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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PINK LOTUS ENTERTAINMENT,
LLC,

Plaintiff,

No. 2:11-cv-03073 WBS KJN

v.

JOHN DOE,

Defendant.

ORDER

_____/

Plaintiff Pink Lotus Entertainment, LLC (“plaintiff”) previously filed an ex parte application for leave to take expedited discovery on January 6, 2012. (App. for Expedited Discovery, Dkt. No. 7.) That application was denied on January 23, 2012. (Order, Dkt. No. 8.)

Presently before the court is plaintiff’s *amended* ex parte application for leave to take expedited discovery, which plaintiff filed on January 30, 2012. (Amended App. for Expedited Discovery, Dkt. No. 9.) As with its original ex parte application, plaintiff did not notice its amended ex parte application for hearing. The undersigned concludes that oral argument would not be of material assistance in resolving the amended application.

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1 Accordingly, the application will be decided on the papers submitted.¹

2 Through plaintiff's amended application for expedited discovery, plaintiff again
3 seeks permission to serve a discovery subpoena upon a third party named Steve Polan ("Mr.
4 Polan" or "the account holder"), who is the "account holder associated with" the Internet
5 Protocol ("IP") address "67.164.219.14," which was allegedly used in connection with
6 infringement upon plaintiff's copyrighted adult video entitled *Dexxter* ("Video"). Although
7 plaintiff alleges that Mr. Polan is the "holder" of the account allegedly used to infringe upon
8 plaintiff's copywritten Video, plaintiff has not formally named Mr. Polan as a defendant in this
9 action because the relationship between an account holder and infringer can be "imperfect."
10 (Complaint, ("Compl."), Dkt. No. 2 ¶ 1; App. for Expedited Discovery at 9; Amended App. for
11 Expedited Discovery at 9.) Instead, plaintiff requests expedited discovery (in the form of
12 deposing Mr. Polan as a third party), purportedly to obtain the identities of the defendant(s)
13 alleged to have used Mr. Polan's account associated with IP address "67.164.219.14" to infringe
14 on plaintiff's rights in regards to the Video. (Amended App. for Expedited Discovery at 5; App.
15 for Expedited Discovery at 5; see also Compl. ¶¶ 1-4, 19-37.)

16 The undersigned has considered plaintiff's amended application and, for the
17 reasons discussed below, the undersigned denies plaintiff's amended ex parte application to
18 conduct limited early discovery pursuant to Federal Rule of Civil Procedure 26(d)(1).

19 I. BACKGROUND

20 On November 21, 2011, plaintiff filed a complaint for copyright infringement and
21 civil conspiracy against John Doe, an unnamed defendant.² (Compl. ¶ 1.) Plaintiff is a producer
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23 ¹ This case was referred to the undersigned pursuant to Eastern District of California Local
24 Rule 302(c)(1) and 28 U.S.C. § 636(b)(1).

25 ² The use of "Doe" defendants is generally disfavored. *Gillespie v. Civiletti*, 629 F.2d 637,
26 642 (9th Cir. 1980). However, a plaintiff should be given an opportunity through discovery to
identify such defendants where the identities of those defendants are not known prior to the filing
of a complaint, "unless it is clear that discovery would not uncover the identities, or that the

1 of adult entertainment content, and is alleged to be the exclusive holder of the relevant rights
2 with respect to the Video. (Compl. ¶¶ 3-4.) In the course of monitoring Internet-based
3 infringement of its copyrighted content, plaintiff's agents allegedly observed unlawful
4 reproduction and distribution of the Video occurring over a particular IP address via the Bit
5 Torrent file transfer protocol, the mechanics of which are further described in the Complaint.³
6 (Compl. ¶¶ 5, 14-18, 22-24.) According to plaintiff, it has already determined that Mr. Polan is
7 the account holder of the IP address involved. (Amended App. for Expedited Discovery at 5.)
8 According to plaintiff, "[e]ven if Mr. Polan did not download and distribute Plaintiff's
9 copyrighted video himself, the infringing activity occurred over his network and the equipment
10 he controls," such that Mr. Polan is the only person "with information that can allow Plaintiff to
11 identify the true infringer." (*Id.* at 5; 9.) According to plaintiff, when plaintiff's counsel
12 contacted Mr. Polan, Mr. Polan was entirely non-responsive, and in fact, "merely ignored all of
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14 complaint would be dismissed on other grounds." *Id.*

15 ³ A magistrate judge in the Northern District of California summarized the BitTorrent
16 protocol as follows:

17 In the BitTorrent vernacular, individual downloaders/distributors of
18 a particular file are called "peers." The group of peers involved in
19 downloading/distributing a particular file is called a "swarm." A server
20 which stores a list of peers in a swarm is called a "tracker." A computer
21 program that implements the BitTorrent protocol is called a BitTorrent
22 "client."

23 The BitTorrent protocol operates as follows. First, a user locates a
24 small "torrent" file. This file contains information about the files to be
25 shared and about the tracker, the computer that coordinates the file
26 distribution. Second, the user loads the torrent file into a BitTorrent client,
which automatically attempts to connect to the tracker listed in the torrent
file. Third, the tracker responds with a list of peers and the BitTorrent client
connects to those peers to begin downloading data from and distributing data
to the other peers in the swarm. When the download is complete, the
BitTorrent client continues distributing data to the peers in the swarm until
the user manually disconnects from the swarm or the BitTorrent client
otherwise does the same.

Diabolic Video Prods., Inc. v. Does 1-2099, No. 10-CV-5865-PSG, 2011 WL 3100404, at *1-2
(N.D. Cal. May 31, 2011) (unpublished).

1 Plaintiff's counsel's attempts to meet and confer" regarding the identity of the alleged infringer.
2 (Id. at 9.)

3 As noted above, plaintiff previously filed an ex parte application for leave to take
4 expedited discovery (App. for Expedited Discovery, Dkt. No. 7), and that application was denied
5 on January 23, 2012. (Order, Dkt. No. 8.) The undersigned denied plaintiff's ex parte
6 application because plaintiff had failed to demonstrate good cause for the expedited discovery
7 plaintiff requested. (Order at 3-8.) The Order also separately raised the undersigned's concern
8 about plaintiff's failure to provide a signed declaration supporting the many factual allegations
9 made in the ex parte application. (Id. at 8-9 ("The undersigned is also troubled by plaintiff's
10 failure to substantiate certain claims made in its moving papers[,]" such as counsel's efforts to
11 communicate with the account holder and counsel's representations about the scope of questions
12 to be asked should the account holder be deposed.))

13 Now, plaintiff again asks the court to authorize service of a third party deposition
14 subpoena upon the account holder. Plaintiff again states that, in some cases, an account holder
15 may be able to offer a credible explanation for why he or she is not the infringer and may be able
16 to identify the actual infringer, such as another household member or tenant. (Amended App. for
17 Expedited Discovery at 5; App. for Expedited Discovery at 5.) Plaintiff again contends that it
18 cannot proceed in the action without ascertaining the likely infringer's identity, and that Mr.
19 Polan is the only person with information that can allow plaintiff to identify the actual infringer
20 and permit service of process on that individual. (Amended App. for Expedited Discovery at 5;
21 App. for Expedited Discovery at 5.)

22 II. DISCUSSION

23 Plaintiff's amended ex parte application raises the same legal arguments plaintiff
24 raised in its original ex parte application. (Compare Amended App. for Expedited Discovery
25 with App. for Expedited Discovery (both arguing that "good cause" exists for expedited
26 discovery, and that a deposition of the account holder would be minimally burdensome and

1 reasonably calculated to lead to the discovery of the infringer’s identity.) The difference between
2 the two applications is that the factual statements within the amended application are supported
3 by a signed declaration from plaintiff’s counsel. (Declaration of Brett Gibbs (“Gibbs Decl.”),
4 Dkt. No. 9-1 at 2-5.) Attorney Gibbs states that he “informed Mr. Polan of the allegations
5 against him and the likelihood of this lawsuit if Mr. Polan could not supply Plaintiff with a
6 factually supportable alibi,” but never heard back from Mr. Polan. (Gibbs Decl. at ¶¶ 5-7.)
7 Attorney Gibbs attests to his firm’s efforts to contact the account holder (id. ¶¶ 2-8), as well as to
8 his intent to depose the account holder by asking only limited questions designed to reveal the
9 “actual infringer” and to “minimize the burden” on the account holder (id. ¶ 9-12).

10 While the undersigned appreciates plaintiff’s renewed diligence in providing a
11 signed declaration to substantiate the factual representations within the moving papers, the
12 undersigned denies plaintiff’s amended application. Under the same legal analyses described in
13 the undersigned’s Order of January 23, 2012, the entirety of which is incorporated by reference
14 here, plaintiff’s amended application fails to show the existence of good cause⁴ warranting the
15 use of expedited discovery. (See Order, Dkt. No. 9 at 3-7 (applying the “good cause” analysis of
16 Semitool, Inc. v. Tokyo Electron. Am. Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002), discussing
17 authorities, including UMG Recordings, Inc. v. Doe, No. C-08-03999 RMW, 2008 WL
18 4104207, at *1-3 (N.D. Cal. Sept. 4, 2008 (unpublished); Arista Records LLC v. Does 1-43, No.
19 07cv2357-LAB (POR), 2007 WL 4538697, at *1-2 (S.D. Cal. Dec. 20, 2007) (unpublished).)

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22 ⁴ District courts within the Ninth Circuit have permitted expedited discovery prior to the
23 Rule 26(f) conference upon a showing of “good cause.” E.g., In re Countrywide Fin. Corp.
24 Derivative Litig., 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (citing Semitool, Inc. v. Tokyo
25 Electron Am., Inc., 208 F.R.D. 273 (N.D. Cal. 2002)); accord Am. LegalNet, Inc. v. Davis, 673 F.
26 Supp. 2d 1063, 1066 (C.D. Cal. 2009). “Good cause exists where the need for expedited discovery,
in consideration of the administration of justice, outweighs the prejudice to the responding party.”
In re Countrywide, 542 F. Supp. 2d at 1179 (citation and internal quotation marks omitted);
Semitool, Inc., 208 F.R.D. at 276.

1 Likewise, plaintiff has not shown that “good cause” outweighs the likely prejudice⁵ that would
 2 result from deposing the account holder.⁶ (See Order, Dkt. No. 8 at 5-8 (recognizing that courts
 3 have granted expedited discovery in the form of limited *document requests* to obtain the name
 4 and contact information of account holders, explaining that plaintiff already has this contact
 5 information, and explaining that plaintiff’s proposed *oral deposition* of the account holder is
 6 much broader in that it seeks “facts about [the account holder’s] involvement, if any, with the
 7 unauthorized distribution of Plaintiff’s video(s) via [the account holder’s] IP address; to learn
 8 about [the account holder’s] computers and network setup; to assess [the account holder’s]
 9 technical savvy; and to identify any other persons who had access to [the account holder’s]
 10 computer and network” (citing App. for Expedited Discovery at 11)⁷.)

11 The undersigned again finds that plaintiff has not shown that good cause exists for
 12 the discovery requested. In light of “the entirety of the record . . . and the reasonableness of the
 13 request in light of all the surrounding circumstances,” plaintiff has failed to demonstrate the
 14 requisite good cause. See Semitool, Inc., 208 F.R.D. at 275 (citation & quotation marks omitted)

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 16 ⁵ As previously noted in the undersigned’s Order of January 23, 2012, plaintiff considers the
 17 account holder to be a *potential defendant* who may be substituted for the “John Doe” defendant in
 18 this case rather than a more typical “third party,” such as an internet service provider. (See Order
 19 at 7-8.) According to plaintiff’s original ex parte application, plaintiff’s counsel met and conferred
 20 informally with Mr. Polan and “informed Mr. Polan of the allegations against him and the likelihood
 21 of this lawsuit if Mr. Polan could not supply Plaintiff with a factually supportable alibi,” but never
 heard back from Mr. Polan. (App. for Expedited Discovery at 5 n.1.) Plaintiff also expressed
 plaintiff’s belief that “Mr. Polan’s evasive behavior thus far does not reflect the actions of an entirely
 innocent third party.” (*Id.*) In the declaration supporting plaintiff’s pending application, plaintiff’s
 counsel confirms that he asked the account holder “whether [he] would be amenable to informal
 discovery and whether [he] would provide [plaintiff] with any substantive evidence showing that he
 was not the infringer in this case.” (Gibbs Decl. ¶ 2.)

22 ⁶ While the discovery timing prescribed by Federal Rule of Civil Procedure 26(d) does not
 23 expressly focus on “prejudice” to unnamed potential defendants, the applicable “good cause”
 24 analysis nonetheless requires the undersigned to examine the “entirety” of the record and the
 “reasonableness of the request in light of all the surrounding circumstances.” See Semitool, Inc., 208
 F.R.D. at 275 (citation & quotation marks omitted) (emphasis removed); Am. Legalnet, 673 F. Supp.
 2d at 1067.

25 ⁷ The declaration in support of plaintiff’s amended application again describes these as areas
 26 to be covered in an oral deposition of the account holder. (Gibbs Decl. ¶ 10.)

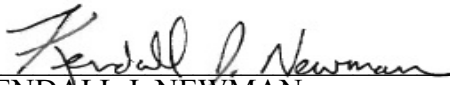
1 (emphasis removed); Am. Legalnet, 673 F. Supp. 2d at 1067. Again, assuming plaintiff has a
2 good faith basis for its claims, plaintiff can name the account holder as a defendant, serve him
3 with process, hold the Rule 26(f) conference, and conduct any discovery necessary. Procedural
4 vehicles exist to later add and/or dismiss defendants based on additional facts discovered, if
5 necessary.

6 III. CONCLUSION

7 Accordingly, for the reasons discussed above, IT IS HEREBY ORDERED that
8 plaintiff's amended ex parte application for leave to take expedited discovery (Amended App. for
9 Expedited Discovery, Dkt. No. 9) is DENIED.

10 IT IS SO ORDERED.

11 DATED: March 20, 2012

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14 KENDALL J. NEWMAN
15 UNITED STATES MAGISTRATE JUDGE
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