

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

LHF PRODUCTIONS, INC.)	
)	Case No. 2:16-CV-498
Plaintiff,)	
)	
-vs-)	
)	Judge Edmund A. Sargus, Jr.
JOHN DOES 1-17)	Magistrate Judge Elizabeth P. Deavers
)	
Defendants.)	

**MEMORANDUM OF CINCINNATI BELL TELEPHONE COMPANY LLC IN
OPPOSITION TO PLAINTIFF’S MOTION FOR AN ORDER TO SHOW CAUSE**

Non-party Cincinnati Bell Telephone Company LLC (“Cincinnati Bell”) opposes Plaintiff’s Motion For An Order Requiring Frontier Communications and Cincinnati Bell to Show Cause (“Motion”), filed August 17, 2016.

At the outset, the Motion asks the Court to hold Cincinnati Bell in contempt for “willful failure to appear at depositions, scheduled for August 5, 2016 October 1, 2015 [sic].” No depositions were ever noticed in this case, so Cincinnati Bell did not “fail to appear” at a deposition, willfully or otherwise. The subpoena was for production of documents or electronically stored material, not for attendance at a deposition.¹

More importantly, and contrary to Plaintiff’s assertion that no objection was lodged to the subpoena, Cincinnati Bell did, in fact, object to the subpoena and notified Plaintiff that it could

¹ In any event, Rule 45(c)(2) does not permit a subpoena to command production of documents or electronically stored information more than 100 miles from the place a person resides, is employed, or regularly transactions business in person. The subpoena was issued to Cincinnati Bell, a Cincinnati company, specifying the place of production as Cleveland, Ohio, well over 100 miles from Cincinnati Bell’s regular place of business. In addition, Civil Rule 45(a)(1)(A)(iv) requires that a subpoena set out the text of Rule 45(d) and (e), but such language is missing from the subpoena attached to the Motion.

not lawfully comply with it. Cincinnati Bell's security department sent a letter from its in-house counsel to Plaintiff's counsel via electronic mail the morning of August 5, 2016 explaining Cincinnati Bell's objection (letter attached hereto as Exhibit 1).

Cincinnati Bell is a cable operator and provides both cable service and "other service," as defined in 47 U.S.C. § 551(a)(2)(B), to the subscribers at issue over the same facilities. Therefore, Cincinnati Bell is subject to the privacy restrictions of the Cable Communications Privacy Act ("CCPA") with respect to the Internet access service at issue here. As explained in its objection to Plaintiff's subpoena request, Cincinnati Bell's obligations under the CCPA prohibit it from disclosing the personally identifiable information ("PII") of a subscriber unless the disclosure is allowed under one of the enumerated exceptions of 47 U.S.C. § 551(c)(2). The only exception potentially available here is in § 551(c)(2)(B), which provides that a cable operator may disclose PII of a subscriber if the disclosure is made pursuant to a court order authorizing such disclosure. Plaintiff presented no such order specifically authorizing Cincinnati Bell to disclose its subscribers' PII.² Plaintiff was required to obtain such an order before Cincinnati Bell was permitted, let alone required, to provide PII in response to the subpoena. Instead, we are engaged in unnecessary motion practice.

To be clear, Cincinnati Bell would be allowed to disclose the requested IP address information pursuant to an order specifically authorizing and directing it to disclose the referenced information. But, in Cincinnati Bell's view as advised by its outside counsel for cable regulation, a subpoena issued by an attorney was not sufficient or compliant with the CCPA court order requirement.

² Cincinnati Bell anticipates that Plaintiff may contend that the Court's June 7, 2016 Order suffices. That Order granted Plaintiff's request to take expedited discovery prior to a Rule 26(f) conference, but did not authorize Cincinnati Bell to disclose any subscriber PII.

Plaintiff's request that the Court hold Cincinnati Bell in contempt is entirely baseless as Cincinnati Bell has an adequate excuse for not complying with the subpoena at this time. As discussed above, there was no scheduled deposition as asserted by Plaintiff in the Motion, and Cincinnati Bell had a valid reason not to obey the subpoena for production of PII based upon the CCPA, and it so notified Plaintiff in writing. Plaintiff did not respond to Cincinnati Bell's written objection or make any other contact with Cincinnati Bell to attempt to resolve this issue prior to filing the instant Motion. Nor did Plaintiff take any steps to obtain a court order authorizing Cincinnati Bell to release the requested PII of its cable subscribers under the CCPA. While Cincinnati Bell would not oppose the issuance of such an order if requested by Plaintiff, it must have such an order and notify its subscriber of it pursuant to 47 U.S.C. § 551(c)(2)(B) before it can supply its subscribers' PII to Plaintiff.

For these reasons, CBT respectfully requests that this Court deny Plaintiff's Motion For An Order Requiring Frontier Communications and Cincinnati Bell to Show Cause.

Respectfully submitted,

/s/ Douglas E. Hart

Douglas E. Hart (Ohio Bar No. 0005600)

441 Vine Street, Suite 4192

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been filed electronically this 9th day of September, 2016, using the CM/ECF system, which will send notices of the filing to counsel of record.

/s/ Douglas E.Hart

EXHIBIT 1

From: Paula Papke <Paula.Papke/CBT> on behalf of Security Office <Security Office/CBT>
To: tashimko@gmail.com
Cc:
Subject: Response to subpoena

Sent: Fri 8/5/2016 8:49 AM

Message LHF Productions--Shimko Law.pdf (886 KB)

Shimko Law Offices - production objection - 08.04.2016 (2).pdf (71 KB)

Mr. Shimko,

Please see attached response to your subpoena.

Thank you,
Paula



Shimko Law Offices - production objection - 08.04.2016 (2).pdf



LHF Productions--Shimko Law.pdf

Paula Papke
Corporate Security
Cincinnati Bell Telephone
221 East Fourth St, Suite 121-300
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513-397-6962 (Office)
1-866-587-8022 (Fax)



Patrick M. Crotty
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August 4, 2016

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SENT VIA ELECTRONIC MAIL

Re: LHF Productions, Inc., vs John Does, 1-17, Civil Action 2:16-CV-498; Objection of Cincinnati Bell Telephone Company LLC to production of customers' Personally Identifiable Information

Mr. Shimko:

This letter serves as formal notice from Cincinnati Bell Telephone Company LLC ("Cincinnati Bell") that it objects to the subpoena issued by your client, LHF Productions, Inc., and will not comply with the demand for production of Cincinnati Bell subscriber account information by 10:00 AM on Friday, 08/05/2016. It is Cincinnati Bell's position that the company is prohibited by federal law from complying with the subpoena as issued.

The Cable Communications Privacy Act, specifically 47 USC 551(c)(1), states that Cincinnati Bell as a cable operator is prohibited from disclosing the personally identifiable information ("PII") of a subscriber unless the disclosure is allowed under one of enumerated exceptions of 47 USC 551(c)(2).

Section 551(c)(2)(B) does provide that a cable operator may disclose PII of a subscriber if the disclosure is made pursuant to a court order authorizing such disclosure. However, while your correspondence included a June 7, 2016 order from Magistrate Judge Deavers granting your client's Motion for Leave to Take Discovery Prior to Rule 26(f) Conference, your subpoena does not bear the signature of a judge. Rather, it bears only your contact information and signature.

Without a valid subpoena signed by a judge from the Southern District of Ohio commanding production of the subscriber PII, Cincinnati Bell must comply with its obligations as a cable operator and so cannot comply with your client's request for information.

All rights reserved.

Respectfully,

Patrick M. Crotty, Esq.
(OH 0088733)