

1 Evan L. James, Esq. (NSB No. 7760)
 CHRISTENSEN JAMES & MARTIN
 2 7440 W. Sahara Avenue
 Las Vegas, Nevada 89117
 3 Telephone: (702) 255-1718
 E-mail: elj@cjmlv.com

4 Brett L. Tolman, Esq. (USB No. 8821) *Admitted Pro Hac Vice (Pending)*
 5 Eric G. Benson, Esq. (USB No. 10414) *Admitted Pro Hac Vice (Pending)*
 RAY QUINNEY & NEBEKER P.C.
 6 36 South State Street, #1400
 Salt Lake City, Utah 84111
 7 Telephone: (801) 532-1500
 Fax: (801) 532-7543
 8 E-mail: btolman@rqn.com
 ebenson@rqn.com

9
 10 *Attorneys for Defendant Jonathan Eborn*

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE DISTRICT OF NEVADA

13 FEDERAL TRADE COMMISSION,
 14 Plaintiff,
 15 vs.
 16 INFUSION MEDIA, INC., *et al.*,
 17 Defendants.

Case No. 2:09-cv-01112-GMN-VCF
**MOTION FOR LEAVE TO FILE
 AMENDED RESPONSE TO
 FEDERAL TRADE COMMISSION'S
 MOTION TO ENTER JUDGMENT
 HOLDING DEFENDANT JONATHAN
 EBORN LIABLE FOR FULL
 MONETARY JUDGMENT
 AND ORDER**

18 Pursuant to Rule 7 of the Federal Rules of Civil Procedure, Defendant Jonathan Eborn
 19 (“Eborn”) respectfully files this Motion for Leave to File Amended Response to Federal Trade
 20 Commission’s (“FTC’s”) Motion to Enter Judgment Holding Defendant Jonathan Eborn Liable
 21

1 for Full Monetary Judgment. This Memorandum is based upon the Memorandum of Points and
2 Authorities and Exhibits attached hereto, the papers and pleadings on file herein, and any oral
3 argument presented at the time of hearing.

4 DATED this 18th day of April, 2014

5 CHRISTENSEN JAMES & MARTIN

6 By: /s/ Evan L. James

Evan L. James, Esq.
7 Nevada Bar No. 7760
8 7440 W. Sahara Avenue
9 Las Vegas, Nevada 89117
10 Telephone: (702) 255-1718
11 Fax: (702) 255-0871
12 E-mail: elj@cjmlv.com

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 On October 4, 2010, the Court entered the Stipulated Final Judgment and Order for
15 Permanent Injunction and Other Equitable Relief (“Stipulated Consent Judgment”) that ended—
16 with the exception of receivership activities—the dispute in the above-captioned matter. The
17 Stipulated Consent Judgment, however, granted the FTC power to “investigat[e] the accuracy of
18 any of Defendants’ Financial Statements upon which the [FTC’s] agreement to [the Stipulated
19 Consent Judgment was] expressly premised.” (Stipulated Consent Judgment, § XIV, at 27.) In
20 aid of this power, the FTC was granted all authority to conduct discovery regarding the subjects
21 of the Stipulated Consent Judgment. (*Id.* § XIV, at 27–28.)

22 On March 25, 2014, nearly three-and-one-half years after entry of the Stipulated Consent
23 Judgment, and without any prior notice of its intentions, the FTC filed the instant Motion to
24

1 Enter Judgment Holding Defendant Jonathan Eborn Liable for Full Monetary Judgment
2 (“Motion”.) Obviously, during the nearly three-and-one-half year intervening period, the FTC
3 engaged in significant and extensive discovery regarding Eborn’s compliance with the Stipulated
4 Consent Judgment. Though, at the present time, the full extent of the FTC’s discovery is
5 unknown to Eborn. Despite the fact that Eborn was aware that the FTC conducted a number of
6 depositions, including deposing Eborn himself, the FTC never provided any clear indication of
7 its suspicions or that it was planning to file its Motion. Aside from participating in depositions—
8 by being present—and reviewing the accompanying transcripts, the only discovery Eborn has
9 seen to date is that which the FTC has chosen to include as exhibits to its Motion. The FTC
10 never advised Eborn that he was a target of its “enforcement investigation” or provided Eborn
11 with the specifics of the investigation. In fact, until March 25, 2014, Eborn was unaware of the
12 exact allegations against him. Thus, Eborn was taken by surprise by the Motion, and found
13 himself with only seventeen (17) days to respond to the FTC’s allegations, which it developed
14 over the course of nearly three-and-one-half years through extensive discovery.

15 Additionally, Eborn’s counsel, located in Salt Lake City, Utah needed to affiliate with
16 local counsel in the District of Nevada before entering an appearance or filing any pleadings in
17 the case. For that reason, on April 10, 2014, Eborn filed an unopposed motion to extend his
18 response time for seven (7) days. That unopposed motion is still pending before the Court.

19 Since Eborn was unable to obtain an extension by the date his response was due, Eborn
20 filed a timely response on April 11, 2014. Eborn noted, however, the critical need to finalize
21 witness declarations to provide additional factual support for his response. In the interim, Eborn

1 has obtained the necessary declarations and has modified his response to attach these
2 declarations as exhibits and by including citations to those exhibits in the response. Moreover,
3 Eborn requests leave to file this amended response within the time period requested by his
4 unopposed motion for an extension of time.

5 Therefore, Eborn asks that the Court grant leave to file an amended response. The
6 proposed amended response is attached hereto as Exhibit A.

7 DATED this 18th day of April, 2014

8 CHRISTENSEN JAMES & MARTIN

9 By: /s/ Evan L. James

10 Evan L. James, Esq.
11 Nevada Bar No. 7760
12 7440 W. Sahara Avenue
13 Las Vegas, Nevada 89117
14 Telephone: (702) 255-1718
15 Fax: (702) 255-0871
16 E-mail: elj@cjmlv.com

17 **ORDER**

18 **THE COURT HAVING READ** the foregoing Motion for Leave to File
19 Amended Response to Federal Trade Commission's Motion to Enter Judgment Holding
20 Defendant Jonathan Eborn Liable for Full Monetary Judgment filed by Defendant
21 Jonathan Eborn, and good cause appearing therefore, hereby **GRANTS** the same.

22 **IT IS FURTHER ORDERED** that Defendant Jonathan Eborn's counsel shall
23 file with the Clerk of Court, the Amended Response attached hereto as Exhibit A.

24 **DATED** this 24th day of April, 2014.

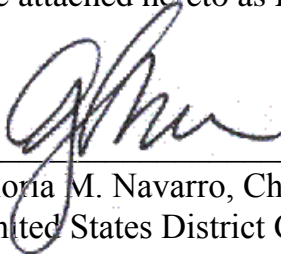

Gloria M. Navarro, Chief Judge
United States District Court

EXHIBIT A

EXHIBIT A

1 Evan L. James, Esq. (NSB No. 7760)
CHRISTENSEN JAMES & MARTIN
2 7440 W. Sahara Avenue
Las Vegas, Nevada 89117
3 Telephone: (702) 255-1718
E-mail: elj@cjmlv.com

4
5 Brett L. Tolman, Esq. (USB No. 8821) *Admitted Pro Hac Vice (Pending)*
Eric G. Benson, Esq. (USB No. 10414) *Admitted Pro Hac Vice (Pending)*
RAY QUINNEY & NEBEKER P.C.
6 36 South State Street, #1400
Salt Lake City, Utah 84111
7 Telephone: (801) 532-1500
Fax: (801) 532-7543
8 E-mail: btolman@rqn.com
ebenson@rqn.com

9 *Attorneys for Defendant Jonathan Eborn*

10
11 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

12 FEDERAL TRADE COMMISSION,
13
14 Plaintiff,
15 vs.
16 INFUSION MEDIA, INC., *et al.*,
17 Defendants.

Case No. 2:09-cv-01112-GMN-VCF

**AMENDED RESPONSE TO FEDERAL
TRADE COMMISSION'S MOTION TO
ENTER JUDGMENT HOLDING
DEFENDANT JONATHAN EBORN
LIABLE FOR FULL MONETARY
JUDGMENT**

ORAL ARGUMENT REQUESTED

19 Pursuant to Rule 7 of the Federal Rules of Civil Procedure, Defendant Jonathan Eborn
20 ("Eborn") respectfully files this Response to Federal Trade Commission's ("FTC's") Motion to
21 Enter Judgment Holding Defendant Jonathan Eborn Liable for Full Monetary Judgment. This

1 Response is based upon the Memorandum of Points and Authorities, Exhibits and Declarations
2 attached hereto, the papers and pleadings on file herein, and any oral argument presented to the
3 Court at the time of hearing.

4 DATED this 18th day of April, 2014

5 CHRISTENSEN JAMES & MARTIN

6 By: /s/ Evan L. James

Evan L. James, Esq.
7 Nevada Bar No. 7760
8 7440 W. Sahara Avenue
9 Las Vegas, Nevada 89117
10 Telephone: (702) 255-1718
11 Fax: (702) 255-0871
12 E-mail: elj@cjmlv.com

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I.**

15 **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

16 On October 4, 2010, the Court entered the Stipulated Final Judgment and Order for
17 Permanent Injunction and Other Equitable Relief (“Stipulated Consent Judgment”) that ended—
18 with the exception of receivership activities—the dispute in the above-captioned matter. The
19 Stipulated Consent Judgment provided:

20 5. The parties stipulate and agree to this Order, without trial
21 or adjudication of any issue of fact or law, to settle and resolve all
22 matters in dispute arising from the Complaint to the date of this
23 Order.

24 6. By entering into this Order, Defendants do not admit to the
allegations set forth in the Complaint, other than the jurisdictional
facts.

1 adjudication, shall enter a modified judgment holding the
2 offending Defendant(s) liable to the [FTC] in the amount of
3 \$29,497,320.57 for consumer redress, less any amounts turned
4 over to the FTC pursuant to Section VI of this Order Upon
5 such reinstatement of the monetary judgment, the Court shall make
6 an express determination that the judgment shall become
7 immediately due and payable by the offending Defendant(s),
8 jointly and severally, and the [FTC] shall be entitled to interest
9 computed from the day of entry of this Order at the rate prescribed
10 under 28 U.S.C. § 1961, as amended, on the unpaid balance. The
11 [FTC] shall be permitted to engage in discovery in aid of
12 execution.

13 (*Id.* § VIII, at 18–19.) However, the Stipulated Consent Judgment went further, granting the
14 FTC power to “investigat[e] the accuracy of any of Defendants’ Financial Statements upon
15 which the [FTC’s] agreement to [the Stipulated Consent Judgment was] expressly premised.”

16 (*Id.* § XIV, at 27.) In aid of this power, the FTC was granted all authority to conduct discovery
17 regarding the subjects of the Stipulated Consent Judgment. (*Id.* § XIV, at 27–28.) Eborn did, in
18 fact, submit two sworn financial statements, one dated July 13, 2009 and the other June 6, 2010
19 prior to signing the Stipulated Consent Judgment.

20 On March 25, 2014, nearly three-and-one-half years after entry of the Stipulated Consent
21 Judgment, and without any prior notice of its intentions, the FTC filed the instant Motion to
22 Enter Judgment Holding Defendant Jonathan Eborn Liable for Full Monetary Judgment
23 (“Motion”). In the Motion, the FTC—wrongfully—alleges that “Eborn omitted material
24 information and made material misrepresentations on [his] sworn financial statements,” and
requests that the Court enter judgment against Eborn for \$26,971,926.50. (Motion at 1.)

1 Obviously, during the nearly three-and-one-half year intervening period, the FTC
2 engaged in significant and extensive discovery regarding Eborn's compliance with the Stipulated
3 Consent Judgment. Though, at the present time, the full extent of the FTC's discovery is
4 unknown to Eborn. Eborn was aware that the FTC conducted a number of depositions, including
5 deposing Eborn himself, but the FTC never provided any clear indication of its suspicions or that
6 it was planning to file the instant Motion. (Eborn Decl., attached hereto as Exhibit 1, ¶ 27.)
7 Aside from participating in depositions—by being present—and reviewing the accompanying
8 transcripts, the only discovery Eborn has seen to date is that which the FTC has chosen to
9 include as exhibits to the Motion. (*Id.* ¶ 28.) Thus, Eborn was taken by surprise by the Motion,
10 and found himself with only seventeen (17) days to respond to the FTC's allegations, which it
11 developed over the course of nearly three-and-one-half years through extensive discovery. (*Id.*
12 ¶ 29.)

13 Despite the inequity of the situation, Eborn responds to the FTC's allegations below,
14 illustrating through the use of the limited evidentiary resources available—*i.e.*, deposition
15 transcripts and the exhibits attached to the FTC's Motion—that he did not omit any material
16 information or make any material misrepresentations on his sworn financial statements. Eborn's
17 response shows that the FTC has failed to satisfy its burden of establishing that Eborn's sworn
18 financial statements contained any material omission or misrepresentation. As such, the Court
19 should deny the FTC's Motion.

20 ///

21 ///

1 **II.**

2 **RESPONSE TO FTC’S STATEMENT OF FACTS**

3 The FTC’s Motion alleges that Eborn (1) “failed to disclose significant sums of money,
4 including \$61,519 in cash”; (2) “misrepresented his ownership and control of assets, including
5 ownership stakes in companies”; (3) “misrepresented the nature of payments to him, through
6 which he hid at least \$274,828.80”; and (4) “failed to identify assets, such as newly acquired
7 high-value property totaling more than \$33,100.” (Motion at 2.) Despite nearly four years of
8 targeting and investigating Mr. Eborn, and faced with evidence contradicting its own allegations
9 contained in the Motion, the FTC now seeks to hold Mr. Eborn liable for the nearly \$27 million
10 loss figure—an amount not proven but instead agreed to in the Stipulated Consent Judgment—
11 based on a handful of minor accounting or other disagreements, of which the FTC was largely
12 aware of at the time of entering into the Stipulated Consent Judgment, which certainly do not
13 amount to any “material” omissions or misrepresentations. Each of these categories of factual
14 allegations will be discussed in turn.

15 **A. ALLEGED FAILURE TO DISCLOSE SIGNIFICANT SUMS OF MONEY**

16 1. EBORN DEPOSITS \$23,200 AFTER SUBMITTING HIS JULY 13, 2009 FINANCIAL
17 STATEMENT

18 The FTC alleges that immediately after submitting the July 13, 2009 financial statement,
19 “Eborn opened a new bank account at Home Savings Bank and deposited \$23,200 in cash in
20 three installments over eight days.” (Motion at 2.) The bank statements obtained by the FTC
21
22
23
24

1 speak for themselves. (*Id.*, at Exs. 4–5.) From the alleged fact that Eborn deposited \$23,200 into
2 the bank *after* submitting the July 13, 2009 financial statement, the FTC asserts:

3 Eborn recently testified that the \$23,200 in cash deposits were loan
4 proceeds. But, this *post hoc* justification does not withstand
5 scrutiny. Eborn testified at a deposition that he has never repaid
6 the “loan.” Therefore, if it were in fact a loan, he should have
7 listed it on his 2010 Statement. On his 2010 Statement, however,
8 he lists only the loan from PDR, which, as discussed below, did
9 not loan him this cash. Although he suggests that the loan is from
10 family, he further testified that he does not owe his family any
11 money *and* that he never repaid the loan. Additionally, when
12 asked, he could not identify a single individual that could have
13 made the loan to him.

14 (*Id.* at 3 (internal citations omitted).)

15 The FTC has mischaracterized evidence and draws conclusions that are not supported by
16 the evidence. On June 23, 2009, this Court entered a TRO against all defendants in the case,
17 including Eborn, and the majority of Eborn’s assets were frozen. (Dkt. No. 12; Eborn Decl., Ex.
18 1, ¶ 3.) At the time of the TRO, Eborn possessed cash which he understood was subject to the
19 asset freeze pursuant to the Court’s TRO. (Eborn Decl., Ex. 1, ¶ 4.) Less than a month after the
20 TRO issued, on July 13, 2009, Eborn submitted a sworn financial statement. (Gov’t Motion, Ex.
21 1.) In the 2009 Statement, Eborn disclosed \$42,400 in cash—which was the amount of cash
22 Eborn personally possessed at the time he signed the statement and represented the amount he
23 understood to be frozen at the time. (Motion Ex. 1, at 7, 15; Eborn Decl., Ex.1, ¶ 6.) As
24 settlement negotiations progressed in the case, and after speaking with counsel, Eborn was
informed and understood that he need not surrender those particular fungible bills, but that the
amount of cash he possessed at the time of the entry of the TRO would need to eventually be

1 accounted for, if in the end a final judgment were entered or if a settlement with the FTC were
2 reached. (Eborn Decl., Ex.1, ¶ 7.) Thus, after disclosing this cash on his 2009 Statement,¹ Eborn
3 used some of the money to pay for personal expenses and deposited some of the money into
4 bank accounts. (*Id.* ¶ 11.) It is Eborn’s recollection that the \$23,200 of deposits at issue were
5 part of the \$42,400 cash he had on hand when the TRO was entered and which he disclosed in
6 his financial statements. (*Id.*) A little over a year after the entry of the TRO, Eborn entered into
7 the Stipulated Consent Judgment with the FTC. (Dkt. No. 74.) As part of the Stipulated Consent
8 Judgment, Eborn was required to surrender assets and monies already in possession of the
9 receiver. (*See* Stipulated Consent Judgment, § VI.) Additionally, the agreement required Eborn
10 to pay an additional \$78,000 out-of-pocket to cover past tax liabilities. (*Id.* § VII.) The
11 Stipulated Consent Judgment did not specify that the \$78,000 payment included the \$42,400
12 cash Eborn possessed at the time the TRO was entered, but through settlement negotiations,
13 Eborn understood that this \$78,000 payment would settle all claims, and that the \$42,400 in cash
14 would be considered part of the settlement amount. (Eborn Decl., Ex. 1, ¶ 8.) Further, Eborn
15 understood that the Stipulated Consent Judgment superseded any prior seizure order and that his
16 payment of \$78,000—along with his surrendering all property previously seized and in the
17 receiver’s possession—settled the matter completely. (*Id.* ¶ 9.)

18 In its Motion, the FTC claims that the above-described \$61,519 in cash “should have
19 been frozen and turned-over to the FTC,” (Motion at 11,) yet the documents related to the case

20 ¹ Understanding that the cash in his possession at the time of the entry of the TRO would eventually have to be
21 accounted for at the time of an eventual settlement, Eborn once again listed the \$42,400 in cash in his 2010
22 financial statement. (*See* Motion, Ex. 2, at 13; Eborn Decl., Ex. 1, ¶ 12.)

1 never specify that amount of cash as “frozen” or specific directions to surrender the monies to
2 the Receiver.² Instead, a more logical explanation is that any amounts of cash in Eborn’s
3 possession at the time of the TRO, or the \$42,400 claimed on Eborn’s 2009 and 2010 financial
4 statements, would need to be reconciled at the time of settlement. From the history outlined
5 above, it is clear that the FTC mischaracterizes the evidence and, more importantly, adduces no
6 facts to show that Eborn knowingly violated a court order or made material omissions or
7 misrepresentations in his financial statements. In its Motion, the FTC—without engaging in any
8 sort of sourcing analysis—speculates that Eborn’s deposits over many months now seem
9 suspicious and therefore the deposits must somehow constitute a violation of the Stipulated
10 Consent Judgment. However, if speculation is allowed on one side, the alternative question is
11 also worth posing here: If Eborn intended to conceal large amounts of cash from the Government
12 before signing the Stipulated Consent Judgment, why would he disclose so much of it on two
13 separate disclosure forms while the case was pending against him?

14 2. EBORN DEPOSITS \$38,319 BETWEEN ENTRY OF THE TRO AND NOVEMBER 2010

15 Similarly, the FTC alleges that “Eborn deposited an additional \$38,319 in cash between
16 the date of the Temporary Restraining Order and November 2010.” (Motion at 4.) The FTC
17 continues by alleging that “Eborn cannot account for these funds.” (*Id.*) In the next breath, the
18 FTC states that in his deposition, “Eborn stated that they were ‘loans’ or ‘gifts,’ from whom he
19 does not know, or were deposits from the \$42,400 in cash that he disclosed on the 2009

20
21 ² Around this same time, at the Receiver’s request, Eborn did turn over gold, silver and a cashier’s check to his
22 attorneys for safekeeping during the pendency of the case. (Eborn Decl., Ex. 1, ¶ 10.)

1 Statement.” (*Id.*) However, as above, the FTC takes these allegations and makes an unsupported
2 leap:

3 The “loan” explanation is incredible—despite the size of the
4 deposits, he does not know who loaned him the money and he
5 never disclosed the loans on his 2010 Statement. The gift
6 explanation is false. Inconceivably, he does not know who gave
7 him these substantial gifts. If Eborn was spending frozen cash, he
8 is claiming to have knowingly and willfully acted in contempt of
9 this Court’s orders, an act that could have both civil and criminal
10 consequences. Furthermore, Eborn claims his alleged contempt
11 accounts for only some of the deposits.

12 (*Id.* (internal citations omitted).)

13 Again, the FTC has mischaracterized evidence and draws conclusions that are not
14 supported by the evidence. Throughout the tumultuous time period during the pendency of the
15 underlying case, Eborn received financial support from family and friends on numerous
16 occasions. (Eborn Decl., Ex. 1, ¶ 13.) While many of these cash infusions were outright gifts,
17 others were informal “loans” from friends that would likely have to be repaid at some point,
18 albeit on an informal schedule. (*Id.* ¶ 14.) In any event, Eborn never understood that he was
19 required to list post-TRO gifts or informal loans as assets on his disclosure forms as these monies
20 were used to enable the Eborn family to survive. (*Id.* ¶ 15.) In reality, much of this money came
21 in and was spent quickly thereafter on Eborn’s family’s expenses. (*Id.* ¶ 18.) The rest of the
22 money was deposited in banks over time. (*Id.* ¶ 18.) As explained above, some of this \$38,319
23 was likely disclosed as part of the \$42,400 listed on Eborn’s 2009 and 2010 statements. (*Id.*
24 ¶ 19.) The balance likely came from family and friends to support the Eborns during the difficult
time they faced. (*Id.*) Now, five years after-the-fact and without having the benefit of extensive

1 bank documentation, Eborn cannot remember the source and other details regarding each
2 transaction and which deposits were disclosed—as part of the reported \$42,400 in cash—and
3 which were gifts and therefore not disclosed. (*Id.* ¶ 20.) Whatever the case, the FTC should bear
4 the burden of sourcing this money and proving that Eborn actively concealed cash that he
5 possessed at the time the TRO was entered, and then surreptitiously deposited the money to
6 avoid disclosing it to the FTC on his financial statements—while at the same time he
7 inexplicably disclosed \$42,400 in cash on both his 2009 and 2010 statements. Such a
8 speculative leap defies common sense and certainly does not prove that Eborn either omitted or
9 misrepresented facts regarding cash assets on his financial disclosures, and certainly does not
10 justify holding Eborn solely responsible for a nearly \$27 million dollar judgment.

11 **B. ALLEGED MISREPRESENTATION OF OWNERSHIP IN OR CONTROL OF**
12 **COMPANIES**

13 1. EBORN’S INTEREST IN AUGUSTA CAPITAL

14 The FTC alleges that “Eborn hid his ability to tap Augusta Capital’s corporate assets by
15 falsely claiming to be the ‘Retail Accounts Manager’ when he was actually an officer and
16 principal.” (Motion at 5.) To support this allegation, the FTC makes three assertions. First, the
17 FTC states that “Augusta Capital did not have ‘retail accounts’ for him to manage.” (*Id.*)
18 Second, the FTC states that “aside from self-serving testimony, all evidence shows that [Eborn]
19 was an officer and principal.” (*Id.*) Supposedly, the evidence supporting this is that “[t]he FTC
20 obtained a corporate resolution that Augusta Capital submitted to a bank listing Eborn as an
21 officer,” and “a signed letter seeking health insurance for Augusta Capital employees indicating

1 that Eborn was a principal.” (*Id.*) Finally, the FTC states that “the company paid [Eborn] like an
2 officer or principal.” (*Id.*)

3 Here, without evidence in support and ignoring evidence to the contrary, the FTC alleges
4 that Eborn was an officer or principal in Augusta Capital, that the company had sufficient
5 corporate assets which could be tapped in order to offer a larger settlement figure to the FTC,
6 and that Eborn concealed these facts from the FTC in his declarations to hide, or at least
7 minimize, his net worth.

8 Again, the FTC’s conclusions that “*all* evidence shows that [Eborn] was an officer and
9 principal” in Augusta Capital is not supported by the facts in the record. (Motion at 5.) In his
10 deposition, Pace Mannion, president of Augusta Capital and presumably the person in the best
11 position to know whether Eborn actually possessed an ownership interest in the company,
12 directly contradicted the FTC’s theory that Eborn was an officer because he was listed on a
13 corporate resolution. Mr. Mannion stated that Eborn’s name was simply put on the corporate
14 documents as an oversight, and that Eborn really had no management role in the company:
15 “Well, it looks like we [included Eborn’s name on the corporate documents] to open the bank
16 account because we needed two signers but I don’t . . . I don’t think [Eborn] was ever part of the
17 corp.” (Motion, Ex. 8, at 55: 5-8.)

18 Regarding the letter which sought health insurance for company employees purportedly
19 identifying Eborn as a principal of Augusta Capital, Mannion explained that although the letter
20 appeared to list both Mannion and Eborn as owners, it “was . . . typed out by somebody who
21

1 incredible that Arnell, a former Infusion Media employee and Eborn subordinate, was the true
2 Link Media principal when Link Media was merely a continuation of Arnell’s business role at
3 Infusion Media.” (*Id.*) With regards to Link Media, the FTC offers no reasonable evidence that
4 Eborn was an officer or a principal other than characterizing certain aspects of Eborn’s
5 involvement with the company as “incredible” in the FTC’s subjective eyes.

6 Eborn actually did very little work with Link Media. (Eborn Decl., Ex. 1, ¶ 23; Miller
7 Decl., attached hereto as Exhibit 2, ¶ 5.) Eborn’s co-defendant McClain Miller ended up
8 working much more extensively with Link Media than did Eborn. (Eborn Decl., Ex. 1, ¶ 23;
9 Miller Decl., Ex. 2, ¶ 5.) Whatever the case, the FTC presents no evidence that Eborn owned or
10 controlled Link Media and that he actively shielded company assets from the FTC in order to
11 extract a more favorable settlement for himself in 2010. Further, quibbling about whether Eborn
12 really acted as an “account executive” at Link or in some other capacity, such as a consultant, is
13 largely an exercise in futility, as any determination of the issue would not be material and thus
14 would not be subject to the provisions of the Stipulated Consent Judgment.

15 **C. ALLEGED MISREPRESENTATION OF THE NATURE AND AMOUNT OF**
16 **PAYMENTS MADE TO EBORN**

17 1. EBORN’S PAYMENTS FROM AUGUSTA CAPITAL

18 The FTC alleges that “Augusta Capital and a related entity transferred \$145,500 to
19 Eborn, all of which Eborn deposited shortly after signing the 2010 Statement.” (Motion at 6.)
20 Further, the FTC states: “Curiously, Eborn falsely reported earning \$44,300 from Augusta
21
22
23
24

1 Capital between January 1 and June 6, 2010,” even though “Augusta Capital did not transfer any
2 money to Eborn until June 9, 2010.” (*Id.*)

3 Here, curiously, the FTC accuses Eborn of both underreporting his income from Augusta
4 Capital and also of overreporting his income around the same time. As the FTC points out in its
5 Motion, Eborn reported earning \$44,300 from Augusta Capital between January 1 and June 6,
6 2010. (Eborn Decl., Ex. 1, ¶ 21.) In an abundance of caution, Eborn reported this number on his
7 2010 financial statement—signed halfway through the year in June—based on his projected
8 income that year. (*Id.*) Eborn eventually earned around \$95,000 from Augusta Capital that year.
9 (*Id.*) In his 2010 declaration, Eborn estimated a total monthly income of \$9,100, or \$109,200 for
10 the year, yet that figure would prove to be ambitious that year as Eborn eventually only earned
11 \$95,000 that year—or approximately \$7,916 per month. (Motion, Ex. 2, at 3.) Overestimating
12 his income in this fashion is hardly suggestive of someone intending to defraud the FTC by
13 falsifying financial records through *underreporting* income and assets.

14 In 2010, Eborn recalls receiving around \$140,000 or so from Augusta Capital—he is not
15 certain of the exact number without having access to relevant documents and bank records.
16 (Eborn Decl., Ex. 1, ¶ 22.) As discussed above, of the \$140,000 approximately \$95,000 accounts
17 for salary Eborn received for his work at Augusta Capital that year. (*Id.*) The balance of the
18 Augusta money was loaned to Eborn in order for Eborn to resolve the underlying case and to pay
19 \$78,000 to the FTC as part of the Stipulated Judgment Order. (*Id.*) Pace Mannion testified that
20 this money was a loan to enable Eborn to settle with the FTC in 2010, and Mannion further states

1 that Eborn has been paying back the loan over time by referring business to Mannion’s company.
2 (*See* Motion Ex. 8, at 95:4-96:15.)

3 Along those same lines, the FTC accuses Eborn of waiting a few extra days in June 2010
4 before depositing checks into his bank account in order to avoid disclosing the money on his
5 2010 financial statement. (Motion at 9.) Once again, this allegation flies in the face of
6 conventional wisdom, considering the fact that Eborn reported \$44,300 of income on his 2010
7 financial statement and then deposited a check from that reported employer, Augusta Capital,
8 into his bank account a few days later. Thus, the government seems to merely allege that Eborn
9 did not deposit a check from Augusta Capital on the same day that he received the check—
10 hardly a material violation, much less one worthy of triggering a \$26,971,926.50 judgment.

11 2. EBORN’S LOANS FROM PDR BILLING

12 The FTC alleges that “Eborn misrepresented the nature of a dozen large transfers totaling
13 \$292,628.83 from PDR, Infusion Media’s former payroll company.” (Motion at 7.) The FTC
14 asserts that “[a]lthough characterized as ‘loans,’ PDR was holding Eborn’s money during the
15 pendency of the case and distributing it whenever Eborn asked.” (*Id.*) Even further, the FTC
16 states:

17 There was no contemporaneous loan agreement documenting these
18 transfers. Ultimately, Eborn signed a promissory note for
19 \$196,700 on August 30, 2010, but only after all of the transfers.
20 The note is a sham document. PDR has made no attempts to
21 collect on it. Furthermore, the final two payments, totaling
22 \$40,928.83, were made less than three weeks prior to when Eborn
23 signed the alleged promissory note. But, neither Eborn nor PDR
24 included them in the promissory note. Additionally, it inexplicably
excluded the July 2, 2009 payment, the October 30, 2009 payment,

1 and the January 19, 2010 payment. All told, the promissory note
2 failed to include \$95,928.83 in transfers to Eborn.

3 (*Id.* (internal citations and footnotes omitted).) Thus, the FTC asserts that “[a]lthough Eborn
4 listed a loan from PDR on his 2010 Statement, he failed to disclose more than half of the total
5 amount he had received as of the 2010 Statement.” (*Id.*)

6 Other than hyperbole, the FTC provides absolutely no evidence that the money provided
7 to Eborn by PDR Billing was Eborn’s money that he had parked with PDR Billing to conceal
8 detection, and not a loan. First, it is the FTC that bears the burden of establishing that Eborn
9 violated the Stipulated Consent Judgment. To satisfy that burden, the FTC must provide some
10 evidence—not just its conclusory statement that the promissory “note is a sham document,”
11 (Motion at 8)—that the money provided to Eborn from PDR Billing was, in reality, Eborn’s
12 money parked with PDR Billing. The FTC can, and on information and belief, has accessed
13 PDR Billing’s financial and banking records, along with those from Eborn and Infusion Media.
14 With this information at its fingertips, it is surprising that the FTC has provided no actual
15 evidence that PDR Billing was just essentially laundering Eborn’s own money back to him
16 during the pendency of the underlying case. Missing this crucial piece of evidence renders the
17 FTC incapable of supporting its position and asking this Court to hold Eborn responsible for a
18 nearly \$27 million dollar judgment based solely upon the FTC’s self-serving statement that the
19 promissory note was a sham.

20 Second, all of the evidence points to the conclusion that the PDR Billing transfers to
21 Eborn were unsecured loans, in the truest sense of the term. Eborn represented the PDR Billing

1 transfers as a loan on the June 6, 2010 disclosure. (*Id.*) Moreover, Jeff Benson, the managing
2 member of PDR Billing, stated that the PDR Billing transfers to Eborn were loans in the very
3 declaration the FTC relies on as Exhibit 12 to its Motion. (Motion, Ex. 12, at ¶¶ 1, 17–28.) And,
4 despite the FTC’s attempt to make much of the fact that Eborn only signed a promissory note
5 after all of the PDR Billing transfers, the explanation for the structure of the transaction is
6 explained clearly by Jeff Benson. Jeff Benson stated: “Loans to third party businesses or their
7 owners who are clients of ours are fairly commonplace. PDR Billing and now Shutter Lending
8 loans money on a daily basis.” (*Id.* ¶ 21.) PDR Billing and Jeff Benson “continued to believe
9 that [they] would be paid back and continued to loan money to Mr. Eborn personally until about
10 April 2010 when [they] realized, based on a better understanding of the full nature of the issues
11 regarding the Temporary Injunction that the issues Infusion and Mr. Eborn faced might be
12 more permanent.” (*Id.* ¶ 22.) In light of this, Jeff Benson expressed his concerns over
13 repayment to Eborn, and “pushed to enter into a firmer loan position by having the loan
14 secured,” but Jeff Benson “learn[ed] that security did not exist due to the Temporary Injunction.”
15 (*Id.* ¶ 23.) Thereafter, Jeff Benson “negotiated to have an unsecured promissory note evidencing
16 the \$197,700.00 loaned to Mr. Eborn.” (*Id.* ¶ 24.) The promissory note matures on October 31,
17 2014, and Jeff Benson still “fully expect[s] and anticipate[s] Mr. Eborn to fulfill the terms of the
18 note and payment of the note and interest by the Maturity date.” (*Id.* ¶ 28.)

19 Finally, regarding the difference between the \$197,700 promissory note in Eborn’s name
20 and the \$292,628.83 disbursed by PDR Billing during this timeframe, it is explained by the fact
21 that PDR Billing transferred money for legal fees to both Eborn and to his co-defendant McClain

1 Miller in order for them to fund their defense in the underlying case. (Eborn Decl., Ex. 1, ¶ 17;
2 Miller Decl., Ex. 2, ¶ 4.) At some point prior to signing the promissory note, those fees
3 advanced by PDR Billing for legal fees which were reserved for Miller’s defense were deducted
4 from Eborn’s loan. (Eborn Decl., Ex. 1, ¶ 17; Miller Decl., Ex. 2, ¶ 4.) Thus, the final amount
5 owing on Eborn’s promissory note is significantly less than the total amount disbursed by PDR
6 Billing throughout this time period. (Eborn Decl., Ex. 1, ¶ 17.) In order to support its
7 allegations that all PDR Billing transfers to Eborn were really just a “sham” for Eborn to hide
8 wealth, the FTC must show sufficient evidence in support of its allegations. Yet the FTC fails to
9 make this showing and its conclusory allegations fail to show that Eborn parked any monies with
10 PDR Billing during the pendency of this case and asked for secretive disbursements through
11 PDR Billing in order to avoid listing the monies as assets on his disclosure forms.

12 3. EBORN’S INCOME ON THE JUNE 6, 2010 FINANCIAL STATEMENT

13 The FTC alleges that “Eborn hid his true income by fabricating his average monthly
14 income on his 2010 Statement.” (Motion at 9.) The FTC asserts that despite claiming “\$9,100 in
15 monthly income,” “including the PDR transfers, [Eborn] had been receiving and spending more
16 than twice his disclosed income.” (*Id.*)

17 First, as discussed above, the FTC has no evidence that the PDR Billing transfers are
18 anything other than loans—the only evidence on the issue comes directly from the owner of PDR
19 and supports only the conclusion that they were indeed loans. The FTC has presented absolutely
20 no evidence that the PDR Billing transfers should have been included as income. As a fact of
21 common reality in the United States’ consumer culture, it is hardly rare for an individual to

1 spend more than that individual's income each month. With the ready availability of consumer
2 and other credit, individuals are able to spend potentially far more than their actual income
3 during any given period of time. Here, Eborn is no different, and in fact it is admitted that Eborn
4 received substantial monetary gifts and loans during the relevant period, allowing him to spend
5 more money than he made in income during the relevant period. (Eborn Decl., Ex. 1, ¶ 13-14.)

6 Second, apart from the fact that the FTC has improperly conflated monies spent by Eborn
7 with Eborn's income, it is difficult to see how any potential misrepresentation by Eborn could
8 have been material. In footnote 19, the FTC states that Eborn had not made any income up to the
9 June 6, 2010 disclosure. Despite this, Eborn claimed \$9,100 in monthly income. (Motion at 9 &
10 n.19.) As explained above, over-disclosure of assets hardly seems to be a material
11 misrepresentation. In reality, this disclosure was an estimate of the income that Eborn expected
12 to bring in during 2010 and, out of an abundance of caution, he over-disclosed. (Eborn Decl.,
13 Ex. 1, ¶ 21.) In fact, Eborn's actual income for 2010 was \$95,000, equating to \$7,916 per month
14 of income, a number significantly less than indicated by Eborn in the June 6, 2010 disclosure.
15 (*Id.*) If Eborn was really trying to hide wealth and income streams from the FTC, why would he
16 over-disclose his income? Again, the FTC's allegations rest on improper assumptions,
17 insufficient to satisfy its burden—here, the assumption that Eborn could only have spent as much
18 as he earned, despite knowing that Eborn received additional non-income money during this
19 tumultuous period in his life.

20 ///

21 ///

1 **D. ALLEGED FAILURE TO IDENTIFY REAL AND PERSONAL PROPERTY**

2 1. EBORN'S ADDRESS DISCLOSURE

3 The FTC alleges that "Eborn hid his ineligibility for a homestead exemption by falsely
4 claiming his Sandy, UT home as his current address even though he had moved to Draper, UT
5 eight months before signing the 2010 Statement." (Motion at 9.) The FTC asserts that Eborn
6 "estimated that the Sandy, UT home had between \$42,948 and \$3,000 in equity." (*Id.* at 10.)
7 Although "[t]he Utah homestead exemption would have protected \$40,000 if he lived in the
8 home," the FTC argues that "[a]fter moving out of the home, Eborn was limited to the \$10,000
9 exemption for a non-primary residence." (*Id.*)

10 In fact, the Sandy, UT home was solely owned by Eborn's wife. (Eborn Decl., Ex.1,
11 ¶ 25.) Early on in the process, the FTC communicated to Eborn that it was not interested in the
12 Sandy, UT home, regardless of its value. (*Id.*) This was likely the case because even if the
13 Sandy, UT home was to be sold, there was not likely to be any net recovery for the FTC after
14 considering the cost of selling the home, the home's increasing mortgage balance due to Eborn's
15 inability to make the payments, and the decreasing value of the home due to the poor real estate
16 market at that time. (*Id.*) Moreover, Eborn does not recall ever having knowledge of a potential
17 homestead exemption or attempting to utilize its provisions. (*Id.*)

18 Regardless, it is important to note the misleading nature of the FTC's statement: "After
19 moving out of the [Sandy, UT] home, Eborn was limited to the \$10,000 exemption for a non-
20 primary residence." (Motion at 10.) The FTC compares this to the \$40,000 exemption for a
21 residence, and asserts that "[b]ecause the FTC did not know that [Eborn] had moved, the home

1 appeared to have no or little value.” (*Id.*) First, the FTC provides no evidence that Eborn took
2 advantage of *any* homestead exemption or that he even knew it was available to him. As the
3 moving party, this is the FTC’s burden. The FTC’s failure to establish this baseline fact is
4 dispositive because if Eborn did not get the benefit of any homestead exemption, then this *could*
5 *not* have been a material misstatement and it could not have influenced the FTC’s decision.³

6 Second, even if Eborn did receive the advantage of a homestead exemption, on the face
7 of the FTC’s motion it would have been immaterial whether the Sandy, UT home was a primary
8 or non-primary residence. Although the FTC attempts to juxtapose the estimated values of the
9 Sandy, UT home in the July 13, 2009 and June 6, 2010 disclosures, (*id.*), the only relevant value
10 is the June 6, 2010 disclosure. The June 6, 2010 disclosure is the only relevant disclosure
11 because the FTC concedes that Eborn did not move into the Draper, UT home until October
12 2009, *after* the July 13, 2009 disclosure. (*Id.* at 9.) Thus, the only potential misrepresentation—
13 the FTC does not assert that Eborn’s estimates of the Sandy, UT home’s value was
14 misrepresented—is with respect to the June 6, 2010 disclosure.⁴ As of June 6, 2010 the value of
15 Eborn’s equity in the Sandy, UT home—which the FTC does not dispute—was only \$3,000. (*Id.*
16 at 10.) And, by the FTC’s own admission, *both* the homestead exemption for a primary
17

18 ³ Because the FTC failed to produce any evidence that Eborn received the benefit of a homestead exemption, it is
19 unnecessary for Eborn to consider whether a homestead exemption would have even properly applied in his
20 situation.

21 ⁴ Likewise, even if the Sandy, UT home had been worth much more in 2009, the reality is that for purposes of
22 considering the FTC’s reasons for entering the Stipulated Consent Judgment the FTC would not have been
23 concerned with the prior value of the home. Only the June 6, 2010 Sandy, UT home value could be material to the
24 FTC’s decision to enter the Stipulated Consent Judgment.

1 residence (\$40,000) and a non-primary residence (\$10,000) would have prevented the FTC from
2 being able to extract any value from the Sandy, UT home. (*Id.*) Therefore, the status of the
3 Sandy, UT home as Eborn’s primary or non-primary residence could not have been material to
4 the FTC’s decision.

5 Finally, the mere fact that Eborn was not primarily living in the Sandy, UT home after
6 October 2009 is immaterial. From a financial perspective, Eborn entered into a long-term lease
7 option on the Draper, UT home. (*Id.* at 9.) As such, Eborn possessed no equity in the Draper,
8 UT home that could be extracted by the FTC. So, the only other importance as to where Eborn
9 lived would be so that the FTC could contact him. The FTC has not made any allegation that it
10 has been unable to contact Eborn, nor that Eborn has been uncooperative. In fact, the FTC has
11 been in contact with Eborn throughout the entire period.⁵ (Eborn Decl., Ex. 1, ¶ 26.) Eborn
12 picked up the mail at the Sandy, UT home nearly every day, and spent time at that home during
13 the period. (*Id.*) Prior to his submission of the April 2011 compliance report, Eborn had always
14 planned to move back into the Sandy, UT home. (*Id.*) Eborn moved to the Draper, UT home
15 because he and his family were receiving threatening phone calls in the wake of the FTC lawsuit.
16 (*Id.*) The plan was to eventually move back into the Sandy, UT property, but the home ended up
17 in foreclosure. (*Id.*) Despite all this, the location of Eborn’s residence—outside the potential for
18 a financial recovery—cannot be said to have been material to the FTC’s decision to enter the
19 Stipulated Consent Judgment.

20 ⁵ In fact, on information and belief, Eborn is the only defendant involved in the case who has consistently filed his
21 required disclosures in the years following the signing of the Stipulated Consent Judgment. Tellingly, the FTC
22 makes no allegations in its Motion about Eborn’s non-compliance with the Order in the years after its execution.

1 \$26,971,926.50 judgment against Eborn because he failed to list and value a few pieces of
2 furniture and a piano—bought with borrowed money—would be manifestly unjust and violate
3 the spirit of the Stipulated Consent Judgment.

4 **III.**

5 **ARGUMENT**

6 **THE FTC HAS FAILED TO SATISFY ITS BURDEN OF PROVING THAT**
7 **EBORN’S FINANCIAL STATEMENTS CONTAINED MATERIAL OMISSIONS**
8 **OR MISREPRESENTATIONS**

8 It appears as though the FTC argues that the “without further adjudication” provision of
9 the Stipulated Consent Judgment requires the Court to automatically enter judgment against
10 Eborn. That is not the case. The relevant provision states:

11 If, upon motion by the [FTC], *this Court finds* that any
12 Defendant(s) has (1) materially misstated in Defendants’ Financial
13 Statements, the value of any asset, (2) made any material
14 misrepresentation or omitted material information concerning his
15 or her financial condition by failing to disclose any asset that
16 should have been disclosed in Defendants’ Financial Statements,
17 or (3) made any other material misstatement or omission in
18 Defendants’ Financial Statements, *the Court shall terminate*, as to
19 the offending Defendant(s), the suspension of the monetary
20 judgment entered in Section VI.A. *The Court, without further*
21 *adjudication, shall enter a modified judgment* holding the
22 offending Defendant(s) liable to the [FTC] in the amount of
23 \$29,497,320.57 for consumer redress, less any amounts turned
24 over to the FTC pursuant to Section VI of this Order

(Stipulated Consent Judgment, § VIII, at 18–19 (emphasis added).) It is clear that the Stipulated
Consent Judgment contemplates that the FTC must bear some burden of proof. That is, the FTC
must prove, and the Court must find, that Eborn’s sworn financial statements included *material*

1 omissions or misrepresentations. It is only after the FTC has satisfied its burden of proof, and
2 the Court has made requisite factual findings, that “without further adjudication” the Court
3 should enter judgment against Eborn.

4 The FTC is trying to get the cart before the horse in this instance. The FTC has brought a
5 motion before the Court containing sparse, often contradicted, evidence and asks the Court to
6 accept that evidence as true and enter an enormous judgment against Eborn based upon very
7 small accounting disagreements. At best this is improper; at worst it would evince a marked
8 departure from Due Process guarantees. Regardless, as demonstrated above in Eborn’s detailed
9 response to the FTC’s factual allegations, the FTC has failed to satisfy its burden of proving that
10 Eborn’s sworn financial statements contained material omissions or misrepresentations. The
11 FTC completely ignores the evidence contrary to its tenuous theories, choosing instead to rely on
12 hyperbole and its own unsupported conclusions. And, the fact that the FTC engaged in virtually
13 unlimited discovery for nearly three-and-a-half years should inform the Court of the one-sided
14 nature of the FTC’s Motion and requested relief which is, in reality, just the culmination of a
15 long and tortured witch hunt. Imposing a nearly \$27 million dollar judgment against Eborn
16 based on the FTC’s unsupported allegations is improper and if entered under these circumstances
17 would amount to a miscarriage of justice.

18 Given the paucity of the FTC’s evidence and the potential gravity of the consequences for
19 non-compliance with the Stipulated Consent Judgment, Eborn requests oral argument before the
20 Court on the issues.

21 ///

1 **IV.**

2 **CONCLUSION**

3 For the foregoing reasons, the Court should deny the FTC's Motion.

4 DATED this 18th day of April, 2014

5 CHRISTENSEN JAMES & MARTIN

6 *By: /s/ Evan L. James* _____

7 Evan L. James, Esq.
8 Nevada Bar No. 7760
9 7440 W. Sahara Avenue
10 Las Vegas, Nevada 89117
11 Telephone: (702) 255-1718
12 Fax: (702) 255-0871
13 E-mail: elj@cjmlv.com

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 18th of April, 2014, I electronically filed the foregoing
3 **AMENDED RESPONSE TO FEDERAL TRADE COMMISSION'S MOTION TO**
4 **ENTER JUDGMENT HOLDING DEFENDANT JONATHAN EBORN LIABLE FOR**
5 **FULL MONETARY JUDGMENT** with the Clerk of the Court using the CM/ECF system
6 which sent notification to the following:

7 Benjamin Theisman
8 Daniel O. Hanks
9 Kathleen Benway
10 Michael J. Davis
11 Katherine Johnson
12 FEDERAL TRADE COMMISSION
13 600 Pennsylvania Avenue, NW
14 Washington, D.C. 20580
15 btheisman@ftc.gov
16 dhanks@ftc.gov
17 kbenway@ftc.gov
18 mdavis@ftc.gov
19 kjohnson3@ftc.gov
20 *Attorneys for Plaintiff*

Blaine T. Welsh
U.S. ATTORNEY'S OFFICE
DISTRICT OF NEVADA
333 Las Vegas Blvd. South
Suite 5000
Las Vegas, NV 89101
Blaine.Welsh@usdoj.gov
Attorney for Plaintiff

Ogonna Atamoh
Richard F. Holley
COTTON DRIGGS WALCH HOLLEY,
ET AL.
400 S. Fourth Street
Third Floor
Las Vegas, NV 89101
oatamoh@nevadafirm.com
rholley@nevadafirm.com
Attorneys for Defendants

20 /s/ Sara D. Cope
21 CHRISTENSEN JAMES & MARTIN

EXHIBIT 1

EXHIBIT 1

1 Evan L. James, Esq. (NSB No. 7760)
CHRISTENSEN JAMES & MARTIN
2 7440 W. Sahara Avenue
Las Vegas, Nevada 89117
3 Telephone: (702) 255-1718
E-mail: elj@cjmlv.com

4
5 Brett L. Tolman, Esq. (USB No. 8821) *Admitted Pro Hac Vice (Pending)*
Eric G. Benson, Esq. (USB No. 10414) *Admitted Pro Hac Vice (Pending)*
RAY QUINNEY & NEBEKER P.C.
6 36 South State Street, #1400
Salt Lake City, Utah 84111
7 Telephone: (801) 532-1500
Fax: (801) 532-7543
8 E-mail: btolman@rqn.com
ebenson@rqn.com

9 *Attorneys for Defendant Jonathan Eborn*

10
11 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

12 FEDERAL TRADE COMMISSION,

13 Plaintiff,

14 vs.

15 INFUSION MEDIA, INC., *et al.*,

16 Defendants.

Case No. 2:09-cv-01112-GMN-VCF

**DECLARATION OF
JONATHAN D. EBORN**

17
18 Jonathan D. Eborn, being first duly sworn, deposes and states under penalty of perjury as
19 follows:

20 1. I was one of the owners of Infusion Media, Inc.
21
22
23
24

1 2. On June 22, 2009, the Federal Trade Commission (“FTC”) filed a complaint that
2 *inter alia* named both Infusion Media, Inc. and me personally.

3 3. On June 23, 2009, the Court entered a Temporary Restraining Order (“TRO”)
4 against all defendants in the case, including myself, and the majority of my assets were frozen.

5 4. At the time of the TRO, I possessed cash that I understood was subject to the asset
6 freeze pursuant to the TRO.

7 5. As part of the proceedings, I was required to provide sworn financial statements.

8 6. On my July 13, 2009 financial statement, I disclosed the \$42,400 in cash that I
9 personally possessed at the time I signed the statement, which represents the amount of cash I
10 understood to be frozen.

11 7. As settlement negotiations progressed in the case, and after speaking with
12 counsel, I was informed and understood that I need not surrender those particular fungible bills,
13 but that the amount of cash I possessed at the time of the entry of the TRO would need to
14 eventually be accounted for, if in the end a final judgment were entered or if a settlement with
15 the FTC were reached.

16 8. The Stipulated Consent Judgment eventually required that I pay \$78,000 in cash,
17 but did not specify that the required \$78,000 payment included the \$42,400 cash I possessed at
18 the time the TRO was entered. Through settlement negotiations, however, I understood that this
19 \$78,000 payment would settle all claims, and that the \$42,400 in cash would be considered part
20 of the settlement amount.

21

22

23

24

1 9. I also understood that the Stipulated Consent Judgment superseded any prior
2 seizure order and that my payment of \$78,000—along with surrendering all of my property
3 previously seized and in the receiver’s possession—settled the matter completely.

4 10. At the time the TRO was entered, and at the Receiver’s request, I did turn over
5 gold, silver and a cashier’s check to my attorneys for safekeeping during the pendency of the
6 case.

7 11. So, after disclosing this cash on my July 13, 2009 financial statement, I used some
8 of the money to pay for personal expenses and deposited some of the money into bank accounts.
9 It is my recollection that \$23,200 of deposits at issue were part of the \$42,400 cash I had on hand
10 when the TRO was entered and which I disclosed in my financial statements.

11 12. Despite having used this money, because I understood that the cash I possessed at
12 the time of the entry of the TRO would eventually have to be accounted for at the time of an
13 eventual settlement—as it was—I once again listed the \$42,400 in cash on my June 6, 2010
14 financial statement.

15 13. Throughout the tumultuous time period during the pendency of the underlying
16 case, I received financial support from family and friends on numerous occasions.

17 14. While many of these cash infusions were outright gifts, others were informal
18 “loans” from friends that would likely have to be repaid at some point, albeit on an informal
19 schedule.

1 15. In any event, I never understood that I was required to list post-TRO gifts or
2 informal loans as assets on my financial statements as these monies were used to enable my
3 family to survive in the interim.

4 16. I also received more formal loans from PDR Billing that I disclosed on my 2010
5 financial statement.

6 17. Regarding the difference between the \$197,700 PDR Billing promissory note in
7 my name and the \$292,628.83 disbursed by PDR Billing during this timeframe, it is explained by
8 the fact that PDR Billing transferred money for legal fees to both me and my co-defendant
9 McLain Miller in order for us to fund our defense in the underlying case. At some point prior to
10 signing the promissory note, the portion of those fees advanced by PDR Billing for legal fees
11 which were reserved for McLain Miller's defense were deducted from my loan amount. For this
12 reason, the final amount owing on my promissory note is significantly less than the total amount
13 disbursed by PDR Billing throughout this time period.

14 18. In reality, much of this money came in and was spent quickly thereafter on my
15 family's expenses. The rest of the money was deposited in banks over time.

16 19. I believe that some of the \$61,519 in deposits discussed in the FTC's Motion was
17 part of the \$42,400 cash I had on hand when the TRO was entered and which I disclosed in my
18 financial statements and subsequently paid to the FTC as part of the \$78,000 payment I made in
19 conjunction with the Stipulated Consent Judgment. The balance likely came from family and
20 friends to support my family during that difficult time.

1 20. Without having the benefit of extensive bank documentation and since this
2 occurred approximately five years ago, however, I cannot remember the source and other details
3 regarding each transaction and which deposits were disclosed—as part of the reported \$42,400 in
4 cash—and which were gifts and therefore not disclosed.

5 21. I also reported earning \$44,300 from Augusta Capital between January 1 and June
6 6, 2010. In an abundance of caution, I reported this number on my 2010 financial statement—
7 signed halfway through the year in June—based on my projected income that year. I eventually
8 earned around \$95,000 from Augusta Capital that year.

9 22. In 2010, I recall receiving around \$140,000 or so from Augusta Capital. Again,
10 without having access to relevant documents and bank records, I am not sure of the exact
11 amount. Approximately \$95,000 of the \$140,000 accounts for salary I received for my work at
12 Augusta Capital that year. The balance of the Augusta Capital money was a loan in order for me
13 to resolve the underlying case and to pay \$78,000 to the FTC as part of the Stipulated Judgment
14 Order. Despite the FTC’s assertions to the contrary, I have never been either a principal or
15 officer of Augusta Capital and have likewise never had any ownership in the company.

16 23. I also did very little work with Link Media. McLain Miller ended up working
17 much more extensively with Link Media than I did. Further, I have never been a principal or
18 officer in Link Media and had no ownership in the company.

19 24. I did not disclose certain items of furniture and other miscellaneous items of
20 personal property on my 2010 financial statement for a number of reasons. For one thing, I did
21 not consider this property to be an asset requiring disclosure because it was purchased with loan
22
23
24

1 proceeds. Further, during this time I understood that personal property was exempt from the
2 TRO. Such an exemption was consistent with the receiver's actions after the TRO was entered
3 when the receiver allowed me to remove personal music equipment and instruments from
4 Infusion Media's offices and indicated that the personal property was exempt from the seizure
5 order.

6 25. Regarding the Sandy, UT home, my wife solely owned that home. Early on in the
7 process, the FTC communicated to me that it was not interested in the Sandy, UT home,
8 regardless of its value. I believe this was the case because even if the Sandy, UT home was to be
9 sold, there was not likely to be any net recovery for the FTC after considering the cost of selling
10 the home, the home's increasing mortgage balance due to my inability to make the payments,
11 and the decreasing value of the home due to the poor real estate market at that time. Moreover, I
12 do not recall ever having knowledge of a potential homestead exemption or attempting to utilize
13 its provisions.

14 26. My family and I moved to the Draper, UT home because we were receiving
15 threatening phone calls in the wake of the FTC lawsuit. I did not disclose the Draper, UT home
16 as my residence on my 2010 financial disclosure because our plan was to eventually move back
17 into the Sandy, UT property, but that home ended up in foreclosure. Regardless, the FTC has
18 been in contact with me throughout the entire period, despite my living in Draper. I picked up
19 the mail at the Sandy, UT home nearly every day, and spent time at that home during the period.

20 27. After the underlying case concluded, I was aware that the FTC conducted a
21 number of depositions, including deposing me, but the FTC never provided me with any clear
22
23
24

1 indication of its suspicions or that it was planning to file the instant Motion. The FTC never
2 advised me that I was a target of its “enforcement investigation” or provided me with the
3 specifics of the investigation.

4 28. Aside from participating in depositions—by being present—and reviewing the
5 accompanying transcripts, the only discovery I have seen to date is that which the FTC has
6 chosen to include as exhibits to its Motion.

7 29. I was taken by surprise by the Motion, and until March 25, 2014, was unaware of
8 the exact allegations against me.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

VERIFICATION

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

Jonathan D. Eborn verifies under criminal penalty of the State of Utah that the foregoing declaration is true and correct.

DATED this 18th day of April, 2014.

/s/ Jonathan D. Eborn
Jonathan D. Eborn

1279816v1

EXHIBIT 2

EXHIBIT 2

1 Evan L. James, Esq. (NSB No. 7760)
CHRISTENSEN JAMES & MARTIN
2 7440 W. Sahara Avenue
Las Vegas, Nevada 89117
3 Telephone: (702) 255-1718
E-mail: elj@cjmlv.com
4

5 Brett L. Tolman, Esq. (USB No. 8821) *Admitted Pro Hac Vice (Pending)*
Eric G. Benson, Esq. (USB No. 10414) *Admitted Pro Hac Vice (Pending)*
RAY QUINNEY & NEBEKER P.C.
6 36 South State Street, #1400
Salt Lake City, Utah 84111
7 Telephone: (801) 532-1500
Fax: (801) 532-7543
8 E-mail: btolman@rqn.com
ebenson@rqn.com
9

Attorneys for Defendant Jonathan Eborn

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

INFUSION MEDIA, INC., *et al.*,

Defendants.

Case No. 2:09-cv-01112-GMN-VCF

**DECLARATION OF
McLAIN MILLER**

McLain Miller, being first duly sworn, deposes and states under penalty of perjury as follows:

1. I was one of the owners of Infusion Media, Inc.

VERIFICATION

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

McLain Miller verifies under criminal penalty of the State of Utah that the foregoing
declaration is true and correct.

DATED this 18th day of April, 2014.

/s/ McLain Miller
McLain Miller

1280004v1