UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UMG RECORDINGS, INC.; CAPITAL RECORDS, LLC; WARNER BROS. RECORDS INC.; ATLANTIC RECORDING CORPORATION; ELEKTRA ENTERTAINMENT GROUP, INC.; FUELED BY RAMEN, LLC; NONESUCH RECORDS INC.; SONY MUSIC ENTERTAINMENT; SONY MUSIC ENTERTAINMENT US LATIN LLC; ARISTA RECORDS LLC; LAFACE RECORDS LLC; and ZOMBA RECORDING LLC,

Plaintiffs,

v.

TOFIG KURBANOV d/b/a FLVTO.BIZ and 2CONV.COM;
And DOES 1-10,

Defendants.

Case No.
1:18-CV-00957-CMH-TCB

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO STAY DISCOVERY AND PROCEEDINGS PENDING: (1) THIS COURT'S FURTHER RULING ON PERSONAL JURISDICTION AS REQUIRED BY THE FOURTH CIRCUIT'S ORDER OF REMAND; AND (2) A RULING ON DEFENDANT'S (FORTHCOMING) PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

Background

In the present case, Plaintiffs, a collection of twelve companies, none of which is located within Virginia, brought suit against Tofig Kurbanov, an individual defendant who is a Russian citizen and resident who has never once been to the United States. The suit centers around two websites that are managed entirely and exclusively from Russia and that each receive more than 90% of their traffic from outside the United States.

On October 1, 2018, Mr. Kurbanov filed a timely motion to dismiss the complaint for a lack of personal jurisdiction. On January 22, 2019, this Court granted Mr. Kurbanov's motion to dismiss, holding that:

> Defendant took no action through the Websites that would demonstrate purposeful targeting of Virginia or the United States. Defendant does not advertise the Websites in either forum, nor does Defendant provide specific instructions or advice to users in either forum.... The contact that users have with the Websites is unilateral in nature and as such cannot be the basis for jurisdiction without more.... Users may access the Websites from anywhere on the globe and they select their location when they use the Websites. Plaintiffs make the contention that Defendant's tracking of where the users are located and use of geo-targeted advertisements demonstrates that he was targeting Virginians and Americans. This is an attenuated argument as tracking the location of a user does not show targeting of the user or their location; instead it is merely a recording of where the user's unilateral act took place.... Even if the Websites' servers knew exactly where the users were located, any interaction would still be in the unilateral control of the users as they initiate the contacts.... It is clear that Defendant did not take any actions which purposefully targeted Virginia or the United States.
>
> As the Websites are semi-interactive, the interactions with the users are non-commercial, and there were no other acts by the Defendant that would demonstrate purposeful targeting, the Court finds that Defendant did not purposefully avail himself of the benefits and protections of either Virginia or the United States. Due to this finding, the Court does not need to engage in a reasonability analysis. The Court finds that exercise of personal jurisdiction over Defendant would be unconstitutional as a violation of due process under either Rule 4(k)(1) or 4(k)(2).

UMG Recordings, Inc. v. Kurbanov, 362 F. Supp. 3d 333, 339-40 (E.D. Va. 2019).

Plaintiffs filed a timely appeal and, on June 26, 2020, the Fourth Circuit reversed and remanded to this Court. In its remand order, the Fourth Circuit addressed the reasonability prong of the due process analysis, stating:

> We recognize the district court did not perform a reasonability analysis in the first instance, so we cannot address this prong on appeal.... Accordingly, the district court on remand should perform the required reasonability analysis.

UMG Recordings, Inc. v. Kurbanov, 963 F.3d 344, 355 (4th Cir. 2020).

Mr. Kurbanov filed a timely Petition for Rehearing *En Banc*, which the Fourth Circuit denied on July 24, 2020.

On September 8, 2020, this Court issued a scheduling order directing the parties to "develop a discovery plan which will complete discovery by Friday, January 8. 2021." It does not appear, however, that the Court has yet conducted the "required reasonability analysis" directed by the Fourth Circuit, an analysis which may well result in the dismissal (again) of the present litigation.

Additionally, Mr. Kurbanov has informed Plaintiffs of his intent to file a Petition for Certiorari with the Supreme Court for review of the Fourth Circuit's decision. Although Mr. Kurbanov's Petition is not technically due until December 21, 2020 under the Supreme Court's COVID-19 orders, he has further informed Plaintiffs that it is his intent to file his petition by September 30, 2020 in order to minimize delay.

Mr. Kurbanov's challenge to this Court's jurisdiction is substantial and well-founded, as evidenced by this Court's own decision as well as decisions from the Supreme Court, other Fourth Circuit panels, and other circuit courts. And, combined with the fact that this Court has not yet concluded the "required reasonability analysis," ordered by the Fourth Circuit on remand, a stay of discovery and other proceedings is warranted until such time as the gateway jurisdictional issues are conclusively determined.

In further support of this Motion, Mr. Kurbanov states as follows:

Argument

It is "well established that courts may stay discovery pending a motion to dismiss." *Harrell v. Freedom Mortg. Corp.*, 2019 U.S. Dist. LEXIS 231638, at *6-7 (E.D. Va. Mar. 12, 2019) (multiple citations omitted). It is similarly well established that the court may stay discovery pending appellate review of an issue, including a petition for *certiorari*. *See*, *e.g.*, *Orr v. NRA of Am.*, 2017 U.S. Dist. LEXIS 227770, at *7-9 (E.D. Va. May 19, 2017) (finding it

appropriate to stay proceedings pending review by the D.C. Circuit and *cert* review by the Supreme Court where an appellate decision might "moot certain legal and factual disputes that otherwise might arise," particularly when the case is at an early stage of the proceedings).

In deciding whether to issue a stay of proceedings, the Court generally considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Northrop Grumman Tech. Servs. v. DynCorp Int'l LLC*, 2016 U.S. Dist. LEXIS 78864, at *4-5 (E.D. Va. June 16, 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). In the present case, each of these factors weighs in favor of a stay.

I. Likelihood of Success on the Merits

In the context of a motion to stay pending an appeal, the movant need only demonstrate that "there is a strong likelihood that the issues presented on appeal *could be rationally resolved* in favor of the party seeking the stay." *Northrop Grumman Tech. Servs.*, *supra* at *6 (emphasis in original) (quoting *United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995)).

In the present case, there is little question but that Mr. Kurbanov's jurisdictional challenge could be rationally resolved in his favor – indeed, this Court *did* resolve the issue in Mr. Kurbanov's favor. Moreover, although the Fourth Circuit reversed the Court's decision (on the first prong of the jurisdictional review), the Forth Circuit's decision is in conflict with: (a) U.S. Supreme Court precedent; (b) prior holdings of the Fourth Circuit; and (c) recently-issued opinions from the Ninth Circuit (decided on remarkably similar facts) and the D.C. Circuit.

A. Supreme Court Decisions

Preliminarily, it should be noted that – much to the consternation of courts and commentators – the United States Supreme Court has not directly considered the question of when virtual contacts are sufficient to satisfy the requirements of the Due Process Clause. *See*, *e.g.*, *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014) ("In any event, this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State."); Lovrin, Max D., *Virtual Pretrial Jurisdiction for Virtual Contacts*, 85 Brooklyn L. Rev. 943, 945 (Summer 2020) ("Cases involving assertions of personal jurisdiction predicated on internet-based contacts have become especially unpredictable."); Borchers, Patrick Joseph, *Extending Federal Rule of Civil Procedure 4(K)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 Am. U.L. Rev. 413, 437-439 (December 2017) ("While *Zippo* was an admirable effort to bring order to the chaos, two decades hence its sliding scale is obsolete.... Thus, critical issues are unresolved in common fact patterns"); Delic, Elma, *Cloudy Jurisdiction: Foggy Skies in Traditional Jurisdiction Create Unclear Legal Standards for Cloud Computing and Technology*, 50 Suffolk U. L. Rev. 471, 488 (2017) ("Courts have added ambiguity through vague decisions, making it challenging for businesses to develop strategies for technological advancement because they do not know where they could be open to litigation.").

Viewed in the context of the Supreme Court's traditional jurisprudence, however, it appears clear that this Court's original dismissal of the present case was proper and that – given the opportunity – the Supreme Court would reinstate that dismissal. Specifically, the Fourth Circuit's opinion in this case conflicts with modern jurisdictional holdings from the Supreme Court:

- *Walden v. Fiore*, 571 U.S. at 283, where the Court held that "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State.... First, the relationship must arise out of contacts that the 'defendant himself' creates with the forum State.... We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.... Second, our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." Contrary to the holding in *Walden*, the Fourth Circuit's decision improperly relied on the decision of third parties to access the websites from the United States.

- *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017), where the Court held that "In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.... When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." Contrary to the holding in *Bristol-Myers Squibb Co.*, the Fourth Circuit elevated the importance of the number of visitors to the subject websites, without considering whether ***any*** of those visitors ever downloaded a single song owned by Plaintiffs.

- *Daimler AG v. Bauman*, 571 U.S. 117, 141-42 (2014), where the Court admonished the Ninth Circuit for having "paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.... The Solicitor General informs us ... that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements

on the reciprocal recognition and enforcement of judgments.' ... Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands." In this case, too, the Fourth Circuit's opinion failed to recognize the issues of international comity involved in exercising personal jurisdiction over Mr. Kurbanov, a Russian national. *See*, *also*, *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.").

- *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011), where the Supreme Court rejected the notion that personal jurisdiction can be based on a defendant's failure to "take some reasonable step to prevent the distribution of its products in this State." The Fourth Circuit's holding in this case – which found that jurisdiction could be premised on Mr. Kurbanov's failure to *prevent* the Websites from being accessed in the United States – conflicts with this holding.

B. Fourth Circuit Decisions

Next, the Fourth Circuit's decision in this case appears to be in conflict with prior decisions of that Court. For example:

- *Fidrych v. Marriott, Int'l.*, 952 F.3d 124 (4th Cir. 2020). In *Fidrych*, the Fourth Circuit addressed one of the questions squarely presented in this appeal: whether a foreign Defendant can be subject to personal jurisdiction by virtue of its operation of an interactive website, if the website is not purposefully directed at the forum in question. There, the Court held:

> While Marriott obviously uses its website to engage in commercial transactions, the website does not target South Carolina residents for commercial transactions

> any more than it targets any other state. Instead of targeting any particular state, the website makes itself available to anyone who seeks it out, regardless of where they live. In our view, the mere fact that the website is accessible in a given state does not mean that Marriott is targeting its activities at that state.

Id., at 141. The *Fidrych* opinion appears to conflict with the Fourth Circuit's holding in this case which placed undue emphasis on the accessibility of Defendant's Websites in the United States.

- In *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745,748 (4th Cir. 1971), the Court held that "the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context." This is in conflict with the Fourth Circuit's consideration here of the appointment of a DMCA agent by the Websites.

C. Conflicts with Other Circuits

Finally, the Fourth Circuit's decision in this case conflicts with decisions from the Ninth Circuit and D.C. Circuit on various crucial issues.

- *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020). In *AMA Multimedia*, the Ninth Circuit was presented with facts and arguments nearly identical to those raised by this case. The parallels included the fact that the website at issue in *AMA Multimedia* received 20% of its traffic from the United States and utilized geotargeted advertisements.[1] Nevertheless, the Ninth Circuit held (in conflict with the Fourth Circuit's opinion in this case) that these facts failed to establish the express aiming required to satisfy the Due Process Clause:

> Here, nearly 20% of ePorner's traffic comes from U.S. users. But this does not establish that Wanat expressly aimed at the U.S. market, because ePorner's advertising structure materially differs from Brand's. AMA alleges, and Wanat's expert agreed, that ePorner uses geo-located advertisements, which tailor

[1] As the Court is aware, in the present case, each of the relevant Websites receives more than 90% of its traffic from outside the United States and each is available in 23 different languages. Neither of the Websites – which are freely available anywhere in the world – is targeted in any way at either Virginia or the United States, nor are they in any way targeted at users in Virginia or the United States any more than they are targeted at users in Italy, Brazil, Turkey, or Mexico (each of which has more users of the Websites than the United States).

> advertisements based on the perceived location of the viewer. This tailoring does not establish that Wanat expressly aimed ePorner at the United States. ePorner's geo-located advertisements, provided by a third-party advertising company, unlike Brand's, are always directed at the forum: a viewer in the United States will see advertisements tailored to the United States while a viewer in Germany will see advertisements tailored to Germany. Wanat does not personally control the advertisements shown on the site, as ePorner contracts with third parties (not located in the United States) which tailor the advertisements themselves or sell the space to other parties who do. ePorner's forum-based traffic, absent other indicia of Wanat's personal direction, does not establish that Wanat tailored the website to attract U.S. traffic.
>
> If such geo-located advertisements constituted express aiming, ePorner could be said to expressly aim at any forum in which a user views the website. As we recognized in *Mavrix*, "[n]ot all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every [forum] in which it is accessed." 647 F.3d at 1231. As a feature of the geo-located advertisements on ePorner's website, all users in every forum received advertisements directed at them. To find specific jurisdiction based on this would run afoul of the Supreme Court's directive in *Walden* and "impermissibly allow[] a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis." *Walden*, 571 U.S. at 289.

Id.

- *Triple Up, Ltd. v. Youku Tudou, Inc.*, 2018 U.S. App.LEXIS 19699 (D.C. Cir.

July 17, 2018). In *Triple Up., Ltd,* the D.C. Circuit Court held – in direct conflict with the Fourth Circuit's holding in the present case – that personal jurisdiction could not be premised on a website's failure to block (or "geoblock") visitors from a particular jurisdiction:

> The Court, however, is unpersuaded that the possibility of "geoblocking" warrants a different result here.... To hold otherwise would invite a sea change in the law of internet personal jurisdiction.... Triple Up's proposed rule – which equates a *failure to geoblock* with purposeful availment – would effectively mandate geoblocking for any website operator wishing to avoid suit in the United States. To say the least, such a rule would carry significant policy implications reaching beyond the scope of this lawsuit ... and, indeed, could limit U.S. residents' access to what is appropriately called the *World* Wide Web.

Id. at *25.

Ultimately, given (a) the lack of direct precedent from the Supreme Court (and the clear need for such precedent) and the conflicts between the Fourth Circuit's opinion in this case and the Supreme Court's existing jurisdictional case law; (b) the conflicts between the Fourth Circuit's opinion in this case and its opinions in prior cases, and (c) the Fourth Circuit's opinion in this case and the decisions of other Circuit Courts of Appeal, Mr. Kurbanov has demonstrated a likelihood of success on the merits of his appeal.

II. Irreparable Harm

It is widely acknowledged that a stay is appropriate – and the moving party will suffer irreparable harm in the absence of such a stay – where, as here, a failure to issue a stay would render the moving party's right to appeal "hollow." *See*, *e.g.*, *Northrop Grumman Tech. Servs.*, *supra* at *6 (numerous citations omitted). In *Northrop Grumman*, the district court had ordered a remand of a matter removed from state court and the defendants appealed to the Fourth Circuit and moved for a stay of the district court proceedings. In holding that the defendant would suffer irreparable harm if the stay was not granted, the Court found that requiring the defendant to litigate in the state court while simultaneously pursing an appeal in the Fourth Circuit robbed the defendant of the very benefit he sought from the Fourth Circuit, *i.e.* the right *not* to proceed in the wrong forum. The same principle holds true here.

Mr. Kurbanov, a Russian national and citizen, who has never set foot in the United States, has a right to challenge this Court's exercise of jurisdiction over him as violative of the Due Process Clause. And, of course, with that comes his right to be free from the expensive and onerous discovery obligations inherent in U.S. litigation. In short, the very right that Mr. Kurbanov seeks to have vindicated is his right to be free from proceedings in a Court that lacks personal jurisdiction over him. If the stay is not granted (particularly given the expedited nature

of proceedings in this Court), Mr. Kurbanov's right to appeal will be a hollow one, with the harm sought to be avoided a *fait accompli* by the time the Supreme Court has the opportunity to consider his cert petition. Accordingly, Mr. Kurbanov has demonstrated that he will suffer irreparable harm if a stay is not ordered.

III. Lack of Injury to Plaintiffs

Although Plaintiffs would obviously *prefer* that discovery proceed immediately, they will not be harmed by a stay in any meaningful way inasmuch as – if this Court finds that jurisdiction is proper and if the Supreme Court denies *cert* or upholds the Fourth Circuit's opinion – they will be free to proceed with the proceedings in this case. *See*, *e.g.*, *Northrop Grumman*, *supra* at *5 ("Because the harm felt by Defendant as a result of a stay would be temporary, and would at most result in a later trial date in state court, it pales in comparison to the potential harm Plaintiff would suffer if no stay is issued. Accordingly, while this factor weighs slightly against issuing a stay pending appeal, it is easily overwhelmed by the preceding factor."); *Orr v. NRA of Am.*, 2017 U.S. Dist. LEXIS 227770, at *8 (E.D. Va. May 19, 2017) ("Upon weighing the competing interests, the Court finds that staying these proceedings is warranted at this early stage in the case. A stay will likely preserve judicial resources that this Court would spend resolving motions and discovery matters. Further, ACA may potentially refine the issues that both parties explore during discovery—regardless of whether ACA would resolve all factual dispute.").

Here, too, the minor inconvenience that Plaintiffs may see from a short delay of the present proceedings is clearly outweighed by the irreparable harm Mr. Kurbanov would suffer in the absence of a stay.

IV. <u>Public Interest</u>

Finally, although it is certainly true that there is a public interest in the "timely conclusion of legal disputes" (*see*, *e.g.*, *Northrop Grumman*, *supra*), it is equally true that there is a public interest – indeed, a Constitutional guarantee – that a defendant will not be required to submit to the jurisdiction of a Court in contravention of the Due Process Clause. Given these competing concerns, this factor, too, weighs in favor of a stay.

<u>Conclusion</u>

For the reasons stated hereinabove, it is requested that the Court stay discovery and all other proceedings in this case until:

(a) this Court has issued its decision concerning the reasonability analysis as required by the Fourth Circuit's order of remand, ***<u>and</u>***

(b) the United States Supreme Court has issued an order either denying Mr. Kurbanov's *certiorari* petition or (having allowed such a petition) issues its order following its consideration of Mr. Kurbanov's appeal.

Respectfully submitted,

TOFIG KURBANOV

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE WITH MEET AND CONFER REQUIREMENTS

I hereby certify that, prior to the filing of this motion, I met and conferred with Plaintiff's counsel in an attempt to narrow or eliminate the disputes addressed in this motion.

/s/ Jeffrey H. Geiger
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