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 Defendants  
 12 **BODOG ENTERTAINMENT GROUP**  
 S.A., and erroneously named Specially  
 13 Appearing Defendants **BODOG.NET** and  
**BODOG.COM**

14  
 15 UNITED STATES DISTRICT COURT  
 16 DISTRICT OF NEVADA

17 1ST TECHNOLOGY LLC,  
 18 Plaintiff,  
 vs.

19 RATIONAL ENTERPRISES LTDA.,  
 20 RATIONAL POKER SCHOOL LIMITED,  
 BODOG ENTERTAINMENT GROUP S.A.,  
 21 BODOG.NET, BODOG.COM, AND  
 FUTUREBET SYSTEMS LTD.,  
 22 Defendants.

Case No: 2:06-cv-1110-RLH-GWF

**SPECIALLY APPEARING DEFENDANTS  
 BODOG ENTERTAINMENT GROUP S.A.  
 AND ERRONEOUSLY NAMED  
 SPECIALLY APPEARING DEFENDANTS  
 BODOG.NET AND BODOG.COM  
 OPPOSITION TO PLAINTIFF 1ST  
 TECHNOLOGY LLC'S "EMERGENCY  
 MOTION FOR PERMANENT  
 INJUNCTION"**

**Date:** October 11, 2007  
**Time:** 9:00 a.m.  
**Courtroom:** 6C

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1 **I. INTRODUCTION**

2 Specially appearing Defendants Bodog Entertainment Group S.A.,<sup>1</sup> Bodog.net, and Bodog.com,  
3 (collectively “Defendants”)<sup>2</sup> challenge jurisdiction and oppose Plaintiff’s “emergency” motion for a  
4 permanent injunction. Plaintiff’s conduct in this litigation establishes it is attempting to turn a patent that has  
5 valueless claims that are virtually impossible to infringe into a gold mine by ambushing defendants with an  
6 improperly served lawsuit, misleading the Court about numerous issues, and seeking an improper form of  
7 relief.

8 Plaintiff’s motion should be denied because: (1) Plaintiff has misled this Court about prior  
9 proceedings in the Washington court; (2) its motion is futile; and (3) Plaintiff has not even attempted to meet  
10 the standard for issuance of a permanent injunction in a patent case.

- 11 • Plaintiff attempts to mislead the Court in several ways.

- 12 - Plaintiff misconstrues the order it obtained in the Washington state case. The Washington  
13 Order never gave Plaintiff “control of the ... traffic of Bodog.com.”

- 14 - Further, Plaintiff failed to inform the Court that the Washington Court is already  
15 considering the same issues that Plaintiff raises with this Court, and Plaintiff raised those issues with the  
16 Washington court before filing its motion with this Court. This Court should defer consideration of  
17 Plaintiff’s motion until the Washington Court decides the issues.

- 18 • Plaintiff’s motion is futile.

- 19 - Defendants have already moved to set aside the default judgment and there is no point to  
20 considering this motion until the pending motion to set aside the default judgment is decided. If the default  
21 judgment is set aside, there will be no judgment upon which a permanent injunction could issue.

- 22 - Plaintiff’s motion is also futile because Bodog Entertainment Group, S.A. does not operate  
23 the relevant websites and could not comply with Plaintiff’s proposed order.

- 24 - Further, the Court does not have jurisdiction over Defendants and any order would be

25 \_\_\_\_\_  
26 <sup>1</sup> Referred to herein as Bodog Entertainment or Bodog Entertainment Group, S.A.

27 <sup>2</sup> Improperly named Bodog.com and Bodog.net are not entities. They are merely domain names  
28 and the Court has no in rem jurisdiction over them because they are not registered in Nevada.

1 ineffectual and a violation of First Amendment rights.

2 - Additionally, Plaintiff's proposed order would not provide it any value because even if  
3 traffic were not redirected from NewBodog.com to another Internet address, there would be no reason for  
4 customers to go to the NewBodog.com Internet address and NewBodog.com would have virtually no value.

5 • Plaintiff has not attempted to make the showing required for issuance of an injunction and did not  
6 even cite the appropriate standard.

7 - Under some circumstances an injunction may sometimes issue in patent cases to prevent  
8 patent infringement. Plaintiff, however, does not seek to prevent patent infringement. Instead, Plaintiff  
9 wants the activities it alleges constitute patent infringement to continue.

10 - Additionally, Plaintiff failed to make any showing on any of the factors a court considers  
11 when deciding whether to issue an injunction, i.e., irreparable injury, inadequacy of remedies available at  
12 law, the balance of hardships, and the public interest. Because all of these factors weigh against issuing an  
13 injunction, the motion for an injunction should be denied.

14 **II. FACTUAL BACKGROUND**

15 **A. The Parties**

16 **1. Plaintiff Is Simply A Licensing Entity And Has Repeatedly Licensed Its**  
17 **Patent**

18 1st Technology sued the defendants in this case for infringement of U.S. Patent No. 5,564,001 (“’001  
19 patent”) (Complaint, Ex. 1). 1st Technology is a frequent litigant in the District of Nevada, and has sued  
20 various companies on the ‘001 patent in at least five other litigations since 2004. (Exs. 3 - 7).<sup>3</sup>

21 As the principal of 1st Technology, Scott Lewis admits in his declaration to licensing the ‘001 patent  
22 (¶ 6 of Ex. A to Ex. 1 to Plaintiff’s moving papers). An Internet search reveals that 1st Technology appears  
23 to have licensed other companies as well. Exs. 8-10. Plaintiff has not provided any evidence that it engages  
24

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25 <sup>3</sup> The Niro, Scavone, Haller & Niro firm represented 1st Technology in at least two D. Nev.  
26 lawsuits since 2004 (exs. 3, 4, 6), and it appears that the Niro Scavone firm attempted to represent 1st  
27 Technology in yet another D. Nev. lawsuit, but the petition for permission to practice pro hac vice was  
28 denied. (Ex. 5). The first named partner in the Niro Scavone firm is the self proclaimed first “patent  
troll,” i.e., an entity that provides no products to consumers and whose only “service” is suing on and  
licensing patents. (Ex. 8).

1 in any business other than suing on and licensing its patents. Plaintiff does not appear to provide any online  
2 games or entertainment services.

3 **2. Bodog Entertainment Does Not Operate The Relevant Websites**

4 Bodog Entertainment does not itself provide online entertainment services. It merely provided  
5 technical services, including domain name management, for various entities, including but not limited to  
6 entities that use the BODOG name and variations thereof to provide various online entertainment services.  
7 Further, Bodog Entertainment does not itself operate any websites.

8 **B. Proceedings In This Case**

9 As explained in more detail in Defendants' motion to set aside the default judgment, on September 7,  
10 2006, Plaintiff filed the instant action against the Defendants in the United States District Court for the  
11 District of Nevada, alleging infringement of an internet-related patent. Plaintiff, however, failed to serve the  
12 Defendants properly. Instead, Plaintiff allegedly served Bodog Entertainment by purportedly leaving the  
13 Summons and Complaint with an administrative assistant not authorized to accept service of process.<sup>4</sup>

14 Plaintiff moved for and obtained an Entry of Clerks Default and later moved this Court for Default  
15 Judgment. (Docket No. 27).

16 On June 13, 2007, this Court issued a Default Judgment in favor of Plaintiff and against the  
17 Defendants. (*Id.* at No. 33). The Default Judgment was entered without an evidentiary hearing and was  
18 based upon a questionable affidavit provided by Plaintiff. (*Id.*). The Court entered a monetary judgment  
19 against the Defendants in the amount of \$46,597,849. (*Id.*). The Court, however, did **not** enter an order  
20 regarding the Bodog domain names. (*Id.*).

21 Defendants did not learn of the instant action or the Default Judgment until August 21, 2007, when  
22 Plaintiff moved to enforce the default judgment against Bodog Entertainment in King County Superior Court  
23 in Washington. (Ex. 11). On August 21, 2007, without prior notice to Bodog Entertainment, Plaintiff  
24

---

25 <sup>4</sup> Moreover, the only entity named as a defendant is Bodog Entertainment Group, S.A.  
26 "Bodog.com" and "Bodog.net" are not entities, are improperly named, and this Court has no personal  
27 jurisdiction over such domain names. While courts may have *in rem* jurisdiction over domain names,  
28 this Court has no *in rem* jurisdiction over Bodog.com and Bodog.net, which even Plaintiff admit are not  
registered in Nevada. Thus, there is no basis for the Court to have jurisdiction over the Bodog.com and  
Bodog.net domain names, or to issue any orders affecting Internet traffic to or from such domain names.

1 obtained a Writ of Execution in King County Superior Court, ordering eNom, a domain registrar, to transfer  
2 nearly 3,000 domain names (the “Original Domain Names”) to Plaintiff’s domain account (“Execution  
3 Order”). (Ex. 12). The vast majority of those domain names have **nothing** to do with any BODOG gaming  
4 business (which is the only target of Plaintiff’s patent infringement claim), but instead relate to entertainment  
5 content services (such as the Bodog Music, Bodog TV and Bodog Fight businesses) and domain names run  
6 by entities not named as defendants here. Thus, the seizure order entered by the Washington court was  
7 grossly overbroad. Immediately after learning of the Default Judgment and the Execution Order, Bodog  
8 Entertainment specially appeared in this Court, filing its Motion to Set Aside Default Judgment. (Docket  
9 No. 26).

10 To date, and contrary to Plaintiff’s assertions, Bodog Entertainment has not violated any order of this  
11 Court. Nor could Bodog Entertainment violate any Order of this Court, as the only Order against Bodog  
12 Entertainment, which the Defendants believe is invalid due to Plaintiff’s failure to properly serve the  
13 summons and complaint, is a money judgment.

14 **C. Plaintiff’s Attempt To Enforce Its Default Judgment In Washington State Precludes**  
15 **This Court Ordering the Relief Requested Here as the Relief Requested is Identical**  
16 **to that Requested in Washington**

17 In an attempt to persuade this Court to grant its requested permanent injunction, Plaintiff has failed to  
18 fully and accurately inform the Court of the litigation in the State of Washington. Specifically, Plaintiff has  
19 failed to inform this Court that the parties are awaiting a ruling by the Superior Court of King County on the  
20 very same request that Plaintiff seeks in its request for the instant permanent injunction. Accordingly, this  
21 Court should reject Plaintiff’s disingenuous request to enter an order that could conflict with an order issued  
22 by the Superior Court of the State of Washington. Plaintiff also misrepresents the Washington state court  
23 order in that the order nowhere gives Plaintiff “control of the ... traffic of Bodog.com” as falsely alleged at  
24 Mot 3:17. See Ex. C to Ex. 1 to moving papers.

25 **1. Plaintiff’s Motion for Writ of Execution**

26 On August 3, 2007, Plaintiff filed a Motion for Writ of Execution re Domain Names in the Superior  
27 Court of the State of Washington for the County of King (“Motion for Writ of Execution”). (Ex. 11).  
28

1 Plaintiff alleged that it sought execution on the domain names registered to Defendants based on the  
2 judgment of \$48,937.456. (Id.). The hearing on Plaintiff's Motion for Writ of Execution was calendared for  
3 August 21, 2007. (Id. at 1). Plaintiff, however, never provided the Defendants with Notice of its Motion for  
4 Writ of Execution.

5 In its Motion for Writ of Execution, Plaintiff noted that it "conducted searches for assets held by  
6 Defendants and came across numerous domain names registered through Washington based registrars, eNom  
7 Inc. and its subsidiaries." (Id. at 3). Accordingly, Plaintiff sought execution of those Bodog domain names,  
8 including but not limited to Bodog.com and Bodog.net (as well as thousands of other domain names  
9 unrelated to its patent infringement claims). (Id. at 1). On August 21, 2007, the Washington state court  
10 granted Plaintiff's motion and ordered that the Original Domain Names be transferred to Plaintiff's domain  
11 account. (Ex. 12). The Execution Order also (improperly) granted Plaintiff the right to use BODOG  
12 trademarks. (Id. at ¶ 6).

13 In response to the Execution Order, granting Plaintiff's un-noticed motion for writ of execution, and  
14 Plaintiff's improper seizure of thousands of domain names, there was a registration of a suite of new domain  
15 names under "NewBodog" URL variations such as NewBodog.com (the "NewBodog Domain Names") with  
16 a registrar in Luxembourg, so that the various Bodog businesses could operate at new Internet addresses.  
17 The NewBodog Domain Names were **not** registered by any named Defendant in this case (meaning this case  
18 and this Court have no jurisdiction over them). They were registered because Plaintiff seized not only  
19 bodog.com, bodog.net, and the 300 or so domain names listed on Exhibit A to Execution Order, but  
20 thousands more (well over 3,000 domain names) which were **not** authorized by the Execution Order. The  
21 NewBodog Domain Names were registered with Euro DNS, located in Luxembourg, in an effort to re-  
22 establish a location on the internet and to avoid further irreparable harm to the various Bodog businesses.  
23 Contrary to Plaintiff's assertion, there was nothing improper about starting new web sites at new domain  
24 names; certainly nothing in this Court's or the Washington state court's prior orders prohibited that.

25 **2. Defendants' Motion for Relief from Enforcement and Plaintiff's Motion for**  
26 **Writ of Execution re Replacement (Additional) Domain Names**

27 On September 7, 2007, Defendants filed an Amended Motion for Relief from Enforcement of  
28

1 Plaintiff's Writ of Execution and requested an Order shortening time for the hearing on the motion. (Ex. 15).  
2 Plaintiff filed its opposition to Defendants' motion for relief (ex. 16) and Defendants filed their reply in  
3 support of the motion for relief on September 11, 2007. (Ex. 17). As of a result of the registration of the  
4 NewBodog Domain Names, including NewBodog.com, Plaintiff filed in the Washington court a Motion for  
5 Writ of Execution re Replacement (Additional) Domain Names on September 4, 2007. (Ex. 18).  
6 Specifically, Plaintiff sought an order effecting transfer of the New Bodog Domain Names registered by  
7 Bodog Entertainment. (Id.). On September 10, 2007, Defendants filed their opposition to Plaintiff's motion  
8 regarding the replacement domain names. (Ex. 19). On September 11, 2007, Plaintiff filed its reply in  
9 support of its motion regarding the replacement domain names. (Ex. 20).

### 10 **3. The Washington State Court's Order & the Parties' Additional Briefing**

11 On September 12, 2007, the Washington State court, the Honorable John Erlick, heard argument on  
12 Defendants' motion for relief and Plaintiff's motion to extend its writ of execution to the NewBodog Domain  
13 Names. During the argument, Plaintiff orally requested that the Washington court enter an order preventing  
14 the Defendants from redirecting traffic from the Original Domain Names to the NewBodog Domain Names  
15 or other domain names pending resolution in this Court of Defendants' motion to set aside the default  
16 judgment. In response, Defendants argued that the Washington court did not have jurisdiction to enter such  
17 an order against entities over whom it had no personal jurisdiction and, further, that such an order would  
18 violate the First Amendment.

19 Following the hearing, the Washington court ordered Plaintiff not to dispose of the already-seized  
20 Original Domain Names pending resolution of Defendants' motion to set aside the default judgment before  
21 this Court. (¶ 1 to Ex. C to Ex. 1 of Plaintiff's moving papers). The Washington court further ordered that  
22 any NewBodog Domain Names that were within that court's jurisdiction and registered to Defendants remain  
23 in Defendants' possession in lock down status, pending the resolution of the motion to set aside default  
24 judgment before this Court. (Id. at ¶ 2). In response to Plaintiff's oral request that the Washington court  
25 issue an order to prevent Defendants or other entities from redirecting traffic from the Original Domain  
26 Names to the NewBodog Domain Names or other domain names, the Court ordered that the parties submit  
27 additional briefing on whether "this Court ha[d] jurisdiction, and whether it is in violation of the First  
28

1 Amendment to the United States Constitution,” to issue such an order. (*Id.* at ¶ 3). Finally, reversing its  
2 prior order on this point, the Washington court ordered that Plaintiff did “not have the right to use any of the  
3 defendant’s trademarks without further Order of this Court.” (*Id.* at ¶ 5). This is because, as Bodog  
4 Entertainment explained to the Washington court, allowing Plaintiff to use any BODOG trademarks would  
5 result in unlawful trademark infringement.

6 After that hearing, the Bodog businesses then unveiled a new suite of domain names under the name  
7 “BodogLife” – including BodogLife.com and BodogLife.net (the “BodogLife Domain Names”). This is part  
8 of the continued rebranding of the Bodog businesses – again, something which is a perfectly legitimate  
9 business decision and not prohibited by law or any order of any court. The BodogLife Domain Names are  
10 registered with an Internet registrar in Europe (meaning that this Court has no jurisdiction over them).  
11 Moreover, the BodogLife suite of domain names was not registered by any named Defendant in this action  
12 and the web sites available there are not operated by any named Defendant in this action. And as before, the  
13 BodogLife suite of domain names also encompass numerous entertainment content businesses (including  
14 Bodog Music, Bodog TV, and Bodog Fight) which have nothing to do with the gaming business accused of  
15 infringing Plaintiff’s patent. Despite these important distinctions, by this motion, Plaintiff seeks (before both  
16 the Washington court and now before this Court) to prevent redirection of any Internet traffic from the  
17 NewBodog Domain Names to the BodogLife Domain Names.

18 On September 19 and September 21, 2007, the parties submitted cross-motions and cross-replies in  
19 response to the Washington court’s September 12, 2007 order for additional briefing. In its supplemental  
20 briefing, Defendants argued that the Washington court had no in personam jurisdiction over Bodog  
21 Entertainment to make such an order preventing redirection of Internet traffic from the Original and/or  
22 NewBodog Domain Names to the BodogLife Domain Names, and such an order would, accordingly, violate  
23 the due process clause of the United States Constitution. (Ex. 21). Defendants also argued that such an  
24 order would violate the First Amendment and amount to an unconstitutional prior restraint on lawful and  
25 truthful speech. (*Id.*)

26 In its supplemental briefing, Plaintiff asked the Washington court to enter an order enjoining  
27 Defendants from “registering alternative domain names and directing users to these replacement domain  
28



1 names.” (Ex. 22). In addition, Plaintiff submitted a proposed order, asking the court to order that “Bodog,  
2 and its agents, or agencies, persons or entities [be] ENJOIN[ED] from directing their customers and traffic to  
3 ‘BodogLife.com’ or any other website other than “NewBodog.com”[.]” (Ex. 23). The proposed order  
4 further requested that Defendants be ordered to “(a) email its newbodog.com customers within 24 hours of  
5 the date of th[e] Order to return to the NewBodog.com domain name and (b) not to make any further  
6 statements which are intended or which would reasonably have the effect of migrating users to  
7 bodoglife.com[.]” (Id.). Plaintiff’s proposed order further requested that Defendants be ordered “to cease  
8 using the BodogLife.com site for their Bodog operations pending the outcome of the motion to set aside (in  
9 Nevada)[.]” (Id.). As of the date of the filing of this opposition, the Washington state court has not yet ruled  
10 on the parties’ cross-motions filed in response to the court’s request for additional briefing.

11 **4. Plaintiff’s Request In This Emergency Motion For Permanent Injunction Is**  
12 **Identical To The Request Currently Pending Before The Superior Court In**  
13 **The State Of Washington**

14 Plaintiff’s “emergency” motion request is virtually identical to the request it made to the Superior  
15 Court of the State of Washington that is currently under submission. A review of both requests reveals that  
16 Plaintiff seeks identical relief from this Court and the court in Washington. Specifically, Plaintiff seeks an  
17 order from both courts that defendants be: (a) enjoined from directing users and traffic to BodogLife.com or  
18 any other website besides NewBodog.com; (b) required to email users to return to the NewBodog.com  
19 domain name; and (c) forced to cease using the BodogLife.com site pending their motion to set aside the  
20 default judgment. (It is worth noting that Plaintiff does not appear to be seeking any court order about  
21 domain names used for other Bodog businesses, such as Bodog Music, Bodog TV or Bodog Fight).

22 This Court should reject Plaintiff’s request that it issue an order while a state court judge in  
23 Washington is considering the identical request.

24 **5. The Nature Of Domain Names Doomed Plaintiff’s Attempt To Satisfy A**  
25 **Judgment By Seizing Bodog Domain Names**

26 In addition to numerous other infirmities in Plaintiff’s motion, the motion is futile and a waste of the  
27 Court’s resources. Plaintiff seeks to have Defendants stop “directing their customers and traffic to  
28

1 ‘BodogLife.com’ ... require Bodog Entities to email their customers to return to the NewBodog.com domain  
2 name, and to force the Bodog Entities to cease using the BodogLife.com site for their Bodog operations.”  
3 (Mot. 1:20-25). As an initial matter, the Defendants in this case have no ability to comply with Plaintiff’s  
4 proposed injunction because they do not operate the websites in question. Further, even if the Defendants  
5 could comply, Plaintiff’s proposed relief would provide it no value.

6 A domain name is essentially an Internet address at which someone can do business, and is similar to a  
7 phone number for a business. “In most cases, a domain name registration is valueless apart from the way it  
8 is used by the entity with rights to it, and if the only value that comes from transfer of the domain name is  
9 from the value added by the user, it is inappropriate to consider that an element subject to execution.” Dorer  
10 v. Arel, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999). Thus, once a business using an arbitrary domain name  
11 stops providing goods or services at the arbitrary domain name address, the value of the domain name will  
12 quickly drop because users will no longer go to a site that does not do anything. The NewBodog.com  
13 domain name is arbitrary and has no significant value if Bodog online entertainment services are not  
14 provided there.

15 At this time, no Bodog entity intends to provide online entertainment services at the NewBodog.com  
16 domain. Therefore, there is virtually no value in the NewBodog.com domain name. Indeed, if Plaintiff got  
17 its wish and Internet users were not redirected from NewBodog.com to another site, the NewBodog.com site  
18 would have no content and there would be no point for Internet users to stay at or return to the  
19 NewBodog.com URL. Thus, if Plaintiff’s motion were granted the value of the NewBodog.com site would  
20 be miniscule – achieving the opposite effect that Plaintiff wants.

21 Even if the NewBodog.com domain name were eventually turned over to Plaintiff, the value of that  
22 domain name would be negligible. Plaintiff appears to be simply a licensing entity that sues on its patent or  
23 threatens to sue on its patent and then provides a license for money. Plaintiff apparently has no ability to  
24 provide online entertainment services and has provided no evidence of such an ability.<sup>5</sup> By the terms of the  
25

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26 <sup>5</sup> Plaintiff also argues quite vehemently that any Bodog online gaming services are illegal under  
27 U.S. law, so Plaintiff itself would surely not operate gaming at NewBodog.com (or any other domain  
28 name it may acquire in connection with this litigation). While Defendants dispute the merits of  
Plaintiff’s accusations about the legality of Bodog online entertainment services, the truth of the matter  
is that the arbitrary NewBodog.com domain name has virtually no value if Plaintiff were to own it, and

1 Order in the Washington case (¶ 5 of Ex. C, to Ex. 1 of Plaintiff's moving papers) Plaintiff is now prohibited  
2 from using the BODOG trademark (and related marks) and cannot trade on any goodwill in the BODOG  
3 marks. Therefore, there is no value to Plaintiff in the NewBodog.com domain name, and there would also be  
4 no value to the NewBodog.com domain name unless Internet Users were redirected to another web site that  
5 did, in fact, provide online entertainment content services. Thus, the Court should see Plaintiff's motion for  
6 what it truly is: an improper and misguided attempt to force a lucrative monetary settlement from  
7 Defendants. Plaintiff's motion should be denied.

8 **D. Plaintiff's Patent Contains Claims That Cannot Be Infringed By Defendants**

9 To establish patent infringement, the patent owner must show that the accused infringer practices  
10 every element of the asserted claim. Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1330  
11 (Fed. Cir. 2001). The only claim from its patent which Plaintiff specifically alleges in the complaint as being  
12 infringed is claim 26. See Complaint ¶ 17, Ex. 1. Claim 26, like most of the claims in the '001 patent,  
13 requires two devices. The first is an "interactive multimedia mastering system." See '001 Patent, Ex. 2.  
14 Claim 26 also requires another device, referred to as an "interactive media device."

15 Although 1st Technology has never explained in this litigation how anyone could possibly infringe  
16 this claim, presumably 1st Technology must believe that an entity provides both devices claimed. "[L]iability  
17 for infringement requires a party to make, use, sell, or offer to sell the patented invention, meaning the entire  
18 patented invention." See BMC Resources v. Paymentech, L.P., Case No. 2006-1503 (Fed. Cir. Sep. 20, 2007)  
19 Slip Op. at 11, (finding no possible infringement when the claims required the actions of multiple parties)  
20 (emphasis added) (Ex. 24). 1st Technology has never explained how any named Defendant could possibly  
21 provide the "interactive media device," which Plaintiff would presumably contend is a consumer's computer  
22 or some other unidentified hardware.<sup>6</sup> Indeed, there has never been any allegation (let alone proof) that any  
23 named Defendant provides any computers or other hardware to consumers and it appears that Plaintiff would  
24 have no chance of proving infringement of claim 26 if the case were litigated on the merits.

25 \_\_\_\_\_  
26 if Internet traffic could not be directed from it to another site that provides online entertainment content  
or services.

27 <sup>6</sup> Neither has Plaintiff explained how any named Defendant provides the "interactive multimedia  
28 mastering system."

1 **III. PLAINTIFF’S MOTION FOR A PERMANENT INJUNCTION SHOULD BE DENIED**

2 **A. As A Threshold Issue, The Court Should Not Hear Plaintiff’s Motion Until After**  
3 **Deciding Defendants’ Motion To Set Aside The Default Judgment**

4 Plaintiff’s Emergency Motion for a Permanent Injunction should be denied pending a decision on  
5 Defendants’ previously filed motion to set aside the default judgment. Permanent injunctions may be  
6 rendered only after a valid adjudication on the merits of the action. See Amoco Prod. Co. v. Village of  
7 Gambell, 480 U.S. 531, 546 n.12 (1987). If the default judgment is set aside, the underlying judgment on  
8 which the permanent injunction motion is premised will not exist, and there would be no basis for the motion  
9 for a permanent injunction.<sup>7</sup> It would serve judicial economy not to even consider Plaintiff’s motion now.

10 **B. The Court Should Deny Plaintiff’s Motion Pending A Decision By The Washington**  
11 **State Court**

12 Plaintiff seeks an order from this Court that is identical to the order it seeks from the Superior Court of  
13 the State of Washington. As of the date of the instant filing, the Washington court has not yet ruled on  
14 Plaintiff’s request that is identical in all respects to the request Plaintiff seeks in this Court. The basis for  
15 Plaintiff’s claim in Washington is that the court in Washington has in rem jurisdiction over the domain names  
16 at issue (the Original Domain Names and the NewBodog Domain Names).<sup>8</sup> Plaintiff does not present  
17 evidence, nor could it, that this Court has in rem jurisdiction over either the Original Domain Names or the  
18 New Bodog Domain Names (which are not registered with any Internet registrar in Nevada), let alone the  
19 BodogLife Domain Names. Accordingly, this Court reject Plaintiff’s request for an order that may  
20 potentially conflict with an order that is to be issued in Washington.

21 \_\_\_\_\_  
22 <sup>7</sup> In this case, the Court’s earlier default judgment is not a final judgment on the merits because  
23 Defendants are currently attempting to have the judgment set aside for good cause under Federal Rule of  
24 Civil Procedure 55(c) and 60(b). See Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir.  
25 1985) (observing that “default judgments are generally disfavored” because cases should be decided on  
26 the merits); Veeck v. Commodity Enters., Inc., 487 F.2d 423, 425-26 (9th Cir. 1973) (failure to serve  
27 properly constituted a lack of jurisdiction to enter default judgment, thus default judgment was set  
28 aside); Mason v. Genisco Tech. Corp., 960 F.2d 849, 851 (9th Cir. 1992) (default judgment is void  
where a plaintiff fails to serve process properly); Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.,  
2007 U.S. Dist. LEXIS 60708 (D. Nev. 2007).

<sup>8</sup> There can be no dispute, however, that neither the Washington court nor this Court have any *in rem* or personal jurisdiction over the BodogLife Domain Names, which are not registered in the U.S.

1 Plaintiff filed both its original motion for writ of execution on the Original Domain Names, as well as  
2 its later motion for a writ of execution on the replacement (*i.e.*, NewBodog Domain Names) domain names,  
3 in the state of Washington because those domain names were “registered through a registrar located in  
4 Washington[.]” (Ex. 11 at 2). Plaintiff argued “that domain names are a species of property which can be  
5 converted like any other property.” (*Id.* at 4). Thus, Plaintiff argued, “Washington statute allows execution  
6 of a judgment against a domain name which is registered to the judgment debtor.” (*Id.*)

7 Under the principles established by the Supreme Court in Younger v. Harris, 401 U.S. 37 (1971), and  
8 its progeny, this Court should abstain from exercising its jurisdiction while ongoing state civil enforcement  
9 proceedings are pending. A federal court must abstain from enjoining pending state proceedings if the state's  
10 interest in the proceeding is so important that exercise of the federal judicial power would disregard the  
11 comity between the states and the federal government. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).  
12 Younger abstention is proper where: (1) there are ongoing state judicial proceedings; (2) that implicate  
13 important state interests; and (3) there is an adequate opportunity in the state proceedings to raise federal  
14 questions. Confederated Salish v. Simonich, 29 F.3d 1398, 1405 (9th Cir. 1994).

15 In the instant motion, Plaintiff requests that this Court issue an order regarding numerous domain  
16 names that are presently subject to litigation in Washington. Specifically, Plaintiff seeks an Order from this  
17 Court that is virtually identical to a proposed order that is currently under submission in Washington state  
18 court. Unlike the Washington state court, however, this Court has no in rem jurisdiction over the Original  
19 Domain Names or the NewBodog Domain Names because, as Plaintiff acknowledges, those domain names  
20 are registered in Washington. (Moreover, this Court certainly has no jurisdiction to affect Internet traffic to  
21 the BodogLife Domain Names, which are not even registered in the U.S.) Thus, the Washington state courts  
22 have an interest in concluding civil proceedings related to domain names that are registered in Washington.  
23 Finally, Plaintiff’s requests in its emergency motion for permanent injunction before this Court are virtually  
24 identical to its requests currently pending in the Washington state court.

25 Plaintiff’s actions in filing the instant motion for permanent injunction, while also requesting identical  
26 relief in Washington state, support abstention by this Court. The issues have been fully briefed in  
27 Washington state court, all briefs were submitted as of September 21, 2007 and the issue is currently under  
28

1 submission with Judge Erlick. On September 24, 2007, Plaintiff contacted the court clerk for Judge Erlick  
2 and explained that “the parties were before the Court a week or two ago . . . and the Court requested  
3 supplemental briefing.” (Ex. 25). Based on the fact that all briefing was completed on September 21, 2007,  
4 Plaintiff “request[ed an] oral hearing in connection with the briefing.” (Id.). In response, the court clerk  
5 informed Plaintiff that the “judge will decide whether to grant oral argument after reviewing the  
6 supplemental briefing. (Id.).

7 In making its request for oral argument, Plaintiff did not disclose to Judge Erlick’s court clerk that it  
8 had moved for identical relief before this Court. (Id.). What is troubling about this lack of disclosure is that  
9 Plaintiff sought the oral argument four days after it filed the instant motion for permanent injunction before  
10 this Court. Also troubling is Plaintiff’s lack of candor with this Court, as Plaintiff purposely failed to inform  
11 this Court that it was awaiting a ruling from the Washington state court on its request for relief that is  
12 identical to the request for relief it seeks in its motion for permanent injunction.

13 Based on the foregoing, this Court should abstain from ruling on Plaintiff’s motion for permanent  
14 injunction.

15 **C. This Court Has Neither In Personam Jurisdiction Over Defendant, Nor In Rem**  
16 **Jurisdiction Over The Domain Names Targeted In Plaintiff’s Motion**

17 By urging this Court to exercise its “general power to enjoin,” (Mot. p. 6), Plaintiff has overlooked a  
18 constitutional prerequisite to the exercise of this power—jurisdiction. Lewis v. Lewis, 695 F. Supp. 1089,  
19 1090 (D. Nev. 1988) (“[I]f a court lacks jurisdiction over a party, then it lacks all jurisdiction to adjudicate  
20 the party’s rights, whether or not the subject matter is properly before it.”); Vaile v. District Court, 44 P.3d  
21 506, 516 (Nev. 2002) (holding that lower court order entered without jurisdiction was void). Here, this Court  
22 possess neither in personam jurisdiction over any named Defendants, nor in rem jurisdiction over any of the  
23 domain names targeted in this motion.

24 **1. Personal Jurisdiction Is Lacking Because Defendants Were Not Properly**  
25 **Served And Defendants Have No Contacts With The State Of Nevada**

26 For a court to exercise in personam jurisdiction over a defendant, two things must occur. First, the  
27 defendant must be served with process sufficient to give notice that a court is seeking to assert personal  
28

1 jurisdiction over it, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–16 (1950), and,  
 2 second, the plaintiff must show that the defendant has sufficiently meaningful contacts with the forum state  
 3 that a court’s assertion of jurisdiction over the defendant does not offend fundamental notions of fairness or  
 4 due process. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (due process clause protects  
 5 corporation from “being subject to the binding judgments of a forum with which it has established no  
 6 meaningful ‘contacts, ties, or relations.’”) Plaintiff’s purported assertion of jurisdiction over Defendant here  
 7 fails on both counts.

8 **a. Defendant Was Never Served With Process In This Action Sufficient**  
 9 **To Confer Personal Jurisdiction**

10 As argued in Defendants’ Motion to Set Aside the Default Judgment, 1<sup>st</sup> Technology failed to serve  
 11 process properly in the underlying patent infringement claim. Plaintiff’s failure to serve process adequately  
 12 negates this Court’s jurisdictional ability to grant the orders requested in Plaintiff’s Emergency Motion for  
 13 Permanent Injunction. An “elementary and fundamental requirement of due process in any proceeding . . . is  
 14 notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an  
 15 opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314  
 16 (1950). Courts have repeatedly recognized that a judgment lacking lawful service is void. Nature's First,  
 17 Inc. v. Nature's First Law, Inc., 436 F. Supp. 2d 368, 372 (D. Conn. 2006) (“[P]laintiff must effectuate valid  
 18 service of process before the district court can assert personal jurisdiction over a defendant.”); Flory v. U.S.,  
 19 79 F.3d 24 (5th Cir. 1996); Jones v. Watts, 142 F.2d 575, 575 (5th Cir. 1944).

20 This court is without jurisdiction to issue the Plaintiff’s requested injunction because of Plaintiff’s  
 21 failure to adequately serve Defendants with summons. Without proper service of process, there is no basis  
 22 for the Court to exercise jurisdiction over Defendants, and the proposed orders would be invalid.

23 **b. This Court Lacks General In Personam Jurisdiction over Defendant**

24 Assuming the Court wishes to engage in a minimum contacts analysis, the result is the same. 1<sup>st</sup>  
 25 Technology bears the burden of both adequately alleging and proving personal jurisdiction over Defendants.  
 26 Trump v. District Court, 857 P.2d 740, 748 (Nev. 1993) (holding that plaintiff bears burden of producing  
 27 some evidence in support of all facts necessary to establish personal jurisdiction). 1<sup>st</sup> Technology cannot  
 28

1 seriously contend that the Court has general jurisdiction over Defendants. A court cannot exercise general  
 2 jurisdiction over a non-resident defendant unless the defendant's forum activities are so "substantial or  
 3 continuous and systematic" that it may be deemed present in the forum." Helicopteros Nacionales de  
 4 Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984); Freeman v. District Court, 1 P.3d 963, 965 (Nev. 2000)  
 5 (citing Budget Rent-A-Car v. District Court, 835 P.2d 17, 19 (Nev. 1992)).

6 Plaintiff has not shown that Defendants have extensive in-state contacts with Nevada or that they  
 7 conduct any activities within the state – let alone substantial and continuous activities. Dole Food Co., Inc.  
 8 v. Watts, 303 F.3d 1104, 1108 (9th Cir. 2002) ("Where a defendant brings a motion to dismiss for lack of  
 9 personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate."); Amba  
 10 Mktg. Sys. Inc. v. Jobar Int'l Inc., 551 F.2d 784, 787 (9th Cir. 1977) (stating that plaintiff cannot "simply rest  
 11 on the bare allegations of its complaint . . ."). Plaintiff has not met its burden and this Court has no general  
 12 in personam jurisdiction over Defendant.

13 **c. This Court Lacks Specific In Personam Jurisdiction Over Defendant**  
 14 **And Defendants Have Not Purposefully Availed Themselves Of The**  
 15 **Benefits And Protections Of Nevada Law**

16 Under Nevada law, specific jurisdiction is appropriate only where "the cause of action arises from the  
 17 defendant's contacts with the forum." Zuffa, LLC v. Showtime Networks, Inc., 2007 U.S. Dist. LEXIS  
 18 60711 (D. Nev. 2007); Price and Sons v. District Court, 831 P.2d 600, 602 (Nev. 1992). Exercise of specific  
 19 jurisdiction is only appropriate if the Due Process Clause is satisfied and the defendant's activities fall within  
 20 those activities enumerated in Nevada's long-arm statute.<sup>9</sup> See Trump, 857 P.2d at 748. Here, the exercise  
 21 of specific jurisdiction is improper because Plaintiff has not alleged, nor can it prove, that Defendants have  
 22 purposefully availed itself of the benefits and protections of Nevada law.

23 This Court should not grant 1<sup>st</sup> Technology's requested injunction because Defendants have no  
 24 meaningful contacts with the State of Nevada. The Due Process Clause protects a corporation from "being  
 25

26 <sup>9</sup> Nevada's long-arm statute provides six bases for the exercise of jurisdiction, none of which are  
 27 applicable here: See NRS § 14.065. This statute is meant to be coextensive with the limits of federal  
 28 due process inasmuch as it authorizes Nevada courts to exercise jurisdiction "over a party to a civil  
 action on any basis not inconsistent with . . . the Constitution of the United States." Id.



1 subject to the binding judgments of a forum with which [it] has established no meaningful ‘contacts, ties, or  
2 relations.’” Burger King Corp., 471 U.S. at 472 (citing International Shoe Co. v. Washington, 362 U.S. 310,  
3 319 (1945)). The Constitution requires meaningful contacts to ensure that a corporation can predictably  
4 determine when its conduct in a state rises to the level that it “should reasonably anticipate being haled into  
5 court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). These requirements are  
6 not met unless the defendant has “purposefully availed” itself of “the benefits and protections of [the forum  
7 state’s] laws.” Hanson v. Denckla, 357 U.S. 235, 253 (1958). This occurs when a foreign corporation  
8 “creat[es] continuing relationships and obligations with citizens of another state.” Travelers Health Assn. v.  
9 Virginia, 339 U.S. 643, 647 (1950).

10 This Court has no specific jurisdiction over Defendants because they have not purposefully availed  
11 themselves of the benefits and protections of Nevada laws. Plaintiff has not alleged any contacts, let alone  
12 any meaningful contacts. Having not cultivated any contacts with the State of Nevada, the Due Process  
13 Clause protects Defendants from being haled into Nevada’s courts because Defendants could not have  
14 reasonably anticipated being subject to the State’s jurisdiction.

15 As an initial matter, as explained previously, Bodog.com and Bodog.net are not entities. They are  
16 merely domain names, over which this Court has no personal jurisdiction. Nor could this Court have *in rem*  
17 jurisdiction over them because those domain names are not registered in the State of Nevada (but instead in  
18 the State of Washington).

19 As for the only named entity, Bodog Entertainment Group, S.A., the only conceivable basis upon  
20 which Plaintiff could argue that it has meaningful contacts with Nevada is through its registration of domain  
21 names and mere maintenance of websites that are accessible in Nevada. However, these contacts are  
22 insufficient for two reasons: First, courts that have been called on to consider the jurisdictional implications  
23 of domain-name registration have held that, at most, the registration of domain names within a state permits  
24 a court therein to exercise *in rem* jurisdiction over the domain names, not *in personam* jurisdiction over the  
25 out-of-state company. See America Online, Inc. v. Aol.org, 259 F. Supp. 2d 449, 451 (E.D. Va. 2003)  
26 (holding *in rem* jurisdiction is proper over domain name registered in jurisdiction but personal jurisdiction is  
27 improper where registrant has no other contacts with forum); Globalsantafe Corp. v. Globalsantafe.com, 250  
28

1 F. Supp. 2d 610, 615 (E.D. Va. 2003) (same). However, these cases are inapplicable to the present case  
2 because Bodog Entertainment Group, S.A. has not registered its domain names with Nevada registrars.

3 Second, Plaintiff may argue that there is specific personal jurisdiction because internet sites using the  
4 BODOG trademark (and variations thereof) might be accessible by Nevada residents. Courts sometimes  
5 apply a sliding-scale to determine whether activity over the Internet permits an assertion of specific  
6 jurisdiction within a particular forum: “the likelihood that personal jurisdiction can be constitutionally  
7 exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts  
8 over the Internet.” Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)  
9 (outlining sliding-scale of Internet activity that ranges from “passive” to “interactive”). This argument fails  
10 in the instant case for several reasons.

11 First, the so-called “Zippo test” is inapplicable unless the Internet transactions being examined are  
12 themselves the basis of the cause of action. See Zuffa, 2007 U.S. Dist. LEXIS 60711 (“[S]pecific  
13 jurisdiction over a defendant may be established only where the cause of action arises from the defendant’s  
14 contacts with the forum.”). 1<sup>st</sup> Technology makes no allegation and offers no evidence regarding where the  
15 alleged infringement occurred or what transactions caused the alleged infringement. Its underlying  
16 complaint offers only the vague and conclusory assertions that Bodog Entertainment Group, S.A. “has  
17 previously and is presently making, using, selling, offering for sale, and/or importing into the United States,  
18 software products that infringe one or more claims” of its patent. See Complaint at ¶ 7, Ex. 1. It makes the  
19 exact same allegations as to all Defendants and all are insufficient.

20 Second, 1<sup>st</sup> Technology makes no showing that Bodog Entertainment Group, S.A., the only legal  
21 entity before this Court, ran any internet entertainment or other websites at any of the disputed domain  
22 names that can be accessed in Nevada or otherwise directed advertising to Nevada residents. Digital  
23 Control, Inc. v. Boretronics, Inc., 161 F. Supp. 2d 1183, 1185 (W.D. Wash. 2001) (stating that unless website  
24 operator has chosen to “dive into a particular forum, the mere existence of a worldwide web site, regardless  
25 of whether the site is active or passive, is an insufficient basis on which to find that the advertiser has  
26 purposefully directed its activities at residents in the forum state.”). (Indeed, Bodog Entertainment Group  
27 S.A. is not even the registered owner of the NewBodog Domain Names or the BodogLife Domain Names;  
28

1 thus, there is clearly no jurisdiction for this Court to enter an order prohibiting that entity from redirecting  
 2 traffic from NewBodog.com to BodogLife.com or other websites – because that entity has no interest in  
 3 those domain names.)

4 In sum, the Due Process Clause forbids this court from exercising specific jurisdiction over any  
 5 Defendant because Defendants have not purposefully availed themselves of the benefits and protections of  
 6 Nevada law.<sup>10</sup> Having not cultivated any meaningful contacts in the State of Nevada, Defendants had no  
 7 obligation to reasonably anticipate being haled into Nevada’s courts. The scarcity of Bodog Entertainment  
 8 Group, S.A.’s contacts with Nevada is illustrated by the fact that its domain names (the Original Domain  
 9 Names) were not even registered here and its internet activities are unrelated to 1<sup>st</sup> Technology’s underlying  
 10 cause of action.

11 **2. This Court Has No In Rem Jurisdiction Over The Domain Names Targeted**  
 12 **In Plaintiff’s Motion**

13 In requesting a permanent injunction, Plaintiff has made three specific requests that relate to the  
 14 disputed domain names. Mot. p. 9. The requests should be denied because this court does not possess in  
 15 rem jurisdiction over the domain names. None of the domain names in question (the Original Domain  
 16 Names, the NewBodog Domain Names, and particularly the BodogLife Domain Names) have any  
 17 connection whatsoever to the State of Nevada.<sup>11</sup> Even if these domain names had a connection to the State  
 18 of Nevada, 1<sup>st</sup> Technology would still need to establish that Defendants have cultivated the minimum  
 19 contacts required under the Due Process Clause. See Shaffer v. Heitner, 433 U.S. 186, 206 (1977)

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21 <sup>10</sup> The “effects test” for exercising specific jurisdiction is likewise inapplicable. Under this test, a  
 22 nonresident defendant is found to have purposefully availed itself of a forum state’s laws if it commits  
 23 an intentional tort that is aimed at the forum state. Calder v. Jones, 465 U.S. 783, 789–90 (1984). The  
 24 effects test has since been applied to a website operator who engaged in “cybersquatting.” Panavision  
Int’l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998). Here, Plaintiff has not alleged, nor can it allege,  
 that Defendant has committed any intentional torts, much less any aimed at the state of Nevada.

25 <sup>11</sup> Though it is not controlling, the Anticybersquatting Consumer Protection Act, 15 U.S.C. §  
 26 1125(d)(2)(C)(i)-(ii), provides persuasive guidance regarding the jurisdiction in which a domain name  
 27 will subject its owner to in rem jurisdiction: “In an in rem action . . . a domain name shall be deemed to  
 28 have its situs in the judicial district in which (i) the domain name registrar, registry, or other domain  
 name authority or registered or assigned the domain name is located; or (ii) documents sufficient to  
 establish control and authority regarding the disposition of the registration and use of the domain name  
 are deposited with the court.”

1 (extending minimum contacts requirement to exercises of in rem jurisdiction because “jurisdiction over a  
2 thing” is merely “an elliptical way of referring to jurisdiction over the interests of persons in a thing.”).

3 **D. The Motion Should Be Denied As Futile Because No Defendant Can Provide The**  
4 **Relief Requested**

5 Even assuming, arguendo, that this Court had jurisdiction over Defendants, this Court should deny  
6 Plaintiff’s motion because Defendants cannot provide the relief requested by Plaintiff. This is so because  
7 Bodog Entertainment Group, S.A. does not itself provide online entertainment services. It merely provided  
8 technical services, including domain name management, for various entities, including but not limited to  
9 entities that use the BODOG mark and variations thereof to provide various online entertainment services.  
10 Further, Bodog Entertainment does not operate any websites; it merely administered the Original Domain  
11 Names for other businesses. Accordingly, an order requiring Bodog Entertainment Group, S.A. to do  
12 anything related to websites, online entertainment services, or deal with “customers” would be futile.

13 Plaintiff’s suggestion that Defendants have “sought to evade the judgment through legal and illegal  
14 means[,]” by “fraudulently transferr[ing] their web traffic from their United States domain name to a foreign  
15 domain name,” (Mot. at 1), is false and based on a fundamental misunderstanding of the nature of domain  
16 names.<sup>12</sup> The simple fact is that domain names have little or no inherent value to Plaintiff. Their value is  
17 entirely dependent on the businesses using them, significant advertising/promotion of them or their  
18 associated brands, and the goodwill associated with the business.

19 Here, Plaintiff has no trademark rights associated with the various BODOG brands, offers no content  
20 associated with the various BODOG marks and has no goodwill associated therewith, so any of the domain  
21 names in Plaintiff’s possession will inevitably have little, if any, value to Plaintiff. Dorer, 60 F. Supp. 2d at  
22 560 n.9. As the BODOG businesses own rights in the BODOG and related trademarks, Plaintiff could not  
23 itself use any of the disputed domain names without infringing these undeniable trademark rights.

24 Based on the foregoing, ordering Defendants to do anything related to websites, online entertainment  
25

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26 <sup>12</sup> These arguments are also based on a declaration from Plaintiff’s counsel which inaccurately  
27 attempt to summarize his September 11, 2007 conversation with Defendants’ counsel. Not only are the  
28 statements inaccurately reported, they are disclosed in breach of the settlement privilege – under which  
that conversation was held. (*See* Nguyen Decl., ¶ 3-5.)

1 services, or dealing with Internet users would be futile. Accordingly, this Court should reject Plaintiff's  
2 request to enter a futile Order.

3 **E. The Proposed Order Would Violate the First Amendment to the United**  
4 **States Constitution and Article I, § 5 of the Washington Constitution.**

5 Even assuming that the Court could properly assert personal jurisdiction over Bodog, this Court's  
6 proposed censorship of Bodog's speech in communicating with internet users and potential users regarding  
7 online business addresses for other entities (not sued here) would violate the First Amendment to the United  
8 States Constitution. The proposed order, which would enjoin Bodog "from directing traffic to  
9 'BodogLife.com' or any other websites besides 'NewBodog.com'" is not limited to barring mechanical or  
10 electronic redirection, but also could be read to censor speech that would redirect traffic or otherwise inform  
11 users of new website domain names. Such an order, which bars speech before it even occurs, is a "prior  
12 restraint," which is highly disfavored. See William Blackstone, Commentaries on the Laws of England, bk.  
13 IV, ch. XI, 151-52, (London, 1765-69) (18th ed., New York, 1836, vol. 2, 112-13). The Supreme Court has  
14 repeatedly emphasized that prior restraints are presumptively unconstitutional. See, e.g., Pittsburgh Press v.  
15 Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Organization for a Better Austin v. Keefe,  
16 402 U.S. 415, 419 (1971). A plaintiff, correspondingly, bears "a heavy burden of showing justification for  
17 the imposition of such a restraint[,]" Organization for a Better Austin, 402 U.S. at 419, and Plaintiff has not  
18 met that burden here.

19 The speech this order purports to bar is commercial speech. Commercial speech is entitled to First  
20 Amendment protection in both prior-restraint and subsequent-punishment cases alike provided it is truthful  
21 and not misleading. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557, 563-66 (1980);  
22 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)<sup>13</sup>.

23 To determine whether the commercial speech in question gets First Amendment protection, the Court  
24

25  
26 <sup>13</sup> See also American Future Sys., Inc. v. Pennsylvania State Univ., 688 F.2d 907 (3d Cir.), on  
27 remand, 553 F. Supp. 1268 (M.D. Pa. 1982) (invalidating, as an unconstitutional prior restraint, an order  
28 restricting Tupperware parties on college campuses); Lloyd v. Alaska Worldwide, Inc., 550 S.W. 2d 343  
(Tex. Civ. App. 1977) (prohibiting television station from broadcasting stories that interfered with a  
firm's business was an unconstitutional prior restraint violating the First Amendment).

1 must closely examine the actual speech that is to be targeted by the government action. Central Hudson, 447  
 2 U.S. at 565-66. Here, the proposed order would censor all speech that would “direct traffic to  
 3 ‘BodogLife.com’ or any other website besides ‘NewBodog.com[.]’” (Mot. at 1). Notably, the speech  
 4 targeted by the proposed order is not advertising of any online entertainment services,<sup>14</sup> and the order does  
 5 not purport to be directed at advertisements for any illegal activity. Rather, the order would prohibit Bodog  
 6 from merely redirecting traffic or, presumably, informing internet users about any redirection. There is  
 7 nothing false or illegal about this speech, and it receives First Amendment protection. Also, just as Bodog  
 8 has a First Amendment right to engage in commercial speech, internet users have a right to receive the  
 9 information contained therein, which right would also be violated by the proposed order. Virginia State Bd.  
 10 Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976).

11 Moreover, there is nothing wrong with the various Bodog businesses starting new websites at new  
 12 URL addresses (which is itself a speech act). Likewise, there is nothing wrong with redirecting traffic to  
 13 those new URLs. When government action targets truthful and non-misleading commercial speech  
 14 regarding lawful activity, it will be found unconstitutional unless (1) it seeks to advance a substantial  
 15 government interest; (2) it directly advances that interest; and (3) it does not burden any more speech than  
 16 is necessary to accomplish its goal. See Central Hudson, 447 U.S. at 563-66. Here, Plaintiff, as the party  
 17 seeking to censor speech, bears the burden of proving each of these elements. Id. If any element is not met,  
 18 the restraint is invalid. In this case, none are met.

19 **1. This Court Does not Have a Substantial Interest in Regulating the**  
 20 **Online Location of Legal Internet Activities of Non-Washington**  
 21 **Residents.**

22 The proposed order does not meet the first prong of the Central Hudson test, which requires a  
 23

24 <sup>14</sup> Plaintiff will no doubt assert that Bodog runs online gaming services, that these services are  
 25 illegal, and that speech related to them, therefore, does not deserve First Amendment protection. This  
 26 argument fails. First, despite its repeated assertions, the plaintiff has offered no evidence showing that  
 27 Bodog Entertainment Group S.A., the Defendant in this matter, provided any online entertainment  
 28 services (gaming or otherwise) or otherwise did anything to infringe the patent at issue in the Nevada  
 action. Second, and more crucial for current purposes, the Court’s proposed order does not even purport  
 to restrict advertising of any aspect of online services, it only would censor speech that “redirect[s]” web  
 traffic from site to another.

1 “substantial interest to be achieved by restrictions on commercial speech . . . .” Central Hudson, 447 U.S. at  
2 564. While the Court certainly has a legitimate interest in enforcing its default judgment, this Court does not  
3 have a general interest in regulating speech by foreign businesses telling internet users where online  
4 entertainment services and information can be found. Further, while the Court arguably has an interest in  
5 preserving assets within its jurisdiction – such an interest is not implicated where, as here, the Court has no  
6 in rem jurisdiction over the domain names at issue. Without a substantial interest to justify the ban on speech  
7 related to Bodog’s online web addresses, Plaintiff cannot satisfy the Central Hudson test, and the proposed  
8 order will not survive constitutional scrutiny.

9 **2. The Proposed Redirection Ban Does not Advance the Narrow**  
10 **Interests That this Court Has.**

11 The Court’s proposed censorship of Bodog’s speech regarding redirecting web traffic does not directly  
12 advance any legitimate interest. A restriction on truthful commercial speech “must directly advance the state  
13 interest involved; the [speech restriction] may not be sustained if it provides only ineffective or remote  
14 support for the government’s purpose.” Central Hudson, 447 U.S. at 564. A prior restraint on even  
15 commercial speech “may extend only as far as the interest it serves. The State cannot regulate speech that  
16 poses no danger to the asserted state interest . . . .” Id.

17 The interest that this Court has in preserving assets in its jurisdiction to satisfy a default judgment is a  
18 very narrow one, which is not advanced at all by the proposed ban on any speech redirecting traffic to other  
19 domains. First, this Court only has no in rem jurisdiction over the domain names at issue in this matter.  
20 Further, even if the Court had in rem jurisdiction over the domain names, such jurisdiction would be limited  
21 to the domain names themselves, not the underlying business, the revenue streams, the goodwill, *etc.* See  
22 Network Solutions, Inc. v. Umbro Int’l, Inc., 529 S.E.2d 80 (Va. 2000) (recognizing that the interest that a  
23 domain name registrant holds is merely “the contractual right to use a unique domain name for a specified  
24 period of time.”). Whether Bodog redirects its online businesses to other web addresses has no bearing on  
25 this Court’s jurisdiction over the default judgment issued against Defendants or Defendants assets in Nevada,  
26 of which there are none.

27 Although Plaintiff is sure to argue that redirecting traffic to new domain names will harm the value of  
28

1 the domain names, this argument is futile as this Court has no in rem jurisdiction over the domain names at  
2 issue. Further, the domain names will *inevitably* lose value should the Bodog businesses become unable to  
3 use the names or redirect traffic from them. The longer the domain names remain inoperative, the less value  
4 they have. Because the domain names in question are largely based on valid trademarks that Bodog  
5 businesses own, any use by Plaintiff is likely to be infringing under the Lanham Act. See 15 U.S.C. § 1051,  
6 et seq. Furthermore, if Plaintiff cannot use the domain name, the only “value” would be in preventing  
7 Bodog from using it, which is illegal under the Anti-Cybersquatting Consumer Protection Act. See 15  
8 U.S.C. § 1125.

9 Consequently, even if the Court had some interest in preserving the value of assets subject to its in rem  
10 jurisdiction, of which there is none in Nevada, the proposed censorship order would not advance that  
11 interest. Since this element of the Central Hudson test is not met by the order, such an order would violate  
12 the First Amendment.

13 **3. The Proposed Order Burdens Far More Speech Than is Necessary to**  
14 **Accomplish its Narrow Goal.**

15 The proposed order is not narrowly tailored to serve the narrow interest that this Court has.  
16 Government action that censors speech cannot “completely suppress information when narrower restrictions  
17 . . . would serve its interest as well.” Central Hudson, 447 U.S. at 564. Here, another, less-restrictive non-  
18 speech means would suffice to serve the Court’s interests, namely, the registrar lock, and it is already in place  
19 based on the Washington state court’s order. The order proposed by the Court would prevent Bodog from  
20 communicating truthful information to its customers and potential customers alike that certain online  
21 addresses have changed, and would censor speech impacting entertainment businesses such as the BODOG  
22 MUSIC record label, the BODOG BATTLE OF THE BANDS competition and reality TV show, BODOG  
23 FIGHT mixed martial arts events, and many other entertainment services regarding which there is no  
24 contention of either illegality or infringement. Thus, the proposed order is plainly overbroad, and will not  
25 protect any legitimate interests.

26 **F. Plaintiff Fails To Make The Required Showing Warranting Entry Of A Permanent**  
27 **Injunction**



1                   **1. Plaintiff Fails To Inform The Court Of The Relevant Law Concerning**  
2                   **Injunctions In Patent Cases**

3                   Contrary to Plaintiff's insinuations at Mot. pp. 7-8, procedure in suits seeking injunctive relief is  
4 governed by federal, and not state, law. 13 Moore's Federal Practice and Procedure § 65.07[1] at 65-27  
5 (2007). Further, Plaintiff almost completely ignores the fact that the sole cause of action in this case is for  
6 patent infringement. The patent statute, 35 U.S.C. § 283 provides that a Court may "grant injunctions in  
7 accordance with the principles of equity to prevent the violation of any right secured by patent" (emphasis  
8 added). In eBay v. MercExchange, 126 S. Ct. 1837, 1839, 1842 (2006) the Supreme court clarified that to  
9 obtain a permanent injunction in a patent case, a "plaintiff must demonstrate: (1) that it has suffered an  
10 irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to  
11 compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant,  
12 a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent  
13 injunction."

14                   Plaintiff's motion for a permanent injunction is baseless for several reasons. First, Plaintiff does not  
15 seek to enjoin any right secured by patent – instead he wants the online entertainment services accused of  
16 infringement to continue, but at a place of his choosing rather than someone else's choosing. Second, the  
17 relief Plaintiff may request is really in the nature of a writ of execution rather than a permanent injunction  
18 prohibiting patent infringement, but there are no assets in Nevada which Plaintiff can seize. Third, Plaintiff  
19 neither identified the standard for a permanent injunction nor provided any evidence to meet its burden of  
20 satisfying the standard for a permanent injunction.

21                   **2. Plaintiff's Requested Injunction Bears No Relation To Any Right Secured**  
22                   **By Patent And Should Be Denied**

23                   As noted above, 35 U.S.C. § 283 provides that an injunction in a patent case may issue "to prevent the  
24 violation of any right secured by patent." Plaintiff does not seek to stop patent infringement, however.  
25 Instead, Plaintiff wants the activities that it alleges constitute patent infringement to continue, but just at  
26 NewBodog.com instead of BodogLife.com. Plaintiff's desire to have the alleged patent infringement  
27 continue at a place of its choosing bears no relation to the default judgment it obtained or to preventing  
28

1 patent infringement and Plaintiff's motion for a permanent injunction should be denied as improper.

2 **3. Plaintiff's Attempt To Enforce Its Judgment Through An Injunction Rather**  
3 **Than A Writ Of Execution Is Improper**

4 Fed. R. Civ. P. 69(a) provides that "process to enforce a judgment for the payment of money shall be a  
5 writ of execution, unless the court directs otherwise." See Hilao v. Marcos, 95 F.3d 848, 854-55 (9th Cir.  
6 1996) (enforcement of judgment shall be by writ of execution despite the size of the judgment). Plaintiff, in  
7 its motion, relegated its mention of Rule 69 to a footnote and did not cite other applicable federal law  
8 because it knows that the relief it seeks, money and a mandatory injunction that it thinks would help it  
9 increase the price of a domain name at an auction, are really an attempt to enforce its money judgment. An  
10 injunction, however, is not the proper vehicle for enforcing a judgment. To enforce its judgment, Plaintiff  
11 needs to seek a writ of execution. Plaintiff is obviously familiar with writs of execution, as it sought one in  
12 Washington state court. Plaintiff refused to do so here, however, because it knows that Defendants have no  
13 assets that would be subject to a writ of execution in Nevada.

14 **4. Plaintiff Failed To Make Any Competent Showing Concerning The Relevant**  
15 **Factors To Be Analyzed In Connection With An Injunction**

16 As noted above, under eBay, Plaintiff has the burden to establish: (1) that it has suffered an irreparable  
17 injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that  
18 injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity  
19 is warranted; and (4) that the public interest would not be disserved by a permanent injunction. Plaintiff has  
20 not made a showing under any of these factors.

21 **a. Plaintiff's Repeated Licensing Of Its Patent Establishes That It Is**  
22 **Not Suffering Any Irreparable Injury Warranting A Permanent**  
23 **Injunction And Money Damages Are Adequate**

24 After eBay, permanent injunctions are not routinely granted in patent cases. z4 Techs., Inc. v.  
25 Microsoft Corp., 434 F. Supp. 2d 437 (E.D. Tex. 2006) (denying an injunction). Indeed, a judgment of  
26 infringement does not warrant a finding of irreparable harm. Id. 440. Where a patentee fails to show that  
27 monetary damages were inadequate compensation for infringement, courts have found that there is no  
28

1 showing of irreparable injury. Id. at 441. Unlike a situation in which the parties are direct competitors and  
2 the patentee would lose market share if patent infringement continued, here 1st Technology appears to be  
3 merely a licensing entity that does not provide any online entertainment services. See Paice LLC v. Toyota  
4 Motor Corp., 2006 WL 2385139 at \* 5 (E.D. Tex.) (denying an injunction sought by a licensing company  
5 who did not manufacture the accused products) (Ex. 26); Voda v. Cordis Corp., 2006 WL 2570614 (W.D.  
6 Okla.) at \* 5 (denying an injunction when the patentee failed to prove irreparable injury or that money  
7 damages would be inadequate) (Ex. 27).

8 Just as in Paice, z4, and Voda, the Plaintiff here just wants money. Plaintiff has made no showing that  
9 it will lose market share, brand name recognition, or lost profits if no permanent injunction is entered. Based  
10 on Plaintiff's complete lack of proof of irreparable injury and inadequacy of monetary damages, the Court  
11 should deny the request for a permanent injunction.

12 **b. Remedies At Law Are Sufficient To Compensate For Any Alleged**  
13 **Injury And Money Damages Are All Plaintiff Sought In Its Default**  
14 **Judgment**

15 Unlike this case involving a dubious patent whose merits have not been litigated, even after a case is  
16 tried on the merits and a patent is found to be infringed, a patentee's right to exclude does not automatically  
17 mean that money damages are inadequate. z4, 434 F. Supp. 2d at 441. Again, because there is no direct  
18 competition between the parties, and there would be no loss of goodwill or market share for Plaintiff if an  
19 injunction were not entered, Plaintiff's remedies at law are adequate. Indeed, money damages are all that  
20 Plaintiff has ever sought before trying to use its motion for permanent injunction as a bargaining tool.  
21 Because Plaintiff completely failed to provide any proof on this prong its motion for permanent injunction  
22 should be denied.

23 **c. Plaintiff Is Not Suffering Any Hardship, But Defendants Would**  
24 **Suffer A Hardship In That It Could Not Comply With The Proposed**  
25 **Injunction**

26 The balance of hardships also warrants denying a permanent injunction. See z4, 434 F. Supp. 2d at  
27 443. First, Plaintiff presents no evidence of any hardship it is suffering. Second, as explained above, the  
28

1 named Defendants simply do not provide the services Plaintiff claims they provide and they cannot comply  
2 with a permanent injunction. If the Court were to order a permanent injunction with which Defendants  
3 cannot comply, Plaintiff would surely assert that the named Defendants are in contempt and institute further  
4 proceedings and seek to extract even more money from Defendants. Therefore, the balance of hardships tips  
5 strongly in Defendants' favor and the Court should deny the permanent injunction on this basis.

6 **d. The Public Interest Would Not Be Served By An Injunction**

7 Just as with all of the other prongs, Plaintiff provides no evidence that the public interest would be  
8 served by an injunction. See z4, 434 F. Supp. 2d at 444. Plaintiff is not trying to stop any online  
9 entertainment activities. Plaintiff merely wants the activities to take place at a Internet address of its  
10 choosing so as to boost the value of a particular domain name that it hopes to seize and auction later.  
11 Plaintiff's desire in no way serves the public interest. Plaintiff's proposed injunction serves only Plaintiff's  
12 interest in attempting to extract settlement money from Defendants.

13 **G. Plaintiff Provides No Pertinent Authority For Its Demand For Posting Of Security**

14 Normally, the party requesting a preliminary injunction must post security that can be used to  
15 compensate a party wrongfully enjoined. See Nintendo of Am. Inc. v. Lewis Galoob Toys, Inc., 16 F.3d  
16 1032, 1036-38 (9th Cir. 1994). Here, Plaintiff seeks to turn the security requirement on its head and have  
17 defendants post \$9.3 million in security. Plaintiff, of course, provides no authority justifying its bizarre  
18 request (let alone the amount of the requested security). Plaintiff is, in effect, seeking to impose exorbitant  
19 contempt sanctions on Defendants, without showing that Defendants violated any order. Plaintiff has failed  
20 to employ the proper procedure to obtain contempt sanctions. See Shuffler v. Heritage Bank, 720 F.2d 1141,  
21 1148 (9th Cir. 1983) (judgment creditor could not point to any exceptional circumstances to justify payment  
22 of judgment by securing fine, and contempt order could not be sustained to extent it was intended to enforce  
23 payment). Plaintiff has not established that defendants violated any order of this Court (because Defendants  
24 have not). Thus, Plaintiff's motion is faulty and should be denied.

25 ///

26 ///

27 ///

1 **IV. CONCLUSION**

2 For all the foregoing reasons, the “emergency” motion for permanent injunction should be denied.  
3  
4

5 Dated: September 27, 2007

By:

/s/ Charles McCrea

Charles McCrea

**LIONEL SAWYER & COLLINS**

Attorneys for Specially Appearing Defendants

**BODOG ENTERTAINMENT GROUP S.A.,**

and erroneously named Specially Appearing

Defendants **BODOG.NET** and **BODOG.COM**