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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SKOUT, INC,
Plaintiff,
v.
JEN PROCESSING, LTD, et al.,
Defendants.

Case No. 14-cv-02341-JSC

**ORDER RE PLAINTIFF’S EX PARTE
MOTION FOR EXPEDITED
DISCOVERY**

Re: Dkt. No. 14

Plaintiff Skout, Inc. (“Skout”), a California corporation which provides a free location-based platform for chatting with people online, alleges that Defendants are spammers who create fake Skout profiles to lure Skout users to websites owned by Defendants or their affiliates. Plaintiff sues for breach of contract, fraud, and violation of Business and Professions Code Section 17200. Plaintiff has attempted unsuccessfully to serve the named Defendants all of which are foreign corporations. Having been unable to serve the named Defendants thus far, Plaintiff seeks leave to conduct early discovery to identify Does 1-4 by serving subpoenas on non-party proxy registration services. Having considered Plaintiff’s arguments and the relevant authority, the Court DENIES the motion for early discovery without prejudice.

BACKGROUND

Skout is a free location-based web platform that allows registered users to meet and chat with other users. (Dkt. No. 1 ¶ 18.) Skout users send messages to each other through the Skout platform. (*Id.* ¶ 19.) Plaintiff alleges that Defendants are spammers who have created fake Skout profiles, which they use to send fraudulent links to lure Skout’s users onto their own websites, for their own commercial gain. (*Id.* ¶ 1.) In particular, Defendants are alleged to use bots or other automated techniques to direct Skout users to pornographic websites owned by Defendants or their

1 business affiliates. (*Id.* ¶ 32.)

2 Defendants' spamming activity has negatively affected Skout users' experience, damaged
3 the users' good will towards Skout, and caused some Skout users to terminate their accounts. (*Id.*
4 ¶ 25.) Skout has also lost prospective business relationships, and been forced to spend substantial
5 amounts of money, time, and other resources, to combat the spam. (*Id.* ¶ 25.)

6 The named defendants—Jen Processing, LTD, Infium, LTD, CityNet Line, V.A.N.
7 Kereskedelmi es Szolgaltato Beteti Tarsasag, and Epiohost LTD—are all foreign corporations
8 doing business in California. (*Id.* ¶¶ 3-7.) Plaintiff has been unable to find valid physical
9 addresses for any of these Defendants other than Defendant Jen Processing, LTD. (Dkt. No. 14 at
10 3.) Plaintiff is attempting to serve Defendant Jen Processing, LTD, a United Kingdom
11 corporation, in accordance with the Hague Convention, but this process is estimated to take
12 several months. (*Id.*)

13 Plaintiff alleges that Does 1-4 are companies or businesses doing business in the state of
14 California who own and operate specified domain names (websites) used by the spammers. (Dkt.
15 No. 1 ¶¶ 8-11.) However, Plaintiff alleges that Does 1-4 use proxy registration services to conceal
16 their identities by having the proxy registration services replace the website owner's information
17 in the public Whois directory with the proxy registration service's own information. (Dkt. No. 14
18 at 3:16-23.) Plaintiff contends that through a search of the publicly available Whois directory it
19 discovered the following information regarding the proxy registration services used by Does 1-4.
20 (Dkt. No. 14-1 ¶ 4.) Doe 1 owns and operates the domain xxxblackbook.com which uses Contact
21 Privacy Inc. as its proxy registration service. (*Id.*) Doe 2 owns and operates the domain
22 paydirtdollars.com and uses Domains By Proxy, LLC as its proxy registration service. (*Id.*) Doe
23 3 owns and operates the domains mywebcamcrush.com, webcamflushcrush.com,
24 camflushcrush.com, blamcams.com, flirtyinvitations.com, sunnydollars.net,
25 disrespectmybody.com, cambayHD.com, and nervoustv.com and uses Moniker Privacy Services
26 as its proxy registration service. (*Id.*) Doe 4 owns and operates the domain cam555.com using
27 Whoisguard Protected as its proxy registration service. (*Id.*)

28 Plaintiff seeks leave to propound subpoenas pursuant to Federal Rule of Civil Procedure 45

1 on the non-party proxy registration services to discover the identities of Does 1-4.¹

2 **LEGAL STANDARD**

3 Federal Rule of Civil Procedure 26(d)(1) requires a court order for discovery if it is
4 requested prior to a Rule 26(f) conference between the parties. Generally, a “good cause” standard
5 applies to determine whether to permit such early discovery. *Semitoool, Inc. v. Tokyo Electron Am.,*
6 *Inc.*, 208 F.R.D. 273, 276 (N.D.Cal. 2002). “Good cause may be found where the need for
7 expedited discovery, in consideration of the administration of justice, outweighs the prejudice of
8 the responding party.” *Id.*

9 To determine whether there is “good cause” to permit expedited discovery to identify doe
10 defendants, courts consider whether:

- 11 (1) the plaintiff can identify the missing party with sufficient specificity such that
12 the Court can determine that defendant is a real person or entity who could be sued
13 in federal court; (2) the plaintiff has identified all previous steps taken to locate the
14 elusive defendant; (3) the plaintiff’s suit against defendant could withstand a
15 motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable
16 likelihood of being able to identify the defendant through discovery such that
17 service of process would be possible.

18 *OpenMind Solutions, Inc. v. Does 1–39*, No. 11–3311, 2011 WL 4715200, at *2 (N.D. Cal. Oct.7,
19 2011) (citing *Columbia Ins. Co.v. seescandy.com*, 185 F.R.D. 573, 578–80 (N.D.Cal.1999)).

20 **DISCUSSION**

21 Prior to seeking early discovery, Plaintiff must demonstrate that it has “ma[d]e a good faith
22 effort to comply with the requirements of service of process and specifically identify[]
23 defendants.” *Columbia Ins. Co.*, 185 F.R.D. at 579. In *Columbia*, Plaintiff sought leave to conduct
24 early discovery to likewise discover the identity of the owners or operators of certain domain
25 names. *Id.* The court found that Plaintiff had made a sufficient good faith effort to identify the
26 unknown defendant where plaintiff’s counsel called the phone numbers listed in the Whois
27 directory and sent email and hardcopies of the pending motions to the contact information listed
28 on Whois. *Id.*

¹ Plaintiff has not provided the Court with copies of the subpoenas it proposes to propound on these proxy registration services.

1 Plaintiff has not made similar efforts here; instead, it merely alleges that it consulted the
2 publicly available Whois directory. It insists that because the Whois directory listing suggests that
3 each domain name is registered through a proxy registration service which masks the true identity
4 of the website owner or operator it has made sufficient efforts to discover the identity of these doe
5 defendants. Proxy registration services, such as those Plaintiff proposes to subpoena here, provide
6 a service to domain name holders whereby their contact information is listed in the Whois
7 directory maintained by the Internet Corporation for Assigned Names and Numbers (“ICANN”)
8 instead of the actual domain name holder. *See Balsam v. Tucows Inc.*, 627 F.3d 1158, 1159 (9th
9 Cir. 2010) (discussing the responsibilities of domain registration services). Plaintiff does not
10 allege that it made any effort to contact anyone through the information listed in the Whois
11 directory for the specified websites, although contact information for the proxy registration
12 services is provided on Whois. Moreover, each of the proxy registration services—Domains By
13 Proxy, LLC, Contact Privacy Inc., Moniker Privacy Services, and Whoisguard Protected—include
14 information on their websites about making an inquiry or complaint regarding a domain name
15 under their control. *See, e.g.*, <https://www.domainsbyproxy.com/default.aspx> (Domains By Proxy,
16 LLC)(last visited August 5, 2014); <https://www.contactprivacy.com/> (Contact Privacy Inc.)(last
17 visited August 5, 2014); <http://www.moniker.com/legal/report-abuse> (Moniker Privacy
18 Services)(last visited August 5, 2014); and [http://www.whoisguard.com/report-](http://www.whoisguard.com/report-spam.asp?type=whoisguard-protected&from=index)
19 [spam.asp?type=whoisguard-protected&from=index](http://www.whoisguard.com/report-spam.asp?type=whoisguard-protected&from=index) (Whoisguard Protected)(last visited August 5,
20 2014).

21 There is nothing in the record that suggests Plaintiff attempted to contact the proxy
22 registration services prior to filing this motion. It may well be that inquiring of the proxy
23 registration services without a court-issued subpoena will not be fruitful. But making such
24 inquiries is not burdensome and until Plaintiff makes the inquiries, or submits other evidence or an
25 allegation that suggests that the proxy services will not reveal the identity of a spammer absent a
26 subpoena, the Court cannot find that they will not result in the information Plaintiff seeks, at least
27 on this record. Plaintiff has thus failed to demonstrate that it made a sufficient effort to identify
28 the owners or operators of the domain names at issue through reasonably available mechanisms

1 prior to seeking leave to conduct early discovery.

2 Accordingly, because the record does not reflect any effort on the part of Plaintiff to
3 identify the doe defendants through the contact information provided in the Whois database prior
4 to seeking permission to issue Rule 45 subpoenas on the proxy registration services, Plaintiff has
5 failed to establish good cause to issue the subpoenas and the motion is denied without prejudice.
6 Any renewed motion for early discovery should attach the proposed subpoenas.

7 This Order disposes of Docket No. 14.

8 **IT IS SO ORDERED.**

9 Dated: August 7, 2014

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12 JACQUELINE SCOTT CORLEY
13 United States Magistrate Judge
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