

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

MALIBU MEDIA, LLC,)	
)	
Plaintiff,)	Civil Case No.: 3:13-cv-01579-PDB
)	
v.)	
)	
CURT VANDENHEUVEL,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO MOTION TO QUASH
SUBPOENA AND MOTION FOR PROTECTIVE ORDER BY DEFENDANT & THIRD-
PARTY AMBER VAN DEN HEUVEL [CM/ECF 82]**

I. INTRODUCTION

Defendant is one of the most egregious copyright infringers undersigned has ever encountered and his feigned ignorance of the infringement in this case is both offensive and appalling. To explain, Defendant’s ISP recently produced two hundred seventy (270) Digital Millennium Copyright Act (“DMCA”) notices of infringement and five (5) Copyright Alert System (“CAS”) notices that were sent to Defendant between 2012 and 2014. Every notice produced pertained to unlawful BitTorrent use and, of the first 29 notices, 23 were for infringement of adult content similar to Plaintiff’s. There is no question that Plaintiff is suing the right person.

Notwithstanding the foregoing, Defendant denies liability. Defendant is either lying or covering for a family member. Deposing Defendant’s daughter is both necessary and proper because: (a) she resided in Defendant’s home during the period of recorded infringement; (b) Plaintiff’s expert located evidence on Defendant’s computer proving she used BitTorrent; (c) Plaintiff’s additional evidence list of third party BitTorrent infringements correlates to her

favorite music, movies, and TV shows; and (d) Defendant would not stipulate that she is not the infringer. For the foregoing reasons, as explained more fully below, this Court should deny the subject Motion.

II. FACTS

A. Defendant and His Family Are the Only Possible Infringers

IP address 50.139.254.161 was used to download twenty nine (29) of Plaintiff's movies between August 27, 2013 and November 12, 2013. Defendant's ISP correlated the IP address to Defendant. Defendant stipulated that he has no evidence to suggest that one of his neighbors could have used his internet to commit the infringement since his wireless internet signal was password protected and they each have their own internet accounts. *See* CM/ECF 50. Because the infringement occurred over a few months, the infringer was not a short term guest or other interloper. The DMCA and CAS notices prove that someone with regular longstanding access to Defendant's internet connection consistently used BitTorrent to download copyrighted movies. The only individuals residing in Defendant's household between August 27, 2013 and November 12, 2013 were Defendant, his wife, his daughter and his son. Deposition of Curt Van Den Heuvel ("Depo."), p. 8:16-19 ("Q: During the period between August 27th, 2013 and November 12th, 2013, both of your children were living at home with you, correct? A: Yes.").

B. Comcast Produced 270 DMCA Notices of Infringement and 5 Copyright Alert System Notices

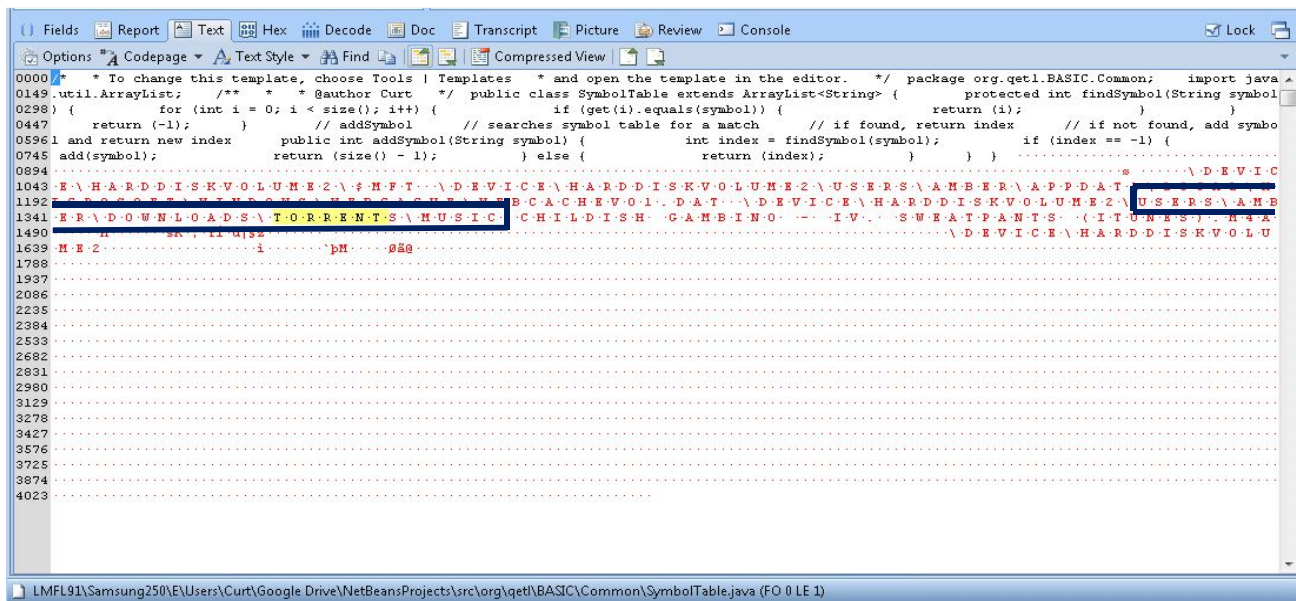
On January 20, 2016, Comcast produced 270 DMCA Notices of Infringement and 5 Copyright Alert System notices sent to Defendant between 2012 and 2014. The number of notices is staggering and undermines Defendant's false deposition testimony claiming he "believe[s] [he received] only about two or three." Depo., p. 22:19-21. Defendant testified that the last notice he received was "in March of 2013, and there was nothing after that." Depo.,

p.27:20-21. This testimony is also false. 263 notices were sent between March 2013 and 2014; only 7 DMCA notices were sent *prior* to March 2013. Defendant was aware or should have been aware of massive copyright infringement emanating from his home.

Further, of the first 29 notices produced by Comcast, 23 were for adult content movies similar to Plaintiff's.¹ And, although Plaintiff has not yet reviewed every single one, a vast majority of the notices pertain to BitTorrent downloads of music by rapper Kanye West and Katy Perry. Both of those artists are "liked" by Defendant's daughter on her Facebook page.

C. Defendant's Daughter Had a "Torrents" Folder on Defendant's Computer

Plaintiff's computer forensic expert examined Defendant's computers. *See* Plaintiff's Expert Witness Report, attached hereto. A keyword search for the word "torrent" on Defendant's Gateway laptop revealed a folder called "Torrents." Although the folder had been deleted, it existed in the file path: "\Users\Amber\Downloads\Torrents\Music."



¹ None of the DMCA notices or CAS notices are attached to the instant Motion as they were designated Confidential pursuant to the protective order at CM/ECF 85. The last notice was sent March 30, 2014, approximately four (4) months after this lawsuit was filed and one month before Defendant received notice of same from his ISP. Defendant was notified of the lawsuit by Comcast on or about April 21, 2014. *See* CM/ECF 15, p. 10.

Amber was the primary user of the Gateway laptop computer. Depo., p. 38:17-19 (“Q: And the Gateway laptop, was that primarily used by your daughter? A: Yeah.”). *See also e.g.* p. 37:6-7 (“A: . . . My daughter used my laptop quite frequently.”) The above screenshot showing the file path for the “Torrents” folder proves that Amber had her own user login for the Gateway laptop. Defendant falsely testified, however, that she did not have a separate user login and that she used his. Depo., p. 38:24-25 (“Q: Did you have separate user log-ins? A: No, she just used my log in.”); p. 39:7-9 (“Q: So when she used the computer she didn’t have a log in of her own? A: No, she didn’t.”). Amber’s user account was deleted from the machine at some point prior to its production to Plaintiff.

D. Plaintiff’s List of Third Party BitTorrent Infringements Implicates Defendant’s Daughter

Defendant did not monitor his daughter’s use of the Gateway laptop computer. Depo., p. 72:23-25. And, he testified that if she had used BitTorrent he would not necessarily have known about it. *Id.* at p. 73:14-19 (“Q: If Amber had been using BitTorrent on that computer would you have known about it? . . . A: I can’t say for certain . . .”). Plaintiff’s additional evidence list ties Defendant’s IP address to BitTorrent infringement of numerous third party works. Many of the third party infringements correlate with Defendant’s daughter’s Facebook “likes” including but not limited to: “Drake,” “American Dad,” “Arrested Development,” “Community,” “Doctor Who,” “Family Guy,” “Futurama,” “Modern Family,” “The Big Bang Theory,” “Lana Del Ray,” and “Trey Songz.” There are approximately one hundred (100) files on Plaintiff’s additional evidence list that correlate to Defendant’s daughter²:

² During last week’s telephonic hearing, defense counsel attempted to argue that Plaintiff’s evidence of third party infringements is irrelevant because Defendant testified he subscribes to Netflix and other services. Plaintiff’s additional evidence has nothing to do with such services. Each entry on Plaintiff’s additional evidence list pertains to BitTorrent downloads, not streaming content from subscription services.

Hit Date UTC	Filename
07/12/2013	01 Right Above It (feat. Drake).mp3
07/29/2013	American Dad - The Complete Season 6 [HDTV]
07/29/2013	American Dad - The Complete Season 7 [HDTV]
07/29/2013	American.Dad.S08E01.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E02.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E03.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E04.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E05.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E06.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E08.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E09.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E11.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E12.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E13.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E14.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E15.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E17.HDTV.x264-LOL.mp4
07/29/2013	American.Dad.S08E19.HDTV.x264-LOL.mp4
11/04/2013	American.Dad.S09E03.HDTV.x264-LOL.mp4
11/12/2013	American.Dad.S09E04.HDTV.x264-LOL.mp4
05/26/2013	Arrested.Development.S04E01.1080p.WEBRip.AAC2.0.H.264-NFRiP [PublicHD]
05/26/2013	Arrested.Development.S04E02.1080p.WEBRip.AAC2.0.H.264-NFRiP [PublicHD]
10/30/2013	B.o.B Feat 2 Chainz - HeadBand.mp3
07/12/2013	Big Sean Feat Lil Wayne & Jhene Aiko - Beware.mp3
10/30/2013	Chris Brown - Love More (explicit) Ft. Nicki Minaj Esubs[720p x264]-BFAB-[P2PDL]
11/09/2013	Chris Brown - Love More (feat. Nicki Minaj) - Single
10/12/2013	Chris Brown Feat Nicki Minaj - Love More.mp3
05/13/2013	Community.S04E01.HDTV.x264-LOL.mp4
05/13/2013	Community.S04E04.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E05.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E07.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E08.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E09.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E11.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E12.HDTV.x264-LOL.mp4
07/03/2013	Community.S04E13.HDTV.x264-LOL.mp4
03/31/2013	Doctor.Who.2005.7x06.The.Bells.Of.Saint.John.720p.HDTV.x264-FoV.mkv
04/07/2013	Doctor.Who.2005.7x07.The.Rings.Of.Akhaten.720p.HDTV.x264-FoV.mkv
04/14/2013	Doctor.Who.2005.7x08.Cold.War.720p.HDTV.x264-FoV.mkv
04/21/2013	Doctor.Who.2005.7x09.Hide.720p.HDTV.x264-FoV.mkv
04/28/2013	Doctor.Who.2005.7x10.Journey.To.The.Centre.Of.The.Tardis.720p.HDTV.x264-FoV.mkv
05/05/2013	Doctor.Who.2005.7x11.The.Crimson.Horror.720p.HDTV.x264-FoV.mkv
05/12/2013	Doctor.Who.2005.7x12.Nightmare.In.Silver.720p.HDTV.x264-FoV.mkv
05/19/2013	Doctor.Who.2005.7x13.The.Name.Of.The.Doctor.720p.HDTV.x264-FoV.mkv
10/12/2013	Fall Out Boy - The Phoenix.mp3
10/10/2013	Family Guy Porn 2 Vids (1 Hardcore 1 Lesbian)

10/23/2013	Family.Guy.S12E01.HDTV.x264-LOL.mp4
11/12/2013	Family.Guy.S12E04.HDTV.x264-LOL.mp4
08/01/2013	Futurama.S07E21.Assie.Come.Home.WEB-DL.x264-FU[ettv]
09/05/2013	Futurama.S07E26.HDTV.x264-2HD[ettv]
06/21/2013	Futurama.S07E14.HDTV.x264-EVOLVE.mp4
06/21/2013	Futurama.S07E15.HDTV.x264-EVOLVE.mp4
06/28/2013	Futurama.S07E16.HDTV.x264-SYS.mp4
07/05/2013	Futurama.S07E17.HDTV.x264-ASAP.mp4
07/13/2013	Futurama.S07E18.REPACK.HDTV.x264-ASAP.mp4
07/21/2013	Futurama.S07E19.HDTV.x264-EVOLVE.mp4
07/27/2013	Futurama.S07E20.HDTV.x264-EVOLVE.mp4
08/10/2013	Futurama.S07E22.HDTV.x264-ASAP.mp4
08/16/2013	Futurama.S07E23.HDTV.x264-EVOLVE.mp4
08/22/2013	Futurama.S07E24.HDTV.x264-EVOLVE.mp4
08/29/2013	Futurama.S07E25.HDTV.x264-EVOLVE.mp4
09/05/2013	Futurama.S07E26.720p.HDTV.x264-EVOLVE.mkv
10/15/2013	How.I.Met.Your.Mother.S09E05.HDTV.x264-2HD.mp4
10/23/2013	How.I.Met.Your.Mother.S09E06.REPACK.HDTV.x264-ASAP.mp4
04/15/2013	Iron Man 005 - (2013) (Digital) (Zone-Empire).cbr
09/08/2013	J Cole Feat TLC - Crooked Smile [Explicit Single Version].mp3
10/12/2013	Juicy J Feat Wale & Trey Songz - Bounce It.mp3
11/10/2013	Kevin Rudolf - Welcome to the World (feat. Kid Cudi) [Single] [2009]-Sebastian[Ub3r]
10/30/2013	Lana Del Rey - Young And Beautiful.mp3
07/12/2013	Lil Wayne Feat 2 Chainz - Rich As F_k.mp3
11/09/2013	Migos feat. Drake - Versace -.mp3
11/10/2013	Migos Ft. Drake - Versace.mp3
09/08/2013	Miley Cyrus - We Can't Stop.mp3
03/23/2013	Modern.Family.S04E05.HDTV.x264-LOL.mp4
03/23/2013	Modern.Family.S04E07.HDTV.x264-LOL.mp4
03/23/2013	Modern.Family.S04E09.HDTV.x264-LOL.mp4
03/23/2013	Modern.Family.S04E13.HDTV.x264-LOL.mp4
03/23/2013	Modern.Family.S04E15.HDTV.x264-LOL.mp4
03/23/2013	Modern.Family.S04E16.HDTV.x264-LOL.mp4
09/07/2013	Monsters University 2013 DVDRip XviD-TASTE
10/10/2013	Monsters.University.2013.BRRip.XviD.AC3-RARBG
10/30/2013	Panic At The Disco - Pretty Odd [2008][CD+SkidVid_XviD+Cov]
11/09/2013	Panic! At the Disco - Miss Jackson (feat. Lolo) - Single
09/03/2013	Panic! At The Disco- Vices And Virtues
07/28/2013	Pirates of the Caribbean - Dead Man's Chest (2006) [1080p]
10/12/2013	Pirates of the Caribbean On Stranger Tides (2011) DVDRip XviD
09/08/2013	Rascal Flatts - Greatest Hits Vol 1 [Mp3][www.lokotorrents.com]
04/01/2013	Robin Thicke - Blurred Lines ft. T.I., Pharrell UNRATED.mp4
07/12/2013	Rocko Feat Future & Rick Ross - U.O.E.N.O..mp3
08/14/2013	Taylor Swift - Our Song.mp3
07/01/2013	The Avengers Ts 2012 XviD-RedBlade.avi
11/12/2013	The Dark Knight Rises 2012 DVDRip XViD - FT5
06/16/2013	The Perks of Being a Wallflower (2012) 720p_BRRip_scOrp_sujaidr
03/23/2013	The.Big.Bang.Theory.S06E10.HDTV.x264-LOL.mp4

03/23/2013	The.Big.Bang.Theory.S06E14.HDTV.x264-LOL.mp4
03/23/2013	The.Big.Bang.Theory.S06E16.HDTV.x264-LOL.mp4
03/23/2013	The.Big.Bang.Theory.S06E17.HDTV.x264-LOL.mp4
05/05/2013	The.Big.Bang.Theory.S06E20.HDTV.x264-LOL.mp4
05/12/2013	The.Big.Bang.Theory.S06E23.HDTV.x264-LOL.mp4
11/09/2013	The.Big.Bang.Theory.S07E07.HDTV.x264-LOL.mp4

E. Defendant Would Not Stipulate That Another Member of His Household is Not the Infringer

Plaintiff asked Defendant if he would stipulate that neither his wife nor kids committed the infringement. Defendant was only willing to stipulate that his wife is not the infringer but would not so stipulate regarding his kids “because he has no certain knowledge regarding the attestations requested.” See E-mail of 12/16/2015 attached. Defendant also testified that he did not ask either of his kids whether they ever installed a BitTorrent client on his computers or if they ever erased any data from drives before they were produced. Depo., 103:23-25, 104:1, 105:18-21.

F. Defense Counsel Refused to Inform Plaintiff Whether He Represented Any Other Members of Defendant’s Family or Provide Alternate Dates of Availability for the Deposition Despite Repeated Requests

On December 16, 2015, undersigned counsel sent defense counsel an email stating “I will make arrangements to depose your client January 13, 2016 . . . I may also schedule a deposition of one or both of your client’s children at/near that time. Do you plan to represent them such that you can accept service of a subpoena on their behalf or should I make arrangements to have them personally served?” See E-mail of December 16, 2015, attached. Defense counsel’s response merely stated “should you seek to subpoena his family for such depositions, we will move to quash and for a protective order.” See E-mail of December 16, 2015. On January 4, 2015, Plaintiff’s counsel served Defense counsel with a copy of the notice of deposition and subpoena that it intended to serve on Defendant’s daughter. The e-mail stated: “I have set the deposition for January 20, 2016. *If this date does not work for your schedule please send alternate dates.*

Thank you.” *See* Email of January 4, 2016 (emphasis added). Defense counsel responded within ten (10) minutes stating “Amber is not available on the 20th.”³ *See* E-mail of January 4, 2016. Plaintiff’s counsel responded asking defense counsel to “please confirm that you represent Amber . . . *If you do represent Amber please tell me what alternate dates she is available for a deposition per my prior email. Please also let me know if you will accept service of the subpoena on her behalf. I am not going to cancel her deposition on January 20th without having an alternate date lined up.*” *See* Email of January 4, 2016 (emphasis added).

Two days later, with no word from defense counsel, Plaintiff’s counsel e-mailed him “because I have not heard from you, the subpoena and notice for Amber’s deposition will be sent to the process server today. We have confirmed the date, time, and location with the Court reporting company and the deposition will go forward on January 20 as noticed.” *See* Email of January 6, 2016. Defense counsel, still refusing to provide alternate dates of availability, responded “as you were previously advised, we will file an [*sic*] Motion to Quash and for a Protective Order. We do not agree to having the deposition on the 20th.” E-mail of January 6, 2016. Undersigned counsel responded:

As a resident of your client’s household and user of the computers and internet that were used to commit the infringement, Amber has information that is relevant to this case. This is especially so in light of the fact that your client denies having personally committed the infringement and your representation that he will not stipulate that she did not commit the infringement because “he has no certain knowledge regarding” the same. As such, the deposition is proper and we will oppose your motion(s).

See E-mail of January 6, 2015.

As demonstrated herein and represented during last week’s telephonic hearing, had defense counsel merely informed Plaintiff of Defendant’s daughter’s medical procedure

³ How defense counsel could have been retained, contacted Defendant’s daughter, ascertained her availability, and responded to Plaintiff all within ten (10) minutes is questionable.

scheduled for January 20 and provided an alternate date for the deposition, undersigned would have gladly moved the deposition. However, defense counsel provided no explanation for Amber's unavailability (choosing instead to attempt to make Plaintiff appear unreasonable and obstinate) and provided no alternate dates. Thus, Plaintiff had no choice but to continue as scheduled.

III. LEGAL STANDARD

Under Rule 26 "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case" Fed. R. Civ. P. 26(b)(1). "The scope of discovery is broad 'in order to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise and to promote settlement.'" *Moss v. GEICO Indem. Co.*, No. 5:10-CV-104-OC-10TBS, 2012 WL 682450, at *1 (M.D. Fla. Mar. 2, 2012) (citing *Coker v. Duke & Co., Inc.*, 177 F.R.D. 682, 685 (M.D.Ala.1998)). "Relevance is 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Id.* (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253(1978)).

"A party or any person from whom discovery is sought may move for a protective order . . . in the court for the district where the deposition will be taken." Fed. R. Civ. P. 26(c)(1). The court may only grant such a motion for good cause shown in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" *Id.* "The burden is on the movant to show the necessity of the protective order, and the movant must meet this burden with a 'particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'" *Ekokotu v. Fed. Exp. Corp.*, 408 F. App'x 331, 335-36 (11th Cir.

2011) (*quoting United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir.1978).). “In addition to requiring good cause, the district court must ‘balance the interests of those requesting the order.’” *Id.* (Citation omitted).

IV. ARGUMENT

A. Defendant’s Daughter Possesses Relevant Information

As demonstrated herein, abundant evidence links Defendant’s daughter to BitTorrent use. Defendant acknowledges his daughter may have relevant information since she can testify about “whether [she] ever witnessed her father downloading or sharing Plaintiff’s porn, [and] whether Amber herself downloaded the porn” Motion, p. 3. Further, she was a primary user of Defendant’s computers and could have used BitTorrent on the computer without Defendant knowing. Depo., p. 73:14-19. She may also provide testimony that directly contradicts or undermines that of Defendant *i.e.* by testifying that she had her own user login on the Gateway laptop – a fact proved true by Plaintiff’s expert’s examination. *See* Facts, section C, *supra* at p. 4. Further, she may possess information unknown to Defendant regarding Defendant’s computers. For example, Defendant did not know if any of his children had ever installed any “data sanitizing utilities” on his computers but he admits that it is possible. Depo., p. 88:19-25, 89:1. Defendant was also unaware of whether anyone in his household erased data from either of the two flash drives he produced since he “didn’t ask them that.” *Id.* at 105:18-21. Significantly, as Plaintiff’s expert report makes clear, CCleaner a “software used to . . . delet[e] files” was used on Defendant’s “Data Stick Pro Flash Drive and Dane Flash Drive on November 10, 2015 – *just 8 days prior to imaging the devices.*” Expert Report, pp. 4-7. Defendant’s daughter could have erased files or know who did.

In short, there is no legally cognizable basis for barring Plaintiff from obtaining evidence helpful to its case. The purpose of discovery is to “make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S. Ct. 983, 986-87, 2 L. Ed. 2d 1077 (1958). As explained to both Defendant and his counsel, BitTorrent copyright infringement cases are a “whodunit.” Proper preparation requires Plaintiff to leave no stone unturned – especially when abundant evidence implicates at least one other person in the infringement.⁴ There is no question that massive BitTorrent infringement emanated from Defendant’s internet. The only possible infringers are Defendant, his wife, his son, his daughter, and any combination of the foregoing. If Defendant is covering for his daughter (or another family member), Plaintiff has the right to investigate the same. Plaintiff’s discovery into other additional infringers within Defendant’s home is proper.

B. Defendant’s Motion Fails to Demonstrate the Necessity of a Protective Order Under Binding 11th Circuit Law

Black letter law makes clear that the burden rests on Defendant and his daughter to show that a protective order is proper. They have not done so here. Neither made a “particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *Ekokotu*, 408 F. App'x at 335-36. To the contrary, only stereotyped and conclusory statements are made in support of the instant Motion. To wit: Defendant argues “[g]ood cause exists for a protective order to prevent the needless harassment . . . about the named Defendant . . . and his alleged use of a computer to download or share Plaintiff’s porn, all subject to Plaintiff’s attempts

⁴ Defendant’s assertion that it is “disconcerting [] why Plaintiff found it necessary to depose Defendant’s daughter . . . and not Defendant’s wife or son[,]” is irrelevant and wrong. Motion, p. 2, ¶ 8. As demonstrated herein, the evidence tied to Defendant’s daughter is overwhelmingly persuasive. No similar evidence exists pointing to either Defendant’s wife or son. Notwithstanding, their deposition testimony would be equally relevant and proper as the only two other possible infringers.

to try to extract a settlement out of Defendant.” Motion, p. 5. Defense counsel’s repeated accusation that Plaintiff’s only goal is to “try to extract a settlement out of Defendant[,]” is frivolous and conclusory. Motion, p. 7. *See also e.g. id.* at p. 2 (“Malibu’s strategy and its business models are to extort, harass, and embarrass defendants to persuade defendants to pay settlements”); *id.* at ¶ 34 (“Plaintiff’s desire in deposing Amber, Defendant’s daughter, is to embarrass and annoy him into a concession.”). Settlement has not been broached since mid-September 2015 when defense counsel made his first appearance.⁵ Defendant cannot point to a single instance of malfeasance by Plaintiff in this litigation. To the contrary, Plaintiff has litigated in good faith from the start and only seeks to uncover the game of hide-the-ball being played by Defendant and obtain redress for the infringement suffered.

Further, Defendant should not be heard to argue that Plaintiff is attempting to coerce Defendant to settle by publicly embarrassing him. At no point in this litigation has Defendant sought to remain anonymous. Plaintiff’s well-known and widely stated nationwide policy in these cases is to *never* object to a defendant’s request to litigate as “John Doe” so as to avoid any undue embarrassment. Had Defendant sought such relief, Plaintiff would not have objected. Having failed to seek such relief, however, Defendant’s argument should fall on deaf ears.

C. Defendant’s Motion is Untimely

“Upon receipt of objectionable discovery, a party has a duty to seek relief immediately i.e. without waiting until the discovery is due or almost due.” Middle District Discovery (2015) at VII(B) (emphasis added). In December, Defendant was aware of Plaintiff’s intent to depose the other members of his household. *See* Facts, section F, *supra* at p. 7. Defense counsel was

⁵ Notwithstanding, the parties are currently scheduled for a settlement conference before Judge Toomey on February 16, 2016. To save Plaintiff the cost of flying across the country undersigned counsel intends to confer with defense counsel prior to the settlement conference to see if settlement is possible in advance of the conference.

served with a copy of the notice and subpoena for Defendant's daughter on January 4, 2016. The instant motion was filed two-weeks later, on January 18, 2016 – a mere two (2) days before the deposition was scheduled to take place. Defendant's Motion is untimely and no justification was offered for the delay.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court deny the subject Motion.

Dated: January 26, 2016

Respectfully Submitted,

By: /s/ Jason H. Cooper
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2016, 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/ Jason H. Cooper