

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

In re:

Thinkstream of Delaware
Incorporated f/k/a Thinkstream,
Incorporated of Colorado,

Debtor.

Case No. 15-10553

Chapter 11 (Involuntary)

Judge Douglas D. Dodd

**EX PARTE MOTION TO SERVE SUBPOENAS UPON
BARRY L. BELLUE, SR. BY CERTIFIED MAIL**

NOW INTO COURT, through undersigned counsel, comes TSB Ventures, LLC ("TSB"), who moves for the entry of an order authorizing service of subpoenas upon Barry L. Bellue, Sr. ("Bellue") by certified mail. In support, TSB represents:

1. The issue before the Court is whether service of a subpoena on a non-party individual must be accomplished by personal service or whether, at least under these circumstances, service by certified mail satisfies the requirements of Rule 45(b)(1). TSB submits that the Court should authorize alternative service of the subpoena by certified mail for the following reasons.

2. Barry is the president and chief executive officer of the debtor, Thinkstream Incorporated of Delaware ("Thinkstream"). As Thinkstream's president and CEO, Bellue has information and documentation in his personal capacity that is relevant to this involuntary bankruptcy case. TSB

seeks to depose Bellue. TSB seeks to require Bellue to produce documents. TSB seeks to require Bellue to appear at the July 20, 2015 hearing. As such, TSB issued subpoenas to Bellue.¹

3. However, it appears that Bellue is evading service. As evidenced by the Declaration of Michael Thibodeaux, TSB has attempted to effectuate service of the subpoenas upon Bellue at his office (6146 Crestmount Drive) and his home (2601 East Lakeshore Drive). However, despite three (3) attempts at Bellue's Office, Mr. Thibodeaux was informed each attempt by Thinkstream's employees at its office (6146 Crestmount Drive) that Bellue was out of the office. Further, Mr. Thibodeaux attempted to effectuate service at Bellue's residence (2601 East lakeshore Drive) on June 15, 2015 and also early on the morning of June 17, 2015. Although the lights were on, no one came to the door.

4. While Rule 45, as interpreted by the Fifth Circuit and this Court, generally requires personal service, and not service by certified mail, TSB submits that the facts of this case warrant authorization to serve Bellue by certified mail.

5. Rule 45 provides that "[a]ny person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires

¹ A copy of those subpoenas are attached to the Declaration of Michael Thibodeaux as *in globo* Exhibit A thereto.

delivering a copy to the named person [...] .” FED. R. CIV. P. 45(b)(1). Again, the Fifth Circuit generally requires that personal service of a subpoena is required. *See In re Dennis*, 330 F.3d 696, 704 (5th Cir. 2003) (“[T]he rule indicates that proper service requires [...] personal delivery of the subpoena, but also tendering of the witness fee and a reasonable mileage allowance.”).²

6. However, “the language of Rule 45 does not explicitly demand personal service of a subpoena”; indeed “[s]uch language ‘neither requires in-hand service nor prohibits alternative means of service.’” *Cordius Trust v. Kummerfeld*, 2000 WL 10268, at *2 (S.D.N.Y. Jan. 3, 2000) (quoting *King v. Crown Plastering Corp.*, 170 F.R.D. 355, 356 (E.D.N.Y.1997)). Several courts have held, however, that personal service of a subpoena is not required. *See, e.g., King*, 170 F.R.D. at 356 (“the court sees no reason for requiring in hand delivery so long as service is made in a manner that reasonably insures actual receipt of the subpoena by the witness”); *First Nationwide Bank v. Shur*, 184 B.R. 640, 642 (E.D.N.Y. 1995) (“‘delivering’ a copy of a subpoena, for the purposes of Rule 45 includes any act or series of acts that reasonably assures the entity to which it is addressed fair and timely notice of its issuance, contents, purpose and effect”); *Hinds v. Bodie*, 1988 WL 33123, at *1

² TSB also acknowledges that this Court has previously held that service of a subpoena by certified mail is generally in effective. However, TSB submits there are mitigating facts in this case which warrant service upon Bellue by certified mail.

(E.D.N.Y. 1988) (court ordered service by alternative means after five unsuccessful attempts to serve subpoena on non-party witness).

7. TSB submits that this case is akin, if not identical to, *Cordius Trust*. There a plaintiff attempted to serve a defendant's chairman of the board and at one point the defendant's president. 2000 WL 10268, at *1. However, the defendant's chairman evaded service. Among other things, the record showed:

between December 8, 1999 and December 17, 1999, plaintiff made repeated attempts to serve [the chairman] at his residence with a [sic] executed subpoena duces tecum, but the doorman repeatedly barred the process server from ascertaining whether Kummerfeld was in his apartment. When he attempted to effect service at [the chairman's] place of business, the process server was informed that [he] was no longer employed there.

Id. at *1.

8. The *Cordius Trust* court recognized that many courts have interpreted Rule 45 to require personal service. *Id.* However, the court also recognized that other courts have authorized service by alternative means, including certified mail. *Id.*

9. The *Cordius Trust* court ultimately authorized service upon the defendant's chairman by certified mail. The court wrote:

In accordance with the interpretative principle that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action", Rule 1, Fed.R.Civ.P., and given the textual ambiguity of Rule 45 combined with the repeated attempts of the plaintiff to effectuate personal service, and the cost and delay that would result by requiring further

attempts at such service, plaintiff is permitted to serve [the chairman] by certified mail.

Id. at *2. The court added, “The Federal Rules of Civil Procedure should not be construed as a shield for a witness who is purposefully attempting to evade service.” *Id.*

10. Again, TSB recognizes that service of a subpoena is generally effectuated by “personal service.” However, in this instance, TSB has made several attempts to “personally serve” Bellue at his office and at his residence. As evidenced by the Declaration of Thibodeaux, Bellue is evading service. Thus, TSB requests that the Court authorize service of subpoenas upon Bellue by certified mail at his office and his residence.

11. This alternative service by means of certified mail reasonably insures actual receipt of the subpoena by Bellue, the “delivery” requirement of Rule 45 will be met, and Bellue will be provided with fair and timely notice of his obligation to produce documents and appear at a deposition and the July 20, 2015 trial. Further, service by certified mail comports with due process as it is reasonably calculated under the circumstances to provide Bellue with both notice and an opportunity to present objections.

12. Lastly, TSB submits that ex parte relief is appropriate because attempts to resolve this issue with Bellue would waste further time and resources. Upon information and belief, Bellue is not represented by an

attorney in this case. TSB seeks to subpoena Bellue in his individual capacity. Bellue is evading service. Thus, ex parte relief is appropriate.

WHEREFORE, TSB requests the entry of an order (i) granting authority to serve subpoenas upon Bellue by certified mail; and (ii) such further and additional relief as the facts may warrant and justice so requires.

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