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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

AF HOLDINGS, LLC

Plaintiff,

vs.

JOHN DOE

Defendant

) Case No.: 4:12-cv-02049-PJH

) JOSH HATFIELD’S OPPOSITION TO
) PLAINTIFF’S MOTION TO AMEND

) Hearing: November 7, 2012

) Time: 9:00 A.M.

) Courtroom 3, Third Floor

TABLE OF CONTENTS

I.	Introduction and Factual Background.....	2
A.	The Insufficiency of an IP Address.....	2
B.	AF Holdings v. Does 1-135.....	4
C.	The Instant Lawsuit: AF Holdings v. John Doe & Josh Hatfield.....	5
II.	Argument	
A.	This Matter Should Be Dismissed Via Fed. R. Civ. Proc. 41(b) For Failure to Prosecute and Failure to Comply With Court Order.....	7
1.	Failure to Prosecute.....	8
2.	Failure to Comply With Court Order.....	9
B.	Leave to Amend Should Be Denied.....	11
1.	Bad Faith.....	11
2.	Undue Delay.....	12
3.	Failure to Provide Evidentiary Support.....	13
4.	Futility of Amendment.....	14
III.	Conclusion.....	15

TABLE OF AUTHORITIES

CASES

<i>AF Holdings v. Does 1-135</i> , 5:11-cv-03336-LHK (ECF Doc. 35)(N.D. Cal. Jan. 19, 2012).....	4
<i>AF Holdings v. Does 1-135</i> , 5:11-cv-03336-LHK, 2012 WL 1038671, (N.D. Cal. Mar. 27, 2012).....	5
<i>AF Holdings v. Nigel Sookdeo, et. al.</i> Case Nos. CV12-22146, CV12-22150, and CV 12-22155 (S.D. Fla. October 10, 2012).....	10
<i>Alexander v. Pacific Maritime Association</i> , 434 F.2d 281, 283 (9th Cir. 1970).....	8
<i>Anderson v. Air West, Inc.</i> , 542 F.2d 522, 525 (9th Cir. 1976).....	8
<i>Athey v. Farmers Ins. Exchange</i> , 234 F.3d 357 (8 th Cir. 2000).....	6
<i>Boy Racer, Inc. v. Does 1-52</i> , 2011 WL 7402999 (N.D. Cal. 2011).....	2-3
<i>Citizens Utilities Co. v. AT&T</i> , 595 F.2d 1171, 1174 (9th Cir. 1979).....	8
<i>Edwards v. Aetna Life Ins. Co.</i> , 690 F. 2d 595, FN5 (6 th Cir. 1982).....	15
<i>Foman v. Davis</i> , 371 U.S. 178, 182 (1962).....	11
<i>Hard Drive Productions v. Doe</i> , No. 4:11-cv-05634-PJH (ECF No. 9 – Plaintiff’s Ex Parte Application for Discovery at 9-10)(January 6, 2012)(emphasis added).....	3
<i>Hard Drive Productions, Inc. v. John Doe</i> , No. 4:11-cv-05630-YGR (Order Granting Leave to Issue Deposition Subpoena)(N.D. Cal. January 18, 2012)(ECF No. 10 at 2).....	12
<i>Jordan v. County of Los Angeles</i> , 669 F.2d 1311, 1324 (9 th Cir. 1982), <i>vacated on other grounds in</i> 459 U.S. 810, 103 S.Ct. 35, 74 (1982).....	13
<i>Layfield v. Heard</i> , 607 F.2d 1097 (5 th Cir. 1979).....	14
<i>Liberty Media Holdings v. Tabora</i> . 2012 WL 2711381 (S.D.N.Y July 9, 2012).....	6
<i>Morris v. California</i> , 966 F.2d 1162, 1167 (9 th Cir. 1991).....	14

Nealey v. Transportation Maritima Mexicana, S.A., 662 F.2d 1275, 1280 (9th Cir. 1980).....8

Parker v. Joe Lujan Enters., Inc., 848 F.2d 118, 121 (9th Cir.1988)12

Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir. 1965).....8

SBO Pictures, Inc v. Does 1-3036., 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011).....2

Vine v. Beneficial Finance Co., 374 F.2d 627 (2d Cir. 1967).....12

VPR Internationale v. Does 1-1017, 11-cv-02068-HAB-DGB, Dkt. No. 15 (C.D. Ill. 2011).....2

Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503 (9th Cir. 1978).....13

Whitehead v. Payless Shoe Source, Inc., No. H-07-2066, 2007 WL 3284019, at *1
(S.D. Tex. Nov. 6, 2007).....9

SECONDARY MATERIALS

4B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE §
1137 (3d ed. 2002).....10

I. INTRODUCTION AND FACUTAL BACKGROUND

A. The Insufficiency of an IP Address

This case is the latest installment in a wave of copyright infringement suits based on the alleged infringement of a Plaintiff's copyright via the BitTorrent protocol. Each case shares the same flaw: a Plaintiff can identify an IP address, but an IP address is simply insufficient to identify the infringer of a Plaintiff's copyright. As this district recognized in *SBO Pictures, Inc.*, "the ISP subscriber to whom a certain IP address was assigned may not be the same person who used the internet connection for illicit purposes." *SBO Pictures, Inc v. Does 1-3036*, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011). Indeed, as Judge Baker noted in *VPR Internationale v. Does 1-1017*, 11-cv-02068-HAB-DGB, Dkt. No. 15 (C.D. Ill. 2011), obtaining subscriber identities will not "tell Plaintiff who illegally downloaded Plaintiff's works, or, therefore, who Plaintiff will name as the Defendant in this case. It could be the Subscriber, or another member of the household, or any number of other individuals who had direct access to the Subscriber's network." *VPR Internationale* at pg. 2.

Plaintiff's present counsel has been litigating BitTorrent claims, in some form or another, against thousands of "John Does" nationwide. In attempting to justify its general failure to serve any of the thousands of defendants in its mass cases, Plaintiff's counsel has frequently been forced to admit that an IP address is insufficient to identify the actual infringer of its copyright. These admissions effectively began in *Boy Racer v. Does 1-52*. In that case, Judge Grewal severed Does 2-52 as improperly joined, leaving Mr. Gibbs with a sole remaining defendant. Plaintiff received the same ISP subscriber information for John Doe 1 that was requested herein.

As described by Judge Grewal:

"To the court's surprise, in its filing and oral argument to the court, *Boy Racer* admitted that, its previous representations notwithstanding, the subpoenas were not sufficient to "fully identify" "each P2P network user suspected of violating the plaintiff's copyright." Instead, it revealed for the first time that still more 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.**"

1 *Boy Racer, Inc. v. Does 1-52*, 2011 WL 7402999 (N.D. Cal. 2011) (emphasis added).

2 Mr. Gibbs admission in *Boy Racer* would not be his last. Indeed, Plaintiff's counsel
3 subsequently filed a series of suits against "John Doe" defendants, despite having received the
4 precise ISP subscriber information that it received herein. The Plaintiff's justification in each
5 was explicit – that an IP address is not sufficient, without further discovery, to determine
6 whether an ISP subscriber is actually the individual that committed copyright infringement via a
7 particular IP address. To quote Mr. Gibbs again,

8
9 "As some courts in this District have noted, 'the relationship between accused
10 activity linked to an IP address and subscriber information associated with that
11 IP address is imperfect at best.'" *Diabolic Video Productions, Inc.*, No. 5:10-cv-
12 05865-PSG, at 5 (quoting *VPR Internationale v. Does 1-1017*, No. 2:11-cv-
13 02068-HAB-DGB, at 2 (C.D. Ill. Apr. 29, 2011),(ECF No. 15). **Accordingly,**
14 **Plaintiff must conduct additional limited ex parte discovery to determine**
15 **who should be named as the defendant in this case.** Without this discovery
16 from Mr. Abrahams, Plaintiff cannot be certain if Mr. Abrams is the defendant
17 who should be named and served with process, or merely the sole material
18 witness..." *Hard Drive Productions v. Doe*, No. 4:11-cv-05634-PJH (ECF No. 9
19 – Plaintiff's Ex Parte Application for Discovery at 9-10)(January 6,
20 2012)(emphasis added).

21 Mr. Gibbs has repeated this formulation in a number of cases throughout this district and
22 the Eastern District. A copy of one such request, regarding another Doe originating in AF
23 Holdings v. Does 1-135, is annexed hereto as Exhibit G. Plaintiff further argues that although
24 the subscriber may not be the infringer, the subscriber is the *only* person capable of identifying
25 the infringer. Plaintiff goes on to state that instead of "**blindly naming**" the account-holder, a
26 deposition should be allowed in order to identify the "true infringer." See, also *Hard Drive*
27 *Productions v. Doe*, No. 4:11-cv-05634-PJH (ECF No. 9 – Plaintiff's Ex Parte Application for
28 Discovery at 9)(N.D. Cal. January 6, 2012) ("However, instead of blindly naming Mr. Abrahams
as a defendant based solely on the fact that he is the IP address account holder, Plaintiff seeks
discovery to gather evidentiary support for its contentions...").

Finally, Plaintiff has again admitted the insufficiency of an IP address in the presently
operative pleadings in this case. As described in detail below, despite obtaining the ISP

1 subscriber information for Mr. Hatfield many months ago, Plaintiff herein has conceded that
2 “Plaintiff does not know if Defendant Doe is the same individual as Josh Hatfield.” Based on the
3 foregoing, it is clear that an IP address is insufficient to actually identify the infringer of
4 Plaintiff’s copyright, and Plaintiff has conducted no discovery in the instant case to attempt such
5 identification. This infirmity lies at the heart of the instant opposition.

6 **B. AF Holdings v. Does 1-135**

7 Plaintiff’s complaint herein is based on the alleged infringement of its copyright by an
8 unknown individual on April 21, 2011, (or May 2, 2011, depending on which of Plaintiff’s
9 complaints is to be believed)¹. On July 7, 2011, AF Holdings filed suit in this court (Case No.
10 5:11-cv-03336-LHK – hereinafter ‘AF #1) against 135 unidentified “John Doe” defendants,
11 claiming that each had infringed Plaintiff’s copyrighted work, “Sexual Obsession.” Among the
12 IP addresses implicated in the instant suit was 67.161.66.97, an IP address allegedly belonging to
13 Josh Hatfield. On July 14, 2011, Plaintiff filed a motion for ex parte discovery in order to
14 discover the identity of the ISP subscriber associated with the implicated IP addresses.
15 Plaintiff’s motion was granted on August 2, 2011, and Mr. Hatfield’s ISP, Comcast
16 Communications, apparently responded on October 10, 2011 by providing, inter alia, Mr.
17 Hatfield’s personally identifying information. See “Piehl Declaration and Exhibit,” annexed
18 hereto collectively as Exhibit C.

19 After obtaining Mr. Hatfield’s identity, Plaintiff evidently took no action for three
20 months. Then, on January 19, 2012, Judge Koh noted that 196 days had passed since the filing
21 of the initial complaint (and more than 150 since the order authorizing expedited discovery), yet
22 Plaintiff had failed to file a single proof of service for any of the defendants. As such, Judge
23 Koh ordered AF Holdings to show cause why the Doe defendants should not be dismissed based
24 on Plaintiff’s failure to effectuate service as to any identified Doe. *AF #1*, 5:11-cv-03336-LHK
25 (ECF Doc. 35 – Order to Show Cause)(N.D. Cal. Jan. 19, 2012)(annexed hereto as Exhibit A).

26
27 ¹ The complaint in AF #1 alleged an infringement via 67.161.66.97 on April 21. The initial
28 complaint in AF #2 alleged an infringement on May 2, 2011. The amended complaint in this
action alleged infringements on both dates. Plaintiff’s proposed second amended complaint
includes only the April 21 allegation. No explanation has been offered for these discrepancies.

1 Plaintiff filed its response on January 24, 2012. On February 22, 2012, Judge Koh held a
2 hearing on the initial Order to Show Cause. Unsatisfied with the Plaintiff's explanations,, Judge
3 Koh ordered Plaintiff to provide a variety of pertinent details regarding its litigation campaign,
4 including "A list of the BitTorrent copyright infringement cases involving multiple joined John
5 Doe Defendants filed by Plaintiff's counsel's law firm or predecessor firm in federal court.
6 Identify the case by name, case number, court, and filing date. For each case, indicate how many
7 Doe Defendants were actually served." *AF #1*, 5:11-cv-03336-LHK (ECF Doc. 42)(N.D. Cal.
8 Feb. 23, 2012). A copy of the Court's Minute Order is annexed hereto as Exhibit B.

9 In response, Plaintiff herein was forced to admit that Plaintiff's counsel had not served a
10 single ISP subscriber, despite being granted discovery as to 15,000+ subscriber identities. 5:11-
11 cv-03336-LHK, ECF Doc. 43-1 at #9, (February 24, 2012). A copy of Plaintiff's response and
12 an exhibit thereto is collectively annexed hereto as Exhibit C. On March 27, 2012, Judge Koh
13 dismissed the matter in its entirety due to Plaintiff's failure to effectuate service on any of the
14 defendants. 5:11-cv-03336-LHK, 2012 WL 1038671, (N.D. Cal. Mar. 27, 2012). A copy of
15 this order is annexed hereto as Exhibit D.

16 17 **C. The Instant Lawsuit: AF Holdings v. John Doe & Josh Hatfield**

18 Plaintiff filed the instant lawsuit ("AF #2) on April 24, 2012, accusing a still unidentified
19 John Doe of copyright infringement and accusing Josh Hatfield of negligence based on his
20 failure to secure his internet connection. The complaint specifically noted that "**At this stage of**
21 **the litigation Plaintiff does not know if Defendant Doe is the same individual as Josh**
22 **Hatfield.**" *AF #2*, ECF Doc 1-2, at FN1. The complaint reiterates that "Defendant Doe's actual
23 name is unknown to Plaintiff," and that Plaintiff expected to learn the identity through formal
24 discovery in the negligence action. ECF Doc 1-2 at 2-3. The negligence claim against Mr.
25 Hatfield is premised entirely on the fact that a separate individual (not Mr. Hatfield), accessed
26 Plaintiff's copyrighted works via Mr. Hatfield's internet connection.

27 On May 31, 2012, Defendant Hatfield filed a Motion to Dismiss the original complaint
28 because the negligence cause of action failed to state a claim upon which relief may be granted.

1 In response, Plaintiff filed their first amended complaint (“FAC”), on June 14, 2012. The FAC
2 again accused an unidentified Doe of committing copyright infringement, and again alleged that
3 Josh Hatfield was guilty of negligence based on the third party’s use of his internet connection to
4 commit the infringement. The FAC expanded on the purported duty that Mr. Hatfield had to
5 secure his internet connection, but again noted that “At this stage of the litigation Plaintiff does
6 not know if Defendant Doe is the same individual as Josh Hatfield.” See ECF # 14 at FN1.

7 On June 30, 2012, Defendant filed a Motion to Dismiss the First Amended Complaint for
8 failure to state a claim (ECF No. 17). In opposition to Defendant’s motion, Plaintiff attempted
9 to distinguish a recent holding from the Southern District of New York in *Liberty Media*
10 *Holdings v. Tabora*. 2012 WL 2711381 (S.D.N.Y July 9, 2012). In attempting to distinguish the
11 instant matter, Plaintiff argues that “Unlike the *Liberty Media Holdings* case, **this case does**
12 **involve a concededly ignorant but allegedly careless defendant**. Plaintiff has not alleged that
13 Defendant knowingly facilitated and actively participated in anyone’s infringement.” (ECF No.
14 21 at 6)(emphasis added).

15 A hearing on the Motion to Dismiss the negligence claim was scheduled to be held on
16 September 5, 2012, before the Honorable Judge Hamilton. However the day before the hearing,
17 on September 4, 2012, this Court granted Mr. Hatfield’s Motion to Dismiss, and further ordered
18 Plaintiff to perfect service on the remaining “Doe” defendant by October 5, 2012. (ECF No. 26
19 at 8). This Court’s Order was entered at 1:58 P.M. on September 4. See Exhibit E. At 6:18
20 p.m., less than five hours after this court’s decision granting Mr. Hatfield’s motion to dismiss,
21 Plaintiff’s counsel threatened to sue Josh Hatfield as the infringer, despite the prior admission
22 that they did not know whether he was indeed the responsible party. A copy of this email is
23 annexed hereto as Exhibit E.² The email stated, in relevant part,

24 “Congratulations on the success of your motion to dismiss, Nick. As a courtesy,
25 I am notifying you that this is your client’s last chance to settle this case before
26 being named as *the infringer* in this case. Our client’s settlement offer is \$6,000.

27 ² Notwithstanding FRE 408, settlement offers are admissible, as long as they are not offered for
28 one of the prohibited purposes listed in the rule. In the instant case, Plaintiff’s demand is being
offered to demonstrate Plaintiff’s bad faith, an allowable purpose. See *Athey v. Farmers Ins.*
Exchange, 234 F.3d 357 (8th Cir. 2000).

1 This offer expires on Friday, September 7, 2012 at 5:00 p.m., at which time I will
2 be filing the second amended complaint naming Mr. Hatfield.” See Exhibit E.
(emphasis in original).

3 Approximately three weeks after this Court’s order and the email described above,
4 Plaintiff decided to file the instant motion requesting leave to amend. Plaintiff’s motion is
5 entirely devoid of any evidentiary support for their sudden revelation that Mr. Hatfield was, in
6 fact, the infringer. Plaintiff has not included any sworn declarations whatsoever supporting its
7 change of heart. Instead, Plaintiff’s motion includes a single line stating that “Having engaged in
8 further investigation since initially filing this case, at this stage, Plaintiff has a good faith basis to
9 believe that Josh Hatfield is the infringer.” ECF No. 27 at 4. Plaintiff does not hint at what this
10 “investigation” might have entailed, but it certainly did not include any communication with Mr.
11 Hatfield. See Ranallo Dec. at ¶ 8. Plaintiff’s motion likewise fails to indicate when this “further
12 investigation” might have taken place or whether it was conducted in the four and a half hours
13 between the dismissal of the negligence claim and Plaintiff’s threat to sue Mr. Hatfield as the
14 infringer.

15
16 **II. ARGUMENT**

17 **A. This Matter Should be Dismissed via Fed. R. Civ. Proc. 41(b) For Failure to**
18 **Prosecute and Failure to Comply with Court Order**

19 Fed. R. Civ. Proc. 41(b) provides that “If a Plaintiff fails to prosecute or to comply with
20 these rules or a court order, a defendant may move to dismiss the action or any claim against it.”³
21 The instant matter should be dismissed based on two separate grounds identified in Fed. R. Civ.
22 Proc. 41(b), namely failure to prosecute and failure to comply with a court order.

23 //

24 //

25 //

26 ³ Although the text of the rule grants defendants the right to file a motion seeking dismissal, a
27 court may dismiss a case or cause of action under this section without a defendant’s motion. See
28 *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962).³ In the interests of judicial efficiency, then,
Mr. Hatfield has included his arguments in the instant opposition, rather than filing and
calendar a separate motion seeking the same relief.

1 **1. Failure to Prosecute**

2 It is “without question” that “a plaintiff’s failure to serve process in a timely manner may
3 amount to a failure to prosecute or that a district court may dismiss an action on this ground.”

4 *Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). As the Ninth Circuit has noted,

5 A district court's decision on a motion to dismiss for want of prosecution requires
6 weighing conflicting policies: on the one hand, the court's need to manage its
7 docket, the public interest in expeditious resolution of litigation, and the risk of
8 prejudice to defendants from delay; on the other hand, the policy favoring
9 disposition of cases on their merits.

10 *Citizens Utilities Co. v. AT&T*, 595 F.2d 1171, 1174 (9th Cir. 1979).

11 Weighing the factors noted above, dismissal is entirely appropriate in the instant case.
12 The Court’s need to manage its docket and the public interest in expeditious resolution of
13 litigation both militate in favor of dismissal of the instant action. As laid out above, Plaintiff has
14 been pursuing the instant claims against ‘John Doe’ for well in excess of a year. Plaintiff
15 obtained the identity of the ISP subscriber in a prior action based on the same alleged
16 infringements. Plaintiff did not serve any Doe defendants in the prior action, and the prior action
17 was dismissed based on Plaintiff’s failure to effectuate service. Plaintiff subsequently filed the
18 instant action, and again let more than 120 days pass without attempting to name or serve any
19 Doe defendant, and let the extended deadline for service pass without filing proof of service, as
20 required.

21 Taken cumulatively, Plaintiff’s actions in this matter and the prior action strongly support
22 a finding of unreasonable delay necessary for a dismissal for want of prosecution. See, *Nealey v.*
23 *Transportation Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir. 1980). Unreasonable
24 delay “creates a presumption of injury” to the defendant. *Alexander v. Pacific Maritime*
25 *Association*, 434 F.2d 281, 283 (9th Cir. 1970); *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir.
26 1965). Moreover, “the plaintiff, of course, has the ultimate burden of persuasion both as to the
27 excuse for his own delay and as to the lack of prejudice to the defendant.” *Nealey*, at 1280.

1 Plaintiff has made no real effort to justify its own delay in this matter and has not shown
2 lack of prejudice to the defendant. Prejudice, as the 9th Circuit has noted, is presumed, and
3 usually takes two forms – loss of evidence and loss of memory by a witness. *Nealy*, 662 F.2d at
4 1281. Each is relevant to the instant case. Unlike the negligence claim, much of the evidence
5 for the copyright infringement claim would consist in fleeting electronic evidence which may be
6 irretrievably lost due to the passage of time. Allowing defendant to proceed with the new claim
7 at this point would therefore operate to prejudice the defendant. In light of the foregoing, this
8 matter should be dismissed via Fed. R. Civ. Proc. 41(b) based on Plaintiff’s failure to timely
9 prosecute this action (or the last).

10 2. Failure to Comply With Court Order

11 In addition to dismissal for failure to prosecute, a court may likewise dismiss a claim
12 under 41(b) based on a Plaintiff’s failure to comply with a court order or the Federal Rules.
13 Here, Plaintiff has failed to comply with both.

14 In its order dismissing Plaintiff’s negligence cause of action, the Court noted that, at the
15 time of the order, more than 120 days had already passed since the filing of the action, (a
16 violation of Fed. R. Civ. Proc. 4(m)), and Plaintiff had not sought expedited discovery regarding
17 the identity of John Doe. This court thus ordered that “no later than October 5, 2012, AF
18 Holdings **shall file a proof of service showing service of the summons and complaint. If AF**
19 **Holdings fails to do so, the complaint will be dismissed without prejudice as to the “Doe”**
20 **defendant, pursuant to Federal Rule of Civil Procedure 4(m).”** ECF No. 26, at 8.

21 It is undisputed that Plaintiff has failed to comply with this Court’s September 4, 2012,
22 order. Plaintiff did not file any objection to the September 4th order, nor any motion for an
23 extension of time to serve. Plaintiff likewise did not request any further discovery from the
24 Court. Instead, Plaintiff simply ignored the plain language of the order, and filed an unsupported
25 motion to amend the complaint seeking to replace the John Doe defendant with Josh Hatfield.
26 Filing a Motion to Amend, however, does not toll the deadline under 4(m) or abrogate this
27 court’s order requiring “proof of service” by October 5th. See, e.g., *Whitehead v. Payless Shoe*
28 *Source, Inc.*, No. H-07-2066, 2007 WL 3284019, at *1 (S.D. Tex. Nov. 6, 2007) (“[F]iling an

1 amended complaint generally will not toll the 120-day limit for service.”); 4B Charles Alan
2 Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1137 (3d ed. 2002).

3 It appears that this is a common theme with this Plaintiff. Indeed on October 10, 2012,
4 (two days before the instant opposition was filed), the Southern District of Florida dismissed
5 three AF Holdings cases when confronted with almost precisely the same scenario as herein. A
6 copy of this order is attached hereto as Exhibit F. The court noted that

7
8 “in each of the foregoing cases the undersigned informed Plaintiff, AF
9 Holdings, that it had until October 8, 2012, to perfect service on the Defendants or
10 show cause why each case should not be dismissed for failure to prosecute. The
11 Orders warned Plaintiff that the failure to file proofs of service or show good
12 cause by October 8 would result in orders of dismissal without prejudice.
13 Incredibly, on October 8, 2012, rather than comply with the clear language of the
14 Orders, Plaintiff filed nearly identical Responses explaining it filed amended
15 complaints... Plaintiff does not explain or offer any reason why the Court should
16 extend the 120-day deadline Plaintiff was reminded of by the July 24 Orders.”

17 *AF Holdings v. Nigel Sookdeo, et. al.* Case Nos. CV12-22146, CV12-22150, and CV 12-22155
18 (S.D. Fla. October 10, 2012).

19 As above, Plaintiff herein has ignored this Court’s September 4th Order, and has filed a
20 totally unsupported motion seeking leave to amend, *after the deadline to file proof of service*,
21 despite the unmistakable language of the order. This Court should not reward such disregard,
22 and should instead dismiss this matter via Rule 41(b).

23 The final factor under Rule 41(b) to be examined is a court’s interest in deciding cases on
24 the merits. This factor will always militate against dismissal. In the instant case, however, the
25 first three factors weigh heavily in favor of dismissal, and outweigh the generalized interest in
26 deciding cases on the merits. Moreover, Plaintiff has had ample opportunity to test its claims on
27 the merits, and has already had its prior claim against Mr. Hatfield determined on the merits.
28 Moreover, it appears that AF Holdings has not reached the merits of its copyright claims in any
of its previous filings across the country, nor have they attempted any action against the vast
majority of individuals from the underlying suit, *AF Holdings v. Does 1-135*. As this Plaintiff
has not shown any real desire to have its cases decided on the merits, the final factor in this case
should not outweigh the previous factors militating in favor of dismissal.

2. LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED

The decision whether to grant leave to amend is within the sound discretion of the trial court. Leave should be freely given in the absence of undue delay, bad faith, undue prejudice to the opposing party, or futility of the proposed amendment. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). As described further below, leave should be denied based on several independent grounds articulated in *Foman*. First, Plaintiff's bad faith in the instant matter is apparent. Second, Plaintiff has unnecessarily delayed the instant case before seeking amendment. Third, Plaintiff has failed to cure the instant deficiency in the complaint, despite previous opportunities to do so. Finally, Plaintiff has failed to comply with the Local Rules in submitting the instant motion, which represents an independent ground for denial of leave to amend.

1. Bad Faith

Plaintiff's bad faith is evident, and the timeline discussed above is the most obvious evidence thereof. Plaintiff has strung Mr. Hatfield, and this Court, along for months on the premise that it does not know the identity of the infringer, and was unable to determine the identity without formal discovery. Plaintiff filed not one, but two complaints premised on this fact. Plaintiff then filed an opposition to Mr. Hatfield's motion to dismiss that argued explicitly that Mr. Hatfield was "**concededly ignorant**" regarding the infringement. At no time did Plaintiff attempt to withdraw its motion, or its arguments regarding Mr. Hatfield's ignorance, and one has to assume that Plaintiff would have reiterated the same positions during the hearing that was scheduled for September 5th. Nevertheless, mere hours after the negligence cause of action was dismissed on September 4th, Plaintiff immediately increased its settlement demand and threatened to name Mr. Hatfield as the infringer. See Exhibit E.⁴

Judge Seeborg recently commented on similar threats by Plaintiff's counsel, in the context of a request for a subscriber deposition. The Court was told there, just as they were here, that Plaintiff did not know the identity of the infringer and Plaintiff would need further discovery to identify the individual responsible. In response, Judge Seeborg stated that:

1 “Plaintiff’s motion includes an argument that it more reasonable to take Wang’s
2 deposition than simply to name her as a defendant. **Given plaintiffs’ admission
3 that it lacks knowledge as to whether Wang is responsible for the alleged
4 infringement, naming her as a defendant at this juncture would present a
5 serious Rule 11 issue. As such, the argument has the appearance of an
6 improper threat.”**

7 *Hard Drive Productions, Inc. v. John Doe*, No. 4:11-cv-05630-YGR (Order Granting Leave to
8 Issue Deposition Subpoena)(N.D. Cal. January 18, 2012)(ECF No. 10 at 2)(emphasis added).

9 Mr. Hatfield was subjected to precisely the type of “improper threat” described above,
10 mere hours after prevailing on the negligence cause of action. The instant motion to amend
11 represents an attempt to punish Mr. Hatfield for succeeding in his motion, and a last-ditch effort
12 to salvage an ill-conceived suit that Plaintiff has hitherto made no effort to prosecute. As such,
13 this court should deny Plaintiff’s motion to amend.

14 In addition to the bad faith described above, courts have found bad faith where the
15 Plaintiff engages in gamesmanship by proffering one cause of action and, following a
16 defendant’s successful motion to dismiss, proffering a new, inconsistent theory. In *Vine v.*
17 *Beneficial Finance Co.*, the Second Circuit upheld the denial of leave to amend, noting that “one
18 basis for denial of leave to amend was the bad faith of appellant in waiting to see how he would
19 fare on the prior motion to dismiss. Although ‘leave shall be freely given when justice so
20 requires,’ in these circumstances it was certainly within the district court’s discretion to deny
21 leave to amend” 374 F.2d 627, 637, (2d Cir. 1967).

22 **2. Undue Delay**

23 A second factor to be considered when determining whether to deny a motion to amend is
24 whether the applicants “unduly delayed in filing their motion.” See, e.g. *Parker v. Joe Lujan*
25 *Enters., Inc.*, 848 F.2d 118, 121 (9th Cir.1988) (affirming district court’s denial of motion to
26 amend in part on ground of undue delay). A relevant inquiry under this prong is whether the
27 moving party knew or should have known the facts and theories raised by the amendment in the
28 original pleading. Thus, “[w]here the party seeking amendment knows or should know of the
facts upon which the proposed amendment is based but fails to include them in the original

1 complaint, the motion to amend may be denied.” *Jordan v. County of Los Angeles*, 669 F.2d
2 1311, 1324 (9th Cir. 1982), *vacated on other grounds in* 459 U.S. 810, 103 S.Ct. 35, 74 (1982).

3 Here, Plaintiff has not been granted any discovery since the initial order authorizing it to
4 subpoena Mr. Hatfield’s ISP. This was approximately one year ago. Plaintiff’s motion does not
5 identify what “new information” it has learned, how the information was learned or, most
6 importantly, why it couldn’t have conducted its “investigation” prior to filing two complaints and
7 additional opposition papers identifying Mr. Hatfield as a “concededly ignorant” account holder.
8 The fact that Plaintiff has not requested or conducted any formal discovery strongly suggests that
9 any investigative capacity has been available to Plaintiff since the date of the infringement.
10 There is simply no reason that Plaintiff couldn’t have conducted its “investigation,” if indeed
11 there was one, before wasting the time and resources of this Court and Mr. Hatfield. Plaintiff’s
12 undue delay represents an independent ground for denial of leave to amend in the instant case.

13 14 **3. Failure to Provide Evidentiary Support**

15 In addition to the grounds articulated above, Plaintiff’s Motion to Amend should be
16 denied for failing to provide any evidence in support of the motion, whether by declaration,
17 affidavit, or otherwise. N.D. Cal. Local Rule 7-5 requires that “Factual contentions made in
18 support of or in opposition to any motion must be supported by an affidavit or declaration and by
19 appropriate references to the record.” Failure to comply with local rules represents yet another,
20 independent ground for denying leave to amend. See *Waters v. Weyerhaeuser Mortgage Co.*,
21 582 F.2d 503 (9th Cir. 1978)(“It was clearly discretionary to deny the first motion to amend for
22 failure to comply with the local rule”).

23 The Fifth Circuit, citing *Waters*, likewise acknowledged that failure to provide
24 evidentiary support for the motion to amend may be fatal. Specifically, the court noted that
25 “when the appellant finally filed her motion for leave to amend, she failed to supply any briefs or
26 affidavits in support thereof. A local rule of the district court requires that all written motions be
27 accompanied by supporting briefs and affidavits. In our opinion, the district court could properly
28

1 deny leave to amend for failure to comply with local rule.” *Layfield v. Heard*, 607 F.2d 1097 (5th
2 Cir. 1979).

3 In the instant case, Plaintiff’s failure to comply with Local Rule 7-5 is not a mere
4 technical deficiency. Instead, the lack of any evidentiary support leaves this court (and
5 defendant) guessing about the five hundred pound elephant in the room – how Plaintiff has
6 suddenly discovered that Mr. Hatfield is the infringer of its copyright, despite its prior contrary
7 admissions and lack of further expedited discovery. Plaintiff knows that the timeline in this
8 matter makes its claims highly suspect and that prior, contrary pleadings that are subject to Rule
9 11 make any effort to explain its conduct in this litigation extremely difficult. So Plaintiff has
10 chosen to offer no evidence at all in support of its contentions. Given the circumstances of the
11 instant case, this Court should not simply overlook the deficiency in Plaintiff’s motion, and
12 should deny leave to amend the complaint in this matter.

13 14 **4. Futility of Amendment**

15 In addition to the grounds outlined above, leave to amend should be denied in the instant
16 case because amendment would be futile. Specifically, Plaintiff is barred by principles of
17 equitable and judicial estoppel from alleging that Josh Hatfield is the infringer of its copyrighted
18 works. The doctrine of judicial estoppel applies to bar a party who has taken a position in a
19 prior proceeding from subsequently asserting an inconsistent position in future litigation. The
20 Ninth Circuit has described the goal of judicial estoppel as preventing a Plaintiff from “playing
21 fast and loose with the courts,” and is designed to protect the integrity of the judicial system and
22 litigants. See *Morris v. California*, 966 F.2d 1162, 1167 (9th Cir. 1991). Although the doctrine
23 of judicial estoppel requires that the party to be estopped successfully asserted the position in a
24 prior proceeding, this does not equate to success on the merits of the claim. Indeed, as the 6th
25 Circuit has explained, “A party need not finally prevail on the merits in the first proceeding.
26 Rather, judicial acceptance means only that the first court has adopted the position urged by the
27 party, either as a preliminary matter or as part of a final disposition.” *Edwards v. Aetna Life Ins.*
28 *Co.*, 690 F. 2d 595, FN5 (6th Cir. 1982).

1 In the instant case, Plaintiff unequivocally stated that Mr. Hatfield is a “concededly
2 ignorant” account-holder in an effort to distinguish prior precedent. Although Plaintiff’s
3 negligence cause of action was ultimately rejected, the language of the operative order makes it
4 clear that this court has accepted Plaintiff’s representations regarding Mr. Hatfield. First, as
5 always, factual allegations are accepted by the court as true in the context of a motion to dismiss.
6 As such, this court was required to accept each of Plaintiff’s allegations regarding the
7 unidentified third party’s infringement in order to analyze the negligence.

8 In addition, the order notes that AF Holdings has not alleged direct or contributory
9 infringement against Mr. Hatfield, “both of which claims require, among other things,
10 knowledge of the infringing activity.” (ECF No. 26 at 1). This court further determined that
11 CDA immunity likely applied to the negligence claim, and a key element of CDA immunity
12 requires that the subject information originate from someone other than the defendant. As such,
13 it is clear that this court has previously accepted Plaintiff’s statements that Mr. Hatfield was not
14 the infringer, and was instead a “concededly ignorant” account-holder.

15 Plaintiff should not be allowed to play “fast and loose” with this court’s rules (and its
16 own obligations under Rule 11) by changing the fundamental basis for its allegations at the
17 eleventh hour, following the defeat of its prior cause of action. Because Plaintiff’s proposed
18 amendment should be barred by the doctrine of judicial estoppel, amendment in the instant case
19 would be futile, and should not be allowed.

20 IV. CONCLUSION

21 Plaintiff herein is attempting to change horses in midstream, following this Court’s
22 dismissal of its negligence claim. Now, despite repeated prior assertions that Plaintiff does not
23 know the identity of John Doe, Plaintiff has suddenly decided that Mr. Hatfield is the infringer of
24 its copyright. Plaintiff has not requested further expedited discovery, nor have they complied
25 with this Court’s September 4th Order. Plaintiff has known Mr. Hatfield’s identity as the ISP
26 subscriber for approximately one year, and have nonetheless failed to previously identify Mr.
27 Hatfield as the infringer. Moreover, Plaintiff failed to serve *any* defendants in the prior matter,
28 which was dismissed pursuant to Fed. R. Civ. Proc. 4(m), and have again failed to complete

1 service in a timely matter. Plaintiff's failure to prosecute and failure to comply with this court's
2 order represent independently sufficient grounds for dismissal with prejudice via Fed. R. Civ.
3 Proc. 41(b).

4 In addition to the grounds for dismissal, this court likewise has ample reason to deny
5 Plaintiff's Motion to Amend in the instant case, including bad faith, futility, undue delay, and
6 failure to comply with this Court's rules regarding evidentiary support. Any of these grounds is
7 sufficient to deny leave to amend.

8
9 October 12, 2012

10 Respectfully Submitted,

11
12 ___/S/ Nicholas Ranallo_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 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