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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,  
Plaintiff,  
v.  
JOHN DOE subscriber assigned IP  
address 70.95.200.211,  
Defendant.

Case No.: 17cv2313 AJB (JMA)  
**ORDER GRANTING EX PARTE  
APPLICATION FOR LEAVE TO  
SERVE A THIRD PARTY  
SUBPOENA PRIOR TO A RULE  
26(f) CONFERENCE [ECF No. 4]**

Before the Court is an Ex Parte Application for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference filed by Plaintiff Strike 3 Holdings, LLC (“Plaintiff”). (ECF No. 4.) For the reasons discussed below, Plaintiff’s motion is **GRANTED**.

**I. PROCEDURAL HISTORY**

On November 14, 2017, Plaintiff filed a Complaint against Defendant John Doe subscriber assigned IP address 70.95.200.211 (“Defendant”). (Compl., ECF No. 1). Plaintiff alleges it “owns the intellectual property to the *Blacked, Tushy,* and *Vixen* adult brands, including the copyrights to each of the motion pictures distributed through the brands’ sites and the trademarks to each of the brand

1 names and logos.” Ex Parte Appl. at 1; Compl., ¶ 25 & Ex. A. The Complaint  
2 alleges a claim of copyright infringement. Plaintiff alleges that Defendant, using  
3 IP address 70.95.200.211, infringed Plaintiff’s copyrights by copying and  
4 distributing the constituent elements of Plaintiff’s copyrighted works using the  
5 BitTorrent protocol without Plaintiff’s authorization, permission or consent. Id., ¶¶  
6 35-37.

7 Plaintiff seeks leave of court to serve a subpoena pursuant to Fed. R. Civ.  
8 P. 45 on Defendant’s internet service provider (“ISP”), Time Warner Cable  
9 (Spectrum), in order to learn Defendant’s identity.

## 11 **II. LEGAL STANDARDS**

12 Generally, discovery is not permitted without a court order before the  
13 parties have conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R.  
14 Civ. P. 26(d)(1). Yet, “in rare cases, courts have made exceptions, permitting  
15 limited discovery to ensue after filing of the complaint to permit the plaintiff to  
16 learn the identifying facts necessary to permit service on the defendant.”  
17 Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999)  
18 (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)). Courts grant  
19 these requests when the moving party shows good cause for the early discovery.  
20 Semitool, Inc. v. Tokyo Elec. Am., Inc., 208 F.R.D. 273, 275-76 (N.D. Cal. 2002).

21 The Ninth Circuit has held that when the defendants’ identities are  
22 unknown at the time the complaint is filed, courts may grant plaintiffs leave to  
23 take early discovery to determine the defendants’ identities “unless it is clear that  
24 discovery would not uncover the identities, or that the complaint would be  
25 dismissed on other grounds.” Gillespie, 629 F.2d at 642. A district court’s  
26 decision to grant discovery to determine jurisdictional facts is a matter of  
27 discretion. Columbia Ins. Co., 185 F.R.D. at 578.

1 District courts apply a three-factor test when considering motions for early  
2 discovery to identify certain defendants. Id. at 578-80. First, the plaintiff should  
3 “identify the missing party with sufficient specificity such that the Court can  
4 determine that defendant is a real person or entity who could be sued in federal  
5 court.” Id. at 578. Second, the movant must describe “all previous steps taken to  
6 locate the elusive defendant” to ensure that the plaintiff has made a good faith  
7 effort to identify and serve process on the defendant. Id. at 579. Third, the  
8 plaintiff should establish that its suit against the defendant could withstand a  
9 motion to dismiss. Id. “[T]o prevent abuse of this extraordinary application of the  
10 discovery process and to ensure that the plaintiff has standing,” the plaintiff must  
11 show that some act giving rise to liability actually occurred and that the discovery  
12 is aimed at identifying the person who actually committed the act. Id. at 579-80.

### 13 14 **III. DISCUSSION**

#### 15 **A. Identification of Missing Parties with Sufficient Specificity**

16 First, Plaintiff must identify Defendant with enough specificity to enable the  
17 Court to determine that the defendant is a real person or entity who would be  
18 subject to the jurisdiction of this Court. Id. at 578. “[A] plaintiff identifies Doe  
19 defendants with sufficient specificity by providing the unique IP addresses  
20 assigned to an individual defendant on the day of the allegedly infringing  
21 conduct, and by using “geolocation technology” to trace the IP address to a  
22 physical point of origin. 808 Holdings, LLC v. Collective of Dec. 29, 2011 Sharing  
23 Hash, 2012 WL 1648838, at \*4 (S.D. Cal. May 4, 2012).

24 Here, Plaintiff determined the ISP that had provided the subject IP address  
25 associated with Defendant was Time Warner Cable (Spectrum), and used  
26 geolocation technology to trace the IP address to an address located within this  
27 district. Compl., ¶¶ 8-9 & Ex. A; Pasquale Decl. at ¶¶ 7-9. Consequently,  
28

1 Plaintiff has identified Defendant with sufficient specificity and has satisfied the  
2 first factor of the test for permitting early discovery.

3 **B. Previous Attempts to Locate Defendant**

4 Next, Plaintiff must identify all previous steps taken to identify the Doe  
5 Defendant in a good faith effort to locate and serve it. See Columbia Ins. Co.,  
6 185 F.R.D. at 579. According to Plaintiff, it “has been unable to identify any other  
7 way to go about obtaining the identities of its infringers.” Ex Parte Appl. at 8.  
8 This is the case because although publicly available data allowed Plaintiff to  
9 identify the specific ISP used by Defendant as well as the city associated with the  
10 IP address, it did not permit Plaintiff to ascertain the identity of the subscriber or  
11 actual defendant. Id. Accordingly, Plaintiff appears to have investigated and  
12 obtained the data pertaining to the alleged infringement in a good faith effort to  
13 locate Defendant. See, e.g., Digital Sin, Inc. v. Does 1-5698, No. C-11-04397  
14 LB, 2011 U.S. Dist. LEXIS 128033, at \*5 (N.D. Cal. Nov. 4, 2011).

15 **C. Ability to Withstand a Motion to Dismiss**

16 Lastly, to be entitled to early discovery, Plaintiff must demonstrate that the  
17 Complaint can withstand a motion to dismiss. See Columbia Ins. Co., 185 F.R.D.  
18 at 579.

19 1. **Ability to State a Claim Upon Which Relief Can Be Granted**

20 Plaintiff alleges it “owns the intellectual property to the *Blacked*, *Tushy*, and  
21 *Vixen* adult brands, including the copyrights to each of the motion pictures  
22 distributed through the brands’ sites and the trademarks to each of the brand  
23 names and logos.” Ex Parte Appl. at 1; Compl., ¶ 25 & Ex. A. Plaintiff alleges  
24 that Defendant, using IP address 70.95.200.211, infringed Plaintiff’s copyrights  
25 by copying and distributing the constituent elements of Plaintiff’s copyrighted  
26 works using the BitTorrent protocol without Plaintiff’s authorization, permission or  
27 consent. Id., ¶¶ 35-37. The Court finds Plaintiff has alleged a prima facie case  
28 of copyright infringement against Defendant.

1                   2.     Personal Jurisdiction

2             Plaintiff bears the burden of establishing jurisdictional facts. See Columbia  
3 Ins. Co., 185 F.R.D. at 578. Plaintiff, using geolocation technology, traced  
4 Defendant’s IP address to a point of origin within this District. Compl., ¶¶ 8-9 &  
5 Ex. A; Pasquale Decl. at ¶¶ 7-9. Accordingly, Plaintiff has alleged sufficient facts  
6 to show it can likely withstand a motion to dismiss for lack of personal jurisdiction.  
7 See, e.g., Pink Lotus Entm’t, 2011 U.S. Dist. LEXIS 65614, at \*6-7.

8                   3.     Venue

9             “The venue of suits for infringement of copyright is not determined by the  
10 general provision governing suits in the federal district courts, rather by the  
11 venue provision of the Copyright Act.” Goldberg v. Cameron, 482 F. Supp. 2d  
12 1136, 1143 (N.D. Cal. 2007). Civil actions for copyright infringement “may be  
13 instituted in the district in which defendant or his agent resides or may be found.”  
14 28 U.S.C.A. § 1400(1) (West 2006). An individual “resides” for venue purposes  
15 in the district of his domicile. 17 James Wm. Moore, et al., Moore’s Federal  
16 Practice, § 110.39[2], at 110-76 (3d ed. 2011). A defendant is “found” for venue  
17 purposes where he is subject to personal jurisdiction. Id. (footnote omitted); see  
18 also Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1126 (9th Cir.  
19 2010) (“This circuit interprets [28 U.S.C. § 1400(a)] to allow venue in any judicial  
20 district where, if treated as a separate state, the defendant would be subject to  
21 personal jurisdiction.”). Plaintiff alleges venue is proper because Defendant  
22 allegedly committed the infringing acts complained of in this District. Thus,  
23 venue appears to be proper at this time.

24             Accordingly, Plaintiff’s Complaint can likely survive a motion to dismiss.

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26             **IV.     CONCLUSION**

27             For the reasons set forth above, it is hereby ordered that Plaintiff’s Ex Parte  
28 Application is **GRANTED** as follows:

1           1.     Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45 upon  
2 Time Warner Cable (Spectrum) for the sole purpose of obtaining the *name and*  
3 *address only* of Defendant John Doe, based on the IP address listed for him in  
4 the complaint -- 70.95.200.211. Time Warner Cable (Spectrum) shall have  
5 fourteen (14) calendar days after service of the subpoena upon it to notify its  
6 subscriber that his/her identity has been subpoenaed by Plaintiff. The subscriber  
7 whose identity has been subpoenaed shall have thirty (30) calendar days from  
8 the date of such notice to challenge the disclosure to Plaintiff by filing an  
9 appropriate pleading with this Court contesting the subpoena. If Time Warner  
10 Cable (Spectrum) intends to move to quash the subpoena, it must do so prior to  
11 the return date of the subpoena. The return date of the subpoena must allow for  
12 at least forty-five (45) days from service to production. If a motion to quash or  
13 other customer challenge is brought, Time Warner Cable (Spectrum) must  
14 preserve the information sought by Plaintiff pending resolution of the motion or  
15 challenge.

16           2.     The subpoena shall not seek Defendant's telephone number, email  
17 address, or Media Access Control (MAC) address, as this information is not  
18 necessary for Plaintiff to identify and serve Defendant.

19           3.     Plaintiff may use the information disclosed pursuant to the subpoena  
20 only in pursuing this litigation.

21           4.     Plaintiff shall serve a copy of this order with any subpoena served  
22 upon Time Warner Cable (Spectrum) pursuant to this Order. Time Warner Cable  
23 (Spectrum), in turn, must provide a copy of this Order along with the required  
24 notice to the subscriber whose identity is sought pursuant to this Order.

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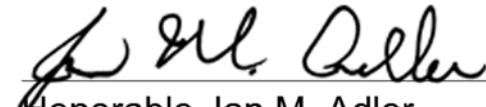
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1 5. No other discovery is authorized at this time.

2 **IT IS SO ORDERED.**

3 Dated: December 28, 2017

4   
5 Honorable Jan M. Adler  
6 United States Magistrate Judge

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