

The Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STRIKE 3 HOLDINGS, LLC, a  
Delaware corporation,

Plaintiff,

v.

JOHN DOE, subscriber assigned IP  
address 73.225.38.130,

Defendant.

No. 2:17-cv-01731-TSZ

**PLAINTIFF’S REPLY IN FURTHER  
SUPPORT OF MOTION TO COMPEL  
PRODUCTION OF DEFENDANT’S  
HARD DRIVES**

Noted on Motion Calendar:  
**June 7, 2019**

Counter-Defendant, Strike 3 Holdings, LLC (“Strike 3” or “Plaintiff”), respectfully requests that this Court grant its Motion to Compel Production of Defendant’s (“Counter-Plaintiff” or “Defendant”) Hard Drives, and in further support, states:

**I. INTRODUCTION**

Defendant’s Response to Plaintiff’s Motion to Compel Production of Hard Drives (“Response”) essentially claims that he retained an expert (Mr. Yasumoto) to image, examine, and create an expert report (which he intends on using at trial) concerning only one of over a hundred hard drives that are located at Defendant’s house. And this single Hard Drive, Defendant’s Response implausibly contends, is entirely irrelevant. Defendant

1 also expects to be allowed to withhold from Plaintiff the ability to access the very evidence  
 2 upon which Mr. Yasumoto's expert report is based. Although Defendant offers a keyword  
 3 search alternative, such a search protocol is unreasonable since it would not produce any  
 4 relevant results on a wiped hard drive. Further, in this case, Plaintiff recently confirmed  
 5 that wiping *has* occurred on a hard drive which was located in Defendant's house during the  
 6 period of infringement and which is the one hard drive that appears to be the most relevant  
 7 to this case, if not entirely dispositive of it. Lastly, all of the factors outlined in Fed. R. Civ.  
 8 P. 26(a)(1) weigh in Plaintiff's favor since the Hard Drives are central to the claims in this  
 9 case, the amount in controversy is substantial, Defendant has easy access to the Hard  
 10 Drives,<sup>1</sup> Plaintiff is willing to bear the cost of imaging, production of the Hard Drives can  
 11 potentially resolve the claims, and the burden and expense do not outweigh the likely  
 12 benefit of production. Nothing in Defendant's Response negates this.

13 For the foregoing reasons, as explained more fully below, Plaintiff respectfully  
 14 requests that this Court grant its Motion to Compel Production of Defendant's Hard  
 15 Drives.<sup>2</sup>

## 16 **II. ARGUMENTS**

### 17 **A. Defendant's Search String Proposal is Unreasonable**

18 Defendant previously proposed an ESI protocol which limits Strike 3's Hard Drive  
 19 examination to "search strings." However, as Plaintiff previously explained in its Motion, a  
 20 key word search protocol is unreasonable because the results may exclude extremely  
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22 <sup>1</sup> Plaintiff's Motion to Compel Production of Defendant's Hard Drives seeks production of 'two' Hard Drives  
 23 Plaintiff believed Michael Yasumoto examined and used as basis for his Expert Report. However,  
 24 Defendant's Response contends that Mr. Yasumoto only examined one Hard Drive – an Asus brand computer.  
 The confusion lies in Mr. Yasumoto's expert report as it is unclear whether the Seagate hard drive is distinct  
 from the Asus hard drive. Regardless, to be clear, Plaintiff's motion only seeks production of the Hard  
 Drive(s) Mr. Yasumoto examined.

25 <sup>2</sup> Strike 3 is still willing to adopt reasonable proposals to protect attorney-client communications, attorney-  
 26 work product, and other confidential information such as passwords, Social Security numbers, and banking  
 information.

1 relevant evidence. For example, key word searches preclude an expert from confirming the  
2 fact that the Hard Drives do belong to the Defendant. Additionally, key word searches  
3 cannot account for the renaming or deletion of files. Finally, Plaintiff's expert would need  
4 confirmation that the Hard Drives have not been wiped. Indeed, wiping a hard drive could  
5 clearly impact any search result. For example, Plaintiff recently discovered that *during the*  
6 *course of this lawsuit* another hard drive located in Defendant's home was wiped.<sup>3</sup> To  
7 explain, since filing its Motion, Strike 3 has continued discovery and recently deposed  
8 Defendant's son ("Son"). During his deposition, the Son confirmed that he had another  
9 computer in his room during the relevant period of infringement. He also testified that he  
10 had used this computer to, through the use of Bittorrent, go to the "Pirate Bay" website to  
11 download adult motion pictures. Finally, he testified that after learning of this lawsuit,  
12 together he and Defendant dismantled that computer and wiped that hard drive. To be  
13 clear, this wiped hard drive is an entirely different hard drive than the one that is the subject  
14 of Plaintiff's Motion to Compel. However, since Defendant has already wiped a computer  
15 that was clearly relevant to this lawsuit, his use of wiping software on all relevant devices is  
16 critical in this case. And his use of wiping software is exactly why a search string is not  
17 proper during examination of *any* Hard Drives. Indeed, neither Plaintiff nor its expert  
18 would be surprised if a search of the term "Vixen" would yield no results on the Son's  
19 wiped hard drive or any wiped hard drive. From what Strike 3 was able to uncover during  
20 the Son's deposition, although a number of the Son's computer parts were sold,<sup>4</sup> the wiped  
21 hard drive is still located in Defendant's home. When asked why the Son did not sell the  
22 wiped hard drive along with the rest of the parts, he testified that he feared a third party

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25 <sup>3</sup> Although Plaintiff does not yet have the Son's deposition transcript, to the best of Plaintiff's knowledge, the  
26 Son testified that he and Defendant wiped that hard drive and that Defendant still has possession of that hard  
drive.

<sup>4</sup> Again, to be clear, parts of possibly relevant computers *were disposed of during the pendency of this lawsuit*.

1 might still be able to recover some information from it. Plaintiff certainly intends to find  
2 out if the Son is right and thus intends on filing another motion to compel production of that  
3 wiped hard drive as soon as it receives the deposition transcript.

4 **B. Contents of Defendant’s Computer Can Potentially Resolve the Claims in**  
5 **this Case**

6 *1. Defendant’s Computer is Related to His Counterclaim of Declaratory*  
7 *Judgment of Non-Infringement*

8 Defendant argues that his Hard Drives are not relevant to his Declaratory Judgment  
9 of Non-Infringement Counterclaim. But Defendant’s counterclaim outright states that he  
10 “did not [commit any of] the 80 allegations of infringement, or [infringe] any works  
11 marketed under the *Vixen*, *Tushy*, and *Blacked* websites.” Dkt. No. 64, ¶31. Further,  
12 Defendant alleges that he “has not infringed any of [Plaintiff’s] rights under 17 U.S.C. §106  
13 nor [...] infringed any of [Plaintiff’s] rights under 17 U.S.C. §105.” Disturbingly, with  
14 respect to his Declaratory Judgment of Non-Infringement claim, Defendant’s Response  
15 argues that since he “does not bear the burden of proof on infringement[,]” Plaintiff’s  
16 position that the Hard Drives are important to prove infringement is “incomplete or non-  
17 sensical.” Dkt. No. 130, p. 7. However, Defendant’s Counterclaim states that “[a] case and  
18 controversy exists between [Plaintiff] and [Defendant] regarding the alleged infringement  
19 of the works[.]” Dkt. No. 64, ¶29. Further, in support of his request for production of IPP’s  
20 software, Defendant previously argued that, “[w]hether it is a direct action for copyright  
21 infringement, or declaratory relief action of non-infringement by a Defendant, the owner of  
22 the copyright always has the burden of proof in an action for a declaratory judgment[.]  
23 [And] [t]o meet its burden, [Plaintiff] must establish that [Defendant] copied [Plaintiff’s]  
24 works[.]” Dkt. No. 94, p. 12. Defendant went on to state, “[b]ecause the software is  
25 central to whether [Plaintiff] can establish [Defendant] copied its works, the software must  
26 be produced.” Dkt. No. 94, p. 12. Since the Hard Drive can be used to establish

1 Defendant's infringement of Plaintiff's works (or covered up infringement by wiping the  
2 device), Defendant's argument is entirely disingenuous.

3 *2. Defendant's Computer is Related to His Counterclaim of Abuse of Process*

4 Defendant's Response also argues that the Hard Drives are not relevant to his Abuse  
5 of Process Counterclaim. However, Defendant's counterclaim states that Plaintiff is liable  
6 for Abuse of Process because it has "no evidence of infringement" (Dkt. No. 64, ¶¶70-71)  
7 and "no intention of litigating" (See Dkt. No. 64, ¶¶58-60 and ¶73). Defendant also accuses  
8 Plaintiff of "extortion" and "sham litigation." As such, the very existence of evidence  
9 establishing infringement goes to the heart of Defendant's abuse of process claim. Indeed,  
10 Defendant accuses Plaintiff of filing baseless lawsuits merely to obtain settlement money  
11 from Defendants. Plaintiff submits that any evidence establishing infringement or evidence  
12 providing a basis for Plaintiff's claims is relevant. And, respectfully, Plaintiff's pursuit of  
13 that very evidence (despite Defendant's unwillingness to provide it) demonstrably  
14 disproves his claim that Plaintiff does not litigate.

15 **C. The Amount in Controversy is Substantial Enough to Warrant Production**  
16 **of this Material Evidence**

17 Given Defendant's own expert's statements that the amount in controversy (the  
18 ongoing legal fees) is substantial, and Plaintiff's willingness to cover the cost of imaging  
19 and examination, this second factor weighs in favor of permitting production.

20 **D. Defendant Has Easy Access to His Hard Drives**

21 Defendant confusingly argues that since Plaintiff "already has access to significant  
22 information" from IPP's monitoring system, production of the Hard Drives is not necessary.  
23 However, this factor is concerned with each of the parties' access to the *requested evidence*,  
24 i.e., the parties' access to the Hard Drives. *Broxson v. Lakewest Condo. Ass'n*, No. C16-  
25 0462-JCC, 2017 WL 1330498, at \*4 (W.D. Wash. Apr. 11, 2017) (In considering "the  
26 parties' relative access to relevant information" factor under Fed. R. Civ. P. 26(b)(1), the

1 Court noted that the responding party had much better access to the requested documents  
2 than the requesting party). Here, Defendant has far better access to his Hard Drives.  
3 Indeed, Plaintiff has no way to access the Hard Drives at all. Thus, this factor weighs in  
4 Plaintiff's favor.

5 **E. Production of the Hard Drives Will Not Be A Burden on Defendant**

6 Defendant's Response argues that Plaintiff's expense analysis fails to account for  
7 the cost of having defense counsel inspect the Hard Drives to determine if they contain  
8 personal and confidential information. Plaintiff did not account for this expense because it  
9 is entirely unnecessary. Defense counsel need not examine each entire Hard Drive bit by  
10 bit to evaluate whether private information exists. The parties need to only agree on (or the  
11 Court should order) a proper protocol to ensure such private information is not shared with  
12 Plaintiff. Further, Plaintiff's proposed protocol already addresses this issue. And,  
13 Defendant's Response fails to state why Plaintiff's protocol is insufficient.

14 **F. The Burden and Expense do not Outweigh the Likely Benefit**

15 There simply is no burden or expense to Doe here. The likely benefit is clear based  
16 on the fact that the Hard Drives are material evidence. In fact, the evidence was so  
17 important that defense counsel had the Hard Drives imaged and examined.

18 **III. CONCLUSION**

19 For the foregoing reasons, Plaintiff respectfully requests that its Motion to Compel  
20 Production of Hard Drives be granted in its entirety.

1 DATED this 7<sup>th</sup> day of June, 2019

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**CERTIFICATE OF SERVICE**

I, Jeremy Roller, hereby certify that on June 7, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of filing to the following parties:

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DATED this 7th day of June 2019 at Seattle, Washington.

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