UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MALIBU MEDIA, LLC, Plaintiff, vs. JOHN DOE subscriber assigned IP address 65.189.10.120, Defendant.	Civil Action No. 1:14-cv-493

REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO QUASH

I. ARGUMENT

On June 13, 2014, Malibu Media filed its complaint and simultaneously sought leave to serve expedited discovery prior to a Rule 26(f) conference. ECF Nos. 1-2. The Court granted Malibu Media's discovery request on June 16, 2014. ECF No. 4. Malibu Media's Rule 45 subpoena sought the Defendant's identity from his ISP provider for purposes of completing service. ECF No. 2-1 at 4. As early as July 31, 2014, Malibu Media was aware the undersigned represented the Defendant and would accept service.[1] Defendant moved to quash the subpoena on the grounds that 1) at this stage, the Defendant's identity is not necessary for Malibu Media to effectuate service; and 2) there exist alternative means for obtaining the Defendant's identity during the discovery process.

A. Malibu Media Misrepresents the "Bellweather" Trial.

"Last June, Plaintiff won the first ever BitTorrent copyright infringement lawsuit to reach trial." ECF No. 9 at 3 (*citing Malibu Media, LLC v. John Does 1, 6, 13, 14 and White*, 950 F. Supp. 2d 779 (E.D. Pa. 2013).

Not exactly.

As an initial matter, Malibu Media often touts the aforementioned "bellwether trial" to distinguish itself from other copyright trolls. Invariably though, they overstate the significance of what has been described as little more than a show trial, and avoid mentioning the facts that led to it.

[1] To this day, Malibu Media refuses to serve the Defendant.

The trial came to be precisely because the court therein found Malibu Media's conduct indicated a lack of intent to litigate its claims or to proceed to to trial.

> [I]t appears that Plaintiff has served the subpoenas allowed by this Court on the ISPs, and has received information enabling Plaintiff to serve the Complaints on certain John Does. However, the record does not show that Plaintiff has, in fact, served a Complaint on any John Doe.

Malibu Media, LLC v. John Does 1, 6, 13, 14 and White, 902 F. Supp. 2d 690, 693 (E.D. Pa. 2012); *id.* at 695-696 ("Plaintiff's counsel candidly advised the Court that the Plaintiff's strategy is, after initiating the lawsuits, to seek leave to serve third-party subpoenas on the ISPs to obtain identification information for the IP addresses specified in Exhibit A to the Complaints. … In this fashion, Plaintiff has initiated hundreds of lawsuits in various district courts throughout the country, but has not yet proceeded to trial in any case.").

In the course of pre-trial procedures, two of the defendants in *White* settled, leaving three defendants for trial. Prior to the June hearing, Malibu Media informed the court 1) it had settled with two of the remaining defendants but wanted a "final judgment" to enter against them; and 2) Bryan White, the third defendant, had reached a high/low agreement with Malibu and wouldn't be paying the whole damages amount, regardless of how the court ruled.[2] *White,* No. 12-cv-2088, ECF Nos. 100, 101 & 102 (E.D. Pa. June 17, 2013). *See also* Exhibit A (Transcript of June 18, 2013 hearing). Lastly, the only party to actually put on witnesses was Malibu Media, but there was no cross examination, no testing of their evidence or methods.

In sum, all of the defendants stipulated to liability and the amount of damages due before the hearing. There was nothing at issue during the one-day bench trial—neither liability, nor sufficiency of the evidence, nor damages.

B. Malibu Media Does Not Need The Defendant's Identity To Effectuate Service.

Malibu Media contends that without the Defendant's identity it cannot protect its rights. ECF No. 9 at 7. Malibu Media's subpoena sought the Defendant's "true name, address, telephone number, and e-mail address" from his ISP provider. ECF No. 2-1 at 4. The express purpose for which Malibu Media sought this information was to serve the Defendant.

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[2] Also worth noting, is that counsel for Mr. White—Jordan Rushie and Marc Randazza—were actively litigating cases on *behalf* of another copyright troll, Liberty Media, at the time. *See, e.g., Liberty Media Holdings v. Does 1-265*, No. 12-cv-04703 (E.D. Pa. 2012) (voluntarily dismissed upon removal from state to federal court).

> Without this information, *Plaintiff cannot serve the Defendant* nor pursue this lawsuit to protect its valuable copyrights.

ECF No. 2-1 at 4 (emphasis added).

> This is all specific information that is in the possession of the Defendant's ISP that will *enable Plaintiff to serve process on Defendant*.

Id. at 6 (emphasis added).

> Obviously, without learning the Defendant's true identity, *Plaintiff will not be able to serve the Defendant with process* and proceed with this case.

Id. at 8 (emphasis added).

Malibu Media asserts that by quashing the subpoena, the Court will be forcing it to litigate against an unknown party in violation of its due process right. ECF No. 9 at 8. Nothing could be further from the truth. All Defendant is asking for is Malibu Media to complete service and get the information it seeks through the proper discovery process, at which point he will no longer be "unknown."

> The Sixth Circuit decided several cases involving John Doe defendants and has not been critical of the practice of using a fictitious name, so long as service and substitution requirements are met. *Cox v. Treadway,* 75 F.3d 230 (6th Cir. 1996); *Nafziger v. McDermott International, Inc.,* 467 F.3d 514 (6th Cir. 2006); *Petty v. County of Franklin, Ohio,* 478 F.3d 341 (6th Cir. 2007).

In re Air Crash at Lexington, Kentucky, No. 06-cv-316, 2008 U.S. Dist. LEXIS 5992, *29 (E.D. Ky. Jan. 25, 2008).

Malibu Media has yet to explain how it will be prejudiced by following proper procedure.[3] Here, Malibu Media is on notice that the undersigned is authorized to accept service, obviating the need for the subpoenaed information, i.e. to serve process ECF No. 8; 8-1 at 35. Still, Malibu Media refuses to serve the Defendant, a fact which calls into question Malibu Media's true motivation in seeking the Defendant's identity.

C. Malibu Media Has Alternative Means Of Obtaining The Subpoenaed Information.

The scope of a subpoena issued under Rule 45 of the Federal Rules of Civil Procedure is also "subject to the general relevancy standard applicable to discovery under Fed.R.Civ.P. 26(b)(1)." *Hilton-Rorar v. State & Fed. Communs., Inc.,* No. 09-cv-01004, 2010 U.S. LEXIS 864, *4 (N.D.

[3] In support of its argument, Malibu Media string cites a number of cases where motions to quash were denied. ECF No. 9 at 7-8. These cases are distinguishable in that the moving defendants did not offer an alternative means of effectuating service. Here, the undersigned is authorized to accept service.

Ohio Jan. 5, 2010) (citing *Laethem Equip. Co. v. Deere and Co*., No. 05-cv-10113, 2007 U.S. Dist. LEXIS 70740, *4 (E.D. Mich. 2007)). Rule 26(b)(2)(C) provides that the Court must limit the scope of discovery sought when that discovery "can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed.R.Civ.P. 26(b)(2)(C). It follows, then, that the need for discovery from a nonparty is diminished when the information is available elsewhere. *Nat'l Benefit Programs, Inc. v. Express Scripts, Inc.*, No. 11-mc-14, 2011 U.S. Dist. LEXIS, *6 (S.D. Ohio July 6, 2011) (*citing Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993)).

The subpoenaed information sought—Defendant's "true name, address, telephone number, and e-mail address"—can be produced more efficiently and less intrusively by the Defendant himself. *Hilton-Rorar,* at *4 (finding an "alternate source of the requested information … demanded in the subpoena can more efficiently be provided by" a party to the action as opposed to a subpoenaed nonparty).

> In a case remarkably similar to this one, the court in *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975 (Fed. Cir. 1993) upheld a district court's refusal to enforce a subpoena issued to a non-party to the underlying out-of-district litigation on grounds that the same documents could have been requested in that underlying litigation from the opposing party.

Prosonic Corp. v. Baker, No. 08-mc-007, 2008 U.S. Dist. LEXIS 36035, *3-4 (S.D. Ohio April 7, 2008) (court found that the [Plaintiff] was "not without his remedies" in the underlying litigation, explaining that the subpoenaed documents were also available from a party).

More so, if, as here, "the material sought by subpoena is readily available, either from a party to the action or from a public source, obtaining it through a subpoena on a nonparty witness often will create an undue burden." James Wm. Moore et al, *Moore's Federal Practice* ¶ 45.03[2] (3d ed. 2014) (*citing Graham v. Casey's Gen. Stores, Inc.*, 206 F.R.D. 251, 253-254 (S.D. Ind. 2002)). *See also Hilton-Rorar,* at *8 (*"*it is certainly possible for a *subpoena duces tecum* to impose an undue burden even though it seeks relevant information.").

Here, Malibu Media has been aware that the undersigned represents the Defendant since July 31, 2014. ECF No. 8-1 at 3. Malibu Media has also been aware that the undersigned is authorized to accept service on behalf of the Defendant. ECF No. 8 at 5; ECF No. 8-1 at 35. Indeed, rather than serve process, pursue its claims and obtain the information it seeks from the Defendant, either via initial disclosures or Rule 34 interrogatories—Malibu Media instead continues to push for one-sided discovery in its favor. A fact which belies any real intent to litigate.

Indeed, a nonparty to an action cannot be subpoenaed to produce documents pursuant to Rule 45 if there is no legal proceeding contemplated. *Taylor v. Litton Medical Products, Inc.*, 19 Fed. R. Serv. 2d 1190, 1191-92 (D. Mass. 1975).

> "One reason for the restrictive interpretation is the potential for abuse of the subpoena. The subpoena invokes the power of the Court and, therefore, has the capacity to disrupt the lives of [the Defendant]. A procedure which allowed parties to send out *subpoenas duces tecum* at will could result in a form of one-sided discovery."

Id.

Nonetheless, Malibu Media argues that it "has every intention to litigate in good faith as demonstrated by its record in this district and nationwide."[4] ECF No. 9 at 1. A cursory review of its 'good faith' in this Circuit alone indicates otherwise:

> [T]he pattern exhibited by [Malibu Media] indicates a lack of intent to litigate these claims, and … these claims are not generally expected to go to trial.

Malibu Media v. Doe, No. 12-cv-13312, 2013 U.S. Dist. LEXIS 141384, *4 (E.D. Mich. Sept. 30, 2013).

> [Malibu Media] in particular has exhibited a pattern of failing to proceed even to discovery; and … all the while, judicial integrity is eroding because the judicial system is being used as an instrument of "essentially an extortion scheme."

Id. (*citing Malibu Media, LLC v. John Does 1 through 10*, No. 12-cv-3623, 2012 U.S. Dist. LEXIS 89286, *13 (C.D. Cal. June 27, 2012).

> "Courts across the country have observed that [Malibu Media] (and other companies involved in this type of litigation) do not seem interested in actually litigating their copyright claims. Rather, they appear to be using the federal courts only to obtain identifying information for the ISP owners and then attempting to negotiate a quick settlement."

Malibu Media LLC v. Doe, No. 12-cv-12598, 2012 U.S. Dist. LEXIS 189311, *21 (E.D. Mich. Oct. 31, 2012) (*citing Malibu Media, LLC v. John Does 1-54*, No. 12-cv-1407, 2012 U.S. Dist. LEXIS 103390, *5 (D. Colo. July 25, 2012)); *vacated on grounds of voluntary dismissal by plaintiff* (*Malibu Media LLC v. Doe*, 2013 U.S. Dist. LEXIS 35893 (E.D. Mich. Mar. 15, 2013)() .

Malibu Media's continued reluctance to serve the Defendant and participate in the discovery process, only serves to underscore that Malibu Media's motivation for subpoenaing the information is for anything but to complete service.

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[4] In support, Malibu Media lists proceedings where it's complaint survived motions to dismiss as proof of its intention to litigate. ECF No. 9 at 10. However, no mention is made as to whether Malibu Media pursued these cases through to discovery or trial.

D. Malibu Media Seeks The Subpoenaed Information For An Improper Purpose.

Malibu Media represented to the Court that it sought the subpoenaed information to effectuate service on the Defendant, and continues to assert that it "cannot proceed and serve Defendant without knowing his identity." ECF No. 9 at 17. What follows, however is more indicative of the truth:

> "It is necessary for Plaintiff to investigate Defendant and determine whether its evidence correctly matches him, or is more appropriately suited against another party, or should not be pursued at all."

Id.[5]

As an "extraordinary remedy," expedited discovery may not be granted where the requested discovery will not give a plaintiff sufficient information to name an infringer. *Robinson v. Doe*, No. 07-cv-729, 2008 U.S. Dist. LEXIS 95420, *4 (S.D. Ohio Nov. 24, 2008) (collecting cases). *See also Whiteside v. Thalheimer,* No. 13-cv-408, 2014 U.S. Dist. LEXIS 112830, *12 n.5 (S.D. Ohio July 3, 2014) (citing *Gillespie v. Civiletti*, 629 F.2d 637 (9th Cir. 1980)).

On June 13, 2014, Plaintiff sought leave to take "limited, immediate discovery." ECF No. 2-1 at 3. In doing so, Plaintiff represented: "Plaintiff is suing Defendant." *Id*.

There can be no dispute that Malibu Media told the Court that with the results of the subpoena in hand it would be able to "identify" the Defendant and serve process. Now Malibu Media states that the subpoena results are in fact insufficient to "identify" the Defendant of violating its copyrights, and that expedited discovery is merely the beginning of an extensive and highly intrusive discovery odyssey for the Defendant.[6] *See e.g. Pac. Century Int'l, Ltd. v. Does 1-101*, No. 11-cv-02533, 2011 U.S. Dist. LEXIS 124518, *7-9 (N.D. Cal.Oct. 27, 2011); ECF No. 9 at 10 ("Without

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[5] Malibu Media's "additional evidence" relies on the misguided and unexplained contention 'that a subscriber who uses his own internet connection is proof of infringement.' ECF No. 9 at 17-19. "[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. 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 … 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. *Patrick Collins, Inc. v. John Does 1-33*, No. 12-cv-13309, 2013 U.S. Dist. LEXIS 50674, *23 (E.D. Mich. Feb. 27, 2013) (citing *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012)).

[6] An example of Malibu Media's 'assessment' practices of its 'evidence' includes attempts at deposing neighbors and employers. *See e.g., Malibu Media v. John Doe*, No. 13-cv-06312 , Dkt. No. 114 (N.D. Ill. Sept. 24, 2014).

knowing Defendant's identity, Plaintiff will not be able to examine its evidence and determine if it is proceeding against the correct party, or evaluate any of Defendant's defenses.").

Even if the court had not been told before precisely the opposite of what it is being told now, Rule 15(c)(3) permits an amended complaint to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party to begin with. *Smith v. City of Akron*, 476 Fed. Appx. 67, 70 (6th Cir. 2012) (collecting cases). *See also Triplett-Fazzone v. City of Columbus Div. of Police,* No. 12-cv-00331, 2013 U.S. Dist. LEXIS 56586, *23 (S.D. Ohio Apr. 19, 2013) (no relation back when plaintiff has no knowledge of defendant's identity).

In this case, there is no "mistake concerning the identity of the proper party," as required by Rule 15(c)(3). Rather, Malibu Media admittedly lacks knowledge of the correct identity of the proper party. Malibu Media fully intended to sue the Defendant, it did so, and Defendant, admittedly, may turn out to be the wrong party. Rule 15(c) is not designed to remedy such mistakes. *City of Akron,* at 69.

II. CONCLUSION

Malibu Media has not been honest with the Court. It pushed for expedited discovery on the grounds it was necessary to complete service, but when presented with an alternative method—namely, serving the Defendant's attorney—it refuses to effectuate service.

Instead, we learn that Malibu Media seeks the information not to serve the Defendant, but rather so it may conduct an unfettered assessment of the strength of its case and ostensibly, the assets of the Defendant before proceeding any further. Neither instance falls within the intended purpose of expedited discovery or the Copyright Act.

Dated: September 26, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

/s/ Joseph A. Bahgat