

FILED

UCS

2000 JUL 22 PM 2:53

David H. ... Superior Court
County of Santa Clara, California
By: *JUDITH CASTILLO*
Clerk/Clerk

1 DAVID T. THUMA, ESQ.
2 JACOBVITZ, THUMA & WALKER
3 500 Marquette N.W., Suite 650
4 Albuquerque, New Mexico 87102
5 Telephone: (505) 766-9272
6 Facsimile: (505) 766-9287

7 ANGELA F. STOREY, ESQ., SBN 217942
8 MILLER, MORTON, CAILLAT & NEVIS, LLP
9 25 Metro Drive, 7th Floor
10 San Jose, California 95110
11 Telephone: (408) 292-1765
12 Facsimile: (408) 436-8272

13 Attorneys for ECLIPSE AVIATION CORPORATION

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF SANTA CLARA
16 UNLIMITED JURISDICTION

17 ECLIPSE AVIATION CORPORATION, a) Case No.: 108 CV 110380
18 Delaware corporation,)
19) ECLIPSE AVIATION CORPORATION'S
20 Plaintiff,) OPPOSITION TO MOTION TO CONTINUE
21 vs.) HEARING ON PREVIOUSLY FILED
22) MOTION TO QUASH SUBPOENAS
23 JOHN DOE; JANE DOE; and various other)
24 unknown individuals designated VARIOUS) Date:
25 DOES,) Time:
26) Dept: 7
27 Defendants.) Judge: Hon. Manoukian

28 I.

INTRODUCTION

Plaintiff ECLIPSE AVIATION CORPORATION ("ECLIPSE"), by counsel, files this Opposition to the Motion to Continue Hearing on Previously Filed Motion to Quash Subpoenas (the "Motion to Continue"), filed by JOHN DOES (the "Movant"). For the reasons set forth below, the Motion to Continue is not well taken and should be denied.

///
///

MILLER, MORTON, CAILLAT & NEVIS, LLP
25 Metro Drive, 7th Floor
San Jose, CA 95110-1339

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

STATEMENT OF FACTS

On April 15, 2008, ECLIPSE served a Deposition Subpoena For Production of Business Records on Google requesting information on the identity of several posters on a blog hosted by Google. On May 7, 2008 the Movant filed a Motion to Quash the Subpoena. ECLIPSE filed its opposition to the Motion to Quash on May 23, 2008. ECLIPSE'S Opposition provided a listing of numerous posts that ECLIPSE believes show a prima facie case entitling it to the information requested. Movant did not file a reply to ECLIPSE'S opposition. The matter was heard by the Court on June 6, 2008. During the hearing, counsel for ECLIPSE gave Movant's attorney a copy of the complaint filed by ECLIPSE in New Mexico. Counsel for Movant informed the court that he intended to file a Motion to Unseal the Complaint in New Mexico and that a continuance of the hearing until August 1, 2008 would provide him sufficient time to do so.

After the hearing, counsel for ECLIPSE agreed to provide Movant's counsel with any supplemental blogger posts ECLIPSE was relying upon as soon as practicable, with the understanding that Movant would begin to prepare his reply in support of the Motion to Quash based on the extensive list of blogger posts attached to ECLIPSE'S opposition. The supplemental information (eight posts, from four bloggers, apart from the posts of a certain blogger named "mouse") was forwarded to Movant's counsel on July 27, 2008. *See*, Declaration of David T. Thuma ("Thuma Decl."), ¶ 3.

At the June 6, 2008 hearing, the Court ordered that any supplemental motion from the Movant's should be filed by July 10, 2008. To date, Movant has not filed any supplemental brief. On July 21, 2008 ECLIPSE filed its supplemental opposition to the Motion to Quash, which contained a copy of the Complaint filed in New Mexico.

On or about July 8, 2008 Movant filed an entry of appearance and affidavit of non-admitted lawyer in the New Mexico action. *See*, Thuma Decl., ¶ 2. To ECLIPSE'S knowledge no further action has been taken by the Movant in the New Mexico action. *See*, Thuma Decl., ¶¶ 2 and 8.

///

1 On July 21, 2008 Movant's counsel faxed to ECLIPSE'S counsel, and presumably filed
2 with the Court, a pleading entitled "Motion to Continue Hearing on Previously Filed Motion to
3 Quash." ECLIPSE opposes any such continuance.

4 **III.**

5 **ARGUMENT**

6 **A. Movant's Motion to Continue it Fatally Defective**

7 The Motion to Continue filed by Movant is fatally defective in that it (1) contains no
8 notice required under California Code of Civil Procedure section 1010, California Rules of
9 Court 3.1110 and 3.1112; and (2) was not served at least sixteen (16) court days prior to the
10 hearing pursuant to Code of Civil Procedure section 1005(b).

11 California Code of Civil Procedure section 1010 requires that all notices be in writing and
12 that the notice must state when the motion will be made, the grounds on which is will be made
13 and the papers on which it will be based. California Rules of Court 3.1110(a) requires a notice
14 of motion to state in the opening paragraph the nature of the order being sought and the grounds
15 for such an order. California Rules of Court 3.1112(a) requires that all motions must contain
16 "(1) a notice of hearing on the motion; (2) the motion itself; and (3) a memorandum in support o
17 the motion or demurer."

18 The Motion to Continue filed by Movant does not contain a proper notice of motion in
19 that it does not specify when the motion will be made, does not contain the grounds for such a
20 motion and does not contain the required memorandum of points and authorities.

21 ECLIPSE is left to assume that Movant intends for the Motion to Continue to be heard
22 prior to or at the August 1, 2008 hearing. The Motion to Continue however is untimely and
23 should be denied as it was not served at least sixteen (16) court days as required by Code of Civil
24 Procedure section 1005(b).

25 **B. Movant Has Unreasonably Delayed Taking Any Action in the New**
26 **Mexico Matter**

27 At the June 6, 2008 hearing, Movant's counsel informed the Court that he intended to file
28 a Motion to Unseal the New Mexico Complaint and would most likely be bringing a Motion to

1 Dismiss in the New Mexico Action. Movant's Motion to Continue alleges that Movant has filed
2 in New Mexico a Motion to Unseal the Court File and a Motion to Dismiss or Definite
3 Statement. (See, Movant's Motion to Continue, ¶ 5). To date, counsel for ECLIPSE has not
4 received or been served with any such motion. Furthermore, the New Mexico court docket does
5 not show that any such motions have actually been filed. See, Thuma Decl., ¶ 8.

6 It is unclear from Movant's Motion why Movant needed the few supplemental postings
7 before he could enter an appearance in the New Mexico action or why those postings were
8 necessary before filing a Motion to Unseal the Complaint. In fact, it took Movant's counsel over
9 a month before filing the paperwork to appear in the New Mexico action.

10 **C. ECLIPSE Will be Prejudiced by Any Continuance of the Hearing**

11 ECLIPSE'S Complaint alleges that current or former employees are breaching their
12 Invention and Nondisclosure Agreements ("INDA's") by posting confidential information about
13 ECLIPSE on a blog hosted by Google. ECLIPSE has incurred substantial damage as a result of
14 such breach of the INDA's and continues to incur damages as several posters are continuing to
15 post confidential information. ECLIPSE reluctantly agreed to a continuance of the June 6, 2008,
16 however any further continuance would result in continuing and substantial harm to ECLIPSE in
17 that it would further delay ECLIPSE'S ability to identify those posters who are violating their
18 INDAs.

19 **IV.**

20 **CONCLUSION**

21 The Motion to Continue filed by the JOHN DOES should be denied as it fails to comply
22 with the notice and motion requirements set forth in the California Rules of Civil Procedure and
23 California Rules of Court. Additionally, Movant has failed to timely file an appearance in the
24 New Mexico Action and has not filed any motion in that action. Movant's own failure to take

25 ///
26 ///
27 ///
28 ///

MILLER, MORTON, CAILLAT & NEVIS, LLP
25 Metro Drive, 7th Floor
San Jose, CA 95110-1339

1 such action does not constitute good cause for continuing the hearing. Therefore ECLIPSE
2 respectfully requests that the Court deny the Motion to Continue.

3
4 Dated: July 22, 2008

MILLER, MORTON, CAILLAT & NEVIS, LLP

5
6 By: 
7 ANGELA F. STOREY
8 Attorneys for ECLIPSE AVIATION
9 CORPORATION

10 ::ODMA\GRPWISE\MMCN_SJDOMAIN.MMCN_SJPO.NewLitigationLibrary:37790.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MILLER, MORTON, CAILLAT & NEVIS, LLP
25 Metro Drive, 7th Floor
San Jose, CA 95110-1339