

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

FLOORGRAPHICS, INC.

Plaintiff,

v.

NEWS AMERICA MARKETING  
IN-STORE SERVICES, INC.

and

NEWS AMERICA MARKETING  
IN-STORE, INC.

Defendants.

Civil Action No. 07-50278 (U.S.D.C. MI)  
Civil Action No. 04-CV-3500 (AET)  
(U.S.D.C. N.J.)

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**RESPONSE OF SUSAN GRIFFIN AND DEFENDANTS TO MOTION OF  
FLOORGRAPHICS, INC.  
TO ENFORCE DOCUMENTS SUBPOENA TO SUSAN GRIFFIN**

**STATEMENT OF THE ISSUES PRESENTED**

1. Should FLOORgraphics, Inc. ("FGI") be permitted to use a subpoena to a nonparty to obtain from a third party Defendant documents which the New Jersey District Court has determined that FGI cannot obtain from Defendants?

Griffin and NAMIS answer "no."

2. Should FGI be permitted access of the personal home computer hard drive of a nonparty former employee where there is no evidence that the hard drive will have relevant responsive data?

Griffin and NAMIS answer "no."

**CONTROLLING OR MOST APPROPRIATE AUTHORITY**

*In Re Southeast Banking Corp.*

204 F.3d 1322, 1330-31, 1334-35 (11th Cir. 2000) (Plaintiff's repeated issuance of third party subpoenas in violation of court orders deliberately challenged the court's authority and was willful, contumacious conduct).

*United States v. Heckencamp*

No. 05-10344, 05, 10323, 2007 WL 1051579 at \*4 (9th Cir. April 5, 2007) (Individuals generally possess a reasonable expectation of privacy in their home computers).

**INDEX OF EXHIBITS**

- Exhibit A: July 19, 2001 and April 11, 2007 Transcripts; August 8, 2006 Order
- Exhibit B: Griffin Declaration
- Exhibit C: Griffin Deposition Transcript
- Exhibit D: Griffin Subpoena & Objections
- Exhibit E: April 3, 2007 email from Debra R. Bernard to Jim Southwick

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**RESPONSE OF SUSAN GRIFFIN AND DEFENDANTS TO MOTION OF  
FLOORGRAPHICS, INC.  
TO ENFORCE DOCUMENTS SUBPOENA TO SUSAN GRIFFIN**

Susan Griffin and Defendants News America Marketing In-Store Services, Inc. L.L.C. and News America Marketing In-Store, Inc. L.L.C. (collectively "NAMIS"), by their attorneys, Howard & Howard, Perkins Coie LLP and Mayer, Brown, Rowe & Maw LLP, submit this Response to the Motion of FLOORgraphics, Inc. ("FGI") to Enforce Documents Subpoena to Susan Griffin.<sup>1</sup> Ms. Griffin and NAMIS state as follows:

**I. INTRODUCTION**

Ms. Griffin (a former employee of FGI and NAMIS) and NAMIS are challenging FGI's demand that Ms. Griffin provide them with copies of all NAMIS documents in her possession without regard to content, and with an image of the entire hard drive of her personal home computer, so that FGI may search for potentially responsive documents to use in its action against NAMIS (which is pending in the U.S. District Court in New Jersey).<sup>2</sup> This intrusion into the personal data of a former employee is unwarranted, unjustified and borders on harassment. Moreover, FGI is seeking documents from Ms. Griffin that the District Court of New Jersey has precluded FGI from obtaining directly from NAMIS.

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<sup>1</sup> NAMIS counsel also represent Ms. Griffin in her capacity as a former NAMIS employee. Further, NAMIS unquestionably has standing to challenge the subpoena. The subpoena requests information that is proprietary to NAMIS. Accordingly, NAMIS has a "personal right" in the documents requested. As long as the party challenging a subpoena issued to a third party has some "personal right" in the documents requested, the party challenging that subpoena has standing to do so. *See NewPark Entertainment L.L.C. v. Electric Factory Concerts, Inc.*, No. Civ.A. 98-775, 2000 WL 62315, at \*4-5 (E.D. Pa. Jan. 13, 2000) (quoting 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* §2035 (2d ed. 1994) (holding that defendant had standing to object to third party subpoena that requested the production of defendant's information); *see also Platinum Air Charters, LLC v. Aviation Ventures, Inc.*, No. 2:05-cv-01451-RCJ-LRL, 2007 WL 1221674, at \*2 (D. Nev. Jan. 10, 2007); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02 Civ. 3400 WCC, 2006 WL 2642192, at \*2 (S.D.N.Y. Sept. 13, 2006) (holding that plaintiff had standing to object to third party subpoena that requested information in which plaintiff had a "sufficient privacy interest").

<sup>2</sup> At issue is an old computer of Ms. Griffin's which is no longer in working order. (Decl. ¶5. A copy of the Declaration of Susan Griffin is attached hereto as Ex. B). Hence, in order to access any data on the hard drive, it likely would have to be restored forensically.

FGI's New Jersey action against NAMIS has been pending since July 2004; discovery closed on March 30, 2007.<sup>3</sup> During the course of discovery, the parties have raised various issues with Magistrate Judge Hughes, who has been supervising the discovery. Judge Hughes has entertained argument and issued rulings narrowing the scope of the discovery which FGI can obtain from NAMIS. (Copies of the relevant transcripts and orders are attached hereto as Ex. A). However, FGI apparently is not content with those rulings, and it is attempting to circumvent those rulings by seeking, from several third parties, discovery of NAMIS documents which Judge Hughes refused to allow FGI to obtain directly from NAMIS. FGI's aggressive demand that Ms. Griffin turn over all of her NAMIS documents and also her *entire* personal hard drive so that FGI can restore it to look for "responsive" documents, without any demonstration that the documents or the hard drive are likely to contain a single relevant document that FGI has not obtained from NAMIS, is another such attempt. FGI's tactics are inappropriate, and this Court should not reward those tactics.

## **II. ARGUMENT**

### **A. Background of the Pending Lawsuit Between FGI and NAMIS**

FGI and NAMIS compete in selling in-store marketing vehicles, including floor advertising. Manufacturers of consumer packaged goods ("CPGs") use in-store marketing vehicles to market their products to shoppers inside retail stores. To implement their business models, FGI and NAMIS negotiate contracts with retailer chains and with CPGs. First, FGI and NAMIS contract individually with different retailers for the right to place marketing vehicles in the retailers' stores. Then, with retail contracts in hand, FGI or NAMIS, as the case may be,

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<sup>3</sup> In the course of party discovery in this case, FGI has directed at least 130 document requests to Defendants, and Defendants have produced more than 50,000 pages of documents, including 295 documents that specifically refer to Ms. Griffin.

contracts individually with CPGs that pay for the creation of in-store marketing vehicles and installation of those marketing vehicles in retail stores.

FGI alleges that NAMIS tortiously interfered with its contracts and/or prospective contracts with various retailers and CPGs. One of FGI's claims is that NAMIS hired several FGI employees, including Ms. Griffin, who allegedly misappropriated FGI's confidential information and shared that information with NAMIS.<sup>4</sup> With respect to Ms. Griffin, FGI asserts simply that because Ms. Griffin had day to day contact with Kmart (in connection with selling floor advertising) she must have known the confidential terms of FGI's contract with Kmart and "likely" disclosed those terms to NAMIS. There is no evidence that supports this assertion.<sup>5</sup> Based upon these unsupported allegations, FGI now requests all documents Ms. Griffin has that relate to NAMIS, without regard to content, plus access to the entire hard drive of Ms. Griffin's personal computer, which she used less than 5% of the time for business communications over the course of many years (including several years when she worked for companies other than FGI and NAMIS). (Decl. ¶4). The Court should deny these outrageous requests.

## **B. The Dispute Regarding Ms. Griffin's Materials**

### **1. Ms. Griffin's paper documents**

From the fall of 1999 until October 2000, Ms. Griffin was employed by FGI as a salesperson. From late October 2000 until June 2003, Ms. Griffin was employed by NAMIS as Senior Account Director, Advertising Sales (Decl. ¶1). On February 21, 2007, FGI's counsel deposed Ms. Griffin. She testified that she had retained a few documents from her tenure at FGI

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<sup>4</sup> FGI also asserts that Defendants "broke into FGI's proprietary, password-protected system...to obtain trade secret information and competitively sensitive information about FGI's business." (FGI Mem. at 3). These allegations are completely irrelevant to Ms. Griffin, because FGI alleges that the purported improper access occurred at least four months after Ms. Griffin left NAMIS.

<sup>5</sup> FGI asserts that emails produced in this case, including those sent by Ms. Griffin, "show that Ms. Griffin was closely involved in NAM's efforts to lure business away from her former employer (FGI) to her new employer (NAM) by tortious means." (FGI Mem. at 3). Ms. Griffin and NAMIS strongly dispute that unfounded assertion.

and NAMIS. (Griffin Tr. at 119-23). (A copy of the Griffin Transcript is attached hereto as Ex. C). FGI requested the documents during Ms. Griffin's deposition, and subsequently issued a subpoena to Ms. Griffin. (Griffin Tr. at 121-23).

Thereafter, FGI issued a subpoena to Ms. Griffin demanding *all* documents in her possession that she obtained during the course of her employment by FGI and NAMIS, regardless of subject matter. Ms. Griffin objected to this subpoena as overbroad, because it encompasses every piece of paper that she obtained during the course of her employment at either FGI or NAMIS, without regard to content or relevance to the issues in the pending case. (Copies of the subpoena and Ms. Griffin's objections are attached hereto as Ex. D). As FGI is well aware, Magistrate Judge Hughes has limited discovery to specified categories of documents that are relevant to the substantive allegations in the complaint.<sup>6</sup> As noted above, FGI's subpoena to Ms. Griffin is one of several attempts by FGI to circumvent Magistrate Judge Hughes' orders by seeking to obtain from third parties NAMIS materials that Magistrate Judge Hughes has held that FGI cannot obtain from NAMIS. Third party subpoenas are an improper means of obtaining discovery that otherwise has been forbidden. *See In re Southeast Banking Corp.*, 204 F.3d 1322, 1330-31, 1334-35 (11th Cir. 2000) (plaintiff's repeated issuance of third party subpoenas in violation of court orders, despite the court's "numerous warning throughout th[e] litigation[,] constituted "willful," "abusive, contumacious conduct" that was properly subject to "harsh" sanctions because it "disrupt[ed] the court proceedings [and] deliberate[ly] challenged[d] the authority of the district court").

Notwithstanding the breadth of FGI's subpoena, Ms. Griffin provided her counsel with all of the documents in her possession that related to retailers, CPGs, FGI and NAMIS. Counsel

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<sup>6</sup> Judge Hughes has ruled that Defendants need not produce documents relating to retailers and CPGs not identified in the substantive allegations in the Complaint, and has limited Defendants' document production obligations in numerous other ways.

produced to FGI all of the documents that were FGI documents and all of the NAMIS documents that related to FGI, or to retailers or CPGs that are named in the substantive allegations of FGI's complaint.<sup>7</sup> FGI claims that it is entitled to *all* documents in Ms. Griffin's possession that she obtained while she was employed by NAMIS. This request is clearly overbroad and contrary to Magistrate Judge Hughes' rulings. FGI has not even attempted to show that the documents are relevant, or that this production may lead to the discovery of admissible evidence. Accordingly, this Court should deny FGI's request for all of Ms. Griffin's paper documents.

## **2. Ms. Griffin's defunct computer hard drive**

When Ms. Griffin was employed by FGI, she worked primarily out of an office in Troy, Michigan, using a computer that FGI provided. (Griffin Tr. at 49). Upon her departure from FGI, she left the computer in the FGI office. (*Id.*). When she was employed by NAMIS, she worked out of her home. (Griffin Tr. at 56-57). NAMIS provided her with a laptop computer to use for business related communications and documents. (Decl. ¶3).

Ms. Griffin also had a personal computer at home which she used for personal purposes, and for less than 5% of her business related communications while she was employed by FGI and NAMIS. (Decl. ¶4). She has not used this personal computer for at least three or four years. (Decl. ¶4). As Ms. Griffin's counsel informed FGI's counsel, she no longer owns a working computer monitor for this home computer. (Decl. ¶5; Ex. E)<sup>8</sup> However, after she received FGI's subpoena, she borrowed a monitor, hooked it up to the computer and turned on both the computer and the monitor. (Decl. ¶5). The computer did not boot up, and Ms. Griffin was not able to view any information from the hard drive. We informed FGI's counsel of these facts.

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<sup>7</sup> Ms. Griffin has produced 462 pages of documents were produced from the old files that she retained.

<sup>8</sup> Counsel previously had advised FGI of the problem with Ms. Griffin's computer monitor. FGI filed its motion before counsel had the opportunity to inform FGI that the borrowed monitor did not solve the problem. After receipt of the motion, the undersigned counsel informed FGI that the computer would not even boot up, and suggested that FGI withdraw its motion. (Ex. E). FGI refused to do so.

(See Ex. E). Nonetheless, FGI is now demanding that Ms. Griffin produce the entire hard drive of her personal computer (which she has not been able to boot up) so that FGI can "search the computer files for responsive documents." (FGI Mem. at p. 5). The hard drive would likely have to be restored forensically so that the data can be retrieved, and then searched and reviewed for potentially responsive data.<sup>9</sup> However, such efforts are completely unwarranted and unjustified. There is absolutely no evidence that there is anything on this hard drive that justifies an extraordinary intrusion into Ms. Griffin's personal information. FGI did not even question Ms. Griffin about any use of a personal computer for business purposes during her deposition, and thus FGI has not established a foundation or justification for such an intrusion into Ms. Griffin's privacy. The hard drive contains almost entirely Ms. Griffin's private and personal communications and files, and she used it for several years when she was working for companies other than FGI and NAMIS.

As courts have repeatedly held, "[i]ndividuals generally possess a reasonable expectation of privacy in their home computers." *United States v. Heckenkamp*, No. 05-10322, 05-10323, 2007 WL 1051579, at \*4 (9th Cir. April 5, 2007) (quoting *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004); *United States v. Buckner*, 473 F.3d 551, 554 n. 2 (4th Cir. 2007); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001). Ms. Griffin clearly has an expectation of privacy in the data on her personal computer—especially since she rarely used it for business purposes. Put simply, FGI is not entitled to fish around in a former employee's personal data in the hopes of finding something that it can use in its pending lawsuit against NAMIS.<sup>10</sup>

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<sup>9</sup> Allowing FGI to rummage through Ms. Griffin's entire hard drive would be an extraordinary violation of her privacy. The alternative of having Ms. Griffin restore and review the hard drive also would be an undue burden and expense for which FGI has not established any legitimate basis. *See, e.g., Traveler's Indem. Co. v. Metro Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005) (where the Court noted that "Rule 45(c)(3) commands that a court 'shall' quash or modify a subpoena if the subpoena 'subjects a person to undue burden.' Fed. R. Civ. P. 45(c)(3)(A)(iv).").

<sup>10</sup> Under the new Federal Rules of Civil Procedure, this electronically stored information is not "reasonably accessible."

### III. CONCLUSION

Ms. Griffin has produced reasonably accessible documents that are responsive to FGI's subpoena and are related to the claims in FGI's action. Hence, Ms. Griffin has complied with the subpoena subject to her objections. FGI's request for the documents from Ms. Griffin's files that relate to CPGs or retailers that are not named in the substantive allegations of FGI's Complaint is overbroad and is designed to deliberately circumvent what Judge Hughes has determined FGI is entitled to discover in the pending case. Further, FGI's unjustified request to image Ms. Griffin's hard drive to search for potentially responsive documents is an improper fishing expedition into Ms. Griffin's personal life. FGI has not set forth any legitimate basis to justify the requested intrusion into Ms. Griffin's home computer, which she rarely used for business communications. The Court should deny FGI's motion.

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**CERTIFICATE OF SERVICE**

I, Patrick M. McCarthy, hereby certify that on May 2, 2007, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Parties receiving service electronically are as follows:

- **n/a**

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing).

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