

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

INCORP SERVICES, INC., a Nevada corporation,

Plaintiff,

v.

DOES 1-10, inclusive,

Defendants.

) Case No.: C 11-4660 PSG

) **ORDER GRANTING PLAINTIFF'S**
) **EX PARTE MOTION FOR**
) **ADMINISTRATIVE RELIEF TO**
) **TAKE EXPEDITED DISCOVERY**

) **(Re: Docket No. 7)**

On September 20, 2011, Plaintiff Incorp Services, Inc. ("Incorp") filed a complaint against ten Doe defendants ("Defendants") who Incorp claims have perpetrated "click fraud" on its online advertising business in violation of federal and state law. Incorp now moves for administrative relief from the initial disclosure and conference requirements imposed by the Federal Rules of Civil Procedure and Civil Local Rules. Incorp seeks leave so that it may take early discovery to identify Defendants and proceed with service in accordance with Fed. R. Civ. P. 4. The court has reviewed Incorp's complaint and papers in support of its motion. For the reasons set forth herein, the court hereby GRANTS Incorp's motion.

I. BACKGROUND

1
2 Incorp is a Nevada corporation that provides company formation and registration services.
3 It invests heavily in online, pay-per-click advertising.¹ It uses the services of another company,
4 Innovative Software Design, Inc. (“Innovative”) to design, maintain, and monitor Incorp’s pay-per-
5 click advertising campaigns.²

6 Incorp alleges that in May 2010, Defendants initiated a “click-fraud”³ campaign against
7 Incorp, whereby they repeatedly clicked on Incorp’s advertisements – often once or multiple times
8 per day – with no intention of purchasing Incorp’s products.⁴ As a result, Incorp suffered depletion
9 of its advertising budget, causing Incorp’s ads not to appear and allowing other online
10 advertisements to obtain a more prominent position in search engine results. Incorp and Innovative
11 utilized click fraud detection software and log files to record the time of and source of the clicks,
12 including internet protocol (“IP”) addresses associated with the clicks. Incorp has narrowed the
13 greatest number of fraudulent clicks to two IP addresses, both serviced by the same internet service
14 provider (“ISP”).⁵ Incorp nevertheless has not been able to identify definitively the particular
15 person(s) responsible for these clicks.
16
17

18 Incorp brings this action under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and
19 also alleges several common law and state consumer law causes of action. On October 6, 2011,
20 Incorp filed the instant, ex-parte motion for expedited discovery. Incorp seeks to serve a subpoena
21

22 ¹ See Docket No. 1 ¶¶ 1, 10, 13, 14 (Compl.).

23 ² See Docket No. 8 ¶¶ 2, 3 (Berger Decl.).

24 ³ Incorp defines “click fraud” as an “industry term that refers to the situation where a person
25 imitates a legitimate Internet user and clicks on a sponsored ad for the purpose imposing [sic] a
26 cost-per-click on the advertiser, without having any actual interest in the advertiser’s goods or
services.” Docket No. 1 ¶ 22.

27 ⁴ See *id.* ¶¶ 27-34.

28 ⁵ See *id.* ¶¶ 26, 32; Docket No. 8 ¶¶ 6-8.

1 on Cox Communications, Inc. (“Cox”), the ISP identified as owner of the suspect IP addresses, in
2 order to obtain the identifying information regarding the two accounts at issue.⁶

3 II. DISCUSSION

4 As a general rule, discovery takes place only after the defendants have been served.⁷ Except
5 when authorized by the court or pursuant to another exception, Fed. R. Civ. P. 26(d)(1) requires the
6 parties to meet and confer, in accordance with Fed. R. Civ. P. 26(f), prior to seeking discovery
7 “from any source.”

8
9 Courts in this circuit have granted limited exception to the requirements imposed by Fed. R.
10 Civ. P. 26(d)(1) and 26(f) in order “to permit the plaintiff to learn the identifying facts necessary to
11 permit service on the defendant.”⁸ This is so “unless it is clear that discovery would not uncover
12 the identities, or that the complaint would be dismissed on other grounds.”⁹ The party seeking
13 expedited discovery must establish good cause for the discovery sought. “Good cause may be
14 found where the need for expedited discovery, in consideration of the administration of justice,
15 outweighs the prejudice to the responding party.”¹⁰ Certain safeguards may help the court assess a
16 discovery request in light of this good cause standard. These include whether the moving party has
17 (1) identified the defendant with enough specificity to allow for a determination of whether
18 defendant is a real person or entity who can be sued in federal court, (2) recounted the steps taken
19 to locate the defendant, (3) demonstrated the claims could survive a motion to dismiss, and (4) filed
20 a discovery request with the court and identified the persons who might be served and for which
21
22

23 ⁶ See Docket No. 7 at 5 (Pl.’s Mot. For Expedited Discov.).

24 ⁷ See *Columbia Ins. Co. v. SeesCandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999).

25 ⁸ See *id.*

26 ⁹ See *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting *Gillespie v. Civiletti*,
27 629 F.2d 637, 642 (9th Cir. 1980)).

28 ¹⁰ See *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002).

1 there is “a reasonable likelihood that the discovery process will lead to identifying information
2 about defendant that would make service of process possible.”¹¹

3 The court is satisfied that Incorp has acted in fulfillment of these safeguards. By tracking
4 the clicks over the course of several weeks and narrowing a substantial portion of the activity to
5 only two IP addresses – both owned by the same ISP – Incorp has provided sufficient information
6 to indicate that the responsible parties are “real person(s)” who may be sued in federal court.¹²
7 Incorp also has demonstrated that it took reasonable steps to identify Defendants.¹³ Because
8 information pertaining to the assignee of an IP address is maintained by the third-party ISP, the
9 only way in which Incorp is able to identify definitively the parties associated with the suspect IP
10 addresses is by subpoena to the ISP.

11 Incorp has properly pled the elements of each cause of action in its complaint, such that it
12 “could survive a motion to dismiss”¹⁴ or a challenge on grounds of misjoinder.¹⁵ In order to
13 maintain the action against multiple defendants, Incorp must demonstrate that the claims against
14 the Doe Defendants “aris[e] out of the same transaction, occurrence, or series of closely related
15 transactions.”¹⁶ In a declaration supporting Incorp’s motion, Innovative President Rick Berger
16 explains that upon analyzing the data and narrowing a significant portion of the alleged click fraud
17 to two IP addresses owned by the same ISP, one can reasonably conclude that the fraud “originated
18 to two IP addresses owned by the same ISP, one can reasonably conclude that the fraud “originated
19

20
21 ¹¹ See *Seescandy.com*, 185 F.R.D. at 578-80.

22 ¹² See Docket No. 8 ¶ 8 (“[O]nly a real person or entity could orchestrate a systematic campaign to
repeatedly click on Incorp’s ads over the course of weeks from a single source.”).

23 ¹³ See *id.* at ¶¶ 4, 10 (describing steps taken to locate Defendants, including: analysis of data
24 collected by Incorp’s advertising services since 2010, identification of two unique IP addresses
largely responsible for the fraudulent clicks, and confirmation that none of the clicks associated
25 with the two IP addresses resulted in purchases).

26 ¹⁴ See *Seescandy.com*, 185 F.R.D. at 579; *Gillespie*, 629 F.2d at 642.

27 ¹⁵ Although an action may not be dismissed for misjoinder, the court may drop improperly-joined
parties at any time. See Fed. R. Civ. P. 21.

28 ¹⁶ See Fed. R. Civ. P. 20(a)(2)(A).

1 from a single source.” While the court recognizes the limited nature of this ex parte presentation as
2 well as the limited information available to Incorp, the court finds that the facts alleged adequately
3 support Incorp’s conclusion.¹⁷

4 Incorp has identified Cox as the subject of its proposed discovery and filed the subpoena
5 that it seeks to serve.¹⁸ The proposed subpoena would order Cox to disclose “information sufficient
6 to identify the user data and account holder” for the two IP addresses, including name, address,
7 phone numbers, and email addresses associated with each.¹⁹ It appears reasonably likely that the
8 discovery process will lead to identifying information to make service of process possible.²⁰

9
10 In sum, Incorp has shown sufficient need for the requested discovery in consideration of the
11 administration of justice. The burden on and prejudice to Cox, as the responding party, from
12 providing the requested discovery is minimal because the proposed discovery implicates only two
13 IP addresses and seeks the limited subscriber information associated with those two accounts. Any
14 prejudice to the subscriber(s) of the subject IP addresses also is limited by the narrow scope of
15 identifying information to be provided and by the procedural protections afforded them by required
16

17
18 ¹⁷ The court does not find the same infirmities here that have prompted the severance of all but one
19 Doe defendant in several recent cases before this court. In those cases, plaintiffs have brought
20 copyright infringement claims against a large number of unrelated Doe defendants connected by
21 nothing more than their alleged participation in an online peer-to-peer “swarm” that allowed for
22 illegal downloading and distribution of plaintiffs’ copyrighted material. The court found this
23 allegation to be insufficient to sustain joinder under Fed. R. Civ. P. 20. *See, e.g., Diabolic Video
24 Productions, Inc. v. Does 1-2099*, No. 5:10-cv-5865-PSG, Amended Order Granting-In-Part
25 Motion for Leave to Take Limited Discovery Prior to Rule 26(f) Conference (Docket No. 16).

26 ¹⁸ *See* Docket No. 9, Ex. A (Burgoyne Decl.).

27 ¹⁹ *See id.*

28 ²⁰ The court is well aware that the relationship between accused activity linked to an IP address and
subscriber information associated with that IP address is imperfect at best. “Reasonably likely” to
lead to identifying information that would make service of process *possible* is not the same as
information that would make service of process *proper*. Incorp remains obligated under Fed. R.
Civ. P. 11 to assess whether the ISP subscriber identified in response to the subpoena is also the
person alleged to have committed the fraudulent acts. Should Incorp find itself unable to name and
serve Defendants after receiving the discovery requested here, it should bear in mind that any
requests for further expedited and intrusive discovery will be considered with these limitations in
mind.

1 notice of the pending Rule 45 subpoena.²¹ Such limited exposure to prejudice does not outweigh
2 Incorp's right to initiate the process of redress for the harm allegedly committed.

3 **III. CONCLUSION**

4 IT IS HEREBY ORDERED that Incorp's motion for administrative relief to take expedited
5 discovery is GRANTED.

6 It is FURTHER ORDERED that Incorp is authorized to issue and serve a Rule 45 subpoena
7 on Cox Communications for the limited purpose of obtaining information sufficient to identify the
8 names and locations of Defendant(s). Incorp's counsel shall issue its subpoena in substantially the
9 same form as the example attached to the Declaration of Henry M. Burgoyne,²² and shall include a
10 copy of this order.
11

12 IT IS FURTHER ORDERED that Cox will have thirty (30) days from the date of service
13 upon it to serve the Doe Defendant(s) with a copy of the subpoena and a copy of this order. Cox
14 may serve Defendant(s) using any reasonable means, including written notice sent to the last
15 known address, transmitted either by first-class mail or via overnight service. Cox and the
16 Defendant(s) each shall have thirty (30) days from the date of service to file any motions in this
17 court contesting the subpoena (including a motion to quash or modify the subpoena). If that 30-
18 day period lapses without Defendant(s) or Cox contesting the subpoena, Cox shall have ten (10)
19 days to produce to Incorp the information responsive to the subpoena.
20

21 IT IS FURTHER ORDERED that Cox shall not assess any charge to Incorp in advance of
22 providing the information requested in the subpoena. Should Cox elects to charge for the costs of
23 production, it shall provide a billing summary and cost report that serves as a basis for such billing
24 summary and any costs claimed by Cox.
25

26 _____
27 ²¹ See *Io Group, Inc. v. Does 1-65*, No. 10-4377 SC, 2010 WL 4055667, at *2 (N.D. Cal. Oct. 15,
2010).

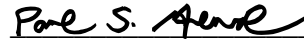
28 ²² See Docket No. 9, Ex. A.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that Cox shall preserve all subpoenaed information pending delivery of such information to Incorp or the final resolution of a timely filed and granted motion to quash the subpoena with respect to such information.

IT IS FURTHER ORDERED that any information disclosed to Incorp in response to a subpoena may be used by Incorp solely for the purpose of protecting its rights under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 and other claims asserted in this action.

Dated: 11/9/2011



PAUL S. GREWAL
United States Magistrate Judge