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20 **UNITED STATES DISTRICT COURT**

21 **DISTRICT OF NEVADA**

22 LIBERTY MEDIA HOLDINGS, LLC, a
23 California Corporation,

24 Plaintiff

25 vs.

26 FF MAGNAT LIMITED d/b/a/ ORON.COM;
27 MAXIM BOCHENKO a/k/a/ ROMAN

Case No. CV 2:12-cv-01057

**DEFENDANT FF MAGNAT LIMITED'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES**

**Hearing: Not yet set
Time: Not yet set
Judge: Hon. Gloria N. Navarro**

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**DEFENDANT FF MAGNAT LIMITED'S OPPOSITION TO PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES
CASE NO. 2:12-cv-01057**

1 ROMANOV; and JOHN DOES 1 - 500.

Courtroom: 7D

2 Defendants.

3
4 Without intending to waive any defenses it may have based on lack of personal jurisdiction,
5 venue or improper service of the summons and complaint, Defendant FF Magnat Limited dba
6 Oron.com (“Oron”) hereby opposes Plaintiff Liberty Media Holdings LLC’s (“Liberty Media” or
7 “Plaintiff”) Motion for Attorneys’ Fees.¹

8 **I. INTRODUCTION**

9 Plaintiff Liberty Media alleges that Defendant Oron has breached the terms of a settlement
10 agreement and has asked this Court to enforce that agreement. In reality, it is the Plaintiff and its
11 counsel who caused the settlement to fall apart. Oron is opposing the motion to enforce the
12 settlement agreement. Statements by Plaintiff’s counsel that it has “partially performed” under the
13 terms of the settlement agreement are false.

14 In conjunction with its Motion to Enforce Settlement, Liberty Media brings this Motion for
15 Attorneys’ Fees, asking the Court “to order Oron to pay Liberty for the costs and fees associated
16 with continuing litigation in Hong Kong, and for the costs and fees associated with the instant
17 motion and the contemporaneous Motion to Enforce Settlement and Motion to Seal.” (Mtn. for
18 Attorneys’ Fees at 2:3-6.) Liberty Media’s request for attorneys’ fees lacks merit and should be
19 denied. Even if Liberty Media were to prevail on its Motion to Enforce Settlement (which it should
20 not), there is absolutely no statutory or contractual basis for awarding Liberty Media any attorneys’
21 fees or costs. In addition, Liberty Mutual has entirely failed to comply with the procedural and
22 substantive requirements for making a motion to recover attorneys’ fees in this District. Liberty
23

24 ¹ The time has not come for defendants to challenge jurisdiction in a motion to dismiss the
25 complaint. Consequently, Defendant Oron is once again specially appearing in order to respond to
26 Liberty Media’s Motion to Enforce Settlement and Motion for Attorneys’ Fees. By filing this
27 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.

1 Media's Motion for Attorneys' Fees is nothing more than an effort to extort further payment from
2 Oron and to prevent it from defending itself in this and other judicial forums, and it should be denied
3 in its entirety.

4 II. ARGUMENT

5 Plaintiff Liberty Media asks this Court to award it attorneys' fees and costs for pursuing what
6 amounts to a breach of contract claim. In its Motion to Enforce Settlement, Liberty Media concedes
7 that "because a settlement agreement is a contract, its construction and enforcement are governed by
8 principles of contract law." (Mtn. to Enforce at p. 1, quoting *May v. Anderson*, 121 Nev. 668, 672,
9 119 P.3d 1254, 1257 (2004)). Under Nevada law, a court may not award "attorney fees ... unless
10 authorized to do so by a statute, rule or contract." *U.S. Design & Constr. v. I.B.E.W. Local 357*, 118
11 Nev. 458, 462, 50 P.3d 170, 173 (2002). There is no question that the term sheet that Liberty Media
12 seeks to enforce as a settlement agreement does not contain any provision whatsoever for attorneys'
13 fees being awarded to either party in the event of a breach. (See Motion to Enforce Settlement, Ex.
14 A.) Nor does Liberty Media cite any "rule" that would support an award of attorneys' fees in
15 connection with its Motion to Enforce Settlement.

16 The only question, therefore, is whether Liberty Media is entitled to recover attorneys' fees
17 for an alleged breach of contract under the federal Copyright Act, namely 17 U.S.C. § 505. The
18 answer is clearly "no." Section 505 of the federal copyright statute provides:

19 § 505. Remedies for infringement: Costs and attorney's fees

20 In any civil action under this title, the court in its discretion may allow the
21 recovery of full costs by or against any party other than the United States or
22 an officer thereof. Except as otherwise provided by this title, the court may
23 also award a reasonable attorney's fee to the prevailing party as part of the
24 costs.

17 U.S.C. § 505.

25 The plain language of the statute provides a remedy "for infringement." That is, a party
26 prevailing on the merits of a copyright infringement claim may, under certain circumstances, recover
27 his or her attorneys' fees. The statute does not provide a remedy for the breach or enforcement of an

1 alleged settlement agreement. That, as Liberty Media recognizes in its own motion, is a claim
2 arising under contract law, not under federal copyright law.

3 Moreover, even where the plaintiff's claim arises under federal copyright law, section 505
4 limits an award of attorneys' fees to "the prevailing party." Where the parties reach a mutual
5 settlement of claims alleging copyright infringement, neither is the "prevailing party" on a copyright
6 claim. As the court explained in *NXIVM Corp. v. Ross Institute*, 2005 WL 1843275 (N.D.N.Y.), to
7 be entitled to an award of attorneys' fees under section 505,

8
9 one must either secure a judgment on the merits or be a party to a settlement
10 agreement that is expressly enforced by the court through a consent decree. *See*
11 [*Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum Res.*,
12 532 U.S. 598, 603-04 (2001).] "[R]esults obtained without such an order d[o] not
13 supply a basis for an award of attorneys' fees because '[a party's] voluntary
change in conduct ... lacks the necessary judicial imprimatur' to render [someone]
14 a prevailing party." *J.C. v. Reg'l School Dist. 10, Bd. Of Educ.*, 278 F.3d 119,
15 123 (2nd Cir. 2002) quoting *Buckhammon*, 532 U.S. at 605).

14 *Id.* at *2.

15 Here, Liberty Media has neither prevailed on the merits of its copyright infringement claims
16 against Oron, nor has it had a settlement agreement enforced by this Court through a consent decree.
17 By its Motion to Enforce Settlement, Liberty Media is not seeking to obtain anything through a
18 consent decree. The Term Sheet does not provided for the entry of a consent decree and no such
19 decree was contemplated or even discussed by the parties. Accordingly, even if 17 U.S.C. § 505
20 were applicable to Liberty Media's breach of contract claim (which it is not), Liberty Media is not a
21 prevailing party under that statute and is therefore not entitled to any award of attorneys' fees and
22 costs.

23 Finally, even if there were some contractual or statutory basis for an award of attorneys' fees
24 in this case, Liberty Media has not satisfied the procedural or substantive requirements for obtaining
25 such an award. First, Liberty Media has not made even a minimal effort to comply with Local Rule
26 54-16(b), which applies to all motions for attorney's fees and provides:
27

1 Content of Motions. Unless otherwise ordered by the Court, a motion for attorney's fees
2 must, in addition to those matters required by Fed. R. Civ. P. 54(d)(2)(B), include the
3 following:

- 4 (1) A reasonable itemization and description of the work performed;
- 5 (2) An itemization of all costs sought to be charged as part of the fee award
6 and not otherwise taxable pursuant to LR 54-1 through 54-15;
- 7 (3) A brief summary of:
- 8 (A) The results obtained and the amount involved;
 - 9 (B) The time and labor required;
 - 10 (C) The novelty and difficulty of the questions involved;
 - 11 (D) The skill requisite to perform the legal service properly;
 - 12 (E) The preclusion of other employment by the attorney due to
13 acceptance of the case;
 - 14 (F) The customary fee;
 - 15 (G) Whether the fee is fixed or contingent;
 - 16 (H) The time limitations imposed by the client or the circumstances;
 - 17 (I) The experience, reputation, and ability of the attorney(s);
 - 18 (J) The undesirability of the case, if any;
 - 19 (K) The nature and length of the professional relationship with the
20 client;
 - 21 (L) Awards in similar cases; and,
- 22 (4) Such other information as the Court may direct.

23 None of the information required under Local Rule 54-16(b) has been submitted. In addition,
24 Local Rule 54-46(c) requires that a motion for attorneys' fees "must be accompanied by an affidavit
25 from the attorney responsible for the billings in the case authenticating the information contained in
26 the motion and confirming that the bill has been reviewed and edited and that the fees and costs
27 charged are reasonable." No attorney affidavit was filed. This is not an insignificant procedural
28 oversight. Indeed, Local Rule 54-16(d) clearly states that "[f]ailure to provide the information
required by LR 54-16(b) and (c) in a motion for attorneys' fees constitutes a consent to the denial of
the motion."

Second, Liberty Mutual has failed to provide any substantive basis for an award of attorneys'
fees under 17 U.S.C. § 505. Courts determining whether to grant attorney fees under Copyright Act

1 are to exercise equitable discretion in light of the degree of success obtained, frivolousness,
2 motivation, objective reasonableness of both factual and legal arguments, and the need in particular
3 circumstances to advance considerations of compensation and deterrence. *See Jackson v. Axton*, 25
4 F.3d 884 (9th Cir. 1994). Here, Liberty Mutual merely states in a conclusory fashion that Oron's
5 conduct has been "frivolous" and "objectively unreasonable." (*See Mtn.* at 3.) It provides
6 absolutely no substantive evidence demonstrating that an award of attorneys' fees under section 505
7 is warranted. Therefore, even if 17 U.S.C. § 505 were applicable here (which it is not), Liberty
8 Media has failed to demonstrate that it is entitled to an award of attorneys' fees under that statute.

9 **III. CONCLUSION**

10 Plaintiff Liberty Media is not entitled to an award of attorneys' fees or costs because there is
11 no contractual or statutory basis for such an award, and because it has entirely failed to comply with
12 the procedural and substantive requirements for such an award. Liberty Mutual's continued efforts
13 to extract payment from Oron without any legal basis for doing so should not be countenanced. For
14 all of these reasons, Oron respectfully requests that the Court deny Plaintiff's Motion for Attorneys'
15 Fees.

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17 Dated: This 12th day of July, 2012

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19 Wilson Elser Moskowitz Edelman & Dicker LLP

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21 By: /s/David S. Kahn
22 DAVID S. KAHN
23 Attorneys for Defendant FF MAGNAT LIMITED
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