

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Target Corporation, a Minnesota
corporation,

Plaintiff,

v.

CHARLES EMMERSON WILLIAM
HARRIS,

Defendant.

CASE NUMBER: 1:06-cv-2116

**BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SERVICE BY PUBLICATION**

COMES NOW Plaintiff Target Corporation and moves the Court to permit service upon Defendant Charles Emmerson William Harris (formerly sued as "John Doe") by publication in accordance with O.C.G.A. §9-11-14(f)(1), showing the Court as follows:

FACTUAL BACKGROUND

In an effort to protect its retail stores from physical threats and financial losses, Target Corporation ("Target"), through considerable effort and expense, has created loss prevention protocols which are set out in part in Target's Assets Protection Directives ("AP Directives"). The Target AP Directives are a set of written methods, techniques and processes that are used by Target's assets

protection personnel to secure Target's merchandise and other property from theft, and to deal with the apprehension of shoplifters and other wrongdoers.

In June of 2006, Target discovered that the AP Directives had been posted on several internet websites and undertook, in advance of the filing of this lawsuit, an investigation to determine the identity of the person making the postings and to remove the postings of its confidential and proprietary information. Target's internal Assets Protection Corporate Investigations and Forensic Services department commenced an investigation to determine the identity of the person posting the AP Directives on the Internet.¹ Based upon information conveyed in the web postings by the person who posted the AP Directives, Target was able to ascertain that the person lived in the state of Georgia.

During the course of its initial investigation, Target identified nine websites on which the AP Directives had been posted and determined that several of these postings were made by a person with the username mrpaulrogers@yahoo.com. Target investigators then set up email accounts in order to communicate with this

¹ Target's initial investigation revealed that the AP Directives were first posted online by a former employee. Target contacted that former employee and he voluntarily removed the posting and attempted to contact other members of the online community with whom he had shared this information to request that they do the same. Based upon information obtained through subpoena, Target understands that Charles Harris was a member of that online community, which was how Harris originally obtained the AP Directives.

user and learned that the person used two other email addresses: charris46@hotmail.com and usembassysouthafrica@hotmail.com. This user also revealed that he had made an in-store complaint at Target in Coral Springs, Florida, following his arrest for shoplifting in that store, and Target verified through its internal records that a complaint relating to this incident had been submitted to Target in the name of W. Harris.

Additionally, Target's preliminary investigation revealed: 1) that this user created the website <http://targetstoressucks.blogspot.com> to misdirect Target's lawyers; 2) that he recreated this website after its administrator shut it down; 3) that the user admitted that his real name was not Paul J. Rogers; and 4) that he also created the website <http://groups.msn.com/TargetAPDirectives/>. Target was further able to determine that a complaint submitted by email that pertained to its Smyrna, Georgia, store was made under the name of W. Harris, who listed his address as P.O. Box 1074, Kennesaw, Georgia 30156, and that W. Harris submitted this complaint using the email address usembassysouthafrica@hotmail.com, one of the same email addresses Target investigators learned had been used by the person who posted the AP Directives.

Target's investigation was undertaken with the goal of identifying the person posting the AP Directives and convincing this user to remove the AP Directives from the internet or, if that was unsuccessful, filing a lawsuit to obtain appropriate

relief. After obtaining the above information, Target filed this lawsuit in order to employ the subpoena power of the Court to confirm the user's identity and obtain relief from this Court. The day after Target filed this lawsuit, the Kennesaw Post office box of W. Harris was closed without any forwarding address.

Once authorized by this Court to serve subpoenas, Target commenced extensive third-party discovery to confirm Harris's identity and whereabouts. Since September of 2006, Target has served seventeen subpoenas on various website, email, and internet providers as follows:

<u>Date</u>	<u>Subpoena Served Upon</u>
9/21/06	America Online
9/21/06	Microsoft (Hotmail)
9/21/06	Yahoo!
10/20/06	America Online
11/7/06	Qwest (Atlanta)
11/7/06	Qwest (Denver)
2/9/07	Microsoft
2/9/07	UPS Store (Kennesaw)
2/9/07	Tribe Networks, Inc.
2/9/07	United Food and Commercial Workers Local 789

2/9/07	Subpoena ZoomShare
2/13/07	UPS Store (Atlanta)
2/14/07	AOL
2/14/07	Hayes E. Government Resources, Inc.
2/15/07	Comcast
2/19/07	AOL
2/26/07	Microsoft (Hotmail)

Based upon documents obtained in response to the subpoenas served in September and October of 2006, Target was able to identify the IP addresses that the defendant used when posting online and to confirm that the Kennesaw post office box used by W. Harris when he made the customer service complaint to Target was the same post office box that a person who said his name was “W. Harris” used to set up the email account usembassysouthafrica@hotmail.com. This account was created using a mobile phone with a “678” (Atlanta) area code. Further, in October of 2006, Plaintiff confirmed through a firm specializing in background checks, that this Kennesaw post office box was listed as belonging to Charles Emmerson William Harris. With the assistance of the Coral Springs Police Department, Target confirmed that Charles Harris provided to the arresting officers the same name and address discovered through the background check.

A second background check from January 2007 on Mr. Harris provided a new address, listing his last known address as a mailbox within a UPS Store at the 2774 N. Cobb Parkway, Box 151, Kennesaw, Georgia 30152. Target served a subpoena upon this UPS store in February of 2007 and confirmed that the box in question was registered to a "Charles E. Harris," who also used the names "C.W." and "Charles William" and who listed his home address as 2451 Cumberland Parkway, Atlanta, Georgia, 30339. This Cumberland Parkway address was discovered simply to be the address of another UPS Store which, in response to a subpoena by Target, revealed that it had no records of a box leased to anyone with Mr. Harris' name. Target's investigation into the phone number provided by Harris on his application to the Kennesaw UPS store was similarly fruitless. However, the subpoena served on the Kennesaw UPS store did result in the discovery of two forms of identification used by Mr. Harris in connection with his rental application. Unfortunately, neither form of identification contained up to date contact or address information, although they did contain photographs and physical descriptions of Mr. Harris.

Also in February of 2007, Target's research revealed that the AP Directives had been posted on several new websites, including tribe.net and zoomshare.com. Through subpoenas served upon these companies, Target determined that the accounts used to post the AP Directives were accessed from IP addresses listed to

Comcast Cable, America Online and Florida Information Resource Network (FIRN). Target served subpoenas on each of these entities, but the information provided by these entities has not at this point led to the residential address of Charles Harris. Further, Microsoft was subpoenaed yet again based upon the email accounts used at tribe.net, zoomshare.com and at the TargetAPDirectives2006 website on msn.com. The account information received in response to that subpoena also contained links to the Atlanta and Kennesaw, GA, area.

In a further effort to locate Charles Harris, in March of 2007, Target employed the services of Ron L. Turner & Associates, Atlanta area investigators, to conduct surveillance on the Kennesaw UPS store which is believed to be Harris's last known address to see if Mr. Harris entered the store or attempted to use the post office box. During their surveillance, the investigators did not observe anyone fitting Mr. Harris's description entering the store and the store manager confirmed what was assumed by Plaintiff, that Harris does not reside in that UPS store. At present, Target is continuing to pursue leads obtained from the recent service of subpoenas and continues in its efforts to locate Mr. Harris. However, Mr. Harris's current address and whereabouts remain unknown to Plaintiff.

In addition, it is worth noting that during the pendency of this lawsuit, the person suspected of posting the AP Directives has taken actions indicating that he is aware of the existence of the lawsuit. First, he closed the Kennesaw Post office

box the day after the lawsuit was filed, leaving no forwarding address. Moreover, he has changed his usernames on various websites. He has also set up new usernames on various weblogs suggesting that his name is Kerry L. Bundy, who is the lead counsel for Target in this matter, and has published on the internet certain personal information about Ms. Bundy. Target has verified that the person portraying himself as “K.L. Bundy” on the website www.targetunion.org is the same person who made the previously described complaint regarding Target’s Smyrna store, demonstrating an awareness of this suit and an attempt to avoid discovery and service of process. In addition, the person posting the AP Directives has also posted various news accounts of this lawsuit as well as the Court’s orders in this matter, again demonstrating his knowledge of this lawsuit.

ARGUMENT AND CITATION OF AUTHORITY

Because of the extensive measures taken by Target to locate Charles Harris and Mr. Harris’s seemingly obvious attempts to evade detection, this is an appropriate case in which to permit Plaintiff to effect service by publication. Fed. R. Civ. P. 4(e) provides, “service upon an individual... may be effected in any judicial district of the United States... (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general

jurisdiction of the State.” Accordingly, it is Georgia law which dictates the means by which service of process may be perfected in this case.

O.C.G.A. § 9-11-4 sets out the methods of service of process available to Georgia litigants and establishes that service may be made by publication in specified circumstances, providing:

When the person on whom service is to be made ... cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of the summons, and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, and it shall appear, either by affidavit or by a verified complaint on file, that a claim exists against the defendant in respect to whom the service is to be made, and that he or she is a necessary or proper party to the action, the judge or clerk may grant an order that the service be made by the publication of summons. O.C.G.A. §9-11-4(f)(1)(A).

Service by publication is available in “all manner of civil actions” and is justified in this case because: 1) Defendant cannot after due diligence be found in Georgia or conceals himself to avoid service; and 2) a claim exists with respect to this Defendant and Defendant is a necessary and proper party to this action. O.C.G.A. §9-11-4(f)(1)(A).

I. Defendant cannot be located for personal service.

Mindful of its duty to exercise due diligence in finding the Defendant, Target has expended significant time and resources attempting to identify and locate the blogger initially sued as John Doe by serving seventeen subpoenas, employing investigators, and diligently following up on the resulting leads. In Abba Gana v. Abba Gana, 251 Ga. 340, 304 S.E.2d 909 (Ga.1983), the Supreme Court of Georgia held that “the constitutional prerequisite for allowing [service by publication] when the addresses of those parties are unknown is a showing that reasonable diligence has been exercised in attempting to ascertain their whereabouts.” See also Bailey v. Lawrence, 235 Ga.App. 73, 76-77, 508 S.E.2d 450, 453 (1998), (holding that service by publication is appropriate when a plaintiff has shown “due diligence is shown in the attempt to track down the [defendant]”).

In Abba Gana, *supra*, the Court reasoned, “each case has its own practicalities and peculiarities, and this court cannot lay down a sweeping rule applicable to all determinations whether reasonable diligence has been exercised. In particular, it must be kept in mind that there may occur situations where a more intensive search or, perhaps, any search is impractical or fruitless.” *Id.*, citing Melton v. Johnson, 242 Ga. 400, 403, 249 S.E.2d 82 (1978); Johnson v. Mayor of

Carollton, *supra* 249 Ga. at 175, 288 S.E.2d 565; *Mullane*, *supra* 339 U.S. at 317-318, 70 S.Ct. at 658-659.

Thus, it is Target's responsibility to pursue "every reasonably available channel of information," which, in this case, Target has done. *Id.* Target has pursued the leads generated by the subpoenas it has served and by the investigators it has employed and has reached the point where a more intensive search is impractical and likely to be fruitless. Based on the facts set forth above and because Target has been unable to locate Harris to effect personal service, service by publication is appropriate in this case as in *Abba Gana*.

Moreover, it appears clear that Harris "conceals himself ... to avoid the service of the summons" as contemplated by O.C.G.A. §9-11-4(f)(1)(A). *See also Daniel v. Leibolt* 178 Ga.App. 186, 190, 342 S.E.2d 334, 338 (Ga.App. 1986), (holding "should it be made to appear that the appellant is deliberately concealing himself to avoid service in this case, the trial court is empowered, pursuant to OCGA § 9-11-4 (e) (1), to order that service be effected by publication.")

Harris closed his post office box the day after this suit was filed, and has undertaken to change his username on several of the websites on which he posts. Moreover, Harris has posted media accounts of the lawsuit and this Court's orders on various websites, indicating his knowledge of the existence of the lawsuit. Indeed, even before this lawsuit was filed or contemplated, Harris demonstrated a

desire to conceal his identity by providing inaccurate addresses and names to various internet service providers, and by using out of date identification to apply for a mailbox.

A review of recent internet forum postings indicates that Harris is aware of this litigation and is avoiding service of process. On the website www.la-legal.com, an online forum facilitating discussion among of legal professionals, a person using the screen name, "TargetSucks," which is a name used previously by Harris, wrote, "I have a copyright problem with materials that I posted on a US blog. Mine involves a filed civil suit 9/5/06..." and links to a site where the AP Directives were posted. He continued, "an annoying US Department store chains 'security manual' got posted by blogger John Doe." The same person asked of other forum members, "What do you think? PS: The EFF has declined representation," which indicated that he has sought legal representation in connection with the present litigation. The blogger expressed awareness that if Target is unable to serve him with process, the lawsuit will not go forward by opining that "this case may never get before the court due to the inability of Target and Ms. Bundy to find/serve Mr. Doe." This conversation, which suggests that Charles Harris is monitoring this litigation and evading service in the hope that this case "may never get to court," is further evidence that Target should be permitted to serve Mr. Harris by publication as permitted under Georgia law.

II. A claim exists against this defendant, who is a necessary party to this action.

The second requirement of O.C.G.A. § 9-11-4 is met because through the course of its expedited discovery, Target has discovered information confirming that Charles Harris is the person who has posted its AP Directives. Specifically, Target's investigation has revealed that:

- The person who posted the AP Directives uses the email addresses mrpaulrogers@yahoo.com, charris46@hotmail.com and usembassysouthafrica@hotmail.com;
- W. Harris made an in-store complaint in Florida following his arrest for shoplifting, an incident referenced in an email exchange by the person who posted the AP Directives;
- The person who posted the AP Directives admitted that his real name is not Paul J. Rogers and that he also created the website <http://groups.msn.com/TargetAPDirectives>;
- The person who posted the AP Directives made a complaint relating to Target's Smyrna store under the name of W. Harris, listing his address as P.O. Box 1074, Kennesaw, Georgia 30156;

- W. Harris submitted an email complaint using the email address usembassysouthafrica@hotmail.com, an email address which Target knows to be used by the person who posted The AP Directives;
- W. Harris closed his Kennesaw post office box the day after this suit was filed;
- Identification with out of date (or false) contact information under the name of Charles E. Harris was used to open a mailbox account in a UPS Store in Kennesaw;

This is more than sufficient to establish that Charles Harris is the person who posted the AP Directives. Moreover, as set out in its Complaint and in the attached affidavit, Target has viable claims against Harris because his posting of the AP Directives constitutes copyright infringement and misappropriation of trade secrets.

CONCLUSION

Despite diligent effort over a period of months, Target has been unable to locate Harris. As such, Target is entitled to effect service of process upon Harris through use of publication as permitted by O.C.G.A. §9-11-4(f)(1)(A). Target requests that it be permitted to serve Charles Harris through the methods set forth in O.C.G.A. § 9-11-4(f): 1) by directing the clerk to publish the required notice in the Fulton County Daily report four times within the ensuing 60 days, with

publications at least seven days apart; 2) by mailing a copy of the summons and complaint to Harris' last known address; and 3) by directing the clerk to mail a copy to Harris's last known address. Moreover, in the interest of fair play and to ensure that Mr. Harris, in fact, receives notice of this lawsuit, Target also requests that the Court permit it to post copies of the notice of service by publication on the websites on which Charles Harris has posted the AP Directives and to email copies to his known email addresses.

Wherefore, Plaintiff prays that the Court inquire into the instant motion and that the same be GRANTED.

CERTIFICATE OF FONT

This is to certify that the above and foregoing pleading has been prepared using Times New Roman font, 14 point, which is approved by the Court in L.R. 5.1B.

Dated: March 26, 2007

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