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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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|------------------------|---|-----------------------------------|
| SI03, INC., |) | |
| |) | MISC. CASE NO. 07-6311-EJL |
| Plaintiff, |) | |
| v. |) | (Civil Case No. 07 C 3266 |
| |) | Northern District of Illinois) |
| BODYBUILDING.COM, LLC, |) | |
| |) | MEMORANDUM IN SUPPORT OF MOTION |
| Defendant. |) | TO PRESERVE ELECTRONIC EVIDENCE |
| |) | AND FOR USE OF THIRD PARTY ESCROW |
| |) | COMPANY |

COMES NOW Plaintiff, SI03, Inc., by and through its counsel of record and, pursuant to Local Rule 7.1, files this Memorandum in Support of Motion to Preserve Electronic Evidence and For Use of Third Party Escrow Company.

BACKGROUND

Pseudonymous individuals posted defamatory statements about SI03, Inc. (“SI03”) on Internet message board forums hosted on the website www.bodybuilding.com. Consequently,

SI03 filed an action against these pseudonymous individuals in the United States District Court for the Northern District of Illinois alleging claims including, but not limited to, defamation. SI03, Inc. v. John Does 1-31 and Doe Companies 1-5, No. 07 CV 3266.

The domain www.bodybuilding.com is hosted, maintained, owned and operated by Bodybuilding.com, LLC with a principal address of 305 Steelhead Way, Boise, Idaho 83704. SI03 served Bodybuilding.com with a subpoena seeking the production of information relating to the pseudonymous individuals who posted defamatory statements about SI03 on Bodybuilding.com's message board forums. Bodybuilding.com opposed such disclosure. Consequently, SI03 filed this action in the District of Idaho seeking to compel production of the information sought by the Subpoena from Bodybuilding.com. SI03's Motion to Compel is presently being briefed by the Parties.

Internet Message Boards

SI03's action seeks the production of information related to individuals who have posted defamatory communications on the website www.bodybuilding.com and its Internet message board forums. An Internet message board has been characterized as the equivalent of a public kiosk in a town square where anyone can read and post messages. For, anyone on the Internet from any location can, theoretically, access and log onto a public message board from which he or she can freely read and post messages. On many message boards, the messages posted by users may be categorized into certain topic areas. Within any particular topic area, a "string of messages" exists discussing particular issues related to that topic. Often, message boards may be restrictive in their content and membership. For example, a message board may be restricted to topics related to fitness. The operators of such a message board may further limit the message board's membership to verified fitness instructors rather than the open public. In any

case, the heart of any message board consists of the messages posted by its users.

A message posted to a webboard may publicly display certain identifying information about the posting that can be viewed by any other webboard user. This information may include the username of the individual posting the message, the date and time the user posted the message, and a subject line identifying the topic of the message. Some users post their usernames as pseudonyms when creating webboard accounts. The username represents the pseudonym created by the user when he or she created an account for use with the webboard. The username may represent the individual's real name or be an alias often having no relation to the individual's real name. Also, an individual can often change his username at any time. By using a pseudonym, an individual can associate anonymously with the webboard, communicate anonymously on the message boards, read material on the message board anonymously, and maintain the privacy of his or her membership with the webboard. Here, members of the Bodybuilding.com message board forums do indeed use pseudonyms when posting and responding to the message boards. *See generally* Pls.' Mot. Compel; Opp. of Resp.

A message posted to the Bodybuilding.com message boards also provides additional information that may or may not be publicly displayed. In particular, a message will most likely be associated with an Internet Protocol ("IP") address. An IP address represents a unique numerical address that identifies to some extent the source from which an individual obtains a connection to the Internet. *See* ICANN, Glossary of Terms and Abbreviations, at <http://www.icann.org/general/glossary.htm> (last visited November 20, 2007) (defining "Internet protocol").

At the individual consumer level, an Internet Service Provider ("ISP"), the entity providing an individual with access to the Internet, will assign IP addresses to its customers.

Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. Rev 653, 654-656 (2003); Joel Michael Schwarz, "A Case of Identity": *A Gaping Hole in the Chain of Evidence of Cyber-Crime*, 9 B.U. J. Sci. & Tech. L. 92, 95 (2003). An individual may be assigned either a dynamic or static IP address associated with his or her connection to the Internet. *Id.* A dynamic IP address may change from time to time and is not associated with any particular individual. *Id.* In such a case, an ISP's equipment automatically assigns a "dynamic" or temporary IP address when a customer connects to the Internet through a modem. *Id.* The dynamic IP address remains associated with that customer so long as the connection to the Internet is maintained. When the connection is broken, the IP address may be returned to the pool of available IP addresses and re-assigned as necessary to another customer. In contrast, a static IP address is assigned to a particular individual and typically remains with that individual until an account is terminated. *Id.* More than one computer may access the Internet through a single IP address.

If one knows a particular IP address, it is possible to identify the ISP used by the individual posting a message to a message board. *See* American Registry for Internet Numbers, <http://www.arin.net> (last visited November 20, 2007) (defining "Internet protocol"). Because ISPs often retain records associating its IP addresses with its customers, it becomes possible for an ISP to identify the customer's account that used a particular IP address on a particular date and time. Thus, disclosure of an IP address will lead an investigator to the individual's ISP and bring a party one step closer to identifying the individual at issue. However, many ISPs retain these records for a limited amount of time. As such, the usefulness of an IP address in litigation will often be inextricably tied to the information ultimately available from the ISP that owns or controls the IP addresses.

ARGUMENT

SI03 moves this Court to issue an order compelling Bodybuilding.com to preserve the information sought by the Subpoena including, but not limited to, any stored electronic information. Additionally, SI03 moves this Court to enter an order that will ensure the usefulness of the information sought by the Subpoena, particularly the IP addresses associated with the pseudonyms. Specifically, SI03 moves this Court to compel Bodybuilding.com to disclose the Responsive IP Addresses to a third party escrow company for purposes of informing the ISPs that own the Responsive IP Addresses about the Subpoena, this Action, and the Preservation Order. By this action, the ISPs will be informed of the litigation and preserve the relevant information in their possession pending resolution of this action. The Court has authority to issue such preservation orders. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, (1991) (noting that courts have inherent authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”); *Niggard Sec. Ins. Co. v. Lakewood Egg’s & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir.1992) (a court’s power includes the “broad discretion to make ... evidentiary rulings conducive to the conduct of a fair and orderly trial.”).

Preservation by Bodybuilding.com

In its Response to SI03’s Motion to Compel, Bodybuilding.com has affirmed that it is preserving information related to pseudonyms identified in a July 23, 2007 letter from SI03’s counsel. Declaration of L. Gary Davis (“L. Gary Davis Decl.”) ¶ 3. While such an affirmation is appreciated, Bodybuilding.com’s Response to the Motion to Compel fails to discuss the IP addresses sought by SI03. *See generally* Opp. Resp. Additionally, the Declaration of L. Gary Davis does not explicitly state that Bodybuilding.com is or will be preserving IP address information for the pseudonyms identified in the July 23, 2007 Letter or the Subpoena. L. Gary

Davis Decl. ¶ 3. Indeed, it makes no mention of IP addresses or the Subpoena at all.

Bodybuilding.com's failure to acknowledge the preservation of IP addresses and the implicit suggestion by L. Gary Davis that it no longer possesses IP address information for some of the pseudonyms concerns SI03. For, the IP addresses associated with the pseudonyms remain a central component of the information sought by SI03. While any personal information provided to Bodybuilding.com by a pseudonymous user may or may not be accurate and truthful, the IP address tends to identify the actual Internet connection used by the pseudonymous user to access Bodybuilding.com. *See supra*. As such, the IP addresses – more so than any other information held by Bodybuilding.com – represent essential information needed for SI03 to pursue its claims. *Id.* For, the IP addresses will enable SI03 to (a) identify the ISPs used by the pseudonymous users and (b) subsequently subpoena and obtain identifying information from the ISPs about the individuals who used the applicable Internet accounts and IP addresses. *Id.* While Bodybuilding.com may not have “contact” information for the pseudonyms at issue, it should – if properly preserved – have IP addresses for each of the pseudonyms at issue. For, the moderators of Bodybuilding.com forums (and possibly others) have access to and routinely publicly publish within the forums various IP addresses used by pseudonymous users.

Bodybuilding.com's silence with respect to IP addresses also concerns SI03 in light of the several notices informing Bodybuilding of its duty to preserve information – including IP addresses – relevant to the pseudonymous users. On July 18, 2007, the undersigned counsel informed Bodybuilding.com by written correspondence of its obligation to preserve information related to the pseudonyms identified in the Complaint. *See* Affidavit of Christopher P. Graham in Support of Motion to Preserve Evidence (“Graham Aff.”), Ex. A (Letter from Charles Lee Mudd, Jr. to Ryan DeLuca dated July 18, 2007). This letter specifically identified IP addresses.

Id. On July 23, 2007, the undersigned counsel supplemented the list of pseudonyms for which information should be preserved by Bodybuilding.com. *See* Graham Aff., Ex. B (Letter from Charles Lee Mudd, Jr. to Ryan DeLuca dated July 23, 2007). As to the information to be preserved, the July 23 letter referenced the initial July 18, 2007 notice in which IP addresses had been explicitly identified. *Id.* On July 27, 2007, SI03 had the original subpoena served upon Bodybuilding.com in which SI03 specifically sought IP addresses (among other information) related to specific pseudonyms. *See* Affidavit of Kasey Vink (attached to Motion to Compel as Exhibit D1). On August 8, 2007, counsel for Bodybuilding.com acknowledged receipt of the foregoing correspondence and subpoena. *See* Graham Aff., Ex. C (Letter from M. Kelly Tillery to Charles Lee Mudd, Jr. dated August 8, 2007). On August 10, 2007, SI03 served a second subpoena (the Subpoena discussed throughout this Motion) on Bodybuilding.com resolving minor issues raised by its counsel. *See* Affidavit of Kasey Vink (attached to Motion to Compel at Exhibit D2). This subpoena again sought IP addresses from Bodybuilding.com. *Id.* Clearly, Bodybuilding.com had notice of its duty to preserve information related to the pseudonyms – particularly the IP addresses – since mid-July. Consequently, again, Bodybuilding.com’s silence with respect to IP addresses – to which only it would have access – concerns SI03 all the more.

For the foregoing reasons, SI03 seeks assurance through a preservation order that the information responsive to the Subpoena, *particularly the IP addresses used by the pseudonyms*, will be preserved pending resolution of this Action. Such an order would merely enforce Bodybuilding.com’s duty to preserve documents and evidence that it knows, or reasonably should know, are relevant to this Action and related pending litigation. *Cf. Silvestri v. General Motors*, 271 F.3d 583, 591 (4th Cir.2001); *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998); *In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1067 (N.D.Cal.2006);

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y.2003); *National Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-67 (N.D.Cal.1987); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D.Cal.1984). Indeed, such an order remains consistent with the recent amendments to the Federal Rules of Civil Procedure. Advisory Committee Notes to 2006 Amendment of F.R.C.P. 37(f) (“[A] party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”). Therefore, the Court should order Bodybuilding.com to preserve all information responsive to the Subpoena, *particularly the IP addresses used by and associated with the applicable pseudonyms.*¹

Use of Third Party Escrow

SI03 also seeks additional protection to ensure the usefulness of the IP addresses associated with the pseudonymous postings at issue in its Motion to Compel. As discussed above, IP addresses will not usually identify any particular individual. Rather, once SI03 obtains an IP address from Bodybuilding.com, it must then determine which ISP owns the IP address. Following this determination, it must then subpoena information about the use of the IP address from that ISP. Specifically, SI03 will need to obtain information relating to the individual account that used the IP address on the relevant dates and times. Consequently, the preservation of the relevant electronic information stored by Bodybuilding.com alone will not suffice to

¹ As Bodybuilding.com has made efforts to preserve information related to the pseudonyms identified in the July 23, 2007 letter from SI03’s counsel, Decl. L. Gary Davis ¶ 3, SI03 suggests that any preservation order encompass these pseudonyms so that no ambiguity arises as to the information SI03 seeks to have preserved.

ensure the usefulness of the information. Indeed, should Bodybuilding.com appeal an adverse ruling, the production of the information could be delayed for several months. During this time, the information held by the relevant ISPs relating to the IP addresses could be deleted, erased or destroyed through their normal course of business. For this reason, SI03 moves this Court to enter an order compelling Bodybuilding.com to disclose the Responsive IP Addresses (and the dates and times they were recorded by Bodybuilding.com) to a third party escrow company.²

The information disclosed to the third party escrow company will not by itself identify any individual. Indeed, the only information disclosed will consist of the Responsive IP Addresses and the relevant dates and times Bodybuilding.com recorded them. In fact, the information will not be associated with any particular pseudonym at all. Once the third party escrow company obtains the Responsive IP Addresses, it can identify the ISPs that own the Responsive IP Addresses. Thereafter, the third party escrow company can send the ISP an agreed upon notice that identifies the IP address(es) owned by it at issue in this litigation, provides a copy of the Court's order, instructs the ISP to preserve any information it possesses relating to the IP address(es), and requests confirmation of such preservation. This methodology protects the privacy rights of Bodybuilding.com's customers as well as the usefulness of the information sought from Bodybuilding.com during the pendency of this Action.

The requested relief will not be burdensome. Presumably, Bodybuilding.com has already preserved all of the evidence responsive to the Subpoena. Consequently, an order compelling the preservation of such evidence will impose no burden on Bodybuilding.com at all. Further, an identification of the relevant IP addresses will not be burdensome. Indeed,

² A more traditional approach could be disclosure of the IP addresses to counsel for SI03 on an "attorney eyes only" basis for the sole purpose of informing the ISPs about the need to preserve the relevant information. As discussed below, the disclosure would not associate any IP address with any particular pseudonym. Consequently, there would be no means to identify the pseudonymous user of the IP address unless and until the Court rules upon SI03's motion to compel.

Bodybuilding.com's moderators have previously demonstrated the ease by which it can obtain and disclose an individual's IP address on its message boards.

Further, the disclosure of the IP addresses to a third party escrow company will not be burdensome on Bodybuilding.com or its users because SI03 agrees to pay the costs of the agreed-upon third party escrow company. SI03 also agrees that the third party escrow company shall not disclose any IP addresses to it unless and until it is ordered to do so by this Court. Because the IP addresses by themselves do not identify any individuals, the identity of Bodybuilding.com's members will remain protected – even from the third party escrow company. Similarly, the ISPs will not disclose any personally identifying information to the escrow company. Rather, the ISPs will merely acknowledge receipt of the notice and affirm that the relevant information has been preserved. Finally, the use of a third party escrow company actually will protect Bodybuilding.com from potential spoliation issues (assuming they have not already arisen) by ensuring that the information sought by SI03 will be preserved. Therefore, the relief sought will not burden Bodybuilding.com or its users.

The use of a third party escrow company for the foregoing purposes most effectively balances the rights of Bodybuilding.com, its users, and SI03. Although SI03 shall not receive any information unless and until the Court grants its Motion to Compel, SI03 will be assured that the information sought from Bodybuilding.com will still exist and that the ISPs from which it must obtain further information will have any existing information preserved and available for disclosure.

CONCLUSION

For the foregoing reasons, SI03, Inc. respectfully requests that the Court grant its Motion to Preserve Evidence.

DATED this 21st day of November, 2007

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2007, I submitted the foregoing to the Clerk of the Court for service on CM/ECF Registered Participants as reflected on the Notice of Electronic Filing, including but not limited to, the following:

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