

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X	:	
STRIKE 3 HOLDINGS, LLC,	:	
	:	Case No. 2:17-cv-05606-SJF-AKT
Plaintiff,	:	
	:	Judge Feuerstein
vs.	:	Magistrate Judge Tomlinson
	:	
JOHN DOE subscriber assigned IP address	:	
148.75.194.14,	:	
	:	
Defendant.	:	
-----X		

**MOTION FOR LEAVE TO SERVE A THIRD PARTY
SUBPOENA PRIOR TO A RULE 26(f) CONFERENCE**

Pursuant to Fed. R. Civ. P. 26(d)(1), and upon the attached: (1) Memorandum of Law in support of this motion; (2) Declaration of Greg Lansky in support of this motion; (3) Declaration of Tobias Fieser in support of this motion; and (4) Declaration of Jeff Fischbach in support of this motion, Strike 3 Holdings, LLC (“Plaintiff”), respectfully moves for entry of an order granting it leave to serve a third party subpoena on Optimum Online, prior to a Rule 26(f) conference (the “Motion”). A proposed order is attached for the Court’s convenience.

Respectfully submitted,

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Defendant.	:	
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO
SERVE A THIRD PARTY SUBPOENA PRIOR TO A RULE 26(f) CONFERENCE**

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO
SERVE A THIRD-PARTY SUBPOENA PRIOR TO A RULE 26(f) CONFERENCE**

Pursuant to Fed. R. Civ. P. 26(d)(1), Plaintiff hereby respectfully submits this Memorandum in support of its Motion for Leave to serve a third-party subpoena prior to a rule 26(f) conference.

I. INTRODUCTION

Plaintiff, Strike 3 Holdings, LLC ("Strike 3") is the owner of original, award winning motion pictures featured on its subscription-based adult websites.¹ Unfortunately, Strike 3's success has led users on the Internet to illegally infringe its works on a very large scale. Indeed, Strike 3's motion pictures are among the most infringed adult content in the world.

Strike 3 hired an investigator, IPP International U.G., to monitor and detect the infringement it faces. IPP discovered that Defendant's IP address was illegally distributing several of Strike 3's movies. Strike 3's independent forensic expert, Jeff Fischbach, reviewed the evidence captured by IPP and confirmed Defendant's IP address was involved in an infringing transaction at the exact date and time reported by IPP.

Strike 3 only knows Defendant by his or her IP address. This IP address is assigned to Defendant by his or her ISP, which is the only party with the information necessary to identify Defendant by correlating the IP address with John Doe's identity. As a result, Plaintiff now seeks leave to serve limited, immediate discovery on Defendant's Internet Service Provider, CSC Holdings LLC ("Optimum Online") ("ISP") so that Plaintiff may learn Defendant's identity, investigate Defendant's role in the infringement, and effectuate service. Further impelling

¹ See generally Declaration of Greg Lansky hereto attached as Exhibit "A."

expediency, Defendant's ISP only maintains the internal logs of the requested information for a brief period of time.²

Plaintiff seeks leave of Court to serve a Rule 45 subpoena on Defendant's ISP. This subpoena will only demand the true name and address of Defendant. Plaintiff will only use this information to prosecute the claims made in its Complaint. Without this information, Plaintiff cannot serve Defendant nor pursue this lawsuit to protect its valuable copyrights.

II. FACTS

A. Plaintiff Has a Serious Problem with BitTorrent Infringement

Greg Lansky ("Greg") is a member of General Media Systems, LLC, ("GMS") the parent company that owns Strike 3. *See* Exhibit A, Declaration of Greg Lansky at ¶ 1. Strike 3 owns the intellectual property to the Blacked, Tushy, and Vixen adult brands, including the copyrights to each of the movies distributed through the brands and the trademarks to each of the brand names and logos. *Id.* at ¶ 3. Strike 3 is owned entirely by Greg's company GMS and has existed since 2015. *Id.*

Greg is the Chief Creative Officer of the Blacked, Tushy, and Vixen adult brands. *Id.* at ¶ 1. In 2006, Greg moved to the United States from Paris to pursue his dream of creating art in an adult context. *Id.* at ¶ 4. He has always been passionate about photography and cinematography. *Id.*

² *See, e.g.,* Statement Of Jason Weinstein Deputy Assistant Attorney General Criminal Division Before The Committee On Judiciary Subcommittee On Crime, Terrorism, And Homeland Security United States House Of Representatives, (January 2011) at <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/01/25/11//01-25-11-crm-weinstein-testimony-re-data-retention-as-a-tool-for-investigating-internet-child-pornography-and-other-internet-crimes.pdf>, stating: "Some [ISP] records are kept for weeks or months; others are stored very briefly before being purged."

It was a difficult start - Greg could barely speak English, and he had trouble making connections and finding employment. *Id.* at ¶ 5. Eventually, after enormous hard work, Greg was fortunate to be hired by some of the biggest adult brands in the world. *Id.* at ¶ 6. Through these experiences, Greg was able to establish himself and become an expert in the field. *Id.*

In 2013, Greg decided to risk everything to create his own company and studio. *Id.* at ¶ 7. Greg's company kept growing and after a few years his brands turned into a multi-million dollar a year business. *Id.* at ¶ 10. His philosophy is to pay artists and models above other companies, focusing on delivering superior quality adult films and a wonderful customer experience. *Id.* at ¶¶ 12-13. And, Strike 3's movies are known for having the highest production budget of any in the industry. *Id.* at ¶ 15.

Because of this, Strike 3's websites have a subscriber base that is one of the highest of any adult sites in the world with 20 million unique visitors to its websites per month and a loyal following. *Id.* at ¶ 10. Strike 3's movies are also currently the number one seller of adult DVDs in the United States. *Id.* at ¶ 17. And Strike 3's content is licensed throughout the world, including in most major cable networks. *Id.* at ¶ 18. This success has led to awards such as "adult site of the year," "best marketing campaign – company image," and "best cinematography." *Id.* at ¶ 19. Greg has also won "director of the year" two years in a row. *Id.*

Unfortunately, piracy is a major threat to Strike 3. "We can compete in the industry, but we cannot compete when our content is offered for free." *Id.* at ¶ 22. In order to continue to provide value for members, exciting and inspiring projects for adult performers, and to continue to create jobs and growth in the adult community, Strike 3 must protect its copyrights.

B. The Infringer

Strike 3 knows that Defendant's Internet was used to infringe several of its movies. *See* Complaint at ¶ 33. Not only does Defendant download these movies through the BitTorrent protocol, but at the same time, Defendant distributes these movies to others, helping other people to also steal Strike 3's movies. *See* Complaint, at ¶ 39. Defendant's infringement appears consistent and ongoing. *See* Exhibit B, Declaration of Tobias Fieser at ¶ 10.

III. ARGUMENT

A. Legal Standard Governing Expedited Discovery Requests To Identify An Anonymous Defendant

"Though parties generally may not initiate discovery prior to satisfying the meet and confer requirement of Fed. R. Civ. P. 26(f), courts may in some instances order earlier discovery." *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012). "[A] party may engage in discovery before such a conference pursuant to court order." *Malibu Media, LLC v. John Doe Subscriber Assigned IP Address 173.68.5.86*, No. 1:16-CV-02462-AJN, 2016 WL 2894919, at *2 (S.D.N.Y. May 16, 2016) (citing Fed. R. Civ. P. 26(d)(1)). "Courts in this district have applied a 'flexible standard of reasonableness and good cause' in determining whether to grant a party's expedited discovery request." *Digital Sin, Inc.*, 279 F.R.D. at 241 (citing *Ayyash v. Al-Madina*, 233 F.R.D. 325, 326–27 (S.D.N.Y. 2005); *see* 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2046.1 (3d ed. 2011) ("Although [Rule 26(d)] does not say so, it is implicit that some showing of good cause should be made to justify such an order, and courts presented with requests for immediate discovery have frequently treated the question whether to authorize early discovery as governed by a good cause standard."))

The Second Circuit has noted that in John Doe proceedings, "identification of the alleged infringers was indispensable for the vindication of plaintiffs' copyright[s]" and that information

was not available “through alternative means.” *Arista Records LLC v. Doe*, 604 F.3d 110, 115 (2d Cir. 2010) (agreeing with the findings of the magistrate judge and denying Doe defendant’s motion to quash plaintiff’s subpoena). The *Arista* court adopted Judge Chin’s five-factor analysis for good cause in *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004):

[the] concrete[ness of the plaintiff’s] showing of a prima facie claim of actionable harm, . . . (2) [the] specificity of the discovery request, . . . (3) the absence of alternative means to obtain the subpoenaed information, . . . (4) [the] need for the subpoenaed information to advance the claim, . . . and (5) the [objecting] party’s expectation of privacy.

604 F.3d at, 119 (quoting *Sony Music*, 326 F.Supp.2d at 564–65). This analysis has become the standard in BitTorrent copyright cases. See *UN4 Prods., Inc. v. Doe*, No. 17CV3278PKCSMG, 2017 WL 2589328, at *1 (E.D.N.Y. June 14, 2017) (collecting cases). Plaintiff has good cause for such expedited discovery.

B. There Is Good Cause for this Court to Grant Plaintiff’s Motion for Leave to Serve Its Subpoena

1. Plaintiff’s Complaint Makes A Prima Facie Claim for Direct Copyright Infringement

To make a prima facie claim for copyright infringement, Plaintiff must show (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Plaintiff’s complaint accomplishes this, stating:

Plaintiff is the owner of the Work, which is an original work of authorship.

Defendant copied and distributed the constituent elements of Plaintiff’s Work using the BitTorrent protocol.

At no point in time did Plaintiff authorize, permit or consent to Defendant’s distribution of its Work, expressly or otherwise.

See Complaint at ¶¶ 30-31.

Plaintiff owns a valid copyright in the work that forms the basis of this case, which is registered with the United States Copyright Office. See 17 U.S.C. § 410(c); *Urbont v. Sony Music Entm't*, No. 11 Civ. 4516, 2015 WL 1781409, *4 (S.D.N.Y. April 20, 2015) (Buchwald) (“a certificate of registration made before or within five years after first publication of the work constitutes prima facie evidence of the validity of the copyright”).

Plaintiff has also made a plausible prima facie showing of “copying.” “The word ‘copying’ is shorthand for the infringing of any of the copyright owner’s five exclusive rights’ described in § 106.” *Arista Records LLC*, 604 F.3d at 117 (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)). Plaintiff’s Complaint alleges that Doe Defendant not only downloaded Plaintiff’s works over the BitTorrent network, see 17 U.S.C. § 106(1), but also distributed these files to the BitTorrent swarm. See *id.* § 106(3); see also Complaint at ¶ 39.

This Court has previously noted that a “[p]laintiff has made a concrete, prima facie case of copyright infringement by . . . alleging unlawful downloading, copying, and distribution of this work by specifying the type of technology used, the IP address from which the file was accessed and shared, and the date and time of the infringement.” *Malibu Media, LLC v. Doe*, No. 14-CV-4808 (JS)(SIL), 2016 WL 4574677, at *6 (E.D.N.Y. Sept. 1, 2016). Judge Chin, too, in his seminal case, found that “the use of P2P systems to download and distribute copyrighted music has been held to constitute copyright infringement.” *Sony Music Entm't Inc.*, 326 F. Supp. 2d, at 565–66 (collecting cases). “Indeed, every court to have addressed this issue has found a sufficiently alleged copyright infringement claim based on BitTorrent technology, even when the defendant was merely identified with an IP address.” *Patrick Collins, Inc. v. John Doe*, 945 F.

Supp. 2d 367, 375 (E.D.N.Y. 2013) (discussing the sufficiency of the complaint under Rule 12(b)(6)).

2. Plaintiff Identifies the Limited and Specific Information Its Subpoena Seeks That Is Necessary to Serve Doe Defendant

Plaintiff's Subpoena is limited and only "seeks concrete and narrow information: the name and address of the subscriber associated with [Doe Defendant's] IP address" *John Wiley & Sons, Inc. v. Doe*, 284 F.R.D. 185, 190 (S.D.N.Y. 2012). The subscriber's identity and address have been described by courts as "highly specific," *Malibu Media*, 2016 WL 4574677, at *6 (collecting cases), as "Plaintiffs clearly need identification of the putative John Does in order to serve process on them and prosecute their claims." *UN4 Prods., Inc. v. Doe*, 2017 WL 2589328, at *3 (E.D.N.Y. June 14, 2017) (citation omitted).

3. There Are No "Alternative Means" to Uncover Doe Defendant's True Identity

At this early stage in litigation, Plaintiff has only a limited view into Defendant's true identity, only having access to the offending IP address. People using the internet are anonymous to the public, but the ISPs responsible for assigning any given IP address "know who an address is assigned to and how to get in contact with them."³ ISPs' records "are the only available evidence that allows us to investigate who committed crimes on the Internet. They may be the only way to learn, for example, that a certain Internet address was used by a particular human being to engage in or facilitate a criminal offense."⁴

³ *Beginner's Guide to Internet Protocol (IP) Addresses* at p. 4, available at <https://www.icann.org/en/system/files/files/ip-addresses-beginners-guide-04mar11-en.pdf>; *American Registry for Internet Numbers Number Resource Policy Manual* at 4.2, available at <https://www.arin.net/policy/nrpn.html#four2>.

⁴ Statement from Jason Weinstein, n.2, *supra*.

Since there is no public registry of what IP addresses correspond to which subscribers, Plaintiff's subpoena is necessary to advancing litigation. *See* Declaration of Jeff Fischbach, Exhibit C (“[A] subpoena to an ISP is consistently used by civil plaintiffs and law enforcement to identify a subscriber of an IP address.”); *see also Malibu Media, LLC v. Doe*, No. 15CV3504JFBSIL, 2016 WL 4444799, at *10 (E.D.N.Y. Aug. 23, 2016) (Quoting testimony from an evidentiary hearing on this issue and others) (“[I]t is common knowledge in law enforcement as well as in the private sector’ that, pursuant to a ‘congressional act,’ an ISP will not ‘provide a civil litigant its subscriber's information without a subpoena.’”)

There is simply no alternative means by which Plaintiff can identify Doe Defendant absent the present subpoena. Indeed, “BitTorrent software is ‘largely anonymous’ except insofar as it requires a user to broadcast the user's IP address.” *John Wiley & Sons, Inc.*, 284 F.R.D., at 190; *see also UN4 Prods., Inc.*, 2017 WL 2589328, at *3 (“BitTorrent's appeal to potential infringers is the large degree of anonymity it provides users.”). The ISP is the only entity that can correspond a subscriber's identity with his or her IP address, and since Plaintiff “cannot identify [Doe Defendant] without a court-ordered subpoena, . . . there is good cause to allow for early discovery.” *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165, 171–72 (S.D.N.Y. 2012).

4. *The Subpoenaed Information Is Necessary to Advance Plaintiff's Infringement Claim*

As previously emphasized, Plaintiff cannot properly serve Doe Defendant without first ascertaining the subscriber's identity from his or her ISP. Judge Chin framed this factor aptly: “Ascertaining the identities and residences of the Doe defendants is critical to plaintiffs' ability to pursue litigation, for without this information, plaintiffs will be unable to serve process.” *Sony Music Entm't Inc.*, 326 F. Supp. 2d, at 566. Plaintiff has a strong claim, indeed, *Arista* noted that

the “the fundamental copyright principles are clear.” *Arista Records LLC*, 604 F.3d, at 117. All that stands in the way of the merits at this point, is effectuating service. *See Malibu Media, LLC v. Doe*, No. 15CV3504JFBSIL, 2016 WL 4444799, at *11 (E.D.N.Y. Aug. 23, 2016) (“Without learning the Defendant's identity and address, the Plaintiff will be unable to serve process and pursue its claim.”) (citation omitted).

5. *Defendant’s Minimum Privacy Interest Is Substantially Outweighed by Plaintiff’s Interest in Protecting Its Copyrights from Mass BitTorrent Infringers*

The Second Circuit has found subscribers do not have a “legitimate privacy interest” in their IP address. *United States v. Ulbricht*, 858 F.3d 71, 84, 97 (2d Cir. 2017) (agreeing with the majority trend in Circuit Courts of Appeals); *see also Sony Music Entm’t Inc.*, 326 F. Supp. 2d at, 566–67 (noting Plaintiffs are “entitled to discovery in light of” this minimal interest), while Plaintiff’s central need for the subpoenaed for information, combined with its strong claim, substantially favors good cause. *See Arista Records, LLC*, 604 F.3d, at 124 (finding Doe Defendant’s “expectation of privacy for sharing copyrighted [works] through an online file-sharing network as simply insufficient to permit him to avoid having to defend against a claim of copyright infringement.”). The jurisprudence in *Sony* has been adopted through the Second Circuit and “courts have recognized that ISP subscribers have a minimal expectation of privacy in the sharing of copyrighted material.” *UN4 Prods., Inc.*, 2017 WL 2589328, at *3 (quotations omitted) (collecting cases); *see also Rotten Records, Inc. v. Doe*, 108 F. Supp. 3d 132, 134 (W.D.N.Y. 2015) (“Plaintiff’s interest in learning Defendant's name and address outweighs Defendant's privacy interest.”)

C. Plaintiff Has Filed a Notice of Related Cases Pursuant to Local Civil Rule 1.6(a)

Pursuant to this Court's Local Civil Rule 1.6, Plaintiff has filed a Notice of Related Cases notifying the Court of other similar cases filed by Plaintiff which may be related. *See* Notice of Related Cases. Plaintiff has filed this notice in every case in this District.

D. Protective Order

Recently, the Honorable Judge Locke issued opinions in several BitTorrent cases establishing procedural safeguards such as allowing a defendant to proceed under the name "John Doe" and setting forth a schedule for a Doe Defendant to move to quash or modify Plaintiff's subpoena. *See In Re Malibu Media Copyright Infringement Cases* 2:17-cv-01080-JMA-SIL (E.D.N.Y. March 13, 2017). Strike 3 respectfully encourages the Court to establish such procedures here, should the Court find it appropriate. A proposed order is attached reflecting the Honorable Judge Locke's order.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court grant leave to Plaintiff to issue a Rule 45 subpoena to Defendant's ISP.

Respectfully submitted,

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**DECLARATION OF GREG LANSKY IN SUPPORT OF PLAINTIFF'S MOTION FOR
LEAVE TO SERVE A THIRD-PARTY SUBPOENA PRIOR TO
A RULE 26(F) CONFERENCE**

I, Greg Lansky, do hereby state and declare as follows:

1. I am a member of General Media Systems, LLC, the parent company that owns Strike 3 Holdings, LLC ("Strike 3"). I am the Chief Creative Officer of the Blacked, Tushy, and Vixen adult brands.

2. I have personal knowledge of all of the matters contained in this declaration and, if called and sworn as a witness, I can and competently will testify to all matters contained herein. This declaration is made in support of Plaintiff's Motion for Leave to Take a Third-Party Subpoena Prior to a Rule 26(f) Conference.

3. Strike 3 owns the intellectual property to the Blacked, Tushy, and Vixen adult brands, including the copyrights to each of the movies distributed through Blacked, Tushy and Vixen and the trademarks to each of the brand names and logos. Strike 3 is owned entirely by our company General Media Systems, LLC and has existed since 2015.

4. I moved to the United States in 2006 from Paris, France to pursue my dream of creating art in an adult context. I have always been passionate about photography and cinematography.

5. It was a difficult start - I could barely speak English, and I had trouble making connections and finding employment. I struggled for several years to make a name for myself as a reliable photographer and director.

6. Eventually, after enormous hard work, I was fortunate to be hired by some of the biggest adult brands in the world. Through these experiences, I was able to establish myself and become an expert in the field.

7. In 2013 I decided to risk everything to create my own company and studio. As a director, I felt the industry and I were not offering the best quality and experience possible. I felt I wasn't offering truly inspiring projects for performers to express their art.

8. At the time, the adult market was demoralized and most felt that a high-quality, well produced, subscription based website would never succeed.

9. I can still remember when our company was just three people in my small home office.

10. We kept growing and after a few years our brands turned into a multi-million dollar a year business. We now have 20 million unique visitors to our websites per month and a loyal following.

11. Our company's philosophies are important.

12. We always strive to pay artists and models above other companies. We are known for paying our performers the highest rates ever recorded. We give them the respect they deserve.

13. We focus on delivering superior quality adult films and a wonderful customer experience. People thought we were crazy and that we would fail because no one wanted to pay for expensive quality adult films. Now, we have a loyal customer base.

14. We provide jobs for nearly 60 people worldwide. We provide good benefits including health care coverage and have an extremely positive company culture.

15. Our movies are known for having the highest production budget of any in the industry. We invest in state of the art cinematic equipment. We film with Hollywood industry standards. And, as our subscriber base grows, we always seek to find ways to invest in value for our customers.

16. Because of this, we have a subscriber base that is one of the highest of any adult sites in the world.

17. We are also currently the number one seller of adult DVDs in the United States. No one sells more than us.

18. Our content is licensed throughout the world, including in most major cable networks.

19. Our success has not gone unnoticed. Indeed, we are very proud to state that our unique cinematic films have won many awards. It's humbling. Some of them include:

- Best marketing campaign – company image (AVN, 2016-2017)
- Best new studio (XBIZ, 2017)
- Best cinematography (AVN, 2016)
- Director of the Year (AVN, 2016-2017; XBIZ, 2017)
- Best membership website (AVN, 2016-2017)
- Adult site of the year – (XBIZ, 2015-2017)

20. We also are routinely featured in the mainstream media. Just in the past few months, Forbes,¹ The Daily Beast,² and CBC Radio³ have all done major profiles on us.

21. We are proud of our impact on the industry. We have raised the bar - leading more adult studios to invest in better content, higher pay for performers, and to treat each performer like an artist. That's a testament to the entire team and the movies we create.

22. Unfortunately, piracy is a major threat to our company. We can compete in the industry, but we cannot compete when our content is offered for free.

¹ "How One Pornographer is Trying to Elevate Porn to Art," *Forbes* July 20, 2017 <https://www.forbes.com/sites/susannahbreslin/2017/07/20/pornographer-greg-lansky-interview/#2301d3ae6593>

² "Meet the Man Making Porn Great Again," *The Daily Beast*, February 18, 2017 <http://www.thedailybeast.com/meet-the-man-making-porn-great-again>

³ "Porn-o-nomics: How one director is making a fortune by defying conventional wisdom," *CBC Radio*, February 24, 2017 <http://www.cbc.ca/radio/day6/episode-326-sanctuary-cities-la-la-land-vs-jazz-hollywood-in-china-porn-o-nomics-and-more-1.3994160/porn-o-nomics-how-one-director-is-making-a-fortune-by-defying-conventional-wisdom-1.3994167>

23. We have discovered that when we put videos online for paid members it takes as little as four minutes to be on torrent websites. We have attempted to identify the initial seeder but have found it impossible with the large volume of our subscriber base.

24. We put our hearts and minds and sweat and blood into creating valuable content for our paid customers. It crushes us to see it available to anyone for free in just minutes.

25. We are undeniably the most pirated adult content in the world.

26. We send on average 50,000 DMCA notices a month but it does nothing to stop the infringement.

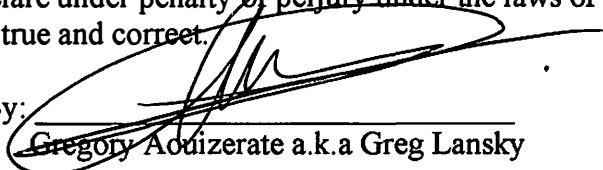
27. The only way to stop the piracy of our movies on BitTorrent networks is to file lawsuits like this one.

28. In order to continue to provide value for our members, exciting and inspiring projects for adult performers, and to continue to create jobs and growth in our community, we must protect our copyrights.

DECLARATION

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

By:


Gregory Aduizerate a.k.a Greg Lansky

DECLARATION OF TOBIAS FIESER IN SUPPORT OF PLAINTIFF'S MOTION FOR
LEAVE TO TAKE DISCOVERY PRIOR TO A RULE 26(f) CONFERENCE

I, Tobias Fieser, do hereby state and declare as follows:

1. My name is Tobias Fieser. I am over the age of 18 and I am otherwise competent to make this declaration.
2. This declaration is based on my personal knowledge and, if called upon to do so, I will testify that the facts stated herein are true and accurate.
3. I am employed by IPP International UG ("IPP"), a German company, in its litigation support department.
4. IPP provides forensic investigation services to copyright owners including an ability to track, monitor, and detect copyright infringement in an online environment. Strike 3 Holdings, LLC ("Strike 3") hired IPP to monitor and record online infringement of its movies.
5. One of the services that IPP provides is that its system monitors the BitTorrent file distribution network for the presence of copyrighted works. IPP's forensic software identifies Internet Protocol ("IP") addresses that are being used by infringers to distribute copyrighted works within the BitTorrent File Distribution Network.
6. As part of my employment with IPP, I was assigned the task of overseeing, analyzing, and reviewing the results of this investigation. I have previously provided the same support for thousands of copyright infringement lawsuits across the United States, and I gave full and complete testimony about the forensic scanning process during the "BitTorrent Bellwether Trial" (*Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779 (E.D. Pa. 2013)).
7. After reviewing IPP's forensic activity records, I determined that IPP's forensic servers connected to an electronic device using IP Address 148.75.194.14. After this connection, Defendant's IP Address of 148.75.194.14 was documented distributing to IPP's servers multiple

pieces of Strike 3's copyrighted movie titled Eva Chapter 4 at exactly 08/20/2017 22:10:57. Each piece was recorded in a PCAP, which stands for "packet capture" and is a forensically sound interface for recording network traffic. The time recorded is quoted in Universal Time which correlates to the assignment logs kept by all Internet Service Providers (ISPs) within the United States. These assignment logs track which IP Address is assigned to which customer at all points in time. These assignment logs are relied upon by both civil litigants as well as law enforcement entities.

8. IPP provided a forensically sound copy of the PCAP that captured the transaction to Jeff Fischbach, Strike 3's forensic examiner located in California.

9. IPP's software additionally analyzed each BitTorrent "piece" distributed by Defendant's IP Address. It verified that reassembling the pieces using a specialized BitTorrent client results in a fully playable digital movie.

10. A digital file can be identified by what is called a "Cryptographic Hash Value." This concept was developed by the United States National Security Agency. IPP's software determined that the file being distributed by Defendant's IP Address of 148.75.194.14 at 08/20/2017 22:10:57 has a unique identifier of the Cryptographic Hash of 2F37046EC89B3AD7ED74C2940723618BFD1A4721.

11. IPP's software downloaded a full copy of the digital file identified by the Hash of 2F37046EC89B3AD7ED74C2940723618BFD1A4721, and I confirmed this file is a digital movie file. I further viewed this file and determined it was substantially similar to Strike 3's copyrighted movie titled Eva Chapter 4.

12. IPP's software is programmed to only allow it to download files from the BitTorrent Network. It is unable to distribute content. At no point did IPP distribute any part of Strike 3's copyrighted movies at any time.

13. IPP additionally confirmed through its ancillary worldwide BitTorrent surveillance program that IP address 148.75.194.14 is associated with significant long term BitTorrent use.

14. And, IPP's software determined that Defendant is a persistent infringer of Strike 3's works. As of the date this declaration is executed, IPP has recorded an individual using Defendant's IP address infringing at least 56 movies belonging to Strike 3. The infringement appears consistent and on-going.

DECLARATION

PURSUANT TO 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of September, 2017.

TOBIAS FIESER

By: 

DECLARATION OF JEFF FISCHBACH IN SUPPORT OF PLAINTIFF'S MOTION FOR
LEAVE TO TAKE DISCOVERY PRIOR TO A RULE 26(f) CONFERENCE

I, Jeff Fischbach, do hereby state and declare as follows:

1. My name is Jeff Fischbach. I am over the age of 18 and I am otherwise competent to make this declaration.
2. This declaration is based on my personal knowledge and, if called upon to do so, I will testify that the facts stated herein are true and accurate.
3. I am founder and President of SecondWave Information Systems, a technology consulting firm specializing in information systems and technology integration based out of Chatsworth, California.
4. Since 1994, I have served as a technology advisor to numerous professional organizations and corporations.
5. I have been engaged as a litigation consultant and Forensic Examiner, offering expert advice and oversight on matters involving computers, information systems, satellite and communications technologies.
6. I have also advised law enforcement, foreign government representatives, judges, lawyers and the press.
7. I have investigated and testified in dozens of cases involving use of Peer-to-Peer file-sharing technology, including but not limited to BitTorrent protocols.
8. I was retained by Strike 3 Holdings, LLC ("Strike 3") to individually analyze and retain forensic evidence captured by IPP International U.G. ("IPP").
9. I received a PCAP from IPP containing information relating to the transaction occurring on 08/20/2017 22:10:57 involving IP address 148.75.194.14.

10. I used a program entitled Wireshark to view the contents of the PCAP.

11. I was able to confirm that IPP recorded the transaction with 148.75.194.14 at 08/20/2017 22:10:57. The IP Address is owned by Optimum Online (CSC Holdings LLC).

12. Based on my experience in similar cases, Defendant's ISP, Optimum Online, is the only entity that can correlate the IP address to its subscriber and identify Defendant as the person assigned the IP address 148.75.194.14 during the time of recorded infringement. Indeed, a subpoena to an ISP is consistently used by civil plaintiffs and law enforcement to identify a subscriber of an IP address.

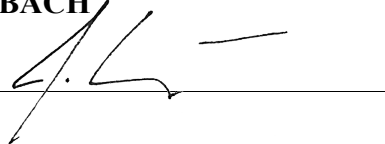
DECLARATION

PURSUANT TO 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of September, 2017.

JEFF FISCHBACH

By: _____

A handwritten signature in black ink, appearing to be 'J. Fischbach', is written over a horizontal line that serves as a signature line.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X	:	
STRIKE 3 HOLDINGS, LLC,	:	
	:	Case No. 2:17-cv-05606-SJF-AKT
Plaintiff,	:	
	:	Judge Feuerstein
vs.	:	Magistrate Judge Tomlinson
	:	
JOHN DOE subscriber assigned IP address	:	
148.75.194.14,	:	
	:	
Defendant.	:	
-----X	:	

**ORDER ON PLAINTIFF’S MOTION FOR LEAVE TO SERVE A THIRD PARTY
SUBPOENA PRIOR TO A RULE 26(f) CONFERENCE**

These copyright infringement actions were commenced by Plaintiff, Strike 3 Holdings, LLC (“Plaintiff” or “Strike 3”) against various unnamed defendants (the “Doe Defendant(s)”), who have as yet only been identified by Internet Protocol (“IP”) addresses allegedly associated with them. Presently before the Court in each such case is a motion for expedited discovery under Federal Rule of Civil Procedure 26(d)(1), seeking permission to serve subpoenas upon various Internet Service Providers (“ISPs”) to obtain the true identities of the Doe Defendants.

The Court concludes that good cause exists to allow for the expedited discovery provided for in the Discovery Order. *See* Memorandum and Order, *Malibu Media, LLC v. John Doe*, No. 15-CV-3504 (E.D.N.Y. Aug. 23, 2016), ECF No. 36. Accordingly:

IT IS ORDERED that Strike 3 may immediately serve a subpoena in compliance with Fed. R. Civ. P. 45 (the “Subpoena(s)”) on the ISP specifically identified in the Complaint, to obtain only the name and address of the internet subscriber associated with the IP address also identified therein. Under no circumstances is Strike 3 permitted to seek or obtain any Doe Defendant’s phone number or email address, or to seek or obtain information about potential defendants other than those whose IP addresses are specifically identified in the Complaints, without a further Court order. Each such Subpoena shall have a copy of this Order attached; and

IT IS FURTHER ORDERED that, upon receiving a Subpoena, the ISP shall use reasonable efforts to identify the internet subscriber(s) associated with the referenced IP address, but shall not immediately disclose such information to Strike 3. Rather, within 60 days of receiving a Subpoena, the ISP shall serve a copy thereof, together with a copy of this Order, upon the subscriber(s) it determines to be associated with the implicated IP address. This measure is appropriate to place the subscriber(s) on fair notice of Strike 3's efforts to obtain his or her identifying information, and his or her rights to contest the Subpoena or litigate it anonymously.

In this regard, service by the ISPs upon any of the Doe Defendants may be made using any reasonable means, including written notice sent to his or her last known address, transmitted either by first-class or overnight mail; and

IT IS FURTHER ORDERED that a Doe Defendant who receives copies of the Subpoena and this Order will have a period of 60 days to file any motions with this Court contesting the Subpoena (including a motion to quash or modify the Subpoena), as well as any request to litigate the Subpoena anonymously. The ISP may not disclose any Doe Defendant's identifying information to Strike 3, or its employees or agents, at any time before the expiration of the 60-day period. Additionally, if a Doe Defendant or ISP files a motion to quash the Subpoena, the ISP may not turn over any information to Strike 3, or its employees or agents, until the issues set forth in the motion have been addressed and the Court issues an Order instructing the ISP to resume in turning over the requested discovery; and

IT IS FURTHER ORDERED that if the 60-day period within which a Doe Defendant may contest or otherwise move with respect to a Subpoena lapses without such action, the ISP will have a period of 10 days to produce the information responsive to the Subpoena to Strike 3 or file its own motion to quash if it so chooses. In the event a Doe Defendant or ISP moves to quash or modify a Subpoena, or to proceed anonymously, he or she shall at the same time as his or her filing also notify the ISP so that the ISP is on notice not to release the Doe Defendant's contact information to Strike 3, or its employees or agents, until the Court rules on any such motion; and

IT IS FURTHER ORDERED that an ISP receiving a Subpoena shall confer with Strike 3 and shall not assess any charge in advance of providing the information requested therein. If an ISP elects to charge for the costs of production, it shall provide a billing summary and cost report to Strike 3; and

IT IS FURTHER ORDERED that any information ultimately disclosed to Strike 3 in response to the Subpoena may be used by Strike 3 solely for the purpose of protecting its rights as set forth in the Complaints; and

IT IS FURTHER ORDERED that until such further Order of the Court, each case identified in the caption above shall be litigated in the name of a "John Doe" defendant, regardless of what information is ultimately disclosed pursuant to the Subpoena.

Dated:

SO ORDERED:
