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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STRIKE 3 HOLDINGS, LLC,
Plaintiff,
v.
JOHN DOE subscriber assigned IP
address 76.176.105.210,
Defendant.

Case No.: 3:23-cv-01380-LL-AHG

**ORDER GRANTING EX PARTE
APPLICATION FOR LEAVE TO
SERVE A THIRD-PARTY
SUBPOENA PRIOR TO A RULE
26(f) CONFERENCE**

[ECF No. 4]

1 Before the Court is Plaintiff Strike 3 Holdings, LLC’s (“Plaintiff”) *Ex Parte*
 2 Application for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference.
 3 ECF No. 4. No defendant has been named or served, and so no opposition or reply briefs
 4 have been filed. For the reasons discussed below, the Court **GRANTS** Plaintiff’s *ex parte*
 5 application.

6 **I. BACKGROUND**

7 On July 28, 2023, Plaintiff filed a Complaint against Defendant “John Doe,” who is
 8 a subscriber of the Internet Service Provider (“ISP”) Spectrum,¹ with assigned Internet
 9 Protocol (“IP”) address 76.176.105.210. ECF No. 1 ¶ 5. Plaintiff Strike 3 Holdings, LLC,
 10 is the owner of numerous adult motion pictures, which Plaintiff distributes through adult
 11 websites and DVDs. *Id.* ¶¶ 2–3. Plaintiff asserts that Defendant is committing “rampant
 12 and wholesale copyright infringement” by downloading, recording, and distributing copies
 13 of Plaintiff’s copyrighted motion pictures without authorization through the use of the
 14 BitTorrent file distribution network. *Id.* at ¶¶ 4, 18–44.

15 In the instant motion, Plaintiff seeks leave to conduct early discovery prior to the
 16 mandated Rule 26(f) conference to learn Defendant’s identity. ECF No. 4. Specifically,
 17 Plaintiff seeks an order permitting it to serve a third-party subpoena under Federal Rule of
 18 Civil Procedure 45 on Defendant’s ISP, Spectrum, which would require Spectrum to
 19 supply the name and address of Defendant John Doe to Plaintiff. ECF No. 4-1 at 7–8; *see*
 20 *also* 47 U.S.C. § 551(c)(2)(B) (Cable Communications Policy Act provision prohibiting
 21 cable operators from disclosing “personally identifiable information concerning any
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 24 ¹ As Plaintiff has explained in other filings before this Court, Spectrum “is a trade name of
 25 Charter Communications, used to market consumer and commercial cable television,
 26 internet, telephone, and wireless services provided by the company” and “Spectrum is
 27 owned by Charter Communications, Inc.” Although Plaintiff refers to the company merely
 28 as “Spectrum” in the filings before the Court, its subpoenas “are addressed to Spectrum
 and its parent company, Charter.” *Strike 3 Holdings, LLC v. Doe*, Case No. 22cv1823-
 RSH-AHG, ECF No. 6-1 at 7 n.1 (S.D. Cal. Dec. 13, 2022) (internal citations omitted).

1 subscriber” without the subscriber’s prior written consent, except, as pertinent here, “if the
2 disclosure is . . . made pursuant to a court order authorizing such disclosure”). Through
3 service of the third-party subpoena, Plaintiff seeks only “the true name and address of
4 Defendant.” ECF No. 4-1 at 8. Additionally, Plaintiff represents to the Court that it will
5 only use this information to prosecute the claims made in its Complaint. *Id.*

6 II. LEGAL STANDARD

7 A party is generally not permitted to obtain discovery without a court order before
8 the parties have conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ.
9 P. 26(d)(1). However, courts make exceptions to allow limited discovery after a complaint
10 is filed to permit the plaintiff to learn the identifying information necessary to serve the
11 defendant. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999);
12 *see, e.g., UMG Recordings, Inc. v. Doe*, No. C-08-3999-RMW, 2008 WL 4104207, at *2
13 (N.D. Cal. Aug. 29, 2008) (noting, in an infringement case, that “a plaintiff cannot have a
14 discovery planning conference with an anonymous defendant[,]” and limited expedited
15 discovery would thus “permit the [plaintiff] to identify John Doe and serve the defendant,
16 permitting this case to go forward.”).

17 Consistent with this generally recognized exception to Rule 26(f), the Ninth Circuit
18 has held that ““where the identity of the alleged defendant[] [is] not [] known prior to the
19 filing of a complaint[,] the plaintiff should be given an opportunity through discovery to
20 identify the unknown defendants, unless it is clear that discovery would not uncover the
21 identities, or that the complaint would be dismissed on other grounds.”” *Wakefield v.*
22 *Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quoting *Gillespie v. Civiletti*, 629 F.2d
23 637, 642 (9th Cir. 1980)).

24 A party who requests early or expedited discovery must make a showing of good
25 cause. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–76 (N.D. Cal.
26 2002) (applying “the conventional standard of good cause in evaluating Plaintiff’s request
27 for expedited discovery”). Good cause is established through a balancing test “where the
28 need for expedited discovery, in consideration of the administration of justice, outweighs

1 the prejudice to the responding party.” *Id.* at 276. To determine whether “good cause”
2 exists to permit expedited discovery to identify John Doe defendants, district courts in the
3 Ninth Circuit consider whether the plaintiff (1) “identif[ies] the missing party with
4 sufficient specificity such that the Court can determine that the defendant is a real person
5 or entity who could be sued in federal court”; (2) “identif[ies] all previous steps taken to
6 locate the elusive defendant” to ensure that plaintiff has made a good faith effort to identify
7 the defendant; and (3) “establish[es] to the Court’s satisfaction that plaintiff’s suit against
8 defendant could withstand a motion to dismiss.” *Columbia Ins.*, 185 F.R.D. at 578–80.
9 Additionally, the plaintiff should demonstrate the discovery will likely lead to identifying
10 information that will permit service of process. *Id.* at 580. These factors are considered to
11 ensure the expedited discovery procedure “will only be employed in cases where the
12 plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant
13 pre-service, and will prevent use of this method to harass or intimidate.” *Id.*

14 III. DISCUSSION

15 Plaintiff contends that there is good cause for this Court to allow expedited
16 discovery. ECF No. 4-1 at 11–18. For the reasons stated below, the Court agrees.

17 a. Identification of Missing Party with Sufficient Specificity

18 To satisfy the first prong, Plaintiff must identify Defendant with enough specificity
19 to enable the Court to determine that Defendant is a real person or entity who would be
20 subject to the jurisdiction of this Court. *Columbia Ins.*, 185 F.R.D. at 578. District courts
21 in this circuit have determined “a plaintiff identifies Doe defendants with sufficient
22 specificity by providing the unique IP addresses assigned to an individual defendant on the
23 day of the allegedly infringing conduct, and by using ‘geolocation technology’ to trace the
24 IP addresses to a physical point of origin.” *808 Holdings, LLC v. Collective of December*
25 *29, 2011 Sharing Hash*, No. 12cv186 MMA-RBB, 2012 WL 12884688, at *4 (S.D. Cal.
26 May 4, 2012); *see Openmind Solutions, Inc. v. Does 1-39*, No. C-11-3311-MEJ, 2011 WL
27 4715200, at *2 (N.D. Cal. Oct. 7, 2011) (concluding that plaintiff satisfied the first factor
28 by identifying the defendants’ IP addresses and by tracing the IP addresses to a point of

1 origin within the State of California); *Pink Lotus Entm't, LLC v. Does 1-46*, No. C-11-
2 02263, 2011 WL 2470986, at *3 (N.D. Cal. June 21, 2011) (same). Other courts have
3 concluded that merely identifying the IP addresses on the day of the alleged infringement
4 satisfies this factor. *808 Holdings*, 2012 WL 12884688, at *4 (collecting cases).

5 Here, Plaintiff has identified the Doe Defendant with sufficient specificity. First, in
6 support of the present motion, Plaintiff provided an 81-paragraph Declaration of David
7 Williamson, an independent contractor hired by Plaintiff as an Information Systems and
8 Management Consultant. ECF No. 4-2 at 2–15 (“Ex. A”). In that role, Mr. Williamson
9 testifies he “oversaw the design, development, and overall creation of the infringement
10 detection system called VXN Scan[,] which [Plaintiff] both owns and uses to identify the
11 IP addresses used by individuals infringing Plaintiff’s movies via the BitTorrent protocol.”
12 Ex. A, ¶ 40. Mr. Williamson’s Declaration explains the VXN Scan system in detail, which
13 involves, in part, the development of a proprietary BitTorrent client that emulates the
14 behavior of a standard BitTorrent client by repeatedly downloading data pieces from peers
15 within the BitTorrent network that are distributing Plaintiff’s movies. *Id.* ¶¶ 52–55.
16 Mr. Williamson testifies that another component of the VXN Scan system is the PCAP²
17 Recorder / Capture Card, which is able to record the IP addresses connecting to the
18 Proprietary Client and sending the infringed copies of Plaintiff’s movies to the Proprietary
19 Client through the BitTorrent network. *Id.* ¶¶ 57–59. Not only does a PCAP contain the IP
20 addresses used in the network transaction, but it also records the port number and
21 BitTorrent client used to accomplish each transaction, and the “Info Hash” associated with
22 the infringing computer file, which reflects the metadata of the particular underlying
23 .torrent file being shared without authorization. *Id.* ¶¶ 61–62. The PCAP Capture Card
24 records PCAPs in real time and is able to record perfect copies of every network packet
25 received by the Proprietary Client. *Id.* ¶ 65. Although this Order touches only on two of
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28 ² PCAP stands for “Packet Capture.” Ex. A ¶ 58.

1 the components of the VXN Scan system, Mr. Williamson’s 81-paragraph Declaration sets
2 forth additional in-depth details of all five components of the system, providing the Court
3 a thorough understanding of how the system reliably pinpoints the IP addresses used by
4 individuals infringing Plaintiff’s movies and verifies the infringement.

5 Second, Plaintiff also provided a declaration by Patrick Paige, a computer forensics
6 expert retained by Plaintiff to analyze and retain forensic evidence captured by the VXN
7 Scan system. ECF No. 4-2 at 17–22 (“Ex. B”). Mr. Paige explains that VXN Scan recorded
8 numerous BitTorrent computer transactions with IP address 76.176.105.210 in the form of
9 PCAPs, and that he reviewed the PCAP to confirm that it evidences a recorded transaction
10 with that IP address on July 8, 2023 at 23:45:35 UTC involving the IP address uploading
11 a piece or pieces of a file corresponding to the hash value that is unique to one of Plaintiff’s
12 movies. Ex. B, ¶¶ 13–26.

13 Third, Plaintiff provided a declaration by Susan B. Stalzer, one of Plaintiff’s
14 employees who verified that each digital file that the Proprietary Client received through
15 its transactions with IP address 76.176.105.210 is a copy of one of Plaintiff’s copyrighted
16 works, by viewing the unauthorized motion pictures corresponding with the file hashes
17 side-by-side with Plaintiff’s original movies. ECF No. 4-2 at 24–26 (“Ex. C”); *see also*
18 ECF No. 1-2 (Exhibit A to the Complaint, listing the hash values of the 43 torrent files
19 received by the Proprietary Client from the IP address 76.176.105.210 between June 12
20 and July 8, 2023).

21 Finally, Plaintiff provides a declaration by Emilie Kennedy, Plaintiff’s in-house
22 General Counsel. ECF No. 4-2 at 28–30 (“Ex. D”). Ms. Kennedy explains that after
23 Plaintiff received infringement data from VXN Scan identifying IP address 76.176.105.210
24 as infringing its works, the IP address was automatically input into Maxmind’s Geolocation
25 Database on June 13, 2023 at 13:04:37 UTC, which traced the IP address location to San
26 Diego, California, within this Court’s jurisdiction. Ex. D, ¶¶ 4–5. Plaintiff has since
27 repeated the trace through the Geolocation Database twice more, prior to filing the
28 Complaint and prior to filing the Kennedy Declaration attached to the instant motion,

1 confirming the IP address continues to trace to San Diego and this District. *Id.* ¶¶ 6–7. The
2 Court is satisfied that these multiple geolocation traces over the course of two months
3 indicating that the Defendant is located in this District are reliably accurate.

4 Based on all of the information above, the Court concludes that Plaintiff has
5 provided a sufficient showing that it seeks to sue a real person subject to the Court’s
6 jurisdiction. Likewise, if Plaintiff obtains the identifying information from the ISP for the
7 subscriber assigned the IP address at issue, the information sought in the subpoena would
8 likely enable Plaintiff to serve Defendant. Therefore, the Court finds Plaintiff satisfied the
9 “sufficient specificity” threshold.

10 **b. Previous Attempts to Locate Defendant**

11 Next, Plaintiff is required to describe all steps taken to identify the Doe defendant in
12 a good-faith effort to locate and serve them. Plaintiff states that it attempted to locate
13 Defendant by searching for Defendant’s IP address using online search engines and other
14 web search tools. ECF No. 4-1 at 14. Plaintiff also reviewed numerous sources of authority
15 such as legislative reports, agency websites, and informational technology guides,
16 regarding whether it is possible to identify such a defendant by other means, and
17 extensively discussed this issue with its computer investigators and cyber security
18 consultants. *Id.* Despite these diligent efforts, Plaintiff was unable to identify any means of
19 obtaining the identity of Defendant other than through subpoenaing the information from
20 Defendant’s ISP. *Id.* In his Declaration, Mr. Paige testified that based on his experience in
21 similar cases, Defendant’s ISP, Spectrum, is the only entity that can correlate the IP address
22 76.176.105.210 to its subscriber to pinpoint Defendant’s identity. Ex. B ¶ 28. Thus, the
23 Court finds Plaintiff has shown it has made a good-faith effort to identify and locate
24 Defendant through other means before resorting to filing the instant motion.

25 **c. Whether Plaintiff Can Withstand a Motion to Dismiss**

26 Lastly, Plaintiff must establish it could survive a motion to dismiss. *See* Fed. R. Civ.
27 P. 12(b); *Columbia Ins.*, 185 F.R.D. at 579. To survive a motion to dismiss for failure to
28 state a claim upon which relief can be granted, “a complaint must contain sufficient factual

1 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
2 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
3 (2007)). To present a prima facie case of copyright infringement, Plaintiff must show: (1)
4 ownership of a valid copyright; and (2) that Defendant violated the copyright owner’s
5 exclusive rights under the Copyright Act. *Range Road Music, Inc. v. East Coast Foods,*
6 *Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012). In addition, for direct infringement Plaintiff is
7 required to show causation by Defendant. *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657,
8 666 (9th Cir. 2017).

9 Here, Plaintiff’s Complaint clearly alleges that Plaintiff owns a valid copyright in
10 the works at issue, which are registered with the United States Copyright Office. *See* ECF
11 No. 1 ¶¶ 43, 46, 49.³ And again, Ms. Stalzer attests that she reviewed the files correlating
12 to the hashes identified in Exhibit A to the Complaint and confirmed that they are
13 “identical, strikingly similar or substantially similar” to Strike 3’s original copyrighted
14 Works. Ex. C ¶¶ 7–11; ECF No. 1 ¶¶ 34–35. Plaintiff’s Complaint also alleges Defendant
15 used BitTorrent to copy and distribute the copyrighted works without authorization, and
16 that the infringement was continuous and ongoing. ECF No. 1 ¶¶ 4, 19–30, 33, 33–36, 44–
17 46. Thus, Plaintiff’s Complaint has stated a claim for copyright infringement against the
18 Doe Defendant sufficient to survive a motion to dismiss. Additionally, Plaintiff has alleged
19 sufficient facts to show it could withstand a motion to dismiss for lack of personal
20 jurisdiction or a motion for improper venue, because Defendant’s IP address was traced to
21 a location in this District. Accordingly, the Court concludes Plaintiff has met the third
22 prong necessary to establish good cause for granting early discovery.

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26 ³ Exhibit A to the Complaint, which shows the hash values of the purportedly infringing
27 movies downloaded from the IP address 76.176.105.210, also contains the United States
28 Copyright Office registration information of the works that correspond with those hash
files. ECF No. 1-2.

IV. CONCLUSION

For the reasons set forth above, and for good cause shown, the Court **GRANTS** Plaintiff's *ex parte* application for leave to serve a subpoena prior to a Rule 26(f) conference. ECF No. 4. However, the Court is cognizant of the potential embarrassment of being identified in this type of case and "shares the growing concern about unscrupulous tactics used by certain plaintiffs, especially in the adult film industry, to shake down the owners of IP addresses." *Malibu Media, LLC v. Does 1-5*, No. 12-Civ-2950-JPO, 2012 WL 2001968, at *1 (S.D.N.Y. June 1, 2012). Anticipating and sharing these concerns, Plaintiff invites the Court to issue a protective order establishing procedural safeguards if the Court finds such procedures appropriate. ECF No. 4-1 at 18. Accordingly, the Court **ORDERS** as follows:

1. Plaintiff shall attach a copy of this Order to any subpoena.
2. Plaintiff may serve the ISP, Spectrum, with a Rule 45 subpoena commanding the ISP to provide Plaintiff with **only** the true name and address of the Defendant to whom the ISP assigned an IP address as set forth on Exhibit A to the Complaint. The ISP is **not** to release the Defendant's telephone number or email address.
3. Within fourteen (14) calendar days after service of the subpoena, the ISP shall notify the subscriber that his or her identity has been subpoenaed by Plaintiff, in compliance with 47 U.S.C. § 551(c)(2)(B). The ISP must also provide a copy of this Order along with the required notice to the subscriber whose identity is sought pursuant to this Order.
4. The subscriber whose identity has been subpoenaed shall have thirty (30) calendar days from the date of such notice to challenge the disclosure of his or her name and contact information by filing an appropriate pleading with this Court contesting the subpoena. A subscriber who moves to quash or modify the subpoena may proceed anonymously as "John Doe," and shall

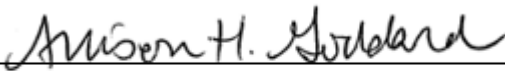
1 remain anonymous until the Court orders that the identifying information may
2 be released.

3 5. If the ISP wishes to move to quash the subpoena, it shall do so before the
4 return date of the subpoena. The return date of the subpoena must allow for at
5 least forty-five (45) days from service to production. If a motion to quash or
6 other challenge is brought, the ISP shall preserve the information sought by
7 Plaintiff in the subpoena pending resolution of such motion or challenge.

8 6. Plaintiff may only use the information disclosed in response to a Rule 45
9 subpoena served on the ISP for the purpose of protecting and enforcing
10 Plaintiff's rights as set forth in its Complaint. If Defendant wishes to proceed
11 anonymously, Plaintiff may not release any identifying information without a
12 court order allowing the release of the information.

13 **IT IS SO ORDERED.**

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15 Dated: August 11, 2023

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18 Honorable Allison H. Goddard
19 United States Magistrate Judge
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