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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PINK LOTUS ENTERTAINMENT,  
LLC,

Plaintiff,

No. 2:11-cv-03073 WBS KJN

v.

JOHN DOE,

Defendant.

ORDER

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Plaintiff Pink Lotus Entertainment, LLC (“plaintiff”) previously filed an ex parte application for leave to take expedited discovery on January 6, 2012. (App. for Expedited Discovery, Dkt. No. 7.) That application was denied on January 23, 2012. (Order, Dkt. No. 8.)

Presently before the court is plaintiff’s *amended* ex parte application for leave to take expedited discovery, which plaintiff filed on January 30, 2012. (Amended App. for Expedited Discovery, Dkt. No. 9.) As with its original ex parte application, plaintiff did not notice its amended ex parte application for hearing. The undersigned concludes that oral argument would not be of material assistance in resolving the amended application.

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1 Accordingly, the application will be decided on the papers submitted.<sup>1</sup>

2 Through plaintiff's amended application for expedited discovery, plaintiff again  
3 seeks permission to serve a discovery subpoena upon a third party named Steve Polan ("Mr.  
4 Polan" or "the account holder"), who is the "account holder associated with" the Internet  
5 Protocol ("IP") address "67.164.219.14," which was allegedly used in connection with  
6 infringement upon plaintiff's copyrighted adult video entitled *Dexxter* ("Video"). Although  
7 plaintiff alleges that Mr. Polan is the "holder" of the account allegedly used to infringe upon  
8 plaintiff's copywritten Video, plaintiff has not formally named Mr. Polan as a defendant in this  
9 action because the relationship between an account holder and infringer can be "imperfect."  
10 (Complaint, ("Compl."), Dkt. No. 2 ¶ 1; App. for Expedited Discovery at 9; Amended App. for  
11 Expedited Discovery at 9.) Instead, plaintiff requests expedited discovery (in the form of  
12 deposing Mr. Polan as a third party), purportedly to obtain the identities of the defendant(s)  
13 alleged to have used Mr. Polan's account associated with IP address "67.164.219.14" to infringe  
14 on plaintiff's rights in regards to the Video. (Amended App. for Expedited Discovery at 5; App.  
15 for Expedited Discovery at 5; see also Compl. ¶¶ 1-4, 19-37.)

16 The undersigned has considered plaintiff's amended application and, for the  
17 reasons discussed below, the undersigned denies plaintiff's amended ex parte application to  
18 conduct limited early discovery pursuant to Federal Rule of Civil Procedure 26(d)(1).

19 I. BACKGROUND

20 On November 21, 2011, plaintiff filed a complaint for copyright infringement and  
21 civil conspiracy against John Doe, an unnamed defendant.<sup>2</sup> (Compl. ¶ 1.) Plaintiff is a producer  
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23 <sup>1</sup> This case was referred to the undersigned pursuant to Eastern District of California Local  
24 Rule 302(c)(1) and 28 U.S.C. § 636(b)(1).

25 <sup>2</sup> The use of "Doe" defendants is generally disfavored. *Gillespie v. Civiletti*, 629 F.2d 637,  
26 642 (9th Cir. 1980). However, a plaintiff should be given an opportunity through discovery to  
identify such defendants where the identities of those defendants are not known prior to the filing  
of a complaint, "unless it is clear that discovery would not uncover the identities, or that the

1 of adult entertainment content, and is alleged to be the exclusive holder of the relevant rights  
2 with respect to the Video. (Compl. ¶¶ 3-4.) In the course of monitoring Internet-based  
3 infringement of its copyrighted content, plaintiff’s agents allegedly observed unlawful  
4 reproduction and distribution of the Video occurring over a particular IP address via the Bit  
5 Torrent file transfer protocol, the mechanics of which are further described in the Complaint.<sup>3</sup>  
6 (Compl. ¶¶ 5, 14-18, 22-24.) According to plaintiff, it has already determined that Mr. Polan is  
7 the account holder of the IP address involved. (Amended App. for Expedited Discovery at 5.)  
8 According to plaintiff, “[e]ven if Mr. Polan did not download and distribute Plaintiff’s  
9 copyrighted video himself, the infringing activity occurred over his network and the equipment  
10 he controls,” such that Mr. Polan is the only person “with information that can allow Plaintiff to  
11 identify the true infringer.” (*Id.* at 5; 9.) According to plaintiff, when plaintiff’s counsel  
12 contacted Mr. Polan, Mr. Polan was entirely non-responsive, and in fact, “merely ignored all of  
13 \_\_\_\_\_  
14 complaint would be dismissed on other grounds.” *Id.*

15 <sup>3</sup> A magistrate judge in the Northern District of California summarized the BitTorrent  
16 protocol as follows:

17 In the BitTorrent vernacular, individual downloaders/distributors of  
18 a particular file are called “peers.” The group of peers involved in  
19 downloading/distributing a particular file is called a “swarm.” A server  
20 which stores a list of peers in a swarm is called a “tracker.” A computer  
21 program that implements the BitTorrent protocol is called a BitTorrent  
22 “client.”

23 The BitTorrent protocol operates as follows. First, a user locates a  
24 small “torrent” file. This file contains information about the files to be  
25 shared and about the tracker, the computer that coordinates the file  
26 distribution. Second, the user loads the torrent file into a BitTorrent client,  
which automatically attempts to connect to the tracker listed in the torrent  
file. Third, the tracker responds with a list of peers and the BitTorrent client  
connects to those peers to begin downloading data from and distributing data  
to the other peers in the swarm. When the download is complete, the  
BitTorrent client continues distributing data to the peers in the swarm until  
the user manually disconnects from the swarm or the BitTorrent client  
otherwise does the same.

26 Diabolic Video Prods., Inc. v. Does 1-2099, No. 10-CV-5865-PSG, 2011 WL 3100404, at \*1-2  
(N.D. Cal. May 31, 2011) (unpublished).

1 Plaintiff's counsel's attempts to meet and confer" regarding the identity of the alleged infringer.  
2 (Id. at 9.)

3 As noted above, plaintiff previously filed an ex parte application for leave to take  
4 expedited discovery (App. for Expedited Discovery, Dkt. No. 7), and that application was denied  
5 on January 23, 2012. (Order, Dkt. No. 8.) The undersigned denied plaintiff's ex parte  
6 application because plaintiff had failed to demonstrate good cause for the expedited discovery  
7 plaintiff requested. (Order at 3-8.) The Order also separately raised the undersigned's concern  
8 about plaintiff's failure to provide a signed declaration supporting the many factual allegations  
9 made in the ex parte application. (Id. at 8-9 ("The undersigned is also troubled by plaintiff's  
10 failure to substantiate certain claims made in its moving papers[,]" such as counsel's efforts to  
11 communicate with the account holder and counsel's representations about the scope of questions  
12 to be asked should the account holder be deposed.))

13 Now, plaintiff again asks the court to authorize service of a third party deposition  
14 subpoena upon the account holder. Plaintiff again states that, in some cases, an account holder  
15 may be able to offer a credible explanation for why he or she is not the infringer and may be able  
16 to identify the actual infringer, such as another household member or tenant. (Amended App. for  
17 Expedited Discovery at 5; App. for Expedited Discovery at 5.) Plaintiff again contends that it  
18 cannot proceed in the action without ascertaining the likely infringer's identity, and that Mr.  
19 Polan is the only person with information that can allow plaintiff to identify the actual infringer  
20 and permit service of process on that individual. (Amended App. for Expedited Discovery at 5;  
21 App. for Expedited Discovery at 5.)

## 22 II. DISCUSSION

23 Plaintiff's amended ex parte application raises the same legal arguments plaintiff  
24 raised in its original ex parte application. (Compare Amended App. for Expedited Discovery  
25 with App. for Expedited Discovery (both arguing that "good cause" exists for expedited  
26 discovery, and that a deposition of the account holder would be minimally burdensome and

1 reasonably calculated to lead to the discovery of the infringer’s identity.) The difference between  
2 the two applications is that the factual statements within the amended application are supported  
3 by a signed declaration from plaintiff’s counsel. (Declaration of Brett Gibbs (“Gibbs Decl.”),  
4 Dkt. No. 9-1 at 2-5.) Attorney Gibbs states that he “informed Mr. Polan of the allegations  
5 against him and the likelihood of this lawsuit if Mr. Polan could not supply Plaintiff with a  
6 factually supportable alibi,” but never heard back from Mr. Polan. (Gibbs Decl. at ¶¶ 5-7.)  
7 Attorney Gibbs attests to his firm’s efforts to contact the account holder (id. ¶¶ 2-8), as well as to  
8 his intent to depose the account holder by asking only limited questions designed to reveal the  
9 “actual infringer” and to “minimize the burden” on the account holder (id. ¶ 9-12).

10           While the undersigned appreciates plaintiff’s renewed diligence in providing a  
11 signed declaration to substantiate the factual representations within the moving papers, the  
12 undersigned denies plaintiff’s amended application. Under the same legal analyses described in  
13 the undersigned’s Order of January 23, 2012, the entirety of which is incorporated by reference  
14 here, plaintiff’s amended application fails to show the existence of good cause<sup>4</sup> warranting the  
15 use of expedited discovery. (See Order, Dkt. No. 9 at 3-7 (applying the “good cause” analysis of  
16 Semitool, Inc. v. Tokyo Electron. Am. Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002), discussing  
17 authorities, including UMG Recordings, Inc. v. Doe, No. C–08-03999 RMW, 2008 WL  
18 4104207, at \*1-3 (N.D. Cal. Sept. 4, 2008 (unpublished); Arista Records LLC v. Does 1-43, No.  
19 07cv2357-LAB (POR), 2007 WL 4538697, at \*1-2 (S.D. Cal. Dec. 20, 2007) (unpublished).)

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23           <sup>4</sup> District courts within the Ninth Circuit have permitted expedited discovery prior to the  
24 Rule 26(f) conference upon a showing of “good cause.” E.g., In re Countrywide Fin. Corp.  
25 Derivative Litig., 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (citing Semitool, Inc. v. Tokyo  
26 Electron Am., Inc., 208 F.R.D. 273 (N.D. Cal. 2002)); accord Am. LegalNet, Inc. v. Davis, 673 F.  
Supp. 2d 1063, 1066 (C.D. Cal. 2009). “Good cause exists where the need for expedited discovery,  
in consideration of the administration of justice, outweighs the prejudice to the responding party.”  
In re Countrywide, 542 F. Supp. 2d at 1179 (citation and internal quotation marks omitted);  
Semitool, Inc., 208 F.R.D. at 276.

1 Likewise, plaintiff has not shown that “good cause” outweighs the likely prejudice<sup>5</sup> that would  
2 result from deposing the account holder.<sup>6</sup> (See Order, Dkt. No. 8 at 5-8 (recognizing that courts  
3 have granted expedited discovery in the form of limited *document requests* to obtain the name  
4 and contact information of account holders, explaining that plaintiff already has this contact  
5 information, and explaining that plaintiff’s proposed *oral deposition* of the account holder is  
6 much broader in that it seeks “facts about [the account holder’s] involvement, if any, with the  
7 unauthorized distribution of Plaintiff’s video(s) via [the account holder’s] IP address; to learn  
8 about [the account holder’s] computers and network setup; to assess [the account holder’s]  
9 technical savvy; and to identify any other persons who had access to [the account holder’s]  
10 computer and network” (citing App. for Expedited Discovery at 11)<sup>7</sup>.)

11 The undersigned again finds that plaintiff has not shown that good cause exists for  
12 the discovery requested. In light of “the entirety of the record . . . and the reasonableness of the  
13 request in light of all the surrounding circumstances,” plaintiff has failed to demonstrate the  
14 requisite good cause. See Semitool, Inc., 208 F.R.D. at 275 (citation & quotation marks omitted)

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16 <sup>5</sup> As previously noted in the undersigned’s Order of January 23, 2012, plaintiff considers the  
17 account holder to be a *potential defendant* who may be substituted for the “John Doe” defendant in  
18 this case rather than a more typical “third party,” such as an internet service provider. (See Order  
19 at 7-8.) According to plaintiff’s original ex parte application, plaintiff’s counsel met and conferred  
20 informally with Mr. Polan and “informed Mr. Polan of the allegations against him and the likelihood  
21 of this lawsuit if Mr. Polan could not supply Plaintiff with a factually supportable alibi,” but never  
heard back from Mr. Polan. (App. for Expedited Discovery at 5 n.1.) Plaintiff also expressed  
plaintiff’s belief that “Mr. Polan’s evasive behavior thus far does not reflect the actions of an entirely  
innocent third party.” (*Id.*) In the declaration supporting plaintiff’s pending application, plaintiff’s  
counsel confirms that he asked the account holder “whether [he] would be amenable to informal  
discovery and whether [he] would provide [plaintiff] with any substantive evidence showing that he  
was not the infringer in this case.” (Gibbs Decl. ¶ 2.)

22 <sup>6</sup> While the discovery timing prescribed by Federal Rule of Civil Procedure 26(d) does not  
23 expressly focus on “prejudice” to unnamed potential defendants, the applicable “good cause”  
24 analysis nonetheless requires the undersigned to examine the “entirety” of the record and the  
25 “reasonableness of the request in light of all the surrounding circumstances.” See Semitool, Inc., 208  
26 F.R.D. at 275 (citation & quotation marks omitted) (emphasis removed); Am. Legalnet, 673 F. Supp.  
2d at 1067.

<sup>7</sup> The declaration in support of plaintiff’s amended application again describes these as areas  
to be covered in an oral deposition of the account holder. (Gibbs Decl. ¶ 10.)

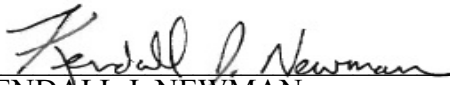
1 (emphasis removed); Am. Legalnet, 673 F. Supp. 2d at 1067. Again, assuming plaintiff has a  
2 good faith basis for its claims, plaintiff can name the account holder as a defendant, serve him  
3 with process, hold the Rule 26(f) conference, and conduct any discovery necessary. Procedural  
4 vehicles exist to later add and/or dismiss defendants based on additional facts discovered, if  
5 necessary.

6 III. CONCLUSION

7 Accordingly, for the reasons discussed above, IT IS HEREBY ORDERED that  
8 plaintiff's amended ex parte application for leave to take expedited discovery (Amended App. for  
9 Expedited Discovery, Dkt. No. 9) is DENIED.

10 IT IS SO ORDERED.

11 DATED: March 20, 2012

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14 KENDALL J. NEWMAN  
15 UNITED STATES MAGISTRATE JUDGE  
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