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10  
 11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN JOSE DIVISION  
 14

15 ZYNGA GAME NETWORK INC., a Delaware  
 Corporation,  
 16  
 17 Plaintiff,  
 18 v.  
 19 JASON WILLIAMS, an individual, LUNA  
 MARTINI, an individual, and JOHN DOES 1-5  
 20 D/B/A MW GROUP  
 21 Defendants.

**CASE NO. CV-10:01022 JF (PVTx)**  
  
**PLAINTIFF ZYNGA GAME NETWORK  
 INC.'S MOTION FOR LEAVE TO  
 CONDUCT THIRD PARTY DISCOVERY;  
 AND**  
  
**MEMORANDUM OF POINTS AND  
 AUTHORITIES**  
  
**NO HEARING DATE REQUESTED**

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**MOTION**

Plaintiff Zynga Game Network Inc. (“Zynga”) hereby moves the Court for an order authorizing it to conduct third party discovery to discover the true identities and locations of defendants Jason Williams, Luna Martini and John Does 1-5, d/b/a “MW Group” (collectively “Defendants”). This motion is based on the Motion, the supporting Memorandum of Points and Authorities, the Declarations of Sean Hanley and Tara D. Rose, the [Proposed] Order, all pleadings on file in this action, and any other matter that may be submitted in support of the motion.

**ISSUE TO BE DECIDED**

Whether Zynga shall be granted leave to conduct third party discovery to determine the true identities and locations of Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Zynga Game Network Inc. (“Zynga”) respectfully requests leave to conduct the discovery necessary to confirm the true identities and locations of the Defendants in this action (the “Action”). Defendants have established one or more unauthorized and illegal websites through which they unlawfully sell various virtual in-game digital items for use in Zynga’s online game Mafia Wars. To stop Defendants’ illegal activities, Zynga filed the Action and is seeking damages and injunctive relief under the Lanham Act, the Computer Fraud and Abuse Act, the California Unfair Business Practices statute, California Penal Code § 502 and California common law.

Defendants have taken steps to conceal their true identities and locations from Zynga. However, operation of Defendants’ websites through which they conduct their infringing conduct requires the services of legitimate, independent companies to which Defendants must provide some accurate information regarding their identities and locations, including contact and billing information. Zynga seeks leave to conduct discovery of these non-party entities in order to identify, locate and serve Defendants with process pursuant to Federal Rule of Civil Procedure 4.

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1 **II. FACTS**

2 **A. Defendants' Unlawful and Infringing Conduct**

3 Zynga is the largest social gaming company, providing, *inter alia*, online poker games, word  
4 games, board games, role playing games and party games including Zynga Poker, Mafia Wars,  
5 YoVille, Vampires, Street Racing, Scramble and Word Twist. (Declaration of Sean Hanley  
6 (“Hanley Decl.”) ¶ 2.) Zynga’s games are available on Facebook, MySpace, Bebo, Hi5, Friendster,  
7 Tagged, Yahoo!, the iPhone and iPod Touch, among others. (*Id.*)

8 Zynga’s games have been a runaway success. (Hanley Decl. ¶ 3.) One of Zynga’s most  
9 popular properties is Mafia Wars (the “Game”), a computer game for use on wireless devices and  
10 computers that allows users to start a Mafia family with their friends and compete to become the  
11 most powerful family. (*Id.* ¶ 4.) Zynga has made use of the service mark MAFIA WARS in  
12 commerce since September 2008. (*Id.* ¶ 5.) Zynga has made use of the trademark MAFIA WARS  
13 in commerce since April 2009. (*Id.*) (The MAFIA WARS trademark and service mark are referred  
14 herein collectively as the “Mark”.) Zynga currently owns United States Federal Trademark  
15 Application Serial No. 77772110 for the Mark MAFIA WARS in International Class 009 for  
16 downloadable computer game software for use on wireless devices and computers, and International  
17 Class 041 for entertainment services, namely, providing on-line computer games. (*Id.* ¶ 6.)

18 Zynga’s success and the success of its MAFIA WARS Mark have been widely reported in  
19 the press, on the Internet and in blogs. (Hanley Decl. ¶ 7.) As of February, 2009, the Game had  
20 over 1.1 million daily active users. (*Id.*) As of July, 2009, the Game had more than 4 million daily  
21 active users. (*Id.*) As of December, 2009, the Game had over 7 million daily active users. (*Id.*)  
22 Zynga makes the Game available through social networking websites and applications (collectively  
23 “Providers”), including but not limited to the Providers identified above. (*Id.* ¶ 8.)

24 Zynga owns or leases the computer servers that players must access in order to play the  
25 Game. (Hanley Decl. ¶ 9.) Zynga grants players who participate in the Game a revocable license to  
26 access its servers for the purpose of playing the Game. (*Id.*) Zynga’s Terms of Service govern  
27 users’ play of the Game, and players who use the Game must consent to the Terms of Service. (*Id.* ¶

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1 10.) Players who use the Game in a manner not expressly authorized by Zynga, including without  
2 limitation in violation of the Terms of Service, are not authorized to participate in the Game, or to  
3 access Zynga’s servers. (*Id.* ¶ 11.)

4 When users sign up with Zynga to play the Game, they receive a certain amount of “Virtual  
5 Currency” that they use to compete in the Game with other players using the Providers’ sites and/or  
6 applications. (Hanley Decl. ¶ 12.) Players can increase their total amount of “Virtual Currency”  
7 through their play, and can also purchase “Virtual Currency” from Zynga. Players use “Virtual  
8 Currency” to purchase various virtual, in-Game digital items (“Virtual Goods”). (*Id.* ¶ 13.) Players  
9 can also earn “Virtual Goods” by doing “jobs” and otherwise playing the Game. (*Id.*) Zynga grants  
10 players a limited, revocable license to use the “Virtual Currency” or “Virtual Goods” while playing  
11 the Game, but retains sole and exclusive ownership of the “Virtual Currency” or “Virtual Goods”  
12 and the source code that allows the “Virtual Currency” or “Virtual Goods” to be used in the Game.  
13 (*Id.* ¶ 14.) Zynga has not authorized any third party to sell the “Virtual Currency” or “Virtual  
14 Goods” required to play the Game. (*Id.* ¶ 15.) Among other things, the Terms of Service that  
15 govern users’ play of the Game prohibit users from selling “Virtual Currency” or “Virtual Goods”  
16 for real-world money or otherwise exchanging “Virtual Currency” or “Virtual Goods” for anything  
17 of value outside the Game. (*Id.* ¶ 16.)

18 Without Zynga’s authorization or approval, Defendants have created and currently operate  
19 websites at the Internet domain names MAFIAWARSDIRECT.COM, MWBLACKMARKET.COM  
20 and MWFEXPRESS.COM (the “Infringing Websites” or the “Domain Names”), possibly among  
21 others. (Hanley Decl. ¶ 17.) Through the Infringing Websites, Defendants “sell” “Virtual Goods”  
22 that users, playing the Game through the Providers’ websites and/or applications, can use to compete  
23 with other players who obtained their “Virtual Goods” directly from Zynga. (*Id.* ¶ 18.) Defendants  
24 advertise and “sell” these “Virtual Goods” using the MAFIA WARS Mark and/or confusingly  
25 similar misspellings or variations of the MAFIA WARS Mark. (*Id.* ¶ 19.) Defendants “sell”  
26 “Virtual Goods” for use in the Game for real-world money, and at prices that are substantially lower  
27 than the prices paid by users who obtain their “Virtual Goods” from Zynga. (*Id.* ¶ 20.) Defendants  
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1 have used the Game itself as part of their scheme, transferring the “Virtual Goods” they “sell” during  
2 game play in contravention of the Game’s terms of service and/or security measures, and in violation  
3 of the license they received from Zynga to participate in the Game. (*Id.* ¶ 21.) Zynga has never  
4 authorized Defendants to use the Mark or to “sell” “Virtual Goods” for use in the Game, nor has  
5 Zynga authorized Defendants to use the Game to transfer “Virtual Goods” that Defendants have  
6 “sold” to players through the Infringing Websites. (*Id.* ¶ 22.)

7 **B. Third Parties with Information Regarding Defendants’ Identities and locations**

8 Like many bad actors on the Internet, Defendants have taken one or more steps to conceal  
9 their identities and locations, making it impossible for Zynga to identify, locate and serve them with  
10 process without discovery. (Hanley Decl. ¶ 23.) However, because Defendants are operating an  
11 online business, they can be traced through the legitimate companies that provide the services upon  
12 which they rely. (*Id.* ¶ 24.) Zynga seeks authorization to issue subpoenas to these third parties for  
13 information that will allow it to identify, locate and serve Defendants. The specific third parties  
14 Zynga seeks authorization to subpoena are identified below, along with a brief discussion of the  
15 relevance of each third party to Zynga’s investigation.

16 **1. GoDaddy.com, Inc.**

17 Defendants have contracted with Internet service provider GoDaddy.com, Inc. (“GoDaddy”)  
18 for domain name registration services in connection with the Domain Names. (Hanley Decl. ¶ 25,  
19 Exs. 1-3.) GoDaddy is likely to have contact and billing information that will help Zynga to identify  
20 and locate Defendants. (*Id.* ¶ 25.) GoDaddy may also have information about other domain names  
21 that Defendants have registered, which may provide additional clues as to their identities and  
22 locations (for example if they maintain personal websites that provide additional, valid information  
23 about their identities or locations, or about other third parties with whom they do business). (*Id.*)

24 **2. Microsoft Office Live.**

25 Defendants have contracted with Internet service provider Microsoft Office Live  
26 (“Microsoft”) for website hosting services in connection with the Domain Names. (Hanley Decl. ¶  
27 265, Exs. 4-6.) Microsoft is likely to have contact and billing information that will help Zynga to  
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1 identify and locate Defendants. (*Id.* ¶ 26.) Microsoft may also have information about other domain  
2 names that Defendants are hosting through Microsoft, which may provide additional clues as to their  
3 identities and locations (for example if they maintain personal websites that provide additional, valid  
4 information about their identities or locations, or about other third parties with whom they do  
5 business). (*Id.*)

### 6 **3. PayPal, Inc.**

7 Defendants may have contracted with PayPal, Inc. to process payments for sales they made  
8 through the Infringing Websites. (Hanley Decl. ¶ 27, Exs. 7-8.) PayPal identifies its customers’  
9 accounts by one or more email addresses the customers provide when they establish their accounts.  
10 (*Id.* ¶ 28.) Defendants used the email addresses [mafiawarsblackmarket@gmail.com](mailto:mafiawarsblackmarket@gmail.com),  
11 [mwfexpress@gmail.com](mailto:mwfexpress@gmail.com), [mafiawarsdirect@gmail.com](mailto:mafiawarsdirect@gmail.com), [jwilliams1980@ymail.com](mailto:jwilliams1980@ymail.com) and  
12 [lmartini888@gmail.com](mailto:lmartini888@gmail.com) to carry on business through the Infringing Websites. (*Id.* ¶ 29, Exs. 1-3, 8-  
13 10.) Because Defendants used these email addresses to carry on their unlawful business, it is likely  
14 that they established one or more PayPal accounts related to their business using any or all of these  
15 email addresses. (Hanley Decl. ¶ 30.) PayPal is likely to have information regarding Defendants’  
16 true identities and locations. (*Id.* ¶ 31.) Information obtained from PayPal is likely to be accurate  
17 because Defendants rely on PayPal to provide them with the money their customers pay for the  
18 “Virtual Goods” Defendants sell. (*Id.*)

## 19 **III. ARGUMENT**

20 Zynga seeks leave of the Court to conduct limited discovery to determine the true identities  
21 and locations of Defendants so that they can be served with legal process. The Ninth Circuit permits  
22 discovery to determine the identity of unknown defendants. “Where the identity of alleged  
23 defendants will not be known prior to the filing of a complaint[,] . . . the plaintiff should be given an  
24 opportunity through discovery to identify the unknown defendants, unless it is clear that discovery  
25 would not uncover the identities, or that the complaint would be dismissed on other grounds.”  
26 *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980); *see also Wakefield v. Thompson*, 177 F.3d

1 1160, 1163 (9th Cir. 1999) (relying on *Gillespie* in reversing district court’s dismissal of Doe  
2 complaint).

3 In *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), this Court  
4 outlined a four-part framework for a party’s motion for leave to conduct discovery to confirm the  
5 identities and locations of “Doe” Defendants. *Id.* at 578-80. The *Seescandy.com* framework  
6 requires that the moving party: (1) identify the Defendants with enough specificity to allow the  
7 Court to determine whether the Defendants are a real person or entity who could be sued in federal  
8 court; (2) recount the steps taken to locate the defendant; (3) show that its action could survive a  
9 motion to dismiss; and (4) file a request for discovery with the Court identifying the persons or  
10 entities on whom discovery process might be served. *Id.* Zynga seeks limited discovery in this case  
11 pursuant to the *Gillespie* rule and the *Seescandy.com* framework, and respectfully asks the Court to  
12 grant Zynga leave to conduct limited discovery to locate and identify Defendants.

13 **A. Defendants Are Real Persons or Entities**

14 Under *Seescandy.com*, Zynga must first identify Defendants with sufficient specificity such  
15 that the Court can determine that Defendants are real persons or entities that could be sued in federal  
16 court. 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430  
17 n.24 (9th Cir. 1977)). Here, Defendants are individuals or entities who have created and operate the  
18 Infringing Websites in violation of federal and state law. They can be identified through the various  
19 third parties whose services they must obtain in order to operate their business. Defendants are  
20 subject to suit in federal court as they have committed violations of federal law and violations of  
21 state laws over which this Court has jurisdiction in this case.

22 **B. Zynga has Taken Steps to Identify Defendants**

23 The second *Seescandy.com* requirement is that Zynga “identify all previous steps taken to  
24 locate the elusive Defendants.” *Seescandy.com*, 185 F.R.D. at 579 (citing *Plant v. Does*, 19 F. Supp.  
25 2d 1316, 1320 (S.D. Fla. 1998). To date, Zynga has undertaken significant efforts to discover  
26 Defendants’ identities. (Hanley Decl. ¶ 32.) Since discovering the existence of the Infringing  
27 Websites, Zynga has analyzed publicly-available information about the Infringing Websites and the  
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1 Domain Names to identify the third parties who are likely to possess information that will allow it to  
2 confirm Defendants' identities and locations. (*Id.*) This has included examining information in the  
3 public Whois Internet domain name database, analyzing the links to third party websites or  
4 applications on the Infringing Websites identified in the Complaint, and examining the source code  
5 of the Infringing Websites. (*Id.*) The types of third parties Zynga has identified through its analysis  
6 generally will not or cannot disclose information for their customers without a subpoena or other  
7 legal authorization. (*Id.* ¶ 33.)

8 Zynga unsuccessfully attempted to serve Defendants at the physical addresses listed for  
9 Defendants in the Whois database information Domain History for the domain names  
10 MWBLACKMARKET.COM and MWFEXPRESS.COM. (*See* Declaration of David K. Caplan  
11 ("Caplan Decl.") ¶¶ 2-4.) The physical address listed in the Whois database information for  
12 MWBLACKMARKET.COM is not a home or business address for Defendants, but rather is a UPS  
13 Depot from which cargo trucks and vans are dispatched. (*See* Caplan Decl. ¶ 2, Ex. 1.) The physical  
14 address listed in the Whois database information for MWFEXPRESS.COM does not exist in the city  
15 listed for the domain name. (*See id.* ¶ 3, Ex. 2.) The physical address listed in the Whois database  
16 information for MAFIAWARSDIRECT.COM is for Indiana University East and the Whois database  
17 address did not include a suite, dorm or office number necessary to locate a person or entity at the  
18 University. (*See id.* ¶ 4-5, Exs. 3-4.)<sup>1</sup>

19 At this point, Zynga has largely exhausted the publicly-available information available to it  
20 regarding Defendants and the Infringing Websites. (*Id.* ¶ 34.) Additional information that will allow  
21 Zynga to identify, locate and serve Defendants will be available to Zynga only once it has Court  
22 authorization to compel the production of such information through the service of subpoenas. (*Id.* ¶  
23 35.)

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<sup>1</sup> Therefore, Zynga did not attempt to serve Defendants at this address.

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1 **C. Zynga’s Action can Withstand a Motion to Dismiss**

2 The third *Seescandy.com* factor requires Zynga to establish, to the Court’s satisfaction, that  
3 its action against Defendants can withstand a motion to dismiss. *Seescandy.com*, 185 F.R.D. at 579  
4 (citing *Gillespie*, 629 F.2d at 642). More specifically, Zynga “must make some showing that an act  
5 giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific  
6 identifying features of the person or entity who committed that act.” *Id.*

7 Zynga’s Action meets this requirement because Defendants have committed various  
8 copyright violations and/or trademark and service mark violations, in addition to violations of other  
9 state and federal laws, through their creation and operation of the publicly-available Infringing  
10 Websites. Defendants have inappropriately used the Mark MAFIA WARS in their commercial  
11 ventures. Discovery from the third-parties identified in Part II above is specifically aimed at  
12 identifying Defendants using the existing business records of companies that have contracted with  
13 Defendants in connection with their unlawful activities.

14 Zynga has thoroughly and sufficiently pled each and every one of its causes of action against  
15 Defendants in the Complaint in this action, and has provided additional factual information  
16 regarding its claims in support of this Motion. Zynga is confident that once it has identified and  
17 served Defendants, it will succeed in proving Defendants’ liability for violations of the federal  
18 Lanham Act, the Computer Fraud and Abuse Act, and of California statutory and common law, and  
19 will be able to successfully oppose any motion to dismiss.

20 **D. Limited Discovery Directed Toward Specific Third Parties Will Likely Allow Zynga to**  
21 **Identify and Serve Defendants**

22 The final *Seescandy.com* factor requires Zynga to support its request for discovery with  
23 reasons justifying the specific discovery requested, as well as identification of a limited number of  
24 persons or entities on whom discovery process might be served. *Seescandy.com*, 185 F.R.D. at 580  
25 (citing *Gillespie*, 629 F.2d at 642). Zynga must demonstrate that “there is a reasonable likelihood  
26 that the discovery process will lead to identifying information about Defendants that would make  
27 service of process possible.” *Id.*

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1 Zynga proposes to subpoena the above-described entities identified in Part II above for name  
2 and contact information, billing records, website content, server logs (which, among other things, are  
3 likely to contain Internet Protocol addresses that help to confirm Defendants' locations), and  
4 correspondence for Defendants. Such discovery will likely allow Zynga to identify and name  
5 Defendants because Defendants are likely to have provided those entities with at least some accurate  
6 information regarding their identities and locations. The contemporaneous issuing of subpoenas to  
7 these different entities will help Zynga to determine whether the information it receives from any  
8 one of these third parties is likely to be genuine, or if Defendants have sought to further conceal their  
9 identity by providing these third parties with false, mismatched personal and billing information.

10 Zynga also recognizes that the entities it has identified to date may be only the first step in an  
11 investigation that requires the issuance of follow-up subpoenas to identify Defendants' true identity  
12 and location. For example, Defendants may have used email addresses other than those to which  
13 Zynga is aware to establish their PayPal accounts. While Defendants listed five different email  
14 addresses in the public Whois Internet domain name database and on the web pages located at the  
15 Domain Names, it is reasonable to believe that they have used other email addresses in connection  
16 with the Domain Names to carry on their business. Therefore, if a subpoena to a third party Zynga  
17 has already identified reveals that Defendants are using PayPal to pay for the third party's services, a  
18 follow-up subpoena to PayPal regarding the email address that Defendants used to issue and collect  
19 PayPal payments will be likely to reveal reliable information about Defendants' identity and  
20 location.

21 Similarly, if a subpoena to a third party Zynga has already identified reveals that Defendants  
22 are using additional information to which Zynga is currently unaware, follow-up subpoenas to online  
23 service providers, payment processors, and other third parties, will be likely to reveal reliable  
24 information about Defendants' identity and location. In recognition of that fact, Zynga requests  
25 authority to issue follow-up subpoenas, if necessary, on the leads provided by the subpoenaed  
26 parties.

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