IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
LAW DIVISION

Guava, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	2012-L-007363
	)	
Skyler Case,	)	
	)	
Defendant.	)	

MOTION TO QUASH SUBPOENA, OBJECTION TO PERSONAL JURISDICTION AND MOTION FOR A PROTECTIVE ORDER

NOW COME Movants, in accordance with 735 ILCS 5/2-301, identified by IP Addresses 207.38.253.29 and 205.178.93.62, by and through counsel, and move to quash Plaintiff's subpoena served on RCN Telecom Services (Lehigh) LLC, seeking Movants' personal identifiers, and for a protective order against further action against these Movants by Plaintiff. Movants were not provided copies of said subpoenas, but rather each received a letter from a company known as Neustar, Inc., informing them that the subpoena had been received. In support of his motion, Movants state as follows:

I. INTRODUCTION

This matter was filed on June 29, 2012. Sometime thereafter, Plaintiff issued subpoenas to RCN seeking information including Movants' personal identifiers. On August 4, 2012, Neustar, an agent of RCN, issued a letter each to Movants informing them of the subpoenas, and advising them that the requested information, which would include their identifying information, would be produced pursuant to the subpoena on August 22, 2012 unless Movants took action to oppose the subpoena and provide written proof of that opposition on or before August 21, 2012. (Group Ex. A).

II. LEGAL STANDARD

Illinois Supreme Court Rule 201(b)(1) provides that "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party..." Rule 201(c) limits the authorization to pursue relevant discovery by providing that a court may "make a protective order as justice requires, denying ... discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression." A litigant's "right to discovery is limited to disclosure of matters that will be relevant to the case at hand in order to protect against abuses and unfairness..." Leeson v. State Farm Mut. Auto Ins. Co., 546 N.E.2d 782, 787 (Ill.App. 1989). Relevancy, for discovery purposes, is determined by reference to the issues, for generally, something is relevant if it tends to prove or disprove something in issue." Bauter v. Reding, 385 N.E.2d 886, 890 (Ill. App. 1979).

III. ARGUMENT AND CITATION OF AUTHORITY

A. Movants Have Standing To Challenge The Subpoenas.

There is no question that Movants have standing to challenge the subpoenas served on RCN. It is well-recognized that the "decision to remain anonymous...is an aspect of the freedom of speech protected by the First Amendment." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995). The use of the internet does not destroy this fundamental right. See Reno v. ACLU, 521 U.S. 844, 870 (1997) (recognizing there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the internet.) Even if a customer's privacy interest in its subscriber information is minimal or exceedingly small (a point which Movant does not concede), "parties need only have some personal right or privilege in the information sought to have standing to challenge a subpoena to a third party." Third Degree Films, Inc. v.

Does 1-108, 2012 U.S. Dist. LEXIS 25400, 7-8 (D. Md. February 28, 2012) (internal quotation marks and citations omitted). Consequently, Movants have standing to challenge the subpoenas seeking their personal information.

B. Because An IP Address Does Not Identify The Person That Actually Engaged In The Alleged Activity, The Subpoenas Seeking The Personal Information Associated With Movants' Purported IP Addresses 207.38.253.29 and 205.178.93.62 Should Be Quashed.

Plaintiff alleged in its Complaint that "IP addresses are numbers assigned to devices, such as computers, that are connected to the internet." (Complaint ¶14). Plaintiff has alleged that retained a "computer forensics firm" to monitor its computers and capture/analyze digital evidence of unlawful activity. (Complaint ¶12). The "computer forensics firm" allegedly identified Internet Protocol (IP) addresses which Plaintiff alleges are associated with the purported conspiracy to breach its computer systems and distribute misappropriated information. (Complaint ¶14).

Plaintiff has identified two IP addresses as having allegedly unlawfully accessed its website. But it has not identified that the subscribers of those accounts are the individuals responsible for the alleged unlawful access. An IP address provides only the location at which one of any number of computer devices may be deployed, much like a telephone number can be used for any number of telephones. In re: Bittorrent Adult Film Copyright Infringement Cases, 2012 U.S. Dist. LEXIS 61447 at *3 (E.D.N.Y., May 1, 2012). As such, while Plaintiff claims to have observed activity by two specific IP addresses, he has failed to plead sufficient facts to support the contention that Movants committed any of the acts alleged in its Complaint.

Many courts have acknowledged that any ISP subscriber that will be identified through a purported IP address is not necessarily the individual who engaged in the acts alleged in Plaintiff's complaint. See Id. at *4 ("While the ISP will provide the name of its subscriber, the

alleged infringer could be the subscriber, a member of his or her family, an employee, invitee, neighbor or interloper."); see also Digital Sin, Inc. v. Does 1-176, 2012 WL 263491, at *3 (S.D.N.Y. Jan. 30, 2012) ("The Court is also concerned about the possibility that many of the names and addresses produce in response to Plaintiff's discovery request [seeking personal identifiers for a list of IP addresses] will not in fact be those of the individuals who [engaged in the alleged activity]."); SBO Pictures, Inc. v. Does 1-3036, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011) ([T]he ISP subscriber to whom a certain IP address was assigned may not be the same person who used the Internet connection for illicit purposes..."); VPR Int'l v. Does 1-1017, 2011 U.S. Dist. LEXIS 64656, at *4 (C.D. Ill. April 29, 2011) ("Where an IP address might actually identify an individual subscriber and address, the correlation [between IP subscriber and copyright infringer] is far from perfect. *** The infringer might be the subscriber, someone in the subscriber's household, a visitor with her laptop, a neighbor, or someone parked on the street at any given moment.")

Because an IP address does not identify the individual that engaged in the alleged unlawful activity, the subpoenas seeking Movants' personal information should be quashed. Releasing Movants' personal information will not "prove or disprove something in issue" (i.e. reveal the identity of alleged co-conspirators), but merely identify an out-of -state individual that purchases access to the internet (in the case of the Movant associated with IP Address 207.38.253.29) and an Illinois resident who has provided a Declaration denying he committed any of the acts alleged in Plaintiff's Complaint. Bauter, 385 N.E.2d at 890. The information sought by Plaintiff's subpoena to RCN for Movants' information should be quashed.

C. The Subpoena Seeking The Personal Information Associated With The Movant Associated With IP Address (207.38.253.29) Should Be Quashed Because This Court Lacks Jurisdiction Over This Movant.

The subpoena seeking the personal information connected with Movant's IP Address, 207.38.253.29, should be quashed because he is not a resident of the state of Illinois and lacks any contacts with this forum. Movant lacks even the minimum contacts necessary to confer personal jurisdiction as set forth by the U.S. Supreme Court in International Shoe v. State of Washington, 326 U.S. 316, 316 (1945) and its progeny.

1. Illinois Long-Arm Statute

Section 2-209 of the Code of Civil Procedure sets forth when Illinois courts will exercise personal jurisdiction over a nonresident defendant. See 735 ILCS 5/2-209. Subsection (a) governs specific jurisdiction and lists fourteen (14) different acts that could subject a nonresident defendant to the jurisdiction of an Illinois court. 735 ILCS 5/2-209(a)(1) through (a)(14).

Plaintiff has failed to specifically plead the grounds for jurisdiction over the named Defendant, Skyler Case. Plaintiff appears to be arguing that it owns computer systems based somewhere (notably Plaintiff has not pled that the computers are in Illinois), but has averred that the computers are "accessible to individuals in Cook County, Illinois." (Complaint ¶4). In fact, Plantiff has failed to state in its Complaint whether it is in fact the Guava, LLC reflected on the Illinois Secretary of State website, or if it is, in fact, a limited liability company located in another jurisdiction. It is also noteworthy that Plaintiff has failed to identify whether Defendant actually resides in the jurisdiction. See Complaint.

Plaintiff has alleged no facts that would demonstrate that Movant has engaged in substantial activity in Illinois and, as discussed infra, Movant is not a resident of the state of

Illinois. Furthermore, as set forth in Movant's supporting Declaration (attached hereto as Exhibit B), Movant is not a resident of the state of Illinois, nor has Movant engaged in any activity, substantial or otherwise, within the State of Illinois. (Group Ex. B). As such, Plaintiff has failed to allege that this Court has specific jurisdiction over this Movant, and the subpoena should be quashed.

Subsection (b) governs general jurisdiction and lists four grounds, none of which are applicable to Movant. 735 ILCS 5/2-209(b). Subsection (c), a "catchall" provision, permits Illinois courts to exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. 735 ILCS 5/2-209(c). This catchall provision permits an Illinois court to exercise personal jurisdiction to the extent permitted by federal due process. Klump v. Duffus, 71 F.3d 1368, 1371 (7th Cir. 1995); Baltimore & O.R. Co. v. Mosele, 368 N.E.2d 88, 92 (Ill. 1977) (holding that the Illinois long-arm statute extends personal jurisdiction to the extent permitted by the due process clause as interpreted by International Shoe.)

The subpoena to RNC seeking this Movant's personal information should be quashed. Permitting Plaintiff to proceed without quashing this subpoena would allow general jurisdiction in any court in Illinois against any person across the country, or even the world, so long as a plaintiff claims they are a "John Doe", an entirely unnamed party, or a so-called "co-conspirator" allegedly using the internet. This offends the traditional notions of fair play and substantial justice guaranteed by the United States Constitution. International Shoe, 326 U.S. 310, 316 (1945).

2. Federal Due Process

It is a fundamental principle that defendants should not be forced to have their interests adjudicated in a jurisdiction within which the defendant has no contact. The basic requirement of personal jurisdiction gives a "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 197 (1980). The constitutional standard is whether the nonresident defendant has certain minimum contacts with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316. The minimum contacts analysis "cannot simply be mechanical or quantitative", but instead must depend on the "quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the Due Process Clause to insure." Id. at 319. The minimum contacts necessary to confer jurisdiction depend on whether specific or general jurisdiction is asserted. MacNeil v. Trambert, 932 N.E.2d 441, 445-46 (Ill. App. 2010). General jurisdiction is satisfied when a defendant's general business contacts within the forum state are continuous and systematic. Id. at 446. Specific jurisdiction exists when the defendant purposefully directs his activities at the forum state or the cause of action arises out of the defendant's contacts with the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); MacNeil, 932 N.E.2d at 446.

Plaintiff has not alleged that this Court has specific or general jurisdiction over Movant. Instead it appears to have merely partially pled a conspiracy, and claims in which the alleged co-conspirators are mentioned. Therefore, Plaintiff has failed to proffer a basis for this Court's

jurisdiction and the Court lacks jurisdiction over Movant. Pace Communictions Serv. Corp. v. Express Products, Inc., 945 N.E.2d 1217, 1221 (Ill. App. 2011) ("When seeking jurisdiction over a nonresident defendant, a plaintiff has the burden of establishing a prima facie case for jurisdicition."). In addition, as discussed herein and set forth in Movant's supporting Declaration, Movant is not a resident of the state of Illinois nor has Movant engaged in any activity, substantial or otherwise, within the state of Illinois. (Ex. B).

The subpoena for this Movant's personal information must be quashed, as it violates Movant's federal due process rights.

D. In Similar Cases, The Illinois Supreme Court, As Well As Numerous Other Courts, Have Quashed The Subpoena Served On ISPs Or Otherwise Protected A Movant's Personal Information From Discosure.

The subpoenas to both Movants (207.38.253 and 205.178.93.62) should be quashed. Plaintiff has shown no legitimate purpose for obtaining the requested information. Moreover, Plaintiff's counsel has a long history of filing similar complaints, which have been acknowledged by numerous courts as "shakedowns" and mere constructs in a scheme to coerce settlements from people under pain of the threat that, whether they committed any wrongdoing or not, they will be publicly accused of being lawbreakers and consumers of pornographic films. Movants respectfully request that this Honorable Court refuse to permit such a scheme to operate here.

Plaintiff's counsel filed a lawsuit virtually identical to that filed in the case at bar in St. Clair County, Illinois in December of 2011. Lightspeed v. Doe, 2011 L 683. As in the instant case, they issued subpoenas to thousands of alleged "co-conspirators". In fact, they issued subpoenas to 6,600 so-called "co-conspirators." The Honorable Robert P. LeChien presided over Lightspeed, entering orders permitting expansive discovery despite the fact that, as in the instant

matter, it was clear that Plaintiff had failed to sufficiently plead its claims and was merely attempting to utilize the court as an apparatus for harvesting settlements.

Ultimately, several of the ISPs who had received subpoenas for information regarding their subscribers sought to intervene in the matter and challenge the subpoenas. Their motions were denied, as were motions to quash filed by other subpoena targets. The ISPs filed a Rule 383 motion seeking a supervisory order from the Illinois Supreme Court directing the Circuit Court of St. Clair County to vacate the discovery order and allow the motions to quash. A copy of the petition filed by the ISPs is attached hereto as Exhibit C. The petition explains in detail the nefarious nature of this litigation, and its history of rejection by courts all over the country. On June 27, 2012, the Illinois Supreme Court issued a supervisory order directing the Circuit Court of St. Clair County to vacate its discovery orders and enter an order allowing the motion to quash subpoenas filed by the ISPs. A copy of that order is attached hereto as Exhibit D.

The arguments made by the ISPs in Lightspeed are appropriately made here. The discovery order in the case at bar was entered as an Agreed Order between the Plaintiff and Defendant Case on July 27, 2012. (Note that in Lightspeed the order was not an agreed order, but a discovery order entered by the court.) The Agreed Order entered by the parties in this matter on July 27, 2012 serves no legitimate purpose. The entire lawsuit is part of a nationwide scheme under which Plaintiff's lawyers harvest identifying subscriber information based on one-sided papers, unchallenged evidence (as in this matter), and *ex parte* orders, and then contact the identified subscribers to threaten them with public exposure for alleged unauthorized access to pornographic content if they don't cough up thousands of dollars in settlement. See e.g. In re BitTorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765 (E.D.N.Y.) (noting "a nationwide blizzard of civil actions brought by purveyors of pornographic films" and also taking

note of a media report that "more than 220,000 individuals have been sued since mid-2010 in a mass of BitTorrent lawsuits, many of them based upon alleged downloading of pornographic works.") The Eastern District Court's Order contains a thorough discussion of the nature of the coercive scheme in which Plaintiff and its counsel are engaged. A copy of the May 1, 2012 order is attached hereto as Exhibit E.

Though Movants have not been provided a copy of the subpoenas seeking their personal information, they have no reason to believe their telephone numbers and email addresses have not been requested. Movants' telephone numbers and email addresses are absolutely immaterial and irrelevant to the claims made by Plaintiff. The only reason to request that information is to utilize it to harass Movants and to attempt to coerce Movants to settle their claims.

Typically, these types of lawsuits are filed in federal court and assert copyright infringement. But, plaintiffs like Guava and Lightspeed who are enlisting the courts for the purpose of harvesting contact information are encountering a "stiffening judicial headwind" in federal courts across the country. Pac. Century Int'l. Ltd. v. John Does 1-37, 2012 WL 1072312 at *3 (N.D. Ill. Mar. 30, 2012). These courts have, in rapidly increasing numbers, quashed subpoenas, severed mass defendants, imposed sanctions and generally increased their supervision and skepticism over these lawsuits. See In re BitTorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765 at *9. ("The most pervasive argument against permitting plaintiffs to proceed with early discovery arises from the clear indicia, both in this case and in related matters, that plaintiffs have employed abusive litigation tactics to extract settlements from John Doe defendants"). Stymied in many federal courts, plaintiffs have begun turning to state courts, where they present the same issues and objectives – sometimes repackaged in the

form of non-copyright claims, but still seeking to coerce mass settlements for alleged unauthorized access to their pornographic materials.

This case is an example of the latest effort to secure mass discovery from a single court, as discussed with disapproval in the May 1, 2012 order entered in the Eastern District of New York in In Re: BitTorrent Adult Film Copyright Infringement Cases. (Ex. E) In essence, to annex the court to the office of Plaintiff's counsel and its Florida call center, to which subpoena targets are directed in the subpoena and in the letters issued to the targets by the ISPs and their agents, such as Neustar. (Group Ex. A). In this type of case, the plaintiff's lawyers sue just one defendant, then say that there are numerous potential "joint tortfeasors" or so-called "co-conspirators" as to which discovery should be permitted even though they are not parties. Thus, discovery is sought as to hundreds or thousands of individuals under the theory that they are simultaneously (i) potential parties as to whom identification is warranted and (ii) non-parties as to whom personal jurisdiction, venue and joinder are not pertinent. In support of this fictional pleading, plaintiff's lawyers boldly argue *both* that the so-called "co-conspirators" lack standing to challenge the subpoenas (because the subpoenas are directed at the ISPs) and that the ISPs lack standing to challenge the subpoenas (because many of the arguments involve the rights of the ISP's customers who are the so-called "co-conspirators". The plaintiff's lawyer will also say that the subscriber's rights, if any, should be addressed after they are served and enter an appearance, when in actuality, the plaintiffs have no intention of serving or naming any other defendants and, even if they did, such would be at or near the conclusion of the mass identification and coercion game that is actually at play. (Ex. E).

Many other courts have entered orders quashing subpoenas and attempting to put a stop to the coercive scheme perpetrated by counsel for Plaintiff and other similar, and in some

instances related, law firms. See Nu Image, Inc. v. Does 1-3,932, No. 11-cv-545, Doc. No. 31-1, (M.D. Fla. Feb. 24, 2012) (recommending that a movant's motion to quash be granted because the court lacks jurisdiction over the out-of-state movant); Liberty Media Holdings, LLC v. BitTorrent Swarm, 2011 U.S. Dist. LEXIS 126333, at *4 (S.D. Fla. Nov. 1, 2011); and LaFace Records, LLC v. Does 1-38, 2008 U.S. Dist. LEXIS 14544, at *7 (E.D.N.C. Feb. 27. 2008) ("[M]erely committing the same type of violation in the same way does not link defendants together for purposes of joinder.") And the Illinois Supreme Court quashed all of the subpoenas issued to the ISP movants, taking the extraordinary action of exercising its supervisory jurisdiction to order a sitting judge in the Circuit Court of St. Clair County to vacate his discovery orders and grant motions to quash which had been filed by the ISPs.[1]

E. Conclusion

Movants have standing to challenge the subpoenas issued by Plaintiff to their internet service provider, RCN. Movants have provided Declarations in which they confirm they have not acted unlawfully and have not done any of the things alleged in Plaintiff's Complaint. Moreover, Movant 207.38.253.29 is not an Illinois resident and has no ties to Illinois through which this Court could exercise general, personal or long-arm jurisdiction. Movants respectfully request that this Honorable Court enter an order quashing the subpoenas, issuing a protective order prohibiting Plaintiff or counsel for Plaintiff from further contact with Movants, and prohibiting their ISPs from disclosing their personal information to Plaintiff and/or counsel for Plaintiff. In the event the Court feels production of the personal information for either Movant is appropriate,

[1] It is noteworthy that counsel for plaintiffs in the Lightspeed case (and the case at bar) then amended their case to name the ISPs who had succeeded in obtaining relief from the Illinois Supreme Court. The case was immediately removed to federal court and is currently pending in the Southern District of Illinois, where it is known as Lightspeed Media v. Anthony Smith, et al, 3:12-cv-00889.

Movants respectfully request that the Court enter an Order limiting that production to name and address, and denying Plaintiff access to their telephone numbers and email addresses.

Dated August 21, 2012.

Respectfully submitted,

THE RUSSELL FIRM

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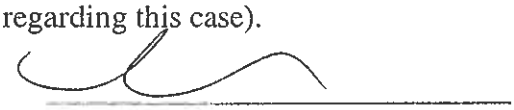
CERTIFICIATE OF SERVICE

On August 21, 2012, the undersigned served a copy of the foregoing via hand delivery to Paul Duffy, 2 N. LaSalle Street, 13th Floor, Chicago, IL 60602, and via e-mail to Adam Urbanczyk at admin@torrentlitigation.com (the email address the undersigned has used in the recent past to communicate with Mr. Urbanczyk regarding this case).



Erin Russell