UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHEN SOTELO, individually and on behalf of all persons similarly situated, Plaintiffs, v. DIRECTREVENUE, LLC; DIRECTREVENUE HOLDINGS, LLC; BETTERINTERNET, LLC; BYRON UDELL & ASSOCIATES, INC., D/B/A ACCUQUOTE; AQUANTIVE, INC., and JOHN DOES 1-100, Defendants.	Index No. 05 C 2562 Judge Gettleman

DEFENDANTS DIRECTREVENUE, LLC'S AND BETTERINTERNET, LLC'S MOTION FOR A PROTECTIVE ORDER

Defendants DirectRevenue LLC, and BetterInternet LLC, (collectively, "DirectRevenue"), through their undersigned attorneys, pursuant to Fed. R. Civ. P. 26(c), hereby move the Court for entry of a protective order prohibiting plaintiff Stephen Sotelo ("Sotelo" or "Plaintiff") from serving any additional subpoenas on DirectRevenue's non-distributor customers. In support of their Motion, Defendants state as follows:

I. SUMMARY OF THE MOTION

Since removing this case to this Court, Plaintiff has served subpoenas on 22 third parties, seeking voluminous and far-reaching discovery materials in this fledgling class action case concerning DirectRevenue's targeted advertising software (the "Software"). Included in this

growing list of subpoenas are several directed to non-party advertisers and vendors, demanding production of overly broad and unduly burdensome categories of documents such as "All documents relating to [third party's] use of pop-up internet advertising" and "All documents relating to DirectRevenue and BetterInternet." As the result of receiving these far-flung, burdensome, and harassing subpoenas, customers and vendors have stopped doing business with DirectRevenue.

Plaintiff's subpoenas, in large part, seek information that is not relevant to this case at all, and to the extent the requested information has any arguable relevance, it would only relate to the merits of the case, rather than the preliminary matters or class certification issues, the limited categories of discovery on which the Court directed the parties to focus when the parties last appeared before the Court. The merits of the case will become academic if Plaintiff's putative class is not certified. In view of the damage being inflicted on DirectRevenue's business, the Court should therefore order Plaintiff to cease serving these inappropriate, harassing, and untimely subpoenas, at least until such time as it is evident that they might yield documents relevant to the issues in the case.

II. RELEVANT PROCEDURAL HISTORY

Defendants removed this case from the Circuit Court of Cook County to this Court on April 29, 2005. On May 4, 2005, Plaintiff filed a motion to remand which Plaintiff subsequently withdrew after Defendants briefed their opposition.

The parties have appeared before the Court to discuss discovery in this case on June 15, 2005 and on July 18, 2005. At the July 18 hearing, and by subsequent order of that same date, the Court stayed all discovery served on Defendants except for Plaintiff's document requests to DirectRevenue. As to those document requests, the Court directed the parties to

negotiate a narrower scope than the 48 overly broad requests initially served by Plaintiff, with emphasis on class certification and DirectRevenue's distributors. While declining to stay any of Plaintiff's outstanding third-party subpoenas – no motion specifically addressing those subpoenas was before the Court at that time – the Court did direct Plaintiff to "be reasonable about what [it] get[s]" from third parties. Plaintiff continued to serve subpoenas, including several on DirectRevenue's customers, apparently selected at random by Plaintiff.

On August 31, 2005, the Court issued a decision on several motions made by the Defendants. In its decision, the Court dismissed the case as against Defendant DirectRevenue Holdings, LLC, and dismissed Plaintiff's unjust enrichment claims against Defendants DirectRevenue, Byron Udell & Associates, Inc. d/b/a AccuQuote ("Udell") and aQuantive, Inc. The Court denied Defendants' motions as to the other counts of the complaint, and denied DirectRevenue's and Udell's motion to stay the litigation in favor of arbitration.

On September 7, 2005 counsel for DirectRevenue conferred in good faith with Plaintiff's counsel by e-mail, requesting that Plaintiff stop serving his unnecessary and irrelevant subpoenas on DirectRevenue's customers, and informing him that this motion would follow he would not agree. Plaintiff indicated that he would not consent to stop serving the subpoenas.

III. ARGUMENT

While Rule 26(b) provides for "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party," the rule also provides:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules any by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive… or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties'

> resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Further, Rule 26(c) provides that the court may issue a protective order, "for good cause shown… to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including… (1) that the disclosure or discovery not be had; [or] (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place…." "The district court has discretion to decide when a protective order is appropriate and what degree of protection is required", and "[g]ood cause is the only statutory requirement for determining whether or not to issue a protective order." *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997).

In deciding whether good cause exists sufficient to issue a protective order limiting discovery, the court must "balance the interests involved." *Id.* at 229. In other words, the court must weigh the "harm to the party seeking the protective order" against "the importance of the disclosure to the non-moving party." *Beloit Liquidating Trust v. Century Indem. Co.*, No. 02 C 50037, 2003 WL 355743, at *3 (N.D. Ill. Feb. 13, 2003). Even the *potential* for harm can be sufficient to support a finding of good cause warranting a protective order. *See Escobar v. Foster*, No. 99 C 4812, 2000 U.S. Dist LEXIS 6764, at *5 (N.D. Ill. May 16, 2000)("The court… must balance the requesting party's need for information against the injury that *might* result if uncontrolled disclosure is compelled." (emphasis added)). The negative effect on a party's business flowing from an opponent contacting the party's customers "certainly presents a potential justification for the district court's limitations on discovery." *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 759 (7th Cir. 2000).

Courts will grant protective orders preventing a party from contacting the other party's customers where the harm to the party seeking protection "outweighs the importance of the information to the party seeking that information." *Murata Mfg. Co., Ltd., v. Bel Fuse Inc.*, No. 03 C 2934, 2004 WL 1194740, at *5 (N.D. Ill. May 126, 2004). For example, where third-party discovery was likely to harm a party's relationship with its customers, and the information sought could potentially be discovered from the party itself, a federal district court granted a protective order preventing discovery from the third-party customers. *See Joy Technologies, Inc. v. Flakt, Inc.*, 772, F. Supp. 842, 849 (D. Del. 1991). Another federal court has issued a protective order preventing a plaintiff from contacting the defendant's customers for the purposes of litigation where the plaintiff was creating a "de facto injunction" by its contact with those customers. *May Coating Technologies, Inc. v. Illinois Tool Works*, 157 F.R.D. 55, 56-57 (D. Minn. 1994). And this District Court has itself granted a protective order preventing third party discovery where the information sought would jeopardize the defendant's customer relationships, where that information was of little relevance to the issues in the case, and where other evidence was available to prove the issues the discovery would have allegedly established. *Murata*, 2004 WL 1194740, at *6.

In this case, there is more than the mere potential for harm due to Plaintiff's ongoing campaign of serving third-party subpoenas on DirectRevenue's customers. DirectRevenue has already suffered (and will continue to suffer) genuine and significant harm resulting from the subpoenas. As set forth in the accompanying declaration of Andrew Reiskind ("Reiskind Declaration"), at least one of DirectRevenue's customers and one vendor have stopped doing business with DirectRevenue as the result of their receipt of subpoenas issued by the Plaintiff in this case. Specifically, as detailed more fully in the Reiskind Declaration,

DirectRevenue's customer ING Direct, has ceased placing advertisements with DirectRevenue. (Reiskind Decl. ¶ 4.) Further, ValueClick, the company purchasing subpoena recipient FastClick, Inc., has directed FastClick to stop accepting DirectRevenue's own advertising for its Software. (*Id*. ¶ 6.) Each of those entities has indicated that its decision to stop dealing with DirectRevenue stems from its receipt of a subpoena in this case.[1] (*Id*. ¶¶ 5, 6.) Plaintiff's subpoenas are thus interfering both with DirectRevenue's customer relationships and with its ability to distribute its own product. In effect, then, Plaintiff is creating a *de facto* injunction against DirectRevenue outside of the procedures for obtaining such an injunction in this Court; Plaintiff is obtaining *de facto* relief and attempting to strangle DirectRevenue's operations without proving any liability on DirectRevenue's part, any damages, or even any *likelihood* of success.

The severe damage DirectRevenue is suffering due to these subpoenas far outweighs any potential benefit to be gained by Plaintiff. The information sought by Plaintiff's subpoenas is irrelevant to the case at this time; indeed, the Court has already directed the parties to focus their discovery on preliminary and class certification issues, and has directed the Plaintiff to "be reasonable" about what it seeks from third parties. Not only has the Court not yet certified Plaintiff's putative class, but Plaintiff has not yet even moved for certification.

Plaintiff's subpoenas to DirectRevenue's customers do not seek any information dealing with any issue relating to class certification, which could theoretically be relevant to a motion by Plaintiff for class certification. Rather, the subpoenas either seek information that is not even relevant to the case, or if it is, relates only to the merits of the case, which will never even be heard by the Court if the putative class is not certified. For example, the oppressively

[1] Copies of the subpoenas served by Plaintiff on ING Direct and FastClick, Inc. are attached to the accompanying Declaration of Anthony S. Hind as Exhibits A and B, respectively.

broad subpoena to FastClick, Inc., includes requests for "All documents showing terms and conditions that companies who place advertisements through FastClick should follow, including all documents pertaining to the permissibility of ActiveX popups being installed through advertisements," as well as "All correspondence with BetterInternet or any other aliases of DirectRevenue, or any complaints relating to BetterInternet." (See Exhibit B to Hind Dec.) Similarly, the overly broad subpoenas served on ING Direct and other advertisers demand "All documents relating to [the subpoena recipient's] use (directly or indirectly) of DirectRevenue or BetterInternet to display advertisements on computers," and "All documents relating to DirectRevenue or BetterInternet." (See Exhibit A to Hind Dec.) The ING Direct subpoena further demands "all documents relating to the ad-effectiveness of" an ING ad allegedly placed with DirectRevenue. (*Id.*) These overbroad subpoenas clearly seek information that is either irrelevant to the case, or if relevant at all, relates only to the merits, and is not connected with any issues relating to the existence of a certifiable class.

In fact, some of the materials sought by the subpoenas do not even necessarily relate to any of the Defendants in this case, and appear to be fishing expeditions and attempts to intimidate third parties concerning separate matters relating to the third parties' conduct. For example, the subpoena to ING Direct requests "[a]ll documents relating to ING DIRECT's use of Internet pop-up advertising," "[d]ocuments sufficient to show which companies ING DIRECT relies upon to place/display its Internet pop-up advertisements," and "[d]ocuments sufficient to show each company that ING DIRECT relied upon or dealt with to have the advertisement depicted on Exhibit A displayed." (*Id.*)

In any event, it is clear that by these subpoenas that Plaintiff seeks to circumvent the effect of the Court's July 18 order, by obtaining from third parties what the Court would not

allow him to have at this juncture from DirectRevenue. The information Plaintiff seeks through these subpoenas can be more easily obtained from DirectRevenue itself, if and when such discovery becomes appropriate. The minimal utility of the documents sought by Plaintiff, compared with the significant harm being inflicted on DirectRevenue's business, compel a finding of good cause for this Court's intervention.

IV. CONCLUSION

For all of the foregoing reasons, Defendants DirectRevenue, LLC, and BetterInternet, LLC, respectfully request that the Court (a) issue a protective order prohibiting Plaintiff from serving any further subpoenas on DirectRevenue's non-distributor customers until such discovery becomes relevant to the case, and (b) grant such other relief as the Court deems just and proper.

Dated: September 8, 2005

DirectRevenue, LLC, and
BetterInternet, LLC, Defendants

By: ____/s/ Anthony S. Hind_____
One of their attorneys

Neal H. Klausner (*pro hac vice*)
David S. Greenberg (*pro hac vice*)
DAVIS & GILBERT LLP
1740 Broadway
New York, New York 10019
(212) 468-4800

Bradford P. Lyerla (3127392)
Anthony S. Hind (6257797)
MARSHALL, GERSTEIN & BORUN LLP
6300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6357
(312) 474-6300

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2005, the attached Defendants DirectRevenue, LLC's and BetterInternet, LLC's Motion for a Protective Order has been filed electronically with the Clerk of the Court using the CM/ECF System which sent notification of such filing to the following:

Counsel for Plaintiff Stephen Sotelo:

Shawn Michael Collins smc@collinslaw.com
David J. Fish dfish@collinslaw.com
Norman Benjamin Berger nberger@vblhc.com
Michael D Hayes mhayes@vblhc.com

Counsel for Defendant aQuantive, Inc.:

Matthew J. Gehringer mgehringer@perkinscoie.com,
Scott H. Gingold sgingold@perkinscoie.com,

/s/ Anthony S. Hind
One of the attorneys for Defendants Direct Revenue, LLC and BetterInternet, LLC