

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YVES SICRE DE FONTBRUNE,)	Case No. 13-cv-05957-SC
)	
Plaintiff,)	ORDER VACATING MARCH 12,
)	2014 ORDER AND GRANTING
)	<u>MOTION TO DISMISS</u>
v.)	
)	
ALAN WOFSY, ALAN WOFSY &)	
ASSOCIATES, and DOES 1 through)	
100, inclusive,)	
)	
Defendants.)	
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)	

I. INTRODUCTION

Now before the Court is Defendants Alan Wofsy and Alan Wofsy & Associates' (collectively, "Defendants") motion for leave to file a motion for reconsideration of the Court's March 12, 2014 Order granting in part and denying in part Defendants' motion to dismiss. ECF No. 26. Having reviewed the motion, along with the papers originally submitted in connection with the motion to dismiss, the Court concludes that its previous finding concerning judicial notice of foreign laws was in error. Accordingly, the Court VACATES the March 12, 2014 Order and enters this amended Order on

1 Defendants' motion to dismiss. No further briefing is necessary,
2 and the Court limits its discussion to the issues raised in the
3 papers filed in connection with Defendants' motion to dismiss. ECF
4 Nos. 9 ("MTD"), 18 ("Opp'n"), 19 ("Reply"). For the reasons set
5 forth below, Defendants' motion to dismiss is GRANTED.

6
7 **II. BACKGROUND**

8 The following facts are taken from Plaintiff's Complaint along
9 with the exhibits attached thereto. The instant action arises out
10 of a copyright suit Plaintiff filed against Defendants in the
11 French courts in 1996. Compl. Ex. 2 ("2001 J." (translation)) at
12 1. In the French action, Plaintiff claimed to have artistic and
13 literary property rights to a catalog of the works of Pablo Picasso
14 created by Christian Zervos (the "Zervos works"). Plaintiff
15 asserted claims for copyright infringement and unfair competition
16 against Defendants based on their alleged reproduction of the
17 Zervos works in two catalogs of Picasso artwork. Id.

18 The trial court held Defendants harmless in the action and
19 declared Plaintiff's claims "inadmissible[] due to his lack of
20 proof of his locus standi." Id. at 2. On September 26, 2001, the
21 Paris Court of Appeals reversed. Id. at 12. The court held
22 Defendants liable for copyright infringement, prohibited Defendants
23 from using Zervos's photographs under penalty of "astreinte"¹ of ₣
24 10,000 per discovered breach, ordered the destruction of the
25 infringing materials, and awarded Plaintiff ₣ 800,000 in pecuniary
26 damages and ₣ 50,000 in costs. Id. at 12-13. Defendants appealed

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28 ¹ As discussed below, the parties disagree on the precise
translation of astreinte in this context. Plaintiff claims it
means damages, while Defendants claim it means penalty.

1 this judgment, but their appeal was dismissed. Compl. ¶ 9.

2 In or around 2011, Plaintiff brought a case against Defendants
3 before a French enforcement judge concerning the 2001 Judgment of
4 the Paris Court of Appeals.² Compl. Ex. 6 ("2012 J."
5 (translation)) at 3. On January 10, 2012, the court rendered a
6 judgment in the action. The court's description of the underlying
7 facts and claims is vague, at least in the translation provided by
8 Plaintiff, and Plaintiff's pleading does nothing to clarify the
9 matter. However, it appears the court found that Defendants had
10 violated the terms of the 2001 Judgment. The court awarded
11 Plaintiff € 2,000,000 in "liquide l'astreinte" and € 1,000 for
12 costs. Compl. Exs. 5, 6 at 3-4.

13 In September 2011, Plaintiff and Éditions Cahiers D'art filed
14 another suit against Defendants concerning "works dedicated to the
15 works of Picasso" before the Tribunal de Grande Instance de Paris.
16 Compl. Ex. 16 ("2013 J." (translation)) at 2. Defendants did not
17 engage an attorney for the proceeding. Id. at 3. On January 13,
18 2013, the tribunal found that Plaintiff lacked locus standi to
19 bring his claims for copyright infringement because, on December
20 20, 2001, he transferred his intellectual property rights in the
21 works to Cahier D'art Holding. Id. at 4. The tribunal concluded
22 that Plaintiff's claims against Defendants were "inadmissible" and
23 ordered Plaintiff to pay the costs of the proceedings. Id.

24 Plaintiff filed the instant action in California state court
25 on November 14, 2013. Defendant subsequently removed on diversity
26 grounds. Pursuant to the Uniform Foreign-Country Money Judgments

27 ² There appears to be a typo in the French Judgment, which is
28 repeated in the translation, setting the date of the underlying
judgment at September 26, 2011, rather than September 26, 2001.

1 Recognition Act ("UFCMJRA"), Cal. Code Civ. Proc. § 1713 et seq.,
2 Plaintiff demands that "the judgment of the Paris Court of Appeals
3 be recognized as [a] valid judgment for Plaintiff and be entered as
4 a California judgment." Id. pg. 6. Plaintiff seeks a total sum of
5 \$2,688,101.03, which is allegedly the United States dollar
6 equivalent of the € 2,001,000 awarded in the 2012 Judgment. Id.
7 There is no indication that Plaintiff is seeking a California
8 judgment in connection with the 2001 Judgment.

9

10 **III. LEGAL STANDARD**

11 A motion to dismiss under Federal Rule of Civil Procedure
12 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
13 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
14 on the lack of a cognizable legal theory or the absence of
15 sufficient facts alleged under a cognizable legal theory."
16 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
17 1988). "When there are well-pleaded factual allegations, a court
18 should assume their veracity and then determine whether they
19 plausibly give rise to an entitlement to relief." Ashcroft v.
20 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
21 must accept as true all of the allegations contained in a complaint
22 is inapplicable to legal conclusions. Threadbare recitals of the
23 elements of a cause of action, supported by mere conclusory
24 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
25 Twombly, 550 U.S. 544, 555 (2007)).

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1 **IV. DISCUSSION**

2 **A. Procedural Matters**

3 Plaintiff attached the 2001, 2012, and 2013 judgments to his
4 Complaint, along with English translations of those judgments.
5 Defendants object to the translations as inaccurate, and have
6 offered purportedly accurate translations of their own. ECF No. 12
7 ("Obj.") at 3. Defendants have also submitted the declaration of
8 Vonnick le Guillou, an attorney licensed to practice in France, on
9 certain issues of French law relevant to the instant dispute. ECF
10 No. 9-2 ("Guillou Decl."). In response to the Guillou Declaration,
11 Plaintiff has submitted a declaration on French law by Christopher
12 J. Mesnooh, an attorney admitted to the Paris bar. ECF No. 18-1
13 ("Mesnooh Decl.").

14 Plaintiff argues that the Court should strike the translations
15 submitted by Defendants, along with the Guillou Declaration, on the
16 ground that the Court should limit its analysis to the pleadings on
17 a Rule 12(b)(6) motion to dismiss. Since the Court need not refer
18 to Defendants' translations to resolve the instant dispute, it does
19 not rule on Plaintiffs' objections to them. Plaintiffs' objection
20 to Guillou Declaration is OVERRULED. Pursuant to Federal Rule of
21 Civil Procedure 44.1, the Court may consider any relevant material
22 or source in determining foreign law, regardless of whether that
23 material is otherwise admissible under the Federal Rules of
24 Evidence. Plaintiff argues that the Court should decline to make
25 determinations of foreign law at the pleading stage since the
26 record is not yet fully developed and the Court should not merely
27 resort to "simply picking one French lawyer's declaration . . . or
28 another's." ECF No. 24. However, pursuant to Rule 44.1, the Court

1 is not limited to considering the materials submitted by the
2 parties in resolving issues of foreign law. While expert testimony
3 may be useful, it is not "an invariable necessity in establishing
4 foreign law." Access Telecom, Inc. v. MCI Telecomms. Corp., 197
5 F.3d 694, 713 (5th Cir. 1999) (internal quotations omitted).

6 As determinations of foreign law are issues of law, not fact,
7 the Court takes judicial notice of the declarations submitted by
8 both Guillou and Mesnooh, but only insofar as they relate to French
9 law.³

10 **B. The 2001 Judgment**

11 Defendants argue that recognition of the 2001 Judgment is
12 barred by the UFCJMRA's ten-year statute of limitations. Mot. at 5
13 (citing Cal. Code Civ. Proc. § 1721). Plaintiff does not respond
14 to this argument, though it appears that he is not seeking to
15 enforce the 2001 Judgment. The Complaint's prayer seeks only
16 \$2,688,101.03, the U.S. dollar equivalent of the 2012 Judgment. To
17 the extent that Plaintiff is seeking enforcement of the 2001
18 Judgment, his claim is DISMISSED.

19 **C. The 2012 Judgment**

20 Defendants argue that the 2012 Judgment is unenforceable
21 because: (1) Plaintiff lacks standing to enforce the 2012 Judgment
22 because he sold his rights to the Zervos works in 2001; and (2) the
23 judgment is for a fine or a penalty, neither of which are
24 cognizable under the UFCMJRA. The Court rejects the first argument
25 but finds the second persuasive.

26 _____
27 ³ Guillou also submitted a declaration in support of Defendants'
28 reply brief. ECF No. 22 ("Guillou Reply Decl."). Plaintiff
objects to the Guillou Reply Declaration on the ground that
Defendants should not be allowed to raise new arguments on reply.
Guillou's reply declaration does not change the Court's analysis.

1 **1. Plaintiff's Standing**

2 Defendants argue that Plaintiff lacks standing to enforce the
3 2012 Judgment because he transferred his rights to the Zervos works
4 in 2001. MTD at 10-11. As an initial matter, this argument
5 conflates Plaintiff's locus standi in the French court and his
6 standing in this Court. Plaintiff is not suing for copyright
7 infringement in the instant action -- he is suing to enforce the
8 2012 Judgment issued by the French court. Thus, the pertinent
9 question with respect to standing is whether Plaintiff has an
10 interest in the 2012 Judgment, not whether he has an interest in
11 the Zervos works. As the 2012 Judgment ordered Defendants to pay €
12 2,001,000 to Plaintiff specifically, Defendants cannot dispute that
13 Plaintiff has an interest in enforcing that judgment. Instead,
14 Defendants are essentially challenging Plaintiff's standing in the
15 2012 French action. The Court leaves this issue to the French
16 courts.

17 To the extent that the Court can review the accuracy of the
18 2012 Judgment, it would need to look outside of the pleadings to do
19 so. Defendants point out that the 2013 Judgment, which is attached
20 to Plaintiff's pleading, states that Plaintiff transferred his
21 rights to the Zervos works to Cahier D'Art Holding Limited on
22 December 21, 2001. However, "[f]actual findings in one case are
23 not ordinarily admissible for their truth in another case through
24 judicial notice." Wyatt v. Terhune, 315 F.3d 1108, 1114 n.5 (9th
25 Cir. 2003). And though the Court is not bound by the allegations
26 in Plaintiff's Complaint when they are contradicted by the exhibits
27 attached thereto, the 2012 Judgment, which is also attached to the
28 Complaint, implicitly holds that Plaintiff did have locus standi in

1 the 2012 action. Defendants are essentially asking that the Court
2 find that the 2012 Judgment was in error and the 2013 Judgment was
3 not, when the reverse might be true. Under the UFCMJRA, the Court
4 has the discretion to refuse to recognize a foreign judgment where
5 it conflicts with another final and conclusive judgment. See Cal.
6 Code Civ. Proc. 1716(c)(4). The Court declines to exercise its
7 discretion before it has had the opportunity to review the evidence
8 concerning Plaintiff's rights to the Zervos works.

9 While the Court may not take judicial notice of the truth of
10 the matters asserted in the 2013 Judgment, it may take judicial
11 notice of the judgment's legal effect. If the 2012 Judgment is no
12 longer final, enforceable, or conclusive on account of the 2013
13 Judgment, the Court could not enforce it under the UFCMJRA. See
14 id. § 1715(a)(2). According to Guillou, it is "very likely" that
15 Plaintiff did not inform the enforcement judge that he transferred
16 his commercial rights to the photographs in 2001 and such
17 concealment could form grounds for a motion for revision of the
18 2012 Judgment, pursuant to Article 595 of the French Code of Civil
19 Procedure. Guillou Decl. ¶ 19. However, under Article 596 of the
20 French Code of Civil Procedure, the statute of limitations for a
21 motion for revision is two months, and it begins to run from the
22 date on which a party is aware of the grounds for the revision upon
23 which it relies. There is no indication that Defendants have filed
24 such a motion, though they were clearly aware of possible grounds
25 for revision of the 2012 Judgment when this motion was filed over
26 two months ago. At the pleadings stage, the Court declines to
27 speculate as to whether Defendants could file or have filed a
28

1 motion for revision within the statute of limitations.⁴

2 Accordingly, the Court declines to dismiss Plaintiff's case
3 based on a lack of standing.

4 **2. Penalty**

5 Defendants argue that the 2012 Judgment is a penalty and is
6 therefore not cognizable under the UFCMJRA. The Court first
7 reviews the standard for determining whether a judgment constitutes
8 a penalty and then applies this standard to the 2012 Judgment.

9 **a. Penalty Standard**

10 The UFCMJRA applies to a foreign-country judgment to the
11 extent that judgment both (1) "[g]rants or denies recovery of a sum
12 of money" and (2) "[u]nder the law of the foreign country where
13 rendered is final, conclusive, and enforceable." Cal. Code Civ.
14 Proc. § 1715(a)(1)-(2). The statute "does not apply to a foreign-
15 country judgment, even if the judgment grants or denies recovery of
16 a sum of money," to the extent that the judgment is a "fine or
17 other penalty." Id. § 1715(b), (b)(2).

18 In determining whether a foreign-country judgment is a penalty
19 for the purposes of the UFCMJRA, a court must determine whether the
20 purpose of the judgment "is to punish an offense against the public
21 justice of the State, or to afford a private remedy to a person
22 injured by the wrongful act." Java Oil Ltd. v. Sullivan, 168 Cal.
23 App. 4th 1178, 1187 (Cal. 2008) (quoting Huntington v. Attril, 146
24 U.S. 657, 673-74 (1892)). "The test is not by what name the
25 statute is called by the legislature or the courts of the State in

26 _____
27 ⁴ Even if Defendants decline to file a motion for revision, the
28 Court may choose not to enforce the 2012 Judgment if it was
obtained by fraud or is repugnant to public policy. Cal. Code Civ.
Proc. § 1716(c)(2)-(3). These issues are not amenable for
resolution at this stage of the litigation.

1 which it was passed, but whether it appears . . . to be in its
2 essential character and effect, a punishment of an offence against
3 the public, or a grant of a civil right to a private person." Id.
4 (quoting Huntington, 146 U.S. at 683). A penal statute is one
5 "that awards a penalty to the state, or to a public officer in its
6 behalf, or to a member of the public, suing in the interest of the
7 whole community to redress a public wrong. . . . The purpose
8 must be, not reparation to one aggrieved, but vindication of the
9 public justice." Id. (quoting Cavarria v. Sup. Ct., 40 Cal. App.
10 3d 1073, 1077 (Cal. Ct. App. 1974)).

11 Applying these principles in Java Oil, the California Supreme
12 Court found that a foreign judgment awarding attorney fees was
13 cognizable under the UFCMJRA. The court reasoned that the
14 defendant was being ordered to compensate the plaintiffs for fees
15 they incurred in defending a lawsuit, the award was payable to the
16 plaintiffs rather than to the state, the judgment arose from a
17 civil action, and the damages were not designed to provide an
18 example or punish the defendant. Id. at 1188.

19 In an earlier case, the California Supreme Court also found
20 that penal section 205(e) of the Emergency Price Control Act of
21 1942 was penal. Miller v. Mun. Court, 22 Cal. 2d 818, 838 (Cal.
22 1943). That law allowed purchasers of commodities sold in
23 violation of a government price schedule to sue for either \$50 or
24 treble the amount of the overcharge. Id. The court reasoned that
25 though the fines were payable to private citizens, the primary
26 purpose of providing for consumer actions was to aid in the
27 enforcement of the act, and that the penalties authorized by the
28 statute were intended to serve as a deterrent. Id. at 839.

1 The Ninth Circuit also addressed the issue of penalties under
2 the UFCMJRA in Yahoo! Inc. v. La Ligue Contre Le Racisme Et
3 L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006). In that case, a
4 French court entered an order requiring Yahoo! to block French
5 citizens' access to Nazi material displayed on Yahoo!'s website.
6 Id. at 1202-03. The French order stated that Yahoo! was subject to
7 a penalty of € 100,000 per day of delay or per confirmed violation.
8 Id. at 1203. The Ninth Circuit found that it "exceedingly
9 unlikely" that the French judgment could be enforced under the
10 UFCMJRA because the judgment was a penalty. Id. at 1218. First,
11 the court noted that the word used by the French court,
12 "astreinte," was consistently translated as a "penalty" in the
13 record.⁵ Id. at 1219. Second, Yahoo! had been held liable for
14 violating a section of the French penal code, and the judgment did
15 not lose its penal nature merely because private litigants
16 initiated the action. Id. Third, the court observed that the
17 penalties were designed to deter Yahoo! from creating "a threat to
18 public order" and were payable to the government. Id. at 1220.

19 In sum, courts generally balance a number of factors in
20 determining whether an award is an unenforceable penalty under the
21 UFCMJRA: (1) does the award compensate the plaintiff for damages or
22 punish the defendant for an offense against the public, (2) is the
23 award payable to the plaintiff or to the state, (3) does the
24 judgment arise from a civil action or a penal statute, (4) are the
25 damages intended to provide an example and deterrence, and (5) does

26 _____
27 ⁵ Defendants argue that the Ninth Circuit's translation of
28 astreinte in Yahoo! controls the outcome of the instant dispute.
The Court disagrees. The Ninth Circuit looked beyond the literal
translation of astreinte and considered its function in the
underlying French action. The Court does the same here.

1 the judgment impose a mandatory fine, sanction, or multiplier on
2 the defendant. See Plata v. Darbun Enterprises, Inc., 09CV44-IEG
3 CAB, 2009 WL 3153747, at *6 (S.D. Cal. Sept. 23, 2009).

4 **b. Application to the 2012 Judgment**

5 With the above framework in mind, the Court examines whether
6 the € 2 million awarded as astreinte in the 2012 Judgment
7 constitutes a penalty. The Court concludes that it does.

8 Guillou, Defendants' declarant, states that astreinte is
9 independent of damages, and that French courts award an astreinte
10 to deter parties from noncompliance with a judgment or to punish
11 parties for failing to comply. Guillou Decl. ¶¶ 12-13. Guillou
12 also states that the amount of astreinte is fixed by "taking into
13 account the behavior of the defendant and the difficulties he has
14 met to comply with the judgment," rather than the damages suffered
15 by the plaintiff. Id. ¶ 14. Finally, Guillou asserts that the
16 concept of astreinte was created by French judges during the
17 Nineteenth Century, when they did not have the means to coerce
18 compliance with their civil orders. Guillou Reply Decl. ¶ 9.
19 Mesnooh, Plaintiff's declarant, agrees that the intent of astreinte
20 is to compel a party to comply with a judgment. Mesnooh Decl. ¶
21 27. However, Mesnooh contends that astreinte cannot be considered
22 a fine or a penalty because it is a personal remedy which goes
23 entirely to the party seeking the enforcement of the court
24 decision. Id. ¶¶ 29-30.

25 On balance, the Court finds that the award of an astreinte in
26 this case constitutes a penalty for the purposes of the UFCMJRA.
27 As Plaintiff points out, the astreinte arises out of a civil matter
28 vindicating Plaintiff's copyrights and is payable to Plaintiff, not

1 to the state or the court. Opp'n at 9. However, this does not end
2 the inquiry. The primary purpose of the astreinte was not to
3 remedy harm to Plaintiff, but to coerce compliance with the 2001
4 injunction. There is no indication that the French court even
5 considered Plaintiff's damages when it fixed the astreinte.
6 Instead, it engaged in a mechanical calculation, multiplying the
7 number of discovered violations by F 10,000 -- the amount set by
8 the 2001 Judgment -- and converting the product from Francs to
9 Euros. 2012 J. at 3. Moreover, the court noted that it could
10 properly consider "the behaviour of the [Defendants], and the
11 difficulties that [they] encountered in executing [the
12 injunction]." Id. The court's focus on Defendants' behavior and
13 disregard of Plaintiff's damages underscores the penal nature of
14 the astreinte.

15 It is possible that a portion of the astreinte awarded is
16 compensatory, since assuming he continued to hold the rights to the
17 Zervos works, Plaintiff may have been harmed by Defendants'
18 repeated violation of the 2001 injunction. However, the French
19 court did not delineate between the compensatory and punitive
20 aspects of the award. In any event, it appears that the
21 compensatory portion is minimal. The amount of the 2012 Judgment
22 (the equivalent of about F 14 million) is over eighteen times
23 larger than the amount of the original 2001 Judgment (F 800,000),
24 despite the fact that the court awarded the astreinte based on the
25 examination of just two infringing works. 2012 J. at 3.

26 Accordingly, the Court finds that the € 2 million awarded as
27 astreinte in the 2012 Judgment is a penalty and therefore not
28 cognizable under the UFCMJRA. Though neither party addresses the

1 issue, the Court also finds that the € 1,000 in costs awarded by
2 the 2012 Judgment is also not cognizable, as it was awarded in
3 connection with a punitive award.

4

5 **V. CONCLUSION**

6 For these reasons, the Court VACATES the March 12, 2014 Order
7 and GRANTS Defendants' motion to dismiss. This action is DISMISSED
8 WITH PREJUDICE.

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10 IT IS SO ORDERED.

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12 March 26, 2014

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UNITED STATES DISTRICT JUDGE

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