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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15
16 TWITCH INTERACTIVE, INC., a
Delaware corporation,

17 Plaintiff,

18 v.

19 JOHN AND JANE DOES 1-100,
20 individuals,

21 Defendants.

Case No. 19-cv-03418-WHO

**PLAINTIFF TWITCH INTERACTIVE,
INC.'S EX PARTE APPLICATION FOR
LEAVE TO SERVE THIRD PARTY
SUBPOENAS PRIOR TO RULE 26(f)
CONFERENCE AND MEMORANDUM IN
SUPPORT**

[Civil L.R. 7-10]

TO ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that Plaintiff Twitch Interactive, Inc., will and hereby does apply to the Court *ex parte* for leave to issue third-party subpoenas to Defendants' social media platforms, electronic mail providers, and Internet Service Providers to identify Defendants prior to a Federal Rule of Civil Procedure 26(f) conference. This motion complies with Local Civil Rule 7-10 because, as explained in the motion, Defendants are real people amenable to suit in California; Twitch has exercised diligence in trying to contact Defendants, including by sending them copies of the Complaint and a waiver of service form by email;¹ Twitch's Complaint would withstand a motion to dismiss; and the requested discovery is likely to uncover Defendants' identities. *Skout, Inc. v. Jen Processing, Ltd.*, Case No. 14-cv-02341-JSC, 2015 WL 224930, at *2 (N.D. Cal. Jan. 15, 2015); *see also Strike 3 Holdings, LLC v. Doe*, Case No. 18-cv-06938-WHO, 2019 WL 402358, at *2-3 (N.D. Cal. Jan. 31, 2019) (Orrick, J.) (granting *ex parte* application for leave to serve third-party subpoena); *Sapient Corp. v. Does 1-50*, Case No. 18-cv-01681-WHO, 2018 WL 8221301, at *3 (N.D. Cal. Mar. 27, 2018) (Orrick, J.) (granting *ex parte* motion for expedited discovery). Good cause therefore exists for expedited discovery in this matter under Federal Rule of Civil Procedure 26(d)(1).

This application is based on: the memorandum of points and authorities; the declarations of Carl Hester and Holly M. Simpkins filed concurrently herewith and all attached exhibits; all pleadings and evidence on file in this matter; and on such additional evidence or arguments as the Court may deem proper.

¹ Twitch will send Defendants a copy of this motion and associated papers by email.

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I. INTRODUCTION

Beginning on or around May 25, 2019, Defendants broadcast hundreds of obscene, pornographic, and terrorist videos on Twitch.tv, one of the world's largest real-time video streaming services. This included a video of the March 2019 Christchurch mosque attack, which Defendants streamed from multiple Twitch accounts; full-length copyrighted movies and television shows; hard-core pornography; and racist and misogynistic videos. The streaming of these videos on Twitch violated Twitch's Terms of Service, which endeavor to create a safe and accessible community for Twitch viewers and streamers and therefore ban the type of violent and obscene videos Defendants broadcasted. Defendants coordinated their attack on Twitch using a website and Twitter account that prominently display Twitch's trademarks. Defendants anonymized their account information on Twitch to evade Twitch's security measures. As a result, Twitch does not know Defendants' real identities.

Twitch moves this Court for an order allowing it to take discovery from third parties Google, Microsoft, Verizon, Comcast Cable Communications LLC, Contina, Charter Communications Inc., Optimum Online, Suddenlink Communications, Twitter, Discord, and OVH Hosting, Inc. to obtain information that is reasonably likely to lead to the identity of the Doe Defendants. As set forth below, good cause exists to allow the proposed discovery.

II. ISSUE(S) TO BE DECIDED (CIVIL L.R. 7-4(a)(3))

Whether Twitch is entitled to expedited discovery from third parties Google, Microsoft, Verizon, Comcast Cable Communications LLC, Contina, Charter Communications Inc., Optimum Online, Suddenlink Communications, Twitter, Discord, and OVH Hosting, Inc. to obtain information that is reasonably likely to identify the Doe Defendants such that Twitch can effectuate service.

III. FACTS & PROCEDURAL BACKGROUND

A. Twitch

Twitch is a real-time video streaming service where community members gather to watch, play, and chat about shared interests—predominantly video games, sports, and creative arts.

Compl. (ECF No. 1) ¶¶ 1, 15.

1 Twitch, headquartered in San Francisco, has a global reach. *Id.* ¶¶ 12, 16. Each month,
2 more than three million unique streamers from around the world entertain millions of viewers by
3 streaming live content on Twitch. *Id.* ¶ 16. Viewers use Twitch to find and watch interesting
4 content and to interact with their favorite streamers. “Popular” streamers, those that have many
5 viewers and followers, are easier for viewers to find on Twitch. *Id.* ¶¶ 17–18. Viewers can also
6 find streamers by navigating to a particular game’s directory (Twitch.tv page dedicated to that
7 game) and searching or scrolling for people streaming the game. *Id.* ¶ 17. To create an account
8 on Twitch.tv or otherwise access the Twitch Services (the network of websites hosted by Twitch),
9 a user agrees to be bound by, among other things, Twitch’s Terms of Service. *Id.* ¶¶ 19, 24.

10 The safety of Twitch’s community is its top priority. For this reason, Twitch’s Terms of
11 Service and Community Guidelines (collectively, the “Terms”) expressly prohibit users from
12 creating, uploading, or streaming any content that is unlawful, defamatory, obscene,
13 pornographic, violent, harassing, threatening, abusive, or otherwise objectionable. *Id.* ¶¶ 26, 28.
14 The Terms also prohibit streamers from using “bots”—computer programs designed to mimic
15 real users on Twitch—to artificially inflate their live viewer counts, thus increasing their
16 popularity and making them more easily discoverable on Twitch. *Id.* ¶ 30.

17 **B. Defendants’ Wrongdoing**

18 Beginning on or about May 25, 2019, Defendants used the game directory for the game
19 Artifact to broadcast prohibited content on Twitch, including hard-core pornography, racist and
20 misogynistic videos, copyrighted movies and television shows, and videos depicting terrorism,
21 including videos of the March 2019 Christchurch mosque attack. Compl. ¶ 34. Twitch took
22 quick action to shut down the accounts streaming the prohibited content. *Id.* ¶ 35. Despite
23 Twitch’s actions, the Streamers quickly reappeared in the Artifact game page to again stream the
24 prohibited content, leading to the conclusion that Defendants used bots to open new accounts and
25 evade Twitch’s detection measures. *Id.* ¶ 36. Defendants also used bots to artificially inflate the
26 popularity of the infringing streams on Twitch, making those streams easier for unsuspecting
27 Twitch viewers to encounter. *Id.* ¶ 38.

28

1 This was a coordinated attack. Defendants maintained a website,
2 www.artifactstreams.com, that prominently featured Twitch’s GLITCH trademark (U.S. Reg. No.
3 5,769,921). Compl. ¶¶ 39–40.² The website linked to a Twitter account and several Discord
4 servers where Defendants discussed their attack, including the prohibited content they were
5 sharing and how best to avoid Twitch’s security measures. *Id.* ¶ 42. The Twitter account,
6 @TwitchToS, uses Twitch’s TWITCH trademark (U.S. Reg. Nos. 4,275,948, 5,769,920, and
7 5,503,626) in its handle and on its landing page. *Id.* Twitch has not authorized Defendants to use
8 its trademarks in this way.

9 Defendants’ actions harm Twitch and the Twitch community. *Id.* ¶ 44. Twitch viewers
10 seeking interesting content inadvertently saw Defendants’ obscene and offensive videos. Compl.
11 ¶ 45. To combat Defendants’ attacks, Twitch suspended streaming for all new Twitch accounts
12 for nearly two days while it worked to implement two-factor authentication (a move that would
13 help prevent Defendants from using bots to open new accounts and stream prohibited content).
14 *Id.* ¶ 46. This resulted in lost revenue for Twitch as well as a loss of goodwill. *Id.* ¶ 49.
15 Defendants also use Twitch’s trademarks in a manner that is likely to cause confusion as to their
16 affiliation with Twitch. *Id.* ¶¶ 41, 43. For example, the Twitter handle @TwitchToS is
17 confusingly similar to Twitch’s Twitter handle @TwitchSupport, where Twitch users go for
18 important information about the Twitch Services. *Compare id.* ¶ 42, *with id.* ¶ 45. A Twitch user
19 trying to access @TwitchSupport could easily be misled by @TwitchToS and exposed to
20 Defendants’ prohibited content.

21 C. Twitch’s Investigation

22 Twitch immediately investigated those it believes to be responsible for the attacks.
23 Declaration of Carl Hester (“Hester Decl.”) ¶ 3. Twitch believes that one of those individuals
24 involved in the attacks uses the aliases “Skel,” and “Skelytal.” *Id.* ¶ 4. Skel is a persistent
25 violator of the Terms and has used Twitch’s trademarks without authorization to publish his
26 exploits. *Id.* Skel operates a Twitter account, @Skeltaly, and is associated with a second

27 _____
28 ² As of the date of the filing of this motion, it appears that Defendants have moved their activity to another location or have decided to cease their abusive activity for the present time.

1 account, @TwitchToS. *Id.* ¶ 5. In late-May 2019, Skel shared a script named `tos.py` with other
2 users, which he uses to set up and share porn streams. Around this time Twitch started seeing the
3 terrorist and obscene content on the Artifact game directory. *Id.* ¶ 4. A person with the Discord
4 username “Skel” moderates one of the Discord servers Defendants used to coordinate their
5 attacks, and the `www.artifactstreams.com` website linked to the Twitter account @TwitchToS,
6 which is also associated with Skel. Declaration of Holly M. Simpkins (“Simpkins Decl.”) ¶¶ 3, 6.
7 Twitch identified two IP addresses associated with Skel’s Twitch.tv accounts; these IP addresses
8 are issued by MCI Communications Services Inc. d/b/a Verizon Business. *Id.* ¶ 8; Hester Decl.
9 ¶ 7. Twitch identified several email accounts associated with Skel’s Twitch.tv account. Hester
10 Decl. ¶ 6.

11 Twitch also identified IP addresses associated with the Twitch accounts streaming the
12 prohibited content. *Id.* ¶ 9. Several of those IP addresses come from a cloud computing and
13 dedicated server company named OVH Hosting, Inc. Simpkins Decl. ¶ 9. OVH Hosting has a
14 server in Warrenton, Virginia. *Id.* ¶ 10 & Ex. E. Twitch identified many more Twitch accounts
15 that streamed prohibited content. Hester Decl. ¶ 9. Twitch isolated IP addresses associated with
16 multiple accounts banned during the May 2019 attack for streaming pornographic, violent and
17 other prohibited content. Simpkins Decl. ¶ 8. Twitch’s counsel conducted reverse WhoIs
18 searches to identify the ISP provider and location associated with those IP addresses. *Id.*

19 Finally, Twitch located a website, `https://www.artifactstreams.com`, that Defendants used
20 to coordinate their attacks. Hester Decl. ¶ 8. The Artifact Streams website linked to Skel’s
21 Twitter account, `https://twitter.com/TwitchToS`. Simpkins Decl. ¶ 3. A WhoIs search revealed
22 an additional email address, `ganggangchef@gmail.com`, that is associated with the Artifact
23 Streams website. *Id.* ¶ 5.

24 Twitch sued Defendants on June 14, 2019 seeking damages and a permanent injunction
25 that would bar Defendants from posting terrorist, pornographic, and otherwise obscene content on
26 Twitch. Shortly after filing the Complaint, Twitch sent a copy of the Complaint; a notice of
27 lawsuit and waiver of service form; and a copy of this Court’s standing orders to three email
28 addresses associated with Skel and `www.artifactstreams.com`. Simpkins Decl. ¶ 11 & Exs. F–H.

1 Twitch asked Defendants to identify themselves and waive service. *Id.* Defendants have not
2 responded.

3 IV. ARGUMENT

4 A court may authorize discovery to be taken before the parties' Rule 26(f) conference for
5 "good cause." Fed. R. Civ. P. 26(d)(1); *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D.
6 273, 276 (N.D. Cal. 2002). Good cause generally exists where the need for expedited discovery
7 outweighs the prejudice to the party from whom discovery is sought. 208 F.R.D. at 276.
8 "[W]here the identity of alleged defendants [is not] known prior to the filing of a complaint[,] the
9 plaintiff should be given an opportunity through discovery to identify the unknown defendants,
10 unless it is clear that discovery would not uncover the identities, or that the complaint would be
11 dismissed on other grounds.'" *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999)
12 (citation omitted). Courts frequently grant *ex parte* motions for expedited discovery relating to
13 the identities of Doe defendants. *See, e.g., Strike 3 Holdings, LLC v. Doe*, Case No. 18-cv-06938-
14 WHO, 2019 WL 402358, at *2–3 (N.D. Cal. Jan. 31, 2019) (Orrick, J.) (granting *ex parte*
15 application for leave to serve third-party subpoena); *Marketo, Inc. v. Doe*, Case No. 18-cv-06792-
16 JSC, 2018 WL 6046464, at *2–3 (N.D. Cal. Nov. 19, 2018) (granting *ex parte* application to serve
17 Rule 45 subpoenas in order to identify Doe defendants); *Strike 3 Holdings, LLC v. Doe*, Case No.
18 18-cv-4988-LB, 2018 WL 4587185, at *4 (N.D. Cal. Sept. 24, 2018) (granting motion to
19 subpoena ISP to uncover identity behind IP address).

20 To determine whether "good cause" exists, courts consider whether:

21 (1) the plaintiff can identify the missing party with sufficient specificity such that
22 the Court can determine that defendant is a real person or entity who could be sued
23 in federal court; (2) the plaintiff has identified all previous steps taken to locate the
24 elusive defendant; (3) the plaintiff's suit against defendant could withstand a motion
25 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.

26 *Skout, Inc v. Jen Processing, Ltd.*, Case No. 14-cv-02341-JSC, 2015 WL 224930, at *2 (N.D. Cal.
27 Jan. 15, 2015) (citing *OpenMind Sols., Inc. v. Does 1–39*, No. C 11–3311 MEJ, 2011 WL

1 4715200, at *2 (N.D. Cal. Oct.7, 2011)). Discovery should be allowed here because Twitch
2 satisfies each of these criteria and the need for discovery outweighs any prejudice to the
3 responding party.

4 **A. Twitch Has Sufficiently Identified John/Jane Does**

5 Under the first factor, a court must consider “whether the Plaintiff has identified the
6 Defendants with sufficient specificity, demonstrating that each Defendant is a real person or
7 entity who would be subjected to jurisdiction in this Court.” *Skout*, 2015 WL 224930, at *2. To
8 establish specific personal jurisdiction, “(1) the non-resident defendant must purposefully direct
9 his activities into the forum or purposefully avail himself of the privilege of conducting activities
10 in the forum; (2) the claim must arise out of or relate to forum related activities; and (3) the
11 exercise of jurisdiction must comport with fair play and substantial justice.” *Id.* These elements
12 are met here.

13 First, the Doe Defendants are real people amenable to suit in federal court. The
14 Defendants are associated with specific acts of trademark infringement, fraud, trespass, and
15 breach of contract. Compl. ¶¶ 34–45. They coordinated an attack on Twitch by posting hundreds
16 of violent, racist, terrorist, and misogynistic videos and exposing Twitch and its community to
17 this content. *Id.* ¶¶ 34, 45. In some cases, Defendants carried out their illicit scheme using
18 Twitch accounts linked to U.S.-based IP addresses and Internet Service Providers, which Twitch
19 identified. Simpkins Decl. ¶ 8; *Strike 3 Holdings*, 2019 WL 402358, at *2 (identifying Doe
20 defendants by IP address and location sufficient to meet this prong). The Defendants also
21 coordinated with one another on Discord and Weebly. Compl. ¶ 39. When Discord and Weebly
22 shut down their sites, Defendants created a website, <https://www.artifactstreams.com/>, to
23 disseminate information about the Twitch attack. *Id.* ¶ 40. The use of Internet chat rooms,
24 Twitter, and websites to facilitate a coordinated attack on Twitch identifies Defendants as real
25 people amenable to suit in federal court.

26 Second, this Court has personal jurisdiction over the Defendants given their significant
27 contact with California. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433
28 F.3d 1199, 1205 (9th Cir. 2006) (en banc) (“a court may exercise personal jurisdiction over a

1 defendant consistent with due process only if he or she has certain minimum contacts with the
2 relevant forum such that the maintenance of the suit does not offend traditional notions of fair
3 play and substantial justice.” (citation and internal quotation marks omitted)). Defendants entered
4 into a contract with Twitch, a California resident, by agreeing to the Terms. Compl. ¶ 47;
5 *Yahoo!*, 433 F.3d at 1205-206 (key factor in determining personal jurisdiction is whether the non-
6 resident defendant “consummate[d] some transaction with the forum or resident thereof”). The
7 Terms contain a venue provision providing that state or federal courts in California have
8 exclusive jurisdiction over any suit between the parties not subject to arbitration. Simpkins Decl.
9 ¶ 12 & Ex. I. This is sufficient to establish jurisdiction. *Twitch Interactive, Inc. v. Johnston*,
10 Case No. 16-cv-03404-BLF, 2018 WL 1449525, at *4 (N.D. Cal. Jan. 22, 2018).

11 Defendants also knowingly accessed Twitch’s servers, which are located in California, to
12 stream prohibited content from their Twitch.tv accounts, including videos depicting terrorism,
13 pornography, and racist and misogynistic memes. Compl. ¶¶ 3, 34–45; Hester Decl. ¶ 10. And
14 Defendants used Twitch’s trademarks on websites—www.artifactstreams.com and Twitter.com—
15 accessible to California residents. Compl. ¶¶ 40–42. This case arises out of these forum related
16 activities: Defendants contacted Twitch’s servers under fraudulent pretenses to stream content
17 that violated Twitch’s Terms and publicized their wrongdoing using Twitch’s trademarks. These
18 are the exact wrongs for which Twitch is suing. Compl. ¶¶ 60–86. This Court has personal
19 jurisdiction over defendants. *Gen. Motors L.L.C. v. Autel. US Inc.*, Case No. 14-14864, 2016 WL
20 1223357, at *4 (E.D. Mich. Mar. 29, 2016) (“that Autel ITC has reached into Michigan to access
21 GM’s intellectual property located on its servers residing in Michigan is an example of
22 purposeful availment”); *see also Microsoft Corp. v. Mountain W. Computers, Inc.*, No. C14-
23 1772RSM, 2015 WL 4479490, at *7 (W.D. Wash. July 22, 2015) (finding personal jurisdiction
24 where the “Defendants alleged actions were intentional and directed at Plaintiff” in the forum
25 state, Washington.).

26 **B. Twitch Has Made a Good Faith Effort to Locate John/Jane Does**

27 The second factor requires a party to identify the previous steps taken to locate the
28 defendant. *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). “This

1 element is aimed at ensuring that plaintiffs make a good faith effort to comply with the
2 requirements of service of process and specifically identifying defendants.” 185 F.R.D. at 579.

3 This requirement is satisfied because Twitch has attempted in good faith to identify the
4 Doe defendants but has been unable to do so. Twitch identified Twitch user “Skel” or “/skelytal”
5 or “/skelytal_” as an individual involved in the attack on Twitch. Hester Decl. ¶ 4. Twitch
6 identified one Google email addresses and one Hotmail email address associated with Skel. *Id.*
7 ¶ 6. Twitch sent the Complaint and associated documents to these email addresses shortly after
8 filing this lawsuit, but Skel has not responded. Simpkins Decl. ¶ 11. Twitch also traced the IP
9 addresses connected to Skel’s Twitch presence and identified them as being hosted by Verizon
10 Business. *Id.* ¶ 8; Hester Decl. ¶ 7. Twitch was unable to find a physical address or name
11 associated with Skel such that it could complete service of process.

12 Twitch also investigated the online presence of other individuals associated with the
13 attack. Twitch located the website, www.artifactstreams.com, and from there accessed a Twitter
14 account (@TwitchToS) and several Discord servers on which Defendants promoted their
15 prohibited content and otherwise discussed the attack on Twitch. Hester Decl. ¶ 8; Simpkins
16 Decl. ¶ 2. The @TwitchToS Twitter account and www.artifactstreams.com website prominently
17 display Twitch’s trademarks, including the GLITCH and TWITCH marks. Compl. ¶¶ 40, 42.
18 Twitch ran a WhoIs search on www.artifactstreams.com, but the identifying information was
19 falsified. Simpkins Decl. ¶ 5. However, the WhoIs search revealed a Gmail address associated
20 with the website: ganggangchef@gmail.com. *Id.* Twitch sent the Complaint and associated
21 documents to this email address shortly after filing this lawsuit, but Defendant has not responded.
22 *Id.* ¶ 11. Twitch was unable to uncover further personal information associated with the
23 owner/moderator of the Twitter account, Discord servers, or www.artifactstreams.com website,
24 despite diligent efforts.

25 Finally, Twitch has identified thousands of Twitch accounts that streamed prohibited
26 content as part of the coordinated attack on Twitch. Hester Decl. ¶ 9. Twitch traced the IP
27 addresses and locations associated with accounts using a reverse WhoIs lookup tool. Simpkins
28 Decl. ¶¶ 8–9. Several of these accounts trace to OVH Hosting, Inc., a server and cloud

1 computing company with servers in Virginia. Simpkins Decl. ¶¶ 9–10. Many more are
2 associated with U.S.-based ISPs such as Verizon, Comcast Cable Communications LLC, Contina,
3 Charter Communications Inc., Optimum Online, and Suddenlink Communications. Simpkins
4 Decl. ¶ 8. Twitch was unable to find a physical address or name associated with the offending
5 Twitch accounts such that it could complete service of process. *Id.* This element is satisfied. *See*
6 *Strike 3 Holdings*, 2019 WL 402358, at *2.

7 **C. Twitch’s Complaint Could Withstand a Motion to Dismiss**

8 The third factor requires that a plaintiff’s claim would survive a motion to dismiss. *Id.*
9 The Complaint alleges federal trademark infringement under 15 U.S.C. § 1114, breach of
10 contract, trespass to chattels, and fraud under California law. Twitch has sufficiently pled each
11 cause of action.

12 **1. Federal trademark infringement**

13 “To prove infringement of a registered trademark, a plaintiff must demonstrate that it
14 ‘owns a valid mark, and thus a protectable interest’ and that the defendant’s ‘use of the mark is
15 likely to cause confusion, or to cause mistake, or to deceive.’” *Twitch Interactive, Inc.*, 2018 WL
16 1449525, at *6 (citation omitted). Twitch sufficiently pled these elements. First, Twitch alleged
17 it owns rights to the federally registered GLITCH and TWITCH trademarks and submitted the
18 marks’ registration certificates with the Complaint. *See* Compl. ¶¶ 20–23; *id.* Ex. A. Twitch
19 alleged that Defendants used the marks in a manner likely to cause confusion among consumers
20 and supported these allegations with images of the infringing use. *See id.* ¶¶ 40–43. These
21 allegations are sufficient to withstand a motion to dismiss the trademark claim. *Twitch*
22 *Interactive, Inc.*, 2018 WL 1449525, at *5 (granting default judgment to Twitch in case with
23 similar facts).

24 **2. Breach of contract**

25 “A claim for breach of contract is comprised of a contract, plaintiff’s performance or
26 excuse for nonperformance, defendant’s breach, and the resulting damages to plaintiff.” *Yelp*
27 *Inc., v. Catron*, 70 F. Supp. 3d 1082, 1099 (N.D. Cal. 2014).

28

1 Twitch has sufficiently pled these elements. The Terms is a contract to which Defendants
2 agreed when they created accounts on or otherwise used the Twitch Services. *See Yelp*, 70 F.
3 Supp. at 1099 (holding that website’s terms of service is a contract); Compl. ¶¶ 24, 64.
4 Defendants violated the Terms by posting content on Twitch.tv that the Terms expressly prohibit,
5 including violent videos and pornography. *See* Compl. ¶ 68. Defendants also violated the Terms
6 by using bots to artificially inflate the viewer counts associated with the infringing streams,
7 making them easier for viewers to encounter. *Id.* Twitch performed its obligations under the
8 Terms and was harmed by Defendants actions—Defendants’ attack on Twitch required it to
9 suspend streaming for all new accounts for nearly two days, resulting in loss of revenue for
10 Twitch. *Id.* ¶ 70.

11 3. Trespass to chattels

12 In order to state a claim for trespass based on accessing a computer system, the plaintiff
13 must allege: “(1) defendant intentionally and without authorization interfered with plaintiff’s
14 possessory interest in the computer system; and (2) defendant’s unauthorized use proximately
15 resulted in damage.” *In re Apple Inc. Device Performance Litig.*, 347 F. Supp. 3d 434, 455 (N.D.
16 Cal. 2018).

17 Again, Twitch sufficiently pled these elements. Twitch alleged that Defendants accessed
18 the Twitch Services without authorization when they streamed prohibited content on Twitch and
19 deployed bots to increase the viewer counts associated with their streams. Compl. ¶¶ 73–74.
20 This activity exceeded the scope of permissible access to the Twitch Services and therefore
21 constitutes trespass. *Apple*, 347 F. Supp. 3d at 455 (“California case law has long recognized that
22 consent to enter may be limited and that a trespass claim may lie when the scope of consent is
23 exceeded.”). The Twitch Services were harmed by Defendants’ trespass: Defendants’ actions
24 degraded the quality of the content on Twitch, exposed Twitch viewers to obscene and violent
25 videos, and forced Twitch to suspend streaming for all new accounts. *Fields v. Wise Media, LLC*,
26 No. C-12-05160 WHA, 2013 WL 5340490, at *4 (N.D. Cal. Sept. 24, 2013) (injury element
27 satisfied when trespass impaired condition, quality, or value of property); Compl. ¶ 76.
28

1 **4. Fraud**

2 “To state a fraud claim under California law, a plaintiff must allege with particularity: (1)
3 false representation as to material fact; (2) knowledge of its falsity; (3) intent to defraud; (4)
4 actual and justifiable reliance; and (5) resulting damage.” *Bonete v. World Savings Bank, FSB*,
5 Case No. 15-01219 JSW, 2015 WL 12990148, at *6 (N.D. Cal. Aug. 11, 2015). These elements
6 are pled here.

7 Defendants agreed to the Terms without intending to abide by them. Compl. ¶ 80.
8 Twitch shut down Defendants’ accounts because Defendants streamed content prohibited by the
9 Terms. Knowing that Twitch had barred them from further accessing the Twitch Services,
10 Defendants created additional Twitch accounts; agreed to the Terms thereby falsely representing
11 to Twitch that they would not post content that violated the Terms; and then violated their
12 promise by immediately posting obscene, violent, terrorist and pornographic videos. *Id.* ¶ 82.
13 Defendants coordinated with one another to gain access to the Twitch Services and post
14 prohibited content, indicating their intent to misrepresent their intentions on Twitch. *Id.* ¶ 39.
15 Twitch granted Defendants access to the Twitch Services in reliance on their representation that
16 Defendants would not violate the Terms, and Twitch was harmed when Defendants published
17 prohibited content on Twitch. *Id.* ¶¶ 84–85. Twitch states a claim for fraud.

18 **D. There is a Reasonable Likelihood the Proposed Discovery Will Uncover the Identity**
19 **of John/Jane Does**

20 The final factor concerns whether there is a reasonable likelihood the proposed discovery
21 will uncover the identities of the Doe defendants. *Columbia*, 185 F.R.D. at 579 (citation omitted).
22 The subpoenas to Google, Discord, Microsoft (which owns Hotmail), and Twitter should yield
23 identification information for the persons behind @TwitchToS, Defendants’ Discord groups, and
24 the Gmail and Hotmail addresses associated with Skel and www.artifactstreams.com. The
25 subpoenas to Verizon, Comcast Cable Communications LLC, Contina, Charter Communications
26 Inc., Optimum Online, Suddenlink Communications, and OVH Hosting should yield information
27 sufficient to identify the individuals connected to the IP addresses Twitch linked to Skel’s
28 account and accounts that streamed prohibited content in the Artifact game directory during the

1 attacks. This data will likely allow Twitch to identify the Does. *See Strike 3 Holdings*, 2019 WL
2 402358, at *3 (permitting plaintiff to subpoena ISP AT&T because “AT&T will be able to
3 provide the subscriber’s name and address in response to a subpoena, which will allow Strike 3 to
4 serve process”). Examples of the substantive parts of the proposed subpoenas are attached to the
5 Simpkins Declaration as Exhibits J through M.

6 **E. There Is No Prejudice From the Proposed Discovery**

7 The proposed discovery will not prejudice the responding parties. *See Semitool*, 208
8 F.R.D. at 276 (“Good cause may be found where the need for expedited discovery, in
9 consideration of the administration of justice, outweighs the prejudice to the responding party.”).
10 Twitter, Google, Discord, Microsoft/Hotmail, Verizon, Comcast Cable Communications LLC,
11 Contina, Charter Communications Inc., Optimum Online, Suddenlink Communications, and
12 OVH Hosting are established social media companies, Internet Service Providers, and cloud
13 computing companies who routinely deal with discovery requests. These companies would suffer
14 little burden from producing data regarding account information. And, Twitch will be unable to
15 locate and serve Defendants without the requested discovery. Accordingly, Twitch’s need for
16 discovery to identify Defendants outweighs any prejudice to the responding parties.

17 **V. CONCLUSION**

18 For the foregoing reasons, Twitch respectfully requests that the Court grant its application
19 for limited expedited discovery and permit it to serve third-party subpoenas on Twitter, Google,
20 Microsoft/Hotmail, Discord, Verizon, Comcast Cable Communications LLC, Contina, Charter
21 Communications Inc., Optimum Online, Suddenlink Communications, and OVH Hosting.
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