

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

---

BMG RIGHTS MANAGEMENT (US) LLC, and )  
ROUND HILL MUSIC LP, )

Plaintiff, )

Case No. 1:14-cv-1611 (LOG/JFA)

v. )

COX ENTERPRISES, INC., COX )  
COMMUNICATIONS, INC., and )  
COXCOM, LLC, )

Defendants. )

---

**COX'S OPPOSITION TO BMG'S  
MOTION FOR A PERMANENT INJUNCTION**

**TABLE OF CONTENTS**

	<b>Page</b>
INTRODUCTION .....	1
ARGUMENT .....	3
I.    BMG’s PROPOSED INJUNCTION IS IMPERMISSIBLY VAGUE AND OVERBROAD. ....	4
A.    BMG’S Proposed Injunction Violates Rule 65’s Specificity Requirements. ....	4
B.    BMG’s Proposed Injunction Is Also Overbroad. ....	5
II.   BMG HAS FAILED TO SHOW IRREPARABLE HARM AND INADEQUACY OF MONETARY DAMAGES. ....	6
A.    BMG’s Conduct Undermines Its Claim of Irreparable Harm. ....	7
B.    BMG’s Accusation that Cox Was Ignoring Infringement Notices Was Reckless and Fails to Show Irreparable Harm.....	8
C.    The Injunction Plaintiff Seeks Will Not Prevent the Harm It Claims.....	9
III.  THE BALANCE OF HARDSHIPS DOES NOT FAVOR AN INJUNCTION.....	11
A.    To the Extent the Injunction Requires Terminating Internet Service or Spying on Subscribers, It Imposes Disproportionate and Unreasonable Hardships on Cox and Its Customers. ....	11
B.    The Requirement to Hand Over Customer Information to BMG and Its Agents Based on Future Accusations Imposes Undue Hardships. ....	14
C.    The Imposition of Constructive Knowledge of Infringement Is Unreasonable.....	15
D.    BMG’s Proposed Injunction Does Nothing to Guard Against Abuses by BMG and Rightscorp.....	17
IV.  THE PUBLIC INTEREST WEIGHS AGAINST AN INJUNCTION. ....	18
V.   NONE OF THE CASES PLAINTIFF CITES SUPPORTS THE TYPE OF INJUNCTION IT SEEKS HERE. ....	21
VI.  ALTERNATIVELY, THE COURT SHOULD STAY ENFORCEMENT OF ANY INJUNCTION. ....	23
VII. IF THE COURT IS INCLINED TO GRANT ANY INJUNCTIVE RELIEF, IT SHOULD BE VERY NARROW. ....	25
CONCLUSION .....	26

## INTRODUCTION

BMG seeks an unprecedented permanent injunction that is not limited to the works at issue in the lawsuit and is hopelessly vague as to the acts that it would restrain or require. It restrains Cox from “materially contributing” to infringement, without identifying any particular acts that constitute “material contribution.” It also vaguely requires Cox to take unspecified actions “to prevent or limit infringement” of unspecified works through unspecified conduct by unspecified people. Although the proposed order is silent on whether Cox can or should warn or suspend customers whom BMG will accuse of infringement in the future, BMG’s motion strongly suggests that it expects Cox to spy on its customers’ activities, and terminate their Internet accounts. Yet the proposed injunction offers no particular terms for when, how, or under what circumstances this should occur.

BMG’s motion falls far short of satisfying the stringent requirements for a permanent injunction, and the Court should deny it. First, BMG has failed to show irreparable harm or that money damages are inadequate. BMG’s years of delay in bringing its claims, and its practice of accepting settlement payments while taking no steps to restrain further file sharing, undermine its claim of irreparable injury. And although BMG claimed in its motion that Cox has ignored notices of continuing infringement, BMG now admits that this accusation was false. In fact, shortly after trial, Cox unblocked Rightscorp notices, and for over a month it has received no notices from Rightscorp or BMG. Moreover, by its admission, the injunction BMG seeks would do nothing to stop the continued availability of BMG’s asserted works via BitTorrent sites like The Pirate Bay or Kick Ass Torrents.

Second, the balance of hardships overwhelmingly weighs against the injunction BMG seeks. The injunction imposes unreasonable burdens on Cox, both through vague requirements and prohibitions that give Cox no guidance as to when it may face contempt, and through specific

terms that would threaten to swamp Cox's ability to address other threats and would force it to violate its customers' trust.

The injunction also threatens the public interest, blindly punishing consumers by terminating their Internet accounts based on mere accusations, with no due process. The injunction provides no opportunity for customers to respond to accusations or submit counter notices, and it raises the specter that they may lose Internet access with a single notice. The injunction also forces the disclosure of private consumer information to Rightscorp, a company with a long track record of using deception and unlawful tactics. And it imposes no restrictions on what BMG, Rightscorp, or others may do with consumers' personal information.

Notably, none of the injunction cases BMG cites involve conduit ISPs, like Cox, that merely provide Internet access. Instead, BMG's authorities involve operators of dedicated file sharing services or direct infringers themselves. And even as to individual adjudicated infringers, BMG cites no cases in which any court has stripped that person of Internet access. No court has forced a neutral gateway to the Internet to become its gatekeeper, operating at the whim of a particular special interest. This Court should decline Plaintiff's invitation to become the first.

BMG's proposed injunction would also interfere with Cox's ongoing efforts to improve its internal systems and processes in a manner that balances the interests of other rights owners. In addition to unblocking notices from Rightscorp, Cox has taken steps to ensure that its personnel adhere to Cox's written policies for terminations. It is also continuing to improve and streamline its graduated response system, implementing changes that balance technical limitations and the interests of many stakeholders. The Court should not impose a permanent injunction that threatens these improvements and jeopardizes the interests of other rights owners and the public solely to serve BMG's interests.

Alternatively, even if the Court were otherwise inclined to grant an injunction, a stay under Rule 62(c) would be warranted, and Cox intends to seek a stay of enforcement of the judgment including any injunction. The Court has acknowledged the significant, controverted, and novel legal issues this case presents. Given these serious and difficult questions of law, the irreparable harm that Cox would face under BMG's unworkable and vague injunction, the lack of irreparable harm to BMG from a stay, and the serious privacy risks and due process threats that the injunction presents to the public, the Court should provide a full and fair opportunity for Cox to brief a stay of the judgment, including any injunction pending appeal, before any injunction takes effect.

### **ARGUMENT**

The Supreme Court has “consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” *eBay v. MercExchange*, 547 U.S. 388, 392-93 (2006). Instead, the Court affirmed the traditional showing that a plaintiff must make to obtain a permanent injunction in any type of case, including in a copyright case: the plaintiff must demonstrate all of the following: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Id.* at 391. Even upon this showing, whether to grant the injunction remains in the equitable discretion of the court. *Id.*, *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532 (4th Cir. 2007) (affirming district court's order denying injunction in a copyright case). In addition, Rule 65 requires that an injunction be specific and detailed in the conduct that it restrains or requires. Fed. R. Civ. P. 65(d).

Here, BMG has failed to demonstrate any of these requirements, and its motion should be denied.

**I. BMG’S PROPOSED INJUNCTION IS IMPERMISSIBLY VAGUE AND OVERBROAD.**

**A. BMG’S Proposed Injunction Violates Rule 65’s Specificity Requirements.**

Rule 65 requires that every injunction state its terms specifically, and describe in reasonable detail, and not by referring to the complaint or other document, the act or acts restrained or required. Fed. R. Civ. P. 65(d). This is not a procedural nicety but a fundamental due process consideration. “Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty.” *H. K. Porter Co., Inc. v. National Friction Prods.*, 568 F.2d 24, 27 (7th Cir. 1977). The terms of Rule 65(d) “are mandatory and must be observed in every instance.” *Thomas v. Brock*, 810 F.2d 448, 450 (4th Cir. 1987) (internal quotation marks omitted). “[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); accord *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996); *Town of Islip v. Eastern Air Lines, Inc.*, 793 F.2d 79, 83 (2d Cir. 1986). In addition, without specificity, appellate review of an injunctive order is “greatly complicated, if not made impossible.” *Schmidt*, 414 U.S. at 477. “Rule 65(d) thus serves the twin purposes of providing fair notice of what an injunction requires and of facilitating appellate review.” *CPC Int’l, Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir. 2000).

Here, BMG’s proposed injunction imposes impermissible burdens by failing to describe “in reasonable detail . . . the act or acts sought to be restrained.” First, the order instructs Cox not to “materially contribute” to any unauthorized (1) copying, (2) uploading, (3) downloading, (4) transmitting, or (5) distributing any musical composition in which BMG owns or controls any copyright. The proposed order does nothing to define what particular acts might constitute

“material contribution,” which might mean nothing more than the mere provision of access to the Internet. In essence, it is an open-ended order to “obey the law.” Second, the proposed injunction requires Cox to describe “actions it has taken to prevent or limit further infringement of the BMG copyrighted work identified in the notice.” This seems to indirectly suggest that Cox must take affirmative steps to prevent or limit third party infringement. Yet it offers no guidance as to what that action might be. Third, the injunction applies to any musical composition in which BMG claims that it owns or controls an exclusive right without identifying the works; that would require reference to other documents, again in violation of Rule 65(d). Fourth, the proscription against “material contribution” applies to “unauthorized” copying, uploading, downloading, transmitting, or distributing any musical composition BMG owns or controls, without specifying how Cox is to know when such activity is “authorized” or not.

In sum, BMG’s proposed injunction both requires and restrains acts by Cox, without telling Cox what those acts might be, on pain of contempt. This is precisely what the due process protection of Rule 65(d) prohibits. “The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.” *International Longshoremen’s Assn. v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76 (1967). Because BMG’s proposed injunction burdens Cox with impermissibly vague terms, the Court should deny it.

**B. BMG’s Proposed Injunction Is Also Overbroad.**

BMG’s proposed injunction is also impermissibly overbroad. An injunction is an “extraordinary writ” which “should be tailored to restrain no more than what is reasonably required to accomplish its ends.” *Consolidation Coal Co. v. Disabled Miners*, 442 F.2d 1261, 1267 (4th Cir. 1971). Accordingly, an injunction should be carefully addressed to the circumstances of the

case, and “should not go beyond the extent of the established violation.” *Hayes v. N. State Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993).

By the time of trial, BMG’s lawsuit concerned alleged infringement of 1,397 specific asserted works, based on allegations of file sharing using BitTorrent. Trial Tr. 1805:4-6, 2146:15-17. Plaintiff’s evidence of alleged copying came solely from Rightscorp. Yet BMG’s proposed injunction is not limited to (1) the specific works as to which it established ownership of valid copyrights, (2) alleged infringement via BitTorrent, or (3) detections of alleged BitTorrent use by Rightscorp. Instead, it gives BMG a perpetual blank check in which the validity of BMG’s future infringement claims will be wrongly prejudged, regardless of the circumstances. Accordingly, the injunction far exceeds the extent of the established violation, and it locks Cox in a perpetual obligation to act as an enforcer for any variety of BMG copyright claims in the future.<sup>1</sup>

## **II. BMG HAS FAILED TO SHOW IRREPARABLE HARM AND INADEQUACY OF MONETARY DAMAGES.**

Plaintiff has the burden of showing that it will suffer irreparable harm in the absence of an injunction. Following *eBay v. MercExchange*, there is no presumption of irreparable harm in a copyright infringement case, even if a plaintiff proves that it owns a valid copyright that the defendant has infringed. *Bethesda Softworks, L.L.C. v. Interplay Entm’t Corp.*, 452 F. App’x 351, 354-55 (4th Cir. 2011) (rejecting premise that copyright infringement creates a rebuttable presumption of irreparable harm); *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 568 (E.D. Va. 2007) (after the Supreme Court’s decision, a presumption of irreparable harm “no longer

---

<sup>1</sup> For example, Rightscorp claims to have developed new technology to detect unauthorized *streaming* of digital files, a technology that does not involve BitTorrent and was not at issue in this lawsuit. This order would require Cox to take action regardless of the nature of the alleged violation or how BMG or its agents claim to have detected it.



exists.”).<sup>2</sup> Moreover, it is not enough for Plaintiff to show that past infringement might have caused it irreparable harm: “To the extent that future infringement is relevant to the analysis, the onus is on Plaintiffs to explain why future infringements resulting from [defendant’s] inducement would cause *irreparable* harm. It cannot be presumed.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1215 (C.D. Cal. 2007).

**A. BMG’s Conduct Undermines Its Claim of Irreparable Harm.**

Here, BMG’s conduct before and during this litigation belies its claim of irreparable harm and demonstrates that money damages are adequate. BMG, through its agent, routinely accepts cash payments from individuals accused of file-sharing, *without requesting or obtaining any agreement to refrain from future infringement*. Rightscorp’s standard settlement form, which BMG approved, did not require that the accused infringer refrain from *any* future acts. DTX0078. Thus, for years, BMG and Rightscorp have readily accepted cash without taking any steps to restrict future file-sharing activities by accused infringers.

Consistent with this practice, in its correspondence with Cox, BMG’s agent Rightscorp repeatedly asked Cox to suspend subscribers *until they paid settlements*, rather than terminating their accounts. PX1833 at COX\_BMG00008071 (ISP Briefing Doc) (“We do not want you to be required to permanently terminate your customers.”). This conduct is fundamentally inconsistent with any claim by BMG that it faces irreparable harm from individual BitTorrent use.

BMG’s three-year delay in bringing this lawsuit, during which it refused to modify its notices, also undercuts its claim of irreparable harm. BMG delayed bringing this action as long as possible, essentially running down the clock on the three-year statute of limitations and

---

<sup>2</sup> BMG relies on *Cadence Design Systems v. Avant! Corp.* in support of its claim of irreparable harm. *Cadence Design Sys., v. Avant! Corp.*, 125 F.3d 824, 829 (9th Cir. 1997). However, *Avant!* relied on a “presumption” of irreparable harm that the Supreme Court and Fourth Circuit have rejected.

maximizing its damages claim. 17 U.S.C. § 507(b). It did so knowing that Cox refused to accept the notices Rightscorp sent. Cox repeatedly told Rightscorp in March 2011 and thereafter that it would not accept or process notices containing settlement demands and threats. *See, e.g.*, DTX0478 (“Cox Communications does not accept nor process infringement notices which contain settlement offers”), PX2516 (“As stated before, we do not accept settlement agreements, so please adjust accordingly”), DTX2391 at RGHTS00000831, PX2149; Trial Tr. 782:2-13. Thus, even before Rightscorp signed up BMG as a client, Rightscorp knew Cox’s position. Trial Tr. 801:6-8. BMG also knew that Cox, like other major ISPs, ignored Rightscorp notices. *See, e.g.*, DTX0474 at BMG00004851 (Rightscorp presentation to BMG listing Cox along with other major Internet service providers “that ignore your notices”); Trial Tr. 802:22-803:13. Yet BMG never instructed Rightscorp to modify its notices, and it never reached out to Cox directly. Trial Tr. 180:5-17 (BMG’s president of creative and marketing Mr. Hubert admitted he made no effort to contact Cox directly).

If BMG had faced irreparable harm from the activities of Cox subscribers, it had numerous options at its disposal. It could have required its agent Rightscorp to change its notices, served subpoenas or taken action against individual subscribers, or sought a preliminary injunction early in the case. It also could have pursued claims against the dozens of individual subscribers whose contact information it obtained in this lawsuit. It did none of the foregoing, choosing instead only to continue sending notices and e-mails which it knew were going nowhere. That BMG did nothing but lie in wait for three years shows the lack of seriousness of its claim of irreparable harm.

**B. BMG’s Accusation that Cox Was Ignoring Infringement Notices Was Reckless and Fails to Show Irreparable Harm.**

In its permanent injunction motion, BMG alleged that “ongoing infringement inflicts irreparable harm on BMG,” claiming specifically that “[t]hrough Rightscorp, BMG has continued

to notify Cox of the infringement and continues to receive no response from Cox.” Dkt. 766 (“Injunction Motion”) at 1, 4. BMG further claimed that it had asked what changes Cox was making to its system, and that Cox would “only say that it is ‘analyzing all aspects of its process and procedures.’” *Id.*

In fact, BMG’s claim that Cox was ignoring ongoing infringement notices was completely false. Shortly after trial, Cox unblocked Rightscorp, permitting Rightscorp to send notices for processing by Cox’s CATS system. Cox expressly informed BMG’s counsel of this fact on January 5, 2016. *See* Ex. 1. Nevertheless, as of February 11, 2016—more than a month later—Cox had not received any notices, emails, letters, or other contacts from BMG or Rightscorp. There was no basis for BMG’s factual representation. After extensive investigation on Cox’s part to look for the alleged notices, and without finding any, Cox’s counsel asked BMG’s counsel on what basis BMG had accused Cox of ignoring BMG’s notices. BMG’s counsel has now confirmed that in fact, Rightscorp had “suspended” sending notices to Cox, and counsel claims that BMG’s accusations in its motion were an “inadvertent misstatement.” Dkt. 772.3

This revelation undermines BMG’s claim of ongoing irreparable injury, demonstrating that BMG and its agent Rightscorp have been cavalier about actually seeking action against alleged infringers. It also underscores the unreliability of Rightscorp’s accusations, and the danger of imposing an injunction—with contempt as a sanction—that assumes Rightscorp’s future accusations will be trustworthy.

**C. The Injunction Plaintiff Seeks Will Not Prevent the Harm It Claims.**

The purported irreparable harm BMG identifies—the continued availability of BMG’s asserted works via BitTorrent sites like The Pirate Bay or Kick Ass Torrents—is something that no

---

<sup>3</sup> BMG’s counsel did not disclose when Rightscorp had “suspended” sending notices.

injunction against Cox will prevent. BMG argued at trial, and it argues again here, that once a song is available through such sites, it is instantly replicated around the world and can never be stopped. *See, e.g.*, Trial Tr. 174:22-175:5 (uploading a song into BitTorrent environment “is the equivalent of a perpetual giving away of [BMG’s] music”), 102:13-16, 133:25-134:3, Injunction Motion at 5 (arguing that the “viral nature of BitTorrent” makes further copying unstoppable). Thus, every song at issue in this lawsuit has long been available in a BitTorrent payload throughout the world, and—according to BMG and its experts—those songs will remain available for free as downloads regardless of any injunction as to Cox.

At trial, Dr. Sullivan’s unrebutted testimony showed that, even assuming that every “observation” of a song reflected a separate download, there is essentially a zero percent probability that Cox subscribers caused those songs to be available. Trial Tr. 1692:20-1694:11 (“So you can see the number here, it is 0, lots of zeros, 396 percent. It’s a really, really small number.”). In other words, the songs at issue in this lawsuit would be available regardless of whether particular Cox subscribers contributed to making them available. Accordingly, BMG’s proposed injunction does nothing to curb the speculative macroeconomic concerns, such as “compet[ing] with free,” that Plaintiff identifies as the basis for its irreparable harm claim. Injunction Motion at 4.

Notably, there has never been an allegation that Cox operated a file sharing service or website, that it hosted any of the BitTorrent sites at issue, or that it induced illegal file sharing. There was also no evidence or even argument that any particular Cox subscribers created the BitTorrent payloads at issue. For this reason, the cases on which BMG relies, which found irreparable harm from the continued operation of platforms that were dedicated to file sharing, are completely distinguishable. *See, e.g., Arista Records v Lime Wire*, No. 1:06-cv-05936, 2010 WL

10031251 (S.D.N.Y. August 9, 2010) (granting stipulated injunction against file-sharing site overwhelmingly dedicated to infringement); *Grokster*, 518 F. Supp. 2d at 1215 (noting that defendants operated and distributed peer-to-peer software, which was used overwhelmingly for infringing purposes, and which targeted a known community of infringers—former Napster users).

Here, in contrast, an injunction against Cox will do nothing to stop the BitTorrent sites of the world. Because BMG cannot meet its burden of showing that it will suffer irreparable harm without an injunction, its motion should be denied.

### **III. THE BALANCE OF HARDSHIPS DOES NOT FAVOR AN INJUNCTION.**

BMG's proposed injunction imposes a host of unreasonably burdensome terms, both through vague requirements and prohibitions that fail to comply with rule 65's specificity requirements, discussed in Section I, above, and through the unreasonable specific terms that BMG proposes.

#### **A. To the Extent the Injunction Requires Terminating Internet Service or Spying on Subscribers, It Imposes Disproportionate and Unreasonable Hardships on Cox and Its Customers.**

Although BMG's proposed order is silent on the particular acts it requires Cox to take, there is a strong suggestion in BMG's memorandum of what BMG wants: spying on customers and terminating their accounts. Injunction Motion at 9 (asserting that Cox has tools to terminate subscribers and suggesting that Cox could target specific subscribers with "deep packet inspection" tools). To the extent the injunction requires either termination or surveillance, it imposes undue hardships on Cox, both because the order is vague and because it imposes disproportionate, intrusive, and punitive measures against households and businesses with no due process. *Christopher Phelps & Assoc.*, 492 F.3d at 545 (rejecting injunction where it "would take on a fundamentally punitive character, which has not been countenanced in the Copyright Act's remedies.").

First, with respect to termination, the injunction is impossibly vague as to when, who, how, and under what circumstances Cox should terminate Internet accounts. At trial, although BMG was critical of Cox's termination practices, it offered no evidence of what particular steps Cox *should* have taken. Indeed, Dr. McGarty, Plaintiff's purported expert in the field, admitted he had no opinion on the appropriate circumstances for terminating an alleged repeat infringer. Trial Tr. 2033:25-2034:2. Dr. McGarty also had no knowledge of whether other ISPs terminate subscribers, and BMG successfully moved to exclude evidence of other ISP policies and practices. Trial Tr. 2034:8; Dkt. 691, granting BMG's motion in limine no. 9 (Dkt. 568). With this motion, BMG again declines to offer any concrete proposal. Instead, it attempts either to place on the Court the burden of deciding the particular steps Cox should take or to obtain a vague injunction under which Cox faces contempt regardless of what it does.

The proposed injunction leaves open a host of questions. Is Cox required to suspend accused infringers, or simply terminate them upon one notice, or after the second notice? What if BMG sends ten notices for one IP address in one hour, or one minute? If the injunction requires termination of "repeat" infringing subscribers in appropriate circumstances, when is a subscriber a "repeat" infringer, and what are the "appropriate circumstances" for termination? Does the order permit or require suspension before termination? Can Cox warn the account holder first? Is Cox permitted to give customers an opportunity to respond to the accusations against them, or is it required to terminate accused infringers and provide them no redress? If the subscriber denies the accusation, what process will exist to adjudicate the accusation by BMG? Can Cox implement a counter-notice process such as the DMCA provides for storage providers? What if, for example, the subscriber's computer was infected with malware, the user's network password was stolen, or a neighbor or guest accessed the user's account? BMG's motion and proposed order are silent on

these critical questions. In sum, these provisions would put Cox in the position of suspending or terminating access to households and businesses without any adjudication, and without any consideration of mistake, fair use, license, authorization, or even the process specified in the DMCA for a safe harbor.

BMG brushes aside the serious concerns that arise from an order requiring a major ISP to terminate Internet access based on mere accusations. It blithely suggests that Cox faces no hardship from an injunction because it can turn off a subscriber's Internet access "with the push of a button." Injunction Motion at 9. But the mechanics of turning off the Internet do not measure the hardship to Cox and its customers from the aftermath. As this brief discusses below, in the past BMG (through Rightscorp) sent Cox *millions* of notices of infringement *that it chose not to pursue at trial and that remain unproven*. Giving BMG a blank check to force the termination of Internet subscribers with future accusations threatens to inflict irreparable harm to Cox's business, both in its ability to meet its customer support obligations and in the likely damage to Cox's goodwill and reputation.

BMG's suggestion that the Court should require Cox to use deep packet inspection or other measures to spy on customers is equally problematic. The evidence at trial showed that Cox cannot use deep packet inspection or other tools to police its users' activities because surveillance to detect the contents of user transmissions is likely illegal. Trial Tr. 1346:17-23 (Cox's privacy policy prohibits Cox from monitoring where customers go on the Internet). The evidence showed that Cox does not track where users go on the Internet; that Cox does not know what content passes over its system, and that Cox cannot identify, much less block, which files a subscriber accesses or shares using BitTorrent. Trial Tr. 1518:18-1519:15; 1522:2-5. While Cox could theoretically measure the *volume* of BitTorrent traffic that a particular account uses on a particular

day (Trial Tr. 1523:13-15) it cannot detect the *content* of any BitTorrent traffic. Trial Tr. 1519:1-6. Thus, Cox cannot use deep packet inspection to detect whether a user is using BitTorrent to share music or movies using its network. *Id.* at 1519:7-10.

Nor can Cox detect what files a person transmits or receives over the Cox network. *Id.* at 1519:11-15; *see also* Trial Tr. 1157:16-1158:9 (Negretti testimony that Cox does not have the ability to determine how people use the services they purchase from Cox). Additionally, Cox has no tools that it could even theoretically use to *stop* its subscribers from sharing an individual file, and while Cox might theoretically block BitTorrent traffic<sup>4</sup>, it cannot do so as a practical and legal matter. Trial Tr. 1398:8-23; 1521:2-17. Indeed, Rightscorp itself recognized that “ISPs may want to block P2P, not legal to do so.” DTX480 at COX\_BMG00207829; *see also* Trial Tr. 2046:14-20 (Dr. McGarty testimony that Cox cannot block a person’s access to BitTorrent). Not surprisingly, BMG cites no opinion where a court has required an Internet company to use deep packet inspection or similar technologies to conduct surveillance on customers. Doing so would raise significant privacy concerns and set a dangerous precedent.

**B. The Requirement to Hand Over Customer Information to BMG and Its Agents Based on Future Accusations Imposes Undue Hardships.**

BMG’s proposed requirement that Cox disclose private customer information to BMG and Rightscorp is also overbroad and improper. Section 5 of BMG’s proposed order would require Cox to disclose customer contact information within seven days of receiving any notice.

---

<sup>4</sup> As the Court noted during a side bar at trial, the whole focus of BMG’s case was on the alleged “BitTorrent infringements.” Trial Tr. 1805:4-6. While there is substantial evidence that BitTorrent is capable of non-infringing uses, BMG has taken the position that BitTorrent traffic is inherently infringing and nefarious. *See, e.g.*, Dkt. 761 at 8, n5 (relying on PX2429, PX2067); *see also* Dkt. 763 at 29, (Cox’s motion for new trial challenging admission of hearsay reports equating BitTorrent use to copyright infringement).



Dkt. 765-1. This provision circumvents court supervision of subpoenas, implicates significant privacy concerns, and threatens Cox's relationships with customers.

Notably, the DMCA does *not* require a conduit ISP, such as Cox, to hand over customer information without a valid Rule 45 subpoena. In particular, Section 512(h) does not authorize issuance of a "DMCA subpoena" to an ISP, like Cox, which acts as a conduit, but does not store user material on its servers. *Recording Indus. Assoc. of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *In re Charter Commc'n, Inc., Subpoena Enf. Matter*, 393 F.3d 771 (8th Cir. 2005). Indeed, Rightscorp has tried—and failed—to use Section 512(h) to issue subpoenas for customer information en masse from conduit ISPs. *In re Subpoena issued to Birch Commc'ns, Inc.*, No. 1:14-cv-03904, 2015 WL 2091735, at \*5 (N.D. Ga. May 5, 2015), *appeal dismissed* (Aug. 7, 2015).

This proposed injunction term is therefore nothing more than an end run around the limitations of Section 512(h). It is designed to circumvent court supervision of subpoenas, and to give BMG and Rightscorp unfettered access to Cox customer information to do with as they please. For this reason, the balance of hardships weighs against an injunction.

**C. The Imposition of Constructive Knowledge of Infringement Is Unreasonable.**

The injunction is also unreasonable in that it creates imputed "knowledge" of infringement based on unproven future accusations. The proposed order, at paragraph 3, states that Cox is deemed to know of unauthorized copying, uploading, downloading, transmitting, or distributing of a work that BMG owns, if BMG or any agent of BMG provides Cox a notice. The injunction therefore presumes that 100% of the notices that BMG (or any of its agents) will send at any point in the future will be valid, both as to the claim of ownership and the claim of copying. The record in the case shows that this is anything but true. Although BMG prevailed on some claims, it did so only after dropping vast numbers of infringement claims.

First, BMG dropped the majority of its accusations of copying from the case, cherry picking a comparatively small subset for use at trial. Rightscorp sent over *7.6 million* notices to Cox accusing its subscribers of copyright infringement. But at trial, it pursued claims on 1.8 million notices, *less than 25%* of the notices it had sent. *See, e.g.*, Trial Tr. 893:15-17, 1001:22-24, 2170:20-22. Moreover, even as to the subset of works and notices that BMG chose to enforce at trial, it is unclear from the record that the jury found all of the notices were accurate, or all of the works at issue were infringed. Under this proposed injunction, every notice will be deemed valid and will require immediate action by Cox.

Second, BMG and Rightscorp's claims of ownership have also proved to be unreliable. Significantly, under this proposed order, there is no requirement that the notice state under penalty of perjury that the detected activity is "unauthorized." There is also no requirement that BMG or its agent claim ownership or the right to enforce a copyright under penalty of perjury. Rather, any time BMG claims that it has a "good faith belief" that it owns or controls a copyright, it will be deemed to be an owner. BMG and Rightscorp's omission of any claim of "unauthorized" activity, and the use of "good faith belief" language regarding ownership, is no accident, since their past claims of ownership and lack of authorization have been unreliable. Shortly before summary judgment, BMG dropped approximately one hundred of its asserted copyrights, apparently lacking proof of ownership or authority to sue as to those works. Trial Tr. 183:19-21. BMG previously sent notices as to songs where the recording artist had authorized their availability for free on BitTorrent. Trial Tr. 193:8-23. BMG's agent Rightscorp also sent notices (under penalty of perjury) on behalf of Round Hill, and the claims of ownership proved to be false. Dkt. 675 (order denying Plaintiff's motion for summary judgment in part on the ground that Round Hill did not own its asserted copyrights). This means Rightscorp was collecting payments on behalf of a

company that had no right to receive them, and it underscores the danger of assuming that future Rightscorp notices on behalf of BMG or others will be reliable.

Significantly, the jury made no specific findings of the number of infringements, number of infringers, or number of works that it found infringed; its damage award did not appear to be a principled dollar-value multiple of the number of works at issue. Moreover, even if the jury had found that Rightscorp's process was accurate as to the asserted works and asserted infringements, the order also does nothing to require accuracy on the part of BMG, Rightscorp, or other BMG agents in the future. For example, Rightscorp claimed at trial that it performed sampling to verify that certain works were available to be downloaded from Cox IP addresses. Trial Tr. 313:10-320:8. Yet this system sampling was not automated or consistent, it did not occur until a substantial time after the initial notice had been sent, and there is no assurance that Rightscorp will take similar steps in the future. Rightscorp also admitted to using a 10% bitfield threshold, but BMG claimed (after dropping post-complaint claims from the case) that it used the 10% bitfield only after it filed the Complaint. Yet BMG's proposed order would permit future infringement notices based on a 10% bitfield detection, other unreliable modifications to the Rightscorp system, and notices based on any third party technology that BMG chooses to use in the future.

In sum, there is no basis for the Court to determine that future notices on BMG's behalf will be reliable or accurate. Accordingly, the injunction's blanket assumption of constructive knowledge of infringement based on future accusations is untenable.

**D. BMG's Proposed Injunction Does Nothing to Guard Against Abuses by BMG and Rightscorp.**

BMG's proposed injunction also imposes unreasonable hardships by failing to address or curb potential abuses by BMG or Rightscorp. The injunction requires Cox to extract and forward information for every notice, and report activity to BMG within days, with no restrictions on the

nature or number of notices that BMG or its agent might choose to send. Given Rightscorp's history, this is a significant concern. Rightscorp historically sent multiple notices in the same day for the same work for the same account. It also threatened—as a negotiating tactic—to increase the numbers of notices it would send Cox. And it configured its software to send up to fifty thousand notices to Cox “at a sitting.” See DTX0484 (Rightscorp threatening Cox to increase the number of notices sent); DTXSC0243 (showing Rightscorp code sending multiple notices for the same work on the same day). The absence of any safeguards to prevent abuse by Rightscorp or other BMG agents imposes additional undue hardships on Cox.

#### **IV. THE PUBLIC INTEREST WEIGHS AGAINST AN INJUNCTION.**

The public interest also weighs strongly against the injunction BMG seeks. BMG's proposed injunction threatens to strip consumers and businesses of Internet access based on unproven accusations and with no due process; invades their privacy; and forces them into a relationship with Rightscorp, a company with a track record of abusive tactics.

*First*, the threat to disrupt or terminate Internet access to households and small businesses across the U.S. is a serious one. For many Americans, the Internet is a vital part of daily life. As the FCC noted in passing recent “Net Neutrality” rules, the Internet “drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them.” *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, page 3.

<https://www.fcc.gov/document/fcc-releases-open-internet-order>. Millions of Americans use the Internet for work, education, healthcare, banking, tax filings, signing up for the Affordable Care Act, and access to the courts, among countless other important and lawful activities.

Despite these important functions, the proposed injunction threatens to cut off Internet access based on mere accusations. It provides no mechanism for an accused subscriber to respond

and receive any form of due process. Notably, the categories of information that BMG includes in the injunction come from the DMCA notice and takedown provisions under 17 U.S.C. § 512(c). Although this procedure is inapplicable to conduit ISPs like Cox, it is important to note that section 512 provides a mechanism for an accused infringer to send a counter-notice denying infringement. 17 U.S.C. § 512(c)(3). BMG's proposed injunction provides no such opportunity. Rather, it wrongly assumes that everyone accused in the future will be guilty, and imposes a grossly disproportionate penalty. That BMG managed to prevail at trial on a small subset of its allegations of infringement does not warrant such a sweeping and punitive injunction against future suspected infringers. Indeed, as this brief discusses above, no court has ordered consumers to lose Internet access based on copyright infringement allegations, even when those consumers are adjudicated infringers.

*Second*, the requirement that Cox disclose private customer information to BMG and its agents raises serious privacy concerns. The order provides no notice to consumers of this disclosure (and no time to provide it), no opportunity for consumers to object, and no oversight for what BMG and its agents can do with Cox consumers' information. Notably, when allowing discovery as to some customer information in this case, Judge Anderson provided for notice and an opportunity to object before any disclosure of personal information. There are no similar safeguards in the proposed order, even though the scope and duration of these disclosures are far more uncertain. And even if the Court were to provide for such safeguards, administering a system to provide for counter-notices and customer complaints would create significant burdens as well.

*Third*, the fact that Rightscorp is BMG's agent highlights other significant public interest concerns. Rightscorp has a history of shady behavior. Although the Court excluded this evidence at trial and rejected the unclean hands defense, the undisputed evidence is highly relevant to the

proposed injunction. In its order denying Cox's motion for summary judgment as to its unclean hands defense, the Court found that the conduct Cox complained of did not have a "direct nexus" to the litigation and were "all directed towards Rightscorp's treatment of third parties. . . ." Dkt. 703 at 69-70. But a permanent injunction in this case would subject Cox and its customers to Rightscorp's tactics going forward, raising significant public interest concerns.

Rightscorp regularly floods ISPs and individuals with multiple, duplicative notices of alleged infringement, demanding payment without proof that the targeted subscriber actually engaged in infringement. *See, e.g.*, Trial Tr. 1410:24-1414:5 (Rightscorp generating scores of notices for individual IP addresses within one minute); DTX0486 (same); Trial Tr. 948:21-23 (Mr. Boswell testifying that "[I]t's not a one-to-one correlation, but the more e-mails that go out, the more likely you are that someone will pay"); Sabec Video Tr. at 134:6-20 (Mr. Sabec testifying that Rightscorp does not know who engaged in the accused infringement); Trial Tr. 925:13-16 (similar testimony from Mr. Boswell); Trial Tr. 925:23-24 (Mr. Boswell admitting that the alleged infringement could have been initiated by someone other than a Cox subscriber). Rightscorp has also sent notices of alleged infringement containing false statements as to ownership of the works asserted in the notices. *See* Dkt. 703 at 18-26 (holding that Plaintiff Round Hill Music LP lacked ownership of copyrights asserted in Rightscorp notices sent to Cox); *see also* Dkt. 763 at 6, n1. Rightscorp's heavy-handed approach also extends to the aggressive practices of its telephone enforcement agents. Rightscorp equips its phone agents with a mandatory script designed to scare consumers into paying Rightscorp's demands, even when they are innocent. Ex. 2 (DTX0006).<sup>5</sup> The script instructs phone agents to disregard protests and even to lie, asserting that the consumer

---

<sup>5</sup> The Court precluded Cox from entering the Rightscorp phone script into evidence at trial. Dkt. 691, granting BMG's motion in limine no. 1 (Dkt. 543). Cox has challenged that ruling in its separate motion for a new trial. Dkt. 763.

must obtain a police report, and that the police may “take your device and hold it for ~5 days to investigate the matter.” *Id.*<sup>6</sup> In addition, in January 2016, Rightscorp was forced to pay hundreds of thousands of dollars to settle a consumer class action charging it with making illegal robocalls. *Reif v. Rightscorp, Inc.*, No. 2:14-cv-09032-DSF-JCG, Dkt. 88.1 at 1 (C.D. Cal. February 8, 2016). And Rightscorp has been the subject of letters to several state attorneys general offices and complaints to the FTC<sup>7</sup> sent by consumers raising questions and worries after falling victims to its harassment. *See* Dkt. 744 at 3 (DTX0490, DTX0491, DTX0492, DTX2411, DTX2412, DTX2424, DTX2425, DTX2426, DTX2427, DTX2428, DTX2429, DTX2430, and DTX2431). In view this pattern of abuse, an injunction requiring Cox to surrender its customers to suffer Rightscorp’s tactics is not in the public interest.

In sum, BMG’s proposed injunction threatens the public interest. It blindly punishes consumers by terminating their Internet access based on mere accusations, invading their privacy, and forcing them into a relationship with known abuser Rightscorp. For this reason, as well, the Court should deny BMG’s motion.

**V. NONE OF THE CASES PLAINTIFF CITES SUPPORTS THE TYPE OF INJUNCTION IT SEEKS HERE.**

Although BMG cites several cases granting injunctions against peer-to-peer operators, none of those cases involves an injunction against a conduit Internet service provider like Cox. Rather,

---

<sup>6</sup> Rightscorp’s officers have denied knowledge as to the source of some of the most inflammatory content in the script.

<sup>7</sup> The actual complaints are available only by formal Freedom of Information Act (FOIA) request. However, several news outlets were able to obtain them and excerpted relevant portions from those complaints. *See, e.g.*, Tim Cushing, “Complaints To FTC About Rightscorp Detail Robocalls, Harassment And Baseless Threats To Sever Internet Connections,” TECHDIRT (April 16, 2015), available online at: <https://www.techdirt.com/articles/20150415/18160330671/complaints-to-ftc-about-rightscorp-detail-robocalls-harassment-baseless-threats-to-sever-internet-connections.shtml>.

these cases involved providers of dedicated file-sharing platforms, like the Napsters and Aimsters of the world.

In *A&M Records v. Napster*, defendant Napster was not an Internet service provider, but an early peer-to-peer file sharing system. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Unlike Cox, Napster had the ability to “locate infringing material listed on its search indices . . . .” *Id.* at 1024. Aimster, often likened to Napster, operated a server that hosted websites and collected and organized information obtained from the users to facilitate swapping infringing files. *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003). Aimster had been set up to attract Napster customers, and it offered computerized tutorials for swapping files; along with “Club Aimster,” a service to download the “top 40” popular-music files. *Id.* at 646. The defendant in *Arista Records LLC v. Lime Wire LLC* was another operator of a peer-to-peer file-sharing service that targeted users of the then defunct Napster. *Arista Records*, 2010 WL 10031251, at \*4. Similarly, the defendants in *Grokster* were operators of peer-to-peer file-sharing or “file-trading” services. *Grokster*, 518 F. Supp. 2d at 1217. Thus, the injunctions against these defendants targeted specifically infringing sites and platforms, not access to the Internet in general.

BMG also relies on default judgments in which the accused individual infringers failed to present any defense. *Twentieth Century Fox Film Corp. v. Streeter* involved a default judgment against an individual defendant who allegedly transmitted copyrighted movies online. *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1073 (D. Ariz. 2006). The defendant in *Disney Enters. v. Delane*, also an individual, operated BitTorrent trackers that facilitated the reproduction and distribution of a number of the plaintiffs’ television programs and operated a website through which the plaintiffs’ works were copied and distributed. *Disney Enters v. Delane*, 446 F. Supp. 2d 402, 408 (D. Md. 2006). *Columbia Pictures Industries v. Fung* similarly



concerned an individual operator of torrent sites, torrent trackers, and message boards. *Columbia Pictures Indus. v. Fung*, No. 06-cv-5578, Dkt. 551 at 3 (C.D. Cal. Aug. 5, 2013). And in *John Wiley & Sons v. Williams*, the court entered default judgments against individual defendants, enjoining them from personally using BitTorrent to copy and distribute the plaintiffs' materials. *Id.* *John Wiley & Sons v. Williams*, No. 1:12-cv-00079, 2012 WL 5438917, at \*3 (S.D.N.Y. Nov. 5, 2012).

Thus, none of these cases involved a conduit Internet service provider, and none raised the significant privacy and First Amendment concerns that come with blocking access to the Internet. An injunction against Napster meant only that people could no longer get free music on Napster. An injunction requiring one of the nation's leading Internet access providers to terminate Internet access for families and businesses is an entirely different matter. The injunction BMG proposes would be the first of its kind: an order forcing a major ISP to terminate Internet access to individuals based on accusations alone; to do business with Rightscorp and surrender control of customer relationships with no court supervision, and to forward immediately any number of notices to customers, thus spamming, harassing, and invading the privacy of families across the country.

**VI. ALTERNATIVELY, THE COURT SHOULD STAY ENFORCEMENT OF ANY INJUNCTION.**

Alternatively, if the Court is inclined to grant an injunction, the Court should stay the implementation of an injunction under Fed. R. Civ. P. 62(c). Cox intends to seek a stay as to enforcement of the judgment, briefing on motions for attorneys' fees, and any injunction. Thus, Cox respectfully requests that the implementation of any injunction be delayed long enough to allow Cox to move for a stay. The reasons for a stay can be fully presented only in such a motion, but the following summary demonstrates that a stay motion would be meritorious.

In deciding whether to issue a stay under Rule 62(c), the Court must examine four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). “[T]he traditional stay factors contemplate individualized judgments in each case . . . .” *Id.* at 777. ). “[T]he factors are balanced, such that a stronger showing on some of these prongs can make up for a weaker showing on others.” *Ohio Valley Envtl. Coal. Inc. v. U.S. Army Corps of Engineers*, 890 F.Supp.2d 688, 692(S.D.W. Va 2012).

All of the factors support a stay of any injunction here. Significantly, none of the cases Plaintiff cites involved the type of injunction here, forcing a conduit ISP to mete out punishment against consumers based on future accusations. Indeed, this Court has acknowledged the importance of the disputed legal questions in this case. Trial Tr. 2289-6-23 (“[I] also know that this is the first step in a multistep process while we, the courts, try and deal with what everybody understands is a really important issue. And I don’t know whether this will be the first case to get to the Supreme Court on this issue.”) Given Cox’s high likelihood of success on the substantial questions of law this case presents, the irreparable harm that Cox would face under BMG’s unworkable and vague injunction, the lack of harm to BMG from a stay, and the serious privacy risks and due process concerns that BMG’s proposed injunction presents to the public, the Court should provide time for the parties to brief a stay pending appeal of any injunction.

**VII. IF THE COURT IS INCLINED TO GRANT ANY INJUNCTIVE RELIEF, IT SHOULD BE VERY NARROW.**

For the reasons this brief presents above, any injunction here is unnecessary and unwarranted, particularly in view of the changes Cox has already implemented to its handling of notices. The Court should stay any injunction given the serious questions this case presents. However, if the Court is inclined to issue an injunction at this time, such an injunction should require no more than the following (to be delineated in specific terms of an injunction as Rule 65(d) requires), and should contain the following limitations:

1. Cox shall accept BMG notices containing the elements in 17 U.S.C § 512(c)(3) and, within 5 business days of receipt of the notice, forward to the relevant account holders information from the notices identifying (a) the IP address at which infringing activity with respect to the work allegedly took place, (b) the title of the work, (c) the date and time identified in the notice, and (d) the contact information for BMG or its agent;
2. Information forwarded under paragraph (1) shall include information from the first notice received by Cox for a particular IP address;
3. Cox shall reduce the total number of steps in its graduated response system;
4. Cox shall not allow an IP address-account that receives information from a valid Notice to “reset” to the beginning of the graduated response system;
5. Any injunction should not require Cox to forward customer information to BMG or its agent without a further court order addressing specific circumstances;
6. The injunction should be limited to the 1397 works as to which BMG established ownership;

7. The injunction should be limited to notices of alleged actual transmission of BMG works via BitTorrent over the Cox network;
8. The injunction should limit BMG and its agent to sending no more than 400 notices per day, and 1 notice per work per day per IP address; and
9. The Court should maintain jurisdiction to enforce the injunction and to modify it based on updated information regarding the feasibility and burdens of the injunction.

### **CONCLUSION**

For the reasons Cox explained above, Cox respectfully requests that the Court deny BMG's motion for a permanent injunction. Alternatively, Cox requests that the Court defer effectiveness of any injunction until after briefing and a hearing on Cox's intended motion to stay enforcement of the judgment.

Respectfully submitted,

Dated: February 12, 2016

*/s/ Craig C. Reilly*

\_\_\_\_\_  
Craig C. Reilly (VSB No. 20942)

111 Oronoco Street

Alexandria, VA 22314

Tel: (703) 549-5354

Fax: (703) 549-5355

Email: [craig.reilly@ccreillylaw.com](mailto:craig.reilly@ccreillylaw.com)

*Counsel for Defendants*

*Of Counsel for Defendants*

Andrew P. Bridges (*pro hac vice*)  
David L. Hayes (*pro hac vice*)  
Jedediah Wakefield (*pro hac vice*)  
Guinevere L. Jobson (*pro hac vice*)  
Fenwick & West LLP  
555 California Street, 12th Floor  
San Francisco, CA 94104  
Tel: (415) 875-2300  
Fax: (415) 281-1350  
Email: abridges@fenwick.com  
dhayes@fenwick.com  
jwakefield@fenwick.com  
gjobson@fenwick.com

Brian D. Buckley (*pro hac vice*)  
Fenwick & West LLP  
1191 2nd Avenue, 10th Floor  
Seattle, WA 98101  
Tel: (206) 389-4510  
Fax: (206) 389-4511  
Email: bbuckley@fenwick.com

Armen N. Nercessian (*pro hac vice*)  
Ronnie Solomon (*pro hac vice*)  
Ciara Mittan (*pro hac vice*)  
Nicholas A. Plassaras (*pro hac vice*)  
Fenwick & West LLP  
801 California Street  
Mountain View, CA 94041  
Tel: (650) 988-8500  
Fax: (650) 938-5200  
Email: anercessian@fenwick.com  
rsolomon@fenwick.com  
cmittan@fenwick.com  
nplassaras@fenwick.com

**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2016 the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users.

*/s/ Craig C. Reilly*

\_\_\_\_\_  
Craig C. Reilly (VSB No. 20942)

111 Oronoco Street

Alexandria, VA 22314

Tel: 703-549-5354

Fax: (703) 549-5355

Email: [craig.reilly@creillylaw.com](mailto:craig.reilly@creillylaw.com)

*Counsel for Defendants*