

United States District Court
Northern District of California

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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 GRANTING PLAINTIFF'S
RENEWED MOTION FOR EARLY
DISCOVERY**

Re: Dkt. No. 19

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. After carefully considering the arguments and briefing submitted, the Court concludes that oral argument is unnecessary, see Civ. L.R. 7-1(b), and GRANTS the renewed motion for early discovery. (Dkt. No. 19.)

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

1 profiles, which they use to send fraudulent links to lure Skout’s users onto their own websites, for
2 their own commercial gain. (Id. ¶ 1.) In particular, Defendants are alleged to use bots or other
3 automated techniques to direct Skout users to pornographic websites owned by Defendants or their
4 business affiliates. (Id. ¶ 32.)

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

9 The named defendants—Jen Processing, LTD, Infium, LTD, CityNet Line, V.A.N.
10 Kereskedelmi es Szolgaltato Beteti Tarsasag, and Epiohost LTD—are all foreign corporations
11 doing business in California. (Id. ¶¶ 3-7.) Plaintiff has been unable to find valid physical
12 addresses for any of these Defendants other than Defendant Jen Processing, LTD. (Dkt. No. 14 at
13 3.) Plaintiff is attempting to serve Defendant Jen Processing, LTD, a United Kingdom
14 corporation, in accordance with the Hague Convention, but no appearance has yet been made on
15 its behalf. (Dkt. No. 19-1 ¶ 2.)

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

1 as its proxy registration service. (Id.) Doe 4 owns and operates the domain cam555.com using
2 Whoisguard Protected as its proxy registration service. (Id.)

3 Plaintiff seeks leave to propound subpoenas pursuant to Federal Rule of Civil Procedure 45
4 on the non-party proxy registration services to discover the identities of Does 1-4. (Dkt. No. 19-2.)
5 The Court previously denied Plaintiff’s motion for leave to conduct early discovery to serve these
6 subpoenas without prejudice to Plaintiff first attempting to obtain the information from the proxy
7 registration services voluntarily. (Dkt. No. 15.) Plaintiff’s attempted to do so; however, the proxy
8 registration services for Doe 2 and Doe 4, Domains By Proxy, LLC and Whoisguard Protected ,
9 respectively, have public policies prohibiting the release of information about the owners of their
10 domain sites in connection with a civil lawsuit without a subpoena. (Dkt. No. 19-1 ¶¶ 6-7.)
11 Plaintiff’s efforts to contact the proxy registration services, Contact Privacy and Moniker Privacy
12 Services, for Doe 1 and Doe 3, respectively, were likewise unsuccessful. (Id. at ¶¶ 8-9.) Plaintiff
13 thereafter filed the now pending renewed motion for early discovery.

14 **LEGAL STANDARD**

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

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

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

OpenMind Solutions, Inc. v. Does 1–39, No. 11–3311, 2011 WL 4715200, at *2 (N.D. Cal. Oct.7,

1 2011) (citing *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578–80 (N.D.Cal.1999)).

2 DISCUSSION

3 A. Plaintiff Identified the Missing Parties with Sufficient Specificity

4 Under the first factor, “the Court must examine whether the Plaintiff has identified the
5 Defendants with sufficient specificity, demonstrating that each Defendant is a real person or entity
6 who would be subjected to jurisdiction in this Court.” *Pac. Century Int’l, Ltd. v. Does 1–48*, No.
7 11–3823, 2011 WL 4725243, at *2 (N.D. Cal. Oct. 7, 2011). The Court finds that it has.

8 First, Plaintiff has sufficiently established that Doe Defendants 1 through 4 are real persons
9 or entities. Plaintiff contends that these Doe Defendants have either directly spammed Skout’s
10 users or have acted in concert with other defendants who have directly spammed Skout’s users, in
11 order to drive traffic to their websites for their own commercial gain. (Dkt. No. 1 ¶ 31.)

12 Second, with respect to the jurisdiction question, the Court applies a three-part test to
13 determine whether a party has sufficient minimum contacts to be susceptible to specific personal
14 jurisdiction: (1) the non-resident defendant must purposefully direct his activities into the form or
15 purposefully avail himself of the privilege of conducting activities in the forum; (2) the claim must
16 arise out of or relate to forum related activities; and (3) the exercise of jurisdiction must comport
17 with fair play and substantial justice. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,
18 802 (9th Cir. 2004). Here, Plaintiff represents that the Doe Defendants intentionally spammed
19 Skout which is a California company, and its users—many of whom are California residents—
20 thus, causing foreseeable harm in California. This is sufficient to show that the Doe Defendants
21 may be amenable to suit in federal court. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*
22 *L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (holding that under the purposeful
23 direction test “the defendant allegedly must have (1) committed an intentional act, (2) expressly
24 aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the
25 forum state.”)

26 B. Previous Steps Taken to Identify the Doe Defendants

27 Under the second factor, the party should identify all previous steps taken to locate the
28 elusive defendant. *Columbia Ins. Co.*, 185 F.R.D. at 579. “This element is aimed at ensuring that

1 plaintiffs make a good faith effort to comply with the requirements of service of process and
2 specifically identifying defendants.” Id. In Columbia, Plaintiff sought leave to conduct early
3 discovery to likewise discover the identity of the owners or operators of certain domain names. Id.
4 The court found that Plaintiff had made a sufficient good faith effort to identify the unknown
5 defendant where plaintiff’s counsel called the phone numbers listed in the Whois directory and
6 sent email and hardcopies of the pending motions to the contact information listed on Whois. Id.

7 The Court previously denied Plaintiff’s motion for early discovery without prejudice
8 because the record did not demonstrate that Plaintiff had attempted to contact the proxy
9 registration services prior to filing the motion to inquiry as to whether they would voluntarily
10 provide information regarding the identity of the owners or operators of the domain names at
11 issue. Plaintiff thereafter emailed and/or called the four proxy registration services at issue and
12 was unable to obtain any information regarding the domain names. (Dkt. No. 19-1 ¶¶ 5-9.)
13 Plaintiff has thus made a sufficient showing that it attempted to identify the Doe Defendants prior
14 to requesting early discovery.

15 **C. Withstanding a Motion to Dismiss**

16 Under the third requirement, a plaintiff should establish to the court’s satisfaction that
17 plaintiff’s suit against defendant could withstand a motion to dismiss. Columbia Ins. Co., 185
18 F.R.D. at 579. “A conclusory pleading will never be sufficient to satisfy this element.” Id. Thus,
19 plaintiff must make some showing that “an act giving rise to civil liability actually occurred and
20 that the discovery is aimed at revealing specific identifying features of the person or entity who
21 committed that act.” Id. at 580.

22 Here, Plaintiff alleges state law claims for breach of contract, fraud, and violation of
23 California Business and Professions Code Section 17200. The elements of a breach of contract
24 claim under California law are: (1) the contract, (2) the plaintiff’s performance or excuse for
25 nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff. Reichert v.
26 Gen. Ins. Co. of Am., 68 Cal.2d 822, 830 (1968). Plaintiff alleges that all Skout users are parties to
27 Skout’s Terms which constitute a valid and enforceable contract through which the Doe
28 Defendants—as Skout users—obtained a limited license to use Skout’s services. (Dkt. No. 1 at ¶

1 38.) Plaintiff further alleges that it performed all its obligations under the Terms except those
2 excused by the Defendants' action. (Id. at ¶ 39.) Finally, Plaintiff alleges that the Defendants
3 have breached the contract by 1) using Skout for commercial purposes; 2) interfering with or
4 disrupting Skout's services; 3) using Skout's services in a manner that violates local, state,
5 national or international law; 4) using Skout's services to harm minors; 5) using Skout's services
6 to reveal personal information about Skout users; 6) defrauding or misleading Skout and its users;
7 7) impersonating a person or entity and falsely stating or otherwise misrepresenting their
8 affiliation with a person or entity; 8) creating an account by automated means and false pretenses;
9 9) using other users' accounts; 10) failing to comply with local rules; and 11) failing to comply
10 with applicable laws regarding the transmission of technical data exported from the United States
11 or the countries in which Defendants reside. This is a sufficient showing that Plaintiff's breach of
12 contract claim would withstand a motion to dismiss which is sufficient for purposes of this factor.
13 See *New Sensations, Inc. v. Does 1-426*, No. 12-3800, 2012 WL 4675281, at *6 (N.D. Cal. Oct. 1,
14 2012); *Liberty Media Holdings, LLC v. Does 1-62*, No. 11-575, 2011 WL 1869923, at *4 (S.D.
15 Cal. May 12, 2011).

16 Another issue frequently addressed by courts in these types of cases is whether the Doe
17 Defendants are properly joined. Federal Rule of Civil Procedure 20 permits joinder of defendants
18 in a single action if a right to relief is asserted against them "arising out of the same transaction,
19 occurrence, or series of transactions or occurrences" and a "question of law or fact common to all
20 defendants will arise in the action." Fed. R. Civ. P. 20(a)(2) (A)(B). "[T]he impulse is toward
21 entertaining the broadest possible scope of the action consistent with fairness to the parties;
22 joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America*
23 *v. Gibbs*, 383 U.S. 715, 724 (1966); see also *League to Save Lake Tahoe Reg'l Planning Agency*,
24 558 F.2d 914, 917 (9th Cir.1997) (stating that the "primary purpose" of Rule 20 "is to promote
25 trial convenience and to prevent multiple lawsuits"). Plaintiff alleges that its causes of action
26 against the Doe Defendants arise out of the same series of transactions or occurrences; that is, that
27 in the year prior to filing the Complaint, the Doe Defendants acted in concert with each other
28 and/or other Defendants in order to spam Skout's users for their own commercial purposes and

1 financial gain. (Dkt. No. 1 ¶¶ 21, 31.) Thus, Plaintiff contends that there will be numerous
2 common questions of law and fact. The Court agrees.

3 **D. Likelihood of Identifying the Doe Defendant Through Discovery**

4 The final factor concerns whether the discovery sought will uncover the identities of the
5 Doe Defendants. See Gillespie v. Civiletti, 629 F.2d 639, 642–43 (9th Cir. 1980) (stating that
6 early discovery to identify doe defendants should be allowed “unless it is clear that discovery
7 would not uncover the identities”); Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir.1999)
8 (holding that “the plaintiff should be given an opportunity through discovery to identify the
9 unknown defendants, unless it is clear that discovery would not uncover the identities”). Here, the
10 Doe Defendants appear to be using proxy registration services to mask their true identity and these
11 proxy registration services are unwilling to provide information regarding the Doe Defendants’
12 identities absent a subpoena. (Dkt. No. 19-1 ¶¶ 6-9.) Plaintiff has thus demonstrated that a
13 subpoena on these proxy registration services should reveal the identities of the individuals or
14 entities behind the domain names at issue.

15 **CONCLUSION**

16 For the reasons stated above, Plaintiff’s motion for early discovery is GRANTED. (Dkt.
17 No. 19.)

18 **IT IS SO ORDERED.**

19 Dated: January 15, 2015

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22 JACQUELINE SCOTT CORLEY
23 United States Magistrate Judge
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