

CAUSE NO. 2024-48085

ATLANTIC WAVE HOLDINGS, LLC and SECURE COMMUNITY, LLC,	§	IN THE DISTRICT COURT OF
	§	
	§	
Plaintiff/Judgment-Creditor	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
CYBERLUX CORPORATION and MARK D. SCHMIDT, Individually,	§	
	§	
	§	
Defendant/Judgment-Debtors	§	129TH JUDICIAL COURT

PLAINTIFF’S MOTION TO COMPEL AND RESPONSE TO CYBERLUX CORPORATION AND MARK D. SCHMIDT’S MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH ATLANTIC WAVE HOLDING’S SUBPOENA DUCES TECUM AND DEPOSITION ON WRITTEN QUESTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiff Atlantic Wave Holdings, LLC and Secure Community, LLC, (“hereinafter collectively “Plaintiffs”) files this Motion to Compel and Response to Defendants Cyberlux Corporation and Mark D. Schmidt’s Motion for Protective Order and Motion to Quash Atlantic Wave Holdings, LLC and Secure Community, LLC’s Subpoena Duces Tecum and Deposition on Written Questions, and in support thereof, Plaintiffs would respectfully show the Court the following:

Background

1. On July 30, 2024, Plaintiffs filed its Petition to Enforce Foreign Judgment, of its approximately \$1.5 million judgment rendered in Virginia against Defendants (“Texas Judgment”).
2. On August 14, 2024, Plaintiffs served its Notice of Oral Deposition of Neil Whiteley and Subpoena Duces Tecum (“Whiteley Depo Subpoena”) to take Mr. Whiteley’s deposition, remotely, on August 27, 2024.¹

¹ See Whiteley Depo Subpoena, attached hereto as **Exhibit A**.

3. In addition, Plaintiffs served its Notice of Oral Deposition of Phillip Tucker and Subpoena Duces Tecum (“Tucker Depo Subpoena”), to take Mr. Tucker’s deposition, remotely, on August 27, 2024.²

4. On August 20, 2024, Defendant Cyberlux filed its Motion to Quash the Whiteley Depo Subpoena and its Motion to Quash the Tucker Depo Subpoena.

5. On August 21, 2024, counsel for Plaintiffs, Mr. Shawn Grady, and counsel for Defendants, Mr. Alex Pennetti, held a phone call to conference regarding the requested depositions.

6. On August 23, 2024, Defendant Cyberlux filed its Motion for Protection to prevent the depositions of Phillip Tucker and Neil Whitely, both employees of Defendant Cyberlux.

7. On August 23, 2024, Defendants filed their Motion to Vacate and Motion to Stay.

8. After oral hearing, on October 28, 2024, the Court denied Defendants’ Motion to Vacate and issued a 30-day stay on execution of the Texas Judgment, but expressly ruled that Plaintiffs may proceed with discovery.

9. On or about the same date, Defendants filed their Amended Motion for Protection, seeking to impose limitations on the scope and length of the oral depositions based on an alleged agreement between counsel on August 21, 2024.

10. During the meet and confer call on August 21, 2024, Defendants’ counsel, Mr. Pennetti represented that Deponents knew little about Defendant Cyberlux. Plaintiffs’ counsel and Plaintiffs’ representative on the phone call suggested that if Deponents were not executives of Defendant Cyberlux and had no knowledge of the operations of Cyberlux, the deposition could be concluded expeditiously, and agreed to limit the depositions to 30 minutes each. As a matter of

² See Tucker Depo Subpoena, attached hereto as **Exhibit B**.

efficiency, and for the same reasons, Plaintiffs further agreed to limit its Subpoena Duces Tecum on the Whiteley Depo Subpoena and Tucker Depo Subpoena.

11. However, since this informal agreement was made, Plaintiffs' have discovered that Defendant's counsel, Mr. Pannetti misrepresented the positions Deponents held at Cyberlux. Specifically, Plaintiffs have learned that Mr. Whitely holds the title of Senior Vice President and that he also formally owned the company prior to selling the business to Cyberlux. Plaintiffs agreement to limit its time (30 minutes) and Subpoena Duces Tecum was predicted on the misleading suggestion that the witnesses knew nothing about Cyberlux and were not executives. Regardless, Defendants did not honor the agreement anyway, which they now ask the Court to enforce, and filed their Motion for Protection.

12. As such, Plaintiffs are now forced to file this Motion to Compel so that they may conduct post-judgment discovery of Defendants via the oral depositions of two executives of Cyberlux, Neil Whiteley and Phillip Tucker, as permitted under the Texas Rules of Civil Procedure.

Arguments and Authorities

13. Pursuant to Rule 621a of the Texas Rule of Civil Procedure, Plaintiff propounded the Whiteley Depo Subpoena and Tucker Depo Subpoena to Defendant Cyberlux, "for the purpose of obtaining information to aid in the enforcement" of its Texas judgment. *See* TEX. R. CIV. P. 621a. "Relevance in the context of post-judgment discovery must be viewed generally in the same manner as in ordinary pretrial discovery, which includes anything reasonably calculated to lead to the discovery of material evidence. Material evidence includes any information that would aid in enforcement of the judgment." *See Blankinship v. Brown*, 399 S.W.3d 303, 312 (Tex. App.—Dallas 2013, pet. Denied). Rule 193.1 of the Texas Rules of Civil Procedure requires a party to

make a “complete response” to a discovery request. TEX. R. CIV. P. 193.1. A trial court may compel a party to respond adequately to discovery. TEX. R. CIV. P. 215. In the trial court, the party resisting discovery bears the burden of proving the request lies outside the guidelines described by the rules and the supreme court. *See* Tex.R. Civ. P. 193.4(a). *In re Rogers*, 200 S.W.3d 318, 321–22 (Tex. App.—Dallas 2006, no pet.) (financial information as to holding comprising the bulk of trusts assets was discoverable in beneficiary action).

14. To enforce the Texas Judgment, Plaintiffs are entitled to depose witnesses of Defendant Cyberlux with knowledge of the financial condition of the company and its operations. Defendant Cyberlux admits that Neil Whiteley and Phillip Tucker are executives of Cyberlux, which would indicate that they have relevant knowledge. As such, Plaintiffs are entitled to depose these witnesses at a reasonable time and place, for up to 6 hours.³

15. To accompany the deposition notices, Plaintiffs submitted identical Subpoena Duces Tecums with standard post-judgment discovery. Defendants have issued voluminous and baseless objections to these discovery requests. All of these requests go directly to the financial condition of the company and are relevant to aid in enforcement of the Texas Judgment. As such, Defendants’ objections must be overruled.

16. As to the prior agreement as to limitations on time and documents, Plaintiffs only agreed to this limitation on the premise that the witnesses had little knowledge of Defendant Cyberlux’s financial condition or operations, which is clearly false. If anything the agreement shows that Plaintiffs noticed these depositions in good faith and do not seek to waste anyone’s time. Indeed, if the deponent party witnesses reveal that they possess little knowledge then the depositions will be brief, but in light of their executive positions, Plaintiffs should not be

³ *See* Tex. R. Civ. P. 199.5(c).

hamstrung limited to an agreement which is based on the misunderstanding or misrepresentation that the deponents know very little about the Defendant Cyberlux. As such, Plaintiffs request that Defendants be compelled to present party witnesses Neil Whitely and Phillip Tucker, in the next fourteen (14) days, for remote deposition, and to overrule all objections to the documents requests in Plaintiffs' subpoena duces tecum, and produce documents within ten (10) days, and for such further relief to which Plaintiffs are entitled.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

As described in this motion, Plaintiffs' counsel Mr. Grady and Defendants' counsel, Mr. Pennetti conferred by phone on or about August 21, 2024, and subsequently by email. Defendants are opposed to this motion.

/s/ Shawn M. Grady

Shawn M. Grady

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all known counsel of record in accordance with the Texas Rules of Civil Procedure on this the 8th day of November 2024.

/s/ Shawn M. Grady
Shawn M. Grady

Unofficial Copy Office of Marilyn Burgess District Clerk

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Shawn Grady on behalf of Shawn Grady

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Status as of 11/11/2024 12:29 PM CST

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