

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 12-4221 SC
)	
AF HOLDINGS, LLC,)	ORDER GRANTING DEFENDANT'S
)	MOTION TO REQUIRE UNDERTAKING
Plaintiff,)	PURSUANT TO CALIFORNIA CODE OF
)	<u>CIVIL PROCEDURE § 1030</u>
v.)	
)	
ANDREW MAGSUMBOL,)	
)	
Defendant.)	
)	

I. INTRODUCTION

Now before the Court is Defendant Andrew Magsumbol's ("Defendant") motion to require undertaking. ECF No. 20 ("Mot."). Defendant's Motion asks the Court to require Plaintiff AF Holdings, LLC ("Plaintiff"), a foreign corporation, to post an undertaking with the Court pursuant to California Code of Civil Procedure section 1030. See id. The motion is fully briefed, ECF Nos. 32 ("Opp'n"), 33 ("Reply"), and appropriate for resolution without oral argument, Civ. L.R. 7-1(b). For the reasons explained below, the Court GRANTS Defendant's Motion.

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1 **II. DISCUSSION**

2 Though there is no provision of the Federal Rules of Civil
3 Procedure relating to security for costs, "federal district courts
4 have the inherent power to require plaintiffs to post security for
5 costs." Simulnet E. Assocs. v. Ramada Hotel Operating Co., 37 F.3d
6 573, 574 (9th Cir. 1994). In exercising this power, federal
7 district courts follow the forum state's practice regarding
8 security for costs, an especially common occurrence when a non-
9 resident party is involved. Id.

10 Section 1030 of the California Code of Civil Procedure allows
11 for an undertaking "to secure an award of costs and attorney's
12 fees," which may be awarded if (1) "the plaintiff resides out of
13 state or is a foreign corporation" and (2) "there is a reasonable
14 possibility that the moving defendant will obtain judgment in the
15 action" The purpose of this statute is to "enable a
16 California resident sued by an out-of-state resident to secure
17 costs in light of the difficulty of enforcing a judgment for costs
18 against a person who is not within the court's jurisdiction . . .
19 [and] prevent out-of-state residents from filing frivolous lawsuits
20 against California residents." AF Holdings LLC v. Navasca, No. C
21 12-2396 EMC, 2013 WL 450383, at *2 (quoting Alshafie v. Lallande,
22 171 Cal. App. 4th 421, 428 (Cal Ct. App. 2009) (internal quotation
23 marks omitted)).

24 There is no dispute in this matter that Plaintiff is a foreign
25 corporation, as alleged in Plaintiff's own First Amended Complaint:
26 "[Plaintiff] is a limited liability company organized and existing
27 under the laws of the Federation of Saint Kitts and Nevis." ECF
28 No. 12 ("FAC") ¶ 2. Nor is there a dispute that Defendant is a

1 California citizen. Id. ¶ 4. The only remaining issues to
2 consider are the possibility of Defendant obtaining judgment in
3 this action, and the Ninth Circuit's guidance on the imposition of
4 bonds.

5 California Code of Civil Procedure section 1030 requires only
6 that there be a "reasonable possibility" that the moving defendant
7 will obtain judgment in the action. This is a relatively low bar.
8 See, e.g., Navasca, 2013 WL 450383, at *2. Here, Defendant argues
9 that Plaintiff's evidence supporting its infringement claim is
10 weak. Mot. at 8-12. This Court and others have held repeatedly
11 that Plaintiff's core allegations of infringement -- mere
12 association of Defendant's Internet Service Provider subscription
13 information with the Internet Protocol address linked to the
14 allegedly infringed file -- is insufficient to establish that the
15 subscriber was the person who allegedly infringed copyright. See,
16 e.g., Navasca, 2013 WL 450383, at *2-3; SBO Pictures, Inc. v. Does
17 1-3036, No. 11-4220 SC, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30,
18 2011). Plaintiff provides no additional details to indicate that
19 Defendant himself actually infringed the file at issue here,
20 despite its surprising assertion that it possesses such details but
21 chose not to describe them in its reply brief or complaint. See
22 Reply at 8-9. Plaintiff's other arguments all involve attempts to
23 place on Defendant a higher burden of proof than he has under the
24 law. The Court finds that Defendant has shown a reasonable
25 possibility of obtaining judgment.

26 Therefore, following this Court's rulings in previous, almost-
27 identical cases, the Court will require Plaintiff to post an
28 undertaking in this matter. See Navasca, 2013 WL 450383 at *4; AF

1 Holdings v. Trinh, No. 12-02393 CRB, 2012 U.S. Dist. LEXIS 161394,
2 at *3 (N.D. Cal. Nov. 9, 2012). The only remaining question is
3 whether the amount of the undertaking Defendant requests is
4 appropriate. In Trinh, for example, this Court required an
5 undertaking of \$48,000 in costs and fees after determining that the
6 originally requested undertaking of \$88,000 was excessive because
7 Defendant's counsel's proposed fees were not reasonable given
8 Defendant's characterization of the case as frivolous and simple.
9 2012 U.S. Dist. LEXIS 161394 at *3.

10 In this case, Defendant's counsel expects to incur \$73,875 in
11 costs and fees, estimating about 293 hours of work at a \$250 per
12 hour billing rate. Mot. at 17. The Court finds the requested
13 amount excessive. Defendant's counsel's estimation of the total
14 hours he might spend on this case is unreasonably high, especially
15 since he is, by now, an old hand in these matters. The Court
16 concludes, in line with its previous decisions, that a total
17 undertaking of \$48,000 is appropriate. That amount is comprised of
18 a lodestar of \$37,500, calculated by multiplying Defendant's
19 counsel's \$250 per hour billing rate by an estimated 150 hours of
20 work, plus Defendant's estimated \$10,500 in costs.

21 In granting Defendant's motion, the Court is cognizant of
22 Plaintiff's concerns about having to post an undertaking each time
23 it attempts to pursue a copyright infringement claim. See Reply at
24 4. However, the Court finds unconvincing Plaintiff's protestations
25 that copyright infringement cases frequently take place in other
26 courts without the "special disadvantage" of plaintiffs being
27 required to post undertakings. See id. Plaintiff is not presently
28 in one of those other courts, and in this Court, undertakings for

1 foreign corporations may be required under California law.

2

3 **III. CONCLUSION**

4 For the reasons explained above, the Court GRANTS Defendant
5 Andrew Magumbol's Motion to Require an Undertaking. Plaintiff AF
6 Holdings, LLC is required to post an undertaking of \$48,000 with
7 the Court within thirty (30) days of this Order's signature date,
8 or this action may be dismissed with prejudice.

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10 IT IS SO ORDERED.

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12 Dated: March 18, 2013

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UNITED STATES DISTRICT JUDGE

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