

**In the Court of Common Pleas of Philadelphia
Civil Trial Division**

Guava, LLC,

Plaintiff,

December Term 2012

v.

No. 03387

John Does 1-40,

Defendants.

**Plaintiff's Memorandum of Law in Support of its Motion for Leave to Take Pre-Complaint
Discovery Under Pa. R.C.P. 4003.8**

Summary of the Argument: A plaintiff may obtain pre-complaint discovery where the information it seeks is material and necessary to file its complaint, and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party. The Court may require a plaintiff requesting this pre-complaint discovery to particularly state how it will materially advance the preparation of a complaint. In this case, begun by a writ of summons, Plaintiff has in its possession a list of Internet Protocol ("IP") addresses of John Does who illegally hacked into Plaintiff's protected computer systems. Plaintiff requests that this Court grant its motion so it may obtain the identities of John Does 1-40 from the internet service provider Verizon Online LLC ("Verizon"), and properly initiate legal proceedings to vindicate its rights against those who illegally shared plaintiff's content. Defendants will not be steamrolled or surprised by this discovery request, as the Cable TV Privacy Act of 1984 provides that any internet service provider notify customers before it discloses identifying information.

1. Matter before the Court.

Before this Court is Plaintiff's request for leave of court to take pre-complaint discovery to serve a subpoena upon Verizon Online LLC ("Verizon"), a cable television and internet service provider in Pennsylvania.

2. Statement of Question Involved.

Question: This is a case where pre-complaint discovery is necessary to identify the proper defendants against whom Plaintiff may file a legally-sufficient complaint. In such a case, should the Court grant a request for leave of court to take pre-complaint discovery, that Plaintiff may obtain the identities of the defendant to file a complaint?

Suggested Answer: Yes.

3. Facts

a. Introduction.

A flash mob of ski-masked thieves break into a bank. They steal money as well as the personal information of the bank's customers. But these thieves weren't the sharpest tools in the shed — each was wearing a shirt with their home telephone number prominently printed on the back of it. And unfortunately for them, they didn't realize that a video camera in the bank recorded the entire incident. The police, reviewing the surveillance footage, see the phone numbers, link the phone numbers to the thieves, and prosecute them for theft.

Now imagine that happened over the internet, and you understand precisely what happened here.

In this case, a swarm of individuals, believing they were anonymous, hacked into Plaintiff's protected computer systems. While they thought their anonymity would shield them from being identified, they missed something.

Just like the ski masked mob, each of the John Doe defendants in this case left behind the electronic equivalent of their phone number printed on the back of their shirt — their IP address.¹

With this motion, plaintiff asks this Court to provide it with the tools to electronically unmask the 40 John Doe defendants. Plaintiff desires to serve a subpoena on Verizon to link the

¹An IP address is similar to a telephone number. It is a numerical label assigned to any device (like a computer or printer) that participates in a computer network that uses the internet protocol for communication. It is an identifier that links internet communication to the individual responsible for the internet account.

IP addresses to the individuals behind them, based on its belief that the users of these IP addresses hacked into Plaintiff's computer systems.

b. The Parties – A Pornography Company and 40 Doe Defendants.

Plaintiff Guava, LLC is a Limited Liability Company that that owns and operates protected computer systems. Plaintiff operates and maintains a website by and through which individuals who pay a monthly subscription fee can view its adult content.

Defendant Does 1—40 are individuals whose true names and addresses are unknown to Plaintiff. These Doe defendants hacked into Plaintiff's protected computer systems, gained unauthorized access to Plaintiff's subscription website as though they were paying members and stole private and personal information.

c. Plaintiff's Request for Pre-Complaint Discovery.

As part of this pre-complaint discovery investigation, Plaintiff intends to subpoena Verizon to determine the identity of each internet subscriber assigned the corresponding IP address on the date and time of hacking.

The information which Plaintiff will request in subpoenas to be directed to Verizon is governed by 47 U.S.C. § 551 ("The Cable TV Privacy Act of 1984"). The Cable TV Privacy Act prohibits cable operators from disclosing a subscriber's identifying information without either 1) the subscriber's express consent; or 2) a court order that specifically authorizes the disclosure.²

Accordingly, Plaintiff requests that this Court issue the attached order instructing Verizon to produce all documents or information sufficient to identify the user or users of the respective IP addresses as listed in Exhibit A during the corresponding dates and times.

Additionally, Plaintiff asks permission to conduct pre-complaint discovery on each user identified by these internet service providers to determine whether the actual subscriber performed the acts complained of, or it was some other individual.

²The Act requires the ISP notify the subscriber of any such order. *See* 47 U.S.C. § 551(c)(2)(B).

d. Internet Service Providers, Internet Protocol Addresses, and How This Court Will Help Unmask the Defendants.

The illegal hacking and other wrongful acts at issue in this action occurred online. In order to execute the illegal acts complained of, a user must connect to the internet.

Individuals gain access to the internet through an internet service provider (“ISP”). When an ISP provides internet access to a subscriber, it does so through a modem located at the subscriber’s home or office. Each time the subscriber accesses the Internet, the ISP provides a unique number to the subscriber called an IP address. This is somewhat akin to a telephone number. The IP address for a subscriber may stay the same (a static IP address) or it may change from time to time (a dynamic IP address). An ISP generally records the times and dates it assigns each IP address to a subscriber.

Internet theft relies on the ability to identify the computers to and from information streams, which users search and exchange files. The technology identifies those computers through the IP address from which the computer connects to the Internet. In this manner, plaintiff identified the IP addresses from which individuals connected to the internet to unlawfully access Plaintiff’s computer systems, and hack into its protected website.

Plaintiff recorded the exact date and time individuals illegally accessed Plaintiff’s computer systems.

Anyone can perform a simple search on public databases to determine which Internet access provider controls a specific IP address. Plaintiff now seeks to subpoena Verizon to determine the name and address of the subscribers to whom they assigned the various IP addresses recorded.

e. Procedural Background and the Reasons for this Request for Pre-Complaint Discovery.

Plaintiff filed an action by writ of summons against 40 John Doe defendants, who have so far been identified by IP address only. Plaintiff believes that these John Doe defendants are Verizon customers.

To properly identify and serve the defendants who illegally shared Plaintiff's content, Plaintiff must conduct pre-complaint discovery to subpoena the IP address holders' identities. Plaintiff files this motion and requests that this Court grant its motion for leave to file pre-complaint discovery for the following reasons:

- i. Pre-complaint discovery is necessary in this case to obtain the information material and necessary to the filing of the complaint—specifically defendants' identities. Plaintiff cannot file a legally sufficient pleading without identifying the defendants as persons, rather than simply as IP addresses;
- ii. This request is not a fishing expedition, nor is it meant to cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party. Once this Court grants plaintiff's motion, plaintiff will serve Verizon with a subpoena. Under the Cable TV Privacy Act of 1984 (47 U.S.C. §551), Verizon must notice the Doe defendants of the subpoena. After notice, Verizon will provide Plaintiff with the subscribers' identifying information;
- iii. Defendants will not be steamrolled or surprised by this action. Under the Cable TV Privacy Act of 1984, 47 U.S.C. §551(c)(2)(b), a cable provider who provides identifying information regarding a customer must first provide notice to the subscriber before it discloses any such information. This includes internet service providers.

Plaintiff addresses each of these elements in turn below.

4. Argument.

- a. Pre-complaint Discovery is Necessary to File a Legally Sufficient Complaint. Though this Discovery, Plaintiff Will Ascertain John Doe Defendants' Identifies.**

Plaintiff requires pre-complaint discovery to learn defendants' identities, so it may properly serve them with civil process.

Plaintiff does not yet have any other identifying information of defendants other than IP address, which uniquely identify the John Doe defendants. To prosecute its claims to protect its property, plaintiff must learn the defendants' identities. These identities can be discerned by pre-complaint discovery.

Pre-complaint discovered is governed by Pa. R.C.P. 4003.8. Rule 4003.8 provides that a plaintiff may obtain pre-complaint discovery where (1) the information sought is material and necessary to the filing of the complaint; and (2) the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party.

In *McNeil v. Jordan*, 586 Pa. 413, 443 (Pa. 2006) the Pennsylvania Supreme Court explained the standard for obtaining pre-complaint discovery:

To obtain pre-complaint discovery, a litigant should be required to demonstrate his good faith as well as probable cause that the information sought is both material and necessary to the filing of a complaint in a pending action. A plaintiff should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading, as well as averring that, but for the discovery request, he will be unable to formulate a legally sufficient pleading. ... The reasonableness of a given request, as well as the existence of probable cause and the good faith of the party seeking discovery, are matters for the trial court to determine in the exercise of its sound discretion.

In this case, the identities of the John Doe defendants is material and necessary to the filing of a complaint against them. Plaintiff seeks the identities of John Doe defendants that have so far been identified only by IP address. Once Verizon provides the identities of these defendants to the plaintiff, then plaintiff will be able to properly name and serve the defendants with process under Pa. R.C.P. 400. Furthermore, without this specific identifying information, plaintiff will be wholly unable to prosecute its claims for conversation against defendants. This request is made in good faith, as Plaintiff has already identified, by IP address, those defendants who have illegally hacked into its computer systems.

Additionally, there are no other practical measures Plaintiff could take to identify the Doe defendants. Plaintiff is aware of no available information that would identify the hackers, other than information maintained by their ISPs. Because of the nature of internet transactions,

Plaintiff has no way of determining Doe defendants' identities except through a third-party subpoena.

Other courts have indicated that a plaintiff requesting early discovery to identify defendants should justify specific requests and explain how such requests will lead to identifying information about a defendant that would make service of process possible.³ The process explained above shows precisely how plaintiff's request will lead to the identification of defendants that will make service possible.

Sometimes, the internet subscriber is not the proper defendant in an action like as this. Plaintiff may seek to depose and issue interrogatories to the internet subscriber identified by the ISPs to determine whether any specific subscriber is a proper defendant in this action. Plaintiff believes that pre-complaint discovery under Pa. R.C.P. 4003.8 is the only proper method to made this determination.

Therefore, plaintiff respectfully requests that this Court finds that it has satisfied the Supreme Court's requirements for pre-complaint discovery, explained in *McNeil v. Jordan* and later codified in Rule 4003.8, and grant its request to pre-complaint discovery.

b. This Request is Made with the Intent of Vindicating Plaintiff's Rights to Protect its Computer Systems.

Plaintiff's request for pre-complaint discovery is proper under Pa. R.C.P. 4003.8. Rule 4003.8(a) requires that when a plaintiff seeks pre-complaint discovery, that discovery must not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party. Plaintiff's pre-complaint will cause none of this.

In this case, Plaintiff plainly admits that defendants, once identified, may be annoyed or embarrassed because they have been caught illegally hacking into Plaintiff's computer systems.

³*Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 580 (N.D. Cal 1999) ("[s]ervice of process can pose a special dilemma for plaintiffs in cases ... in which the tortious activity occurred entirely on-line."); *see also Gillespie v. Civiletti*, 629 F. 2d 637, 642 (9th Cir. 1980) ("As a general rule, the use of 'John Doe' to identify a defendant is not favored. However, situations arise ... where the identity of alleged defendants will not be known prior to the filing of a complaint. In such circumstances, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds.") (internal citations omitted).

But this annoyance or embarrassment is not “unreasonable” by any means — and no more annoying or embarrassing than being named a defendant in any other lawsuit.

Additionally, there will be no unreasonable expense, oppression, or burden to any party should this court grant Plaintiff’s request for pre-complaint discovery. Verizon, as an ISP, has subscribers’ information stored electronically. This information is easily accessible with only a few minutes’ investment. It will be electronically transmitted to Plaintiff with virtually no burden or expense to Verizon.

Therefore, because Plaintiff’s request for pre-complaint discovery is within the scope contemplated by Pa. R. Ci. P. 4008.3(a), this Court should grant the request and allow Plaintiff to take pre-complaint discovery.

c. Defendants will not be Steamrolled or Surprised by this Action.

Plaintiff’s request for pre-complaint discovery will comply with all notice requirements under the Pennsylvania Rules regarding third party subpoenas.

Under Pa. R.C.P 4009.21(a), “a plaintiff seeking production from a person not a party to [an] action shall provide written notice to every other party of the intern to serve a subpoena at least twenty days before the date of service.” This notice serves to allow a party to object to the filing of the subpoena under Rules 4009.21 and 4009.24(b). Peculiar in this case is that Plaintiff does not yet know defendants’ identities, that it may provide notice to the defendants of this subpoena. While this at first presents a quandary to the Plaintiff seeking pre-complaint discovery in this matter, this riddle can be quickly solved by looking to the Cable TV Privacy Act’s own notice requirements.

Under the Cable TV Privacy Act of 1984, 47 U.S.C. § 551, cable operators are prohibited from disclosing personally identifiable information concerning subscribers — unless the subscriber gives prior written or electronic consent or a court orders that the information be provided. Many internet service providers, including Verizon, are also cable operators. In this case, once Plaintiff serves pre-complaint discovery upon Verizon, Verizon must then notify all defendants of the subpoena before it turns over any identifying information to the Plaintiff.

Because the Cable TV Privacy Act requires an ISP to provide notice of any subpoena regarding a subscriber's identity to the subscriber before it turns over any identifying information, Plaintiff believes that the written notice requirement of Rule 4009.21 would be satisfied by any subpoena issued under the Act.

Plaintiff envisions the process as follows:

- First, Plaintiff will serve a subpoena upon Verizon.
- Verizon will then provide notice of the subpoena to its subscribers.
- Verizon will not release any identifying information about its subscribers until the 20 day period mandated by Rule 4009.21 has passed. This will allow the subscribers sufficient time to object to the subpoena under the relevant Pennsylvania Rule.
- After the 20 day period mandated by Rule 4009.21 has elapsed, assuming no objection from John Doe defendants, Verizon will turn over the IP addresses to Plaintiff.

This process keeps within the spirit of the Pennsylvania Rule while addressing a situation that Rule 4009.21 does not contemplate.

To ensure compliance with the guidelines established by the Cable TV Privacy Act, Plaintiff requests that the Court order state clearly that the Court contemplated the Cable Privacy Act and that the order specifically complies with the Act's requirements.⁴

Though Plaintiff does not yet know Doe defendants' identities, and therefore cannot provide notice under the exact method contemplated by Pa. R.C.P. 4009.24, the notice provisions of the Cable TV Privacy Act alleviate any concerns regarding proper notice of the third party subpoena to the Doe defendants. Therefore, this Court should grant Plaintiff's pre-complaint discovery request to file a third-party subpoena upon Verizon to disclose the identities of Doe defendants 1-40.

5. Relief.

⁴See 47 U.S.C. §551; see also *Fonovisa, Inc. v. Does 1-9*, Case No. 07-1515 2008 U.S. Dist. LEXIS 27170 at * 21-25 (W.D. Pa. Apr. 3, 2008) (discussing the Cable TV Privacy Act in the circumstances of a Doe defendant's motion to quash a subpoena in federal litigation. The Court denied Doe defendant's motion).

WHEREFORE, because the pre-complaint discovery is necessary to file a sufficient complaint in this action, and because it does not run contrary to any rule or law, Plaintiff Guava, LLC, requests that this Court grant its Motion for Leave to Take Pre- Complaint Discovery and enter the proposed order that accompanies this Motion.

RESPECTFULLY SUBMITTED,

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