IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:21-cv-1901-DDD-MEH

AFTER II MOVIE, LLC, et al.,

Plaintiffs,

v.

WIDEOPENWEST FINANCE, LLC,

Defendant.

OMNIBUS MOTION FOR ORDER OVERRULING OBJECTIONS AND COMPELLING DEFENDANT TO RESPOND TO THE REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to *Federal Rules of Civil Procedure* ("FRCP") 37(a), 47 U.S. Code § 551 ("Cable Act") and this Court's Order [Doc. #56] of Jan. 19, 2022, Plaintiffs hereby submit their motion, memorandum in support, and proposed order overruling the objections [Docs. ##64-69, 71-98, 101-111, 115-116 and 118] of Defendant WIDEOPENWEST FINANCE, LLC ("Defendant") and numerous non-party subscribers (the docket entries of the objections are listed in Exhibit "A") and compelling Defendant to disclose the identity of the subscribers. Pursuant to FRCP 37(a)(1) and D.C.Colo.LCivR 7.1(a), the undersigned counsel conferred with Angela B. Kennedy and Kyle G. Gottuso, counsels for Defendant and the subscribers concerning this motion on Oct. 24, 2022. The Parties were able to come to a resolution concerning the Defendant's objections [Docs. ##90-1 and 115-1] to disclosing identification information for passed away subscribers assigned

IP addresses 207.98.247.128 and 216.186.218.197 wherein Defendant would provide unique identifications D1 and D2. The Parties were unable to come to an agreement concerning the other objections of Defendant or Defendant's subscribers.

I. BRIEF FACTUAL HISTORY

1. On October 1, 2021, Plaintiffs filed their First Amended Complaint ("FAC") [Doc. #25].

2. On October 12, 2021, Plaintiffs and Defendant (hereafter: "Parties") conducted their Rule 26(f) conference.

3. On October 29, 2021, Defendant filed a motion to dismiss the FAC ("Motion to Dismiss") [Doc. #35].

4. On November 4, 2021, the Parties agreed to a proposed scheduling order in which discovery would be staged. *See* Proposed Joint Scheduling Order [Doc. #38] at pgs. 8-9. Stage 1 discovery begins after the Court enters an order denying, in whole or in part, Defendant's Motion to Dismiss, lasts 100 days and is limited to Defendant's safe harbor defense under 17 U.S.C. § 512(a). *See Id.*

5. On Nov. 8, 2021, Plaintiffs' counsel served on Defendant's counsel a data preservation letter to "…reiterate that WOW should be preserving all electronic data including log data for its subscribers who have infringed copyright protected Works as shown in Exhibit 2 [Doc. #25-2] to the First Amended Complaint and the attached excel sheet…" The excel sheet listed details for more than 30,000 notices that were sent to Defendant including the IP addresses and times. *See* Aff. of Culpepper at ¶2.

6. On Dec. 20, 2021, the Court entered the Parties' stipulated protective order

[Doc. #52]. Per Section III, ¶4 of the protective order, "All Protected Information provided by any party or nonparty…shall be used solely for the purpose of…trial…and for no other purpose…"

7. On Jan. 19, 2022, the Court granted Plaintiffs' Motion for Order Authorizing Disclosure of Defendant's Subscribers' Identities and Ordering Defendant to Begin Notification Process over Defendant's opposition. *See* Order [Doc. #56]. Particularly, in the Order the Court states:

> the Court authorizes Defendant to disclose the subscriber identifications to Plaintiffs on commencement of Stage 1 Discovery. The Court further orders Defendant to immediately notify the subscribers of the impending disclosure so that the subscriber identifications can be immediately disclosed upon commencement of Stage 1 Discovery and any objections by subscribers can be promptly resolved…The RPODs and subpoenas authorized by this Order shall be deemed appropriate court orders under 47 U.S.C. § 551.

Order at p. 5-6.

8. On Jan. 25, 2022, Plaintiff served a Request for Productions of Documents ("RPOD") under FRCP 34 consistent with the Order on Defendant. The RPOD included a 1650 page excel sheet entitled Exhibit "1" listing the Notice ID#, IP address, file name, notice sent date, movie title, and hit date among other information. *See* Aff. of Culpepper at ¶3.

9. Between May 9, 2022 and Oct. 17, 2022, numerous objections were filed to disclosure of customer identifications as shown in Exhibit "A". The objections that were filed *pro se* are marked as anonymous in Exhibit "A" to distinguish from those filed by Defendant's counsel (on behalf of Defendant and Defendant's subscribers). *See* Id. at ¶¶4-5.

10. On August 19, Oct. 6 and Oct. 14, 2022, Defendant provided Plaintiffs' counsel with a redacted copies of the objections filed by counsel for Defendant on behalf of Defendant and Defendant's subscribers. *See* Aff. of Culpepper at ¶6.

II. RELEVANT LAW

11. FRCP 26(b)(1) provides that Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.

12. FRCP 26(c) provides that the court may issue an order "to protect…a person from annoyance, embarrassment…or undue burden…"

13. FRCP 45(d)(3) provides that the Court must quash or modify a subpoena that "(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subject a person to undue burden".

14. The Cable Act provides that a cable operator may disclose personally identifiable information concerning any subscriber if (i) the disclosure is made pursuant to a court order authorizing such disclosure and (ii) if the subscriber is notified of such order by the person to whom the order is directed. *See* 47 U.S. Code § 551(c)(2)(B).

III. ARGUMENT – subscribers' objections should be overruled.

A. *The identification of Defendant's subscribers is relevant and proportional to the needs of this case.*

15. As this Court already stated in the Order [Doc. #56], "…the Court agrees that the subscribers' personally identifiable information is relevant." The subscribers' identifications will establish if the IP address was assigned to the same subscriber during

the duration for which notices were sent. For example, referring to Exhibit "1" to the RPOD and Exhibit "A" to this motion, Plaintiffs' agents sent 110 notices to Defendant concerning piracy of its subscriber(s) at IP address 75.118.244.40 between 12/3/2020 and 3/24/2021. The subscriber identification information would show whether all 110 notices were sent to an IP address that was assigned the same subscriber, and thus rebut Defendant's safe harbor defense, including proving that Defendant has failed to implement a robust policy for copyright infringement, including permanent termination of services for repeat infringers as it asserts in pg. 11 of its Motion to Dismiss [Doc. #35]. This information also refutes an argument Defendant has repeatedly made in its filings that Plaintiffs have no evidence that the individuals directly responsible for this piracy are Defendant's subscribers. *See, e.g.,* Reply Brief [Doc. #50] at pg. 2 ("Plaintiffs do not allege any facts plausibly showing that the people who engaged in the alleged activity at those IP addresses are WOW subscribers.").

16. The subscribers' objections basically amount to mere denials that they infringed the Works and assertions that they have no information. However, as mentioned above, the subscriber names are relevant because they will show whether the IP address was assigned to the same subscriber during the duration of the notices. Moreover, the subscriber names are relevant because Plaintiffs can compare the subscriber names to the email addresses of the users that registered for accounts with the piracy website YTS (*see* Exhibit "2" [Doc. #25-2]) or to those that have boasted on social media how Defendant allows them to pirate content without any problems. *See* Second Amended Complaint [Doc. #25] at ¶168 ("…I know from personal experience that if you're in the

midwest, Wide Open West Cable & Internet are *amazing* on torrents. I've used them for the past 5+ years now, and have downloaded truly an outrageous amount of data…and never gotten a letter or notice…I've downloaded 2+ TB in a single month without a word from them.") Further, the subscribers' denials (which fly in the face of overwhelming evidence) have no bearing on whether their identification information is relevant.

B. *The disclosure of the subscribers' identities will not subject them to an undue burden.*

17. Although the RPOD was not a Rule 45 third-party subpoena and the subscribers have not motioned for protective orders per Rule 26(c), the grounds a third-party may assert for quashing or modifying a third-party subpoena or seeking a protective order under these rules are instructive.

18. Per Rule 45(d)(3), a Court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter…or subjects a person to undue burden". Disclosure of Defendant's subscribers' identities does not subject them to an undue burden because the subscribers are not required to do anything. Rather, Defendant will be providing the identification information. Indeed, this Court has already stated that disclosure of the identification by Defendant is not an undue burden. *See* Order [Doc. #56] at p. 5 ("…the Court finds the requested information proportional to the needs of this case").

19. Assuming *arguendo* that the subscribers' identification is confidential information, the protective order in this case designates subscribers' personally identifiable information as Attorneys' Eyes Only information. *See* Protective Order [Doc.

#52] at ¶2(b) ("HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY information includes…subscribers' personally identifiable information (including information that reveals the identities of specific subscribers"). Further, the protective order prevents the Plaintiffs from using the identifications for any purposes except for trial in this case. Accordingly, there are already adequate measures in place to protect confidential information.

20. Nonetheless, Defendant's subscribers' identifications are not a trade secret, privileged or confidential information. Courts have repeatedly stated that a person has no legitimate expectation of privacy in information they voluntarily turn over to third parties. "Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation." *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008). As noted by *Perrine*, an expectation of privacy was further vitiated when "…he had peer-to-peer software on his computer, which permitted anyone else on the internet to access at least certain folders in his computer." *Id.* Such is the case here since the subscriber's used BitTorrent to share copies of Plaintiffs' Works. Accordingly, the objections filed by Defendant's counsel on behalf of subscribers should be overruled and Defendant should be ordered to disclose the identifications to Plaintiffs.

C. *The anonymous subscriber objections should also be overruled.*

21. Plaintiffs have not been able to even view the anonymous subscriber objection. *See* Aff. of Culpepper at ¶5. Although these anonymous objections were filed as Level 2 restricted documents per the restriction order [Doc. #61], the same order

"…further directs that the Clerk forward a copy of any such filings to Defendant upon request." However, when Plaintiffs' counsel contacted Defendant's counsel regarding the anonymous objections, he was merely told "We do not have copies of the objections we did not file, nor have we requested copies of the same from the clerk." *See* Aff. of Culpepper at ¶7.

22. Nonetheless, based upon Plaintiffs' counsel's experience, these anonymous objections are likely just a naked denial of infringement along with statements indicating a wish not to provide their identification information just like the other objections. *See* Aff. of Culpepper at ¶8. However, nothing in Rule 45 permits a court to quash a subpoena based on "a general denial of liability." *See, e.g., First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241, 250 (N.D. Ill. 2011).

23. Accordingly, the anonymous objections should be overruled and Defendant should be ordered to disclose the identifications to Plaintiffs.

IV. ARGUMENT – Defendant's objections should be overruled.

A. Defendant satisfied the notice requirement of the Cable Act by sending notifications to subscriber's last known address.

24. Defendant incorrectly asserts that it has been unable to comply with the requirements of the Cable Act because it was unable to send notifications via certified mail. *See* Objection [Doc. #115] at p 1. The notification portion of the Cable Act states, "…if the subscriber is notified of such order by the person…" 47 U.S. Code § 551(c)(2)(B). Nowhere in this language is a mandate for notification by personal delivery. Indeed, as this Court and Courts across the United States have stated, merely sending a

notification of intended disclosure by first class mail to last known address is sufficient. *See reFX Audio Software, Inc. v. Doe*, Civil Action No. 12-cv-03146-WYD-KMT, 2013 U.S. Dist. LEXIS 33146, at *5 (D. Colo. Mar. 11, 2013) ("The ISP may serve the relevant Doe Defendant using any reasonable means, including written notice to his last known address, transmitted by either first-class mail or overnight service"); *Eve Nevada, LLC et al. v. DOES 1-16*, Civil Action No. 1:20-cv-00475-DKW-KJM, Doc. #8 (D. Haw. Dec 4, 2020) ("Verizon Wireless may serve the subscribers by any reasonable means, including written notice sent to the subscriber's last known address via first class mail")(attached as Exhibit "E"); *Malibu Media, LLC v. Doe*, No. 2:12-cv-1262 JAM DAD, 2012 U.S. Dist. LEXIS 146607, at *5 (E.D. Cal. Oct. 9, 2012) ("The ISP may serve the subscriber using any reasonable means, including written notice sent to the subscriber's last known address, transmitted either by first-class mail or via overnight service, or by e-mail notice.")

25. Defendant relies merely on the unpublished decision of *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp,* 2010 U.S. Dist. LEXIS 40653, (E.D.N.Y. Feb. 5, 2010) in support of its position that it must send notifications by certified mail and receive a return receipt before disclosure. However, the Court in *Cablevision* merely mentioned the notification requirement in a footnote without discussing what type of notification is suitable because the Court quashed the subpoena. *See Id.* Moreover, even *Cablevision* noted that Courts have rejected efforts to prevent disclosure of identifying information on First Amendment grounds when the anonymous individual had allegedly engaged in copyright infringement. *See Id*. *at* 24.

26. Plaintiffs' assertion that mailing the notice to subscriber's last known address satisfies the notification requirement of the Cable Act is consistent with the Tenth Circuit's interpretation of §(a)(1) which also requires Cable companies to send a notification to subscribers. Particularly, the Tenth Circuit concluded that mailing a copy of the subscriber privacy notices, taken as whole, satisfied notice requirements of 47 U.S.C. § 551. *See Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874, 875 (10th Cir. 1992) ("The principal questions before us are whether… privacy notices mailed by TeleCable in 1988 and 1989 violated the section 551(a) notice requirements, *see* 47 U.S.C. 551(a)(1)(A)-(E)… We conclude that both notices, taken as a whole, satisfied the section 551(a) notice requirements.")

27. Accordingly, Defendant has complied with the notification requirement of the Cable Act by sending the notification to subscriber's last known address. Therefore, Defendant's objections based upon failure to receive a certified mail return receipt or a mail being returned undeliverable such as in Doc. #115 (see pgs. 2-6 and 9-11) should be overruled.

B. Defendant does not have standing to raise objections on behalf of its subscribers.

28. Defendant does not have standing to raise an objection based upon the notification requirement. The Supreme Court has stated that standing requires an injury that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Defendant has shown no injury to it by sending notifications to subscribers that are unsuccessfully delivered. Any injury, at best, would be to the

subscriber not to Defendant. Accordingly, Defendant's objections based upon an inability to send a notification by certified mail should be withdrawn.

C. Defendant should be compelled to give further information concerning the issues that made subscriber identification data unavailable.

29. Defendant objects to disclosing subscriber identifications for 49 IP addresses because "it is unable to associate [personally identifiable information] with any subscriber." Objection [Doc. #115] at 6. In support, Defendant has provided the affidavit of Kelly Arnold who essentially gives 5 reasons why Defendant is not disclosing identifications for these 49 IP addresses: (a) market sale; (b) termination of third-party vendor service agreement; (c) subscribers that owned or own equipment and terminated service; (d) IP addresses associated with more than one customer; and (e) unexplained errors. *See* Aff. of Kelly Arnold [Doc. #115-1] at pp. 2-3. However, as explained below, Defendant should be compelled to give further information regarding these reasons.

30. Plaintiffs' counsel sent Defendant a letter via certified mail concerning its customers' piracy on March 15, 2021. *See* Exhibit "4" [Doc. #25-4]. Defendant was served the Complaint on July 15, 2021. *See* Proof of Service [Doc. #10]. Defendant's counsels entered their appearances on Aug. 3, 2021. Plaintiff's counsel served Defendant's counsel with a data preservation letter on Nov. 8, 2021. *See* Aff. of Counsel at ¶2. Accordingly, Defendant had a duty to preserve relevant electronic evidence as early as March 15, 2021 but at least from July 15, 2021. *See Zbylski v. Douglas Cty. Sch. Dist.*, 154 F. Supp. 3d 1146, 1163 (D. Colo. 2015).

31. According to its press release, Defendant entered into two transactions to

sell service areas: to Atlantic Broadband that was completed on Sept. 1, 2021; and to Astound Broadband that would be completed in fourth quarter of 2021. *See* WideOpenWest, Inc., "WOW! Completes $1.125 Billion Sale of its Ohio Service Areas to Atlantic Broadband", Sept. 1, 2021, https://www.prnewswire.com/news-releases/wow-completes-1-125-billion-sale-of-its-ohio-service-areas-to-atlantic-broadband-301367530.html [last accessed on 11/8/2022] (attached as Exhibit "B"). Both transaction dates are well after March 15, 2021 when Defendant was on notice of this case or the issues pertaining to it.

32. Regarding (a), Mr. Arnold has merely stated "due to a market sale, some subscriber and IP address data has been sold and is no longer available". Aff. of Arnold [Doc. #115-1]. As pointed out above, Defendant was obligated to preserve this information from March 15, 2021 but at least from July 15, 2021. Because the Atlantic Broadband and Astound Broadband transactions had not been completed as of March 15 or July 15 of 2021, the Court should order Defendant to disclose when this subscriber and IP address data was sold, to whom it was sold and what steps Defendant took to preserve this data so that Plaintiff can ascertain whether Defendant took the appropriate steps to preserve this data and if can serve third-party subpoenas on the to the third-party to which Defendant sold these subscriber accounts to obtain the identifications.

33. Regarding reasons (b)-(e), Defendant has lumped all these IP addresses together under the category "Data No Longer Available" in Exhibit "B" [Doc. #115-3]. Regarding (b) Defendant should be compelled to disclose (i) which IP addresses cannot be identified because of the issue with the third-party vendor; (ii) the name of the third-

party vendor; and (iii) the date that the agreement with the third-party vendor was terminated so that Plaintiff can ascertain whether Defendant took the appropriate steps to preserve this data and if Plaintiffs can serve third-party subpoenas on the to the third-party vendor to obtain relevant evidence.

34. Regarding (c)-(e), Defendant should be compelled to specify the IP addresses connected with (c) subscriber owned equipment terminations; (d) multiple customers assigned same IP address; and (e) unexplained errors. As conceded by Mr. Arnold "WOW cannot determine which subscriber was using the IP address at the time of the corresponding copyright infringement complaint". Aff. of Arnold [Doc. #115-1] at ¶8D. Accordingly, this information is relevant because it undermines if not completely contradicts Defendant's argument that it has implemented the appropriate policy for terminating subscribers.

E. Defendant should be required to pay Plaintiffs' attorneys fees for bringing this motion.

35. Plaintiffs' counsel met and conferred with counsel for Defendant and Defendant's subscribers (same counsel) concerning this motion. Plaintiffs' counsel specifically pointed out that the argument made on behalf of Defendant that Defendant must successfully send notices by certified mail to the subscribers to satisfy the notification requirement of the Cable Act had no basis in law. Plaintiffs' counsel also specifically pointed out that the arguments made on behalf of Defendant's subscribers would fail because the subscribers had failed to disclose a recognized privacy interest. Nonetheless, Defendant and its subscribers (through the same counsel) refused to change these unreasonable positions and merely pointed to the *Cablevision* decision

which has no detailed discussion of the cable act notification provisions.

36. Defendant's objection based upon not being able to send notices by certified mail, as well as Defendant's counsel's filing of frivolous objections on behalf of Defendant's subscribers, are nothing more than a transparent strategy to block Plaintiffs from obtaining evidence proving that Defendant had not implemented the requisite policy by running out the clock before the expiration of the 100 day period of Stage 1 discovery. Sanctions for these frivolous objections will deter Defendant from taking the same approach when Plaintiffs request information concerning its implementation and enforcement of its so-called policy such as communications with the pirating customers and copies of notices sent to Defendant by other rightsholders during Stage 1 discovery. The Court should take into consideration that in this case Defendant has taken the extraordinary step of deputizing its counsel to also represent its customers. In comparison, when Defendant was a third-party in John Doe lawsuits where its customer were the Defendants, Defendant did not provide free counsel for its customers and told them "We cannot provide legal advice to you on this matter". *See* Aff. of Culpepper at ¶12; Exhibit "C".

IV. CONCLUSION

37. Accordingly, pursuant to FRCP 37(a), Plaintiffs respectfully request that this Court issue an order: overruling Defendant's and the subscribers' objections except those Defendant made at Docs ##90-1 and 115-1 on behalf of the passed away subscribers assigned IP addresses 207.98.247.128 and 216.186.218.197; compelling Defendant to disclose the identification information in its possession for all the subscribers in the RPOD

except IP addresses 207.98.247.128 and 216.186.218.197 for which Defendant should disclose the unique identifiers; for those subscriber identifications not in its possession, Defendant should disclose when subscriber and IP address data was sold, to whom it was sold and what steps Defendant took to preserve this data, which IP addresses cannot be identified because of the issue with the third-party vendor, the name of the third-party vendor; the date that the agreement with the third-party vendor was terminated. Further, Defendant should specify which IP addresses are connected with (c) subscriber owned equipment terminations; (d) multiple customers assigned same IP address; and (e) unexplained errors; and award Plaintiffs' their attorneys' fees for bringing this motion.

Dated: November 11, 2022 Kailua Kona, HI 96740

Respectfully submitted,

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I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1)

CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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