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

AF HOLDINGS LLC,

Plaintiff,

No. 2:12-cv-01073 KJM KJN

v.

JOHN DOE,

Defendant.

ORDER

_____/

Presently before the court is plaintiff’s ex parte application for leave to conduct expedited discovery (“Application”) pursuant to Federal Rule of Civil Procedure 26(d)(1).¹ (Application, Dkt. No. 10.) Plaintiff seeks leave of court to serve a discovery subpoena on nonparty Internet Service Provider (“ISP”) Comcast Cable Communications LLC (“Comcast”), and if necessary serve subpoenas on other “intermediary ISPs,” in order to obtain the true identity of defendant “John Doe,” who is alleged to have infringed on plaintiff’s copyrighted video entitled *Popular Demand*. (See generally Application; see also, e.g., Am. Compl. ¶¶ 1, 3-4).

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¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(1) and 28 U.S.C. § 636(b)(1).

1 Based on a review of the court’s docket, plaintiff has already successfully applied
2 for an order granting the exact same requested expedited discovery plaintiff now seeks.² The
3 pending Application is therefore denied without prejudice to refiling.

4 II. DISCUSSION

5 On April 23, 2012, plaintiff filed its complaint against defendant “John Doe,”
6 asserting claims of copyright infringement, contributory infringement, and negligence in regards
7 to the copyrighted video entitled *Popular Demand* (“Video”). (See generally Compl.) On May
8 3, 2012, plaintiff filed an ex parte application for leave to conduct expedited discovery upon
9 nonparty Comcast. (Dkt. No. 7.) On May 24, 2012, the undersigned granted the application and
10 permitted the expedited discovery. (Order, Dkt. No. 8.)

11 On July 21, 2012, plaintiff filed a First Amended Complaint. (First Am. Compl.,
12 Dkt. No. 9.) On July 25, 2012, plaintiff filed the pending ex parte application. (Application,
13 Dkt. No. 10.)

14 As a preliminary matter, it appears that plaintiff may not have filed its First
15 Amended Complaint in accordance with Federal Rule of Civil Procedure 15(a).³ A review of the
16

17 ² Because plaintiff did not request a hearing, and oral argument would not materially aid the
18 resolution of the pending matter, the court resolves plaintiff’s Application on the moving papers and
19 record. See Fed. R. Civ. P. 78(b); E. Dist. Local Rule 230(g).

20 ³ Federal Rule of Civil Procedure 15(a) provides, in relevant part:

21 **(a) Amendments Before Trial.**

22 **(1) Amending as a Matter of Course.** A party may amend its
23 pleading once as a matter of course within:

24 **(A)** 21 days after serving it, or

25 **(B)** if the pleading is one to which a responsive pleading is
26 required, 21 days after service of a responsive pleading or 21
days after service of a motion under Rule 12(b), (e), or (f),
whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its

1 court's docket does not reflect that plaintiff's First Amended Complaint was filed within 21 days
2 after the service of plaintiff's original pleading. Fed. R. Civ. P. 15(a)(1)(A). The docket does
3 not reflect plaintiff ever having served its original pleading, and it is possible that plaintiff never
4 served it, so it is possible that the amended pleading does not run afoul of Rule 15. However,
5 given that the undersigned granted plaintiff's prior application for expedited discovery upon
6 Comcast — an application that was based on the original pleading — it appears possible that
7 plaintiff completed that discovery, learned the identity of the John Doe defendant, and completed
8 service of the original pleading. However, plaintiff has not discussed any reason for filing an
9 amended pleading at this posture, leaving the court to wonder whether the original pleading has
10 been served and/or whether any prejudice would result from allowing an amended pleading at
11 this posture. Plaintiff did not request leave of court prior to filing its amended pleading. Fed. R.
12 Civ. P. 15(a)(1)(C). In any event, the undersigned defers to the district judge regarding the
13 propriety of the First Amended Complaint and resolves the pending Application on other
14 grounds.⁴

15 Plaintiff's pending Application is denied for two reasons. First, the Application
16 appears almost completely identical to plaintiff's previous ex parte application, which has
17 already been granted. (Compare Dkt. No. 7 with Dkt. No. 10.) Both applications seek expedited
18 discovery from the same nonparty, Comcast. Both applications explain that the expedited
19 discovery would aid the identification of the "John Doe" defendant named in this action. The
20 pending Application offers no explanation as to how it differs from the application that was
21 granted on May 25, 2012. (Dkt. No. 8.) The undersigned declines to grant a duplicative order.

22
23 pleading only with the opposing party's written consent or the court's
leave. The court should freely give leave when justice so requires.

24 Fed. R. Civ. P. 15(a)(1).

25 ⁴ A status (pretrial scheduling) conference is presently set for August 30, 2012, before United
26 States District Judge Kimberly J. Mueller. (Order Setting Status (Pretrial Scheduling) Conference
at 1, Dkt. No. 5.)

1 Second, plaintiff's original complaint and previous ex parte application target a
2 John Doe defendant with "IP address 76.20.26.96." (Compl. ¶ 4; Declaration of Peter Hansmeier
3 ("Hansmeier Decl.") in support of original ex parte application, Dkt. No. 7-1 at ¶ 27.) Yet, and
4 potentially somewhat disturbingly, plaintiff's amended pleading and pending Application now
5 target an entirely different IP address: "76.114.14.5. " (First Am. Compl. ¶ 4; Hansmeier Decl.,
6 Dkt. No. 10-1 at ¶ 27.)

7 In short, the amended pleading and pending Application target an entirely
8 different John Doe defendant than the one this case started with. At best, this change represents a
9 simple typo. At worst, it suggests an attempt to use the expedited discovery mechanism to seek
10 identifying information regarding two John Doe defendants while paying only one case filing fee.
11 Absent an explanation as to why John Doe's IP address has changed between pleadings, the
12 undersigned declines to order the requested expedited discovery. Given plaintiff's silence
13 regarding this change, it is impossible to tell whether plaintiff has already used the undersigned's
14 prior order to obtain discovery from Comcast as to the original IP address, and now seeks a
15 second bite at the apple — this time, seeking to identify someone with an entirely different IP
16 address who may not properly be part of this action.

17 Accordingly, the pending Application is denied without prejudice to refileing.

18 III. CONCLUSION

19 For the foregoing reasons, IT IS HEREBY ORDERED that:

20 Plaintiff's ex parte Application to conduct expedited discovery (Dkt. No. 10) is
21 denied without prejudice to refileing.

22 IT IS SO ORDERED.

23 DATED: August 23, 2012

24 
25 _____
26 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE