

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DALLAS BUYERS CLUB, LLC,

Plaintiff,

v.

DOES 1-28,

Defendants.

CASE NO. C15-576RAJ; 15-
579RAJ; 15-580RAJ; 15-581RAJ;
15-582RAJ

ORDER

I. INTRODUCTION

This Matter comes before the Court on Plaintiff's Motion for Leave to Issue FRCP 45 Subpoenas to Nonparties, filed August 12, 2015. Dkt. # 21-1. Plaintiff has filed identical motions in 4 of the nearly identical lawsuits before this Court. *See* Case No. 15-579RAJ, Dkt. # 15; Case No. 15-580RAJ, Dkt. # 11; Case No. 15-581RAJ, Dkt. # 10; Case No. 15-582RAJ, Dkt. # 18.

II. BACKGROUND

This case was filed on April 13, 2015. In this case and 12 other cases filed between July 2014 and April 2015, Plaintiff filed an essentially identical complaint naming between 10 and 39 "John Doe" Defendants who it accuses of infringing its copyright in the motion picture *Dallas Buyers Club* by unlawfully copying or distributing the film using peer-to-peer file sharing networks. These cases have necessitated a high degree of case management. Consequently, this Court has issued several Orders, either in

1 this case or in a related case, in an effort to streamline and expedite this litigation. Those
2 Orders remain in full effect.

3 Most pertinent to the instant matter is an Order this Court issued on May 4, 2015 –
4 over four months ago – wherein this Court permitted Plaintiff to issue subpoenas to
5 Internet Service Providers (“ISP”) in order to identify Doe Defendants. *See* Dkt. # 7. At
6 the same time, this Court issued a Standing Case Management Order directing Plaintiff –
7 in this case and in others – to file an amended complaint or to file a motion for leave to
8 amend explaining why it wished to continue to name one or more John Doe Defendants
9 within 120 days of service of those subpoenas. *See* Dkt. # 8 at 1; Case No. 15-579RAJ,
10 Dkt. # 8; Case No. 15-580RAJ, Dkt. # 8; Case No. 15-581RAJ, Dkt. # 8; Case No. 15-
11 582RAJ Dkt. # 8. It has been well over 120 days since the Court’s issuance of that Order
12 and, at least at this point, Plaintiff has yet to file either an amended complaint or a motion
13 for leave to amend in any of these five cases.

14 Perhaps the instant Motion is Plaintiff’s effort to clarify why it has yet to name
15 certain Doe Defendants. As Plaintiff explains (albeit without providing this Court any
16 evidence),¹ it has subpoenaed the ISPs (though it declines to specify *when* it did so) to
17 identify the parties responsible for the claimed copyright infringement. *See* Dkt. # 21-1
18 at 1. Where possible, the ISPs have identified the subscriber assigned to each Internet
19 Protocol (“IP”) address used by the Doe Defendant. *Id.*

20 Plaintiff further states (again without providing this Court any evidence) that it
21 then undertook other efforts to try to identify the infringing party. These efforts included
22 observing the online activity of each identified IP address to see if it was associated with
23 significant infringing activity and the exchange of titles on BitTorrent apart from *Dallas*
24

25 ¹ These “facts” are derived solely from Plaintiff’s Motion. “[F]acts not appearing of record”
26 must be supplied by separately filing “affidavits, declarations, photographic or other evidence
27 presented in support of the motion.” *See* Local Rules W.D. Wash. LCR 7(b); *see also Reynolds*
28 *Metals Co. v. Alcan Inc.*, No. C04-175L, 2005 WL 1252202, at *2 (W.D. Wash. May 23, 2005).
Quite frankly, Plaintiff has left the Court to accept Plaintiff’s averments on faith alone.

1 *Buyers Club*.² *Id.* at 1-2. They also included Google address mapping and investigating
2 county records for ownership and rental status and associated residences. *Id.* at 2.
3 Additionally, these efforts included investigating social media sites such as Facebook and
4 LinkedIn to obtain further information. *Id.* And, finally, Plaintiff sent multiple letters to
5 either the subscriber identified by the ISP or their counsel requesting their voluntary
6 participation in identifying the actual infringer. *Id.*

7 Plaintiff explains that now, despite these efforts, the subscribers or other resident
8 associated with 16 IP addresses in this action and 45 IP addresses in the other four cases
9 have refused to voluntarily respond or refused to voluntarily provide discovery. *See id.* at
10 3. Consequently, Plaintiff now requests leave of Court to subpoena the depositions of 16
11 subscribers in this case and 45 subscribers in the other cases pending before this Court.

12 In order to comply with this Court's prior Orders, Plaintiff proposes to: (1) limit
13 depositions to no more than 2 hours, (2) seek only testimony of a subscriber or other
14 resident identified by the ISP, without any document production, and (3) allow for at least
15 30 days between service of the subpoena and the time for complying. *See* Dkt. # 21-1 at
16 5. Moreover, Plaintiff further proposes that it will be flexible in working with the
17 subscribers to reschedule depositions and will send a cover letter to subpoenaed
18 nonparties informing them of the nature of the lawsuit, their obligations under the
19 subpoena, and encouraging them to consult an attorney. *See* Dkt. # 20 Ex. B.

20 Previously, this Court found that these limitations were reasonable and that these
21 depositions were reasonably likely to lead to the discovery of relevant information. *See*
22 Case No. 14-1819RAJ, Dkt. # 36 at 3. Perhaps revealing the relative failure of these
23 efforts, Plaintiff has now filed a bevy of motions for leave for alternative service or for
24 contempt (for failure to comply with said subpoena) in three of the cases in which this
25 Court had authorized Plaintiff to issue subpoenas to non-parties. *See* Case No. 14-

26
27 ² The Court notes that Plaintiff's Complaint alleges that Plaintiff undertook this step prior to
28 even filing this Action. *See* Compl. ¶ 11.

1 1684RAJ, Dkt. # 25; Case No. 14-1926RAJ, Dkt. # 37 & 38; Case No. 15-133RAJ, Dkt.
2 # 22 & 24. No doubt Plaintiff will claim that it has had some success through its current
3 measures, pointing to its dismissal of Doe defendants in several of these cases. *See e.g.*,
4 Case No. 15-134RAJ, Dkt. # 32, 33, 34, 35, 36 & 37 (notices of dismissal). But the
5 bottom line is that to this Court's knowledge, no amended complaint has been filed and
6 no defendant has been named in any of these suits except for in Case No. 14-1153RAJ.

7 Quite tellingly, Plaintiff has yet to file any statement indicating its preparedness to
8 name a defendant, amended complaint naming such defendant, or other statement in Case
9 No. 14-1819RAJ as it was directed to do within 90 days of service of a deposition
10 subpoena. *See* Case No. 14-1819RAJ, Dkt. # 36 at 6. This is particularly surprising
11 given that Mr. Pleake in that matter actively opposed Plaintiff's motion. *See* Case No.
12 14-1819RAJ, Dkt. # 32. It has been well over 90 days since the Court issued its July 1,
13 2015 Order. Nothing has been filed since.

14 All this implies that Plaintiff is not actually interested in bringing these cases to
15 conclusion on their merits and is instead trying to use these proceedings to leverage
16 settlements out of unidentified Doe defendants through the threat of Court order.
17 Numerous other courts have considered the possibility of abusive litigation tactics in
18 addressing similar motions. *See e.g., Malibu Media, LLC v. Doe*, No. 15 CIV. 4369
19 AKH, 2015 WL 4092417, at *2 (S.D.N.Y. July 6, 2015) (collecting cases). And this
20 Court is increasingly tired of the slow progress of these cases and increasingly
21 apprehensive of the possibility of abuse. This Order aims to address these concerns and
22 to steer these cases toward a more realistic possibility of a determination on the merits.

23 **III. DISCUSSION**

24 As this Court has previously noted, Federal Rule of Civil Procedure 26(d)
25 provides that absent a court order or other authorization, "[a] party may not seek
26 discovery from any source before the parties have conferred as required by Rule 26(f)."
27 This includes non-parties as well as parties. *See Deuss v. Siso*, No. 14-CV-00710-

1 YGR(JSC), 2014 WL 4275715, at *4 (N.D. Cal. Aug. 29, 2014) (quoting *Villegas v.*
2 *United States*, No. 12–0001, 2012 WL 1801735, at *8 (E.D. Wash. May 16, 2012)).

3 Courts have applied a “good cause” standard in evaluating requests for early
4 discovery. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D.
5 Cal. 2002). In the specific context of determining whether there is good cause to permit
6 expedited discovery to identify anonymous internet user Doe Defendants, courts have
7 often considered four factors derived from *Columbia Ins. Co. v. seescandy.com*, 185
8 F.R.D. 578-80 (N.D. Cal. 1999). Those factors are whether:

9 (1) the plaintiff can identify the missing party with sufficient specificity
10 such that the Court can determine that defendant is a real person or entity
11 who could be sued in federal court; (2) the plaintiff has identified all
12 previous steps taken to locate the elusive defendant; (3) the plaintiff’s suit
13 against defendant could withstand a motion to dismiss; and (4) the plaintiff
has demonstrated that there is a reasonable likelihood of being able to
identify the defendant through discovery such that service of process would
be possible.

14 *Braun v. Primary Distrib. Doe No. 1*, No. 12-5812 MEJ, 2012 WL 6087179, at *2 (N.D.
15 Cal. Dec. 6, 2012) (quoting *OpenMind Sols., Inc. v. Does 1–39*, No. 11–3311, 2011 WL
16 4715200, at *2 (N.D. Cal. Oct. 7, 2011)).

17 In this particular case, the factors are not dispositive. First, Plaintiff has provided
18 lists of Doe Defendants by the IP address assigned to them and of the date and time of the
19 alleged infringement, suggesting they have identified them with sufficient specificity.

20 *MCGIP, LLC v. Does 1-149*, No. C 11-02331 LB, 2011 WL 3607666, at *2 (N.D. Cal.
21 Aug. 15, 2011). Second, Plaintiff has provided (albeit without *any* evidence) a list of the
22 steps it has undertaken to identify the Doe Defendants. *See* Dkt. # 21-1 at 2-3. Third,
23 although many courts have expressed doubt as to the sufficiency of similar copyright
24 infringement claims (*see e.g., Malibu Media, LLC v. Doe*, No. 15 CIV. 4369 AKH, 2015
25 WL 4092417, at *4 (S.D.N.Y. July 6, 2015)) and numerous courts have dismissed doe
26 defendants for improper joinder (*see e.g., Third Degree Films, Inc. v. Does 1-131*, 280
27 F.R.D. 493, 499 (D. Ariz. 2012)), this Court has not previously addressed these issues

1 and declines to do so at this point. Suffice it to say that in similar BitTorrent suits, courts
2 appear more willing to dismiss Doe defendants for improper joinder. *See e.g., Malibu*
3 *Media, LLC v. John Does 1-23*, 878 F. Supp. 2d 628, 630-31 (E.D. Va. 2012); *On The*
4 *Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 502-03 (N.D. Cal. 2011); *Hard Drive*
5 *Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011).

6 Finally, and most important to this Court, there are significant questions as to
7 whether a deposition would be likely, much less *reasonably likely*, to lead to the
8 discovery of the proper defendant. If the subpoenaed subscriber denies being the primary
9 infringer or identifies other individuals who could have been the primary infringer at the
10 deposition, Plaintiff would be in no better a position to name a Doe Defendant than
11 before. If the subscriber refuses to comply with the subpoena – and Plaintiff’s motions
12 for contempt make clear this is not uncommon – Plaintiff is put in the same position as
13 before, except armed with yet another tool for seeking attorneys’ fees or sanctions.

14 Furthermore, although good cause has been found in other cases, this Court is less
15 convinced, particularly given the number of deposition subpoenas Plaintiff now requests
16 and the relative lack of success this Court has seen. In fact, numerous courts have
17 specifically denied such depositions. *See e.g., Millenium TGA, Inc. v. Doe*, No. 2:11-cv-
18 03080 MCE KJN, 2012 WL 219329, at *1 (E.D. Cal. Jan. 23, 2012). These courts have
19 done so on the simple basis that good cause for this discovery simply does not exist as
20 plaintiffs already have the name and contact information of the account holder of the
21 relevant IP address. *See id.* at *3.

22 This Court agrees with these other courts. Plaintiff has already indicated that it
23 has received information from the ISPs identifying the subscriber assigned to the relevant
24 IP addresses. *See* Dkt. # 21-1 at 1. So long as Plaintiff has a good faith basis for its
25 claims, it can either name the subscriber as a defendant or it can dismiss that Doe
26 Defendant and file another action naming that individual. Procedural vehicles exist for
27 Plaintiff to add or dismiss defendants based on additional facts discovered, if necessary.

1 *See* Fed. R. Civ. P. 15. Furthermore, the Court is concerned about the potential for abuse
2 and prejudice to the non-parties responding to the expedited discovery. *See e.g., Hard*
3 *Drive Prods., Inc. v. Doe*, 283 F.R.D. 409, 412 (N.D. Ill. 2012) (denying request for
4 deposition of IP address account holder in part because such discovery was unnecessary,
5 broad, and prejudicial). In fact, courts have noted that “[e]xpedited discovery may be
6 inappropriate where defendants are required to unwarily incriminate themselves before
7 they have a chance to review the facts of the case and to retain counsel.” *Pod-Ners, LLC*
8 *v. N. Feed & Bean of Lucerne Ltd. Liab. Co.*, 204 F.R.D. 675, 676 (N.D. Colo. 2002)
9 (quoting *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982)). The fact that some
10 subscribers have not responded to Plaintiff’s previous deposition subpoenas itself
11 indicates that these (potentially unrepresented) non-parties may not fully appreciate their
12 weight.

13 This Court acknowledges that Plaintiff has provided some safeguards in its
14 request. Although not explicitly stated in either the proposed subpoena³ or the Motion,
15 the only apparent purpose and subject of the proposed depositions is to “identify[] the
16 party that used [the subscriber’s] IP address to infringe [Plaintiff’s] motion picture.” *See*
17 *Dkt. # 21-1 Ex. B*. Moreover, the letter accompanying the deposition subpoenas
18 expressly encourages the subscriber to retain counsel. *Id.* While these provisions
19 ameliorate some of the Court’s concerns, they do not resolve them – particularly as
20 Plaintiff does not include any vehicle to allow the subscribers “an opportunity to review
21 the claims against him.” *Millenium TGA*, 2012 WL 219329, at * 4 n.5. Nor does
22 Plaintiff offer to work with the subscribers with respect to the place or manner of
23 deposition.

24 One final point merits mention. Plaintiff argues that this Court should permit it to
25 pursue a “post-conduct ratification” theory of copyright infringement against subscribers

27 ³ The Court notes that the proposed subpoena does not appear to limit the topics or scope of the
28 deposition. *See Dkt. # 21-1 Ex. A.*

1 who refuse to comply with the proposed depositions. *See* Dkt. # 21-1 at 6. Because the
2 Court denies leave to conduct those depositions, the Court does not anticipate that
3 Plaintiff will further raise such a theory. To the extent that it does, however, that theory
4 is incomprehensible and rejected. This Court could not find *any* case supporting such a
5 theory. Rather, the Ninth Circuit recognizes only “three doctrines of copyright liability:
6 direct copyright infringement, contributory copyright infringement, and vicarious
7 copyright infringement.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). All
8 three doctrines are significantly different than mere post-infringement ratification.

9 Plaintiff’s cited case, *Swenson v. Potter*, 271 F.3d 1184, 1192-93 (9th Cir. 2001),
10 deals with the liability of employers for an employee’s sexually harassing conduct under
11 Title VII. In that situation, if the employer fails to take corrective action or takes
12 inadequate action after learning of the offending conduct, it may be deemed to have
13 adopted the offending conduct. *See id.* It is not clear how that a Title VII claim is
14 analogous to one for copyright infringement.

15 IV. ORDER

16 With these concerns in mind, the Court ORDERS the following:

17 1) The Standing Case Management Order remains in effect for all of these cases.

18 This Court will treat the motions disposed of in this Order as satisfying
19 Plaintiff’s obligation to file a motion for leave to amend explaining its wish to
20 continue naming Doe defendants.

21 2) Plaintiff’s Motions for Leave to Issue FRCP 45 Subpoenas to Nonparties
22 located at Case No. 15-576RAJ, Dkt. # 21-1; Case No. 15-579RAJ, Dkt. # 15;
23 Case No. 15-580RAJ, Dkt. # 11; Case No. 15-581RAJ, Dkt. # 10; Case No.
24 15-582RAJ, Dkt. # 18 are **DENIED**.

25 3) In Case Nos. 15-576RAJ, 15-579RAJ, 15-580RAJ, 15-581RAJ, and 15-
26 582RAJ, within **60 days** of this Order, Plaintiff must file an amended
27 complaint with only named defendants. Plaintiff shall not name any defendant

1 with whom it has already reached a settlement or other permanent resolution of
2 its claims. Dismissed Doe defendants shall remain as currently named – i.e. as
3 “Doe 1,” and so on.

- 4 4) Any defendant so named must be served promptly in a manner fully compliant
5 with Federal Rule of Civil Procedure 4. As such, in accordance with the
6 Standing Case Management Order, Plaintiff must seek entry of default against
7 any defaulting named defendant within **30 days** after the expiration of the time
8 for the defendant to answer or otherwise respond. Plaintiff must also seek
9 default judgment or otherwise resolve its claim against a defaulted defendant
10 within **30 days** of the entry of default.
- 11 5) As before, Plaintiff must serve copies of the Standing Case Management Order
12 and this Order to any defendant it will name.

13
14 DATED this 29th day of October, 2015.

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18 The Honorable Richard A. Jones
19 United States District Judge