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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DALLAS BUYERS CLUB,

Plaintiff,

v.

MICHAEL AHMARI,

Defendant.

Case No. 3:15-cv-01614-BAS-DHB

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS COMPLAINT
UNDER FRCP 12(b)(6); AND
REQUEST FOR RULE 11 SANCTIONS

NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT

Hearing Date: July 25, 2016
Hearing Time:
Judge: Hon. Cynthia Bashant

MEMORANDUM OF POINTS AND AUTHORITIES

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1 Defendant requests a dismissal of the First Amended Complaint (“FAC”)
2 pursuant to Fed. R. Civ. P. 12(b)(6) for the reasons stated herein and the
3 documents on file in this case. Futhermore, Defendant requests reimbursement of
4 his attorney fees expended in the defense of this baseless action.

5 **I. STATEMENT OF ISSUES**

6 Is the conclusory allegation by Plaintiff, that Defendant was a subscriber to an
7 IP address, in and of itself, without any further factual allegations demonstrating
8 that Defendant was the actual infringer, sufficient to survive dismissal under FRCP
9 12(b)(6)?

10 Is the plaintiff subject to rule 11 sanctions where he has demonstrated a
11 reckless disregard for the rights of Defendant by dragging him into a lawsuit where
12 the Court has previously warned Plaintiff about filing on the basis of an IP address
13 with no evidence that Defendant was an actual infringer?

14 **II. PROCEDURAL HISTORY**

15 Plaintiff filed this lawsuit against Defendant Ahmari on or about March 5,
16 2016. On April 20, 2016, defendant’s counsel contacted plaintiff’s counsel,
17 James Davis to inquire as to why plaintiff named defendant in this case. Mr.
18 Davis could provide no basis other than the fact that defendant was a
19 subscriber to an IP address. Despite not having even a shred of evidence
20 against defendant, Mr. Davis demanded that defendant reimburse plaintiff for
21 his costs and attorney fees and immediately pay him \$10,000 or “the price
22 would go up.” Defendant was incredulous at such a request for fees and the
23 obvious extortion tactics, when plaintiff admitted he had no evidence
24 implicating Defendant as the actual infringer.

25 The following day, April 21, 2016, plaintiff’s counsel sent his first of an
26 ongoing series of demands for settlement. In this first written salvo from
27 plaintiff’s counsel, he requested \$10,800.00 to settle the case and based such
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1 request on his expenditure of attorney fees. This was again, flatly and
2 vehemently denied as defendant has never been involved in any activity as
3 alleged in the complaint.

4 After a series of actions constituting bad faith tactics, plaintiff entered a
5 default against defendant on May 5, 2016. On May 6, 2016, Defendant
6 notified plaintiff of its disgust at the Plaintiff's actions, requested Plaintiff's
7 stipulation to set aside the default and thereafter filed an objection to the entry
8 of default and notice of intent to appear in the case. On May 16, 2016,
9 Defendant filed a Motion to Set Aside the Entry of Default.

10 Plaintiff's response was to demand even more money from Defendant.
11 When again asked for a shred of evidence to substantiate the fact that
12 defendant was somehow liable for infringement, none was forthcoming.
13 Plaintiff's counsel stated that he had done extensive investigation and spent
14 upwards of \$15,000 to investigate. When asked how he could have possibly
15 spent such money to investigate, plaintiff's counsel stated he sent out a couple
16 of letters to the former address of defendant and that he had spoken to
17 defendant's father, who denied his son's involvement and did not help with
18 plaintiff's investigation. Defendant is a recently graduated college student
19 who does not have the money to spend thousands of dollars on a lawsuit
20 wherein the plaintiff has no information other than an IP address.

21
22 Plaintiff's counsel then presented defendant with a spreadsheet showing
23 that the IP address of defendant was allegedly used to infringe the copyright of
24 his client. ***It is uncontroverted that the sole basis of plaintiff's lawsuit was***
25 ***that defendant was a subscriber to the IP address of which a movie was***
26 ***supposedly downloaded.*** Defendant explained to plaintiff's counsel that he
27 lived in an apartment residence at San Diego State University and that his wife
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1 connection was open to all residents and guests to his apartment over the last
2 two years.

3 On June 9, 2016, this Court set aside the default. In the Court's Order it
4 acknowledged that Plaintiff previously admitted "Ahmari may not be the
5 actual infringer as he shared a student apartment with other individuals. (ECF
6 No. 12.)". Such an admission by Plaintiff demonstrates the malicious nature
7 of filing against Defendant in this case. Plaintiff intentionally conflates the IP
8 address of a subscriber to being an actual infringer despite his having filed
9 literally dozens of these cases.

10 Plaintiff was warned by this Court that it did not consider this to be
11 enough to file an action against defendant. "Plaintiff then requested leave to
12 take the deposition of Ahmari by written depositions. (ECF No. 17) The
13 Court denied this request as well. (ECF No. 18.) Thereafter, on March 5,
14 2016, *despite admissions that Plaintiff was not sure whether Ahmari had*
15 *committed the infringing conduct or not*, Plaintiff filed a First Amended
16 Complaint ("FAC") naming Ahmari as the defendant. (ECF No. 20.)"
17 Despite the warning from the Court, Plaintiff moved forward to aggressively
18 and maliciously name defendant in a manner that constitutes libel against
19 defendant. Defendant has now spent thousands of dollars in back and forth
20 communications with plaintiff's counsel, the malicious filing of a default by
21 Plaintiff, the unreasonable refusal to set aside such default when requested,
22 and the present motion.

24 **III. LEGAL BASIS FOR 12(b)(6) REQUEST FOR DISMISSAL**

25 A FRCP 12(b)(6) motion for dismissal is proper where there is either a
26 lack of cognizable legal theory or the absence of sufficient facts alleged under
27 a cognizable legal theory. *Balisteri v. Pacifica Police Dept.* (9th Cir. 1990)
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1 901 F.2d 696, 699. The question for the Court on a motion to dismiss is
2 whether the facts in the complaint sufficiently state a “plausible” ground for
3 relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

4 Although a complaint need not provide detailed factual allegations, it
5 must offer “more than labels and conclusions” and contain more than a
6 “formulaic recitation of the elements of a cause of action.” *Twombly*, 550
7 U.S. at 555. If the complaint fails to state a cognizable legal theory or fails to
8 provide sufficient facts to support a claim, dismissal is appropriate. *Robertson*
9 *v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

10 “[W]here the well-pleaded facts do not permit the court to infer more than
11 the *mere possibility* of misconduct, the complaint has alleged - but it has not
12 show[n] that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 565U.S. 662,
13 679(2009).

14 **IV. ENTITLEMENT TO COSTS AND ATTORNEY’S FEES**
15 **PURSUANT TO 17 USC §505; FRCP RULE 11**

16
17 Defendant requests that it be awarded its costs and attorney fees in
18 responding to this action. Title 17 USC §505 states, “In any civil action under
19 this title, the court in its discretion may allow the recovery of full costs by or
20 against any party other than the United States or an officer thereof. Except as
21 otherwise provided by this title, the court may also award a reasonable
22 attorney’s fee to the prevailing party as part of the costs.”

23
24 Plaintiff has made unequivocal conclusory assertions amounting to libel,
25 that Defendant has illegally infringed the copyright of Plaintiff with the FAC,
26 but has failed to provide even a shred of evidentiary support for such claims.

27 FRCP Rule 11(b) states that by presenting to the court a pleading, it
28 certifies that, “(1) it is not being presented for an improper purpose, such as to

1 harass, cause unnecessary delay, or needlessly increase the cost of litigation;”
2 and “(3) the factual contentions have evidentiary support or, if specifically so
3 identified, will likely have evidentiary support after a reasonable opportunity
4 for further investigation or discovery.”

5 Plaintiff has utilized extortion tactics by progressively demanding more
6 money from defendant on each successive conversation with defense counsel
7 and through emails, **based on plaintiff's costs and attorney fees.** (See
8 Exhibit 1, Email from Plaintiff's counsel) It is very telling that plaintiff's
9 counsel is more concerned with his own fees than dragging defendant into a
10 costly lawsuit. In the next demand from plaintiff's counsel, the price has
11 “gone up” as was promised. (See Exhibit 2, Email from Plaintiff's counsel)

12 Plaintiff has exponentially increased the costs to defendant by contesting
13 relief from default after previously stating that he would pay for *all costs* of a
14 polygraph and dismiss defendant based on the results therefrom, which he
15 later withdrew.

16 Plaintiff demanded a declaration under penalty of perjury from defendant
17 that asserted his innocence. Defendant provided such a declaration, but was
18 met with the swift filing of default. (See Exhibit 3, Dec. of Michael Ahmari)

19 Plaintiff seems to believe that conflating a subscribers IP address to being
20 the actual infringer should shield him from liability for those libelous
21 statements and unethical actions to extort money from defendant.

22 Plaintiff's counsel has filed untold numbers of these cases in this district
23 court alone. Plaintiff's counsel has a duty to know the law existing and the
24 pleading requirements when he files a complaint. Plaintiff's counsel has failed
25 to fully investigate the facts prior to filing. Another resident of the Alvarado
26 Apartments, Brandon Whyte, indicates that he was contacted one time by
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1 plaintiff's counsel. Mr. Whyte states that Defendant Ahmari was not the
2 actual infringer. (See Exhibit 3, Dec. of Brandon Whyte)

3 Plaintiff's counsel should know and in fact has been previously warned
4 by this Court that he cannot conflate an IP address to an actual infringer and
5 has sued anyway.

6 In addition to being entitled to costs and fees by 17 USC §505 this court
7 may on its own initiative order Plaintiff to show cause under Rule 11(b)(3) to
8 stop this defendant from further such coercive conduct against defendant and
9 other individuals that may be similarly situated. Defendant maintains that the
10 actions listed above were solely for the improper purpose of coercion of a
11 settlement from an innocent defendant. Defendant's counsel has expended 32
12 hours of time through the date of drafting the motion herein, at the rate of
13 \$375/hr., for total fees of \$12,000.00. (See Exhibit 5, Dec. of Clay Renick,
14 Esq.)

15
16 **V. PLAINTIFF HAS FAILED TO STATE A CLAIM IN THE FIRST**
17 **AMENDED COMPLAINT (“FAC”)**

18 Plaintiff makes conclusory allegations as to liability with absolutely no
19 factual basis. Plaintiff's FAC alleges at par. 13., “Through direct connection
20 with Defendant's computer Plaintiff's investigator observed defendant
21 regularly distributing Plaintiff's motion picture ...” What facts does plaintiff
22 have to support such a conclusion? The answer is none. Plaintiff has
23 previously admitted to the court that he only had an IP address and that he
24 could not be sure that Defendant had committed the infringing conduct.
25 Proceeding with such knowledge is malice.

26 Plaintiff's FAC alleges at par. 14, “The Defendant's IP address has been
27 observed as associated with the peer-to-peer exchange of a large number of
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1 copyrighted titles indicating the Defendant was a willful and persistent
2 infringer.” Plaintiff does not even identify the exact IP address itself. This
3 allegation makes it absolutely clear that Defendant is being sued solely on the
4 basis of an IP address. That's it as far as allegations against Defendant.

5 The remainder of the nine page complaint may appropriately be described
6 as *meaningless fluff* with not even a scant mention of any actual facts that
7 connect Defendant Ahmari to the alleged infringement.

8 The FAC neither identifies the IP address nor indicates a single fact which
9 connects the Defendant as the actual infringer to such IP address. Defendant
10 has now been forced to spend thousands of dollars responding to this
11 complaint based on the mere speculation of Plaintiff.

12 In In re Bittorrent Adult Film Copyright Infringement Cases, 2012 WL
13 1570765, at *3 (E.D.N.Y. May1, 2012), the district court explained that “it is
14 no more likely that the subscriber to an IP address carried out a particular
15 computer function . . . than to say an individual who pays the telephone bill
16 made a specific telephone call.” Courts limit discovery regarding Doe
17 defendants in BitTorrent cases to ensure that potentially innocent subscribers
18 are not needlessly humiliated and coerced into unfair settlements. See
19 *Discount Video Center, Inc., v. Does 1-29*, 285 F.R.D. 161, 166 (D Mass.
20 Aug.10, 2012).

21 Due to the risk of “false positives,” an allegation that an IP address is
22 registered to an individual is not sufficient in and of itself to support a claim
23 that the individual is guilty of infringement. In *AF Holdings LLC v. Doe*,
24 2013 WL 97755,at *8 (N.D. Cal. Jan. 7, 2013) one of the reasons the court
25 denied plaintiff leave to file an amended complaint alleging that a particular
26 individual, Hatfield, infringed plaintiff’s copyrighted material, was that the
27 individual, Hatfield, infringed plaintiff’s copyrighted material, was that the
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1 amended complaint alleged “no facts showing that Hatfield infringed AF
2 Holdings’ copyrighted material, apart from the facts that were previously
3 alleged and that have been known to AF Holdings for more than a year – in
4 particular, that the IP connection through which the material was downloaded
5 is registered to Hatfield.”

6 Plaintiff has had ample opportunity to state facts far beyond his FAC in
7 responding to the Defendant's Request to Set Aside the Default. Instead of
8 providing any evidence that Plaintiff had an actual case against defendant,
9 plaintiff argued that defendant should have filed a timely answer. The only
10 actual evidence submitted was from Defendant in his Motion for Relief from
11 Default, who provided a declaration under penalty of perjury stating that he
12 never infringed plaintiff's copyright and providing plaintiff with a possible
13 infringer. (See Exhibit 2, Declaration of Michael Ahmari)

14 **VI. CONCLUSION**

15 Defendant finds himself involuntary dragged into the fishing expedition of
16 plaintiff's counsel and forced to pay for plaintiff's recklessness. It is the very
17 costly process of defending this litigation that has led defendant to do
18 everything possible to limit the costs of proceeding, including agreeing to a
19 polygraph test and providing a declaration to plaintiff's counsel upon his false
20 promise to dismiss.

21 Plaintiff has made it clear both to this Court and defense counsel, that
22 Defendant has been named in this action for the sole reason that he is a
23 subscriber to an IP address that Plaintiff alleges was associated with infringing
24 the copyright of Plaintiff.

25 Defendant requests the Court to dismiss the instant action with prejudice
26 and entry of judgment against plaintiff.
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Defendant further respectfully requests that the Court order the payment of costs and attorney fees in the amount of \$12,000.00 pursuant to 17 USC §505 and to issue monetary sanctions in the amount of \$36,000.00 and an order to show cause under rule 11(b)(3) to curtail the coercive tactics utilized by plaintiff's counsel in this case and in the future.

For all of the above reasons this motion to dismiss should be granted.

Dated: June 20, 2016

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/s/ Clay Renick
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Attorney for Defendant
Michael Ahmari

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