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UNITED STATES DISTRICT COURT

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Northern District of California

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San Francisco Division

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PATRICK COLLINS, INC.,

No. C 11-2766 MEJ

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Plaintiff,

**PLAINTIFF'S RESPONSE TO
ORDER TO SHOW CAUSE RE**

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v.

DOE 654 (IP ADDRESS 24.215.237.108)

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DOES 1-2,590,

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Defendants.

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1 I WITHOUT DOE 654'S ACTUAL IDENTIFYING INFORMATION, WE ARE STILL
2 IN A PRELIMINARY STAGE OF LITIGATION, WHEREIN CONSIDERATION OF
3 ISSUES SUCH AS PERSONAL JURISDICTION AND VENUE ARE PREMATURE

4 The Court is very familiar with the facts and issues in this case, so Plaintiff will endeavor
5 to keep repetition of previous discussions to a minimum.

6 In the Court's Order of November 3, 2011 (Dkt. No. 21), the Court set forth the
7 following:

8 "Now before the Court is a Motion to Dismiss, filed by a Doe
9 Defendant (I.P. Address 24.215.237.108). Dkt. No. 20. In his motion,
10 Doe requests that the subpoena be quashed as to him and the case against
11 him dismissed because the Court lacks jurisdiction and venue is
12 improper. Based on the information presented in Doe's motion, it appears
13 that the Court lacks jurisdiction. Accordingly, the Court hereby
14 ORDERS Plaintiff to either: (1) file a voluntary dismissal of Doe
15 Defendant at I.P. Address 24.215.237.108, without prejudice to filing a
16 complaint against him/her in the proper jurisdiction; or (2) show cause
17 why the Court should not grant Doe's motion to dismiss. Plaintiff shall
18 file its response by November 14, 2011."

19 In response, Plaintiff notes that the first option may not be available to Plaintiff. That is
20 because **what we have here is a potential defendant continuing to act anonymously**. Because
21 any new suit would require starting from scratch with a new ex parte application for early
22 discovery, with the concomitant delays in having another court consider the application, the ISP
23 then having to be served with a subpoena, and then search its records. As noted in par. 18 of the
24 Declaration of Jon Nicolini (Dkt. No. 5-1),

25 "An ISP generally records the times and dates that it assigns each
26 IP address to a subscriber and maintains for a period of time a record of
27 such an assignment to a subscriber in logs maintained by the ISP."

28 By the time that the steps required by a new suit and subpoena process occur, the ISP may no
longer have the required information, or the subscriber may have moved with no forwarding
address. So, denying Plaintiff the opportunity to obtain the requested information from the ISP
(which a dismissal would effectively do), may also deny Plaintiff the opportunity to obtain
redress from an infringer.

As this Court noted in its Order granting the discovery requested by Plaintiff (Dkt. No.
12) (emphasis added),

1 "Here, Plaintiff is currently obtaining identifying information from ISPs so
 2 that they can properly name and serve the defendants. If the Court were to
 3 consider severance at this juncture, Plaintiff would face significant obstacles in its
 4 efforts to protect its copyright from illegal file-sharers and this would only
 5 needlessly delay the case. Plaintiff would be forced to file 2,590 separate lawsuits,
 6 in which it would then move to issue separate subpoenas to ISPs for each
 7 defendant's identifying information. Plaintiff would additionally be forced to pay
 8 the Court separate filing fees in each of these cases, which would further limit its
 9 ability to protect its legal rights. 'This would certainly not be in the 'interests of
 10 convenience and judicial economy,' or 'secure a just, speedy, and inexpensive
 11 determination of the action.' *Call of the Wild*, 770 F. Supp. 2d at 334 (citation
 12 omitted) (declining to sever defendants where parties joined promotes more
 13 efficient case management and discovery and no party prejudiced by joinder).

14 "Further, the Doe Defendants are currently identified only by their IP
 15 addresses and are not named parties. Consequently, they are not required to
 16 respond to Plaintiff's allegations or assert a defense. **The defendants may be able
 17 to demonstrate prejudice once Plaintiff proceeds with its case against them,
 18 but they cannot demonstrate any harm that is occurring to them before that
 19 time. *Id.***

20 "Thus, the Court finds that, at this preliminary stage, Plaintiff has met the
 21 requirements of permissive joinder under Rule 20(a)(2). The putative defendants
 22 are not prejudiced but likely benefitted by joinder, and severance would debilitate
 23 Plaintiff's efforts to protect its copyrighted material and seek redress from the Doe
 24 Defendants who have allegedly engaged in infringing activity."

25 With respect to Doe 654 (IP address 24.215.237.108), we still are in the preliminary
 26 stage, and we will not be out of it until Doe 654's actual name, address and other requested
 27 identifying information are provided to Plaintiff by the ISP.

28 II. PLAINTIFF OBJECTS TO CONSIDERATION OF ANY MOTION
 FILED BY OR ON BEHALF OF AN ANONYMOUS PARTY

A person has anonymously filed a motion to quash, as to him, her or it, a subpoena that
 has been served on an Internet service provider. The bases of the motion are the movant's
 purported right of privacy and this Court's purported lack of jurisdiction over the movant.

Movant purports to be the potential defendant listed in Exhibit A to the Complaint as
 having IP address 24.215.237.108 (hereinafter sometimes referred to as Doe 654).

As far as Plaintiff's counsel knows, putative defendant Doe 654 provided no
 identification of any kind to the Court. In other words, with all of pleadings and papers in this
 case available on, among other websites, PACER, **putative defendant Doe 654 may be a
 "stealth" movant, a mere interloper.**

1 Further, **because no identifiable person has signed any declaration, this Court has no**
 2 **reason whatsoever to believe any of the purported facts set forth in connection with Doe**
 3 **654's motion.**

4 Further, even if putative Doe 654 made statements in an actual declaration under penalty
 5 of perjury, this Court should not put any credence in them at this stage of the litigation, when
 6 Plaintiff has had no opportunity to test, through discovery, their truthfulness. In this regard, the
 7 Court is asked to take notice that we have just experienced a week of a member of Congress
 8 making untrue statements and partial answers all in the name of protecting his reputation and
 9 privacy and preventing embarrassment. This Congressman falsely claimed several times that a
 10 particular a message was sent by a hacker and not by himself, even though in making such false
 11 claim he effectively impugned the security measures against hacking by Twitter and other
 12 Internet services. The Congressman did not become forthright until additional information was
 13 discovered. See the story here, e.g.,

14 <http://www.businessweek.com/news/2011-06-07/weiner-apologizes-for-photos-that-imperil-his-political-future.html>

15 To reduce the risk that an interloper may be involved, Doe 654 should have at the very
 16 least provided his identity to both the Court and Plaintiff's counsel. As ordered by United States
 17 District Judge William Alsup in New Sensations, Inc. v. Does 1-1745, Northern District of
 18 California Case No. CV 10-05863 WHA (N.D. Cal. June 23, 1911) (Doc. #28) (Emphasis
 19 added.):

20 "If 'Defendant Doe #333' [Doe 733] wishes to appear in this action
 21 anonymously or otherwise, he or she must follow the proper procedures for doing
 22 so. **At a minimum, the Court and the parties must be informed of the**
 23 **litigant's identity.** If the litigant wishes to protect his or her identity from the
 24 public, the litigant may use a pseudonym in public filings only after receiving
 permission for good cause shown. Counsel are advised that the Ninth Circuit
 court of appeals allows the use of pseudonyms only in the most unusual cases.
 See, e.g., *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68
 (9th Cir. 2000)."

25 In Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067-9 (9th Cir. 2000),
 26 the court held as follows:

27 "In this circuit, we allow parties to use pseudonyms in the 'unusual case '
 28 when nondisclosure of the party's identity 'is necessary . . . to protect a person
 from harassment, injury, ridicule or personal embarrassment.' *United States v.*

1 Doe, 655 F.2d 920, 922 n.1 (9th Cir. 1981) ('Doe II') (using pseudonyms in
2 opinion because appellant, a prison inmate, 'faced a serious risk of bodily harm'
3 if his role as a government witness were disclosed); see also Madison School
4 Dist., 147 F.3d at 834 n.1 (stating that plaintiff filed case as 'Jane Doe' because
5 she feared retaliation by the community). We have not, however, decided an
6 appeal from a district court's order granting or denying permission to proceed
7 anonymously. As a result, we have had no opportunity to set out the legal
8 standard governing a district court's discretionary decision to permit a party to
9 proceed anonymously.

10 "Four federal Courts of Appeals have heard appeals from a district court's
11 order refusing to allow plaintiffs to use pseudonyms. These courts held that a
12 district court must balance the need for anonymity against the general
13 presumption that parties' identities are public information and the risk of
14 unfairness to the opposing party. See *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th
15 Cir. 1998); *James*, 6 F.3d at 238 (Fourth Circuit); *Doe v. Frank*, 951 F.2d 320,
16 323-24 (11th Cir. 1992); *Stegall*, 653 F.2d at 186 (Fifth Circuit). Applying this
17 balancing test, courts have permitted plaintiffs to use pseudonyms in three
18 situations: (1) when identification creates a risk of retaliatory physical or mental
19 harm, see *Stegall*, 653 F.2d at 186; *Gomez v. Buckeye Sugars*, 60 F.R.D. 106, 107
20 (N.D. Ohio 1973) (permitting FLSA plaintiffs to use pseudonyms to protect them
21 from employer reprisals); (2) when anonymity is necessary 'to preserve privacy
22 in a matter of sensitive and highly personal nature,' *James*, 6 F.3d at 238; see also
23 *Doe v. United Services Life Ins. Co.*, 123 F.R.D. 437 (S.D.N.Y. 1988) (allowing
24 plaintiff to sue insurance company anonymously to protect against identification
25 as a homosexual); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974)
26 (permitting plaintiff in abortion suit to use pseudonym due to the personal nature
27 of pregnancy); and (3) when the anonymous party is 'compelled to admit [his or
28 her] intention to engage in illegal conduct, thereby risking criminal prosecution,'
Stegall, 653 F.2d at 185; see also *Doe v. Commonwealth's Attorney for City of
Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), judgment aff'd by 425 U.S. 985
(1976).

"We join our sister circuits and hold that a party may preserve his or her
anonymity in judicial proceedings in special circumstances when the party's need
for anonymity outweighs prejudice to the opposing party and the public's interest
in knowing the party's identity. We further hold that in cases where, as here,
pseudonyms are used to shield the anonymous party from retaliation, the district
court should determine the need for anonymity by evaluating the following
factors: (1) the severity of the threatened harm, see *Southern Methodist Univ.*,
599 F.2d at 713; (2) the reasonableness of the anonymous party's fears, see
Stegall, 653 F.2d at 186; and (3) the anonymous party's vulnerability to such
retaliation, see *id.* (discussing vulnerability of child plaintiffs); *Doe II*, 655 F.2d at
922 n.1 (recognizing enhanced risks to long-term prison inmate). The court must
also determine the precise prejudice at each stage of the proceedings to the
opposing party, and whether proceedings may be structured so as to mitigate that
prejudice. See *James*, 6 F.3d at 240-41 (evaluating defendants' assertions that
plaintiffs' use of pseudonyms would prejudice the jury against the defendants and
would impair defendant's ability to impeach plaintiffs' credibility). Finally, the
court must decide whether the public's interest in the case would be best served by
requiring that the litigants reveal their identities. See *Stegall*, 653 F.2d at 185
(recognizing that 'party anonymity does not obstruct the public's view of the
issues joined or the court's performance in resolving them.').

"We recognize that the balance between a party's need for anonymity and
the interests weighing in favor of open judicial proceedings may change as the
litigation progresses. In cases where the plaintiffs have demonstrated a need for
anonymity, the district court should use its powers to manage pretrial

1 proceedings, see Fed. R. Civ. P. 16(b), and to issue protective orders limiting
2 disclosure of the party's name, see Fed. R. Civ. P. 26(c), to preserve the party's
3 anonymity to the greatest extent possible without prejudicing the opposing party's
ability to litigate the case. It may never be necessary, however, to disclose the
anonymous parties' identities to nonparties to the suit.

4 In that case the court allowed the **plaintiffs** to proceed anonymously during a preliminary stage
5 of the litigation when those plaintiffs faced fear of retaliation in the form of physical violence
6 from parties not before the court.

7 In Does I thru XXIII v. Advanced Textile Corp. the case could actually proceed, at least
8 through early stages, with plaintiff's pseudonymously named. Here, of course, the situation is
9 reversed. In the instant case, without defendant's name, address and other identifying
10 information, the case cannot go forward at all. In other words, any need putative Doe 654 might
11 have for anonymity does not outweigh the prejudice to Plaintiff. What harm does potential
12 defendant Doe 654 face? The potential for being named in a lawsuit? That is no different from
13 any other person. The risk of actually being found to be liable? Again, that is not different from
14 any other person. The embarrassment of actually being accused of copyright infringement?
15 That certainly is not the type of embarrassment from which any party is entitled to be protected.
16 The embarrassment of being named as someone who downloaded a adult motion picture. Again,
17 that is not the type of embarrassment from which any party is entitled to be protected, or else no
18 adult motion picture producer could enforce its copyrights. Note, in the cases in which a party is
19 allowed to proceed pseudonymously or anonymously to avoid embarrassment, that party is
20 typically a plaintiff. And see, Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d
21 869, 872 (7th Cir. 1997) in which a plaintiff was not allowed to proceed anonymously even
22 though the actual name of "John Doe" and that his case involved his suffering from a psychiatric
23 disorder would be disclosed. Surely, the fact that someone is accused of copyright infringement,
24 or that the infringed work contains adult content, is not as private or embarrassing a situation as
25 someone's medical condition.

26 And, putative Doe 654's identity is NOT subject to any right of privacy. As held in Third
27 Degree Films, Inc. v. Doe, 2011 U.S. Dist. LEXIS 116205, 9-10 (N.D. Ind. Oct. 6, 2011)

1 "A subpoena may have a broad reach and compel disclosure of things commonly
 2 accepted as privileged, such as documents subject to the journalistic or doctor-
 3 patient confidentiality. *First Time Videos*, 2011 U.S. Dist. LEXIS 89044, 2011
 4 WL 3498227 at *4. An internet subscriber's expectation of privacy falls far below
 5 this level. 'Internet subscribers do not have a reasonable expectation of privacy in
 6 their subscriber information — including name, address, phone number, and
 7 email address — as they have already conveyed such information to their ISPs.'
 8 Internet subscribers share their information to set up their internet accounts and
 9 cannot proceed to assert a privacy interest over the same information they chose
 10 to disclose. *First Time Videos*, 2011 U.S. Dist. LEXIS 89044, 2011 WL 3498227
 11 at *4."

12 What putative Doe 654 really wants is to have this Court prevent Plaintiff from ever
 13 finding out his (or her or its) identity, even if putative defendant Doe 654 really is that Doe
 14 defendant, and to thereby deny Plaintiff the opportunity to obtain justice. **The irony here is
 15 enormous: putative defendant Doe 654 wants this Court to keep his, her or its identity
 16 secret so that he cannot be sued - in other words, so that he, she or it can keep on infringing
 17 Plaintiff's copyright with impunity.**

18 III. IN VIEW OF THE DEARTH OF INFORMATION AVAILABLE, IT
 19 WOULD BE IMPROPER FOR THE COURT TO DISMISS FOR
 20 LACK OF JURISDICTION OR FOR IMPROPER VENUE

21 As indicated above, there is no basis for giving any credence to an statement by an
 22 anonymous person. If we were to start granting credence to such statements, the court system
 23 would be nothing but a publishing house for fiction. Above, mention was made of a
 24 Congressman who lied to protect himself. Other Congress members have apparently falsely
 25 denied wrongdoing. See,

26 http://www.nola.com/news/index.ssf/2009/08/william_jefferson_verdict_guil.html

27 http://articles.cnn.com/2002-04-11/justice/traficant.trial_1_traficant-guilty-verdict-bribery?_s=PM:LAW

28 If cases were allowed to be prosecuted against such Congress members despite their denials, it is
 totally inappropriate to consider dismissing this case against putative Doe 654 for lack of
 jurisdiction based on a completely unsubstantiated, and as yet unchallenged because of its
 anonymity, statements that putative Doe 654 does not have sufficient contact with California for
 general jurisdiction.

1 In other words, Plaintiff at the very least should be able to make its own investigation
2 about putative Doe 654's contacts with California, and even to take jurisdictional discovery if
3 necessary. Of course, all of that is impossible without the information sought from the ISP.

4 Further, a plaintiff has the right to sue a defendant in at least any court in which such
5 plaintiff has a good faith belief that jurisdiction is proper. Through the BitTorrent peer-to-peer
6 network in which the Doe Defendants participated, out-of-California potential defendants have
7 copied from and made available infringing copies of the motion picture to other potential
8 defendants that are in the forum district. In other words, potential defendants have participated
9 in infringements in the forum district.

10 With copyright infringement involving cooperation with many potential defendants in
11 this the Northern District of California (Nicolini Decl., pars. 6 and 23), or having a direct effect
12 on Plaintiff in California, this Court may exercise personal jurisdiction over out-of-state
13 defendants under the effects test set out in Calder v. Jones, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S.
14 Ct. 1482 (1984). As explained by U.S. District Judge Patel in IO Group, Inc. v. Pivotal, No. C
15 03-5286 MHP, 2004 U.S. Dist. LEXIS 6673, 2004 WL 838164, *6 (N.D. Cal. Apr. 19, 2004),

16 "Finally, this court may also exercise specific jurisdiction over defendants
17 under the *Calder* effects test. See *Panavision v. Int'l, LP v. Toeppen*, 141 F.3d
18 1316, 1321 (9th Cir. 1998) (citing *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804,
19 104 S. Ct. 1482 (1984)). [*17] Under *Calder*, personal jurisdiction can be based
20 upon '(1) intentional actions, (2) expressly aimed at the forum state, (3) causing
21 harm, the brunt of which is suffered--and which the defendant knows would likely
22 be suffered--in the forum state.' *Id.* (citing *Core-Vent Corp. v. Nobel Ind. AB*, 11
23 F.3d 1482, 1486 (9th Cir. 1993)). Copyright infringement may be characterized as
24 an intentional tort. See *Columbia Pictures Television v. Krypton Broad. of
25 Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir. 1997), overruled on other grounds
26 by *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 140 L. Ed. 2d 438, 118
27 S. Ct. 1279 (1998);

28 " * * IO Group also alleges that all of the studios in the gay adult
entertainment industry are located in California. Webb Decl. P21. As a result,
defendants knew that the brunt of the harm resulting from their infringement
would likely be felt in California. Based on this evidence, IO Group has
adequately demonstrated that defendants published images belonging to a
California company, affecting an industry primarily centered in California,
knowing that harm would likely be felt in that state. Construing these facts in a
light most favorable to the plaintiff, IO Group has made a prima facie case that
defendants are subject to the personal jurisdiction of this court under *Calder*."

1 "Thanks to, among other reports, a CBS "60 Minutes" report, Americans have long
2 known that California is the center of adult motion picture production. See,

3 <http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml>

4 In this regard, see, Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1231-1232
5 (9th Cir. Cal. 2011)

6 "We acknowledge the burden that our conclusion may impose on some
7 popular commercial websites. But we note that the alternative proposed by
8 Brand's counsel at oral argument — that Mavrix can sue Brand only in Ohio or
9 Florida — would substantially undermine the 'interests . . . of the plaintiff in
10 proceeding with the cause in the plaintiff's forum of choice.' *Kulko v. Superior*
11 *Court of Cal.*, 436 U.S. 84, 92, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978). Brand's
12 theory of jurisdiction would allow corporations whose websites exploit a national
13 market to defeat jurisdiction in states where those websites generate substantial
14 profits from local consumers. See *Burger King*, 471 U.S. at 473-74 ('[W]here
15 individuals 'purposefully derive benefit' from their interstate activities, it may well
16 be unfair to allow them to escape having to account in other States for
17 consequences that arise predictably from such activities; the Due Process Clause
18 may not readily be wielded as a territorial shield to avoid interstate obligations
19 that have been voluntarily assumed.' (quoting *Kulko*, 436 U.S. at 96)). We also
20 note that the 'expressly aimed' requirement is a necessary but not sufficient
21 condition for jurisdiction. In order to establish specific jurisdiction, a plaintiff
22 must also show that jurisdictionally significant harm was suffered in the forum
23 state.

24 "We therefore turn to the question of harm, the third element of the *Calder*
25 *effects test*. We conclude that Brand has 'caus[ed] harm that [it] knows is likely
26 to be suffered in the forum state.' In determining the situs of a corporation's
27 injury, '[o]ur precedents recognize that in appropriate circumstances a
28 corporation can suffer economic harm both where the bad acts occurred and
29 where the corporation has its principal place of business.' *Dole Food Co., Inc. v.*
30 *Watts*, 303 F.3d 1104, 1113 (9th Cir. 2002). '[J]urisdictionally sufficient harm
31 may be suffered in multiple forums.' *Id.* (citing *Core-Vent Corp. v. Nobel Indus.*
32 *AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). Mavrix alleges that, by republishing the
33 photos of Ferguson and Duhamel, Brand interfered with Mavrix's exclusive
34 ownership of the photos and destroyed their market value. The economic loss
35 caused by the intentional infringement of a plaintiff's copyright is foreseeable. See
36 *Brayton Purcell*, 606 F.3d at 1131. It was foreseeable that this economic loss
37 would be inflicted not only in Florida, Mavrix's principal place of business, but
38 also in California. A substantial part of the photos' value was based on the fact
39 that a significant number of Californians would have bought publications such as
40 *People and Us Weekly* in order to see the photos. Because Brand's actions
41 destroyed this California-based value, a jurisdictionally significant amount of
42 Mavrix's economic harm took place in California.

43 "In sum, we conclude that Mavrix has presented a prima facie case of
44 purposeful direction by Brand sufficient to survive a motion to dismiss for lack of
45 personal jurisdiction."

46 All defendants in this case have reason to believe (i) that they are cooperating with
47 Californians when they join BitTorrent swarms, which are not passive (i.e., the defendants
48

1 intentionally join the swarm) because one out of every 10 Americans is a Californian and (ii) that
2 they are injuring a California party. Further, in this very case, 1 out of every 16 defendants is
3 believed to be in this very district. Nicolini Decl., par. 23.

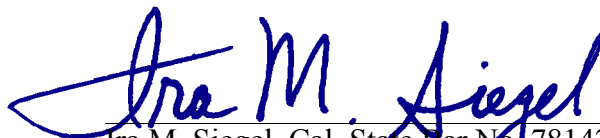
4 At this stage of the litigation, there is no reason to believe that general, and in particular,
5 specific jurisdiction over an anonymous defendant is improper.

6 IV. CONCLUSION

7 Purported defendant Doe 654 wants this Court to deny Plaintiff the opportunity to make
8 its case, to deny Plaintiff's right to seek justice and compensation as expressly provided in the
9 Constitution and the Copyright Act. Of course, almost all people infringing the rights of others
10 seek to maintain their privacy, and thus even bank robbers who engage in their acts in some of
11 the most public places often wear masks to protect their privacy. In contrast to the hindrances
12 put up by movant, copyright owners such as Plaintiff need the Court's assistance in pursuing
13 defendants that engage in mass, swarm infringements. Further, as the Court has already noted,
14 having the ISPs provide the requested information promotes litigation efficiency and does not
15 prejudice defendants. As noted before, without the requested identifying information, Plaintiff
16 may be completely denied redress.

17 For the reasons set forth above, Plaintiff requests that the Court (i) no longer entertain
18 motions by or on behalf of anonymous or pseudonymous putative defendants (who might even
19 be "stealth" interlopers), and (ii) deny the motion made by the putative defendant having IP
20 address 24.215.237.108 (i.e., putative Doe 654).

21 Respectfully submitted,

22 

23 Dated: November 14, 2011

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