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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 STRIKE 3 HOLDINGS, LLC,
12 Plaintiff,
13 v.
14 JOHN DOE,
15 Defendant.
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Case No.: 20-cv-00209-BAS (JLB)

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF'S EX
PARTE MOTION FOR LEAVE TO
SERVE A THIRD-PARTY
SUBPOENA PRIOR TO A RULE
26(f) CONFERENCE**

[ECF No. 4]

19 Before the Court is Plaintiff's *Ex Parte* Motion for Leave to Serve a Third-Party
20 Subpoena Prior to a Rule 26(f) Conference. (ECF No. 4.) No opposition was filed, as no
21 defendant has been named or served in this case. For the reasons set forth below, Plaintiff's
22 *ex parte* motion is **DENIED WITHOUT PREJUDICE.**

23 **I. BACKGROUND**

24 This is one of the numerous cases filed by Plaintiff alleging copyright infringement
25 claims against a John Doe defendant using the BitTorrent file-sharing system.¹ Plaintiff
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28 ¹ Since December 2019 to date, Strike 3 Holdings, LLC has filed eight separate cases
against John Does in this District: 19-cv-02452-JAH (LL); 19-cv-02488-LAB (AHG); 20-

1 alleges that it is the copyright owner of motion pictures distributed through adult content
2 websites *Blacked*, *Tushy*, *Blacked Raw*, and *Vixen*. (ECF No. 1 ¶¶ 2–4.) Plaintiff alleges
3 that between December 3, 2018, and December 8, 2019,² the person or entity assigned
4 Internet Protocol (“IP”) address 136.26.17.74 illegally downloaded and distributed fifty-
5 five of Plaintiff’s motion pictures through his, her, or its use of the online BitTorrent file
6 distribution network. (*Id.* ¶¶ 4–5, 25; ECF No. 1-2 at 1–3.) On January 30, 2020, Plaintiff
7 commenced this action against Defendant “John Doe, subscriber assigned IP address
8 136.26.17.74.” (ECF No. 1.) The Complaint alleges a single claim of copyright
9 infringement. (*Id.* ¶¶ 37–42.)

10 Because Defendant used the Internet to commit the alleged infringement, Plaintiff
11 alleges that it knows Defendant only by his, her, or its IP address, which was assigned to
12 Defendant by the Internet Service Provider (“ISP”), Webpass. (*Id.* ¶¶ 5, 14.) In the present
13 motion, Plaintiff asserts that Webpass is the owner of Defendant’s IP address, and thus, “is
14 the only party with the information necessary to identify Defendant.” (ECF No. 4-1 at 6.)
15 Plaintiff therefore seeks leave to serve a Rule 45 subpoena on Webpass requesting the name
16 and address associated with IP address 136.26.17.74. (*Id.* at 7.)

17 **II. LEGAL STANDARD**

18 Discovery is not permitted before the parties have conferred pursuant to Federal Rule
19 of Civil Procedure 26(f) unless authorized by court order. Fed. R. Civ. P. 26(d)(1).
20 “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to
21 ensue after filing of the complaint to permit the plaintiff to learn the identifying facts
22 necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185
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25 cv-00067-LAB (LL); 20-cv-00068-BAS (JLB); 20-cv-00209-BAS (JLB); 20-cv-00308-
26 GPC (RBB); 20-cv-00309-AJB (MDD); 20-cv-00414-BAS (KSC).

27 ² Plaintiff does not specifically allege this infringement period in the Complaint but
28 attaches as an exhibit to the Complaint a table reflecting that the subscriber assigned IP
address 136.26.17.74 engaged in allegedly infringing activity between December 3, 2018,
and December 8, 2019. (ECF No. 1-2 at 1–3.)

1 F.R.D. 573, 577 (N.D. Cal. 1999). Requests to conduct discovery prior to a Rule 26(f)
2 conference are granted upon a showing of good cause by the moving party, which may be
3 found “where the need for expedited discovery, in consideration of the administration of
4 justice, outweighs the prejudice to the responding party.” *Semitoool, Inc. v. Tokyo Electron*
5 *Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal. 2002). “A district court’s decision to grant
6 discovery to determine jurisdictional facts is a matter of discretion.” *Columbia Ins. Co.*,
7 185 F.R.D. at 578.

8 District courts in the Ninth Circuit apply a three-factor test to determine whether
9 good cause exists to allow for expedited discovery to identify Doe defendants. *Id.* at 578–
10 80. “First, the plaintiff should identify the missing party with sufficient specificity such
11 that the Court can determine that [the] defendant is a real person or entity who could be
12 sued in federal court.” *Id.* at 578. Second, the plaintiff “should identify all previous steps
13 taken to locate the elusive defendant” to ensure that the plaintiff has made a good faith
14 effort to identify and serve process on the defendant. *Id.* at 579. Third, the plaintiff “should
15 establish to the Court’s satisfaction that [the] plaintiff’s suit against [the] defendant could
16 withstand a motion to dismiss.” *Id.* “Lastly, the plaintiff should file a request for discovery
17 with the Court, along with a statement of reasons justifying the specific discovery requested
18 as well as identification of a limited number of persons or entities on whom discovery
19 process might be served and for which there is a reasonable likelihood that the discovery
20 process will lead to identifying information about [the] defendant that would make service
21 of process possible.” *Id.* at 580.

22 **III. DISCUSSION**

23 Plaintiff seeks leave to serve a Rule 45 subpoena on Webpass before the Rule 26(f)
24 conference so that Plaintiff may obtain “the true name and address of Defendant.” (ECF
25 No. 4-1 at 7.) Plaintiff represents that it “will only use this information to prosecute the
26 claims made in its Complaint,” and “[w]ithout this information, Plaintiff cannot serve
27 Defendant nor pursue this lawsuit and protect its copyrights.” (*Id.*)

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1 In light of certain allegations in the Complaint, the Court will first analyze the second
2 factor—whether Plaintiff has identified all steps it took to locate Defendant to ensure the
3 Court that it has made a good faith effort to identify and serve process on Defendant. *See*
4 *Columbia Ins. Co.*, 185 F.R.D. at 579. The Court finds that Plaintiff has not met its burden
5 with respect to this factor.

6 In the pending motion, Plaintiff states that it has diligently attempted to locate
7 Defendant by searching for Defendant’s IP address using online search engines and
8 “various web search tools.” (ECF No. 4-1 at 12–13.) Plaintiff further states that it has also
9 “review[ed] numerous sources of authority,” such as “legislative reports, agency websites,
10 [and] informational technology guides” regarding whether it is possible to identify such a
11 defendant by other means and has “discussed the issue at length with computer
12 investigators and cyber security consultants.” (*Id.* at 13.) Plaintiff concludes that it cannot
13 determine any other means of obtaining Defendant’s identity other than through
14 subpoenaing the information from Defendant’s ISP.

15 However, Plaintiff makes no reference in its motion to the following allegation in its
16 Complaint:

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18 In an effort to conserve Federal judicial resources, Strike 3 originally moved
19 to discover Defendant’s identity utilizing a state court procedure in Florida
20 where Strike 3’s infringement detection servers are located. Defendant
21 objected asserting that the action is more properly litigated in the federal court
of his or her domicile. Because Plaintiff is amenable to litigating the matter
in either forum, this suit was initiated[.]

22 (ECF No. 1 ¶ 6.) A fair reading of this allegation suggests that Defendant appeared in a
23 prior action filed by Plaintiff concerning the infringement alleged herein and identified the
24 Southern District of California as his, her, or its domicile. If Defendant did make such an
25 appearance, it seems to the Court that Plaintiff is aware of Defendant’s identity or, at a
26 minimum, may have an available mechanism to determine Defendant’s identity. As such,
27 based on this record, the Court cannot conclude that the “need for expedited discovery, in
28 consideration of the administration of justice, outweighs the prejudice to the responding

1 party.” *Semitoal, Inc.*, 208 F.R.D. at 275–76.

2 **IV. CONCLUSION**

3 For the reasons stated above, the Court **DENIES** Plaintiff’s *ex parte* motion. This
4 denial is **WITHOUT PREJUDICE** to Plaintiff re-filing its motion if it can resolve the
5 discrepancy between the allegations in its Complaint and the present motion.

6 **IT IS SO ORDERED.**

7 Dated: March 11, 2020

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9 Hon. Jill L. Burkhardt
United States Magistrate Judge

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