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5  
6 IN THE UNITED STATES DISTRICT COURT FOR THE  
7  
8 NORTHERN DISTRICT OF CALIFORNIA

9  
10 AF HOLDINGS LLC, )

No. 3:12-CV-02396-EMC

11 Plaintiff, )

**PLAINTIFF AF HOLDINGS’  
EMERGENCY MOTION FOR  
EXPEDITED BRIEFING AND HEARING;  
AND MOTION TO COMPEL  
PRODUCTION**

12 v. )

13 )  
14 JOE NAVASCA, )

15 Defendant. )

16 TO DEFENDANT JOE NAVASCA AND HIS ATTORNEY OF RECORD:

17 NOTICE IS HEREBY GIVEN that as soon as counsel may be heard by the above-entitled  
18 Court, Plaintiff AF Holdings LLC (“Plaintiff”) will, and hereby does, move the Court for an order  
19 setting an expedited briefing and hearing schedule on Plaintiff’s Motion to Compel Production. This  
20 Motion for Expedited Briefing and Hearing is brought on the ground that, as further described  
21 below, Defendant has violated his duty to preserve evidence, and Plaintiff wishes to compel  
22 production of all computers in Defendant’s household before any further evidence can be spoliated.  
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24 Plaintiff further will, and hereby does, move the Court for an order compelling Defendant to  
25 produce each and every computer in his household, including his own, because, as set forth more  
26 fully below, Defendant exercises has testified that he has significant control over all of these  
27 computers; in the alternative, Plaintiff further will and hereby does move the Court for an order  
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1 compelling Defendant to produce his computer *immediately*, as well as an order issuing subpoenas  
2 *duces tecum* to each and every other member of Defendant’s household, requiring each of them to  
3 produce their *immediately* computers as well. These motions are based on this notice of motion, the  
4 memorandum of points and authorities filed herewith, the declaration of Brett L. Gibbs, the  
5 pleadings and papers on file herein, and upon such other matters as may be presented to the Court at  
6 the time of hearing.  
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### 8 MOTION FOR EXPEDITED BRIEFING AND HEARING

9 Pursuant to Local Rule 6-3, Plaintiff requests an expedited briefing and hearing on its motion  
10 to compel production.

11 This is an action for alleged infringement of Plaintiff’s copyright over the Internet. The  
12 nature of this action triggered very important and automatic obligations on the part of Defendant Joe  
13 Navasca (“Defendant”) and his attorney. Per his deposition of January 14, 2013, Defendant and his  
14 attorney have failed to meet one of these obligations—namely, that of evidence preservation.  
15

16 Defendant was deposed on January 14, 2013. (*See* Declaration of Brett Gibbs [“Gibbs  
17 Decl.”] at ¶ 2.) During this deposition, Defendant stated that he had installed a software program  
18 called CCleaner onto his computer as well as all other computers in his household. *Id.* ¶¶ 3-4.  
19 Defendant further stated that the CCleaner software continued to operate on his computer, as well as  
20 all other computers in his household, up until (and including) the time of the deposition. *Id.* ¶ 4.  
21 Tellingly, Defendant *repeatedly* asserted that *no one* had ever informed him of his obligation to  
22 preserve evidence. *Id.* ¶ 8. In essence, Defendant admitted to his destruction of crucial electronically  
23 stored information (“ESI”) on his, and others’, computers.  
24

25 Defendant’s continued use of CCleaner makes it unmistakably clear that his attorney,  
26 Nicholas Ranallo, did not inform him of his duty to preserve evidence. This failure on the part of  
27 Mr. Ranallo *directly* contradicts the statements he made in his portion of *two separate* Joint CMC  
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1 Statements, submitted by Plaintiff and Defendant on November 23, 2012 (ECF No. 19) and  
2 December 14, 2012 (ECF No. 31), respectively. *Id.* ¶¶ 9-10. In each of these Joint CMC Statements,  
3 under the heading entitled “6. Evidence Preservation,” Mr. Ranallo stated that “Mr. Navasca is  
4 aware of his obligation to preserve relevant evidence, including electronic evidence, and has every  
5 intention of complying with this obligation.” (*See* ECF No. 19 at 6) (*See* ECF No. 31 at 9-10.) Mr.  
6 Navasca’s statements at the deposition, that (1) he continued to run CCleaner on all computers in the  
7 household, including his own computer and (2) he was never made aware of his obligation to  
8 preserve evidence, obviously present grave issues with respect to evidence preservation. As such,  
9 Plaintiff moves for expedited briefing and hearing in order to expeditiously bring these issues before  
10 the Court and prevent any further evidence spoliation.  
11

12 As required by Local Rule 37-1(a), Plaintiff conferred with Defendant’s counsel in an  
13 attempt to resolve the instant discovery dispute without burdening the Court. (Gibbs Decl. ¶ 12.) Mr.  
14 Ranallo, however, denied that there was any issue with the CCleaner software as it related to  
15 spoliation of evidence. *Id.* Mr. Ranallo’s statement, of course, is incorrect. CCleaner is well-known  
16 as a product that cleans computers of, among other things, BitTorrent files and logs. *Id.* ¶ 6. In fact,  
17 one of CCleaner’s uses is to ***erase any previously existing trace of μTorrent on a given computer<sup>1</sup>***.  
18 *Id.* As described in Plaintiff’s Amended Complaint, μTorrent 2.2.1 is the BitTorrent client that  
19 Plaintiff alleges Defendant had used to infringe upon Plaintiff’s Copyright. (*See* ECF No. 13 ¶ 22.)  
20 Mr. Navasca’s continuous use of CCleaner during this pending litigation is thus *prima facie*  
21 evidence of willful destruction of relevant evidence. Even if Mr. Navasca’s conduct was not willful,  
22 his conduct indicates a clear emergency situation: Plaintiff needs to immediately inspect the  
23 computers in the Navasca household, before *even more* evidence can be destroyed.  
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28 <sup>1</sup> [http://www.ehow.com/way\\_5859959\\_can-uninstall-utorrent\\_.html](http://www.ehow.com/way_5859959_can-uninstall-utorrent_.html)

1 In light of Mr. Navasca's destruction of evidence, an expedited briefing and hearing  
2 schedule is necessary in the hope of preserving and analyzing whatever evidence remains of Mr.  
3 Navasca's conduct. Any delay in the Court's consideration of these matters could allow Defendant  
4 to commit further spoliation of evidence.  
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6 **MOTION TO COMPEL PRODUCTION**

7 As described above, Mr. Ranallo never informed his client, Mr. Navasca, of his obligation to  
8 preserve relevant evidence, despite the fact that Mr. Ranallo represented to the Court in his portion  
9 of *two separate CMC Statements* that "Mr. Navasca is aware of his obligation to preserve relevant  
10 evidence, including electronic evidence, and has every intention of complying with this obligation."  
11 (*See* ECF No. 19 at 6) (*See* ECF No. 31 at 9-10.) Given the high degree of control that Mr. Navasca  
12 apparently exercises over the other computers in his household, including, but not limited to,  
13 installing the CCleaner software on all the other computers in his household, Plaintiff moves the  
14 Court for an order compelling Defendant to produce each and every computer in his household,  
15 including his own, because Defendant exercises significant control over all of these computers, by,  
16 among other things, having installed the CCleaner software on all of the computers in his household;  
17 in the alternative, Plaintiff moves the Court for an order compelling Defendant to produce his  
18 computer, as well as an order issuing subpoenas *duces tecum* to each and every other member of  
19 Defendant's household, requiring each of them to produce their computers as well. Electronic  
20 evidence is, by its very nature, fleeting, and by bringing this Emergency Motion, Plaintiff will be  
21 better able to assess the relative position of the parties, as well as, most importantly, prevent any  
22 further spoliation of evidence. (Gibbs Decl. ¶ 13). Plaintiff's inspection of these computers is crucial  
23 to proving its allegations of copyright infringement. Immediate forensic examination of whatever  
24 traces of prior  $\mu$ Torrent-based is necessarily—regardless of whether such information still exists in  
25 light of Defendant's actions.  
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**CONCLUSION**

For the reasons contained herein, the Court should grant Plaintiff's Emergency Motion for Expedited Briefing and Hearing; and Motion to Compel.

Respectfully Submitted,

DATED: January 17, 2013

By: /s/ Brett L. Gibbs, Esq.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 17, 2013, all individuals of record who are deemed to have consented to electronic service are being served a true and correct copy of the foregoing document, and all attachments and related documents, using the Court's ECF system, in compliance with Local Rule 5-6 and General Order 45.

/s/ Brett L. Gibbs