

**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.

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**DOE DEFENDANT 98.242.52.89’S SPECIAL APPEARANCE<sup>1</sup>  
AND MOTION TO DISMISS OR TO QUASH OR FOR PROTECTIVE ORDER  
AND INCORPORATED MEMORANDUM OF LAW**

Strike 3 Holdings filed this proceeding as a bill of discovery under the laws of the State of Florida. But in reality it is a strike suit, seeking to extract payment from anonymous Internet users through the threat of exposing false and potentially embarrassing accusations about those users’ Internet viewing histories.

Strike 3’s strategy is both simple and unconscionable: It alleges copyright infringement by large numbers of anonymous Internet users whom it claims have distributed its “adult entertainment,” seeks discovery of those users’ identities from their Internet Service Providers, and then demands “settlements” of the infringement claims. Although many of the claims may be factually baseless, previously-anonymous users may agree to a strike-suit level settlement only to avoid being publicly accused of watching Strike 3’s films, especially where the cost of settling is much less than the cost of hiring a lawyer to protect their rights.

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<sup>1</sup> This is a special limited appearance and shall not be construed as a general appearance. Doe has not been served with process and her special, limited appearance does not waive service; nor does Doe intend to waive service.

To execute its scheme, Strike 3 now seeks discovery of a large group of anonymous Internet users' identities in state court so that it may then press its copyright infringement claims. Strike 3 likely initiated this proceeding in state court, even though federal courts have exclusive jurisdiction over copyright claims, because federal courts across the country have repeatedly rejected or limited its attempts to uncover the identities of anonymous Internet users. Strike 3 filed this action and obtained the Court's leave to pursue discovery by filing a misleading motion that cited cases about discovery in copyright cases while omitting the holdings of those cases. Relying on the leave obtained through its ex parte brief, Strike 3 has subpoenaed Comcast to provide identifying information, about Doe 98.242.52.89 as well as a large number of other Internet users.

Strike 3's claims for relief in service of its strike-suit scheme are both legally insufficient and constitutionally unsound. It has not made the showing that other courts have required before similar subpoenas may be enforced, and the court lacks both subject matter and personal jurisdiction to enforce the subpoena seeking to identify Doe 98.242.52.89 among others. Accordingly, pursuant to Florida Rules of Civil Procedure 1.410 and 1.440(b), and through this special, limited appearance, Doe<sup>2</sup> moves the Court to quash the subpoena and to dismiss the bill of discovery against her with prejudice. In addition, Doe 98.242.52.89 asks the Court to award her attorney fees under section 505 of the Copyright Code, which completely preempts any state-law claims that plaintiffs might purport to be pursuing in this case.

### **Facts and Legal Background**

Strike 3 is a company that makes pornographic movies that it euphemistically calls "adult

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<sup>2</sup> Doe is identified in this brief using female gender pronouns, without intending any implications about Doe's actual gender.

content.” The complaint alleges that Strike 3 sells large numbers of DVD’s, but a significant part of its business model has involved filing copyright infringement claims against hundreds of defendants in a single lawsuit. Strike 3 seeks discovery from Internet Service Providers (ISP’s) 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). 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 by the Copyright Act are preempted by federal law. 17 U.S.C. § 301(a).

As a result, when Strike 3 began bringing mass infringement suits against alleged infringers, it filed its lawsuits in federal courts through 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*, 2018 WL 1427002, at \*3 (S.D. Cal. Mar. 22, 2018); *Strike 3 Holdings v. Doe*, 2018 WL 357287, at \*1 (N.D. Cal. Jan. 10, 2018).<sup>3</sup>

However, 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

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<sup>3</sup> 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.*

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*, 2013 WL 424131 (M.D. Fla. Feb. 4, 2013) (severing case sua sponte).<sup>4</sup> Second, courts expressed suspicion of plaintiffs’ litigation tactics, stating that Strike 3 and other such companies 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*, 2019 WL 4745360, at \*1 (D.N.J. Sept. 30, 2019); *Strike 3 Holdings v. Doe*, 3:18 CV 1945 (JBA), 2019 WL 1122984, at \*3 (D. Conn. Mar. 12, 2019) *Malibu Media v. Doe*, 923 F. Supp. 2d 1339, 1345–46 (M.D. Fla. 2013) (citing other cases without addressing whether this is sufficient reason to deny discovery), Third, a number of federal judges have 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, LLC 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).)

Strike 3 has apparently decided to move its campaign of copyright infringement litigation

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*Does 1-1058*, 752 F.3d 990, 996 (D.C. Cir. 2014)

<sup>4</sup> *See, e.g., Ingenuity 13 LLC v. Doe*, 2013 WL 765102 (C.D. Cal. Feb 7, 2013); *Hard Drive Prods., Inc. v. Does 1-90*, 2012 WL 1094653 (N.D. Cal. Mar. 30, 2012); *MCGIP, LLC v. Does 1-149*, 2011 WL 4352110 (N.D. Cal. Sept. 16, 2011); *On The Cheap, LLC v. Does 1-5011*,

to state court, and, specifically, to this Court, where it seeks to use the techniques barred to it in the federal courts. In this case, one of several 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 ¶ 6. There is no allegation 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 studiously makes no averment 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 as allowing discovery at the outset of the litigation to identify anonymous alleged infringers,<sup>5</sup> 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* 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. Nor did Strike 3’s memorandum inform the Court of binding authority providing that only federal courts

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280 F.R.D. 500 (N.D. Cal. 2011).

<sup>5</sup> *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).

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. Doe 98.242.52.89 now moves to quash the subpoena seeking to deprive her of her First Amendment right to speak anonymously.

### **ARGUMENT**

#### **I. A PLAINTIFF MUST MAKE A PRIMA FACIE SHOWING OF A VALID CLAIM AGAINST A DOE DEFENDANT BEFORE IT CAN USE THE POWER OF A COURT TO DEPRIVE THAT DEFENDANT OF HER FIRST AMENDMENT RIGHT TO SPEAK ANONYMOUSLY.**

Strike 3 has failed to make a showing, required by the Constitution, that its discovery request has sufficient legal and factual basis to overcome the anonymous speech rights of the Doe defendants that it targets. The prevailing legal tests, adopted by courts around the country, protect the constitutionally-guaranteed right of anonymity of Internet users accused of wrongful speech from unwarranted intrusion by plaintiffs' discovery. See *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756 (N.J. App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). That test should govern this case.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

[A]n author is generally free to decide whether or not to disclose his or her true

identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

\* \* \*

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

*McIntyre*, 514 US at 341-342, 356 (emphasis added).

Although Strike 3 is a private company, it has issued a subpoena that invokes judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

Consequently, when plaintiffs have sought to invoke judicial process to compel the identification of anonymous speakers whom they wish to sue on a claim that the speech was wrongful, courts ensure that there is truly a compelling interest in overcoming the First Amendment right to speak anonymously by requiring the plaintiff to present both a modicum of

evidence that the anonymous defendant has engaged in wrongful speech, to a legal argument showing that it can prevail on a suit in that court on such a claim of actionable wrongdoing.

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, “If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). As another court explained:

People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one’s mind without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identities.

*Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D .Cal. 1999).

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away defendant’s anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar “too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.” *Cahill*, 884 A.2d at 457.

The leading decision on this subject, *Dendrite Int’l v. Doe No. 3*, established a five-part test to determine whether to grant discovery to reveal the identity of anonymous Internet users accused so that they can be sued over their Internet use that became a model followed or adapted

throughout the country:

- 1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
- 2. Require Specificity:** Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
- 3. Ensure Facial Validity:** Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
- 4. Require An Evidentiary Showing:** Courts require the plaintiff to produce evidence supporting each element of its claims.
- 5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

*Id.* at 760-61.

A few years later, the Delaware Supreme Court adopted a similar test, omitting the final “balancing” stage. *Doe v. Cahill*, 884 A. 2d 451 (2005). Over the ensuing years, some twelve other states (including the District of Columbia) as well as many federal courts have adopted either the *Dendrite* or the *Cahill* formulation of the test for the identification of anonymous Internet users accused of wrongful speech.<sup>6</sup>

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<sup>6</sup> *Sarkar v. Doe*, 897 N.W.2d 207 (Mich. App. 2016); *Doe v. Coleman*, 497 S.W.3d 740, 743 (Ky. 2016); *Thomson v. Doe*, 356 P.3d 727 (Wash. App. Div. 1 2015); *In re Drasin*, 2013 WL 3866777, at \*5 (D. Md. July 24, 2013); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012); *Koch Industries v. Does*, 2011 WL 1775765 (D. Utah May 9, 2011); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev., April 27, 2011); *Pilchesky v. Gatelli*, 2011 PA Super 3, 12 A.3d 430 (2011); *Salehoo v. Doe*, 722 F.Supp.2d 1210 (W.D. Wash. 2010); *USA Technologies v. Doe*, 2010 WL 1980242 (N.D. Cal. May 17, 2010); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (DC 2009); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D.Cal. Nov. 09, 2011); *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128 (D.D.C. 2009); *Quixtar v. Signature Management Team*, 566 F. Supp.2d 1205 (D. Nev. 2008), *mandamus denied sub nom. In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010),

In the copyright context, the leading cases regarding the application of the First Amendment right to remain anonymous to discovery seeking to identify alleged infringers include *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D.Cal. Nov. 09, 2011), *Arista Records*, and *Sony Music*. These cases recognize that the alleged transmission or display of copyrighted works is “speech,” and that just as legally sufficient allegations and evidence of wrongdoing are required even when speech is alleged to be false and defamatory, and hence outside the protection of the First Amendment, so too, the fact that a plaintiff has merely **alleged** that a defendant committed copyright infringement (and hence acted beyond the protection of the First Amendment) should not excuse a copyright plaintiff from showing that it has a legally and evidentially sufficient claim before it is allowed to compel identification of the defendant.

Consequently, when plaintiffs make a showing in support of their requested discovery that their copyright claims may well be tenable – by the presentation of both evidence of infringement and legal argument — only then can courts make discovery available despite the impact on the anonymous Internet users’ First Amendment right to remain anonymous. But in other cases, where the anonymous Internet user shows that the copyright claim is likely to be defeated, or otherwise shows that anonymity need not be breached to enforce copyright claims,

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*rehearing denied with new opinion*, 661 F.3d 1168 (9th Cir. 2011); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp.2d 153, 164 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal. App.4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *McMann v. Doe*, 460 F. Supp.2d 259 (D. Mass. 2006); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony Music Entertainment v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *In re 2TheMart.com Securities Litigation*, 140 F. Supp.2d 1088 (W.D. Wash. 2001); *Columbia Insurance Company v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *Melvin v. Doe*, 49 Pa. D&C 4th 449 (2000), *rev’d on other grounds*, 575 Pa. 264, 836 A.2d 42 (2003). *See also Signature Management Team v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017).

courts withhold relief that breaches anonymity. So, for example, in *Art of Living*, it was apparent that the main reason for seeking to identify anonymous Internet users who had published the secret rituals of a religious cult was to find a way to retaliate against them, so the defendant's anonymity was protected while the parties litigated the defendants' fair use defense. 2011 WL 5444622, at \*10. Similarly in *Signature Management Team*, the possibility of retaliation was significant, so even though the defendants had committed a technical infringement that they were enjoined from continuing, the trial court, affirmed by the Court of Appeals, allowed the defendant to maintain their anonymity. 876 F.3d at 839, *on remand*, 323 F. Supp. 3d 954, 961 (E.D. Mich. 2018).

The context of mass infringement claims brought by companies that make pornographic movies has also led courts to be more cautious about allowing routine disclosure of identities, because many of these mass lawsuits are brought without any intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly identified as defendants in such cases will be enough to induce such defendants to pay thousands of dollars in settlements. *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012); *Patrick Collins v. Doe I*, 288 F.R.D. 233 (E.D.N.Y. 2012). Indeed, some pornographic films are now being made not to be sold, but to be used as the basis for subpoenas to identify alleged downloaders who can then be pressured to "settle" to avoid the embarrassment of being named publicly as defendants in such litigation. *On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011).

**II. THE FIRST AMENDMENT, THE SUPREMACY CLAUSE AND THE DUE PROCESS CLAUSE REQUIRE DISMISSAL OF THIS PROCEEDING BECAUSE STRIKE 3 HAS NOT SHOWN THAT IT HAS A LAWFUL BASIS FOR PROCEEDING IN THIS COURT AGAINST DOE 98.242.52.89.**

There are four separate legal and evidentiary reasons why discovery of the identity of Doe 98.242.52.89 should be quashed, and why the Bill of Discovery seeking her identity should be denied with prejudice to refile in this Court: (1) Strike 3's claims are completely preempted by federal copyright law which gives the federal courts exclusive jurisdiction to adjudicate claims for relief related to copyright; (2) this Court lacks personal jurisdiction over defendant Doe 98.242.52.89; (3) Strike 3 has not presented any evidence that Doe infringed its copyrights; and (4) even if the bill of discovery is not completely preempted, the bill should be denied because Strike 3 has an adequate remedy at law.

**A. Federal Copyright Law Completely Preempts State Claims in the Field of Copyright, and Makes Federal Courts the Exclusive Jurisdiction in Which Copyright Claims May Be Pursued.**

Strike 3 seeks relief against alleged infringers of copyright that may be granted only in federal court. Although Strike 3 purports to be invoking 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 most courts hold that copyright law **completely** preempts state law; the distinction between ordinary preemption and complete preemption matter because, under complete preemption, instead of forbidding a state law claim within the scope of copyright from being maintained, copyright law displaces the supposedly state-law claim and transforms it into a copyright claim. *Spear Marketing v. Bancorpsouth Bank*, 791 F.3d 586, 593,

598 n.62 (5th Cir. 2015). The Eleventh Circuit has not yet decided whether complete preemption applies in the copyright context, *Stuart Weitzman v. Microcomputer Resources*, 542 F.3d 859, 864 (11th Cir. 2008), but the five federal courts of appeals that have addressed this question unanimously favor complete preemption. *Id.*(listing four circuits that support complete preemption); *Spear Marketing*, 791 F.3d at 864.

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. Dept. of Transp.*, 626 So. 2d 1333, 1335 (Fla. 1993) (recognizing that section 1338 bars state court jurisdiction in both copyright and patent cases). As such, this action should be dismissed with prejudice barring any refiling in this Court, but with leave to file in an appropriate federal court.

**B. Plaintiff Has Not Shown a Proper Basis for Personal Jurisdiction Over Doe 98.242.52.89.**

In addition to incorrectly seeking relief in state court rather than federal court, Strike 3 is litigating its discovery request in the wrong location. Its discovery to identify Doe 98.242.52.89 should be quashed, and this proceeding dismissed, because Strike 3 has neither pleaded nor proved a sufficient basis for personal jurisdiction. 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 took actions in Florida.<sup>7</sup> Moreover, to meet the test for disclosure on the First Amendment, plaintiff must present at least prima facie evidence in support of personal jurisdiction in Florida. Unlike the record in cases such as *Sony Music* and *Arista Records*, not to speak of *Malibu Media v. Doe*, No. 2:13-cv-259, 2013 WL 2154818, at \*2 (M.D. Fla. May 17, 2013), also cited by plaintiff at page 6 of its motion, plaintiff in this case has presented no evidence in support of personal jurisdiction. Moreover, although the complaint **alleges** that "Defendants have been recorded distributing Plaintiffs' motion pictures into Miami-Dade County," Complaint ¶ 8, no evidence has been presented to support that allegation.

In past cases, Strike 3 has consistently admitted that it uses a service in Germany to look for copies of its copyrighted works being distributed on Bit Torrent, *Strike 3 Holdings v. Doe*, No. C17-1731, 2020 WL 531996, at \*1 (W.D. Wash. Feb. 3, 2020); *Strike 3 Holdings v. Doe*,

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<sup>7</sup> 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.* at 1288. The Court of Appeal for the Third District has held that *Licciardello* is inconsistent with subsequent Supreme Court precedent. *Estes v. Rodin*, 259 So. 3d 183, 193 (Fla. 3DCA 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).

No. 1:19-cv-02614-AJN, 2019 WL 1837447, at \*1 (S.D.N.Y. Apr. 10, 2019); a German service in contact with a BitTorrent swarm would receive downloaded files from copyrighted films in Germany, not in Florida; thus concrete evidence is needed to show an evidentiary basis for contending that copyrighted matter was distributed into Florida by someone using IP address 98.242.52.89. Additionally, as noted above, an IP address is not a person, and the fact that an IP address—if shown—was used for downloading into Florida would not be evidence that Doe 98.242.52.89 was distributing into Florida. Therefore, Strike 3 must provide evidence establishing any assertion that Doe’s IP address was used to distribute copyrighted works into Florida, and that Doe was involved in that distribution.

Moreover, IP geolocation services indicate the IP address 98.242.52.89 is located in El Dorado Hills, California, Levy Affidavit ¶ 5. That is, in fact, the address to which Comcast sent its notice of subpoena pursuant to 47 U.S.C. § 551(c)(2)(B), Levy Affidavit ¶¶ 4-5, and where Doe 98.242.52.89 was living at the time plaintiff claims to have tracked that IP address distributing its copyrighted movies. Doe Affidavit, ¶ 2. Doe does not, herself, have the BitTorrent client on any of her computers, *id.* ¶ 9, and she has never either obtained or disseminated copies of plaintiff’s copyrighted works. *Id.* ¶ 8. Doe did use her Internet connection to operate a home wi-fi network, *id.* ¶ 5, and it is possible that one of Doe’s neighbors improperly accessed that network and used the BitTorrent client on one of such neighbor’s devices. But if a neighbor accessed the wi-fi network, and even if there turns out to be evidence that Doe’s IP address was used to distributed copyrighted works into the state of Florida, Doe was not intentionally aiming any infringing conduct toward Florida. Hence it would violate due process to require Doe to defend against this Bill of Discovery here in Florida.

Forcing Doe defendants to defend their anonymity thousands of miles from home

unfairly increases the costs they face and thus presses them in the direction of paying a strike-suit settlement. A defendant who is sued in the jurisdiction where she lives can more easily find a local lawyer to move to quash, or to defend on the merits, but a defendant sued on the opposite side of the country must also find a Florida lawyer, raising the cost of defense. And because Strike 3 is not located in Florida, it has no legitimate interest in pursuing this proceeding in Miami; in Delaware, where it is based, its discovery would be subject to the law established by the Delaware Supreme Court in *Doe v. Cahill*. The Bill of Discovery should be denied and the complaint dismissed with prejudice forbidding any refiling in Florida, but without prejudice to refiling in a federal court of appropriate jurisdiction.

**C. Discovery Should Be Denied Because Strike 3 Has Presented No Evidence That Doe 98.242.52.89 Infringed Any Copyright.**

The third reason why the subpoena to Comcast for information identifying Doe 98.242.52.89 should be quashed is that Strike 3 has presented no evidence that Doe 98.242.52.89 has engaged in any infringing activity. Unlike the record created by Sony Music, Arista Records, and other copyright plaintiffs seeking early discovery in support of their mass copyright infringement litigation (including cases filed in federal court by Strike 3 Holdings), where the plaintiffs submitted affidavits showing the use of the accused IP addresses to disseminate copyrighted works, here Strike 3 has filed a complaint alleging copyright infringement, but has submitted no affidavits under oath. The mere filing of an unsworn complaint alleging copyrighted infringement does not create a compelling interest sufficient to overcome an anonymous Internet user's First Amendment right to remain anonymous.

Moreover, one of the reasons why some federal courts have withheld early discovery in mass copyright infringement actions is that they recognize that recording an IP address as having

been used for the commission of an allegedly actionable act is not, in itself, evidence that the owner of the Internet account that has been assigned that IP address committed the actionable act, any more, say, than recording a telephone number shows that a telephone call was made by the owner of the phone company account. Cases cited supra page 2. That scenario applies in this case, because Doe 98.242.52.89 established a home wi-fi network using her Comcast Internet account and the account was not password protected. Doe Affidavit ¶ 5. Coupled with the facts that Doe does not have the BitTorrent client software on any of her devices, and that the Doe has never seen or downloaded Strike 3's films, *id.* ¶¶ 8, 9, the record establishes that any of allegedly infringing uses in which the IP number was allegedly involved would most likely have been committed by one of Doe's neighbors, for which Doe would not be liable. *Cobbler Nevada v. Gonzales*, 901 F.3d 1142, 1147 (9th Cir. 2018) Moreover, because Doe has no records of which computers might have been used to access her home wi-fi network, Doe Affidavit ¶ 5, obtaining Doe's identity could not, as Strike 3 speculated on page 6 of its Motion for Discovery, lead to the discovery of the alleged infringer.

In short, Strike 3 has offered no evidence supporting the proposition that identifying Doe is needed to meet a compelling state interest sufficient to overcome Doe's First Amendment right to maintain the anonymity of her Internet account.

**D. The Bill of Discovery Should Be Denied Because Strike 3 Has an Adequate Remedy at Law.**

The fourth reason why discovery should be denied – whether under the First Amendment or as a matter of state law alone — is that Strike 3 cannot use the equitable device of a bill of discovery because it has an adequate remedy at law.

Under the current state of the law, the 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 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. Indeed, federal law gives copyright holders a panoply of discovery procedures to identify alleged infringers, in addition to seeking early discovery in a pending copyright infringement action. Rule 27 of the Federal Rules of Civil Procedure allows the use of discovery techniques to preserve evidence before a federal lawsuit is filed, and section 512(h) of the Copyright Code, 17 U.S. Code § 512(h), gives copyright holders access to a special subpoena issued by the Clerk in the absence of a pending lawsuit (although not in the circumstances present here). 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.

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.

A plaintiff “may not utilize the trial court's resources to go on a pre-suit ‘fishing expedition’ to substantiate [its] claims. *Kirlin v. Green*, 955 So.2d 28, 390 (Fla. 3d DCA 2007). The bill of discovery in this action is a massive pre-suit fishing expedition that should be quashed in favor of the normal remedies that Congress has provided for the enforcement of federal copyright law.

### **III. THE COURT SHOULD AWARD DOE HER ATTORNEY FEES UNDER 17 U.S.C. § 505.**

Because 17 U.S.C. § 301 completely preempts this action and transforms it into a proceeding for copyright infringement under Title 17 of the United States Code, *supra* section A, section 505 provides for an award of attorney fees against plaintiff for maintaining the Bill of Discovery. Strike 3 is a sophisticated copyright holder and repeat litigant in copyright litigation many times over. It should be held responsible for knowing that copyright infringement cannot be pursued in state court, and for knowing that IP addresses have geolocational data that it could have and should have used to ascertain that Doe 98.242.52.89 lives in California and that any infringement committed using Doe’s IP address, if any, would have been committed in California. Although Strike 3 Holdings may have run into obstacles in pursuing its strike suits in federal courts against anonymous Internet users whom it considers responsible for piracy of its copyrighted content, that frustration does not justify its end run around federal preemption and exclusive federal jurisdiction by bringing its abusive litigation practices to this Court.<sup>8</sup>

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<sup>8</sup> Motions to quash filed on behalf of other Doe defendants represent that this proceeding is one of fifty-one nearly identical cases filed in this Court seeking to identify large numbers of other alleged infringers. *E.g.*, Motion to Quash of Doe 68.55.78.46, Filing No. 112510491 (August 27, 2020), at 1 and Exhibit A.

In denying the Bill of Discovery, the Court should state that defendant Doe 98.242.52.89 is entitled to an award of attorney fees under 17 U.S.C. § 505 and give Doe 30 days either to reach agreement on the amount, or to file a motion for award of attorney fees in a specific amount if agreement cannot be reached.

### CONCLUSION

The subpoena to Comcast for information pertaining to Doe 98.242.52.89 should be quashed, and the Bill of Discovery should be dismissed with prejudice to refile in this Court or in any state court, but without prejudice to the filing in a federal court of appropriate personal and subject matter jurisdiction. The Court should also award Doe her attorney fees in an amount to be determined.

Respectfully submitted,

/s/ Paul Alan Levy

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