

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

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

PLAINTIFF’S MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiff, Malibu Media, LLC (“Plaintiff”), by and through undersigned counsel and pursuant to S.D. Ohio Civ. R. 7.2(a)(2), hereby submits its Motion for Leave to File Sur-Reply to Defendant’s Reply to Plaintiff’s Opposition to Motion to Quash (CM/ECF 10), and states:

1. On August 22, 2014, Defendant filed his Motion to Quash Subpoena to TWC. (CM/ECF 8).
2. Plaintiff’s Response in opposition to Defendant’s Motion, which demonstrates that Defendant failed to provide a valid reason under Fed. R. Civ. P. 45 to quash the subpoena and that it is necessary for Plaintiff to receive Defendant’s identifying information, was filed on September 12, 2014. (CM/ECF 9).
3. Defendant’s Reply was filed on September 26, 2014. (CM/ECF 10).
4. In Defendant’s Reply, Defendant raises for the first time three new arguments: (1) Plaintiff should be denied discovery pursuant to Fed. R. Civ. P. 26; (2) Plaintiff filed the suit

with an improper purpose; (3) Plaintiff cannot relate back its Complaint. All of these arguments are newly raised and lack merit.

5. “This Court has routinely found good cause exists to permit a party to file a sur-reply to address an issue raised for the first time in a reply brief.” *Geiger v. Pfizer, Inc.*, 271 F.R.D. 577, 580 (S.D. Ohio 2010).

6. Plaintiff respectfully requests this Court grant the instant Motion for Leave to File Sur-Reply so that Plaintiff may properly address and explain:

(A) Defendant’s new argument that the Court should not allow Plaintiff to take discovery pursuant to Fed. R. Civ. P. 26 lacks merit because the discovery response from the ISP is necessary for Plaintiff to ultimately prove its case and show that Time Warner correctly correlated the IP address to Defendant and that Defendant is the proper party. Further, Defendant does not have standing to raise this argument because he is not facing any inconvenience, burden, or expense. Indeed, the ISP is the one responding to the subpoena and they have not objected to compliance. *See Vision Films Inc. v. Does 1-41*, 3:13-CV-128, 2013 WL 5943941 (E.D. Tenn. Nov. 5, 2013) (“The Sixth Circuit has observed that ‘[o]rdinarily, a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought.’”)

(B) Defendant’s new argument that Malibu Media’s suit was filed for an improper purpose also lacks merit. Defendant states that because Malibu Media will not blindly serve a defendant, it has no intent to litigate. *See* CM/ECF 10 at *6-8. This argument is disingenuous. Courts have cautioned Malibu Media to not proceed against a defendant it does not have a good faith basis to do so. *See e.g. Malibu Media v. John Doe*, 13-cv-2707 (D. Md.

July 14, 2014) (“I find that Malibu MAY AMEND the Complaint to name a person other than the Subscriber as the defendant in this case (and, in fact, I note that Malibu likely is required to do so by Fed. R. Civ. P. 11 if it no longer believes that it has named the proper defendant”). And, Malibu Media has a policy of not proceeding against certain defendants. *See* Declaration of Colette Field CM/ECF 2-2 (“We do not pursue our claims against all Doe Defendants. For example, once receiving discovery, we may learn that some Doe Defendants are on active duty in the military, a coffee shop with open wireless, or have some other circumstance that would prevent us from pursuing our claims”). Malibu Media should not be forced to serve someone who may be a 90 year old grandmother, when her 30 year old grandson, who lives in her household and takes care of her, is the most likely person responsible for the infringement. This is not only just and logical, but also judicially efficient.

Defendant states “[w]e learn that Malibu Media seeks the information not to serve the Defendant, but so it may conduct an unfettered assessment of the strength of its case and ostensibly, the assets of the Defendant before proceeding any further.” CM/ECF 10 at 7. This is not an improper purpose. Indeed, if a lawyer proceeded against a defendant without evaluating the strength of the case on behalf of his client, or the likelihood of recovery before expending the client’s funds, that lawyer would commit malpractice. It is in the best interests of Plaintiff, Defendant, and the Court to allow Plaintiff to assess its case knowing Defendant’s identity before proceeding to serve Defendant.

Further, Defendant’s claim of highly intrusive discovery is also misplaced. Plaintiff is not seeking any discovery other than the limited discovery set forth in its motion for leave, namely the Defendant’s name and contact information. Once Defendant is served, Plaintiff will engage in discovery like any other litigant. If Defendant raises the defense that his wi-fi was

hacked by a neighbor, Plaintiff will depose his neighbors during the course of regular discovery. This is not for any other purpose than to defeat potential defenses and prove its case. Plaintiff did not make any misrepresentations to the Court. At this time it is suing Defendant and it is seeking limited discovery. Defendant cannot possibly be prejudiced by Plaintiff learning his name now rather than during the course of discovery.

(C) Finally, Defendant's new argument that Malibu Media may not be able to relate back the Complaint lacks merit. If Defendant is not the infringer but it is instead someone in his household, Plaintiff will add the other party and dismiss Defendant. Whether Plaintiff can relate back its Complaint is not relevant to whether this Court should allow Plaintiff to proceed with early discovery.

7. Here, good cause exists to grant the subject motion under S.D. Ohio Civ. R. 7.2(a)(2). Defendant's motion did not raise the three issues above and Malibu Media has demonstrated good cause to file a sur-reply and respond.

WHEREFORE, Plaintiff respectfully requests this Court grant the subject Motion for Leave to File Sur-Reply.

DATED: October 3, 2014.

Respectfully submitted,

YMF, INC.: The Law Office of Yousef M. Faroniya

/s/ Yousef M. Faroniya

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 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.

By: /s/ Yousef M. Faroniya
Yousef M Faroniya