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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11 **WESTERN DISTRICT**

12 ) **CASE NO.: C-12-132 DDP (SSx)**  
13 )  
14 ) **PLAINTIFF CELESTIAL INC.'S**  
15 ) **RESPONSE TO ORDER TO SHOW**  
16 ) **CAUSE WHY MATTER SHOULD**  
17 ) **NOT BE DISMISSED FOR LACK OF**  
18 ) **PERSONAL JURISDICTION**  
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CELESTIAL, INC,  
Plaintiff,  
vs.  
SWARM SHARING HASH  
8AB508AB0F9EF8B4CDB14C6248  
F3C96C65BEB882 ON  
**DECEMBER 15, 2011** and DOES 1  
and 2,  
Defendants.

23 Plaintiff Celestial, Inc. (Celestial) filed a motion for leave to take early  
24 discovery. [ECF No. 8] The Court issued its Order Denying Plaintiff's Motion for  
25 Leave to Take Early Discovery, and Order to Show Cause Why the Matter Should  
26 Not Be Dismissed for Lack of Personal Jurisdiction (Order to Show Cause). [ECF  
27 No. 9] Celestial responds.

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1 *People Pictures, LLC v. Group of Participants in Filesharing Swarm Identified by Hash:*  
2 *43F4CFD05C115EE5887F680B0-CA73B1BA18B434A*, CIV.A. 11-1968 JEB, 2011 WL  
3 6758462 (D.D.C. Dec. 23, 2011) ..... 6  
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8 *TGA v. Doe*, 10 C 5603, 2011 WL 7444064 (N.D. Ill. Sept. 26, 2011) ..... 6  
9 *W. Coast Prods. v. Doe*, 275 F.R.D. 9 (D.D.C. 2011) ..... 4  
10 *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F. 2d 406 (9th Cir. 1977) ..... 8

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## INTRODUCTION

Plaintiff Celestial, Inc. filed a series of fifteen complaints in the Central District of California to recover damages caused by the infringement of its works through bit torrent networks.<sup>1, 2</sup> Due to the nature of the infringement Plaintiff cannot identify the infringers without subpoenaing subscriber information for the IP addresses at issue. In response to Plaintiff's request to take relevant discovery, the Court requested briefing on the issue of personal jurisdiction.<sup>3</sup> Plaintiff only

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<sup>1</sup> The Court previously ordered these cases related.

<sup>2</sup> Plaintiff may have caused confusion with regard to the number of defendants in this matter by identifying the defendants as "SWARM SHARING HASH 8AB508AB0F9EF8B4CDB14C6248F3C96C65BEB882 ON DECEMBER 15, 2011 and DOES 1 and 2", perhaps mistakenly suggesting Plaintiff intended to include more defendants than the specifically identified Does. However, Plaintiff identified the defendants by the HASH and Date in order to distinguish this case from many other separately filed cases that would have also been named *Celestial, Inc. v. Does 1 and 2*. Plaintiff did not and does not intend to include any other defendants (e.g. other infringers who participated in the swarm but who accessed the Internet from outside California). It may have been more precise to caption the case *Celestial, Inc. v. Does 1 and 2 as participants of SWARM SHARING HASH 8AB508AB0F9EF8B4CDB14C6248F3C96C65BEB882 ON DECEMBER 15, 2011*.

<sup>3</sup> The Court also directed that any renewed motion for early discovery must address the issue of joinder. Plaintiff will bring a renewed motion for early discovery but preliminarily notes that Plaintiff only seeks to join several defendants each of whom shared the same hash on the same day. Plaintiff alleges these defendants traded bits of the file with one another thus engaging in contributory infringement for which they are jointly and severally liable (Complaint at ¶44-53) and are therefore properly joined. Previous cases, including those cited in the Court's Order to Show Cause at footnote 3, joined large numbers of defendants who accessed a swarm (or different swarms) over significant periods of time. None of these cases included allegations

1 included in its Complaint Defendants who accessed the Internet from IP addresses  
2 that geolocation tools find are likely to resolve to physical addresses in California.  
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4 [Declaration of Tobias Fieser in Support of Plaintiff's Response to Order to Show  
5 Cause at ¶8 (Fieser Decl.)]  
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7 **ARGUMENT**

8 **I. This Matter Should Not Be Dismissed for Lack of Personal Jurisdiction**  
9 **Because Analysis of Personal Jurisdiction Is Premature.**  
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13 of contributory infringement. *See, Hard Drive Productions, Inc. v. Does 1-188*, 809  
14 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011)(infringement occurred over a number of  
15 weeks and apparently involved participation in different swarms); *On The Cheap,*  
16 *LLC v. Does 1-5011*, C10-4472 BZ, 2011 WL 4018258 (N.D. Cal. Sept. 6, 2011)  
17 (court adopted the reasoning of other opinions, most of which focused on the  
18 expanse of time in which the infringement took place and focused on the  
19 manageability and fairness issues of joining 5,011 defendants); *SBO Pictures, Inc. v.*  
20 *Does 1-3036*, 11-4220 SC, 2011 WL 6002620 (N.D. Cal. Nov. 30, 2011) (in case  
21 with 3036 doe defendants, the court relied heavily on the fact that, "Doe Defendants'  
22 alleged participation in the same swarm spanned approximately a four-month period  
23 from May 2011 through August 2011"); *Hard Drive Productions v. Does 1-33*, C  
24 11-03827 LB, 2011 WL 5325530, at \*3 (N.D. Cal. Nov. 3, 2011) ("[T]he court does  
25 not believe that permissive joinder is appropriate given the wide range of dates on  
26 which the Doe defendants allegedly downloaded and shared the copyrighted  
27 work."); *AF Holdings, LLC v. Does 1-97*, C 11-3067 CW, 2011 WL 5195227, at \*3  
28 (N.D. Cal. Nov. 1, 2011)("[T]he activity alleged includes ninety-seven defendants,  
eleven different Internet Service Providers, and a week and a half of activity.");  
*MCGIP, LLC v. Does 1-149*, C 11-02331 LB, 2011 WL 4352110 (N.D. Cal. Sept.  
16, 2011)("[The alleged "chain of data distribution" spans 149 defendants, 14  
different ISPs, and 36 separate days between March 28, 2011 and May 11, 2011.");  
*Boy Racer, Inc. v. Does 1-60*, C 11-01738 SI, 2011 WL 3652521, at \*4 (N.D. Cal.  
Aug. 19, 2011)("[T]he Exhibit attached to plaintiff's complaint indicates that  
defendants were allegedly present in BitTorrent swarms on approximately 18  
different dates.").

1 In the first instance, it is simply premature to fully analyze the issue of  
2 personal jurisdiction, which as the name implies, is unique to the person. One  
3 cannot analyze the factors relating to personal jurisdiction until Plaintiff identifies  
4 and names the Defendant. As explained in Plaintiff's motion for early discovery,  
5 the only thing Plaintiff knows about the identity of the Doe Defendants is that on a  
6 certain date and time the Defendants accessed the Internet from the identified IP  
7 address. Courts considering the issue in similar cases have held that until a Plaintiff  
8 has identified defendants and amended the Complaint to name actual parties,  
9 personal jurisdiction cannot be fully or properly analyzed.  
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14 In *Io Group, Inc. v. Does 1-19*, the court granted plaintiff's motion for early  
15 discovery and plaintiff subpoenaed the ISP for subscriber information. *IO Group,*  
16 *Inc. v. Does 1-19*, C 10-03851 SI, 2010 WL 5071605 (N.D. Cal. Dec. 7, 2010). The  
17 subscriber anonymously filed a motion to quash the subpoena and to dismiss the  
18 complaint against him based on the lack of personal jurisdiction. The Court denied  
19 the motion to dismiss for lack of personal jurisdiction, writing, "[t]he Court, and  
20 plaintiff, cannot adequately determine if personal jurisdiction exists until Doe 4  
21 either identifies himself to the Court and plaintiff's counsel or he is identified by [the  
22 ISP in response to the subpoena]." *Id.* at \*3. *See also, Liberty Media Holdings,*  
23 *LLC v. Does 1-62*, 11-CV-575-MMA NLS, 2012 WL 628309, at \*3 (S.D. Cal. Feb.  
24 24, 2012)("[i]n the absence of [information about a defendant's connections or lack  
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1 thereof to California], it is premature to decide whether the Court has personal  
2 jurisdiction over unnamed Doe Defendants”); *Call of the Wild, LLC v. Does 1-*  
3 *1,062*, 770 F. Supp. 2d 332, 347 (D.D.C. 2001)(“[A]t this juncture when no putative  
4 defendant has been named, the Court has limited information to assess whether any  
5 putative defendant has a viable defense of lack of personal jurisdiction.”); *London-*  
6 *Sire Records, Inc. v. Doe* 1,542 F. Supp. 2d 153, 180-81 (D. Mass. 2008) (denying  
7 motion to quash for lack of personal jurisdiction because jurisdictional discovery  
8 might establish a basis for jurisdiction); *Sony Music Entm’t v. Does 1-40*, 326 F.  
9 Supp. 2d 556, 567-68 (S.D. NY, 2007)(concluding it would be premature to  
10 determine that personal jurisdiction is lacking before the defendant had been  
11 identified).

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17 The Court states that Celestial’s Complaint would not survive a motion to  
18 dismiss for lack of personal jurisdiction. [Order To Show Cause at 5:15-17.]  
19 However, the accuracy of this statement depends upon who eventually brings such a  
20 motion, which cannot be determined until Plaintiff identifies the Doe Defendants  
21 and names them in an amended complaint. *See, W. Coast Prods. v. Doe*, 275 F.R.D.  
22 9, 14-15 (D.D.C. 2011)(finding that until plaintiff formally names and serves each  
23 defendant, the Court could not be certain whether parties moving to dismiss would  
24 be compelled to defend this action as parties).

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28 **II. Plaintiff Filed Its Complaint in This Court Because It Has a Good Faith  
Belief That the Court Holds Personal Jurisdiction over the Defendants.**



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2 Plaintiff's investigators used geo-locating tools to approximate where the IP  
3 addresses used to infringe might be located and the Complaint here only names doe  
4 defendants whose IP address likely are to be found in California. [Fieser Decl, *in*  
5 *passim*] In granting motions for leave to take early discovery in similar cases,  
6  
7 courts have relied on evidence of ip location based on the use of geolocation tools.  
8  
9 *See, Pink Lotus Entm't, LLC v. Does 1-46*, C-11-02263 HRL, 2011 WL 2470986, at  
10 \*3 (N.D. Cal. June 21, 2011)(“Plaintiff also used ‘geolocation’ technology to trace  
11 these IP addresses to a point of origin within the state of California.”); *OpenMind*  
12 *Solutions, Inc. v. Does 1-39*, C 11-3311 MEJ, 2011 WL 4715200, at \*2 (N.D. Cal.  
13  
14 Oct. 7, 2011) (“Plaintiff indicates that it used geolocation technology to trace these  
15 IP addresses to a point of origin within the state of California.”); *First Time Videos,*  
16 *LLC v. Does 1-95*, C 11-3822 MEJ, 2011 WL 4724882, at \*2 (N.D. Cal. Oct. 7,  
17  
18 2011) (“Plaintiff indicates that it used geolocation technology to trace these IP  
19 addresses to a point of origin within the state of California.); *MCGIP, LLC v. Does*  
20 *1-30*, C11-03680 HRL, 2011 WL 3501720, at \*3 (N.D. Cal. Aug. 10, 2011)(“Court  
21 allowed discovery where “Plaintiff also used “geolocation” technology to trace these  
22 IP addresses to a point of origin within the state of California.”).

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26 Other courts have relied on geolocation tool results to predict IP addresses  
27 presumably would be *outside* of the state where the actions were brought.  
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1 *Millenium TGA v. Doe*, 10 C 5603, 2011 WL 7444064 (N.D. Ill. Sept. 26,  
2 2011)(court dismissed case for lack of personal because geolocation tools placed ip  
3 address *outside* the district); *People Pictures, LLC v. Group of Participants in*  
4 *Filesharing Swarm Identified by Hash: 43F4CFD05C115EE5887F680B0-*  
5 *CA73B1BA18B434A*, CIV.A. 11-1968 JEB, 2011 WL 6758462 (D.D.C. Dec. 23,  
6 2011)(court issued order to show cause why case should not be dismissed for lack of  
7 personal jurisdiction where geolocation tools placed ip address *outside* the  
8 jurisdiction); *See also*, Brief of Amicus Curiae Electronic Frontier Foundation in  
9 Support of Motion to Quash Subpoena, *First Time Videos, LLC v. Does 1-500*, 276  
10 F.R.D. 241 (N.D. Ill. 2001) (No. 1:10-cv-06254), at 6 (arguing geolocation tools can  
11 determine the likely location of the computers associated with those IP addresses).

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17 With the reasoning of these cases in mind, Plaintiff only named Defendants  
18 who accessed the Internet from IP addresses that geo-location tools placed within  
19 California. [Complaint at ¶3; Fieser Decl. at ¶8]

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21 Plaintiff also filed these related matters in its home jurisdiction under the  
22 theory that once identified, personal jurisdiction *may* also be established under the  
23 “effects test”. A party can establish a defendant purposefully directed his activities  
24 towards California using the three-part Calder-effects test. Under this test, “the  
25 defendant allegedly must have (1) committed an intentional act, (2) expressly aimed  
26 at the forum state, (3) causing harm that the defendant knows is likely to be suffered  
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1 in the forum state.” *Liberty Media Holding, LLC v. Tabora*, No. 11-cv-651, 2012  
2 WL 28788, at \*3 (S.D. Cal. Jan 4, 2012). Although the court in *Tabora*, found the  
3 facts did not establish jurisdiction, it only reached that determination *after* the  
4 defendant and related facts had been identified. *Id. at* \*2-7. Where defendants  
5 have not yet been identified, it seems preferable to file the Complaint in a  
6 jurisdiction where there was some indications defendants’ intentional tortuous acts  
7 would cause harm, rather than to select a forum at random.  
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11 As noted above, Plaintiff has a good faith belief Doe Defendants accessed the  
12 Internet from locations within California based on geolocation tool results. If the  
13 Defendant is identified as a California resident, an analysis applying the effects will  
14 be moot. If in spite of the indications that jurisdiction is likely to be found, Plaintiff  
15 discovers a defendant lives in another state and accordingly dismisses its claims  
16 against that defendant, an effects test analysis will also be moot. If the Court is not  
17 satisfied that geolocation results are sufficiently reliable to establish a good faith  
18 belief that the personal jurisdiction lies in California, it seems reasonable to file the  
19 Complaint in Plaintiff’s home jurisdiction when at least some factors support a  
20 finding of personal jurisdiction based on the effects test and no facts suggest  
21 personal jurisdiction is proper elsewhere.  
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1           **III. Courts Must Allow Jurisdictional Discovery, If a Party Would**  
2           **Otherwise Suffer Actual and Substantial Prejudice.**

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4           Even in cases where a party is already identified, Courts will allow a party to  
5 take limited discovery in order that the Court might have sufficient information to  
6 properly analyze the question of personal jurisdiction. Failure to allow such  
7 discovery where a party will suffer actual and substantial prejudice is an abuse of  
8 discretion.  
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11           Although discovery is generally not permitted before parties confer pursuant  
12 to Rule 26(f), “[w]here pertinent facts bearing on the question of jurisdiction are  
13 controverted ... or where a more satisfactory showing of the acts is necessary’ courts  
14 should allow for discovery.” *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556  
15 F.2d 406, 430 n.24 (9th Cir. 1977), citing, *Kilpatrick v. Texas & P. Ry.*, 72 F. Supp.  
16 635, 638 (S.D.N.Y.1947). In the Ninth Circuit, a party is not required to present a  
17 colorable basis for personal jurisdiction in order to obtain leave to take such  
18 jurisdictional discovery. *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D.  
19 670, 673 (S.D. Cal. 2001) (“It would [...] be counterintuitive to require a plaintiff,  
20 prior to conducting [jurisdictional] discovery, to meet the same burden that would  
21 be required in order to defeat a motion to dismiss.”).  
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26           In this matter, the only information currently known about the Defendants  
27 suggests that personal jurisdiction is likely to lie in California and no evidence  
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1 suggests that jurisdiction is proper anywhere else. Limited discovery in the form  
2 requested is warranted not only to identify the Defendant, but also to discover facts  
3 relevant to personal jurisdiction. Although, Plaintiff did not specifically identify  
4 the discovery it requested as jurisdictional in nature, it is apposite that identifying  
5 the name and address of the Internet subscriber will likely resolve the question of  
6 whether personal jurisdiction lies in California.  
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10 The question of whether jurisdictional discovery should be permitted is  
11 generally left to the discretion of the trial court. *Data Disc, Inc. v. Systems Tech.*  
12 *Assocs., Inc.*, 557 F.2d 1280, 1285 n. 1 (9th Cir.1977), citing *Wells Fargo & Co.*  
13 However, it is an abuse of discretion to refuse discovery when such refusal would  
14 lead to actual and substantial prejudice to the litigant. *Wells Fargo & Co.* 556 F.2d  
15 at 430 n.24, citing *Budde v. Ling-Temco-Vought, Inc.*, 511 F.2d 1033, 1035 (10th  
16 Cir. 1975). *See, Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903  
17 (11th Cir.1984) (Court vacated dismissal because trial court did not allow discovery  
18 to establish plaintiff's claims); *Canavan v. Beneficial Fin. Corp.*, 553 F.2d 860, 865  
19 (3d Cir.1977)(court vacated dismissal and allowed discovery on subject matter  
20 jurisdiction). *See also, Marshall v. McCown Deleeuw & Co.*, 391F.Supp.2d 880,  
21 882 (D. Idaho 2005)(relying on *Wells Fargo & Co.* and *Data Disc, Inc.*, district  
22 court allowed discovery of facts to show alter ego status of one defendant in order to  
23 establish personal jurisdiction).  
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In this matter, denying discovery would prevent Plaintiff from proceeding in any jurisdiction, leading to actual and substantial prejudice.

**CONCLUSION**

The Court should not dismiss this matter for lack of personal jurisdiction because personal jurisdiction is specific to yet to be identified defendants; the limited known facts indicate jurisdiction is most likely to lie in California; and it would be an abuse of discretion to dismiss this matter without first allowing Plaintiff to take jurisdictional discovery because Plaintiff would suffer actual and substantial prejudice if not allowed to take such discovery.

As Plaintiff has adequately addresses personal jurisdiction , it will move again for early discovery.

Respectfully submitted,

Dated: 3/29/2012

*/s/ D. Gill Sperlein*

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GILL SPERLEIN  
Attorney for Plaintiff CELESTIAL, INC.