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2011 JUN 16 A 11:13

U.S. DISTRICT COURT
DISTRICT OF NEVADA

BY _____ DEPUTY

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7 ROBERT H. SIMYAR

8
9 UNITED STATES DISTRICT COURT
10 DISTRICT OF NEVADA

11 Case No. 2:11cv992 KJD-LRL

12 FIRST TIME VIDEOS LLC, a Nevada limited
13 liability company and ROBERT H. SIMYAR,

14 Plaintiffs,

15 v.

16 SUPERSTAR MEDIA LABS, LLP, an Arizona
17 limited liability partnership, and REGAN
SCOTT FRANKS II, an individual,

18 Defendants.

**PLAINTIFFS' MOTION FOR LEAVE
TO OPEN AND MAINTAIN ACTION
UNDER SEAL**

19 Plaintiff First Time Videos LLC ("FTV") and Plaintiff Robert H. Simyar ("Mr. Simyar")
20 (together "Plaintiffs") are seeking an *ex parte* temporary restraining order, without notice, to
21 prohibit the Defendants from continuing to sell counterfeit DVDs that contain Plaintiffs'
22 copyrighted content under Plaintiffs' federally registered FTV FIRST TIME VIDEOS trademarks.
23 Plaintiffs are seeking an *ex parte* temporary restraining order without notice to because, as set
24 forth more fully below, there is a substantial risk that, if provided with notice, the Defendants will
25 move, hide, or destroy the counterfeit DVDs at issue, records of counterfeit DVD sales, or the
26 instrumentalities used by the Defendants to copy, mass produce, and distribute the counterfeit
27 DVDs at issue.

28 Accordingly, Plaintiffs hereby move the Court for leave to open and maintain this action

1 under seal and to file under seal: (1) the Civil Cover Sheet; (2) the proposed Summonses; (3) the
2 Complaint; (4) their *ex parte* motion for temporary restraining order; (5) their motion for
3 preliminary injunction; (6) the Declaration of Robert Simyar; (7) the Declaration of Michael J.
4 McCue; (8), their proposed temporary restraining order; (9) their proposed preliminary injunction;
5 (10) this motion; and (11) a proposed form of order granting this motion, until such time as the
6 Court has had an opportunity to consider and rule on Plaintiffs' accompanying *ex parte* motion for
7 temporary restraining order without notice.

8 STATEMENT OF FACTS

9 Plaintiff First Time Videos LLC ("FTV") is a limited liability company formed under the
10 laws of the State of Nevada, having its principal place of business at 7582 Las Vegas Boulevard
11 South, Suite 134, Las Vegas, Nevada, 89123. (Compl. ¶ 4; Simyar Decl. ¶ 2.) Plaintiff Robert H.
12 Simyar ("Mr. Simyar") is an individual who resides in Las Vegas, Nevada. (Compl. ¶ 5.) Mr.
13 Simyar is the Managing Member of FTV. (*Id.*; Simyar Decl. ¶ 1.)

14 Defendant Superstar Media Labs, LLP ("SML") is an Arizona limited liability partnership.
15 Upon information and belief, Superstar conducts business from 454 E. 52nd Street, Long Beach,
16 California 90805-6404. (*Id.* ¶ 6.) Defendant Regan Scott Franks II ("Franks") is an individual
17 who, upon information and belief, resides at 454 E. 52nd Street, Long Beach, California 90805-
18 6404. (*Id.* ¶ 7.) Upon information and belief, Franks is the General Partner of SML. (*Id.*) Upon
19 information and belief, Franks controls and directs the infringing activities of SML and profits
20 from such infringing conduct. (*Id.*) Upon information and belief, Franks and SML are the alter
21 egos of one another and each is liable for the acts of the other.

22 FTV is the exclusive owner of: (a) United States trademark registration number 3,264,607
23 for the FTV FIRST TIME VIDEOS mark for use in connection with "[e]ntertainment services,
24 namely, providing an on-line subscription service featuring images and video recordings in the
25 nature of adult entertainment and providing a website featuring images and video recordings in
26 the nature of adult entertainment; production and distribution of adult entertainment recordings;
27 and providing adult entertainment information."; and (b) United States trademark registration
28 number 3,391,879 for the FTV FIRST TIME VIDEOS mark for use in connection with "[p]re-

1 recorded DVDs and downloadable video recordings featuring adult entertainment” (collectively,
2 the “FTV Marks”). (Compl. ¶ 8; Simyar Decl. ¶¶ 3-4 & Exs. A & B.)

3 Based on Plaintiffs’ ownership of United States trademark registrations for the FTV Marks
4 and based upon Plaintiffs’ continuous and extensive use of the FTV Marks in commerce since
5 2002, Plaintiffs own the exclusive right to use the FTV Marks in connection with the production,
6 distribution, and sale of adult DVDs and adult videos. (Compl. ¶ 9; Simyar Decl. ¶ 6.)

7 Between 2004 and the Fall of 2008, in exchange for a percentage of revenues, FTV
8 provided the Defendants with Plaintiffs’ raw video footage and granted Defendants the right to
9 produce finished DVDs and to distribute and sell the finished DVDs under Plaintiffs’ federally
10 registered FTV Marks. (Compl. ¶ 10; Simyar Decl. ¶ 7.) After experiencing repeated problems
11 with Defendants’ performance, including the production of poor quality DVDs and poor customer
12 service, FTV terminated its agreement with the Defendants on November 1, 2008. (*Id.*)

13 After discovering that Defendants were continuing to distribute and sell counterfeit DVDs
14 using Plaintiffs’ content and the FTV Marks, on May 29, 2009, Plaintiffs’ counsel sent the
15 Defendants a cease and desist letter. (Compl. ¶ 11; Simyar Decl. ¶ 8; McCue Decl. ¶ 2 & Ex. A.)
16 The letter demanded, among other things, that Defendants “[c]ease production, offering for sale
17 and sale of any DVDs or other products using the FTV mark.” (*Id.*)

18 On May 29, 2009, Franks responded to Plaintiffs’ cease and desist letter, stating:

19 I will make sure we have complied with everything you demand in your
20 letter. We have already removed many FTVGirls titles from our inventory
21 and I will make sure the remainder are deleted over the weekend and the
22 domain transfer is initiated.

(Compl. ¶ 12; McCue Decl. ¶ 3 & Ex. B.)

23 On June 3, 2009, Franks sent Plaintiffs’ counsel a follow-up email, stating:

24 [W]e’ve have complied with all of your requirements. [D]omain changed all
FTV titles are removed from the store and deleted from the system.

25 (Compl. ¶ 13; McCue Decl. ¶ 4 & Ex. C.)

26 Notwithstanding Defendants’ representations, Defendants continued to use the FTV Marks
27 on the Internet. (Compl. ¶ 14; Simyar Decl. ¶ 9; McCue Decl. ¶ 5.)

28 On June 4, 2009, Plaintiffs’ counsel again wrote to Defendants concerning Defendants

1 continued use of the FTV Marks on Internet websites and identified several uses of the FTV
2 Marks on Defendants' <dvdsuperstar.com> web site. (Compl. ¶ 15; Simyar Decl. ¶ 9; McCue
3 Decl. ¶ 6 & Ex. D.)

4 On June 4, 2009, Franks responded, claiming that the continued use of the FTV Marks on
5 the Internet was not intentional, and promising to take the <dvdsuperstar.com> site offline,
6 stating: "Sorry about that, not intentional. I've gone ahead and taken that site offline." (Compl. ¶
7 16; Simyar Decl. ¶ 9; McCue Decl. ¶ 7 & Ex. E.)

8 Notwithstanding Franks' claim that he had taken the <dvdsuperstar.com> website offline,
9 FTV subsequently discovered that Defendants were continuing to use the FTV Marks to offer
10 adult DVDs for sale on the <dvdsuperstar.com> website. (Compl. ¶ 17; Simyar Decl. ¶ 10;
11 McCue Decl. ¶ 8.)

12 On June 25, 2009, Plaintiffs' counsel sent Defendants a second cease and desist letter via
13 email. (Compl. ¶ 18; Simyar Decl. ¶ 10; McCue Decl. ¶ 8 & Ex. F.)

14 On June 30, 2009, Franks responded by again claiming that he was in the process of
15 removing the FTV Marks and content from his website, stating:

16 I have been working on this since receiving this email on the 25th. I am having
17 to sort this out myself as I am unable to hire a tech person.

18 At this time, I believe all FTVgirls images and references have been deleted.

19 (Compl. ¶ 19; Simyar Decl. ¶ 11; McCue Decl. ¶ 9 & Ex G.)

20 FTV subsequently confirmed that Defendants had complied with Plaintiffs' demands and
21 FTV considered the matter resolved. (Compl. ¶ 20; Simyar Decl. ¶ 11.)

22 In May 2011, FTV discovered that Defendants were again using FTV Marks in connection
23 with the sale of counterfeit DVDs featuring pirated FTV content. (Compl. ¶ 21; Simyar Decl. ¶
24 12; McCue Decl. ¶¶ 10-13 & Ex. H.) This time, however, Defendants were selling counterfeit
25 DVDs under the FTV Marks and using Plaintiffs' content on the web site accessible at
26 <dvdhotties.com>. (*Id.*) The website contains an online store through which DVDs may be
27 purchased. (*Id.*) Its main page contains a hyperlink denominated "ftvgirls" that takes the user to a
28 section of the website devoted exclusively to the sale of DVDs that contain Plaintiffs' copyrighted

1 content and bear the FTV Marks. (*Id.*) The website currently lists 219 “FTVGirl” titles for sale.
 2 (*Id.*) The web site is owned and operated by the Defendants. (*Id.*) However, in an effort to
 3 conceal this infringing conduct, Defendants utilized a technical measure to make the web site
 4 inaccessible to Plaintiffs or Plaintiff’s counsel. (*Id.*) This has prevented Plaintiff and Plaintiffs’
 5 counsel from discovering the infringement. (*Id.*)

6 FTV also learned that Defendants are continuing to use the FTV Marks on the
 7 <dvdsuperstar.com> web site. (Compl. ¶ 22; Simyar Decl. ¶ 13; McCue Decl. ¶ 15 & Ex. J.)
 8 The links leading to the infringing conduct are not available on the home page. (*Id.*) However,
 9 the infringing content is on the <dvdsuperstar.com> web site and is accessible through links in
 10 Google search results. (*Id.*)

11 On or about May 20, 2011, FTV retained an investigator to order an FTV-branded DVD
 12 from Defendants’ <dvdhotties.com> website. (Compl. ¶ 23; Simyar Decl. ¶ 14; McCue Decl. ¶
 13 14 & Ex. I.) On May 25, 2001, Defendants shipped the DVD by mail to the investigator’s address
 14 in Henderson, Nevada. (*Id.*) The spine of the DVD case states “FTV FIRST TIME VIDEO GIRLS.”
 15 (*Id.*) The cover of the DVD case states “FIRST TIME VIDEO GIRLS.” (*Id.*) And the DVD disc
 16 itself states “FTV First Time Videos.” (*Id.*) The shipping label states that the package was sent
 17 by “SUPERSTAR MEDIA LABS, 454 E. 52ND STREET, LONG BEACH, CA 90805-6404.”
 18 (*Id.*)

19 In addition to the foregoing, the Defendants have accessed Plaintiffs’ Internet website
 20 <ftvgirls.com> using the name “Regan Franks.” (Compl. ¶ 24; Simyar Decl. ¶ 15.) The
 21 Defendants have willfully copied copyrighted content from the website, including adult video
 22 footage. (*Id.*; McCue Decl. ¶ 16 & Ex. K.) The Defendants have used the copied content to
 23 create and distribute adult videos and DVDs that are substantially similar to Plaintiffs’
 24 copyrighted content. (*Id.*) By doing so, the Defendants have willfully infringed Plaintiffs’
 25 copyrights.

ARGUMENT

I. GOOD CAUSE EXISTS TO OPEN AND MAINTAIN THIS ACTION UNDER SEAL PENDING THE COURT’S RULING ON PLAINTIFFS’ *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER WITHOUT NOTICE.

1 It is well recognized in counterfeiting cases that advance notice to the defendants of a
2 motion for injunctive relief merely enables the defendants to transfer the counterfeit goods to
3 another seller whose identity would be unknown or unobtainable. As the court in *In re Vuitton et*
4 *Fils S.A.*, 606 F.2d at 1 (2d Cir. 1979) recognized, no notice should be given in such
5 circumstances: “If notice is required, that notice all too often appears to serve only to render
6 fruitless further prosecution of the action.” *Id.* at 5.

7 In this case, if notice were given to the Defendants of the existence of this action or the
8 relief Plaintiffs are seeking prior to the Court ruling on Plaintiffs’ *ex parte* motion for temporary
9 restraining order, it is very likely that Defendants will move, hide, or destroy the counterfeit
10 DVDs at issue, records of sales of the counterfeit DVDs at issue, and the instrumentalities used by
11 Defendants to copy, mass produce, and distribute the counterfeit DVDs at issue. Plaintiffs are
12 entitled to seize all of this evidence in a trademark counterfeiting case. *See* 15 U.S.C. § 1116. An
13 order allowing this action to be opened and maintained under seal pending the Court’s
14 consideration and ruling on Plaintiffs’ *ex parte* motion for temporary restraining order is
15 particularly appropriate given the Defendants conduct. As set forth above, the Defendants have
16 made repeated promises to Plaintiff and to Plaintiffs’ counsel that they would stop using
17 Plaintiffs’ federally registered FTV Marks in connection with the sale of adult DVDs. (Compl. ¶¶
18 11-20; Simyar Decl. ¶¶ 7-11; McCue Decl. ¶¶ 2-9.) These promises have all been false as
19 Defendants have continued to use Plaintiffs’ FTV Marks to sell counterfeit DVDs. (*See id.*) Even
20 worse, Defendants are now copying copyrighted content from Defendants’ <ftvgirls.com>
21 website and selling counterfeit DVDs containing Plaintiffs’ copyrighted works. (Compl. ¶¶ 24;
22 Simyar Decl. ¶ 15; McCue Decl. ¶ 11.)

23 Defendants have even gone so far as to implement technical measures designed to dupe
24 Plaintiffs and their counsel into believing that Defendants stopped selling counterfeit DVDs on
25 the Internet. As set forth in the accompanying declarations of Robert H. Simyar and Michael J.
26 McCue, the Defendants have implemented technical measures to prevent Plaintiffs and Plaintiffs’
27 counsel from accessing the <dvdhotties.com> website where the Defendants are and have been
28 selling counterfeit FTV brand DVDs. (Compl. ¶ 21; Simyar Decl. ¶ 12; McCue Decl. ¶ 2-13.)

1 Given Defendants false promises, flagrant disregard of Plaintiffs' intellectual property rights, and
2 technical measures undertaken to avoid the discovery of their ongoing infringement, Plaintiffs
3 respectfully submit that good cause exists to allow Plaintiffs to open and maintain this action
4 under seal pending the Court's ruling on Plaintiffs' *ex parte* motion for temporary restraining
5 order.

6 **CONCLUSION**

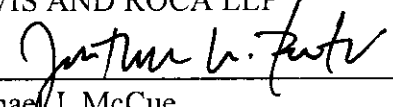
7 As the foregoing demonstrates, good cause exists to allow Plaintiffs to open and maintain
8 this matter under seal until the Court has had an opportunity to consider and rule on Plaintiffs' *ex*
9 *parte* motion for temporary restraining order.

10 Accordingly, Plaintiffs respectfully request that the Court enter an order granting
11 Plaintiffs' leave to open and maintain this action under seal and to file under seal: (1) the Civil
12 Cover Sheet; (2) the proposed Summonses; (3) the Complaint; (4) their *ex parte* motion for
13 temporary restraining order; (5) their motion for preliminary injunction; (6) the Declaration of
14 Robert Simyar; (7) the Declaration of Michael J. McCue; (8), their proposed temporary
15 restraining order; (9) their proposed preliminary injunction; (10) this motion; and (11) a proposed
16 form of order granting this motion, until the Court has had an opportunity to consider and rule on
17 Plaintiffs' accompanying *ex parte* motion for temporary restraining order without notice.

18 DATED: this 15th day of June, 2011

19 Respectfully submitted,

20 LEWIS AND ROCA LLP

21 By: 

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10 DISTRICT OF NEVADA

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12 FIRST TIME VIDEOS LLC, a Nevada limited
liability company and ROBERT H. SIMYAR,

13 Plaintiffs,

14 v.

15 SUPERSTAR MEDIA LABS, LLP, an Arizona
16 limited liability partnership, and REGAN
SCOTT FRANKS II, an individual,

17 Defendants.
18

Case No.

**ORDER GRANTING PLAINTIFFS'
MOTION FOR LEAVE TO OPEN AND
MAINTAIN ACTION UNDER SEAL**

19 UPON CONSIDERATION of Plaintiffs' motion for leave to open and maintain this
20 action under seal, Plaintiffs' motion for an *ex parte* temporary restraining order without notice,
21 Plaintiffs' motion for preliminary injunction, the Declaration of Robert H. Simyar, the Declaration
22 of Michael J. McCue, the memoranda of points and authorities supporting each of the foregoing
23 motions, and for other good cause shown;

24 Plaintiffs' motion for leave to open and maintain this action under seal is hereby
25 **GRANTED**. Plaintiffs' counsel shall appear in the office of the Clerk of the Court, shall pay the
26 filing fee, and shall submit for filing an original and two paper copies of: (1) the Civil Cover
27 Sheet; (2) the proposed Summonses; (3) the Complaint; (4) Plaintiffs' *ex parte* motion for
28 temporary restraining order without notice; (5) Plaintiffs' motion for preliminary injunction; (6)

1 the Declaration of Robert Simyar; (7) the Declaration of Michael J. McCue; (8), Plaintiffs'
2 proposed temporary restraining order; (9) Plaintiffs' proposed preliminary injunction; (10)
3 Plaintiffs' motion for leave to open and maintain this action under seal; and (11) a proposed form
4 of order granting Plaintiffs' motion for leave to open and maintain this action under seal. The
5 Clerk of the Court is directed to receive these papers, to open a civil action under seal, and to
6 maintain the action under seal pending further order of the Court.

7 **IT IS SO ORDERED:**

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10 _____
UNITED STATES DISTRICT JUDGE

11 DATED: _____
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