Chapter 2

The Court System

Case 2.1

N.C.App.,2010.
Southern Prestige Industries, Inc. v. Independence Plating Corp.
690 S.E.2d 768, 2010 WL 348005 (N.C.App.)
Court of Appeals of North Carolina.
SOUTHERN PRESTIGE INDUSTRIES, INC., a North Carolina corporation, Plaintiff-appellee
v.
INDEPENDENCE PLATING CORPORATION, a New Jersey corporation, Defendant-appellant.
No. COA09-888.
Feb. 2, 2010.
CALABRIA, Judge.
Independence Plating Corporation ("defendant") appeals an order denying its motion to dismiss for lack of personal jurisdiction. We affirm.
The facts in the instant case are undisputed. Defendant is a New Jersey corporation that provides anodizing services. Defendant's only office and all of its personnel are located in the state of New Jersey. Defendant does not advertise or otherwise solicit business in North Carolina. Prior to July 2007, defendant had engaged in a long-standing business relationship with Kidde Aerospace ("Kidde"), a North Carolina company.
In July 2007, on the recommendation of Kidde, Southern Prestige Industries, Inc. ("plaintiff"), a North Carolina corporation, contacted defendant to establish a business relationship. Under the terms of the arrangement between plaintiff and defendant, plaintiff would ship specified machined parts from its location in Statesville, North Carolina to defendant's location in New Jersey for anodizing. After the parts were anodized by defendant, they were shipped back to plaintiff, unless plaintiff otherwise directed. Plaintiff would then send the parts to the end user, Kidde.
Plaintiff and defendant engaged in frequent transactions between 27 July 2007 and 25 April 2008. In all, the record reveals

thirty-two purchase orders and invoices totaling $21,018.70. All invoices were sent from defendant in New Jersey to plaintiff in North Carolina and were paid by checks issued from plaintiff's corporate account at Piedmont Bank in Statesville, North Carolina.

On 18 November 2008, plaintiff initiated an action for breach of contract in Iredell County Superior Court. Plaintiff alleged that defects caused by defendant's anodizing process caused plaintiff's machined parts to be rejected by Kidde. On 6 February 2009, defendant filed, with a supporting affidavit, a motion to dismiss pursuant to N.C. Gen.Stat. § 1A-1, Rule 12(b)(2) (2007) for lack of personal jurisdiction. On 18 March 2009, plaintiff filed an affidavit, with supporting exhibits, challenging the assertions in defendant's motion to dismiss. On 4 May 2009, after reviewing the evidence submitted by the parties, the trial court entered an order denying defendant's motion to dismiss. Defendant appeals.

Defendant's only argument on appeal is that the trial court erred in denying its motion to dismiss for lack of personal jurisdiction. Specifically, defendant argues there are insufficient contacts to satisfy the due process of law requirements that are necessary to subject defendant to the personal jurisdiction of North Carolina's courts. We disagree.

As an initial matter, we note that the denial of a motion to dismiss is generally deemed interlocutory and therefore not subject to immediate appeal. However, "[t]he denial of a motion to dismiss for lack of jurisdiction is immediately appealable." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C.App. 612, 614, 532 S.E.2d 215, 217 (2000) (citing N.C. Gen.Stat. § 1-277(b)).

Neither party contests the findings of fact contained in the trial court's order. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *National Util. Review, LLC v. Care Ctrs., Inc.*, ---N.C.App. ----, ----, 683 S.E .2d 460, 463 (2009)(internal quotation and citation omitted). Therefore, the only issue to be determined is "whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. We conduct our review of this issue *de novo*." *Id.* (internal quotations and citations omitted).

> North Carolina courts utilize a two-prong analysis in determining whether personal jurisdiction against a non-resident is properly asserted. Under the first prong of the analysis, we determine if statutory authority for jurisdiction exists under our long-arm statute. If statutory authority exists, we consider under the second prong whether exercise of our jurisdiction comports with standards of due process.

Baker v. Lanier Marine Liquidators, Inc., 187 N.C.App. 711, 714, 654 S.E.2d 41, 44 (2007)(internal citations omitted).

Defendant has conceded that the facts are sufficient to confer jurisdiction under N.C. Gen.Stat. § 1-75.4 (2007), the North Carolina long-arm statute. Therefore, "the inquiry becomes whether plaintiffs' assertion of jurisdiction over defendants complies with due process." *Baker*, 187 N.C.App. at 715, 654 S.E.2d at 44 (internal quotation and citation omitted).

In order to satisfy due process requirements, there must be "certain minimum contacts [between the non-resident defendant and the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945)(*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940)). In order to establish minimum contacts with North Carolina,

> the defendant must have purposefully availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of the laws of North Carolina. The relationship between the defendant and the forum state must be such that the defendant should reasonably anticipate being haled into a North Carolina court.

Baker, 187 N.C.App. at 715, 654 S.E.2d at 45 (citation omitted).

> The United States Supreme Court has recognized two bases for finding sufficient minimum contacts: (1) specific jurisdiction and (2) general jurisdiction. Specific jurisdiction exists when the controversy arises out of the defendant's contacts with the forum state. General jurisdiction may be asserted over a defendant even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state.

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N . C.App. 690, 696, 611 S.E.2d 179, 184 (2005) (internal quotations and citations omitted). In the instant case, the record does not support a finding of general jurisdiction and so it must be determined whether specific jurisdiction exists.

> For specific jurisdiction, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction. Our courts look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties.

Id. (internal quotation and citations omitted).

In the instant case, the trial court found that the parties "had an ongoing business relationship characterized by frequent transactions between July 27, 2007 and April 25, 2008, as reflected by 32 purchase orders." Plaintiff would ship machined parts to defendant, who would then anodize the parts and return them to plaintiff in North Carolina. Defendant sent invoices totaling $21,018.70 to plaintiff in North Carolina, and these invoices were paid from plaintiff's corporate account at a North Carolina bank. Plaintiff filed a breach of contract action against defendant because the machined parts that were shipped to defendant from North Carolina and then anodized by defendant and shipped back to North Carolina were

defective.

"It is generally conceded that a state has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Thus, North Carolina has a 'manifest interest' in providing the plaintiff 'a convenient forum for redressing injuries inflicted by' defendant, an out-of-state merchant." *Baker*, 187 N.C.App. at 716, 654 S.E.2d at 45 (internal quotations and citation omitted). As for the remaining factor, there is no evidence in the record that would indicate that it is more convenient for the parties to litigate this matter in a different forum. "Litigation on interstate business transactions inevitably involves inconvenience to one of the parties. When [t]he inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience of plaintiff of litigating in [defendant's state] ... no convenience factors ... are determinative[.]" *Cherry Bekaert & Holland v. Brown*, 99 N.C.App. 626, 635, 394 S.E.2d 651, 657 (1990)(internal quotations and citations omitted).

Therefore, after examining the ongoing relationship between the parties, the nature of their contacts, the interest of the forum state, the convenience of the parties, and the cause of action, we conclude defendant has "purposely availed" itself of the benefits of doing business in North Carolina and "should reasonably anticipate being haled" into a North Carolina court. We hold that defendant has sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over defendant without violating the due process clause.

Affirmed.

Case 2.2

C.A.9 (Or.),2009.
Oregon v. Legal Services Corp.
552 F.3d 965, 09 Cal. Daily Op. Serv. 258, 2009 Daily Journal D.A.R. 356
United States Court of Appeals,
Ninth Circuit.

State of OREGON, Plaintiff-Appellant,

v.

LEGAL SERVICES CORPORATION, Defendant-Appellee,

United States of America, Intervenor-Appellee.

No. 06-36012.

Argued and Submitted Oct. 23, 2008.
Filed Jan. 8, 2009.

MILAN D. SMITH, JR., Circuit Judge:

Plaintiff-Appellant the State of Oregon (Oregon) appeals the district court's dismissal***967** of its claims under Federal Rule of Civil Procedure 12(b)(6). Oregon brought suit against the Legal Services Corporation (LSC) for an alleged violation of its rights under the Tenth Amendment to the United States Constitution. LSC has required the recipients of its funding to maintain legal, physical, and financial separation from organizations that engage in certain prohibited activities. Oregon alleges that this restriction has effectively thwarted its ability to regulate the practice of law in the State of Oregon and to provide legal services to its citizens. The district court dismissed the suit on the basis that Oregon's allegations of injury were not recoverable, and Oregon appealed. Because we conclude that Oregon lacks standing, we vacate the district court's dismissal of this action on the merits and remand with instructions that the action be dismissed for lack of subject matter jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statutory Background: The Program Integrity Regulation

LSC is a private nonprofit corporation established by the United States for the purpose of providing financial support to individuals who would otherwise be unable to afford legal assistance. 42 U.S.C. § 2996b(a). To accomplish this purpose, LSC provides federal funds to local legal assistance programs throughout the United States. *Id.* § 2996e(a). *See generally* Legal Services Corporation Act of 1974 (LSC Act), Pub.L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. §§ 2996-2996*l*).

By regulation, LSC places certain restrictions on the use of its funds. *Id.* § 2996e(b)(1). These restrictions include, for

example, a prohibition on the use of LSC funding for such activities as lobbying, participating in class action lawsuits, and advocating for the redistricting of political districts. 45 C.F.R. §§ 1612.3, 1617.3, 1632.3. Additionally, LSC requires its recipients to maintain "objective integrity and independence from any organization that engages in restricted activities." *Id.*§ 1610.8(a).[FN1] Requirements for this "objective integrity" are codified in what is now denominated the "program integrity" rule or regulation. The requirements include: (1) legal separation of the recipient from the unrestricted organizations; (2) no transfer of LSC funds between the recipient and the unrestricted organization; and (3) the recipient's physical and financial separation from the unrestricted organization.[FN2] *Id.*

FN1. This regulation was promulgated in response to a constitutional challenge to LSC restrictions on recipients using non-LSC funds for otherwise constitutional activities. Shortly after the restrictions were amended in 1996 to prohibit certain legal activities, a district court in Hawaii enjoined the LSC from enforcing them "to the extent that they relate to the use of Non-LSC Funds." *Legal Aid Soc'y of Haw. v. Legal Servs. Corp. (LASH)*, 961 F.Supp. 1402, 1422 (D.Haw.1997). The district court found that the plaintiffs had a significant likelihood of success in arguing that the restrictions constituted unconstitutional conditions on the receipt of a federal subsidy. *Id.* at 1416-17.

The new rule, codified at § 1610.8, allows recipients to affiliate with organizations that use non-federal funds to engage in restricted activities, subject to preserving "objective integrity" between the two organizations. In so doing, it overcame the constitutional concerns raised in *LASH.See Legal Aid Soc'y of Haw. v. Legal Servs. Corp. (LASH II)*, 145 F.3d 1017, 1021-23 (9th Cir.), *cert. denied,* 525 U.S. 1015, 119 S.Ct. 539, 142 L.Ed.2d 448 (1998).

FN2. These regulations were designed to mirror the program integrity rule promulgated pursuant to Title X of the Public Health Service Act, which withstood constitutional attack in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). *See*62 Fed.Reg. 27,695-97 (May 21, 1997). LSC's current regulations have also withstood constitutional challenges. *See LASH II*, 145 F.3d at 1031; *Velazquez v. Legal Servs. Corp. (Velazquez II)*, 164 F.3d 757, 773 (2d Cir.1999).

***968** Whether an LSC fund recipient is sufficiently physically and financially separated from non-compliant legal services providers is determined on a case-by-case basis, based upon the totality of the circumstances. *Id.*§ 1610.8(a)(3). The program integrity regulation specifies that "mere bookkeeping separation of LSC funds from other funds is not sufficient." *Id.* Other factors, such as having separate personnel, separate accounting and timekeeping records, separate facilities, and distinguishing forms of identification are relevant but not all-encompassing. *Id.* Fund recipients must annually certify to the LSC that they comply with the program integrity regulation. *Id.*§ 1610.8(b).

In this appeal, Oregon contends that the program integrity regulation violates its Tenth Amendment rights.

II. Factual and Procedural History: Conflict with Oregon's Guidelines

In April 2005, the Oregon State Bar amended its guidelines for Oregon's legal services program, directing service providers to integrate their operations and staff in places where separate organizations provide services to the same geographic area. While some of Oregon's service providers are LSC fund recipients, others are not and engage in restricted activities. Legal Aid Services of Oregon (LASO), a legal services provider, is a recipient of LSC funds, which account for approximately 45% of its $6.5 million annual budget. Oregon Law Center (OLC), another large legal services provider, is not an LSC fund recipient and engages in LSC-restricted activities.

In response to the State Bar's amended guidelines, LASO submitted a configuration proposal to LSC that would combine the LASO and OLC corporations into one non-profit corporation. Under the proposal, the newly constituted corporation would have two divisions, one of which would be subject to the LSC restrictions and the other of which would not. The two divisions would also maintain separate financial books and records, and would notify the public of their distinct functions in letterheads, business cards, and signage. However, the two divisions of the proposed new entity would share personnel and equipment, and would operate in the same physical premises. LSC's Office of Legal Affairs reviewed the proposal and concluded that it would not comply with LSC's requirements for program integrity.

In September 2005, LASO and OLC filed a complaint against LSC in district court, alleging that the LSC restrictions violated their First Amendment rights. On the same day and in the same court, Oregon filed this action against LSC alleging that the program integrity regulation effectively thwarted Oregon's policies governing its legal services program, in violation of the Tenth Amendment. Oregon sought to enjoin LSC from enforcing the program integrity regulation in Oregon. The two suits were consolidated and assigned to a magistrate judge.

The magistrate judge recommended that the district court grant LSC's motion to dismiss as to all of LASO's claims except its as-applied challenge to the program integrity rule. The magistrate judge also recommended granting LSC's motion to dismiss Oregon's complaint, because the state itself was not regulated by the LSC and because Oregon's claims of coercion did not meet the high standard required under Ninth Circuit precedents. *See* ***969***California v. United States*, 104 F.3d 1086 (9th Cir.1997); *Nevada v. Skinner*, 884 F.2d 445 (9th Cir.1989).

The district court adopted the magistrate judge's recommendations and re-severed the lawsuits. Oregon appealed its claims to this court.

JURISDICTION

[1] The jurisdiction of the federal courts is limited to "cases" and "controversies." U.S. CONST., Art. III, sec. 2. "Whenever it

appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3). An objection that a federal court lacks subject matter jurisdiction may be raised at any time, even after trial and the entry of judgment. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). The objection, made under Federal Rule of Civil Procedure 12(b)(1), may be raised by a party or by the court on its own initiative.[FN3] *Id.* While we have jurisdiction over this appeal under 28 U.S.C. § 1291, we found reason to question whether the district court had subject matter jurisdiction over this case. As analyzed in this opinion, we conclude that Oregon lacks standing to bring a claim under the Tenth Amendment or the Spending Clause because it has not alleged a sufficiently concrete and particularized injury. We therefore vacate the district court's judgment and remand for an entry of dismissal for lack of subject matter jurisdiction.

FN3. Neither the district court nor the parties alluded to any possible jurisdictional problem with Oregon's prosecution of this action. We therefore asked, at oral argument, for supplemental briefing on Oregon's standing to pursue this action.

DISCUSSION

I. Standing Requirements

[2] A plaintiff must demonstrate standing "for each claim he seeks to press" and for " 'each form of relief sought.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)); *see also Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted"). The plaintiff bears the burden of proof to establish standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). When, as here, the plaintiff defends against a motion to dismiss at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because we " 'presume that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).

[3] The "irreducible constitutional minimum" requirements for standing were described in *Lujan* as follows:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore* [*v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 [103 S.Ct. 1660, 75 L.Ed.2d 675] (1983)). Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ...***970** trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 [96 S.Ct. 1917, 48 L.Ed.2d 450] (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 38, 43 [96 S.Ct. 1917].

504 U.S. at 560-61, 112 S.Ct. 2130 (footnote and some internal citations omitted). Before applying these requirements to the facts of this case, however, we must first consider what impact, if any, Oregon's status as a state as opposed to a private party has on the standing inquiry.

A. State Standing: Quasi-Sovereign Interests

The Supreme Court has recognized that "States are not normal litigants for the purposes of invoking federal jurisdiction," and have interests and capabilities beyond those of an individual by virtue of their sovereignty. *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 1454, 167 L.Ed.2d 248 (2007). The Court in *Massachusetts* focused principally on the state's sovereign interest in its territory and its ability to preserve clean air for its citizens. *Id.* The Court has elsewhere characterized a state's unique prerogatives as a *parens patriae* action stemming from "a 'quasi-sovereign' interest" defined rather vaguely as "a set of interests that the State has in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982).

[4] However, the Supreme Court has also recognized that "the concept [of special State standing due to the quasi-sovereign interest] risks being too vague to survive the standing requirements.... [Therefore, a] quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* at 602, 102 S.Ct. 3260. Furthermore, "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party." *Id.* If a State is only a nominal party "without a real interest of its own-then it will not have standing under the *parens patriae* doctrine." *Id.* at 600, 102 S.Ct. 3260.

Generally, a state has been granted standing under the *parens patriae* doctrine in situations involving the abatement of public nuisances, such as global warming, flooding, or noxious gases. *See Massachusetts*, 549 U.S. 497, 127 S.Ct. 1438 (Massachusetts had standing to sue the EPA for failing to issue rules regarding the emission of greenhouse gases); *North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342 (1923) (North Dakota had standing to sue Minnesota for allegedly creating conditions leading to flooding of farmland); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 27 S.Ct. 618, 51

L.Ed. 1038 (1907) (Georgia had standing to sue for an injunction to prevent the defendant copper companies from discharging noxious gases over Georgia's territory). In other cases, states have been granted standing to represent the economic interests of their residents. *See* *Snapp*, 458 U.S. 592, 102 S.Ct. 3260 (Puerto Rico had standing to sue defendant apple farmers for subjecting its workers to conditions more burdensome than those established for temporary foreign workers in violation of the Wagner-Peyser Act); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) (Georgia had standing to bring suit against railroads for conspiracy to fix freight rates in a manner that discriminated against Georgia shippers in violation of federal antitrust law); ***971***Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923) (Pennsylvania had standing to sue for an injunction preventing West Virginia from giving other states a preferential right of purchase and curtailing the supply of gas carried to Pennsylvania).

As the Supreme Court noted in *Snapp*, the common thread among these cases is each state's quasi-sovereign interest in the health and well-being of its residents and a quasi-sovereign interest in "not being discriminatorily denied its rightful status within the federal system." 458 U.S. at 607, 102 S.Ct. 3260. In contrast, the Court has expressly found that a state does not have standing "to protect her citizens from the operation of federal statutes." *Massachusetts*, 127 S.Ct. at 1455 n. 17 (referencing *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (Massachusetts lacked standing to enjoin a Congressional act authorizing appropriations on a voluntary basis)).

B. Prudential Principles: No Reliance on the Claims of Third Parties

[5] In recognizing that a state may have standing by virtue of its quasi-sovereign interest in its citizens, the Supreme Court has been careful to note that a state's interest must be in some way distinguishable from that of its citizens: "In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607, 102 S.Ct. 3260. The doctrine that a plaintiff must have an independent means of standing is one of a set of "prudential principles" adopted by the Supreme Court to augment the requirements of Article III. These "judicially self-imposed limits on the exercise of federal jurisdiction" function to further limit the role of the courts, but they can be modified or abrogated by Congress. *Allen*, 468 U.S. at 751, 104 S.Ct. 3315; *see also* *Warth v. Seldin*, 422 U.S. 490, 500-01, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (noting that without the prudential requirements, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions," and that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules").

[6] In addition to the requirement that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," the Supreme Court has disapproved of considering " 'abstract questions of wide public significance' " amounting to " 'generalized grievances.' " *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting *Warth*, 422 U.S. at 499-500, 95 S.Ct. 2197).

II. Oregon's Alleged Injury

Oregon alleges that LSC's restrictions "effectively infringe on Oregon's sovereignty in violation of the Tenth Amendment and principles of federalism established in the structure of the United States Constitution, and exceed federal authority under the Spending Clause." Although we do not address the merits of Oregon's claim for the purpose of determining standing, *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, we do analyze the characterization of the injury itself to determine whether or not it is "concrete and particularized," "actual or imminent," and "fairly traceable to the challenged action of the defendant." *Id.* at 560, 112 S.Ct. 2130 (citations omitted). Oregon need only allege general factual allegations of injury resulting from LSC's conduct to resist a motion to dismiss for lack of standing. ***972***Id.* at 561, 112 S.Ct. 2130. Because Oregon's factual allegations do not rise to the level of a concrete, particularized, actual or imminent injury against the state itself, that is independent from alleged harm to private parties, we hold that the action must be dismissed for lack of subject matter jurisdiction.

Oregon alleges that LSC's restrictions fall outside Congress's spending authority. In addition, Oregon alleges that LSC uses its restrictions to coerce LASO into complying with federal regulations over state regulations because LASO cannot survive as an organization without federal funding.

Oregon further alleges that LSC's restrictions limit Oregon's ability to regulate LASO and its other legal services providers. Oregon cannot require LASO to combine its facilities with OLS because that would make LASO ineligible for federal funding, and would lead to LASO's dissolution. Oregon paints this situation as a restriction on its ability to make policy, and alleges that such a restriction violates the Tenth Amendment.

However, Oregon acknowledges that it is not regulated by LSC, and that it is completely free to make or change its policy in the face of LSC regulations. Oregon does not receive LSC funding, and so is unaffected by its existence or non-existence aside from the fact that parties within Oregon are recipients. Oregon would be in the same position it now occupies if the federal government, for whatever reason, decided to cease further LSC funding. Therefore, Oregon's only alleged injury is on behalf of its legal services providers. As pleaded, Oregon's injury is indistinguishable from LASO's.

A. Oregon Has No Independent Injury

1. *Tenth Amendment Coercion Claim*

[7][8] Although Oregon claims an injury under the Tenth Amendment separate from LASO's, it has not alleged general facts sufficient to establish such a claim. The Tenth Amendment reserves any power not expressly delegated to the federal government to the States. Only states have standing to pursue claims alleging violations of the Tenth Amendment by the federal government. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 144, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *see also Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219, 234 (2d Cir.2006). However, to bring a claim under the Tenth Amendment, a state must first allege facts relating to a relevant injury. In this case, we hold there is no such injury.

The Supreme Court made a similar ruling in *Mellon*, a case in which Massachusetts sought to enjoin Congress from enacting the Maternity Act, Cong. Ch. 135, 67th Cong., 42 Stat. 224 (1921). The Maternity Act provided for an initial appropriation, followed by annual appropriations for a period of five years, to be apportioned among the states that elected to accept the funds and comply with the attached provisions. *Id.*§ 2. The purpose of the act was "promoting the welfare and hygiene of maternity and infancy." *Id.*§ 1. Massachusetts alleged that "the act is a usurpation of power not granted to Congress by the Constitution-an attempted exercise of the power of local self-government reserved to the States by the Tenth Amendment." *Mellon*, 262 U.S. at 479, 43 S.Ct. 597.

The Court found that Massachusetts, which had not accepted the funds or the conditions, had no standing to allege an injury under the Tenth Amendment. The Court reasoned:

> What, then, is the nature of the right of the State here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the ***973** statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States.... But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

Id. at 482, 43 S.Ct. 597.

Similarly, in this case there is no burden or injury placed on Oregon. Like Massachusetts in *Mellon*, Oregon has not accepted federal funds, nor is it bound by the accompanying restrictions. Oregon is not injured by the federal government's decision to subsidize certain private activities, even if the government attaches impermissible conditions, as is alleged, to the recipients of those funds. Oregon is only affected by virtue of its interest in the effect of the grant and the conditions on its citizens; it has no independent claim of injury.

Oregon cannot claim injury simply on the basis that federal subsidies to private parties do not compliment Oregon's policies. The state has no standing to sue the federal government to provide voluntary federal subsidies to private parties, and certainly has no standing to sue the federal government to change its conditions for those federal subsidies. This is true even assuming, as we must, at the pleading stage of the litigation, that the federal government has gone beyond its authority under the Spending Clause to regulate private parties who accept its funds.

Such a ruling does not conflict with the Supreme Court's language in *Dole*, which allows for the possibility of a Tenth Amendment claim in cases where "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " 483 U.S. at 211, 107 S.Ct. 2793 (quoting *Davis*, 301 U.S. at 590, 57 S.Ct. 883). In that case, as in all other cases where the doctrine of coercion has been addressed, the state was the direct subject of both federal grants and federal restrictions. *See, e.g., Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *California*, 104 F.3d 1086; *Nevada*, 884 F.2d 445. In this case, Oregon is not a recipient of funds, nor does it have authority to accept or refuse funds on behalf of its legal services providers, which are all private parties. Consequently, it cannot claim to be the subject of coercion in violation of the Tenth Amendment.

2. *"Interference" Claim*

Oregon argues in the alternative that it has been injured by LSC's regulations, which thwart Oregon's efforts at policy making with regards to Oregon's Legal Service Program. Oregon attempts to analogize its situation to cases recognizing a state's standing to defend its statutes when they are alleged to be unconstitutional or pre-empted by federal regulation. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 137, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir.2008). However, those cases are distinguishable, because in this case there is no dispute over Oregon's ability to regulate its legal services program, and no claim that Oregon's laws have been invalidated as a result of the LSC restrictions.

***974** The core of the dispute is whether Oregon should have the ability to control the conditions surrounding a voluntary grant of federal funds to specifically delineated private institutions. Because Oregon has no right, express or reserved, to do so, there is no judicially cognizable injury. Oregon may continue to regulate its legal service programs as it desires, but it cannot depend on voluntary financial support from LSC to LASO or any other legal services provider within the state if it makes choices that conflict with the LSC program integrity regulations.

B. Oregon Lacks Standing Under The Parens Patriae Doctrine

[9] As detailed above, Oregon's only allegations of injury are generalized grievances about the probable consequences to legal services providers within Oregon as a result of conflicting state and federal policy goals. Oregon does not have standing to bring suit on behalf of these private parties, nor has Oregon proven it has standing under the *parens patriae* doctrine, because it has shown no independent quasi-sovereign interest.

Oregon claims a quasi-sovereign interest in regulating access to its civil justice system, alleging that this interest has been threatened by the LSC regulations. Looking beyond the fact that such an interest has never before been recognized, this court cannot accept such a claim as "an interest apart from the interests of particular private parties." *Snapp*, 458 U.S. at 607, 102 S.Ct. 3260. The state's interest in the "health and well-being-both physical and economic-of its residents in general" is not at issue here, nor does Oregon allege that it is being "discriminatorily denied its rightful status within the federal system." *Id.* Moreover, we can see no effective way federal courts could ever limit *parens patriae* standing were a state allowed to bring suit on behalf of its citizens solely by virtue of its interest that its citizens benefit from voluntary federal grants. Allowing such cases would make the *parens patriae* doctrine "too vague to survive the standing requirements of Art. III." *Id.* at 602, 102 S.Ct. 3260.

We likewise reject Oregon's attempt to link itself to *Bowen v. Public Agencies Opposed to Social Security Entrapment* by using the argument that, like the State in *Bowen*, Oregon's sovereignty has been diminished as a result of federal action. In *Bowen*, unlike here, the State was a party to a contract with Congress and Congress acted to breach the contract, resulting in actual injury. 477 U.S. 41, 50, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986). There was therefore no question of standing, as is raised here.

CONCLUSION

Oregon has failed to allege generalized facts sufficient to show an actual injury for the purposes of establishing its standing in this case. Oregon is not directly affected by the allegedly unconstitutional LSC regulations, and is free to avoid any or all indirect effects of those regulations by simply increasing its own taxes to fund its desired policies. Oregon has also failed to show a sufficient basis for bringing suit on behalf of its citizens. Oregon has not shown a cognizable interest apart from the interests of LSC recipients who are also citizens of Oregon, and is, therefore, without standing to pursue its claims in this action. Accordingly, we VACATE the district court's dismissal of this action on the merits and REMAND with instructions that the action be dismissed for lack of subject matter jurisdiction. Each party shall bear its own costs.

VACATED and REMANDED, with instructions.

Case 2.3

Ky.,2010.
Blankenship v. Collier
302 S.W.3d 665
Supreme Court of Kentucky.

Robert M. BLANKENSHIP, M.D., Appellants,
And Caritas Health Services, Inc., d/b/a Caritas Medical Center
v.
Horace COLLIER, Appellee.

Nos. 2007-SC-000916-DG, 2007-SC-000921-DG.
Jan. 21, 2010.

Opinion of the Court by Justice ABRAMSON.

The central question in this medical malpractice case is whether and when a trial court may grant summary judgment against a plaintiff who has failed to identify any expert witnesses. Pursuant to Kentucky law, in most medical malpractice cases, a plaintiff is required to put forth expert medical testimony to establish the applicable standard of care, any breach that occurred and any resulting injury to the plaintiff. This case being a typical medical malpractice case, Horace Collier, the plaintiff, never disputed that an expert was necessary to prove that Dr. Robert Blankenship and Caritas Health Services were negligent in the diagnosis and treatment of his appendicitis. Despite his repeated representations to the trial court that he would be using expert testimony and his request for an extension for more time to locate and identify an expert, Collier still had failed to provide the names of any expert witnesses more than one year following the filing of the complaint.

Because under Kentucky substantive law Collier would be unable to sustain his burden of proof without expert testimony, the trial court granted Dr. Blankenship's and Caritas's motions for summary judgment. After the Court of Appeals reversed the trial court's grant of summary judgment, this Court granted discretionary review.

[1][2][3][4] According to CR 56.02, a defendant "may, at any time, move with or without supporting affidavits for a summary judgment in his favor...." Although a defendant is permitted to move for a summary judgment at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions "only after the opposing party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky.1988). Thus, even though an appellate court always reviews the substance of a trial court's summary judgment ruling *de novo, i.e.,* to determine whether the record reflects a genuine issue of material fact, a reviewing court must also consider whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling. In a medical malpractice action, where a sufficient amount of time has expired and the plaintiff has still "failed to introduce evidence sufficient to establish the respective applicable standard of care," then the defendants are entitled to summary judgment as a matter of law. *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781, 784 (Ky.App.2007); *See also Neal v. Welker*, 426 S.W.2d 476, 479-480 (Ky.1968). The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion.

In this case, the issue before this Court is not simply whether Collier had failed to establish a genuine issue of material fact at the time Dr. Blankenship and Caritas filed their summary judgment motions-without a doubt, there is no genuine issue of material fact in the record because Collier has no expert to support his claim of medical negligence. Rather, the more specific issue is whether the trial court was correct to take up the defendants' summary judgment motions and enter a ruling when it did and, secondarily, whether the court was required first either to enter a separate order requiring Collier to obtain expert testimony or to enter an order sanctioning Collier for failing to meet the court's expert disclosure deadline.

Having carefully reviewed the record, we conclude that the defendants' summary judgment motions were properly before the trial court and it did not abuse its discretion in taking them up and deciding to rule on the motions approximately four months after they were filed and seventeen months after the lawsuit was initiated. Collier had completely failed to identify any expert witnesses and could not sustain his burden of proof without expert testimony and, thus, no material issue of fact existed in the record and the defendants were entitled to summary judgment as a matter of law. Because Collier never disputed that a medical expert was necessary to prove his claim of medical negligence and continually represented to the trial court that he would obtain an expert witness, no separate ruling stating the obvious-the need for an expert witness-was required before the court ruled on the defendants' summary judgment motions. Further, because CR 56 operates independently of the discovery rules (and specifically CR 37.02), the trial court was not required to enter a sanctions order prior to granting the defendants' summary judgment motions. Thus, the Court of Appeals opinion is reversed, and the Jefferson Circuit Court's summary judgments granted to Dr. Blankenship and Caritas are reinstated.

RELEVANT FACTS

On February 17, 2004, Collier was admitted to Caritas Medical Center in Louisville, Kentucky, after suffering from abdominal pain. The following day, after undergoing tests and being diagnosed by Dr. Blankenship as having appendicitis, Collier had an appendectomy. Subsequently, on February 23, 2004, Collier was released from Caritas and returned home. Approximately one year later, on February 17, 2005, Collier filed suit against Dr. Blankenship and Caritas in Jefferson Circuit Court, alleging that both parties were negligent in their failure to re-evaluate and treat Collier in a timely manner. Specifically, Collier contended that he had been ignored for several hours while awaiting treatment, during which he suffered from severe abdominal pain, and further that the x-ray of his abdomen had not been stored properly, contributing to the delay in his diagnosis and treatment. In his complaint, Collier alleged that as a result of Dr. Blankenship's and Caritas's medical negligence, he sustained permanent physical and mental injuries, prolonged pain and mental anguish, impairment of his power to labor and earn money and significant medical expenses.

After Dr. Blankenship and Caritas filed their answers denying Collier's allegations, the parties began pre-trial discovery. More than nine months after Collier filed his complaint, on November 30, 2005, the trial court entered a Civil Jury Trial Order, which required Collier to disclose his expert witnesses by January 30, 2006, and scheduled the case for jury trial on October 10, 2006. On February 2, 2006, two days after the expert disclosure deadline, Collier filed a motion with the court requesting a thirty-day extension. In his motion, Collier stated that he was moving "the Court for an extension of time to identify and disclose the expert witness(es) who will offer expert opinion(s) at the trial of this matter." Without an objection from the defendants, the trial court granted Collier's request and extended the plaintiff's expert disclosure deadline to February 28, 2006.

On March 14, 2006, after Collier had still failed to disclose any experts, Dr. Blankenship and Caritas filed motions for summary judgment, each arguing that there could be no issue of material fact in this medical malpractice case without expert testimony. In his response to the defendants' motions, Collier contended that summary judgment was inappropriate in this instance because it was only being used as a sanctioning tool to punish him for failing to timely disclose his experts and because there was a "serious question" as to whether Collier would even need experts to prove his medical malpractice

case. On July 7, 2006, nearly four months after the defendants moved for summary judgment, the trial court entered its order granting the defendants' motions. Although the trial court recognized that an expert was not required in all medical malpractice cases, it stated that "[i]n this case, however, a layperson would not be able to discern (without specialized knowledge that an expert in that field possessed) whether Dr. Blankenship's delay in treatment, if any, caused Plaintiff permanent physical and mental injuries." Concluding that without any expert witnesses, Collier would be unable to prove causation in his medical malpractice case, the trial court held that the defendants were entitled to summary judgment as a matter of law.

Collier appealed the trial court's grant of summary judgment to the Kentucky Court of Appeals. Relying primarily on *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky.2005), the Court of Appeals reversed. The Court of Appeals explained that *Baptist Healthcare* outlines a procedure to be used when trial courts are deciding summary judgment motions in medical malpractice cases and that the trial court did not follow that procedure in this case. Applying *Baptist Healthcare, supra,* the Court of Appeals held that before granting summary judgment in a medical malpractice case based on a plaintiff's failure to identify an expert, a trial court should first make a separate ruling determining whether an expert is actually needed in the case. If the court decides that an expert is needed, the court should then give the plaintiff a reasonable amount of time to identify and disclose an expert witness. Concluding that the trial court's grant of summary judgment was improper in this case, the Court of Appeals vacated the order and remanded the case to Jefferson Circuit Court. As noted, this Court then granted discretionary review to consider when it is appropriate for trial courts to grant summary judgment in medical malpractice cases based on a plaintiff's failure to disclose expert witnesses.

ANALYSIS

[5] Dr. Blankenship and Caritas contend that the Court of Appeals erred in applying cases that involved a legitimate dispute about the need for expert witnesses because, in this case, Collier never disputed that expert medical testimony was required. In response, Collier contends that *Baptist Healthcare, supra*, *Ward v. Housman*, 809 S.W.2d 717 (Ky.App.1991), and *Poe v. Rice*, 706 S.W.2d 5 (Ky.App.1986), are on-point with the facts of this case and mandate a reversal of the trial court's grant of summary judgment. However, each of these cases cited by Collier differs from the facts of this case and none addresses the common scenario presented here.

I. The Procedure Outlined in *Baptist Healthcare* Does Not Apply Because Collier Never Legitimately Disputed the Need for a Medical Expert and Because Collier's Claim Could Not Be Presented Without An Expert.

[6] Under Kentucky law, a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care. *Perkins v. Hausladen*, 828 S.W.2d 652, 655-56 (Ky.1992). Expert testimony is not required, however, in *res ipsa loquitur* cases, where "the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it", and in cases where the defendant physician makes certain admissions that make his negligence apparent. *Id.* (*quoting Restatement (Second) of Torts,* Comment b, p. 157). Medical malpractice cases can therefore be divided into two categories: cases where the parties do not dispute the need for expert testimony, which encompass the vast majority of medical malpractice claims, and cases where the plaintiff disputes the need for expert testimony because he contends one of the narrow exceptions applies. *Baptist Healthcare Systems, Inc. v. Miller, supra,* falls into the latter, somewhat rare, category while Collier's case fits into the former, much more common, category wherein expert testimony is essential.

In *Baptist Healthcare*, 177 S.W.3d at 678, the plaintiff, Ms. Miller, experienced nerve damage after the hospital's phlebotomist [FN1] left a tourniquet on her arm for over ten minutes while she was having blood drawn at Central Baptist Hospital. Ms. Miller subsequently brought an ordinary negligence claim against the hospital. Prior to trial, Baptist Healthcare moved for summary judgment, arguing that Ms. Miller's case was actually a medical malpractice claim and not an ordinary negligence claim, and that her lack of expert testimony meant that Ms. Miller could not prove either the applicable medical standard of care or a breach of that standard. Although Ms. Miller responded that the hospital's phlebotomist breached his own employer's standard of care as set forth in a training manual and that a medical expert was not needed, the trial court disagreed. The court held that medical standard of care testimony was necessary, denied the hospital's summary judgment motion, and gave Ms. Miller a thirty-day continuance to identify an expert. *Id.* Ms. Miller secured an expert and the case was tried, resulting in a verdict for the plaintiff.

> FN1. A phlebotomist is a person who is trained in withdrawing blood from a person's vein through an incision or a needle puncture. *Stedman's Medical Dictionary* (27th ed. 2000).

On the hospital's appeal, the Court of Appeals and ultimately this Court concluded that the trial court did not abuse its discretion. This Court first held that because the standard of care in drawing blood "is not within the scope of common experience of jurors, requiring expert testimony as to the standard of care of a phlebotomist was a proper exercise of trial court discretion." *Id.* at 680-681. Second, this Court concluded that the trial court did not err in denying Baptist Healthcare's motion for summary judgment even though at the time the motion was made, the record reflected that Ms. Miller had no expert witness to establish the medical standard of care. *Id.* at 681-682.

This Court based its ruling on the fact that up until the trial court required her to do otherwise, Ms. Miller had planned on proceeding to trial without expert testimony. *Id.* In other words, Ms. Miller had from the outset of her case legitimately

disputed the need for expert testimony. Commenting on this strategy, this Court stated that because phlebotomy is an "unlicensed" field of practice in Kentucky it "was not unreasonable for Ms. Miller to contend that no expert witness was necessary to determine that her injuries were caused by leaving the tourniquet [on] her ... arm too long or that the principle of *res ipsa loquitur* applied to the case." *Id.* at 681. Because Ms. Miller had disputed the need for expert testimony in her case and had a reasonable basis to do so, this Court held that the trial court proceeded correctly by first making a separate ruling on the necessity of an expert witness and then giving Ms. Miller a reasonable amount of time to identify an expert before ruling on Baptist Healthcare's summary judgment motion. *Id.*

[7] The *Baptist Healthcare* Court reiterated it would have been clearly inappropriate for the trial court to grant summary judgment because at the time the defendant filed its motion, the trial court had not even resolved the "dispute as to the need for an expert." *Id.* In cases where there is a real dispute regarding the need for expert testimony, imposing sanctions on the plaintiff for failing to comply with a scheduling order requiring disclosure of the expert's name and testimony is a more appropriate remedy than a summary judgment. *Id.* at 681-682. We have recited this Court's analysis in *Baptist Healthcare, supra,* to emphasize the essential fact on which its holding was based-a reasonable, legitimate dispute about the necessity for expert testimony given the facts of that case. Because there was no such dispute in Collier's case, the procedure followed in *Baptist Healthcare, supra,* is simply not applicable.

Collier, unlike the plaintiff in *Baptist Healthcare,* never created a legitimate dispute about the need for expert testimony. On the contrary, he made affirmative representations to the trial court that he would be using expert witnesses, but that those witnesses had not yet been secured. For example, in his response to Dr. Blankenship's requests for admissions, Collier stated that the "expert witness(es) who will testify has/have not been determined." In addition, Collier filed the aforementioned written motion with the trial court requesting "an extension of time to identify and disclose the expert witness(es) who will offer expert opinion(s) at the trial of this matter." Only when Collier was facing a summary judgment motion for not identifying any experts did he argue for the first time that he could meet his burden of proof without expert testimony. Collier's belated response, when considered in the context of the medical malpractice claims he stated in his complaint, simply did not create a legitimate dispute about the need for expert testimony.

In addition, unlike the plaintiff in *Baptist Healthcare,* supra, Collier did not have a reasonable basis on which to dispute the need for medical experts in his case. Having reviewed the negligence allegations, the trial court found that Collier could not succeed on his medical malpractice claim without expert testimony. The record supports this conclusion. In his complaint, Collier alleged that Dr. Blankenship and Caritas were negligent in their failure to reevaluate and treat him in a timely manner. As to each defendant, Collier specifically stated that the defendant deviated "from *acceptable standards of medical care* and said deviations constitute medical negligence." Complaint ¶¶ 9, 11. (emphasis supplied). Before this Court, Collier claimed that "it does not take an expert to offer an opinion that as a medical doctor Appellant-Blankenship had deviated from the standard of care for being a (sic) lazy and angry because he did not want to be on call" and treat patients. Assuming Collier could have offered evidence that Dr. Blankenship was lazy and angry, such lay testimony would in no way establish the medical standard of care as to a patient presenting with symptoms of appendicitis and whether Dr. Blankenship breached it. In the trial court, in his response to the defendants' summary judgment motions, Collier also argued that an expert was not needed in this case because a breach of the medical standard of care occurred when his abdominal x-ray was left unattended instead of being scanned promptly into a computer database. However, even this allegation of negligence would have required a medical expert to testify regarding the standard of care for handling, storing, and reading x-rays; any breach that may have occurred here; and how such breach caused injury to Collier. Simply put, Collier failed to timely dispute the need for expert testimony and because Collier did not have a reasonable basis to do so, the trial court did not abuse its discretion in deciding to rule on the summary judgment motion without first entering an order declaring that experts were necessary.

[8] In order to give guidance to the bench and bar regarding this recurring issue, we reiterate that where a plaintiff does create a legitimate dispute about the need for an expert witness prior to the expiration of the court's expert disclosure deadline, the trial court should first make a separate ruling on that issue, *i.e.,* the need, or lack of need, for expert testimony in the case. If the court determines within its discretion that an expert is needed, it should give the plaintiff a reasonable amount of time to identify an expert as outlined by this Court in *Baptist Healthcare, supra.* However, if the need for an expert is never disputed and if it would be unreasonable for the plaintiff to argue that an expert is not needed, (and most particularly if the plaintiff requests an extension for the express purpose of securing more time to identify his experts), there is no reason for a trial court first to enter a separate ruling informing the plaintiff that his case requires expert testimony before considering a defendant's summary judgment motion based on the plaintiff's failure of proof. Here, Collier never suggested to the trial court that he could prove medical negligence without expert witnesses until he responded to the defendant's motions for summary judgment filed some thirteen months following the filing of the complaint. Because Collier failed to identify any expert witnesses, never seriously disputed that an expert would be needed and had asserted medical malpractice claims which clearly required expert testimony, the summary judgment motions were properly before the trial court for ruling and the trial court correctly found there was no genuine issue of material fact precluding summary judgment.

II. *Ward v. Housman* and *Poe v. Rice* Are Factually Distinguishable From Collier's Case and the Trial Court Was Not Required First to Enter a Sanctions Order Pursuant to CR 37.02.

Collier argues that the cases of *Ward v. Housman, supra*, *Poe v. Rice, supra,* both of which involve the Kentucky Court of Appeals reversing a trial court's grant of summary judgment in a medical malpractice case, also mandate a reversal of the trial court's grant of summary judgment in this case. Although those cases are not binding on this Court, each is distinguishable from the present case and neither is inconsistent with the procedure we have outlined.

Ward v. Housman, supra, involved a plaintiff who did not disclose an expert until nine months after the deadline in the trial court's scheduling order had passed. After Kelly Ward and her husband brought a typical medical malpractice action against her doctor, the trial court entered a scheduling order, setting the trial date for September 5, 1989, and requiring the Wards to disclose expert witnesses by October 31, 1988. 809 S.W.2d at 718. Nine months passed after the disclosure deadline without any pertinent motions filed by the plaintiffs or defendant and then on July 24, 1989, the Wards filed supplemental answers to the defendant's interrogatories, finally naming an expert witness. *Id.* In response, the defendant filed a motion to exclude the Wards' expert witness because the disclosure had occurred well-after the deadline, and, in the alternative, he asked for a continuance because the witness was "a surprise" expert. The trial court granted the defendant's motion to exclude the Wards' expert, ruling that the plaintiffs were not allowed to have any witnesses at trial who were not known to the defendant by the October 31, 1988 disclosure deadline. *Id.* Although the Wards argued in a motion for reconsideration that they would not be able to sustain their burden at trial without the expert, the trial court denied reconsideration and subsequently, on September 6, 1989, entered summary judgment against the Wards. Significantly, the defendant had *never* moved for summary judgment thus presenting for consideration the Kentucky Rule of Civil Procedure 56.03 issues of absence of material fact and entitlement to judgment as a matter of law. As the Court of Appeals bluntly put it "[t]he result [the defendant] got was more than what he asked for." *Id.* at 719.

In concluding that the trial court improperly granted summary judgment, the *Ward* Court held that the trial court did not dismiss the case because it lacked a genuine issue of material fact, but rather, because the Wards had not complied with a scheduling order. The Court of Appeals distinguished the Wards' case from one in which the plaintiff never discloses an expert, noting that "the case at hand was not one where the dismissed party had no expert but [instead] was [one where the dismissed party was] prevented from using the expert's testimony as a sanctioning technique for the dilatory conduct of the Wards' counsel." *Id.* To reiterate, Ward, supra, held that summary judgment is not appropriate when entered *sua sponte* as a sanction because expert witnesses have been identified in an untimely manner. *Id.* Notably, even though the disclosure deadline had long since expired, the Wards actually identified an expert witness before the defendant raised the absence of proof issue *via* a summary judgment motion.

[9] Here, Collier never attempted to identify or disclose any expert witnesses. When the trial court granted summary judgment against Collier on July 7, 2006, seventeen months had passed since Collier had filed his complaint, more than four months had passed since the extended disclosure deadline, and approximately four months had passed since the filing of the defendants' summary judgment motions.[FN2] During all this time, Collier never created a genuine issue of material fact regarding Dr. Blankenship's negligence by identifying a medical expert who could testify about a breach of the standard of care. Thus, when the trial court granted summary judgment against Collier, it was not simply sanctioning Collier for failing to meet a deadline, but rather correctly applying the legal standard in medical malpractice cases regarding the expert testimony necessary to meet Collier's burden of proof. When it is evident that the plaintiff has not secured a single expert witness and has failed to make any expert disclosures after a reasonable period of time, there truly is a failure of proof and a summary judgment motion is appropriate.

> FN2. We deliberately refrain from setting any time lines for identification of expert witnesses because each case must be considered by the trial court on a case-by-case basis. In this case, Collier was given adequate time.

Poe v. Rice is also distinguishable from the case at hand. After Ms. Poe initiated a medical malpractice action against Dr. Rice, he requested through interrogatories that Poe disclose her expert witnesses. 706 S.W.2d at 6. In her replies, Poe repeatedly objected to "producing" her expert witnesses at that time (for reasons not explained in the opinion), but continued to maintain their existence. *Id.* Nonetheless, because Poe did not disclose her experts as requested by the defendants, the trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed and remanded.

Poe is a very cursory opinion in which the Court of Appeals did not include any facts regarding when Poe filed her complaint, when or if the court had set a trial date, or when or if Poe was required by the court to disclose her experts although it appears that, at the time the trial court granted summary judgment, the parties were still engaging in early discovery. Regardless, *Poe, supra,* was certainly not a case where the plaintiff had acknowledged the requirement that she disclose her experts and then, after the first and second expert disclosure deadlines expired, still had failed to identify any experts. Rather, Poe repeatedly had objected to Dr. Rice's early requests to disclose her experts (again for reasons unexplained) and yet the trial court apparently never imposed a deadline or ordered Poe to respond to the defendant's interrogatories. *Id.*

In this case, Collier was on notice of the importance of the expert disclosure deadline from the time the court entered its November 30, 2005 Civil Jury Trial Order, and he specifically requested an extension of that deadline to locate a potential expert. Unlike Poe's objections to Dr. Rice's requests, Collier never objected to the court-ordered expert disclosure deadline

and never suggested, until his response to the motion for summary judgment, that his was the type of medical malpractice case that did not require expert testimony.

[10] Finally, while CR 37.02 allows a trial court to enter an order sanctioning a party for failing for failing to provide or permit discovery, there is no requirement that a party first be sanctioned under CR 37.02 before the trial court grants a properly supported and timely filed summary judgment motion. CR 56 stands independently of the discovery sanction rules and, provided the non-moving party has been given sufficient time to respond, the trial court may grant the summary judgment motion without preliminarily sanctioning the plaintiff for failing to identify and to produce an expert witness.

III. Plaintiffs In Typical Medical Malpractice Cases Cannot Proceed to Trial Without Disclosing Medical Experts.

[11][12] Finally, Collier contends that plaintiffs are entitled to proceed to trial, and simply reserve the right not to call an expert witness. Collier admits that this course of action may have resulted in a directed verdict against him, but insists that such trial strategy is within a plaintiff's right. Although this trial strategy may be appropriate for a plaintiff alleging an ordinary negligence claim, that is simply not the case with medical negligence cases in Kentucky. As explained previously, a plaintiff bringing a typical medical malpractice case is required by law to put forth expert testimony to inform the jury of the applicable medical standard of care, any breach of that standard and the resulting injury. *Perkins v. Hausladen*, 828 S.W.2d at 655. A jury trial without the requisite proof is a futile exercise, wasteful of judicial time, jurors' time and the litigants' time and resources. CR 56 is intended to avoid such unnecessary proceedings. *Neal v. Welker*, 426 S.W.2d at 479-480 "the curtain must fall at some time upon the right of a litigant" to put forth the most basic level of proof and the plaintiff's bare assertion "that something will turn up' cannot be made basis for showing that a genuine issue as to a material fact exists"; *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d at 784 (the trial court properly granted summary judgment for the defendant doctor because the plaintiff, by not identifying any expert witnesses, "failed to introduce evidence sufficient to establish the respective applicable standard of care").

CONCLUSION

Despite Collier's argument that the summary judgments were actually a sanction for his failure to meet an expert disclosure deadline, the trial court based its grant of summary judgment on Collier's failure of proof. The trial court properly held, pursuant to CR 56.03, that without expert testimony there was no issue of material fact and, as a matter of law, Collier could not sustain his burden of proof. Although Collier asserts that the trial court should have followed the procedure in *Baptist Healthcare, supra,* and first entered a separate ruling regarding whether experts were needed before ruling on the defendants' summary judgment motion, Collier's failure to create a reasonable, legitimate dispute about the need for expert testimony rendered the procedure in *Baptist Healthcare, supra,* inapplicable. Thus, the trial court did not abuse its discretion in deciding to take up and rule on the summary judgment motion at a point when it had not entered CR 37.02 sanctions against Collier or an order requiring him to obtain experts. Because the trial court correctly found that there were no genuine issues as to any material fact and that the defendants were entitled to a judgment as a matter of law, the Court of Appeals Opinion is reversed, and the Jefferson Circuit Court's summary judgments for Dr. Blankenship and Caritas are reinstated.

Supplemental Case Printout for: *Shifting Legal Priorities for Business*

C.D.Cal.,2007.
Columbia Pictures Industries v. Bunnell
Not Reported in F.Supp.2d, 2007 WL 2080419 (C.D.Cal.)
United States District Court,

C.D. California.

COLUMBIA PICTURES INDUSTRIES, et al., Plaintiff,

v.

Justin BUNNELL, et al., Defendants.

No. CV 06-1093FMCJCX.

May 29, 2007.

CHOOLJIAN, Magistrate J.

I. SUMMARY

***1** Pending before the court are (1) plaintiffs' motion to require defendants to preserve and produce certain electronic data, and for evidentiary sanctions, based upon defendants' failure to date to preserve and produce such data; and (2) defendants' request for attorneys' fees and costs.

Based upon the court's consideration of the extensive arguments and evidence presented, the court's assessment of the credibility of the declarants and witnesses who testified at the evidentiary hearing in this matter, and the applicable law, the court finds: (1) the data in issue is extremely relevant and within the scope of information sought by plaintiffs' discovery requests; (2) the data in issue which was formerly temporarily stored in defendants' website's random access memory ("RAM") constituted "electronically stored information" and was within the possession, custody and control of defendants; (3) the data in issue which is currently routed to a third party entity under contract to defendants and received in said entity's RAM, constitutes "electronically stored information," and is within defendants' possession, custody or control by virtue of defendants' ability to manipulate at will how the data in issue is routed; FN1 (4) defendants have failed to demonstrate that the preservation and production of such data is unduly burdensome, or that the other reasons they articulate justify the ongoing failure to preserve and produce such data; (5) defendants must preserve the pertinent data within their possession, custody or control and produce any such data in a manner which masks the Internet Protocol addresses ("IP addresses") of the computers used by those accessing defendants' website; (6) sanctions against defendants for spoliation of evidence are not appropriate in light of the lack of precedent for requiring the retention of data in RAM, the lack of a preservation request specifically directed to data present only in RAM, and the fact that defendants' failure to retain such data did not violate any preservation order; and (7) awarding attorneys' fees and costs are not appropriate.

> FN1. It may also be the case that the data in issue is within defendants' possession, custody and control by virtue of defendants' contractual relationship with the third party entity. In that circumstance, defendants would, at a minimum, have an obligation to make reasonable inquiry of the third party entity for the data in issue. *See A. Farber and Partners, Inc. v. Garber,* 234 F.R.D. 186, 189 (C.D.Cal.2006).

II. PROCEDURAL HISTORY

On February 23, 2006, plaintiffs filed a complaint against defendants for copyright infringement. Plaintiffs allege, *interalia,* that defendants knowingly enable, encourage, induce, and profit from massive online piracy of plaintiffs' copyrighted works through the operation of their internet website. The complaint is predicated on theories of contributory infringement, secondary infringement, and inducement. Defendants filed an Answer on May 24, 2006.

On March 12, 2007, plaintiffs filed a "Notice of Motion and Local Rule 37-1 Joint Stipulation Regarding Plaintiffs' Motion for an Order (1) Requiring Defendants to Preserve and Produce Certain Server Log Data, and (2) for Evidentiary Sanctions" ("Plaintiffs' Motion"), a declaration of plaintiffs' counsel Duane C. Pozza ("Pozza I Decl."), a declaration of plaintiffs' expert Ellis Horowitz ("Horowitz I Decl."), a declaration of defendants' counsel Ira P. Rothken, and a declaration of defendant Wes Parker ("Parker I Decl."), as well as accompanying exhibits to each declaration. Plaintiffs' Motion requests that the court issue an order requiring defendants to preserve and produce certain data responsive to plaintiffs' First Request for Production of Documents, Request Nos. 10 and 12.FN2Specifically, plaintiffs seek the preservation and production of the following data: (a) the IP addresses of users of defendants' website who request "dot-torrent" files; (b) the requests for "dot-torrent files"; and (c) the dates and times of such requests (collectively "Server Log Data").FN3 Plaintiffs' Motion also seeks evidentiary sanctions against defendants for their alleged spoliation of the Server Log Data. Defendants request that the court require plaintiffs to pay reasonable expenses incurred in opposing Plaintiffs' Motion, including attorneys' fees, pursuant to F.R. Civ. P. 37(a)(4)(B).

> FN2. Request No. 10 seeks "all documents that identify the dot-torrent files that have been made available by, searched for, or downloaded by users of TorrentSpy, including documents that identify the users who have made available, searched for, or downloaded such dot-torrent files."Request No. 12 seeks "all documents, including server logs, databases of a similar nature, or reports derived from such logs or databases that [defendants] maintain, have ever maintained, or have available that record the activities of TorrentSpy or its users, including documents concerning ... Electronic communications of any type between TorrentSpy and [users]; ... Logs of user activities; and ... Logs or records of dot-torrent files made available, uploaded, searched for, or downloaded on TorrentSpy."
>
> FN3. As the Server Log Data is temporarily stored in RAM and constitutes a document that identifies dot-torrent

files that have, at a minimum, been searched for by users of TorrentSpy, it is encompassed by Document Request No. 10. Similarly, as the Server Log Data constitutes an available document concerning electronic communications between TorrentSpy and users and a record of dot-torrent files made available or searched for on TorrentSpy, it is also encompassed by Document Request No. 12.

***2** On March 20, 2007, plaintiffs filed a supplemental memorandum in support of Plaintiffs' Motion ("Plaintiffs' Supp. Memo I"), a supplemental declaration of Duane C. Pozza, and accompanying exhibits. On the same date, defendants filed a supplemental memorandum in opposition to Plaintiffs' Motion ("Defendants' Supp. Memo I") and a supplemental declaration of Wes Parker ("Parker II Decl.").

On March 21, 2007, the court directed the parties to file additional items. On March 27, 2007, plaintiffs filed a supplemental brief ("Plaintiffs' Supp. Memo II") and another declaration of Ellis Horowitz ("Horowitz II Decl."), and defendants filed a supplemental brief ("Defendants' Supp. Memo II"), a joint declaration of Justin Bunnell and Wes Parker ("Jt. Bunnell/Parker Decl."), and accompanying exhibits. On March 30, 2007, in response to the court's request that the parties submit statements as to whether certain declarants should attend and be available to testify at the hearing on this matter, the parties each submitted brief additional filings.

On April 3, 2007, the court held an evidentiary hearing at which declarants Ellis Horowitz, Wesley Parker, and Justin Bunnell testified, and the court heard the arguments of counsel.[FN4]The court took Plaintiffs' Motion under submission at the conclusion of the hearing.[FN5]

FN4. "RT" refers to the Reporter's Transcript of the April 3, 2007 hearing.

FN5. Subsequent to the hearing, plaintiffs and defendants submitted proposed findings regarding Plaintiffs' Motion for the court's consideration.

III. FACTS [FN6]

FN6. The court finds plaintiffs' expert Ellis Horowitz to be the most credible of the three technical declarants/witnesses (*i.e.,* Horowitz, Parker, and Bunnell). To the extent the testimony and statements of Parker and Bunnell conflict with those of Horowitz, the court accepts the testimony and statements of Horowitz. The court finds that defendant Parker's testimony is credible in part and gives it some weight. However, as discussed below, the court finds that portions of Parker's declarations and testimony are unsupported and not credible. The court finds that defendant Bunnell's testimony is largely unsupported and lacks credibility.

Defendants operate a website known as "TorrentSpy" which offers dottorrent files for download by users. (Horowitz I Decl. ¶ 5). The dot-torrent files offered on defendants' website do not contain actual copies of a full-length content item. (Horowitz I Decl. ¶ 6). Rather, they contain data used by a "BitTorrent client" on a user's computer to access the content in issue. (Horowitz I Decl. ¶ 6).

As certain aspects of the technical operation of the website are relevant to the resolution of this matter, the court first sets forth its understanding and findings, based upon the evidence presented, of the operation of the relevant aspects of: (i) websites in general; (ii) defendants' website prior to the filing of Plaintiffs' Motion; and (iii) defendants' website proximate or subsequent to the filing of Plaintiffs' Motion, as the record reflects that the method of operation changed during the pendency of this action.

A. Operation of Websites in General

In general, when a user clicks on a link to a page or a file on a website, the website's web server program receives from the user a request for the page or the file. (Horowitz I Decl. ¶ 11; Horowitz II Decl. ¶ 3). The request includes the IP address of the user's computer, and the name of the requested page or file, among other things.[FN7](Horowitz I Decl. ¶ 11; Horowitz II Decl. ¶ 3). Such information is copied into and stored in RAM. (Horowitz II Decl. ¶ 4). RAM is a form of temporary storage that every computer uses to process data. (Horowitz II Decl. ¶ 4). Every user request for a page or file is stored by the web server program in RAM in this fashion. (Horowitz II Decl. ¶ 4). The web server interprets and processes that data, while it is stored in RAM, in order to respond to user requests. (Horowitz II Decl. ¶ 4). The web server then satisfies the request by sending the requested file to the user. (Horowitz II Decl. ¶ 3). If the website's logging function is enabled, the web server copies the request into a log file, as well as the fact that the requested file was delivered. (Horowitz I Decl. ¶ 12; Horowitz II Decl. ¶ 3). If the logging function is not enabled, the request is not retained. (Horowitz I Decl. ¶ 12; Horowitz II Decl. ¶ 3). While logging such information can be useful to a website operator in many respects, and may be a usual practice of many website operators, such logging is not essential to the functionality of a website.[FN8] (Horowitz I Decl. ¶ 13; RT 41-42).

FN7. An IP address is a standard way of identifying a computer that is connected to the Internet. *United States v. Heckenkamp,* 482 F.3d 1142, 1144 (9th Cir.2007). With an IP address, a party could identify the Internet Service Provider ("ISP") providing internet service to the user of the computer corresponding to such IP address. *See In Re Charter Communications, Inc.,* 393 F.3d 771, 774 (8th Cir.2005). Only the ISP, however, could link the particular IP address to an individual subscriber.*Id.* As in the case of a subscriber to a particular telephone number, the identity of the subscriber to an IP address is not necessarily indicative of the person using the service at a given time.

FN8. As a general matter, logging data can be useful for maintenance and upkeep of a site, to identify and correct technical problems with the site, to examine the website traffic patterns and evaluate the performance of the site,

and to audit and evaluate data related to advertising on the site. (Horowitz I Decl. ¶ 3).

B. Operation of Defendants' Website Prior to the Filing of Plaintiffs' Motion

***3** Defendants' web server is located in the Netherlands. (Jt. Bunnell/Parker Decl. ¶ 6). A factor in the decision to use a server in the Netherlands was to attract business from those individuals who did not wish their identities to be known, as defendants believe the Netherlands to have stricter privacy laws governing such information. (RT 122-23). Defendants use the web server Microsoft Internet Information Services (IIS) 6.0 to operate their website. (Horowitz I Decl. ¶ 9 Horowitz II Decl. ¶ 2; Jt. Bunnell/Parker Decl. ¶ 5). The IIS web server program contains logging functionality-meaning that it has the capacity, if the logging function is not disabled, to retain the Server Log Data. (Horowitz I Decl. ¶ 10; Horowitz II Decl. ¶ 2; Jt. Bunnell/Parker Decl. ¶ 5).[FN9]

FN9. It is the default when IIS is installed, for logging to be on. (RT 144; Horowitz I Decl. ¶ 10).

Since its inception, defendants' website's logging function has not been enabled to retain the Server Log Data. (RT 99; Parker I Decl. ¶ 3). Such logging is not necessary to, or part of defendants' business operations. (Parker I Decl. ¶ 3). The decision not to enable the logging function was based, at least in part, on the belief that the failure to log such information would make the site more attractive to users who did not want their identities known for whatever reason.[FN10](RT 122). Although defendants did not affirmatively retain the Server Log Data through logging or other means, the data went through and was temporarily stored in the RAM of defendants' website server for approximately six hours. (RT 47-48, 49-50, 54-55, 76; Jt. Bunnell/Parker Decl. ¶ 5).

FN10. Defendants' privacy policy, which is posted on defendants' website, advises users, *interalia,* that the site "will not collect any personal information about you [the user] except when you [the user] specifically and knowingly provide such information."(Parker I Decl., Ex. B). The policy further reflects that the site reserves the right at any time to modify, alter or update the policy, but that if the site does so, it will post the changes so that users are always aware of what information the site collects, how the information is used, and under what circumstances the information is disclosed. (Parker I Decl., Ex. B). Defendants have presented no evidence as to whether or how the term "personal information" is defined in the privacy policy. As an IP address identifies a computer, rather than a specific user of a computer, it is not clear that IP addresses, let alone the other components of the Server Log Data in issue, are encompassed by the term "personal information" in defendants' website's privacy policy. *Seesupra* note 7.

C. Operation of Defendants' Website Proximate or Subsequent to the Filing of Plaintiffs' Motion

At some point proximate or subsequent to the filing of Plaintiffs' Motion, defendants altered the method through which the website operates. (RT 54). Defendants' server no longer receives all, or all facets of the Server Log Data, or at least not in the same way.[FN11](RT 47, 56, 111). Instead, defendants now contract with a third party entity, "Panther," which essentially serves as a middleman in the process. (RT 98). Panther has multiple servers around the world, including approximately 25 servers in the United States. (RT 48, 55). Requests from users who visit defendants' website for a dot-torrent file on defendants' server are now routed from a location not hosted on defendants' server to a Panther server geographically proximate to the users making the requests. (RT 53, 56-57). Panther's servers in the United States serve United States users. (RT 124). In cases involving an initial request for a specific dot-torrent file, defendants' website now receives such request from Panther. (RT 57). Defendants' website sends the requested dot-torrent file to Panther. (RT 57). Panther then sends the file to the original requesting party. (RT 57). However, once a particular dot-torrent file has been requested from defendants' website by Panther, Panther then caches it and can provide it in response to subsequent requests for the same dot-torrent file without the need to obtain it from defendants' server. (RT 51-53, 57-58). In the latter circumstance, defendants' server no longer receives data reflecting a request to download the particular dot-torrent file. (RT 58). Thus, Panther now receives the Server Log Data in issue in its RAM. (RT 98). Panther, however, does not retain logs of such information.[FN12](RT 75). Defendant Parker testified that defendants switched to Panther because it allows for significantly faster processing and delivery of content. (RT 102-03). Defendants deny that the decision to contract with Panther was motivated by a desire to avoid being in possession of Server Log Data or to bypass a possible court order. (RT 50, 103, 123).[FN13]

FN11. Prior to the filing of Plaintiffs' Motion, defendants' website provided links to third-party sites that have torrent files on their sites, as well as links to torrent files on the cache of defendants' website. (RT 111). Once defendants made the recent change in their method of operation, defendants' website no longer does such caching. (RT 111). Instead, a third party under contract to defendants performs that function. (RT 111). However, when a user runs a search on defendants' website, every search is a request on defendants' server. (RT 126). Similarly, when a user gets a list of results back, clicks one of those links, and gets taken to a detailed dot-torrent page hosted by defendants' server, all of those pages-on which the names of dot-torrent files are identified-are hosted on defendants' server. (RT 127).

FN12. Defendant Parker testified that he was advised by a Panther representative that Panther does not have the capacity for full-server logging on all of its servers. (RT 75). Although plaintiffs argue that Panther can selectively log certain data, there is no evidence in the record as to whether Panther specifically has the capacity to log the

Server Log Data in issue. (RT 177).

FN13. In light of the change in the method of operation, and the timing thereof, as well as the other evidence in the record, the court finds that defendants have the ability to manipulate at will how the Server Log Data is routed. Indeed, defendants represent that they could disengage and resume the functions currently performed by Panther if directed to log the Server Log Data in issue. (RT 72, 103-04).

D. Plaintiffs' Preservation Request

***4** On May 15, 2006, defendants sent a notice to plaintiffs' counsel formally reminding counsel and plaintiffs of their obligation to preserve all potentially discoverable evidence in their possession, custody or control related to the litigation, including all logs for the TorrentSpy website, and records of all communications between defendants and users of the website, including instant-messaging and other chat logs. (Pozza I Decl., Ex. H). This notice did not specifically request that defendants preserve Server Log Data temporarily stored only in RAM. Plaintiffs do not point to any other preservation request which specifically addresses data temporarily stored only in RAM. The court further notes that prior to the filing of Plaintiffs' Motion, the docket does not reflect that plaintiffs sought a preservation order.

IV. DISCUSSION

A. The Server Log Data in Issue Is Relevant

Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. F .R. Civ. P. 26(b)(1). Plaintiffs argue that the Server Log Data is relevant to numerous claims and defenses, including whether defendants' users have directly infringed plaintiffs' copyrighted works, and to what extent defendants' website is used for purposes of copyright infringement. (Plaintiffs' Motion at 1, 15-20). The court agrees. This case is predicated on theories of vicarious infringement, contributory infringement, and inducement. (Complaint ¶¶ 34-36). Primary infringement is a necessary predicate to such claims. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 2007 WL 1428632, *15 (9th Cir. May 16, 2007) (citing *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n. 2) (9th Cir.2001)). Defendants contest primary infringement. (Answer ¶ 33). Indeed, defendant Parker's testimony suggests his view that without logs, a case cannot be made against a website alleged to have engaged in secondary/contributory infringement because such logs are "essential" to finding direct infringers. (RT 129-30). There can be no serious dispute that the Server Log Data in issue is extremely relevant and may be key to the instant action.[FN14]

FN14. Defendants contend that plaintiffs' request for Server Log Data is overbroad because the vast majority of the website's users are located overseas such that their conduct cannot constitute copyright infringement. (RT 115-20, 125-26). The court rejects this contention. First, defendants' evidence regarding the volume of overseas traffic lacks foundation and is speculative at best. Second, even if defendants are correct regarding the asserted volume of overseas traffic, the court still finds such data to be relevant or reasonably calculated to lead to the discovery of relevant admissible evidence. Having said that, if (1) it is technically feasible; (2) defendants could reliably demonstrate that (i) Panther's United States servers process Server Log Data for users in the United States; and (ii) measures could be taken to protect against manipulation of the routing to alter the representative nature of such data; and (3) defendants choose to meet their obligations under this order by directing Panther to retain and provide defendants with the Server Log Data for dissemination to plaintiffs, the court would entertain a request to limit the required preservation and production to Server Log Data that is processed through the RAM of Panther's United States servers pursuant to its contract with defendants. Alternatively, if a reliable and verifiable means exists to identify the country from which requests to defendants' website for dot-torrent files originated, the court would entertain a request to limit the required preservation and production to Server Log Data originating from users of defendants' website in the United States. The court does not view the data provided on the optional registration surveys referenced by defendant Parker during his testimony as a reliable and verifiable means to identify the country from which user requests originate. (RT 126).

B. The Server Log Data in Issue Is Electronically Stored Information

Rule 34(a) of the Federal Rules of Civil Procedure provides for the discovery of documents or electronically stored information-including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. F.R. Civ. P. 34(a)."Rule 34(a) applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined."Advisory Comm. Notes to the 2006 Amendment of Rule 34. The Advisory Committee Notes further indicate that Rule 34(a)(1)"is expansive and includes any type of information that is stored electronically," and that it "is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and development."*Id.*

***5** Defendants argue that the Server Log Data does not constitute electronically stored information under F.R. Civ. P. 34(a) because the data has never been electronically stored on their website or in any medium from which the data can be retrieved or examined, or fixed in any tangible form, such as a hard drive. (Defendants' Supp. Memo I at 1; Parker II Decl. ¶ 2). Plaintiffs assert that the Server Log Data is electronically stored information because such data is copied to the RAM while user requests are processed. (Plaintiffs' Supp. Memo II at 2; Horowitz II Decl. ¶ 4).

Although the parties point to no cases in which a court has assessed whether data present only in RAM constitutes electronically stored information under Rule 34, the Ninth Circuit has addressed whether data in RAM is electronically stored information in another context. In *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir.1993), the Ninth Circuit determined in the context of the Copyright Act, that software copied into RAM was "fixed" in a tangible medium and was sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.[FN15]It defined RAM as "a computer component in which data and computer programs can be temporarily recorded." *Id.* at 519 (citing *Apple Computer, Inc. v. Formula International, Inc.*, 594 F.Supp. 617, 622 (C.D.Cal.1984) (describing the copying of programs into RAM as a "temporary fixation")). RAM has elsewhere been described as providing "temporary storage." *See* *Adobe Systems Inc. v. Macromedia, Inc.*, 201 F.Supp.2d 309, 318 (D.Del.2002) (characterizing RAM as "temporary storage"); *seealso* *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1243 n. 3 (3d Cir.1983) ("RAM ... is a chip on which volatile internal memory is stored which is erased when the computer's power is turned off.").

> FN15. The Ninth Circuit effectively reaffirmed the continuing viability of *MAI* in it recent opinion *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 2007 WL 1428632 (9th Cir. May 16, 2007). In that case, the court stated: "A photographic image is a work that is " 'fixed" in a tangible medium of expression' for purposes of the Copyright Act, when embodied (i.e., stored) in a computer's server (or hard disk, or other storage device). The image stored in the computer is the 'copy' of the work for purposes of copyright law. *See* *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-18 (9th Cir.1993) (a computer makes a 'copy' of a software program when it transfers the program from a third party's computer (or other storage device) into its own memory, because the copy of the program recorded in the computer is 'fixed' in a manner that is 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." ' *Perfect 10, Inc.*, 487 F.3d 701, 2007 WL 1428632, at *6.

In light of the Ninth Circuit's decision in *MAI,* and the similarity between the definitions of electronically stored information in the Advisory Committee Notes to Rule 34 and the Copyright Act, the latter of which was in issue in *MAI,* this court concludes that data in RAM constitutes electronically stored information under Rule 34. Based on the evidence in the record, the court finds that the Server Log Data in this case is transmitted through and temporarily stored in RAM while the requests of defendants' website users for dot-torrent files are processed. Consequently, such data is electronically stored information under Rule 34.

C. The Server Log Data in Issue Is within the Possession, Custody or Control of Defendants

Rule 34(a) is limited in its scope to documents and electronically stored information which are in the possession, custody or control of the party upon whom the request is served. F.R. Civ. P. 34(a); *Rockwell Int'l Corp. v. H. Wolfe Iron & Metal Co.*, 576 F.Supp. 511, 512 (W.D.Pa.1983).

***6** Prior to the filing of Plaintiffs' Motion, the Server Log Data was received, at least in large part, in defendants' website's RAM, and therefore was clearly within defendants' possession, custody and control. As the Server Log Data is now directed to Panther's RAM as opposed to the RAM on defendants' website, the court must also consider whether the Server Log Data routed to Panther is in defendants' possession, custody or control.

Federal courts have consistently held that documents are deemed to be within a party's possession, custody or control for purposes of Rule 34 if the party has actual possession, custody or control, or has the legal right to obtain the documents on demand. *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir.1995); *seealso* *United States v. International Union of Petroleum and Industrial, Workers, AFL-CIO,* 870 F.2d 1450, 1452 (9th Cir.1989) ("Control is defined as the legal right to obtain documents upon demand."). The record reflects that defendants have the ability to manipulate at will how the Server Log Data is routed. Consequently, the court concludes that even though the Server Log Data is now routed to Panther and is temporarily stored in Panther's RAM, the data remains in defendants' possession, custody or control.

D. Requiring the Preservation and Production of the Server Log Data Is Not Tantamount to Requiring the Creation of New Data

Rule 34 only requires a party to produce documents that are already in existence. *Alexander v. FBI,* 194 F.R.D. 305, 310 (D.D.C.2000). Accordingly, "a party cannot be compelled to create, or cause to be created, new documents solely for their production." *Paramount Pictures Corp. v. Replay TV ("Replay TV"),* 2002 WL 32151632, *2 (C.D.Cal.2002) (citing *Alexander,* 194 F.R.D. at 310).

Defendants argue that because their website has never recorded or stored Server Log Data since the commencement of the website's operations, requiring defendants to retain such data would be tantamount to requiring them to create a record of the Server Log Data for its production. Plaintiffs contend that the Server Log Data already exists because such data is generated by the website users, received by a web server operated by, or under contract to defendants, and utilized to respond to user requests. As suggested by the court's analysis above, the court concludes that the Server Log Data in issue exists and, at least until recently, was temporarily stored in defendants' RAM.

As noted above, because the Server Log Data is temporarily stored in Panther's RAM, and is in the possession, custody or control of defendants, defendants would not be required to create new information for its production. This case is thus

distinguishable from *Replay TV*, 2002 WL 32151632 (C.D.Cal.2002) and *Alexander*, 194 F.R.D. 305 (D.D.C.2000) on which defendants heavily rely. In both of those cases, the courts found that the information sought by plaintiffs was never in existence. *See Replay TV*, 2002 WL 32151632, *2 (C.D.Cal.2002) (denying production of customer data because such information "is not now and has never been in existence"); *Alexander v. FBI*, 194 F.R.D. 305, 310 (D.D.C.2000) (denying production of certain list of names because there was no evidence that list existed and that the responding party was in possession of such list). In the instant case, because the Server Log Data already exists, is temporarily stored in RAM, and is controlled by defendants, an order requiring defendants to preserve and produce such data is not tantamount to ordering the creation of new data.

E. An Order Requiring the Preservation of Server Log Data Is Appropriate

***7** Plaintiffs' Motion requests that the court issue an order requiring defendants to preserve the Server Log Data. Plaintiffs contend, *interalia,* that defendants are and have been obligated to preserve the Server Log Data, and that activating a logging function to preserve and store the server log data would impose no undue burden or cost on defendants. Defendants object to plaintiffs' request for a preservation order on the grounds that the Server Log Data is not subject to any preservation obligation and that requiring such preservation would be unduly burdensome.

In determining whether to issue a preservation order, courts undertake to balance at least three factors: (1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in the absence of an order directing preservation; (2) any irreparable harm likely to result to the party seeking the preservation of the evidence absent an order directing preservation; and (3) the capability of the party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation. *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 432-33 (W.D.Pa.2004).

As defendants do not currently retain and affirmatively object to retention of the Server Log Data, and in light of the key relevance of such data in this action, the first two factors clearly weigh in favor of requiring preservation of the Server Log Data.

The third factor requires more analysis. The parties offer drastically different views regarding the degree to which defendants may be burdened if they are required to preserve the Server Log Data. As the "burden" issues relative to preservation significantly overlap with the "burden" issues relative to production, the court will address such issues together.

First, the court considers the potential burden attendant to employing a technical mechanism through which retention of the Server Log Data in RAM may be enabled. Plaintiffs contend that employing such a technical mechanism would be a trivial matter involving little more than a setting change on the web server program. (Horowitz I. Decl. ¶ 15). Defendants concede that the activation of a logging function to enable the retention of Server Log Data in RAM, in and of itself, would not be difficult. (Jt. Bunnell/Parker Decl. ¶ 7). Consequently, the court finds that it would not be an undue burden on defendants to employ a technical mechanism through which retention of Server Log Data in RAM is enabled.[FN16]

> FN16. The record also reflects that a programmatic method (which is distinct from enabling the logging function) could be employed to retain the Server Log Data from http headers while the data is in RAM. (RT 78, 81). Employing such a technique would require the writing of a script to collect the Server Log Data which would take several hours. (RT 78, 81). The court also find that the use of the programmatic method would not impose an undue burden on defendants.

Second, the court considers the potential burden attendant to actually retaining (*i.e.,* recording and storing) and producing the Server Log Data. Defendants contend that the burdens attendant to recording, storing and producing the Server Log Data would be technically, financially, and legally prohibitive. Plaintiffs disagree and argue that most of defendants' contentions are based on an incorrect premise and a vastly overbroad assumption regarding the scope and volume of data in issue.

(i) Volume of Data/Resulting Costs/Impact on Website Functionality

***8** Defendants represent that the Server Log Data would accumulate 30-40 gigabytes (30,000 to 40,000 megabytes) a day-a volume which defendants' current server does not have the capacity to record, store or copy, and the retention of which would negatively affect the functionality of their website, and require a costly re-design of their system and the installation of new equipment.[FN17](Jt. Bunnell/Parker Decl. ¶¶ 6, 8). Defendants further argue that the costs of producing such material would be prohibitive.[FN18]However, during the hearing in this matter, it became evident that defendants' representation regarding the volume of Server Log Data was significantly overstated. Rather than estimating the volume of incoming Server Log Data only, defendants estimated the volume of *all* requests for data.[FN19](RT 60-62). On cross-examination, defendant Parker conceded that collecting and recording only the subset of Server Log Data would "most likely" result in a volume of data far less than 40 gigabytes (40,000 megabytes) a day. (RT 82). Plaintiffs' expert in fact testified that the Server Log Data would likely have a volume of one-hundredth of what defendant Parker had originally suggested (*i.e.,* 300 to 400 megabytes).[FN20] (RT 134). Defendant Parker testified that he had not considered data storage issues if the volume was significantly smaller, *i.e.,* if the Server Log Data in issue had a volume of only one gigabyte (1000 megabytes) a

day.[FN21](RT 82-83). He did concede, however, that if the logging was limited to only the Server Log Data (as opposed to *all* incoming data), he would not have the same concerns about, *interalia,* computer processing unit usage.[FN22](RT 86).

FN17. Based on the (incorrect) assumption that the data to be preserved would have a volume of 30 to 40 gigabytes a day, defendants estimate that they would either need to redevelop their existing server at an estimated cost of $10,000 and an expenditure of two weeks of time, or terminate their existing arrangement and set up a new higher capacity server sytem at an estimated cost of $50,000. (Defendants' Supp. Memo II at 5; Jt. Bunnell/Parker Decl. ¶¶ 6, 8).

FN18. Defendants contend that since they are not physically in the Netherlands where their server is located, saving the Server Log Data would require a File Transfer Protocol ("FTP") download of the files from the server. (Jt. Bunnell/Parker Decl. ¶ 6). Based again on the (incorrect) assumption that the volume in issue is 30 to 40 gigabytes a day, defendants represent that it would be impossible to download this volume in a single download day. (Jt. Bunnell/Parker Decl. ¶ 6). Defendants argue that even if this volume of data could be burned onto a DVD, approximately 10 DVDs would need to be burned on a daily basis, and then shipped overseas, requiring an unreasonable amount of human labor time spent processing and burning the data. (Defendants' Supp. Memo II at 3; Jt. Bunnell/Parker Decl. ¶ 6).

FN19. Defendant Parker testified that he based his estimate on the volume of logging "everything"-"every image, any kind of thing that loads up to the user"-because he did not believe that the logging function could be selectively enabled to retain just the Server Log Data. (RT 60-62). The court does not accept defendant Parker's testimony regarding the inability to selectively enable logs to retain solely the Server Log Data in issue. Indeed, defendant Parker ultimately conceded, after reviewing an exhibit offered by plaintiffs, that the software used by defendants' website could create server logs for limited amounts of data and could save it in a particular folder. (RT 78). The court concludes that defendant Parker either did not know that the logs could be selectively enabled to collect the Server Log Data only or that he intentionally misrepresented the volume of data in issue. The former suggests a lack of knowledge and expertise which significantly undercuts his testimony. The latter suggests a lack of candor which likewise significantly undercuts his testimony. As the incorrect assumption that logs could not be selectively enabled serves as the predicate for virtually all of defendants' testimony and declarations regarding the alleged burden that would be imposed upon defendants if they were required to preserve and produce just the Server Log Data, such testimony and declarations are completely undercut and not viewed by this court as credible.

FN20. Plaintiffs contend that even if the data generated a few gigabytes of storage space per day, the data could be backed up on a DVD, which can store up to four gigabytes of data and would take around five to ten minutes. (Horowitz Decl. ¶ 18). Plaintiffs further assert that storing the data would not be costly because a DVD can be purchased for under a dollar. (Horowitz Decl. ¶ 18).

FN21. Defendant Parker also failed to consider that the volume of even just the Server Log Data would be further significantly reduced if compressed, or if collected in binary (rather than text) format. (RT 83-84, 135-36).

FN22. Defendant Parker similarly indicated that he would not have the same concerns if the programmatic method was limited to retention of only the Server Log Data (as opposed to all incoming data). (RT 86).

Based upon the evidence regarding the estimated volume of data resulting from the logging of solely the Server Log Data in issue (as opposed to all data) and the other evidence presented, the court finds that defendants would not be unduly burdened as a consequence of the volume of Server Log Data if required to preserve and produce such data.

(ii) Privacy/First Amendment/Federal Statutory Issues

Defendants also raise issues concerning the privacy of their website users based upon defendants' privacy policy, the First Amendment and multiple federal statutes. (Defendants' Supp. Memo II at 8-15). Although the court discusses each such issue below, the court does not find defendants' arguments to be persuasive, particularly in light of the fact that this order directs defendants to mask users' IP addresses before the Server Log Data is produced.[FN23] The court finds that defendants' asserted interest in maintaining the privacy of the users of their website can be adequately protected by the protective order already entered in this action and the masking of the users' IP addresses. *See Farber,* 234 F.R.D. at 191.

FN23. Although defendants suggest that the actual IP addresses could be retrieved from masked/encrypted IP addresses through "brute force," the court has protected against that by prohibiting plaintiffs from taking any measures to unmask or decrypt the masked/encrypted IP addresses.

(a) Privacy Policy

Defendants contend that Plaintiffs' Motion should be denied because plaintiffs' privacy policy precludes them from preserving and producing "personal information" about their website's users. The court rejects this contention.

***9** First, defendants cannot insulate themselves from complying with their legal obligations to preserve and produce relevant information within their possession, custody or control and responsive to proper discovery requests, by reliance on a privacy policy-the terms of which are entirely within defendants' control.

Second, even if a litigant's privacy policy could have such an impact, it is not clear to the court that defendants' current privacy policy actually prohibits the retention and production of the Server Log Data. *Seesupra* note 10. Moreover, the record

reflects that despite this policy, defendants, unbeknownst to their users, do disclose IP addresses and search queries to third parties, albeit without disclosure of clicks on dot-torrent download links. (RT 90-97).

Third, to the extent defendants' privacy policy may prohibit the disclosure of IP addresses, compliance with this order does not violate such policy because IP addresses are to be masked.

Finally, even if the privacy policy currently prohibits the retention and disclosure of the Server Log Data, the policy itself advises users that such policy may be modified at any time. As this order does not contemplate the historical retention and production of data from users who have arguably relied on the existing policy, and as nothing in this order prevents defendants from modifying their privacy policy so that it accurately reflects defendants' prospective retention and production obligations pursuant to this order, defendants themselves retain the ability to ensure that they do not violate their own privacy policy.

(b) First Amendment

Defendants also argue that Plaintiffs' Motion should be denied because the First Amendment protects anonymous speech on the internet.

The First Amendment protects anonymous speech, at least in circumstances involving core First Amendment expression such as political speech. *See McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (discussing central role of anonymous speech in free marketplace of ideas). At least one court, in the context of a third party subpoena, has also concluded that the anonymous use of file sharing/copying networks to download and disseminate copyrighted material without permission qualifies for minimal First Amendment protection subject to other considerations. *In re Verizon Internet Services, Inc.*, 257 F.Supp.2d 244, 260 (D.D.C.), *rev'd on other grounds,* 351 F.3d 1229 (D.D.C.2003).

This court assumes, without deciding that the users of defendants' website are entitled to limited First Amendment protection. However, even assuming such protection applies, the court finds that the preservation and disclosure of the Server Log Data does not encroach or substantially encroach upon such protection, particularly in light of the fact that such data does not identify the users of defendants' website and that the IP addresses of such users have been ordered to be masked.

(c) Stored Communications Act

***10** Defendants argue that Plaintiffs' Motion should be denied because the Stored Communications Act (18 U.S.C. §§ 2701-11) prohibits the disclosure of the Server Log Data. Title 18, United States Code, Section 2702, generally prohibits a person or entity providing an electronic communication service to the public from knowingly divulging the contents of a communication while in electronic storage. 18 U.S.C. § 2702(a). Specifically excepted from this prohibition are disclosures of the contents of communications (1) to an intended recipient of such communication or an agent thereof; or (2) with the lawful consent of an intended recipient of such communication.[FN24] 18 U.S.C. §§ 2702(b)(1), 2702(b)(3).

> FN24. As the cases upon which defendants rely involve third party subpoenas to electronic server providers who were not the intended recipients of the communications in issue, they are not applicable.

As defendants' website is the intended recipient of the Server Log Data, and defendants have the ability to consent to the disclosure thereof, this statutory provision does not provide a basis to withhold such data which is clearly within defendants' possession, custody and control.[FN25]

> FN25. As the good faith reliance on a court order (such as the instant order) provides a complete defense to any civil or criminal action predicated on a violation of the above-referenced non-disclosure provision, the court also rejects defendants' assertions of burden based on the potential of being sued for violating this provision. 18 U.S.C. § 2707(e).

(d) The Wiretap Act

Defendants argue that Plaintiffs' Motion should be denied because the Wiretap Act (18 U.S.C. §§ 2510-22) prohibits the disclosure of the Server Log Data.

Title 18, United States Code, Section 2511, generally prohibits the intentional interception of electronic communications during the transmission thereof and the disclosure of such intercepted communications. 18 U.S.C. §§ 2511(a), 2511(c), 2510(12).Title 18, United States Code, Section 2510(12) defines "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photoptical system that affects interstate or foreign commerce" except as expressly excluded therein. Specifically excepted from the prohibition against the interception and disclosure of electronic communications are: (1) the interception by a party to the communication; (2) the disclosure of the contents of such communication while in transmission to the intended recipient of such communication or an agent thereof; and (3) the disclosure of the contents of such communication while in transmission with the lawful consent of an intended recipient of such communication. 18 U.S.C. §§ 2511(2)(d), 2511(3)(a), 2511(3)(b)(ii).

First, the court concludes that this statute is not implicated because, as to electronic communications, it only prohibits interceptions during transmission (not while in electronic storage, *i.e.,* RAM), and the disclosure of electronic communications intercepted during transmission. *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878-79 (9th Cir.2002). This is true even though storage is a necessary incident to transmission. *Id.* at 879 n. 6.

Second, even if the Server Log Data were considered to be in transmission while in RAM, and therefore subject to this statute's prohibition against interception and disclosure, the statute would still not relieve defendants of their obligation to preserve and produce such data. As defendants' website is the intended recipient of the Server Log Data, and defendants can lawfully intercept and consent to the disclosure thereof, this statutory provision, even if applicable would not provide a basis to withhold such data which is clearly within defendants' possession, custody and control.[FN26]

FN26. As the good faith reliance on a court order (such as the instant order) provides a complete defense to any civil or criminal action predicated on a violation of the above-referenced non-disclosure provision, the court also rejects defendants' assertions of burden based on the potential of being sued for violating this provision. 18 U.S.C. § 2520(d)(1).

(e) The Pen Register Statute

***11** Defendants also argue that Plaintiffs' Motion should be denied based on the Pen Register Statute (18 U.S.C. §§ 3121-27).

Title 18, United States Code, Section 3121, generally prohibits the installation and use of pen registers and trap and trace devices except in the circumstances referenced therein. 18 U.S.C. § 3121(a). A pen register is essentially a device which captures outgoing telephone numbers or IP addresses.[FN27] A trap and trace device essentially captures incoming IP addresses or telephone numbers (such as a caller identification device).[FN28] Excepted from this prohibition are pen register and trap and trace devices used by providers of electronic communication services relating to the operation and maintenance of such service. 18 U.S.C. § 3121(b)(1).

FN27. More specifically, a pen register is a device or process which records dialing, routing, addressing or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, excluding the contents of any communication. 18 U.S.C. § 3127(3). Such term does not include (i) any device or process used by a provider of electronic communication service for billing, recording as an incident to billing, or providing communications services; or (ii) any device or process used by such provider for cost accounting or other like purposes in the ordinary course of its business. 18 U.S.C. § 3127(3).

FN28. More specifically, a "trap and trace device" is a device or process which captures the incoming electronic or other impulses which identify the originating number of an electronic communication, excluding the contents of any communication. 18 U.S.C. § 3127(4).

As the Server Log Data sought by plaintiffs encompasses incoming IP addresses, it arguably implicates the prohibition against the unauthorized use of trap and trace devices. However, as plaintiffs correctly note, the collection of incoming IP addresses by defendants is exempt from this prohibition pursuant to 18 U.S.C. § 3121(b)(1) because defendants already and necessarily capture such data in their RAM (or Panther's RAM) to operate the website.

(f) Impact on Good Will

Defendants also argue that they would lose business and good will of customers and advertisers as result of the stigma that would flow from any order directing them to preserve and produce the Server Log Data. (Jt. Bunnell/Parker Decl. ¶ 9; RT 152-55).

The testimony and declarations of defendants Parker and Bunnell regarding such loss of good will and business is largely speculative, conclusory and without foundation.[FN29]Nonetheless, in light of the discussion in *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 684 (N.D.Cal.2006), the court recognizes that the preservation and production of the Server Log Data may negatively impact the way in which defendants' website is perceived by its users and advertisers and result in a loss of business and good will. Notably, these concerns did not prevent the court in *Gonzales* from ordering a third party to disclose certain data to the United States government.

FN29. For example, although defendant Bunnell testified that the sites Grokster and Lokitorrent "were basically shut down" because they were "forced to turn over log information" (RT 153), on cross-examination, it became clear that he did not have any personal knowledge regarding such matters and that his testimony was, at most, based on things he had read or heard which might or might not be true. (RT 159-62). Similarly, defendant Bunnell provided a declaration and testified regarding his concern about suffering the same type of consequences as AOL, which defendants contend was sued because it published search queries and log-in information excluding IP addresses on the internet. (RT 153-54). However, it again became clear during cross-examination that defendant Bunnell's testimony was speculative and without foundation. Indeed, although a copy of a complaint against AOL was attached to and referenced in his declaration, Bunnell apparently did not even realize that the testimony he was providing about such lawsuit related to said complaint as he both denied having read it and then affirmed having read it. (RT 163-65). The court observes, based on its review of the copy of the complaint against AOL that is of record, that the data in issue in that case, unlike the Server Log Data in issue here, encompassed personal identifying user names, street addresses, dates of birth, phone numbers, credit card numbers, and social security numbers. (Jt. Bunnell/Parker Decl., Ex. C). The AOL case also does not appear to have involved disclosure pursuant to a court order as contemplated in the instant case. (Jt. Bunnell/Parker Decl., Ex. C).

In this case involving the preservation and disclosure by a party to another private civil litigant, the court finds that

preservation and production of the Server Log Data is appropriate in light of the conclusory and speculative nature of the evidence presented regarding the loss of good will and business, the key relevance and unique nature of the Server Log Data in this action, the lack of a reasonable alternative means to obtain such data, and the limitation imposed by the court regarding the masking of IP addresses.[FN30]

FN30. Defendants suggest that Digital Millennium Copyright Act ("DMCA") subpoenas are available to plaintiffs pursuant to 17 U.S.C. § 512(h), and provide a more convenient, less burdensome, and less expensive means of obtaining the Server Log Data. The court rejects defendants' assertion. The DMCA permits, under circumstances specified therein, subpoenas to be issued for "information sufficient to identify [an] alleged infringer."17 U.S.C. § 512(h)(1). Defendants have not satisfied the court that the Server Log Data (and all facets thereof) may permissibly be sought pursuant to such subpoenas, or that DMCA subpoenas are a viable alternative in this action. In any event, the court does not find that DMCA subpoenas would be "more convenient, less burdensome, or less expensive."

In light of fact that the Server Log Data is currently routed to Panther, the court has also considered whether a third party discovery request to Panther would be a viable alternative. The court concludes that while such data may well be obtainable from Panther, requiring plaintiffs to pursue that avenue would likely not be "more convenient, less burdensome, or less expensive" in light of the nature of the relationship between defendants and Panther, the nature of the information sought, and the other evidence presented in this matter.

(iii) International Issues

Defendants further assert that any changes to the existing web server would need to be in compliance with Netherlands law because defendants lease their server from an Internet Service Provider in Amsterdam, Netherlands and their server is located at the ISP's secure plant. (Defendants' Supp Memo II at 2; Jt. Bunnell/Parker Decl. ¶ 6). Defendants have offered evidence that defendants' contract with the entity from which it leases its Netherlands server is governed by Netherlands law. (Jt. Bunnell/Parker Decl., Ex. A). Defendants have also supplied the court with the Netherlands Personal Data Protection Act which is directed to "information relating to an identified or identifiable person."(Jt. Bunnell/Parker Decl., Ex B). The court is not persuaded that such concerns should relieve defendants of their obligation to preserve and produce the Server Log Data.

***12** First, as it now appears that the entity which has immediate possession of the Server Log Data has over 25 United States servers, defendants' expressed international concerns no longer appear valid. At a minimum, their expressed concerns carry less weight in light of their use of Panther's services and the fact that defendants retain the ability to manipulate the routing of the Server Log Data.

Second, even if such concerns remain, it is not clear that the Netherlands' Personal Data Protection Act applies to IP addresses, let alone to the other Server Log Data in issue, as an IP address identifies a computer, rather than a specific user of a computer. *Seesupra* note 7. A party relying on foreign law has the burden of showing that such law bars the discovery in issue. *United States v. Vetco*, 691 F.2d 1281, 1289 (9th Cir.1981). Defendants have not met this burden.

Third, even if the Netherlands' statute applies and is read to prohibit defendants' preservation or production of the Server Log Data, it is well settled that foreign blocking statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce (let alone preserve) evidence even though the act of production may violate that statute. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir.1992) (citation and internal quotations omitted). In considering whether to excuse noncompliance with discovery orders based on foreign statutory bars, as opposed to issuance of an order directing the preservation or production of evidence which is the issue here, courts are to balance the relevant factors in issue. *Id.* at 1474-75.These factors include the importance of the information requested in the litigation, the degree of specificity of the request, whether the information originated in the United States, the availability of alternative means of securing the information, the extent to which noncompliance would undermine important interests of the United States or compliance would undermine important interests of the state where the information is located, and the degree of hardship on the producing party and whether such hardship is self-imposed. *Richmark Corp.*, 959 F.2d at 1475-77).

The court has weighed such factors in assessing whether to direct defendants to preserve and produce the Server Log Data-to the extent evidence bearing upon such factors has been presented. The court concludes that these factors weigh in favor of requiring defendants to preserve and produce the Server Log Data. The court primarily relies upon the key relevance of the Server Log Data to this action, the specificity of the data sought, the lack of alternative means to acquire such information, and the fact that defendants are United States individuals and entities who affirmatively chose to locate their server in the Netherlands at least in part to take advantage of the perceived protections afforded by that country's information security law.

***13** In sum, defendants have failed to demonstrate that their expressed international concerns should relieve them of the obligation to preserve and produce the Server Log Data.

F. An Order Requiring the Production of Certain Server Log Data Is Appropriate

Defendants contend that they should not be ordered to produce the Server Log Data for the same reasons, discussed above,

that cause defendants to believe that a preservation order should not issue. Plaintiffs maintain that such data should be produced, at least in a form that masks the IP addresses.

On a motion to compel discovery, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or cost. F.R. Civ. P. 26(b)(2)(B). If such a showing is made, a court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of F.R. Civ. P. (b)(2)(C). A court may limit discovery of electronic materials under F.R. Civ. P. 26(b)(2)(C) if: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. F.R. Civ. P. 26(b)(2)(C).

Based on the discussion, analysis, and findings above, the court further finds: (1) defendants have failed to demonstrate that the Server Log Data is not reasonably accessible because of undue burden or cost; (2) plaintiffs have shown good cause to order discovery of such data; (3) the discovery sought is not unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, less burdensome, or less expensive; (4) plaintiffs have not otherwise had the opportunity to obtain the data sought; and (5) the burden and expense of the proposed discovery does not outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[FN31]

> FN31. The court emphasizes that its ruling should *not* be read to require litigants in all cases to preserve and produce electronically stored information that is temporarily stored only in RAM. The court's decision in this case to require the retention and production of data which otherwise would be temporarily stored only in RAM, is based in significant part on the nature of this case, the key and potentially dispositive nature of the Server Log Data which would otherwise be unavailable, and defendants' failure to provide what this court views as credible evidence of undue burden and cost.

G. Evidentiary Sanctions

Plaintiffs' Motion also requests evidentiary sanctions against defendants in light of defendants' alleged wilful failure to preserve, and intentional spoliation of, the Server Log Data. (Plaintiffs' Motion at 13-14).

Pursuant to F.R. Civ. P. 37(f), absent exceptional circumstances, a court may not impose sanctions under the discovery rules based on a party's failure to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. F.R. Civ. P. 37(a). A "good faith" operation may require a party to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. Advisory Comm. Notes to the 2006 Amendment to Rule 37.

***14** A litigant is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or the subject of a pending discovery request. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1455 (C.D.Cal.1984). Therefore, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y.2003). As a general rule, the litigation hold does not apply to inaccessible electronically stored information, such as back-tapes, which may continue to be recycled on the schedule set forth in the company's policy. *See id.*

As noted above, although this court now finds that defendants have an obligation to preserve the Server Log Data in issue that is temporarily stored only in RAM, in the absence of (1) prior precedent directly on point in the discovery context; (2) a specific request by defendants to preserve Server Log Data present solely in RAM; and (3) a violation of a preservation order, this court finds that defendants' failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required. Consequently, the court finds that evidentiary sanctions against defendants for spoliation of evidence are not appropriate.

H. Attorneys' Fees and Costs

Defendants request that the court require plaintiffs to pay reasonable expenses incurred in opposing Plaintiffs' Motion, including attorneys' fees, pursuant to F.R. Civ. P. 37(a)(4)(B). As Plaintiffs' Motion has largely been granted, the court finds that the award of such fees is not appropriate. To the extent Plaintiffs' Motion has been denied in part, the court finds that the making of such motion was substantially justified and that the award of expenses would be unjust.

V. CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED:

1. Defendants are directed to commence preservation of the Server Log Data in issue within seven (7) days of this order and to preserve the Server Log Data for the duration of this litigation or until further of this court or the assigned District Judge. As the record reflects that there are multiple methods by which defendants can preserve such data, the court does not by

this order mandate the particular method by which defendants are to preserve the Server Log Data.
2. Defendants shall initially produce the Server Log Data (with the exception noted below) by no later than two weeks from the date of this order. Defendants thereafter have a continuing obligation regularly (no less frequently than every two weeks) to update such production.[FN32]Although defendants are required to preserve the IP addresses of the computers used to request dot-torrent files, defendant are not, at least at this juncture, ordered to produce such IP addresses in an unmasked/unencrypted form. Instead, defendants shall mask, encrypt, or redact IP addresses through a hashing program or other means, provided, however, that if a given IP address appears more than once, such IP address is concealed in a manner which permits one to discern that the same IP address appears on multiple occasions.[FN33]Plaintiffs are prohibited from using "brute force" or any other means to pierce or reverse any such mask/encryption/redaction. The court does not by this order either mandate or prohibit notification to the users of defendants' website of the fact that the Server Log Data is being preserved and has been ordered produced with masked/encrypted/redacted IP addresses.[FN34]

FN32. Plaintiffs have represented that they are willing to accept a sample of Server Log Data of one hour a day, provided that the hour each day is selected to provide a representative picture of the usage of defendants' site. (RT 180-81). The court has not limited its order to sampling at this juncture because of concerns that one hour a day will not provide a representative sample of activity in light of defendants' expressed concerns regarding its notification and disclosure obligations vis-a-vis its users. However, the court encourages the parties to meet and confer regarding sampling, and, if appropriate, to prepare a stipulation accordingly modifying the scope of preservation and production required by this order. In the absence of such a stipulation, the instant order is without prejudice to a request by defendants to share or shift the costs of preservation and production.

FN33. For example, if, hypothetically, an IP address of "1234.5678.9101" which requested a dot-torrent file on day one at noon, was masked as "abcd.efgh.ijkl," and the same IP address requested a dot-torrent file on day two at noon, defendants' production should reflect that "abcd.efgh.ijkl" made the request on day two at noon as well as on day one at noon.

FN34. Having said that, absent further order of this court or the assigned District Judge, the Clerk is directed to file and maintain this order *underseal* for a period of seven (7) days. The court finds good cause to file such order *underseal* for at least the limited seven-day period in light of the nature of its contents and the fact that it may be based, at least in part on materials submitted *underseal* pursuant to a protective order. The parties shall have five (5) days from the date of this order to submit any objections to the public filing of this order or any portion thereof. Any such objections should state the legal reason therefor and be accompanied by a proposed redacted version of the order which, in the objecting parties' view, is appropriate for public filing. If no objections are timely received, and absent further order of this court or the assigned District Judge, the court will direct the Clerk to file this order in the public record at the expiration of the seven-day period.

***15** 3. Plaintiffs' request for evidentiary sanctions based upon plaintiffs' failure to date to preserve the Server Log Data is denied.
4. Defendants' request for attorneys' fees and costs pursuant to F.R. Civ. P. 37(a)(4)(B) is denied.
IT IS SO ORDERED.