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BONDing WITH NPE's - The Requirement for Security for Costs or Expenses Under Section 1030 of the California Code of Civil Procedure

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A little used and often overlooked provision of the California Code of Civil Procedure recently played an important role in three recent cases brought by AF Holdings LLC, a foreign entity formed under the laws of the Federation of Saint Kitts and Nevis, against California residents for allegedly dealing with copyright infringing content through use of BitTorrent software. These decisions, copies appended, are:

AF Holdings LLC v. Trinh, United Stated District Court for the Northern District of California, 2012 U.S. Dist. Lexis 161394 (November 9, 2012) ("AF Holdings I").

AF Holdings LLC v. Navasca, United Stated District Court for the Northern District of California, No. C-12-2396 EMC (February 5, 2013) ("AF Holdings II").

AF Holdings LLC v. Magsumbol, United Stated District Court for the Northern District of California, No. 12-4221 SC (March 18, 2013) ("AF Holdings III").

Many of us are familiar with NPE (non-practicing entity) claims of all types in the IP realm, including patent, trademark and copyright claims. Section 1030 of the California Code of Civil Procedure (found athttp://codes.lp.findlaw.com/cacode/CCP/3/2/14/6/s1030) provides some comfort for NPE defendants in California by giving them push-back leverage, especially when confronted with facially weak claims filed by NPEs against hundreds if not thousands of defendants who often feel that the only escape from an intractible legal web is by settling even unsupportable claims that would typically cost more to fight. In fact, the NPEs generally count on defendants settling sooner rather than later to keep down their own costs. The longer a suit drags on, the less profitable to the NPE. Section 1030 provides a strategic tool, when appropriate, for potentially leveling this playing field.

Section 1030 is a mechanism for the defendant to force the plaintiff to file a bond to secure an award of costs and, if provided by the relevant statute, for attorneys fees. The requirements are simple: 1) The plaintiff resides out of state or is a foreign corporation and 2) there is a "reasonable possibility" (emphasis added) that the defendant will prevail. The whole point of this provision is to enable a California resident to secure costs against an out-of-state plaintiff and to prevent out-of-state plaintiffs from filing frivilous law suits against California residents.[1] Even though the Federal Rules of Civil

Procedure have no such specific procedure, the Federal Courts have the inherent power to require plaintiffs to post security for costs and typically follow the forum state's practices with this regard.[2]

AF Holdings I opened the door on this provision in the context of a BitTorrent claim, where the plaintiff could not convince the Court that the named defendant was the party making use of a particular IP address for purposes of infringing adult content when others had access to the same IP address (as is often the case for internet based claims). Furthermore, absent such showing, the defendant could not, under these circumstances, be held negligent since the defendant had no duty of care to prevent infringement of the plaintiff's copyrighted works. Accordingly, the Court required the posting of a $48,000 bond.

AF Holdings II required a slightly higher $50,000 bond adding new wrinkles. The Court emphasized that Section 1030 sets a relatively low standard, requiring only a showing of a "reasonable possibility" that the defendant will prevail. As in AF Holdings I, there were others (in this instance five others) who had access to the same IP address. The plaintiff had argued, unsuccessfully, that the defendant was the only likely infringer since, "Plaintiff's content attracts a specific demographic, and Joe Navasca was the member of the household who best fit that demographic." Even though Navasca knew a lot about computers -- since he worked in technical support at a gaming company -- the Court pointed out that one doesn't need to be tech savy to download online information. Even though AF Holdings' claim would survive a Rule 11 motion naming Navasco as defendant, "…that was a separate issue from whether AF should nevertheless be required to provide an undertaking because it is a reasonable possibility that Mr. Navasca will prevail on the merits." (Emphasis in original.)

AF Holdings II further disposed of plaintiff's claim that requiring a bond would effectively deprive it of access to the courts. First, AF Holdings made no showing that it could not post bond. Second, any such claim should be taken "with a grain of salt" since AF Holdings had initiated multiple cases throughout the country in which it managed to pay the filing fees. The Court, noting that the defendant was represented by the same counsel as in AF Holdings I, thus required a slightly higher $50,000 bond.

AF Holdings faired no better in AF Holdings III, in which the Court likewise ordered a bond. Here, however, the defendant (represented by the same counsel as in AF Holdings I and II) ran into some trouble with its requested bond for a projected $73,875 in costs and attorneys fees. The Court found this excessive, "…especially since [counsel] is, by now, an old hand in these matters." Furthermore, defense counsel had argued that the case was "frivolous and simple" in which case defense fees should be substantially less. The result was, not so surprisingly, a $48,000 bond.

As a minor point, the plaintiff, in AF Holdings III, protested that copyright infringement cases often take place in other courts without the "special disadvantage" of a plaintiff's bond. The Court's retort? "Plaintiff is not present in one of those other courts…" This exchange, however, does emphasize the limited application of this trio of decisions to those suits by non-residents or foreign corporations in the California courts. On the other hand, resourceful defense attorneys are likely to find similarly helpful bond provisions in their own home courts.

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[1] Alshafie v. Lallande, Cal. App. 4th 421, 428 (2009).

[2] Smulnet E. Assocs. v. Ramada Hotel Operating Co., 37 F.3d 573, 574 (9th Cir. 1994).

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