

1 GEORGE GASCÓN, SBN 182345
District Attorney of San Francisco
2 JUNE D. CRAVETT, SBN 105094
Assistant Chief District Attorney
3 EVAN H. ACKIRON, SBN 164628
Managing Assistant District Attorney
4 NANCY TUNG, SBN 203236
DANIEL C. AMADOR, SBN 247642
5 STEPHANIE J. LEE, SBN 279733
Assistant District Attorneys
6 732 Brannan Street
San Francisco, California 94103
7 Telephone: (415) 551-9574

8 *Attorneys for Plaintiff,*
The People of the State of California
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
11 UNLIMITED JURISDICTION

12 THE PEOPLE OF THE STATE OF
CALIFORNIA,

13 Plaintiff,

14 v.

15 LILY ROBOTICS, INC.; and DOES 1 through
16 100, inclusive,

17 Defendants.
18
19
20
21

Case No.

CGC-17-556365

- (1) THE PEOPLE'S EX PARTE
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER AND AN ORDER TO SHOW
CAUSE RE: PRELIMINARY
INJUNCTION
- (2) MEMORANDUM OF POINTS AND
AUTHORITIES
- (3) SUPPORTING DECLARATIONS
(filed under separate cover)
- (4) [PROPOSED] ORDER (filed under
separate cover)

22 INTRODUCTION

23 Plaintiff, the People of the State of California ("the People"), acting by and through the
24 District Attorney for the City and County of San Francisco, hereby applies ex parte for (1) a
25 temporary restraining order, and (2) an order to show cause why a preliminary injunction should
26 not issue, pursuant to Business and Professions Code §§ 17203, 17204, and 17535, Code of Civil
27 Procedure § 527 *et seq.*, and Rules 3:1150 and 3.1200 *et seq.* of California Rules of Court. The
People request this relief to stop defendant Lily Robotics, Inc. ("Lily Robotics")—a company that

ENDORSED
FILED
Superior Court of California
County of San Francisco

JAN 12 2017

CLERK OF THE COURT
BY: ANNA L. TORRES
Deputy Clerk

1 used a false and misleading promotional video to acquire more than \$34 million in “preorder” sales
2 from customers around the world—from further dissipating these ill-gotten preorder funds. These
3 funds are needed to satisfy the restitution obligations that Lily Robotics would have to pay should
4 the People prevail in this matter, and both the People and Lily’s victims will be irreparably harmed
5 if Lily Robotics dissipates these assets.

6 **APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND AN ORDER TO**
7 **SHOW CAUSE RE: PRELIMINARY INJUNCTION**

8 The People apply for a temporary restraining order and an order to show cause why a
9 preliminary injunction should not issue to:

- 10 A. enjoin Lily Robotics from spending, transferring, disbursing, encumbering, or
11 otherwise dissipating, without Court approval, except to provide preorder customer
12 refunds, any of the following:
- 13 1. money or other consideration received from customers who preordered a Lily
14 Camera at any time; and
 - 15 2. any accounts maintained at any financial institution by Lily Robotics in which Lily
16 Robotics deposited any money, property, or other consideration described in (1)
17 above, including but not limited to the following accounts:
 - 18 i. Silicon Valley Bank, Account Number *****3216, Account Title “SVB Cash
19 Sweep”;
 - 20 ii. Silicon Valley Bank, Account Number *****3551, Account Name “SVB Cash
21 Sweep”;
 - 22 iii. Silicon Valley Bank, Account Number *****2683, Account Name “Business
23 Checking - Analysis”;
 - 24 iv. Silicon Valley Bank, Account Number *****2698, Account Name “Business
25 Checking - Analysis”; and
 - 26 v. Silicon Valley Bank, Account Number *****7340, Account Name “Business
27 Checking – Analysis;” and

1 B. order Lily Robotics to immediately disclose the account numbers, current balances, and
2 the source of funds, of all accounts it holds at any financial institution or funds it has
3 deposited with third-party payment processors.

4 The People apply for a temporary restraining order and an order to show cause why a
5 preliminary injunction should not issue on the grounds that Lily Robotics has violated, and is
6 continuing to violate Business and Professions Code §§ 17200 (prohibiting unlawful, unfair, and
7 fraudulent business practices) and 17500 (prohibiting false or misleading advertising). Lily
8 Robotics's violations of these statutes, and the People's likelihood of prevailing on their claims
9 based on these violations, are discussed in the memorandum of points and authorities supporting
10 this Application.

11 The relief requested is necessary to protect consumers from being irreparably harmed by
12 Lily Robotics's conduct. The People are informed and believe that Lily Robotics used false and
13 misleading advertising and other statements to illegally obtain approximately \$34 million in
14 preorder money from customers. The People also are informed and believe that Lily Robotics used
15 and encumbered that preorder money to obtain an approximately \$4 million loan from Silicon
16 Valley Bank, thereby dissipating the total amount of preorder money. In addition, the People are
17 informed and believe that there is a likelihood that Lily Robotics is running out of other, non-
18 preorder money to operate its business, and unless it receives more funding, it will have to use and
19 encumber more of the preorder money. The total amount of preorder money must remain intact for
20 customer refunds by Lily Robotics or so that if Lily Robotics is ordered to disgorge any other ill-
21 gotten gains the preorder money will be available for it to do so.

22 The relief requested will not irreparably harm Lily Robotics; it will merely maintain the
23 status quo that Lily Robotics itself established when it told its customers on December 17, 2015, in
24 an attempt to persuade them not to seek refunds, that it was "not using [customer pre-order] money
25 to run the company" and that "[e]very pre-order dollar we've received has been placed in cold
26 storage." Furthermore, the People are not seeking to enjoin Lily Robotics from using the funds to
27 make refunds to customers. In any event, as Lily Robotics obtained the preorder money illegally, it
should not be able to use that money to further its unlawful business practices.

1 **THE PEOPLE PROVIDED NOTICE TO LILY**

2 The People have given Lily Robotics notice of this Application through its counsel, Eric
3 Hairston. (Declaration of Evan H. Ackiron (“Ackiron Decl.”), ¶¶ 2-3; *see* Code. Civ. Proc. § 527;
4 Cal. R. Ct. 3.1201(3), 3:1203(a), 3.1204.)

5 **PERMISSION TO FILE A BRIEF IN EXCESS OF 15 PAGES**

6 The memorandum of points and authorities filed in support of this Application exceeds the
7 normal 15-page limit for briefs. (*See* Cal. R. Ct. 3.1113.) The People request permission to file a
8 brief in excess of this page limit: a 20-page brief. The People submit that a brief in excess of 15
9 pages is necessary to discuss the full extent of Lily Robotics’s misconduct, the substantial legal
10 authority that allows the Court to grant the People’s requested relief, and the numerous facts that
11 demonstrate the need for such relief.

12 **THE PEOPLE ARE NOT REQUIRED TO POST AN UNDERTAKING**

13 The People are not required to post an undertaking. (*See* Code Civ. Proc. §§ 529(b)(3),
14 995.220.)

15 **NO PREVIOUS APPLICATIONS**

16 The People have not previously applied for any ex parte relief in this action. (*See* Cal. R.
17 Ct. 3.1202(b).)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 In May 2015, Lily Robotics used a false and misleading promotional video for a camera
4 drone to obtain over \$34 million in “preorder” sales from customers all over the world. A
5 “preorder” is when a customer pays a seller for a product with the understanding that the product is
6 not yet available to be shipped but that it will be shipped by some stated future date. In addition,
7 Lily Robotics did not refund those customers their money when it delayed for almost a year the
8 shipping dates for its product, as the law required. Instead, it told its customers that the preorder
9 money “remain[ed] untouched,” was in “cold storage,” and was not being used “to run the
10 company.” This, too, was false and misleading. According to a witness, Lily Robotics had actually
11 used that preorder money as collateral to obtain a \$4 million loan so it could continue its
12 operations. It is now January 2017. Lily Robotics still has not shipped a single product to any of its
13 customers, and, according to a witness, it likely is running out of non-preorder money.

14 To protect the misled customers’ funds and prevent Lily Robotics from further dissipating
15 these ill-gotten gains, the People ask the Court to maintain the status quo by enjoining Lily
16 Robotics from spending, using, or dissipating its customers’ preorder money except to provide
17 refunds to preorder customers. The People have a strong case, and the relief the People seek is
18 narrowly tailored. The People do not, for instance, ask the Court to freeze all of Lily Robotics’s
19 assets or prevent Lily Robotics from using any equity or debt funding it may have; rather, the
20 People ask the Court to prevent Lily Robotics from further encumbering and dissipating a specific,
21 readily identifiable amount of ill-gotten gains that must be available for disgorgement and
22 restitution. This is a fair and reasonable request when Lily Robotics has already encumbered and
23 dissipated those ill-gotten gains and has taken steps to do so again.

24 **FACTS**

25 The People have set forth their factual allegations against Lily Robotics in the Complaint
26 filed concurrently with this Application and incorporate by reference those factual allegations. The
27 People nonetheless set forth below a summary of the facts that are relevant to this Application.

1 Lily Robotics advertises for sale and purports to manufacture an autonomous, flying
2 camera drone (the “Lily” or the “Lily Camera”). (Complaint (“Compl.”), ¶8.) Essentially, the Lily
3 Camera is a drone with a camera in it which purportedly can autonomously follow a person who is
4 holding a remote tracking device. (Compl., ¶ 8.)

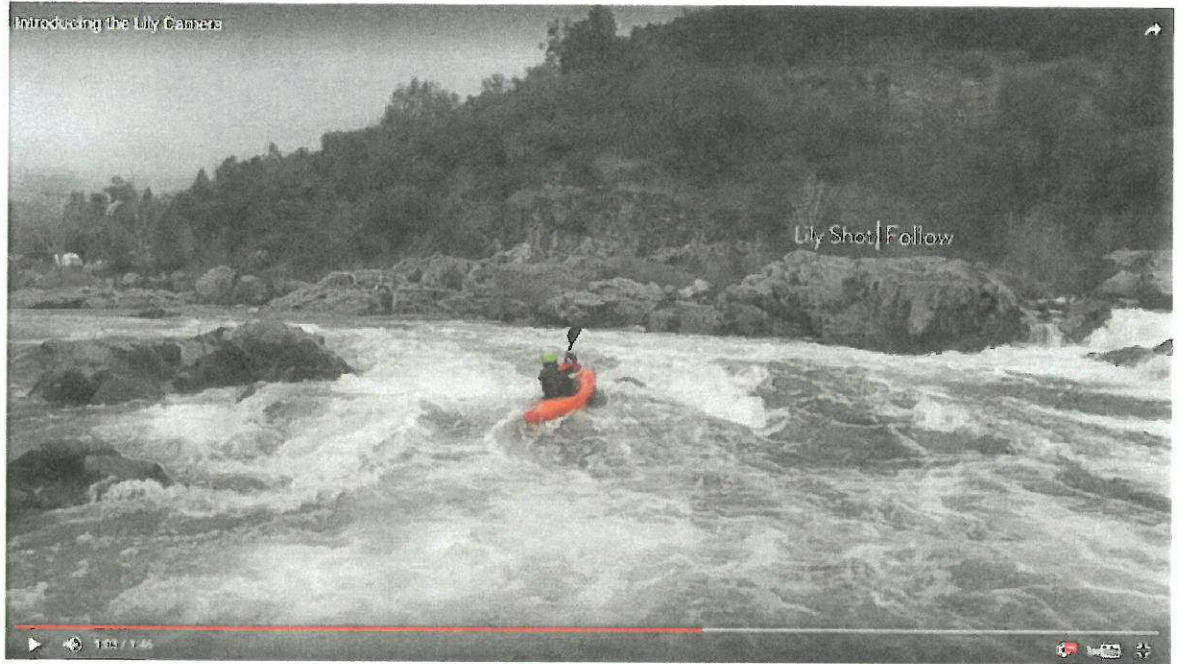
5 On May 12, 2015, Lily Robotics introduced itself and the Lily Camera to the world
6 through a professionally-produced promotional video (the “Promotional Video”).¹ (Compl., ¶ 10.)
7 The Promotional Video introduced prospective customers to the Lily Camera and its purported
8 functionality through snowboarding, kayaking, and family sequences. (Compl., ¶19.) Among other
9 things, the Promotional Video features several shots that appear to be taken from the point of view
10 of a Lily Camera that is flying near and filming a user (e.g., the snowboarder, the kayaker, etc.).
11 (Compl., ¶¶20-25.) What’s more, is text that appears explaining that the shots are “Lily Shots,”
12 i.e., taken from a Lily Camera. (Compl., ¶ 20-25.) Specifically, the Promotional Video shows:

- 13 • a “Lily Shot | Follow,” in which the Lily Camera apparently films a snowboarder and a
14 kayaker while following the snowboarder and the kayaker from behind;

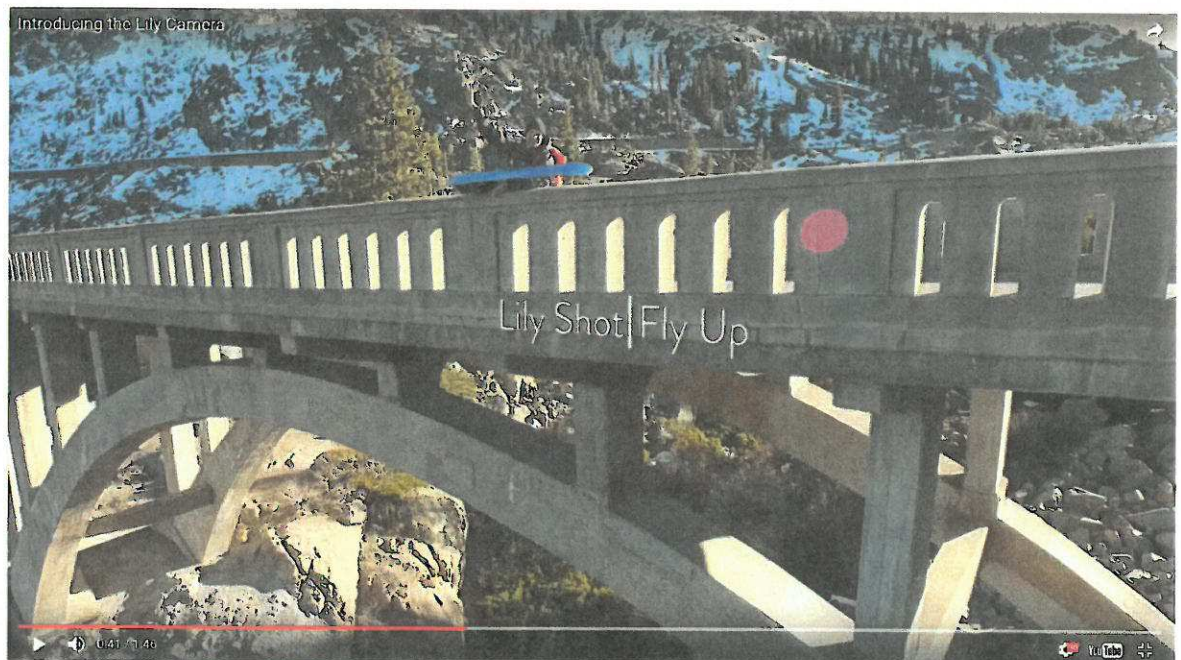


26

27 ¹ As of January 5, 2017, the Promotional Video may be viewed at, among many other
places, Lily Robotics’s website (<https://www.lily.camera/>) and on Youtube
(<https://www.youtube.com/watch?v=4vGcH0Bk3hg>).



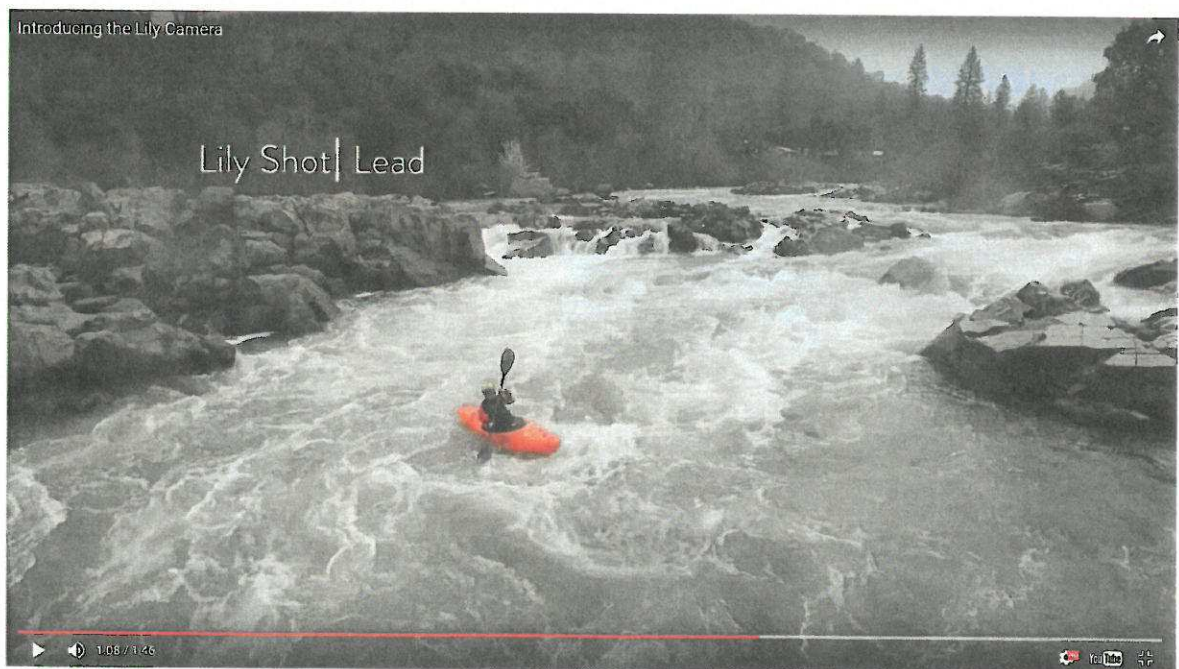
- 12
- 13 • a “Lily Shot | Fly Up,” in which the Lily Camera apparently films a snowboarder now
14 waving from a bridge as the Lily Camera flies up from below that bridge;



- a “Lily Shot | Side,” in which the Lily Camera apparently films while following a snowboarder from the side;



- a “Lily Shot | Lead,” in which the Lily Camera apparently flies ahead of a kayaker and films the kayaker behind it; and



- a “Lily Shot | Loop,” in which the Lily Camera apparently flies in a loop around a group of individuals while filming them.



(Compl., ¶¶ 20-25; Declaration of Reginald Clay (“Clay Decl.”), ¶ 3, Ex. 1[disk with video on it].)

At no time during the video is there any disclaimer stating or implying that these “Lily Shots” were not really taken with a Lily Camera or that the shots are aspirational dramatizations of what Lily Robotics hopes the Lily Camera will be able to do. (Compl., ¶ 25; Clay Decl., ¶ 3, Ex. 1.)

The Promotional Video was a huge success for Lily Robotics. According to Adweek, the Promotional Video was viewed 5.3 million times on Youtube during May 2015. (Compl., ¶ 35; Clay Decl., ¶ 4, Ex. 2.) And according to Lily Robotics’s own CEO, Antoine Balaesque, the Promotional Video had been viewed more than 30 million times by the summer of 2016. (Compl., ¶ 35; Clay Decl., ¶ 5, Ex.3.) In addition, Lily Robotics, the Lily Camera, and the Promotional Video were featured in positive articles published by major media outlets, such as CNBC, Business Insider, Forbes, Wired, and countless others. (Compl., ¶ 35; Clay Decl., ¶¶ 6-9, Exs. 4-7.)

But it wasn’t a success only because it was viewed millions of times and discussed extensively in the media. It was a success also because it was the beginning of Lily Robotics’s

1 solicitation of preorder sales for the Lily Camera. Lily Robotics invited customers to “preorder”
2 the Lily Camera through its website (*i.e.*, go online and immediately provide full preorder
3 payment for a Lily Camera with the understanding that it will not be available for shipping until
4 certain later dates). (Compl., ¶ 36.) From May 12, 2015 to June 16, 2015, customers could
5 preorder the Lily Camera for \$499, and Lily Robotics told customers who placed preorders during
6 that time that it would ship their Lily Cameras in February 2016. (Compl., ¶ 38.)

7 On June 16, 2015, Lily Robotics began to tell customers who purchased Lily Cameras on
8 or after that date that it would ship their Lily Cameras in May 2016. (Compl., ¶ 38.) Lily Robotics
9 also began to raise the price of the Lily Camera. Throughout the rest of the year, and continuing
10 through October 2016, Lily Robotics raised the price of the Lily Camera \$100 dollars at a time:
11 from \$599 on June 16, 2015, to \$699 on July 15, 2015, to \$799 on October 1, 2015, to \$899 on
12 February 12, 2016. (Compl., ¶¶ 38-41, 45.)

13 With no track record or actual product, but with the Promotional Video and the media
14 attention it received, Lily Robotics presold roughly 60,000 Lily Cameras and accumulated more
15 than \$34 million in presales in 2015 alone. (Compl., ¶ 35; Clay Decl., ¶ 5, Ex. 3; Declaration of
16 Johnny Hsu (“Hsu Decl.”), ¶ 2.) Lily Robotics also was able to use the success of the Promotional
17 Video and the preorder sales to help secure \$14 million in private funding. (Compl., ¶ 14; Clay
18 Decl., ¶ 10, Ex. 8.)

19 It turns out, however, that the Promotional Video was false and misleading advertising. It
20 did not show what Lily Robotics said it showed. The “Lily Shots” in the Promotional Video were
21 not filmed by a Lily Camera; they were filmed by a non-autonomous, remote-controlled drone (the
22 Inspire) manufactured by another drone company (DJI) that costs more than \$2,000 and includes a
23 4K-resolution professional camera mounted to it. (Compl., ¶ 26; Declaration of Alexander Nocon
24 (“Nocon Decl.”), ¶¶ 4, 6, Exs. 1, 2.) In fact, Lily Robotics did not have a fully operational Lily
25 Camera prototype during the filming of the Promotional Video that alone could perform all of the
26 functions demonstrated in the Promotional Video. (Compl., ¶ 27; Nocon Decl., ¶ 4, Ex. 1.) In
27 short, the Promotional Video—which led to Lily receiving more than \$34 million in preorder sales
from customers—was false and misleading, and Lily knew it.

1 Without a product that could do what was advertised, it is not surprising that Lily Robotics
2 would not meet the shipping dates it told its customers. On December 17, 2015 (seven months
3 after it began taking preorders), Lily Robotics announced on its website that it “will be delaying
4 pre-order shipments until Summer 2016” (the “December 17, 2015 First Delay Notice”). (Compl.,
5 ¶ 44; Clay Decl., ¶ 10, Ex. 8.) In addition to telling its customers about this first delay, Lily
6 Robotics “shed some light” on its financial condition “in the interest of transparency.” (Compl., ¶
7 44; Clay Decl., ¶ 10, Ex. 8.) It told its customers:

8 Some of you have asked about the status of your pre-order funds. As you may
9 know, we are a privately funded company, not a crowd-funded project. This means
10 that we are not using your money to run the company. Every pre-order dollar we’ve
received has been placed in cold storage. We have no plans to use a single cent of
that money until your Lily Camera goes into final production.

11 (Compl., ¶ 44; Clay Decl., ¶ 10, Ex. 8 (emphasis added).) After discussing its equity financing a
12 bit more, Lily Robotics told its customers:

13 As always, we can provide you with a full refund anytime from the moment you
14 purchase your Lily Camera until 30 days after your order arrives, no questions
15 asked. Just email us with your order number and the email address you used to
place your order, and you’ll be all set.

16 (Compl., ¶ 44; Clay Decl., ¶ 10, Ex. 8.) Lily Robotics did not expressly inform its customers that,
17 under applicable law, those buyers’ orders had to be automatically cancelled unless Lily Robotics
18 shipped the Lily Cameras within 30 days of its original shipping dates or unless the customers
19 “specifically consented” to the delay.

20 Needless to say, Lily Robotics did not ship the Lily Cameras by “Summer 2016.” On
21 August 25, 2016 (more than one year and three months after it began taking preorders), Lily
22 Robotics announced on its website that:

23
24 All United States pre-orders will ship between December 2016 and January
25 2017. Pre-orders will be fulfilled in the order in which they were placed. Due to
26 regulatory and logistical constraints, international pre-orders will start shipping later
in 2017. We will be sharing a more detailed rollout plan in the coming weeks. In the
meantime, your pre-order dollars will continue to remain untouched.

27 (Compl., ¶ 46; Clay Decl., ¶ 11, Ex. 9.) As for refunds, Lily Robotics told its customers this:

1 We've embarked on a journey to create a flying camera not just for
2 hobbyists and professionals, but for any creative mind looking to capture the world
3 from a new angle. This would not be possible without you. However, if you'd like a
4 refund, please contact support@lily.camera and we will process your request as
5 soon as we can.

6 (Compl., ¶ 46; Clay Decl., ¶ 11, Ex. 9.) Lily Robotics again failed to tell its customers that, under
7 applicable law, their preorders had to be automatically cancelled unless they specifically
8 consented to the new delay.

9 Aside from failing to follow the law regarding shipment delays and refunds, Lily Robotics
10 also falsely told its customers that their preorder funds "remain[ed] untouched" in "cold storage,"
11 thereby suggesting that it was not using those funds. (Compl., ¶¶ 44, 46; Clay Decl., ¶¶ 10-11,
12 Exs. 8, 9.) This was not true. According to a witness, Lily Robotics:

- 13 • placed a portion of the "preorder funds" (defined as cash from preorders on Lily Robotics's
14 balance sheet) in an account or accounts at Silicon Valley Bank;
- 15 • did not place the preorder funds received from customers into an escrow account but
16 instead commingled the preorder funds with funds received from equity investors;
- 17 • did not have possession of all of its customers' preorder funds, as several million of it was
18 in the possession of Lily Robotics's payment processor, Tilt.com, Inc.;
- 19 • used balance sheet assets, which largely consisted of customers' preorder funds, as
20 collateral to secure a \$4 million loan from Silicon Valley Bank in early 2016; and
- 21 • obtained this \$4 million loan because, by the middle of 2016, the \$14 million in Series A
22 equity funding it received in 2015 was likely to be insufficient to achieve the anticipated
23 order delivery dates.

24 (Hsu Decl., ¶¶ 3-6.) According to that same witness, based on Lily Robotics's operational burn
25 rate in July 2016 and the assumption that Lily Robotics received no additional outside liquidity
26 (e.g., equity or subordinated debt), the \$4 million Lily Robotics received from Silicon Valley
27 Bank would likely have been used to fund business operations after July 2016 and would likely
have been used in its entirety near the end of 2016. (*Id.*, ¶¶ 7-8.) Finally, according to the witness,
in July 2016 Lily Robotics was investigating and taking steps to obtain additional liquidity. (*Id.*, ¶

9.) This included but was not limited to conversations with Silicon Valley Bank to obtain more debt, communicating with equity investors, and attempting to obtain other forms of financing. (*Id.*)

According to documents obtained from Silicon Valley Bank, Lily Robotics has more than \$25 million in its accounts with the bank. (*See* Nocon Decl., ¶ 7.)

To date, Lily Robotics still has not shipped a Lily Camera to any preorder customer.

On January 11, 2017, Lily Robotics informed the People that it was beginning the process of issuing refunds to all preorder customers. (*See* Ackiron Decl., ¶ 3.)

ARGUMENT

I. THE COURT HAS STATUTORY AUTHORITY TO GRANT THE PEOPLE'S PROPOSED INJUNCTIVE RELIEF

The People ask the court to issue an injunction enjoining Lily Robotics from dissipating, without Court approval, any of its customers' preorder money, except for the purposes of refunding preorder customers' money. The People's proposed injunctive relief is statutorily authorized. California's Unfair Competition Law and False Advertising Law provide broad authority for the People to seek, and for the Court to issue, an injunction. (*See* Bus. & Prof. Code §§ 17203, 17204, 17535; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320 ["[T]he Legislature framed the UCL's substantive provisions in broad, sweeping language and provided courts with broad equitable powers to remedy violations. The state's false advertising law is equally comprehensive within the narrower field of false and misleading advertising."], internal quotation marks and citations omitted.)

California Code of Civil Procedure § 526 also empowers the Court to issue the People's proposed injunctive relief. Section 526(a) provides in relevant part:

An injunction may be granted in the following cases:

- (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
- (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

1 (3) When it appears, during the litigation, that a party to the action is doing, or
2 threatens, or is about to do, or is procuring or suffering to be done, some act in
violation of the rights of another party to the action respecting the subject of the
action, and tending to render the judgment ineffectual. . . .

3 As discussed in detail below, the People are likely to succeed on the merits of their claim. The
4 People also demonstrate below that Lily Robotics has already used and encumbered some of its
5 ill-gotten gains and likely will do so again, causing the People great or irreparable injury and
6 rendering ineffectual a judgment that includes restitution and civil penalties.

7 **II. WHEN THE PEOPLE ARE SEEKING PROVISIONAL INJUNCTIVE RELIEF**
8 **THERE IS A PRESUMPTION IN FAVOR OF GRANTING IT**

9 The general purpose of provisional injunctive relief, such as a temporary restraining order
10 or preliminary injunction, “is the preservation of the status quo until a final determination of the
11 merits of the action.” (*Cont’l Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) “The granting or
12 denial of a [such provisional relief] does not amount to an adjudication of the ultimate rights in
13 controversy. It merely determines that the court, balancing the respective equities of the parties,
14 concludes that, pending a trial on the merits, the defendant should or that he should not be
15 restrained from exercising the right claimed by him.” (*Id.*, quoting *Miller & Lux v. Madera Canal*
16 *etc. Co.* (1909) 155 Cal. 59, 62-63.)

17 Ordinarily, whether provisional injunctive relief should be granted “involves two
18 interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the
19 relative balance of harms that is likely to result from the granting or denial of interim injunctive
20 relief.” (*White v. Davis* (2003) 30 Cal.4th 528, 554.) But when the plaintiff is a governmental
21 entity seeking to enjoin illegal activity, a “more deferential standard” applies. (*People ex rel.*
22 *Feuer v. FXS Mgmt., Inc.* (2016) 2 Cal.App.5th 1154, 1158; *City of Corona v. AMG Outdoor*
23 *Advertising, Inc.* (2016) 244 Cal.App.4th 291, 299; see Lee Smalley Edmon & Curtis E.A.
24 Karnow, Cal. Prac. Guide: Civ. Proc. before Trial (Rutter 2016), § 9:534.)

25 The California Supreme Court has established the following rebuttable presumption in
26 these instances: “Where a governmental entity seeking to enjoin the alleged violation of [a law]
27 which specifically provides for injunctive relief establishes that it is reasonably probable it will
prevail on the merits, a rebuttable presumption arises that the potential harm to the public

1 outweighs the potential harm to the defendant.” (*IT Corp. v. City of Imperial* (1983) 35 Cal.3d 63,
2 72, fn. omitted.) This presumption exists because “[w]here a legislative body has enacted a
3 statutory provision proscribing a certain activity, it has already determined that such activity is
4 contrary to the public interest.” (*Id.* at 70.) “Further, where the legislative body has specifically
5 authorized injunctive relief against the violation of such a law, it has already determined (1) that
6 significant public harm will result from the proscribed activity, and (2) that injunctive relief may
7 be the most appropriate way to protect against that harm.” (*Id.*)

8 To rebut the presumption, the defendant must show that it would suffer grave or
9 irreparable harm from the issuance of the injunctive relief. (*People ex rel. Feuer, supra*, 2
10 Cal.App.5th at 1158, citing *IT Corp., supra*, 35 Cal.3d at 72.) Only if the defendant shows this
11 must the court then “examine the relative actual harms to the parties.” (*IT Corp., supra*, 35 Cal.3d
12 63, 72.) “Once the defendant has made such a showing, an injunction should issue only if -- after
13 consideration of both (1) the degree of certainty of the outcome on the merits, and (2) the
14 consequences to each of the parties of granting or denying interim relief -- the trial court concludes
15 that an injunction is proper.” (*IT Corp., supra*, 35 Cal.3d at 72.)

16 “At this stage of the analysis,” while “no hard and fast rule dictates which consideration
17 must be accorded greater weight by the trial court,” the California Supreme Court has stated that
18 “the clearer the violation, the less the trial court need be concerned with the balancing of harm.”
19 (*Id.* at 72 & fn. 5.)

20 **III. THE PEOPLE ARE LIKELY TO SUCCEED ON THE MERITS**

21 The People bring a false advertising claim and an unfair competition claim against Lily
22 Robotics in their complaint. As discussed below, the People are reasonably likely to succeed on
23 the merits of each of them.

24 **A. The People Are Likely to Succeed on Their False Advertising Claim**

25 The People bring a claim against Lily Robotics for false advertising in violation of
26 California’s False Advertising Law (“FAL”), Bus. & Prof. Code § 17500 *et seq.* (*See Compl.*) The
27 FAL prohibits the dissemination of any advertising “which is untrue or misleading, and which is
known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”

(Bus. & Prof. Code, § 17500.) It has been broadly construed to proscribe “not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” [Citation.]” (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951.) “Thus, to state a claim under . . . the false advertising law, based on false advertising or promotional practices, ‘it is necessary only to show that “members of the public are likely to be deceived.”’ [Citations.]” (*Id.*; accord *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876 [“Intent of the disseminator and knowledge of the customer are both irrelevant” when examining a claim under section 17500].)

Lily Robotics’s Promotional Video, which is how it advertised the Lily Camera and solicited customers, was untrue and misleading because the “Lily Shots” were not shot with a Lily Camera. They were shot with a more expensive, non-autonomous, remote-controlled, DJI-made drone that included a professional camera mounted to it and that required two people to use it. (Compl., ¶¶ 12, 26.) Lily Robotics knew the “Lily Shots” (which really are “DJI Shots”) were not taken with a Lily Camera. (Compl., ¶¶ 12, 20-30.) And at no time during the video is there any disclaimer stating or implying that these so-called “Lily Shots” were taken with anything other than a Lily Camera or that the shots are aspirational dramatizations of what Lily Robotics hopes the Lily Camera will be able to do. (Compl., ¶ 25.) For these reasons, the Promotional Video is actually misleading or likely to deceive or confuse the public. (Compl., ¶¶ 12, 20-30.) The People, therefore, are likely to succeed on their FAL claim.

B. The People Are Likely to Succeed on Their Unfair Competition Claim

The People also bring a claim against Lily Robotics for unfair competition in violation of California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200 *et seq.* (See Compl.) “The UCL’s purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation.]” (*Kasky, supra*, 27 Cal.4th at 949.)

“The UCL’s scope is broad” (*id.*), and “California courts have consistently interpreted the language of section 17200 broadly,” (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 519.). It defines “unfair competition” to include “any unlawful, unfair or fraudulent business act or practice.” (Bus. & Prof. Code § 17200; *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th

1 390, 394 [“The UCL sets out three different kinds of business acts or practices that may constitute
2 unfair competition: the unlawful, the unfair, and the fraudulent. [Citations.]”].)

3 Section 17200 is written in the disjunctive and establishes three varieties of unfair
4 competition—acts or practices which are unlawful, or unfair, or fraudulent. (*See Cel-Tech*
5 *Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) An
6 unlawful business practice is any activity that is forbidden by law, “be it civil or criminal, federal,
7 state or municipal, statutory or regulatory, or court-made [law].” (*Saunders v. Super. Ct.* (1994) 27
8 Cal.App.4th 832, 838-839.)² An unfair business practice, generally speaking, is one that violates a
9 law, is immoral, unethical, oppressive, unscrupulous, or is substantially injurious to consumers
10 and has no real countervailing benefit to the defendant. (*See Drum v. San Fernando Valley Bar*
11 *Assn.* (2010) 182 Cal.App.4th 247, 253, 256-57 [describing the three tests used by California
12 courts to determine whether a business practice is unfair].) And a fraudulent business practice is
13 one by which that members of the public are likely to be deceived. (*See Podolsky v. First*
14 *Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647-48.) In this action, the People allege all three
15 varieties against Lily Robotics, and the conduct described below satisfies each test.³

16 **1. Lily Robotics Has Violated California Business and Professions Code §**
17 **17500**

18 As explained above, the People allege that Lily Robotics has violated the FAL by
19 knowingly using its false and misleading Promotional Video to solicit customers. (Compl., ¶¶ 8-
20 47.) This is enough to establish Lily’s violation of the UCL, too. (*Kasky, supra*, 27 Cal.4th at 950-
21 51 [“This court has recognized that ‘[a]ny violation of the false advertising law . . . necessarily
22 violates’ the UCL. [Citation.]”].)

23 **2. Lily Robotics Has Violated the Federal Trade Commission’s Mail,**
24 **Internet, or Telephone Order Merchandise Rule, 16 C.F.R. Part 435**

25 ² A UCL action “borrows” the law on which a claim of unlawful business practice is based.
26 (*Rose, supra*, 57 Cal.4th at 396; *see Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17
Cal.4th 553, 570 [explaining the independent nature of a UCL action].)

27 ³ The People’s Complaint alleges more predicate violations of the UCL than are discussed
in this Application. The predicate violations unmentioned here have been omitted merely in the
interest of brevity.

1 The People allege that Lily Robotics has violated the FTC's Mail, Internet, or Telephone
2 Order Merchandise Rule, 16 C.F.R. §§ 435.1-435.3. (Compl., ¶¶ 48-60; *see* William L. Stern, Bus.
3 & Prof. Code § 17200 Practice (Rutter 2016), §§ 3:66, 3:68 [discussing the use of FTC regulations
4 as predicate violations of an "unlawful" UCL claim and stating that "a California law enforcement
5 official can seek redress for violations of the FTC rules . . . through a § 17200 claim"].) This rule,
6 known colloquially as the "Mail Order Rule," generally requires a seller who solicits a buyer to
7 order merchandise through the mail, via the Internet, or by phone to have a reasonable basis to
8 expect that it can ship within the advertised time, or, if none is specified, within 30 days. (*See* 16
9 C.F.R. § 435.2(a).) When a seller cannot ship within the promised time, it also requires the seller
10 to either obtain the buyer's consent to a shipping delay or refund payment. (*See* 16 C.F.R. §
11 435.2(b), (c).) Lily Robotics violated the Mail Order Rule in at least three ways.

12
13 **i. Lily Robotics's December 17, 2015 First Delay Notice Violated**
14 **the Mail Order Rule**

15 The Mail Order Rule sets forth the processes by which a seller may delay a shipment for
16 the first time. Specifically, it is a violation for a seller, "[w]here a seller is unable to ship
17 merchandise within the applicable time set forth in [16 C.F.R. § 435.2(a)(1)], to fail to offer to the
18 buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay
19 in shipping or to cancel the buyer's order and receive a prompt refund." (16 C.F.R. § 435.2(b)(1).)
20 In other words, when a seller seeks to delay a shipping date for the first time, the Mail Order Rule
21 requires what the FTC calls a "first delay option notice."

22 Lily Robotics violated the Mail Order Rule by failing, in its December 17, 2015 First
23 Delay Notice, to tell its customers that their preorders would be cancelled automatically unless
24 they specifically consented to the revised shipping date. The Mail Order Rule states that "[w]here
25 the seller has provided a definite revised shipping date which is more than thirty (30) days later
26 than the applicable time set forth in [16 C.F.R. § 435.2(a)(1)] . . . , the offer of said option shall
27 also expressly inform the buyer that the buyer's order will automatically be deemed to have been
cancelled unless: (A) The seller has shipped the merchandise within thirty (30) days of the

1 applicable time set forth in [16 C.F.R. § 435.2(a)(1)], and has received no cancellation prior to
2 shipment; or (B) The seller has received from the buyer within thirty (30) days of said applicable
3 time, a response specifically consenting to said shipping delay. . . .” (16 C.F.R. §§
4 435.2(b)(1)(iii).) Lily Robotics provided a revised shipping date (Summer 2016) that was more
5 than 30 days after its initial shipping dates. Lily Robotics neither shipped the Lily Camera within
6 that time nor received from its customers “response[s] specifically consenting to” the revised
7 shipping date. (16 C.F.R. §§ 435.2(b)(1)(iii)(B).) This is not surprising because Lily Robotics’s
8 December 17, 2015 First Delay Notice did not “expressly inform” its customers that their orders
9 would be cancelled automatically unless the customers “specifically consent[ed] to” the revised
10 shipping date. (16 C.F.R. §§ 435.2(b)(1)(iii)(B).)

11 **ii. Lily Robotics’s August 25, 2016 Second Delay Notice Also**
12 **Violated the Mail Order Rule**

13 The Mail Order Rule also sets forth the processes by which a seller may delay a shipment a
14 second time. It is a violation for a seller, “[w]here a seller is unable to ship merchandise on or
15 before the definite revised shipping date provided under [16 C.F.R. § 435.2(b)(1)(i)] and
16 consented to by the buyer pursuant to [16 C.F.R. § 435.2(b)(1)(ii) or (iii)], to fail to offer to the
17 buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to
18 a further delay or to cancel the order and to receive a prompt refund.” (16 C.F.R. § 435.2(b)(2).) In
19 other words, when a seller seeks to delay a shipping date again, the Mail Order Rule requires what
20 the FTC calls a “renewed delay option notice.”

21 First, Lily Robotics violated the Mail Order Rule by failing to “expressly inform” its
22 customers in its August 25, 2016 Second Delay Notice that their preorders would be cancelled
23 automatically unless they specifically consented to the new revised shipping date. The Mail Order
24 Rule states that “[t]he offer of a renewed option shall expressly inform the buyer that, unless the
25 seller receives, prior to the expiration of the old definite revised shipping date or any date
26 superseding the old definite revised shipping date, notification from the buyer specifically
27 consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to
have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old

1 definite revised shipping date or any date superseding the old definite revised shipping date.” (16
2 C.F.R. § 435.2(b)(2)(ii).) Lily Robotics’s August 25, 2016 Second Delay Notice did not do this.
3 Instead, Lily Robotics told its U.S. customers that “[a]ll United States pre-orders will ship between
4 December 2016 and January 2017,” and told its non-U.S. customers that “international pre-orders
5 will start shipping later in 2017.” (Compl., ¶¶ 15, 46, 54.)

6 Second, Lily Robotics’s August 25, 2016 Second Delay Notice violated the Mail Order
7 Rule because it did not give Lily Robotics’s non-U.S. customers required information about the
8 shipping date for their preorders. The Mail Order Rule provides that “[a]ny offer to the buyer of
9 said renewed option shall provide the buyer with a new definite revised shipping date, but where
10 the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice
11 shall inform the buyer that the seller is unable to make any representation regarding the length of
12 the further delay.” (16 C.F.R. § 435.2(b)(2)(i).) Lily Robotics’s August 25, 2016 Second Delay
13 Notice stated that “[d]ue to regulatory and logistical constraints, international pre-orders will start
14 shipping later in 2017.” (Compl., ¶ 54.) “Later in 2017” does not constitute a “definite revised
15 shipping date,” and Lily Robotics’s statement also does inform its non-U.S. customers that it “is
16 unable to make any representation regarding the length of the further delay.” (16 C.F.R. §
17 435.2(b)(2)(i).) Lily Robotics was required to do one or the other, and it did neither.

18 **iii. Lily Robotics’s Failure to Deem Its Customers’ Orders**
19 **Cancelled and to Promptly Refund Their Money Violated the**
20 **Mail Order Rule**

21 Finally, Lily Robotics violated the Mail Order Rule by not cancelling its customers’ orders
22 and promptly refunding their money. It is a violation for a seller “[t]o fail to deem an order
23 cancelled and to make a prompt refund to the buyer whenever . . . [t]he seller fails to offer the
24 option prescribed in [16 C.F.R. § 435.2(b)(1)] and has not shipped the merchandise within the
25 applicable time set forth in [16 C.F.R. § 435.2(a)(1)].” (16 C.F.R. § 435.2(c)(5).) As explained
26 above, Lily Robotics’s December 17, 2015 First Delay Notice was not a proper first delay option
27 notice and did not comply with 16 C.F.R. § 435.2(b)(1). Lily Robotics therefore failed to “offer
the option prescribed” in that provision. Lily Robotics also has not shipped the Lily Camera to any

1 customers. This means that Lily Robotics was required to cancel its customers' preorders and
2 provide refunds. Lily Robotics did not do this.

3 **IV. LILY ROBOTICS HAS DISSIPATED ITS ILL-GOTTEN GAINS AND HAS**
4 **TAKEN STEPS TO DO IT AGAIN**

5 Because the People are reasonably likely to succeed on the merits of their claims against
6 Lily Robotics, the rebuttable presumption that the potential harm to the public outweighs the
7 potential harm to the defendant arises. (*See IT Corp.*, *supra*, 35 Cal.3d at 72.)

8 Yet even if this presumption were not enough on its own, there are additional reasons why
9 the People would be harmed if an injunction is not issued. First, despite telling its customers, in a
10 clear attempt to dissuade them from seeking refunds, that their preorder money is in "cold
11 storage," the People have been informed that Lily Robotics has already encumbered that money by
12 using it as collateral to obtain a \$4 million loan. The loan places the creditor ahead of the
13 customers in the event of Lily Robotics's bankruptcy. Lily Robotics, therefore, has dissipated
14 some of the preorder money, and when assets have been or may be dissipated, a preliminary
15 injunction should issue because it is "reasonably necessary and fair to both sides to maintain the
16 status quo pending the outcome of the litigation." (*Lenard v. Edmonds* (1957) 151 Cal.App.2d
17 764, 769) [appellate court affirmed the trial court's decision to issue a preliminary injunction
18 "where appellant was threatening to negotiate the third party notes given as partial consideration,
19 and had started proceedings to sell the motel under the deed of trust"]; *see Doyka v. Superior*
20 *Court* (1991) 233 Cal.App.3d 1134, 1136 [recognizing case law "approving the use of injunctions
21 to prevent dissipation of assets"]; *see also* Code Civ. Proc. § 526(a)(2), (3).⁴

22 Second, Lily Robotics has taken steps to further dissipate the preorder funds, and based on
23 its operational burn rate in July 2016 and assuming it has not received additional outside liquidity,
24 it likely is running out of non-preorder funds. While "mere monetary loss," as a general matter, is

25 ⁴ Although it is clear from its language, it is worth noting that California Code of Civil
26 Procedure § 526 "does not limit its operation to equitable proceedings"; a court may grant a
27 preliminary injunction even in "a purely legal action for damages" if the circumstances support
one. (*Lenard*, *supra*, 151 Cal.App.2d at 769; *see also Mitsui Mfrs. Bank v. Tex. Commerce Bank-*
Fort Worth (1984) 159 Cal.App.3d 1051, 1059 [that "only money is involved . . . does not prevent
the issuance of a preliminary injunction"].) The dissipation of assets is such a circumstance.

1 not sufficient on its own to render legal remedies inadequate, a preliminary injunction may issue,
2 and frequently has issued, when the party causing the alleged monetary loss is insolvent or in any
3 manner unable to respond in damages. (*See W. Coast Constr. Co. v. Oceano Sanitary Dist.* (1971)
4 17 Cal.App.3d 693, 700; *see also* Lee Smalley Edmon & Curtis E.A. Karnow, Cal. Prac. Guide:
5 Civ. Proc. before Trial (Rutter 2016), § 9:520; William L. Stern, Bus. & Prof. Code § 17200
6 Practice (Rutter 2016), § 8:56.) California courts have recognized this rule for over 150 years.
7 (*See, e.g., Cal. Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Grp.* (2011) 193
8 Cal.App.4th 849, 857 [“In the context of injunctions, insolvency or the inability to otherwise pay
9 money damages is a classic type of irreparable harm.”]; *W. Coast Constr., supra*, 17 Cal.App.3d at
10 700 [citing appellate decisions that “adhere to the foregoing rule that the asserted insolvency of the
11 defendant is a proper matter for the court’s consideration” in the context of a request for a
12 preliminary injunction]; *Lenard, supra*, 151 Cal.App.2d at 769 [preliminary injunction was proper
13 where the defendant’s acts, if allowed, “might well render himself unable to pay the judgment, if
14 one were secure”]; *Union Oil Co. v. Domengeaux* (1939) 30 Cal.App.2d 266, 272 [“But under the
15 circumstances before us, and giving consideration to the fact that the persons who had actually
16 drilled the well were insolvent, there is no doubt that the trial court properly granted the
17 injunction.”]; *Duvall v. White* (1920) 46 Cal.App. 305, 308 [injunctive relief may be considered
18 upon “averment or showing that the parties causing the loss are insolvent or in any manner unable
19 to respond in damages”]; *Leach v. Day* (1865) 27 Cal. 644, 646 [injunctive relief is available
20 where the plaintiff’s legal remedy is inadequate, whether from “the nature of the injury itself or
21 from the insolvency of the party committing it”].)

22 While Lily Robotics has not filed for bankruptcy, it likely is running out of non-tainted
23 funds. According to a witness, Lily encumbered the preorder money and took out the \$4 million
24 loan because its Series A equity funding was running out, and the witness estimated, based on its
25 operational burn rate in July 2016 and assuming it has not received additional outside liquidity,
26 that Lily Robotics would have used up the \$4 million by the end of 2016. The witness further
27 informed the People that in July 2016 Lily Robotics was investigating and taking steps to obtain
additional liquidity. These steps included having conversations with Silicon Valley Bank to obtain

1 more debt (which, presumably, would be collateralized by Lily Robotics's main "asset"—the
2 preorder money), communicating with equity investors, and attempting to obtain other forms of
3 financing.

4 In short, Lily Robotics's financial condition and the steps it has taken in response to it
5 demonstrate the likelihood that it will be not be able to provide refunds and pay full restitution to
6 its victims. Lily Robotics's potential inability to do this "is a classic type of irreparable harm."

7 (*Cal. Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Grp.* (2011) 193

8 Cal.App.4th 849, 857.)

9 **V. LILY ROBOTICS WOULD NOT BE IRREPARABLY HARMED BY THE**
10 **PEOPLE'S REASONABLE, NARROWLY-TAILORED PROPOSED INJUNCTION**

11 Although it is Lily Robotics's burden to rebut the presumption that the potential harm to
12 the public outweighs the potential harm to the defendant arises (*see IT Corp., supra*, 35 Cal.3d at
13 72), it is clear that Lily Robotics would not suffer irreparable harm if the Court issues injunctive
14 relief. The People do not ask the Court to freeze all of Lily Robotics's assets, stop Lily Robotics
15 from using any equity or debt funding it currently has, or preventing Lily Robotics from obtaining
16 additional equity funding; rather, the People ask the Court to prevent the further dissipation of a
17 specific, readily identifiable amount of ill-gotten gains. The People are not seeking to prevent Lily
18 Robotics from returning the preorder money to the rightful owners, that is, the preorder customers.
19 This is a fair and reasonable request when Lily Robotics has already dissipated and continues to
20 take steps to dissipate those ill-gotten gains. (*See Lofton v. Wells Fargo Home Mortg.* (2014) 230
21 Cal.App.4th 1050, 1067, fn. 5 ["The TRO properly seeks to prevent dissipation of a specific
22 asset."]; *cf. Doyka v. Superior Court* (1991) 233 Cal.App.3d 1134, 1136 ["No doubt, under [*West*
23 *Coast Construction* and *Lenard*] the superior court here could have enjoined distribution of the
24 loan funds while they were readily identifiable and separately held."].) And because Lily Robotics
25 obtained the preorder money through fraudulent means and did not refund it to them as it already
26 should have, it cannot legitimately contend that its harm from not being able to use the customers'
27 preorder money outweighs the customers' interest in having it returned to them.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CONCLUSION

The People's claims against Lily Robotics are strong, and the People have a reasonable likelihood of success. The public will suffer harm if Lily Robotics is allowed to continue these practices and dissipate its customers' preorder funds for a purpose other than refunding the money to preorder customers, and Lily Robotics will not suffer irreparable injury from the People's proposed injunction. The entry of provisional injunctive relief therefore is appropriate. (*See IT Corp., supra*, 35 Cal.3d at 72 & fn. 5 [establishing a rebuttable presumption in favor of the government when its claims are strong and noting that "the clearer the violation, the less the trial court need be concerned with the balancing of harm"].) The People ask the Court to grant their Application.

DATED: 1/11/17

GEORGE GASCÓN

District Attorney, City and County of San Francisco

BY: 

EVAN H. ACKIRON

Managing Assistant District Attorney