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November 12, 2021

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Re: *Everytown for Gun Safety Action Fund, Inc. v. Defcad, Inc., et al.*
No. 1:21-cv-08704-PGG (S.D.N.Y.)

Dear Counsel:

We represent Twitter, Inc. ("Twitter") and write regarding the *ex parte* order of November 5, 2021 ("Order") that Plaintiff Everytown for Gun Safety Action Fund, Inc. ("Plaintiff") obtained demanding discovery regarding the Twitter account https://twitter.com/xYeezySZN ("Twitter Account"). We understand the Order was stayed by the Second Circuit on November 10, 2021 in Appeal No. 21-2806. But regardless of how that appeal proceeds, the Order cannot compel discovery from Twitter because Twitter is not subject to personal jurisdiction in this matter, the Order does not comply with Fed. R. Civ. P. 45, and the Order's discovery demands raise serious concerns under the federal Stored Communications Act ("SCA") and First Amendment.

Twitter is not subject to personal jurisdiction in this matter.

Non-party Twitter is a Delaware corporation headquartered in San Francisco, California and therefore is not subject to personal jurisdiction in this matter. *See Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014) (a district court must have personal jurisdiction over a non-party to compel it to comply with a discovery request); *Al-Ahmed v. Twitter, Inc.*, 20-CV-4982, 2021 WL 3604577 (S.D.N.Y. Aug. 11, 2021) (Twitter is not subject to personal jurisdiction in the Southern District of New York). While expedited discovery is sometimes permitted under Rule 26(d)(1) in intellectual property cases based on a showing of "good cause" when a plaintiff cannot identify a defendant, the proper means of obtaining that discovery is with "a court-ordered subpoena" issued under Rule 45. *AdMarketplace, Inc. v. Tee Support, Inc.*, No. 13-cv-5635 (LGS), 2013 WL 4838854, at *2 (S.D.N.Y. Sept. 11, 2013) (citing *John Wiley & Sons, Inc. v. John Does 1–22*, Nos. 12 Civ. 4231(PAC), 12 Civ. 4232(PAC), 12 Civ. 4730(PAC),

2013 WL 1091315, at *1 (S.D.N.Y. Mar. 15, 2013) ("Without subpoenaing further information from the ISPs, which it now seeks to do, [plaintiff] is unable to contact or further identify the Defendants.")). Thus, if the court finds "good cause" for expedited discovery from non-parties, it can only authorize it via "a court-ordered subpoena under Rule 45 of the Federal Rules of Civil Procedure." *Next Phase Distribution, Inc. v. John Does 1–27*, 284 F.R.D. 165, 171 (S.D.N.Y. July 31, 2012). There is no other rule governing non-party discovery, nor does the Order cite one. Accordingly, to obtain any discovery from Twitter, Plaintiff must issue a subpoena under Rule 45 that lists a place of compliance within 100 miles of Twitter's San Francisco headquarters as required by Fed. R. Civ. P. 45(c)(2)(A). *See Europlay Capital Advisors, LLC, et al. v. Does*, 323 F.R.D. 628, 629-30 (C.D. Cal. 2018) (a non-party corporation is entitled to the jurisdictional protection of having discovery disputes heard in a court within 100 miles of its headquarters) (collecting cases).

The Order does not comply with any of the other substantive and procedural provisions of Fed. R. Civ. P. 45.

As noted, "[n]on-party discovery is governed by Federal Rule of Civil Procedure 45." *United States v. UBS Securities LLC*, No. 1:18-CV-6369 (RPK)(PK), 2020 WL 7062789, at *3 (E.D.N.Y. Nov. 30, 2020). In addition to the jurisdictional protections provided by Rule 45(c)(2)(A), Rule 45 contains substantive and procedural protections for non-parties and those impacted by non-party discovery requests. The importance of these protections is reflected by the requirement that the text of Rule 45 be "set out" in any discovery demand. Fed. R. Civ. P. 45(a)(1)(A)(iv). The Order does not incorporate any of those protections.

Principally, "reasonable steps" must be taken "to avoid imposing undue burden or expense on a" non-party. Fed. R. Civ. P. 45(d)(1). "In determining whether a [discovery demand] subjects a witness to undue burden, a court must" consider, among other things, "whether the information is necessary and whether it is available from any other source." *Angelo, Gordon & Co., L.P. v. MTE Holdings, LLC*, No. 20 Misc. 23, 2020 WL 4700910, at *2 (S.D.N.Y. Aug. 13, 2020). In this case, the user of the Twitter Account promptly appeared in this matter through counsel, *see* Dkt. No. 34, thus rendering any identifying information unnecessary for purposes of service. Moreover, if Plaintiff is entitled to any information about the Twitter Account that it has not already obtained from the public domain, the user can produce any records or communications related to their account in the ordinary course of discovery, thus rendering the discovery demands to Twitter unduly burdensome. *See MTE Holdings*, 2020 WL 4700910, at *3; *Alcon Vision, LLC v. Allied Vision Group, Inc.*, 19 Misc. 384 (AT), 2019 WL 4242040, at *2 (S.D.N.Y. Sept. 6, 2019) (a subpoena imposes an undue burden if the plaintiff "can obtain that information from Defendants in the underlying action.").[1]

[1] A description of how the user can download and view their Twitter information is available at https://help.twitter.com/en/managing-your-account/how-to-download-your-twitter-archive#.

The Order also broadly seeks "all documents related to the distribution of the Infringing Products" even though the pleadings indicate Plaintiff already possesses relevant Tweets, and "any complaints received related to Defendants' Infringing Products" even though Plaintiff would necessarily possess any complaints it lodged. Requests for documents that a party already possesses are unduly burdensome. *See MTE Holdings*, 2020 WL 4700910, at *3.

Regardless, it is unduly burdensome to expect non-party Twitter to review the entire Twitter Account and somehow identify "all documents related to the distribution of the Infringing Products." *See Rainsy v. Facebook, Inc.,* 311 F. Supp. 3d 1101, 1113 (N.D. Cal. 2018) (it is unduly burdensome to require a non-party service provider to read communications and determine whether they address certain subjects).

Rule 45 also requires that all parties be served with discovery demands. *See* Fed. R. Civ. P. 45(a)(4). Consistent with Rule 45, it is Twitter's policy to notify users of any demands for their account records so they have a reasonable time to object. *See also Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 559 (S.D.N.Y. 2004) (ordering service provider to notify its subscriber of a subpoena for their identifying information related to alleged copyright infringement). But the Order was issued *ex parte* and compels Twitter to produce records in 7 days without any provision for user notice and regardless of whether the user files objections, which has subsequently occurred both in the district court and the Second Circuit.[2]

Finally, a non-party has the right to serve "a written objection to" any discovery demand, which can only be overcome if the requesting party "on notice to the" non-party moves for an order compelling production. Fed. R. Civ. P. 45(d)(2)(B). With respect to Twitter, a motion to compel production can only be filed in the Northern District of California, where Twitter is headquartered. *See* Fed. R. Civ. P. 37(a)(2), 45(c)(2)(A), (d)(2)(B)(i); *see also Europlay Capital Advisors*, 323 F.R.D. at 629-30 ("despite Google having an office in Venice, [California,] the proper district to hear a motion to compel is where Google is headquartered."). But the Order turns this process on its head by compelling Twitter to produce documents in the Southern District of New York before Plaintiff served Twitter with any discovery or Twitter even knew this case was pending.

The Order violates the SCA.

The SCA, 18 U.S.C. § 2702, does not permit private litigants to compel production of the content of a user's communications from service providers like Twitter via subpoena or court order. *See* 18 U.S.C. § 2702(a)(1), (2); 18 U.S.C. § 2702(b)(1)-(9). There is no exception under the SCA for non-governmental discovery demands for content, and courts have therefore held

[2] Twitter understands the district court denied a motion to stay discovery filed by Defendant Defcad, Inc., *see* Dkt. No. 38, but that order did not address the objections filed by the Twitter user, *see* Dkt. No. 35, which are now pending before the Second Circuit.

that the SCA does not permit litigants to compel service providers to produce the contents of communications in response to such demands. *See United States v. Pierce*, 785 F.3d 832, 842 (2d Cir. 2015); *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011); *In re Toft*, 453 B.R. 186, 189 (Bankr. S.D.N.Y. 2011). The proper course is to obtain any such discovery from the user, who is not subject to the SCA. *See Pierce*, 785 F.3d at 842 (affirming an order granting Facebook's motion to quash a subpoena where the issuing party "possessed the very contents he claims the SCA prevented him from obtaining" and "failed to subpoena" other users directly); *Suzlon*, 671 F.3d at 731 (the user is responsible for disclosing their content in discovery); *Toft*, 453 B.R. at 199 (same).

Even if Twitter could somehow identify "all documents related to the distribution of the Infringing Products" as demanded by the Order, it violates the SCA to demand that Twitter produce even non-content information such as "the number of times" any such communications "were accessed or otherwise downloaded" as the Order commands. *See Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors.,* No. C 12-80242 EJD, 2013 WL 256771, at *2 (N.D. Cal. Jan. 23, 2013) (producing non-content based on a search for associated content is prohibited by the SCA).

The Order raises First Amendment concerns.

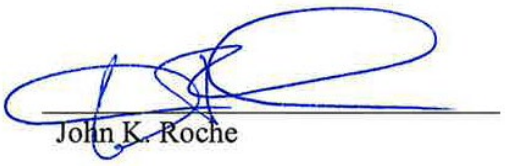
The First Amendment protects anonymous speech, *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), and parody, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988). Twitter's user claims the Tweets at issue are parody, *see* Dkt. No. 35, which raises substantial First Amendment issues regarding the Order's demand for their identifying information. *See, e.g., Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 43 (S.D.N.Y. 2017) (defendant's use of plaintiff's video on YouTube to engage in criticism was protected by the First Amendment); *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 444–45 (S.D.N.Y.), *aff'd*, 674 F. App'x 16 (2d Cir. 2016) (holding defendant's line of tote bags made fair use of plaintiff's copyrights in part because "[p]arody, like other forms of comment or criticism, has an obvious claim to transformative value") (internal quotations omitted). And in the user's pending appeal, Plaintiff does not appear to address the content of the Tweets cited in its pleadings or how those Tweets in particular fail to qualify as parody. *See* Plaintiff's Opposition to Emergency Motion for Administrative Stay, 2d Cir. Case No. 21-2806 (Dkt. No. 13). Any ruling from the Second Circuit that finds Plaintiff has overcome the First Amendment but that does not address the Tweets cited in Plaintiff's pleadings may not resolve the anonymous speech issues raised by the Twitter user.

Accordingly, regardless of how the Second Circuit resolves the pending appeal, we request that Plaintiff confirm withdrawal of the discovery demands made in Plaintiff's November 5th letter to Twitter and its intent to seek vacatur of the Order with respect to Twitter. If Plaintiff declines to do so and the Second Circuit ultimately declines to vacate the Order, please contact

me to meet and confer as required by Fed. R. Civ. P. 37(a)(1). Prior to burdening a court with litigation over the Order, we would like to understand Plaintiff's position on (1) the purported jurisdictional basis for the Order with respect to Twitter; (2) the purported basis for conducting non-party discovery outside the confines of Rule 45; and (3) the scope of and purported basis for the broad discovery demands in the Order under the First Amendment, SCA, and Rule 45 despite the user's ability to produce the information sought by the Order themself if such discovery is ultimately deemed lawful.

Twitter otherwise preserves and does not waive any other available objections or rights.

Best regards,



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