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17 UNITED STATES DISTRICT COURT  
18 CENTRAL DISTRICT OF CALIFORNIA

19 j2 CLOUD SERVICES, INC., AND  
20 ADVANCED MESSAGING  
21 TECHNOLOGIES, INC.,

22 Plaintiffs,

23 v.

24 FAX87, FARJAD FANI, MATT  
25 JOHNSON FINANCE, INC.,  
26 ELNAZ FANI, ONE VOIX,  
27 MIRALUNA CABERTE YARDAN,  
28 STEVEN THONG WAY SEN,  
ROBERT BEAULIEU, CHARLES  
MONTGOMERY, ONLINEFAXES,  
SOLIDFAX, FAXVISION,  
EFAX4LESS, MYPHONEFAX,  
RESELLFAX, AND DOES 1-10,

Defendants.

Case No. 13-cv-05353-DDP

**MYPHONEFAX.COM, LLC'S *EX*  
*PORTE* APPLICATION FOR AN  
ORDER STAYING THE  
DEFAULT JUDGMENT**

1 MYPHONEFAX.COM, LLC (“MPF”) hereby applies to this court *ex parte*  
2 for an Order staying execution of the Default Judgment and Order, including the  
3 injunctive relief contained therein, entered on December 15, 2016, Dkt. Nos. 196-  
4 97.

5 The undersigned has advised counsel for j2 Cloud Services, Inc. and  
6 Advanced Messaging Technologies, Inc. (collectively, “plaintiffs”), Guy Ruttenberg  
7 of Ruttenberg IP Law, 1801 Century Park East, Suite 1920, Los Angeles, California  
8 90067, (310) 627-2270, guy@ruttenbergiplaw.com, that this *ex parte* application is  
9 being made and has advised him of the grounds of this application. *See* Declaration  
10 of David A. Thomas at ¶ 3. As of the filing of this application, Mr. Ruttenberg has  
11 not advised whether plaintiffs oppose this application, though in a prior conversation  
12 he advised that plaintiffs would oppose the relief that MPF is seeking herein. *Id.* at  
13 ¶ 2.

14 This request is timely and necessary to prevent irreparable harm to MPF and  
15 its customers, as the injunction will shutter its websites, terminate its business and  
16 stop all fax services to its approximately 80,000 customers.

17 MPF therefore respectfully requests that this Court order that enforcement of  
18 the default order, and in particular its injunctive relief provisions, be stayed pending  
19 the adjudication of MPF’s forthcoming motion to vacate the default judgment, which  
20 will be filed on December 28, 2016 subsequent to the expiration of the meet and  
21 confer requirement, or, in the alternative, that enforcement of the injunctive relief  
22 provisions in the default order be stayed pending this Court’s issuance of an order to  
23 show cause as to why such a stay should not be effective until final adjudication of  
24 MPF’s motion to vacate. MPF further requests clarification from the Court that the  
25 Default Judgment and Order does not prohibit MPF from paying its legal fees.

26 This application is based on the attached Memorandum of Points of  
27 Authorities, the Declaration of David A. Thomas filed concurrently herewith, the  
28

1 Declaration of Steven Thong filed concurrently herewith, the Declaration of Don  
2 Joffe filed concurrently herewith, and the Declaration of Erick Howard filed  
3 concurrently herewith.

4  
5 Dated: December 21, 2016

Kasowitz, Benson, Torres & Friedman LLP

6  
7 By: /s/ David A. Thomas

David A. Thomas

8 Attorneys for Defendant  
9 MYPHONEFAX.COM, LLC  
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**MYPHONEFAX.COM, LLC'S  
MEMORANDUM IN  
SUPPORT OF *EX PARTE*  
APPLICATION**

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1 MYPHONEFAX.COM, LLC (“MPF”) submits this memorandum of points  
2 and authorities in support of its application for an ex parte order staying enforcement  
3 of the default judgment and order entered against it in favor of j2 Cloud Services,  
4 Inc. and Advanced Messaging Technologies, Inc. (collectively, “plaintiffs”) on  
5 December 15, 2016.

6 **I. PRELIMINARY STATEMENT**

7 MPF, despite never having been served in this action, is now subject to a  
8 default judgment, which includes severe and extremely broad injunctive provisions  
9 that threaten MPF’s very existence, and which, in enforced, will have a devastating  
10 impact on its clients. MPF has just retained counsel and will file a motion to  
11 vacate the default judgement pursuant to Fed. R. Civ. P. 60(b) on December 28,  
12 2016. A stay of the injunction pending decision on the motion to vacate is  
13 necessary to ensure MPF is not put out of business by the injunctive provisions,  
14 which require, in essence, the complete cessation of all services to all of MPF’s  
15 customers. Further, efforts to collect on the monetary judgment awarded will also  
16 unduly interfere with MPF’s operations.

17 The harm absent a stay is manifest. MPF provides services that enable its  
18 customers to send and receive facsimile (“fax”) messages using their computers,  
19 smart phones and similar devices. MPF believes that between 10,000 and 25,000  
20 of its customers are medical professionals, such as doctors, medical offices, and  
21 pharmacists. The impact of cutting off medical providers off from their fax  
22 services could be catastrophic. In fact, interruptions in fax transmittal have  
23 resulted in patient deaths. See *infra*.

24 In addition to medical professionals, MPF provides services to numerous  
25 other businesses and professionals, including attorneys, mortgage loan officers and  
26 realtors. See Declaration of Don Joffe (hereinafter “Joffe Decl.”). If the  
27 permanent injunction remains in place, MPF will no longer be able to remain  
28

operational, resulting in MPF's approximately eighty-thousand (80,000) customers losing the ability to either send or receive any communications via facsimile. Those customers will not be able to transfer their fax numbers to other providers. Absent temporary relief, customers would be forced to incur significant costs related to potential business interruptions, lost opportunities and revising their business cards, brochures, websites, and other promotional materials. MPF will be unable to provide more than \$1.5M in prepaid services, resulting in further loss to its customers.

MPF's motion to vacate is meritorious. Simply, MPF was never served. Rather, plaintiffs sent facially deficient substituted service, without the required return receipt, to a person who is neither employed by nor authorized to receive service for MPF. A default judgment is void and must be set aside under FRCP Rule 60(b)(4) when the service of process was—as here—insufficient resulting in the court lacking personal jurisdiction over the defendant.<sup>1</sup> Moreover, MPF has strong defenses to each and every cause of action asserted by plaintiffs. Most importantly, MPF's services do not infringe plaintiffs' patents. Accordingly, the default judgment should be stayed until MPF's motion to vacate is decided to maintain the status quo and to avoid irreversible damage to MPF and its customers.

## **II. STATEMENT OF FACTS**

### **A. Myphonefax.com**

MPF is a limited liability company organized and existing under the laws of the Cook Islands. It was formed on November 29, 2012. *See* Joffe Decl. at ¶ 2. MPF's principal place of business is in Colombia. *See* Initial Disclosures of Defendant Farjad Fani, attached as Exhibit 1 hereto. MPF has no place of business, assets, operations, agent or employees in the Philippines. *See* Joffe Decl.

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<sup>1</sup> Additionally, MPF has a ground for vacating the Default Judgment under Rule 60(b)(1) by virtue of mistake, which it will assert in its Rule 60 motion.

1 at ¶ 6.

2 MPF provides services that enable its customers to send and receive  
3 facsimile (“fax”) messages using their computers, smart phones and similar  
4 devices. *Id.* at ¶ 4. A substantial portion of MPF’s customer base is medical  
5 professionals – doctors, medical offices, pharmacists and the like. Although there  
6 is no way to know for sure how many medical professionals utilize MPF's services,  
7 the company estimates that its customer base includes between ten to twenty-five  
8 thousand (10,000 – 25,000) individual doctors, medical offices and pharmacists.  
9 *Id.* at ¶ 10. In addition to medical professionals, MPF provides services to  
10 thousands of lawyers, mortgage loan officers, truck drivers, realtors and other  
11 small businesses. The number of fax customers using MPF’s services totals over  
12 80,000 users with almost 100,000 fax numbers belonging to those customers. *Id.* at  
13 ¶ 12. MPF has been paid over \$1.5M in prepaid fax services. *Id.* at ¶ 9.

14 **B. Nature of the Action/Purported Service of Process**

15 Plaintiffs initiated this action with the filing of a summons and complaint on  
16 July 24, 2013. *See* Dkt. No. 1. On April 15, 2016, plaintiffs filed their First  
17 Amended Complaint, which for the first time named “Myphonefax” – and were  
18 given 60 days to complete service on all newly added parties. *See* Dkt No. 43. On  
19 or about May 9, 2016, plaintiffs transmitted a letter to the Clerk of Court requesting  
20 service on several defendants, including “Myphonefax,” be effectuated pursuant to  
21 Fed. R. Civ. P. 4(f)(2)(c)(ii). In that letter, plaintiffs alleged that all those defendants  
22 were residents of the Philippines and could be served at a business park in  
23 Muntinlupa, Republic of the Philippines *See* Dkt. No. 80. According to a delivery  
24 printout attached to the proof of service, the Clerk sent the complaint via Federal  
25 Express to Miralana Caberte Yarden on behalf of One Voix – not MPF – at the  
26 designated address in the Republic of the Philippines, where it was signed for by an  
27 individual named S. Sherry Galvez. *Id.* The Federal Express package did not include

1 a return receipt request. Plaintiffs have alleged that service on MPF in the  
2 Philippines was proper due to the presence of Miraluna Yardan (“Ms. Yardan”)  
3 stating that “Miraluna Yardan holds herself out to be the CEO, COO, and/or  
4 managing member of each of Defendants ....” *Id.* Plaintiffs have not alleged that S.  
5 Sherry Galvez, the individual who received the package, is connected in any way to  
6 MPF.

7 The person plaintiffs tried to serve, Ms. Yardan, is not an employee of MPF,  
8 much less an officer in the company, and is not authorized to accept service on behalf  
9 of MPF. *See* Joffe Decl. at ¶ 6. Rather, Ms. Yardan is a principal at ONE VOIX,  
10 which provides customer service functions for MPF on a contract basis. *Id.* MPF  
11 does not maintain any offices or other facilities in the Philippines and has no  
12 employees or other assets located in that country. *Id.*

13 No authorized agent of MPF was served with *any* legal process in this case.  
14 *Id.* at ¶ 7. A now *former* MPF employee, Farjad Fani (“Mr. Fani”), who served as  
15 Manager of MPF from its formation until his resignation on September 9, 2016,  
16 reported to Don Joffe, the head of MPF’s management team (“Mr. Joffe”), that he  
17 was personally engaged in litigation but that MPF had not yet been properly served.<sup>2</sup>  
18 As a result, Mr. Joffe concluded that MPF did not need to hire counsel or take any  
19 other action unless and until the appropriate documents were correctly served on  
20 MPF.

21 MPF did not and has not filed a responsive pleading, as it has no presence in  
22 the Philippines and thus has not been properly served with process in this action.  
23 Nevertheless, on October 31, 2016 – apparently as a result of a routinized clerk  
24 notice – plaintiffs moved for a default judgment against MPF. This Court granted  
25 plaintiffs application, and entered an order for a default judgment on December 15,

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26 <sup>2</sup> Mr. Fani’s counsel, Erick Howard, had concluded that service on MPF through  
27 Ms. Yardan, was defective. *See* Howard Decl. at ¶¶ 2-3.

1 2016. *See* Dkt. No. 196 MPF’s new counsel filed a Special Appearance on behalf  
2 of MPF on December 20, 2016. *See* Dkt. No. 198.

3 **C. The Default Judgment and Permanent Injunction**

4 On December 15, 2016, the Court issued a Default Judgment and Order  
5 against the allegedly defaulting defendants, ostensibly including MPF (though it is  
6 erroneously named by its website, myphonefax.com). The Court granted judgment  
7 in favor of plaintiffs against MPF on counts one through nine of the First Amended  
8 Complaint. In so doing, the court awarded plaintiffs \$17,020,758 in compensatory  
9 damages, \$336,389 in attorney’s fees, and \$8,788,550 in enhanced damages for a  
10 total monetary award of \$26,145,697. MPF was found to be jointly and severally  
11 liable with all other defaulting defendants for the full amount of the award.

12 In addition to awarding monetary damages, the court entered permanent  
13 injunctive relief against all defaulting defendants, including MPF. MPF is  
14 permanently enjoined from selling or offering for sale any fax services in the  
15 United States, using the EFAX, E-FAX, or similar trademarks at issue in this  
16 action, and from providing services or any support to any person or entity selling or  
17 providing internet fax services. As discussed *infra*, this overly broad and vague  
18 permanent injunction essentially serves to shutter MPF’s business.

19 **D. The Court-Imposed Permanent Injunction Creates Irreparable**  
20 **Harm to MPF and its Customers**

21 The permanent injunction issued in connection with the default order against  
22 MPF requires, in essence, the complete cessation of all services to all of MPF’s  
23 customers, including the aforementioned medical professionals. The impact of  
24 cutting medical providers off from their fax services could be catastrophic.  
25 Interruptions in fax transmittal have resulted in patient deaths. *See* Joffe Decl. at ¶  
26 11. In fact, plaintiffs recognize the prevalence and importance of fax usage by the  
27 medical profession on their own website, which states that “[f]ax remains the  
28

1 dominant method of communicating with colleagues, patients, insurance companies  
2 and pharmacies.” *Id.*

3 In addition to medical professionals, MPF provides services to countless other  
4 businesses and professionals, including attorneys, mortgage loan officers and  
5 realtors. *Id.* at ¶ 12. If the permanent injunction remains in place, MPF will no  
6 longer be able to remain operational, resulting in MPF’s approximately eighty-  
7 thousand (80,000) customers losing the ability to either send or receive any  
8 communications via facsimile. Additionally, MPF’s customers would not be able to  
9 port and otherwise transfer their fax numbers to other providers. *Id.* at ¶ 12. The  
10 majority of MPF’s customers have retained the same fax number for years. Absent  
11 temporary relief, these customers would be forced to get new fax numbers and incur  
12 significant costs related to revising their business cards, brochures, websites, and  
13 other promotional materials. In addition, the unexpected loss of fax capabilities will  
14 likely result in customers losing sales and opportunities, and have countless  
15 unforeseeable additional effects. *Id.* at ¶ 12.

16 A substantial percentage of MPF’s customer base pre-pays for future fax  
17 services. The total amount of money pre-paid by customers for services not yet  
18 utilized totals approximately \$1,521,131.85. *Id.* at ¶ 8. If MPF is forced to shut  
19 down through enforcement of the permanent injunction, MPF would be unable to  
20 fulfill its service agreements with customers utilizing its pre-paid services,  
21 potentially resulting in significant losses for those customers. Finally, absent a stay,  
22 MPF will be unjustly deprived of revenue from its operations.

23 Absent the granting of temporary relief pending the adjudication of MPF’s  
24 forthcoming motion to vacate the default judgment, MPF will be irreparably harmed  
25 as it will have no choice but to cease all operations, which, in turn, will cause great  
26 and immediate harm to its customers. Of course, all of this will be manifestly unjust  
27 when MPF demonstrates that its services do not infringe any of Plaintiffs’ patents.

### III. LEGAL STANDARD

Fed. R. Civ. P. 62(b) states in part that “... the court may stay the execution of a judgment - or any proceedings to enforce it - pending disposition of any of the following motions:... (4) under Rule 60, for relief from a judgment or order.” The decision whether to grant a stay or not under Rule 62 is within the Court's discretion. *See U.S. for Use and Benefit of Larkin v. Platt Contracting Co.*, 324 F.2d 95 (1st Cir. 1963); *see also Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (the ability to stay proceedings “is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for the litigants.”).

Under Fed. R. Civ. P. 62(b) and as set forth by the Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), a court looks to the balance the equities when granting a stay. The accepted standards that courts use for discretionary stays are: (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. *See id.* Analysis of those factors clearly demonstrates that the Default Judgment against MPF should be stayed by this Court.

## IV. ARGUMENT

The balance of the equities are in MPF's favor. As demonstrated below, MPF is likely to succeed on the merits of its application to vacate the Default Judgment, which is void due to improper service. MPF also would experience massive and irreparable harm absent the stay of enforcement of the permanent injunction pending the final adjudication of its motion to vacate. Not only will MPF be forced to go out of business, its customers will be irreparably damaged and countless medical professionals will be without the use of critical fax services.

1 Given the use of MPF's services by medical professionals, there also is a risk of  
2 death or injury arising from cessation of fax services. Other customers will lose  
3 prepaid services and likely will never recover such funds.

4 Unable to port over their fax numbers, all of MPF's customers will be  
5 forced, at the holiday, to contact clients, customers, and other business contacts to  
6 advise of new fax numbers, be forced to change all their business materials that  
7 contains their fax numbers, and otherwise be subjected to serious disruption of  
8 their fax-dependent businesses. Joffe Decl. at ¶ 12.

9 There is no remotely comparable harm to plaintiffs, in that in the wholly  
10 unlikely event they prevail on the motion to vacate, the Default Judgment would  
11 remain intact and, in any event, they would still have an enforceable judgment and  
12 injunctive relief against several additional defaulting defendants. MPF simply  
13 seeks the ability to continue operations and litigate the issues implicated in this  
14 dispute on the merits. At a minimum, there are clearly "serious questions" on the  
15 merits and the balance of harms "tips sharply" in favor of a stay. *See Lopez v.*  
16 *Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

17 **A. MPF Is Likely to Succeed on the Merits of Its Motion to Vacate**

18 MPF is likely to succeed on its forthcoming motion to vacate the default  
19 judgment and order against it. Default judgments are generally disfavored, as  
20 public policy dictates cases be adjudicated on the merits wherever possible. *See*  
21 *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). Fed. R.  
22 Civ. P. 60(b)(4) provides that a party may set aside a default judgment on the  
23 grounds that it is void based upon insufficient service of process. If the court  
24 deems that process was not sufficient, the judgment is void and must be vacated:

25 There is no question of discretion on the part of the court when a  
26 motion is under Rule 60(b)(4). Nor is there any requirement, as there  
27 usually is when default judgments are attached under Rule 60(b), that

1 the moving party show that he has a meritorious defense. Either a  
2 judgment is void or it is valid. Determining which it is may well  
3 present a difficult question, but when that question is resolved, the  
4 court must act accordingly.

5 *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614  
6 F.2d 1247, 1256 (9th Cir. 1980); *see also S.E.C. v. Internet Solutions for Bus. Inc.*,  
7 509 F.3d 1161, 1165 (9th Cir. 2007).

### 8 **1. Service of Process Under Rule 4**

9 Plaintiffs purported to serve MPF in the Philippines under Fed. R. Civ. P.  
10 4(f)(2)(c)(ii). According to Rule 4(f)(2)(C)(ii), service by “mail that the clerk  
11 addresses and sends to the individual and that requires a signed receipt,” is allowed  
12 “unless prohibited by the foreign country's law.” The laws and rules of the  
13 Philippines have specific requirements for serving a summons and for service by  
14 mail, including a requirement that the reasons personal service could not be made  
15 be set out in the service documentation. *See* Philippines Code of Civil Procedure  
16 Rule 7, Section 11. It appears mail service was the one and only attempt at service  
17 here.

18 Additionally, for service under Fed. R. Civ. P. 4(f)(2)(C)(ii) to be effective,  
19 the plaintiff must submit proof of use of a “form of mail that the clerk addresses  
20 and sends to the individual and that requires a signed receipt.” Under Fed. R. Civ.  
21 P. 4(l), service outside of a United States judicial district under 4(f)(2) or (f)(3)  
22 must be proved “by a receipt signed by the addressee, or by other evidence  
23 satisfying the court that the summons and complaint were delivered to the  
24 addressee.” Fed. R. Civ. P. 4(l)(2)(B). This did not occur.

### 25 **2. MPF Was Not Properly Served Under Rule 4**

26 The most glaringly obvious deficiency revealed by plaintiffs’ alleged proof of  
27 service of summons (the “proof of service”) with respect to MPF is that nothing  
28

1 reflected in the proof of service has anything to do with MPF. *See* Dkt. No. 80.  
2 Plaintiffs allege that MPF, along with other defendants, was properly served per  
3 Federal Rule of Civil Procedure 4(f)(2)(C)(ii), citing to Dkt. No. 77 (a Federal  
4 Express purchase receipt) in support of their assertion. *Id.* However, Rule  
5 4(f)(2)(C)(ii) requires service by “mail that the clerk addresses and sends to the  
6 individual and that requires a *signed receipt*.” (emphasis added). Contrary to  
7 plaintiffs’ assertion, the Federal Express printout merely shows that a package was  
8 sent to Miralana Caberte Yarden on behalf of One Voix at an address in the Republic  
9 of the Philippines. As it was not addressed to MPF nor sent to MPF, plaintiffs’  
10 alleged service on MPF failed to comply with the requirement that it be addressed  
11 and sent *to MPF*. *See* Dkt. No. 77; *see also Lerma v. Stylistics Los Angeles Car Club,*  
12 *Inc.*, No. CV 12-06704 DDP JEMX, 2015 WL 349310, at \*2 (C.D. Cal. Jan. 23,  
13 2015), *aff’d*, No. 15-55270, 2016 WL 6803737 (9th Cir. Nov. 17, 2016) (“Service is  
14 proper when a copy of the summons and complaint are delivered ‘to the individual  
15 personally’ in the case of an individual defendant, or delivered ‘to an agent  
16 authorized by appointment or by law to receive service of process,’ in the case of a  
17 corporate defendant.”), citing Fed. R. Civ. P. 4. Service directed to an entity other  
18 than MPF cannot possibly meet that standard.

19 In addition, plaintiffs have offered no evidence or explanation in support of  
20 their assertion that Ms. Yarden held herself out as the “CEO, COO, and/or managing  
21 member” of MPF at the time of the alleged service. *See Kexuan Yao v. Crisnic Fund,*  
22 *S.A.*, No. SACV 10-1299 AG JCGX, 2011 WL 3818406, at \*7 (C.D. Cal. Aug. 29,  
23 2011) (“Courts have found that Rule 4(h)(2) allows for service of a corporation  
24 through service of its officers, managers, or authorized agents...But Plaintiff has  
25 submitted no evidence that Cruz is an officer, managing agent, general agent, or  
26 otherwise authorized agent of Defendant Crisnic. Therefore, the Court concludes that  
27 Plaintiff has not satisfied service of Defendant Crisnic under Rule 4(h)(2) or any

1 other provision of Rule 4(h)"). Further, the person served must be an *actual* officer,  
2 manager or authorized agent of the party – apparent authority will not suffice. *See*  
3 *Vazquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1, 6 (1st Cir. 2014). Regardless, Ms.  
4 Yardan's status is completely irrelevant given the facially defective means of service  
5 employed.

6 Plaintiffs offered no evidence that the federal express package required a  
7 signed receipt—another fatal flaw. *See* Fed. R. Civ. P. 4(f)(2)(C)(ii); *see also*  
8 *Kexuan Yao v. Crisnic Fund, S.A.*, No. SACV 10-1299 AG JCGX, 2011 WL  
9 3818406, at \*7 (C.D. Cal. Aug. 29, 2011) ("The evidence of service by United States  
10 Postal Service is insufficient because Plaintiff has submitted no evidence of a signed  
11 receipt."). Of course, no signed receipt was ever produced. A Federal Express  
12 printout showing delivery to a receptionist at a different company is neither a signed  
13 receipt nor any proof of service on MPF.

14 In sum, plaintiffs offered no credible proof or explanation demonstrating how  
15 a FedEx slip addressed to Miralana Caberte Yarden on behalf of One Voix with a  
16 Philippine address was proof of service on or has any connection to MPF. However,  
17 to be clear, (i) MPF is a Cook Islands company, (ii) does not maintain a business,  
18 have an office, or own property in the Philippines, and (iii) Miralana Caberte Yarden  
19 is not a MPF officer, manager, or authorized agent. *See* Joffe Decl. at ¶¶ 2, 6. These  
20 critical facts, in addition to the fatal flaws in the method of service, leave no doubt  
21 that service was not properly effectuated on MPF. Accordingly, MPF is likely to  
22 prevail on the merits of its motion to vacate the default judgment on the grounds that  
23 it is void. *See S.E.C. v. Internet Sols. for Bus. Inc.*, 509 F.3d 1161, 1165 (9th Cir.  
24 2007).

### 25 3. MPF Can Show "Good Cause" for Vacating the Default

26 As stated *supra*, the court need not proceed any further given that the default  
27 is a legal nullity. However, even if the court applies a "good cause" threshold,  
28

MPF's conduct and actions still meet the standard for vacating the default. The good cause analysis considers three factors: (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984). As discussed below, MPF can meet all three *Falk* factors in its motion to vacate.

**a. Plaintiff Will Not Be Prejudiced By Litigating the Issues on the Merits**

Prejudice to a plaintiff in vacating a default typically occurs where a plaintiff's ability to pursue its claim will be hindered because evidence is lost, discovery becomes more difficult, or there is an opportunity for fraud or collusion. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) (*overruled on other grounds by Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001)). There is no evidence on the record even suggesting that vacating the default will lead to the loss of evidence, onerous discovery, or fraud or collusion.

**b. Defendant Has Several Meritorious Defenses to each of Plaintiffs' Claims**

While a defendant moving to vacate a default judgment must present a meritorious defense to the action, the "burden on a party seeking to vacate a default judgment is not extraordinarily heavy" in this regard. *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1094 (9th Cir. 2010). MPF has several meritorious defenses to plaintiffs' claims.

First, as detailed above, MPF possesses several jurisdictional defenses predicated on insufficient service of process. Second, the majority of plaintiffs' claims against MPF are grounded in the theory that MPF was an alter ego of several other defendants. Simply put, this assertion is not true -- MPF is an independent entity based in the Cook Islands. MPF is not an affiliate or alter ego

1 to any of the parties which negotiated and executed the agreements at issue in the  
2 case. Third, MPF has meritorious defenses to plaintiffs' claims grounded in unfair  
3 business practices, as plaintiffs' First Amended Complaint fails to identify any  
4 injury to customers, let alone a "substantial" injury.

5 MPF also has several meritorious defenses to plaintiffs' patent claims.

6 **(1) U.S. Patent No. 8,675,220**

7 The '220 patent concerns searching on keywords digitally extracted from  
8 faxes. MPF's services do not use digital character recognition to extract text, and  
9 do not run keyword searches on extracted text. The limited search capability on  
10 MPF's sites only searches on separately input fields, like sender and recipient, not  
11 on extracted text. Thong Decl. at ¶ 13.

12 **(2) U.S. Patent No. 6,208,638**

13 The '638 patent covers receiving a fax, converting the fax into a digital  
14 representation, and emailing it. In MPF's network, an independent company,  
15 EtherFax, is the entity that receives a fax message and converts the message to  
16 digital format. EtherFax does not email the converted text. Instead, it uses a batch  
17 transfer protocol that is not email. Thong Decl. at ¶ 8.

18 **(3) U.S. Patent No. 8,310,699**

19 This patent covers counting the number of fax pages received, and then  
20 based on that page count, determining a "measure" of the total number of pages  
21 transmitted, such as the number of trees saved by not printing faxes, or a number of  
22 carbon credits earned. There is no such "measure" of a page count in MPF's  
23 services. Thong Decl. at ¶ 15.

24 **c. Defendant's Conduct was Not Culpable**

25 Finally, MPF was not "culpable" under the third *Falk* prong. *See TCI Group*  
26 *Life*, 244 F.3d at 697–98 (holding that situations where the moving defendant  
27 offers a credible, good faith explanation negating any "intention to take advantage

1 of the opposing party, interfere with judicial decision making, or otherwise  
2 manipulate the legal process” are generally not considered “culpable,” even if the  
3 moving defendant had actual notice of the pending action).

4 Here, MPF received notice of a pending suit in which it had been named in  
5 (albeit improperly), but not served with process. MPF had a good faith belief that  
6 it had not been properly served and thus had no obligation to take any action. *See*  
7 Joffe Decl. at ¶¶ 6-7; Decl. of Erick Howard at ¶¶ 2-3. The failure of a Cook  
8 Islands domiciliary, purportedly (and ineffectively) served in the Philippines, to  
9 appear in an action pending in the United States could hardly be construed as a  
10 “devious, deliberate, willful” attempt to “manipulate the legal process.” *See TCI*  
11 *Group Life*.

12 **B. MPF Will Be Irreparably Harmed Absent Temporary Relief**

13 It is difficult to imagine a clearer case of irreparable harm than the one  
14 presented here. As set forth above (*supra* § II) and in the accompanying  
15 declarations, MPF and its customers will incur significant and irreparable harm  
16 absent the granting of temporary injunctive relief.

17 The overly broad and vague nature of the permanent injunction entered in  
18 connection with the default order is such that MPF will have no choice but to cease  
19 operations if the injunction remains in effect. Not only will this affect MPF’s  
20 successful business, it will have a disastrous effect on MPF’s 80,000 customer  
21 base, which includes up to twenty-five thousand (25,000) medical professionals.  
22 *See* Joffe Decl. at ¶ 10. MPF’s customers will lose more than \$1.5 million in pre-  
23 paid fees, and will be forced to incur significant expenses related to changing fax  
24 numbers.

25 **C. The Balance of the Harms Tips Sharply Towards MPF**

26 The judgment should be stayed because there is little possible harm to  
27 plaintiffs that may result from the Court granting the ex parte application for a stay  
28

1 of the injunctive relief. Plaintiffs have an enforceable money judgment and  
2 injunctive relief against several additional defaulting defendants. Additionally,  
3 plaintiffs are entitled to post-judgment interest. In the extremely unlikely event the  
4 Court denies the motion to vacate, plaintiffs can be compensated with interest and  
5 the injunction will then go into effect. Conversely, permitting the imposition of the  
6 injunctive relief contained in the default order on MPF now will cripple its  
7 business and cause irreparable harm on its business, customers, and third parties.

8 **D. A Stay of Enforcement is in the Public Interest**

9 As detailed above, some 80,000 of MPF's customers, including medical  
10 professionals and their patients, will be adversely impacted absent a stay of the  
11 permanent injunction. *See* Joffe Decl. at ¶ 9. Simply put, MPF will go out of  
12 business without a stay—an inequitable result given that it has not been afforded an  
13 opportunity to defend the claims asserted against it on the merits, and given that  
14 MPF has complete defenses to this action.

15 **V. CLARIFICATION REQUEST CONCERNING LEGAL FEES**

16 In an abundance of caution, MPF seeks clarification from the Court that the  
17 Default Judgment and order do not prohibit MPF from paying counsel in this  
18 litigation. The Court's order provides that "Defendants MJF and Fax87 shall use  
19 any undistributed assets to pay the judgment in this case," and "MJF and Fax87 are  
20 further ordered to collect assets distributed to any shareholders, officers or  
21 directors in order to pay the judgment." ¶¶ 29-30. MPF understands this provision  
22 to be specific to the assets of MJF and Fax87, and not a constraint on MPF's ability  
23 to pay its counsel. Nor does MPF read these provisions as restricting the payment  
24 of fees for counsel to represent a party in this litigation. Any such restriction would  
25 unfairly impair MPF's right to counsel and due process, including to pursue its  
26 rights under Rule 60 and its right to appeal. In the interim, fees are being paid into  
27 an isolated bank account at Citibank, # 9250402260.

1 **VI. CONCLUSION**

2 For these reasons, MPF respectfully requests that the Court GRANT its  
3 application and stay enforcement of the December 15, 2016 default judgment and  
4 order pending adjudication of its motion to vacate the default judgment.  
5

6 Dated: December 21, 2016 Kasowitz, Benson, Torres & Friedman LLP  
7

8 By: /s/ David A. Thomas

9 David A. Thomas

10 Attorneys for Defendant  
11 MYPHONEFAX.COM, LLC  
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