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Attorney for Owner/Requestor
Hunter Killer Productions, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In re Subpoena to) **Case No.: 1:19-mc-125**
Verizon Wireless) (Copyright)
)
) APPLICATION FOR 512(h)
) SUBPOENA
)
)
)

APPLICATION FOR 512(h) SUBPOENA

TO: CLERK OF THE ABOVE-ENTITLED COURT:

Pursuant to 17 USC 512(h) (hereafter: "512(h)"), Hunter Killer Productions, Inc. (hereafter: "Owner") hereby applies for issuance of a subpoena to Verizon Wireless (the service provider) to identify alleged infringers (the individuals at IP

addresses identified in Exhibits 1A-1C) of Owner's Copyright protected motion picture.

512(h) provides the copyright owner with a mechanism to request a subpoena from this Court. Particularly, 512(h)(1) provides:

(1) Request.—

A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

As stated in the Declaration of Counsel, the undersigned represents the Owner of the Copyright protected subject matter.

512(h)(2) provides:

(2) Contents of request.—The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

The undersigned provided a copy of the notification described in subsection (c)(3)(A) [*See* Exhibit "2"], a proposed subpoena and the sworn declaration.

512(h)(3) provides:

(3) Contents of subpoena.—

The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

The proposed subpoena is in accordance with 512(h)(3).

512(h)(4) provides:

(4) Basis for granting subpoena.—

If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

As the undersigned has provided the notification, the proposed subpoena in proper form, and the properly executed declaration, the clerk must issue and sign the proposed subpoena. 512(h)(4) provides that *the Clerk*, not a Judge should issue and sign the proposed subpoena.

512(h)(6) provides that “...the procedure for issuance and delivery of the subpoena...shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum”. That is, 512(h)(6) provides that the procedures for the Rule 45 subpoena shall govern. The proposed subpoena is a Rule 45 subpoena.

The DC Circuit has determined that a subpoena under 512(h) “may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity.” *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003). The Eighth Circuit adopted the reasoning of the DC Circuit and concluded that 512(h) only applies to ISPs that

directly store, cache, or provide links to infringing material. *See In re Charter Communications, Inc.*, 393 F.3d 771, 776-77 (8th Cir. 2005). Both of these decisions turned on the conclusion that the notification described in subsection (c)(3)(A) could not be applied to an ISP that acts as a conduit. The Ninth Circuit has not yet concluded whether 512(h) applies to ISPs that function as a conduit for infringing material. However, the Fourth Circuit recently concluded that notifications similar to those described in subsection (c)(3)(A) were sufficient to trigger an ISP's loss of the DMCA safe harbor. *See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 300 (4th Cir. 2018). Accordingly, Owner respectfully submits that the Ninth Circuit would likely conclude that 512(h) does also apply to ISPs that directly store, cache, or provide links to infringing material.

For these reasons, the undersigned request that the Clerk of the Court expeditiously issue and sign the proposed subpoena and return it to the undersigned via ECF to be served on the service provider Verizon Wireless.

DATED: Kailua-Kona, Hawaii, April 17, 2019.

CULPEPPER IP, LLLC

/s/ Kerry S. Culpepper
Kerry S. Culpepper

Attorney for Owner/Requestor

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In re Subpoena to)
) **19-mc-125**
)
Verizon Wireless)

DECLARATION PURSUANT TO 17 U.S.C. 512(h)

KERRY S. CULPEPPER, hereby declares under penalty of law that the following is true and correct:

1. I am an attorney licensed to practice law in Hawai'i and represent Hunter Killer Productions, Inc. the owner of the copyright in the motion picture *Hunter Killer*.

2. This declaration is made in support of the accompanying subpoena, pursuant to 17 USC 512(h)(2)(C).

3. The purpose of the accompanying Subpoena is to obtain the identity of the alleged copyright infringer(s) who is/are identified at the Internet Protocol addresses in the notice(s) contained in Exhibits 1A-1C to the Subpoena. The

information obtained will be used only for the purpose of protecting the rights granted to the copyright owner(s).

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kailua-Kona, Hawaii, April 17, 2019.

CULPEPPER IP, LLLC

/s/ Kerry S. Culpepper
Kerry S. Culpepper

Attorney for Owner/Requestor

No	IP	Port	Hit Date UTC	File Name	File Hash	ISP	Region
1	174.239.8.238	10061	2019-03-18 21:03:27	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
2	174.239.2.92	1390	2019-03-12 14:55:42	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
3	174.239.3.63	6598	2019-03-12 14:44:18	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
4	174.239.2.150	1746	2019-03-12 13:56:07	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
5	174.239.0.216	4092	2019-03-12 13:08:06	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
6	174.239.0.102	7493	2019-03-12 11:10:38	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
7	174.239.2.134	53046	2019-02-05 08:16:34	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
8	174.239.2.240	24958	2019-01-30 05:51:22	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
9	174.239.1.248	28522	2019-01-28 08:10:22	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
10	174.239.4.25	24085	2019-01-27 06:43:31	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii
11	174.239.1.156	1765	2019-01-24 21:10:18	Hunter Killer (2018) [WEBRip] [1080p] [YTS.AM]	SHA1: 57537D93A76F574369DC2E573E99C3840A9FD89D	Verizon Wireless	Hawaii

Exhibit 1A

No	IP	Port	Hit Date UTC	File Name	File Hash	ISP	Region
1	174.239.0.199	5838	2019-01-10 05:31:57	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii
2	174.239.1.234	21167	2019-01-09 08:42:58	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii
3	174.239.1.146	50464	2019-01-07 21:26:37	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii
4	174.239.1.61	31003	2018-12-31 05:36:17	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii
5	174.239.0.230	55174	2018-12-29 02:26:03	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii
6	174.239.31.129	8069	2018-12-22 16:07:14	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii
7	174.239.23.136	8467	2018-12-22 04:14:50	Hunter Killer.2018.HC.1080p.HDRip.X264-EVO[TGx]	SHA1: E6886D05D9088EFC43798955727F43509998794c	Verizon Wireless	Hawaii

Exhibit 1B

No	IP	Port	Hit Date UTC	File Name	File Hash	ISP	Region
1	174.239.5.84	16192	2019-02-14 09:43:28	Hunter Killer (2018) [BluRay] [720p] [YTS.AM]	SHA1: C6F7C26601FAA47C9BB50A99BB	Verizon Wireless	Hawaii
2	174.239.2.91	43604	2019-01-26 05:56:39	Hunter Killer (2018) [BluRay] [720p] [YTS.AM]	SHA1: C6F7C26601FAA47C9BB50A99BB	Verizon Wireless	Hawaii

Exhibit 1C

From: Kerry Culpepper
 To: "DMCA@varizon.com"
 Cc: "stephanie@culpepperip.com"
 Subject: FW: Copyright Abuse / Infringement Notice [Case No. 20-017A]
 Date: Wednesday, April 17, 2019 11:36:00 AM

Copyright Abuse / Infringement Notice [Case No. 20-008G]

* * * Notice of Legal Claim * * *

Dear Sir or Madam:

You are receiving this notice because your Internet service has been used for the unauthorized copying and distribution of my client's motion picture through a peer-to-peer (BitTorrent) network in violation of U.S. copyright law.

We have evidence that someone using your Internet service has placed a media file that contains the protected content for our client's motion picture in a shared folder location and is enabling others to download copies of this content. Through a direct connection to the infringing computer we have also obtained specifics related to the software used and additional metadata, all corresponding to the IP address assigned to you at the time the infringing activity occurred. Relevant information is listed below.

You may consider this a notice of potential lawsuit, a demand for the infringing activity to terminate, and a demand for damages from the actual infringer. We invite your voluntary cooperation in assisting us with this matter, identifying the infringer, and ensuring that this activity stops. Should the infringing activity continue we may file or may have already filed a civil lawsuit seeking judicial relief.

Do I need my own attorney?

We strongly encourage you to consult with an attorney to review your rights in connection with this matter. If you obtain an attorney, please have them contact me. Legal assistance may be available from the following:

HSBA Lawyer Referral & Information Service (LRIS)
 (808) 537-9140

<http://hawaii.lawyerreferral.com/>

Legal Aid Society of Hawaii

www.legalaidhawaii.org

808-536-4302 (Oahu)

1-800-499-4302 (Neighbor Islands)

Volunteer Legal Services Hawaii

www.vlsh.org

(808) 528-7046 (Oahu)

(808) 698-8210 (Kauai)

We thank you in advance for your anticipated cooperation in this matter and we look forward to resolving our client's claim with the infringing party in an efficient and amicable fashion.

Sincerely,

Kerry S. Culpepper
 Culpepper IP, LLLC
 75-170 Hualalai Road, Suite B204
 Kailua Kona, HI 96740
www.culpepperip.com

Responding to this email: Please only respond to this email to acknowledge receipt. If you have any questions or believe you may have received this notice in error, please respond to above address.

Please include the Case Number and IP address in any response.

- - - 17 USC 512 Verification - - -

Under penalty of perjury I verify: The below information accurately identifies the observed time of infringing activity, IP address used, port used, and the specific content including Rights Holder (owner), title, file name and file hash; I am fully authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; I have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

/s/ Kerry S. Culpepper/

of counsel for owner

- - - Information - - -

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 US Tel 1-202-621-0218

This message is intended only for the use of the entity to which it is addressed and may contain confidential and privileged information. If the reader of this message is not the intended recipient, kindly delete this message and notify the sender.

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Verizon Wireless/SUBPOENA COMPLIANCE
on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.