UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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MALIBU MEDIA, LLC,	Hon. Michael A. Shipp, U.S.D.J.
Plaintiff,	Case No. 3:12-cv-06945 (MAS)
vs.	CIVIL ACTION
JOHN DOES 1-19,	Return date: April 1, 2013
Defendants.	Document Filed Electronically

REPLY BRIEF OF DEFENDANT, JOHN DOE 16, IN SUPPORT OF MOTION TO QUASH SUBPOENA, SEVER AND DISMISS

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POINT I

DEFENDANT JOHN DOE 16 DOES HAVE STANDING TO CHALLENGE THE SUBPOENA, WHICH WOULD SUBJECT THIS DEFENDANT TO UNDUE BURDEN, ANNOYANCE, HARASSMENT AND EXPENSE.

A. Standing

Contrary to plaintiff's arguments in his brief in opposition to this Motion, 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). Defendant John Doe 16 in this case has a personal interest in the personal details sought. Congress recognized in enacting the Cable Franchise Policy and Communications Act that cable or internet subscribers have a **privacy interest** in their personally identifying information retained by ISPs. *See* H.R. Rep. 98-934 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655 at *79 ("The Congress is recognizing a right of privacy in personally identifying information collected and held by a cable company . . ."). Defendant's initial brief in support of her, his or its motion points to several decisions acknowledging defendant's privacy interest in the information sought by plaintiff's subpoena. *See* Db5.

Also contrary to plaintiff's arguments, this defendant does face a substantial burden as delineated in the plethora of cases cited in defendant's initial brief in support of this Motion, many of which describe the pattern of typical copyright trolls[1] such as the plaintiff in the use of

[1] *Third Degree Films v. Does 1-47,* No. 12-10761 (ECF No. 31 at 1) (D. Mass. Oct. 2, 2012)

A copyright troll is an owner of a valid copyright who brings an infringement action "not to be made whole, but rather as a primary or supplemental revenue stream."

(continued...)

extortion and coercive settlement demands, the low probability that the sought-after information actually would identify the correct defendant(s) (if any), and where the plaintiff has no interest in actually bringing these cases to trial. *See* Db6-9.

Notwithstanding the Court's decision in *Malibu Media, LLC, v. John Does 1-30,* No. 12-3896 (ECF No. 23) (D.N.J. Dec. 12, 2012), cited by plaintiff, this Court more recently has held in numerous cases cited in defendant's initial brief in support of this Motion that the release of the same personal information plaintiff here seeks does impose an undue burden on defendant. *See* Db10. Those cases also are in line with Judge Falk's January 17, 2013, decision in *Third Degree Films, Inc., v. John Does 1-110,* No. 12-5817 (ECF No. 7 at 3) (D.N.J. Jan. 17, 2013), wherein he denied a motion for Rule 45 subpoenas and expedited discovery because

> [i]n some instances, the IP subscriber and the John Doe defendant may not be the same individual. Indeed, the infringer might be someone other than the subscriber; for instance, someone in the subscriber's household, a visitor to the subscriber's home or even someone in the vicinity that gains access to the network. *See VPR Internationale v. Does 1-1,017,* No. 11-2068 (ECF No. 15), 2011 WL 8179128 (C.D. Ill. Apr. 29, 2011). As a result, Plaintiff's sought after discovery has the potential to ensnare numerous innocent internet users into the litigation placing a burden on them that outweighs Plaintiff's need for discovery as framed.).

Thus, since this defendant has a privacy right in the personal information sought, and the information sought is not likely to lead to the identity of the actual infringer (if any) or any other discoverable evidence, divulging it to plaintiff most likely would subject defendant to undue annoyance, harassment, and burden.

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[1](...continued)
Id. at n. 1 (citing James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages,* 19 U.C.L.A. ENT. L. REV. 79, 86 (2012)).

B. Personal Jurisdiction

John Doe 16 is willing to provide the Court with this defendant's address *in camera* in order to show that John Doe 16 is not a citizen of and does not reside in New Jersey.

Accordingly, defendant John Doe 16 has standing to Quash the Subpoena and/or Sever and Dismiss John Doe 16 from this case.

POINT II

THE GROWING CONSENSUS - BOTH WITHIN THIS DISTRICT AND ACROSS THE COUNTRY - IS THAT PLAINTIFFS LIKE MALIBU MEDIA ARE IMPROPERLY JOINING UNIDENTIFIED DOE DEFENDANTS IN BITTORRENT COPYRIGHT INFRINGEMENT CASES. FED. R. CIV. P. 20.

In this District, the predominance of the decisions over the last several months in BitTorrent cases has been either to sever and dismiss all defendants except one, or to refuse permission to issue the subpoenas the plaintiff seeks without a pre-approved discovery plan. On October 12, 2012, Judge Hochberg issued four (4) separate but substantively identical unpublished opinions severing and dismissing all unidentified defendants except Doe 1. *See Amselfilm Productions GMBH & Co. KG v. Swarm 6A6DC,* No. 12-3865 (ECF No. 12 at 2-4) (D.N.J. Oct. 10, 2012);[2] *Century Media Ltd. v. Swarm 4234C,* No. 12-3868 (ECF No. 25) (D.N.J. Oct. 10, 2012); *Amselfilm Productions GMBH & Co. KG v. Swarm BB012,* No. 12-3864 (ECF No. 29) (D.N.J. Oct. 10, 2012); and *Century Media Ltd. v. Swarm D1BF1,* No. 12-3867 (ECF No. 10) (D.N.J. Oct. 10, 2012). On November 21, 2012, Judge Patty Schwartz used improper joinder to sever and dismiss nine Doe defendants. *See* ***Malibu Media*** *v. John Does 1-10,* No. 12-7092 (ECF No. 6) (D.N.J. Nov. 27, 2012).

As noted in this defendant's initial brief, in the case of *Third Degree Films, Inc., v. John Does 1-110,* No. 12-5817 (ECF No. 7 at 3) (D.N.J. Jan. 17, 2013), Judge Falk denied the plaintiff's motion for Rule 45 subpoenas and expedited discovery because

> Plaintiff's sought after discovery has the potential to ensnare numerous innocent internet users into the litigation placing a burden on them that outweighs Plaintiff's need for discovery as framed.

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[2]This defendant cited and quoted from this case in defendant's initial brief in support of this Motion.

Judge Dickson of this Court made the same findings and held similarly in two cases on February 26, 2013. *See* ***Malibu Media, LLC****, v. John Does 1-11,* 12-07615 (ECF No. 8) (D.N.J. Feb. 26, 2013); and *Modern Woman, LLC, v. Does 1-X,* 12-04859 (ECF No. 6) (D.N.J. Feb. 26, 2013). In those cases, this Court denied the plaintiffs' requests to issue Rule 45 subpoenas and obtain expedited discovery; but the Court went even further by requiring that the plaintiffs show cause why the Court should not recommend a *sua sponte* dismissal of the cases without prejudice which would allow the plaintiff to re-file individual cases against putative defendants. ***Malibu Media, LLC****, v. John Does 1-11 supra,* at 5; *Modern Woman, LLC, v. Does 1-X, supra,* at 9.[3] Similarly, just one month ago, Judge Hayden quashed *sua sponte* the subpoenas sent to the defendants' ISPs, except as to John Doe #1, and severed and dismissed all claims without prejudice against all defendants except for John Doe #1, "[i]n order to promote case-management efficiency, judicial economy, and fairness . . . ." *See Patrick Collins, Inc., vs. John Does 1-43,* No. 12–03908 (ECF Nos. 33, 32 at 6) (D.N.J. Feb. 15, 2013).

As noted in defendant's initial brief in support of this Motion, courts are concerned that the copyright trolls like the plaintiff in this case abuse and manipulate the joinder mechanism in order to facilitate a low-cost, low-risk revenue model for the adult film companies owning the copyrights. *See* Db18-19. The courts largely have frowned upon this abuse of joinder as a method of extorting settlements from often-innocent persons.

Recognizing the threats posed by mass copyright infringement litigation, courts across the country that previously denied motions for severance have recently reversed course. A

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[3] *Accord* Judge Ann Marie Donio's most recent decision in *Dragon Quest Productions, LLC, v. John Does 1-100,* No. 12-06611 (ECF No. 7) (D.N.J. Mar. 8, 2013), and Judge Donio's other recent decisions on February 13, 2013, cited in defendant's initial brief in support of this Motion. *See* Db13.

survey of many of the most recent decisions confirms that those unpublished opinions cited by Malibu Media as allowing the joinder of numerous unidentified defendants are the exception to the general rule of severance and dismissal. For instance, plaintiff would have this Court believe that early 2012 cases from the Middle District of Florida support its views on joinder. However, cases since then show that the courts in that district are cracking down on the BitTorrent copyright infringement business model. *See, e.g.,* ***Malibu Media, LLC****, v. Does 1-20,* No. 12-1076 (ECF No. 23) (M.D. Fla. Dec. 26, 2012) (severing and dismissing due to improper joinder); ***Malibu Media, LLC****, v. Does 1-67,* No. 12-267 (ECF No. 44) (M.D. Fla. Dec. 27, 2012) (same); ***Malibu Media, LLC****, v. Does 1-13,* No. 12-1417 (ECF No. 18) (M.D. Fla. Dec. 11, 2012) (same).

Similarly, the District of Massachusetts, which previously condoned joinder of numerous Doe defendants, recently changed its mind, explaining the change in its position as follows:

> Since its decision was issued in *Liberty Media,* this Court has entertained a profusion of filings in the mass copyright infringement cases on its docket. Upon further reflection and a deeper understanding of the policy concerns at play, the Court now revisits and amends its holding in *Liberty Media*. The Court continues to maintain that joinder is technically proper under Rule 20(a). The Court now holds, however, that in light of its serious concerns regarding prejudice to the defendants as a result of joinder, it ought exercise the broad discretion granted it under Rule 20(b) and sever the Doe defendants in this action and in similar actions before this Court.
> *Third Degree Films v. Does 1-47,* No. 12-10761 (ECF No. at 10) (D. Mass. Oct. 2, 2012).

Since that time, additional judges from the District of Massachusetts have admonished other BitTorrent copyright troll plaintiffs like Malibu Media for their disinclination to proceed with actual discovery. *See Discount Video Center, Inc. v. Does 1-29,* No. 12-10805 (ECF No. 51) (D. Mass. Nov. 7, 2012) (denying ex parte application for expedited discovery in a consolidated order affecting three separate cases for the plaintiff's failure to produce a discovery plan); *Third Degree Films v. Does 1-72,* No. 12-10760 (ECF No. 28) (D. Mass. Nov. 5, 2012) (severing and

dismissing numerous Doe defendants); *accord West Coast Productions v. Does 1-13,* 12-30087 (ECF No. 20) (D. Mass. Mar. 14, 2013) (quashing all subpoenas and severing all Does except #1).

The landscape in the Eastern District of Michigan is not as clear as Malibu Media would have this Court think. More recently, on January 10, 2013, the tides changed in that District when the court severed and dismissed 14 John Doe defendants from a similar case, simultaneously quashing the subpoenas as to those 14 John Doe defendants in the process. ***Malibu Media, LLC****, v. John Does 1-15,* No. 12-13667 (ECF No. 9) (E.D. Mich. Jan. 10, 2013). In the Northern District of Illinois, the court made a similar ruling recently in severing and dismissing all but the first John Doe defendant. ***Malibu Media, LLC****, v. John Does 1-33,* No. 12-8940 (ECF No. 10) (N.D. Ill. Dec. 19, 2012). Just two months ago, the Northern District of California dismissed and severed all but the first Doe defendant from a case brought by copyright troll Third Degree Films. *Third Degree Films, Inc. v. Does 1-178,* No. 12-3858 (ECF No. 57) (N.D. Cal. Jan. 14, 2013).

Plaintiff asserts in its brief opposing defendant's Motion that defendant merely is engaging in *ad hominem* attacks by citing the multitude of court decisions that question and criticize the motives and tactics of plaintiffs such as this one in BitTorrent litigation. Actually, plaintiff's motives and litigation tactics are relevant to the issues in this Motion in order to show that plaintiffs like Malibu Media are using the courts in these cases for improper purposes. They sue multiple unrelated John Does to avoid separate filing fees in cases they have no intention of bringing to a trial. They use litigation as an extortion scheme to scare a few Does into settling without ever serving process. Then they dismiss the cases, pack up and go home. *See* Citations and arguments in defendant's initial brief in support of this Motion at 7-9.

Accordingly, the John Does in this case are improperly joined and there is good cause for this Court to Vacate its prior Order and Quash the Subpoena issued to Verizon to prevent the release of this defendant's identity, as well as to Sever and Dismiss John Doe 16 from this action.

POINT III

PLAINTIFF IS NOT WITHOUT A REMEDY IF THE SUBPOENA IS QUASHED OR THE JOHN DOES SEVERED AND DISMISSED.

A. Plaintiff could change its practices and file and actually litigate individual cases like this.

As noted above and in defendant's initial brief in support of defendant's Motion to Quash, Sever and Dismiss, besides the plaintiffs' proof problems, one of the problems courts and innocent defendants have had with these cases is that plaintiffs like Malibu Media and their ilk have shown repeatedly that they are not actually interested in prosecuting cases through discovery and rest of the litigation process, but pursue a business model of exacting quick settlements for a fraction of the would-be defendants' potential exposure in the cases. They also have proven to have abused the joinder rules by including tens or hundreds of John Doe defendants in the same case who have no connection to each other so that a plaintiff can save vast sums on filing fees. The courts have seen that the blizzard of BitTorrent cases filed against such high numbers of John Doe defendants has been clogging the courts and deprived them of necessary revenue to operate that otherwise would be derived from the filing of individual cases.

If plaintiffs such as Malibu Media in this case would file, subpoena and actually litigate individual cases as if they are going to trial, many of these problems would be eliminated and fairer to the defendants, and prove to be less of a burden on the courts. As such, the courts would be less inclined to quash subpoenas, or sever and dismiss claims against most of the John Does and the plaintiff could pursue his case.

B. Plaintiff could participate in the Copyright Alert System to reduce the incidents of actual copyright infringement.

Many entertainment industry groups and major internet service providers (ISPs) have teamed up to create the Copyright Alert System. The system is used pre-litigation to educate and

dissuade consumers from participating in illegal methods of sharing copyrighted materials online. *See* Daniel Bean, *Entertainment and Internet Providers Launch Copyright Alert System*, abcNEWS - TECHNOLOGY REVIEW (Feb. 27, 2013, 6:00a.m.) http://abcnews.go.com/blogs/technology/2013/02/entertainment-and-internet-providers-launch-copyright-alert-system/, (last visited March 11, 2013); *see also* Copyright Alert System http://en.wikipedia.org/wiki/Copyright_Alert_System, (last modified March 11, 2013, last visited March 11, 2013).

ISPs Cab1evision, Comcast, Verizon, AT&T, and Time Warner Cable have agreed to participate in this 6-strike system whereby copyright owners send notices of alleged copyright infringement to participating Internet Service Providers, who then forward these notices to their Subscribers in the form of Copyright Alerts. Before initiating litigation, the copyright holder sends up to six (6) alerts of increasing degree of seriousness to the internet subscribers. The first two are "Educational Alerts," then two "Acknowledgment" Alerts that require a response from the subscriber, and finally two "Mitigation" Alerts that impose minor consequences (such as reducing download speeds) to emphasize the seriousness of the problem. The Educational Alert includes links to authorized, legal ways to find the desired copyrighted content. *See* Bean, *supra; and Comcast, AT&T, Cablevision, and other Internet service providers launch Copyright Alert System,* (Feb. 26, 2013, 3:25p.m. PST) http://www.imdb.com/news/ni47909855/, (last visited March 11, 2013).

By using such a system, copyright owners can protect their intellectual property and usually can avoid ensnaring innocent internet subscribers because it is likely that innocent subscribers who receive such notices will investigate who might be using their internet connection for improper purposes and/or take appropriate action to make their connection more

secure. Although older, actual copyright violations may not be remedied with this system, but if the holders of adult film industry copyrights are serious about actually protecting their copyright, rather than using litigation simply as a revenue stream, they will participate in and work to expand this system as necessary.

As such, plaintiff currently has remedies by litigating individual cases and preventing future copyright violations as described above.

Accordingly, defendant John Doe 16's Motion to Quash, and/or Server and Dismiss should be granted.

CONCLUSION

Plaintiff herein has joined 19 unrelated individuals in this suit based solely on the allegation that they downloaded the same works through the same medium, though at entirely different times. As recognized by multiple courts this country, mass joinder in the BitTorrent context is inappropriate. Moreover, since John Doe 16 is not a citizen or resident of New Jersey, the Court should not attempt to exercise personal jurisdiction over this defendant.

Thus, for all of the foregoing reasons and those contained in this defendant's initial brief, John Doe 16 respectfully requests entry of an Order Quashing the Subpoena issued to ISP Verizon to prevent it from divulging defendant's name and other identifying information, and Severing this defendant from and Dismissing this action.

Respectfully submitted,
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Dated: March 11, 2013 By: s/ Leslie A. Farber
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