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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELF-MAN, LLC,)	Case No.: 2:13-CV-507-RSL
Plaintiff,)	
v.)	PLAINTIFF’S RESPONSE TO ORDER TO
DOES 1 – 152,)	SHOW CAUSE AND QUASHING
Defendants.)	SUBPOENAS
)	

Comes now Elf-Man, LLC, by and through its counsel of record, Maureen C. VanderMay and The VanderMay Law Firm PC, and responds to the Court’s Order to Show Cause and Quashing Subpoenas filed on May 9, 2013. Dkt. # 10.

STATEMENT OF RELEVANT FACTS

A. Commencement of Case and Status of Preliminary Discovery

On March 20, 2013, Plaintiff filed a copyright infringement action with this Court against 152 Doe Defendants alleging the infringement of its motion picture entitled *Elf-Man*.¹ On that

¹ The Court’s order states that this action is one of fifty-one copyright infringement actions filed against approximately 2,773 Doe defendants in this district in a four month period.

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1 date, Plaintiff also filed its *Ex Parte* Motion to Expedite Discovery seeking permission to serve
 2 subpoenas on the Internet Service Providers (“ISPs”) identified on Exhibit 1 to Plaintiff’s
 3 complaint. Dkt # 2. The Court granted Plaintiff’s motion by order filed on March 26, 2013. Dkt
 4 # 6.

5 Upon receipt of this order, Plaintiff’s counsel immediately began researching the
 6 registered agents for the nine ISPs at issue so that personal service could be effected upon them
 7 and her staff began preparing the subpoenas and related documents. Counsel also communicated
 8 with several of the ISPs to confirm that the proper entity had been identified, that personal
 9 service would be effected properly and that any follow up service requested by the ISPs would be
 10 accomplished. Plaintiff’s counsel’s staff forwarded these subpoenas, related documents and
 11 copies of the Court’s Order Granting Leave for Preliminary Discovery (“March 26th order / Dkt #
 12 6”) via overnight delivery to its process server in Olympia, Washington on April 4, 2013.
 13 Counsel’s efforts to ensure that the ISPs were personally served as quickly as possible are
 14 described in the accompanying declaration of counsel at ¶¶ 3-11.

15 Personal service was effected on the following ISPs on April 9, 2013:

- 16 1. WaveDivision Holdings, LLC at its place of business in Kirkland, Washington;
- 17 2. Broadstripe, LLC through its registered agent, C T Corporation System;
- 18 3. Tulalip Broadband through its custodian of records at its place of business in
 19 Marysville, Washington;
- 20 4. Comcast Cable Holdings through its registered agent, C T Corporation System;
- 21 5. CenturyLink, Inc. through its registered agent, C T Corporation System;

22 _____
 23 Order to Show Cause and Quashing Subpoenas (“Court’s OSC / Dkt. # 10”) at 1. Plaintiff’s
 24 counsel has filed one other action alleging copyright infringement in this district (*The Thompsons*
 25 *Film, LLC v. Does 1-194*, Case No. 2:13-CV-0560-RSL, filed on March 28, 2013). Plaintiff’s
 26 counsel has no knowledge of or involvement with the remaining actions referenced by the
 27 Court’s order.

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1 6. Frontier Communications of America, Inc. through its registered agent,
2 Corporation Service Company;

3 7. Verizon Wireless (VAW) LLC through its registered agent, C T Corporation
4 System; and

5 8. Click! Network through James Kauffman, records manager for Tacoma Public
6 Utilities, which conducts business under the name Click! Network.

7 ISP Nobis Technology Group, LLC informed Plaintiff’s counsel that it does not
8 maintain a registered agent in the State of Washington (despite the fact that it conducts business
9 within the state) and indicated that it required personal service at its place of business in
10 Phoenix, Arizona. After locating an Arizona process server, Plaintiff’s counsel forwarded the
11 subpoena and related documents for this ISP to its process server via facsimile on April 15, 2013,
12 and service was personally effected on April 17, 2013.

13 The Court’s OSC notes that more than six weeks have elapsed since discovery was
14 authorized. Court’s OSC / Dkt. # 10 at 2. While Plaintiff acknowledges that this is the case, it
15 submits that at the time of receipt of the Court’s OSC it had been unable to effect service on the
16 individual Defendants and to amend its complaint to name said Defendants because of its
17 compliance with the time frames set forth in the Court’s March 26th order. That order provided
18 as follows: 1) each ISP was to give written notice to its affected subscriber(s) “as soon as
19 possible after service of the subpoena[;]” 2) ISPs and affected subscriber(s) were afforded thirty
20 days “from the date of service of the subpoena on the ISP to object to the subpoena[;]” and 3) if
21 no objection were served, the ISP was to “comply with the subpoena within ten (10) days.”²

22
23 _____
24 ² This time frame for subpoena compliance was, of course, extended in the event
25 that an objection was filed by either an ISP or an affected subscriber. In that instance, disclosure
26 of identifying information was prohibited until further order from the Court. March 26th order /
27 Dkt. # 6 at 2.

1 March 26th order / Dkt. # 6 at 1-2. As such, Plaintiff was required to set a compliance date of at
2 least forty days from the date that service was effected.

3 Because service was effected on eight of the ISPs on April 9, 2013, under the terms of the
4 March 26th order, the deadline for the filing of objections to the subpoenas was May 9, 2013 – the
5 date of the Court’s order quashing the subpoenas.³ In order to allow for the thirty day notice
6 period to affected subscribers and the additional ten days within which the ISPs were to respond
7 to the subpoenas absent the filing of an objection, the compliance date stated on these eight
8 subpoenas was May 20, 2013.⁴ Until such time as the information responsive to these subpoenas
9 was provided directly to The VanderMay Law Firm PC from the ISPs, Plaintiff could not have
10 named the individual Defendants and have them served.

11 In light of the foregoing chronology and the accompanying declaration of counsel,
12 Plaintiff submits that it has not unduly delayed the identifying and naming of the Defendants to
13 this action. Rather, it has made every effort to ensure that the ISP subpoenas were issued and
14 served as quickly as possible and that the terms of the Court’s March 26th order were fully and
15 strictly followed. Indeed, when an ISP inadvertently provided subscriber information prior to the
16 expiration of the thirty day notice period set forth in the March 26th order, counsel worked
17 cooperatively with the ISP’s counsel, did not review the information, kept no record of it and

18 ////

21 ³ Because of the need to effect personal service in Arizona, the compliance date on
22 the Nobis Technology Group, LLC subpoena was necessarily later than the eight subpoenas
23 served in Washington. Because that subpoena was served on April 17, 2013, the thirty day
24 notice period had not yet run when the issued its order quashing these subpoenas.

25 ⁴ As explained in the declaration of counsel, several ISPs requested extensions time
26 for subpoena compliance due to their processing times and the need to ensure that their
27 subscribers were afforded due notice. In order to accommodate the needs of the ISPs, counsel
28 agreed to short extensions for two ISPs. See accompanying declaration of counsel at ¶¶ 8-10.

1 returned the mailed copy unopened to the ISP's counsel. *See* the accompanying declaration of
2 counsel at ¶ 11.

3 **B. Contacts With Affected Subscribers**

4 Prior to filing this action, Plaintiff's counsel established office procedures for fielding any
5 inquiries from subscribers. After serving the subpoenas in the instant action, counsel has been
6 contacted by a handful of individuals who have received notice from their ISPs of the subpoenas
7 issued pursuant to the Court's March 26th order. The following outlines the procedures followed
8 by counsel's office in responding to such contacts:

9 When a person contacts The VanderMay Law Firm PC and identifies himself or herself as
10 a subscriber or counsel for a subscriber, our office staff asks for the following information: their
11 name, address, telephone number, their ISP, the case number and the name of the motion picture
12 at issue. If the caller provides this information, counsel's office forwards to them a packet of
13 information explaining the nature of the case and Plaintiff's position on resolution.

14 When a person indicates that he or she (or their client when the contact is made by
15 counsel for the subscriber) does not believe they are responsible for the download of the motion
16 picture at issue, Plaintiff's counsel has, in every instance, offered to have the person's computer
17 reviewed by an expert to determine if there is any activity on the computer that would indicate
18 that the film had been downloaded. Plaintiff's counsel also suggests that the subscriber confer
19 with others who may have access to their internet account because frequently the download was
20 conducted by another who lives with or spends time at the subscriber's home or place of
21 business.

22 Plaintiff, through its counsel, has diligently indicated to parties who claim no
23 responsibility that Plaintiff has no interest in trying to obtain money and/or consent decrees from
24 persons who are in fact innocent of the conduct alleged in the complaint. However, counsel has
25 requested some reasonable proof that the information Plaintiff has developed which identifies the

1 IP address and the conduct occurring through that IP address is in fact mistaken or that some
2 excusable conduct has occurred.

3 As of this date, no payments have been accepted in settlement of any claims asserted in
4 this action. Plaintiff's counsel's office has had discussions with two persons who have, in
5 theory, agreed to pay a settlement. Counsel's office has engaged in negotiations with counsel for
6 a third person. Additionally, information packets have been sent to several other persons who
7 have called in as a result of the notices from their ISPs.

8 Several persons who have called Plaintiff's counsel's office have indicated that their
9 financial means are limited. In these instances, counsel's office has explained that it is not
10 Plaintiff's intent to push any Defendant into bankruptcy and that Plaintiff is willing to work with
11 persons in difficult financial circumstances to effect a settlement consistent with those
12 circumstances. These efforts are illustrated by the material filed under seal in response to the
13 Court's OSC / Dkt. # 10. *See* Exhibit 3 to the accompanying declaration of counsel.

14 The Court's OSC references "the possibility that the judicial authority of the United
15 States may be used to wrest improvident settlements from pro se litigants under threat of huge
16 statutory penalties." Court's OSC / Dkt. # 10 at 2. Plaintiff commenced this action not to wrest
17 improvident settlements but to seek redress for the piracy of its copyrighted work. As explained
18 in detail in Plaintiff's complaint, piracy via peer-to-peer networks such as BitTorrent is a
19 widespread problem that is having a significant adverse impact on the entertainment industry
20 and, particularly, on Plaintiff. Plaintiff has filed this action in an effect to stop the theft of its
21 copyrighted material and for no other purpose. *See* accompanying declaration of counsel at ¶ 14.

22 SUBSTANTIVE RESPONSES

23 1. Plaintiff's counsel was served electronically with the Court's OSC on Friday, May 10,
24 2013, at 11:56 a.m. On that date, counsel was out of the office and she did not review this order
25 until approximately midday on Monday, May 13, 2013. Upon reviewing this order, counsel

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1 began notifying the nine above-referenced ISPs of the fact that they need not respond to the
2 subpoenas previously served upon them. All nine ISPs previously served with subpoenas have
3 been afforded this notice.

4 2. All requested documentation is being filed contemporaneously under seal as required
5 by the Court's order. See accompanying declaration of counsel at ¶ 21 and Exhibit 3. Since
6 reviewing the Court's OSC, Plaintiff's counsel staff have been directed to simply take a message
7 from any callers regarding this action who identify themselves as subscribers or counsel for
8 subscribers. Pursuant to the Court's directive, counsel has not returned any of these calls, nor
9 have any additional correspondence (including emails), information packets or settlement
10 documents been set out since the Court's OSC was seen by Plaintiff's counsel.

11 3. For the reasons set forth *infra* in the Legal Argument section of this response, Plaintiff
12 respectfully requests the Court conclude that joinder of the 152 Doe Defendants was proper and
13 that it allow this action to proceed as filed by Plaintiff, subject to any subsequent Court order
14 and/or the request of any Defendant to be severed due to a claim of prejudice and named in a
15 separate action.

16 4. Plaintiff respectfully requests that the Court lift the stay of this proceeding imposed in
17 its OSC and that it reinstate the ISP subpoenas quashed in said order.

18 **LEGAL ARGUMENT**

19 **Joinder of Plaintiff's Claims Against the Doe Defendants Is Proper Under**
20 **F.R.C.P. 20(a)(2) and the Claims Should Not Be Severed**

21 Plaintiff's complaint joins the 152 Doe Defendants pursuant to the permissive joinder
22 rule set forth in F.R.C.P. 20(a)(2). This provision provides in pertinent part as follows:

23 "Persons . . . may be joined in one action as defendants if:

24 "(A) any right to relief is asserted against them jointly, severally, or in the
25 alternative with respect to or arising out of the same transaction, occurrence, or
series of transactions or occurrences; and

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1 “(B) any question of law or fact common to all defendants will arise in the
2 action.”

3 Under well-established decisional law, this rule has been broadly construed in favor of
4 joinder. *See, e.g., United Mine Workers v. Gibbs*, 383 US 715, 724 (1966) (noting with respect
5 to the Federal Rules of Civil Procedure that “[u]nder the Rules, the impulse is toward
6 entertaining the broadest possible scope of action consistent with fairness to the parties; joinder
7 of claims, parties and remedies is strongly encouraged.”); *League to Save Lake Tahoe v. Tahoe*
8 *Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) (“We start with the premise that
9 Rule 20, Fed. Rules Civ. Proc., regarding permissive joinder is to be construed liberally in order
10 to promote trial convenience and to expedite the final determination of disputes, thereby
11 preventing multiple lawsuits”). *See also* 4 James William Moore, *Moore’s Federal Practice* (3d
12 ed. 2013) § 20.02[1][a] (“Consistent with other federal joinder provisions, the permissive party
13 joinder rule emphasizes pragmatism; joinder is not based on arcane historic formulations of legal
14 relationships, but on common sense, fact-based considerations.”).

15 The present controversy easily meets Rule 20(a)(2)’s two pronged requirement for
16 permissive joinder. First, Plaintiff’s complaint alleges that all of the Doe Defendants participated
17 in the unlawful downloading of its motion picture *Elf-Man* in either the same transaction or
18 occurrence or through a series of related transactions or occurrences. The pertinent allegations
19 read as follows:

20 ¶ 23 – “The Defendants are a group of BitTorrent users or peers *whose computers are*
21 *collectively interconnected and used* for illegally copying and distributing Plaintiff’s motion
22 picture.” (Emphasis added).

23 ¶ 24 – “The Defendants and each of them have illegally and without authorization from
24 Plaintiff *copied, downloaded, shared and uploaded* Plaintiff’s motion picture using the
25 BitTorrent system.” (Emphasis added.)

1 In its explanation of how BitTorrent works to download content, Plaintiff's Complaint,
2 Dkt. # 1, at ¶¶42-59, Plaintiff makes the following additional allegations regarding the
3 relationship among these Defendants:

4 ¶ 55 – “ The effect of this distributed network of users all downloading and uploading the
5 same file creates what is commonly known as a ‘swarm’ wherein users operate collectively to
6 copy and distribute media and content.”

7 ¶ 56 – “Members of the swarm become interconnected to download files, wherein the
8 download creates an exact digital copy on the downloaders' computers. As additional infringers
9 request the same file, each additional infringer joins the collective swarm, and each new infringer
10 receives pieces of the file from each other infringer in the swarm who has already downloaded
11 any part of the file.”

12 ¶ 57 – “This distributed nature of BitTorrent leads to a rapid viral sharing of media and
13 content throughout the collective peer users. As more peers join the collective swarm, the
14 frequency and speed of successful downloads also increases.”

15 In describing Defendants' conduct, Plaintiff's complaint alleges further as follows:

16 ¶ 65 – “By participating in a swarm, each Defendant participated in the exact same or
17 nearly identical transaction, occurrence, or series of transactions or occurrences as the other
18 Defendants.”

19 ¶ 66 – “Upon information and belief, many Defendants also acted in concert with others,
20 including other Defendants by participating in a Peer Exchange.”

21 ¶ 67 – “Upon information and belief, many Defendants also acted in concert with other
22 Defendants and swarm members and by linking together globally through use of a Distributed
23 Hash Table.”

24 ¶ 68 – “Each defendant's conduct is effectively a collective enterprise constituting
25 substantially similar or identical facts.”

1 With respect to the issue of joinder, Plaintiff's complaint alleges as follows:

2 ¶ 31 – "Plaintiff acknowledges that joinder in this action under F.R.C.P. 20(a)(2) is
3 permissive in that Plaintiff's claims arise out of the same occurrences or transactions, or series of
4 occurrences or transactions and that there are questions of law and fact common to each of the
5 Defendants."

6 ¶ 32 – "All of the Defendants have collectively acted through BitTorrent to illegally
7 download and distribute Plaintiff's motion picture, each damaging Plaintiff."

8 ¶ 33 – "As such, Plaintiff's rights to relief, as stated below, ultimately arise out of the
9 same series of transactions and occurrences."

10 ¶ 34 – "This action also raises substantial questions of law and fact common to all
11 Defendants."

12 ¶ 35 – "Permissive joinder in the instant case is to permit a more efficient management of
13 Plaintiff's claims against the several Defendants and to reduce the costs to Plaintiff and
14 Defendants and to reduce the costs and burdens on the Court."

15 ¶ 36 – "Notice is provided, that on being specifically identified and on request from an
16 identified Defendant, Plaintiff agrees to sever any Defendant that claims prejudice in being
17 joined in this matter and to proceed against each such Defendant individually."

18 These allegations, taken together, demonstrate that Plaintiff has not merely alleged that all
19 Defendants unlawfully downloaded its motion picture. Rather, it has alleged that the use of
20 BitTorrent to download *Elf-Man* was necessarily a collective enterprise in which Defendants
21 participated in order to engage in this infringing activity.

22 The Court's OSC calls the complaint's allegation that the Doe Defendants participated in
23 a "single swarm" into question because the infringing downloads are alleged to have occurred
24 over a three month period. Court's OSC /Dkt. # 10 at 1-2. With all due respect, Plaintiff
25 submits that because a swarm's activity need not and typically does not occur simultaneously,

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1 this time span does not refute Plaintiff's assertion that these Defendants acted as a single swarm
 2 in their downloading of *Elf-Man*. What ties the Defendants into a single swarm is their use of a
 3 a single so-called "hash" in downloading Plaintiff's motion picture. Plaintiff's complaint
 4 describes these hash identifiers as follows:

5 "The torrent file contains a unique hash identifier which is a unique identifier
 6 generated by a mathematical algorithm developed by the National Security
 7 Agency. This torrent file is tagged with the file's unique "hash," which acts as a
 "roadmap" to the IP addresses of other users who are sharing the media or content
 identified by the unique hash, as well as specifics about the media or content file."

8 Complaint / Dkt. # 1 at ¶ 49.

9 Exhibit 1 to the complaint indicates that all 152 Defendants employed a single hash
 10 identifier, namely SHA1: 33E6C4D563C276F29A7A48502C6640191DE3DD72, in their
 11 downloading of *Elf-Man*. As the complaint's discussion of an exemplar Defendant explains,
 12 Plaintiff alleges that each Doe obtained a Torrent file identified by this hash and then used his or
 13 her BitTorrent program to initiate connections with hundreds of other users possessing and
 14 uploading or sharing copies of its copyrighted work. Dkt. # 1 at ¶¶ 69-71. Nothing about this
 15 collective process requires that the uploading/downloading activity be done simultaneously or
 16 even close in time. The United States District Court of the Southern District of New York
 17 addressed this issue in *Malibu Media, LLC v. Does 1-5*, No. 2:12-cv-2954 (NRB) at 9-10
 18 (S.D.N.Y. August 24, 2012) (memorandum and order allowing joinder), and concluded that the
 19 Defendant's BitTorrent activity over a period of months was a part of the same "series of
 20 transactions or occurrences." The Court stated as follows:

21 "The length of time over which defendants are alleged to have participated in the
 22 swarm - eighty-eight days - does not undermine the interrelated nature of their
 23 actions. '[T]he law of joinder does not have as a precondition that there be
 24 temporal distance or temporal overlap' Patrick Collins, 2012 WL 1190840,
 25 at *8. As described above, the BitTorrent protocol operates such that every user is
 26 logically related to every other user who participates in the same swarm,
 27 regardless of their time of participation. *See id.*; *see also First Time Videos, LLC*
 28 *v. Does 1-95*, No. 11 Civ. 3822 (MEJ), 2011 WL 4724882, at *6 (N.D. Cal. Oct.
 7, 2011) (noting that 'even after a Doe Defendant disconnects from the swarm, the

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1 parts of the file that he downloaded and uploaded will continue to be transferred
2 to other Doe Defendants remaining in the swarm’).

3 “While the period at issue may therefore appear protracted by ordinary standards,
4 the doctrine of joinder must be able to adapt to the technologies of our time. *Cf.*
5 *Ginett v. Computer Task Grp., Inc.*, 962 F.2d 1085, 1094 (2d Cir. 1992) (noting
6 that ‘[w]ith the advent of industrialization, high-speed transportation, and
7 urbanization, more intricate disputes appeared with greater frequency, requiring
8 greater use of the more liberal joinder procedures’ (internal quotation marks
9 omitted). Here, the nature of the technology compels the conclusion that
10 defendants’ alleged transactions were part of the same ‘series of transactions or
11 occurrences.’ *See Digital Sin 176*, 2012 WL 263491, at *5. Accordingly, we find
12 that the Rule 20(a)(2) criteria for joinder are satisfied.”

13 With respect to Rule 20(a)(2)’s second requirement, i.e. that “any question of law or fact
14 common to all defendants will arise in this action[,]” Plaintiff’s complaint alleges that all 152
15 Doe Defendants used the same technology to download its copyrighted motion picture. As such,
16 the governing law will be largely identical with respect to all claims, as will many of the facts
17 concerning how this work was downloaded by Defendants. While some Defendants at a later
18 stage in this proceeding may raise defenses that turn on specific factual circumstances, the
19 existence of some individual factual issues does not defeat joinder. Rule 20(a)(2) requires only
20 *one or more* common factual or legal issues – not complete identity of issues. *See* 7 Wright,
21 Miller & Kane, *Federal Practice and Procedure* Civil 3d § 1653 (“The second requisite that
22 must be satisfied to sustain permissive joinder of parties is that a question of law or fact common
23 to all the parties will arise in the action. Rule 20(a) does not require that every question of law or
24 fact in the action be common among the parties; rather, the rule permits party joinder whenever
25 there will be at least one common question of law or fact.”).⁵

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27 ⁵ The Wright, Miller & Kane treatise discusses the text of F.R.C.P. 20(a) prior to its 2007
28 amendment. However, these amendments were stylistic only and the operative language was not
altered from the predecessor version of the rule. *See* Committee Notes on Rules – 2007
Amendment.

1 Plaintiff's complaint acknowledges that joinder in this case is permissive rather than
2 mandatory and it expressly agrees to sever any named Defendant who claims prejudice as a result
3 of being joined in this action and to proceed individually against each such Defendant. *See*
4 Complaint, Dkt. # 1 at ¶¶ 31, 36. In Plaintiff's view, the permissive joinder of its claims coupled
5 with this agreement to sever based solely upon an allegation of prejudice by any named
6 Defendant will promote the efficient processing of these claims while protecting the interest of
7 any Defendant who objects to joinder. This efficiency is demonstrated by the manner in which
8 this case has been processed to date. Had Plaintiff opted to file 152 separate actions against these
9 Defendants, the Court would have received 152 complaints and related documents for initial
10 processing, along with 152 separate motions to expedite discovery so that the information
11 necessary to identify each Doe Defendant could be obtained from his or her ISP. Of course, the
12 content of these motions and the legal issues raised therein would be substantially identical.
13 Such a proliferation of substantially identical claims would be directly contrary to the primary
14 purpose of F.R.C.P. 20, which is to promote judicial efficiency and avoid the unnecessary
15 multiplication of suits. *See 7 Federal Practice and Procedure, supra*, at § 1652 ("The purpose
16 of [F.R.C.P. 20] is to promote trial convenience and expedite the final determination of disputes,
17 thereby preventing multiple lawsuits." (Footnotes omitted)). In declining to sever claims based
18 upon docket management considerations, one district recently stated as follows: "Trading the
19 uncertainty of *possible* problems from multiple defenses for the certainty of multiple lawsuits
20 does not make practical sense, at this point, and seems contrary to the potential economies Rule
21 20 hopes to achieve." Report and Recommendation Re: Motions to Sever Defendants, Dkt No.

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1 6, at 15, *Malibu Media, LLC v. Does 1-30*, No. 2:12-cv-13312-DPH-MJH (E.D. Mich. May 16,
2 2013).⁶

3 At the very least, it would be premature to sever the claims against the Doe Defendants at
4 this early stage of the litigation. F.R.C.P. 20(b), along with F.R.C.P. 21, provides the Court with
5 flexible tools for the efficient management of this action as it progresses, either through ordering
6 separate trials or severing the claims made against certain parties if circumstances so warrant
7 once this action has progressed. *See 7 Federal Practice and Procedure, supra*, at § 1653 (noting
8 that an expansive reading of F.R.C.P. 20(a) “seems sound inasmuch as no difficulty is likely to
9 result from the joinder of even marginally related parties at the pleading stage. The court always
10 has discretion under Rule 20(b) to sever those parties whose claims may be tried more
11 conveniently in separate actions or whose continued presence might be prejudicial to other
12 litigants.” (footnotes omitted)).

13 In a substantially similar copyright infringement action asserted against over 2,000 Doe
14 defendants based upon the downloading of motion pictures using BitTorrent technology, the U.S.
15 District Court for the District of Columbia denied motions to dismiss based upon improper
16 joinder. *Maverick Entertainment Group, Inc. v. Does 1-2,115*, 810 F. Supp. 2d 1 (D.D.C. 2011).
17 In reaching this conclusion, the Court noted the “same transaction, occurrence or series of
18 transactions or occurrences” language of Rule 20(a)(2) requires that the joined claims be
19 “logically related.” *Id.* at 12. The Court concluded that the plaintiff’s allegations regarding file
20 sharing through BitTorrent rendered the claims “logically related.” *Id.* The Court also found that
21 the plaintiff had met the requirement of at least one common legal or factual issue. It noted that
22

23 ⁶ Because it contains a detailed description of how BitTorrent works and also
24 discusses the decisions of various courts regarding the joinder of claims against BitTorrent
25 participants, a true and correct copy of this Report and Recommendation is attached hereto as
26 Attachment 1.

1 the plaintiff would need to establish ownership of the copyright and the conduct amounting to
 2 infringement against all Defendants. Further, the evidence regarding how BitTorrent works and
 3 how Plaintiff investigated the conduct at issue would be common to all claims. *Id.* at 14. *See*
 4 *also Liberty Media Holdings, LLC v. Swarm Sharing Hash File AE340D056012 9AFEE8D78CE*
 5 *07F2394C7 B5BC9C05*, 821 F. Supp. 2d 444, 451-52 (D. Mass. 2011) (concluding that joinder
 6 of claims against a swarm of BitTorrent downloaders was proper); *Malibu Media, LLC v. Does*
 7 *1-5*, No. 2:12-cv-2954 (NRB) (S.D.N.Y. August 24, 2012) (same).⁷

8 The Court's OSC expresses concerns regarding the impact of copyright infringement
 9 actions of this sort on its docket, Court's OSC / Dkt. # 10 at 3, and Plaintiff is cognizant of these
 10 concerns. However, Plaintiff respectfully requests that the Court also consider the limited
 11 options it and other copyright owners have in seeking redress for the losses they are sustaining as
 12 a result of piracy through peer-to-peer file sharing through BitTorrent. With respect to this issue,
 13 the Court in *Donkeyball Movie, LLC v. Does 1-171*, 810 F. Supp. 2d 20 (D.D.C. 2011), noted as
 14 follows:

15 "This Court similarly must evaluate judicial economy and the administrative
 16 burdens of managing such cases, set against the challenge this broad-scale
 17 allegedly infringing activity represents for the copyright owners. Copyright
 owners' efforts to protect their copyrighted works through Doe actions are
 'costly[,] time consuming[,] ... cumbersome and expensive.' *In re Charter*

18
 19 ⁷ As the Court is undoubtedly aware, various U.S. District Courts have considered
 20 the issue of joinder of claims stemming from BitTorrent downloading and have reached differing
 21 conclusions on this issue. *See Malibu Media, LLC v. Does 1-15*, Case No. 2:12-2077 (E.D. Pa.
 22 July 30, 2012) (memorandum opinion denying motions to sever and to quash subpoena and
 23 summarizing decisions respectively allowing and disallowing joinder). Plaintiff submits that the
 24 decisions allowing joinder are both more persuasive and more consistent with the purpose of
 25 Rule 20(a)'s expansive approach to joinder, particularly at this early stage of the litigation. For a
 detailed discussion of how BitTorrent downloading works and why joinder is appropriate for
 claims against those using BitTorrent to download a given motion picture, see Report and
 Recommendation Re: Motions to Sever Defendants, Dkt No. 61 in *Malibu Media, LLC v. Does*
1-30, No. 2:12-cv-13312-DPH-MJH) (E.D. Mich. May 16, 2013), attached hereto as Attachment
 1.

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 27 15 PLAINTIFF'S RESPONSE TO ORDER TO
 28 SHOW CAUSE AND QUASHING SUBPOENAS
 (2:13-CV-507)

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 2021 S. Jones Blvd.
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1 *Commc'ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771, 782 (8th Cir.2005)
2 (Murphy, J., dissenting). Yet, copyright owners have limited alternatives to obtain
3 redress for infringement of their protected works other than such lawsuits. *See*
4 *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 252 (D.Me.2008) ('the
5 Court begins with the premise that the Plaintiffs have a statutorily protected
6 interest in their copyrighted material and that the Doe Defendants, at least by
7 allegation, have deliberately infringed that interest without consent or payment.
8 Under the law, the Plaintiffs are entitled to protect their copyrighted material and
9 it is difficult to discern how else in this unique circumstance the Plaintiffs could
act. Not to act would be to allow those who would take what is not theirs to
remain hidden behind their ISPs and to diminish and even destroy the intrinsic
value of the Plaintiffs' legal interests.');

10 810 F. Supp. 2d at 30-31.

11 Plaintiff submits that allowing this action to proceed against 152 Doe Defendants at this
12 preliminary stage furthers both the Court's interest in managing its docket and Plaintiff's interest
13 in seeking redress for the infringement of its copyrighted work.

14 Lastly, the Court's OSC expresses concern at the possibility that "the judicial authority of
15 the United States may be used to wrest improvident settlements from pro se litigants under threat
16 of huge statutory penalties." Court's OSC / Dkt. # 10 at 2. While Plaintiff is cognizant of the
17 bases for the Court's concern and addresses this issue in the accompanying declaration of
18 counsel, it submits that nothing in its conduct nor in that of its counsel indicates that Plaintiff has
19 any such intent and, therefore, its claims should not be severed due to the superficial similarity
20 between its claims and those of others. *See* Memorandum and Order, *Malibu Media, LLC v.*
21 *Does 1-5*, No. 2:12-cv-2954 (NRB) at 12, (S.D.N.Y. August 24, 2012) (declining to exercise
22 discretion to sever claims due to reluctance "to prevent plaintiff from proceeding with its case
23 based only on a 'guilt-by-association' rationale").

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27 16 PLAINIFF'S RESPONSE TO ORDER TO The VanderMay Law Firm PC
28 SHOW CAUSE AND QUASHING SUBPOENAS 2021 S. Jones Blvd.
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1 CONCLUSION

2 For the reasons set forth herein, Plaintiff respectfully requests that the Court allow this
3 action to proceed against all Doe Defendants, that it lift the stay of this proceeding and that it re-
4 instate the quashed subpoenas to the ISPs listed on Exhibit 1 to the complaint.

5 DATED: May 22, 2013

6 Respectfully submitted,

7 The VanderMay Law Firm PC

8 /s/ Maureen C. VanderMay

9 Maureen C. VanderMay, WSBA No. 16742

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15 Of Attorneys for Plaintiff

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27 17 PLAINTIFF'S RESPONSE TO ORDER TO
28 SHOW CAUSE AND QUASHING SUBPOENAS
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