



STINSON
MORRISON
HECKER LLP

Joan K. Archer
(816) 691-3212
jarcher@stinsonmoheck.com
www.stinsonmoheck.com

1201 Walnut, Suite 2900
Kansas City, MO 64106-2150

Tel (816) 842-8600
Fax (888) 290-2618

March 8, 2006

VIA ELECTRONIC MAIL

Honorable Donald W. Bostwick
United States Magistrate
United States District Court for the District of Kansas
Room 403
401 N. Market
Wichita, KS 67202

Re: Balboa Threadworks, Inc., et al. v. Ronald A. Stucky, et al., v.
Darlene Dando, Case No. 05-1157-JTM

Dear Judge Bostwick:

This letter is response to Susan Schrag's letter of March 7, 2006 concerning the issue of inspection of Ron Stucky's computers. Ms. Schrag claims the plaintiffs are not entitled to inspect Mr. Stucky's computers based upon Sherry Stucky's explanation concerning the email on which Mr. Stucky's name appeared as a header, Bates stamped No. S41. The explanation I received from Ms. Schrag was surprising as she previously represented to the court that her clients had informed her that all e-mails produced had been printed from Ms. Stucky's computer. This shift in facts alone warrants providing the plaintiffs with full access to all electronic media in the Stuckys' possession. It is clear that the Stuckys made a misleading statement to their attorney in an attempt to avoid discovery. Nonetheless, Ms. Schrag has failed, in my view, to present a compelling reason for withholding any of the Stuckys' computers. The discovery sought clearly is reasonably calculated to lead to the discovery of admissible evidence, as will be more fully explained below.

In the course of her letter argument, Ms. Schrag presents many facts that have not been substantiated and that undoubtedly will be in dispute at trial. Ms. Schrag also makes improper use of the instant discovery dispute to make the case that Mr. Stucky should not be a defendant in this action. Notably, no motion to dismiss Mr. Stucky has been filed to date and no affidavit has been submitted from Mr. Stucky confirming the claim that his computers were not otherwise used to perform infringing acts. As such, the plaintiffs clearly are entitled to full discovery from this party defendant. Moreover, one would think that if Mr. Stucky was, in fact,

KANSAS CITY
OVERLAND PARK
WICHITA
WASHINGTON, D.C.
PHOENIX
ST. LOUIS
OMAHA
JEFFERSON CITY

DB03/805742 0002/6763983.1

"innocent" of the charges alleged he would be more than willing to make the computers available to support his claim.

The mere fact that the document was created on Mr. Stucky's computer alone warrants providing the plaintiffs' full access to all of Mr. Stucky's computers so that potential evidence might be preserved. The fact that Ms. Stucky sought Mr. Stucky's counsel and advice is consistent with other known facts and constitutes additional support for the plaintiffs' claim that Mr. Stucky is a contributory infringer. For the Court's information, I have enclosed a copy of my February 1, 2006 letter to Ms. Schrag, which sets forth the core basis for the plaintiffs' suit against Mr. Stucky. In this letter, I point out that a party may be found to have furthered the infringement if that party is in a position to control use of copyrighted works by others and authorized said use. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 437 (1984). Mr. Stucky's involvement in the PayPal dispute with Ms. Dando constitutes evidence of his involvement in Ms. Stucky's attempt to keep the spoils of her infringing activity and supports the conclusion that he likely benefited financially from the infringement. Additional electronic data discovery is needed to further confirm or deny this fact.

Furthermore, the plaintiffs are entitled to full discovery on the issue of Mr. Stucky's potential involvement in the infringing acts. The evidence in this case will show that this was not the first time Mr. Stucky was involved in Ms. Stucky's embroidery business. Testimony will support that Mr. Stucky attended a major embroidery trade show with Ms. Stucky and was heavily involved in the purchase of a substantial piece of equipment used by Ms. Stucky in her embroidery business. Additional evidence in support of the conclusion that Mr. Stucky was in a control position may appear on his computers as well.

The plaintiffs' request for this information is no different than a paper discovery request seeking production of documents. The only variation is in the nature of the information sought. Because the data is in electronic and not paper form, it is uniquely transitory and more difficult for even parties themselves to access. Enclosed is the Affidavit of John R. Mallery of BKD, LLP's Forensics and Dispute Consulting Division explaining the importance of data preservation and collection. Mallery Affid. ¶ 7. Mr. Mallery also generally describes the types of information that may be obtained as a result of the imaging process, including deleted files, e-mails, word processing documents and spreadsheets. Mallery Affid. ¶ 9. The electronic data review also may prove or disprove Ms. Schrag's claim that the email in issue was not sent. Mallery Affid. ¶ 9. Online purchasing habits, chat communications and file-sharing activities also can potentially be discovered, as well as information concerning the dates when particular communications were sent or received. *Id.* Such information is of particular relevance in light of Ms. Stucky's claim that the CD in issue was created over a twenty-four (24) hour period in 2005 upon alleged acts of inducement by the Carosellis, a fact of which my clients vehemently deny based upon other evidence in this case that directly refutes Ms. Schrag's story. For example, Ms. Dando will testify that in 2004, Ms. Stucky offered to sell and, in fact, sent to her a

CD with a computer date stamp of 2004. The size of the files on the CDs in issue also belies Ms. Stucky's claim. The plaintiffs should be afforded an opportunity to determine whether electronic information contained on any of the Stuckys' computers further refutes her story. The metadata sought to be examined by the plaintiffs clearly may be relevant. See Williams v. Sprint/United Management Co., 230 F.R.D. 640, 652-53 (D. Kan. 2005).

Whenever electronic discovery occurs, it is anticipated that irrelevant and even, in some instances, personal confidential information will be housed on the same electronic media as contains relevant data. This is precisely why parties typically enter into painstaking negotiations concerning the electronic search terms and the protocol for the actual data acquisition and production. A carefully crafted acquisition protocol, along with the Protective Order entered in this case, would alleviate all concerns that the plaintiffs will obtain access to irrelevant personal information. If Mr. Stucky's claims of non-involvement are true, one would expect that the plaintiffs ultimately would receive no documents from his machines. Yet, at the same time, providing the plaintiffs full access to this information ensures that their discovery rights have been honored. Moreover, the requested discovery is in no way burdensome as it will be undertaken at the plaintiffs' expense. See Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000).

Finally, Ms. Schrag's letter makes no mention of Ms. Stucky's laptop, which she stated was used in connection with her client's embroidery business, and her clients' CDs. Ms. Schrag previously represented to the Court that she intended to withhold these items from production. The laptop and CDs may contain discoverable information in the form of illegally downloaded designs, as well as evidence of improper use of the Balboa designs in Ms. Stucky's embroidery business. The plaintiffs should, therefore, be afforded full access to all electronic data media in the Stuckys' possession.

Very truly yours,

STINSON MORRISON HECKER LLP

A handwritten signature in black ink, appearing to read "Joan K. Archer", written in a cursive style.

Joan K. Archer

JKA:cft

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

BALBOA THREADWORKS, INC.,)
KEITH W. CAROSELLI,)
and LEE R. CAROSELLI,)

Plaintiffs,)

vs.)

Case No. 05-CV-1157-JTM

RONALD A. STUCKY,)
SHERRY J. STUCKY,)
STUCKY FARMS, and DESIGNS BY)
SHER,)

Defendants,)

v.)

DARLENE DANDO,)

Third-Party)
Defendant)

AFFIDAVIT OF JOHN R. MALLERY

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

JOHN R. MALLERY, being duly sworn, deposes and states:

1. I am a member of the BKD, LLP Forensics and Dispute Consulting Division, and specialize in the practical application of computer security and digital forensics. I have been actively involved in computer forensics since the fall of 1999, and have had training in both DOS based and

Windows based computer forensics software. My whitepaper, Secure File Deletion: Fact or Fiction?, is an excellent reference for computer forensics examiners.

2. I am a contributing editor for Security Technology and Design magazine, and have published more than 20 articles on security and technology-related topics.

3. I am co-author of "Hardening Network Security" published by McGraw Hill/Osborne in January of 2005.

4. I have designed and presented Post Accredited Computer Forensics Training for Law Enforcement.

5. I have been asked to speak at the Southeast Cybercrime Summit in Atlanta, Georgia, for the last three years, and have appeared on CNN several times as a computer forensics expert, addressing how computer forensics may have helped in apprehending the BTK serial killer.

6. I have served on the Board of the local chapter of High Technology Crime Investigation Association, and I am the current chapter president.

7. Based on my knowledge, education, training and experience, I am aware that digital data and digital evidence can be volatile and fragile, and it is important to collect digital evidence early on in the litigation process to insure that deleted files and other residual data that is relevant to the litigation is not overwritten or otherwise destroyed during normal computer use.

8. Based on my knowledge, education, training and experience, it is recommended that exact bit by bit image copies are created of the Ronald A. Stucky and Sherry Stucky hard drives and any USB storage devices in order to preserve the data on these hard drives. These images can then be securely stored until any legal issues or objections are resolved. The imaging process is


performed electronically; at no time during the process are any of the files on the computer viewable by the technician.

9. Based on my knowledge, education, training and experience, it is recommended that upon agreement of the parties, a complete examination of the Ronald A. Stucky and Sherry Stucky hard drives and any USB storage devices be conducted. This examination will be based on search parameters agreed upon by all parties. A complete examination can reveal detailed computer use information. An examination can recover deleted files, including e-mails, word processing documents and spreadsheets. Detailed Internet usage can also be recovered. This type of information can often be useful in determining on line purchasing habits, chat communications, and file sharing activities. In addition, the examination may provide the ability to determine if and when particular communications were sent or received and if and when particular communications were deleted. Due to the ability to easily and efficiently distribute data over a wide range of computer systems and portable data storage devices for the purposes of increased accessibility, improved mobility, data backup and ease of distribution, it is often prudent to examine all systems and portable data storage devices, including but not limited to, CD's, DVD's, and USB storage devices, in the possession of the parties involved in litigation.

10. The results of the computer forensics examination can be provided to opposing counsel to review for relevance and privilege. After the review, responsive documents can be provided to plaintiff's counsel.

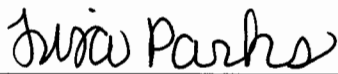
11. This affidavit is based on personal knowledge.

Further affiant saith naught.



JOHN R. MALLERY

Subscribed and sworn to before me this 8th day of March, 2006.



NOTARY PUBLIC

My Commission Expires:

11/2/09

LISA PARKS
Notary Public - Notary Seal
STATE OF MISSOURI
Clay County
My Commission Expires: November 2, 2009
Commission # 05400525



STINSON
MORRISON
HECKER LLP

Joan K. Archer
(816) 691-3212
jarcher@stinsonmoheck.com
www.stinsonmoheck.com

1201 Walnut, Suite 2900
Kansas City, MO 64106-2150

Tel (816) 842-8600
Fax (888) 290-2618

February 1, 2006

**VIA ELECTRONIC MAIL AND
REGULAR MAIL**

Susan R. Schrag
Member
Morris Laing Evans Brock & Kennedy Chartered
Old Town Square
300 N. Mead, Suite 200
Wichita, KS 67202-2722

Re: Balboa Threadworks, Inc. v. Ronald Stucky, et al v. Darlene Dando

Dear Susan:

In the past, you have taken the position that Ronald Stucky is not a proper party in the above-captioned matter and have threatened a subsequent malicious prosecution lawsuit. I believe the failure to initially inform my clients that Mr. Stucky was not a proper party and to seek his dismissal from the lawsuit will ultimately bar Mr. Stucky from bringing such a claim. At the very least, Mr. Stucky's silence on the subject would seriously limit his ability to collect damages. Additionally, I note that your clients have vigorously resisted producing through discovery information and documents that bear on the issue of contributory infringement. If Mr. Stucky is not a proper party, one would think that the items requested would have been produced. Instead, my clients are now forced to initiate procedures that, as you know, ultimately may result in the filing of a motion to compel with the Court. Any such motion will only result in the needless accumulation of additional attorneys' fees that, as you know, may ultimately be the responsibility of your clients due to their infringing acts.

That said, my clients are reasonable people. They may be willing to dismiss Mr. Stucky from the case if sufficient proof can be provided to support the conclusion that he was not a contributory infringer. Of course, general statements denying Mr. Stucky had involvement will be insufficient. To prove that Mr. Stucky was not a contributory infringer, your clients must come forward with evidence showing: (1) that Mr. Stucky's personal conduct did not form part of or further the infringement, and (2) that he did not contribute to the machinery or goods that provided the means to infringe. A party may be found to have furthered the infringement if that party is in a position to control use of copyrighted works by others and authorized said use. See Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 437 (1984).

KANSAS CITY
OVERLAND PARK
WICHITA
WASHINGTON, D.C.
PHOENIX
ST. LOUIS
OMAHA
JEFFERSON CITY

DB03/805742 0002/6715827.1

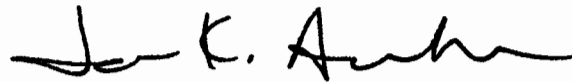
letters

If your clients can come forward with sufficient evidence to support that Mr. Stucky is not a contributory infringer under the law and facts, in part by producing the items we previously requested through written discovery, which may eliminate the need for a motion to compel, my clients may be willing to consider dismissing him from the case. I ask, however, that any evidence your clients produce be provided to me as soon as possible so my clients can avoid incurring additional expense associated with performing discovery related to Mr. Stucky.

I trust you will share this information and offer with Mr. Stucky. My clients are concerned, based on comments made by him at the mediation, that Mr. Stucky is not fully informed or is unwilling to acknowledge the seriousness of their charge of infringement and the compelling nature of the proof for their claims. Perhaps you can explain to him why the Caroselli's have a "problem" with what the Stuckys have done. Given the events that have transpired thus far, my clients' offer to consider evidence in support of Mr. Stuckys' dismissal to be more than generous.

Very truly yours,

STINSON MORRISON HECKER LLP



Joan K. Archer

JKA:cft

cc: Keith W. Caroselli, via electronic mail
Lee R. Caroselli, via electronic mail
Darlene Dando, via electronic mail