

IN THE COUNTY COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STRIKE 3 HOLDINGS, LLC,

Plaintiff,

vs.

Case No. 2020-014520-CC-05

UNKNOWN INFRINGERS
IDENTIFIED ON EXHIBIT “1,”

Defendants.

_____ /

DOE DEFENDANT 98.242.52.89’S MOTION FOR ATTORNEY FEES AND COSTS

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Doe Defendant 98.242.52.89 (“Doe 98.242.52.89”), which became a prevailing party in this matter on March 19, 2021, hereby seeks an award of attorney fees and costs pursuant to Rule 1.420 of the Florida Rules of Civil Procedure and 17 U.S.C. § 505.

INTRODUCTION

In this proceeding, plaintiff Strike 3 Holdings (“Strike 3”) has followed a pattern that has become all-too-common in recent years—It filed a Bill of Discovery seeking identifying information about hundreds of anonymous Internet users located all over the United States. Strike 3 contended that each of them had engaged in infringement of its copyright of one of a handful of grossly pornographic movies, and it claimed that it needed to identify the users so that it could sue the users for damages in an appropriate federal court. Apparently, however, plaintiff is only interested in getting identifying information about easy targets who don’t fight back. When anonymous defendants oppose discovery by retaining counsel who move to quash, pointing out the many ways in which the law flatly forbids granting the requested discovery, Strike 3 invariably drops that defendant from the Bill of Discovery, ensuring that the legal arguments are never presented to a judge and therefore preserving Strike 3’s ability to use its tactics against defendants who are more easily intimidated. Here, plaintiff waited until the eve of oral argument to drop defendant Doe 98.242.52.89, forcing Doe and her counsel to incur time and expenses in the case.

The Copyright Act’s fee-shifting provision is designed to encourage beneficial litigation and deter abusive litigation. *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979, 1986 (2016); *see* 17 U.S.C. § 505. In exercising their discretion to award fees to prevailing parties, courts consider the particular circumstances of the case, including the objective unreasonableness of the plaintiff’s position in the litigation. Copyright defendants as well as copyright plaintiffs are both entitled to seek attorney fees, under the same standard. *Kirtsaeng*, 136 S. Ct. at 1985. Here, Strike 3 pursued

an unreasonable claim for discovery in a court that plainly lacked jurisdiction, and pursued the litigation in an unreasonable manner. The factors set forth by the United States Supreme Court in *Kirtsaeng* warrant an award of attorney fees and costs to Doe as the prevailing party in this matter.

STATEMENT OF THE CASE

A. Legal Background

Strike 3 is a Delaware company that makes pornographic movies that it euphemistically calls “adult content.” The complaint alleges that Strike 3 sells many DVD’s, but for several years at least, a significant part of its business model has involved filing copyright infringement claims against defendants who allegedly used the BitTorrent protocol to share access to its works – more than 4700 infringement suits in the federal courts since January 1, 2017, Levy Second Affidavit ¶ 11, as well as mass Bill of Discovery proceedings in this Court seeking to identify thousands of users. Motion to Quash, Exhibit A at page 3. Strike 3 seeks discovery from Internet Service Providers (“ISPs”) by identifying Internet Protocol addresses (“IP addresses”) that have been allegedly used to distribute plaintiff’s copyrighted content, in alleged violation of the Strike 3’s display or distribution rights under section 106(3) and (5) of the Copyright Act, 17 U.S.C. §§ 106(3) and (5). To reduce its own litigation costs, Strike 3 prefers to proceed against large numbers of alleged infringers in a single case—nearly two hundreds users in locations distant from Florida in this case alone. Proceeding in that manner, however risks imposing significant extra costs on defendants. And unless the courts are scrupulous to apply individualized considerations to each of the defendants when they oppose Strike 3’s proceedings, proceeding in that manner risks lumping innocent defendants in with those who are genuinely guilty of copyright infringement.

Under federal law, copyright claims are exclusively within the jurisdiction of the federal

courts, 28 U.S.C. § 1338, and state laws that purport to protect any of the rights accorded to copyright owners are preempted by federal law. 17 U.S.C. § 301(a). Thus, Strike 3 began its litigation campaign in the federal courts, using early discovery to identify the anonymous defendants (several such cases are cited on pages 3 and 4). However, that approach became inconvenient because, to ensure fairness and due process for each of the individual anonymous Internet users who are being charged with infringement, federal courts have interposed significant and important limits on the use of discovery to identify the putative defendants in mass copyright actions.

First, a number of courts objected to lawsuits that joined hundreds of unrelated defendants in a single action, holding that they violated the joinder limitations in Rule 20 of the Federal Rules of Civil Procedure. *See, e.g., Malibu Media v. Doe*, 923 F. Supp. 2d 1339, 1346 (M.D. Fla. Feb. 13, 2013) (severing case); *Dead Season v. Does 1-13*, No. 8:12-cv-2436-T-33EAJ, 2013 WL 424131 (M.D. Fla. Feb. 4, 2013) (severing case sua sponte).¹ Second, courts expressed suspicion of the litigation, stating that Strike 3 and other such companies engaging in this tactic were deliberately seeking to identify individuals who might well face public humiliation if they were accused of watching plaintiffs' works, giving the anonymous defendants a huge incentive to pay extortionate settlements even if they were not liable for infringement. *Strike 3 Holdings v. Doe*, No. 3:18 CV 1945 (JBA), 2019 WL 1122984, at *3 (D. Conn. Mar. 12, 2019); *Strike 3 Holdings v. Doe*, No. 18-CV-2648 (VEC), 2019 WL 78987, at *4 (S.D.N.Y. Jan. 2, 2019); *Malibu Media v. Doe*, 923 F. Supp. 2d 1339, 1345–46 (M.D. Fla. 2013) (citing other cases without addressing whether this is

¹ *See, e.g., Ingenuity 13 LLC v. Doe*, No. 2:12-CV-08333-ODW-JC, 2013 WL 765102 (C.D. Cal. Feb 7, 2013); *Hard Drive Prods., Inc. v. Does 1-90*, No. C 11-03825 HRL, 2012 WL 1094653 (N.D. Cal. Mar. 30, 2012); *MCGIP, LLC v. Does 1-149*, No. C 11-02331 LB, 2011 WL 4352110 (N.D. Cal. Sept. 16, 2011); *On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500 (N.D. Cal. 2011).

sufficient reason to deny discovery), Third, a number of federal judges noted that the IP address observed as being connected to an instance of copyright infringement might well not belong to the infringer. *Strike 3 Holdings v. Doe*, 331 F.R.D. 14, 16 (E.D.N.Y. 2019) (“It is no more likely that the subscriber to an IP address carried out . . . the purported illegal downloading . . . than to say an individual who pays the telephone bill made a specific telephone call,” quoting *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012) (report and recommendation), *adopted sub nom. Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012).)

In recent years, Strike 3 has moved a portion of its campaign of copyright infringement litigation to state court, and, specifically, to this Court, where it sought to use the techniques barred in the federal courts. But it has proceeded in this Court using an abusive technique that it did not even attempt when it was suing for infringement in the federal courts. There, when Strike 3 began bringing mass infringement suits against alleged infringers, it filed its lawsuits in federal courts throughout the country, using the Internet Protocol addresses (“IP addresses”) where it claimed to have observed infringing activity to identify the approximate geographical location of the alleged infringers to ensure that it was proceeding only in the federal district courts where the alleged infringers were located. *E.g.*, *Strike 3 Holdings v. Doe*, No. 18CV47-WQH (RBB), 2018 WL 1427002, at *3 (S.D. Cal. Mar. 22, 2018); *Strike 3 Holdings v. Doe*, No. 17-CV-07051-LB, 2018 WL 357287, at *1 (N.D. Cal. Jan. 10, 2018).² In this case, however, it seeks information about

² Most IP addresses pinpoint both the ISP whose services were used to access the Internet—thus enabling a plaintiff to send a subpoena to the appropriate ISP to seek to identify the anonymous defendant—as well as the approximate geographical location from which the ISP’s services were used, by using a readily available IP geolocation tool. *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 996 (D.C. Cir. 2014).

anonymous Internet users whom it should know, given the geolocational aspects of IP addresses, are located thousands of miles from Florida.

B. Proceedings to Date.

In this case, one of more than fifty very similar proceedings filed in this Court, Strike 3’s complaint identifies as defendants 195 different individuals having IP addresses allegedly associated with infringement. A random review of the IP addresses listed in exhibit 1 to the complaint reveals that few of them are in Florida. Levy Affidavit In Support of Motion to Quash, ¶ 6. The complaint does not allege that any of the defendants knew that their downloading was occurring in Florida or, indeed, that defendants intentionally directed any of their allegedly infringing conduct toward Florida. The complaint also makes no allegation about where its “proprietary software . . . establish[ed] connections with the Defendants’ IP addresses.” Complaint ¶¶ 22, 23.

Strike 3 filed an ex parte motion with the Court asking to be allowed to take discovery to identify the defendants who used the IP addresses enumerated in Exhibit 1 as provided by Comcast. It cited several federal-court decisions that allowed discovery at the outset of the litigation to identify anonymous alleged infringers,³ but it failed to mention that, in each of these cases, the plaintiff copyright owners had supplied detailed affidavits providing evidence of copyright infringement that enabled the plaintiffs in those cases to overcome the First Amendment right to speak anonymously. Indeed, Strike 3’s brief did not mention the First Amendment right to speak anonymously, which was discussed at length in *Arista Records* and *Sony Music*—both of which were cited in Strike 3’s

³ *Arista Records v. Doe*, 604 F.3d 110 (2d Cir. 2010); *Malibu Media v. Doe*, 2013 WL 2154818, at *2 (M.D. Fla. May 17, 2013); *Sony Music Entertainment v. Does 1–40*, 326 F. Supp.2d 556, 564–65 (S.D.N.Y.2004).

motion, at 6—as those courts explained why plaintiffs’ evidence of infringement was sufficient to overcome the Doe defendants’ First Amendment rights at an early stage of the case. *Arista Records*, 604 F.3d at 119-124, *Sony Music*, 326 F. Supp.2d at 555-556. Nor did Strike 3’s memorandum inform the Court of binding authority providing that only federal courts may exercise jurisdiction in copyright cases. Deprived of a fair statement of the governing law, the Court granted leave to take early discovery.

Strike 3 then served a subpoena on Comcast. Comcast in turn gave notice to Doe 98.242.52.89—whose IP address appears at page 764 of the 780-page complaint filed in this case—at her home in California.

In a detailed motion, Doe 98.242.52.89 moved to quash the subpoena seeking to deprive her of her First Amendment right to speak anonymously. The motion argued that the Court lacked both subject matter jurisdiction (because copyright cases are exclusively federal), and personal jurisdiction (because neither Strike 3 nor Doe is in Florida), and that Strike 3 had not presented evidence of infringement. In that same filing, Doe 98.242.52.89 asserted her intention to seek an award of attorney fees, as provided by 17 U.S.C. § 505. The papers attached to her motion showed that, as the IP address cited in the complaint would have suggested, Doe was a California resident who has no connection to Florida. Her motion explained that Doe had never seen any of plaintiff’s movies, and had never used the BitTorrent software, and so could not have engaged in the infringement alleged in the complaint. However, as the motion explained, Doe had a home WiFi network that was not password-protected, which made it possible that someone else had accessed the Internet by poaching on Doe’s WiFi. Under controlling law in California’s federal courts, Doe could not be held liable for such infringement by others. *Cobbler Nevada v. Gonzales*, 901 F.3d 1142, 1147 (9th Cir.

2018). Doe further explained that she had no records from which the identity of such a neighbor could be ascertained.

After filing this motion, counsel for defendants prepared a motion for admission pro hac vice of lead counsel for Doe. It then took several tries before counsel for defendant was able to identify a date when plaintiff would be available for a hearing on that motion because, according to plaintiff's counsel, her client wanted to have a corporate representative at the hearing. Wasylik Affidavit ¶ 2. Finally, in December, 2020, the motion to quash was set for hearing on March 23, 2021.

As the date for the hearing approached, counsel for defendant and their staff began preparing for the hearing. They compiled the briefing book for the Court as required by the Court's procedures, Wasylik Affidavit ¶ 3, and began preparing for argument at the hearing by outlining the anticipated argument, revising the legal research to provide supplemental authority for the court, reviewing the cases cited in the motion and the opposition brief, and setting up a moot court. Levy Second Affidavit ¶ 6, Wasylik Affidavit ¶ 3. Counsel also reached out to potential expert witnesses to be ready to rebut some of the technical assertions made in plaintiff's brief. Levy Affidavit ¶ 6.

After the close of business on March 18, 2020, counsel for plaintiff indicated for the first time that her client might be willing to forego a ruling on the motion to quash, assuming that certain conditions were met, later portraying this as "the rational business decision, given the expenses involved." Levy Second Affidavit, Exhibit B. In the early afternoon on March 19, Strike 3 filed a notice stating that Doe 98.242.52.89 was being dropped from the Bill of Discovery.

During the period between the filing of the motion to quash and the notice dropping Doe from the case, counsel for defendant spent an additional 21.4 hours and hundreds of dollars of out-of-pocket expenses on the litigation, all of which could have been saved if plaintiff had dropped

Doe from the case immediately on receipt of the motion to quash. Wasylik Affidavit ¶ 5; Levy Second Affidavit ¶ 7.

Defendant's counsel sent a written demand for attorney fees, laying out the amount of fees sought and the legal basis for the application. Strike 3 has declined to negotiate that issue. Levy Affidavit ¶ 10.

ARGUMENT

I. AS THE PREVAILING PARTY, DOE 98.242.52.89 IS ENTITLED TO SEEK FEES AND COSTS.

Strike 3 dismissed Doe 98.242.52.89 from this case through a Rule 1.250 notice. Rule 1.250 is the single-party equivalent of a Notice of Voluntary Dismissal pursuant to Rule 1.420. *Nat'l Bank of Commerce v. Jupiter Mortg. Corp.*, 890 So. 2d 553, 555 (Fla. 2d DCA 2005). Upon being dropped from the case, the prevailing defendant must then seek fees and costs to which defendant is entitled within thirty days pursuant to Fla. R. Civ. P. 1.525. *Siboni v. Allen*, 52 So. 3d 779, 780 (Fla. 5th DCA 2010) (because Rule 1.250 is the equivalent of a notice of voluntary dismissal, party seeking judgment taxing costs, fees, or both must follow the procedures required by Rule 1.525).

By dropping Doe 98.242.52.89 from the case, Strike 3 made her a prevailing party for purposes of seeking an award of fees and costs. In most instances, "when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party." *Thornber v. City of Fort Walton Beach*, 568 So.2d 914, 919 (Fla. 1990). That rule applies to motions for attorney fees as well as for costs whenever a statute or contract provides for attorney fees for the prevailing party. *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034, 1040 (Fla. 2d DCA 2013). The Courts of Appeals for the First, Second, Third, Fourth and Fifth Districts have each followed this general rule. *Rushing*

v. Caribbean Food Products, 870 So. 2d 953, 955 (Fla. 1st DCA 2004); *Dam v. Heart of Fla. Hosp., Inc.*, 536 So.2d 1177 (Fla. 2d DCA 1989); *Yampol v. Schindler Elevator Corp.*, 186 So.3d 616, 617 (Fla. 3d DCA 2016); *Alhambra Homeowner's Association v. Asad*, 943 So.2d 316, 319 (Fla. 4th DCA 2006); *Vidibor v. Adams*, 509 So.2d 973 (Fla. 5th DCA 1987)

Because Strike 3 dropped its bid to conduct discovery in state court to determine Doe 98.242.52.89's identity, she is the prevailing party under *Thornber*. The possibility that Strike 3 could ultimately file suit against Doe in federal court in California, where it could properly assert subject matter and personal jurisdiction, does not alter this conclusion. *Yampol*, 186 So. 3d at 617 (“The general rule of *Thornber* has properly been applied to confer prevailing party status where the voluntary dismissal was without prejudice, even if the plaintiff later refiles the same suit.”); *Vidibor*, 509 So.2d at 974; *Alhambra Homeowner's Association*, 943 So.2d at 319. As the First District has held, citing *Thornber*, that “[a] defendant generally becomes the prevailing party when a plaintiff dismisses its action,” and “[w]hether the dismissal was taken with or without prejudice has no bearing on this result.” *Palm Beach County Sch. Dist. v. Ferrer*, 990 So. 2d 13, 15 (Fla. 1st DCA 2008).

II. BECAUSE FEDERAL COPYRIGHT LAW SUPPLANTS PLAINTIFF'S BILL OF DISCOVERY PROCEEDING WITH A FEDERAL CAUSE OF ACTION, THE ATTORNEY FEE PROVISION OF THE FEDERAL COPYRIGHT STATUTE APPLIES HERE.

Strike 3 sought relief against alleged infringers of copyright that may be granted only in federal court. Copyright owners who seek to proceed against alleged infringers whose names they do not know file suit against the anonymous defendants as Doe defendants, and then make the showing required by the First Amendment to obtain early discovery, and subpoena the defendants'

identifying information from the ISPs who have that information. *Arista Records v. Doe*, 604 F.3d 110 (2d Cir. 2010); *Malibu Media v. Doe*, No. 2:13-CV-259-FTM-99, 2013 WL 2154818, at *2 (M.D. Fla. May 17, 2013); *Sony Music Entertainment v. Does 1–40*, 326 F. Supp.2d 556, 564–65 (S.D.N.Y.2004). Strike 3 commonly sought and obtained such relief in its own federal court copyright infringement litigation in the years before it started filing cases like this one in state court. *Strike 3 Holdings v. Doe*, No. 17-CV-9659 (VEC), 2018 WL 2371730 (S.D.N.Y. May 23, 2018); *see also* Strike 3’s Opposition to the Motion to Quash, at 7 n.4 (citing nine federal court cases). Indeed, in cases that it has been litigating in federal courts while this Bill of Discovery proceeding as pending, Strike 3 has continued to employ federal court jurisdiction to seek and obtain discovery of the identity of alleged infringers. *E.g. Strike 3 Holdings v. Doe*, No. 1:20-CV-01394 EAW, 2021 WL 545818 (W.D.N.Y. Jan 28, 2021); *Strike 3 Holdings v. Doe*, No. 21-10041, 2021 WL 625251 (E.D. Mich. Jan 9, 2021). Strike 3 cannot claim to have been unaware that it was pursuing in this case a federal copyright remedy that is properly pursued only in federal court.

Although Strike 3 purported to invoke a state-law right to obtain information to be used in pursuing copyright claims against defendant Doe 98.242.52.89, federal copyright law preempts all state-law claims that fall within the scope of copyright. *Utopia Provider Sys. v. Pro-Med Clinical Sys.*, 596 F.3d 1313, 1325 (11th Cir. 2010); *Garrido v. Burger King Corp.*, 558 So. 2d 79, 81 (Fla. 3d DCA 1990). And copyright law **completely** preempts state law. *Spear Marketing v. Bancorpsouth Bank*, 791 F.3d 586, 593, 598 (5th Cir. 2015). When a state-law claim is completely preempted by copyright law, the purported state-law claim “becomes a federal claim under Title 17.” *Rosciszewski v. Arete Associates, Inc.*, 1 F. 3d 225, 233 (4th Cir. 1993). As the Eleventh Circuit noted in *Stuart Weitzman v. Microcomputer Resources*, 542 F.3d 859, 864 (11th Cir. 2008), the four

federal courts of appeals—the First, Second, Fourth and Sixth—that had addressed this question unanimously favor complete preemption. *Id.* (citing cases), and *Spear Marketing* made the Fifth Circuit the fifth circuit to do so. (In *Stuart Weitzman* the court declined to decide this question, while citing two previous Eleventh Circuit cases that has suggested that complete preemption applies. 542 F.3d at 864, discussing *Dunlap v. G&L Holding Group*, 381 F.3d 1285, 1289–91, 1293–98 (11th Cir.2004), and *Foley v. Luster*, 249 F.3d 1281, 1287–88 (11th Cir. 2001).)

Unlike ordinary preemption, when federal law completely preempts, the preemptive force of the federal law is so strong that it displaces the state-law claim and transforms it into a federal claim. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003). In those circumstances, the plaintiff is no longer the master of the complaint and cannot simply declare that it is not relying on federal law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987).

The Copyright Act provides that in “**any** civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S. C. § 505 (emphasis added). When the Copyright Act completely preempts a state law claim, “it becomes a federal claim under Title 17.” *Rosciszewski*, 1 F.3d at 233. As such, the prevailing defendant is entitled to seek fees and costs under the Copyright Act. Because the Copyright Act completely preempts state law, Doe is entitled to seek an award of attorney fees and costs under the Act’s fee-shifting provisions. *Id.* (holding that the defendant was entitled to seek attorney fees under the Copyright Act, even though the complaint had alleged only claims under state law).

III. STRIKE 3’S BILL OF DISCOVERY PROCEEDING AGAINST DOE WAS UNREASONABLE AND WAS PURSUED IN AN UNREASONABLE MANNER, WARRANTING AN AWARD OF ATTORNEY FEES FOR COMPENSATION AND DETERRENCE.

The Supreme Court has twice addressed the standards that apply in deciding whether to award attorney fees under section 505 of the Copyright Act. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527-533 (1994). In each of these two cases, the Supreme Court has identified several nonexclusive factors to be considered, including “frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty*, 510 U.S. at 534 n.9. The court should place substantial, but not dispositive, weight on the objective reasonableness of the losing party’s position. *Kirtsaeng*, 136 S. Ct. at 1989 (2016). In this case, Strike 3’s objectively unreasonable use of the state court Bill of Discovery procedure to obtain information for pre-empted claims for which there is an adequate remedy at law warrants an award of fees. Moreover, there is a strong need for compensation and deterrence to deter “overaggressive assertions of copyright claims.” *Kirtsaeng*, 136 S. Ct. at 1989.

A. The Pursuit of a State-Law Bill of Discovery in This Court to Seek a Remedy for Copyright Infringement Was Objectively Unreasonable.

The pursuit of this proceeding against Doe was objectively unreasonable for four reasons. First, Strike 3 is seeking relief for copyright infringement, despite the fact that federal copyright law preempts all state-law claims that fall within the scope of copyright. *Utopia Provider Sys. v. Pro-Med Clinical Sys.*, 596 F.3d 1313, 1325 (11th Cir. 2010); *Garrido v. Burger King Corp.*, 558 So. 2d 79, 81 (Fla. 3d DCA 1990). Because Strike 3’s claim of entitlement to identify alleged infringers falls within the scope of copyright law, this Bill of Discovery can only proceed as a copyright claim.

At the same time, however, it cannot proceed in this Court, because 28 U.S.C. § 1338 gives exclusive jurisdiction for the pursuit of copyright claims to the federal courts. *EMSA Ltd. Partn. v. Lincoln*, 691 So. 2d 547, 550 (Fla. 4th DCA 1997); *Sparta Surf v. Korda*, 599 So. 2d 242, 243 (Fla. 4th DCA 1992); see also *Jacobs Wind Elec. Co. v. Dep't of Transp.*, 626 So. 2d 1333, 1335 (Fla. 1993) (recognizing that section 1338 bars state court jurisdiction in both copyright and patent cases). Because Strike 3 is a repeat litigant, having filed nearly five thousand copyright lawsuits in federal court since January 1, 2017, Levy Affidavit ¶ 11, it should be deemed aware of this black-letter principle of copyright law.

Second, Strike 3 has every reason to be aware that this Court lacked personal jurisdiction over Doe 98.242.52.89. Strike 3 is a Delaware company, and Strike 3 must have known, based on the geolocational aspect of the IP address 98.242.52.89, that Doe is located in California. To obtain personal jurisdiction over a nonresident defendant, plaintiff must satisfy a two-part inquiry: (1) whether the exercise of jurisdiction is appropriate under Florida's long-arm statute; and (2) whether the exercise of personal jurisdiction would violate due process. *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1205 (Fla. 2010); see also § 48.193, Fla. Stat. Here, neither prong of the test is met.

The complaint alleges that the web sites where Strike 3's films are hosted are accessible in Florida, but to secure personal jurisdiction over each of the defendants, plaintiff must both plead (and eventually prove) that each defendant deliberately took actions in Florida, or at least deliberately aimed their tortious conduct at Florida. In past cases, Strike 3 consistently admitted that it was using a service in Germany to look for copies of its copyrighted works being distributed on Bit-Torrent. *Strike 3 Holdings v. Doe*, 2020 WL 531996, at *1 (W.D. Wash. Feb. 3, 2020); *Strike 3 Holdings v. Doe*, 2019 WL 1837447, at *1 (S.D.N.Y. Apr. 10, 2019). In order to try to establish personal

jurisdiction in this Court, it appears that Strike 3 has moved its infringement detection operation to Florida, but that change of venue no more entitles Strike 3 to claim personal jurisdiction over alleged infringers located everywhere in the United States than it could have forced infringers to litigate copyright defenses in Germany.⁴

If personal jurisdiction were predicated on the idea that Internet users conceptually enter a state whenever their electronic signals are accessible in that state, “State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.” *ALS Scan v. Digital Serv. Consultants*, 293 F.3d 707, 712–13 (4th Cir. 2002), cited in *Enzyme Env'tl. Sols. v. Elias*, 60 So. 3d 1158, 1162 (Fla. 4th Dist. App. 2011). If plaintiff can assert personal jurisdiction here, Floridians could be forced to defend themselves in state court in Alaska by the same sort of device. When there is no evidence defendants knew that the plaintiff had any connection to Florida or that their alleged infringement was taking place in this state, personal jurisdiction is wanting. *Vision Media TV Group, LLC v. Forte*, 724 F. Supp. 2d 1260, 1266 (S.D. Fla. 2010). Here, there is no evidence (and no allegation) that any of the Doe defendants knew that they were directing their allegedly wrongful conduct.⁵

⁴ Moreover, Strike 3’s affidavit indicates that users of the BitTorrent protocol were distributing fragments of its movies to Strike 3 itself. However, improper use of downloading applications violates the copyright holder’s distribution right, *A&M Records v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001), and under 17 U.S.C. § 106, both “display” and distribution must be to the **public**. It is doubtful that providing a copy of a work to the copyright owner is an act of infringement, just as the making of an allegedly defamatory statement to the person criticized does not constitute “publication.” *Valencia v. Citibank Intern.*, 728 So. 2d 330, 330 (Fla. 3d Dist. App. 1999).

⁵ Strike 3 may be relying on the “accessibility” test set forth in the Eleventh Circuit’s decision in *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 (11th Cir. 2008). But the *Licciardello* Court found that the minimum contacts existed where the complaint alleged that the defendant in that case infringed the plaintiff’s rights, for commercial gain, through “commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum.” *Id.*

Third, Strike 3's proceeding here was objectively unreasonable because the procedural device that it purports to have invoked, the equitable device of a Bill of Discovery, is unavailable when there is an adequate remedy at law.

[T]he filing of a bill of discovery is justified only in "narrow and limited circumstances." *Venezia Lakes*, 34 So.3d [755,] 756 (Fla. 3d DCA 2010). Specifically, a bill of discovery may be used "[i]n the absence of an adequate legal remedy . . . 'to identify potential defendants and theories of liability and to obtain information necessary for meeting a condition precedent to filing suit.'" *Id.* at 758 (quoting *Mendez v. Cochran*, 700 So.2d 46, 47 (Fla. 4th DCA 1997)).

Vorbeck v. Betancourt, 107 So.3d 1142, 1145 (Fla. 3d DCA 2012).

In this case, Strike 3 has an adequate remedy at law: it can file a copyright infringement action against Doe in a federal court of appropriate jurisdiction, and then seek early discovery in that action to obtain Doe's identifying information. That is, in fact, the technique that Strike 3 has used in dozens of other cases, while this case was pending. Given that copyright litigation is exclusively a subject of federal law and litigation in the United States District Courts, it is not appropriate to employ the equitable remedy of a Bill of Discovery to identify Doe.

Fourth, Strike 3's Bill of Discovery proceeding against multiple unrelated anonymous parties distorted the purpose of a Bill of Discovery: to obtain discovery from the Defendant herself. A Bill of Discovery is a tool to seek discovery from the allegedly liable defendant, not from third parties.

at 1288. The Court of Appeals for the Third District has held that *Licciardello* is inconsistent with subsequent Supreme Court precedent. *Estes v. Rodin*, 259 So. 3d 183, 193 (Fla. 3d DCA 2018), citing *Walden v. Fiore*, 571 U.S. 277, 284 (2014). Here, plaintiff does not allege that the defendant Doe intended to distribute any of plaintiff's works into Florida, or even that she was aware of distribution into this state. Moreover, plaintiff's allegations about "accessibility" do not tie the accessibility contacts to the infringements alleged in the Bill of Discovery. Consequently, any claims of personal jurisdiction based on accessibility in Florida amount to claims of general personal jurisdiction, which would be contrary to the Supreme Court post-*Licciardello* holding in *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014).

As the Florida Supreme Court has explained, “Such a bill lies to obtain the disclosure of facts within the **defendant's** knowledge, or deeds or writings or other things in his custody.” *First Nat. Bank of Miami v. Dade-Broward Co.*, 171 So. 510, 510–11 (Fla. 1936) (emphasis added). But here, Strike 3 sought discovery from third parties. “Neither is [the Bill of Discovery] **available simply to obtain a preview of discovery obtainable once suit is filed**. Such a use of the bill places an undue burden on the court system.” *JM Family Enterprises, Inc. v. Freeman*, 758 So. 2d 1175, 1176 (Fla. 4th DCA 2000) (emphasis in original) (quoting *National Car Rental v. Sanchez*, 349 So.2d 829 (Fla. 3d DCA 1977)). Although some courts have stated that the equitable remedy “may be used to identify potential defendants and theories of liability and to obtain information necessary for meeting a condition precedent to filing suit,” *Mendez v. Cochran*, 700 So. 2d 46, 47 (Fla. 4th DCA 1997), a close reading of the cases using this terminology shows that they do so in the context of discovery served on the defendant to the Bill of Discovery, not on third parties.

Indeed, although “the pure bill of discovery has not been abrogated by the later adoption of liberal rules of discovery, . . . its use should now be relatively rare.” *JM Family Enterprises*, 758 So. 2d at 1176. *See also Trak Microwave Corp. v. Culley*, 728 So.2d 1177, 1178 (Fla. 2d DCA 1998). For Strike 3, however, the Bill of Discovery is not at all rare – as of last summer alone, it had filed more than fifty such Bills of Discovery in this Court. That is an abusive imposition on the courts, as well as on thousands of distant anonymous Internet users, that needs to be brought to an end.

Strike 3 may well have been frustrated by the due process limitations that it has faced as it was litigating its copyright claims in federal court, but those limitations do not, as a matter of law, make the federal litigation anything other than an adequate remedy at law. It is Congress that decided that copyright claims are exclusively within the jurisdiction of the federal courts, and the

limitations that ensue when copyright owners proceed in that venue are simply one of the features of the balance between the rights of copyright owners and the rights of the general public, including protections for First Amendment freedoms, that are embodied in the Copyright Act.

B. Plaintiff Pursued Its Unreasonable Claims in an Unreasonable Manner, Warranting an Award of Fees to Deter Excessive Enforcement and to Provide Compensation to Doe for Standing Up for Her Rights.

When deciding whether to award attorney fees, courts are also to consider the unreasonable manner in which parties pursue their copyright claims. *Kirtsaeng*, 136 S. Ct. at 1988. Courts may award attorney fees “to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims.” *Id.* at 1989. Throughout this case, Strike 3 has conducted itself in an unreasonable manner that warrants an award of fees as deterrence.

First, Strike 3 obtained the authority to serve process on Comcast by presenting an *ex parte* motion for leave to undertake early discovery that omitted any mention of the First Amendment right to speak anonymously, which required it to present **evidence** supporting its infringement claims and not merely allegations, and omitted any mention of the controlling law holding that federal copyright law preempted any state claims within the scope of copyright and provides exclusive jurisdiction to the federal courts. When a party proceeds *ex parte*, its counsel has an especial obligation to provide the Court with information contrary to the plaintiff’s position that the Court needs to consider to make a just determination. Florida Rules of Professional Responsibility, Rule 4-3.3(C); *Maine Audubon Soc. v. Purslow*, 907 F.2d 265, 268-269 (1st Cir. 1990) (“Where counsel appears *ex parte* ... the customary checks and balances do not pertain—and the court is entitled to expect an even greater degree of thoroughness and candor from unopposed counsel than in the typical adversarial setting.”), quoted with approval in *U.S. ex rel. Bumbury v. Med-Care Diabetic & Med.*

Supplies, 102 F. Supp. 3d 1350, 1353 (S.D. Fla. 2015); *Jorgenson v. County of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988). Strike 3 failed to meet that obligation in its ex parte motion for early discovery; that failure renders its manner of litigation unreasonable.

Second, plaintiff Strike 3 has established a regular pattern with respect to its Bill of Discovery proceedings. If a Doe alleged infringer retains counsel and files a motion to quash, Strike 3 invariably drops its claim against that Doe from the Bill of Discovery, presenting that move as a “rational business decision” to avoid the expense of a hearing, and thereby avoiding giving the Court an opportunity to pass on the legitimacy of its discovery efforts based on **adversary** briefing. *See* Motion to Quash, Exhibit at page 4; Conlin Affidavit ¶¶ 2-5. Indeed, Strike 3 told one lawyer who has represented a number of anonymous alleged infringers that he should just contact Strike 3 when he undertakes to represent a Doe so that it can promptly drop that defendant from the Bill of Discovery proceeding. Levy Second Affidavit, Exhibit A.

That is, Strike 3 apparently pursues its discovery in this Court only when it can do so on an ex parte basis, avoiding any risk to its ability to secure identifying information about the vast majority of defendants, who do not retain counsel to protect their rights. Those defendants can then be intimidated into paying a strike-suit settlement regardless of guilt or innocence of infringement, because it is much more expensive to hire a copyright litigator to defend the case than to pay a settlement amount in the low four figures. This pattern of avoiding a hearing on the propriety of Strike 3’s state-Bill-of-Discovery business model provides an additional basis for finding that its manner of proceeding in this case was unreasonable.

Third, Strike 3’s general tendency has been to drop the party whose counsel filed a motion to quash promptly. *See* attachment to Motion to Quash, at page 4 (“**Promptly** after a motion to

quash is filed, Strike 3 files a “notice of dropping party . . .”) (emphasis added). Here, however, Strike 3 went through the charade of setting a hearing, even stating that certain dates were unavailable because its corporate representative needed to be at the hearing; it filed an opposition and forced Doe’s counsel to undertake additional work, and incur additional expense, to prepare for the oral argument on the motion to quash. See Levy Second Affidavit ¶¶ 6-7; Wasylik Affidavit, ¶¶ 2-5. Running up the opponent’s costs when the plaintiff intends all along to drop its claims is unreasonable conduct that warrants an award of fees.

Considerations of compensation and deterrence also warrant an award of attorney fees in this case. Defendant Doe stood up for her right to have any claims of infringement pursued in federal court; so far, at least, it appears that defendant Doe has protected herself against any disclosure in light of the fact that she is innocent of infringement. Strike 3, knowing of the controlling law in the United States Court of Appeals for the Ninth Circuit, has chosen not to pursue an infringement claim in the Eastern District of California where Doe resides. *Kirtsaeng* calls for Doe’s successful assertion of the protections of copyright law to be compensated.

Indeed, courts have recognized the special need for awards of attorney fees to encourage defendants in intellectual property cases to stand up for their own rights and thus, implicitly, for the public domain. *Nightingale Home Healthcare v. Anodyne Therapy*, 626 F.3d 958, 963 (7th Cir. 2010); *Woodhaven Homes & Realty v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005). The plaintiff, after all, has built-in statutory incentives to pursue claims that might lead to a very substantial award of damages divorced from any actual damages, including statutory damages of at least \$750 and as high as \$30,000 or even \$150,000 per work infringed, 17 U.S.C. §§ 504(c)(1) and (2), but a defendant has no way of recovering damages from which attorney fees can be paid. The Seventh Circuit expressed

particular concern in *Nightingale* about the misuse of the litigation process by a profitable business against a vulnerable opponent, as in this case. Strike 3 knows full well that it is suing individuals who are not likely to have ready access to lawyers. As the Court said in *Woodhaven*, “[W]ithout the prospect of such [a fee] award, [a defendant] might be forced into a nuisance settlement or deterred all together from exercising his rights.” 396 F.3d at 824 (quotation omitted).

Finally, considerations of deterrence warrant an award of fees in this case. Suing large numbers of alleged infringers to cough up strike settlements for alleged infringements, while evading any judicial review of its conduct, is at least a significant part of Strike 3’s business model, and the misuse of state Bill of Discovery proceedings to make that process significantly less expensive has, for all appearances, become a significant source of such revenues. An award of attorney fees for one of the Does who stood up for her rights, and forced plaintiff to drop her from the case to avoid having to defend its conduct in open court, is needed to deter Strike 3, and other copyright trolls, from undertaking such abusive campaigns in the future. Consequently, considerations of deterrence as well as compensation warrant an award of attorney fees in this case.

IV. THE COURT SHOULD DETERMINE ENTITLEMENT, THEN CONDUCT AN EVIDENTIARY HEARING ON ATTORNEY FEES AND COSTS.

“Prior to awarding attorney’s fees for services already rendered and for costs already incurred, a trial court must hold an evidentiary hearing to determine the reasonableness and necessity of the fees and costs awarded.” *Bateman v. Serv. Ins. Co.*, 836 So. 2d 1109, 1111 (Fla. 3d DCA 2003). For purposes of judicial economy, Doe requests that the Court first hold a hearing on the issue of entitlement, and then set a second evidentiary hearing to award a reasonable fee.

CONCLUSION

The Court should hold that defendant is entitled to an award of attorney fees and costs, and set an evidentiary hearing to determine the amount to be awarded.

Respectfully submitted,

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April 19, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing and served a true and accurate copy of this document via the Florida Courts eFiling Portal on April 19, 2021, to all parties not exempt from Florida Rule of Judicial Administration 2.516 at the indicated email address on the service list, and by U.S. Mail to any other parties.

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