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 FACEBOOK, INC.

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION

15 FACEBOOK, INC.,

16 Plaintiff,

17 v.

18 VARIOUS, INC.; GMCI INTERNET
 OPERATIONS, INC.; TRAFFIC CAT, INC.;
 19 FRIENDFINDER NETWORKS INC.; and
 DOES 1-100,

20 Defendants.

Case No. 4:11-cv-01805-SBA

**FACEBOOK’S NOTICE OF MOTION,
 MOTION AND MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF ITS MOTION FOR
 EXPEDITED DISCOVERY AND
 ENTRY OF PROPOSED PROTECTIVE
 ORDER**

Date: TBD
 Time: TBD
 Courtroom: 1, 4th Floor
 Judge: Hon. Sandra Brown Armstrong

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NOTICE OF MOTION AND MOTION

Please take notice that on _____ at ___ p.m. or as soon thereafter as the matter may be heard in Courtroom 1 located at Fourth Floor, 1301 Clay Street, Oakland, California, before Honorable Sandra Brown Armstrong, Plaintiff Facebook, Inc. (“Facebook”), hereby moves this Court for an order for expedited discovery pursuant to Federal Rules of Civil Procedure 26(d)(1). This Motion is supported by the following argument, the Declaration of Jeffrey T. Norberg in Support of Facebook’s Motion for Expedited Discovery and Entry of Proposed Protective Order (“Norberg Decl.”), and Facebook’s Motion to Shorten Time, filed concurrently herewith.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiff Facebook Inc., (“Facebook”) seeks limited expedited discovery from Defendants Various Inc., GMCI Internet Operations, Inc., Traffic Cat, Inc., and Friendfinder Networks, Inc., (“Named Defendants”) for the purpose of identifying and serving Does 1-100 (the “Doe Defendants”), and facilitating a motion for preliminary injunction. As explained in greater detail in Facebook’s Complaint, the Named Defendants run a pornography-focused social networking website that infringes the FACEBOOK brand: www.facebookofsex.com. The Doe Defendants are part of a network of affiliates who are paid or otherwise caused by Defendants to use infringing marks and domains to drive traffic to the Named Defendants’ websites. This motion presents a classic case of good cause to allow expedited discovery because: 1) Facebook is unaware of the identities and/or contact information for the Doe Defendants; 2) Plaintiff intends to file a motion for preliminary injunction, and expedited discovery is necessary to present a complete record and to ensure that all defendants can be served with the Complaint and bound by the anticipated preliminary injunction; and 3) Named Defendants would not be unduly prejudiced by Facebook’s request.

II. STATEMENT OF FACTS

Facebook offers the most popular and widely used social networking website in the world. Named Defendants operate an adult social networking website branded and promoted as

1 “Face Book of Sex.” As alleged in the Complaint, the FACE BOOK OF SEX mark is nothing
2 more than an attempt by Defendants to hijack Facebook’s fame for illicit financial gain.

3 Defendants’ Face Book of Sex site, however, is just one part of their larger scheme to
4 misappropriate the Facebook brand. Defendants also operate a widespread infringing affiliate
5 network that pays, and provides infringing promotional materials to, third party website operators
6 (the Doe Defendants). *See, generally*, Complaint (D.I. 1), Ex. D. The Defendants’ affiliate
7 program marketing materials encourage affiliates to “be a part of the crowd cashing in on this
8 new and exciting cobrand” and share in the profits generated by the Defendants’ infringement of
9 the Facebook brand: “[w]ith millions of *Adult FriendFinder* members worldwide, **as well as a**
10 **highly recognizable name**, you’ll generate great income on facebookofsex.com!” *Id.* (emphasis
11 added). These marketing materials provide Doe Defendants specific instructions on how to
12 implement tools to redirect traffic to the FACE BOOK OF SEX site. Doe Defendants use these
13 tools to generate web traffic and revenue for Named Defendants’ websites, and are paid by the
14 Named Defendants based upon the volume of traffic they generate. *Id.*

15 In October of 2010, Facebook contacted the site’s operator, Defendant Various Inc.
16 (“Various”) and requested that Various disable the site and cease using the FACEBOOK
17 trademark. Complaint (D.I. 1), Ex. G. Various refused, and Facebook began an investigation of
18 Various, Inc., the www.facebookofsex.com site, and several other similar domains that used the
19 Facebook brand and redirected to the www.facebookofsex.com site. This investigation has
20 revealed more than 100 domain names that appear to participate in the FACE BOOK OF SEX
21 affiliate program. Norberg Decl. ¶2 & Ex. A. Absent discovery, however, Facebook was unable
22 to learn the true identities of the owners of all of the infringing affiliates – many of the domain
23 names were registered in the anonymous name of Domains by Proxy, and other listed owners
24 appeared to be false identities. *See, e.g.*, Norberg Decl. ¶¶4-7 & Exs. B-E. After a final effort to
25 resolve the issue directly with the Named Defendants failed to produce a timely end to the
26 infringing activities, Facebook filed this Action, naming the affiliates as Does 1-100 until
27 discovery can determine their true identities.

28 After filing the Complaint, Facebook continued its effort to resolve this matter via

1 settlement discussions. Norberg Decl. ¶¶13-15. These discussions, however, did not resolve the
2 parties' dispute. The Named Defendants' continue to use the FACEBOOK trademark in the
3 www.facebookofsex.com domain name, which ultimately directs users to one of Named
4 Defendants' other websites: www.xmatch.com (**Caution – Adult Content**). And the Doe
5 Defendants continue to use the FACEBOOK Mark in numerous sites, such as
6 www.facebooksextubes.com (**Caution – Adult Content**), and/or by displaying the Named
7 Defendants' banners or other advertisements on infringing domains, such as [www.face-book-of-](http://www.face-book-of-sex.com)
8 [sex.com](http://www.face-book-of-sex.com) (**Caution – Adult Content**), which includes an advertisement that directs traffic to
9 www.GetItOn.com, a Various site. Norberg Decl. ¶¶6-7 & Exs. D-E.

10 Given the unambiguous nature of the defendants' direct, vicarious and contributory
11 infringement and the ongoing irreparable harm to the Facebook brand, Facebook intends to bring
12 a motion for preliminary injunction as soon as practicable. Because any such motion will seek to
13 bar both the Named Defendants and the Doe Defendants from using Facebook's trademark during
14 the pendency of this suit, Facebook seeks expedited discovery to allow Facebook to determine,
15 from the Named Defendants and limited third-parties, the true identities of the Doe Defendants,
16 details of the Named Defendants' infringing activities, and the manner in which the Named
17 Defendants have implemented the affiliate program.

18 **III. REQUESTED EXPEDITED DISCOVERY**

19 As discussed above, Plaintiff seeks to expeditiously obtain evidence that will demonstrate
20 the scope and extent of Defendants' infringement of the FACEBOOK mark through immediate
21 service of the following discovery:

- 22 1. Interrogatories and Requests for Inspection of Documents and Things related to:
 - 23 a. The Face Book Of Sex affiliate network, including but not limited to the
24 identities of the Doe Defendants and details regarding how the affiliate
25 network functions, how Named Defendants track traffic received from the Doe
26 Defendants, and the Named Defendants' incentivizing of the Doe Defendants'
27 infringing activities (whether financial or otherwise); and
 - 28 b. Named Defendants' direct infringing activities to be enjoined in any

1 preliminary injunction, including the establishment and operation of the Face
2 Book of Sex website, and the Named Defendants' use of any other infringing
3 domains or advertisements that direct traffic to the Named Defendants' sites.

4 True and correct copies of the discovery requests to be propounded on Named
5 Defendants are attached to the Norberg Declaration as Exhibits H and I. Given the
6 ongoing irreparable harm being caused by the defendants' activities, and the need to
7 move expeditiously for a preliminary injunction, Plaintiff requests that the normal 30
8 day period for responses to written discovery be shortened to 15 days with respect to
9 Exhibits H and I.

10 2. A Notice of Deposition to FriendFinder Networks, Inc., as reflected in Exhibit J to the
11 Norberg Declaration.

12 3. Plaintiff further seeks authorization to issue subpoenas to Domains By Proxy and
13 other web hosting services that veil the contact information for the Doe Defendants,
14 and other third-parties, such as payment processors and domain hosting services, and
15 notice percipient witness depositions to individual employees of the Named
16 Defendants, whom Plaintiff anticipates will be identified as part of this early
17 discovery, to the extent necessary to determine the identities of the Doe Defendants
18 and the nature of the Named Defendants' affiliate program.

19 **IV. THERE IS GOOD CAUSE TO PERMIT PLAINTIFF TO IMMEDIATELY SERVE THE**
20 **REQUESTED DISCOVERY**

21 The Court may, for good cause, authorize discovery prior to the Federal Rule of Civil
22 Procedure Rule 26(f) meeting of the parties. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208
23 F.R.D. 273, 276 (N.D. Cal. 2002). "Good cause exists 'where the need for expedited discovery,
24 in consideration of the administration of justice, outweighs the prejudice to the responding
25 party.'" *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal.
26 2008) (quoting *Semitool, Inc.*, 208 F.R.D. at 276). Courts have found that "good cause" for early
27 expedited discovery existed in cases where the identities of the alleged defendants are not known
28 prior to the filing of the complaint. *See Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980);

1 *Arista Records, LLC v. Does 1-12*, No. 1:08-cv-1242–OWW–GSA, 2008 WL 4133874, at *1
2 (E.D. Cal. Sept. 4, 2008); *UMG Recordings, Inc. v. Doe*, No. C 08-1193 SBA, 2008 WL
3 4104214, at *3-5 (N.D. Cal. Sept. 3, 2008). Good cause for expedited discovery can also exist in
4 cases involving infringement or unfair competition in which a preliminary injunction is sought.
5 *See Pod-Ners, LLC v. N. Feed & Bean of Lucerne, LLC*, 204 F.R.D. 675, 676 (D. Colo. 2002);
6 *Qwest Commc’ns Int’l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003).

7 **A. Good Cause For Expedited Discovery Exists Because the Identity of the Doe**
8 **Defendants Cannot be Known Without Additional Discovery From Named**
9 **Defendants**

10 Facebook seeks expedited discovery on the Doe Defendants, the owners and operators of
11 the Face Book of Sex website affiliates. Facebook cannot determine with any certainty the
12 identity and/or the contact information of Doe Defendants, without the information possessed by
13 Named Defendants. Courts have found “good cause” existed in similar circumstances where
14 plaintiffs have been unable to identify the proper defendants without early expedited discovery.
15 In *Gillespie*, a *pro se* plaintiff was attempting to file a complaint against United States Marshalls
16 for their treatment of him while in their custody. *Gillespie*, 629 F.2d at 639. After the district
17 court granted the defendants’ motion to dismiss, plaintiff appealed based, in part, on the district
18 court’s dismissal of his interrogatories requesting the names and addresses of potential defendants
19 in the suit. *Id.* at 642-43. The court held that in situations “where the identity of alleged
20 defendants will not be known prior to the filing of a complaint. . . . [T]he plaintiff should be given
21 an opportunity through discovery to identify the unknown defendants, unless it is clear that
22 discovery would not uncover the identities, or that the complaint would be dismissed on other
23 grounds.” *Id.* at 642. Courts have applied this reasoning in circumstances like these, where a
24 defendant’s identity is shielded by the anonymity of the internet. *Arista Records*, 2008 WL
25 4133874, at *1-2 (citing *Gillespie* in ordering a third party internet service provider to provide
26 information sufficient to identify individuals who downloaded copyrighted works, including
27 names, addresses, telephone numbers, and email addresses); *see also UMG Recordings.*, 2008
28 WL 4104214, at *5-6.

Named Defendants are the operators of the Face Book of Sex affiliate network. An initial

1 investigation by Facebook uncovered more than 100 affiliate websites using infringing domain
2 names. Facebook’s investigation indicates that the network of affiliates using infringing
3 advertisements may be even more widespread. But efforts to uncover the ownership of these sites
4 have been frustrated by proxy service domain registration. *See, e.g.*, Norberg Decl. Ex. F. Even
5 for those sites with listed owners, such information is often inaccurate. *See, e.g.*, Draft Report for
6 the Study of the Accuracy of WHOIS Registrant Contact Information, ICANN, January 17, 2010,
7 (“only 23% of [WHOIS] records were fully accurate, but twice that number met a slightly relaxed
8 version of the criteria. . .”)¹. Moreover, absent discovery, there is no way for Plaintiff to identify
9 with certainty whether there are other infringing affiliate websites that were not identified as a
10 result of Facebook’s initial investigation.

11 By virtue of their financial arrangements with the Doe Defendants, Named Defendants
12 will necessarily have contact and payment information for these individuals or entities. Facebook
13 seeks early discovery of this information to amend its complaint and to expeditiously and
14 efficiently pursue its motion for a preliminary injunction against all Defendants. Accordingly,
15 Facebook respectfully request that the Court grant Facebook’s motion for expedited discovery
16 regarding the identity of the Doe Defendants.

17 **B. Good Cause Exists Because Expedited Discovery Will Help Plaintiff Establish**
18 **A More Complete Record In Support Of Its Anticipated Preliminary**
19 **Injunction Motion**

20 Facebook’s complaint requests injunctive relief, and Facebook intends to file a motion for
21 a preliminary injunction against all Defendants. Indeed, Facebook seeks expedited discovery in
22 order to accelerate resolution of its anticipated motion for a preliminary injunction by providing
23 the Court the necessary evidentiary record on which to issue an order to enjoin all infringing uses
24 of the FACEBOOK trademark, including infringement by the Doe Defendants. Courts have
25 allowed expedited discovery when a plaintiff is seeking injunctive relief. *See Ellsworth Assocs.,*
26 *Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996) (stating expedited discovery is
27 particularly appropriate in cases where plaintiff is seeking injunctive relief); *Edudata Corp. v.*

28 ¹ Available at <http://www.icann.org/en/compliance/reports/whois-accuracy-study-17jan10-en.pdf>.

1 *Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (holding that expedited
2 discovery should be granted because further development of the record before the preliminary
3 injunction hearing would better enable the court to judge the parties interests and respective
4 chances for success on the merits); *see also Am. Legalnet Inc. v. Davis*, 673 F. Supp. 2d 1063,
5 1066-67 (C.D. Cal. 2009).

6 While Named Defendants' scheme on its own provides a strong basis for this Court to
7 enter a preliminary injunction, details regarding the Named Defendants' affiliate network cannot
8 be easily ascertained from publicly available information. Absent discovery on the manner in
9 which the affiliate program is implemented and maintained, Plaintiff and the Court cannot fully
10 determine the most effective and reasonable method for enjoining the all infringing uses of the
11 FACEBOOK mark attributable to the affiliate network. Expedited discovery on the Named
12 Defendants' direct infringement of the FACEBOOK mark will also allow Facebook to present a
13 more complete evidentiary record when making its motion for preliminary injunction, by
14 allowing Facebook to present direct rather than circumstantial evidence on factors such as the
15 Named Defendants' intent in selecting the FACE BOOK OF SEX mark, and whether the Named
16 Defendants have encountered any instances of actual confusion. Accordingly, Facebook
17 respectfully requests that the Court grant Facebook's motion for expedited discovery on the topics
18 of the Named Defendants' direct infringement of the FACEBOOK Mark, and the related affiliate
19 program.

20 **C. Defendants Will Not be Unduly Prejudiced by Facebook's Discovery Requests**

21 Defendants will not be unduly prejudiced by Facebook's requests. In determining
22 whether a party will be unduly prejudiced by a request for expedited discovery, courts consider,
23 among other things, the reasonableness and breadth of the request, as well as when the party was
24 put on notice of the potential lawsuit. *Semitool*, 208 F.R.D. at 276-77.

25 Facebook's requests are both narrow and reasonable. Facebook is not requesting all
26 documents relevant to the claims made in its complaint. Instead, Facebook is only seeking a
27 small subset of relevant documents necessary to build the evidentiary record for Facebook's
28 anticipated preliminary injunction motion, and to identify and serve the Doe Defendants. Named

1 Defendant Various received notice of these claims long before this complaint was filed through
2 Facebook's correspondence and follow-up discussions. Complaint (D.I. 1), Ex. G; Norberg Decl.
3 Exs. K-L. Named Defendants cannot claim to have been caught unaware by this lawsuit.

4 Finally, even to the extent Facebook's request create a burden on Named Defendants, that
5 burden is heavily outweighed by the Plaintiff's interest in expeditiously ending the defendants'
6 infringing activities. The Named Defendants created the need for this early discovery by setting
7 up a blatantly infringing website and establishing strong incentives for third-parties to infringe
8 Facebook's Mark. Having enjoyed the financial benefits of establishing this network, defendants
9 cannot now complain that the burden associated with dismantling the network is somehow undue.

10 **D. Named Defendants' Changes to the Face Book Of Sex Website Do Not Render**
11 **Early Discovery Unnecessary**

12 The Named Defendants' changes to the Face Book Of Sex website, made after Plaintiff
13 filed this complaint, do not alleviate the need for early discovery or a preliminary injunction.
14 Shortly after this case was filed, Named Defendants altered the landing page of
15 www.facebookofsex.com to display the following message:



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28 Norberg Decl. Ex. G. Named Defendants have also introduced certain measures that prevent

1 some, but not all, of the Doe Defendants from sending traffic to the Named Defendants' sites.
2 *See, e.g.,* Norberg Decl. Ex. B. These changes do not alleviate the need for early discovery in
3 advance of a motion for preliminary injunction because the defendants' infringing activity has not
4 ceased, and there is no guarantee that Named Defendants will not resume their prior activities.
5 *See Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135-36 (9th Cir. 1986) (voluntary
6 cessation of infringing activity not grounds for denial of preliminary injunction absent some
7 guarantee that infringing activity would not restart).

8 Initially, the change to the www.facebookofsex.com website does nothing to remedy the
9 extensive infringement by the Doe Defendants, who continue to use infringing domains and
10 marks to direct traffic to the Named Defendants' sites. *See, e.g.,* Norberg Decl. ¶¶6-7 & Exs. D-
11 E. Plaintiff has identified over 100 similarly infringing domains. And, as is evident from the
12 screen print above, Named Defendants still allow users of the Face Book Of Sex website to log in
13 via the infringing domain www.facebookofsex.com.

14 In short, Plaintiff is continuing to be irreparably harmed despite the changes to the
15 www.facebookofsex.com website. Named Defendants continue to use the FACEBOOK mark as
16 a domain, and continue to benefit from the Doe Defendants' infringing activities.

17 **E. Facebook Has Satisfied Its Meet and Confer Obligation**

18 Finally, Facebook has satisfied its meet and confer obligations by engaging in lengthy
19 meet and confer sessions with opposing counsel, which have not resulted in a resolution of this
20 matter. The day after Facebook filed the Complaint in this action, Facebook sent David Bloom,
21 counsel for Defendant Various, Inc., a letter enclosing the complaint, and explaining that
22 Facebook intended to file a motion for expedited discovery and preliminary injunction if the
23 defendants did not take certain actions designed to ensure, among other things, that the third-party
24 infringement created by the defendants' affiliate program could be quickly stopped. Norberg
25 Decl. ¶13 & Ex. K. Following that call, the parties held a series of calls in an effort to resolve the
26 case without the need for further Court intervention, all but two of which are confidential and
27 subject to Federal Rule of Evidence 408. *Id.* ¶14. On April 18, 2011, counsel for the parties held
28 a meet and confer call in which Facebook noted that it would file a motion for expedited

1 discovery unless the defendants complied with the demands in its April 14 letter. *Id.* ¶15. The
2 defendants did not comply with those demands, but Facebook continued to discuss the possibility
3 of settlement nonetheless. When it became clear that the parties would not be able to settle the
4 matter, Facebook initiated a final meet and confer in an attempt to obtain the discovery requested
5 in this motion. *Id.* ¶16 & Ex. L. Those efforts failed, and this motion followed.

6 **V. CONCLUSION**

7 Good cause exists for the Court to order expedited discovery because it is necessary to
8 determine the identity of the Doe Defendants and the expedited discovery will provide the
9 necessary evidentiary record for the Court to adjudicate Plaintiff's preliminary injunction. Thus,
10 this Court should grant Plaintiff's motion for expedited discovery and permit Plaintiff to
11 immediately serve discovery attached to the Norberg Declaration on Named Defendants, and to
12 issue subpoenas and other discovery necessary to determine the true identities of the Doe
13 Defendants.

14
15 Dated: May 12, 2011

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