UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

TFSC, LLC a Michigan Limited Liability Company d/b/a TANNER FRIEDMAN,

Plaintiff,

v.

Case No. 09-12017
Hon. Marianne O. Battani
Magistrate Steven Whalen

JOHN DOE, an individual or Michigan Corporation,

Defendant.

TOMKIW DALTON, plc
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PLAINTIFF'S MOTION FOR LEAVE TO TAKE IMMEDIATE DISCOVERY

NOW COMES the Plaintiff, TANNER FRIEDMAN, by and through its attorneys, *Tomkiw Dalton, plc*, and for its Motion for Leave to Take Immediate Discovery, pursuant to Federal Rules of Civil Procedure 26 and 45, states as follows:

1. Plaintiff, TANNER FRIEDMAN, filed this action for action for cyber fraud and abuse pursuant to The Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030; cyberpiracy pursuant to Section 43(d) of the Lanham Trademark Act, 15 U.S.C.A. § 1125(d); trademark infringement, trade name infringement and false designation of origin pursuant to Section 43(a) of the Lanham Trademark Act, 15 U.S.C.A. § 1125(a); for unfair competition under Federal and Michigan common law and The Michigan Consumer Protection Act, Mich. Comp. Laws Ann. §

445.901-445.922; for intentional interference with contractual and business relations; and for defamation.

2. In order to obtain the identity of the John Doe Defendant, Plaintiff requires immediate discovery on a third party, Twitter, Inc., ("Twitter") a global Internet media company, with its principal place of business located at 164 South Park, San Francisco, CA 94107..

3. As alleged in the Verified Complaint (**D/E 1**), Defendant John Doe is an unknown defendant who posted false and defamatory statements on the internet site "Twitter," found at http://twitter.com, under the assumed name "tannerfriedman." The true name of Defendant John Doe, aka "tannerfriedman," is unknown to Plaintiff, but readily available to Twitter.

4. The Twitter account name "tannerfriedman," and its postings on January 13, 2009, February 17, 2009, March 6, 2009, March 23, 2009, March 24, 2009, and March 26, 2009, as alleged in the complaint, are specific enough to permit identification of the unknown party through reasonable discovery

5. Plaintiff intends to serve a Rule 45 subpoena on Twitter seeking Defendant's true name, address, telephone number, and e-mail address. Without this information, Plaintiff cannot identify the Doe Defendant or pursue its lawsuit to protect Plaintiff's rights from infringement, to prevent relevant customers from being confused, mistaken, or deceived, or to protect Plaintiff's goodwill and reputation from being harmed.

6. Good cause exists to allow Plaintiff to conduct this limited discovery in advance of Rule 26(f) conference where there are no known defendants with whom to confer.

WHEREFORE, for the reasons stated herein and in the attached Brief in Support, Plaintiff moves this Honorable Court to issue an Order permitting Plaintiff to conduct the foregoing requested discovery immediately.

Respectfully submitted,
TOMKIW DALTON, plc

/s/Daniel P. Dalton
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Dated: May 27, 2009

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BRIEF IN SUPPORT
OF PLAINTIFF'S MOTION FOR LEAVE TO TAKE IMMEDIATE DISCOVERY

1. INTRODUCTION

Plaintiff, Tanner Friedman, a reputable and well-known public relations/marketing firm, seeks leave of Court to serve limited, immediate discovery on a third party, Twitter, Inc. ("Twitter") to determine the true identity of Doe Defendant, who is being sued for trademark infringement, cyber piracy and fraud, tortuous interference, unfair competition, and defamation.

Without such discovery, Plaintiff cannot identify the Doe Defendant, and thus cannot pursue its lawsuit to protect its name and business from repetitive and rampant infringement.[1]

On January 13, 2009, Doe Defendant registered an account on Twitter under the assumed name "tannerfriedman," and, as its "tweet," posted a false and defamatory statement regarding Tanner Friedman using the hijacked name. The "tannerfriedman" Twitter account is not an authorized account by Plaintiff nor is it run by anyone associated with Plaintiff. Doe Defendant posted disparaging "tweets" about Plaintiff, under the assumed name "tannerfriedman," on February 17, 2009, March 6, 2009, March 23, 2009, March 24, 2009, and March 26, 2009.

Courts allow discovery to identify Doe Defendants, and will also allow expedite discovery where the party establishes good cause, *i.e.* the need for expedited discovery, in consideration of whether the administration of justice outweighs prejudice to the responding party. Here, Tanner Friedman will suffer ongoing irreparable harm by the repeated unauthorized use of their trade name and the posting of defamatory remarks thereunder. In addition, Defendant will not be prejudiced because Plaintiff seeks contact information only and will use the information for the limited purpose of enforcing their rights under the Computer Fraud and Abuse Act, 18 U.S.C.A. § 1030; Section 43 of the Lanham Trademark Act, 15 U.S.C.A. § 1125; Federal and Michigan common law; and under The Michigan Consumer Protection Act, Mich. Comp. Laws Ann. § 445.901-445.922. Because the information regarding the identity of the "tannerfriedman" Twitter account may be only available for a limited time, Plaintiff may lose the opportunity to assert its rights if it is not allowed immediate discovery. Plaintiff is unable to obtain the subscriber name by any other means, and without this information the case cannot proceed.

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[1] Because Plaintiff does not currently know the identity of Defendant, Plaintiff cannot serve Defendant or ascertain the Defendant's position on this Motion.

2. FACTUAL BACKGROUND

Since January 2007, Plaintiff Tanner Friedman has become a reputable and well-known public relations / marketing firm in Michigan. Plaintiff relies upon its goodwill and reputation amongst its clients and the public, as that is the foundation of the public relations industry.

Currently, tens of millions of computers in the United States alone are linked directly to the Internet, and more than 100 million users connect to the Internet worldwide, scouring different sites for information relevant to their business, financial and personal decisions. Twitter, Inc. ("Twitter") is a global Internet media company, operating its principal place of business in San Francisco, California, and whose "Twitter" Web Site (http://twitter.com) has recently emerged as one of the most popular social media destinations on the World Wide Web. On Twitter, users can publish an on-line, publicly accessible answer to the prompted question "what are you doing?" Such status updates, commonly known as "tweets," can be viewed and read by anyone with an account on Twitter.

Tweets are text-based posts of up to 140 characters in length. Updates are displayed on the user's profile page and delivered to other users who have signed up to receive them. Senders can restrict delivery to those in their circle of friends, but delivery to everyone is the default setting. Users can send and receive updates via the Twitter website, SMS, RSS (receive only), or through applications such as Tweetie, Twitterrific, Twitterfon, TweetDeck and feedalizr. Each day, countless users around the world subscribe to Twitter to read these tweets.

On or near January 13, 2009, Defendant John Doe registered an account on the Twitter website, under the assumed name "tannerfriedman," and, as its "tweet," posted a false and defamatory statement regarding Tanner Friedman using the hijacked name. The "tannerfriedman" Twitter account is not an authorized account by Plaintiff nor is it run by

anyone associated with Plaintiff. The owners, employees, and representatives of Tanner Friedman have previously registered Twitter account names (@KMPriest, @kayleehawkins, @dontanner, @walzale, and @mfrieds). Essentially, John Doe took the tweets that some of the Tanner Friedman professionals had posted using their own Twitter accounts, rewrote them and reposted them under its assumed name "tannerfriedman." Defendant then posted these disparaging "tweets" about Plaintiff on February 17, 2009, March 6, 2009, March 23, 2009, March 24, 2009, and March 26, 2009. The intention was to mislead Twitter users that it was the Plaintiff who was posting these tweets and to impugn its reputation.

On March 27, 2009, Plaintiff filed a formal complaint with Defendant Twitter regarding the "tannerfriedman" account, informing Defendant Twitter that "tannerfriedman" Twitter account is not an authorized account by Plaintiff nor is it run by anyone associated with Plaintiff, and requesting assistance in removing this account. A copy of Plaintiff's written notice and request for removal is attached as **Exhibit 1**. To date, Twitter has failed to respond any of Plaintiff's correspondence, or to remove or retract any of the defamatory material.

Plaintiff now seeks leave from this Court to conduct immediate discovery. According to Twitter's "Privacy Policy," **Exhibit 2,** when a user signs up for the Twitter Service, personally identifiable information is collected by Twitter, which includes IP addresses, full user name, password, email address, city, time zone, telephone number, and other information. Plaintiff intends to serve a Rule 45 subpoena on Twitter seeking Defendant's true name, address, telephone number, and e-mail address, as this information is easily available to Twitter via Defendant's account name "tannerfriedman." (See also Twitter's "Terms of Service," attached as **Exhibit 3,** where Twitter expressly reserves the right to terminate accounts and "***to reclaim usernames on behalf of businesses or individuals that hold legal claim or trademark on those***

usernames.") Without this information, Plaintiff cannot identify the Doe Defendant or pursue its lawsuit to protect Plaintiff's rights from infringement, to prevent relevant customers from being confused, mistaken, or deceived, or to protect Plaintiff's goodwill and reputation from being harmed, if not destroyed.

3. LEGAL ARGUMENT

Courts routinely allow discovery to identify Doe defendants. *See Wakefield v. Thompson,* 177 F.3d 1160, 1163 (9th Cir. 1999) (error to dismiss unnamed defendants given possibility that identity could be ascertained through discovery); *Valentin v. Dinkins,* 121 F.3d 72, 75 (2d Cir. 1997) (vacating dismissal; pro se plaintiff should have been permitted to conduct discovery to reveal identity of defendant); *Dean v. Barber,* 951 F.2d 1210, 1215 (11th Cir. 1992) (error to deny plaintiff's motion to join John Doe defendant where identity of John Doe could have been determined through discovery); *Munz v. Parr,* 758 F.2d 1254, 1257 (8th Cir. 1985) (error to dismiss claim merely because defendant was unnamed; "Rather than dismissing the claim, the court should have ordered disclosure of the Officer Doe's identity"); *Schiff v. Kennedy*, 691 F.2d 196, 197-198 (4th Cir. 1982) (holding the district court erred by dismissing the case because the Doe defendant was a real person who could be identified through discovery); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (stating "where identity of alleged defendants [are not] known prior to the filing of a complaint . . . the plaintiff should be given an opportunity through discovery to identify the unknown defendants"); *Maclin v. Paulson*, 627 F.2d 83, 87 (7th Cir. 1980) (same).

The Sixth Circuit Court of Appeals has not yet addressed this issue in any published opinion, but did reach the same conclusion in an unpublished case. *Yates v. Young*, 84-5586 and 85-5701, 1985 WL 13614 (6th Cir. 1985) (unpublished table opinion) ("[a]lthough the

designation of a 'John Doe" defendant is not favored in the federal courts, it is permissible when the identity of the alleged defendant is not known at the time the complaint is filed and plaintiff could identify defendant through discovery"); *see Carter v. Ricumstrict*, 2:07-13311, 2007 WL 3173368 (E.D. Mich. 2007) (unpublished) (citing *Yates* and allowing plaintiff time to ascertain the identities of the "John Doe" defendants in order to serve these individuals).

Courts will also allow expedited discovery where the party establishes good cause, *i.e.* the need for expedited discovery, in consideration of administration of justice, outweighs prejudice to the responding party. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Qwest Comm. Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003); *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613-14 (D. Ariz. 2001). Here, Tanner Friedman demonstrates good cause because it has been and will continue to be irreparably harmed by Defendant's conduct, there is no prejudice to Defendant, there is a limited availability of the information sought, and discovery is necessary for the movement forward of the case.

a. Irreparable Harm from Infringement

First, good cause exists where, as here, the complaint alleges claims of infringement. *See Semitool,* 208 F.R.D. at 276; *Qwest Comm.,* 213 F.R.D. at 419 ("The good cause standard may be satisfied . . . where the moving party has asserted claims of infringement and unfair competition"). This is not surprising since such claims necessarily involve irreparable harm to the plaintiff. In this case, Defendant's unauthorized use of "tannerfriedman" as its Twitter account name, which is confusingly similar to Plaintiff's trade name, has eroded and will continue to erode the goodwill and reputation embodied in Plaintiff's distinctive name. Since their posting, the false and defamatory statements regarding Tanner Friedman and falsely "from"

tannerfriedman, have remained available to the millions of Twitter users, and Plaintiff has no means of removing these false and defamatory statements from the website.

b. No Prejudice to Defendant

Second, good cause exists because the narrowly-tailored discovery requests do not exceed the minimum information required to advance this lawsuit and will not prejudice Defendant. *See Semitool,* 208 F.R.D. at 276 ("Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party"). Plaintiff seeks immediately discovery to identify the Defendant; information that may be erased very soon. Plaintiff, who continues to be harmed by Defendant, cannot wait until after the Rule 26 conference because there are no known Defendants with whom to confer, thus no conference is possible. There is no prejudice to the Defendant because Plaintiff merely seeks information to identify the Defendant and to serve Defendant, and the information disclosed pursuant to the subpoena will only be used for the purpose of protecting Plaintiff's rights and asserting the claims set forth in its complaint.

Moreover, if the Court grants this Motion, Plaintiff will serve a subpoena upon Twitter requesting the true name and other identification information about Defendant within fifteen (15) business days. Twitter then will be able to notify this account subscriber that this information is being sought, and the Defendant will be able to raise any objections before this Court in the form of a motion to quash prior to the return date of the subpoena. Thus, to the extent that Defendant wishes to object, Defendant will be able to do so.

c. Limited Availability of the Information Sought

Third, good cause exists here because there is very real danger that Twitter will not long preserve the information that Plaintiff seeks. Under its "Terms of Service," (**Exhibit 3**) Twitter

reserves the right to terminate accounts and to reclaim usernames on behalf of businesses or individuals that hold legal claim or trademark on those usernames. Moreover, Twitter's "Terms of Service" and "Privacy Policy" (**Exhibit 2**) do not state how long personal identifiable information is stored, and if Doe Defendant closes its account, that information could be erased. Plaintiff will then have ***no*** ability to identify the Defendant, and thus will be unable to pursue its lawsuit or be made whole for Defendant's damaging conduct. Where "physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation," good cause for expedited discovery exists. *See Qwest Comm.*, 213 F.R.D. at 419; *Pod-Ners, LLC v. Northern Feed & Bean,* 204 F.R.D. 675, 676 (D. Colo. 2002) (allowing plaintiff expedited discovery to inspect "beans" in defendant's possession because they might no longer be available for inspection if discovery proceeded in the normal course).

d. Movement Forward of the Case

Finally, courts regularly grant expedited discovery where such discovery will "substantially contribute to moving th[e] case forward." *Semitool,* 208 F.R.D. at 277. Here, the present lawsuit cannot proceed, at all, without the limited, immediate discovery Plaintiff seeks because there is no other information Plaintiff can obtain about Defendant without discovery from Twitter. Plaintiff's verified complaint alleges *prima facie* claims for infringement, cyber piracy, computer fraud and abuse, unfair competition, tortious interference, and defamation. Plaintiffs have alleged that Doe Defendant took tweets that some of Plaintiff's professionals had posted using their own Twitter accounts, rewrote them and reposted them under its assumed name "tannerfriedman." Defendant posted these disparaging "tweets" about Plaintiff, under the assumed name "tannerfriedman," on January 13, 2009, February 17, 2009, March 6, 2009, March 23, 2009, March 24, 2009, and March 26, 2009, with the intention was to mislead Twitter

users that it was the Plaintiff who was posting these tweets and to impugn its reputation. This account remains open to date, and absent limited, immediate discovery, Plaintiff will be unable to obtain redress for any of this infringement and harm.

4. CONCLUSION

Plaintiff, Tanner Friedman, seeks leave from this Court to conduct immediate discovery by serving a Rule 45 subpoena on Twitter, Inc. seeking Doe Defendant's true name, address, telephone number, and e-mail address. Courts routinely allow expedited discovery to identify Doe defendants, especially where the party establishes good cause. Here, Tanner Friedman demonstrates good cause because it has been and will continue to be irreparably harmed by Defendant's conduct, there is no prejudice to Defendant, there is a limited availability of the information sought, and discovery is necessary for the movement forward of the case. Without this information, Plaintiff cannot identify the Doe Defendant or pursue its lawsuit to protect Plaintiff's rights from infringement, to prevent relevant customers from being confused, mistaken, or deceived, or to protect Plaintiff's goodwill and reputation from being harmed.

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Motion and enter an Order substantially in the form of the submitted proposed Order.

Respectfully submitted,
TOMKIW DALTON, plc

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Dated: May 27, 2009

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
)SS
OAKLAND COUNTY)

I hereby certify that on May 27, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system.

Respectfully submitted,
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Dated: May 27, 2009