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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN RE: SUBPOENA ISSUED PURSUANT TO THE DIGITAL MILLENNIUM COPYRIGHT ACT TO: 43SB.COM, L.L.C.	Case Number: MS 07-6236 **SUR-REPLY[1] IN OPPOSITION TO MOTION TO QUASH FILED ON JUNE 25, 2007, BY 43SB.COM, L.L.C.** All information herein is designated as confidential.

INTRODUCTION

At its core, this is an issue of statutory construction. All that is needed to resolve this dispute is found in 17 U.S.C. Section 512(h). In summary fashion, here is what that statute

[1] Melaleuca submits this sur-reply pursuant to the Court's Order dated August 9, 2007. That Order addressed 43SB.COM, L.L.C.'s motion seeking leave to file an over-length reply brief, which Melaleuca opposed only after 43SB refused to stipulate that Melaleuca could file a sur-reply if any new issues were raised in the over-length reply. *See* Exhibit A hereto.

requires for purposes of issuance and enforcement of a Digital Millennium Copyright Act ("DMCA") subpoena:

1. The subpoena must be requested by a copyright *owner*. 17 U.S.C. Section 512(h)(1). Notably, there is no reference here to a copyright *registrant*.[2]

2. The subpoena may be issued by "the clerk of *any* United States District Court." 17 U.S.C. Section 512(h)(1) (emphasis added). Here, the instant subpoena was issued by the clerk of this court.

3. All that is required for the subpoena to issue is for the copyright owner to file with the clerk a copy of the take-down notice sent to the service provider (hereinafter the "Take-Down Notice"), a proposed subpoena, and "a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title." 17 U.S.C. Section 512(h)(2). Notably, the statute does *not* impose any requirement that the party requesting the subpoena make a prima facie showing of copyright infringement.

4. If the preceding requirements are met and if the subpoena is in proper form, "the clerk *shall* expeditiously issue . . . the proposed subpoena." 17 U.S.C. Section 512(h)(4) (emphasis added). This is a mandatory ministerial task. No substantive determination as to the merits of the case is contemplated or, frankly, permitted.

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[2] There is a significant distinction between copyright ownership and copyright registration, one apparently not understood by 43SB. Copyright Office Circular No. 1 states: "The way in which copyright protection is secured is frequently misunderstood. No publication or registration or other action in the Copyright Office is required to secure copyright. . . . There are, however, certain definite advantages to registration. . . . Copyright is secured automatically when the work is created, and a work is "created" when it is fixed in a [tangible medium] for the first time." Copyright Office Circular No. 1, p. 3, *available at* http://www.copyright.gov/circs/circ01.pdf.

5. Upon receipt of the issued subpoena, the subpoenaed party "*shall* expeditiously disclose to the copyright *owner* . . . the information required by the subpoena, *notwithstanding any other provision of law* . . . ." 17 U.S.C. Section 512(h)(5) (emphasis added).

Under the preceding standards, 43SB's motion to quash ("Motion") should be denied and 43SB should be compelled to respond to the subpoena at issue ("Subpoena") so that Melaleuca, Inc., ("Melaleuca") may "protect[] [its] rights under [Title 17]." 17 U.S.C. Section 512(h)(2)(C). Melaleuca, as evidenced by the factual record and various exhibits, has satisfied all applicable requirements under the DMCA, and the framework established by the DMCA requires enforcement when such requirements are met. The reply brief ("Reply") submitted by 43SB.COM, L.L.C. ("43SB") does not dispute Melaleuca's satisfaction of the statutory requirements for the Subpoena. Instead, 43SB attempts unsuccessfully in the Reply to breathe life back into its Motion by raising three new and extraneous arguments. Contrary to those arguments, (1) this court has jurisdiction to decide this matter, (2) the Subpoena's request for information identifying the individual using the screen name "Tom Paine" (hereinafter "Tom Paine") is completely appropriate, and (3) Melaleuca has satisfied any purported obligation to plead a prima facie case of copyright infringement.

ARGUMENT

I. This Court Has Jurisdiction To Decide This Matter

A. The Court Clerk Had Authority To Issue The Subpoena Regardless Of Any Jurisdictional Issues

The court clerk who issued the Subpoena ("Clerk") did so properly with statutory authority that is independent of any jurisdictional requirements.[3] Indeed, Melaleuca's

[3] 43SB does not appear to distinguish between the Clerk's issuance of the Subpoena and the Court's enforcement of the Subpoena for purposes of its argument regarding jurisdiction, but this distinction is critical. *See Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 257 F. Supp. 2d 244, 250 (D.D.C. 2003).

satisfaction of all applicable requirements under DMCA sections 512(c)(3)(A) and 512(h) – which is not disputed in 43SB's Reply – obligated the Clerk to issue the Subpoena. *See* 17 U.S.C. Section 512(h)(4) ("If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk *shall* expeditiously issue and sign the proposed subpoena. . . .") (emphasis added); *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 257 F. Supp. 2d 244, 249 (D.D.C. 2003) ("Under … subsection [512(h)(4)], the clerk exercises no discretion; if the requirements are met, the subpoena must be issued."). This court's potential jurisdiction over a possible future copyright action related to issues covered in the Subpoena has no bearing on the Clerk's authority to issue the Subpoena. *See id.* at 254 ("Congress has expressly provided the clerk of the court with the authority to issue § 512(h) subpoenas; thus the clerk need not draw upon the powers arising from jurisdiction over a pending case or controversy."). The independence of the Clerk's authority from any jurisdictional issues makes sense given that "because the issuance of a § 512(h) subpoena is a ministerial task accomplished without judicial involvement, it does not implicate Article III judicial power. . . ." *See id.* at 251.

B. This Court Has Subject Matter Jurisdiction Allowing It To Compel 43SB's Response To The Subpoena

This court has subject matter jurisdiction to enforce the Subpoena that was issued by the Clerk, contrary to 43SB's assertions, because the framework established by Section 512(h), which incorporates the Federal Rules of Civil Procedure, establishes such jurisdiction. First, Sections 512(h)(1) and 512(h)(4) authorize "the clerk of *any United States District Court* to issue a subpoena" if certain requirements are met. 17 U.S.C. Sections 512(h)(1), 512(h)(4) (emphasis added). Next, Section 512(h)(6) provides that "the remedies for noncompliance with the subpoena[] shall be governed to the greatest extent practicable by those provisions of the Federal

Rules of Civil Procedure governing the . . . enforcement of a subpoena duces tecum." 17 U.S.C. Section 512(h)(6). Federal Rule 45(e) provides for the enforcement of subpoenas duces tecum by providing that "[f]ailure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Fed. R. Civ. P. 45(e). This framework, which permits this court to deem 43SB in contempt for failure to respond to the Subpoena, clearly indicates that this court has jurisdiction to resolve disputes relating to the Subpoena.

28 U.S.C. Section 1337 provides a redundant basis for this court's subject matter jurisdiction in this matter. Section 1337(a) provides that "[t]he district courts shall have original jurisdiction of any civil action *or proceeding* arising under any Act of Congress regulating commerce. . . ." 28 U.S.C. Section 1337(a) (emphasis added). This provision has been interpreted broadly, and the Ninth Circuit has indicated that it covers proceedings involving claims of infringement. *See E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1286 (9th Cir. 1992).

Case law supporting Section 512(h) of the DMCA confirms that the federal district courts have subject matter jurisdiction allowing them to enforce DMCA subpoenas. As explained by the District of Columbia District Court, "[i]n a real-world sense, no Article III judge takes any action with respect to a § 512(h) subpoena until the copyright holder moves to enforce the subpoena or the service provider moves to quash it – at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution." *See Recording Indus. Ass'n of Am.*, 257 F. Supp. 2d at 250.[4]

[4] Although the question of copyright registration does not affect this court's jurisdiction here, Melaleuca notes, contrary to 43SB's assertions, that it has obtained a registration of its copyright in the April 6, 2007, letter by Ken Sheppard that was posted on 43SB's website, as Registration No. TXu1362431. Should Melaleuca elect to sue "d2," "Tom Paine," *et al.*, for infringement, any 17 U.S.C. Section 411 registration prerequisite has been satisfied.

C. The Authority Cited By 43SB Does Not Place Into Question Either The Clerk's Authority Or This Court's Jurisdiction Here

None of the authority cited by 43SB as part of its jurisdiction argument under subheading C in the Reply places the Clerk's authority to issue the Subpoena or this court's jurisdiction to enforce it into question because none of it applies to subpoenas issued under the DMCA. Section 411 of Title 17 of the United States Code, which 43SB seems to put forth as the foundation of its jurisdiction argument, explicitly covers only "action[s] for infringement," and thus has no application to DMCA subpoenas issued outside the context of any action. *See* 17 U.S.C. Section 411(a). Furthermore, Section 512, which authorizes the Subpoena at issue, makes no reference to 17 U.S.C. Section 411, and 43SB does not offer any basis for linking the two sections, nor could it. *See* 17 U.S.C. Section 512.

None of the cases cited by 43SB under subheading C of its Reply even refer to a subpoena issued under the DMCA. *See* Reply at 4-10. In particular, the opinion in *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), makes no mention of subpoenas and analyzes jurisdiction only in the context of an infringement suit. Also, the opinion in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), does not address the DMCA, and its irrelevance to issues involving DMCA subpoenas is explicitly noted in case law analyzing a DMCA subpoena. *See Recording Indus. Ass'n of Am.*, 257 F. Supp. 2d at 254.[5] The authority cited by 43SB thus has no bearing on the issue before this court, particularly given the availability of relevant language from the DMCA itself and case law addressing jurisdictional issues relating to DMCA subpoenas (which is addressed above).

[5] 43SB's efforts to focus this court's attention on irrelevant statutory and case law for purposes of its jurisdiction argument instead of addressing the plain meaning of the DMCA itself and the relevant DMCA-subpoena case law cited elsewhere in its own Reply is a telling indication of the weakness of 43SB's position. *See Recording Indus. Ass'n of Am.*, 257 F. Supp. 2d 244; Reply at 12-13.

II. 43SB Should Be Obligated To Provide Information Identifying The Individual Using The Screen Name "Tom Paine"

43SB must respond to the Subpoena regardless of the quality of the evidence that has so far come to light regarding Tom Paine's involvement in the infringement of Melaleuca's copyright because Melaleuca has satisfied all applicable DMCA requirements. The DMCA establishes an unconditional obligation to respond to a properly issued subpoena like the Subpoena at issue here. *See* 17 U.S.C. Section 512(h)(5) ("Upon receipt of the issued subpoena, … the service provider shall expeditiously disclose . . . the information required by the subpoena, *notwithstanding any other provision of law*. . . .") (emphasis added). 43SB's Reply does not offer any authority suggesting that quality of evidence linking an alleged infringer to the act of infringement, or any other factor, can release the recipient of a properly issued DMCA subpoena from its obligation to respond. This is not surprising given the plain language of subsection 512(h)(5). The quality of evidence of a nexus between Tom Paine and the infringing post of the Letter clearly is an issue that should be put on hold to be addressed in any infringement suit that might later be brought by Melaleuca.

Even if Melaleuca were required to provide evidence linking Tom Paine to the infringement of the Letter, which it is not, Melaleuca could easily satisfy any such requirement under relevant DMCA standards. Neither Section 512(h) nor 512(c) addresses the issue of a nexus between an alleged infringer and the infringement. However, even for the more basic issue of whether infringement occurred, Section 512(c) provides that the party requesting a subpoena need only state a "good faith belief" that it did occur. *See* 17 U.S.C. Section 512(c)(3)(A)(v). Given this standard, the most that could be asked of Melaleuca under any hypothetical requirement to address a nexus between Tom Paine and the infringement here would be to state a good faith belief in such a nexus. Melaleuca made that assertion under

penalty of perjury in its original Take-Down Notice, and Melaleuca continues to believe in good faith that such a nexus may exist.

43SB's own description of relevant events in its Reply provides a more-than-sufficient basis for Melaleuca's good faith belief in a nexus between Tom Paine and the infringing post of the Letter. According to 43SB's version of events, the individual using the screen name "d2" (hereinafter "d2") somehow obtained the Letter that was sent to an owner of 43SB, determined that the comments referenced in the Letter had been posted by Tom Paine, and then decided to post the Letter. *See* Reply at 10-11. Based on this version of events, it appears reasonably likely (1) that Tom Paine was involved in d2's interpretation of the Letter and decision to post it, and/or (2) that d2 and Tom Paine could be affiliated in some way that would make Tom Paine jointly liable for d2's acts of copyright infringement. 43SB's unsubstantiated reference to Tom Paine as a "speaker who had nothing to do with infringement" does nothing to impair Melaleuca's good faith basis for believing that Tom Paine was somehow likely involved in the infringement. In any event, it bears repeating that under the DMCA and supporting case law there is no requirement for a party causing the issuance of a 512(h) subpoena to address the nexus between an alleged infringer and the infringement. This is more appropriately addressed through motions to dismiss and motions for summary judgment made in any subsequent copyright infringement litigation.[6]

III. Melaleuca Is Not Required To Provide Any Evidence Supporting Its Pleading Of A Prima Facie Case Of Copyright Infringement

Melaleuca is under no obligation to provide any evidence supporting a prima facie case of copyright infringement in order for this court to enforce the Subpoena, contrary to 43SB's assertions. In its Reply, 43SB essentially adds a new argument to its prior assertion that

[6] Such a case is obviously also the appropriate forum to address issues such as creativity, fair use, and jurisdiction.

Melaleuca must present a prima facie case of infringement by arguing that Melaleuca needed to provide *evidence* in support of such a case. In reality, Melaleuca's obligation under DMCA case law is at most to, "in effect, *plead* a prima facie case of copyright infringement," which Melaleuca has done by asserting both ownership and infringement in its original Take-Down Notice. *See Recording Indus. Ass'n of Am.*, 257 F. Supp. 2d at 263 (citation omitted) (emphasis added).[7] Clearly, an obligation to *plead* a prima facie case does not include any obligation to provide evidence. 43SB's assertions regarding evidence appear to be yet another effort to treat this matter as if it were already in litigation.

CONCLUSION

For the reasons set forth above, Melaleuca respectfully requests that this court deny 43SB's motion to quash and order that 43SB must respond to the Subpoena.

DATED this 20th day of August, 2007.

HAWLEY TROXELL ENNIS & HAWLEY, LLP

By: /s/ Bradlee R. Frazer
Bradlee R. Frazer

[7] The DMCA itself does not make any mention of a requirement to plead a prima facie case of copyright infringement, and the court in *Recording Indus. Ass'n of Am.*, 257 F. Supp. 2d at 263, does not purport to add such a requirement. Rather, the court appears to reference the pleading of a prima facie case simply as a way of characterizing the notice requirements of Section 512(c)(3). *See id.*

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2007, I electronically filed the foregoing **SUR-REPLY IN OPPOSITION TO MOTION TO QUASH FILED ON JUNE 25, 2007 BY 43SB.COM, L.L.C.** using the CM/ECF system, which will send notification of such filing to counsel of record.

HAWLEY TROXELL ENNIS & HAWLEY, LLP

By: ____/s/ Bradlee R. Frazer_____
Bradlee R. Frazer

Brad Frazer

From: Erika Lessing [elessing@pikelaw.com]
Sent: Thursday, August 09, 2007 10:35 AM
To: Brad Frazer
Subject: RE: Activity in Case 4:07-mc-06236-EJL-LMB Motion for Leave to File Excess Pages

Brad -

I have conferred with my client. 43SB will not stipulate to this proposal. I will inform the Court that we do not have a stipulation.

Thanks,

ERIKA LESSING

-----Original Message-----
From: Brad Frazer [mailto:BFRA@hteh.com]
Sent: Wednesday, August 08, 2007 8:23 AM
To: elessing@pikelaw.com
Subject: FW: Activity in Case 4:07-mc-06236-EJL-LMB Motion for Leave to File Excess Pages

Erika,

I received your voice mail, and Melaleuca will stipulate to the court's granting your motion for leave to file excess pages if we state that Melaleuca shall be permitted the opportunity to file a sur-reply to respond to new issues raised in your reply brief.

If this is acceptable, please prepare a form of stipulation, and I will sign it and return it to you for filing.

Thank you,
Brad

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From: ecf@id.uscourts.gov [mailto:ecf@id.uscourts.gov]
Sent: Tuesday, August 07, 2007 1:46 PM
To: CourtMail@idd.uscourts.gov
Subject: Activity in Case 4:07-mc-06236-EJL-LMB Motion for Leave to File Excess Pages

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Case Number:	4:07-mc-6236
Filer:	In Re: Subpoena issued pursuant to the Digital Millenium Copyright Act to: 43SB.Com.L.L.C.
Document Number:	7

Docket Text:
MOTION for Leave to File Excess Pages *for Reply Brief of 43SB.COM* by In Re: Subpoena issued pursuant to the Digital Millenium Copyright Act to: 43SB.Com.L.L.C.. Responses due by 8/31/2007 (Lessing, Erika)

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Bradlee R Frazer bfra@hteh.com

Erika Lessing elessing@pikelaw.com, arp@pikelaw.com, llarson@pikelaw.com

Edward W Pike ewp@pikelaw.com, arp@pikelaw.com

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