IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JOHNS-BYRNE COMPANY, an Illinois corporation,	)	
Petitioner,	)	
v.	)	Case No. 11 L 009161
TECHNOBUFFALO LLC, a California limited liability company; MEDIA TEMPLE, INC., a California corporation; GOOGLE, INC., a Delaware corporation, and AT&T, INC., a Delaware corporation,	)	
Respondents.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on October 17, 2011 the undersigned filed with the Clerk of the Circuit Court, Cook County, Illinois, Law Division, **Johns-Bryne Company's Response to Technobuffalo LLC's Opposition to Petition for Discovery.**

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CERTIFICATE OF SERVICE

David A. Eisenberg, an attorney, certifies that he caused the foregoing **Johns-Bryne Company's Response to Technobuffalo LLC's Opposition to Petition for Discovery,** to be served on all parties of record via First Class U.S. Mail, in properly addressed envelopes with postage prepaid from 191 N. Wacker Drive, Ste. 1800, Chicago, Illinois on this 17th day of October, 2011.

TO: Elizabeth M. Bradshaw
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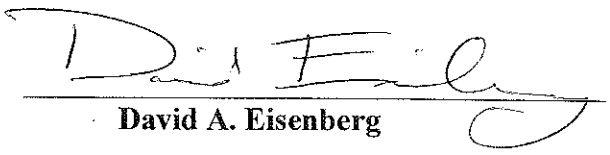

David A. Eisenberg

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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JOHNS-BYRNE COMPANY, an Illinois corporation, Petitioner, v. TECHNOBUFFALO LLC, a California limited liability company; MEDIA TEMPLE, INC., a California corporation; GOOGLE, INC., a Delaware corporation, and AT&T, INC., a Delaware corporation, Respondents.	)	Case No. 2011 L 9161

JOHNS-BYRNE COMPANY'S RESPONSE TO TECHNOBUFFALO LLC'S OPPOSITION TO PETITION FOR DISCOVERY

Johns-Byrne Company ("JBC"), by its attorneys, responds as follows to TechnoBuffalo LLC's ("TechnoBuffalo") Opposition to Petition for Discovery:

INTRODUCTION

In opposition to JBC's petition for discovery, TechnoBuffalo asserts the reporter's privilege. In so doing, TechnoBuffalo is attempting to protect the identity of a common thief and does so for no good reason; not public policy or anything else. Significantly, this case does not involve news uncovered for the good of the public; it involves commercial hype pertaining to a cell phone. Quite simply, the reporter's privilege was not intended to extend this far.

PROCEDURAL HISTORY

On September 1, 2011, JBC filed its "Petition Pursuant to Supreme Court Rule 224 to Initiate Discovery Before Suit," seeking discovery from TechnoBuffalo, Media Temple, Inc. ("Media Temple"), Google, Inc. ("Google"), and AT&T, Inc. ("AT&T"). On September 26,

2011, TechnoBuffalo filed its opposition asserting the reporter's privilege as a defense. For the reasons expressed in this response, however, TechnoBuffalo's conduct does not fall within the asserted privilege.[1]

FACTUAL BACKGROUND

On and prior to August 16, 2011, JBC performed printing and marketing services for a client (the "Client"). In connection with those services, the Client provided certain confidential information to JBC concerning a new product (a smart phone) it was about to introduce.

On or about August 16, 2011, an unknown individual (the "Perpetrator") used an Apple iPhone, or similar device, to steal Client's confidential trade secrets, apparently on JBC's premises. Shortly thereafter, the Perpetrator caused the images of the Client's confidential trade secrets to be submitted to a website known as TechnoBuffalo.com, either via data transfer provided by AT&T or via an unknown electronic mail hosting service. On information and belief, TechnoBuffalo.com is owned and operated by TechnoBuffalo.

Based on the information currently available to JBC, the Perpetrator may have been an employee of JBC. As such, that employee breached his or her duty of loyalty to JBC when he or she captured the images of the Client's trade secrets and posted those images on a public website. Moreover, under the Economic Espionage Act, the Perpetrator's conduct was likely criminal. 18 USC §1832.

Shortly after receiving the images from the Perpetrator, TechnoBuffalo caused the images to be displayed on TechnoBuffalo.com. Accordingly, JBC seeks to take discovery from TechnoBuffalo, Media Temple, Google, and AT&T to determine the identity of the Perpetrator, or, alternatively, the Perpetrator's internet service provider and electronic mail.

[1] In the event this Court determines that TechnoBuffalo may assert the reporter's privilege, JBC will be filling a petition to divest TechnoBuffalo in addition to this response brief.

ARGUMENT

I. Illinois Law Applies Since it is the State with the Most Significant Relationship with the Communication

In the present case, Illinois, not California law, applies. That is because Illinois has the most significant relationship with the communication.

In determining which law applies, Illinois courts will apply the Illinois choice-of-law rules. *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 336 Ill.App.3d 442, 452 (1st Dist. 2002). In addressing choice-of-law issues, Illinois courts utilize the Restatement (Second) of Conflict of Laws. *People v. Allen*, 336 Ill.App.3d 457, 459 (2nd Dist. 2003). Under the Restatement, the law of the state with the most significant contacts will apply. That state is usually the state where the communication took place, i.e., "the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing." *Allianz Insurance Co. v. Guidant Corp.*, 373 Ill.App.3d 652, 668-669 (2nd Dist. 2007) quoting Restatement (Second) of Conflict of Laws § 139 (1971).

In the present case, Illinois is the state with the most significant relationship with the communication. JBC is located in Illinois, its client is located in Illinois, and the Perpetrator committed the act of theft in Illinois. The Perpetrator took the pictures in Illinois and sent those pictures from his device in Illinois. TechnoBuffalo then received the communication in California and caused the images to be displayed from California with international exposure on the internet. While TechnoBuffalo received the communication in California, all acts leading to the receipt by TechnoBuffalo occurred in Illinois. Therefore, Illinois is the state with the most significant relationship with the communication.

II. Illinois' Reporter's Privilege Law Was Not Intended To Extend to Parties in TechnoBuffalo's Position

Quite simply, Illinois' reporter's privilege law was not intended to extend protection to bloggers providing information pertaining to upcoming mobile devices. To extend the privilege to TechnoBuffalo in this case would be to create an overly expansive rule.

First and foremost, in order to be covered by Illinois' reporter's privilege, an individual must be providing *news*:

- "No court may compel any person to disclose the course of any information obtained by a reporter except as provided in Part 9 of Article VIII of this Act." 735 ILCS 5/8-901.
- "'[R]eporter' means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis." 735 ILCS 5/8-902(a).
- "'[N]ews medium' means any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format...." 735 ILCS 5/8-902(b).
- "'[S]ource' means the person or means from or through which the news or information was obtained." 735 ILCS 5/8-902(c).

The information TechnoBuffalo provided here was not news as contemplated by the Act.

Although Illinois courts have not had the opportunity to discuss to whom the reporter's privilege applies, several federal courts have discussed the extent to which communications are covered. In *von Bulow v. von Bulow*, for example, the United States Court of Appeals for the Second Circuit fashioned a test to determine who has status to invoke a journalistic privilege. 811 F.2d 136 (2nd Cir. 1987). First, the *von Bulow* court noted that the process of newsgathering is a qualified protected right. *Id.* at 142. Second, whether a person is a journalist is determined by the person's intent at the inception of the information gathering process. *Id.* Third, an individual can assert the privilege if he is involved in activities traditionally associated with the gathering and dissemination of news. *Id.* Moreover, the burden of proof is on the party claiming

the protection of a privilege to establish the essential elements of the privileged relationship. *Id.* at 144.

Here, like in *von Bulow*, TechnoBuffalo is asserting a qualified protected right and it has the burden of proof to establish the essential elements of the privileged relationship. But here, TechnoBuffalo can not establish at least one of the necessary elements; that it was gathering "news."

Similarly, in *In re Madden*, the Third Circuit Court of Appeals held that certain communications obtained by an individual for entertainment purposes were not "news" entitled to the protections of the privilege under the Pennsylvania Journalist's Shield Law. 151 F.3d 125 (3rd Cir. 1998). In *Madden*, the court noted that testimonial exclusionary rules and privileges are not favored by courts, that they contravene the fundamental principle that the public has a right to every person's evidence, and that they, therefore, should not be expansively construed. *Id.* at 128, citing *U.S. v. Bryan*, 339 U.S. 323, 331 (1950). Using the test fashioned by the *von Bulow* court, the *Madden* court analyzed Madden's intent at the inception of the process, finding that Madden was disseminating hype, not news. *Madden*, 151 F.3d at 130. Because Madden intended to create art or entertainment rather than news, the privilege did not apply. *Id.*

The present case is analogous to *Madden* in that both Madden and TechnoBuffalo disseminated mere hype. Although such information might be of interest to the public, this does not make the information news or TechnoBuffalo a reporter. The information TechnoBuffalo provided here was nothing more than commercial hype intended to excite the blog's followers. Indeed, TechnoBuffalo's website explains that its main goal is "[t]o help you get the most out of your tech lifestyle." The website further explains that TechnoBuffalo hopes it "can make sure you lead the tech filled lifestyle that you want, without the missteps of purchasing technology

that doesn't quite live up to its hype or promises." As expressed on its own website, TechnoBuffalo's intent is to inform its readers about technology hype and to provide them with opinions as to the best technology. Thus, whether or not TechnoBuffalo's readers obtain useful information, the fact remains that opinions, reviews, and information pertaining to commercial products are not news; they are hype and entertainment.

The *von Bulow* test also requires that an individual be involved in activities traditionally associated with the gathering and dissemination of news. Again, a website providing opinions about the best technology products is not the type of activity the court was considering when it required activities traditionally associated with news gathering and dissemination. TechnoBuffalo obtains its information via a link on its website requesting that readers "Send Us a Tip!" TechnoBuffalo has not asserted that it actively seeks information, but rather, passively awaits tips. Like in *Madden*, TechnoBuffalo was not gathering or investigating news. This is not the type of investigative journalism that is intended to be protected under Illinois' reporter's privilege law.

Also on point is the Superior Court of New Jersey, Appellate Division's decision in *Too Much Media, LLC v. Hale*. 413 N.J.Super. 135 (2010). There, the court discussed the difficulty in identifying to whom the reporter's privilege should apply. The court noted that the "Internet poses a particularly perplexing problem in deciding who should qualify for the privilege given its easy accessibility, connectiveness, virtually limitless research capacity and universality." *Id.* at 153. Blogs especially give "people a chance to post their opinions and insights about a wide range of topics." *Id.* at 154. The court warned, though, that "the fact of presenting information on a new, different medium, even if capable of reaching a wider audience more readily, does not make it 'news,' for purposes of qualifying for the newsperson's privilege." *Id.* The court clarified

that there is "a distinction between, on the one hand, personal diaries, opinions, impressions and expressive writing and, on the other hand, news reporting." *Id.* "Some delimiting standards must pertain lest anyone with a webpage or who posts materials on the Internet would qualify." *Id.* at 155.

The warning in *Hale* resonates here. If Illinois' reporter's privilege is not limited to reporter's publishing newsworthy information but rather is extended to blogs providing product reviews, the privilege will become overly extensive and subject to widespread abuse.

Quite simply, the dissemination of information by TechnoBuffalo in the present case does not rise to the level of legitimate journalism and TechnoBuffalo has not met its burden of proving that it does. The fact that TechnoBuffalo has fans and a broad distribution does not make its blog posts news. Its articles are designed to entertain and excite its readers while providing them with commercial product information in order to allow them to make informed decisions about those products. It is nothing more than a product review.

If this Court determines that TechnoBuffalo is entitled to assert the reporter's privilege, TechnoBuffalo may still be divested of such privilege.

III. Illinois' Choice of Law Test Mandates Disclosure of the Information

Even if this Court determines that California has the most significant relationship with the communication, Illinois' choice of law test mandates disclosure.

TechnoBuffalo argues that under California law, TechnoBuffalo is entitled to invoke the reporter's privilege. California law, though, is irrelevant. If California law does apply, under Illinois' choice of law test, the privileged communication is still subject to disclosure in Illinois absent a special reason against admission:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be

> admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

Restatement (Second) of Conflict of Laws § 139 (1971); see also, *Allen*, 336 Ill.App.3d at 459.

Under subparagraph (2) of Section 139, where there is a conflict between the forum state (Illinois) and the state with the most significant relationship to the communication (assuming, *arguendo*, California), the communication in question will still be admitted if it is not privileged in the forum state, absent some special circumstance. *Allen*, 336 Ill.App.3d at 459. Therefore, it really does not matter which state has the most significant relationship. Absent a special reason, the Restatement favors admission if the law under the forum state would provide for admission.

Here, no "special reason" exists that would preclude disclosure. In determining whether such a "special reason" exists, Illinois courts will consider: (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved; (2) the relative materiality of the evidence that is sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties. *Allianz.*, 373 Ill.App.3d at 670, citing Restatement (Second) of Conflict of Laws § 139 (1971).

Here, those factors all favor disclosure. JBC, its Client, and the Perpetrator are located in Illinois. In addition, the act of taking and sending the pictures occurred in Illinois. Conversely, TechnoBuffalo is located in California, where it received and publicized the information.

As for the relative materiality of the evidence that is sought to be excluded, here that evidence is the precise reason for the petition. It is of upmost importance and without it, there would be no petition.

Similarly, in the present case, we are dealing with a newer privilege, the extent of which is undefined and heavily debated. But it is not absolute. Indeed, Illinois courts will divest reporters of their privilege, as opposed to attorney-client privileged communications or doctor-patient privileged communications, which are generally absolute unless waived. *See, Illinois Emcasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 393 Ill.App.3d 782 (1st Dist. 2009); *Reagan v. Searcy*, 323 Ill.App.3d 393 (5th Dist. 2001).

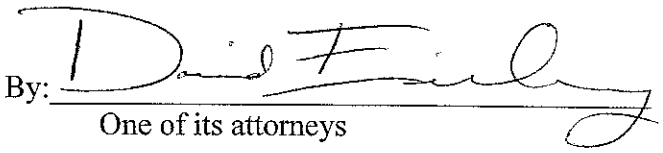
Finally, fairness to the parties favors JBC, especially when it is not even clear that the privilege should be extended to blogs. It would be manifestly unfair to JBC to allow TechnoBuffalo to keep the identity of the Perpetrator, a criminal, secret when there is no compelling public policy interest involved concerning the public's right to know. What was stolen was not the Pentagon Papers, just the specifications for a new smart phone. JBC has incurred, and continues to incur, loss of business based upon its leak. Until the identity of the Perpetrator is identified, JBC will continue to be unfairly harmed.

Therefore, Illinois' choice-of-law rules require disclosure of the communication since there is no special reason to exclude the evidence here.

CONCLUSION

For the foregoing reasons, TechnoBuffalo is not entitled to the protections of Illinois' reporter's privilege and should be ordered to disclose the identity of the Perpetrator.

JOHNS-BYRNE COMPANY

By: 

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