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JOHN DOE subscriber assigned IP address
67.180.177.80

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
Ctrm: No. 8, 19th Floor

REPLY BY DEFENDANT JOHN DOE IN SUPPORT OF MOTION FOR SANCTIONS AGAINST PLAINTIFF MALIBU MEDIA AND ITS ATTORNEYS BRIAN HEIT AND BRENNA ERLBAUM

Date: September 29, 2016
Time: 8:00 a.m.
Ctrm: 8, 19th Floor

Complaint Filed:	February 29, 2016
FAC Filed:	June 1, 2016
Trial Date:	September 5, 2017
FAC Dismissed:	July 28, 2016

I. PLAINTIFF'S OPPOSITION IS BASED ON INCOMPETENT AND INADMISSIBLE EVIDENCE

Plaintiff Malibu Media's opposition[1] to the Motion for Sanctions asserts that "Defendant's IP Address downloaded" music and television belonging to unnamed third parties. Plaintiff argues that this somehow justified their filing the First Amended Complaint against Defendant John Doe accusing him of downloading Plaintiff's films. This assertion is illogical and based on completely inadmissible evidence.

The only evidence offered to support these assertions is the Declaration of Plaintiff's attorney Brian Heit. That Declaration is full of conclusory statements and opinions for which Mr. Heit has no personal knowledge or expertise. For example, in paragraph 7 Mr. Heit declares that "Malibu's investigator Excipio recorded not only the torrenting activity of Malibu's works taking place through Defendant's IP address—but that Defendant's IP address was torrenting numerous other copyrighted files." In paragraphs 12 and 13, Mr. Heit purports to identify music and television shows that were downloaded by "Defendant's IP Address."

These factual assertions are incompetent and inadmissible. Mr. Heit has no personal knowledge sufficient to testify to any of these assertions. He lays no foundation to show how he could possibly know what was "downloaded" by "Defendant's IP Address." He recites what his "investigator" supposedly told him but that is inadmissible hearsay and opinion. He does not explain how an IP address would even be capable of downloading files, since that would seem to

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[1] The Motion for Sanctions was brought against Malibu Media and its attorneys Brian Heit and Brenna Erlbaum, but the Opposition was filed only on behalf of Malibu Media. Technically, attorneys Heit and Erlbaum have not properly opposed the Motion for Sanctions against them.

require some human action.

Mr. Heit seems to think that this Court should just take his word for it that Plaintiff has an "expert" who somehow ascertained these supposed facts. This exemplifies how Plaintiff's entire litigation strategy is based on junk science and rank speculation. Even if Plaintiff had submitted a competent declaration from its "investigator," the fact remains that identifying the account holder for a Comcast account accessible to numerous people does not prove copyright infringement by any specific person. The Court should have little tolerance for Plaintiff and its counsel playing fast and loose when making factual assertions in a federal court lawsuit.

II. ONCE PLAINTIFF WAS ADVISED THAT NUMEROUS OTHER PEOPLE HAD ACCESS TO DEFENDANT'S COMCAST ACCOUNT, PLAINTIFF HAD NO BASIS FOR FILING THE FIRST AMENDED COMPLAINT.

At page 7 of its opposition, Plaintiff asserts that "[e]very court to address the issue has found that Plaintiff's complaints state a plausible claim for relief." This is simply not true. See Elf-Man LLC v. Cariveau, C13-0507RSL, 2014 WL 202096 (W.D. Wash. 2014), Ingenuity 13, LLC v. John Doe, 12-CV-8333-ODW (C.D.Cal. 2013). As the District Court reasoned in Cobbler Nevada, LLC. v. Gonzales, No. 3-13-CV-00866-SB (D.Ore. 2016):

> 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. 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. The First Amended Complaint does not allege that Gonzales' Internet connection is secured. 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 s ystems 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."

Any basis Plaintiff had for suing Defendant John Doe evaporated weeks before the filing of the First Amended Complaint when Plaintiff's counsel received the letter from defense counsel dated May 10, 2016, advising that numerous other people had access to the Comcast account. That letter also advised that Defendant was out of town on one of the dates in question, and counsel could corroborate that fact based on his personal knowledge. At that instant, Plaintiff knew that it could not prove it was plausible that Defendant John Doe had done any improper downloading.

III. DEFENDANT DOE HAD NO OBLIGATION TO PROVIDE EXCULPATORY EVIDENCE BECAUSE PLAINTIFF COULD NOT STATE A PRIMA FACIE CASE.

Plaintiff and its counsel seem to believe that a defendant has the burden to disprove an allegation of copyright infringement, and that Plaintiff is free to sue unless and until the defendant provides exculpatory evidence that satisfies Plaintiff. More specifically, Plaintiff seems to think that a defendant must spend thousands of dollars to have an independent IT expert inspect his computer, and

then turn that report and a copy of the hard drive over to the Plaintiff's counsel without any assurance that Plaintiff will refrain from legal action if the report is negative. This is a gross distortion of the burdens of pleading and proof.

A defendant, of course, has no obligation to disprove anything in order to avoid being sued. To the contrary, Plaintiff and its counsel have an affirmative obligation to conduct a reasonable investigation before filing suit and verify that any lawsuit has sufficient evidentiary support. It is preposterous for Plaintiff to assert that defense counsel somehow acted in bad faith by not immediately producing an exculpatory written report from an IT expert. Defendant had no obligation to procure such a report in the first place. Defendant went beyond the call of duty by paying thousands of dollars for a forensic examination of his computer, and advising Plaintiff that the results were negative. Defendant then offered to have a third party IT expert conduct the same test on the computer, yet Plaintiff refused this offer. These facts reflect Plaintiff's illicit motivation in using the cost of defense to shake down innocent defendants and force them into a settlement.

IV. DISMISSAL OF THE FIRST AMENDED COMPLAINT DOES NOT INSULATE PLAINTIFF AND ITS COUNSEL FROM SANCTIONS.

Since Plaintiff dismissed the First Amended Complaint after getting Defendant's Rule 11 Motion, Defendant is precluded by Rule 11 from filing that motion with the Court. But this does not insulate Plaintiff and its counsel from sanctions under 28 U.S.C. § 1927 or the inherent powers of the Court. "Rule 11 has not robbed the district courts of their inherent power to impose sanctions." Mach v. Will County Sheriff, 580 F. 3rd 495, 502 (7th Cir. 2009).

Plaintiff Malibu Media and its attorneys have filed thousands of these cases. If they are allowed to "cut and run" once the defendant has incurred the significant expense of a Rule 11 motion, without suffering any consequences, then they will exploit that loophole every time. The Court cannot view this case in isolation. It is the tip of an iceberg. The Court should impose suitable sanctions, including but not limited to ordering payment of Defendant's attorneys' and experts' fees.

V. PLAINTIFF'S CLAIM THAT IT FILED THE FIRST AMENDED COMPLAINT MISTAKENLY REINFORCES THE PROPRIETY OF SANCTIONS.

In paragraph 27 at page 4 of his Declaration, Brian Heit states: "I did not realize my partner [Brenna Erlbaum] had already filed the Amended Complaint and mistakenly told Defendant's counsel we would be filing it the next day." This is a startling admission for a lawyer practicing in federal court. Mr. Heit provides no explanation for how this mistake could have happened, and it is hard to imagine any excuse in these circumstances. The Plaintiff's law firm consisted of just Mr. Heit and Ms. Erlbaum—how could Mr. Heit not know that his partner had filed the First Amended Complaint?

Mr. Heit's claim of mistake is simply not believable in the circumstances. To begin with, Mr. Heit does not specify <u>when</u> he discovered that his partner had filed the First Amended Complaint. The First Amended Complaint was filed on June 1, but the Declaration of Bruce D. May shows that Mr. Heit did not disclose this to defense counsel in their phone conversations and emails on on June 3 and 7. Instead, in those communications, Mr. Heit made additional demands for exculpatory evidence from the Defendant—without promising to refrain from legal action if the evidence was as defense counsel represented. It was not until

after defense counsel wrote to Mr. Heit on June 10 offering to have an independent examination of the Defendant's computer that Mr. Heit admitted having filed the First Amended Complaint. (Declaration of Bruce D. May ¶¶ 21-31, Exs. C and D.)

Even then, Mr. Heit did not disclose that it was filed 10 days earlier, and he made no claim that the filing was a mistake. If it were a mistake, Mr. Heit should have immediately withdrawn or dismissed the First Amended Complaint immediately, so he could consider the exculpatory evidence. Instead, in his June 10 email, Mr. Heit told defense counsel to sign a lopsided protective order allowing Plaintiff to inspect the entire hard drive on Defendant's computer or else "…I will serve you with the amended complaint and see you at the next CMC." (Declaration of Bruce D. May ¶ 33 and Ex. D.) Mr. Heit then served the First Amended Complaint on June 15.

A month later, Mr. Heit served discovery requests that were blatantly overbroad and invasive. Among other things, Plaintiff requested a copy of all hard drives Defendant had used in the prior three years; all computer programs, cloud storage, and browser activity for the prior three years, all leases for Defendant's residence; and credit card receipts, cancelled checks, and bank statements showing Defendant's whereabouts "around" the time of the alleged infringement. (Declaration of Bruce D. May ¶¶ 47-49 and Exs. J and K.) This refutes any suggesting that filing the First Amended Complaint was a good faith mistake. Plaintiff intended to sue Defendant all along, regardless of the exculpatory evidence.

This brings us to another startling admission in paragraph 27 of Mr. Heit's Declaration. After claiming that the filing was done "mistakenly, Mr. Heit states:

"Importantly, because a decision had been made to proceed, I did not want to cause unnecessary delay." (Heit Declaration at page 4, lines 9-11, emphasis added.) In other words, Plaintiff and his counsel had already decided to file the First Amended Complaint on June 1. This indicates that Mr. Heit was just pretending to consider the exculpatory evidence offered by defense counsel.

VI. CONCLUSION

The Court should order Plaintiff and its counsel to pay Defendant's attorneys' fees and costs, and impose appropriate sanctions that will punish and deter their systematic abuse of the federal courts.

Dated: September 1, 2016 STUART KANE LLP

By: /s/ Bruce D. May
BRUCE D. MAY

Dated: September 1, 2016 LAW OFFICE OF NICHOLAS RANALLO

By: /s/ Nicholas Ranallo
NICHOLAS RANALLO

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

I certify that on September 1, 2016, I served the foregoing **REPLY BY DEFENDANT JOHN DOE IN SUPPORT OF MOTION FOR SANCTIONS AGAINST PLAINTIFF MALIBU MEDIA AND ITS ATTORNEYS BRIAN HEIT AND BRENNA ERLBAUM** on Plaintiff Malibu Media and its counsel by posting a true and correct copy on the Court's electronic CM/ECF system for which they are registered users.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Certificate of Service was executed in Newport Beach, California, on September 1, 2016.

/s/ Lorin Moreno
Lorin Moreno

9/1/2016
Date