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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

REDISEGNO.COM, S.A. DE C.V.,
Plaintiff,
v.
BARRACUDA NETWORKS, INC., et al.,
Defendants.

Case No. [5:20-cv-00316-EJD](#)

**ORDER GRANTING DEFENDANT’S
MOTION FOR AN ORDER
REQUIRING PLAINTIFF TO POST AN
UNDERTAKING**

Re: Dkt. No. 40

Presently before the Court is Defendant Barracuda Networks, Inc.’s (“Barracuda”) motion requesting an order requiring Plaintiff Redisegno.com, S.A. DE C.V. (“Redisegno”) to post an undertaking for costs and attorney’s fees pursuant to California Civil Procedure Code § 1030. Having considered the Parties’ papers, the Court **GRANTS** Barracuda’s motion.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Redisegno is a Mexican corporation which provides hardware and software solutions in Mexico and is a distributor of Barracuda’s products and services. Complaint (“Compl.”) ¶ 5, Dkt. No. 1. On or about October 16, 2017, Redisegno through co-defendant Edgar Chake Corella Flores (“Flores”) entered into a Reseller Agreement with Barracuda to become a reseller/distributor of certain Barracuda “Products and Services.” *Id.* ¶ 19; Ex. A.

On or around June 4, 2015, a Mexican federal agency, Caminos y Puentes Federales de Ingresos y Servicios Conexos (“CAPUFE”), solicited bids for a project aimed at retaining security and information technology services and optimizing communication links related to the country’s

¹ Pursuant to N.D. Cal. Civ. L.R. 7-1(b), this Court finds this motion suitable for consideration without oral argument.

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1 infrastructure. *Id.* ¶ 21. Redisegno, then owned by Flores and his mother, successfully bid on the
 2 contract, and formally entered into an agreement with CAPUFE on or about July 23, 2015. *Id.* ¶
 3 24. On August 11, 2015, Flores and his mother transferred their interest, shares, and rights in
 4 Redisegno to Fact Leasing, S.A. de C.V. and to Mr. Carlos Alberto Lugo Vega (the “New
 5 Owners”). *Id.* Redisegno alleges Flores led the New Owners to believe that Redisegno had
 6 already purchased from Barracuda the IT products necessary to perform under the CAPUFE
 7 contract. In fact, Redisegno only had demos of Barracuda’s product, which expired after six
 8 months. *Id.* ¶ 27. Barracuda allegedly refused to supply equipment to Redisegno and disavowed
 9 their relationship, despite assuring the Mexican Government that it would fully support
 10 Redisegno’s bid. *Id.* ¶¶ 23, 27. The deadline for the equipment installation under the CAPUFE
 11 contract was October 11, 2015. *Id.* ¶ 24. Because Barracuda would not provide the required IT
 12 equipment to Redisegno, Redisegno failed to honor its commitments to CAPUFE and CAPUFE
 13 administratively rescinded the contract on or about January 18, 2016. *Id.* ¶ 32.

14 **B. Procedural History**

15 On August 17, 2017, Redisegno filed a complaint against Barracuda in the Southern
 16 District of Texas.² There, Redisegno alleged two causes of action against Barracuda: (1) tortious
 17 interference with an existing contract, and (2) breach of implied contract. On January 11, 2018,
 18 the Texas district court dismissed the complaint for lack of personal jurisdiction and improper
 19 venue. Redisegno filed this action on January 14, 2020 asserting claims against Barracuda for (1)
 20 breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of
 21 implied contract, (4) tortious interference, and (5) conspiracy. *See generally* Compl. Following a
 22 motion for judgment on the pleadings, the Court found that Redisegno’s fourth and fifth claims
 23 were barred by the applicable statute of limitations. *See* Order Granting Defendants’ Motion for
 24 Judgment on the Pleadings (“MJP Order”) at 8, Dkt. No. 28. Thus, Redisegno’s only remaining
 25

26 ² The Court previously took judicial notice of Redisegno’s complaint from the Southern District of
 27 Texas as it is a matter of public record. MJP Order at 2-3; *see also* Request for Judicial Notice
 (“RJN”) Ex. A, Dkt. No. 25.

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1 claims against Barracuda are for breach of contract, breach of the implied covenant of good faith
2 and fair dealing, and breach of implied contract.

3 Barracuda has now filed this motion to require an undertaking by Redisegno in the amount
4 of \$450,000 to secure its reasonably anticipated costs pursuant to California Civil Procedure Code
5 § 1030. *See* Motion for an Order Requiring Plaintiff to Post and Undertaking (“Mot.”), Dkt. No.
6 40. Redisegno filed an opposition (“Opp’n”), to which Barracuda has filed a reply (“Reply”).
7 Dkt. Nos. 44, 46.

8 **II. LEGAL STANDARD**

9 The Ninth Circuit has addressed the framework for the relief sought herein:

10 There is no specific provision in the Federal Rules of Civil Procedure
11 relating to security for costs. However, the federal district courts have
12 inherent power to require plaintiffs to post security for costs.
13 “Typically federal courts, either by rule or by case-to-case
14 determination, follow the forum state’s practice with regard to
15 security for costs, as they did prior to the federal rules; this is
16 especially common when a non-resident party is involved.”

14 *Simulnet E. Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994) (quoting 10
15 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2nd § 2671). Accordingly, the
16 application of California procedure is a matter within this Court’s discretion.

17 Here, the Court is guided by California Civil Procedure Code § 1030. Section 1030
18 provides, “[w]hen the plaintiff in an action . . . resides out of the state, or is a foreign corporation,
19 the defendant may at any time apply to the court by noticed motion for an order requiring the
20 plaintiff to file an undertaking to secure an award of costs and attorney’s fees which may be
21 awarded in the action. . . .” Cal. Civ. Pro. Code § 1030(a). “The purpose of the statute is to enable
22 a California resident sued by an out-of-state resident ‘to secure costs in light of the difficulty of
23 enforcing a judgment for costs against a person who is not within the court’s jurisdiction’” and to
24 prevent out-of-state residents from filing frivolous lawsuits against California residents. *Alshafie*
25 *v. Lallande*, 171 Cal. App. 4th 421, 428 (2009) (quoting *Yao v. Superior Ct.*, 104 Cal. App. 4th
26 327, 331 (2002)).

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1 A defendant requesting that the Court order a plaintiff to post an undertaking must
2 establish a “reasonable possibility that the moving defendant will obtain judgment in the action or
3 special proceeding.” Cal. Civ. Proc. Code § 1030(b). This Court has previously noted that the
4 “reasonable possibility” standard is relatively low. *See GeoTag, Inc. v. Zoosk*, No. C-13-0217
5 EMC, 2014 WL 793526, at *3 (N.D. Cal. Feb. 26, 2014). Thus, a defendant need not show that
6 there is “no possibility” that plaintiff would win at trial, “but only that it [is] reasonably possible
7 that the defendant will] win.” *Baltayan v. Est. of Getemyan*, 90 Cal. App. 4th 1427, 1432 (2001).
8 At the same time, the “reasonable possibility” standard is not so low as to be non-existent. The
9 Court declines to read § 1030 so broadly as to require every out-of-state litigant who brings a non-
10 frivolous suit in California to post a bond simply because there is a reasonable chance the
11 defendant may prevail.

12 As the Ninth Circuit, speaking generally about bond requirements such as § 1030, has
13 noted, “[w]hile it is neither unjust nor unreasonable to expect a suitor to put his money where his
14 mouth is, tollbooths cannot be placed across the courthouse doors in a haphazard fashion.”
15 *Simulnet*, 37 F.3d at 576 (quoting *Aggarwal v. Ponce Sch. of Med.*, 745 F.2d 723, 727–28 (1st Cir.
16 1984)). This concern is rooted in the fact that courts must take care “not to deprive a plaintiff of
17 access to the federal courts.” *Id.* Accordingly, the Court agrees with those district courts located
18 in California which have held that, in applying § 1030, a court must consider not only the extent of
19 the requested bond, but also the “degree of probability/improbability of success on the merits, and
20 the background and purpose of the suit.” *Gabriel Techs. Corp. v. Qualcomm Inc.*, No. 08 CV
21 1992 MMA POR, 2010 WL 3718848, at *2 (S.D. Cal. Sept. 20, 2020); *see also Susilo v. Wells*
22 *Fargo Bank, N.A.*, No. CV 11-1814 CAS PJWX, 2012 WL 5896577 (C.D. Cal. Nov. 19, 2012)
23 (same); *Plata v. Darbun Enterprises, Inc.*, No. 09CV44-IEG(CAB), 2009 WL 3153747, at *12
24 (S.D. Cal. Sept. 23, 2009) (same).

25 **III. DISCUSSION**

26 Although Redisegno, a company based in Mexico, qualifies as a foreign corporation, the

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1 Parties dispute whether Barracuda can show a reasonable possibility of prevailing on the merits of
2 Redisegno's remaining claims. The Court concludes that Barracuda has a reasonable possibility
3 of prevailing, but that Redisegno need only post a fraction of the undertaking Barracuda seeks.

4 **A. Reasonable Possibility of Judgment in Barracuda's Favor**

5 Barracuda first argues there is a reasonable probability that it will prevail on the merits
6 because Redisegno lost all rights under the Reseller Agreement after its prior owners sold their
7 rights in the company without Barracuda's consent. Barracuda relies on the general provision in
8 the Reseller Agreement and argues terms included in the general provision conditioned
9 Redisegno's continuing rights under the Reseller Agreement, following a 50% (or greater) change
10 in control, on Barracuda's consent. Mot. at 8. Moreover, Barracuda asserts that the terms in the
11 general provision represent the Parties' intent to treat a change in control as an assignment of
12 rights to a third-party, which required Barracuda's consent. *Id.*; *see also* Compl., Ex. A ¶ 7.
13 Accordingly, Barracuda posits that because it did not consent to Redisegno's sale to the New
14 Owners, it was relieved of further performance obligations. And therefore, Barracuda cannot be
15 liable for claims arising out of the original Reseller Agreement relationship with Redisegno.

16 In its opposition Redisegno argues that the Reseller Agreement did not condition its
17 owners' ability to assign their rights on the consent of Barracuda. Opp'n at 4. The terms in the
18 general provision of the Reseller Agreement, however, appear to contradict Redisegno's argument.
19 Given that the Reseller Agreement expressly dictates that Barracuda would be able to assign its
20 rights without any prior consent and also that an assignment had to be "permitted," Barracuda's
21 success on both the express and implied contract-based claims is at least reasonably possible.

22 Barracuda also argues that even if a viable contract existed between itself and the New
23 Owners of Redisegno, any alleged breach occurred outside the applicable statute of limitations.
24 Mot. at 11-13. Under California law, contract-based claims are subject to a four-year statute of
25 limitations. *See* Cal. Civ. Proc. Code § 337. Redisegno alleges that it "expected [Barracuda] to
26 perform under the contract by October 11, 2015" and that following this, it "then attempted to

1 resolve the issue of [Barracuda's] lack of performance" until January 18, 2016 when CAPUFE
 2 administratively rescinded its contract with Redisegno. Compl. ¶¶ 24, 27, 32. The expectation
 3 that Barracuda would perform under the contract by October 11, 2015 creates the reasonable
 4 possibility that Barracuda will attain a judgment against Redisegno because its claims are time
 5 barred.³

6 **B. Additional Factors**

7 As discussed above, courts should also "balance several factors in assessing the propriety
 8 of requiring a plaintiff to post security for costs, including whether the litigation has 'the
 9 appearance of vexatiousness' and: (i) the degree of probability/improbability of success on the
 10 merits, and the background and purpose of the suit; (ii) the reasonable extent of the security to be
 11 posted, if any, viewed from the defendant's perspective; and (iii) the reasonable extent of the
 12 security to be posted, if any, viewed from the nondomiciliary plaintiff's perspective." *A. Farber*
 13 *& Partners, Inc. v. Garber*, 417 F. Supp. 2d 1143, 1146 (C.D. Cal. 2006) (citing *Simulnet*, 37 F.3d
 14 at 576).

15 Although the record in this case does not have the appearance of vexatiousness in and of
 16 itself to justify posting an undertaking, the second *Simulnet* factor is similar to the second factor
 17 under California Civil Procedure Code § 1030. *See A. Farber & Partners*, 417 F. Supp. 2d at
 18 1148. Because Barracuda has already demonstrated that it has a reasonable possibility of
 19 succeeding on the contract-based claims asserted against it, this weighs in favor of requiring a
 20 security. Nonetheless, consideration of the reasonable extent of the undertaking to be posted
 21

22 ³Redisegno argues that its claims are not time barred because the doctrine of equitable tolling
 23 applies. However, the Court previously found that equitable tolling did not apply since Redisegno
 24 waited more than two years after the Southern District of Texas dismissed its action to refile suit.
 25 MJP Order at 7. Moreover, there can be no equitable tolling for claims which have never been
 26 pleaded. The statute of limitations is equitably tolled only on claims in a second-filed action during
 27 the pendency of identical claims in a first-filed action that was pursued in a different forum. *Mitchell*
 28 *v. Snowden*, No. 215CV1167TLNACP, 2016 WL 5407858, at *5 (E.D. Cal. June 10, 2016). In the
 Southern District of Texas case, Redisegno never pleaded a claim for breach of written contract.
 Redisegno's sole contract-based claim was for breach of implied contract. Therefore, there is still a
 reasonable possibility that Barracuda will attain judgment because the claims asserted against it are
 time barred.

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1 requires the Court to reduce the amount Barracuda seeks. Barracuda does not point to any actions
2 taken by Redisegno or provide sufficient information about the financial state of Redisegno’s
3 business which suggest Barracuda will have difficulty enforcing a judgment for attorney fees and
4 costs were it to prevail to justify the amount requested. The Court does not find Redisegno’s
5 difficulties with effectuating service against other defendants in Mexico to be persuasive evidence
6 for this amount.

7 Barracuda claims that it has already incurred \$50,355 to date in attorney fees and costs and
8 “conservatively estimates that it may incur an additional \$400,000. *See* Decl. of Jeffrey J.
9 Lederman (“Lederman Decl.”) ¶¶ 2-3, Ex A., Dkt. No. 40-1. Redisegno disputes the
10 reasonableness of both amounts, but does not provide the Court with a figure that it could
11 reasonably post as a security—it argues only that the \$450,000 figure is not justified and
12 excessive. Opp’n at 8. Given the absence of such context, the Court shall require Redisegno to
13 post a bond in the amount of \$250,000. Such an amount will protect the fees and costs that
14 Barracuda has already incurred, but will help ensure that Redisegno can continue its participation
15 in this action.

16 **IV. CONCLUSION**

17 Accordingly, the Court **GRANTS** Barracuda’s motion to require Redisegno to post an
18 undertaking in the amount of \$250,000 within 30 days of the date of this Order. This Order is
19 entered without prejudice to Barracuda applying to increase the required bond if the current bond
20 is shown to be inadequate.

21 **IT IS SO ORDERED.**

22 Dated: July 22, 2021



EDWARD J. DAVILA
United States District Judge