IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NORTHEASTERN UNIVERSITY and JARG CORPORATION Plaintiffs, v. GOOGLE INC. Defendant.	Case No. 2:07-CV-486-CE JURY TRIAL DEMANDED

PLAINTIFFS' EMERGENCY MOTION TO QUASH
THE SUBPOENA OF MICHAEL BELANGER

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Plaintiffs Northeastern University and Jarg Corporation ("Plaintiffs") submit this Emergency Motion to Quash the Subpoena of Michael Belanger and memorandum in support thereof.[1]

I. PRELIMINARY STATEMENT

Defendant Google Inc. ("Google") has served a subpoena on Mr. Belanger seeking to compel his testimony at the trial of this case. Plaintiffs file this emergency motion requesting that this Court quash the subpoena for each of the following four independent reasons. First, Mr. Belanger is not subject to subpoena in Florida for a trial in this district court in Texas. Second, the subpoena is an improper, end-run attempt to force Plaintiffs to designate a certain corporate representative for trial purposes. Third, the subpoena would subject Mr. Belanger to undue burden because Mr. Belanger does not have unique knowledge regarding Plaintiff Jarg Corporation ("Jarg") and, to the extent he has any unique knowledge, Google may present his testimony to the jury by videotaped deposition. Fourth, the subpoena is null because the required mileage and witness fees were not tendered directly to Mr. Belanger with the subpoena.

II. STATEMENT OF FACTS

Because the trial to which the subpoena relates is scheduled to commence on April 11, 2011, Plaintiffs respectfully request that their motion be given emergency treatment.

1. Dr. Ken Baclawski is the inventor of the patent-in-suit. He is also a co-founder of Jarg[2] and served on Jarg's Board of Directors until 2005.[3] Today, Jarg is essentially a nonoperating company, and Dr. Baclawski holds no office with the

[1] Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action served on Mr. Belanger on Apr. 4, 2011 ["Belanger Subpoena"], attached hereto as Exhibit 1.

corporation.[4] Nevertheless, Dr. Baclawski remains the second largest shareholder of Jarg.[5]

2. Along with Dr. Baclawski, Mr. Belanger co-founded Jarg. Mr. Belanger is Jarg's President and CEO. He is currently the largest shareholder of Jarg.[6]

3. Mr. Belanger is currently living in Florida with his elderly father.

4. Jarg designated Dr. Baclawski as its corporate representative for certain topics and designated Mr. Belanger as its corporate representative for other topics in response to Google's Notice of 30(b)(6) deposition of Plaintiffs Jarg and Northeastern University.[7] Google deposed both Mr. Belanger and Dr. Baclawski as Jarg corporate representatives and in their personal capacities for two days each.

5. On March 11, 2011, counsel for Plaintiffs sent counsel for Google a letter informing Google that, for purposes of trial, Dr. Baclawski would be the corporate representative on behalf of Jarg.[8]

6. At the March 29, 2011 Pre-Trial Hearing in this case, counsel for Google asked this Court to compel Plaintiffs to bring Mr. Belanger to trial to testify.[9] This Court

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[2] Deposition of Kenneth Baclawski (Aug. 27, 2009) ["Baclawski Dep."] at 71:21-25, relevant excerpts attached hereto as Exhibit 2.

[3] *Id.* at 80:18-24.

[4] *Id.* at 81:20-21.

[5] *Id.* at 81:10-21.

[6] Deposition of Michael Belanger (July 15, 2010) ["Belanger Dep."] at 12:25-13:4 & 13:15-18, relevant excerpts attached hereto as Exhibit 3; *see also* Baclawski Dep. at 81:22-25.

[7] *See* Amended Joint Pretrial Order at 11 (Dkt. No. 194).

[8] Letter from counsel for Plaintiffs (Nicki Glauser) to counsel for Google re: Trial Coordination, dated Mar. 11, 2011, attached hereto as Exhibit 4.

[9] Transcript of the Pre-Trial Hearing Before the Honorable Judge Chad Everingham United States Magistrate Judge, dated Mar. 29, 2011 ["Pre-Trial Hearing Tr."] at 48:2-52:1, relevant excerpts attached hereto as Exhibit 5.

denied Google's request stating: "I'm denying the request to have plaintiff bring a particular representative or witness to trial."[10]

7. At the close of jury selection on April 4, 2011, Google reiterated its request that Mr. Belanger be compelled to testify at trial. Specifically, Google's counsel informed the Court that it had a private investigator staking out Mr. Belanger in Florida, and that there was no reason to believe that Mr. Belanger was needed in Florida to attend to his father's care. In Response, Plaintiffs' counsel stated that Plaintiffs had not opposed Google's request to compel Mr. Belanger's trial attendance based on his father's health, but rather on Plaintiffs' right to choose their own trial corporate representative. The Court acknowledged its previous ruling on this issue, but indicated that it would entertain a motion to quash if Google were able to serve a trial subpoena on Mr. Belanger.

8. Fifteen minutes after the Court excused the parties from jury selection, Google served a subpoena on Mr. Belanger at his residence in Florida.[11] The subpoena purports to require Mr. Belanger to testify at trial on April 18, 2011, in Marshall, Texas, more than 1000 miles away from Florida. Google did not tender the required witness fee or any amount for mileage.[12]

III. ARGUMENT AND AUTHORITY

Federal Rule of Civil Procedure 45 governs subpoenas issued by United States courts. The subpoena issued by Google is invalid under Rule 45 because it (1) asks this Court to extend its subpoena power beyond its jurisdiction; (2) attempts, in effect, to force Plaintiffs to designate a particular individual as their corporate representative for

[10] *Id.* at 51:24-52:1.

[11] Declaration of Bob Schick, dated Apr. 5, 2011 at ¶ 2.

[12] Ex. 1: Belanger Subpoena at 1.

the purposes of testifying at trial; (3) imposes an undue burden on Mr. Belanger; and (4) was not properly served. Therefore, the subpoena should be quashed.

A. The Subpoena Should Be Quashed Because It Seeks To Extend This Court's Subpoena Power Beyond The Permissible Geographic Limitations.

Google failed to serve Mr. Belanger at a place where a subpoena may validly be served under Rule 45. Rule 45(b)(2) provides:

> Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:
>
> (A) within the district of the issuing court;
>
> (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
>
> (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
>
> (D) that the court authorizes on motion and for good cause, if a federal statute so provides.[13]

By the plain language of this provision, a person must be served with a subpoena in one of the four places listed in Rule 45(b)(2) to compel that person's attendance at trial. Indisputably, none of the four places authorized in the Rule would include Mr. Belanger's residence in Florida. Plainly, the delivery of the subpoena in Florida is not "within the district of [this] court;" is not "outside [the] district but within 100 miles of the place specified for the . . . trial . . . ;" is not "within the state of [Texas];" and this Court has not authorized a subpoena "on motion and for good cause" pursuant to a "federal statute" that "so provides."[14] As a result, the subpoena is invalid.

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[13] Under the heading "Quashing or Modifying a Subpoena," Rule 45(c)(3)(A)(ii) provides that a court must quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that . . . the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held."

[14] FED. R. CIV. P. 45(b)(2)(A)-(D).

Mr. Belanger's status as an officer of Jarg does not warrant a different result. Admittedly, there is a split of authority, including within this district, regarding whether Rule 45(b)(2)'s cross-reference to Rule 45(c)(3)(A)(ii) permits a court to issue a subpoena requiring a party or a party's officer to travel more than 100 miles to testify at trial.[15] The better reading of Rule 45 and the one that most comports with Fifth Circuit precedent, however, is that Rule 45(c)(3)(A)(ii) functions as a limitation on the scope of Rule 45(b)(2). In other words, that Rule 45(c)(3)(A)(ii) does not expand or broaden the four permitted locations where a subpoena may be served under Rule 45(b)(2).

A number of federal courts, including this Court, have interpreted Rule 45 in this manner.[16] This Court in *Lindloff* held that officers or employees of a party may not be subpoenaed if they could not be served in accordance with Rule 45(b)(2).[17] Specifically, the Court explained that "Federal Rule of Civil Procedure 45(b)(2) sets a 100 mile limit on the court's subpoena power over witnesses outside the district. Consequently, any of

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[15] *Compare Lindloff v. Schenectady Int'l*, 950 F. Supp. 183, 185 (E.D. Tex. 1996) (considering a motion to transfer and ruling the Federal Rule of Civil Procedure 45 does not allow a court to issue a subpoena on a party or a party officer located outside the 100-miles radius), *with Promote Innovation, Inc. v. Ortho-McNeil Pharm., LLC*, No. 2:10-109-TJW (E.D. Tex. Jan. 12, 2011) (considering a motion to transfer and reaching the opposite conclusion).

[16] *See Lindloff*, 950 F. Supp. at 185. *See also Chao v. Tyson Foods, Inc*., 255 F.R.D. 556, 559 (N.D. Ala. 2009) (granting a motion to quash a subpoena for a party witness outside 100 miles of the courthouse and explaining that it is simply "too tenuous an inference to conclude that because a court is not required to *quash* a subpoena issued to a party or a party's officer under Rule 45(c)(3)(A)(ii), it therefore has the power to *compel* the attendance of a party witness who was served beyond the explicit geographical limitations of Rule 45(b)(2) and that *service* of a subpoena is valid on a nationwide basis whenever the person served is a party or the officer of a party"); *Lyman v. St. Jude Med. S.C., Inc.*, 580 F. Supp. 2d 719, 733-34 (E.D. Wis. 2008) (quashing a subpoena of a party officer who was served outside of the judicial district of the issuing court and outside of 100 miles from the courthouse); *Mazloum v. Dist. of Columbia Metro. Police Dep't*, 248 F.R.D. 725, 728 (D.D.C. 2008) (concluding that Rule 45(c)(3)(A)(ii) does not refer to anything other than a constraint on the court's subpoena power); *Jamsports & Entm't, LLC v. Paradama Prods., Inc.*, No. 02C22981, 2005 WL 14917, at *1 (N.D. Ill. Jan. 3, 2005) (quashing deposition of officer and holding that "Rule 45(c)(3)(A) does not confer authority for service of a subpoena; it confers authority to quash or modify a subpoena. It provides an exception to Rule 45(b)(2), not an addition to that Rule."); *Johnson v. Land O'Lakes, Inc.*, 181 F.R.D. 388, 397 (N.D. Iowa 1998) (quashing a subpoena of the defendant's vice president because he was not served within 100 miles of the site of the trial and holding that "Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power").

[17] 950 F. Supp. at 185.

Defendant's officers or employees who are outside the Eastern District and who might be unwilling to appear at trial would have to be within a 100 mile radius of the Beaumont federal courthouse in order to be compelled to appear."[18]

The Fifth Circuit's decision in *Cambridge Toxicology Group, Inc. v. Exnicios*[19] compels the Court to reach the same conclusion it reached in *Lindloff*. In *Cambridge Toxicology*, the plaintiff argued that the district court had erred by failing to either order two defendants to appear at trial or enter a default judgment against them. The Fifth Circuit held that its decision in *GFI Computer Industries, Inc. v. Fry*[20] "control[led]" the issue and, applying *GFI*, concluded that "the district court did not abuse its discretion by refusing to order the defendants to appear at trial or enter a default judgment."[21]

In *GFI*, the district court entered a default judgment on liability against a defendant who resided in the Bahamas, predicated on the defendant's failure to comply with an April 12, 1972 order of the court directing him, *inter alia*, to appear at trial of the case in Dallas and to submit himself as a witness in the case.[22] In reviewing the default judgment, the Fifth Circuit first noted that the defendant resided "some 1500 miles distant from Dallas, the situs of the lawsuit."[23] It then held that the district court's April 12 order was "incorrect" because "the court had no power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and there submit to examination."[24]

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[18] *Id.*

[19] 495 F.3d 169 (5th Cir. 2007).

[20] 476 F.2d 1 (5th Cir. 1973)

[21] *Cambridge Toxicology*, 495 F.3d at 179.

[22] 476 F.2d at 2.

[23] *Id.* at 2.

[24] *Id.* at 5.

Although the Fifth Circuit did not specifically reference Rule 45, it decided *Cambridge Toxicology* more than fifteen years after the most recent substantive amendments to Rule 45 were implemented in 1991.[25] Moreover, the Fifth Circuit's holding is clear. The federal district court does not have power to compel a party or a party officer who resides outside the 100-mile territorial limit of the court's subpoena power to appear as a trial witness.

In *Johnson v. Big Lots Stores, Inc.*, the federal court for the Eastern District of Louisiana thoroughly analyzed Rule 45, existing case law, rule-making history and leading commentary on the geographic and territorial limits of the subpoena power, interplay between Rule 45(b)(2) & (c)(3)(A)(ii), and the language of the two sections themselves.[26] There, the plaintiff filed a motion to quash nine trial subpoenas of plaintiffs who lived outside of the state and more than 100 miles from the courthouse.[27] The court refused to expand the territorial reach of where a party or a party officer may be served with a trial subpoena, and instead held that, to compel attendance at trial, the person "must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii) . . . ."[28] In doing so, the Court provided the following salient points:

- "To read the 'subject to Rule 45(c)(3)(A)(ii)' clause as *expanding* the territorial reach of where a party or party officer may be served with a trial subpoena ignores the ordinary meaning of the phrase 'subject to.' The phrase 'subject to' ordinarily operates to limit a power or right, not expand it."

[25] The 2007 amendments extensively revised the organization of Rule 45(b)(2), but they did not alter its substance. *See Maryland Marine Inc. v. United States*, No. H-07-3030, 2008 WL 2944877, at *5 (S.D. Tex. July 23, 2008).

[26] 251 F.R.D. 213, 215-222 (E.D. La. 2008).

[27] *Id.* at 214.

[28] *Id.* at 218-19 (emphasis added).

- § "Nothing in th[e] text [of Rule 45(c)(3)(A)(ii)] affirmatively expands the geographic scope of where the Court may issue subpoenas. It spells out only the conditions under which a court *must* quash a subpoena."

- § "The position of Big Lots would essentially require the Court to read the limiting ('subject to') clause of Rule 45(b)(2) as stating "*In addition to the provisions* of Rule 45(c)(3)(A)(ii), a subpoena may be served at any place.' The Court would then have to impute, when Rule 45(b)(2) does not so provide, that a subpoena for a party or its officer may be properly served anywhere in the country."

- § "It strikes the Court as exceedingly odd that Congress would create a system of nationwide subpoena service in the backhanded manner that Big Lots suggests. It is even odder that Congress would do so in a subsection with the heading 'Protecting a Person Subject to a Subpoena.' . . . The Court's perspective is further informed by the observation that when Congress has sought to provide for service of subpoenas in places other than those listed in Rule 45(b)(2), it has done so with unmistakable clarity."[29]

Additionally, the court observed that Rule 32(a)(4) "anticipate[s] the unavailability of a witness" and thus provides for the use of depositions at trial when a witness is more than 100 miles from the courthouse.[30]

Judge Lee H. Rosenthal, who is a member of the Judicial Conference Discovery Rules Advisory Committee that drafts amendments to the Federal Rules of Civil Procedure, recently addressed this issue in *Maryland Marine Inc. v. United States.*[31] There, in analyzing the private interest factor of availability of compulsory process for purposes of a motion to transfer venue, the court ruled that to compel a person to attend trial under Rule 45, the person must be served with a subpoena in one of the places listed in Rule 45(b)(2) and not be subject to the protection of Rule 45(c)(3)(A)(ii).[32] In other words, Judge Rosenthal noted that Rule 45(b)(2) provides the four locations for proper

[29] *Id.* at 216-18 (citations omitted).

[30] *Id.* at 219.

[31] 2008 WL 2944877, at *5.

[32] *Id.*

service and that Rule 45(c)(3)(A)(ii) "does not alter the requirements for proper service of a subpoena."[33]

Ultimately, then, even though Mr. Belanger is an officer of Jarg, he must still be served in one of the places authorized by Rule 45(b)(2). It is undisputed that he was not. Accordingly, service on Mr. Belanger was improper and the subpoena should be quashed.

B. The Subpoena Should Be Quashed Because It Seeks To Force Plaintiffs To Present Mr. Belanger As Its Corporate Representative At Trial.

Google cannot force Plaintiffs to present Mr. Belanger as Jarg's corporate representative at trial, even if Rule 45 were available to compel a party officer beyond the 100-mile range of the court's subpoena power to attend trial. Yet this is exactly what Google seeks to do here, albeit while serving the subpoena on Mr. Belanger instead of Jarg. As Google's counsel argued to this Court during the March 29, 2011 Pre-Trial Hearing, Google wants this court to "order [Plaintiffs] to have their client show up. [Mr. Belanger] is the corporation. He has represented them all the way through this case, and he ought to be here. . . . So we're entitled to have the man who is the persona of Jarg [Mr. Belanger] here in the courtroom and sit in the witness stand and testify."[34]

Plaintiffs have chosen the inventor and second largest shareholder of Jarg Corporation, Ken Baclawski, as Jarg's corporate representative and trial witness, as they have a right to do. There is no legal basis for Google to force Plaintiffs to instead designate Mr. Belanger as its corporate representative for the purposes of testifying at trial; nor can Google cite to any case law or other authority in support of their contrary

[33] *Id.* (internal quotations & citations omitted).

[34] Ex. 5: Pre-Trial Hearing Tr. at 49:2-8 & 51:20-22.

position. Indeed, this Court has already "den[ied] [Google's] request to have plaintiff bring a particular representative or witness to trial."[35]

C. The Subpoena Should Be Quashed As Unduly Burdensome.

Even if valid, which it is not, the subpoena of Mr. Belanger is unduly burdensome and should be quashed under Rule 45(c).[36] Whether a subpoena subjects a witness to undue burden generally raises a question of the subpoena's reasonableness. The Fifth Circuit has described that this analysis "requires a court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it. [T]his balance of the subpoena's benefits and burdens calls upon the court to consider whether the information is necessary and unavailable from any other source."[37] Here, where the burdens are obvious and substantial, and the testimony sought is cumulative of evidence otherwise available to Google, the Court should find the burdens of the subpoena to be undue.

As noted above, Mr. Belanger lives in Massachusetts for part of the year and is at the moment living in Florida with his elderly father, more than 1,000 miles away from Marshall, Texas. Compared to these burdens, any benefits of the subpoena are insubstantial, for at least the following reasons. First, rather than forcing Mr. Belanger to appear live, Google may use Mr. Belanger's deposition testimony at trial.[38] In February 2011, Google designated testimony from Mr. Belanger's depositions that Google

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[35] *Id.* at 51:24-52:1.

[36] FED. R. CIV. P. 45(c)(3)(A)(iv).

[37] *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 377 (5th Cir. 2004) (internal quotations & citations omitted), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

[38] *See* FED. R. CIV. P. 32(a)(4)(B) (providing that a party may use the deposition of a witness if the court finds the witness is more than 100 miles from the place of hearing or trial).

indicated it may present at trial.[39] Plaintiffs have no objection to any of the testimony that Google initially designated for Mr. Belanger.[40] Yesterday, on April 4, 2011, counsel for Google requested that it be permitted to add additional designations from Mr. Belanger's deposition testimony because Plaintiffs were not bringing Mr. Belanger to trial.[41] Even though the request came two months after the Court ordered deadline to submit deposition designations, Plaintiffs informed Google that it would not object to its additional designations for Mr. Belanger.[42]

Additionally, Dr. Baclawski can provide at trial all of the evidence that Google seeks to elicit from Mr. Belanger. Dr. Baclawski acted as Jarg's 30(b)(6) designee for purposes of Google's deposition of Jarg, and Plaintiffs have designated Dr. Baclawski as Jarg's corporate representative for purposes of trial. Dr. Baclawski is the inventor of the patent-in-suit, a co-founder of Jarg, a former officer of Jarg, and the second largest shareholder of Jarg.

Consequently, the evidence that Google seeks to elicit from Mr. Belanger is unnecessary and available from another source, Dr. Baclawski's live testimony and/or Mr. Belanger's deposition testimony. The subpoena, therefore, is unduly burdensome and must be quashed.

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[39] Email from counsel for Google to counsel for Plaintiffs attaching Google's witness list, exhibit list and [deposition] designation list, dated Feb. 18, 2011, attached hereto as Exhibit 6.

[40] Ex. 5: Pre-Trial Hearing Tr. at 41:23-42:7.

[41] Email chain between Jerry Yen and Nicki Glauser re: Google/Jarg - Additional Belanger Designations, dated Apr. 4 & 5, 2011, attached hereto as Exhibit 7.

[42] *Id.*

D. The Subpoena Should Be Quashed Because Defendant Did Not Tender The Witness or Mileage Fees to Mr. Belanger.

Rule 45 provides that, if a subpoena requires a person's attendance, serving a subpoena requires tendering the fees for one day's attendance and the mileage allowed by law.[43] As reflected on the face of the subpoena here, the service on Mr. Belanger did not include the fee or allowance and thus was not properly served. The Fifth Circuit and this Court hold that Rule 45(b)(1) requires tender of a reasonable mileage allowance and witness fee *contemporaneous with* service of the copy of the subpoena.[44] Indeed, this case is even more compelling than *In re Dennis* because the witness in *Dennis* lived just a few miles away and the mileage may have been as little as $5. By contrast, Mr. Belanger would be required to travel from Florida and would likely be required to stay overnight. Because the subpoena was not accompanied with the witness and mileage fees mandated by Rule 45(b)(1), "the subpoena was not properly served."[45] Accordingly, the Court should quash the subpoena.

IV. CONCLUSION

For all the reasons stated above, Plaintiffs' Emergency Motion to Quash the Subpoena of Mr. Belanger should be granted.

Dated: April 6, 2011

Respectfully submitted,

/s/ *Nicole E. Glauser*

[43] FED. R. CIV. P. 45(b)(1).

[44] *See In re Dennis*, 330 F.3d 696, 704 (5th Cir. 2003) (upholding the district court's decision to quash a trial subpoena based on failure to tender the required mileage fee, which would have been less than five dollars and noting that "[t]he conjunctive form of [Rule 45(b)] indicates that proper service requires not only personal delivery of the subpoena, but also tendering of the witness fee and a reasonable mileage allowance."); *Carroll v. Variety Children's Hosp.*, No. 407-MC-033, 2007 WL 2446553, at *2 (E.D. Tex. Aug. 23, 2007) (granting motion to quash subpoena served on witness for failure to pay mileage allowance and witness fee).

[45] *Dennis*, 330 F.3d at 705.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 6th day of April 2011.

/s/ Nicole E. Glauser
Nicole E. Glauser

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Plaintiffs has complied with the meet and confer requirements under Local Rule CV-7(h). The present motion is opposed.

/s/ Nicole E. Glauser
Nicole E. Glauser