

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION**

IN RE: AUTO BODY SHOP
ANTITRUST LITIGATION

MDL Case No: 6:14-md-2557-Orl-31TBS

**DEFENDANTS' RESPONSE TO PLAINTIFFS' "EMERGENCY MOTION"
FOR ISSUANCE OF SUBPOENA *DUCES TECUM* TO NONPARTIES**

Plaintiffs filed this same motion, unsuccessfully seeking this same nonparty document production, a year ago. (*See* Plaintiffs' prior motion, Doc. 160.) Defendants opposed that original motion, arguing among other things that discovery had been stayed and that Plaintiffs' basis for the motion was without factual support. (*See* Defendants' response to Plaintiffs' prior motion, Doc. 169.) This Court denied Plaintiffs' motion on April 2, 2015, finding that discovery was stayed and that Plaintiffs "failed to show good cause for lifting the stay and permitting them to engage in the requested discovery." (4/2/15 Order at 3, Doc. 174.) Discovery remains stayed in this litigation and, since the Court's April 2, 2015 Order, various of Plaintiffs' complaints have been dismissed many more times – some with prejudice. As a year ago, no complaint has yet survived a motion dismiss.

This Court should deny the current "emergency motion." To begin with, there is no emergency. The premise of Plaintiffs' instant motion could have been raised long before now. And the bases for denial of Plaintiffs' current "emergency motion" are the same as those expressed by Defendants a year ago, and by the Court in its 4/2/15 Order. Indeed, the bases for denial are even stronger, because Plaintiffs have continued to fail to proffer a

complaint that can survive a motion to dismiss. And the subpoenas themselves were premised on conclusory, unsubstantiated allegations about possible violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, that this Court found to be “speculation” and without “evidence that Defendants were behind the telephone calls.” (4/2/15 Order at 3.) Thus, Plaintiffs’ current “emergency motion” should be denied for the same reasons.

Plaintiffs unsuccessfully attempt to fashion an entirely new basis for issuing these subpoenas by alleging “on information and belief” that GoDaddy.com and Google are about to destroy documents subject to the requested subpoenas, and are not “under any legal compulsion to comply with a document retention request.” Plfs. Mot. at 2-3. Plaintiffs further allege that neither GoDaddy.com nor Google “can or will undertake to confirm they will comply” with such a document retention request. *Id.* at 3. These allegations are offered without either factual or legal support. Plaintiffs offer no showing that documents are about to be destroyed, that GoDaddy.com or Google have document retention policies that could result in the destruction of documents by February 20, 2016, that GoDaddy.com or Google has been contacted about the documents, or that either has refused to retain the documents. To the extent Plaintiffs actually had a substantiated concern about preservation, however, the opening of discovery to allow production under their purported subpoenas *duces tecum* is not an appropriate remedy – and Plaintiffs surely have offered no rationale to conclude otherwise. That is particularly true where the documents sought by these subpoenas are, at best, entirely collateral to the rejected price-fixing allegations in this litigation and do not satisfy Rule

26(b)'s standard that production be "relevant to" Plaintiffs' claims "and proportional to the needs of the case" FED. R. CIV. P. 26(b).

For all of the foregoing reasons, Defendants respectfully request that Plaintiffs' restyled "emergency motion" for leave to issue subpoenas to Google and GoDaddy.com be denied.

Dated: February 3, 2016

Respectfully submitted,

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I HEREBY CERTIFY that on this 19th day of January, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record that are registered with the Court's CM/ECF system.

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