

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MALIBU MEDIA, LLC

Plaintiff,

v.

JOHN DOE subscriber assigned to IP Address
24.14.81.195,

Defendant.

Case No. 1:13-cv-06312

The Hon. Geraldine S. Brown

**RESPONSE IN OPPOSITION TO:
EXCIPPIO'S MOTION TO INTERVENT TO SEEK THE ENTRY OF A PROTECTIVE ORDER TO
SAFEGUARD ITS SOURCE CODE (ECF DOC. 46)**

I. Introduction

Excipio has filed a Motion to Intervene for no apparent reason. Excipio is not a party served a discovery requests.¹ Excipio is also not the subject of any third-party subpoena request.² According to both Malibu and Excipio, Malibu doesn't have the ability to turnover the (not even requested) source code. With Excipio having no legitimate interest in this case, *i.e.* no trade secret to be disclosed, Doe is at a loss as to why Excipio has intervened. Excipio has failed to meet its burden to show why it should be allowed to intervene. This is because, fundamentally, according to both Excipio and Malibu, its software and source code are not in danger of being provided to Doe.

II. Governing Law

Rule 24(a)(2) does allow a non-party to intervene in cases under certain circumstances, including when trade secrets may be disclosed. Fed. R. Civ. P. 24(a)(2); *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960). However, two of the four requirements are that (a) the

¹ Indeed, even while seeking relief from this Court, Excipio refuses to submit to its jurisdiction. See, Motion, p. 1, n. 1.

² Indeed, Excipio takes care to suggest in the first page of its motion that it would seek the protection of "treaties" and is not subjecting itself to the jurisdiction of this Court. As a German company, it may be (a point not conceded) that Excipio cannot be forced to turnover documents Germany filed a reservation under Art. XXIII of the Hague Evidence Convention that refuses execution of letters of request pertaining to US pretrial discovery of documents.

purported intervener has an interest in property subject to the action and (b) the disposition of the matter may impair the ability to protect the interest in the property. *Security Ins. Co of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995).

III. Argument

A. Excipio fundamentally lacks an interest in this case

Excipio does not have a horse in this race. Both Excipio, and Malibu,³ claim that Malibu does not, and has not, had the software sought, or the source code not requested. See, Motion, ¶ 2; Corrected Fed. R. Civ. P. 26(a) Disclosure, p. 1 (ECF Doc. 54-4); Plt's Resp. to Deft's Motion for an Order Requiring Malibu to Show Cause Why It Should Not Be Held In Contempt, p. 1, 2 (ECF Doc. 48). Excipio's repeatedly stated interest is its *allegedly* trade secret source code, not even being sought by Doe. However, according to Excipio and Malibu, there is no threat of the same being provided to Doe.

Excipio has not been served with a third-party subpoena seeking its software, or its source code. In fact, such a subpoena would likely be disputed under international law. *Supra*, fn. 1 (noting that Germany has opted out of pre-trial discovery of documents under the Hague Evidence Convention). Thus, its interest is not being implicated – it has not been asked to provide anything.

Further, if Malibu truly does not possess or control the software and source code, it is fundamental that it cannot turn it over. This fact cannot excuse Malibu's attempts to play cat-and-mouse for months, only unveiling Excipio when faced with an Order to show cause; however, the fact of the matter is that Malibu cannot release what it does not have. This begs the question, why is Excipio trying to protect the release of something that fundamentally cannot be released?

³ Although, it should be noted that Malibu only recently revealed this information, after numerous sworn statements and signed pleadings repeatedly asserting that it was IPP's software on IPP's servers, and so on. See, Reply Memo to: Plt's Resp. to Deft's Motion for an Order Requiring Malibu to Show Cause Why It Should Not Be Held In Contempt, p. 6-7 (ECF Doc. 54).

- B. Even if Excipio's interest was implicated, the repeated concerns about Source Code are misplaced; no one is seeking source code

Assuming that Excipio was subject to a discovery request, or Malibu actually could comply with the Court's Order, Excipio's source code is not subject to that Order. Excipio has intervened in order to protect its, allegedly, trade secret source code. Motion, ¶ 3. It seeks to extensively amend this Court's model protective order with an extensive Source Code Addendum. Motion, ¶ 6; Motion, Exh. B. The overly burdensome restrictions are meant to protect from "catastrophic inadvertent disclosure by not allowing the source code to be transmitted" Motion, ¶ 7. No one is seeking source code. There is no Court Order to turnover source code. The Order that Excipio is concerned about only required Malibu to turn over the documents sought pursuant to Request to Produce 5. Request five read sought, "A copy of the software used by IPP, Ltd. to investigate Doe." (ECF Doc. 24-6).

Source code is not software. Source code is compiled or interpreted in a process to create a program. Source code explains how things work to a computer programmer. Software, compiled source code, explains how things work to a computer. Excipio appears to to have compiled programs,⁴ that run on servers, that it then claims to (restrictively) license use to third-parties. Motion, Exh. A, ¶¶ 4, 5, 6. Even Excipio recognizes that computer programs are distinct from the "associated source code." *Id.* at ¶ 5.

Excipio's entire attempt to intervene is concerned with its source code. Doe isn't asking for the source code. Again, the question arises, why is Excipio intervening? The question leads to an easy conclusion; Excipio doesn't need to intervene, and shouldn't be granted leave to do so.

⁴ Some of which may be, upon information and belief, based on open-source code, which *may* make Excipio's code unprotectable anyways. Excipio certainly did not address this in its Motion to Intervene. This belief is partially based upon the fact that Excipio's "handshakes" (part of the BitTorrent file transfer process) identify Excipio as using the Vuze/Azuerus 4.5.0.4 client. Azuerus is licensed under the General Public License, a common open-source license.

- C. As shown above, two elements needed
for intervention have not been met

In order to intervene, Excipio has to have an (i) interest that was worth protecting in this case (ii) that would be harder to protect due to activities in this case. *Security Ins. Co of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995). Excipio has claimed that it has an interest in trade secreted source code that is implicated by this litigation. Excipio has jumped the gun. It hasn't been asked for anything, and Malibu does not, apparently, have anything belonging to Excipio, let alone source code *that Doe isn't even seeking*. Excipio has failed to meet two of the elements required for intervention. Accordingly, its Motion must fail.

- D. Excipio's intervention has already drastically raised
the costs of this litigation for Doe, and its overly
burdensome proposed protective order would only make it worse

As shown above, Excipio has no business intervening in this case. However, since doing so, the cost of this litigation jumped drastically. As indicated in open court on March 19, 2014, prior to Excipio's intervention, the parties had come to terms on a proposed protective order. The inclusion of Excipio in protective order discussions has cost Doe hundreds of dollars in legal fees,⁵ and has actually slowed down the discovery in this case.

Excipio licenses its software to other companies who engage in similar litigation-business models. Motion, Exh. A, ¶ 3. Mr. Türbach, Excipio's CEO, is also the President of Copyright Defenders, Inc., a Nevada Corporation. See Exh. A. It's Director, Mattihas Schroder-Padawet provides declarations, like those of Tobias Feiser in this case, for many different plaintiffs and companies. See, e.g. *4 Twenty Media Inc v. Swarm Sharing Hash Files 6D59B29B0E51E9B5B4C0F9192CE99ED5EC5457E8 et al*, Padawet Decl., Case No. 6:12-cv-

⁵ While the point should be moot, as no one is seeking Excipio's source code, the restrictions in Excipio's proposed protective order's source code addendum are unduly burdensome, requiring experts to be locked in Excipio's counsel's office only to interact with code that could be easily transportable with appropriate safe-guards in place to prevent inadvertent disclosure. But again, *no one is even seeking the source code*.

00031, ECF Doc. 2-3 (W.D. La. Jan. 11, 2012); MICK HAIG PRODUCTIONS, E.K., HATTINGER STR. 88 D-44789 BOCHUM, GERMANY v. Does 1-670, Padawet Dec., Case No. 3:10-cv-01900-N, ECF Doc. 2-1 (N.D. Tex.) (wherein Mr. Padawet claims to work for Excubitor USA, Inc.).

Doe brings these facts to the Court's attention for two reasons. First is to ensure the record reflects the complex, interconnected, and incestuous nature of the various investigating companies,⁶ making Malibu's lack of forthrightness and outright misstatements all the more troubling. However, more importantly for the purposes of this Response, these facts tend to suggest that it is possible that Excipio has intervened simply to run up Doe's costs in this litigation. Its easily uncovered small family of companies certainly provides motive to raise the cost of innocent infringers' defenses. Again, the question must be asked, why did Excipio – not at risk of having its source code disclosed – motion to intervene in this proceeding? As indicated above, Excipio had no legitimate reason to do so.

IV. Conclusion

Excipio has failed to meet two of the required elements to allow it to intervene. This is because, fundamentally, it has no interest in this case. Doe has not sought the source code from anyone, and even if he did, apparently, no one that discovery has been propounded upon actually possesses or controls it. Why a company would intervene, in a case that does not concern it in any way, only to run up the costs of an innocent Doe is unknown. However, Excipio certainly has motive to run up Doe's defense costs. The Motion should be denied.

Respectfully submitted,

/s/Jonathan LA Philips

Jonathan LA Phillips
One of Doe's Attorneys
456 Fulton St.
Ste. 255

⁶ Here, IPP, Excipio, and Excubitor are connected with only a few minutes of research

Peoria, IL 61602
309.494.6155
jphillips@skplawyers.com
ARDC No. 6302752

Certificate of Service

I certify that on March 28, 2014 a copy of the foregoing has been filed with the Clerk of the Court via the Court's ECF filing system, thereby serving it upon all counsel of record.

/s/ Jonathan LA Phillips