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 11 Defendants ATLANTIC WAVE
 12 HOLDINGS, LLC and STRIKEPOINT,
 13 LLC

14 **UNITED STATES DISTRICT COURT**
 15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 ATLANTIC WAVE HOLDINGS, LLC,
 17 a Virginia limited liability company and
 18 STRIKEPOINT CONSULTING, LLC, a
 19 Virginia limited liability company,
 20 Plaintiffs,
 21 vs.
 22 CYBERLUX CORPORATION, a
 23 Nevada Corporation; MARK D.
 24 SCHMIDT, an individual; and DOES 1
 25 to 50, Inclusive,
 26 Defendants.

CASE NO. 3:24-cv-00482-RBM-VET
Honorable Ruth Bermudez Montenegro

**PLAINTIFFS ATLANTIC WAVE
 HOLDINGS, LLC AND
 STRIKEPOINT CONSULTING,
 LLC’S UPDATE RE: MOTION TO
 VACATE**

ORAL ARGUMENT REQUESTED

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Atlantic Wave Holdings, LLC and Strikepoint, LLC (collectively,
4 “Plaintiffs”) submit this update to the Court in accordance with the Order dated July
5 22, 2024 (Doc. 26), which denied Plaintiffs’ Ex Parte Application for an Order to
6 Require Defendant to Post a Bond and directed supplemental briefing on Defendant
7 Cyberlux Corporation's Motion to Vacate the domesticated judgment. Since the
8 Court’s Order, Plaintiffs have diligently pursued enforcement of the judgment and
9 uncovered further evidence of Defendants' ongoing misconduct, financial instability,
10 and continued breach of the settlement agreement.

11 Defendants have engaged in actions that have significantly delayed the
12 enforcement of the judgment. They improperly filed the same declaratory relief
13 actions as counterclaims in our collection action and then re-filed them as a request
14 for declaratory relief on the original case in Virginia, even though it had been closed
15 since the final judgment was issued. After this Court dismissed those same claims on
16 grounds of forum non conveniens, Defendants finally filed new actions in Virginia.
17 Despite claiming to seek injunctive and immediate declaratory relief, Defendants
18 have not responded to our counsel or to discovery requests, and they are clearly
19 attempting to delay proceedings at every turn.

20 Since August 2023, Defendants have failed to make required payments under the
21 settlement agreement, provide requested information on drone sales, and have made
22 several late payments. Despite receiving a substantial \$38 million payment from a US
23 Government contract in September 2023, Defendants misused these funds for
24 personal expenses and transfers. Bank records obtained in discovery show that over
25 \$4 million was transferred to Defendant Mark D. Schmidt and his associates. Specific
26 transfers include \$250,000 on September 8, 2023, \$213,000 on September 11, 2023
27 for a car purchase, and \$850,000 on October 16, 2023 to Schmidt's Edward Jones
28 account, among many others. The total amount of these transfers is \$4,417,205.06.

1 Furthermore, Defendants violated the May 31, 2024, Court Order by misusing
2 \$317,000 in garnished funds intended for payroll purposes. This misuse of funds
3 directly contravenes the Court's directive and further demonstrates Defendants'
4 disregard for their legal obligations and the authority of this Court.

5 Plaintiffs have continued their efforts to collect the judgment through
6 garnishment proceedings in Virginia and Texas, and by scheduling depositions of key
7 Cyberlux personnel. These enforcement actions have been met with resistance and
8 non-compliance from Defendants. Both Neil Whiteley and Phillip Tucker were served
9 in Texas, with depositions set for August 27, 2024. However, Defendants filed a
10 motion to vacate our judgment in Texas, which automatically stayed discovery.
11 Additionally, a deposition in Virginia was scheduled for August 27, 2024, but
12 Defendants did not appear, resulting in a non-appearance. This consistent failure to
13 comply with discovery obligations further highlights the urgency of lifting the stay to
14 allow Plaintiffs to continue their collection efforts.

15 Defendants' refusal to provide requested information on drone sales and their
16 pattern of transferring significant sums of money to personal accounts, friends, and
17 family members, while ignoring their obligations to Plaintiffs and the IRS,
18 underscores the critical need for immediate court intervention. Plaintiffs have
19 uncovered that, despite public statements and financial reports indicating drone sales,
20 Defendants have continually denied such sales in communications with Plaintiffs. An
21 email from Doug Grimes explicitly stated, "we did not sell any drones," contradicting
22 financial records showing payments received for drone sales.

23 Given these developments and the ongoing dissipation of assets by Defendants,
24 Plaintiffs respectfully request that the Court deny Defendants' Motion to Vacate the
25 domesticated judgment and lift the stay to allow Plaintiffs to pursue collection efforts.
26 Plaintiffs also request a hearing to address any questions the Court may have and to
27 avoid further delay. Immediate court intervention is necessary to prevent further
28

1 evasion of financial responsibilities by Defendants and to secure the assets needed to
2 satisfy the judgment.

3 **II. DEVELOPMENTS AND ARGUMENTS**

4 **A. Updates on All Litigation Surrounding the Settlement Agreement**

5 **i. California (Present Action)**

6 Plaintiffs initiated a straightforward collection action in California to enforce
7 the Virginia Judgment against Cyberlux’s wholly-owned subsidiary, Datron, Inc.,
8 located in Vista, California. This action was necessary due to Defendants' consistent
9 breaches of the settlement agreement and failure to comply with their payment
10 obligations. This action is stayed pending the resolution of Defendants’ Motion to
11 Vacate Domesticated Judgment. (Dkt. Nos. 9, 12, 13; Declaration of William Welter
12 (“Welter Decl.”) at ¶ 2).

13 **ii. Virginia**

14 The original action in Virginia resulted in the Settlement Agreement (Dkt. No.
15 24-1) and the Amended Final Order and Judgment (“Virginia Judgment”) (Dkt. No.
16 9-2 at p. 29), which form the basis of Plaintiffs' collection efforts. After Plaintiffs
17 garnished Defendants’ funds held in PNC and Towne Bank accounts, Defendants
18 filed an emergency motion seeking access to the garnished funds. (Welter Decl. at ¶
19 4, Ex. A). Defendants sought declarations regarding the validity and enforceability of
20 the settlement agreement. (Id.) The court initially allowed Cyberlux to access up to
21 \$317,000 for payroll purposes and \$230,000 to pay Plaintiffs. (Welter Decl. at ¶ 5,
22 Ex. B). This initial relief was granted to address alleged urgent payroll needs and
23 partial payment obligations. (Id.) Bank records obtained in discovery show that the
24 same day the Court issued the temporary order, Cyberlux requested a check for
25 \$198,798.37 to pay its attorneys’ fees. (Welter Decl. at ¶ 6).

26 However, the same judge who signed the original Judgment and Order later
27 found that Defendants' request for declaratory relief was improperly filed. In the June
28 7, 2024, Opinion and Order, the court dismissed Defendants' declaratory relief

1 complaint and awarded Plaintiffs their attorneys' fees for defending against the
2 improperly brought action. (Welter Decl. at ¶ 7, Ex. C). Subsequently, on August 9,
3 2024, the court released \$183,798.34 from PNC Bank and \$4,862.86 from Towne
4 Bank to Plaintiffs. (Welter Decl. at ¶ 8, Exs. D & E).

5 On July 8, 2024, Cyberlux filed a Declaratory Relief action and a Complaint
6 for Temporary Preliminary Injunction in Virginia. (Welter Decl. at ¶ 9, Ex. F). Despite
7 these filings claiming the need for emergency relief, Defendants have done nothing
8 to schedule a hearing or submit further briefing regarding their so-called emergency.
9 (Welter Decl. at ¶ 10). This inaction strongly suggests that the filings were intended
10 to delay enforcement rather than to address any substantive legal issues.

11 Additionally, Defendants have ignored several letters from Plaintiffs' counsel
12 regarding deposition scheduling, demonstrating their refusal to engage in the legal
13 process. (Welter Decl. at ¶ 11, Exs. G, H, & I). For instance, letters sent by Plaintiffs'
14 counsel on August 6, 2024, August 9, 2024, and August 23, 2024, went unanswered.
15 Defendants also failed to respond to discovery requests and did not appear for a
16 deposition scheduled for August 27, 2024, resulting in a non-appearance. (Welter
17 Decl. at ¶ 12, Ex. J).

18 **iii. Texas**

19 In Texas, the Virginia judgment was domesticated, and garnishment
20 proceedings were initiated to obtain assets related to Cyberlux's subsidiary, Catalyst
21 Machine Works. (Welter Decl. at ¶ 13). However, Defendants filed a motion to vacate
22 the domesticated judgment, which automatically stayed the proceedings. (Id.)
23 Depositions of Cyberlux's PMK and other personnel were scheduled for August 27,
24 2024, but did not occur due to the motion to vacate. (Id.)

25 When attempting to serve the PMK subpoena, the process server noted that
26 there were no vehicles parked at the address, and there was no answer at the door.
27 (Welter Decl. at ¶ 14). Employees in the leasing office confirmed that Neil Whiteley
28 and Phillip Tucker work at this address but are not currently in possession of their

1 office as they are negotiating the terms of their lease. (Id.) This further complicates
2 Plaintiffs' efforts to enforce the judgment and highlights Defendants' ongoing
3 attempts to delay and obstruct the collection process.

4 **B. Updates on All Disputes Regarding the Settlement Agreement**

5 Defendants have been in breach of the contract since August 2023. Despite
6 multiple efforts by Plaintiffs to obtain compliance, Defendants have consistently
7 failed to meet their obligations under the settlement agreement. The following
8 outlines the key disputes and instances of non-compliance:

9 **i. Unanswered Requests for Information on Drone Sales**

10 On July 31, 2023, Plaintiffs, through their principal, Will Welter, requested
11 information from Defendants regarding the number of drones included in Cyberlux's
12 contract with the Department of Defense (Dkt. No. 9-3 at p. 22). Cyberlux never
13 responded to this request, violating their obligations under the settlement agreement
14 (Welter Decl. at ¶ 22).

15 On September 8, 2023, Welter again asked whether an extra payment made by
16 Defendants was "related to the \$5k per drone sold" provision in the Settlement
17 Agreement (Dkt. No. 9-3 at p. 38). Cyberlux never responded to this request (Welter
18 Decl. at ¶ 23).

19 Welter renewed his request on October 2, 2023, emphasizing the significance
20 of the information by stating, "Also, the agreement calls for accelerated payments
21 (\$5,000 per drone sold). Can you please let us know how many drones were sold?
22 Would be nice to conclude these matters. Thanks" (Dkt. No. 9-3 at p. 55). Again,
23 Cyberlux did not respond (Welter Decl. at ¶ 24).

24 On October 9, 2023, Welter made another request for basic information: "Can
25 you advise how many drones were sold?" (Dkt. No. 9-3 at p. 62). Once more,
26 Cyberlux ignored this request for information they agreed to promptly provide under
27 the settlement agreement (Welter Decl. at ¶ 25).

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1 On November 2, 2023, Welter again asked for information related to drone
2 sales: “Also, the initial drone transaction was mid-September. If the transaction has
3 proceeded and if they pay the \$5k per drone, that would conclude matters (beside the
4 stock issues). As mentioned to you before, our goal has been to make a clean cut
5 between the two companies. The proposed / new SA appears to prolong that by
6 another 3 years. Lastly, any documents relevant to the drone transaction will be
7 helpful. I’ve held back on requests for same thus far, however, I think reviewing the
8 documents on the drone transaction will now be very helpful” (Dkt. No. 9-3 at p. 75).
9 Cyberlux ignored this request as well (Welter Decl. at ¶ 26).

10 Finally, on December 5, 2023, Welter once again requested information about
11 drone sales: “We are still concerned about the Drone sales and the necessity to fulfill
12 all the terms of and under the settlement agreement (\$5k per Drone) upon the sale. As
13 mentioned we have been dealing with this matter since fall 2021 and are ready to
14 conclude. To that end, I ask again can you please send documentation relevant to the
15 Drone sales” (Dkt. No. 9-3 at p. 80). Cyberlux also ignored this request (Welter Decl.
16 at ¶ 27).

17 The settlement agreement defines requested information as being late if not
18 received within ten (10) calendar days and states that any breach not cured within
19 three (3) calendar days will be considered a breach of the agreement (Dkt. No. 24-1
20 at p. 11, § 21). Defendants’ utter refusal to provide any information about drone sales
21 is an ongoing breach of the Settlement Agreement.

22 **ii. Late Payments Under the Settlement Agreement**

23 Defendants do not deny making late payments under the settlement agreement.
24 The agreement explicitly states that Defendants shall transmit thirty-six (36) non-
25 defeasible monthly payments of \$21,459.00 payable on the first day of each month,
26 beginning in July 2023. (Dkt. No. 24-1 at pp. 5-6, §§ 4.a-4.c). Time being of the
27 essence, these monthly payments were to continue on the first of each month until the
28 total Settlement Consideration due to Plaintiffs was paid. Defendants also agreed to

1 accelerate and pay the full outstanding balance of all sums owed under the Consent
2 Judgment within twenty-one (21) days of receiving payment for any contract to
3 purchase drone aircraft (Id.).

4 The settlement agreement defines a late payment as any payment not received
5 by the first of each month and states that any breach not cured within three (3) calendar
6 days will be considered a breach of the agreement (Dkt No. 24-1 at p. 11, § 21).
7 Specifically, Section 21 of the Settlement Agreement (Dkt. No. 24-1 at p. 11) states:
8 "For the avoidance of doubt, any payment not received by the first of each month shall
9 be deemed late, any information requested shall be due in ten (10) calendar days and,
10 unless cured within 3 calendar days, will be considered a breach of this Agreement."

11 Despite these clear terms, Defendants have made several late payments and
12 ceased payments due in June, July, and August 2024. (Welter Decl. at ¶ 15). This
13 failure to make timely payments constitutes a breach of the settlement agreement.

14 **iii. The Settlement Agreement Was Never Amended.**

15 Defendants have claimed that Plaintiffs agreed to amend the terms of the
16 settlement agreement or payment terms. This claim is categorically false. Plaintiffs
17 never agreed to any modifications or amendments to the settlement agreement.
18 (Welter Decl. at ¶ 18). The terms of the agreement were clear and unambiguous, and
19 Plaintiffs have consistently sought compliance with these terms. (Welter Decl. at ¶
20 19).

21 Plaintiffs' requests for information and payments were made in accordance with
22 the original terms of the settlement agreement. (Welter Decl. at ¶ 19). At no point did
23 Plaintiffs agree to alter or amend the payment schedule or any other terms of the
24 agreement. (Welter Decl. at ¶ 19). Defendants' assertions are unsupported and appear
25 to be an attempt to justify their continued non-compliance and breaches of the
26 settlement agreement.

27 The settlement agreement explicitly states that any modification or amendment
28 must be in writing and signed by both parties. (Dkt. No. 24-1 at p. 10, § 16). No such

1 written amendment exists. (Welter Decl. at ¶ 20). Plaintiffs have fulfilled their
2 obligations under the agreement and have made multiple attempts to secure
3 compliance from Defendants, who have continually failed to meet their contractual
4 responsibilities.

5 **iv. Dispute Over Cyberlux's Caveat Emptor Status**

6 There is a remaining dispute over the Caveat Emptor status of Cyberlux's stock.
7 According to the settlement agreement, Defendants promised that the Caveat Emptor
8 status would be removed from their stock on or before December 31, 2023. (Dkt. No.
9 24-1 at pp. 4-5, § 2.e). As of the date of this filing, the Caveat Emptor status has not
10 been removed. (Welter Decl. at ¶ 33, Ex. K).

11 While this dispute remains unresolved, it is not a subject of Plaintiffs' collection
12 action, which deals solely with the enforcement of the amended final judgment and
13 order. (Dkt. No. 9-2 at p. 29).

14 **C. Updates on All Payments Made Under the Settlement**
15 **Agreement**

16 Bank records obtained in discovery in Virginia show that Cyberlux received a
17 payment of \$38 million from a U.S. Government contract to supply drones to Ukraine
18 in September 2023. (Welter Decl. at ¶ 34). Despite receiving this substantial amount,
19 Defendants misused these funds for personal expenses and cash transfers instead of
20 fulfilling their obligations under the settlement agreement. This misuse of funds
21 further demonstrates Defendants' disregard for their contractual responsibilities and
22 highlights the urgency for immediate court intervention.

23 **iv. Misuse of Funds**

24 Bank records obtained in discovery reveal that Defendants transferred
25 significant sums of money to personal accounts, friends, and family members,
26 beginning on the same day the \$38 million was transferred into Cyberlux's account.
27 (Welter Decl. at ¶ 36). Instead of making the required payments to Plaintiffs,
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1 Defendant Mark D. Schmidt and his associates diverted these funds for personal use.

2 Specific transfers include:

- 3 • \$250,000 phone transfer authorized by Mark Schmidt on September 8, 2023;
- 4 • \$213,000 wire to Fletcher Jones Motorcars on September 11, 2023 for a vehicle
- 5 purchase;
- 6 • \$175,000 phone transfer authorized by Mark Schmidt on September 13, 2023;
- 7 • \$187,500 phone transfer authorized by Mark Schmidt on September 14, 2023;
- 8 • \$600,000 phone transfer authorized by Mark Schmidt on September 20, 2023;
- 9 • \$692,689 member debit memo on September 26, 2023;
- 10 • \$850,000 on October 16, 2023 to Schmidt's Edward Jones account (Welter
- 11 Decl. at ¶ 37).

12 The total amount of these transfers is \$4,417,205.06. (Id.) These unauthorized
13 transfers are a clear violation of the settlement agreement, which required Defendants
14 to make timely payments to Plaintiffs and provided for accelerated payments upon
15 receipt of substantial funds from drone contracts. (Dkt. No. 24-1 at pp. 5-6, §§ 4.a-
16 4.c).

17 **v. Application of Garnished Funds**

18 Following the garnishment of Defendants' funds held in PNC and Towne Bank
19 accounts and subsequent court orders, Plaintiffs applied the remaining garnished
20 funds to reduce the total amount Defendants owe. Specifically, \$183,798.34 from
21 PNC Bank and \$4,862.86 from Towne Bank were released to Plaintiffs on August 9,
22 2024. (Welter Decl. at ¶ 31). These amounts were applied to partially satisfy
23 Defendants' outstanding obligations under the settlement agreement. (Id.)

24 **vi. Failure to Make Payments Since May 2024**

25 Defendants' last regular payment was made in May 2024. (Welter Decl. at ¶
26 16). Since then, Defendants have not made any further payments. (Id.) This cessation
27 of payments, coupled with Defendants' refusal to provide any information on the
28 number of drones sold, further complicates the accurate determination of the total

1 amount owed. Despite receiving \$38 million under a US Government contract to
2 supply drones to Ukraine, Defendants have consistently failed to provide the required
3 information and payments as stipulated in the settlement agreement.

4 This persistent non-compliance and financial mismanagement underscore the
5 need for immediate court intervention to ensure that Plaintiffs can enforce their
6 rightful claims under the settlement agreement and secure the assets needed to satisfy
7 the judgment.

8 **D. Detailed Accounting of All Payments Remaining Under the**
9 **Settlement Agreement**

10 As of August 2024, the outstanding amounts due under the Settlement
11 Agreement are as follows:

- 12 • Atlantic Wave Holdings, LLC and Secure Community, LLC (AWH/SC)
 - 13 ○ Principal: \$430,295.59
 - 14 ○ Interest Due: \$95,000.62
 - 15 ○ Total Owed: \$525,296.21
- 16 • StrikePoint, LLC
 - 17 ○ Principal: \$372,669.40
 - 18 ○ Interest Due: \$79,916.69
 - 19 ○ Total Owed: \$452,586.09

20 Grand Total Owed: \$977,882.31 (Welter Decl. at ¶ 32).

21 **III. CONCLUSION**

22 Given the ongoing breaches of the settlement agreement, the misuse of funds,
23 and the failure to comply with court orders and discovery obligations, Plaintiffs
24 respectfully request that the Court deny Defendants' Motion to Vacate the
25 domesticated judgment. Plaintiffs further request that the Court lift the stay on
26 collection efforts and schedule a hearing to address these matters urgently. Immediate
27 court intervention is necessary to prevent further dissipation of assets and to ensure
28 that Plaintiffs can recover the amounts owed under the settlement agreement.

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DATED: September 3, 2024

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