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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.
16

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

**MOTION TO STRIKE AND TO SEAL
DEFENDANT’S EMERGENCY
MOTION FOR INVESTIGATING THE
PLAINTIFFS HARD DRIVES**

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19 Plaintiff Teller (“Teller” or “Plaintiff”) by and through undersigned counsel, hereby moves to
20 strike and seal Defendant Gerard Dogge’s (“Dogge” or “Defendant”) Emergency Motion for
21 Investigating the Plaintiffs Hard Drives (“Defendant’s Motion”) (Doc. No. 85). Plaintiff’s Motion is
22 based upon the pleadings and papers on file herein, the following Memorandum of Points and
23 Authorities, as well as the affidavit and exhibits submitted in support thereof, and any oral argument

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1 allowed by this Court at the time of hearing, all of which are incorporated herein by this reference.

2 DATED this 29th day of May, 2013.

3 GREENBERG TRAUIG, LLP

4
5 /s/ Mark G. Tratos

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11 Counsel for Plaintiff

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION AND FACTUAL BACKGROUND**

14 In Defendant’s Motion, Dogge is once again making outrageous, inflammatory and
15 unsupported allegations that have nothing to do with the merits of the copyright infringement and
16 unfair competition claims underlying this action. Instead, it appears that Dogge’s sole purpose in
17 this case has become to use the case to launch immaterial, hateful personal attacks on Teller.
18 Knowing that he has no legitimate defenses to Teller’s allegations of copyright infringement and
19 unfair competition, Dogge continues to resort to desperate public smear tactics designed to harass
20 and embarrass Teller, increase the expense of the litigation, and to waste this Court’s time and
21 resources.

22 In the instant motion, Dogge makes meritless inflammatory and intentionally provocative
23 accusations that Teller is somehow involved in criminal conduct and should be investigated by the
24 FBI and Interpol. Dogge bases these allegations on one thing – a .PDF file of a computer screenshot
25 simply showing a “bookmarks bar” that was attached as a single exhibit to Teller’s original multi-
26 page complaint. While this screenshot has long since been redacted and replaced in response to
27 Dogge’s objections, Dogge continues to try and focus this Court’s attention on this immaterial issue.
28 Despite Dogge’s false allegations that he was able to access the websites listed in the screenshot of
the “bookmarks bar” through the court systems computers, this is impossible. The .PDF file

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1 attached to the original Complaint did not contain any “live” links. In other words, the filed
2 screenshot is merely a “picture” of what was displayed on the user’s computer screen at the time the
3 screenshot was taken, and does not contain embedded links to any websites. As such, there is no
4 way any person viewing this .PDF screenshot capture can “click” on the 19 links listed in the
5 “bookmarks bar” and be directed to any live websites. Therefore, the only way that Dogge, or
6 anyone else, could even attempt to determine what sites those “bookmarks” actually linked to would
7 be to enter those words in an independent internet search engine and review the search results.
8 However, even if this were Dogge’s method, it is flawed, as computer users can name their
9 “bookmarks” anything they want, with or without regard to the actual site the “bookmark” links to.
10 Here, it is clear that Dogge has conducted his own independent internet searches by using only the
11 words listed in the “bookmarks bar” of the .PDF screenshot, and he has manipulated his search
12 results to find the very pornographic images that he claims are so offensive to him. The bookmark
13 bar lists the Oxford English Dictionary, The Artist Vermeer, Netflix, and 2 Long for texts which are
14 too long for Tweeter.

15 Further, despite the Court’s previous Order specifically directing Dogge to cease filing
16 pornographic images, Dogge has once again attached a pornographic “thumbnail” image in Exhibit
17 13 to Defendant’s Motion. In fact, the majority of Defendant’s Motion centers on the completely
18 irrelevant issue of gay pornography, and is merely a further attempt by Dogge to get around the
19 Court’s order by describing the pornography he wants to talk about to this Court in words, rather
20 than filing the images that the Court has specifically prohibited.

21 **II. PROCEDURAL BACKGROUND**

22 The underlying facts of this matter are well known to the Court. As such, only a brief review
23 of the factual and procedural background is necessary. The instant lawsuit is a copyright
24 infringement and unfair competition action involving the well-known Las Vegas magician Teller (of
25 Penn & Teller) and a Belgian magician and entertainer, Dogge. Dogge copied and performed
26 Teller’s signature illusion, Shadows, and uploaded two videos of Dogge performing the illusion to
27 YouTube together with an offer to sell the illusion instructions and a prop. In these videos, Dogge
28 performs the illusion and offers to sell the illusion for around \$3,000. The videos were “tagged” by

1 Dogge with keytags including “Penn,” “Teller,” “Revealed,” and “Tutorial,” among others. Dogge
 2 also states in the comments to the video that “I’ve seen the great Penn & Teller performing a similar
 3 trick...” Teller holds a copyright in Shadows, and these videos were removed by YouTube pursuant
 4 to a DMCA copyright notice submitted by Teller. Initially Dogge indicated that he would show the
 5 videos to the Court as part of his defense. However, he failed to produce the videos as part of his
 6 initial Disclosures. When counsel for Teller asked for the videos that were identified but not
 7 provided in the disclosures, Dogge did not respond. Teller sought the videos in the first round of
 8 Request for Production of Documents. Dogge responded that he did not prefer to produce them
 9 again. When Teller asked the Magistrate Judge to order the videos be produced, Dogge said he had
 10 lost them when he cleaned up his computer to make more space on the hard drive. When ordered by
 11 the Magistrate Judge to produce the video, he refused to do so. When asked by Teller’s counsel to
 12 sign a stipulation allowing YouTube to provide a copy of the videos to the Plaintiff and the Court, he
 13 also refused to do so and has opposed the Motion to Compel such a stipulation.

14 Most recently, while Dogge files his pleadings in English, he has refused to communicate
 15 with counsel in English instead corresponding only in Dutch. He has also refused to attend a
 16 deposition he previously agreed to and has most recently refused to answer any further discovery,
 17 the third and fourth rounds of written discovery, which is not translated for him into Dutch. Thus,
 18 until Teller’s numerous discovery motions are heard, the Defendant has brought the U.S. litigation to
 19 a standstill!

20 Teller concurrently files a separate Opposition to Defendant’s Motion; however, in the
 21 instant Motion to Strike and Seal Plaintiff respectfully urges the Court to completely strike this
 22 baseless, harassing and irrelevant motion from the record, and to seal the Defendant’s Motion in its
 23 entirety.

24 **III. LEGAL ARGUMENT**

25 **A. Defendant’s Motion is Immaterial and Scandalous and Should Be Stricken.**

26 Dogge’s motion entitled “Emergency Motion for Investigating the Plaintiffs Hard Drives”
 27 should be stricken as consisting of only ignorant, immaterial, impertinent, inflammatory and
 28 scandalous matter specifically designed to harass and embarrass Teller. Further, the document itself

1 is vicious, vexatious, and scurrilous and does not ask for any specific relief.

2 The Federal Rules of Civil Procedure state that on motion made by a party “[t]he court may
3 strike from a pleading...any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ.
4 P. 12(f). This Court has recognized that “[a]lthough Rule 12(f) of the Federal Rules of Civil
5 Procedure provide authority only to strike pleadings or content therein, a district court has the
6 inherent power to strike a party’s submissions other than pleadings.” *North American Specialty Ins.*
7 *Co. v. National Fire & Marine Ins. Co.*, 2013 WL 1332205, *5 (D. Nev. 2013) (internal citations
8 omitted). This basis for striking improper filings “derives from the district court’s ‘inherent power
9 over the administration of its business. Specifically, the district court has inherent authority to
10 regulate the conduct of attorneys who appear before it [and] to promulgate and enforce rules for the
11 management of litigation.’” *Id.* (citing *Spurlock v. F.B.I.*, 69 F.3d 1010, 1016 (9th Cir. 1995)).

12 Here, Dogge’s main premise for asking for an investigation of Teller’s hard drive – alleged
13 criminal activity is a response to Teller seeking to mirror Dogge’s hard drive– is inflammatory,
14 harassing, and completely baseless.¹ Dogge has seized upon the idea that a few bookmarks (out of
15 many) on a .PDF screenshot in the original Exhibit 3 – which hasn’t been a part of the filed
16 pleadings since it was redacted and re-filed in April of 2012 – could be construed as associated with
17 pornography. He argues that the bookmarks at issue, “mantube,” “CFSelect,” “Corbin,” and
18 “2Long,” link to pornographic sites involving young actors. What Dogge omits, however, is that
19 Dogge has no way of knowing what those bookmarks link to. The bookmarks in Exhibit 3 were not
20 live links, and a user can name his or her bookmarks anything he wants. Dogge’s unrelated
21 “evidence” for his suspicions undoubtedly comes from taking the name of the bookmark – say,
22 “Corbin”– and entering that name into a search engine such as Google. Google may return any
23 manner of related results – not necessarily what is actually linked to in the bookmark. For example,
24 searching for “Corbin” in Google yields results about Corbin Motorcycle Seats; the town of Corbin,
25 Kentucky; and Pat Corbin, the baseball player. In the case of 2 Long, the proper link is too long for

26
27 ¹ The other premise for Defendant’s Motion is Dogge’s allegation that Teller’s own computer contains a copy of the
28 video on which his copyright and unfair competition claims and which Dogge first refused to produce and then said he
lost, are based. The argument is fully addressed in Teller’s separately filed Opposition to Defendant’s Motion.

1 Tweeter and has no sexual meaning at all except in the Defendant’s intended twisted reasoning.

2 No doubt taking the worst possible search results and following links until he finds
 3 something outrageous, Dogge claims that this is “evidence” of some kind of wrongdoing for which
 4 the Plaintiff should be investigated. Combining this with alleged “suspicious” elements such as
 5 Teller’s name change (from Raymond Teller to simply “Teller”)² and Teller’s silence on stage (he’s
 6 a silent performer; he speaks off stage),³ Dogge disingenuously purports to be simply doing his civic
 7 duty in reporting this behavior to the Court for potential investigation. This is calculated and
 8 intentional harassment in its purest form. These purported allegations are also completely irrelevant
 9 to the copyright and unfair competition litigation at issue and in no way warrant inspection of
 10 Teller’s hard drive. In fact, the entirety of Defendant’s Motion is really Dogge’s malicious attempt
 11 to get around the Court’s previous Order directing him not to file any more pornographic images.
 12 Here, Dogge writes about the pornography instead of filing the images.⁴ As such, Defendant’s
 13 Motion should be stricken in its entirety.

14 **B. Defendant’s Motion Contains Scandalous Statements And Should Be Sealed.**

15 Defendant’s Motion contains baseless and scandalous statements about Teller and should be
 16 sealed. There are two standards that govern motions to seal: a more stringent “compelling reasons”
 17 standard for dispositive motions, and a lesser “good cause” standard for non-dispositive motions.
 18 *Golden Boy Promotions, Inc. v. Top Rank, Inc.*, 2011 WL 686362, *1 (D. Nev. 2011). The
 19 “compelling reasons” standard applies to material attached or included in dispositive motions and is
 20 only met when the moving party overcomes “a strong presumption in favor of access by showing
 21 articulable facts that a compelling reason exists.” *Id.* (internal citations omitted). “Generally, a
 22 ‘compelling reason’ exists when court files have ‘become a vehicle for improper purposes, such as
 23 the use of records to gratify private spite, promote public scandal, circulate libelous statements, or

24 _____
 25 ² Changing one’s name by simply omitting one’s first name but keeping the last, while becoming a renowned public
 figure would not be the best way to hide. Incidentally, it is Dogge who goes by a number of aliases: Gerard Robert,
 Gerard Bakardy, and Gerard Danvers are those Teller has confirmed.

26 ³ Dogge presents a list of 20 enumerated “suspicions.” As they are baseless, Teller does not go through each of them
 27 here. However, if the Court would prefer, Teller will address them individually upon request.

28 ⁴ However, as indicated above, contrary to the Court’s previous Order Dogge has actually filed a pornographic image in
 Exhibit 13 attached to Defendant’s Motion.

1 release trade secrets.” *Asdale v. Int’l Game Technology*, 2010 WL 2161930, *2 (D. Nev. 2010)
2 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)).

3 For non-dispositive motions, on the other hand, a party seeking to seal a judicial record must
4 only meet the “good cause” standard. *Asdale*, 2010 WL 2161930 at *2. “Because non-dispositive
5 motions are often ‘unrelated, or only tangentially related to the underlying cause of action[,]’ the
6 ‘public policies that support the right of access to dispositive motions...do not apply with equal force
7 to non-dispositive materials.’” *Id.* (citing *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1179-80
8 (9th Cir. 2006)). Therefore, a showing under the “good cause” standard of Fed. R. Civ. P. 26(c) is
9 all that is necessary to preserve the secrecy of sealed materials attached or included in non-
10 dispositive motions. *Id.*

11 Here, while the Defendant’s Motion is certainly non-dispositive, Teller actually meets the
12 more stringent “compelling reasons” standard to seal material attached or included in dispositive
13 motions. As detailed above in Section II.A., Dogge has used a court filing to circulate scandalous
14 statements about Teller by accusing him of sexual misdeeds or other wrongdoing without the
15 slightest legitimate supporting evidence. These completely baseless and harassing claims of sexual
16 misconduct should not be allowed to remain in a public record. Defendant’s Motion is nothing more
17 than a vehicle for improper purposes, and is being used by Dogge to gratify his own private spite,
18 promote public scandal, and circulate intentionally inflammatory statements about Teller. Not only
19 does this qualify as a “good cause,” but it also demonstrates the existence of a “compelling reason”
20 to seal Defendant’s Motion in its entirety.

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1 **IV. CONCLUSION**

2 Defendant's Motion is meritless, harassing and immaterial. In light of the foregoing,
3 Plaintiff respectfully requests that this Court GRANT Teller's Motion to Strike and Seal Defendant's
4 Emergency Motion for Investigating the Plaintiffs Hard Drives.

5 Dated this 29th day of May, 2013

6 GREENBERG TRAUERIG, LLP

7 /s/ Mark G. Tratos

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on May 29, 2013, service of the foregoing **MOTION TO STRIKE AND TO SEAL DEFENDANT’S EMERGENCY MOTION FOR INVESTIGATING THE PLAINTIFFS HARD DRIVES** 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

/s/ Cynthia Nev
An employee of Greenburg Traurig

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