

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

GUAVA, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. A. No. 1:12-cv-11880-FDS
	)	
JOHN DOE,	)	
	)	
Defendants.	)	

**DEFENDANTS’ REQUEST FOR JUDICIAL NOTICE OF AN AFFIDAVIT FILED IN A  
RELATED PROCEEDING**

Pursuant to Federal Rule of Evidence 201, Defendants 209.6.50.65, 209.6.72.13 and 66.189.69.147 (collectively, “Defendants”) respectfully request that the Court take judicial notice of the Affidavit of Spencer Merkel, filed today in a related case brought by Plaintiff Guava, LLC (“Plaintiff”), *Guava, LLC v. Spencer Merkel*, No. 27-CV-12-20976 (Minn. Dist. Ct. Hennepin Cty. filed Jan. 25, 2013) (“Affidavit”). The Affidavit, a true and accurate copy of which is attached hereto as Exhibit A, provides further support for Defendants’ pending motion for a stay, costs, and a protective order. (ECF No. 7.)

**LEGAL STANDARD**

Under Federal Rule of Evidence 201(b)(2), the Court is entitled to take judicial notice of facts that are not subject to reasonable dispute in that they are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” The Court may take judicial notice, whether requested or not, at any stage of the proceeding. Fed. R. Evid. 201(c); (f). Judicial notice is mandatory when properly requested by a party who supplies the Court with the necessary information. Fed. R. Evid. 201(d). “It is well-accepted that federal

courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.” *Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990). “[C]ourts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). *See also E.I. DuPont de Nemours & Co., Inc. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986) (taking judicial notice of complaint in state court action).

### **ARGUMENT**

The Affidavit is a public record filed in state court in Minnesota. As such, its existence is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” and is properly the subject of judicial notice. Fed. R. Evid. 201(b)(2).

As Defendants have noted, Plaintiff brought its original action in Illinois state court against a “defendant in name only” to obtain, through discovery, information identifying Defendants and other alleged co-conspirators, who were “defendants in all but name.” (ECF No. 12 p. 1 & n.1.) The named defendant in the original action “admitted the existence of and his participation in the conspiracy,” and “agreed to Plaintiff’s order authorizing discovery about Defendants and thousands of other alleged co-conspirators.” (ECF No. 12 p. 1 n.1.) Such cooperation with Plaintiff’s case raised suspicions of collusion, and the Judge in the original action asked whether counsel for Plaintiff and that Defendant were “in bed with each other.” (*Id.*)

The Affidavit filed today by Spencer Merkel, the named defendant in another state proceeding brought by Plaintiff, gives further credence to such concerns of collusion. Mr. Merkel states that an attorney from Plaintiff’s law firm, Prenda Law, offered to settle an infringement

claim by a different plaintiff if Mr. Merkel “would agree to be sued.” (Ex. A pp. 1-2.) Mr. Merkel states that did agree, was sued, and retained an attorney referred to him by Prenda Law. (*Id.* p. 2.) He further states that he has “learned of Guava LLC’s and Prenda Law’s practice of finding one John Doe to be a named defendant, and then discovering the names [of] and requesting settlement money from other John Does by issuing subpoenas to ISPs.” (*Id.*)

These statements are directly pertinent to the matters at hand. Arranging strawman defendants is consistent with Plaintiff’s aversion to *bona fide* litigation. (See ECF No. 12 pp. 1-2.) Defendants actively defended themselves in the original action from Plaintiff’s attempts to obtain discovery about them and settlements from them. (See ECF No. 7 pp. 2 & 9.) If those attempts were tainted by collusion and fraud, then they too were vexatious, and further warrant the relief requested in Defendants’ pending motion: an award of costs incurred by Defendants in the prior action and a stay of these proceedings, and protection from any further duplicative litigation and abusive discovery.

### CONCLUSION

WHEREFORE, Defendants 209.6.50.65, 209.6.72.13 and 66.189.69.147 respectfully request that the Court take judicial notice of the Exhibit attached hereto, and grant Defendants such other and further relief to which they are entitled.

Respectfully submitted by counsel for Defendants 209.6.50.65, 209.6.72.13 and 66.189.69.147,

Dated: January 25, 2013

/s/ Daniel G. Booth

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**CERTIFICATE OF SERVICE**

I hereby certify that on this January 25, 2013, I electronically filed the foregoing Defendants' Request for Judicial Notice of an Affidavit Filed in a Related Proceeding, by using the Court's ECF system, thereby causing a true copy thereof to be served upon counsel of record for Plaintiff as identified on the Notice of Electronic Filing.

/s/ Daniel G. Booth