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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LIBERTY MEDIA HOLDINGS, LLC, a California Corporation, Plaintiff vs. FF MAGNAT LIMITED d/b/a/ ORON.COM; MAXIM BOCHENKO a/k/a/ ROMAN	Case No. CV 2:12-cv-01057 **DEFENDANT FF MAGNAT LIMITED'S OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT** **Hearing:** **Not yet set** **Time:** **Not yet set**

ROMANOV; and JOHN DOES 1 - 500.

Defendants.

Judge: **Hon. Gloria N. Navarro**
Courtroom: **7D**

Without intending to waive any defenses it may have based on lack of personal jurisdiction, venue or improper service of the summons and complaint, Defendant FF Magnat Limited dba Oron.com ("Oron") hereby opposes Plaintiff Liberty Media Holdings LLC's ("Liberty Media" or "Plaintiff") Motion to Enforce Settlement Agreement ("Motion").[1]

I. INTRODUCTION

As has been the case throughout the relatively short life of this litigation, Plaintiff once again relies on misstatements, half-truths and an inaccurate recitation of the "facts" to support what is, at heart, a baseless motion. While Plaintiff wishes the Court to believe that Oron has "backed out" of an enforceable settlement agreement, that claim is simply untrue. Plaintiff has conveniently forgotten to inform the Court that the parties never reached a meeting of the minds as to the scope of the settlement, and thus there is no settlement for the Court to enforce. Indeed, contrary to Plaintiff's claim, it was Plaintiff – not Oron – who terminated the parties settlement discussions based on that failure to reach agreement.[2]

Simply stated, this motion, as well as Plaintiff's motion for attorneys' fees, are nothing more than the next phase in Plaintiff's efforts to extort payment from yet another victim – in this case Oron – who is faced with the Hobson's choice of resolving meritless claims brought by Plaintiff or suffering continued slander of its business in the media. Plaintiff's counsel has himself made clear

[1] The time has not come for defendants to challenge jurisdiction in a motion to dismiss the complaint. Consequently, Defendant Oron is once again specially appearing in order to respond to Liberty Media's Motion to enforce Settlement Agreement. By filing this opposition, Oron does not intend to submit to this Court's jurisdiction or to waive any right to challenge jurisdiction and/or improper service. To the contrary, Oron expressly reserves its right under the Federal Rules of Civil Procedure to challenge personal jurisdiction and service by way of a motion to dismiss the complaint and/or a motion to quash.

[2] Plaintiff's demand for attorneys' fees, and for an order requiring Oron to cease defending itself in the Hong Kong litigation, are also procedurally improper, as discussed below and in Oron's opposition to Plaintiff's Motion for Attorneys' Fees, being filed today.

that he would "prefer to kill Oron altogether and keep all $3 million" of Oron's assets frozen by the courts here and in Hong Kong.[3] Moreover, a brief Internet search suggests that Plaintiff and its counsel have engaged in this type of conduct repeatedly and without shame. Indeed, their conduct here appears to be typical of their approach to "litigation" – trump up baseless claims of infringement against companies or individuals, seek to freeze their corporate victim funds where possible so as to force them out of business or threaten draconian financial sanctions against individuals who plainly cannot afford to fight back, and slander and defame (or threaten to do so) their victim to their customers, and the Internet community at large, so as to either force a settlement or destroy their victim's business entirely.[4] Plaintiff's counsel's unscrupulous efforts here – including the admittedly meritless claim that Oron's website contained child pornography – typify his modus operandi in other cases, and should not be condoned or permitted.[5]

II. FACTUAL BACKGROUND

A. Factual Background

Oron is a Hong Kong company that operates a "cloud" based data storage business through its website, Oron.com. Plaintiff Liberty Media is a producer of hardcore gay pornographic video material, some of which third persons have allegedly stored on Oron's computer servers without Plaintiff's permission. As a simple internet search reveals that Liberty Media has filed numerous "mass defendant" lawsuits alleging copyright infringement against a host of companies as well as hundreds of individuals, including many of Liberty Media's own customers. It appears that Liberty

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[3] *See* Declaration of Stevan Lieberman in Opposition to Motion to Enforce Settlement Agreement ("Lieberman Decl.), filed herewith, ¶ 9 & Ex. G.

[4] Plaintiff's counsel has admittedly filed over 30,000 copyright infringement lawsuits. See Lieberman Decl., ¶ 10 & Ex. H.

[5] In its response to Oron's Motion to Amend TRO, Plaintiff for the first time accused Oron of permitting child pornography to be stored on its site. Plaintiff offered no evidentiary support for that scurrilous accusation, and to the contrary, the July 1, 2012 term sheet – which Plaintiff incorrectly describes as a settlement agreement – suggest that there was never any factual basis for that claim. *See* Lieberman Decl., Ex. A at ¶ 12. At the same time, Plaintiff was prepared to concede that "after a careful review of the facts, [Plaintiff is] belie[s] Oron is protected by the DMCA safe harbor." (*Id.*).

Media is developing a reputation as a "troll litigator" in the arena of copyright infringement.

On June 20, 2012, Plaintiff filed its complaint in this action against both Oron and defendant Maxim Bochenko ("Bochenko").[6] At the same time, Plaintiff filed its Emergency Motion for Ex Parte Temporary Restraining Order, Order for Seizure, and Appointment of Receiver, and Order to Show Cause Re Preliminary Objection ("Motion"). On June 21, 2012, the Court entered an order (e-Docket 11) ("Order") granting the Motion in part, and freezing all of Defendants' assets pending the hearing on Plaintiff's request for a preliminary injunction, including all assets in any U.S. bank or financial institution and any funds held for Oron by PayPal, Inc., CCBill, LLC, and AlertPay , and enjoined Defendants "from disgorging or dissipating any fund, property, domain names, or other assets until further notice." *Id.* at 2-3. On June 26, 2012, the Court granted in part Oron's emergency motion to amend the TRO to permit the release of certain funds from Oron's PayPal account.

Contemporaneous with the filing of this lawsuit, Plaintiff instituted legal proceedings against Oron in Hong Kong. According to Plaintiff, it obtained an order, similar in some respects to the Order here, freezing Oron's assets (HK$3,000,000) in Hong Kong.[7]

Despite the ferocity of Plaintiff's legal attack and its unfounded accusations against Oron, the parties have engaged in settlement negotiations. Based on those discussions, on July 1, 2012, Oron's counsel prepared a draft term sheet for review by Plaintiff's counsel, setting out certain terms of a proposed settlement. (Lieberman Decl., ¶¶ 3-4 & Ex. A). Among other things, the proposed term sheet provided that Oron would make a payment of $550,000 to Plaintiff; that "both proceedings in NV and HK [would] be dismissed with prejudice" upon payment of the settlement amount; and that

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[6] Plaintiff included Bochenko based on the spurious and unsupported allegation that Bochenko was an owner of Oron.

[7] To the extent that Plaintiff has suggested that it has "frozen" "$3 million" of Oron's assets in Hong Kong, that is yet another example of the misleading statements relied upon by Plaintiff during this litigation. To be clear, the "$3 million" in Hong Kong is actually in Hong Kong dollars, not U.S. dollars, and is approximately US $386,700.00 at the current exchange rate. The suggestion that Oron has tried to hide vast sums of money overseas is simply false, and to the contrary, Plaintiff's efforts have pushed Oron to the brink of extinction.

"all parties" would execute mutual releases. (*Id.*, Ex. 4 at ¶¶ 1, 8, 15).

However, the parties quickly discovered that they had not reached a "meeting of the minds" as to the material terms of the proposed settlement. For example, Oron understood that the proposed settlement would "buy its peace" by settling the lawsuits in their entirety, including the claims against Defendant Bochenko. (*Id*, ¶¶ 5-6 & Exs. B-D). Plaintiff, however, took the position that Bochenko was not part of the proposed settlement, and that Plaintiff would "settle with him separately . . . he's on his own." (*Id.*, ¶ 7 & Ex. E).

On July 2, 2012, Plaintiff's counsel wrote to Oron's server host, LeaseWeb. Although Plaintiff claims that this letter was an indication that the parties had already reached a final settlement, the terms of the letter demonstrate otherwise. Specifically, the letter informs LeaseWeb that "Oron.com is on the eve of making a deal with" Plaintiff. (*See* Motion, Ex. B). It says nothing about a final settlement having been reached.

On July 3rd, following further discussion as to whether Mr. Bochenko was to be included within the proposed settlement, Plaintiff's counsel made clear that there was no settlement between the parties. In an email to Oron's counsel, Stevan Lieberman, Plaintiff's counsel took the position that the parties "need to put the brakes on" the settlement discussions, and that while "[t]his may change and we may get back on track, [] it seems that right now, the settlement we brokered is going off the rails." (Lieberman Decl., ¶ 8 & Ex. F).

Despite the overwhelming evidence that there was never an agreement as to a settlement between the parties, Plaintiff nevertheless has the temerity to move to enforce this "settlement agreement" and to move for attorneys' fees.[8]

[8] Contrary to Plaintiff's contention, Oron's counsel, Mr. Lieberman, was not purposely avoiding Plaintiff's phone calls, but was without phone or email service due to ongoing and widely reported power outages in the Washington, D.C. area last week. (Lieberman Decl., ¶ 11).

III. ARGUMENT

A. There is No Settlement Agreement to Enforce Because The Parties Did Not Have "Mutual Assent" As To The Material Terms of a Proposed Settlement

Notwithstanding its penchant for misstating the facts, Oron agrees with Plaintiff on one point: under Nevada law, the construction and enforcement of a settlement agreement is governed by contract law. *See, e.g., May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2004). Applying contract law here, however, demonstrates that Plaintiff's motion is meritless. Plaintiff has not shown – and cannot show – that the parties ever entered into a contractual settlement agreement that is subject to enforcement by this Court.

Under Nevada law, "preliminary negotiations do not constitute a binding contract unless the parties have agreed to all the material terms. . . . In the case of a settlement agreement, a court cannot compel compliance when the material terms remain uncertain." *Id.* Thus, the issue here – and the burden that Plaintiff must satisfy in its Motion – is whether the parties reached an agreement as to all the material terms of a settlement, and what those terms are. Absent such a showing, there is no contract for the Court to enforce.

Plaintiff, however, ignores that burden, and instead merely concludes that the "July 1 settlement agreement is clear on its face." Motion at 3:8-9. Yet to support that contention, Plaintiff refers to only on only two terms of the alleged agreement – an obligation on Plaintiff's part to "provide documentation" to Oron's server host, and Oron's obligation to pay the settlement amount. That cursory analysis, however, ignores the fact that other material terms were in dispute, and the fact that Plaintiff itself terminated the purported settlement.

Most fundamentally, the evidence is clear that the Plaintiff and Oron did not even reach agreement as to the most fundamental of issues – which parties would be covered by the settlement. During negotiations, Oron's counsel, Stevan Lieberman, understood that he was negotiating a global settlement of the litigation in the United States and Honk Kong, and that Oron would be "buying its peace" with Plaintiff. As Lieberman understood it, this would include co-Defendant Bochenko.

(Lieberman Decl., ¶ 6 & Ex. D) ("If Mr. Bochenko is not dismissed, Oron will not have bought its peace."). Indeed, the July 1 proposed term sheet clearly states that once the settlement amount is paid, "both proceedings in NV and HK will be dismissed with prejudice." (*Id.*, Ex. A, ¶ 8). The proposed term sheet does not contemplate the dismissal of only Oron, but a wholesale dismissal of the proceedings with prejudice.

Nonetheless, on July 3, 2012, Plaintiff's counsel, Mr. Randazza, informed Oron that for the settlement to apply only to Oron, not Bochenko, and that if Bochenko wished to settle, he "was on his own." (*Id.*, ¶ 7 & Ex. E). Lieberman and Randazza then exchange d a series of emails as to which parties were covered by the proposed settlement. Ultimately, it was Plaintiff – not Oron, as Plaintiff wishes the Court to believe – who rejected the proposed settlement, informing Lieberman that the parties "need to put the brakes on" the settlement discussions, and that while "[t]his may change and we may get back on track, [] it seems that right now, the settlement we brokered is going off the rails." (*Id.*, ¶ 8 & Ex. F). Plainly if Plaintiff and Oron could not even agree as to which parties were included in the settlement, there was no "meeting of the minds" or "mutual assent" as to a critical and material term, and thus no settlement agreement was ever formed. *See, e.g., Stoddart v. Miller*, 238 P.3d 845, *4 (Nev. 2008)(table) ("When evidence shows that, after a contract was purportedly formed, the parties continued to negotiate the agreement's essential terms, it is clear that there has been no meeting of the parties' minds, and consequently, that no binding contract exists as a matter of law.") (citing *Louis Lesser Enterprises, Ltd. v. Roeder*, 25 Cal. Rptr. 917, 919 (Ct.App.1962)).

This fundamental dispute also impacted the releases that were contemplated by the July 1 term sheet. As one of the "General Terms" of the proposed settlement, the term sheet provides "[a]ll parties mutually release." (*Id.*, Ex. A, ¶ 15). Once again, Oron understood this to mean that all parties, including Bochenko, would be released by Plaintiff. Given Plaintiffs contention that it would not include – and thus would not release – Bochenko as part of the proposed settlement, this was yet another material term on which no agreement was reached. Nevada law is clear that "release

terms are generally thought to be material to any settlement agreement." *May*, 119 P.3d at 1257. In *May*, the Nevada Supreme Court explained that "an enforceable settlement agreement cannot exist when the parties have not agreed to the essential terms of the release because these provisions constitute a material term of the settlement contract. . . . If the prevention of future litigation is one of the primary goals of a settlement, the essential terms of the release needed to achieve that goal are material to the settlement agreement." *Id.* at 1258.

Here, the parties' correspondence make clear that the avoidance of future litigation – whether claims by Plaintiff or indemnity claims by Bochenko against Oron – was a fundamental goal of Oron's efforts to buy its peace. (*Id.*, ¶ 6 & Ex. D). Because Plaintiff and Oron fundamentally disagreed as to which parties would be covered by the mutual releases, there is no settlement contract for Plaintiff to enforce.

Finally, Plaintiff's effort to point to its own conduct as evidence of a settlement miss the mark. First, the July 2nd letter that Plaintiff sent to LeaseWeb actually makes clear that there was no final settlement between the parties as of that date, even though the purported contract was dated July 1. The July 2nd letter expressly states that "Oron.com is on the eve of making a deal with us" – a far cry from having already made a deal or reached a settlement. In truth, Plaintiff was "on the eve" of backing out of the proposed settlement based on the parties fundamental disagreement as to who the parties to the settlement actually were.

Second, Plaintiff's reliance on the parties' July 3rd joint stipulation to continue the hearing on Plaintiff's preliminary junction motion is also unavailing. (Docket No. 28). Nothing in that stipulation suggests that a settlement had been concluded – to the contrary, the stipulation states that the parties are agreeable to the continuance because they "believe they will facilitate attempts to narrow the issues in this matter or come to a mutually beneficial resolution to the dispute." (*Id.* at 2). Thus the joint stipulation establishes that no settlement had been reached by July 3rd, two days after the date of the term sheet, and the same day that Plaintiff backed away from the purported settlement.

Whether these facts are viewed separately or in conjunction, it is clear that the parties never reached an agreement as to the fundamental terms of a settlement. Consequently, there is no settlement agreement for this Court to enforce, and Plaintiff's Motion should be denied.

IV. CONCLUSION

Plaintiff's unabashed effort to mislead this Court and enforce a "settlement" that was never reached is yet another step in Plaintiff's unscrupulous efforts to cripple or "kill Oron altogether." As the facts show, the parties were never able to reach agreement on the most fundamental element of a settlement, i.e. which parties would be settling. Although Plaintiff ignores this, and conveniently forgets to mention that it was Plaintiff who terminated the settlement discussions, the evidence here amply shows that the parties never completed their settlement discussions or entered into a binding settlement agreement. As such, there is nothing for the Court to enforce, and Oron respectfully requests that the Court deny Plaintiff's Motion in its entirety.

Dated: this 12th day of July, 2012

Wilson Elser Moskowitz Edelman & Dicker LLP

By: /s/ David S. Kahn
DAVID S. KAHN
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