

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EARTHLINK, INC.,)
)
 Plaintiff,)
)
 v.) CASE NO. 1:04-CV-3008 CAP
)
)
 CHRISTINA REESE; YAMBOCS, INC.;)
 ANGELA M. NICKERSON d/b/a)
 YAMBOCS.COM; and JOHN DOES 4-25)
 (the "ASMP SPAMMERS"),)
)
 Defendants.)

PLAINTIFF EARTHLINK INC.'S RESPONSE
TO ORDER TO SHOW CAUSE

Plaintiff EarthLink, Inc. ("EarthLink") hereby responds to this Court's August 3, 2005 Order directing EarthLink to show cause why this case should not be dismissed for failure to prosecute pursuant to Local Rule 41.2(b). EarthLink shows as follows:

EarthLink filed its First Amended Complaint identifying Christina Reese ("Reese"), Angela Nickerson ("Nickerson"), YamboCS, Inc. ("Yambo")¹ on January 18, 2005. See First Amended Complaint [Docket No. 11]. At that time, based on its investigation during the "John Doe" phase of this case,

¹ According to records kept by the Washington Secretary of State, Christina Reese is the registered agent of YamboCS, Inc.

EarthLink believed that Reece and Nickerson lived in an apartment community located on East Sammamish Parkway in the Seattle, Washington suburb of Redmond. See Subpoena response from Pony Express at Exhibit A. The same day that EarthLink filed its First Amended Complaint, it sent three sets of service materials to a private process server in Seattle for immediate service on the identified defendants. See March 17 Declaration of Attempted Service ("Declaration") at Exhibit B. Unfortunately, Reese and Nickerson moved away from that address in April, 2004.

Counsel for EarthLink and the private process server in Seattle both obtained new addresses for Reese and Nickerson. See Exhibit B, Declaration; see also Subpoena and response from Jefferson at Marymoor Apartments at Exhibit C. EarthLink's process server attempted service at this new location (on Thomas Street in Seattle, Washington) numerous times, but was never able to personally serve either individual. See Exhibit B, Declaration.

At the same time that Plaintiffs were attempting to locate and serve Reese and Nickerson, EarthLink, and EarthLink's counsel were assisting and cooperating with a parallel criminal investigation on this same matter being conducted by the Atlanta office of the Federal Bureau of Investigation ("FBI"). At all

times, EarthLink has, through its own internal fraud and abuse personnel and the undersigned outside legal counsel, cooperated with the FBI investigation, and has voluntarily provided information relating to Reese, Nickerson, and all others identified as part of its own independent civil investigation. See Declaration of Kelly Wallace ("Wallace Decl.") at Exhibit D.

By March 4, Reese and Nickerson had learned - either through EarthLink's repeated attempts to serve process on them or through the FBI's independent investigation - of the suit, and abruptly changed addresses. EarthLink attempted to obtain additional information about Reese and Nickerson's present whereabouts from their most recent landlords, but neither defendant left a forwarding address at that location. See Exhibit B, Declaration; Subpoena and response from Weisenbach Properties at Exhibit E.

On or about March 4, the undersigned counsel received a telephone call from attorney Karen L. Sykora ("Sykora") of Dozier Internet Law, P.C. ("Dozier") of Glen Allen, Virginia. Sykora stated that Dozier had been contacted by and represented Reese and Nickerson. On March 7, the undersigned counsel sent a "Notice of Lawsuit and Request for Waiver of Service of Summons" for each individual defendant, care of Sykora at Dozier's office in Virginia. See Notice of Lawsuit and Request for Waiver of

Service of Summons for Christina Reese at Exhibit F; Notice of Lawsuit and Request for Waiver of Service of Summons for Angela Nickerson at Exhibit G. On March 28, 2005, the undersigned counsel contacted Sykora to inquire as to whether her clients intended to waive service and was informed that they would not agree to waive service, but that EarthLink's counsel was welcome to "serve them if you can find them." See Exhibit D, Wallace Decl.

On March 16, 2005, the undersigned counsel sent, via overnight service, copies of all service documents to the Corporations Division of the Washington Secretary of State and requested that they accept process on behalf of the corporate defendant, YamboCS, Inc. See Correspondence with Washington Secretary of State at Exhibit H; Notice of Receipt from Washington Secretary of State at Exhibit I.

On July 11, 2005, Plaintiff's counsel served a subpoena on the custodian of records for Seattle City Light, the public utility company responsible for provision of electricity to Seattle and its surrounding municipalities, seeking information relating to any utility services in the name of Reese or Nickerson or using either's social security number. Seattle City Light's response on July 14 located both defendants at an address on Martin Luther King, Jr. Way in Seattle, Washington.

See Subpoena and response from Seattle City Light at Exhibit J. EarthLink immediately recommenced attempts to serve process on Reese and Nickerson at this new address, but has thus far been unsuccessful. See Correspondence with I-5 Legal Support at Exhibit K.

CONCLUSION

For the foregoing reasons demonstrating the defendants' repeated and ongoing attempts to avoid service of process and EarthLink's consistent and persistent efforts to locate and serve the defendants, EarthLink respectfully requests that this Court not dismiss for failure to prosecute.

Respectfully submitted this 12th day of August, 2005.

WELLBORN & WALLACE, LLC

/s/ Kelly O. Wallace

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**RULE 7.1 CERTIFICATE OF
COMPLIANCE WITH LOCAL RULE 5.1**

This is to certify that the foregoing Verified First Amended Complaint was prepared using 12 point Courier New font and accordingly complies with Local Rule 5.1. This certificate is given in compliance with Local Rule 7.1(D) this 18th day of January, 2005.

WELLBORN & WALLACE, LLC

/s/ Kelly O. Wallace

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INDEX TO EXHIBITS

- Exhibit A Subpoena Response from Pony Express
- Exhibit B Declaration of Attempted Service (March 17, 2005)
- Exhibit C Subpoena and Response from Jefferson at Marymoor Apartments
- Exhibit D Declaration of Kelly O. Wallace
- Exhibit E Subpoena and Response from Weisenbach Properties
- Exhibit F Notice and Lawsuit and Request for Waiver of Service of Summons (Reese)
- Exhibit G Notice of Lawsuit and Request for Waiver of Service of Summons (Nickerson)
- Exhibit H Correspondence with Corporations Division, Washington Secretary of State (March 16, 2005)
- Exhibit I Notice of Receipt from Washington Secretary of State (March 18, 2005)
- Exhibit J Subpoena and response from Seattle City Light
- Exhibit K Correspondence with I-5 Legal Support (July 18, 2005)

(All documents redacted in accordance with Standing Order 04-02)