

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RETROPHIN, INC.,

Plaintiff,

— against —

TIMOTHY PIEROTTI,

Defendant.

Index No. 651104/2013

Part 45

Hon. Melvin L. Schweitzer

**DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO COMPEL**

Dated: New York, New York
January 17, 2014

SHEPPARD MULLIN RICHTER & HAMPTON LLP
30 Rockefeller Plaza
New York, New York 10112
(212) 653-8700

Attorneys for Defendant Timothy Pierotti

Defendant Timothy Pierotti, through his attorneys Sheppard, Mullin, Richter & Hampton, LLP, hereby move pursuant to CPLR Sections 2214(d) and 3124 for an order compelling Plaintiff Retrophin, Inc. (“Plaintiff”) to forensically preserve and provide to Mr. Pierotti for forensic analysis the following:

- The Switch/Router/Firewall Logs for Wednesday, December 25, 2013 – Saturday, December 28, 2013 for the network segment IP Address; and
- Web Logs (ie. BlueCoat) or similar for Wednesday, December 25, 2013 – Saturday, December 28, 2013 for the network segment with the IP Address; and
- A full forensic image of the custodian’s computer that would reside behind the network segment IP Address; and
- A full forensic image of all computers that Martin Shkreli uses either for business or personal purposes; and
- A full forensic image of all tablets, smartphones, and portable hard drives or other backup media used by Mr. Shkreli for either business or personal purposes.

These materials shall be referred to herein as the “Materials.” Mr. Pierotti also seeks his costs, attorneys’ fees, and other expenses in bringing this motion due to Plaintiff’s failure to confirm preservation of the Materials.

INTRODUCTION

Timothy Pierotti’s Facebook, AOL, Gmail, LinkedIn, and Twitter accounts were all hacked on December 26-27, 2013 – this represented the culmination of a long and escalating campaign of harassment directed at Mr. Pierotti and his family by Plaintiff through its CEO Martin Shkreli. That campaign has included Mr. Shkreli sending a letter to Mr. Pierotti’s wife stating: “I hope to see you and your four children homeless and will do whatever I can to assure this.” It has also included Mr. Shkreli friending one of Mr. Pierotti’s teenage sons on Facebook and sending him a message stating: “I want you to know about your dad . . . he betrayed me. he

stole \$3 million from me.” Mr. Shkreli has additionally contacted or attempted to contact Mr. Pierotti’s father, brother, and another of Mr. Pierotti’s minor children.

It is not reasonably disputable that Plaintiff hacked Mr. Pierotti’s Facebook account on December 26, 2013, because the IP address 38.122.241.243 (the “IP Address”) that was used to change Mr. Pierotti’s Facebook password was directly traced to Plaintiff’s network.

Additionally, while the Facebook account was being hacked and therefore out of Mr. Pierotti’s control, the hacker posted the complaint in this proceeding on Mr. Pierotti’s Facebook feed.

Further, Mr. Shkreli lied to the Summit County Police when they confronted him about the hackings and the harassment, “den[ying] even knowing Mr. Pierotti” at the beginning, and then claiming that he “hasn’t talked to Mr. Pierotti in over a year,” notwithstanding the documented Facebook friend requests he sent to Mr. Pierotti’s sons.

Coming on the heels of Mr. Shkreli’s campaign of harassment, it is clear that Plaintiff is responsible not only for the Facebook hack, but the hacking of the other four accounts as well. Additional proof lies in the fact that the hacker of the LinkedIn account also posted the complaint in this proceeding through Mr. Pierotti’s account – the exact same conduct as in the Facebook hack. However, notwithstanding that Mr. Pierotti has proof of Plaintiff’s hacking and has repeatedly attempted to negotiate preservation and turnover of the Materials with Plaintiff, Plaintiff has refused to confirm that it has even preserved the Materials, which constitute critical evidence of Plaintiff’s hacking. Plaintiff has also, and unsurprisingly, refused to turn over the Materials to Mr. Pierotti’s expert for analysis. The Materials are potentially highly time-sensitive. As just one example, server logs are frequently only maintained for a thirty-day period. Mr. Pierotti therefore has no choice but to ask for the Court’s intervention to preserve and obtain the Materials.

RELEVANT FACTS

I. SHKRELI'S HISTORY OF HARASSING PIEROTTI AND HIS FAMILY

Well before the filing of this meritless suit, Mr. Shkreli began harassing Mr. Pierotti and his family. The campaign began in January of 2013, two months before Plaintiff filed its Summons with Notice in this action, with a letter Mr. Shkreli sent to Mr. Pierotti's wife via both Federal Express and U.S. Mail. (1/16/2014 Affidavit of Timothy Pierotti ("Pierotti Aff."), ¶ 4.)

In his letter, Mr. Shkreli claimed:

Your husband has stolen \$1.6 million from me and I will get it back. I will go to any length necessary to get it back . . . Having frozen your husband's stock account once, I will do so repeatedly until I get what is mine . . . Your pathetic excuse of a husband needs to get a real job that does not depend on fraud to succeed . . . I hope to see you and your four children homeless and will do whatever I can to assure this.

(Pierotti Aff., Ex. A.)

On March 27, 2013, the same day in which his company, the Plaintiff, filed the Summons with Notice in this action, Mr. Shkreli sent a message to Mr. Pierotti's wife via Facebook, stating, "Hi Kristen. I hope you're well. Today, we are filing a summons demanding \$3 million in damages and penalties from you and your family, specifically your husband . . . I'm going to be sending copies of the summons with notice to everyone you and your husband know . . ."

(Pierotti Aff., ¶ 5; Ex. B.) Also on March 27, 2013, Mr. Shkreli sent Facebook friend requests to Mr. Pierotti's father and brother. (Pierotti Aff., ¶ 6; Ex. C.)

Even after the filing of the Complaint in the action (the "Complaint"), Mr. Shkreli continued to prosecute his campaign of harassment. On June 6, 2013, Mr. Shkreli posted the Complaint to Mr. Pierotti's Facebook page. (Pierotti Aff., ¶ 7; Ex. D.) On October 25, 2013, Mr. Shkreli again sent a message to Mr. Pierotti's wife via Facebook, stating, "How do you sleep at night? Your husband stole millions from me." (Pierotti Aff., ¶ 8; Ex. B.)

II. FIVE SEPARATE ACCOUNTS BELONGING TO PIEROTTI ARE HACKED WITHIN 24 HOURS STARTING DECEMBER 26, 2013

a. Shkreli's Campaign Of Harassment Intensifies As Christmas Approaches

As Christmas neared, Mr. Shkreli's campaign of harassment intensified. The steady escalation of Mr. Shkreli's intrusive and harassing behavior is striking.

First, on or around December 20, 2013, Mr. Shkreli sent a Facebook friend request to Mr. Pierotti's 16-year old son. (Pierotti Aff., ¶ 9.) Mr. Shkreli followed-up with a Facebook message, stating, "hey. i'm a friend of your father." (Pierotti Aff., ¶ 9; Ex. E.) When Mr. Pierotti's son asked why Mr. Shkreli sent him a Facebook friend request, Mr. Shkreli responded, "because I want you to know about your dad . . . he betrayed me. he stole \$3 million from me." (Pierotti Aff., ¶ 9; Ex. F.)

Next, on or around Christmas Day, Mr. Shkreli also sent a Facebook friend request to Mr. Pierotti's 14-year old son, who never responded. (Pierotti Aff., ¶ 10; Ex. G.) Later that same day, at 10:00pm, Mr. Shkreli sent Mr. Pierotti a message via LinkedIn, stating simply, "Scumbag. – Martin Shkreli." (Pierotti Aff., ¶ 11; Ex. H.)

b. Plaintiff and Shkreli Hack Pierotti's Accounts

On December 26, 2013, at around 10:30 pm, Mr. Pierotti was awoken by a text from his brother, who asked why Mr. Pierotti had posted the Complaint in this action on his Facebook page. (Pierotti Aff., ¶ 15.) Because Mr. Pierotti knew he had made no such Facebook posting, he immediately attempted to login to his Facebook account. (Pierotti Aff., ¶ 15.) Mr. Pierotti was denied access to his Facebook account, and a message appeared stating, "Your password was changed at: Today at 10:08pm." (Pierotti Aff., ¶ 15; Ex. K.) Indeed, when Mr. Pierotti's wife logged into her Facebook account, she could see that whoever had infiltrated Mr. Pierotti's account had posted the complaint in this action because it was visible on her News Feed.

(Pierotti Aff., ¶ 16; Ex. L.) At that point, Mr. Pierotti realized that his account had been hacked, and he initiated the appropriate measures to shut down his Facebook account – the account was shut down at around 11:00 pm. (Pierotti Aff., ¶ 17.)

Next, Mr. Pierotti attempted to access his AOL e-mail account, and observed that his AOL password had also been changed. (Pierotti Aff., ¶ 18.) Despite repeated attempts, he was unable to gain access to his AOL account in order to reset his password and regain control of his account. (Pierotti Aff., ¶ 18.)

Mr. Pierotti next discovered that he was locked out of his LinkedIn account. (Pierotti Aff., ¶ 19.) He then began receiving emails from colleagues notifying him that the Complaint had been posted to his LinkedIn account by someone – Mr. Pierotti was not responsible for the postings, and was unable to log in to delete the posting. (Pierotti Aff., ¶ 19; Ex. M.)

The next morning, on December 27, 2013, at around 7:45 am, Mr. Pierotti's wife received an email alerting her that the password information associated with Mr. Pierotti's Gmail account had been changed. (Pierotti Aff., ¶ 21; Ex. O.) He immediately attempted to access the account, but was unable. (Pierotti Aff., ¶ 21.)

On December 28, 2013, Mr. Shkreli left Mr. Pierotti a voicemail on his mobile phone apologizing if Mr. Pierotti and his family felt harassed by Mr. Shkreli's recent conduct. (Pierotti Aff., ¶ 25.)

c. Pierotti Files Police Reports Regarding The Hacking

Mr. Pierotti initially went to the Summit, New Jersey Police Department at around 11:45pm on December 26 to file a report regarding the hacking. (Pierotti Aff., ¶ 20; Ex. N.) Following the realization that Mr. Pierotti's Gmail account had also been breached, Mr. Pierotti reached out again to the Summit Police Department at around 10:45 am on December 27 to

notify them of the Gmail breach. (Pierotti Aff., ¶ 22.) The police reached Mr. Shkreli on his cell phone, and Mr. Shkreli promptly lied to the police. The officer who spoke with Mr. Shkreli described the conversation with Mr. Shkreli as follows:

Mr Shkreli initially denied even knowing Mr Pierotti, however when I made him aware that I had knowledge of the Facebook friend requests he stated, I haven't talked to him in years, well at least a year. I advised Mr. Shkreli of the accusations being made and Mr Shkreli advised me that he hasn't talked to Mr Pierotti in over a year so how could he be harassing him. I suggested to Mr Shkreli that he listen to what I was advising him of and not try to make denials based on word semantics. Mr Shkreli continued to state that if he hasn't talked to someone in over a year how could he be harassing them. I again outlined for Mr. Shkreli what he has been accused of. I told him that should any of the behaviors continue: contacting any of the family members via phone, text, email, or in person, contacting Mr. Pierotti's employers, or accessing Mr Pieroti's email accounts, it would be considered harassment as he has be[en] verbally advised by myself this behavior needs to stop. Mr Shkreli then hung up on myself.

(Pierotti Aff., Ex. P.)

On December 31, 2013, Mr. Pierotti filed a third police report with the Summit Police Department, notifying them of the voicemail from Mr. Shkreli. (Pierotti Aff., ¶ 25.)

d. Pierotti Obtains Proof That The Facebook Hack Originated From A Retrophin IP Address

1. An Email from Facebook Shows the IP Address Responsible for Hacking the Account

Subsequent to filing the third police report with the Summit Police Department, Mr. Pierotti was able to regain access to his AOL account. (Pierotti Aff., ¶ 23.) When he logged in, he noticed that his account contained an email from Facebook stating that his Facebook account had been reset using Mr. Pierotti's AOL email address on December 26, 2013 at 10:08. (Pierotti Aff., ¶ 24.) Importantly, the email provided information regarding the computer that was used to access Mr. Pierotti's Facebook account and reset the password:

Operating System: Windows
Browser: IE
IP address: 38.122.241.243

Estimated location: New York, NY, US

(Pierotti Aff., ¶ 24.)

2. The IP Address Leads to One Fixed Location – Retrophin’s Offices

On January 9, 2014, Mr. Pierotti retained Dr. Shane Shook, Ph.D., an expert in data security and privacy, including intrusion and hacking, to analyze the IP Address contained in the Facebook email. (1/16/2014 Affidavit of Dr. Shane Shook, Ph.D. (“Shook Aff.”), ¶ 3; Pierotti Aff., Ex. R.) Dr. Shook used a “Whois” search to determine the ownership of the IP Address, and determined that it originated from a network registered to Retrophin. (Shook Aff., ¶ 4.) Dr. Shook further determined from the “Whois” search that the IP Address existed at a fixed location – in other words, it is physically connected to Retrophin’s network by wires – and is not associated with a mobile device. (Shook Aff., ¶ 8.) Stated directly, Retrophin – the Plaintiff in this action – is responsible for hacking Mr. Pierotti’s Facebook account.

III. PIEROTTI ATTEMPTS TO GET INFORMATION VOLUNTARILY FROM PLAINTIFF

Upon becoming aware of the hacks into Mr. Pierotti’s accounts, counsel for Mr. Pierotti sent a letter to Plaintiff’s counsel on January 3, 2014 alerting them to Plaintiff’s conduct and demanding that Plaintiff’s counsel forensically image and preserve any of Mr. Shkreli’s electronic devices that could have been used to commit the breaches. (1/17/2014 Affirmation of Jeff Kern (“Kern Aff.”), ¶ 4; Ex. A.) Mr. Pierotti’s counsel then sent a letter to the Court on January 6, its first day back from recess, alerting it to the circumstances and explaining the potential impact on discovery deadlines since Mr. Pierotti was, and remains, unsure as to what extent any of Mr. Pierotti’s emails or documents have been altered, deleted, or modified due to the unauthorized breaches. (Kern Aff., ¶ 5; Ex. B.) Mr. Pierotti’s counsel sent another email immediately thereafter to counsel for Plaintiff reiterating the demand to preserve relevant

electronic evidence of the hacks. (Kern Aff., ¶ 7; Ex. C.) On January 9, upon determining conclusively that Plaintiff was responsible for hacking Mr. Pierotti's Facebook account, counsel for Mr. Pierotti yet again reiterated its demand for preservation, and specified the Materials as the relevant evidence. (Kern Aff., ¶ 9-10; Ex. D.) On January 14, counsel for Mr. Pierotti made a final attempt to confirm preservation of the materials by means of an email to counsel for Plaintiff. (Kern Aff., ¶ 13; Ex. E.)

Throughout this entire tortured process, counsel for Plaintiff has consistently refused to confirm preservation of the Materials, necessitating this motion. (Kern Aff., ¶¶ 8, 11, 14.) Instead, Plaintiff has spent its time complaining about a purported intrusion into Retrophin's network and demanding that Mr. Pierotti forensically preserve all of his electronic computing devices as a result, notwithstanding that Plaintiff has yet to come forward with so much as a scintilla of evidence supporting these fanciful claims. (Kern Aff., ¶ 8, 11, 14.) These efforts constitute naked, unabashed gamesmanship, designed to distract attention away from Plaintiff's and Mr. Shkreli's egregious conduct.

Further, Plaintiff's refusal to confirm preservation of the Materials is especially disturbing given its allegations of a purported intrusion into Retrophin's network. If Plaintiff has really initiated a forensic investigation of the purported intrusion, as counsel has repeatedly claimed, then the Materials are the exact evidence that Plaintiff needs to analyze in order to competently complete this investigation. Therefore, if an investigation is truly underway, it is inconceivable that Plaintiff would not already have preserved the Materials.

IV. EXIGENT CIRCUMSTANCES WARRANT EXPEDITED TREATMENT OF THIS MOTION

The intrusions that Mr. Pierotti is currently aware of occurred on December 26. Since that time, counsel for Mr. Pierotti has attempted to obtain the necessary preservation

reassurances and the Materials from Plaintiff to no avail. Many of the Materials Mr. Pierotti seeks are time-sensitive. As just one example, the server logs may not be preserved for more than 30 days, depending on the device settings and company policy. Therefore, absent expedited relief with respect to preservation, critical evidence that links Plaintiff and Mr. Shkreli to the other four account hacks may be lost.

Further, if either Plaintiff or Mr. Shkreli has interfered with Mr. Pierotti's email accounts, that interference matters with respect to the ongoing discovery in this matter. First, Mr. Pierotti's email accounts contain dozens of privileged communications with his attorneys, and any intrusion by Plaintiff or Mr. Shkreli would be a violation of Mr. Pierotti's attorney client privilege. (Pierotti Aff. ¶ 14.) Second, to the extent that Mr. Pierotti is expected to certify to the completeness of any document production, he would be unable to do so if Plaintiff or Mr. Shkreli have hacked his email accounts. These circumstances, which require the Materials to demonstrate, should be considered by the Court in any discovery process in this case.

ARGUMENT

I. PIEROTTI HAS SATISFIED THE PRECONDITIONS FOR A MOTION TO COMPEL

Mr. Pierotti has complied with Commercial Division Rule 24's core requirement. Mr. Pierotti notified the Court of the dispute and requested a conference. (Kern Aff., ¶ 2.) The Court conducted two conferences regarding this issue, and indicated at the second such conference on Monday, January 13 that either party could make a motion for any relief it felt it was entitled to. (Kern Aff., ¶ 12.) On January 14, 2014, Mr. Pierotti issued a final demand to Plaintiff via email to immediately preserve and turn over the Materials – this email also re-emphasized the irrefutable proof that a computer from within Plaintiff's network was responsible for the breach of Mr. Pierotti's Facebook account. (Kern Aff., ¶ 13; Ex. E.) As explained above in section IV,

supra, because of the exigency of the situation, Mr. Pierotti requires immediate relief and has followed the Court's directive accordingly.

A court may order expedited discovery and compel disclosure pursuant to CPLR 3124 "where, as here, an intention to thwart discovery appears" and "upon such terms and conditions as it may deem just." *See Barletta v. 453 West 17th Rest. Corp.*, 2008 NY Slip Op 32000(U), 2008 N.Y. Misc. LEXIS 10012 (Sup. Ct., N.Y. Cnty. July 11, 2008) (ordering expedited discovery based on defendant's improper discovery tactics to ensure no further delay in discovery); *see also McLaughlin, Piven, Vogel, Inc., v. W. J. Nolan & Co., Inc.*, 114 A.D.2d 165 (2d Dep't 1986) (affirming decision wherein Special Term granted preliminary injunction and expedited litigation). "Further, the Supreme Court has broad discretion over the supervision of disclosure" and it is within its discretion to grant expedited discovery. *See Congel v. Malfitano*, 84 A.D.3d 1145, 1146 (2d Dep't 2011) (affirming order providing for expedited discovery); *see also Clark v. Halmar Equities Inc.*, 88 A.D.3d 940 (2d Dep't 2011) (stating that the "trial court is vested with broad discretion over the supervision of discovery" and granting "plaintiffs' motion pursuant to CPLR 3124 to compel the defendants' compliance with their discovery demands."); *see also Reilly v. Oakwood Heights Comm. Church*, 269 A.D.2d 582 (2d Dep't 2002) (affirming that the court may expedite discovery "despite the automatic stay provision of CPLR §3214(b)... if there is a legitimate need for discovery" and further finding a legitimate need for discovery).

Here, the unavoidable conclusion is that Plaintiff has an intent to thwart discovery. This intent is evident through its continued refusal to agree to preserve information, i. e., the Materials, that likely contain proof bearing on the question whether Plaintiff's and Mr. Shkreli's actions have hampered Mr. Pierotti's ability to fulfill his discovery obligations. There is no reasonable excuse for Plaintiff's refusal to preserve and produce the Materials. In such

circumstances, and given the allegations that the Materials have the ability to prove, intervention by this Court is appropriate.

II. THE MATERIALS SOUGHT BY PIEROTTI ARE NECESSARY TO PROVE THAT PLAINTIFF IS RESPONSIBLE FOR HACKING PIEROTTI'S GMAIL, AOL, LINKEDIN AND TWITTER ACCOUNTS

As explained in detail above, there is indisputable proof that someone at Retrophin hacked Mr. Pierotti's Facebook Account. Facebook itself notified Mr. Pierotti that the IP Address had been used to change Mr. Pierotti's password for Facebook, and the IP Address has been traced through multiple methods to Retrophin. (Pierotti Aff., ¶ 24; Shook Aff., ¶¶ 4-10.) Four of Mr. Pierotti's other accounts have been hacked, including two email accounts relevant to this case – Mr. Pierotti's AOL and Gmail accounts. Further, Mr. Shkreli himself has acknowledged by his voicemail to Mr. Pierotti that he has been behind the campaign of harassment against Mr. Pierotti and his family – it is not a difficult inference to make that Plaintiff (most likely through Mr. Shkreli) is responsible for the other hackings as well. (Pierotti Aff., ¶ 25.)

The Materials will provide objective proof as to whether Plaintiff hacked Mr. Pierotti's AOL, Gmail, Twitter, and LinkedIn accounts. Specifically, and as explained in the affidavit of expert Dr. Shook, the Materials can be analyzed to identify any attempts by any IP address from within the Retrophin network to access any of Mr. Pierotti's accounts, and to determine whether any of Mr. Shkreli's computing devices attempted to access Mr. Pierotti's AOL, Gmail, Twitter, and LinkedIn accounts. (Shook Aff., ¶¶ 11-12.)

The importance of this information to the discovery process in this litigation should not be understated. Mr. Pierotti's Gmail and AOL accounts contain, among other things, all of the documents that he would normally review for production – at this point in time, counsel for Mr. Pierotti cannot confirm whether these documents have been compromised in any way as a result

of the hacking. The most likely source of evidence of any tampering with these documents would be the Materials. Further, Mr. Pierotti's privileged communications with his attorneys are contained in the AOL and Gmail accounts. The Materials should also demonstrate whether those privileged communications were accessed or otherwise tampered with by Plaintiff. Mr. Pierotti has a right to know if his attorney-client privilege has been violated.

Finally, and as noted above, preservation of the Materials should not be burdensome to Plaintiff, assuming that Plaintiff has been doing what it has claimed all along – namely investigating the purported breach of Retrophin's network at around the same time. (Kern Aff., ¶ 13.) The Materials are the very same as those that would be required to conduct such an investigation. And to the extent that Plaintiff has not yet preserved these materials, Mr. Pierotti has made a strong showing of necessity.

CONCLUSION

For at least the above reasons, Mr. Pierotti respectfully requests that the Court grant his motion for preservation and turnover of the Materials, its costs, attorneys' fees, and other expenses in bringing this motion, and any other relief the Court should deem just and fair.

Dated: New York, New York
January 17, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: _____

Robert S. Friedman

Jeff Kern

Rena Andoh

Brian B. Garrett

30 Rockefeller Plaza

New York, New York 10112

(212) 653-8700

Attorneys for Defendant Timothy Pierotti