

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

MALIBU MEDIA, LLC,

Plaintiff,

-v-

JOHN DOE,

Defendant.

Case No. 3:14-cv-378

Judge Thomas M. Rose

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**ENTRY AND ORDER GRANTING IN PART AND OVERRULING IN PART JOHN DOE DEFENDANT'S MOTION TO QUASH THIRD-PARTY SUBPOENA (Doc. #8). THE MOTION TO QUASH THE SUBPOENA IS OVERRULED AND JOHN DOE DEFENDANT IS GRANTED LEAVE TO PROCEED ANONYMOUSLY THROUGH THE COMPLETION OF DISCOVERY**

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Malibu Media, LLC ("Malibu") has identified a John Doe Defendant by the Internet Protocol ("IP") address 75.185.238.121. This IP address was assigned by Time Warner Cable ("TWC"), an internet service provider. Pursuant to this Court's Order of November 17, 2014, Malibu has served a Rule 45 subpoena on TWC so that Malibu may obtain the identity of the holder of the subject IP address.

The John Doe Defendant now seeks to quash the Rule 45 Subpoena as moot and, in the alternative asks that the Court grant leave to proceed anonymously. Malibu responds that this Court should not quash the Rule 45 Subpoena but does not oppose John Doe Defendant's request to proceed anonymously through the end of discovery so long as it is not prevented from conducting discovery in an orderly and efficient manner.

The Motion and a Response has been filed. The time has run and a reply has not been filed. This matter is, therefore, ripe for decision.

## **RELEVANT LEGAL PROVISIONS**

Federal Rule of Civil Procedure 45 sets forth four (4) situations when a subpoena must be quashed and two situations when a subpoena may be quashed. A subpoena must be quashed: if it fails to allow a reasonable time to comply; if it requires a person to comply beyond the geographical limits specified in Rule 45(c); if it requires the disclosure of privileged or other protected matter and no exception or waiver applies; or if it subjects a person to undue burden. Fed. R. Civ. P. 45(d)(3)(A). A subpoena may be quashed: if it requires disclosing a trade secret or other confidential research, development or commercial information; or if it requires disclosing an unretained expert's opinion or information that does not describe the specific occurrences in dispute and results from the expert's study that was not requested by a party. Fed. R. Civ. P. 45(d)(3)(B).

## **ANALYSIS OF MOTION TO QUASH**

In this case, John Doe Defendant seeks to quash the Rule 45 Subpoena that Malibu issued to TWC to obtain the identity of the holder of an IP address. John Doe Defendant seeks to quash this Rule 45 subpoena because Malibu has not demonstrated the requisite need to be allowed to circumvent the established discovery procedures of the federal courts.

John Doe Defendant begins by asserting that the Rule 45 subpoena was issued ex parte but there is now an adversary to present the prejudices that will be faced by the John Doe Defendant as a consequence of permitting Malibu to expedite the discovery process. The first prejudice identified by the John Doe Defendant is that the Complaint in this matter suffers "critical" flaws and should, thus, not support a third-party subpoena. However, the flaws identified by the John Doe Defendant are merely possibilities and can and should be raised as

defenses to a complaint or as reasons for dismissal of a complaint. Further, this Court has already determined that the subpoena should issue and faulty complaints are not one of the reasons for which a subpoena may be quashed.

The John Doe Defendant also argues that the Court should consider innocent IP subscribers who may be dragged into the case. He or she asserts that any disclosure of information identifying the John Doe Defendant in this case would force the John Doe Defendant to “choose between public embarrassment and a coerced settlement on potentially specious claims.” Again, this is not good cause for quashing a subpoena pursuant to Rule 45.

The John Doe Defendant also argues that Malibu’s request for discovery of the “subscriber” in this matter is not justified given the “track record” in cases like this in which plaintiffs use discovery of personal information to coerce settlements. Again, even if true, this is not good cause for quashing a subpoena pursuant to Rule 45.

Finally, the John Doe Defendant argues that her or his attorney could agree to accept service of the complaint, so there would be no need to conduct discovery before the Rule 26(f) conference. Again, this is not good cause of quashing a subpoena pursuant to Rule 45.

In addition, Malibu needs to know John Doe’s identity. Malibu cannot serve discovery requests before first bringing a defendant under this Court’s jurisdiction by valid service of process. *See Malibu Media, LLC v. Doe*, No. 1:14-cv-493, 2015 WL 268995 at \*4 (S.D. Ohio Jan. 21, 2015). And, valid service of process requires knowledge of a defendant’s identity. *Id.*

#### **ANALYSIS OF REQUEST TO PROCEED ANONYMOUSLY**

John Doe Defendant also asserts that, if the third-party subpoena is not quashed, she or he wishes to proceed anonymously. Malibu does not object to allowing John Doe Defendant to

remain anonymous through the end of discovery so long as Malibu is not prevented from conducting discovery in an orderly and efficient manner.

The privilege of proceeding anonymously is not granted automatically even if, as here, none of the Parties involved object. *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997). Proceeding anonymously is disfavored, and the Court has an independent duty to determine whether to permit a party to proceed anonymously. *Id.* Finally, the presumption that parties' identities are public information may be overcome by a showing that the harm to the, in this case, Defendant, exceeds the likely harm from proceeding anonymously. *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004).

John Doe Defendant argues that she or he wishes to proceed anonymously "because of the scandalous nature of Malibu's business model and tactics...." Further, "any disclosure of information identifying the movant [John Doe Defendant] in this case would force them to choose between public embarrassment and a coerced settlement on potentially specious claims."

While a risk of embarrassment may exist for individuals who may become associated with IP addresses used to violate copyrights of pornographic material, this potential for embarrassment does not outweigh the statutory right of the copyright holder to protect his or her property interest in the copyright. *Patrick Collins, Inc. v. John Does 1-9*, No. 12-CV-3161, 2012 WL 4321718 at \*5 (C.D. Ill. Sep. 18, 2012). Yet, where a party has an objectively reasonable fear of extraordinarily severe retaliation, that party may proceed anonymously. *Does I thru XXIII v. Advance Textile Corp.*, 214 F.3d 1058, 1063 (9th Cir. 2000). Extraordinary retaliation is not alleged here by the John Doe Defendant.

However, Fed. R. Civ. P. 26(c)(1) authorizes a court to issue a protective order "to

protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...” This section, of course, relates to discovery.

Defendants have been permitted to proceed anonymously through discovery as a procedural matter when the plaintiff will not be prejudiced. *CineTel Films, Inc. v. Does 1-1052*, 853 F. Supp.2d 545, n.2 (D. Md. 2012). In other situations, involving the discovery of IP address owners, courts have permitted John Doe defendants to proceed anonymously through discovery because “the risk of false positives gives rise to the potential for coercing unjust settlements from innocent defendants....” *Patrick Collins, Inc. v. John Does 1-28*, No. 12-13670, 2013 WL 359759 at \*11 (E.D. Mich. Jan. 29, 2013).

In this case, there is no evidence that Malibu will be prejudiced if John Doe Defendant proceeds anonymously through discovery. Further, the risk of John Doe Defendant being coerced into settlement as an innocent defendant is great at this point. Therefore, John Doe Defendant may proceed anonymously through the deadline set for the completion of discovery in this case.

**DONE and ORDERED** in Dayton, Ohio this Twelfth Day of March, 2015.

**s/Thomas M. Rose**

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THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record