

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

AF HOLDINGS LLC,	/	
	/	
Plaintiff,	/	
v.	/	Case No. 12-cv-14442
	/	
MATTHEW CICCONE,	/	Honorable Gershwin A. Drain
	/	
Defendant,	/	
	/	

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**PLAINTIFF’S RESPONSE TO MOVANT’S REQUEST FOR JUDICIAL NOTICE**

An anonymous individual (“Movant”) claiming to be associated with IP address 76.122.173.86 filed, through attorney John Di Giacomo, a request for judicial notice. (ECF No. 86.) Movant requests “that the Court take judicial notice of the Affidavit of Spencer Merkel.” (*Id.* at 4.) The affidavit, however, is not relevant to the instant action and is simply Movant’s latest attempt to prevent the release of his identity to avoid any chance of being held liable for his unlawful actions. The Court should not take judicial notice of the Affidavit of Spencer Merkel.

As an initial matter, Movant’s request and attached affidavit discuss actions taken by “Prenda Law.” (ECF Nos. 86, 86-1.) As explained in other pleadings “Prenda Law” is not the law firm representing Plaintiff in this matter—Jonathan W. Tappan, PLLC is the law firm representing AF Holdings, LLC in this case. The actions taken by “Prenda Law” in other matters are not relevant to proceedings in this case. Further, the affidavit discusses plaintiffs Hard Drive

Productions, Inc. and Guava, LLC. (ECF No. 86-1.) Neither Hard Drive Productions, Inc. nor Guava, LLC are parties in the instant action. The actions taken by Hard Drive Productions, Inc. and Guava, LLC in other matters are also not relevant to proceedings in this case. The activities of different plaintiffs, represented by different counsel, are not relevant to the proceedings in the instant case. As a result, the Court should not take judicial notice of the Affidavit of Spencer Merkel.

Movant argues that the affidavit supports the claims that Plaintiff “offers settlements to purported copyright infringers if they agree to be sued . . . .” (ECF No. 86 at 3.) Movant, however, provides no evidence of any settlement between the parties prior to the claims being brought in *Guava, LLC v. Spencer Merkel*, No. 27-CV-12-20976 (Minn. Dist. Ct. Hennepin Cty., 2012). Indeed, the affidavit by Spencer Merkel does not state anything regarding settlement between Guava, LLC and himself. The affidavit discusses a settlement offer made in a “Hard Drive Productions, Inc.” case, but even a cursory review of the Guava, LLC case and the Hard Drive Productions, Inc. case reveals that they are completely different actions involving completely different allegations. Settlement of claims in one lawsuit does not mean that a “case [is] manufactured” in another case.

While it is understandable that Spencer Merkel would prefer to avoid liability in the Guava, LLC case, his biased affidavit cannot serve as a basis for establishing undisputed facts in the instant action. The Federal Rules of Evidence permit a court to “judicially notice a fact that is not subject to reasonable dispute . . . .” Fed. R. Evid. 201. An affidavit made by an individual in a matter wholly unrelated to the instant case is subject to reasonable dispute. As a result, the Court should not take judicial notice of the Affidavit of Spencer Merkel.

Respectfully Submitted,

Dated: March 11, 2013

/s/ Jonathan W. Tappan  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 11, 2013, all individuals of record who are deemed to have consented to electronic service are being served true and correct copy of the foregoing documents, and all attachments and related documents, using the Court's ECF system.

/s/ Jonathan W. Tappan