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18  
19  
20 **UNITED STATES DISTRICT COURT**  
21 **DISTRICT OF NEVADA**

22 LIBERTY MEDIA HOLDINGS, LLC, a  
23 California Corporation,

24 Plaintiff

25 vs.

26 FF MAGNAT LIMITED d/b/a/ ORON.COM;

Case No. CV 2:12-cv-01057

**DEFENDANT FF MAGNAT LIMITED'S**  
**EMERGENCY MOTION FOR PARTIAL**  
**RELIEF FROM TEMPORARY**  
**RESTRAINING ORDER AND FOR**  
**EXTENSION OF TIME; OR, IN THE**  
**ALTERNATIVE, TO ADVANCE**

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27  
28 **DEFENDANT FF MAGNAT LIMITED'S EMERGENCY MOTION FOR PARTIAL RELIEF**  
**FROM TEMPORARY RESTRAINING ORDER AND FOR EXTENSION OF TIME; OR, IN**  
**THE ALTERNATIVE, TO ADVANCE HEARING ON PRELIMINARY INJUNCTION**  
**CASE NO. 2:12-cv-01057**

1 MAXIM BOCHENKO a/k/a/ ROMAN  
2 ROMANOV; and JOHN DOES 1 - 500.

**HEARING ON PRELIMINARY  
INJUNCTION**

3 Defendants.

**Judge: Hon. Gloria N. Navarro**

4  
5 Without intending to waive any defenses it may have based on lack of personal jurisdiction,  
6 venue or improper service of the summons and complaint, Defendant FF Magnat Limited dba  
7 Oron.com (“Oron”) brings this emergency motion for partial relief from the Temporary Restraining  
8 Order entered by the Court on June 21, 2012, and for a brief extension of time to respond to the  
9 Court’s Order to Show Cause on Plaintiff Liberty Media Holdings LLC’s (“Liberty Media” or  
10 “Plaintiff”) motion for preliminary injunction.<sup>1</sup>

11 Specifically, Oron requests that the Court amend the Temporary Restraining Order to allow  
12 Oron access to its funds held by PayPal so that Oron may pay legal fees to defend itself in this action  
13 and in a related action brought by Plaintiff in Hong Kong, as well as pay certain limited business  
14 expenses that are necessary to keep operating. Oron proposes that the Court allow PayPal to transfer  
15 €300,000 (approximately \$375,00 U.S. dollars) in Oron’s account to the trust account of Oron’s  
16 outside counsel, Greenberg & Lieberman, LLC of Washington, D.C, and permit those funds to be  
17 disbursed to pay legal fees and costs, and business expenses necessary to keep the company

18  
19 <sup>1</sup> Defendant Oron is specially appearing at this juncture to address a specific concern regarding the  
20 Temporary Restraining Order that was entered on June 21, 2012, based on an ex parte application  
21 and without providing defendants the opportunity to be heard. By making this request, Oron does  
22 not intend to submit to this Court’s jurisdiction or to waive any right to challenge jurisdiction and/or  
23 improper service. To the contrary, Oron fully intends to raise its challenges to personal jurisdiction  
24 and service in its answer to Plaintiff’s motion for a preliminary injunction, and also expressly  
25 reserves its right under the Federal Rules of Civil Procedure to challenge personal jurisdiction and  
26 service by way of a motion to dismiss the complaint in this action. The law provides that an  
27 opposition to a preliminary injunction motion under circumstances such as those present here does  
28 not constitute a waiver. *See, e.g., Hendricks v. Bank of America, N.A.*, 408 F.3d 1127, 1135 (9th Cir.  
2005) (finding that the defendant had not waived its venue and personal jurisdictional defenses  
because it had raised them “in its first responsive pleading,” which was its response to plaintiff’s  
preliminary injunction motion); *Bear Stearns Cos. Inc. v. Lavalle*, 2000 WL 34339833 at \*2 (N.D.  
Tex.) (same). *Cf. Bautista-Perez v. Mukasey*, 2008 WL 314486 (N.D. Cal. 2008) (citing *Hendricks*  
and finding waiver of venue objection because defendant did not raise it in its preliminary injunction  
opposition).

1 operating. In addition, Oron requests a one-week extension of the briefing deadlines and the hearing  
2 on Plaintiff's request for a preliminary injunction to enable its counsel to adequately address the  
3 significant issues presented by that motion.

4 In the alternative, if the Court declines to amend the Temporary Restraining Order as  
5 requested, Oron requests that the Court advance the hearing on Plaintiff's motion for preliminary  
6 injunction to this Friday, June 29, 2012, so that the issue of the preliminary injunction can be  
7 resolved before Oron is required to pay its hosting providers or face the shutdown of its business.

### 8 I. INTRODUCTION

9 Oron is a Hong Kong company that operates a "cloud" based data storage business. The  
10 plaintiff is apparently a producer of pornographic video material, some of which third persons  
11 apparently stored on Oron's computer servers. Very little of Oron's business comes from the United  
12 States and Plaintiff's videos comprise an infinitesimal portion of the data that is stored by users on  
13 Oron's servers. Oron contends that the Plaintiff's suit is entirely without merit on a number of  
14 grounds, and is confident that it will establish that as this case proceeds.

15 Nevertheless, without notice to Oron and without giving Oron an opportunity to be heard,  
16 Plaintiff obtained a Temporary Restraining Order ("TRO") freezing all of Oron's assets. If  
17 unmodified the TRO threatens to prevent Oron from defending itself in this action. Moreover, if  
18 Oron is barred from disbursing any of its funds and cannot pay its necessary expenses, it will be put  
19 out of business even before this Court hears the pending preliminary injunction motion.

20 Plaintiff has also commenced legal proceedings in Hong Kong, where Oron is domiciled, and  
21 on an *ex parte* basis obtained there a temporary restraining order. Unlike the order here, the Hong  
22 Kong court's order expressly allows Oron to expend funds for its legal defense and necessary  
23 business expenses. Oron, however, is prohibited from doing that by this Court's order.<sup>2</sup>

24  
25 \_\_\_\_\_  
26 <sup>2</sup> Plaintiff's counsel is apparently sending notices to entities with whom Oron does business  
essentially demanding that they cease business with Oron and/or that those entities "preserve" their  
records, in an obvious attempt to destroy Oron's business relationships.

1 To be clear, Oron believes there are ample grounds to deny Plaintiff's request for a  
2 preliminary injunction freezing its assets, and intends to fully address those grounds in its answer to  
3 the Court's Order to Show Cause. The relief requested by this Emergency Motion is far more  
4 narrow: Oron simply seeks the ability to pay its lawyers to represent it in this case and to pay the  
5 business expenses necessary to keep it in business until such time as this Court rules on the  
6 preliminary injunction motion. Not only is that request reasonable in scope, it is amply supported by  
7 case law holding that a defendant faced with an asset freezing injunction should, except in  
8 exceptional circumstances not present here, be permitted access to funds in order to defend itself and  
9 pay necessary business expenses.

10 Moreover, given the myriad of complex legal issues to be addressed in Oron's upcoming  
11 answer to the Order to Show Cause – including issues of personal jurisdiction and improper service  
12 of process, issues of whether this case should proceed in Hong Kong rather than in this Court, the  
13 lack of irreparable harm, and the unlikelihood that Plaintiff will prevail on the merits of its copyright  
14 infringement claims (including the applicability of the safe harbor provisions of the Digital  
15 Millennium Copyright Act) – the matter warrants a one-week extension of the briefing schedule and  
16 hearing date on Plaintiff's request for a preliminary injunction. The Court's TRO was only signed  
17 last Thursday, June 21, 2012 and Oron's opposition briefing on the motion is presently due this  
18 Wednesday, June 27, 2012. Plaintiff is seeking relief that will effectively put Oron out of business,  
19 and Oron should be afforded sufficient time to analyze and address the complex legal issues raised  
20 by Plaintiff's request without the TRO itself serving to put Oron out of business before Oron even  
21 has a chance to be heard by this Court.

## 22 II. BACKGROUND

23 While Oron cannot address all of the numerous inaccuracies and misstatements contained in  
24 the allegations of the Complaint, a brief statement of factual background is appropriate here.

### 25 A. Factual Background

26 Defendant FF Magnat Limited is a legitimate business located in Hong Kong, which owns the

1 domain name, Oron.com (“Oron”).<sup>3</sup> Oron provides file sharing and data storage services  
 2 throughout the world and, like well-known “cloud services” offered by such companies as Apple  
 3 (“iCloud”), Amazon, Google, Hewlett Packard and DropBox, Oron offers its users the ability to  
 4 upload and store large amounts of data on remote and secure servers. Oron assigns a unique URL  
 5 web address to the user’s data for access purposes. However, the user has complete control over his  
 6 or her documents and files and makes the decision whether to share those documents and files with  
 7 others. That is Oron’s business model, and it is that business model which Plaintiff is attacking in  
 8 this action. Yet that attack, including Liberty Media’s false and disparaging allegations of “piracy”,  
 9 “theft” and “conspiracy,” is based on little more than Plaintiff’s misstatement of the relevant facts.

10 Liberty Media is the parent company of and does business as CORBIN FISHER®. Although  
 11 the complaint alleges that Liberty Media “produces, markets and distributes adult-oriented  
 12 audiovisual works,” that description of Liberty Media’s business is an understatement. Another  
 13 federal court has described Liberty Media as “a distributor of lawful, albeit hardcore pornography.”  
 14 *Liberty Media Holdings, LLC vs. Swarm Sharing Hash File et al*, 821 F.Supp.2d 444, 447 n.2 (D.  
 15 Mass. 2011). Liberty Media and CORBIN FISHER® have been described as “America’s most  
 16 litigious . . . porn studio,” and produces and distributes “gay hard core pornography.”<sup>4</sup> In addition, a  
 17 simple internet search reveals that Liberty Media has filed numerous “mass defendant” lawsuits  
 18 alleging copyright infringement against a host of companies as well as hundreds of individuals,  
 19 including many of Liberty Media’s own customers. It appears that Liberty Media is developing a  
 20 reputation as a “troll litigator” in the arena of copyright infringement.<sup>5</sup>

21  
 22  
 23 <sup>3</sup> The allegations of the Plaintiff’s complaint regarding the “ownership” of Oron by “individuals” in  
 24 the United States and its alleged “contacts” with this jurisdiction are not accurate. Contrary to  
 Plaintiff’s allegations, Defendant Bochenko is not an owner, founder, officer, director, employee or  
 controlling person of Oron.

25 <sup>4</sup> See <http://www.queerty.com/did-americas-favorite-bareback-studio-spend-500k-on-gay-xxx-just-to-block-it-20111007/>.

26 <sup>5</sup> There will be a question in this case whether the Copyright Act’s protection should even extend to  
 27 plaintiffs like Liberty Media and the hard core pornography that they distribute.

1           Oron runs its business through a website called Oron.com. As noted, Oron.com is simply a  
2 file sharing system. Oron provides these services through a variety of servers maintained by various  
3 hosting providers. If Oron were to lose the ability to provide these servers, its business would be  
4 shut down and all of its users would immediately lose access to their files. Oron pays these hosting  
5 providers on a monthly basis and the invoices for these providers are due to be paid on June 30<sup>th</sup>. If  
6 Oron's assets are frozen and it cannot pay its hosting providers, its business will effectively shut  
7 down as of July 1, 2012.

8           Oron's file storage system allows anyone to upload and store files. Oron strictly maintains  
9 the privacy of its customers. It does not index the materials which are uploaded and it maintains no  
10 catalogue or search function within the website. For the storage services that it offers, Oron charges  
11 its customers a monthly fee if they choose to use its premium services of faster  
12 uploading/downloading and more and longer storage. Visitors to Oron.com, whether for free or as  
13 paying premium customers, do not have access to other user's materials. The individual who initially  
14 uploads and stores his or her material has the sole control over the material which they upload and  
15 store and decides whether to share any of that material with anyone else. Oron is not involved in any  
16 decision by its customers to share anything with anyone else. Notably, this is not a "peer to peer"  
17 system like Napster or Grokster, which have been held to run afoul of the copyright laws. Oron  
18 plays no active role in the uploading and sharing of material between its customers and it does not  
19 "publish" anything, contrary to the allegations of the Complaint.

20           Oron offers its file storage services to individuals throughout the world. The allegation in the  
21 Complaint that Oron's "largest contingent of users are from the United States" is not true. It can be  
22 determined from publicly available information, such as WHOIS domain tools, (*see* Site Profile on  
23 <http://whois.domaintools.com/oron.com>), that only 13.4% of Oron's visitors to its website come  
24 from the United States. The majority of its visitors come from Europe and Asia. Moreover, the  
25 extent to which Plaintiff's files are stored on Oron's servers is extremely small. It is estimated that  
26 Plaintiff's files constitute less than one-tenth of one percent of all the data stored on Oron.com.

1 Thus, more than 99.9% of Oron's customers, none of whom have been alleged to infringe anyone's  
2 intellectual property rights, will likely lose access to their stored files if the TRO is not modified.

3 **B. Procedural History**

4 On June 20, 2012, Plaintiff filed its complaint in this action, and at the same time filed its  
5 Emergency Motion for Ex Parte Temporary Restraining Order, Order for Seizure, and Appointment  
6 of Receiver, and Order to Show Cause Re Preliminary Objection ("Motion"). Plaintiff sought ex  
7 parte relief, without formal notice to Oron of defendant Maxim Bochenko (collectively, where  
8 appropriate, "Defendants"), based on bare allegations that Defendants had "already taken affirmative  
9 steps to move assets beyond the court's reach in order to frustrate any order the court may issue."  
10 (Motion at 10:11-14).

11 On June 21, 2012, the Court entered an order (e-Docket 11) ("Order") granting the Motion in  
12 part, and freezing all of Defendants' assets pending the hearing on Plaintiff's request for a  
13 preliminary injunction, including all assets in any U.S. bank or financial institution, and any funds  
14 held for Oron by PayPal, Inc., CCBill, LLC, and AlertPay. The Court further ordered VeriSign to  
15 "freeze the www.oron.com domain name from any further transfers, and enjoined Defendants "from  
16 disgorging or dissipating any fund, property, domain names, or other assets until further notice."<sup>6</sup> *Id.*  
17 at 2-3. Finally, the Court ordered Plaintiff to immediately serve its complaint, motion papers, and  
18 the Court's Order, and set a July 3, 2012 hearing on the request for a preliminary injunction.  
19 Defendants are currently required to file their answering papers by 5:00 PM on June 27, 2012.<sup>7</sup>

20 In addition to this lawsuit, Plaintiff has instituted legal proceedings against Oron in Hong  
21 Kong. According to Plaintiff, it has already obtained an order, similar in some respects to the Order  
22

23 <sup>6</sup> The Court stated that the Order "does nothing more than prohibit Defendants from fraudulent  
24 transfers and compels that they unwind those in which they have already engaged." However, the  
25 broad language that Defendants may not dissipate any funds, read literally, goes further and prevents  
26 Defendants from spending any money for any legitimate purpose.

27 <sup>7</sup> Apparently Plaintiff has "served" the complaint and restraining order on Bochenko, who is not an  
28 authorized agent of Oron for service of process. Furthermore, he is not an officer, director, owner,  
employee or shareholder of Oron.

1 here, freezing Oron's assets (\$3,00,000) in Hong Kong (the "Hong Kong Order"). (Declaration of  
 2 Stevan Lieberman in Support of Emergency Motion ("Lieberman Decl."), filed herewith, ¶ 4 & Ex.  
 3 A). Importantly, however, the Hong Kong Order does not restrict Oron from "disgorging or  
 4 dissipating" any of its funds, but instead expressly allows for the payment of legal fees and business  
 5 expenses.

### 6 III. ARGUMENT

#### 7 A. The Court Should Modify the Temporary Restraining Order to Allow Defendant 8 Access to Funds In Order to Pay the Legal Fees and Costs Associated With Its 9 Defense To This Lawsuit

10 As written, the Court's Order places severe restrictions on Oron's ability to access the funds  
 11 in its accounts with various banks and payment services, including PayPal.<sup>8</sup> Not only does that  
 12 Order require those financial institutions and payments services to "freeze" any assets in Oron's  
 13 accounts, but it also enjoined Oron from "disgorging or dissipating any funds, property, domain  
 14 names, or other assets until further notice." (Order at 3:6-7.) Read literally, the Order prohibits  
 15 Oron from paying attorneys' fees or legal costs to defend itself in this action and related legal  
 16 proceedings in Hong Kong. It also prohibits Oron from paying its employees or satisfying other  
 17 legitimate business expenses, such as the monthly invoices from hosting providers for Oron's  
 18 servers.

19 In light of that Order, Defendant is placed in the difficult position of having to defend itself  
 20 in this action without having access to the funds it needs to pay legal counsel. Moreover, under the  
 21 terms of the Order, Oron is not permitted to withdraw the funds necessary to pay Hong Kong

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22 <sup>8</sup> That Order was apparently predicated on the allegation that Oron was attempting to transfer funds  
 23 out of the United States in order to take them out of this Court's jurisdiction, including a copy of an  
 24 apparently redacted email from PayPal to Oron concerning the transfer of certain funds. There is no  
 25 evidence that the transfer reflected in that email was anything outside the ordinary course of  
 26 business, since Oron is domiciled in Hong Kong and it would be reasonable for it to transfer its  
 27 funds there. Curiously, Plaintiff offers no details as to how it obtained a private email between Oron  
 28 and its payment service, PayPal, and provides no foundation for that inadmissible document. As  
 Oron will address more fully in its answer to the Order to Show Cause on Plaintiff's request for a  
 preliminary injunction, it appears that the email in question was improperly obtained by "hacking"  
 into Oron's email accounts. It is inappropriate for Plaintiff to seek relief in equity given that conduct  
 and its own unclean hands.



1 counsel in the action brought by Plaintiff. Given this, the Court should modify the Order to permit  
2 Oron to transfer funds from its PayPal account to the trust account of Oron's outside counsel,  
3 Greenberg & Lieberman, LLC, and to permit Oron to use those funds to pay the legal fees incurred  
4 in the defense of those actions as well as reasonable business expenses, which are essential for Oron  
5 to remain in business.

6 **1. Ninth Circuit Precedent Supports Oron's Request**

7 The law in the Ninth Circuit and elsewhere addressing asset freezing injunctions amply  
8 supports Oron's request for access to its funds in order to pay for its legal defense. For example, in  
9 *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988), the Ninth Circuit upheld a  
10 preliminary injunction enjoining the Marcoses from disposing of any of their assets. In balancing  
11 the relative hardships to determine the propriety of the injunction, the Court relied upon the fact that  
12 the district court had provided that the Marcoses could use their assets "to cover normal living  
13 expenses and legal fees." *Id.* at 1362.

14 The Ninth Circuit followed that holding more recently in *Johnson v. Couturier*, 572 F.3d  
15 1067 (9th Cir. 2009). The *Johnson* court upheld a challenge to a district court's asset freezing  
16 injunction because the injunction was limited to the assets in the defendant's possession in which the  
17 plaintiffs had an equitable interest, and because the injunction expressly allowed assets to be used for  
18 "normal living expenses and legal fees." *Id.* at 1085-1086; *see also Fidelity National Title Insurance*  
19 *Company v. Castle*, 2011 WL 5882878 (N.D. Cal., Nov. 23, 2011 ) (relying on *Johnson v. Courtier*  
20 to fashion asset freezing injunction that allowed defendant to use personal funds to cover living  
21 expenses).

22 Similarly, in *Federal Savings & Loan Insurance Corp.*, 835 F.2d 554 (5th Cir. 1987), the  
23 Fifth Circuit held that an asset freezing injunction that allowed individual defendants only \$3,500  
24 per month for living expenses and legal fees was improper because it did not allow enough money  
25 for an adequate defense. As the Fifth Circuit explained:

26 This suit was brought to establish the defendants' wrongdoing; the court

1 cannot assume the wrongdoing before judgment in order to remove the  
 2 defendants' ability to defend themselves. The basis of our adversary system  
 3 is threatened when one party gains control of the other party's defense as  
 4 appears to have happened here. Thus we conclude that some kind of  
 allowance must be made to permit each defendant to pay reasonable  
 attorneys' fees if he is able to show that he cannot pay them from new or  
 exempt [i.e., unfrozen] assets . . . ."

5 *Id.* at p. 565 (citation omitted).<sup>9</sup>

6 Cases in the Ninth Circuit and elsewhere have also held it appropriate to allow a business  
 7 entity defendant to pay necessary business expenses out of frozen assets. *See, e.g., Securities and*  
 8 *Exchange Commission v. Hickey*, 322 F.3d 1123, 1131 (9<sup>th</sup> Cir. 2003) (injunction upheld where  
 9 "under the terms of the freeze order, legitimate corporate business expenses may be paid from frozen  
 10 assets..."); *United States v. Brown*, 988 F. 2d 658 (district court allowed defendant to use frozen  
 11 funds for business expenses; Sixth Circuit accepted that but remanded for district court to ensure  
 12 only funds that plaintiff might ultimately recover were frozen); *Federal Trade Commission v. QT,*  
 13 *Inc.*, 467 F.Supp.2d 863 (N.D. Ill. 2006) (defendants allowed to pay out of frozen assets necessary  
 14 business expenses and legal fees); *Securities and Exchange Commission v. Dodwell*, 2002 WL  
 15 236687 (W.D. Va. 2002) (court grants request to modify freeze order to allow for payment of  
 16 ordinary business expenses).

17 Moreover, Liberty Media has obtained an order from a Hong Kong court freezing up to \$3  
 18 million of Oron's assets. (Lieberman Decl., ¶ 4 & Ex. A). Unlike the Order here, however, the  
 19 Hong Kong order allows funds to be used for legal fees and business expenses. (*Id.* at ¶ 12) ("This  
 20 Order does not prohibit the Defendant from spending a reasonable sum toward its ordinary and  
 21 proper business expenses and on legal advice and representation."). However, because this Court's  
 22 Order as presently written prohibits the Defendants from "disgorging or dissipating any funds" for  
 23 any purpose, Oron is unable to use funds for legal fees as expressly permitted by the court in Hong  
 24

25 <sup>9</sup> While there is some authority that, in appropriate cases, a district court has discretion to forbid or  
 26 limit payment of attorneys' fees out of frozen assets, *see, e.g., Commodity Futures Trading*  
 27 *Commission v. Noble Metals International, Inc.*, 67 F.3d 766 (9<sup>th</sup> Cir. 1995), the cases so holding  
 28 have involved circumstances going far beyond those presented in this case, and are thus inapposite.

1 Kong, where Oron is domiciled.

2 **2. The Request Is Reasonable Because The Complaint Raises Numerous**  
3 **Complex Issues and Thus Preparation of Oron’s Defense Will Require**  
4 **Significant Legal Expense**

5 Oron’s request should also be granted because it is reasonable in scope, and seeks only the  
6 release of sufficient funds to permit Oron to respond to Plaintiff’s request for a preliminary  
7 injunction, and to keep Oron in business during that time. In order to prevail on that request,  
8 Plaintiff is obligated to demonstrate, *inter alia*, a likelihood of success on the merits of its claims.  
9 Yet as described below, the complaint in this action raises a host of complex legal issues, each of  
10 which impacts Plaintiff’s ability to make such a showing. Consequently, in order to prepare an  
11 answer to the Court’s Order to Show Cause on Plaintiff’s request for a preliminary injunction,  
12 Oron’s counsel will be required to conduct extensive factual and legal research into each of the  
13 following issues in order to prepare Oron’s answering brief.<sup>10</sup>

14 **a) Jurisdiction and Service**

15 As noted above, Oron is specially appearing for purposes of this motion and intends to fully  
16 contest whether this Court has jurisdiction to enter any order concerning Oron or its assets. The  
17 complaint contends that Oron is subject to personal jurisdiction under the Nevada long arm statute,  
18 and that Oron has sufficient contacts with the United States for this Court to find personal  
19 jurisdiction exists. Oron, however, is a Hong Kong corporation, which receives the majority of its  
20 income from customers in Europe, Asia and Russia. Contrary to the allegations of the complaint,  
21 less than 14% of Oron’s online traffic is from the United States. Moreover, the allegation that  
22 Maxim Bochenko is a resident of Florida and Colorado and is the “director/controlling party for  
23 Oron” is also false. None of Oron’s employees or officers is a United States resident. Given that  
24 jurisdiction here is premised on these false allegations, the issue of personal jurisdiction will need to  
25 be analyzed in detail in Oron’s opposition to the motion for preliminary injunction.

26 <sup>10</sup> Oron intends to address each of these issues in greater detail in its answer to the Court’s Order to  
27 Show Cause. In addition, Oron reserves the right to address additional issues in that answer.

1 At the same time, Plaintiff has not properly served the complaint in this action, and thus has  
2 not obtained personal jurisdiction over Oron in any event. When Plaintiff's counsel asked if Oron's  
3 outside counsel would accept service of process, he was expressly told that counsel was not  
4 authorized to accept such service. As such, service here was improper, and will need to be addressed  
5 more fully in Oron's answer to the motion for preliminary injunction.

6 **b) No Basis for Preliminary Injunction**

7 Oron also needs to pay legal fees to address the legal basis for an asset freeze. There are two  
8 ways a federal court can freeze a defendant's assets in a civil case. First, under Federal Rule of Civil  
9 Procedure 64, the court can use remedies such as attachment that are available under the law of the  
10 state where the court is located. The plaintiff has not requested such relief.

11 Second, the court in appropriate cases can use its equitable power to issue a preliminary  
12 injunction to maintain the status quo. However, the circumstances which such injunctions are  
13 appropriate are very limited. The legal issues in this area will require careful examination in the  
14 opposition to the motion for preliminary injunction. For example, the United States Supreme Court  
15 held in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) that a  
16 district court has no authority to issue a preliminary injunction freezing a defendant's assets in  
17 connection with a claim for money damages. The Court stressed the historical principle that an  
18 unsecured creditor has no prejudgment rights – at law or in equity – in the property of a debtor. 527  
19 U.S. at 328-330. As the Supreme Court explained:

20 The remedy [of a preliminary injunction freezing assets] sought here could  
21 render Federal Rule of Civil Procedure 64, which authorizes use of state  
22 prejudgment remedies, a virtual irrelevance. Why go through the trouble of  
23 complying with local attachment and garnishment statutes when this all-  
24 purpose prejudgment injunction is available?

25 *Id.* at 330-331. The Court warned of allowing a situation of creditors racing to the courthouse to  
26 freeze assets in a way that could prove “financially fatal” to debtors. *Id.* at 331.

27 Another issue that will be addressed is that the preliminary injunction sought here is not  
28 limited to funds or property that the Plaintiff contends should be turned over to Plaintiff if it prevails.

1 Rather, Plaintiff seeks a preliminary injunction to freeze all of Oron's assets, whatever they may be  
2 and wherever they may be located, with no evidence that the assets should belong to the Plaintiff or  
3 are in any way involved in this case. As indicated above, less than one-tenth of one percent of the  
4 files stored on Oron's servers are Liberty Media's materials. The remaining 99.9% of Oron's  
5 business involves users whose files have nothing to do with Liberty Media and for whom no  
6 allegations of copyright infringement have or can be made. The Ninth Circuit has made clear that a  
7 district court "cannot issue a preliminary injunction to freeze assets of a defendant that are unrelated  
8 to the case to ensure the defendant will have money to pay a future judgment." *In re USA*  
9 *Commercial Mortgage Co.*, 397 Fed. Appx. 300, 306 (9<sup>th</sup> Cir. 2010) (citing *Grupo Mexicano*, 527  
10 U.S. at 333).

11 Moreover, even in cases where a preliminary injunction to freeze assets might be proper in  
12 order to maintain the status quo so that the court can afford final injunctive relief, the barrier to  
13 obtaining such an injunction is a high one.

14 Even under the more lenient standard for claims seeking equitable  
15 relief...[the plaintiff] would have to show a 'likelihood of dissipation of the  
16 claimed assets, or other inability to recover monetary damages, if relief is  
17 not granted. Courts have construed this standard narrowly, only exercising  
18 their inherent authority to freeze assets where there is considerable evidence  
19 of likely asset dissipation. . . . Certainly, every creditor would like to freeze  
20 its alleged debtor's assets before proving its claims, increasing leverage in  
21 settlement negotiations and the chances of collecting any judgment. In the  
22 typical case, however, such an imposition on the alleged debtor and the  
23 courts is not justified.

24 *Allstate Insurance Co. v. Baglioni*, No. CV 11-06704 (DDP), 2011 WL 5402487, \*2 (C.D. Cal.,  
25 November 8, 2011) (citations omitted). The *Allstate* court denied a preliminary injunction even  
26 though there was evidence of a transfer of property that was "quite possibly fraudulent." *Id.* Here,  
27 on the other hand, the only "evidence" that has been provided to the Court is a copy of a redacted  
28 email, reportedly obtained by unidentified means by a "third party," that reflects a transfer of funds  
from Pay Pal to Hong Kong – where Oron is domiciled. (See Declaration of Marc J. Randazza In  
Support of Plaintiff's Emergency Motion For Ex Parte Temporary Restraining Order, ¶ 4). There is

1 no evidence that this transfer, if it occurred, was anything other than a transfer made in the ordinary  
2 course of Oron's business, and it certainly does not justify the extraordinary relief of freezing all of  
3 Oron's assets. Again, this issue will require extensive legal and factual analysis for purposes of  
4 Oron's response to Plaintiff's motion for preliminary injunction.

5 **c) Copyright Infringement Issues**

6 The crux of this action is Plaintiff's claim that Defendants have infringed its copyrighted  
7 materials. Yet that claim raises numerous issues regarding whether Plaintiff can establish a  
8 likelihood of success on merits, all of which Oron needs the time and legal fees to present to the  
9 Court.

10 For example, there are serious questions whether one or more of the defendants can be held  
11 liable for copyright infringement (whether directly or indirectly) because the evidence will establish  
12 that they fall under the safe harbor provision of the Digital Millennium Copyright Act ("DMCA").  
13 17 U.S.C. § 512. Section 512(c) of the DMCA limits liability for "infringement of copyright by  
14 reason of the storage at the direction of a user of material that resides on a system or network  
15 controlled or operated by or for the service provider" so long as the service provider meets various  
16 conditions described in sections 512(c) and (i). The evidence here – as compared to Plaintiff's  
17 unsupported accusations – will establish that Oron satisfies each of those conditions, and thus is  
18 protected under the DMCA safe harbor provision. Indeed, the Complaint itself concedes that Oron  
19 has complied with the DMCA by registering a DMCA agent more than one year ago. At the same  
20 time, there are significant questions as to whether Plaintiff's alleged DMCA notices were sufficient  
21 to trigger the statutes take-down provisions. *See* 17 U.S.C. §§ 512 (c)(3).

22 Plaintiff's claims for contributory and vicarious infringement are similarly flawed. For  
23 example, Plaintiff has provided no admissible evidence that Oron had actual knowledge of any of the  
24 allegedly infringing activity, and thus cannot be liable for contributory infringement. *See e.g.,*  
25 *Perfect 10 Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). To the contrary, per the  
26 strict terms of service between Oron and its customers, Oron maintains the privacy of its clients'

1 content. Nor has Plaintiff offered any admissible evidence that Oron exercised the requisite control  
2 over the alleged direct infringer and/or that Oron derived a financial benefit from the direct  
3 infringement. *Id.* at 1173 (a defendant “exercises control over a direct infringer when he has both a  
4 legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.”)  
5 (citing to *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)).

6 Likewise, Plaintiff’s claim for inducement of copyright infringement will fail. Plaintiff has  
7 not established that Defendants provided a service “with the object of promoting its use to infringe  
8 copyright, as shown by clear expression or other affirmative steps taken to foster infringement.”  
9 *Grokster*, 545 U.S. at 936-937. “[M]ere knowledge of infringing potential or actual infringing uses  
10 would not be enough here to subject [a defendant] to liability.” *Id.* at 937. To “establish inducement  
11 liability, it is crucial to establish that the distributors ‘communicated an inducing message to their ...  
12 users,’ the classic example of which is an ‘advertisement or solicitation that broadcasts a message  
13 designed to stimulate others to commit violations.’” *Perfect 10, Inc. v. Visa Int’l Service, Assoc.*,  
14 494 F.3d 788 (9th Cir. 2007) (citing *Grokster*, 545 U.S. at 936-937). Here the evidence will  
15 establish that Defendants do not actively promote their service to commit copyright infringement, or  
16 that the service has no other legitimate use. To the contrary, the evidence will establish that the vast  
17 majority of its service is for proper purposes.

18 **d) Balance of hardships**

19 Another factor to be considered in connection with the proposed preliminary injunction is the  
20 balance of the hardships that would be imposed should the preliminary injunction be entered. In  
21 addition to the prejudice such an injunction would impose on Oron’s ability to fund its legal defense,  
22 the proposed injunction would also effectively “shut down” Oron without any finding of  
23 infringement on its part. Because the proposed injunction would freeze Oron’s accounts with its  
24 billing payment services, such as PayPal, entry of that injunction would drastically impact Oron’s  
25  
26

1 customers and its ability to conduct business.<sup>11</sup> As noted, Oron offers its customers a premium  
2 service for an additional fee, thereby allowing those customers greater storage capability and faster  
3 service. If Oron's accounts with its payment services are frozen, those customers will not be able to  
4 pay for those premium services, and Oron's cash flow will essentially dry up. That impact on its  
5 business and its customers must be analyzed and balanced as part of Oron's answer to Plaintiff's  
6 motion for preliminary injunction.

7 **e) Lack of Irreparable Harm**

8 In addition, there are also serious issues whether Plaintiff can establish irreparable harm.  
9 Although Plaintiff suggests that irreparable harm in copyright cases is presumed, *see* Motion at 6,  
10 that is not the law in this circuit. To the contrary, the Ninth Circuit has confirmed that irreparable  
11 harm is no longer presumed in copyright infringement cases. *See e.g., Perfect 10, Inc. v. Google,*  
12 *Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392  
13 (2006)); *see also Skinvisible Pharmaceuticals, Inc. v. Sunless Beauty, Ltd.*, 2012 WL 1032549, \* 2-  
14 3 (D. Nev. March 27, 2012) (confirming same).

15 At the same time, Plaintiff has not presented any evidence to support its claim of irreparable  
16 harm. Plaintiff has not established by any admissible evidence that it has and/or will suffer any  
17 damages other than a monetary loss. Without more, that is not enough to establish irreparable  
18 injury. *See e.g., Rent-a-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597,  
19 603 (9th Cir. 1991) (finding that "economic injury alone does not support a finding of irreparable  
20 harm, because such injury can be remedied by a damage award"). Moreover, Plaintiff waited months  
21 and years to bring suit. Such a long delay undercuts Plaintiff's ability to prove irreparable harm.  
22 *See e.g., McDermott v. Amersand Pub., LLC*, 593 F.3d 950, 964-65 (9th Cir. 2010) (no irreparable  
23 harm found given long delay in seeking injunction).

24  
25  
26 <sup>11</sup> Liberty Media's counsel has been emailing numerous billing services in an attempt to block and or  
shut down Oron's ability to accept money from its clients.



1 **f) Inadequacy of Bond**

2 Finally, the Court's Order requires Plaintiff to post a bond in the amount of \$100. Yet at the  
3 same time, the Order freezes all of Oron's assets before any infringement has been proven.  
4 Consequently, Oron will need to analyze and address the appropriateness of that bond should a  
5 preliminary injunction issue.<sup>12</sup>

6 In light of the complexity of the legal issues that need to be addressed, and the  
7 reasonableness of Oron's limited request for access to funds to pay legal fees and costs, Oron  
8 respectfully requests that the TRO be modified to allow it to transfer funds to its counsel's trust  
9 account and to use those funds to pay legal fees and costs as requested herein.

10 **B. The Court Should Grant a One-Week Extension of Time for the Briefing  
11 Schedule and Hearing on Plaintiff's Request for a Preliminary Injunction**

12 Given the myriad of complex legal issues presented by this lawsuit, Oron also requests that  
13 the Court grant a one-week extension of time for the parties to file their respective briefs on  
14 Plaintiff's motion for preliminary injunction, and a similar extension of the hearing on that motion.  
15 Such a short extension will cause no prejudice to Plaintiff, given the Court's entry of the TRO  
16 essentially freezing all of Oron's assets. By contrast, forcing Oron to respond on less than a week's  
17 notice to these complex issues would impose an undue burden on Oron and its counsel, and would  
18 be prejudicial to its ability to present a complete defense on these issues.

19 **C. In the Alternative, the Court Should Advance the Hearing on Plaintiff's Motion  
20 for Preliminary Injunction**

21 In the event that the Court declines to grant the relief requested above and amend the TRO to  
22 permit Oron to pay its legal and business expenses, Oron requests, in the alternative, that the Court  
23 advance the hearing on Plaintiff's motion for preliminary injunction to Friday, June 29, 2012. As  
24 described above, Oron must pay its hosting providers by the end of this month in order to avoid  
25 termination of those hosting services. If Oron's servers are shut down for non-payment of those

26 <sup>12</sup> Oron will also address the impropriety of Plaintiff's request for appointment of a receiver in  
27 Oron's opposition to the motion for preliminary injunction.

1 monthly hosting fees, it will effectively be out of business, and its users – 99.9% of whom have no  
2 connection to this litigation – will lose access to their data. Given this potential hardship, Oron  
3 requests that, if the request to modify the TRO is denied, that the Court advance the hearing so that  
4 the preliminary injunction issue can be resolved before the June 30 deadline for payment of those  
5 hosting fees.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Oron respectfully requests that the Court (1) amend its Temporary  
8 Restraining Order to allow Oron to transfer €300,000 (300,000 Euros, approximately \$375,000  
9 USD) from its PayPal account to the trust account of Oron’s outside counsel, Greenberg &  
10 Lieberman, LLC and to use those funds to pay the legal fees associated with this action and  
11 Plaintiff’s action against Oron in Hong Kong, as well as to pay reasonable business expenses,  
12 including server fees, so that Oron can stay in business until the preliminary injunction motion is  
13 decided; and (2) grant a one-week extension of time for the briefing deadlines and hearing on  
14 Plaintiff’s request for a preliminary injunction.

15 Dated: this 25<sup>th</sup> day of June, 2012

17 Wilson Elser Moskowitz Edelman & Dicker LLP

18 By: 

19 DAVID S. KAHN

20 Attorneys for Defendant FF MAGNAT LIMITED