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HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

1st TECHNOLOGY LLC, a Nevada limited liability company,

Plaintiff,

vs.

BODOG ENTERTAINMENT GROUP S.A., a foreign entity; BODOG IP HOLDINGS LTD., a foreign entity; and GK WORLDLINK TELECOM S.A., a foreign entity,

Defendants.

CASE NO: **CV 08-00872 JCC**

1ST TECHNOLOGY LLC'S MOTION FOR A PRELIMINARY INJUNCTION

NOTED FOR HEARING:
JULY 25, 2008

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This is an action seeking to unwind fraudulent transfers and to direct proper ownership of trademarks owned (and purportedly assigned) by the judgment debtor in a patent infringement lawsuit. Judgment creditor 1st Technology LLC ("***1st Technology***") seeks an injunction preventing Bodog Entertainment Group S.A. ("***BEGSA***"), Bodog IP Holdings Ltd ("***Bodog IP***"), and GK World Link Telecom S.A. ("***GK World***") from: (1) transferring, assigning, or otherwise disposing of the trademarks, "BODOG," "BODOG BATTLE OF THE BANDS," "BODOG GIRLS," and "PLAY HARD" (the "***Marks***"); and (2) utilizing or allowing the use of the Marks in connection with offering illegal gambling services to residents of the State of Washington, pending resolution of this lawsuit.

1st Technology obtained a default judgment – in a patent infringement suit in federal court (in Nevada) against BEGSA, Bodog.net and Bodog.com (the "***Nevada Bodog Defendants***") – in excess of $50 million (including pre and post-judgment interest). The Nevada District Court's judgment (the "***Nevada Judgment***") is still outstanding, despite the fact that the judgment was entered over a year ago and the court refused to set aside the judgment. Two months after entry of the Nevada Judgment, 1st Technology domesticated the Nevada Judgment in Washington and obtained a writ of execution in King County Superior Court over approximately 2000 domain names registered in Washington by BEGSA or its affiliates.

In response to the King County Superior Court's Order Granting 1st Technology's Request for a Writ of Execution, BEGSA registered a second set of domain names that encompassed the "Bodog" name, and diverted traffic to the new domain names, thereby reducing the value of the initial set of domain names. This frustrated 1st Technology's

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ability to collect on the judgment through levying on the first set of domain names. When 1st Technology requested a second writ of execution from the King County Superior Court, BEGSA did this again, this time registering a third set of domain names through an off-shore registrar. BEGSA also requested that the Nevada District Court set aside the Nevada Judgment. The Nevada District Court refused to set aside the Nevada Judgment, citing to, among other things, the corporate "shell games" engaged in by the Nevada Defendants. A*fter* entry of the Nevada Judgment, *after* 1st Technology initiated its collection action in Washington, and *after* the Nevada court refused to set aside the Nevada Judgment, BEGSA purported to transfer ownership of the Marks (for *de minimis* value – ten dollars) to GK World, a related entity with overlapping officers and which has the identical street address. GK World then purported to transfer the Marks to Bodog IP; oddly, this transfer was purportedly effected prior to the transfer from BEGSA to GK World, calling into doubt which of GK World and Bodog IP actually claims legal title.

The Court should issue an injunction prohibiting further transfer of the Marks, and prohibiting their use in connection with illegal gambling services, pending resolution of 1st Technology's fraudulent transfer claims. There is ample evidence that Defendants engaged in a pattern or practice of shifting assets, and tried to evade jurisdiction. Defendants have thumbed their nose at the authority of the United States courts.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. 1ST TECHNOLOGY ASSERTS PATENT INFRINGEMENT CLAIMS IN FEDERAL COURT IN NEVADA AND OBTAINS A JUDGMENT AGAINST BEGSA

On September 7, 2006 1st Technology filed a patent infringement lawsuit in federal court (in Nevada) (denominated *1st Technology LLC v. Rational Enterprises LTD et al.*, Case

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No. 2:06-cv-1110-RLH-GWF (the "***Nevada Lawsuit***")) against the Nevada Bodog Defendants. Although the Nevada Bodog Defendants were personally served in Costa Rica in accordance with Costa Rican law, the Nevada Bodog Defendants failed to appear. As a result, the Nevada Court entered a default on February 26, 2007, and on June 13, 2007 entered a default judgment in excess of $46 million. (*See* **Ex. A** to the Declaration of Venkat Balasubramani.)

On August 31, 2007, two months after entry of the Nevada Judgment, the Nevada Bodog Defendants filed a motion to set aside the judgment. The Nevada District Court Judge (Chief Judge Roger L. Hunt (Judge, D. Nev.)) refused to set aside the default judgment because, among other things, the court did not want "to permit some sort of corporation shell game" by the Nevada Bodog Defendants. (*See* Balasubramani Decl., **Ex. B**, *line 7, page 25* (transcript of hearing in front of Judge Hunt).) In urging Judge Hunt to set aside the Nevada Judgment, counsel for the Nevada Bodog Defendants averred that as of September 2006, BEGSA "became an unregistered taxpayer" and "ha[d] not operated since then." (*See* Id., *lines 19-20, page 5*.) Thus, according to the Nevada Bodog Defendants' counsel, BEGSA ceased to exist approximately one year prior to the date of the Motion to Set Aside the Default.

B. 1ST TECHNOLOGY'S EFFORTS TO COLLECT ON THE NEVADA JUDGMENT

Two months after entry of the Nevada Judgment, 1st Technology domesticated the judgment in Washington and sought a writ of execution from the King County Superior Court over the Nevada Bodog Defendants' property in Washington. Specifically, BEGSA had an ownership interest in approximately 2000 internet domain names registered through eNom, Inc. ("***eNom***"), a registrar located in the State of Washington (the "***eNom Domain***

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Names"). On August 21, 2007, the King County Superior Court granted 1st Technology's motion for writ of execution and ordered eNom to transfer control of all the eNom Domain Names to 1st Technology, and in addition, the court enjoined the Nevada Bodog Defendants, including BEGSA, from using in any way the eNom Domain Names. (*See* Balasubramani Decl., **Ex. C**.)

In response to the entry of the writ of execution, BEGSA registered additional domain names, such as "newbodog.com," with the Washington-based registrars DSTR Acquisition PA I, LLC and DOTREGISTER, LLC ("***Dotster***"). (*See* Declaration of Scott Lewis, **Ex. A**.) BEGSA diverted its customers (who would utilize BEGSA's services through websites accessible via the eNom Domain Names, such as "bodog.com") to websites accessible through the second set of domain names (the "***Dotster Domain Names***"). (Id. **Ex. B**; **¶¶ 3-5**.) These websites appeared identical to the websites accessible via the eNom Domain Names, incorporated the "Bodog" name, and featured and utilized identical Bodog branding. (Lewis Decl., **Ex. C**; **¶ 3**.) BEGSA initially argued that these second set of domain names were beyond the jurisdiction of Washington courts, but later reversed its position when it realized this contention was untenable. (Balasubramani Decl., **Ex. D**, *p 1, line 28-p 2, line 1* (arguing that the Dotster Domain Names are not located in Washington).)

C. 1ST TECHNOLOGY'S EFFORTS TO LEVY AGAINST THE SECOND SET OF DOMAIN NAMES, AND BEGSA'S EFFORTS TO THWART 1ST TECHNOLOGY'S COLLECTIONS EFFORTS

As a result of BEGSA's actions, 1st Technology sought a second writ of execution against the second set of domain names (*i.e.*, the Dotster Domain Names). 1st Technology also sought an order prohibiting BEGSA from "diverting" traffic from the websites accessible via the Dotster Domain Names to other websites created or operated by BEGSA

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or by third parties with which BEGSA had a relationship. In the meantime, BEGSA moved to set aside the Nevada Judgment, and sought a stay of 1st Technology's collections efforts in Washington. While 1st Technology's request for a second writ of execution (with respect to the Dotster Domain Names) was pending in front of Judge Erlick, BEGSA registered a third set of domain names, including "bodoglife.com". (*See* Lewis Decl., **Ex D**; **¶ 6**.) These domain names were registered (unlike the first two sets of domain names) through a foreign-registrar. BEGSA – or its affiliated entities – transitioned traffic from the "newbodog" sites to the "bodoglife" sites by posting notices on the "newbodog" sites to the effect that "Bodog's permanent home will be at 'bodoglife.com'". (Id.)

Following the denial of the Motion to Set Aside filed by the Nevada Bodog Defendants, Judge Erlick allowed 1st Technology's collections efforts to proceed. (Balasubramani Decl., **Ex. E**.) BEGSA, however, requested Judge Erlick to reconsider his prior ruling that domain names were subject to execution under Washington law, and further requested all of the domain names to be transferred to the sheriff for liquidation. (Balasubramani Decl., **Ex. F**.) BEGSA further argued that levying against the domain names would violate BEGSA's rights in the Marks. (Id.) In February 2008, 1st Technology requested Judge Erlick to appoint a receiver to enforce the Nevada Judgment against the Nevada Bodog Defendants' Washington property. (*See* Balasubramani Decl., **Ex. H**.)

D. JUDGE ERLICK REJECTS BEGSA'S REQUEST TO RECONSIDER AND GRANTS 1ST TECHNOLOGY'S REQUEST TO APPOINT A RECEIVER

Judge Erlick rejected BEGSA's request to reconsider his prior orders, and found that domain names are subject to execution under Washington law. Judge Erlick further appointed Mark Northrup of Graham & Dunn as a receiver over the domain names (the

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eNom Domain Names and the Dotster Domain Names). (*See* Balasubramani Decl. **Ex. G** (Judge Erlick's Orders Denying BEGSA's Motion to Reconsider and Granting 1st Technology's Request to Appoint a Receiver).) Finally, Judge Erlick expressed his belief that the Washington State court lacked subject matter jurisdiction or the authority to appoint a receiver over the Marks. (*See* Balasubramani Decl., **Ex. H** (transcript of March 3, 2008 hearing *lines 9-12, page 54* ("I don't know . . . the degree to which state courts have jurisdiction to transfer federal trademarks.")).)

E. DEFENDANTS PURPORT TO TRANSFER THE MARKS IN A FURTHER EFFORT TO FRUSTRATE 1ST TECHNOLOGY'S COLLECTIONS EFFORTS

BEGSA argued before Judge Erlick that the "BODOG" domain names would be worthless to the receiver without "BODOG" trademark rights and on this basis should not be subject to a writ of execution. (*See, e.g.*, Balasubramani Decl., **Ex. F**, *pp. 9-10*.) At the same time, BEGSA took extraordinary steps to try to shift those rights out of the judgment debtor's estate. In the course of investigating what other assets BEGSA had in the State of Washington, and what actions BEGSA may have taken to frustrate 1st Technology's collections efforts, 1st Technology discovered that BEGSA purported to transfer its interest in the Marks to GK World. The following sections detail BEGSA's game of "keep-away."

1. BEGSA purports to assign its interest in the Marks to GK World.

According to documents filed by BEGSA's trademark counsel with the Patent and Trademark Office, ("***PTO***") BEGSA purported to assign its interest in the Marks to GK World on December 28, 2007 (after the Nevada Judgment was entered and after 1st Technology initiated the Washington enforcement action). (*See* Balasubramani Decl., **Ex. I**.) The assignment for the Marks (which was filed with the PTO on January 15, 2008 and which

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listed the Seattle office of Seed IP Law Group ("***Seed***") as BEGSA's and GK World's "Domestic Representative") contains a purported effective date of "September 29, 2006." This date is over one year before the assignment was executed by BEGSA and GK World. In addition, GK World paid a mere ten dollars ($10) for the assignment of four trademarks. Id. The assignment is characterized as a "nunc pro tunc" assignment. At the time of the purported assignment of the Marks from BEGSA to GK World, the officers of BEGSA and GK World overlapped. (*See* Balasubramani Decl., **Ex. J**.) Further, according to BEGSA's website "bodoglife.com," "GK World Link Telecom S.A. is a 100% owned subsidiary of the Bodog.com Entertainment Group of Companies." (*See* Lewis Decl., **Ex. E**.)

2. GK World purports to assign its interest in the Marks to Bodog IP.

Approximately four months after BEGSA purportedly assigned the Marks to GK World, GK World purported to assign the Marks to Bodog IP. (*See* Balasubramani Decl., **Ex. K**.) The assignment from GK World to Bodog IP was filed with the USPTO on January 15, 2008 (the same day the assignment between BEGSA and GK World was filed with the USPTO) and contains a purported effective date of February 7, 2007. This assignment is also characterized as a "nunc pro tunc" assignment. This assignment also lists Seed as the domestic representative for both entities (GK World and Bodog IP). (*See* Balasubramani Decl., **Exs**. **I & K**.) In addition, Bodog IP also paid ten (10) dollars for the assignment of the four Marks. (Id.) While the effective date of the assignment is February 7, 2007, the assignment was not executed until December 24, 2007, four days *before* BEGSA executed its assignment of the Marks to GK World. Since a transferor cannot transfer what it does not have, this sequence of events suggests that title, if not in BEGSA, remains in GK World.

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F. 1ST TECHNOLOGY FILES THE INSTANT FRAUDULENT TRANSFER LAWSUIT

1st Technology initiated the instant action to set aside the assignment of the Marks as a fraudulent transfer of property because the assignment between BEGSA and GK World as well as the assignment between GK World and Bodog IP was executed after the entry of the Nevada Judgment and after 1st Technology initiated the action in King County Superior Court. In addition, the Defendants were necessarily aware of the Nevada Judgment and 1st Technology's efforts to collect on that judgment at the time the assignments were executed. Last, according to BEGSA's counsel, BEGSA was no longer a going concern at the time the assignment was executed between BEGSA and GK World. As a result, given the facts surrounding the assignment, BEGSA's intent in assigning the Marks to GK World could only have been for the purpose of defrauding 1st Technology and frustrating 1st Technology's collections efforts.

G. BEGSA HAS ENGAGED IN A PATTERN OF FLOUTING THE AUTHORITY OF US COURTS

After 1st Technology obtained a writ of execution against BEGSA's first set of domain names, BEGSA registered a second set of domain names that encompassed the "Bodog" name. In addition, BEGSA diverted web traffic from the first set of domain names to the newly registered second set of domain names. (*See* Lewis Decl., **Exs. A-D**; **¶¶ 3-6**.) BEGSA did this yet again, when 1st Technology sought to levy against the second set of domain names. (Id.) BEGSA's registration of the second and third set of domain names demonstrates its pattern of taking actions which frustrate 1st Technology's legitimate collections efforts. In addition, BEGSA has demonstrated a pattern of disregarding the jurisdiction and process of United States Courts.

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1st Technology sought limited discovery from the BEGSA and the other Nevada Bodog Defendants in the Nevada action. BEGSA and the other Nevada Bodog Defendants failed to respond to 1st Technology's proper discovery requests. 1st Technology brought a Motion to Compel seeking to compel responses to these requests. The Magistrate Judge (D. Nev.) who is presiding over discovery (Judge Foley) in the Nevada Lawsuit granted 1st Technology's Motion, finding that the Nevada Defendants (including BEGSA) had refused "to provide substantive responses to [1st Technology's] discovery requests." (*See* Balasubramani Decl., **Ex. L** (Order Granting 1st Technology's Motion to Compel).) Judge Foley also granted 1st Technology's request for attorney's fees. (Id.) BEGSA has yet to provide the requested documents. Rather, counsel for BEGSA sought to withdraw, alleging that BEGSA's controlling person (as-yet unnamed despite Judge Foley's direct request for BEGSA's counsel to provide the name) instructed counsel for BEGSA to not respond to the requests or provide any documents to 1st Technology. (Balasubramani Decl. **Ex. M**.)[1]

All of this is not surprising, given the views of Calvin Ayre, the founder and brainchild of the "Bodog" entities. In a post on his personal blog, Mr. Ayre, stated that his "advice to anyone getting [a subpoena from 1st Technology] is to just say you have never worked for [the Nevada Bodog Defendants]…and then *just throw the [subpoena] in the garbage*." (*See* Lewis Decl. **Ex. F.** (emphasis added).) A cursory look at Mr. Ayre's blog will reveal that he has nothing but contempt for the United States Courts, and believes that he

[1] BEGSA's allegations in this litigation have been rife with inconsistencies. Although, the Nevada Bodog Defendants' counsel stated that BEGSA is no longer a going concern (as of September 2006), it continued – at least – to have an interest in the Marks. On the other hand, BEGSA's purported trademark assignment is inconsistent with its assertion of infringement claims based on the Marks. (*See, e.g.*, Lewis Decl., **Exhibit G**) (cease and desist letter from BEGSA (in January 2007) copied to eNom demanding transfer of the "bodogs.net" name).)

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and his companies are beyond the reach of United States law. (Id.)[2]

III. ARGUMENT

A. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION TO PREVENT FURTHER TRANSFER, AND ANY UNLAWFUL USE OF THE MARKS

The purpose of a preliminary injunction "is to preserve the status quo and avoid irreparable injury before adjudication." Textile Unlimited, Inc. v. A. BMH and Co., 240 F.3d 781, 786 (9th Cir. 2001). In determining whether to issue a preliminary injunction, a court "balances the plaintiff's likelihood of success against the relative hardship to the parties." Rubin v. Pringle (In re Focus Media, Inc.), 387 F.3d 1077, 1085 (9th Cir. 2004) (internal citations omitted). In particular, preliminary injunction relief is warranted where a plaintiff shows: "(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiff[] if injunctive relief is not granted; (3) a balance of hardships favoring the plaintiff[]; and (4) advancement of the public interest." Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). Thus, plaintiff is "required to show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." Id. The two alternatives "represent two points on a sliding scale . . . " United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987).

//

[2] 1st Technology presents the evidence that it has obtained on its own (either through its own investigations or through subpoenas issued to third parties). This evidence is more than sufficient at the preliminary injunction stage, where the Court has flexibility to consider hearsay evidence. *See, e.g.*, Republic of Philippines v. Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988). Indeed, given BEGSA's failure to respond to 1st Technology's discovery requests, the Court should disregard any evidentiary objections raised by Defendants.

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1. 1st Technology has a strong likelihood of showing that the assignments were in violation of the Washington Fraudulent Transfer Act.

a. 1st Technology has a substantial chance of success in its claim that the assignments were made with the intent to hinder or defraud 1st Technology

Given the undisputed facts regarding BEGSA's purported assignment of the Marks to GK World (and further assignment to Bodog IP), 1st Technology has a substantial "chance of success" of showing that the assignment was a fraudulent transfer of property. *See* Rubin, 387 F.3d at 1086. A transfer is deemed fraudulent under the Washington Fraudulent Transfer Act ("***WFTA***") if the transfer was made by the debtor with the "intent to hinder, delay, or defraud any creditor of the debtor" whether the "creditor's claim arose before or after the transfer was made." RCW § 19.40.041(a)(1). In determining intent, the Court may consider, among other things, the following factors: (1) "the transfer or obligation was to an insider;" (2) "[b]efore the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;" and (3) "the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation incurred." RCW § 19.40.041(b).

Here, the assignment of the Marks by BEGSA to GK World was a fraudulent transfer because BEGSA's intent was to hinder, delay, or defraud 1st Technology's collection efforts.

1. The assignment from BEGSA to GK World was to an insider: At the time of the assignment, BEGSA and GK World had overlapping the officers and shared the same street address. (Balasubramani Decl., **Ex. J**.) Indeed, Bodog's own websites proudly state that GK World is a 100% subsidiary of BEGSA. (Lewis Decl., **Ex. E**.)

2. BEGSA had been sued before the transfer was made: At the time the assignment was executed, BEGSA had been sued by 1st Technology in the federal court (in

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Nevada) and 1st Technology had already initiated the Washington State Court action against BEGSA. In fact, the assignment of the Marks between BEGSA and GK World was executed *six months after the Nevada Judgment was entered and four months after the King County Superior Court entered its first writ of execution*. (*Compare* Balasubramani Decl., **Ex A** *with* **Exs. I & K**.)

3. The debtor was insolvent or became insolvent shortly after the transfer: On the date the assignment was executed BEGSA was insolvent. Specifically, the assignment was executed on December 28, 2007; over one year after BEGSA was no longer a going concern. Indeed, BEGSA sought to argue – in the words of BEGSA's own external accountant:

> Bodog Entertainment Group, S.A. effectively shut down operations in September 2006 and has been unregistered as an active tax payer in Costa Rica as a result of discontinuation of operations since September 2006 . . . . *As of September 2006 when Bodog Entertainment Group, S.A. effectively ceased operating, it did not have assets to satisfy a $46 Million judgment or $9.3 Million security*.

(Balasubramani Decl., **Ex. N** (declaration of Mario Jorge Chaves Salas – filed in the Nevada Lawsuit).) Further, the assignment of the Marks between BEGSA and GK World was executed four days after the assignment of the same Marks was executed between GK World and Bodog IP. Thus, it is not certain BEGSA had anything to assign to GK World.

b. 1st Technology has a substantial chance of success in satisfying the alternate basis of setting aside the transfer under the WFTA

Even if the Court ultimately determines that BEGSA did not have the requisite intent to hinder, delay or defraud 1st Technology's collection efforts, the assignment can be still be set aside as a fraudulent transfer under the WFTA. A transfer made by a debtor may also be deemed fraudulent as to a creditor whose claim arose before the transfer was made if: (1) the

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debtor made the transfer without receiving a reasonable equivalent value in exchange for the transfer and (2) the debtor was insolvent at the time of the transfer. RCW § 19.40.051.

BEGSA's assignment of the Marks to GK World was executed on December 28, 2007, six months after the Nevada Judgment was entered and four months after the King County Superior Court entered its first writ of execution. BEGSA did not receive a reasonable value in exchange for the assignment. Specifically, GK World paid a mere ten (10) dollars for the assignment. This is not a reasonable exchange given the fact that by any valuation, the Marks are valued in excess of this amount. (*See* Lewis Decl., **¶ 12**.) For instance, BODOG advertisements appear every day on television. And bodoglife.com still operates. (Id.) Last, as argued by BEGSA itself, BEGSA was insolvent at the time it executed the assignment of the Marks with GK World. (*See* Balasubramani Decl. **Ex. N**.) Since the assignment between BEGSA and GK World was executed after 1st Technology had obtained a judgment against BEGSA, BEGSA did not receive a reasonable exchange for the assignment and BEGSA was insolvent on the date the assignment was executed, the assignment of the Marks between BEGSA and GK World should be characterized as a fraudulent conveyance. Thus, 1st Technology has a "fair chance of success" on the merits.

2. 1st Technology has a strong likelihood of showing that the Marks are being used in conjunction with the offer of illegal services.

In addition to seeking an injunction preventing further transfer of the Marks, 1st Technology seeks an injunction prohibiting use of the Marks in connection with illegal activity. Courts have found that the association of a mark with illegal or questionably illegal enterprises or activities constitutes dilution by tarnishment. Ringling Brothers-Barnum & Bailey Combined Shows, Inc. v. B.E. Windows Corp., 937 F. Supp. 204, 209 (S.D.N.Y.

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1996). Tarnishment can be established by connection of the mark with "shoddy good and services, or an association with obscenity, unwholesome wares, or sexual or illegal activity." Polo Ralph Lauren L.P. v. Schuman, 1998 U.S. Dist. LEXIS 5907, 1998 WL 110059, *5 (S.D.Tex. Feb. 8, 1998); Coca Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972).

Online gambling is illegal under United States (federal) law, as well as under Washington law. 31 U.S.C. §5361 prohibits the acceptance of any financial instrument (including credit cards or electronic funds transfers). *See* 31 U.S.C. §5361. Similarly, Washington recently enacted an internet gambling ban, making it a felony to facilitate internet gambling. The changes expressly address gambling on the internet, operating an internet gambling site, installing or maintaining equipment for transmitting or receiving gambling information, or facilitating internet gambling in any way. *See generally* RCW 9.46.240. There is no dispute that the services marketed under the Marks – *i.e.*, internet sites like bodoglife.com where end users can gamble with money – are available in the State of Washington to its residents. The current use of the Marks extends to illegal goods and services and will reduce the value of the Marks. (*See* Lewis Decl., **¶11**.) An injunction preventing further illegal use of the Marks is warranted in order to preserve the value in the Marks (for the benefit of 1st Technology, as judgment creditor).

3. 1st Technology will suffer irreparable harm if the injunctive relief is not granted.

A party's past behavior as well as the party's prior contempt is sufficient basis for a court to determine that the moving party will suffer irreparable injury if an injunction is not granted. Conn. Gen. Life Ins. Co.. v. New Images of Beverly Hills, 321 F.3d 878, 881 (9th

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Cir. 2003) (irreparable harm was found where defendant had a history of fraudulent transfers and refused to disclose asset information in defiance of a court order). Given the fact BEGSA's and the other Defendants' misconduct in executing the assignment of the Marks after the Nevada Judgment was entered and BEGSA's failure to provide any substantive response to discovery requests about its assets in the Nevada action (despite a court order compelling it to do so), it is highly likely that BEGSA or the other Defendants will transfer the Marks to another offshore entity. Indeed, BEGSA's actions demonstrate an intent to successively shift its operations off-shore and to engage in corporate "shell games". As judgment debtor, 1st Technology will suffer irreparable harm if the Marks are further transferred. (1st Technology's collections efforts will be further stymied by the fact that the defendants in the Nevada Lawsuit have refused to provide any discovery requests.)

4. Defendants will not suffer any prejudice as a result of complying with the injunction.

In considering irreparable harm, courts only consider damages potentially arising from actions which the enjoined party is entitled to take. For example, courts reject attempts by a party resisting injunctive relief to resist on the basis that the party will be harmed from being enjoined from engaging in infringements. Triad Sys. Corp v. Southeastern Exp. Co., 64 F.3d 1330, 1338 (9th Cir. 1995) (defendant "cannot complaint of the harm that will befall it when properly forced to desist from its infringing activities"). Similarly, in this case, BEGSA and the other Defendants will not suffer any hardships if the Court enjoins them from transferring or otherwise disposing of the Marks pending resolution of this lawsuit or from using the Marks in connection with the offering of illegal online gambling in the United States and in the State of Washington. Indeed, Defendants cannot argue that they intend to

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further transfer the Marks – without admitting to the Court that they are engaged in further transfers to frustrate 1st Technology's collections efforts. Similarly, Defendants cannot argue that they will be irreparably harmed by being prevented from using the Marks in connection with online gambling in the United States and in the State of Washington. As such, Defendants cannot possibly articulate any prejudice that they will face as a result of complying with the sought after injunction.

5. A court may issue a preliminary injunction to preserve assets in cases of equity even if a party may not yet have a legal claim to the assets.

In Grupo Mexicano v. Alliance Bond, the Supreme Court held that "preliminary injunctions may not issue to preserve assets to which a party did not yet have a legal claim." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-33 (1999). However, the Court explicitly excepted from this rule cases involving fraudulent conveyances and cases in which equitable relief is sought. Rubin, 387 F.3d at 1085-85 (citing Grupo Mexicano, 527 U.S. at 324-25); United States v. Oncology Assocs., P.C., 198 F.3d 489, 496 (4th Cir. 1999) (upholding the issuance of a preliminary injunction freezing assets where equitable relief was sought); CSC Holdings, Inc. v. Redisi, 309 F.3d 988, 996 (7th Cir. 2002) (upholding the issuance of a preliminary injunction where equitable relief was sought). In particular, the "nexus between the assets sought to be frozen through [a preliminary injunction] and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets." Oncology Assocs., 198 F.3d at 496-97.

Here, 1st Technology seeks to have the assignment between BEGSA and GK World as well as the assignment between GK World and Bodog IP set aside as fraudulent

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conveyances. In addition, the ultimate relief sought by 1st Technology is, among others things, an injunction "against further disposition by the Defendants or any one of them of the Marks transferred." As a result, in the instant case, the Court is not precluded from issuing a preliminary injunction prohibiting Defendants from further transferring pending resolution of the lawsuit simply because 1st Technology may not yet have a legal claim to the Marks.

B. THE COURT HAS AUTHORITY TO ORDER THE REGISTER CORRECTED TO RECTIFY A FRAUDULENT TRANSFER

Defendants will likely raise the issue of whether the Court has the authority to order the Director of the Patent and Trademark Office to correct the register with respect to the Marks or whether the Marks may be properly liquidated to satisfy the Nevada Judgment. Both of these arguments lack any support in the law.

1. The Court is expressly authorized to correct the register with respect to the Marks.

15 U.S.C. § 1119 provides that "the court" may "rectify the register with respect to the registrations of any party to the action". 15 U.S.C. § 1119. One federal court – in nearly identical factual circumstances – found it had authority to order the director of the Patent and Trademark Office to correct the register in order to rectify a fraudulent transfer:

> Panda has shown that the transfer of Alpha's intellectual property was fraudulent as to Panda, a secured party. Therefore, Panda has shown its entitlement to avoidance and rescission of the fraudulent transfer. See 15 U.S.C. § 1119 ("In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action."). . . . The court shall order that the Director of the Patent and Trademark Office "make appropriate entry upon the records of the Patent and Trademark Office" to reflect the rescission and re-store the marks on Court Exhibit 1 to Alpha. 15 U.S.C. § 1119.

Panda Invs., Inc. v. Jabez Enters., 2007 U.S. Dist. LEXIS 93542 (No. 07-CV-114-LRR) (D.

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Kan., Dec. 20, 2007).

2. The Marks may be liquidated pursuant to court order to satisfy the judgment.

BEGSA may additionally argue that the Marks cannot be used to satisfy the judgment issued against BEGSA in favor of 1st Technology. This argument has no support in the law.

Early cases expressed skepticism that trademarks may be subject to forded (judicial) sales. *See, e.g.*, Marshak v. Green, 746 F.2d 927, 223 U.S.P.Q. 1099 (2d Cir. 1984) (precluding judgment creditor from effecting a forced sale of the judgment debtor's trademark rights based on the theory that the public would be deceived by a different musical group using the same name). Later cases take a more realistic view and have squarely rejected this notion. Adams Apple Distributing Co. v. Papeleras Reunidas, S.A., 773 F.2d 925, 931 (7th Cir. 1985). Indeed, Adams Apple states that "[the] assertion that a trademark is not subject to an involuntary judicial sale is incorrect." Id. Any other view would allow a judgment debtor to attempt to – as BEGSA did here – transfer its marks in order to frustrate judgment creditors. That was precisely the case in one federal court lawsuit – involving strikingly similar facts – where the court imposed a lien on the marks and admonished counsel:

> Based on the facts of this case and the discussion above, the Court concludes that imposition of an equitable lien, combined with an injunction, are required for plaintiff to secure his judgment. The Court is deeply concerned that defendants and their associates, through the creation of new entities, use of default judgments, and other transactions, are attempting to commit fraud upon this Court and upon the plaintiff by seeking to protect their assets while denying plaintiff his rightful judgment. Defendants may continue to advocate their positions through the appeals process, but they may not ignore this Court's judgment, and they certainly may not evade it. Counsel who assist defendants in evading the Court's judgment are warned that they will face sanctions imposed by this Court.

Cieslukowski v. Norton Motors Int'l, Inc., 2002 U.S. Dist. LEXIS 17229 (D. Minn. 2002).

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The cases make clear that: (1) the Court is authorized to order the register corrected with respect to the Marks and (2) there is no legal bar to liquidating the Marks in order to satisfy the Nevada Judgment.

C. THE COURT HAS JURISDICTION OVER DEFENDANTS, OR IN THE ALTERNATIVE, OVER THE MARKS

BEGSA has raised the issue of personal jurisdiction both in the Nevada Lawsuit and in front of Judge Erlick (both courts rejected BEGSA's arguments). 1st Technology anticipates that BEGSA will raise the same objection here. Accordingly, 1st Technology addresses BEGSA's anticipated jurisdictional arguments. As set forth below, the Court clearly has personal jurisdiction over BEGSA who took numerous acts within this judicial district, including the transactions in question. Similarly, the Court has jurisdiction over the remaining Defendants because the actions which they took underlying 1st Technology's claims were deemed to be taken within this judicial district.

Washington's long arm statute sets forth various bases for jurisdiction over foreign defendants. *See* RCW § 4.28.185(1)(c) (2008). Washington's long-arm statute "reaches the full extent of the due process clause of the United States Constitution." Easter v. Am. West Fin., 381 F.3d 948, 960 (9th Cir. 2004).

1. The Court has general jurisdiction over BEGSA.

A court has general jurisdiction over a defendant where the defendant's contacts with the forum state are "substantial" or "systematic and continuous." Id. In determining whether a defendant is subject to general jurisdiction, a court "considers all the activities that impact the state." Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F.2d 1474, 1478 (9th Cir. 1986).

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BEGSA's activities which took place in Washington or which were aimed at or which affected the State of Washington are numerous, and include:

- Registering approximately 2000 domain names through a Washington-based registrar (eNom), corresponding with eNom, and paying money to eNom (Lewis Decl., **Ex. G**; **¶ 9**);
- Registering domain names through Washington-based registrars, DSTR Acquisition PA I, LLC and DOTREGISTER, LLC (Balasubramani Decl., **Ex. P**);
- Engaged in extensive promotion and business activities through its music label subsidiary, including signing a Seattle-based band, engaging in advertising, participating and promoting its "Bodog Battle of the Bands," and hosting physical shows in Seattle (Lewis Decl., **Ex. H**; **¶ 10**);
- Engaging Seed IP to prosecute the Marks, paying fees and communicating to Seed IP, all in the Seattle offices of Seed IP (Balasubramani Decl., **Ex. O**); and
- Making available various "Bodog"-branded online gambling sites to residents of the State of Washington (Lewis Decl., **¶ 11**).

There cannot be any serious dispute that the foregoing actions are not a sufficient jurisdictional nexus.

2. The Court has specific jurisdiction over remaining Defendants.

1st Technology contends that the relationship between the remaining Defendants and BEGSA is sufficiently intertwined (*see, e.g.*, Balasubramani Decl., **Ex. J**) that BEGSA's actions may be imputed to the remaining Defendants and subject the remaining Defendants to jurisdiction in the State of Washington. In the alternative, the remaining Defendants are subject to specific jurisdiction here.

Specific jurisdiction is appropriate where the cause of action arises from actions which the non-resident defendant took in the forum state. The Ninth Circuit employs a three-part test to determine specific jurisdiction. First, the foreign defendant must have taken steps

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to "purposefully avail" itself of the privilege of conducting activities in the forum state. Quokka Sports, Inc. v. Cup Int'l Ltd., 99 F. Supp. 2d 1105, 1111 (N.D. Cal. 1999). Second, "the claim must arise out of or result from defendant's forum-related activities." Id. at 1113. Last, the assertion of jurisdiction by the Court must be reasonable. Id. at 1113.

Here, there is no dispute that the remaining Defendants undertook the acts which are the subject of 1st Technology's claims in the State of Washington. Throughout the life cycle of the Marks, including during the time period when the marks were (purportedly) successively assigned, Seed has remained the "domestic representative" with respect to the Marks. (Balasubramani Decl., **Exs. I, K, O**.) Indeed, Seed was the domestic representative during the time of the assignment. Defendants necessarily maintained an agreement of some sort with Seed so Seed could serve as Defendants' domestic representative. 1st Technology's claims arise out of the transfers of the Marks, and related directly to Defendants' activities, which have a Washington-nexus. Finally, the assertion of jurisdiction over the remaining Defendants would not be unreasonable. Those Defendants selected Seed to serve as their domestic representative with respect to the Mark. As such, it would be reasonable for those Defendants to expect to deal with legal issues around the Mark where Seed is located (*i.e.*, in Washington). Thus, specific jurisdiction over Defendants is proper.

3. The Court has jurisdiction over the Marks.

Even if for some reason the Court concludes that it lacks jurisdiction over one or more of the Defendants, the Court has *in rem* jurisdiction over the Marks. Federal trademark rights, like patent rights and other federally created intellectual property rights, have a "legal situs…anywhere [they are] called into play." Beverly Hills Fan v. Royal Sovereign Corp., 21 F.3d 1558, 1564 (Fed. Cir. 1994). The Marks have been utilized extensively in this

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jurisdiction, and are "called into play" here. *In rem* jurisdiction is proper on this basis. *In rem* jurisdiction is also proper because the "domestic representative" with respect to the Marks is located in the State of Washington. *See* Keith M. Stolte, Avoiding Hague Convention Headaches -- An analysis of Lanham Act Section 1(e) Service of Process on Foreign Nationals, 92 Trademark Rep. 1417, 1424-25 (2002) (noting "implication that [section 1051(e)] may also provide a valid basis to confer personal jurisdiction . . .") Id. at n.35.[3]

D. THE BOND SHOULD BE SET AT ZERO GIVEN THAT DEFENDANTS WILL NOT SUFFER ANY DAMAGES FROM COMPLYING WITH THE INJUNCTION

Rule 65(c) requires the Court to set bond prior to issuing preliminary relief. FED R. CIV. P. 65(c). Trial courts are accorded wide discretion in setting a bond. Walczak v. EPL Prolong, Inc., 198 F.3d 725, 733 (9th Cir. 1999). The bond may be set at zero where there is no evidence that a party will suffer damages from the issuance of an injunction. *See* Gorbach v. Reno, 219 F.3d 1087, 1092 (9th Cir. 2000). A party requesting bond must submit evidence regarding likely damages. Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882 (9th Cir. 2003) (refusing to address a bond-related question on appeal where the district court was not presented with the bond issue).

Here, the injunction seeks to prevent Defendants from further transferring or otherwise disposing of the Marks pending resolution of this lawsuit. The injunction also seeks to prevent Defendants from using the Marks in conjunction with online gambling

[3] 1st Technology is not arguing in this motion that it is entitled to effect service via the domestic representative. *See, e.g.*, E & J Gallo Winery v. Cantine Rallo, 430 F. Supp. 2d 1064, 1070 (E.D. Ca. 2005) (declining to find service proper on domestic representative). 1st Technology will address service (and seek leave to serve via alternate means) in a separate motion.

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services to Washington and U.S. residents. Defendants will not suffer any *legitimate* damages as a result of being prevented from taking these acts, since they are not entitled to take these acts anyway. Thus, 1st Technology requests that the Court set the bond at zero.

E. DEFENDANTS (INCLUDING BEGSA) HAVE BEEN PROVIDED ADEQUATE NOTICE OF 1ST TECHNOLOGY'S REQUEST FOR INJUNCTIVE RELIEF

Preliminary injunctions must be noticed to the non-moving party (who must be given a reasonable opportunity to respond). Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003) citing 3 Fed. R. Civ. P. 65(a)(1) ("No preliminary injunction shall be issued without notice to the adverse party."); Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 434 n.7 (1974). Rule 65 does not define "notice." Rather, "the sufficiency of notice 'is a matter left within the discretion of the trial court.'" Four Seasons, 320 F.3d at 1210 (internal quotation marks and citations omitted). However, the Supreme Court has stated that the notice requirement "implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." Granny Goose Foods, 415 U.S. at 434 n.7.

1st Technology has provided notice of the preliminary junction motion to BEGSA and the other Defendants by delivering the motion papers to: (1) counsel for BEGSA in the King County Superior Court proceedings, Newman Dichter; (2) counsel for the Nevada Defendants, Foley & Lardner LLP; (3) Domestic Representative for the Marks, Seed IP Law Group; and (4) Canadian counsel listed for the Marks. 1st Technology has also delivered a copy of the motion papers to BEGSA and the other Defendants at the addresses listed on the assignment documents. The foregoing constitutes sufficient notice and an opportunity to respond under Rule 65 and the cases interpreting it.

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IV. CONCLUSION

1st Technology presents compelling evidence that Defendants have attempted to transfer the Marks in order to frustrate 1st Technology's collections efforts, and that the Marks are being used in connection with the sale of services which are illegal under Washington and United States law. A receiver should be appointed in order to manage and liquidate the Marks (along with the domain names). In the interim, the Court should grant an injunction preventing further transfer of the Marks and enjoining their use in connection with illegal goods or services.

Respectfully submitted, and dated this 2nd day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered the foregoing (**(1) Motion for a Preliminary Injunction, (2) Declaration of Dr. Scott Lewis, (3) Declaration of Venkat Balasubramani, and (4) Proposed Order**), to Defendants as set forth below:

1. via hand delivery to Newman Dichter (counsel for BEGSA):

NEWMAN DICHTER LLP (Derek A. Newman)
505 Fifth Avenue South, Suite 610
Seattle, Washington 98104

2. via hand delivery to Foley & Lardner LLP (counsel for BEGSA):

Victor de Gyarfas (Victor de Gyarfas)
Foley & Lardner LLP
555 South Flower Street, Suite 3500
Los Angeles, CA 90071

3. via hand delivery to Seed IP Law Group (domestic representative for the Marks):

Seed IP Law Group PLLC (William Ferron)
701 Fifth Avenue, Suite 5400
Seattle, Washington 98104

4. via hand delivery to Canadian counsel (with respect to the Marks):

Oyen Wiggs Green & Mutala LLP
601 West Cordova Street
480 The Station
Vancouver, B.C., Canada V6B 1G1

5. via hand delivery to Defendants:

Bodog IP Holdings Ltd.
Old Parham Road, P.O. Box 2735
Milburn House
St. Johns, Antigua & Barbuda

GK Worldlink Telecom S.A.
Oficentro Ejecutivo Sabana, Sur Edificio 7, 5 Piso
San Jose, Costa Rica

Bodog Entertainment Group S.A.
Oficentro Ejecutivo Sabana Sur, Edificio 7, 5 Piso
San jose, Costa Rica 01017

I certify that the foregoing is true and correct, and was executed on July 2. 2008.

Venkat Balasubramani

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