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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE POKEMON COMPANY
INTERNATIONAL, INC.,

Petitioner,

v.

SHOPIFY, INC.,

Respondent.

Case No. 16-mc-80272-KAW

**ORDER DENYING MOTION TO
COMPEL**

Re: Dkt. No. 1

On December 30, 2016, Petitioner The Pokémon Company International, Inc. ("Pokémon") filed a motion to compel compliance with a subpoena issued against Respondent Shopify, Inc. ("Shopify") (Pet.'s Mot., Dkt. No. 1.) The subpoena was issued in connection with The Pokémon Company International, Inc. v. Tee Turtle LLC, Case No. 2:15-cv-1419-RSL, a copyright infringement case currently pending in the Western District of Washington. (See Heilman Decl., Exh. B., Dkt. No. 3.) The Court deems the matter suitable for disposition without hearing pursuant to Civil Local Rule 7-1(b). Having considered the papers filed by the parties and the relevant legal authority, the Court DENIES the motion to compel, for the reasons set forth below.

I. BACKGROUND

Pokémon manufactures, markets, and distributes children's entertainment products based on characters such as Pikachu, Pokémon's principal mascot. (Heilman Decl., Exh. A, Tee Turtle Compl. ¶¶ 6, 14.) Tee Turtle is a St. Louis, Missouri-based online apparel retailer featuring designs derived from various anime, gaming, and pop culture properties. (Tee Turtle Compl. ¶ 21.) Tee Turtle's designs have incorporated various Pokémon characters, including Pikachu, Charmander, Eevee, Mew, Squirtle, Vulpix, and Bulbasaur. (Tee Turtle Compl., Exh. B.) In September 2015, Pokémon brought a copyright infringement suit against Tee Turtle for copyright

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1 infringement based on Tee Turtle's use of the Pokémon characters in its designs. (Heilman Decl. ¶
2 3.)

3 Shopify is a "cloud-based, multi-channel commerce platform" used by merchants to
4 design, set-up, and manage stores. (Zipes Decl. ¶ 1, Dkt. No. 7.) Pokémon believes that Tee
5 Turtle uses Shopify's services for its online sales. (Heilman Decl. ¶ 4.) Shopify is a Canadian
6 corporation, and its principal place of business is in Ottawa, Canada. (Zipes Decl. ¶ 3.) While
7 Shopify lists a San Francisco office on its website, Shopify asserts that the San Francisco office is
8 the principal place of business for Shopify's wholly-owned U.S. subsidiary, Shopify (USA) Inc.
9 (Zipes Decl. ¶ 4; Heilman Decl. ¶ 5, Exh. C.) Shopify further states that only one employee at
10 Shopify (USA) Inc. works on Shopify's e-commerce business, while the remaining employees
11 work on a mobile and messaging platform to help merchants run their businesses. (Zipes Decl. ¶
12 5.)

13 On September 6, 2016, Pokémon served a subpoena on Shopify at the then-current San
14 Francisco address. (Heilman Decl. ¶ 5, Exh. D.) The subpoena was served on "Jason Baker," who
15 allegedly represented that he was authorized to accept service. (Heilman Decl., Exh. D.) Shopify
16 asserts that neither Shopify nor Shopify (USA) Inc. has an employee named "Jason Baker,"
17 although Shopify (USA) Inc. does have an employee named "Josh Baker." (Zipes Decl. ¶ 6.) Josh
18 Baker is a front-end developer, and he is not an officer, manager, or general agent of either
19 Shopify or Shopify (USA) Inc., and lacks authority to accept service of process for Shopify.
20 (Zipes Decl. ¶ 6.)

21 After Shopify failed to respond to the subpoena, Pokémon's counsel, Mr. Garrett Heilman,
22 contacted Shopify via a phone number on Shopify's website. (Heilman Decl. ¶ 8.) Mr. Heilman
23 spoke with Freya Bauer, who informed him that Shopify did not have a legal team in the United
24 States, and directed counsel to e-mail legal@shopify.com. (Heilman Decl. ¶ 8.) On November 3,
25 2016, Mr. Heilman e-mailed Shopify at the provided address, identifying the subpoena and
26 attaching the proof of service. (Heilman Decl. ¶ 9, Exh. F.)

27 On November 4, 2016, Shopify's counsel, Erin Zipes, responded, stating that the
28 November 3, 2016 e-mail was the first time Shopify had seen the subpoena. (Heilman Decl., Exh.

1 G.) Ms. Zipes explained that Shopify was a Canadian corporation, and that it was subject to
2 Canadian privacy laws. Ms. Zipes also noted that enforcement of the subpoena "is contingent
3 upon authorization by the Court of territorial jurisdiction," and that it could not comply with the
4 subpoena "absent due process," although Shopify was willing "to comply with any properly issued
5 court order or subpoena" (Heilman Decl., Exh. G.)

6 On November 8, 2016, Mr. Heilman responded, noting Shopify's privacy concerns. Mr.
7 Heilman cited to the Federal Rules of Civil Procedure, and explained that Shopify had "subjected
8 itself to the personal jurisdiction of U.S. courts in California by conducting business there, directly
9 and/or through its U.S. affiliates, and registering agents there." (Heilman Decl., Exh. H.)

10 On November 14, 2016, Ms. Zipes informed Mr. Heilman that Shopify would comply with
11 any properly issued subpoena, but that if Pokémon "did not wish to have [its] subpoena issued by
12 a court of competent jurisdiction in Canada then at this time [Shopify was] unable to respond to
13 [Pokémon's] subpoena." (Heilman Decl., Exh. I.) Ms. Zipes also stated that if Shopify could
14 comply with the subpoena without breaching privacy obligations to its merchants, it would do so.

15 After further discussions by e-mail and phone, on December 6, 2016, Ms. Zipes explained
16 that Shopify would not respond to the subpoena because the subpoena was not properly served, as
17 the San Francisco address belonged to Shopify (USA) Inc. (Heilman Decl., Exh. N.) Further, Ms.
18 Zipes stated that there was no Jason Baker who worked there, and that Shopify (USA) Inc. was not
19 the owner or custodian of the information Pokémon was seeking. Finally, Ms. Zipes noted that
20 Shopify did have an agent for service of process in the United States, and that it could not
21 otherwise comply with the improperly served subpoena.

22 On December 30, 2016, Pokémon filed the instant motion to compel. (Dkt. No. 1.) On
23 January 13, 2017, Shopify filed its opposition, arguing that Pokémon's motion should be denied
24 because: (1) the Court lacks personal jurisdiction over Shopify, (2) Pokémon failed to properly
25 serve Shopify or Shopify (USA) Inc., and (3) assuming Pokémon properly served Shopify (USA)
26 Inc., Shopify (USA) Inc. lacks possession control of the subpoenaed records. (Resp.'s Opp'n at 1-
27 2, Dkt. No. 6.) On January 20, 2017, Pokémon filed its reply. (Pet.'s Reply, Dkt. No. 8.)
28

II. LEGAL STANDARD

1 Federal Rule of Civil Procedure 45 governs discovery propounded by subpoena. The
2 subpoena must state the place where compliance is required, which must be within 100 miles of
3 where the subpoenaed party resides, is employed, or regularly transacts business in person. Fed.
4 R. Civ. P. 45(a)(1)(A)(iii). Rule 45 requires that a subpoena be issued by the court where the
5 underlying action is pending, but that challenges to the subpoena are to be heard by the district
6 court where compliance with the subpoena is required. Fed. R. Civ. P. 45(a)(2), (d)(3)(A).

III. DISCUSSION

A. Jurisdiction

8
9 First, the Court finds that Pokémon's motion to compel must be denied because it lacks
10 jurisdiction over Shopify. "Federal courts ordinarily follow state law in determining the bounds of
11 their jurisdiction over persons." *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014). California's
12 long-arm statute permits the exercise of personal jurisdiction to the full extent allowed under the
13 United States constitution. *Id.*

14 "For the exercise of personal jurisdiction over a defendant, due process requires that the
15 defendant 'have certain minimum contacts' with the forum state 'such that the maintenance of the
16 suit does not offend traditional notions of fair play and substantial justice.'" *Ranza v. Nike, Inc.*,
17 793 F.3d 1059, 1068 (9th Cir. 2015). Personal jurisdiction can be either "general" or "specific."
18 See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984). With
19 respect to corporations, general jurisdiction exists where the corporations' "affiliations with the
20 State are so 'continuous and systematic' as to render them essentially at home in the forum state."
21 *Daimler*, 134 S. Ct. at 754 (internal quotation omitted). In other words, the corporations
22 "continuous corporate operations within a state are so substantial and of such a nature as to justify
23 suit against it on causes of action arising from dealings entirely distinct from those activities." *Id.*
24 (internal quotation omitted). By contrast, specific jurisdiction exists where the case "arises out of
25 or relates to the defendant's contacts with the forum." *Ranza*, 793 F.3d at 1068 (internal quotation
26 omitted).

i. General Jurisdiction

1 First, the parties dispute whether there is general jurisdiction over Shopify in California, as
2 Shopify is a Canadian corporation with its principal place of business in Ottawa, Canada. (See
3 Zipes Decl. ¶ 3.) Pokémon does not assert that there is general jurisdiction over Shopify based on
4 Shopify's contacts with California; instead, Pokémon argues that the contacts of Shopify (USA)
5 Inc. should be imputed to Shopify, its parent company. (Pet.'s Reply at 2.) The parties do not
6 dispute that the Court would have general jurisdiction over Shopify (USA) Inc.; indeed, Shopify
7 admits that Shopify (USA) Inc.'s principal place of business is in San Francisco, California.
8 (Zipes Decl. ¶ 4.) Thus, at issue is whether Shopify (USA) Inc.'s contacts may be imputed to
9 Shopify.

10 In general, "[t]he existence of a parent-subsidary relationship is insufficient, on its own, to
11 justify imputing one entity's contacts with a forum state to another for the purpose of establishing
12 personal jurisdiction." Ranza, 793 F.3d at 1070. This is because "[a] basic tenet of American
13 corporate law is that the corporation and its shareholders are distinct entities." Id. (quoting Dole
14 Food Co. v. Patrickson, 538 U.S. 468, 474 (2003)). The courts recognize, however, that "the veil
15 separating affiliated corporations may . . . be pierced to exercise personal jurisdiction over a
16 foreign defendant in certain limited circumstances." Id. at 1071.

17 The Ninth Circuit previously permitted a plaintiff to pierce the corporate veil for
18 jurisdictional purposes under two separate tests: an "agency" test and an "alter ego" test. Id.
19 Under the agency test, a plaintiff had to show that the subsidiary "performed services that were
20 sufficiently important to the foreign corporation that if it did not have a representative to perform
21 them, the corporation's own officials would undertake to perform substantially similar services."
22 Id. (internal quotation and modifications omitted). Under the alter ego test, the Court considers
23 "whether the parent and subsidiary are not really separate entities," such as by looking at the
24 parental control of the subsidiary's internal affairs or daily operations. Id. (internal quotation
25 omitted).

26 In Daimler, the Supreme Court invalidated the agency test for establishing general
27 jurisdiction, explaining that the focus on whether the subsidiary's services were important "stacks
28 the deck, for it will always yield a pro-jurisdiction answer: Anything a corporation does through

1 an independent contractor, subsidiary, or distributor is presumably something that the corporation
2 would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist."
3 134 S. Ct. at 759 (internal quotation omitted). Following Daimler, the Ninth Circuit has
4 recognized that the agency test is no longer available to establish jurisdiction over a parent
5 company, as "[s]uch a theory . . . sweeps too broadly to comport with the requirements of due
6 process." Ranza, 793 F.3d at 1071.

7 Pokémon asserts that Shopify (USA) Inc.'s contacts can be imputed to Shopify under the
8 alter ego test.¹ (Pet.'s Reply at 2-3.) Under the alter ego test, Pokémon "must make out a prima
9 facie case (1) that there is such unity of interest and ownership that the separate personalities of
10 the two entities no longer exist and (2) that failure to disregard their separate identities would
11 result in fraud or injustice." Ranza, 793 F.3d at 1073 (internal quotation and modifications
12 omitted). The first prong "requires a showing that the parent controls the subsidiary to such a
13 degree as to render the latter the mere instrumentality of the former." Id. (internal quotation
14 omitted). In short, the parent must exercise pervasive control, i.e., "when a parent corporation
15 dictates every facet of the subsidiary's business – from broad policy decisions to routine matters of
16 day-to-day operation." Id. (internal quotation omitted). Notably, "[t]otal ownership and shared
17 management personnel are alone insufficient to establish the requisite level of control." Id. Thus,
18 even when a parent corporation is involved directly in decision-making about its subsidiary's
19 holdings, but the entities still observe the corporate formalities necessary to maintain corporate
20 separateness, a plaintiff does not meet the alter ego test. Id.

21 In Doe v. Unocal Corp., the Ninth Circuit found that the plaintiff did not make a prima
22 facie case of alter ego where the plaintiff showed that the parent corporation was involved in its
23 subsidiaries' acquisitions, divestments, and capital expenditures; formulated general business
24 policies and strategies applicable to its subsidiaries; provided loans and other types of financing to
25 its subsidiaries; maintained overlapping directors and officers with its subsidiaries; and referred to

26 _____
27 ¹ The Court assumes that Pokémon does not attempt to assert the agency test to establish general
28 jurisdiction, given the Supreme Court's Daimler decision. To the extent Pokémon is asserting the
agency test to establish general jurisdiction, the Court rejects any such argument in light of
Daimler and Ranza.

1 subsidiaries as divisions of the parent company in its annual report. 248 F.3d 915, 927-28 (9th
2 Cir. 2001). In Ranza, the Ninth Circuit likewise found that the plaintiff did not satisfy the alter
3 ego test where the plaintiff presented no evidence that the parent company and subsidiary failed to
4 observe their respective corporate formalities. 793 F.3d at 1074. There, the Ninth Circuit
5 acknowledged that the parent corporation was "heavily involved" in its subsidiary's operations,
6 including controlling the subsidiary's overall budget, having approval authority for large
7 purchases, establishing general human resource policies, being involved in some hiring decisions,
8 operating information tracking systems that all subsidiaries used, and ensuring that its brand was
9 marketed consistently throughout the world. *Id.* This level of involvement, however, was
10 insufficient to show that the entities failed to observe separate corporate formalities, particularly
11 where the subsidiary negotiated its own contracts and licenses, made routine purchasing decisions
12 without the parent corporation's consultation, and had its own human resources division that
13 handled day-to-day employment issues, including hiring and firing. *Id.*

14 Here, Pokémon asserts that Shopify and Shopify (USA) Inc. do not have separate
15 personalities because: (1) Shopify listed the San Francisco office on its website without making
16 any mention of a separate entity; (2) the two entities share the same principal officers and
17 executives,² as well as legal counsel; and (3) the two entities collect information under the same
18 privacy policy. (Pet.'s Reply at 2-3.) This showing, however, is inadequate to establish the
19 requisite level of control required to satisfy the alter ego test; there is no evidence that Shopify and
20 Shopify (USA) Inc. do not observe their respective corporate formalities. As discussed in Unocal
21 and Ranza, overlap in officers and use of general business policies alone is insufficient to establish
22 a prima facie case; similarly, the fact that Shopify lists the San Francisco office without
23 mentioning that it is a separate entity is not evidence that Shopify exercises day-to-day control
24 over Shopify (USA) Inc. Cf. *Maple Leaf Adventures. Corp. v. Jet Tern Marine Co., Ltd.*, Case No.

25 _____
26 ² In support of this argument, Pokémon provides a copy of the Statement of Information for
27 Shopify (USA) Inc., which lists Shopify (USA) Inc.'s corporate officers. (1/20/17 Heilman Decl. ¶
28 6, Exh. C, Dkt. No. 9.) Pokémon fails, however, to identify who Shopify's corporate officers are;
thus, the Court is unable to determine if the corporate officers do in fact overlap. For the sake of
argument, the Court will assume that there is complete overlap of management between Shopify
and Shopify (USA) Inc.

1 15-cv-2504-AJB-BGS, 2016 WL 3063956, at *4, 8 (S.D. Cal. Mar. 11, 2016) (finding inadequate
2 evidence of an alter ego relationship where the subsidiary held itself out as "Selene Ocean
3 Trawlers," the same name under which the parent corporation did business; the "About Selene"
4 section was exclusively devoted to the parent corporation's history; the subsidiary's website held
5 itself out as the factory direct representative for the parent corporation's products; the parent
6 corporation's CEO was listed first on the subsidiary's website; and the parent corporation
7 advertised the subsidiary's opening). Because there is no showing that the corporate separation
8 between Shopify and Shopify (USA) Inc. is not real, Pokémon has not satisfied the "unity of
9 interest and ownership" prong of the alter ego test, and the Court need not analyze the "fraud or
10 injustice" prong. See Ranza, 793 F.3d at 1075 n.9. The Court concludes that Pokémon has failed
11 to satisfy the alter ego test, and therefore the Court lacks general jurisdiction over Shopify.

12 **ii. Specific Jurisdiction**

13 Next, the parties dispute whether the Court has specific jurisdiction over Shopify. In order
14 to establish specific jurisdiction, the Ninth Circuit applies a three-prong test:

- 15 (1) The non-resident defendant must purposefully direct his
16 activities or consummate some transaction with the forum or
17 resident thereof; or perform some act by which he purposefully
18 avails himself of the privilege of conducting activities in the
19 forum, thereby invoking the benefits and protections of its laws;
20 (2) the claim must be one which arises out of or relates to the
21 defendant's forum-related activities; and
22 (3) the exercise of jurisdiction must comport with fair play and
23 substantial justice, i.e. it must be reasonable.

24 Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (internal quotation
25 omitted).

26 Here, Pokémon contends that Shopify has contacts to California via its subsidiary, Shopify
27 (USA) Inc., as well as by listing the San Francisco office as a Shopify address and by having an
28 annual conference for its partners and developers in San Francisco. (Pet.'s Reply at 4-5.)
Pokémon further argues that the subpoena arises out of or results from Shopify's contacts in the
forum. (Id. at 5.) The Court disagrees that the subpoena arises out of or results from Shopify's
contacts in the forum. Pokémon seeks documents relating to inventory information of and
merchandise sold by Tee Turtle, a Missouri corporation, in connection with the copyright

1 infringement lawsuit filed in Washington based on harms suffered by Pokémon in Washington.
2 (Tee Turtle Compl. ¶¶ 2, 4.) Thus, the subpoena arises solely out of Shopify's relationship with
3 Tee Turtle, a Missouri corporation, not with any California contacts. The activities of Shopify
4 (USA) Inc., which works on a messaging platform, and the annual conference held by Shopify in
5 San Francisco, are wholly irrelevant to this underlying copyright infringement lawsuit. The Court
6 therefore concludes that Pokémon has failed to establish specific jurisdiction as well. Because the
7 Court lacks personal jurisdiction over Shopify, the Court DENIES Pokémon's motion to compel.

8 **B. Service**

9 Even assuming that the Court had personal jurisdiction over Shopify, the Court finds that
10 Pokémon's motion to compel must also be denied because Pokémon has failed to effect proper
11 service on Shopify.

12 "If the subpoena commands the production of documents, electronically stored
13 information, or tangible things or the inspection of premises before trial, then before it is served on
14 the person to whom it is directed, a notice and a copy of the subpoena must be served on each
15 party." Fed. R. Civ. P. 45(a)(4); see also Fed. R. Civ. P. 45 advisory committee note (1991) ("The
16 purpose of such [prior] notice is to afford other parties an opportunity to object to the production
17 or inspection, or to serve a demand for additional documents or things."). "Under Federal Rule of
18 Civil Procedure . . . 45(b), a subpoena directed to a corporation or unincorporated association may
19 be served by delivering a copy to an officer, managing agent, general agent, or any other agent
20 authorized by appointment or by law, and mailing a copy to the defendant." *NGV Gaming, Ltd. v.*
21 *Upstream Point Molate, LLC*, No. C-04-3955 SC (JCS), 2009 WL 428550, at *2 (N.D. Cal. Nov.
22 24, 2009).

23 **i. Agency**

24 First, Pokémon argues that Shopify should be deemed to have been served because it
25 served the subpoena on Shopify (USA) Inc. (Pet.'s Mot. at 6; Pet.'s Reply at 8.) "Under California
26 law, a foreign corporation may be served by serving the foreign corporation's 'general manager in
27 this state.'" *Halo Elecs., Inc. v. Bel Fuse Inc.*, 2010 WL 2605195, at *1 (N.D. Cal. June 28, 2010)
28 (quoting Cal. Corp. Code § 2110). Service on a general manager is satisfied where "the agent

1 served is of sufficient character and rank to make it reasonably certain that the defendant will be
2 appraised of the service made." *Id.* (quoting *Cosper v. Smith & Wesson Arms Co.*, 53 Cal. 2d 77,
3 83 (1959)). Several courts have found service of an initial complaint and summons served on a
4 California agent to be sufficient where the agent was affiliated with the parent corporation as an
5 intended outlet, sales agent, or distributor, although at least one court has questioned whether
6 service on a California agent would be adequate for "a Rule 45 subpoena, which has service
7 requirements that courts have construed more narrowly" *Fujikura Ltd. v. Finisar Corp.*, Case
8 No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *6 (N.D. Cal. Oct. 5, 2015).

9 Ultimately, the Court need not decide whether Shopify (USA) Inc. is Shopify's agent
10 because the Court finds that Pokémon failed to properly serve Shopify (USA) Inc. Here, Pokémon
11 served "Jason Baker," who apparently stated that he was authorized to accept service. (Heilman
12 Decl., Exh. D.) Shopify asserts, and Pokémon does not dispute, that there is no Jason Baker who
13 works for either Shopify or Shopify (USA) Inc, only a Josh Baker. (Resp.'s Opp'n at 11-12.)
14 Thus, it is not clear Pokémon even served an employee of Shopify (USA) Inc. Even assuming that
15 Pokémon in fact served Josh Baker, there is no showing that Mr. Baker is authorized to accept
16 service as he is not an officer or a designated agent of Shopify (USA) Inc.³ (*Id.*) Thus, the Court
17 concludes that Shopify cannot be deemed to have been served by virtue of service on Shopify
18 (USA) Inc., as Pokémon failed to properly serve Shopify (USA) Inc.

19 **ii. Ostensible Authority**

20 Next, Pokémon contends that Shopify is still bound by service on Jason Baker because it
21 identified the San Francisco office as its own on its website, and did not contest service until
22 December, following a month of meet-and-confer process. (Pet.'s Mot. at 7, Pet.'s Reply at 7.)
23 Thus, Pokémon asserts that Shopify imbued Jason Baker with "ostensible authority." (*Id.*)

24 California Civil Code § 2317 defines ostensible authority as "such as a principal,
25 intentionally or by want of ordinary care, causes or allows a third person to believe the agent to
26 possess." Further, "[o]stensible authority must be established through the acts or declarations of
27

28 ³ Josh Baker is not listed as an officer or agent for service of process on Shopify (USA) Inc.'s
Statement of Information. (1/20/17 Heilman Decl., Exh. C.)

1 the principal and not the acts or declarations of the agent." *Preis v. Am. Indem. Co.*, 220 Cal. App.
2 3d 752, 761 (1990). Where a principal knows that the agent held "himself out as clothed with
3 certain authority, and remains silent, such conduct on the part of the principal may give rise to
4 liability." *Id.*

5 The Court disagrees that Pokémon has established ostensible authority. While Pokémon
6 argues that Shopify was "silent" about service and therefore "imbued Mr. Baker with ostensible
7 authority," the e-mail record is to the contrary. (Pet.'s Mot. at 7.) In Ms. Zipes's first e-mail
8 response to Mr. Heilman's query about the subpoena, she states in the very first paragraph that "we
9 have no 'Jason Baker' who works at Shopify," thus contradicting any alleged statement by Jason
10 Baker that he had authority to accept service. (Heilman Decl., Exh. G.) While Shopify may not
11 have explicitly challenged service, by stating that the individual who allegedly received service
12 was not an employee of Shopify, Shopify was denying the basis of service (i.e., that Pokémon had
13 served Shopify by serving Jason Baker). From that point on, Pokémon was on notice that service
14 might not be proper. The Court therefore rejects Pokémon's ostensible authority argument.

15 **iii. Actual Notice**

16 Finally, Pokémon argues that Shopify should be compelled to comply with the subpoena
17 because it received actual notice of the subpoena when Mr. Heilman e-mailed Shopify on
18 November 3, 2016, informing them of the subpoena. (Pet.'s Reply at 9.) In support, Pokémon
19 cites to *Chan v. Society Expeditions, Inc.*, where the Ninth Circuit found that under Rule 4, service
20 of a complaint was sufficient where the plaintiff personally served the owner and president of the
21 defendant corporation, but had failed to mention his status as the owner and president of the
22 defendant corporation in the affidavit of service. 39 F.3d 1398, 1404 (9th Cir. 1994). The Ninth
23 Circuit found that this "technical defect . . . d[id] not justify dismissal unless a party is able to
24 demonstrate actual prejudice." *Id.*

25 Chan is inapposite. First, it concerns service of an initial complaint and summons under
26 Rule 4, not a subpoena under Rule 45. See *Fujikura Ltd.*, 2015 WL 5782351, at *6 (noting that
27 the service requirements of a Rule 45 subpoena have been construed more narrowly than service
28 of an initial complaint and summons). Second, Chan involved actual service on the owner and

1 president, with the "technical defect" being the failure to identify his status as owner and president
2 on the affidavit of service. See 39 F.3d at 1404. The instant case involves a far different situation
3 where Shopify was possibly never served, as the service was on an individual who may not have
4 even worked for Shopify or Shopify (USA) Inc., and in any case, lacked the authority to accept
5 service. This is far from a "technical defect" that Pokémon asserts; this would constitute failure to
6 serve altogether.

7 Moreover, the Court rejects Pokémon's contention that "actual notice" alone is sufficient to
8 require compliance with a subpoena that is not properly served. See Fujikura Ltd., 2015 WL
9 5782351, at *7 (finding that the defendant's "insistence that . . . notice is enough for a complaint
10 and therefore must be enough for a subpoena is wrong"). Taking this argument to its logical
11 extreme, service would never be needed because no one would be able to oppose a motion to
12 compel a response to a subpoena on the basis of failure to serve as the motion to compel itself
13 would give the respondent actual notice of the subpoena. Pokémon cites no authority for such a
14 proposition, and the Court finds it, to use a Pokémon term, quite Farfetch'd indeed.

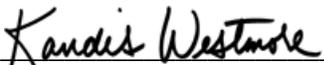
15 The Court therefore concludes that the motion to compel must be denied because the
16 subpoena was not properly served on Shopify.

17 **IV. CONCLUSION**

18 For the reasons stated above, the Court DENIES Pokémon's motion to compel because it
19 lacks jurisdiction over Shopify, and because the subpoena was not properly served on Shopify.⁴

20 IT IS SO ORDERED.

21 Dated: February 22, 2017

22 
23 _____
KANDIS A. WESTMORE
United States Magistrate Judge

24
25
26
27
28 _____
⁴ Given these deficiencies, the Court need not determine whether Shopify (USA) Inc. has possession or custody of the records being sought, or the legal right to demand them.