, at *5-14 (N.D. Cal. Sept. 12, 2012) (applying *Gillespie* and denying request to take discovery other than as to "Doe 1" for failure to satisfy Rule 20's requirements of joinder and other prerequisites).[2]

As the following sections explain, the standards articulated in *Oppenheimer* and *Gillespie* compel the conclusion that leave to conduct multi-Doe discovery is unwarranted here.

B. Good Cause Is Lacking Where, as Here, the Sought-After Discovery Is Unlikely to Lead to Defendants Being Sued and Served in the Forum.

The Central District of California's recent decision in the coordinated *Malibu Media* cases explains succinctly that Plaintiff's requested discovery of the ISPs is "not 'very likely'" to lead to Plaintiff identifying, suing by name, and serving the multiple Doe defendants in this forum, and thus is improper under *Gillespie*, 629 F.2d at 642, and recent precedent:

> [T]he [sought-after] subscriber information is not a reliable indicator of the actual infringer's identity. Due to the proliferation of wireless internet and wireless-enabled mobile computing (laptops, smartphones, and tablet computers), it is commonplace for internet users to share the same internet connection, and thus, share the same IP address. Family members, roommates, employees, or guests may all share a single IP address and connect to BitTorrent.

Malibu Media, 2012 U.S. Dist. LEXIS 152500, at *8-9 (citing *Gillespie*, 629 F.2d at 642; *AF Holdings LLC v. Does 1-96*, 2011 U.S. Dist. LEXIS 109816 (N.D. Cal. Sept. 27, 2011); *Hard Drive Prods. v. Does 1-90*, 2012 U.S. Dist. LEXIS 45509 (N.D. Cal. Mar. 30, 2012)).

[2] *See also Malibu Media, LLC v. Does 1-10*, 2012 U.S. Dist. LEXIS 89286, *5-9 (C.D. Cal. July 27, 2012) (applying *Gillespie*, addressing the "the economics of pornographic copyright lawsuits," and concluding that good cause did not support discovery of multi-Does in light of misjoinder); *Patrick Collins, Inc. v. Does 1-38*, 2012 U.S. Dist. LEXIS 93877, at *13-15 (E.D. Cal. July 6, 2012) (same); *808 Holdings, LLC v. Collective Sharing Hash*, 2012 U.S. Dist. LEXIS 62975, at *21-22 (S.D. Cal. May 4, 2012) (denying leave to conduct discovery in BitTorrent case based on misjoinder; Brooks, M.J.), citing, inter alia, *Celestial Inc. v. Swarm Sharing Hash*, 2012 U.S. Dist. LEXIS 41078, *7 & n.3 (C.D. Cal. Mar. 23, 2012). Additional authority cited, *post*.

Other courts have noted the problem of "false positives" from Plaintiff's sought-after discovery: Plaintiff's targeted Does necessarily "encompass not only those who allegedly committed copyright infringement— proper defendants to Plaintiff's claims—but ISP 'Subscriber[s]' over whose internet connection the Work allegedly was downloaded." *Hard Drive Prods. v. Does 1-130*, 2011 U.S. Dist. LEXIS 132449, at *6-7 (N.D. Cal. Nov. 16, 2011).[3]

The prevalence of shared and unsecured Internet connections in subscribers' homes, and computer viruses or "malware" that permit Internet users to download content without a subscriber's consent or knowledge have not, however, discouraged Plaintiff from demanding pre-service-of-process "settlement" payments from *each* subscriber identified by the ISPs in discovery. (*See, e.g.*, Pietz Decl. ¶¶ 5-19, Dkt. 11-2 filed in No. 3:12-cv-1370.)

Plaintiff's broad-brush approach of demanding payments before naming defendants means that "[t]he individual—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.'" *Hard Drive Prods. v. Does 1-130, supra*, 2011 U.S. Dist. LEXIS 132449, at *9; *see also Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 229, 242 (S.D.N.Y. 2012) (the "risk of false positives gives rise to 'the potential for coercing unjust settlements from innocent defendants' such as individuals who want to avoid the embarrassment of having their names publicly associated with allegations of illegally downloading" pornography).[4]

---

[3] *See also Digital Sin, Inc. v. Does 1-5698*, 2011 U.S. Dist. LEXIS 128033, at *10 (N.D. Cal. Nov. 4, 2011) ("as has been discussed by other courts in this district, the ISP subscribers may not be the individuals who infringed upon Digital Sin's copyright"); *Malibu Media, LLC v. Does 1-28*, 2012 U.S. Dist. LEXIS 144501, at *9 (D. Colo. Oct. 25, 2012) (same; "For example, 'subscriber John Doe 1 could be an innocent parent whose internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' Works.'"); *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447, at *8 (E.D.N.Y. May 1, 2012) ("[T]he assumption that the 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.").

[4] The practice has caused at least one court to question "whether [the sexually explicit films were] produced for commercial purposes or for purposes of generating litigation and settlements." *On the Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011).

Given this dynamic, it is unsurprising that few, if any, of the hundreds of multi-Doe lawsuits filed by Malibu Media in the past two years have proceeded to a litigated judgment. (Pietz Decl. ¶¶ 22-27.) The overwhelming majority of Plaintiff's multi-Doe cases are used solely as a vehicle to obtain the subscribers' information for the purpose of sending threatening demands for payment to them. *Id.*; *see also Malibu Media v. Does 1-10*, 2012 U.S. Dist. LEXIS 89286, at *8-9 ("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"); *Malibu Media, LLC v. Does 1-5*, 2012 U.S. Dist. LEXIS 77469, at *4 (S.D.N.Y. June 1, 2012) ("This court shares the growing concern about unscrupulous tactics used by certain plaintiffs, particularly in the adult films industry, to shake down the owners of specific IP addresses from which copyrighted adult films were allegedly downloaded."); *Malibu Media v. Does 1-13*, 2012 U.S. Dist. LEXIS 148215, at *7 n.2 (same); *Pac. Century Int'l, Ltd. v. Does 1-37*, 282 F.R.D. 189, 196 (N.D. Ill. 2012) ("When evaluating relevancy, 'a court is not required to blind itself to the purpose for which a party seeks information.'"); *K-Beech, Inc. v. Does 1-85*, 2011 U.S. Dist. LEXIS 124581, at *7 (E.D. Va. Oct. 5, 2011).

For these reasons alone, Plaintiff's requested third-party discovery is unsupported by "good cause" and is improper under controlling precedent. *Oppenheimer Fund*, 437 U.S. at 352-53 & n.17; *Gillespie*, 629 F.2d at 643.

C. Plaintiff Has Failed to Make an Adequate Threshold Showing That the Multiple "Does" Are Properly Joined in These Lawsuits.

Plaintiff's attempt to improperly join multiple Does provides an additional compelling reason to reject its requests to obtain the personal information for hundreds of subscribers in these coordinated actions. *See, e.g.*, *Malibu Media v. Does 1-10*, *supra*, 2012 U.S. Dist. LEXIS 148215, at *12-14 (explaining BitTorrent technology and concluding that the Does in the coordinated C.D. Cal. actions were misjoined where, inter alia, "there is no indication that Defendants in each case had any knowledge of or direct contact with one another, nor does Plaintiff allege that pieces of the file were jointly downloaded from Defendants in the same transaction"). Courts that have analyzed BitTorrent increasingly are requiring Does to be sued

separately, or if multiple Does are joined in a single action, at minimum a case-specific evidentiary showing that the Does were online at or around the same time and exchanged the same BitTorrent seeder file. *Id.* (citing collected cases); *see also Hard Drive Prods.*, 2012 U.S. Dist. LEXIS 45509, at *21 ("Plaintiff has not shown that the defendants acted in concert simply by appearing [in] the same swarm at completely different times").[5]

Plaintiff's ex parte applications lack a particularized showing that the Does were acting as part of the "same series of transactions," as Rule 20 requires. Plaintiff's applications are virtual carbon copies of one another (except for the film names, dates, and IP Addresses of subscribers). Many applications, however, assert that the Does accessed a film on different dates over a two-month period—or longer. (*E.g.*, Fieser Decl. Ex. B filed in No. 3:12-cv-1370.) These allegations belie any claim that the Does were acting in concert or in the same series of transactions.[6]

[5] *See also SBO Pictures, Inc. v. Does 1-57*, 2012 U.S. Dist. LEXIS 56578, at *5-6 (D. Md. Apr. 19, 2012) (citing the split of authority and concluding that "the better-reasoned decisions have held that where a plaintiff has not plead that any defendant shared file pieces directly with one another, the first prong of the permissive joinder is not satisfied"); *Malibu Media, LLC v. John Does 1-23*, 2012 U.S. Dist. LEXIS 58860, at *9-10 (E.D. Va. May 30, 2012) (finding that "a plaintiff must allege facts that permit the court at least to infer some actual, concerted exchange of data between those defendants."); *BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447, at *33 (same); *AF Holdings, LLC v. Does 1-97*, 2011 U.S. Dist. LEXIS 126225(N.D. Cal. Nov. 1, 2011) (finding misjoinder where 97 defendants accessed the Internet at different times and were not alleged to know one another or to have been collaborating in some active way); *Boy Racer, Inc. v. Does 1-60*, 2011 U.S. Dist. LEXIS 92994 (N.D. Cal. Aug. 19, 2011) (same); *McGIP*, 2011 U.S. Dist. LEXIS 108109, at *8 (same; plaintiff "failed to show that any of the 149 Doe defendants actually exchanged any piece of the seed file with one another").

[6] *Malibu Media*, 2012 U.S. Dist. LEXIS 152500, at *12 ("According to Plaintiff, Defendants infringed upon Plaintiff's works by uploading pieces of a file containing copyrighted works over a one to two-month period. This loose proximity of Defendants' alleged infringing activity does not show that Defendants are transactionally related."); *Malibu Media, LLC v. Does 1-23*, 2012 U.S. Dist. LEXIS 58860 at *10 (2-1/2 month period between "hit dates" of first and last Does rebutted allegations of concerted action); *Patrick Collins, Inc. v. Does 1-54*, 2012 U.S. Dist. LEXIS 36232, at *15-16 (D. Ariz. Mar. 19, 2012) (two Does who allegedly "logged on to BitTorrent weeks apart" were misjoined); *Liberty Media Holdings, LLC v. BitTorrent Swarm*, 277 F.R.D. 672 (S.D. Fla. 2011) (joinder improper with time span of 2 months); *Raw Films, Inc. v. Does 1-32*, 2011 WL 6840590, at *2 (N.D. Ga. Dec. 29, 2011) ("Downloading a work as part of a swarm does not constitute 'acting in concert' with one another, particularly when the transactions happen over a long period."); *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011) (same).

Deferring a decision on joinder, by contrast,

> effectively precludes consideration of joinder issues at a later point in the proceedings. By not naming or serving a single defendant, [Plaintiff] ensures that this case will not progress beyond its infant stages and therefore, the court will never have the opportunity to evaluate joinder. Deferring a ruling on joinder, then, would "encourage[] [p]laintiffs … to join (or misjoin) as many doe defendants as possible…."

McGIP, 2011 U.S. Dist. LEXIS 108109, at *10 (citation omitted).

For these additional reasons, Plaintiff should not be permitted to obtain from the ISPs broad discovery for multiple subscribers in each of these coordinated cases.

II. PERMITTING EXPEDITED DISCOVERY OF THE INTERNET SERVICE PROVIDERS IN THESE CASES WOULD ENCOURAGE FORUM SHOPPING AND RISK OTHER ILL EFFECTS.

The practical effects of the recent rulings in the coordinated cases in the Central and Eastern Districts of California (*Malibu Media*, 2012 U.S. Dist. LEXIS 152500; *Malibu Media*, 2012 U.S. Dist. LEXIS 148215) are likely to include that Plaintiff—and other serial filers of multi-Doe copyright cases—will pursue subscribers' personal information in courts that are perceived to be more willing to authorize broad discovery of the ISPs. *See AF Holdings, LLC v. Does 1-1,058*, 2012 U.S. Dist. LEXIS 109405, at *75 (D.D.C. Aug. 6, 2012) (noting the split of opinion in multi-Doe cases within the D.C. Circuit and recognizing that "due to the divergence of opinion in this jurisdiction, the potential for forum-shopping exists").

The lack of uniformity of decision among federal courts has rapidly created "destination venues" for multi-Doe actions, with plaintiffs filing mass-Doe complaints and dismissing them *vel non* depending on the judicial assignment. *See, e.g.*, *Millennium TGA, Inc. v. Comcast Cable Communs. LLC*, 2012 U.S. Dist. LEXIS 88369, at *6 (D.D.C. June 25, 2012) (describing "judge shopping" in multi-Doe cases). The benefits of uniformity of decision—and the ill effects of forum shopping—are well-recognized in this Circuit. *American Cas. Co. v. Krieger*, 181 F.3d 1113, 1119 (9th Cir. 1999); *accord Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938).

These risks are magnified here, where Plaintiff has filed hundreds of virtually identical

complaints in districts across the country, and where the subscribers' personal information is used to compile a national database of targets for Plaintiff's "settlement negotiators" to pursue. (*See, e.g.*, Pietz Decl. ¶¶ 9-19, Dkt. 11-2 in No. 3:12-cv-1370.) *Compare Hard Drive Prods.*, 2012 U.S. Dist. LEXIS 45509, at *16 ("At the hearing, plaintiff's counsel disclosed that the information received in response to subpoenas to ISPs is sent to a database where all subscriber information discovered in all of plaintiff's lawsuits is maintained.").[7]

Given the "economics of pornographic copyright lawsuits," in which plaintiffs hope to invest "a single filing fee, a bit of discovery, and stamps" to "send out demand letters to the Does," the incremental additional costs of paying the $350 filing fee for each *properly pleaded* complaint are significant both to plaintiffs and the courts. *Malibu Media*, 2012 U.S. Dist. LEXIS 89286, at *8-9 ("The federal courts are not cogs in a plaintiff's copyright-enforcement business model…. If Malibu desires to vindicate its copyright rights, it must do it the old-fashioned way and earn it"); *BitTorrent Adult Film*, 2012 U.S. Dist. LEXIS 61447, at *38-39 (multi-Doe pleading "results in lost revenue of perhaps millions of dollars (from lost filing fees) and only encourages plaintiffs in copyright actions to join (or misjoin) as many doe defendants as possible"); *K-Beech, Inc. v. John Does 1-41*, 2012 U.S. Dist. LEXIS 31803, at *15 (S.D. Tex. Mar. 8, 2012) (same; "the Court finds that the potential for coercing unjust settlements from innocent defendants trumps K-Beech's interest in maintaining low litigation costs").

And, as noted above, these cases have the collateral effect of imposing significant undue burdens on the ISPs, who have been required to respond to many hundreds of subpoenas for lawsuits that are dismissed voluntarily by plaintiffs soon after the ISPs are subpoenaed or, with increasing frequency, are terminated following motions to reconsider ex parte grants of discovery of the ISPs. The burdens on the ISPs often are compounded by orders issued ex parte that require the ISPs to provide specific information to their customers concerning the pending lawsuits, a

[7] Indeed, it is unclear why many of the "Does" were not pursued in the Central District of California, where plaintiff alleges the IP Addresses that correspond to subscribers originated. Plaintiff does not allege any connection to this District (Plaintiff is based in Malibu, California), and the targeted subscribers include alleged residents of the Central District, including, e.g., residents of Coachella, Indio, Hesperia, La Quinta, Palm Desert and Yucca Valley.

responsibility that goes beyond the duties typically imposed on subpoenaed third parties.

CONCLUSION

For the reasons discussed herein and in the prior briefing submitted on behalf of Doe defendants, the ISPs respectfully submit that these cases should be dismissed or the multiple Doe defendants severed, and that permission to conduct discovery of the ISPs should be denied.

Dated: November 5, 2012

MORRISON & FOERSTER LLP

By: /s/ Benjamin J. Fox
Benjamin J. Fox

Attorneys for
VERIZON ONLINE LLC

Dated: November 5, 2012

LOCKE LORD LLP

By: /s/ Bart W. Huffman (with permission)
Bart W. Huffman

Attorneys for SBC INTERNET SERVICES, INC. d/b/a AT&T INTERNET SERVICES