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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,
Plaintiff,
v.
JOHN DOE subscriber assigned IP
address 68.7.238.158,
Defendant.

Case No.: 18cv0039 WQH (JMA)

**ORDER GRANTING EX PARTE
APPLICATION FOR LEAVE TO
SERVE A THIRD PARTY
SUBPOENA PRIOR TO A RULE
26(f) CONFERENCE [ECF No. 4]**

Before the Court is an Ex Parte Application for Leave to Serve a Third Party Subpoena Prior to a Rule 26(f) Conference filed by Plaintiff Strike 3 Holdings, LLC (“Plaintiff”). (ECF No. 4.) For the reasons discussed below, Plaintiff’s motion is **GRANTED**.

I. PROCEDURAL HISTORY

On January 5, 2018, Plaintiff filed a Complaint against Defendant John Doe subscriber assigned IP address 68.7.238.158 (“Defendant”). (Compl., ECF No. 1). Plaintiff alleges it “owns the intellectual property to the *Blacked*, *Tushy*, and *Vixen* adult brands, including the copyrights to each of the motion pictures distributed through the brands’ sites and the trademarks to each of the brand

1 names and logos.” Ex Parte Appl. at 2; Compl., ¶ 25 & Ex. A. The Complaint
2 alleges a claim of copyright infringement. Plaintiff alleges that Defendant, using
3 IP address 68.7.238.158, infringed Plaintiff’s copyrights by copying and
4 distributing the constituent elements of Plaintiff’s copyrighted works using the
5 BitTorrent protocol without Plaintiff’s authorization, permission or consent.
6 Compl., ¶¶ 35-37.

7 Plaintiff seeks leave of court to serve a subpoena pursuant to Fed. R. Civ.
8 P. 45 on Defendant’s internet service provider (“ISP”), Cox Communications, in
9 order to learn Defendant’s identity.

10 11 **II. LEGAL STANDARDS**

12 Generally, discovery is not permitted without a court order before the
13 parties have conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R.
14 Civ. P. 26(d)(1). Yet, “in rare cases, courts have made exceptions, permitting
15 limited discovery to ensue after filing of the complaint to permit the plaintiff to
16 learn the identifying facts necessary to permit service on the defendant.”
17 Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999)
18 (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)). Courts grant
19 these requests when the moving party shows good cause for the early discovery.
20 Semitool, Inc. v. Tokyo Elec. Am., Inc., 208 F.R.D. 273, 275-76 (N.D. Cal. 2002).

21 The Ninth Circuit has held that when the defendants’ identities are
22 unknown at the time the complaint is filed, courts may grant plaintiffs leave to
23 take early discovery to determine the defendants’ identities “unless it is clear that
24 discovery would not uncover the identities, or that the complaint would be
25 dismissed on other grounds.” Gillespie, 629 F.2d at 642. A district court’s
26 decision to grant discovery to determine jurisdictional facts is a matter of
27 discretion. Columbia Ins. Co., 185 F.R.D. at 578.

1 District courts apply a three-factor test when considering motions for early
2 discovery to identify certain defendants. Id. at 578-80. First, the plaintiff should
3 “identify the missing party with sufficient specificity such that the Court can
4 determine that defendant is a real person or entity who could be sued in federal
5 court.” Id. at 578. Second, the movant must describe “all previous steps taken to
6 locate the elusive defendant” to ensure that the plaintiff has made a good faith
7 effort to identify and serve process on the defendant. Id. at 579. Third, the
8 plaintiff should establish that its suit against the defendant could withstand a
9 motion to dismiss. Id. “[T]o prevent abuse of this extraordinary application of the
10 discovery process and to ensure that the plaintiff has standing,” the plaintiff must
11 show that some act giving rise to liability actually occurred and that the discovery
12 is aimed at identifying the person who actually committed the act. Id. at 579-80.

13 14 **III. DISCUSSION**

15 **A. Identification of Missing Parties with Sufficient Specificity**

16 First, Plaintiff must identify Defendant with enough specificity to enable the
17 Court to determine that the defendant is a real person or entity who would be
18 subject to the jurisdiction of this Court. Id. at 578. “[A] plaintiff identifies Doe
19 defendants with sufficient specificity by providing the unique IP addresses
20 assigned to an individual defendant on the day of the allegedly infringing
21 conduct, and by using “geolocation technology” to trace the IP address to a
22 physical point of origin. 808 Holdings, LLC v. Collective of Dec. 29, 2011 Sharing
23 Hash, 2012 WL 1648838, at *4 (S.D. Cal. May 4, 2012).

24 Here, Plaintiff determined the ISP that had provided the subject IP address
25 associated with Defendant was Cox Communications, and used geolocation
26 technology to trace the IP address to an address located within this district.
27 Compl., ¶¶ 8-9 & Ex. A; Fieser Decl., ¶¶ 7-9; Stalzer Decl., ¶ 11. Consequently,
28

1 Plaintiff has identified Defendant with sufficient specificity and has satisfied the
2 first factor of the test for permitting early discovery.

3 **B. Previous Attempts to Locate Defendant**

4 Next, Plaintiff must identify all previous steps taken to identify the Doe
5 Defendant in a good faith effort to locate and serve it. See Columbia Ins. Co.,
6 185 F.R.D. at 579. According to Plaintiff, it “has been unable to identify any other
7 way to go about obtaining the identities of its infringers.” Ex Parte Appl. at 8.
8 This is the case because although publicly available data allowed Plaintiff to
9 identify the specific ISP used by Defendant as well as the city associated with the
10 IP address, it did not permit Plaintiff to ascertain the identity of the subscriber or
11 actual defendant. Id. Accordingly, Plaintiff appears to have investigated and
12 obtained the data pertaining to the alleged infringement in a good faith effort to
13 locate Defendant. See, e.g., Digital Sin, Inc. v. Does 1-5698, No. C-11-04397
14 LB, 2011 U.S. Dist. LEXIS 128033, at *5 (N.D. Cal. Nov. 4, 2011).

15 **C. Ability to Withstand a Motion to Dismiss**

16 Lastly, to be entitled to early discovery, Plaintiff must demonstrate that the
17 Complaint can withstand a motion to dismiss. See Columbia Ins. Co., 185 F.R.D.
18 at 579.

19 1. **Ability to State a Claim Upon Which Relief Can Be Granted**

20 Plaintiff alleges it “owns the intellectual property to the *Blacked*, *Tushy*, and
21 *Vixen* adult brands, including the copyrights to each of the motion pictures
22 distributed through the brands’ sites and the trademarks to each of the brand
23 names and logos.” Ex Parte Appl. at 1; Compl., ¶ 25 & Ex. A. Plaintiff alleges
24 that Defendant, using IP address 68.7.238.158, infringed Plaintiff’s copyrights by
25 copying and distributing the constituent elements of Plaintiff’s copyrighted work,
26 *Blacked*, using the BitTorrent protocol without Plaintiff’s authorization, permission
27 or consent. Id., ¶¶ 35-37. The Court finds Plaintiff has alleged a prima facie
28 case of copyright infringement against Defendant.

1 2. Personal Jurisdiction

2 Plaintiff bears the burden of establishing jurisdictional facts. See Columbia
3 Ins. Co., 185 F.R.D. at 578. Plaintiff, using geolocation technology, traced
4 Defendant’s IP address to a point of origin within this District. Compl., ¶¶ 8-9 &
5 Ex. A; Fieser Decl., ¶¶ 7-9; Stalzer Decl., ¶ 11. Accordingly, Plaintiff has alleged
6 sufficient facts to show it can likely withstand a motion to dismiss for lack of
7 personal jurisdiction. See, e.g., Pink Lotus Entm’t, 2011 U.S. Dist. LEXIS 65614,
8 at *6-7.

9 3. Venue

10 “The venue of suits for infringement of copyright is not determined by the
11 general provision governing suits in the federal district courts, rather by the
12 venue provision of the Copyright Act.” Goldberg v. Cameron, 482 F. Supp. 2d
13 1136, 1143 (N.D. Cal. 2007). Civil actions for copyright infringement “may be
14 instituted in the district in which defendant or his agent resides or may be found.”
15 28 U.S.C.A. § 1400(1) (West 2006). An individual “resides” for venue purposes
16 in the district of his domicile. 17 James Wm. Moore, et al., Moore’s Federal
17 Practice, § 110.39[2], at 110-76 (3d ed. 2011). A defendant is “found” for venue
18 purposes where he is subject to personal jurisdiction. Id. (footnote omitted); see
19 also Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1126 (9th Cir.
20 2010) (“This circuit interprets [28 U.S.C. § 1400(a)] to allow venue in any judicial
21 district where, if treated as a separate state, the defendant would be subject to
22 personal jurisdiction.”). Plaintiff alleges venue is proper because Defendant
23 allegedly committed the infringing acts complained of in this District. Thus,
24 venue appears to be proper at this time.

25 Accordingly, Plaintiff’s Complaint can likely survive a motion to dismiss.

26 **IV. CONCLUSION**

27 For the reasons set forth above, it is hereby ordered that Plaintiff’s Ex Parte
28 Application is **GRANTED** as follows:

1 1. Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45 upon
2 Cox Communications for the sole purpose of obtaining the *name and address*
3 *only* of Defendant John Doe, based on the IP address listed for him in the
4 complaint – 68.7.238.158. Cox Communications shall have fourteen (14)
5 calendar days after service of the subpoena upon it to notify its subscriber that
6 his/her identity has been subpoenaed by Plaintiff. The subscriber whose identity
7 has been subpoenaed shall have thirty (30) calendar days from the date of such
8 notice to challenge the disclosure to Plaintiff by filing an appropriate pleading with
9 this Court contesting the subpoena. If Cox Communications intends to move to
10 quash the subpoena, it must do so prior to the return date of the subpoena. The
11 return date of the subpoena must allow for at least forty-five (45) days from
12 service to production. If a motion to quash or other customer challenge is
13 brought, Cox Communications must preserve the information sought by Plaintiff
14 pending resolution of the motion or challenge.

15 2. The subpoena shall not seek Defendant's telephone number, email
16 address, or Media Access Control (MAC) address, as this information is not
17 necessary for Plaintiff to identify and serve Defendant.


18 3. Plaintiff may use the information disclosed pursuant to the subpoena
19 only in pursuing this litigation.

20 4. Plaintiff shall serve a copy of this order with any subpoena served
21 upon Cox Communications pursuant to this Order. Cox Communications, in turn,
22 must provide a copy of this Order along with the required notice to the subscriber
23 whose identity is sought pursuant to this Order.

24 5. No other discovery is authorized at this time.

25 **IT IS SO ORDERED.**

26 Dated: February 21, 2018

27 
28 Honorable Jan M. Adler
United States Magistrate Judge