

1 Mark G. Tratos (Bar No. 1086)
tratosm@gtlaw.com
2 Thomas F. Kummer (Bar No. 1200)
kummert@gtlaw.com
3 Kara B. Hendricks (Bar No. 7743)
hendricksk@gtlaw.com
4 GREENBERG TRAUIG, LLP
5 3773 Howard Hughes Parkway
Suite 400 North
6 Las Vegas, Nevada 89169
7 Telephone: (702) 792-3773
8 Facsimile: (702) 792-9002
Counsel for Plaintiff

9 UNITED STATES DISTRICT COURT
10 DISTRICT OF NEVADA

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

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

**REPLY IN SUPPORT OF
EMERGENCY MOTION FOR
MIRROR IMAGING OF DOGGE'S
HARD DRIVE, AND FOR
STIPULATED CONSENT TO OBTAIN
VIDEOS FROM YOUTUBE**

19 Plaintiff Teller ("Teller"), by and through undersigned counsel, hereby files this reply in
20 support of his motion to mirror image Defendant Gerard Dogge's ("Dogge") hard drive, and for an
21 order directing Dogge to consent to the disclosure of the videos at issue from YouTube. This reply
22 is based upon the pleadings and papers on file herein, the following Memorandum of Points and
23 Authorities, and any oral argument allowed by this Court at the time of hearing, all of which are

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GREENBERG TRAUIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone (702) 792-3773
Facsimile (702) 792-9002

1 incorporated herein by this reference.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 In Dogge’s opposition, Dogge does his best to misdirect attention away from the outcome
5 warranted by the facts and circumstances in this case: mirror imaging should be permitted, and this
6 Court should order Dogge to permit YouTube to produce the videos. Dogge’s opposition attempts to
7 raise a number of red herrings designed to distract the Court from the real issues. For example,
8 Dogge makes much of the following, which have no bearing upon the instant motion:

- 9 • that Teller has not “filed” any “evidence” – obviously misunderstanding the way the
10 American system works, with evidence brought before the Court via dispositive
11 motions or at trial
- 12 • that Teller gave a date of March 30, 2012 as the date the screenshots of the video
13 were taken as an interrogatory response. This date was an error and has now been
14 corrected.¹
- 15 • that Teller supposedly told a fellow magician that he intended to ruin Dogge’s life,
16 when the text of the email Dogge cites to states the exact opposite: “I really don’t
17 want to sue [Dogge], and not just because it’s expensive and troublesome for me, but
18 because it would ruin his life, and I am not eager to do that.” (emphasis added).

19 It is also worth noting that Dogge has again changed his story as to the missing videos. In
20 response to Teller’s discovery request for the videos, Dogge stated that he “prefers” not to produce it
21 again. After three meet confer letters to Dogge, all of which went unanswered, Teller filed a motion
22 to compel seeking the videos. In Opposition, Dogge cited many reasons that he did not think he
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25 ¹ Dogge has stated several times in recent papers that Teller “confirmed” the March 30 date. This is simply not true.
26 Teller denied the following request for admission: “Admit that Tellers answer to defendants interrogatory no. 22
27 states ‘exhibit 3 is a screenshot...captured on or about March 30, 2012’ is vague and not clear about the date and time
28 the screenshot was taken.” Such a denial does not amount to “confirming” the March 30 date.

GREENBERG TRAURIG, LLP
1773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada, 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

1 should have to produce the videos, and then stated that he “may” have lost them in a PC cleanup. He
 2 has since maintained that they were deleted from his hard drive.² It was only in this Opposition,
 3 having been confronted with his own ever-changing story, that he now offers a new explanation of
 4 his initial discovery response that he “prefers” not to produce the video again. Now it seems that
 5 Dogge is claiming to have understood this request to mean that he would have to “produce”, by re-
 6 staging and re-filming the video again – rent the camera, rent the theatre, re-perform the illusion, etc.
 7 Each and every Request for Production began with the word “produce.” There was no confusion by
 8 Mr. Dogge as to any other request; this is just another example of Dogge further attempting to avoid
 9 the consequences of his actions by feigning ignorance when he thinks it benefits him. This
 10 honorable Court should bring the Defendant’s gamesmanship to an end by granting the relief sought.

11 Amidst the many distractions by the Defendant, it is difficult to ascertain what Dogge is
 12 actually arguing. Nevertheless, it appears that Dogge’s main arguments are (1) Teller probably has
 13 the videos, and therefore Dogge should not have to submit to mirror imaging or consent to
 14 YouTube’s producing them; (2) allowing Teller to obtain a mirror image of Dogge’s hard drive
 15 would reveal personal information about Dogge, Dogge’s litigation strategies, and trade secrets; and
 16 (3) Dogge’s other video, The Bakardy Rose, shows The Rose at issue and therefore can be used as a
 17 substitute for the missing videos, again, making the mirror imaging or YouTube production
 18 unnecessary.³ As each of these arguments lacks merit, Teller respectfully requests that the Court
 19 grant Teller’s motions.

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 25 ² This Court’s order was issued April 10. In Dogge’s narrative in Opposition, he states that the Court ordered him to
 26 explain the missing videos, then puts an April 9 phone call excerpt in which he discusses the missing videos, as though
 he complied with the Court’s order by explaining what happened to the videos. This is simply misleading.

27 ³ Dogge also appears to cite to several portions of international treaties. The provisions cited are extremely broad and in
 28 no way appear to prevent a standard mirror imaging order.

GREENBERG TRAUERIG, LLP
 3773 Howard Hughes Parkway, Suite 400 North
 Las Vegas, Nevada, 89169
 Telephone: (702) 792-3773
 Facsimile: (702) 792-9002

1 **II. LEGAL ARGUMENT**

2 **A. This Court Should Order a Mirror Imaging of Dogge's Hard Drive**

3 As explained in the original motion, courts have permitted a party to mirror image the
4 opposing party's hard drive where there have been "discrepancies or inconsistencies in the
5 responding party's discovery responses." *See Ameriwood Industries, Inc. v. Liberman*, 2006 WL
6 3825291 (E.D. Mo. 2006). It is well-settled that "[i]nformation stored on a computer is
7 discoverable, and the 'only restriction in this discovery is that the producing party be protected
8 against the undue burden and expense and/or invasion of privileged [or private] matter.'" *See United*
9 *Factory Furniture Corp. v. Alterwitz*, 2012 WL 1155741, *4 (D. Nev. 2012), quoting *Playboy*
10 *Enterprises v. Welles, et al.*, 60 F.Supp.2d 1050 (S.D.Cal.1999). Courts examine five factors before
11 determining whether mirror imaging is appropriate in a given circumstance: "(1) the needs of the
12 case, (2) the amount in controversy, (3) the importance of the issues at stake, (4) the potential for
13 finding relevant material and (5) the importance of the proposed discovery in resolving the issues" in
14 weighing the benefit and the burden of the discovery. *Id.*

15 In his opposition, Dogge does not argue that the videos cannot be found on his hard drive.
16 Indeed, Dogge confirms that the video was on his laptop and uploaded from his laptop. *See*
17 *Opposition*, at 8. He then states again that he deleted it, and that "the video at issue was probably
18 one of the many deleted files in defendant's laptop." *See id.* As noted in the original motion,
19 deleted files remain intact on hard drives, but are treated as "empty space" for the computer to write
20 over. Accordingly, if Teller can obtain a mirror image relatively quickly, it is possible that the file
21 may be able to be recovered.

22 Likewise, Dogge does not argue any of the other four factors. Instead, he argues that (1)
23 Teller probably has the videos, and therefore Dogge should not have to submit to mirror imaging; (2)
24 allowing Teller to obtain a mirror image of Dogge's hard drive would reveal personal information
25 about Dogge, Dogge's litigation strategies, and trade secrets; and (3) Dogge's other video, The
26 Bakardy Rose, shows The Rose at issue and therefore can be used as a substitute for the missing
27 videos, again, making the mirror imaging or YouTube production unnecessary. Each one of these
28 arguments is meritless.

1 First, whether or not Teller is in possession of a copy of the videos has no bearing on
2 Dogge's obligation to produce them during discovery. Even if Teller downloaded the videos from
3 YouTube, that would not confirm the authenticity of the videos. As this Court has noted, "Requiring
4 Defendant to produce any such videos in his possession, custody, or control is relevant since it tends
5 to establish or confirm that the video posted on YouTube was, in fact, posted by Defendant." See
6 Order, Doc. No. 62, at 3. The best evidence of what Dogge posted would be from Dogge himself or
7 from YouTube.

8 Second, Dogge's feigned concerns regarding the information on the hard drive other than the
9 videos in question are fair, but unfounded. As explained in the initial motion, Teller will treat any
10 content as "Confidential," and the Court may order that the expert who takes the mirror image not
11 view (except as necessary to perform his or her functions) or retain custody of the image. Teller can
12 also use the most modern technology to ensure that the search for relevant material is not more broad
13 than necessary.

14 Third, The Bakardy Rose video is not an adequate substitute for The Rose and Her Shadow,
15 for several reasons. First, it is a completely separate non-infringing video. The Bakardy Rose is a
16 motivational story told by Dogge, in which the petals fall from a rose as he speaks about staying
17 positive despite adversity. See YouTube version, <http://www.youtube.com/watch?v=rkq4XfFgCYs>.
18 While it is true that The Rose Apparatus itself is used in this video, The Rose Apparatus is not the
19 main issue in this case. Dogge wants it to be, but it is not. Dogge infringed Teller's copyright in
20 Shadows by performing a very similar dramatic work, not by building a different method of control
21 prop. Dogge posted a video – The Rose and Her Shadow - of Dogge performing a virtually identical
22 variation on Teller's copyrighted work, with an offer to sell the illusion and instructions. To make
23 sure that Teller fans could find it when looking for videos of Teller, he tagged the video with tags
24 such as "Penn" and "Teller." This conduct – copying Teller's signature piece and trading on Teller's
25 goodwill to sell it – is the conduct at issue in the copyright infringement claim and the unfair
26 competition claim.

1 Dogge offers no legitimate argument as to why his hard drive should not be mirror imaged in
2 order to obtain the erased videos at issue. As such, Teller respectfully requests that this Court grant
3 Teller’s motion.

4 **B. This Court Should Order Dogge to Stipulate to YouTube’s Release of the Videos**
5 **to Teller.**

6 Dogge likewise offers no argument as to why he should not provide his consent for YouTube
7 to produce the videos. While this Court has ordered Dogge not to destroy the evidence on his hard
8 drive, should he have written over it the videos may not be recoverable. Thus, if the video is
9 available from YouTube, it should be produced. As noted in the original motion, courts have
10 determined that where a party can prevent the disclosure of documents by withholding consent, that
11 party has an affirmative duty to provide consent to comply with the Federal Rules. *See, e.g., Flagg*
12 *v. City of Detroit*, 252 F.R.D. 346, 363 (E.D. Mich. 2008). As the *Flagg* court noted, “a party’s
13 disinclination to exercise this control is immaterial, just as it is immaterial whether a party might
14 prefer not to produce documents in its possession or custody.” *See Flagg*, 252 F.R.D. 346, 363.

15 Dogge offers no argument as to why this would be improper; indeed, if Dogge had truly
16 accidentally deleted the Rose and Her Shadow videos, this would seem to be a perfect solution –
17 simply provide a signature and YouTube provides the videos. There are no privacy or trade secret
18 concerns for Dogge here, as a third party would be turning over videos that were publically available
19 prior to the takedown notices. Dogge’s other two arguments – that Teller probably has the videos
20 and that The Bakardy Rose is an adequate substitute – are meritless, and are addressed above. As
21 Dogge has offered no valid argument as to why YouTube should not produce the videos, this Court
22 should grant Teller’s motion.⁴

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26 ⁴ Teller also respectfully requests that, given the time constraints of the litigation and Dogge’s disregard for court orders
27 in the past, that if Dogge does not provide his signature within three days of any order requiring him to do so, that
28 the Court simply require YouTube to turn over the videos. Teller will file an amended proposed order to this effect.

GREENBERG TRAUERIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3373
Facsimile: (702) 792-9002

1 **III. CONCLUSION**

2 In light of the foregoing, Teller respectfully requests that this Court GRANT Teller's Motion
3 for Mirror Imaging of Dogge's Hard Drive and for Stipulated Consent to Obtain Videos From
4 YouTube.

5 Dated this 28th day of May, 2013

6 GREENBERG TRAUIG, LLP

7 /s/ Mark G. Tratos

8 Mark G. Tratos (Bar No. 1086)
9 Thomas F. Kummer (Bar No. 1200)
10 Kara B. Hendricks (Bar No. 7743)
11 3773 Howard Hughes Pkwy, Suite 400 North
12 Las Vegas, NV 89169

13 Counsel for Plaintiff
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GREENBERG TRAUIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on May 28, 2013, service of the foregoing **REPLY IN SUPPORT OF EMERGENCY MOTION FOR MIRROR IMAGING OF DOGGE'S HARD DRIVE, AND FOR STIPULATED CONSENT TO OBTAIN VIDEOS FROM YOUTUBE** was made this date through the Court's CM/ECF electronic filing system, via electronic mail and United States mail, postage prepaid to:

Gerard Dogge
Hoevensebaan 2
2950 Kapellen
Belgium - Europe
Gerard-bakardy@hotmail.com

/s/ Sara Haro
An employee of Greenburg Traurig

GREENBURG TRAUIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

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