EXHIBIT C

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FEDERAL COURT OF AUSTRALIA

Dallas Buyers Club, LLC v iiNet Limited (No 2) [2014] FCA 1320

Citation:	Dallas Buyers Club, LLC v iiNet Limited (No 2) [2014] FCA 1320
Parties:	**DALLAS BUYERS CLUB, LLC v IINET LIMITED, INTERNODE PTY LTD, AMNET BROADBAND PTY LTD, DODO SERVICES PTY LTD, ADAM INTERNET PTY LTD and WIDEBAND NETWORKS PTY LTD**
File number:	NSD 1051 of 2014
Judge:	**PERRAM J**
Date of judgment:	3 December 2014
Catchwords:	**PRACTICE AND PROCEDURE** – witness resident overseas required for cross-examination – whether witness should be required to attend hearing in person
Cases cited:	*Unilever Australia Ltd v Revlon Australia Pty Ltd (No 4)* [2014] FCA 1074
Date of hearing:	2 December 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	9
Counsel for the Applicant:	Mr I Pike SC
Solicitor for the Applicant:	Marque Lawyers

Counsel for the Respondents: Mr R Lancaster SC and Mr C Burgess

Solicitor for the Respondents: Thomson Geer

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION **NSD 1051 of 2014**

BETWEEN: **DALLAS BUYERS CLUB, LLC**
Applicant

AND: **IINET LIMITED**
First Respondent
INTERNODE PTY LTD
Second Respondent
AMNET BROADBAND PTY LTD
Third Respondent
DODO SERVICES PTY LTD
Fourth Respondent
ADAM INTERNET PTY LTD
Fifth Respondent
WIDEBAND NETWORKS PTY LTD
Sixth Respondent

JUDGE: **PERRAM J**

DATE OF ORDER: **2 DECEMBER 2014**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The applicant's application to take the evidence of Mr Daniel Macek by videolink be refused.

2. The costs of today be costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA

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JUDGE: **PERRAM J**

DATE: **3 DECEMBER 2014**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 This application for preliminary discovery is listed for hearing on 17 and 18 February 2015. At that time Dallas Buyers Club LLC proposes to read the affidavit of Mr Daniel Macek. Mr Macek is a technical analyst employed by a firm in Stuttgart called Maverickeye UG ('Maverick'). Maverick provides forensic investigation services for copyright owners. Mr Macek will say at the hearing that he monitored BitTorrent file distribution networks for the presence of the Dallas Buyers Club film using software called MaverikMonitor 1.47; that he detected 'numerous instances' in which accounts held with the respondent telecommunications companies have been used to provide copies of the Dallas Buyers Club film to other persons; and that he has collected as Exhibit DM1 a CD containing Excel spreadsheets which identify the telecommunications provider involved in each download and the IP address of the account used to effect that download.

2 The respondents have required Dallas Buyers Club LLC to make Mr Macek available for cross-examination at the hearing. They wish to explore with him whether the method by which he has collected the IP numbers is reliable. Four issues now arise:

1. Because of the preliminary nature of the present case, do the respondents have a right to require Mr Macek for cross-examination?

2. If not, should they nevertheless be permitted to cross-examine Mr Macek pursuant to a grant of leave?

3. If Mr Macek is to be cross-examined, should he be examined by video conferencing procedures or instead required to travel to Australia to be examined in person?

4. If Mr Macek is required to attend in Australia, should there be a special costs order to make the respondents pay for his flights and accommodation?

Questions 1 and 2

3 Although intriguing to lawyers of a certain mindset, Question 1 can be avoided. Even if the respondents require the permission of the Court to cross-examine Mr Macek and have no right to demand it (as they would at a full blown trial) I am satisfied that that permission should be granted. The respondents wish to challenge the accuracy of the process by which the IP addresses have been generated. That challenge is not a forensic dead end. Should it turn out that the IP addresses appearing in Exhibit DM1 are not the addresses of account holders with the respondents, then this would arguably provide quite a good reason to refuse the application for preliminary discovery. I will therefore permit Mr Macek to be cross-examined.

4 One fly in this ointment which was not raised at the hearing concerns whether Mr Macek is the correct person to be interrogated about this. He does not give evidence himself about the accuracy of the MaverikMonitor 1.47 software for its allotted task although he does describe his use of the software. The technical work of assessing the capabilities of MaverikMonitor 1.47 is done instead by a report of Dr Simone Richter, of Darmstadt in Germany. In that report she evaluates its reliability in detecting IP numbers involved in downloads. Mr Macek has attached a copy of her report to his affidavit.

5 I do not presently understand whether Dr Richter's report is to be utilised as well at the hearing. It would be inadmissible if objection were taken to it as an annexure to Mr Macek's evidence. On the other hand, there is a separate copy of Dr Richter's report on the Court file and it is not in any way attached to Mr Macek's evidence. This might suggest that she was to be called as a witness. When the argument as to whether Mr Macek should be made to attend took place, the discussion only concerned his position and no mention was made of Dr Richter. My conclusions must therefore be confined at this stage to Mr Macek.

6 I should indicate, lest there be further disputation, that the logic underpinning the conclusions above about the position of Mr Macek would appear equally to apply to the position of Dr Richter if she were to be called as a witness and if the respondents wish to challenge the accuracy of her report.

Question 3

7 I accept that it would be possible to examine Mr Macek using video conferencing procedures. However, it seems to me quite likely that the cross-examination is likely to be somewhat involved, certainly technical and probably involving the showing of Mr Macek documents. None of these problems is insurmountable but there is also the issue of the time difference between Stuttgart and Sydney which must be weighed in the balance, together with the limits on the time the Court has

available on either side of the hearing dates which have been allotted (slight). Combined with the often less than satisfactory nature of cross-examination conducted via video conferencing facilities I do not think this important evidence should be elicited in that manner: cf. *Unilever Australia Ltd v Revlon Australia Pty Ltd (No 4)* [2014] FCA 1074 at [20]ff per Gleeson J where a very similar situation obtained with respect to Professor Thornthwaite.

Question 4

8 I do not think there should be any special costs order. If Mr Macek were present in the jurisdiction I cannot see that there would be anything unusual which would require a different approach to be taken to the issue of costs. I do not think, at least at this stage, that the presence of Mr Macek in Stuttgart changes the landscape from the perspective of principle. If the cross-examination of Mr Macek turns out to be a disappointing affair in which Mr Macek is asked only his name and whether he has sworn an affidavit it may well be possible to countenance some form of special costs order on the basis that his trip downunder has been a waste of time. But that situation has by no means been reached at this stage and may not, and may never, arrive. The order I will make at this stage is that costs should be costs in the cause.

Conclusion

9 It was for the above reasons that I made the orders I did on 2 December 2014.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 3 December 2014