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**UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION**

CP PRODUCTIONS, INC ) Case No.: 2:12-CV-00616-WBS-JFM  
 )  
Plaintiff, ) Magistrate Judge John F. Moulds  
 )  
vs. ) Hearing Date: July 5, 2012  
 )  
JOHN DOE, ) JOINT STATEMENT RE: DISCOVERY  
Defendant ) DISPUTE  
 )  
 )

Plaintiff is the exclusive holder of the relevant rights with respect to the copyrighted creative work that is the subject of its Complaint in this matter. John Doe is the only defendant in this matter at this time; he is currently unidentified. Movants are two non-party account-holders associated with alleged "co-conspirator" IP addresses 96.41.117.43 and 71.95.203.190, respectively. Plaintiff and Movants, through their undersigned counsel, hereby submit this Joint

1 Statement re: Discovery Disagreement in advance of the July 5, 2012 hearing on Movants'  
2 requests for a Protective Order and Plaintiff's opposition of such. Both sides note that these  
3 arguments are virtually identical to those that were presented to this Court in a June 21, 2012  
4 hearing on a similar motion by a non-party movant in *Pacific Century International, Ltd. v. Doe*,  
5 Case No. 2:11-cv-3479-KJM-JFM.

### 6 7 **I. Details of the Parties Discovery Conferences**

8 Plaintiff and Movant have engaged in two telephonic meet and confer sessions with  
9 regard to the instant motion in an attempt to resolve the discovery disputes. Specifically, counsel  
10 for Movant and Plaintiff spoke on or around May 18, 2012, prior to the filing of the instant  
11 motion for a protective order (and two other functionally identical motions also pending before  
12 this court). In addition, counsel for Movant and Plaintiff spoke again on June 13, 2012,  
13 regarding the discovery dispute. Movants' and Plaintiff's counsel also recently argued a similar  
14 matter on June 21, 2012, before Judge Moulds, in *Pacific Century, Ltd. v. John Doe* (2:11-cv-  
15 03479-KJM-JFM) regarding substantially the same issues as those addressed herein. The court  
16 has yet to issue a decision.

17 Due to the nature of the discovery disagreement, the circumstances of this case and the  
18 irreconcilable differences between the Movant and Plaintiff regarding the propriety of the  
19 discovery, as described more fully below, the respective parties were unable to resolve this  
20 disagreement without court intervention.

### 21 **II. A Statement of the Nature of the Case**

22 Plaintiff herein is the purported owner of the adult work that is the subject of this action.  
23 Defendant herein is a particular unidentified "John Doe" that allegedly downloaded Plaintiff's  
24 work on December 2, 2011. In addition to John Doe, this suit alludes to (but does not presently  
25 include) approximately 116 alleged "co-conspirators," including Movants herein. Each co-  
26 conspirator is accused of downloading Plaintiff's copyrighted work sometime between  
27 November 17, 2011 and March 5, 2012. Movants herein are alleged to have been observed on  
28

1 January 9, 2012 and January 20, 2012 (each more than a month after John Doe’s alleged  
2 participation).

3 The instant complaint was filed on March 9, 2012. On March 13, 2012, Plaintiff applied  
4 to this Court for an Ex Parte Application for early discovery, requesting the names and  
5 identifying information associated with John Doe and each of the “co-conspirators” who are  
6 alluded to in the complaint. In support of its application, Plaintiff submitted the declaration of  
7 Peter Hansmeier, who is identified as a technician for Media Copyright Group, LLC (MCG).

8 On March 19, 2012, this Court granted Plaintiff leave to pursue the requested discovery. A copy  
9 of this order is annexed hereto as Exhibit A.

10  
11 **III. The Contention of Each Party as to Each Contested Issue**

12 **1. Standing**

13 **Movant:** Plaintiff first argues that Movant herein does not have standing to challenge the instant  
14 subpoena via a motion for a protective order. This argument is faulty for a number of reasons  
15 and simply seeks to deprive the subpoenaed individuals of any opportunity to challenge the  
16 falsehoods and misstatements contained in Plaintiff’s Ex Parte Application. For the reasons  
17 outlined below, Plaintiff’s argument must be rejected.

18 First, as noted in the original motion, a party has standing to challenge a subpoena issued  
19 to the third party when the party has a personal or proprietary interest in the information sought  
20 by the subpoena. *See Washington v. Thurgood Marshall Acad.*, 230 F.R.D. 18, 21 (D.D.C.  
21 2005). Movant herein has a personal or proprietary interest in his address, phone number, email  
22 address, and the other identifying details sought by Plaintiff. Indeed, Congress has specifically  
23 recognized that ISP subscribers have a privacy interest in the personally identifying information  
24 kept by ISPs, and explicitly stated the same in the H.R. 98-934 at \*79 (The Congress is  
25 recognizing a right of privacy in personally identifying information collected and held by a cable  
26 company...). Indeed, 47 U.S.C. §551 specifically requires that an ISP subscriber be notified and  
27 given a chance to intervene before his identifying information is released to Plaintiff herein.

1 This process obviously makes no sense if a subscriber lacks standing to bring any motions to  
2 prevent the release of his information.

3 Plaintiff claims that the “plain language” Rule 26 prevents the issuance of a protective  
4 order because the requested discovery is not sought directly from the Movant and because  
5 Movant is not a party. Plaintiff’s reliance on the “plain language” of the Federal Rules is  
6 interesting, given that the plain language of the Federal Rules would also seem to prohibit the  
7 instant “Doe” action filed by Plaintiff (Fed. R. Civ. P. 10(a) (“the title of the action should  
8 include the names of all parties.”)) Plaintiff has not cited any case law that supports his  
9 interpretation of Rule 26 and Plaintiff’s position is directly contrary to the position taken by  
10 other federal courts in this state.

11 For example, in *Coulter v. Murrell*, the Southern District of California confronted an  
12 exactly analogous situation. In that case, Ms. Shelly, a non-party, sought a protective order  
13 preventing the release of various records regarding her late husband that were being sought from  
14 a local hospital. Ms. Shelly was neither a party, nor the individual from whom the records were  
15 sought, and Plaintiff argued that Ms. Shelly therefore lacked standing. The court rejected this  
16 argument and granted a protective order preventing the release of the requested information. In  
17 doing so, the court noted specifically that:

18  
19 “ Even if Ms. Shelly lacked standing to bring a motion to quash [Plaintiff’s]  
20 subpoenas, she has alternatively sought a protective order. This is a remedy that  
21 is available to ‘any person’ who is able to establish good cause for issuance of the  
22 protective order ‘to protect a party or person from annoyance, embarrassment,  
23 oppression, or undue burden or expense...’”

24 *Coulter v. Murrell*, 2011 WL 666894 at \*3-4 (S.D. Cal. 2011).

25 The Northern District has likewise recognized that a “Doe” defendant has standing to  
26 bring a motion for a protective order seeking to prevent the release of his identity. In fact, in *IO*  
27 *Group v. Does 1-19*, (a BitTorrent case like the instant) the court sua sponte converted a Doe’s  
28 motion to quash a subpoena issued from another district to a motion for a protective order in  
order to properly address the merits of the Doe’s argument. *IO Group v. Does*, 2010 WL

1 5071605 at \*2 (N.D. Cal. 2010)(“for purposes of judicial economy and in light of Doe #4’s  
2 consent to this forum – at least for purposes of determining his pending motions – the Court will  
3 consider Doe #4’s motion as one for a protective order.”) See also *Wells v. GC Services LP*  
4 2007 WL 1068222 at \*1(N.D. Cal. 2007)(“Federal Rule of Civil Procedure 45 allocates authority  
5 over subpoenas to the court for the district from which they are issued...However, this court  
6 could properly address a motion for a protective order, and this court has the right to define the  
7 scope of discovery...Therefore, the court deems Plaintiff’s motion to be a motion for a protective  
8 order...”)

9 It is well established that discovery in a civil case may be regulated and controlled by the  
10 court in which the case is filed. See, *Straily v. UBS Fin. Servs., Inc.*, No. 07-cv-884-REB-KMT,  
11 2008 WL 5378148, at \*2 (D. Colo. Dec. 23, 2008). See Also *Static Control Components, Inc. v.*  
12 *Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) (district where case was pending had  
13 authority to issue protective order, pursuant to its right to control general outline of discovery,  
14 even though the particular discovery dispute arose from subpoena issued in another district)  
15 (citing *Fincher v. Keller Indus., Inc.*, 129 F.R.D. 123, 125 (M.D.N.C. 1990)); *Rajala v. McGuire*  
16 *Woods, LLP* 2010 WL 4683979 at \*5 (D. Kan. 2010)(“the Court finds the *Straily* and *Static*  
17 *Control* decisions to be well reasoned and reflective of the majority view”); *Best Western Inc. v.*  
18 *Doe*, 2006 WL 2091695 (D. Ariz. 2006)(“Rule 45(c) does provide that subpoenas should be  
19 enforced by the district court which issued them, but this rule does not alter the broader concept  
20 that the district court in which an action is pending has the right and responsibility to control the  
21 broad outline of discovery. General discovery issues should receive uniform treatment  
22 throughout the litigation, regardless of where the discovery is pursued”)(internal quotes and  
23 citations omitted”).

24 This court has the authority and obligation to control discovery in the underlying action.  
25 In furtherance of this authority, the court herein has ordered that ISP subscribers shall have 30  
26 days to contest the subpoena in this court. Even if Movant were generally prohibited from  
27 seeking a protective order by the language of Rule 26 (which he is not, as shown above), this  
28

1 court's discovery order nonetheless confers standing on Movant to challenge the subpoenas  
2 issued in accordance with the order.

3 **Plaintiff's Position:**

4 This issue was already fully covered at oral argument in the previous case in front of this  
5 Court. First, the cases Movants cite to are entirely inapplicable to the situation at hand. Second,  
6 Movants fail to see that, despite the distinguishable cases cited, there is a concise statement given  
7 the Federal Rules of Civil Procedure Rule 26 that clearly forbids Movants from asking for the  
8 relief requested here. The plain language of Federal Rule of Civil Procedure 26 limits the scope  
9 of who may move for a protective order. *See* Fed. R. Civ. P. 26(c) ("A party or any person from  
10 whom discovery is sought may move for a protective order ....") (emphasis added). Movants are  
11 not parties to this case as no one has yet been named or served. Further, Movants are not John  
12 Doe—the eventual Defendant in this case. (ECF No. 1-1) (listing the IP address associated with  
13 John Doe as 24.7.175.228). Nor are Movants persons from whom discovery is sought. Plaintiff  
14 sought (ECF No. 7), and was granted (ECF No. 9), discovery from ISPs. All subpoenas issued  
15 pursuant to the Court's March 19 Order (ECF No. 9) were issued to nonparty ISPs. Movants,  
16 therefore, lacks standing to move for a protective order. Proper methods exist for Movants to  
17 prevent the disclosure of their identifying information, but moving for a protective order is not  
18 one of them. While Movant's could have had their concerns addressed in the appropriate  
19 district, they utterly failed to do so. In so failing, they now ask the Court to break the Federal  
20 Rules of Civil Procedure for them. The Court should not grant them this relief especially  
21 considering they have no right to present such arguments in this Court.

22 Further, Movants request that the Court to reconsider its March 19 order (ECF No. 9) and  
23 argue that "the court erred in finding that Plaintiff had demonstrated good cause to obtain  
24 expedited discovery of Movant's personal information." (ECF Nos. 12-1 at 7; 14-1 at 7.) This  
25 request is a motion for reconsideration in disguise and is granted only in extreme circumstances.  
26 *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (explaining that a motion  
27 for reconsideration "should not be granted, absent highly unusual circumstances, unless the  
28

1 district court is presented with newly discovered evidence, committed clear error, or if there is an  
2 intervening change in the controlling law.”) The overwhelming majority of district courts,  
3 including courts in this district, presented with similar applications, have granted similar  
4 discovery requests. *See e.g., Pacific Century International, LTD v. John Doe*, No. 12-3479 (E.D.  
5 Cal. Jan 19, 2012), ECF No. 9 (granting discovery for the identifying information of John Doe  
6 and his joint tortfeasors); *Millennium TGA, Inc. v. John Doe*, No. 11-4501 (S.D. Tex. Feb. 9,  
7 2012), ECF No. 6 (same); *First Time Videos LLC v. John Doe*, No. 11-00690 (E.D. Va. Jan. 9,  
8 2012), ECF No. 8 (same). Movants are not allowed to move for reconsideration of a decision  
9 simply because they disagree with the outcome. *See Nunes v. Ashcroft*, 375 F.3d 805, 810 (9th  
10 Cir. 2003) Here, the Court’s decision was consistent with the majority view on this issue.  
11 Reconsideration is not warranted.

## 12 **2. RELEVANCE**

### 13 **Movant’s Position:**

14 “The foremost fundamental principal regarding subpoenaed discovery is that a subpoena  
15 duces tecum to obtain materials in advance of trial should be issued only when the party seeking  
16 the materials can show that the materials are evidentiary and relevant.” *Straily v. UBS Fin.*  
17 *Servs., Inc.*, 2008 WL 5378148, at \*1. Indeed, Rule 26(b) specifically states that “Parties may  
18 obtain discovery regarding any nonprivileged matter that is relevant...” Fed. R. Civ. P. 26(b).  
19 Although relevance, as used in Rule 26 is broad, it is not limitless. Moreover, “a court is not  
20 required to blind itself to the purpose for which a party seeks information.” *Oppenheimer Fund,*  
21 *Inc. v. Sanders* 437 U.S. 340, 353 (1978). “When the purpose of a discovery request is to gather  
22 information for use in proceedings other than the pending suit, discovery properly is denied.” *Id.*

23  
24 Movants, and approximately 116 other unrelated individuals are referred throughout  
25 Plaintiff’s filings as John Doe’s “Co-Conspirators.” **Plaintiff has not alleged that Movant ever**  
26 **interacted with John Doe at any point to share the allegedly copyrighted work that is the**  
27 **subject of this action.** Indeed, there is also no allegation that any particular “co-conspirators”  
28 connected to each other and shared the work. The only commonality is that each “co-

1 conspirator” is accused of downloading the same work. Simply calling an individual a co-  
2 conspirator should not suffice to create a relationship where one would not otherwise exist.

3 The plaintiff’s request for identical co-conspirator discovery was denied for this reason in  
4 two *First Time Video, LLC v. Unknown* cases in this district (Nos. 2:11-cv-03478 and 2:12-cv-  
5 00621), which also involved Plaintiff’s counsel herein. After a detailed discussion of the  
6 appropriate standards for early discovery, the court held that Plaintiff

7 ...has not shown good cause to conduct expedited discovery  
8 regarding John Doe’s alleged co-conspirators, whom plaintiff has not alleged as  
9 defendants in the amended complaint (naming only one doe defendant, John Doe,  
10 and asserting the plaintiff will “seek leave of the court to amend this complaint to  
11 joining John Doe’s co-conspirators as defendants”...[B]ecause plaintiff’s  
12 complaint does not purport to sue John Doe’s alleged “co-conspirators” at this  
13 time, in light of the potential that some of the alleged co-conspirators are innocent  
14 internet users, plaintiff has not shown that the need to discovery their identities at  
15 this early stage outweighs the prejudice to those individuals, or that the request to  
16 subpoena all of those individuals’ ISPs is reasonable at this time, in light of all the  
17 surrounding circumstances.”

18 *First Time Videos, LLC v. Doe* No. 2:11-cv-3478-GEB-EFD (Doc. 9) at 5-6, 2012 WL  
19 170167, at \*3. See also *First Time Videos, LLC. v. Doe*, No. 2:12-cv-00621 (Doc. 8, filed April  
20 18, 2012).

21 In particular, the court noted that Paragraph 27 of the Hansmeier Declaration in Support  
22 of Ex Parte Discovery (which was identical to ¶27 of the Hansmeier Declaration in the instant  
23 case) stated only that the declarant personally observed John Doe’s IP address participating in a  
24 swarm that the alleged co-conspirators also joined at some other time. The court was particularly  
25 concerned with the fact that, like here, Plaintiff could only alleged that “any (or all of the)  
26 individual IP address(es) listed on Exhibit A of the Amended Complaint *could have* aided John  
27 Doe.” (Doc 1-1 at ¶ 27)(emphasis added). Plaintiff’s technician offers no hint that any particular  
28 “co-conspirator” actually did connect with John Doe, only that they *could have*. As in, it is not  
technically impossible (despite the clear evidence that Movant, and most other co-conspirators,  
allegedly downloaded the work weeks apart from John Doe) What Mr. Hansmeier fails to  
mention is that it is also possible that *none* of the “co-conspirators” ever connected to John Doe,



1 or that *countless* other individuals, who are not identified as co-conspirators, could have  
2 connected to John Doe to provide or receive Plaintiff's work.

3 Examining the evidence in support of Plaintiff's discovery request, makes it appear  
4 exceedingly unlikely, in fact, that Movants, (or the majority of "co-conspirators" chosen for this  
5 case), ever interacted in any way with John Doe or with each other. Movants are alleged to have  
6 been observed on January 9<sup>th</sup> and January 20<sup>th</sup>, 2012, each over a month after John Doe's alleged  
7 participation on December 2, 2011. Plaintiff glosses over the obvious problems with this and  
8 makes no attempt to show any chain of interaction or distribution, from co-conspirator 1, for  
9 example, to John Doe, or from John Doe to subsequent "co-conspirators." Instead, Plaintiff's  
10 opposition states

11 "Movant makes several arguments on the merits stating that John Doe and his co-  
12 conspirators did not interact with one another. These arguments are premature  
13 and should be raised only if and when Movant is named and served in this case.  
14 The legal merits of the case have nothing to do with whether or not Plaintiff's  
15 subpoena causes "annoyance, embarrassment, oppression, or undue burden or  
16 expense as required by Rule 26(c)" (Doc. 20 at pg. 6).

17 First, Plaintiff mischaracterizes Movants' argument as relating to the "merits" of his  
18 claim against John Doe and/or the requirements of Rule 26, rather than the relevance of the  
19 requested discovery. Second, Plaintiff simply asserts that by characterizing the argument in this  
20 way it is premature to consider whether the John Doe actually connected to any co-conspirator  
21 herein ever connected to John Doe. Finally, Plaintiff would have you believe that the fact that  
22 the underlying action has no merit is irrelevant to whether the discovery requested in connection  
23 with that action would subject one to annoyance, embarrassment, or undue burden.

24 The response above is telling. Obviously, Plaintiff is unable to provide any support for  
25 the proposition that John Doe actually connected to Movants herein, and has not tried to do so.  
26 Plaintiff is well aware that the evidence actually shows the Movants' IP addresses in the swarm a  
27 full month or more after John Doe. Moreover, Plaintiff cannot plausibly argue that the name,  
28 addresses, and telephone numbers of individuals that never interacted with John Doe in any  
manner are relevant to this action against John Doe. Instead, Plaintiff has chosen a third course,

1 and the only one available to it. Plaintiff therefore begs this court to pay no attention to the fact  
2 that Plaintiff's own evidence shows that Movant and John Doe did not interact.

3 Plaintiff's remaining arguments supporting the relevance of its requested discovery are  
4 likewise unpersuasive. Plaintiff asserts that without the identifying information of alleged co-  
5 conspirators, "Plaintiff will have no means of computing the damages" from John Doe's  
6 infringement. Plaintiff offers no hint as to how these damages would be computed, and its  
7 selection of "Co-Conspirators" makes it clear that Plaintiff's motive for discovery has nothing to  
8 do with "computing damages." As noted above, Plaintiff has not alleged (and presumably has no  
9 basis to allege) that Movant has ever interacted with John Doe, either to provide John Doe with a  
10 file or to receive a file from John Doe. It seems quite unlikely then that the identifying  
11 information of Movant is therefore necessary to compute damages attributed to the allegations  
12 against John Doe.

13 It is also instructive to ask who has not been included as a "co-conspirator" in the instant  
14 suit – namely anyone that resides outside of California. The swarm that John Doe allegedly  
15 participated in almost certainly included individuals from various states in the U.S. and perhaps  
16 many countries worldwide. Nowhere has Plaintiff alleged that the swarm sharing Plaintiff's file  
17 only included the California residents chosen as "co-conspirators" for this suit. Indeed, as  
18 Plaintiff's complaint alleges, "A swarm will commonly have peers from many, if not every, state  
19 in the United States and several countries around the world..." (Doc.1 at ¶15). Thus, it is  
20 extremely likely that the majority of participants in the chosen swarm will not be identified by  
21 the requested discovery and it is also extremely likely that the individuals that John Doe *actually*  
22 connected with are not listed as "co-conspirators" in the instant suit.

23 Obviously, a true computation of the damages attributed to John Doe (if that's what  
24 Plaintiff wanted) would require the inclusion of those individuals that actually connected to John  
25 Doe to share the work, whether or not they lived in California. A true computation of damages  
26 would likewise require the exclusion of individuals, like Movant, that likely never interacted  
27 with John Doe. Instead, Plaintiff has selected a random group of California residents that are  
28

1 alleged only to have downloaded the same work in the same way (though not necessarily from  
2 each other), and chosen to label them co-conspirators.

3 The Southern District of California issued an order on May 21, 2012 that examined an Ex  
4 Parte Application by Mr. Gibbs that provided precisely the same rationales for discovery as those  
5 posited herein. In denying Plaintiff's request, the Court noted the following:

6  
7 "Plaintiff claims that there is a substantial need for the expedited discovery  
8 because damages cannot be established against Defendant without gathering  
9 evidence of and from individuals with the IP addresses listed in Exhibit A.  
10 "Without determining these identities Plaintiff will have no means of computing  
11 the damages that can be attributed to [Defendant's] infringing activities. When  
12 this information is erased, Plaintiff will have no ability to identify [Defendant's]  
13 joint tortfeasors, and thus will be unable to determine damages related to its  
14 copyright infringement claims." But, while Plaintiff's Ex Parte Application  
15 stresses the need for this information in order to assess damages, the Court is left  
16 puzzled by the obvious – an explanation regarding why the identities of the IP  
17 subscribers are necessary to assess damages when the extent of the alleged  
18 infringing activity is captured in full in Exhibit A. Plaintiff fails to adequately  
19 explain, or even attempt to explain, its reasoning and the Court is left to make that  
20 connection on its own, and is unable to do so...If Plaintiff's true reason for  
21 requesting expedited discovery is to assess damages, the Court finds that the  
22 thousands of IP addresses, complete with dates and times of each alleged  
23 copyright infringement activity, should be sufficient to calculate such damages.  
24 The Court is at a loss to understand how names, addresses, phone numbers and  
25 email addresses connected to each IP address listed in Exhibit A could possibly  
26 assist Plaintiff in a computation of damages against Defendant."

19 *Millenium TGA, Inc. v. Paschall*, 2012 WL 1836331 at \* 1-2 (S.D. Cal. May 21, 2012).

20 The Southern District's analysis applies equally to Plaintiff's other justification, that the  
21 identity of Movant is necessary to establish contributory liability against John Doe. A cause of  
22 action for contributory infringement against John Doe requires that John Doe "with knowledge  
23 of the infringing activity, induces, causes, or materially contributes to the infringing conduct of  
24 another." See, e.g. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d  
25 1159, 1162 (2d Cir. 1971). Two aspects of this definition are important. First, there is no  
26 requirement that Plaintiff identify specific individuals that were allegedly on the "receiving end"  
27 of John Doe's contributory infringement. Plaintiff must only establish that there were additional  
28 infringements "by another." This does not require the Movants' addresses, phone numbers,

1 email addresses, or any of the other requested information. Indeed, if Plaintiff's proffered  
2 evidence is to be believed, it already has evidence of the infringements - just does not the identity  
3 of the infringers.

4 The second (extremely important) component of contributory infringement is that John  
5 Doe must have induced, caused, or materially contributed to the infringing conduct of another.  
6 Since Plaintiff is totally unable to even *allege* that Movants interacted with John Doe at any time,  
7 Plaintiff cannot seek to base John Doe's contributory infringement on an alleged direct  
8 infringement by Movants. As such, this justification for the relevance of the requested discovery  
9 must also be dismissed.

10 Plaintiff finally attempts to justify its inclusion of approximately 116 alleged co-  
11 conspirators by including a single sentence in the Amended Complaint that "Plaintiff intends to  
12 seek leave of the Court to amend this complaint to join John Doe's co-conspirators as defendants  
13 in this action pursuant to Fed. R. Civ. P. 20(a)(2)." (Doc. 6 at ¶ 44). Although this hints at the  
14 true reason for the Amended Complaint's "co-conspirators," it doesn't tell the entire story.

15 The simple fact is that the complaint's structure (single John Doe + co-conspirators) is  
16 the result of multiple District Courts rejecting exactly the type of joinder that plaintiff refers in  
17 support of its discovery request. A look at *Millennium TGA, Inc v. Does 1-939* is particularly  
18 instructive.

19 On December 7, 2012, Prenda Law, Inc. filed *Millennium TGA v. Does 1-939*, No. 1:11-  
20 cv-2176-RLW (D.D.C.) in the District of Colombia, alleging copyright infringement against 939  
21 John Does identified by IP address. This case was voluntarily dismissed by the Plaintiff after it  
22 was assigned to Judge Wilkins, who had previously denied a Plaintiff's motion to engage in  
23 identical ISP discovery in *Nu Image, Inc. v. Does 1-23*, 799 F.Supp.2d 34 (D.D.C. 2011). After  
24 this "voluntary" dismissal, Plaintiff subsequently refilled essentially the same complaint against  
25 the same 939 IP addresses in the Southern District of Texas, with one instructive difference. In  
26 *Millennium TGA, Inc., v. John Doe*, No. 4:11-cv-4501-VG (S.D. Tex, filed Dec. 20, 2012)  
27 Plaintiff ostensibly filed suit against a single John Doe, and identified the remaining 938 IP  
28 addresses as co-conspirators, as Plaintiff has done in the instant case. *These were the exact same*

1 individuals, though now they are “co-conspirators” and Plaintiff forwarded substantially the  
2 same arguments justifying co-conspirator discovery as they have here. Although this case is  
3 cited as an example of the propriety of this type of co-conspirator discovery by Plaintiff,  
4 Comcast objected to Plaintiff’s subpoena seeking co-conspirator identity. On June 25, 2012, the  
5 District Court for the District of Columbia denied Plaintiff’s attempt to compel Comcast’s  
6 compliance with the subpoena, stating that “As to the 350 Comcast subscribers who are linked to  
7 alleged “co-conspirators” of Doe, the Court also denies the request for identifying information as  
8 unduly burdensome.” *Millennium TGA, Inc. v. Comcast Cable Communications, LLC*, Misc.  
9 Action No. 12-mc-00150(RLW), at page 12. A copy of this decision is annexed hereto as  
10 Exhibit B.

11 As above, the complaint in the instant case is a transparent attempt to harvest vast  
12 numbers of ISP subscriber identities without having to deal with the issue of joinder – an issue  
13 that has led to the dismissal of literally thousands of Doe Defendants throughout the country in  
14 similar BitTorrent litigation.<sup>1</sup>

15 In addition to the multitude of cited decisions rejecting joinder of individuals based solely  
16 on the allegation that they downloaded the same work from the same swarm, one decision from  
17 the District of Arizona is particularly instructive. In *Patrick Collins v. Does 1-54*, No. 2:11-cv-  
18 01602; 2012 WL 911432 (D. Ariz. 2012), a BitTorrent copyright case like the instant matter, the  
19 court faced a situation where only two defendants remained in the action. The court, after a  
20 thorough discussion of the joinder rules, determined that the joinder of even two individuals

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23 <sup>1</sup> See, e.g. *SBO Pictures, Inc. v. Does 1-3036*, 2011 WL 6002620 (N.D. Cal. Nov. 30, 2011)(dismissing all but Doe  
24 1); *AF Holdings LLC v. Does 1-97*, 2011 WL 2912909 (N.D. Cal. July 20, 2011) (same); *Pac. Century Int’l Ltd. v.*  
25 *Does 1-101*, 2011 WL 2690142 (N.D. Cal. July 8, 2011) (same). In re: BitTorrent Adult Film Copyright  
26 Infringement Cases, No. 2:11-cv-3995-DRH-GRB (E.D.N.Y. May 1, 2012); *Liberty Media Holdings, LLC v.*  
27 *BitTorrent Swarm*, 277 F.R.D. 672 (S.D. Fla. 2011) (severing defendants); *Liberty Media Holdings, LLC v.*  
28 *BitTorrent Swarm*, 277 F.D.R. 669 (S.D. Fla. 2011) (severing defendants); *Raw Films, Inc. v. Does 1-32*, No. 1:11-  
CV-2939, slip op., 2011 WL 6840590 (N.D. Ga. Dec. 29, 2011) (order severing defendants); *Patrick Collins, Inc. v.*  
*Does 1-35*, No. 1:11-CV-02940 (N.D. Ga. Dec. 19, 2011) (order severing defendants); *K-Beech, Inc. v. Does 1-63*,  
No. 1:11-CV-2941-CAP (N.D. Ga. Dec. 5, 2011) (order severing defendants); *Third Degree Films v. Does 1-3577*,  
No. C11-02768 LB, slip op., 2011 WL 5374569 (N.D. Cal. Nov. 4, 2011); *Hard Drive Productions, Inc. v. Does 1-*  
*30*, No. 2:11-CV-345, slip op., 2011 WL 4915551 (E.D. Va. Oct. 17, 2011) (severing defendants); *K-Beech, Inc. v.*  
*Does 1-78*, No. 5:11-CV-05060 (E.D. Penn. Oct. 3, 2011) (order severing defendants).

1 based solely on the allegation that they participated in the same swarm was improper. The  
2 court's reasoning is persuasive. It stated that:

3 "Plaintiff alleges that the two remaining Defendants 'participat[ed] in a BitTorrent  
4 swarm with other infringers' but does not claim that John Doe 6 provided data to  
5 the former John Doe 12, or vice versa. Plaintiff included as Defendants only  
6 those IP addresses from the swarm in question that were located in Arizona,  
7 demonstrating that the actions of the individual members of the swarm are easily  
8 distinguishable. Plaintiff alleges no facts that these two particular Defendants  
9 shared data with each other, and provides data instead that they were logged on to  
10 BitTorrent weeks apart."

11 *Patrick Collins, Inc. v. Does 1-54*, 2012 WL 911432 at \*5 (D. Ariz. 2012). In accordance with  
12 this reasoning, the court held that "Plaintiff has not demonstrated that John Doe 6 and the former  
13 John Doe 12 engaged in a single transaction or occurrence..." and therefore severed John Doe 6.  
14 (Id.). As the foregoing examples illustrate, it is very unlikely that Plaintiff will ever successfully  
15 join multiple parties in this suit, and the simple statement that it will seek leave to do so is not  
16 sufficient to make the identities of Movant (or other "co-conspirators") relevant to the instant  
17 matter.

18 **Plaintiff's Position:**

19 This issue was already fully covered at oral argument in the previous case in front of this  
20 Court. The information is relevant as explained to the Court.

21 Movants argues that "Plaintiff's requested discovery seeks to discover the identities of  
22 individuals that lack any connection whatsoever to the single John Doe that is being sued in the  
23 instant matter." (ECF Nos. 12-1 at 10; 14-1 at 10.) This argument is unfounded. The purpose of  
24 seeking John Doe's joint tortfeasors' identities is, *inter alia*, to establish contributory liability  
25 against John Doe and any later-joined parties for the infringing acts of the joint tortfeasors. *See*  
26 *Sony v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) ("[T]he concept of contributory  
27 infringement is merely a species of the broader problem of identifying the circumstances in  
28 which it is just to hold one individual accountable for the actions of another.") In order to prove  
contributory infringement against a Doe Defendant and any later-joined parties, a plaintiff must  
prove underlying direct infringements. *Cable/Home Communication Corp. v. Network*

1 *Productions, Inc.*, 902 F.2d 829, 846 (11th Cir. 1990) (“Contributory infringement necessarily  
2 must follow a finding of direct or primary infringement.”)

3 Just as it is necessary to ascertain the John Doe’s identity in order to prove his direct  
4 infringement, so too is it necessary to ascertain the joint tortfeasors’ identities to prove their  
5 direct infringement. *Id.* Plaintiff will have no means of seeking information from a joint  
6 tortfeasor, examining digital forensic evidence or assessing the range of possible defenses that a  
7 joint tortfeasor might raise without first knowing who he is. *See, e.g., First Time Videos LLC v.*  
8 *John Doe*, No. 11-00690 (E.D. Va. Jan. 4, 2012), ECF No. 7 at 4 (“Further, without these  
9 identities Plaintiff will have no means of computing the damages that can be attributed to the  
10 conspiracy or establishing testimony from coconspirators to aid in proving liability against John  
11 Doe and any co conspirators who are later joined to this action.”) This, of course, is only one of  
12 many grounds for establishing the relevance of the joint tortfeasors’ identities to Plaintiff’s  
13 claims. For example, Plaintiff would have no sense of the extent of damages caused by a joint  
14 tortfeasor’s infringement unless it had an opportunity to examine digital forensic evidence that is  
15 in the sole possession of that individual.

16 Contributory infringement is a plausible legal theory in BitTorrent-based copyright  
17 infringement cases. Courts have already ruled that using BitTorrent to commit copyright  
18 infringement triggers contributory infringement liability. *Raw Films, Ltd. v. John Does 1-11*, No.  
19 12cv368-WQH (NLS), 2012 WL 684763, at \*2 (S.D. Cal. Mar. 2, 2012) (“Plaintiff’s allegation  
20 that each defendant was willingly and knowingly a part of the ‘swarm’ for purposes of the  
21 infringing conduct supports Plaintiff’s claim of contributory infringement.”); *Liberty Media*  
22 *Holdings, LLC v. Does 1-62*, No. 11-CV-575, 2011 WL 6934460, at \*1 (S.D. Cal. Dec. 30,  
23 2011) (“Defendant’s conduct constitutes contributory infringement of Plaintiff’s copyright in  
24 addition to direct infringement under 17 U.S.C. § 501.”); *Liberty Media Holdings, LLC v. Swarm*  
25 *of November 16, 2010, Sharing Hash File A3E6F65F2E3D672400A5908F64ED55B66A0880B8*,  
26 No. 11-619, 2011 WL 1597495, at \*3 (S.D. Cal. Apr. 26, 2011) (“Plaintiff has alleged the prima  
27  
28

1 facie elements of both direct and contributory copyright infringement . . .”). The information  
2 sought in Plaintiff’s subpoenas is, therefore, highly relevant to the instant case.

3 Further, Movants attached declarations of Diona Atkins, an individual with no connection  
4 to the instant case. (ECF Nos. 12-2; 14-2.) Movants accuse Plaintiff of “threaten[ing] and  
5 harass[ing] those subscribers with future litigation unless the subscriber pays demanded sum.”  
6 (ECF Nos. 12-1 at 11; 14-1 at 11.) Ms. Atkins declaration paints a different picture, however, as  
7 she explains that she has received a single letter from Plaintiff’s counsel and has “received no  
8 other communications from Prenda Law, Inc. of any kind . . .” (ECF Nos. 12-2 ¶ 6; 14-2 ¶ 6.) It  
9 is difficult to make the claim of threats and harassment with respect to the issuance of a single  
10 formal letter setting forth basic demands.

11 Finally, Movants make several arguments on the merits, discussing issues like interaction  
12 within a swarm, joinder, and damage computation. (ECF No. 12-1 at 11-16; 14-1 at 12-17.)  
13 These arguments are premature and should be raised only if and when Movants are named and  
14 served in this case. *Hard Drive Productions, Inc. v. Does 1-118*, No. 11-1567 (N.D. Cal. Nov. 8,  
15 2011), ECF No. 28 at \*5-6 (“While these may have merit, they are for another day.”) The legal  
16 merits of the case have nothing to do with whether or not Plaintiff’s subpoena causes  
17 “annoyance, embarrassment, oppression, or undue burden or expense” as required by Rule 26(c).  
18

19 **3. Capability of Identifying the Infringer of Plaintiff’s Copyright Via the Requested**

20 **Discovery**

21 **Movant’s Position:**

22 It is becoming accepted wisdom in District Courts across the country that an IP address  
23 does not equate to the infringer of a Plaintiff’s copyright, and merely identifying the individual  
24 that pays the internet bill associated with a particular IP address does not identify the individual  
25 that infringed a copyright via that IP address. As the court in *SBO Pictures, Inc.* understood,  
26 “the ISP subscriber to whom a certain IP address was assigned may not be the same person who  
27 used the internet connection for illicit purposes. *SBO Pictures, Inc.*, 2011 WL 6002620, at \*3;  
28



1 Another court noted that:

2  
3 “In its motion, Plaintiff redefines “Defendants” in a manner that would ensnare  
4 unknown numbers of innocent individuals or entities into this matter. Tucked  
5 away in a footnote, Plaintiff discreetly attempts to expand “Defendants” for  
6 purposes of this expedited discovery request to encompass not only those who  
allegedly committed copyright infringement – proper defendants to Plaintiff’s  
claims – but ISP “Subscriber(s)” over whose internet connection the Work  
allegedly was downloaded.”

7 *Pacific Century International, Ltd., v. Does 1-101* No. C-11-02533, 2011 WL 5117424 at \*2  
8 (N.D. Cal. Oct. 27, 2011).

9 Plaintiff’s present counsel has all but admitted that the requested discovery cannot  
10 identify the individual who infringed Plaintiff’s copyright. Mr. Gibbs, attorney for Plaintiff  
11 herein, also represented the plaintiff in *Boy Racer v. Does 1-52*. The presiding judge in that  
12 matter severed *Does 2-52*, but granted expedited discovery as to John Doe #1. Plaintiff received  
13 precisely the ISP subscriber information requested herein.

14 As described by Judge Grewal:

15 “To the court’s surprise, in its filing and oral argument to the court, *Boy Racer*  
16 admitted that, its previous representations notwithstanding, the subpoenas were  
17 not sufficient to “fully identify” “each P2P network user suspected of violating  
18 the plaintiff’s copyright.” Instead, it revealed for the first time that still more  
19 discovery was required. **Boy Racer would require nothing less than an  
inspection of the subscriber’s electronically stored information and tangible  
things, including each of the subscriber’s computer and the computers of  
those sharing his network.”**

20 *Boy Racer, Inc. v. Does 1-52*, 2011 WL 7402999 (N.D. Cal. 2011) (emphasis added). The  
21 requested discovery herein is likewise limited to the name and identifying information of an ISP  
22 subscriber. If the requested discovery could not tell Plaintiff who the defendant was in *Boy*  
23 *Racer*, it is inconceivable that the same information from Movant would be necessary or  
24 sufficient to identify the wholly unrelated John Doe sued herein. Moreover, if, in reality,  
25 Plaintiff needs nothing less than an inspection of each co-conspirators electronically stored  
26 information and tangible things, this court should consider this fact in evaluating the potential  
27 prejudice or burden to the unnamed “co-conspirators.”

1 Judge Lloyd in the Northern District of California recently denied Mr. Gibbs request for  
2 expedited discovery based on the fact that the requested discovery was not likely to identify the  
3 actual infringer of Plaintiff's copyright. Plaintiff filed an application for reconsideration, which  
4 was denied by Judge Lloyd with the following observation: "The papers submitted by plaintiff  
5 and the statements by plaintiff's counsel at the hearing on plaintiff's application for early  
6 discovery make it **clear** that granting the sought-after discovery **would not uncover the**  
7 **identities** of the infringers." *Hard Drive Productions v. John Doe 1-90*, 5:11-cv-03825, (Doc. 21  
8 at pg. 2)(emphasis in original). A copy of this decision is annexed hereto as Exhibit C.

9  
10 **Plaintiff's Position:**

11 Again, this was covered at the previous hearing in front of this Court. Movants argue that  
12 "an IP address does not equate to the infringer of a Plaintiff's copyright and merely identifying  
13 the individual that pays the internet bill associated with a particular IP address does not identify  
14 the individual that infringed a copyright via that IP address." (ECF Nos. 12-1 at 17; 14-1 at 17.)  
15 Movants are, of course, correct. Determining the identities of the account holders of the IP  
16 addresses associated with the infringing activity, however, is an *essential* first step to identifying  
17 the actual infringers. Even if the account holders are not the infringers, they are the only persons  
18 accessible to Plaintiff that would be able to lead Plaintiff to the true infringer. An informal meet  
19 and confer with an account holder is often sufficient to determine whether or not the account  
20 holder is the infringer, and, if not, who the actual infringer is. Without this initial identifying  
21 information Plaintiff would be unable to identify anyone that infringed on its copyrighted work  
22 and would be unable to proceed with its claims in this action.

23 **4. Whether Movant Satisfies the Rule 26 Standards for Granting a Protective Order**

24 **Movant's Position:**

25 Rule 26 allows this court to issue a protective order to prevent annoyance,  
26 embarrassment, oppression, and undue burden or expense. Indeed, the "[d]iscovery restrictions  
27  
28

1 may be even broader where the target is a non-party. *Dart Indus. Co. v. Westwood Chemical*  
2 *Co.*, 649 F.2d 646, 649 (9<sup>th</sup> Cir. 1980).

3 Annoyance, embarrassment, and undue burden and expense represent precisely the  
4 weapons that Plaintiff relies upon to secure “settlements” in these mass copyright infringement  
5 actions. Indeed, as described by Judge Beeler in the Northern District of California,

6  
7 “once the plaintiff obtains the identities of the IP subscribers through early  
8 discovery, it serves the subscribers with a settlement demand...the subscribers,  
9 often embarrassed about the prospect of being named in a suit involving  
10 pornographic movies, settle... Thus, these mass copyright infringement cases have  
11 emerged as a strong tool for leveraging settlements – a tool whose efficiency is  
12 largely derived from the plaintiffs’ success in avoiding the filing fees for multiple  
13 suits and gaining early access en masse to the identities of alleged infringers.”

14 *MCGIP v. Does 1-149*, No. C-11-02331, 2011 WL 4352110 at \*4 (N.D. Cal., Sept. 16,  
15 2011)(emphasis added). See also *On the Cheap, LLC v. Does 1-5011*, No. 10-4472, 2011 WL  
16 4018258, at \*11 (N.D. Cal. Sept. 6, 2011)(stating that plaintiffs’ settlement tactics leave  
17 subscribers with “a decision to either accept plaintiff’s demand or incur significant expense to  
18 defend themselves” and finding that this does not “comport with the ‘principles of fundamental  
19 fairness’”). Other courts have recognized that

20 “[p]laintiff would likely send settlement demands to the individuals whom the ISP  
21 identified as the IP subscriber. That individual – whether guilty of copyright  
22 infringement or not- would then have to decide whether to pay money to retain  
23 legal assistance to fight the claim that he or she illegally downloaded sexually  
24 explicit materials, or pay the settlement demand. **This creates great potential  
25 for a coercive and unjust settlement.**”

26 *SBO Pictures, Inc. v. Does 1-3036* 2011 WL 6002620 at \*3 (quoting *Hard Drive Prods.*, 2011  
27 WL 5573960 at \*3)(emphasis added).

28 Alleged “co-conspirators” can expect to face exactly the same regimen of threatening  
letters, phone calls, and other unwanted communications from Plaintiff. The declaration of  
Diona Atkins, annexed hereto as Exhibit D makes this abundantly clear. Ms. Atkins states that  
she was immediately contacted by Plaintiff’s counsel with a settlement demand after her

1 identifying information was revealed. Plaintiff made no request for information regarding  
2 damages, or the identity of John Doe, or anything else resembling the reasons given in Plaintiff's  
3 request for expedited discovery. A copy of this declaration and the demand letter are annexed  
4 hereto collectively as Exhibit D.

5 As noted above, the Southern District was "at a loss" to understand how the requested  
6 names, addresses, and telephone numbers were relevant to Plaintiff's case against the sole named  
7 defendant. Indeed, *it is* hard to understand how this information is relevant to the purposes cited  
8 by Plaintiff. Occam's Razor is a principle that states that when one must chose among  
9 competing hypotheses, one should select that one which makes the fewest assumptions and  
10 thereby offers the simplest explanation of the effect. Applying this principle to the instant case,  
11 it becomes much easier to understand why Plaintiff has sought the names, addresses, and  
12 telephone numbers of countless individuals who have no apparent connection to the John Doe  
13 being sued.

14 Simply put, the requested information is precisely the type of information that Plaintiff  
15 needs to send demand letters threatening a federal pornography lawsuit unless the subscriber (not  
16 the infringer) pay Plaintiff thousands of dollars, and then follow-up with harassing phone calls  
17 further threatening litigation unless the subscriber settles.

18 It is further telling that, as described in the original motion, Plaintiff has variously  
19 employed several different methods/proposed justification for its discovery requests, but the  
20 requested discovery is always the same: names, addresses, phone numbers, etc. This is true  
21 whether Plaintiff has included the subscriber as a Doe, has identified the subscriber as a "co-  
22 conspirator" or whether Plaintiff has sought the information through an attempt at a Rule 27  
23 petition.

24 Plaintiff attempts to downplay this fear, and notes that they only got around to sending a  
25 single demand letter to Ms. Atkins, which therefore didn't burden her at all. What Plaintiff fails  
26 to mention, however, is that Ms. Atkins then retained present counsel and Plaintiff was therefore  
27 unable to contact her any further. Had she not retained (and paid) counsel, she undoubtedly  
28

1 would have been subjected to the same regimen of letters and phone calls to which each John  
2 Doe (or “co-conspirator) is subjected.

3 Finally, Plaintiff’s counsel has admitted that this initial discovery request is only the tip  
4 of the iceberg, and that Movant should expect significant further discovery. Plaintiff’s  
5 opposition specifically states that without the discovery, Plaintiff will have no means “of seeking  
6 information from a joint tortfeasor, *examining digital forensic evidence*, or assessing the range  
7 of possible defenses” that a subscriber might have. Doc. 20 at pg. 5. As Judge Grewal noted  
8 above, to even identify whether a particular subscriber is an actual infringer, Plaintiff will need  
9 to conduct intrusive digital investigation of every device in the subscriber’s home that is  
10 remotely capable of connecting to the internet (and perhaps those of subscribers neighbors,  
11 family, visitors, and anyone else that has *ever* connected to the subscriber’s network). This is  
12 obviously an oppressive (and expensive) request that would subject anyone to substantial burden.  
13 This burden is clearly “undue” in light of the lack of relevance that the information would have  
14 to the instant suit.

15 **Plaintiff’s Position:**

16 Yet again, this was previously addressed in a hearing before this Court in a case with  
17 virtually identical circumstances. Movants’ final argument is that the Court should “issue a  
18 protective order to prevent annoyance, embarrassment, oppression, and undue burden or  
19 expense.” (ECF Nos. 12-1 at 18; 14-1 at 18.) The “annoyance and embarrassment” referred to in  
20 Rule 26 is not the annoyance of having to defend oneself in court; it is the annoyance and  
21 embarrassment associated with responding to a subpoena. *United States v. Columbia*  
22 *Broadcasting System, Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982) (explaining that a court may  
23 issue a protective order “to protect a party or person from annoyance, embarrassment,  
24 oppression, or *undue burden or expense*” experienced from a subpoena). Movants, however, are  
25 not subject to Plaintiff’s subpoenas and are not required to respond to them in anyway. Thus,  
26 Movants do not face any “annoyance, embarrassment, oppression, or undue burden or expense”  
27 from any of Plaintiff’s discovery requests. *See Voltage Pictures, LLC v. Does 1–5,000*, No. 10-  
28 0873, 2011 WL 1807438, at \*4 (D.D.C. May 12, 2011) (denying motions for protective orders

1 from thirty-five anonymous movants); *MCGIP, LLC v. Does 1-14*, No. 11-2887 (N.D. Ill. July  
2 26, 2011), ECF No. 19 (finding that movants had “failed to show good cause” for an order under  
3 Fed. R. Civ. P. 26(c)(1)). Movants cite cases that have raised concerns about lawsuits involving  
4 sexually explicit materials. (ECF Nos. 12-1 at 18-19; 14-1 at 19-20.) However, none of these  
5 cases involve the issuance of a protective order preventing discovery of identifying information.  
6 (ECF Nos. 12-1 at 18-19; 14-1 at 19-20.) Movants have cited no authority for the proposition  
7 that someone not subject to a subpoena faces any “annoyance, embarrassment, oppression, or  
8 undue burden or expense” from that subpoena. (*See generally* ECF Nos. 12-1; 14-1.) Movants’  
9 request for a protective order must be denied.

10 ///

11 ///

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14 ///

15 Respectfully Submitted,

16 June 28, 2012

18     /s/ Nicholas Ranallo    

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28th day of June, 2012, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system and served on all of those parties receiving notification through the CM/ECF system.

By:       /s/Nicholas Ranallo

Nicholas Ranallo