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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SETH JACOBY,

4 Plaintiff,

5 v.

12 MC 65 Part 1

6 THE WEATHER UNDERGROUND INC.,

7 Defendant.

8 -----x

New York, N.Y.
9 April 10, 2012
10 2:00 p.m.

11 Before:

12 HON. BARBARA S. JONES,

13 District Judge

14 APPEARANCES

15 TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT, LLP
16 Attorneys for Plaintiff Seth Jacoby
17 BY: JOHN E. GREENE

18 HOOPER HATHAWAY PRICE BEUCHE & WALLACE
19 Attorneys for Defendant
20 BY: ANTHONY P. PATTI

21 FRIEDMAN, JAMES & BUCHSBAUM, LLP
22 Attorneys for Defendant
23 BY: JOHN PATON JAMES
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1 (In open court)

2 THE COURT: Good afternoon, please be seated.

3 THE CLERK: Seth Jacoby vs. The Weather Underground,
4 12 MC 65. Plaintiff, state your name for the record.

5 MR. GREENE: John E. Greene, for Movant, Seth Jacoby.

6 THE COURT: For the defendant?

7 MR. JAMES: John James, for Respondent The Weather
8 Underground. And I would like to introduce Anthony Patti, who
9 has been admitted pro hac vice. He's representing The Weather
10 Underground, in Michigan.

11 THE COURT: All right. You're both welcome, as are
12 you, Mr. Greene.

13 All right. Let me hear from the Movant.

14 MR. GREENE: Good afternoon, your Honor.

15 THE COURT: Good afternoon.

16 MR. GREENE: May it please the Court.

17 Seth Jacoby was deposed at length on videotape on
18 September 15, 2010 in an action that is pending in the Eastern
19 District of Michigan.

20 THE COURT: Could I just go right to the -- sort of
21 try to cut to the chase here.

22 MR. GREENE: Absolutely, your Honor.

23 THE COURT: We have our judge in Michigan who has
24 essentially said she's gonna permit a second deposition of Mr.
25 Jacoby. Why shouldn't I just honor that?

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1 MR. GREENE: Well, your Honor, as I pointed out in the
2 reply brief, the rights of Seth Jacoby were never really
3 discussed. The merits of anything pertaining to him, the fact
4 that he is no longer employed by First Look, or the fact that
5 his deposition was videotaped, was never really addressed in
6 that court. And it seemed that, in reading the transcript and
7 sort of especially when the judge in that court ruled on it, it
8 was more a matter of timing. I know that the defendants in
9 that action argued that it would be difficult for them to
10 defend a deposition here in New York and then prepare for a
11 trial which I believe was set to occur in the very next week.

12 Before the argument, the Judge had adjourned the trial
13 date and felt that, well, now, you have time, so that's not
14 really a concern for you, and that was no longer a concern of
15 those defendants. But the concern of my client, Mr. Seth
16 Jacoby, was never addressed, which is: I have already
17 submitted to this, I've done this at length, you have me on
18 videotape, so if there are any indications or anything a jury
19 needs to see as far as demeanor, or any assertions or anything
20 that can be waived in live testimony, you have it on video.

21 Interestingly enough, reviewing the transcript this
22 morning, I see that even the person conducting the deposition,
23 Mr. Enrico Shaffer, said that at one point can you tell the
24 jury what this actually means. So it seems that that
25 deposition was videotaped and should be sufficient for a matter

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1 that my client's no longer involved in. He doesn't have a dog
2 in that fight, pardon the pun. So he no longer wants to be
3 involved in that. He has his own business and trying to get
4 that off the ground. And to now be dragged back into this
5 litigation seems unfair and unjust, your Honor. And this is a
6 Court that still has the right to decide whether to enforce or
7 to quash the subpoena under the federal rules. And especially
8 considering my clients's rights, and the burden on my client to
9 once again submit to what possibly may be a full day, or at
10 least how it was communicated to me earlier in the opposition
11 papers, it seems like the respondents are looking to go into
12 something that could be, conceivably, beyond a full day. And
13 actually, your Honor, if you look back at the Notice of
14 Deposition that the Respondent sent to the parties in the
15 underlying action, it may be sort of form language, but it says
16 the deposition will go on day to day until complete.

17 So there is a worry or concern that, now, my client is
18 once again being dragged back into this when he has his own
19 business and his own priorities to deal with for what
20 conceivably could be an entire day, for what conceivably could
21 go into issues which are unrelated to the underlying action.
22 He has now had to retain counsel, obviously, and pay for that
23 to come in and try to quash this. So it just seems very unfair
24 that my client is being brought back into an action that he
25 just has nothing to do with anymore, especially since he is

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1 trying to start and build his own business.

2 We've sort of tentatively scheduled, if the Court
3 denies the motion, a deposition date. And, funny, my client
4 says to me yesterday, well, I have something really important
5 to do that day, so if we have to go forward, can we start at
6 5:00 in the morning -- which, your Honor, I'm not starting a
7 deposition at 5:00 in the morning, but obviously we'd work as
8 early as possible to get him out as early as possible. But the
9 concern still remains with Mr. Jacoby that he has his own
10 business to tend to, he has his own priorities to tend to. And
11 it would be, I guess, a different matter, conceivably wouldn't
12 be here if Mr. Jacoby hadn't already been deposed, if that
13 deposition were not already on videotape, if that deposition
14 weren't already used in support of the respondent's summary
15 judgment motion.

16 So, clearly, they felt that they had sufficient
17 information to go forward and make their case with this
18 testimony that they already have. The federal rules
19 contemplate using videotape deposition testimony where a
20 witness is beyond the subpoena power of the Court and cannot
21 attend. So it seems that in this case it's ideal that the
22 initial deposition was videotaped and that that could be used,
23 instead of burdening my client to, once again, come in and
24 discuss matters which, quite frankly, can't possibly be fresh
25 in his mind, having no longer working there. I'm not going to

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1 be able to prepare him the way I imagine the underlying
2 defendants did for his initial deposition. It seems a lot
3 fairer and a lot more practical for the videotape deposition to
4 be used. And I think that the federal rules allow this Court
5 to go ahead and quash the subpoena despite the rulings of the
6 Judge in the Eastern District of Michigan, especially when my
7 client did not have a chance to go and advocate his rights in
8 fairness to him being forced to submit to yet another
9 deposition.

10 THE COURT: All right, thank you.

11 You're correct, I certainly have the right to quash
12 the deposition. But I think it's obvious that I know less
13 about the case than the judge in Michigan.

14 MR. GREENE: Yes, your Honor.

15 THE COURT: All right.

16 Mr. Patti.

17 MR. PATTI: Yes, your Honor.

18 THE COURT: What's new, and why do you need more
19 information, and how is it different?

20 MR. PATTI: Well, I started to explain this in the
21 brief, and I'll flesh this out a little bit further.

22 But the case is very much a different case than it was
23 the day that he was first deposed. There is a terabyte of
24 information that was supplied -- back up for a second.

25 This case started in the winter of 2009. We ended up

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1 in front of the US Magistrate Judge several times just to get
2 initial disclosures out of the defendants. And we ended up
3 having discovery battles that took us right up to the time of
4 Mr. Jacoby's first deposition to get them to finally hand over
5 information. And when they did, what they dumped on us was a
6 terabyte drive. And that, literally, means a trillion bytes of
7 information. And I --

8 THE COURT: Now, who is they?

9 MR. PATTI: They would be the defendants and, at that
10 time, of course, Mr. Jacoby's employer. Not just his employer,
11 but he was the president of one of those defendants, First
12 Look.

13 I heard counsel say today, well, my client has nothing
14 do with this. But his client was in fact the -- Mr. Jacoby
15 was -- the president of the company which held, you know,
16 16 million -- 16 million typosquatted domains in his portfolio.
17 And at any given time, hundreds of thousands of them. So
18 during that -- so we get this terabyte drive that was dumped on
19 us. Just to give you some sense of the volume --

20 THE COURT: Well, I'm persuaded just hearing terabyte.
21 You don't have to go any farther than that. But what is it you
22 want to ask him now that is new?

23 MR. PATTI: Well, if I tell you what's on that
24 terabyte, perhaps, because that gets to the heart of it.

25 In that terabyte, among other things, they finally

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1 handed over their entire domain portfolio which we didn't have
2 access to and took a special program and analysts for months to
3 weed their way through. So, virtually, their entire domain
4 portfolio, which is at issue in this case, has been inquired
5 about. At the time that we deposed him the first time, all of
6 the information we had was what my client, The Weather
7 Underground, was able to find on its own. And at that time, we
8 had found roughly 50 domains of ours that we -- typosquatted
9 domains of ours that we thought were at issue. When we went
10 through the terabytes, what we discovered is there is 273 of
11 them. So it's pretty hard to parse out and say this little
12 piece is new. The whole case is different. The case got
13 amended as a result of that.

14 And Judge Battini, in Detroit, is quite familiar with
15 the first deposition. As brother counsel pointed out in his
16 papers, that deposition was used in response to summary
17 judgment. So she knows what was in that deposition, she's
18 looked at that deposition and agrees with us that this really
19 doesn't cut it for, given the whole new posture of this case,
20 to put this witness on effectively for trial. Nor would it
21 make sense to say let's take a few snippets from the first dep,
22 a few snippets from the second dep. What we now have is the
23 full, complete picture. We have deposed his subordinates. We
24 had a lot of things to say that he can be cross-examined with.
25 And she has said: This is how I want this evidence to come in

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1 in my trial; even though I know about the first deposition, I
2 agree with you we need a different vehicle for this key
3 witness, this testimony, to enter into the trial record; this
4 is the most efficient way to do it; this is the way that makes
5 sense.

6 THE COURT: What do you --I heard from Movant that you
7 have a date for a deposition tentatively set aside.

8 How long do you think you need?

9 MR. PATTI: The judge in Detroit put no limit. And I
10 can't say for sure how long we need. But I can say this, we're
11 not incentivized to spend days on end in New York. I love New
12 York, I'm from Long Island, but we all have homes and families
13 to get back to.

14 My concern, because I read it in the reply brief about
15 setting limits, which Judge Battini did not do, is that once
16 limits are set, it will encourage gamesmanship, quite frankly,
17 and lots of objections and ways to eat up the time.

18 THE COURT: I'm sorry, what is the tentative date that
19 you have agreed to?

20 MR. PATTI: This Thursday. We have two attorneys on
21 standby waiting --

22 THE COURT: Ready to go?

23 MR. PATTI: Yes.

24 THE COURT: Okay.

25 MR. PATTI: And so my concern -- and I -- and again,

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1 the judge in Detroit put no limit on it -- is that once a limit
2 gets put on it, either as to content or as to time, that just
3 encourages lots of objections and lots of things to eat up time
4 so that people can say, ah-hah, well, gotcha. But the reality
5 is, since this is going to go in front of a jury, we don't have
6 incentive to subject a jury to 16 hours of Mr. Seth Jacoby.

7 We're now at a point where the record is complete. We
8 can zero in. And we don't want restrictions. But, on the
9 other hand, there is really not any danger that we're going to
10 abuse this witness because that would be foolish, even from a
11 selfish standpoint, in terms of what the jury is going to hear.

12 THE COURT: All right.

13 Any reply?

14 MR. GREENE: Yes, your Honor.

15 THE COURT: Mr. Greene.

16 MR. GREENE: Very briefly. A couple of things that I
17 think are sort of important, and I think go back to my point of
18 about what occurred in the Eastern District.

19 As counsel pointed out, there was no limit set. And
20 if you read the transcript, it is because there was no limit
21 asked.

22 Again, those defendants there were self interested,
23 obviously. And their counsel represented them, not my client.
24 These are issues or concerns that my client has that were never
25 addressed by the judge in the Eastern District.

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1 A couple of other things to sort of keep in mind.

2 THE COURT: Uh-huh.

3 MR. GREENE: You know, Mr. Jacoby actually had a
4 superior, the CEO, who we believe is still employed by First
5 Look and has the same amount of knowledge. So if there is any
6 cross-examination or any additional information that needed to
7 come out during trial, it would probably, I imagine, come out
8 from that witness.

9 The new information is, as counsel pointed out, is a
10 domain portfolio, which is simply different spellings, I
11 imagine, of different domains. But it doesn't undercut the
12 practice; the practice of how this was vetted; the practice of
13 how this was obtained; the practice of consulting legal
14 counsel; the practices behind creating and finding these domain
15 names and quote, unquote, cybersquatting. That was all asked
16 and answered at length during the initial deposition.

17 So the new information doesn't substantively change
18 what Mr. Jacoby has already testified to, which was the how,
19 the why, the intent, or any other thing that goes towards the
20 cybersquatting law which, again, as much as there has been an
21 amended complaint, at the end of the day -- and I have a copy
22 of the transcript, your Honor, I didn't provide it in the
23 motion papers because it's protected by a protective order.

24 But the end of the day the questions that were asked
25 then wouldn't fundamentally be different by the questions that

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1 would be asked now, based on the complaint and the causes of
2 action which are still remaining in that case. It would
3 substantively be, in my conversations with counsel for The
4 Weather Underground, the same types of questions. Of course,
5 now, there are more questions which are coming up, including
6 what his new life is now. Which I can't see how that would
7 possibly be relevant to the underlying action.

8 And so, your Honor, to the extent that the deposition
9 does go forward, and the Court does not quash the subpoena, I'm
10 going to urge at least some modification to both put a time
11 limit on this and to also sort of restrict what can be asked or
12 inquired into. Because if this is supposed to be a trial
13 back-and-forth, if this were a trial, it would be a Court or a
14 judge who could rule on relevance, et cetera, and we won't have
15 that here.

16 THE COURT: Well, what restrictions do you want. I
17 think you alluded to not wanting any questions about his new
18 business.

19 MR. GREENE: That's correct, your Honor.

20 In the opposition papers, in a footnote, counsel
21 raises the fact that they intend to, or suggested that they
22 can, sort of go into his new business. I don't see how his new
23 business would be, in any way, relevant to the cybersquatting
24 that those defendants allegedly either did or didn't do years
25 ago. Time restrictions also, again, your Honor. Because my

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1 client's concerned about getting things done. Like I said, he
2 suggested yesterday a 5:00 start time --

3 THE COURT: I think that's a great idea, Mr. Greene.
4 You are not ready, willing, and able?

5 MR. GREENE: You know, look, he is the client, he's
6 paying my bill, I'll do it if he asked me to, I just wouldn't
7 be a happy attorney defending a deposition.

8 THE COURT: All right, thank you.

9 Anything further, Mr. Patti?

10 MR. PATTI: Very briefly, your Honor.

11 I'll just start with the last point first.

12 THE COURT: Yeah.

13 MR. PATTI: I just cannot imagine any witness in a
14 federal proceeding can't be asked about their current
15 employment and whether there is a connection between that
16 current employment and the defendant's business. I think it
17 gets to bias, and it gets to motive, and it gets to, also, the
18 elements, rather the factors I should say, in an
19 anticybersquat --

20 THE COURT: I could imagine there may be, beyond some
21 questions, some additional questioning that might be
22 irrelevant. But I agree with you that, basically, I'm sure
23 there are a number of questions that would be. And it will be
24 up to a trial judge to decide what is relevant and what is not
25 relevant for the trial in Michigan, not me.

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1 I am denying the motion to quash the subpoena.

2 Mr. Greene, I appreciate that your client wasn't there
3 to talk, or you were not there on his behalf to talk about the
4 inconvenience, et cetera. But I think the fact remains that he
5 appears to me to be an important witness. Certainly Judge
6 Battini believed that when she made her ruling in Michigan.
7 And so, as I say, I'm denying that motion. I'm also not going
8 to enjoin Mr. Patti or his client in terms of prohibiting him
9 from asking questions about your client's new business.

10 Now, how much time do you think you need, gentlemen.

11 Mr. Patti?

12 MR. PATTI: Our plan is to complete this deposition in
13 a day. Obviously, if we spend half the day arguing objections,
14 then we don't want our hands tied. But, again, our motive is
15 to get something that makes sense for a jury to listen to, and
16 not bore them into tears. So but that is -- our hope is to
17 complete it in a day, and that's certainly what the plan is.
18 Again, I'd rather not be limited to that, but I can't see us
19 being far beyond that, if at all.

20 THE COURT: All right. Well, then, would you propose
21 to ask for more time if it was not concluded in a day? I think
22 the rules indicate that unless everybody agrees, or I order it,
23 the deposition is limited to one day of seven hours, isn't that
24 correct?

25 MR. PATTI: It is for a deposition in discovery. It's

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1 a little bit of a different territory, because the judge has --
2 I know that de bene esse is usually a tool of the admiralty
3 court, which is Mr. James' specialty --

4 THE COURT: That's all right. I have recently had
5 someone refer to just such deposition as de bene esse right
6 here in my court, not in an admiralty case.

7 So you're saying that should be different --

8 MR. PATTI: We look at it as this. It's no different.
9 The only thing that is different is the medium by which the
10 testimony is being taken. It's no different than if he were
11 being brought into court live. And there is no restriction on
12 how long a person's on the witness stand in trial. But there
13 are very good reasons why lawyers don't keep those people on
14 the stand ad nauseam, because it backfires on us quite frankly,
15 and it bores juries and so forth. But since there is no
16 restriction on the time of a trial witness on the stand under
17 the rules, and Judge Battini has indicated this is to be a
18 trial deposition, this is to replace him being live in the
19 court because he is beyond her subpoena power, that there
20 should be no restrictions for that reason.

21 THE COURT: All right.

22 MR. GREENE: But, your Honor -- I'm sorry.

23 THE COURT: Yeah.

24 MR. GREENE: But this is a different sort of beast.

25 It's a deposition this Circuit doesn't recognize. And there is

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1 a restriction. And the restriction being that Mr. Jacoby is
2 beyond her subpoena power, so he wouldn't actually have to
3 appear for a trial. So this sort of takes it out of that realm
4 of, well, this should be an exceptional circumstance where we
5 can go beyond seven hours. And, for that reason, it should be
6 limited as such.

7 THE COURT: All right. I'm not going to impose a
8 limit, but I am going to permit the Movant, if required -- or
9 I'm sorry, permit Mr. Patti and his client, if required, to go
10 beyond seven hours. Hopefully, that won't be necessary and
11 everything will be done efficiently.

12 I'm in Part I the rest of the week. I hope I don't
13 hear from you but -- as much as I enjoyed meeting you -- if
14 there are any issues at the deposition, you should call my
15 chambers, (212)805-6187. And actually, on Friday, the judge in
16 Part I, instead of me, will be Judge Koeltl. And his number is
17 (212)805-0222. Again, I hope you are able to resolve
18 everything amicably and efficiently.

19 And I'm not enjoining any particular line of
20 questioning as requested by the Movant.

21 Okay, anything else?

22 MR. GREENE: No, your Honor.

23 MR. PATTI: No, your Honor.

24 THE COURT: Thank you very much. Nice to meet you.

25 (Adjourned)