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January 13, 2012

Via ECF Filing
Honorable Gary R. Brown
United States District Court Magistrate Judge
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, NY 117722-9014

Re: *K-Beech, Inc. vs. John Does 1-37*
Case Number: 11 CV 3995 (U.S.D.C., E.D.N.Y.)

Dear Magistrate Judge Brown,

I represent one of the alleged Defendants in this matter, "John Doe No. 2" (alleged to be IP 76.15.232.8) ("Doe 2"). Pursuant to your Individual Court Practices (Section II.B.), we respectfully submit this letter as Doe 2's letter-motion to quash the subpoena served upon EarthLink pursuant to Fed. R. Civ. O. 45(c)(3) and for a protective order in connection therewith (the "Motion").

Doe 2 seeks to join in the motions of John Doe No. 10 (DE 7), John Doe No. 32 (DE 8), John Doe (DE 14), John Doe 29 (DE 13), John Doe 16 (DE 16) and John Doe 30 (DE 17). The arguments and memoranda set forth in support of each of these motions apply with equal force and effect to Doe 2, and thus are adopted by Doe 2 and incorporated herein by reference in support of this Motion. Also submitted herewith are Doe 2's Affidavit, sworn to January 13, 2011 ("Doe 2 Aff"), and a Proposed Order granting this Motion.

By way of background, Plaintiff K-Beech ("Plaintiff") commenced this copyright infringement action against thirty-seven (37) anonymous "Doe Defendants", claiming that they had each downloaded elements of a film titled "Gang Bang Virgins" (the "Work"). Plaintiff alleges that each Defendant separately did so by purportedly using a BitTorrent client and protocol. Plaintiff sought to obtain expedited discovery and the issuance of subpoenas, prior to a Rule 26(f) conference being held, seeking the identities of the Doe Defendants who allegedly

downloaded the Work. Doe 2 was made aware of this matter for the first time by way of a letter from Earthlink, dated December 16, 2011, stating that it was served with a subpoena seeking Doe 2's identity.

Pursuant to Fed. R. Civ. P. 26(c), the Court may issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Pursuant to Fed. R. Civ. P. 45(c)(3)(A), the Court shall "quash or modify [a] subpoena if it subjects a person to undue burden." A motion to quash may be granted to protect the objecting party's anonymity. *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

Plaintiff's subpoena should be quashed and the Motion granted for several reasons.

First, Doe 2 has never viewed, possessed or downloaded the Work, has never used or subscribed to BitTorrent and his IP address is not 76.15.232.8, as alleged in Plaintiff's subpoena and complaint. (Doe 2 Aff ¶4). Moreover, Doe 2's email account was hacked into in early February 2011. Doe 2 promptly reported this to Earthlink and demanded that it close the account. (Doe 2 Aff ¶5). The viewing of the Work ascribed to Doe 2 in Plaintiffs' complaint and subpoena, occurred more three months later, allegedly on May 20, 2011. Moreover, as Plaintiff admits, IP addresses are, by definition, not static or affixed to a permanent address. Doe 2's router was also unsecured and could have been "piggybacked" by neighbors in the surrounding apartments. (Doe 2 Aff ¶5). Plaintiff thus cannot demonstrate any basis by which to demonstrate that Doe 2 accessed the so-called Work. Accordingly, Plaintiff has no basis upon which to impose on Doe 2 the cost, burden, annoyance and potential embarrassment of being associated with Plaintiff's apparently pornographic Work. Plaintiff's subpoena should thus be quashed as to Doe 2.

Second, as set forth in the motions of John Doe 32 and John Doe 16, Plaintiff has not established that it ever obtained the copyright registration for the Work. The failure to do so negates its prima facie claim for copyright infringement. Doe 2's counsel has attempted to contact the U.S. Copyright Office to determine whether the registration was ever granted or refused, but was unable to obtain a response. Plaintiff, as recently as October 28, 2011, amended its complaint in this action (DE 18), alleging therein that it had only applied for the registration. Plaintiff has filed nothing in this action since that time even alleging, much less demonstrating, that such registration was ever granted. Failing to do so, Plaintiffs' complaint and subpoena are

defective on their face. *See K-Beech, Inc. v. Does 1-29*, 2011 WL 44001933, at *1 (Sept. 19, 2011), *citing Arista Records, LLC v. Doe 3,* 604 F.3d 110, 119 (2d Cir. 2010).

Third, for the reasons set forth in all of the moving Defendants' motions, Plaintiffs' joinder of Doe 2 along with 36 other alleged Defendants is improper on its face. Plaintiff's own complaint, Exhibit 1, asserts only one alleged use by Doe 2, *i.e.*, on May 20, 2011, at time when no other Defendant allegedly accessed the Work. There is no basis to lump all the defendants together into a single action. Plaintiff's entire action and the subject subpoena are thus improper on their face.

Wherefore, Doe 2 respectfully requests the Court quash Plaintiff's subpoena and grant it such other and further relief as the Court deems proper. Thank you.

Respectfully submitted,

Joseph P. Augustine (JA-1805)

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Earthlink (via U.S. mail)