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9  
 10 **UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

11  
 12 PATRICK COLLINS, INC.,  
 a California corporation,

13  
 14 Plaintiff,

15 vs.

16 JOHN DOES 1-51,

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 18 Defendants.

Case No. 3:11-cv-02143-BEN-MDD

**PLAINTIFF'S VERIFIED  
 MEMORANDUM IN OPPOSITION TO  
 SBC INTERNET SERVICES, INC.'S  
 MOTION FOR RECONSIDERATION OF  
 THE ORDER COMPELLING IT  
 RESPOND TO THE SUBPOENA  
 SERVED ON IT**

**AND**

**NOTICE THAT THE ISSUE IS MOOT  
 BECAUSE SBC INTERNET SERVICES,  
 INC. COMPLIED WITH THE  
 SUBPOENA<sup>1</sup>**

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 25 <sup>1</sup> Good cause under Fed.R.Civ.P. 16(b) exists to file this memorandum one day after the  
 26 deadline for filing same because undersigned had a death in the family and was  
 27 unexpectedly out of the office yesterday. While the memorandum was completed by  
 28 yesterday morning undersigned had to read it in final form because undersigned attested to  
 the facts set forth therein.

1           **I. INTRODUCTION**

2           SBC Internet Services, Inc., doing business as AT&T Internet Services'  
3 (hereinafter "AT&T") motion for reconsideration of the order granting Plaintiff's  
4 motion to compel discovery is moot; indeed, it was moot at the time AT&T filed the  
5 motion. To explain, AT&T complied with the subpoena on February 29, 2012.  
6 Amazingly, thereafter on March 5, 2012, AT&T filed the subject motion for  
7 reconsideration of the order requiring it to comply with the subpoena. Given that  
8 AT&T motion for reconsideration is and was moot, undersigned cannot conceive of  
9 any reason why AT&T's counsel would file a motion for reconsideration except to  
10 lodge *ad hominen* attacks at Plaintiff or increase the litigation costs for all concerned  
11 or both.<sup>2</sup> Simply put, at the time AT&T filed its motion for reconsideration there  
12 was no justiciable controversy between the parties. Therefore, AT&T's motion for  
13 reconsideration should be denied. Notwithstanding the foregoing, despite  
14 innumerable attempts, Plaintiff cannot open the electronic file used by opposing  
15 counsel to deliver the subpoenaed information to Plaintiff's. Accordingly, the Court  
16 should order AT&T and its counsel to assist Plaintiff in retrieving the electronic file  
17 or preferably simply to mail the subpoenaed information to undersigned.  
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27 <sup>2</sup> AT&T's *ad hominen* attacks about Plaintiff's motivations for the subject suit are not relevant.  
28 Consequently, Plaintiff will not address that line or argument lest the Court requests that it do so.

1           **II.    FACTS**

2           **A.    AT&T Repetitively Promised the Subpoena Was Being Processed**

3           The Complaint in this matter was filed on September 15, 2011. See DE 1. On  
4           September 20, 2011, Plaintiff filed a Motion for Leave to Serve Third Party  
5           Subpoenas Prior to a Rule 26(f) Conference. See DE 3. On October 12, 2011, this  
6           Court granted Plaintiff leave to serve a subpoena on AT&T. See DE 4. On October  
7           15, 2011, Plaintiff served AT&T with a subpoena requesting that it identify those of  
8           its subscribers who are Doe Defendants in this action. The subpoena demanded that  
9           AT&T provide the identifying information for the Doe Defendants by November 28,  
10          2011.

11          On December 19, 2011, Sean Rocha, a paralegal working with the undersigned  
12          attorney, emailed opposing counsel's paralegal, Charles Salmon, to follow up on the  
13          subpoena. At that time, opposing counsel, Bart Huffmann, was working for the Cox  
14          Smith law firm. Charles Salmon responded via email on December 21, 2011 that the  
15          subpoenaed information would be provided "soon". See Exhibit "A". On January  
16          6, 2012, Mr. Rocha again followed up on the subpoena by calling Mr. Salmon who  
17          stated that the responses would be provided "next week".

18                           **B.    AT&T's Failure To Timely Respond to the Subpoena Prejudiced**  
19                           **Plaintiff Insofar as Plaintiff Could Not Comply With Service**  
20                           **Deadline**

21          The original deadline to serve the Doe Defendants pursuant to Fed.R.Civ.P.  
22          4(m) expired on January 13, 2012. On January 13, 2012, Plaintiff filed a motion to

1 enlarge the deadline to serve the Doe Defendants. See DE 8. The Court granted  
2 Plaintiff until February 13, 2012 to serve the Doe Defendants. See DE 9. Still  
3 having failed to receive AT&T's response, again on February 13, 2012, Plaintiff was  
4 forced to file another motion to extend the deadline to serve the Doe Defendants.  
5 See DE 14. On February 14, 2012, the Court granted this motion and permitted  
6 Plaintiff until March 14, 2012 to serve the Doe Defendants. See DE 19. Now, while  
7 AT&T has attempted to comply with the subpoena by providing Plaintiff with  
8 instructions to open an electronic file located on opposing counsel's server, since  
9 Plaintiff cannot open said file, Plaintiff will be filing yet another motion to extend the  
10 service deadline. This delay is significant because the only defendants left in this  
11 case are those which have been named, and those whose identities Plaintiff has yet to  
12 be able to obtain from AT&T.

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17 **C. AT&T's Delayed Response Forced Plaintiff To File a Motion to**  
18 **Compel**

19 On January 13, 2012, having failed to receive AT&T's response as promised  
20 during the week of January 9, 2012, Plaintiff was forced to file a motion to compel.  
21 See DE 7. The purpose of Plaintiff's motion was to justify yet another enlargement  
22 of the service deadline until AT&T could comply -- as AT&T had always promised  
23 to do. On February 22, 2012 this Court granted Plaintiff's motion to compel. See  
24 DE 24. Significantly, Plaintiff did not seek any relief other than an order compelling  
25 AT&T to comply with the subpoena. Further, Plaintiff did not think the motion  
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1 would be contested because AT&T had repetitively stated that it intended to produce  
2 the subpoenaed information.

3 **D. After Further Assurances The Subpoena Was Being Processed,**  
4 **AT&T Finally Advised Plaintiff That It Did Not Process the**  
5 **Subpoena**

6 On January 24, 2012, Mr. Rocha called Mr. Salmon and inquired about the  
7 status of the subpoena. Mr. Salmon advised that Cox Smith was no longer working  
8 on this matter because Mr. Huffman had changed firms and was now working for  
9 Lord Locke. That same day, on January 24, 2012, Mr. Huffman called Mr. Rocha  
10 and advised him that the subpoena was being processed. On January 27, 2012, Mr.  
11 Rocha called Mr. Huffman's paralegal at Lord Locke, Camile Kerr, who advised that  
12 the subpoenaed information would be provided by January 30, 2012. On January 30,  
13 2012, Mr. Huffman sent a letter to undersigned advising that the subpoena was not  
14 being processed as his offices had repetitively assured undersigned and Mr. Rocha:  
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18 We recently have determined that, due to an internal error, this  
19 subpoena has not actually been processed. AT&T subpoena response  
20 personnel have now prioritized this subpoena, and we expect a thirty  
21 day turnaround. Again, we apologize for this delay . . . .

22 See Exhibit B.

23 **E. 137 Days After Receiving the Subpoena, AT&T Finally Provided**  
24 **the Subpoenaed Information Via An Electronic Portal;**  
25 **Unfortunately, Plaintiff Cannot Access the Information**

26 On February 29, 2012, opposing counsel sent undersigned a letter stating the  
27 information responsive to the subpoena could be accessed by using an electronic  
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1 portal. Unfortunately, despite innumerable attempts, and the assistance of an  
2 information technology professional, undersigned has not been able to access the  
3 responsive information.

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5 **F. Five Days After Complying With the Subpoena, AT&T Filed the**  
6 **Subject Motion for Reconsideration**

7 With all due respect to opposing counsel, in what can only be described as  
8 bizarre, AT&T filed a motion for reconsideration of the order compelling it to  
9 comply with the subpoena five days after it attempted to produce the information to  
10 Plaintiff. In early March, 2012, after receiving the letter and instructions on how to  
11 retrieve the information from Mr. Huffman, Mr. Rocha contacted Ms. Kerr, a  
12 paralegal working with opposing counsel, and requested assistance in retrieving the  
13 information. The product of that conversation was an agreement by Mr. Rocha to  
14 initially attempt to retrieve the information without further assistance from opposing  
15 counsel. Unfortunately, after several more attempts, undersigned and undersigned's  
16 paralegal cannot retrieve the subpoenaed information. Accordingly, Plaintiff simply  
17 needs assistance in this regard.

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21 **III. APPLICABLE LAW – INCORPORATED POINTS AND**  
22 **AUTHORITIES**

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24 It is black letter law that a motion to compel discovery (as well as a motion to  
25 reconsider it) is moot and should be denied when there is no justifiable controversy  
26 between the parties. "The parties confirmed that the motion to compel was resolved.  
27 Accordingly, Plaintiff's motion to compel Defendant Henry Nunez to comply with  
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1 discovery order is denied as moot. Fair Housing Council of Cent. California, Inc. v.  
2 Nunez, 2012 WL 217479, \*1 (E.D. Ca. 2012). “Because Defendant has agreed to  
3 produce the requested discovery, the Court denies as moot Plaintiff’s motion to  
4 compel responses. . . . Defendant is ordered to produce the agreed upon  
5 information.”  
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7 **IV. CONCLUSION**  
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9 Here, AT&T has agreed to provide the requested information and indeed has  
10 done so albeit in a format Plaintiff cannot access. Consequently, there is no  
11 justiciable controversy between the parties with respect to the order compelling  
12 AT&T to comply with the subpoena. Instead, there is simply an ministerial process  
13 of delivering the information through a channel accessible to Plaintiff. Toward that  
14 end, AT&T should be ordered to assist Plaintiff to access the information  
15 electronically or to provide Plaintiff with the subpoenaed information via a hard copy  
16 that it should mail to undersigned.  
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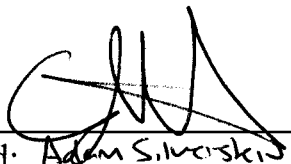
**VERIFICATION**


I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

**This 13<sup>th</sup> day of March, 2012.**

**ADAM SILVERSTEIN, ESQ.**

**SEAN ROCHA**

By:   
Printed: Adam Silverstein  
Title: Attorney

By:   
Printed: SEAN ROCHA  
Title paralegal for Adam Silverstein

Respectfully submitted,

By: /s/ Adam M. Silverstein  
Adam M. Silverstein (197638)  
CAVALLUZZI & CAVALLUZZI  
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Los Angeles, California 90069  
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Facsimile: (310) 246-2606  
Email: adam@cavalluzzi.com  
*Attorneys for Plaintiff*



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**From:** Salmon, Charles [<mailto:cmsalmon@coxsmith.com>]

**Sent:** Wednesday, December 21, 2011 7:32 AM

**To:** [sean@cavalluzzi.com](mailto:sean@cavalluzzi.com)

**Cc:** Huffman, Bart

**Subject:** Subpoenas to AT&T in connection with Cause No. 11-cv-01180, pending in the Central District of California; and Cause No. 11-cv-02143, pending in the Southern District of California

Mr. Rocha,

Both of the above-referenced subpoenas have been sent for processing. The subpoena issued to AT&T in connection with 11-cv-01180 should be ready very soon, and the subpoena issued to AT&T in connection with 11-cv-02143 should be ready soon thereafter.

Charles Salmon

[csalmon@coxsmith.com](mailto:csalmon@coxsmith.com)  
210 554 5297 direct

**COX SMITH**

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EXH "A"



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January 30, 2012

VIA EMAIL: sean@cavalluzzi.com

Sean Rocha  
Cavalluzzi & Cavalluzzi  
9200 Sunset Blvd. #807  
Los Angeles, California 90069

Re: Subpoena issued to AT&T Internet Services in Case No. 3:11-cv-02143-BEN-MDD  
in the United States District Court for the Central District of California (San Diego)

Dear Sean:

Please accept our apology for the delay with respect to AT&T's identification and notification of its subscribers associated with the IP addresses at the dates and times listed in the above-referenced subpoena.

We recently have determined that, due to an internal error, this subpoena has not actually been processed. AT&T subpoena response personnel have now prioritized this subpoena, and we expect a thirty day turnaround. Again, we apologize for this delay, and we will forward the available information to you promptly after the appropriate subscriber notification period has expired (absent, of course, any motion to quash from a subscriber).

Sincerely,

A handwritten signature in black ink, appearing to read "Bart W. Huffman", with a long horizontal line extending to the right.

Bart W. Huffman

cc: Camille Kerr

EXH "B"

**CERTIFICATE OF SERVICE**

1  
2 I hereby certify that on March <sup>14</sup>13, 2012, a true and correct copy of the  
3 foregoing was served via Facsimile and US Mail to the parties listed in the attached  
4 service list.

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By: /s/ Adam M. Silverstein

**SERVICE LIST**

7 Bart Huffman, Esq.  
8 Email Address: bhuffman@lockelord.com  
9 Locke Lord  
10 100 Congress Avenue  
11 Suite 300  
12 Austin, TX 78701-2748  
13 Telephone: (512) 305-4746  
14 Facsimile: (512) 305-4800  
15 *Counsel for AT& T Internet Services*