BRUCE D. MAY, State Bar No. 89556
bmay@stuartkane.com
STUART KANE LLP
620 Newport Center Drive, Suite 200
Newport Beach, California 92660
Tel: (949) 791-5124
Fax: (949) 791-5224

NICHOLAS RANALLO, State Bar No. 275016
nick@ranallolawoffice.com
LAW OFFICE OF NICHOLAS RANALLO
2443 Fillmore Street, #380-7508
San Francisco, California 94115
Tel: (831) 607-9229

Attorneys for Defendant
[ REDACTED ]

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO**

MALIBU MEDIA, LLC,

Plaintiff,

vs.

JOHN DOE subscriber assigned IP address 67.180.177.80,

Defendants.

CASE NO.: 3:16-cv-01005-WHA

Honorable William H. Alsup
Courtroom 8, 19th Floor

**NOTICE OF MOTION AND MOTION BY DEFENDANT [ REDACTED ] FOR SANCTIONS AGAINST PLAINTIFF MALIBU MEDIA AND ITS ATTORNEYS BRIAN HEIT AND BRENNA ERLBAUM**

Date: September 29, 2016
Time: 8:00 a.m.
Ctrm: No. 8, 19th Floor

Complaint Filed: February 29, 2016
FAC File: June 1, 2016
Trial Date: September 5, 2017

**PLEASE TAKE NOTICE** that on September 29, 2016, at 8:00 a.m. or as soon thereafter as the matter can be heard before the Honorable William H. Alsup in Courtroom No. 8 on the 19th Floor of the above entitled Court located at 450 Golden Gate Avenue, San Francisco, California, 94102-3483, Defendant **[ REDACTED ]** ("Defendant") will and hereby does move the Court to invoke its inherent powers to impose appropriate sanctions against Plaintiff MALIBU MEDIA LLC and its attorneys BRIAN HEIT and BRENNA ERLBAUM for bad faith conduct in filing and prosecuting the First Amended Complaint against Defendant vexatiously, wantonly, and for oppressive reasons. See Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1990), and Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-766 (1980); see also 28 U.S.C. § 1927.

This Motion is made on the following grounds: On June 1, 2016, Plaintiff MALIBU MEDIA filed a First Amended Complaint alleging violations of the Copyright Act of 1976 against Defendant, knowing that Plaintiff did not have evidentiary support for its claims against Defendant, and despite having been advised by defense counsel of the following exculpatory evidence: Defendant denied ever downloading any of Plaintiff's films; a forensic examination of Defendant's computers found no evidence of illegal downloading; Defendant was out of town on one of the dates in question; and dozens of other people had equal access to the Defendant's Comcast internet account allegedly used to download Plaintiff's films. (Bruce May Declaration ¶¶ 6-8, 11-12, 16, and Declaration of Michael Kunkel attached thereto as part of Exhibit L.)

Plaintiff unilaterally dismissed the First Amended Complaint before Defendant appeared in the action, immediately after being served with Defendant's Rule 11 Motion which demonstrated that the First Amended Complaint was filed without evidentiary support and for an improper purpose. By dismissing the First Amended Complaint in these circumstances, Plaintiff effectively admitted that the pleading had no merit and was filed for an improper

purpose.

Plaintiff and its counsel acted in bad faith by engaging in litigation misconduct. While pretending to consider the exculpatory evidence offered by defense counsel, Plaintiff's attorneys Brian Heit and Brenna Erlbaum affirmatively concealed the fact that they had already filed the First Amended Complaint, without evidentiary support. The motivation of Plaintiff and its attorneys was to extort a settlement from Defendant for a baseless claim by filing the First Amended Complaint and forcing Defendant to incur the expense and embarrassment of defending a claim of illegally downloading pornography.

This Motion is filed concurrently with Defendant's Motion for Attorneys' Fees under the Copyright Act against Plaintiff. Defendant does not seek duplicative relief via the two motions. This Motion is based on this Notice and the following Memorandum, the Declaration of Bruce D. May, all pleadings and record on file in this action, all matters of which the Court may or shall take judicial notice, and such other evidence and argument as the Court may consider.

Dated: August 11, 2016 STUART KANE LLP

By: /s/ Bruce D. May
BRUCE D. MAY
Attorneys for Defendant

Dated: August 11, 2016 LAW OFFICE OF NICHOLAS RANALLO

By: /s/ Nicholas Ranallo
NICHOLAS RANALLO
Attorneys for Defendant

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## Federal Cases

**Statutes**



**Rules**

## I. INTRODUCTION

This is one of thousands of lawsuits filed by the notorious porno copyright troll Malibu Media. The circumstances of this case show an especially egregious abuse of the legal system by Plaintiff and its attorneys. While pretending to consider the mountain of exculpatory evidence presented by defense counsel, Plaintiff's counsel affirmatively concealed that Plaintiff had already filed the First Amended Complaint against Defendant. Defendant then served a Rule 11 motion showing that the First Amended Complaint lacked evidentiary support and was filed for an improper purpose—to harass Defendant into a settlement rather than incur the expense and embarrassment of defending a (baseless) claim of illegally downloading pornography. Plaintiff immediately attempted to "cut and run" by unilaterally dismissing the First Amended Complaint before Defendant had filed a responsive pleading.

As this Court commented in Malibu Media, LLC v. Doe, No. C 15-04441 WHA, 2016 WL 3383758 (N.D. Cal. June 20, 2016), citing Judge Otis Wright's opinion in Malibu Media, LLC v. John Does 1 through 10, 12-3632, 2012 WL 53832304, at *3–4 (C.D. Cal. June 27, 2012):

> "The Court is familiar with lawsuits like this one. These lawsuits run a common theme: plaintiff owns a copyright to a pornographic movie; plaintiff sues numerous John Does in a single action for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff. The cost to the plaintiff: a single filing fee, a bit of discovery, and stamps. The rewards: potentially hundreds of thousands of dollars. Rarely do these cases reach the merits. 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....

> Many judges have echoed Judge Wright's concerns about the "troubling pattern" of abuse with regard to Malibu Media and other owners of copyrights in pornographic videos. See, *e.g.*, *Malibu Media LLC v. Austen Downs*, No. 14-707 (S.D. Ohio May 26, 2015) (Judge Timothy Black); *Hard Drive Prods., Inc. v. Does 1–90*, No. 11-03825 (ECF No. 18 at 11), 2012 WL 1094653, at *7 (N.D. Cal. Mar. 30, 2012) (Judge Howard R. Lloyd); *MCGIP v. Does 1–149*, No. 11-02331, 2011 WL 4352110, at *4 (N.D. Cal. Sept. 16, 2011) (Judge Laurel Beeler); *On the Cheap, LLC, v. Does 1–5011*, No. 10-4472, 2011 WL 4018258 at *11 (N.D. Cal. Sept. 6, 2011) (Judge Bernard Zimmerman); *SBO Pictures, Inc., v. Does 1–3,036*, No. 11-4220, 2011 WL 6002620, at *8 (N.D. Cal. Nov. 30, 2011) (Judge Samuel Conti).

Defendant has filed a separate Motion for Award of Attorneys' Fees under the Copyright Act of 1976. By the instant Motion, Defendant moves the Court to invoke its inherent powers and to award appropriate sanctions against Plaintiff Malibu Media and its attorneys Brian Heit and Brenna Erlbaum for bad faith conduct. Defendant does not seek duplicative relief by these two motions.

Federal courts have inherent power to impose sanctions against both attorneys and parties who have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1990); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-766 (1980). The Court's inherent powers "are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Chambers, supra, 501 U.S. at 43.

As elaborated below, Plaintiff and its attorneys Brian Heit and Brenna Erlbaum filed a First Amended Complaint against Defendant on June 1, 2016, despite having been advised by defense counsel as follows: Defendant denied ever downloading any of Plaintiff's films; a forensic examination of Defendant's computers found no evidence of illegal downloading; Defendant was out of town on one of the dates in question; and dozens of other people had equal access to the

Defendant's Comcast internet account allegedly used to download Plaintiff's films. (Bruce May Declaration ¶¶ 6-8, 11-12, 16, and Declaration of Michael Kunkel attached thereto as part of Exhibit L.) In the process, Plaintiff's counsel Brian Heit affirmatively misled defense counsel by concealing that he had already filed the First Amended Complaint, while pretending to consider the exculpatory evidence. His partner Brenna Erlbaum signed the First Amended Complaint. (Bruce May Declaration ¶¶ 20-34.)

## II. SUMMARY OF MATERIAL FACTS

Defendant is [ REDACTED ] who rents one room in a 4 bedroom house in [ REDACTED ] that he shares with three other roommates. Defendant, his roommates, and all their friends and visitors shared one Comcast account for internet access. (Bruce May Declaration ¶¶ 3-4.)

The Amended Complaint alleges that Plaintiff's "investigator" in Germany accessed a Comcast internet account attributed to Defendant's [ REDACTED ] address and concluded that someone had sent "pieces" of some of Malibu Media's porno films through the Comcast router on three specific days in 2014-15 using BitTorrent file sharing software. Plaintiff made no claim that Defendant downloaded or viewed any of their films, but only that pieces of certain films had been uploaded through that Comcast router on the dates in question.

### A. Defendant Never Downloaded Any Of of Plaintiff's Films, And A Forensic Exam of His Computer Confirmed This.

At his own expense, Defendant and his attorney arranged for a forensic IT expert (Setec Investigations) to examine the laptop computer, external hard drive, and cell phone that Defendant had used during the period in question. (Bruce May Declaration ¶¶ 9-10.) Using state-of-the-art forensic software, Setec found

no evidence of any of Plaintiff's films on any of Defendant's devices, and no evidence that an "eraser" program had been run on any of the devices. (Bruce May Declaration ¶¶ 11-12 and Declaration of Michael Kunkel attached thereto as part of Exhibit L.)

**B. Defendant Was Out of Town On The Date of Alleged Infringement.**

The First Amended Complaint alleged that the infringement occurred on December 28, 2015, and two other dates. Defendant was with his family in [ REDACTED ] for the holidays and could not possibly have accessed the Comcast account on December 28, 2015. (Bruce May Declaration ¶¶ 7, 29, and Exhibit L.)

**C. Numerous Other Persons Had Access To The Comcast Account.**

Defendant had 7 roommates who also had access to the Comcast account during the period of alleged infringement. (Bruce May Declaration ¶ 8, and Ex. L.) Defendant can identify at least 30 friends and visitors who had access to the Comcast account during the same period, and is aware of at least 50 other persons he cannot identify but who had access to the Comcast account because they were friends or visitors of his roommates. (Bruce May Declaration ¶ 8 and Ex. L.)

**D. Plaintiff And Its Counsel Were Informed Of This Exculpatory Evidence Before They Filed The Amended Complaint.**

On May 2, 2016, defense counsel wrote to Plaintiff's attorney Brian Heit, and advised him that Defendant had never downloaded any files from Malibu Media, and was in [ REDACTED ] at the time of the alleged infringement on December 28, 2016. Defense counsel also explained that all of Defendant's roommates and their friends, acquaintances, and visitors had access to the Comcast account, and that neighbors or passerby could also have accessed that account.

(Bruce May Declaration ¶ 8.)

**E. Counsel For Plaintiff Concealed That He Had Already Filed The Amended Complaint While Pretending To Consider The Exculpatory Evidence.**

In a phone conversation on May 13, 2016, Mr. Heit assured defense counsel that he and his client had "no intention of suing any non-infringer," that they "did not plan on coercing [Defendant]," that "they were not questioning [Defendant's] honesty," and that "[Plaintiff] always considers the financial condition of any defendant before suing them." (Bruce May Declaration ¶ 17.) In a later conversation, Mr. Heit assured defense counsel that he and his client "had no intention of suing [Defendant] if there's no evidence on his computer." (May Declaration ¶ 23.)

In the conversation on May 13, Mr. Heit asked for the names of Defendant's roommates. Defense counsel responded that he and Defendant were not comfortable disclosing the names of his roommates since that was an invasion of their privacy, but if Mr. Heit served another subpoena on Defendant asking for that information he would have to respond accordingly. Mr. Heit agreed to this suggestion, and defense counsel agreed that he would accept service on Defendant's behalf. (Bruce May Declaration ¶ 18.)

Mr. Heit never served any such subpoena. Instead, on June 2, defense counsel was alarmed to receive an email from Mr. Heit stating: "I have conferred with my client and will be filing an amended complaint tomorrow. Please let me know if I should send the waiver of service over to you and if [Defendant] is interested in resolving this case at this stage." (Bruce May Declaration ¶ 20, Exhibit B [emphasis added.].)

The statement by Mr. Heit in his June 2 email that Plaintiff intended to file the Amended Complaint "tomorrow" (meaning June 3) proved to be false, though defense counsel did not discover this until more than a week later. In fact, Plaintiff had already filed the Amended Complaint on June 1, 2016, and Mr. Heit concealed this from defense counsel.

Defense counsel immediately called Mr. Heit on June 3 to express his concern. In that conversation, Mr. Heit demanded a copy of any forensic report prepared by defendant's expert Setec Investigations. Defense counsel responded that he had not asked Setec to prepare a written report in order to keep costs down. (Bruce May Declaration ¶ 22.) Mr. Heit then demanded that Defendant turn over a copy of the hard drive from his computer so that Plaintiff could search its entire contents. (May Declaration ¶ 26.)

Defense counsel spoke to Mr. Heit again on June 7, while still unaware that Plaintiff had already filed the Amended Complaint on June 1. In that conversation, Mr. Heit reiterated his demand that Mr. May produce a mirror image of the entire hard drive so that Mr. Heit and his client could examine it. (Bruce May Declaration ¶ 26.) Mr. Heit did not suggest or offer any limitations on that examination. Instead, his proposal would have allowed Plaintiff complete access to the entire hard drive on Defendant's computer. (Bruce May Declaration ¶ 26.)

In that conversation on June 7, defense counsel told Mr. Heit that Defendant would never agree to such a blatant invasion of his privacy, but they would agree to have a qualified neutral third party forensic IT specialist inspect the mirror image of Mr. May's hard drive solely for the titles or hash values of the Malibu Media files at issue, and for evidence that an eraser program had been used on that drive. (Bruce May Declaration ¶ 27.)

In that conversation on June 7, Mr. Heit responded that he will "probably" not sue Defendant, but he "would not make any commitment." (Bruce May Declaration ¶ 28.) At that time, Mr. Heit knew that the Amended Complaint had already been filed, but he concealed this from defense counsel. Mr. Heit then made additional demands for information from Defendant, without any assurances that Plaintiff would refrain from suing if the evidence was provided. Mr. Heit demanded to see a plane ticket, bank records, and cashed checks to prove that Defendant was out of town at the time of the alleged infringement on December 28, 2015. (Bruce May Declaration ¶ 29.)

Defense counsel then wrote to Mr. Heit on June 7, still unaware that Plaintiff had already filed the Amended Complaint, and stated as follows:

> Even though I feel that Malibu Media does not have sufficient basis to sue [Defendant], and that I have already provided more information than required, I have a final proposal:
>
> [Defendant] will agree to have the mirror image of his hard drive inspected by a qualified independent third party forensic IT firm selected by mutual agreement, at Malibu Media's expense, pursuant to a stipulated protective order approved by Judge Alsup and enforceable by contempt, with the search strictly limited to titles and hash values of the Malibu Media materials listed in the Complaint, and on the condition that Malibu Media will refrain from taking any legal action against him if the inspection shows no such evidence. The mirror image will be used for no other purpose and will be returned to [REDACTED] on completion of the inspection. This offer is conditioned upon Malibu Media refraining from naming [Defendant] as a defendant
>
> Please call me to discuss this proposal. If you and your client decline, this will only reinforce that Malibu Media and you and your firm have no reasonable basis for naming [Defendant] as a defendant in this action or accusing him of copyright infringement. You and your firm will violate Rule 11 if you name [REDACTED] as a defendant, and expose you and your client to liability for malicious prosecution. (Bruce May Declaration ¶ 30, Exh. C.)

Despite these warnings, Plaintiff and his counsel proceeded to serve the First Amended Complaint. At Plaintiff's request, Defense counsel agreed to

waive service, making Defendant's response due on August 15, 2016. (Bruce May Declaration ¶¶ 35, 42.)

**F. Plaintiff's Discovery Requests.**

On July 15, 2016, Plaintiff's counsel served discovery requests that were blatantly overbroad and inappropriate. Plaintiff demanded production of the entire hard drive from Defendant's computer; records of all internet browser use by Defendant in the prior three years; records of all computer software and all video games used by Defendant in the prior three years; all credit card and bank statements relating to the purchase of any computer or software in the prior three years or relating to Defendant's whereabouts on the dates of alleged infringement; records of all cloud-based storage by Defendant in the last three years; and "all documents you intend on using at trial or hearing in this matter." (Bruce May Declaration ¶¶ 47-48, Ex. J.)

Plaintiff also served Interrogatories with the following compound question that was clearly intended to embarrass Defendant and invade his privacy: "Have you ever watched X-rated, adult or pornographic movies (collectively "adult content?") If so, when was the last time you watched adult content, how often do you watch adult content, which studios do you prefer, and what type of movies do you prefer?" (Bruce May Declaration ¶ 49, Ex. K.)

**G. Defendant's Rule 11 Motion Results In Dismissal.**

On July 22, 2016, Defendant served an extensively documented Rule 11 Motion, demanding dismissal of the First Amended Complaint and attorneys' fees and costs. (Bruce May Declaration ¶¶ 50-51, Ex. L.) Six days later, Plaintiff unilaterally filed notice of dismissal of the First Amended Complaint without prejudice, and without explanation. (Bruce May Declaration ¶ 50-52.)

## III. PLAINTIFF DID NOT HAVE SUFFICIENT EVIDENTIARY SUPPORT FOR FILING THE FIRST AMENDED COMPLAINT BECAUSE IT FAILED TO STATE A CLAIM FOR RELIEF

The First Amended Complaint filed against Defendant on June 1 contained the same junk science and rank speculation that Plaintiff relies on in essentially all of its cases. Plaintiff alleged that its "investigator" in Germany accessed a Comcast internet account attributed to Defendant's [ REDACTED ] address and concluded that someone had sent "pieces" of some of Malibu Media's porno films through the Comcast router on three specific days in 2014-15 using BitTorrent file sharing software. Plaintiff made no claim that Defendant downloaded or viewed any of their films, but only that pieces of certain films had been uploaded through that Comcast router on the dates in question.

These conclusory allegations fail as a matter of law to state a claim for copyright infringement against Defendant. A clear consensus has emerged among the federal courts that identifying the account holder for an internet access provider that is shared by numerous other persons is not sufficient evidence to sue the account holder for copyright infringement.

For example, in Elf-Man LLC v. Eric Cariveau, 2014 WL 202096, at *1-2 (W.D. Wash., Jan. 17, 2014, No. C13-0507RSL), the District Court for Western Washington rejected claims for direct and contributory copyright infringement against 182 defendants who were sued based on allegations that they each had access to an internet service account that allegedly was used to download film using Bit Torrent. The Court reasoned as follows:

> "[I]dentifying the account holder tells us very little about who actually downloaded "*Elf-Man*" using that IP address. As one court noted, "it is no more likely that the subscriber to an IP address carried out a particular computer function . . . than to say an individual who pays the telephone bill made a specific telephone call." In re *BitTorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765, at *3

> (E.D.N.Y. May 1, 2012). In fact, it is less likely. Home wireless networks are ubiquitous, meaning that a single IP address can simultaneously support multiple computer devices throughout the home and, if not secured, additional devices operated by neighbors or passersby. Thus, the risk of false positives is very real. *Digital Sin, Inc. v. Does*, 1-176, 279 F.R.D. 239, 243 (S.D.N.Y. 2012). It is not clear that plaintiff could, consistent with its obligations under Fed. R. Civ. P. 11, make factual contentions regarding an internet subscriber's infringing activities based solely on the fact that he or she pays the internet bill."

(*Elf-Man, LLC*, at *2)

The District Court in Cobbler Nevada v. Thomas Gonzales, 2016 WL 3392368, at *3 (D. Or., June 8, 2016, No. 3:15-CV-00866-SB), used the same reasoning and reached the same result as Elf-Man:

> "In its First Amended Complaint, Plaintiff alleges that Gonzales' IP address "has been observed and confirmed as" infringing *The Cobbler* multiple times. (First Am. Compl. ¶ 13.) The only facts Plaintiff pleads in support of its allegation that Gonzales is the infringer, is that he is the subscriber of the IP address used to download or distribute the movie, and that he was sent notices of infringing activity to which he did not respond. That is not enough. Plaintiff has not alleged any specific facts tying Gonzales to the infringing conduct. While it is *possible* that the subscriber is also the person who downloaded the movie, it is also possible that a family member, a resident of the household, or an unknown person engaged in the infringing conduct. [Footnote omitted.] *See, e.g., Elf–Man*, 2014 WL 202096, at *2 ("While it is possible that the subscriber is the one who participated in the BitTorrent swarm, it is also possible that a family member, guest, or freeloader engaged in the infringing conduct."); *Malibu Media, LLC v. Tsanko*, No. 12-3899(MAS) (LHG), 2013 WL 6230482, at *10 (D.N.J. Nov. 30, 2013) ("The Court questions whether these allegations are sufficient to allege copyright infringement stemming from the use of peer-to-peer file sharing systems where the Defendant-corporation is connected to the infringement solely based on its IP address. It may be possible that Defendant is the alleged infringer that subscribed to this IP address, but plausibility is still the touchstone of *Iqbal* and *Twombly*."); *AF Holdings LLC v. Rogers*, No. 12cv1519 BTM (BLM), 2013 WL 358292, at *2 (S.D. Cal. Jan. 29, 2013) ("Because the subscriber of an IP address may very well be innocent of infringing activity associated with the IP address, courts take care to distinguish between subscribers and infringers."); *see also* In re *BitTorrent Adult Film Copyright Infringement Claims*, 296 F.R.D. 80, 85 (E.D.N.Y. 2012) ("[I]t 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 that an individual who pays the telephone bill made a specific telephone call.")"

In Ingenuity 13 LLC v. John Doe, 2013 WL 765102 (Nos. 2:12-cv-833-ODW (JCx), Judge Otis Wright issued an Order to Show Cause dated February 7, 2012, which stated as follows:

> "Upon review of these allegations, the Court finds two glaring problems that Plaintiff's technical cloak fails to mask. Both of these are obvious to an objective observer having a working understanding of the underlying technology.
>
> 1. Lack of reasonable investigation of copyright infringement activity.
>
> The first problem is how Plaintiff concluded that the Defendants actually downloaded the entire copyrighted video, when all Plaintiff has as evidence is a "snapshot observation." (AC ¶ 23.) This snapshot allegedly shows that the Defendants were downloading the copyrighted work—at least at that moment in time. But downloading a large file like a video takes time; and depending on a user's Internet-connection speed, it may take a long time. In fact, it may take so long that the user may have terminated the download. The user may have also terminated the download for other reasons. To allege copyright infringement based on an IP snapshot is akin to alleging theft based on a single surveillance camera shot: a photo of a child reaching for candy from a display does not automatically mean he stole it. No Court would allow a lawsuit to be filed based on that amount of evidence.
>
> What is more, downloading data via the *BitTorrent* protocol is not like stealing candy. Stealing a piece of a chocolate bar, however small, is still theft; but copying an encrypted, unusable piece of a video file via the *BitTorrent* protocol may not be copyright infringement. In the former case, some chocolate was taken; in the latter case, an encrypted, unusable chunk of zeroes and ones. And as part of its prima facie copyright claim, Plaintiff must show that Defendants copied the copyrighted work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). If a download was not completed, Plaintiff's lawsuit may be deemed frivolous. In this case, Plaintiff's reliance on snapshot evidence to establish its copyright infringement claims is misplaced. A reasonable investigation should include evidence showing that Defendants downloaded the entire copyrighted work—or at least a usable portion of a copyrighted work. Plaintiff has none of this—no evidence that Defendants completed their download, and no evidence that what they downloaded is a substantially similar copy of the copyrighted work. Thus, Plaintiff's attorney violated Rule 11(b)(3) for filing a pleading that lacks factual foundation.
>
> 2. Lack of reasonable investigation of actual infringer's identity.
>
> The second problem is more troublesome. Here, Plaintiff concluded that Benjamin Wagar is the person who illegally downloaded the copyrighted video. But Plaintiff fails to allege facts in the Amended Complaint to show how Benjamin Wagar is the infringer, other than noting his IP address, the name of his *BitTorrent*

client, and the alleged time of download."

Later in that same case, Judge Wright issued an Order Issuing Sanctions which stated:

> "The Court maintains that its prior analysis of Plaintiffs' Rule 11 violations is accurate. (ECF No. 48.) Plaintiffs can only show that someone, using an IP address belonging to the subscriber, was seen online in a torrent swarm. But Plaintiffs did not conduct a sufficient investigation to determine whether that person actually downloaded enough data (or even anything at all) to produce a viewable video. Further, Plaintiffs cannot conclude whether that person spoofed the IP address, is the subscriber of that IP address, or is someone else using that subscriber's Internet access."

(See 2013 WL 1898633.)

Based on these authorities, Plaintiff and its counsel did not have sufficient evidentiary support to file the First Amended Complaint in the first place. But that was just the first instance of bad faith on their part.

**A. Plaintiff Had No Good Faith Basis for Naming Defendant In Order To Discover Who Else Had Access To The Account.**

Plaintiff had no basis for naming Defendant in the First Amended Complaint simply to enable discovery into who else had access to the Comcast account. As the District Court reasoned in Elf-Man, supra, at *2, footnote 2:

> Plaintiff apparently concedes that it does not know the "circumstances concerning how these Defendants' IP addresses came to be used for the infringement of Plaintiff's copyright," but argues that it should be allowed to conduct discovery because it cannot reasonably be expected "to have procured such information at this stage of the proceeding." Dkt. # 63 at 13 n.6. This argument "collides with what the Supreme Court said in *Ashcroft v. Iqbal*, 556 U.S. 662[, 678-79 (2009)]: 'Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'" *Starr v. Baca*, 652 F.3d 1202, 1219 (9th Cir. 2011). Mr. Iqbal was required to have evidence of Attorney General Ashcroft's subjective intent at the pleading stage. Requiring plaintiff to allege facts giving rise to a plausible, not merely possible, inference that it has named the correct defendant is no more onerous or unreasonable."

Plaintiff could have conducted third party discovery without naming

Defendant as the infringer. Indeed, Plaintiff's counsel told defense counsel that he intended to issue a Subpoena seeking the names of Defendant's roommates, but never did so. Instead, Plaintiff's counsel surreptitiously filed the First Amended Complaint naming Defendant without informing defense counsel. (Bruce May Declaration ¶ 18-20.) This reinforces that Plaintiff filed the First Amended Complaint for "an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."

## IV. PLAINTIFF MALIBU MEDIA AND ITS ATTORNEYS ENGAGED IN BAD FAITH CONDUCT BY IGNORING THE EXCULPATORY EVIDENCE PROFFERED BY DEFENSE COUNSEL FOR THE IMPROPER PURPOSE OF EXTORTING A SETTLEMENT

Federal courts have inherent power to impose sanctions against both attorneys and parties who have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1990). Though this power must be exercised with restraint, the Court has wide latitude in fashioning appropriate sanctions. Roadway Express, Inc., supra, 447 U.S. 752, 764-766 (1980). "The District Court has the duty and responsibility of supervising the conduct of attorneys who appear before it." Erickson v. Newmar Corp., 87 F.3d 298, 301 (9th Cir. 1996), citing Trust Corp. v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir.1983). The Court has inherent power to sanction bad faith conduct whether or not the conduct is also sanctionable under other rules such as FCRP Rule 11 or 28 U.S.C. § 1927.[1] "These other mechanisms, taken alone or together,

---

[1] 28 U.S.C. § 1927 states: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Voluntary dismissal does not deprive the Court of its power to sanction under Section 1927. See Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992). The courts are split on whether Section 1927 applies to an initial complaint. See In re Keegan Management Co. Securities Litigation, 78 F.3d 431, 435 (9th Cir. 1996); and Ridder v. City of Springfield, 109 F.3d 288, 299 (6th Cir. 1997.)

are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions." Chambers, supra, 501 U.S. at 51-52. See also First Bank of Marietta v. Hartford Underwriters, Ins. Co., 307 F. 3d 501, 514 (6th Cir. 2009)("We are reluctant to impose a wooden requirement" that the district court expressly consider "whether such conduct could be sanctioned under all potentially applicable rules or statutes."); Mach v. Will County Sheriff, 580 F.3d 495, 502 (7th Cir. 2009)("Rule 11 has not robbed the district courts of their inherent power to impose sanctions.")

In the instant case, the conduct of Plaintiff and its counsel cries out for sanctions. They did not merely file a baseless First Amended Complaint. They also deliberately ignored a veritable mountain of exculpatory evidence, and affirmatively concealed from defense counsel that they had already filed the First Amended Complaint. If this were the only case filed by Plaintiff and its attorneys, their tactics might be tolerated as merely aggressive advocacy, or even a good faith mistake. But Plaintiff has filed thousands of these lawsuits, and repeatedly used the same tactics that Judge Wright characterized as an extortion scheme.

Defendant submits that the motivation of Plaintiff and its counsel in this case is obvious. They knew they could not prove infringement. They knew Defendant was not a deep pocket. But they figured that Defendant would cough up a settlement rather than incur the cost and embarrassment of defending against a (baseless) claim of illegally downloading pornography.

This is evident from the way that Plaintiff's counsel Brian Heit increased his demands for exculpatory evidence—such as credit cards statements and bank receipts to prove Defendant was out of town on the day in question—while repeatedly asking if Defendant wanted to talk settlement, all the while knowing

that his partner had already signed and filed the First Amended Complaint. Only after being served with a Rule 11 Motion did Plaintiff retreat, yet this too reinforces how Plaintiff's true motivation was not to litigate, but to inflict costs on Defendant as leverage to exact a settlement.

## V. CONCLUSION

The Court cannot view the conduct of Plaintiff and its counsel in isolation. The Court should consider the pattern it has witnessed in countless other cases they have filed. The Court should also consider the countless cases where the defendant could not afford counsel and succumbed to Plaintiff's tactics without ever getting his or her day in court. Based on the bad faith conduct of Plaintiff and its attorneys, Defendant respectfully suggests the following:

First: The First Amended Complaint should be dismissed with prejudice.

Second: Plaintiff Malibu Media should be ordered to pay the Defendant's attorneys' fees and costs, either on Defendant's Motion for an Award of Attorneys' Fees under the Copyright Act, or as a form of sanctions on this Motion.

///

///

///

///

///

Third: The Court should also impose sanctions that will effectively deter Plaintiff and its counsel from repeating this abuse of the judicial system. Defendant is informed and believes that Plaintiff has filed over 4,000 of these lawsuits, and that Plaintiff and its owners and managers have substantial wealth. Their counsel is currently prosecuting dozens if not hundreds of these lawsuits. Defendant submits that the Court should order Plaintiff Malibu Media and its counsel to disclose their true financial condition, and to show cause why the Court should not impose an appropriate sanction.

Dated: August 11, 2016 STUART KANE LLP

By: /s/ Bruce D. May
BRUCE D. MAY
Attorneys for Defendant

Dated: August 11, 2016 LAW OFFICE OF NICHOLAS RANALLO

By: /s/ Nicholas Ranallo
NICHOLAS RANALLO
Attorneys for Defendant

**CERTIFICATE OF SERVICE**
*Malibu Media, LLC v. John Doe*
Case No. 3:16-cv-01005-WHA

I certify that on August 11, 2016 the foregoing document: **NOTICE OF MOTION AND MOTION BY DEFENDANT [ REDACTED ] FOR SANCTIONS AGAINST PLAINTIFF MALIBU MEDIA AND ITS ATTORNEYS BRIAN HEIT AND BRENNA ERLBAUM** was served on all parties or their counsel of record through the CM/ECF system if they are registered users, or, if they are not, by serving a true and correct copy at the addresses listed below:

Brenna E. Erlbaum, Esq.
Brian Heit, Esq.
HEIT ERLBAUM, LLP
6320 Canoga Avenue
15th Floor
Woodland Hills. CA 91367

*Attorneys for MALIBU MEDIA, LLC*

Telephone: 855.231.9868
E-mail(s):
Brenna.Erlbaum@HElaw.attorney
Brian.Heit@HElaw.attornev

/s/ Leessa M. Westwood
Leessa M. Westwood

8/11/2016
Date