IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY KAY INC.,	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 3:17-CV-0484-B-BK**
	§	
ARTURO AYON and	§	
JOHN DOES 1-100,	§	
Defendants.	§	

ORDER

Pursuant to the District Judge's *Order of Reference*, Doc. 9, the Court now considers Plaintiff's *Motion for Leave to Conduct Discovery Prior to Rule 26(f) Conference*, Doc. 7. For the reasons that follow, Plaintiff's motion is **GRANTED**.

A. Background

Plaintiff brings this action against Defendants Arturo Ayon and John Does 1-100 ("the Doe Defendants") (collectively "Defendants") for trademark infringement, false advertising, unfair competition, trademark dilution, and various state law claims. *See* Doc. 1. Specifically, Plaintiff accuses Defendants of illegally selling products bearing the Mary Kay registered trademarks through three Internet storefronts on amazon.com ("Amazon"),[1] each of which ships the infringing products from Rowlett, Texas.[2] Doc. 1 at 2. Although Plaintiff's counsel sent cease-and-desist letters to each of the Storefronts, no response was received and Plaintiff's products are still being sold through the

[1] The storefronts are identified as "Beauty Flower," "Healthy & Beauty for uuu," and "Healthy & Beauty for you!!!" (collectively "the Storefronts").

[2] The return address for "Beauty Flower" is P.O. Box 754, Rowlett, TX 75030-0754 ("the P.O. Box Address"). The return address for "Healthy & Beauty for uuu" and "Healthy & Beauty for you!!!" is 3526B Lakeview Parkway, Apt. 161, Rowlett, TX 75088 ("the Lakeview Parkway Address"). Doc. 1 at 6-8.

Storefronts. Doc. 1 at 6-8. Thus far, Plaintiff's investigation has identified Defendant Ayon, a former Mary Kay consultant, as an alleged offending party; however, it has been unable to identify the Doe Defendants. Doc. 1 at 8-9.

With the aim of assisting in this effort, Plaintiff notes two entities that are likely have information regarding the Doe Defendants' identities: Amazon and MSJ Investments, Inc. d/b/a Mail+ ("Mail Plus").[3] Doc. 7 at 2. By the instant motion, Plaintiff seeks leave to serve subpoenas on Amazon and Mail Plus "for documents and information that would allow [Plaintiff] to determine the names, address, and contact information of the individuals associated with the Storefronts and mailbox used by Defendants." Doc. 7 at 2.

B. Applicable Law

Generally, parties may not seek discovery from any source before a Rule 26(f) conference, unless permitted by the court. *See* FED. R. CIV. P. 26(d)(1). While the Court of Appeals for the Fifth Circuit has not adopted a standard for determining when early discovery can be conducted, most district courts within the Circuit utilize a "good cause" standard. *Talon Transaction Techs., Inc. v. Stoneeagle Servs., Inc.*, No. 13-CV-902-P, 2013 WL 12172925, at *2 (N.D. Tex. May 14, 2013) (Horan, J.) (citing *St. Louis Grp., Inc. v. Metals & Additives Corp., Inc.*, 275 F.R.D. 236, 239, 240 (S.D. Tex. 2011); *Paul v. Aviva Life & Annuity Co.*, No. 09-CV-1490-B, 2009 WL 3815949, at *1 (N.D. Tex. Nov. 12, 2009) (Kaplan, J.)).

[3] Mail Plus is located at the Lakeview Parkway Address.

Courts have found the requisite good cause where, absent early discovery, the plaintiff is unable to identify and serve certain defendants. *See Combat Zone Corp. v. Does 1-8*, No. 12-CV-2972, 2012 WL 12898023, at *1-2 (S.D. Tex. Dec. 3, 2012); *see also TCYK, L.L.C. v. Does 1-20*, No. 13-CV-3927-L, 2013 WL 6475040, at *1 (N.D. Tex. Dec. 10, 2013) (Horan, J.). In such an instance the court considers whether the moving party: (1) identifies the missing party "with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court;" (2) identified all previous efforts to locate the unknown defendants; and (3) established that its suit could withstand a motion to dismiss. *Combat Zone Corp.*, 2012 WL 12898023, at *1-2 (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)). In other instances, courts have considered (1) whether the plaintiff makes a *prima facie* showing of harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) the necessity of the subpoenaed information to advance the claim; and (5) the user's expectation of privacy. *TCYK, L.L.C.*, 2013 WL 6475040, at *1 (citation omitted).

C. Analysis

Plaintiff has shown good cause for early discovery. First, Plaintiff has identified the Doe Defendants with as much clarity as possible, describing them as persons and entities that have infringed on Plaintiff's trademarked products. Doc. 1 at 2; *see Combat Zone Corp.*, 2012 WL 12898023, at *1 (finding that "as real persons/entities, these Does can be sued in federal court").

Second, Plaintiff has detailed its efforts to locate and identify the Doe Defendants: it has discovered the storefronts through which the infringing products are sold, sent

multiple cease-and-desist letters, and identified the addresses from which the infringing products are shipped. Doc. 1 at 6-8; Doc. 7 at 8-9; *Combat Zone Corp.*, 2012 WL 12898023, at *2.

Third, Plaintiff has established that its suit can withstand a motion to dismiss, as it appears to have sufficiently alleged claims for the trademark-related violations it asserts. *See* Doc. 1; *Combat Zone Corp.*, 2012 WL 12898023, at *2. A cause of action for the infringement of a registered trademark exists where an individual uses (1) any reproduction, counterfeit, copy, or colorable imitation of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive. 15 U.S.C. § 1114(1)(a). Plaintiff alleges that Defendants – without authorization – acquire and sell materially different Mary Kay products, which bear the Mary Kay registered trademarks, through Amazon and other retailers. Doc. 1 at 10. Plaintiff also alleges that sale of these products is likely to confuse consumers who will think they are purchasing legitimate Mary Kay products. Doc. 1 at 10-11. Consequently, Plaintiff has stated a claim under the Lanham Act and make a *prima facie* showing of harm. *See Combat Zone Corp.*, 2012 WL 12898023, at *2; *TCYK, L.L.C.*, 2013 WL 6475040, at *1.

Finally, Amazon and Mail Plus appear to be the only entities from which Plaintiff likely can obtain information regarding the identities of the owners of the Storefronts and the mailbox utilized by the Doe Defendants. Plaintiff avers that it seeks only the information from Amazon and Mail Plus necessary to determine the names, addresses, and contact information of the individuals associated with the Storefronts and the

mailbox and to execute service of process on the Doe Defendants. Doc. 7 at 9; *see Indigital Sols., L.L.C. v. Mohammed*, No. H-12-2428, 2012 WL 5825824, at *3 (S.D. Tex. Nov. 15, 2012) (permitting pre-conference discovery of documents "reasonably calculated to produce the information required to identify and serve the defendants").

D. Conclusion

For the reasons stated herein, Plaintiff's *Motion for Leave to Conduct Discovery Prior to Rule 26(f) Conference*, Doc. 7, is **GRANTED**. Plaintiff is permitted to serve subpoenas on Amazon and Mail Plus for documents other information that would enable it to determine the names, addresses, and contact information of the individuals associated with the Storefronts and the Lakeview Parkway Address.[4]

SO ORDERED on July 12, 2017.

RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

[4] This ruling does not foreclose any valid objections raised by Amazon or Mail Plus in responding to any subpoena.