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10 **UNITED STATES DISTRICT COURT**
 11 **DISTRICT OF NEVADA**

12 Teller, an individual,
 13 **Plaintiff,**
 14 v.
 15 Gerard Dogge (p/k/a Gerard Bakardy), an
 16 individual.
 17 **Defendant.**

Case No. 2:12-cv-00591-JCM-GWF

**MOTION FOR CASE-DISPOSITIVE
 SANCTIONS**

18
 19
 20 Plaintiff Teller (“Teller” or “Plaintiff”) by and through undersigned counsel, hereby moves
 21 this Court for case-terminating sanctions. Plaintiff’s Motion is based upon the pleadings and papers
 22 on file herein, the following Memorandum of Points and Authorities, as well as the affidavit and
 23 exhibits submitted in support thereof, and any oral argument allowed by this Court at the time of

24 ///
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 26 ///
 27 ///
 28 ///

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1 hearing, all of which are incorporated herein by this reference.

2 DATED this 8th day of July, 2013.

3 GREENBERG TRAUIG, LLP

4
5 /s/ Mark G. Tratos

6 Mark G. Tratos (Bar No. 1086)
7 Thomas F. Kummer (Bar No. 1200)
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10 Counsel for Plaintiff

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 Since the very inception of this lawsuit, defendant Dogge has done what he wanted to do,
14 when he wanted to do it, notwithstanding inconveniences such as the Federal Rules or this Court's
15 orders. Dogge's conduct has repeatedly been characterized by a lack of respect for the American
16 judicial system in general and this Court in particular. Over the past year, Dogge has engaged in
17 countless activities which appear to be designed to drive up the cost of litigation and force plaintiff
18 Teller into giving up on enforcing his intellectual property rights. These actions include evading
19 service, filing a vexatious and harassing defamation lawsuit in Belgium, refusing to respond to
20 discovery requests even when ordered to do so by the Court, refusing to answer numerous questions
21 in his deposition, refusing to sign a protective order governing discovery, filing motions containing
22 pornographic images simply to harass and embarrass Teller, and disobeying numerous court orders.
23 As this Court has ample grounds for imposing case-terminating sanctions, Teller respectfully
24 requests that this Court grant Teller's motion for the same.¹

25 ¹ This motion relies upon excerpts from Dogge's deposition. At the time of filing, Dogge had not yet
26 reviewed his deposition transcript and made any changes. If Dogge does so, Teller will
27 supplement or amend this motion as appropriate. Further, there are several motions currently
28 pending before the Court that may affect this motion; specifically, Teller's motion to enforce this
Court's orders and to compel, depending on the outcome, may affect the evidence available.
Teller also has a pending motion for clarification of the Minute Order dated July 5, 2013, which
set the hearing date for several pending motions for July 26. Teller requested that the Court clarify

1 **II. RELEVANT FACTS**

2 The instant action is a copyright infringement and unfair competition action involving the
 3 famous Las Vegas magician Teller (of Penn & Teller) and a Belgian entertainer, Gerard Dogge.
 4 After seeing Teller perform, Dogge copied Teller's signature illusion, Shadows, and uploaded two
 5 videos of Dogge performing the illusion to YouTube with an offer to sell the illusion. In these
 6 videos, Dogge performs the illusion and offers to sell it and instructions for performing the illusion
 7 for \$2,450 Euros. The videos were "tagged" by Dogge with keytags including "Penn," "Teller,"
 8 "Revealed," and "Tutorial," among others. Dogge also states in the comments to the video that "I've
 9 seen the great Penn & Teller performing a similar trick..." Teller holds a copyright in Shadows, and
 10 these videos were removed by YouTube pursuant to DMCA copyright notices submitted by Teller.

11 **The Start of the Litigation**

12 At first, Teller was optimistic that the matter could be resolved without litigation. He
 13 contacted Dogge and asked to speak with him regarding the illusion. Dogge obliged, and the two
 14 spoke on the phone several times and exchanged a number of emails. Unfortunately, Teller's efforts
 15 to settle the matter were met with greed and threats. When Teller made his first offer, Dogge stated
 16 it was like a joke to him, and remarked that he was surprised that Teller valued his signature piece so
 17 little. See March 28, 2013 emails between Teller and Dogge, pka Gerard Bakardy, attached hereto
 18 as **Exhibit 1**. Dogge also threatened that he could "sell the whole thing to a clever Chinese..." and
 19 asked how much is it worth to Teller knowing that by selling the newer version, the old version loses
 20 its value dramatically. *Id.* Dogge stated that he expected to make four or five million dollars from
 21 selling the illusion. *Id.* Later, he suggested a six-figure settlement, and threatened to sell the illusion
 22 immediately if he didn't get it. Suddenly the negotiations became extortion. At that point, on April
 23 11, 2012, Teller filed suit.

24 **Dogge Files His Own Suit in Belgium While Evading Service of Teller's**

25 Having made the decision to file suit, Teller was hopeful that the matter could be dealt with
 26

27 whether or not this was also intended to delay the dispositive motion deadline. Nevertheless, out
 28 of an abundance of caution, Teller files his dispositive motions today.

1 efficiently and in a cost-effective manner. It was not to be, as Dogge sought every opportunity to
2 delay the suit, harass Teller, and drive up litigation costs.

3 Shortly after the filing of the complaint, Dogge contacted Teller and noted his alleged
4 concern regarding Exhibit 3 to the complaint. Exhibit 3 contains several screenshots of the YouTube
5 video that forms the basis of this lawsuit. In two of the screenshots, the “bookmark bar” of the
6 person who took the screenshot is visible, and Dogge claims that several of the 19 “bookmarks” that
7 are visible could be construed as a shorthand designation for adult websites. Although no reasonable
8 person would believe that the bookmarks from the computer that captured the screenshot were
9 related to Dogge, the subject of the screenshot, Teller removed the portion of the exhibit with the
10 bookmarks as a courtesy. Teller had no problem doing so, as the bookmarks had nothing to do with
11 the substance of the exhibits – the YouTube video images demonstrating Dogge’s infringement of
12 the Shadows copyright and attempted public sale of the illusion.²

13 Nevertheless, Dogge saw an opportunity to avoid the merits of the litigation and exploited it.
14 He sought to profit from this invented association between himself and the adult sites by suing Teller
15 in Belgium for defamation for 8 million Euros,³ likely hoping that the frivolous defamation suit
16 would deter Teller from enforcing his intellectual property rights in the American suit.⁴

17 In his Belgian suit, Dogge argues that certain of the nineteen bookmarks, namely, “mantube,”
18 “CFSelect,” “Corbin,” and “2Long,” could be construed as related to pornography. What Dogge
19 omits, however, is that Dogge has no way of knowing what those bookmarks link to. The bookmarks
20 in Exhibit 3 of the complaint were not (and never were) live links, as a user can name his or her

21 _____
22 ² Teller redacted and replaced Exhibit 3 shortly after receiving Dogge’s concerns, out of courtesy to
23 Dogge. In recent frivolous filings, Dogge has claimed that this is “evidence tampering” akin to
24 wiping the fingerprints from a gun – despite the fact that the bookmarks were removed in response
25 to Dogge’s concern.

26 ³ Obviously, these claims are frivolous, as it is common knowledge that on any given computer, the
27 bookmark bar remains the same regardless of what content is being shown in the main part of the
28 browser. No computer user would understand a bookmark bar as a reflection upon or a reference
to the depicted content displayed in the main part of the browser: one has nothing to do with the
other.

⁴ Teller has refused to be intimidated, however, and is defending the vexatious Belgian suit on the
merits.

1 | bookmarks anything they want. To make any kind of association with Dogge, a person would have
 2 | to (1) know that Dogge was sued in the United States; (2) go beyond reading an article or two about
 3 | the case, and actually download the complaint with original exhibits; (3) read the exhibits; (4) notice
 4 | the bookmark bar, which is a small and insignificant part on the top of one exhibit; (5) believe that a
 5 | bookmark bar's links change depending upon the content being displayed (a mistake no computer
 6 | user would make); (6) read the bookmark bar; (7) use a search engine to plug in the terms; (8)
 7 | assume that ambiguous terms such as "2long" or "corbin" relate to pornography; (9) scroll through
 8 | the results of the search engine to find adult sites; and (10) assume that only the most offensive or
 9 | outrageous content on those sites were directed at Dogge. This is manifestly unlikely.

10 | Not surprisingly, Dogge has come forward with no evidence whatsoever in the Belgian
 11 | action that anyone has associated Dogge with the adult sites or refused to employ him as a result of
 12 | Exhibit 3.⁵ As a result, Dogge has attempted to use the American litigation as a forum to further
 13 | publicize the removed Exhibit 3, constantly making outlandish claims, as seen further below, and
 14 | using inflammatory and harassing language in his filings, no doubt hoping to garner media attention
 15 | and manufacture "evidence" for the Belgian suit.

16 | Meanwhile, despite acknowledging receipt of the complaint, communicating with Teller
 17 | regarding the complaint, and filing a lawsuit based on an exhibit in the complaint, Dogge sought to
 18 | evade service of the complaint and claimed in motions that he was not effectively served. As a
 19 | result, Teller was forced to serve by publication – a very costly endeavor in Europe.⁶ Eventually,
 20 | this Court ordered that Dogge was served. *See* Doc. No. 56.

21 | **Early Filings, Including this Court's Order Directing Dogge Not to File Pornography**

22 | When Teller learned of the Belgian lawsuit, Teller sought an anti-suit injunction from this
 23 | Court. It was ultimately denied. However, during the filings related to that motion, Dogge filed a
 24 |

25 | ⁵ If Dogge has indeed had trouble finding work, the more logical solution is that he is viewed as
 26 | unethical for appropriating another magician's illusion.

27 | ⁶ After forcing Teller to spend tens of thousands of dollars and countless time serving by publication,
 28 | Dogge has had the audacity to complain in numerous filings about the newspapers in which the
 announcement was made and the terms that were used in the announcement.

1 motion to file an exhibit under seal. *See* Doc. No. 22. Dogge did not attach the exhibit to the motion
2 or serve it separately on Teller, but Dogge described the exhibit as containing pornographic images.
3 *See id.* Teller filed a notice of non-opposition, noting that Teller did not oppose sealing the exhibit,
4 whatever it was, but reserved the right to challenge the exhibit itself on any other grounds. *See* Doc.
5 No. 27. In response to that motion, this Court specifically ordered that “Defendant shall not file any
6 pornographic material with this court as a sealed exhibit or otherwise.” *See* Doc. No. 56, p. 4.

7 Dogge’s other early filings, including his eventual answer, contained statements and
8 arguments that were bizarre, irrelevant, inflammatory, and nonsensical, a characterization with
9 which this Court agreed. *See* Doc. No. 56, at p. 4-5.

10 Discovery

11 After the Court entered a scheduling order, the parties began discovery. For ease of
12 reference, the key events are broken down into discrete subsections.

13 *Dogge Deletes Key ESI After Stating he Will Produce it.*

14 Probably the most important pieces of evidence in this case are the videos that Dogge
15 uploaded to YouTube. At first, it was evident that Dogge had the videos and that he intended to use
16 them. Specifically, in Dogge’s initial disclosures, which Dogge emailed to Teller on December 31 at
17 12:27 p.m., he stated that he would “provide the Court a copy of the videos at issue, *the video that*
18 *was removed from YouTube by the Plaintiff ‘The Rose and her Shadow’* and a copy of Tellers
19 video, ‘Shadows.’” *See* Dogge’s Initial Disclosures (without exhibits), attached hereto as **Exhibit 2**
20 (emphasis added). At 2:00 p.m. that same day, a Greenberg Traurig paralegal responded to that
21 email, requesting that Dogge send copies of the videos he referenced to Teller’s counsel by mail.
22 *See* December 31, 2013 Email Correspondence between Dogge and Tiffany Milligan Regarding
23 Dogge’s Initial Disclosures to Teller’s Counsel, attached hereto as **Exhibit 3**. Teller received no
24 response. *See* Declaration of M. Tratos, filed concurrently herewith, at ¶ 5.

25 On January 11, 2013, Teller served his first round of discovery requests upon Dogge,
26 including RFP 4, which requested that Dogge “[p]roduce complete and accurate copies of any and
27 all videos, slideshows, or other media that you have posted on YouTube or elsewhere on the Internet
28 related to The Rose, Shadows, and/or The Rose and Her Shadow.” *See* Teller’s first set of requests

1 for production of documents, dated January 11, 2013, to Dogge, attached hereto as **Exhibit 4**. On
 2 February 8, Dogge responded to the first round of discovery. In response to RFP 4, Dogge stated
 3 that “[t]he only video ever posted by defendant related to ‘The Rose and her Shadow’ was removed
 4 from YouTube by the plaintiff. **Defendant prefers not to ‘produce’ it again.**” (Emphasis added).
 5 *See* Dogge’s responses to first request for production of documents, dated February 8, 2013, attached
 6 hereto as **Exhibit 5**.

7 Dissatisfied with this and other discovery responses, counsel sent three letters, each about a
 8 week apart, attempting to explain the deficiencies and asking Dogge to meet and confer. Dogge did
 9 not respond to any of the three letters. *See* Letters to Dogge dated February 15, 2013, February 22,
 10 2013 and February 27, 2013, attached hereto as **Exhibits 6-8**; Tratos Decl., at ¶ 6. Teller was forced
 11 to file a motion to compel. In opposition to the motion to compel, Dogge gave a myriad of reasons
 12 why he should not have to produce the video, but concluded by stating that “Defendant did search
 13 but can’t find the video, **it may be possible that Defendant erased the video** from his computer in
 14 his last PC cleanup.” *See* Doc. No. 59, Opposition, at 2 (emphasis added).⁷

15 In reply, Teller pointed out that if Dogge had truly deleted the video, sanctions for spoliation
 16 would be in order. The Court found that the video was clearly relevant and ordered Dogge to
 17 produce it, warning of spoliation sanctions and holding that if the Defendant could not produce the
 18 video, he must provide a reasonably detailed explanation regarding the erasure. *See* Doc. No. 62, p.
 19 3. Since that time, Dogge has maintained that he erased the video as part of his cleanup of his hard
 20 drive wherein he deleted files to make more space. Tratos Decl., at ¶ 7. However, when asked about
 21 the cleanup at his deposition, Dogge could remember surprisingly little about what, when or how he
 22 deleted files. *See* excerpts of deposition of Gerard Dogge (“Dogge Depo”), taken on June 11, 2013,
 23 attached hereto as **Exhibit 9**, at pp. 198:8–204:25 (Dogge does not remember when he decided to
 24

25 ⁷ When faced with the motion to mirror image his hard drive, Dogge came up with yet another
 26 excuse, claiming that he understood the request for the videos to mean that he would have to
 27 “produce” – by re-staging, re-performing, and re-filming the video again. Each and every document
 28 request began with the word “produce,” yet there was no confusion as to any other request; this is
 yet another example of Dogge feigning ignorance when he believes it to be to his benefit.

1 clean up his computer, whether he deleted the material file by file or in bulk, or how long it took to
2 clean up his hard drive).

3 *Dogge Refuses to Cooperate in Obtaining the Video Through Other Sources*

4 Faced with the destruction of key evidence, Teller sought to obtain the video from other
5 sources. Teller asked Dogge if he would consent to (1) signing a letter asking YouTube for the
6 video, and (2) having a mirror image taken of his hard drive, and having a forensic expert attempt to
7 discover the deleted file, all at Teller's expense. *See* Letters to Dogge dated April 15, 2013 and
8 April 22, 2013, attached hereto as **Exhibits 10-11**. Dogge did not respond to these requests. *Tratos*
9 *Decl.*, at ¶ 8. Teller was forced to file a motion for the same, which was granted.

10 *Dogge Refuses to Obey Two Court Orders Regarding Mirror Imaging*

11 After Teller filed his motion for mirror imaging of Dogge's computer, but before the hearing
12 on the same, the Court entered an interim minute order ordering Dogge to "preserve all evidence on
13 the hard drive at issue in Plaintiff's [74] Motion. Destruction of any evidence may result in the
14 imposition of sanctions, up to and including the striking of Defendant's Answer." *See* Minute Order,
15 Doc. 81. The purpose of that order was to address Teller's concern, as outlined in his motion, that
16 the deleted material would be inadvertently overwritten as the computer treated the deleted files as
17 empty space.⁸ In Dogge's deposition, when asked what he did to comply with this order, he stated
18 that although he had not deleted any further files in his computer, he had continued to work daily on
19 his laptop, while hoping that his computer doesn't crash or get a virus. *See Exhibit 9*, Dogge Depo,
20 at 188:24-189:1-15. Continuing to work on this computer despite the Court's order not to is a
21 violation of the Court's order. On information and belief, Dogge continues to create new files on the
22 computer at issue to this day.

23 The Court granted Teller's motion for mirror imaging of Dogge's computer at a hearing on
24 June 7, and ordered Dogge to produce his computer in Antwerp, Belgium for mirror imaging at
25 Teller's expense. *See* Transcript of Hearing of June 7, 2013, attached hereto as **Exhibit 12**. Counsel
26

27 ⁸ Once a file is deleted, it does not immediately disappear. Instead, it is placed into a different category by the
28 computer and treated as empty space to be written over at will. Accordingly, further activity on the
computer could inadvertently overwrite the deleted file.

1 for Teller discussed the order in a meet and confer conference with Dogge later that day, and asked
2 Dogge when would be convenient. *See* Tratos Decl., at ¶ 9. Dogge stated that he had to talk to his
3 Belgian attorney first (a startling request from a defendant who claims to be acting *pro se*), but that
4 he would provide an answer at his deposition the following week. *Id.* At the deposition, Dogge
5 stated that he would not produce the computer unless the Magistrate Judge’s order was enforced by a
6 Belgian court. *See Exhibit 9*, Dogge Depo at 186:23-187:12. At a follow-up meet and confer,
7 counsel for Teller again asked Dogge to produce the computer, and Dogge again refused. *See* Tratos
8 Decl., at ¶ 10. To this date, Dogge has not agreed to produce his computer despite the Court’s order
9 that he must do so. *See* Tratos Decl., at ¶ 13.

10 *Dogge Refuses to Produce Other Key ESI*

11 In preparation for Dogge’s deposition, Teller had some documents translated into English.
12 One of these documents was a flyer that Dogge had prepared as an advertisement for a magic
13 magazine. *See* Dutch print advertisement and English translation of advertisement, attached hereto
14 as **Exhibit 13**. The print advertisement had been sent to the magic magazine and accepted for
15 publication, but Dogge had pulled it from the magazine during negotiations with Teller. Upon
16 translating the document, Teller’s counsel realized that when a customer ordered the prop, it was to
17 come with an instructional DVD and a manual. Counsel was surprised, as despite discovery requests
18 that would have encompassed such items, these had not been produced.

19 During Dogge’s deposition, counsel for Teller inquired as to the whereabouts of the manual
20 and the DVD. At first, Dogge stated that he didn’t want to produce the manual because it would
21 “give away the secret of [his] trick” and he doesn’t want to do that. He stated that he was
22 “[a]bsolutely not” going to produce it. *See Exhibit 9*, at 108:1-17. Right after that, Dogge stated
23 that the manual and the CD were not even ready. *See Exhibit 9*, at 1098-15. Later in the deposition,
24 counsel asked if Dogge would produce the manual if Dogge could redact what he felt was a trade
25 secret. *See id.* at 180:20-181:2. Dogge then stated that he wasn’t sure he would be able to produce
26 the manual since he deleted so many files in his laptop and he might not have it anymore. *See id.* at
27 181:1-15.

28 Following the deposition, counsel followed up with a letter to Dogge specifically requesting

1 that Dogge produce the manual and DVD, and requesting a meet and confer on the issue. *See* Letter
2 to Dogge dated June 18, 2013, attached hereto as **Exhibit 14**. At the meet and confer, Dogge
3 refused to produce these items, stating that he would only produce them if he were paid for them.
4 *See* Declaration of Moorea Katz (“Katz Decl.”), attached hereto as **Exhibit 15**, ¶ 4; Tratos Decl., at ¶
5 11.

6 ***Dogge Refuses to Obey the Court’s Order Regarding a Protective Order***

7 As discovery commenced, it became obvious that some responses to discovery requests
8 would require sensitive, personal, or trade secret information. Accordingly, Teller sought to work
9 with Dogge to create a mutually-acceptable confidentiality agreement and protective order
10 governing the exchange of documents between the parties. On March 5, 2013, counsel for Teller
11 sent Dogge a draft stipulated protective order and confidentiality agreement. *See* Email to Dogge
12 dated March 5, 2013, attached hereto as **Exhibit 16**. Dogge did not respond, but on March 21, in his
13 opposition to Teller’s first motion to compel, Dogge stated that he would not sign the protective
14 order and confidentiality agreement because he didn’t trust Teller. *See* Doc. No. 59, at 7.

15 On March 22, counsel for Teller sent a letter to Dogge explaining that the protective order
16 and confidentiality agreement was just a draft, that it was a benefit to both parties, and that they
17 sought Dogge’s input so that he would be comfortable with it. *See* Letter to Dogge dated March 22,
18 2013, attached hereto as **Exhibit 17**. Dogge responded with a letter on March 27, 2013, again
19 refusing to participate in the crafting of a mutually-agreeable protective order and confidentiality
20 agreement. *See* Letter from Dogge dated March 27, 2013, attached hereto as **Exhibit 18**. The
21 parties held a meet and confer on April 9, 2013, during which counsel for Teller again explained that
22 a protective order was mutually beneficial and sought Dogge’s input. *See* Transcript of Meet and
23 Confer Conference dated April 9, 2013, attached hereto as **Exhibit 19**. Dogge again refused to
24 participate in crafting a mutually agreeable order. *See id.*

25 On April 12, 2013, Teller filed a motion for protective order, asking the Court to enter a
26 protective order and confidentiality agreement governing discovery in the action. *See* Doc. No. 64.
27 After briefing and a hearing, the Court granted the motion. *See* Doc. No. 103. The Court then
28 ordered that “***the parties are to execute*** and submit the original Stipulated Protective Order to the

1 Court for approval.” *See* Doc. No. 108 (emphasis added). The day of the minute order, counsel for
 2 Teller emailed the minute order and a copy of the protective order to Dogge, requesting that he sign
 3 the signature page and send back. *See* Email to Dogge Dated June 14, 2013, attached hereto as
 4 **Exhibit 20**. Despite the Court’s order to execute the protective order, Dogge has refused to do so.
 5 *See* **Exhibit 15**, Katz Decl., ¶ 5; *See* Tratos Decl., ¶ 12.

6 ***Dogge Refuses to Communicate in English in the Weeks Before His Deposition,***
 7 ***Causing Delay and Increased Cost.***

8 Another example of Dogge’s tactics – do anything to avoid the merits of the litigation – is
 9 when Dogge decided he would simply stop speaking English. Dogge is fluent in a number of
 10 languages, to include English and his native Flemish (Dutch). Dogge has filed all pleadings and
 11 papers in this action in English, and has conducted all telephonic discussions – both with Teller prior
 12 to the lawsuit and with counsel since – in English.⁹ Dogge also appears in a nine-minute YouTube
 13 video speaking excellent English. Nevertheless, about a year into the litigation and a few weeks
 14 before his deposition, Dogge decided to stop speaking English.

15 On May 14, 2013, counsel for Teller served a deposition notice upon Dogge for the
 16 previously-agreed-upon date. *See* Deposition Notice, attached hereto as **Exhibit 21**. Shortly
 17 thereafter, Dogge emailed counsel for Teller an email and letter entirely in Dutch. *See* Email and
 18 Letter, attached hereto as **Exhibit 22**. Counsel for Teller had the letter translated and learned that
 19 Dogge – only weeks before his deposition and the close of discovery – was now refusing to appear
 20 for an oral deposition, instead insisting that the deposition be in writing and in Dutch. *See* certified
 21 translation of letter, attached hereto as **Exhibit 23**. Counsel for Teller then sent a meet and confer
 22 letter to Dogge explaining Teller’s position with regards to the preference for an oral deposition, and
 23 requesting that Dogge change his position. *See* Letter dated May 17, 2013, attached hereto as
 24 **Exhibit 24**. Dogge sent a letter *in Dutch* on May 19, 2013 stating that he would not respond to that
 25 letter unless a *Dutch translation* was provided. *See* Letter dated May 19, 2013 (in Dutch), attached
 26

27 ⁹ Further detracting from Dogge’s claim of difficulty with English, Dogge later deposed Teller for
 28 almost five hours in English, never seeking the assistance of a translator. *See* Tratos Decl., ¶ 15.

1 hereto as **Exhibit 25**. *See also* English translation of May 19, 2013 Dogge letter, attached hereto as
 2 **Exhibit 26**.

3 Teller was forced to bring an emergency motion to compel the oral deposition, which was
 4 granted. At that hearing, the Court also determined that Dogge's English was fine and declined to
 5 order that Teller provide translations of all discovery requests, letters, or other documents. The
 6 deposition was ultimately accomplished with the use of a Dutch translator, but Dogge succeeded at
 7 driving up the cost – as Teller had to translate all of Dogge's communications in the meantime and
 8 file a motion regarding the deposition. Dogge also succeeded in delaying his deposition by several
 9 weeks.¹⁰ During the deposition the translator was largely unused, and was only consulted less than
 10 half a dozen times during the seven hour deposition. *See* Tratos Decl., ¶ 14.

11 By virtue of his sudden decision to interact only in Dutch and demand Dutch translations of
 12 all documents before responding to them, Dogge also delayed discovery. Dogge refused to respond
 13 to the third and fourth rounds of discovery, served on April 22 and May 6, respectively, unless they
 14 were translated for him into Dutch. By employing this delay tactic and requiring Teller to ask the
 15 Court for relief, Dogge secured for himself extra time to respond to the requests.

16 *Dogge Repeatedly Files Proprietary Information*

17 Knowing that both the facts and the law are against him, Dogge has repeatedly sought to
 18 employ improper tactics to force a settlement. In addition to driving up the cost of litigation by
 19 filing as many motions as possible and including harassing content in the motions, one such tactic
 20 has been repeatedly filing Teller's proprietary information, even after the Court ordered it sealed.

21 Specifically, on November 2, 2012, Teller filed a motion to seal two letters from Teller to
 22 Dogge. These letters contain information regarding the financial amounts Teller pays for research
 23 and development into new magic tricks, information regarding the Shadows illusion, and the
 24 monetary amounts of Teller's offers to Dogge (based on research and development costs). *See* Doc.
 25 No. 41. Dogge responded (Doc. No. 43), and Teller replied (Doc. No. 45). The Court granted this

26 _____
 27 ¹⁰ When Dogge's deposition finally occurred, Dogge refused to answer a number of relevant
 28 questions. For example, Dogge refused to disclose the name of the hotel at which he recorded the
 video of himself performing The Rose and Her Shadow (*See Exhibit 9*, at 75:9-76:1-7).

1 motion, ordering that the two documents be sealed. *See* Doc. No. 46. Thereafter, Dogge
2 resubmitted the exhibits with the sums redacted. *See* Doc. No. 47. The Court ordered that this
3 document, which Dogge had entitled “Reply to Order” be sealed as well, as it did not comply with
4 the Court’s instructions that the entire document be sealed. *See* Doc. No. 49.

5 On December 14, Teller filed a motion for clarification, noting that Dogge’s opposition (Doc.
6 No. 43) had included in its body several excerpts from the now-sealed documents, and asked the
7 Court to clarify that the opposition should be sealed as well for that reason. *See* Doc. No. 53. The
8 Court clarified its order and ordered Dogge’s opposition sealed as well. *See* Doc. No. 54.

9 In response to Teller’s first motion to compel, Dogge filed an opposition containing the
10 sealed material in no less than three places.¹¹ *See* Doc. No. 59. Teller was again forced to file a
11 motion to seal. *See* Doc. No. 73. The Court again granted the motion. *See* Doc. No. 103.

12 In response to Teller’s motion for mirror imaging of Dogge’s hard drive, Dogge again filed
13 the sealed information (Doc. No. 84), and Teller was yet again forced to file a motion to seal. The
14 Court again granted the motion, noting that “continued inclusion of previously sealed information in
15 future filings will result in sanctions.” *See* Doc. No. 101.

16 ***Dogge’s Scandalous and Inflammatory Filings***

17 Dogge has also made a number of scandalous, harassing, and inappropriate filings. Early in
18 the suit, after Dogge first filed his vexatious Belgian action, Teller moved for an anti-suit injunction,
19 suggesting that the entire suit be litigated here in the United States. Dogge opposed. Teller’s motion
20 was denied, and Dogge’s case proceeded in Belgium, where it remains active to this day. Teller’s
21 counsel thought that would be the end of any discussion of the Belgian action in the U.S. courts.

22 Unfortunately, Teller’s counsel was wrong. As noted above, Dogge sought to have it both
23 ways, litigating the case in Belgium but also constantly addressing the Belgian action in his U.S.
24 filings, hoping to gain publicity, sympathy, and even evidence for his Belgian case. As explained
25 above, Dogge has taken a screenshot with nineteen completely irrelevant abbreviations on a
26

27 ¹¹ Dogge contended this was different because the emails were forwards sent to a trusted colleague
28 during negotiations, not the original emails.

1 | bookmark bar and focused on four terms that could be related to adult websites (although Dogge has
2 | no way of knowing what these bookmarks refer to, as the links aren't active), and has repeatedly
3 | attempted to harass Teller by mentioning it.

4 | Starting from his answer (Doc. No. 39) and in virtually every filing since, Dogge has made
5 | sure to include some reference to the bookmarks, along with unfounded extrapolations toward
6 | pedophilia and supposedly "young" actors in pornography. This harassment reached a crescendo
7 | when Dogge filed his motion to investigate the plaintiff's hard drive and said he was filing the same
8 | with the FBI and Interpol (Doc. No. 85). In that bizarre, meritless, and offensive document, Dogge
9 | alleges that Teller is somehow involved with criminal conduct and should be investigated by the FBI
10 | and Interpol. Dogge talks in great length about pornography and also filed a pornographic thumbnail
11 | image as part of his exhibits, in violation of the Court's prior order not to file such pornography.
12 | Teller was forced to file a motion to strike and seal the document, which was granted. This Court
13 | found the contents of the motion "impertinent and immaterial" as well as "wholly unrelated to the
14 | underlying litigation." *See* Doc. No. 100.

15 | **Dogge's Conduct Overall Has Been Vexatious and in Bad Faith**

16 | As seen from the many incidents detailed above, Dogge has sought to avoid the legal merits
17 | of this lawsuit by driving up the cost of litigation and harassing Teller. This is not an especially
18 | complex case: there is one individual plaintiff and one individual defendant, and only two causes of
19 | action. Nevertheless, Dogge's conduct has necessitated an unusually high number of motions and
20 | responses for what should have been a very straightforward intellectual property litigation. Dogge,
21 | who claims he is *pro se* and in his own words, has "nothing to lose," is well aware of the expense
22 | incurred each time Teller must file a motion that should not have been necessary or a response to
23 | another frivolous attack on Teller. Thus far at least 15 motions have been filed during the discovery
24 | period alone. Dogge has chosen to proceed *pro se* in this litigation, even though he has consulted
25 | with his Belgian lawyer regarding the U.S. case. There must be a limit to the leeway given to *pro se*
26 | parties. As such, Teller respectfully requests that Dogge be sanctioned by striking his answer and
27 | entering default.

28 | ///

1 **III. LEGAL ARGUMENT**

2 **A. Case-Terminating Sanctions are Warranted Where Dogge has Disobeyed Several**
 3 **Court Orders and has Repeatedly Acted in Bad Faith Throughout This Litigation.**

4 Case-terminating sanctions are warranted here. A court has the inherent authority to enter
 5 default judgment for abusive litigation practices. *See First Source Financial USA, Inc. v. nBank,*
 6 *N.A.*, 2008 WL 131242 (D. Nev. 2008), citing *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915,
 7 916 (9th Cir.1987). Federal Rule 37(b)(2) also provides that if a party fails to obey an order to
 8 provide or permit discovery, the court may “issue further just orders,” including striking pleadings
 9 and rendering default judgment. *See Fed. R. Civ. P. 37(b)*. Under both the court’s inherent authority
 10 and Rule 37, case-terminating sanctions require analysis of five factors: “(1) the public's interest in
 11 expeditious resolution of litigation, (2) the court's need to manage its dockets, (3) the risk of
 12 prejudice to the party seeking sanctions, (4) the public policy favoring disposition of cases on their
 13 merits, and (5) the availability of less drastic sanctions.” *Ecomares Inc. v. Ovcharik*, 2008 WL
 14 2755066, *4 (D.Nev. 2008). The test is not mechanical, however; “it provides the district court with
 15 a way to think about what to do, not a set of conditions precedent for sanctions or a script that the
 16 district court must follow...” *See Connecticut General Life Ins. Co. v. New Images of Beverly Hills*,
 17 482 F.3d 1091, 1096 (9th Cir. 2007).

18 “Where a court order is violated, the first two factors support sanctions and the fourth factor
 19 cuts against a default. Therefore, it is the third and fifth factors that are decisive.” *Ecomares Inc. v.*
 20 *Ovcharik*, 2008 WL 2755066, *4 (D.Nev. 2008). The Court must also determine whether the
 21 violations warranting the case-terminating sanctions were “due to the willfulness, bad faith, or fault
 22 of the party.” *Chase Bank USA, N.A. v. NAES, Inc.*, 2010 WL 2161786 (D.Nev. 2010). The Court
 23 may consider all of the party’s discovery conduct. *Id.* Here, because both the third and fifth factor
 24 favor default, and because Dogge has acted willfully and in bad faith, case-dispositive sanctions are
 25 warranted.

26 **1. *The Third Factor: Prejudice to the Party Seeking Sanctions***

27 Courts consider prejudice to the party seeking sanctions. A party suffers prejudice when the
 28 other party’s actions impair the “ability to go to trial or threaten the rightful decision of the case.”

1 | *Garden City Boxing Club, Inc. v. Godinez*, 2009 WL 914632 (D.Nev. 2009). “Failing to produce
2 | documents as ordered is considered sufficient prejudice” for case-dispositive sanctions, and late
3 | tender is no excuse. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217,
4 | 1227 (9th Cir. 2006). Prejudice may consist of loss of evidence and loss of memory, although it may
5 | also consist of the costs or burdens of litigation. *Id.*

6 | For example, in *Chase Bank*, the defendant refused to respond to discovery requests despite
7 | lacking a valid reason to do so. 2010 WL 2161786, *4. Even after the Court granted a motion to
8 | compel, compelling the defendant to respond to written discovery, the defendant did not do so. *Id.*
9 | Further, the defendant refused to provide a person to testify on its behalf at a deposition. *Id.* The
10 | Court held that this established prejudice to the plaintiff, struck the answer, and entered default. *Id.*

11 | Here, Dogge has refused to produce key and case-determinative documents, as he refuses to
12 | turn over his computer for mirror imaging pursuant to the Court’s order, or the manual or DVD of
13 | his illusion. Further, Dogge has caused unreasonable delay by unilaterally refusing to conduct the
14 | litigation in English halfway through discovery, to include refusing to answer pending discovery
15 | requests if they were not translated into Dutch. Dogge’s refusal to respond to meet and confer
16 | efforts prior to the first motion to compel also delayed the case unnecessarily, as Teller attempted
17 | three letters, given Dogge’s pro se status, prior to filing the motion. Finally, Dogge’s conduct has
18 | necessitated motions that should be unnecessary (such as the motion for oral deposition, the motion
19 | for the Court to enter a protective order governing discovery, and the motion for Dogge’s consent to
20 | YouTube producing the videos) and responses to frivolous motions (such as the motion to
21 | investigate Teller’s hard drive, which accused Teller of criminal conduct, and the motion to reject
22 | plaintiff’s exhibits, which accused Teller of evidence tampering). All of this has driven up the cost
23 | of this litigation astronomically. What should have been a brief and efficient suit has cost an
24 | extraordinary amount. Most notably, Dogge’s refusal to comply with Court orders has left Teller
25 | without the key evidence as the dispositive motion deadline and trial itself approach. Teller has been
26 | severely prejudiced by Dogge’s conduct throughout this litigation.

27 | ///

28 | ///

1 Defendant’s Answer.” *See* Doc. No. 81. At the May 31, 2013 hearing, the Court warned that Dogge
 2 may be sanctioned if Dogge did not appear for his deposition or if there were any further unjustified
 3 delays in taking Dogge’s deposition. *See* May 31, 2013 Hearing Transcript, at p. 10, attached hereto
 4 as **Exhibit 27**. At the June 7, 2013 hearing, the Court stated that spoliation sanctions could include
 5 striking Dogge’s answer and entering default. The Court has also warned Dogge twice of sanctions
 6 regarding filing sealed material not under seal. *See Exhibit 12, pp. 3-6, 64-65*.

7 Although these warnings relate to other aspects of the case, the Ninth Circuit has rejected an
 8 argument that because a court didn’t warn a party for specific conduct, dispositive sanctions were
 9 not appropriate. In *Anheuser-Busch*, the plaintiff argued that she should have been warned more
 10 specifically about the possibility of dismissal in regards to the discovery violations. 69 F.3d 337,
 11 353. The Ninth Circuit noted that the Court had cautioned her that sanctions were a possibility in
 12 several other contexts throughout the litigation, such as failure to obey a pretrial publicity order. *Id.*

13 Nevertheless, warning is not required. This Court has held that the purpose of the warning is
 14 to ensure that litigants are not caught by surprise – “a sanction may be unfair if the party could not
 15 have realized it was in jeopardy of so severe a consequence.” *See Wachovia Bank*, 2010 U.S. Dist.
 16 LEXIS 64511. However, this Court has held that Rule 37’s warning is sufficient, as it explicitly
 17 warns of such consequences. Dogge is in possession of Rule 37 of the Federal Rules of Civil
 18 Procedure, as counsel for Teller has provided Dogge with a hard copy of the Federal Rules of Civil
 19 Procedure and the Local Rules of this Court. *See* Tratos Decl., ¶ 16. Dogge has also been warned
 20 by counsel on several occasions of the possibility of severe sanctions, and the possibility of sanctions
 21 has been raised in several of Teller’s motions. *See id.*

22 Given Dogge’s conduct for the past year and a half, this Court can easily anticipate
 23 “continued deceptive misconduct.” Accordingly, this Court should enter case-dispositive sanctions.

24 **3. Willfulness, Bad Faith, or Fault of the Party**

25 In addition to the five-factor test, courts must also determine “that the violations of discovery
 26 orders were due to the willfulness, bad faith, or fault of the party.” *See Hyde & Drath v. Baker*, 24
 27 F.3d 1162, 1167 (9th Cir. 1994). “Disobedient conduct not shown to be outside the control of the
 28 litigant is sufficient to demonstrate willfulness, bad faith, or fault.” *Id.*

1 This factor is easily met here. Dogge has at all times been in control of his own actions and
2 has made his own decisions. Despite repeated discussions with Teller's counsel, Dogge has
3 continued to refuse to comply with the Court's order to mirror image his hard drive and to sign the
4 protective order, or produce the manual or DVD of his illusion. Dogge's numerous and mostly
5 frivolous filings provide further support for the fact that Dogge has acted in bad faith throughout this
6 litigation. One must look no farther than Dogge's motion to mirror image Teller's hard drive, where
7 Dogge accuses Teller of all manner of criminal sexual conduct and "suspicious" behavior (such as
8 changing his name from Raymond Teller to simply "Teller," or not speaking on stage) to realize
9 Dogge's true intentions. Dogge's latest, the refusal to produce the manual and DVD for the illusion
10 he intended to sell, is more of the same. There can be no question that Dogge has acted willfully and
11 dishonestly in disobeying this Court's orders, and in bad faith throughout this litigation.

12 **4. Due Process Concerns are Not Implicated Here Because Dogge's Misconduct**
13 **Threatens to Interfere With the Rightful Determination of the Case**

14 Finally, Courts look to whether the misconduct at issue bears a close nexus to the merits of
15 the case, so as to avoid due process concerns. *See Anheuser-Busch, Inc. v. Natural Beverage*
16 *Distributors*, 69 F.3d 337, 355 (9th Cir. 1995). "Due process requires that there exist a relationship
17 between the sanctioned party's misconduct and the matters in controversy such that the transgression
18 threatens to interfere with the rightful determination of the case." *Chase Bank USA, N.A. v. NAES,*
19 *Inc.*, 2010 WL 2161786 (D.Nev. 2010).

20 "Dismissal is appropriate where a pattern of deception and discovery abuse made it
21 impossible for the district court do conduct a trial with any reasonable assurance that the truth would
22 be available." *See id.*, internal quotations omitted. Similarly, "[t]here is no point to a lawsuit, if it
23 merely applies the law to lies." *Connecticut General Life Ins. Co. v. New Images of Beverly Hills,*
24 482 F.3d 1091, 1097 (9th Cir. 2007).

25 Here, the misconduct in the case directly bears upon the rightful determination of the case, as
26 Dogge has refused to comply with several of this Court's orders that impact Teller's ability to
27 present his full case. By disobeying the Court's order to preserve his hard drive, refusing to produce
28 his hard drive, and refusing to sign the protective order ordered by the Court, Dogge has interfered

1 with the merits of this action. The missing documents, such as the videos, manual, and DVD, would
2 have been key exhibits at trial related to both the copyright and unfair competition claim. As such,
3 due process concerns are not implicated. As the Ninth Circuit has stated, there is no point in
4 applying the law to lies; going to trial without the key evidence that Dogge has intentionally
5 withheld and/or destroyed would not ensure justice. Instead, there would be no “reasonable
6 assurance that the truth would be available.” Dogge should be sanctioned by having his answer
7 stricken and default entered.

8 **IV. CONCLUSION**

9 In light of the foregoing, Plaintiff respectfully requests that this Court GRANT Teller’s
10 Motion for case-terminating sanctions.

11 Dated this 8th day of July, 2013

12 GREENBERG TRAUERIG, LLP

13 /s/ Mark G. Tratos

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on July 8, 2013, service of the foregoing **MOTION FOR CASE-DISPOSITIVE SANCTIONS** was made this date through the Court's CM/ECF electronic filing system, via electronic mail and United States mail, postage prepaid to:

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