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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 STRIKE 3 HOLDINGS, LLC,
12 Plaintiff,
13 v.
14 JOHN DOE subscriber assigned IP
15 address 76.88.4.131,
16 Defendant.

Case No.: 18cv2722-LAB(KSC)

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

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

22 **I. PROCEDURAL HISTORY**

23 On November 30, 2018, plaintiff filed a Complaint against defendant John
24 Doe subscriber assigned IP address 76.88.4.131 ("defendant"). (Compl., ECF
25 No. 1). Plaintiff alleges it "owns the intellectual property to the *Blacked, Blacked*
26 *Raw, Tushy, and Vixen* adult brands (the "Brands"), including the copyrights to
27 each of the motion pictures distributed through the Brands' sites and the
28 trademarks to each of the Brand's names and logos." Ex Parte Appl. at 1;

1 Compl., ¶ 32 & Ex. A. The Complaint alleges a claim of copyright infringement.
2 Plaintiff alleges that defendant, using IP address 76.88.4.131, infringed plaintiff's
3 copyrights by copying and distributing the constituent elements of plaintiff's
4 copyrighted works using the BitTorrent protocol without plaintiff's authorization,
5 permission or consent. Compl., ¶¶ 35-40.

6 Plaintiff seeks leave of court to serve a subpoena pursuant to Fed. R. Civ.
7 P. 45 on defendant's internet service provider ("ISP"), Spectrum, in order to learn
8 defendant's identity.

9 **II. LEGAL STANDARDS**

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

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

26 District courts apply a three-factor test when considering motions for early
27 discovery to identify certain defendants. Id. at 578-80. First, the plaintiff should
28 "identify the missing party with sufficient specificity such that the Court can

1 determine that defendant is a real person or entity who could be sued in federal
2 court.” Id. at 578. Second, the movant must describe “all previous steps taken to
3 locate the elusive defendant” to ensure that the plaintiff has made a good faith
4 effort to identify and serve process on the defendant. Id. at 579. Third, the
5 plaintiff should establish that its suit against the defendant could withstand a
6 motion to dismiss. Id. “[T]o prevent abuse of this extraordinary application of the
7 discovery process and to ensure that the plaintiff has standing,” the plaintiff must
8 show that some act giving rise to liability actually occurred and that the discovery
9 is aimed at identifying the person who actually committed the act. Id. at 579-80.

10 **III. DISCUSSION**

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

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

20 Here, plaintiff determined the ISP that had provided the subject IP address
21 associated with defendant was Spectrum, and used geolocation technology to
22 trace the IP address to an address located within this district. Compl., ¶¶ 8-9 &
23 Ex. A; Fieser Decl., ¶¶ 7-9; Stalzer Decl., ¶ 11. Consequently, plaintiff has
24 identified defendant with sufficient specificity and has satisfied the first factor of
25 the test for permitting early discovery.

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

27 Next, plaintiff must identify all previous steps taken to identify the Doe
28 defendant in a good faith effort to locate and serve it. See Columbia Ins. Co.,

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

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

11 Lastly, to be entitled to early discovery, plaintiff must demonstrate that the
12 Complaint can withstand a motion to dismiss. See Columbia Ins. Co., 185 F.R.D.
13 at 579.

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

15 Plaintiff alleges it “owns the intellectual property to the *Blacked, Blacked*
16 *Raw, Tushy*, and *Vixen* adult brands, including the copyrights to each of the
17 motion pictures distributed through the brands’ sites and the trademarks to each
18 of the brand names and logos.” Ex Parte Appl. at 1; Compl., ¶ 32 & Ex. A.
19 Plaintiff further alleges that defendant, using IP address 76.88.4.131, infringed
20 plaintiff’s copyrights by copying and distributing the constituent elements of
21 plaintiff’s copyrighted works, *Blacked, Blacked Raw, Tushy* and *Vixen*, using the
22 BitTorrent protocol without plaintiff’s authorization, permission or consent. Id., ¶¶
23 35-40. The Court finds plaintiff has alleged a prima facie case of copyright
24 infringement against defendant.

25 2. Personal Jurisdiction

26 Plaintiff bears the burden of establishing jurisdictional facts. See Columbia
27 Ins. Co., 185 F.R.D. at 578. Plaintiff, using geolocation technology, traced
28 defendant’s IP address to a point of origin within this District. Compl., ¶¶ 8-9 &

1 Ex. A; Fieser Decl., ¶¶ 7-9; Stalzer Decl., ¶ 11. Accordingly, plaintiff has alleged
2 sufficient facts to show it can likely withstand a motion to dismiss for lack of
3 personal jurisdiction. See, e.g., Pink Lotus Entm't, 2011 U.S. Dist. LEXIS 65614,
4 at *6-7.

5 3. Venue

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

21 Accordingly, plaintiff’s Complaint can likely survive a motion to dismiss.

22 **IV. CONCLUSION**

23 For the reasons set forth above, it is hereby ordered that plaintiff’s Ex Parte
24 Application is **GRANTED** as follows:

25 1. Plaintiff may serve a subpoena pursuant to Fed. R. Civ. P. 45 upon
26 Spectrum for the sole purpose of obtaining the *name and address only* of
27 defendant John Doe, based on the IP address listed for him in the Complaint –
28 76.88.4.131. Spectrum shall have fourteen (14) calendar days after service of

1 the subpoena upon it to notify its subscriber that his/her identity has been
2 subpoenaed by plaintiff. The subscriber whose identity has been subpoenaed
3 shall have thirty (30) calendar days from the date of such notice to challenge the
4 disclosure to plaintiff by filing an appropriate pleading with this Court contesting
5 the subpoena. If Spectrum intends to move to quash the subpoena, it must do
6 so prior to the return date of the subpoena. The return date of the subpoena
7 must allow for at least forty-five (45) days from service to production. If a motion
8 to quash or other customer challenge is brought, Spectrum must preserve the
9 information sought by plaintiff pending resolution of the motion or challenge.

10 2. The subpoena shall not seek defendant's telephone number, email
11 address, or Media Access Control (MAC) address, as this information is not
12 necessary for plaintiff to identify and serve defendant.

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

15 4. Plaintiff shall serve a copy of this Order with any subpoena served
16 upon Spectrum pursuant to this Order. Spectrum, in turn, must provide a copy of
17 this Order along with the required notice to the subscriber whose identity is
18 sought pursuant to this Order.

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

20 **IT IS SO ORDERED.**

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22 Dated: December 19, 2018



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24 Hon. Karen S. Crawford
25 United States Magistrate Judge
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