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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Dallas Buyers Club, LLC
Plaintiff,
v.
Ryan Underwood
Defendants.

Case No. 3:15-cv-05537-LB

**Notice of Motion and Motion to Require
Undertaking Pursuant to CCP §1030**

**Judge: Honorable Laurel Beeler
Courtroom C – 15th Floor
August 18, 2016 at 9:30 a.m.**

PLEASE TAKE NOTICE that on August 18th, 2016 at 9:30 a.m. Defendant Ryan Underwood, by and through undersigned counsel and pursuant to federal law and CCP §1030, shall appear before the Honorable Laurel Beeler at the San Francisco Courthouse, Courtroom C – 15th Floor, located at 450 Golden Gate Avenue, San Francisco, CA 94102, and will present his motion to require Plaintiff Dallas Buyer’s Club, LLC to post an undertaking pursuant to Cal. Civ. Proc. Code §1030.

Defendant relies on this motion, the attached memorandum in support, all supporting declarations filed herewith, including the declarations of the defendant and defendant’s counsel, and any oral arguments made before the court. For the reasons set out more fully herein, Defendant respectfully requests that this court require Plaintiff Dallas Buyers Club, LLC to post an undertaking in the amount of \$50,000 to cover costs and fees that Defendant expects to incur in this action.

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 DALLAS BUYERS CLUB, LLC

11 Plaintiff,

12 v.

13 RYAN UNDERWOOD

14 Defendant

Case No. 3:15-cv-05537-LB

Brief in Support of Motion for Undertaking

Hearing Date: August 18, 2016 at 9:30 a.m.

Hon. Judge Beeler

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I. INTRODUCTION AND FACTUAL BACKGROUND

The Plaintiff herein is Dallas Buyers Club, LLC. It does not control this litigation nor is it the beneficiary of any of the proceeds of this litigation. See Section I(b)(1), *infra*. The work at issue may or may not be owned by the Plaintiff herein. See Section I(b)(2), *infra*.

The Defendant herein is Ryan Underwood, who Plaintiff claims “may or may not be” the individual responsible for downloading the work at issue. See ECF No. 17 at 2. Defendant is not *actually* the individual responsible for downloading and distributing the film “Dallas Buyers Club” – regardless of who actually owns it.

Notwithstanding the foregoing, *someone* has chosen to sue Ryan Underwood in the name of Dallas Buyers Club, LLC, and seeks to leverage the very real costs of federal litigation into a dubious and onerous “settlement”. Defendant looks forward to the opportunity to defend himself, but seeks assurances that there will be some money from which to recover the award of attorney fees to which he will eventually be entitled after formally prevailing in this action.

To this end, Defendant respectfully requests that this court order Dallas Buyers Club, LLC to post an undertaking in the amount of \$50,000, pursuant to California Code of Civil Procedure §1030. Similar undertakings have been required in functionally identical BitTorrent cases in this district and, as set forth further below, Defendant certainly satisfies the standard required for the imposition of an undertaking in this case. Plaintiff’s case has been brought on the scantest of evidence and Plaintiff’s counsel has recently conceded that he does not know the identity of the actual infringer. Moreover, as set forth below, there are substantial questions regarding who actually owns the relevant rights at issue, who controls the lawsuits brought in the name of Dallas Buyers Club, LLC, and who ultimately stands to benefit from this lawsuit – and the hundreds of others like it. In sum, Defendant has more than the required “reasonable possibility” of ultimately prevailing in this action.

1
2 **A. A Brief History of BitTorrent Copyright Litigation – Leveraging the Cost of Litigation**
3 **in to a Dubious “Settlement”**

4 The present case is merely the latest iteration of the “copyright trolling” phenomenon that
5 has swept district courts across the country in the last half-decade. BitTorrent copyright cases like
6 this one share two important commonalities.

7 First, they are initially brought against “John Doe” defendants, identified only by the IP
8 address allegedly used to commit the infringement. In most cases, this IP address is the only
9 information that the Plaintiff gathers before filing suit. Plaintiffs then must seek permission to
10 subpoena the relevant internet service provider – in this case Comcast – to try and determine who is
11 *the subscriber* associated with a particular IP address. As described in detail in Section III (b)(1),
12 this is insufficient to identify the actual individual that uploaded or downloaded a particular work,
13 as the subscriber at a particular IP address bears no necessary relationship to the individual that
14 actually downloaded or uploaded a particular work via that IP address.

15 The foregoing creates a difficult problem for the Plaintiff, and leads to the second common
16 feature of these BitTorrent infringement suits: they never reach a decision on the merits for the
17 Plaintiff. Indeed, counsel for Defendant has represented more than one hundred “John Doe”
18 defendants in BitTorrent cases, and monitors the progress of such cases around the country. Yet
19 counsel for the defendant is not aware of any instances where Dallas Buyers Club, LLC – or any of
20 the other entities apparently controlled by Voltage Pictures¹ – has pursued a matter through trial or
21 even to summary judgment.

22 The plaintiffs’ goal in these matters is not to reach a judgment on the merits, but rather to
23 secure a dubious settlement with onerous terms that accrue primarily to the benefit of attorneys and
24 other non-parties. Notably, these terms have been rejected by courts even when the defendant has
25 been cowed in to agreeing to them. See, e.g. Exhibit A, *Cobbler Nevada, LLC v. Reardon*, 3:15-cv-
26 01077, 2015 WL 9239773, (D. OR. Dec. 16, 2015)(rejecting a stipulated consent agreement reached

27 ¹ Voltage Pictures’ role in this suit and other copyright lawsuits across the country will be explored in more
28 detail in Section I(b), *infra*.

1 with an unrepresented defendant and noting grossly inflated attorney fees and onerous terms).
2 Plaintiff and its counsel are not shy about leveraging the costs of federal litigation to achieve that
3 end, and rely heavily on the threat of artificially inflated attorney fees to support their settlement
4 demands. See, e.g. Exhibit B, Declaration of Clay Renick and email from Plaintiff's counsel to Mr.
5 Renick (claiming \$14,000 in attorney fees to support initial settlement demand of over \$10,000).

6 True to form, Plaintiff's first communication to Defendant's counsel in this matter – *prior*
7 *to the ISP even identifying the subscriber* – demanded \$6250 of which \$5670 (91%) was purportedly
8 attributed to attorney's fees and costs. See Ranallo Declaration at ¶3. Not only does the demand
9 accrue almost exclusively to the Plaintiff's attorney, but the attorney fee amount is also clearly
10 inflated. Indeed, the amount purportedly incurred by Plaintiff's counsel *prior to the identification*
11 *of the subscriber in this matter* greatly exceeds the amount awarded to previous BitTorrent
12 plaintiffs' counsel for cases that proceeded through a default judgment or stipulated judgment. See
13 *Reardon*, 2015 WL 9239773 at *4 (“a reasonable attorney fee in this case for Plaintiff is much closer
14 to \$1000 than \$3498”).

15 When pressed to justify his fees, Mr. Davis sent a purported “invoice” noting costs for, inter
16 alia, 5.5 hours for drafting and reviewing a complaint that is functionally identical to those
17 previously filed in other Dallas Buyers Club cases. See Ranallo Declaration at ¶4 and Exhibit C.
18 Rather than relent, Mr. Davis subsequently increased his settlement demands, as is apparently his
19 custom. See Exhibit B, Renick Declaration at ¶7.

20 As though this pattern of behavior was not egregious enough, as described further below,
21 the Plaintiff herein has denied that it even receives the small percentage of the settlement demand
22 that is purportedly allocated to it, and has alleged that it has no control over the instant litigation and
23 no communication with Plaintiff's counsel herein (or any of their counsel nationwide). See Section
24 I (b), *infra*, and Exhibit G.

1 **B. Voltage Pictures, Truth Entertainment, LLC, and Dallas Buyers Club, LLC**

2 **1. Who's Running the Show?**

3 Dallas Buyers Club, LLC is a Texas Limited Liability Company that has filed more than 300
4 copyright lawsuits across the country in the past few years. Many of these cases involve multiple
5 IP addresses and multiple “John Doe” defendants lumped together for the Plaintiff’s convenience,
6 and thus the actual number of defendants is far higher. Notably, Dallas Buyers Club was produced
7 by Voltage Pictures – a common thread with a huge number of BitTorrent lawsuits, for reasons
8 which will become clear.

9 Voltage Pictures previously filed copyright lawsuits on its own behalf for the alleged
10 infringement of its works. See, e.g. Exhibit D (complaint in *Voltage vs Does I-5000*, Case No. 1:10-
11 cv-00873 in the District of Columbia). Voltage has recently evolved its tactics, however. Indeed,
12 it now appears that Voltage Pictures has decided to direct lawsuits on behalf of purportedly separate
13 entities, in order to insulate itself from the bad press that these cases inevitably engender, and to
14 insulate themselves from the danger that their guesswork – and the inherent weakness of BitTorrent
15 infringement cases – will ultimately lead to large attorney fee awards against it. Additional
16 examples of litigious Voltage-affiliated entities include: *The Cobbler* a Voltage Pictures film filing
17 lawsuits as “Cobbler Nevada, LLC”; *Killer Joe*, a Voltage Pictures film filing lawsuits as “Killer
18 Joe Nevada, LLC”; *Pay the Ghost*, filing lawsuits as “PTG Nevada, LLC”; and *Fathers and*
19 *Daughters*, a Voltage Pictures film filing lawsuits as “Fathers and Daughters Nevada, LLC.” See
20 Ranallo Dec. at ¶5-6 and Exhibits E&F.

21 It is unclear what rights (if any) are actually held by Voltage Pictures or the suing entities,
22 though it is abundantly clear that Voltage Pictures controls the litigation and keeps the proceeds
23 collected on behalf of the purported plaintiffs. Indeed, Dallas Buyers Club, LLC – the purported
24 Plaintiff herein – has sued Voltage Pictures in state court in Texas, alleging *inter alia*, that:

25
26 **“DBC has received virtually no updates and has not had any input into**
27 **the actions Voltage is taking around the World.** The only updates DBC receives
28 are thorough [sic] mostly negative, media reports about the actions of Voltage around
the World. **DBC has not received any funds, reports, updates, or any**

1 **information from Voltage on the status [of] numerous lawsuits filed around the**
2 **World in the name of DBC.”** See Exhibit G at ¶31 and Ranallo Declaration at ¶7
(emphasis added).

3 Plaintiffs’ proposed injunctions in other in other Voltage-affiliated cases further allude to
4 who, exactly, is meant to benefit from these cases. For example, though Dallas Buyers Club, LLC
5 only purports to owns a single work, their proposed injunctions frequently include an injunction
6 against infringing “any plaintiff owned or branded pictures.” See, e.g. *Dallas Buyers Club LLC v.*
7 *Signer*, 3:15-cv-1615-DBH, ECF No. 29 (S.D. Cal. April 22, 2016), a copy of which is annexed
8 hereto as Exhibit H. Similar language can be found in proposed injunctions proffered by Voltage
9 Pictures’ other shell companies. See, e.g. Exhibit B at pg. 9 (“...enjoins Mr. Reardon from
10 infringing plaintiff’s ‘rights in their motion pictures’ ...However, only one motion picture is at issue
11 in this case, namely *The Cobbler*, not all of plaintiff’s unidentified motion pictures...”).

12 Perhaps not surprisingly, Plaintiff’s Certificate of Interested Entities (ECF No. 3) in this case
13 does not state whether Voltage Pictures or (or Truth, LLC, described further below) have a financial
14 interest in the outcome of this case. Plaintiff’s Certificate, in fact, makes no effort to comply with
15 the requirements of Local Rule 3-15. See ECF No. 3. This cannot be viewed as a mere oversight
16 or lack of knowledge by Plaintiff’s counsel. Indeed, Plaintiff’s counsel has litigated and settled
17 numerous cases (purportedly) on behalf of Dallas Buyers Club and *must* know where the proceeds
18 of litigation flow, and with whom he communicates. As noted above, it is abundantly clear that
19 these *proceeds do not flow to the purported Plaintiff herein, nor are the decisions made by the*
20 *purported Plaintiff.*

21
22 **2. Who Owns This Movie?**

23 Further allegations by Dallas Buyers Club, LLC and its co-plaintiffs in the Texas suit against
24 Voltage Pictures raise substantial questions about the purported Plaintiff’s ownership rights and
25 standing to bring the instant suit. Instead of identifying Dallas Buyers Club, LLC as the “owner” of
26 the work in question – as the Amended Complaint in this matter does – the original complaint in the
27 Texas suit instead identifies “Truth LLC” as the “owner” of the film. See Exhibit G at ¶9. The
28 complaint goes on to explain that “DBC and its investors were to receive a 15% return on the

1 investment plus 35% of all backend “net proceeds.” Voltage and/or an affiliate was also brought
2 on...with an agreed 15% return. Exhibit G at ¶12. *Importantly, these allegations come from Dallas*
3 *Buyers Club LLC and its co-plaintiff in the suit*, and identify it as nothing more than an entity with
4 a right to collect royalties from the distribution of the work.²

5 Various advertising and promotional materials cast further doubt about the claims that Dallas
6 Buyers Club LLC owns the relevant copyright(s), and reveal a myriad of entities that have, at one
7 time or another, claimed copyright in the film. As described further in the declaration of Ryan
8 Underwood, various DVD covers found during a simple online search reveal copyright notices
9 claiming rights in the film for Voltage Pictures and Universal Studios (Exhibit I), Focus Features &
10 Voltage Pictures (Exhibit J) , and Focus Features alone (Exhibit K).

11
12 **C. Procedural History of the Instant Case**

13 The instant case was filed on December 3, 2015, alleging that an unidentified John Doe had
14 used a particular IP address to download and share the movie “Dallas Buyers Club”. The next day,
15 on December 4, 2015, Plaintiff sought permission from the court to issue a subpoena to the ISP
16 responsible for the IP address at issue herein, noting that in its estimation the Defendant was “likely”
17 to be “either the subscriber” or “a party likely known to the subscriber.” See ECF No. 5. This Court
18 granted Plaintiff’s motion on December 22, 2015 and Comcast subsequently (and seemingly
19 incorrectly) identified Defendant Underwood and Google, Inc. - as the *subscribers* associated with
20 the IP address in question.

21 Because identifying the subscriber is not sufficient to tell the Plaintiff who actually
22 downloaded a particular work via the subscriber’s IP address, however, Plaintiff was still unable to
23 identify a Defendant to name in this action. See ECF No. 17, 20 and Section III(b)(2) *infra*. As
24 such, on March 18, 2016, Plaintiff was forced to come back to the court, and seek still further
25 discovery in an attempt to identify the actual individual that downloaded Dallas Buyers Club. See

26 _____
27 ² The Amended Complaint in the Texas suit muddies the waters further by identifying both Dallas Buyer’s
28 Club, LLC and Truth Entertainment as the ‘owners’ of the film and alleging that Voltage Pictures has a
power-of-attorney to prosecute anti-piracy actions on behalf of one, but not both, of the companies.

1 ECF No. 17 & 20. In support of this application, Plaintiff explicitly admitted that it did not know
2 the identity of the individual that downloaded the relevant work. See ECF No. 17 at 2 (“Ryan
3 Underwood may or may not be the infringer...”). Plaintiff sought permission to send four additional
4 questions to be answered by Mr. Underwood. These questions make it clear that Plaintiff does not
5 know who lived at the subject address with the Defendant or who else might be making use of the
6 Defendant’s IP address. See ECF No. 20.

7 Plaintiff’s application for further discovery was denied by this Court on April 4, 2016. A
8 week later, without further explanation or investigation, Plaintiff nonetheless chose to name Ryan
9 Underwood as the individual that downloaded Plaintiff’s work despite admittedly lacking
10 knowledge regarding the identity of the actual infringer. The Amended Complaint includes no
11 additional allegations that would tie Mr. Underwood to the alleged infringement – instead simply
12 replacing the generic “Defendant” or “John Doe” with Mr. Underwood’s name. Compare ECF 1 &
13 25. Indeed, the amended complaint actually contains fewer factual details than the generic John
14 Doe complaint. On June 25, 2016 Mr. Underwood filed an answer denying that he is responsible
15 for the alleged acts of copyright infringement. ECF No. 41.

16 17 **II. LEGAL STANDARD AND AUTHORITY TO REQUIRE UNDERTAKING**

18 “[T]he federal district courts have the inherent power to require plaintiffs to post security for
19 costs.” *In re Merrill Lynch Relocation Management, Inc.*, 812 F.2d 116 (9th Cir. 1987); see also
20 *Simulnet E. Assocs. V. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994). District
21 courts typically “follow the forum state’s practice with regard to security for costs, as they did prior
22 to the federal rules; this is especially common when a non-resident party is involved” *Simulnet* 37
23 F.3d at 574.

24 In California, the forum state’s practice regarding security for foreign Plaintiffs is contained
25 in California Code of Civil Procedure §1030. §1030 provides that:

26 “When the plaintiff in an action or special proceeding resides out of state, or is a
27 **foreign corporation**, the defendant may at any time apply...for an order requiring
28 the plaintiff to file an undertaking to secure an award of costs and attorney’s

1 fees...” A defendant shall have grounds for an order requiring security if “there
2 is a **reasonable possibility that the moving defendant will obtain judgment in
the action...**” Cal. Code Civ. Proc. §1030(b) (emphasis added).

3 The purpose of §1030 is to “enable a California resident sued by an out-of-state resident to
4 secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not
5 within the court’s jurisdiction...[and] to prevent out-of-state residents from filing frivolous lawsuits
6 against California residents. *Alshafie, v. Lallande*, 171 Cal. App. 4th 421, 428 (2009) (internal
7 quotation marks omitted).

8 The Ninth Circuit has recognized the appropriateness of requiring a bond securing costs and
9 attorney fees in the copyright context in *Kourtis v. Cameron*, 358 Fed. Appx. 863 (9th Cir.
10 2009)(unpublished). In *Kourtis*, the Ninth Circuit affirmed the district court’s imposition of
11 \$100,000 bond, covering expected costs and attorney fees, pursuant to the standard set forth in Code.
12 Civ. Proc. §1030. The Northern District of California has likewise recognized the appropriateness
13 of requiring security for attorney fees and costs in a series of BitTorrent cases based on
14 fundamentally identical allegations (and a similar lack of proof). See Section III(b)(5), *infra*.

15 As described more fully below, Defendant has met the legal standard for imposition of an
16 undertaking. Plaintiff is a non-resident company, and Defendant has a reasonable (or far better)
17 possibility of obtaining judgment in this action. As such, Defendant respectfully requests that this
18 court order the Plaintiff to post an undertaking in the amount of \$50,000 which represents a
19 reasonable estimate of the costs and attorney fees that it Defendant can expect to incur in defense of
20 this action.

21 **III. ARGUMENT**

22 **A. Plaintiff is an Out-of-State Company**

23 To establish that a Defendant is entitled to securing under Code Civ. Proc. §1030, a defendant
24 must first establish that the Plaintiff “resides out of state” or “is a foreign corporation.” CCP
25 §1030(b). “Foreign corporations” include all corporations except those formed under the laws of
26 California. Cal Corp. §167 & 171. There is no dispute in the instant case that this prong is met –
27 Paragraph 4 of Plaintiff’s Amended Complaint explicitly identifies the Plaintiff as a Texas company.
28

1 As such, the first prong is satisfied. There can be no doubt that ‘foreign corporation’ as used in this
2 section encompasses foreign LLCs as well. See, e.g. *AF Holdings v. Trinh*, 2012 WL 1236067
3 (N.D. Cal. Nov. 9, 2012) (imposing undertaking on foreign LLC).

4
5 **B. Defendant Has a “Reasonable Possibility” of Obtaining Judgment in This Action**

6 The second prong of the §1030 test requires that the Defendant have a “reasonable possibility”
7 of obtaining judgment in the matter. This is a relatively low threshold. As one California appellate
8 court noted, under §1030, a defendant “is not required to show that there [is] no possibility that [the
9 plaintiff] could win at trial, but only that it [is] reasonably possible that [the defendant] will win.
10 *Baltayan v. Estate of Getemyan*, 90 Cal. App. 4th 1427, 1432 (2001). The Northern District has
11 likewise recognized that this “is a relatively low bar.” *AF Holdings v. Magumbol*, 2013 WL
12 1120771 at *1 (Mar. 18, 2013). For the reasons set forth further below, Defendant clearly satisfies
13 the second prong of the §1030 test, and an undertaking is therefore appropriate.

14
15 **1. An IP Address is Insufficient to Identify the Infringer**

16 As an initial matter, Plaintiff’s case is fundamentally based upon the allegation that a
17 particular IP address was involved in the infringement of the work in question. The problem, as
18 numerous courts have recognized, is that an IP address is inherently insufficient to identify the
19 particular individual that infringed a particular work. As Judge Brown described it in the Eastern
20 District of New York, “In sum, although the complaints state that IP addresses are assigned to
21 “devices” and thus by discovering the individual associated with that IP address will “reveal
22 defendants’ true identity,” this is unlikely to be the case...” *In re BitTorrent Adult Film Copyright*
23 *Infringement Cases*, 2012 WL 1570765 at *5 (E.D.N.Y. May 1, 2012).

24 There is no shortage of case law supporting this view. See, e.g. *Malibu Media, LLC v.*
25 *Tsanko*, No. 12-3899(MAS) (LHG), 2013 WL 6230482, at *10 (D.N.J. Nov. 30, 2013) (“The Court
26 questions whether these allegations are sufficient to allege copyright infringement stemming from
27 the use of peer-to-peer file sharing systems where the Defendant-corporation is connected to the
28

1 infringement solely based on its IP address. It may be possible that Defendant is the alleged infringer
2 that subscribed to this IP address, but plausibility is still the touchstone of Iqbal and Twombly.”);
3 *AF Holdings LLC v. Rogers*, No. 12cv1519 BTM (BLM), 2013 WL 358292, at *2 (S.D. Cal. Jan.
4 29, 2013) (“Because the subscriber of an IP address may very well be innocent of infringing activity
5 associated with the IP address, courts take care to distinguish between subscribers and infringers.”);
6 see also *In re BitTorrent Adult Film Copyright Infringement Claims*, 296 F.R.D. 80, 85 (E.D.N.Y.
7 2012) (“[I]t is no more likely that the subscriber to an IP address carried out a particular computer
8 function—here the purported illegal downloading of a single pornographic film—than to say that an
9 individual who pays the telephone bill made a specific telephone call.”).

10 11 **2. Plaintiff has Admitted That It Does Not Know the Identity of the Infringer**

12 Lest there be any doubt about the insufficiency of an IP address to identify the actual
13 individual that downloaded or shared a particular work, Plaintiff has explicitly admitted the same in
14 this case. As set forth above, after receiving the subscriber information in this case, Plaintiff was
15 nonetheless forced to return to the court seeking still further discovery to identify the actual infringer
16 in this case. In so doing, Plaintiff was forced to explicitly admit that “Ryan Underwood may or may
17 not be the infringer.” ECF No. 7 at 2. Plaintiff’s application for further discovery was denied by
18 this Court and, a mere 7 days later, Plaintiff decided to name Ryan Underwood as the defendant in
19 this matter, despite its admission that he “may or may not be the infringer.”³ This statement alone
20 makes it abundantly clear that Defendant has a “reasonable possibility” of prevailing in this action,
21 and that an undertaking is therefore appropriate.

22
23
24
25 _____
26 ³ This appears to be part of a disturbing pattern with Plaintiff’s counsel. Indeed, Judge Bashant of the
27 Southern District of California noted in another matter that “despite uncertainty as to the actual infringer,
28 Plaintiff requested permission to name Ahmari in the Complaint” and that “...despite admissions that
Plaintiff was not sure whether Ahmari had committed the infringing conduct or not, Plaintiff filed a First
Amended Complaint naming Ahmari as the Defendant.” See Exhibit L at pg. 2.

3. Ryan Underwood Has Denied the Infringement Under Oath

1
2 As set forth in the Declaration of Ryan Underwood, submitted concurrently herewith, Mr.
3 Underwood affirms under oath that he is not the individual responsible for downloading or otherwise
4 sharing the film at issue herein. As the Northern District recognized in this precise context, a
5 declaration from the accused is competent evidence in this context. Indeed, as Judge Chen stated,
6 a “declaration may be self-interested but that does not mean that it is not entitled to any weight. The
7 situation here is in some ways comparable to the situation in which a court evaluates a motion for a
8 preliminary injunction. For a preliminary injunction motion, a court must similarly consider the
9 plaintiff’s likelihood of success on the merits and, as a part of this consideration, takes into account
10 evidence such as declarations, even if they are self-interested.” *AF Holdings LLC v. Navasca*, 2013
11 WL 450383, at *3 (N.D. Cal. Feb. 5, 2013). Thus, Mr. Underwood’s denial – combined with Mr. Davis’
12 admissions and the inherent weakness of claims based on IP address compel the conclusion that Mr.
13 Underwood has a “reasonable possibility” of ultimately prevailing in this action.
14

4. Dallas Buyers Club, LLC Appears to Lack Standing

15
16
17 As set forth in detail above, there are serious questions regarding whether the Plaintiff
18 herein owns the necessary rights to maintain suit under the Copyright Act or to establish that it is
19 the real party in interest. According to Plaintiff’s own allegations in the Texas complaint, Truth
20 LLC is the owner of the work at issue in this litigation. Additional allegations in the Texas suit
21 indicate that the purported Plaintiff herein has no control over the conduct of this lawsuit or the
22 myriad other suits being brought in its name, and has not received any of the proceeds from the
23 hundreds of suits nationwide. Read in the inverse, this means that a third party - presumably Voltage
24 Pictures - has filed copyright lawsuits in the name of Dallas Buyers Club throughout the country,
25 has had sole responsibility for managing those lawsuits, and has kept all of the proceeds of that
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1 litigation. Unfortunately for Plaintiff and Voltage, however, this arrangement is insufficient to
2 confer standing as “the Copyright Act does not permit copyright holders to choose third parties to
3 bring suits on their behalf.” *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th
4 Cir. 2005), quoting *ABKCO Music, Inc., v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d. Cir.
5 1991).

6 In addition, as set forth above, numerous publicly available advertising materials or DVD
7 covers available on the internet identify numerous other companies as holding the copyright to the
8 film *Dallas Buyers Club*, including Focus Features, Universal Pictures, and Voltage Pictures itself.
9 At the very least, there is a “reasonable possibility” that the Plaintiff herein either does not hold the
10 rights required to maintain a copyright suit, or is otherwise not the real party in interest in the instant
11 suit. Either of these outcomes would fatally undermine its ability to pursue this infringement suit.
12 When combined with the inherent weakness of an IP address and Defendant’s denial of liability,
13 there can be no doubt that Defendant has a “reasonable possibility” of ultimately prevailing in this
14 action.
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18 **5. Case Law in This District Supports the Issuance of an Undertaking In**
19 **BitTorrent Infringement Cases**

20 As noted throughout this motion, the Northern District of California has been asked to impose
21 an undertaking in three other BitTorrent infringement cases, and each time has determined that an
22 undertaking was appropriate pursuant to §1030. See *AF Holdings v. Trinh*, 2012 WL 1236067 (N.D.
23 Cal. Nov. 9, 2012); *AF Holdings v. Navasca*, 2013 WL 450383 (N.D. Cal. Feb. 5, 2013); and *AF*
24 *Holdings v. Magsumbol*, 2013 WL 1120771 (N.D. Cal. March 18, 2013). Each court noted the basic
25 insufficiency of an IP address to identify the actual individual that may have downloaded a particular
26 work. As Judge Conti stated “This Court and others have held repeatedly that Plaintiff’s core
27 allegations of infringement – mere association of Defendant’s Internet Service Provider subscription
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1 information with the Internet Protocol address linked to the allegedly infringing file – is insufficient
2 to establish that the subscriber was the person who allegedly infringed the copyright.” *Magsumbol*
3 at *1. Or, as Judge Breyer more succinctly put it, “Defendant has also shown a reasonable
4 probability that he will obtain a judgment in his favor. He has done so by noting that Plaintiff’s
5 current evidence of infringement is weak.” *Trinh*, 2012 WL 1236067 at *1. Judge Breyer also
6 found it important that “the suit is one of a great many like it brought by Plaintiff.” *Id* at *2. As
7 noted above, Dallas Buyers Club, LLC is also a prolific litigant, in this district and throughout the
8 country. The sheer volume of its litigation campaign underscores the point that the Plaintiff is not
9 interested in actually litigating each matter properly – instead hoping to force settlements based on
10 litigation economies of scale.

11 12 **6. An Undertaking Is Needed in the Instant Case**

13 As set forth above, the purpose of §1030 is to “enable a California resident sued by an out-
14 of-state resident to secure costs in light of the difficulty of enforcing a judgment for costs against a
15 person who is not within the court’s jurisdiction...[and] to prevent out-of-state residents from filing
16 frivolous lawsuits against California residents. *Alshafie, v. Lallande*, 171 Cal. App. 4th 421, 428
17 (2009) (internal quotation marks omitted). Both justifications offered by the *Alshafie* court ring true
18 in the instant case.

19 First, as a basic matter, enforcing a judgment against a Texas company raises significant
20 hurdles to collection and would require, at the very least, a Texas attorney to initiate enforcement
21 proceedings. This alone has the potential to eat up a significant portion of any judgment ultimately
22 awarded. Moreover, the uncertain relationship between the various parties and non-parties in this
23 case make it unclear what assets the purported Plaintiff might actually control. Any adverse
24 determination regarding the ownership rights in this suit could lead to a cascade of adverse decisions
25 against Dallas Buyers Club, LLC, and a cascade of judgments for attorney fees against it. Defendant
26 seeks to avoid becoming involved in a race for assets, or becoming a claimant in an ultimate
27 bankruptcy action. Finally, the lawsuit between Plaintiff and Voltage Pictures makes it clear that
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1 the purported Plaintiff does not control this litigation, does not make any decisions in this lawsuit,
2 and has not been apprised of the status of this litigation. At the very least, requiring an undertaking
3 from Plaintiff should put it on notice that a third party has decided to sue an individual in its name,
4 despite admittedly lacking knowledge regarding the identity of the actual infringer and has thereby
5 exposed it to substantial potential liability. The Plaintiff can then decide whether they'd like to cut
6 their losses at this point, or double down on their specious claims.

7 Additionally, this court should be mindful of §1030's role in discouraging frivolous claims
8 against California residents. As set forth above, Plaintiff and its attorneys have apparently made it
9 a practice to sue individuals shortly after admitting that they do not, in fact, know who the actual
10 infringer of its works are. This practice underscores the fact that Plaintiff does not actually intend
11 to secure a judgment against the actual infringers in these matters, but instead seeks to leverage the
12 costs of federal litigation to compel a settlement with whomever it decides to sue. This practice
13 should not be encouraged by the courts, and Defendant respectfully requests that this court use its
14 discretion to impose a bond to discourage such behavior and to ensure that Defendant will ultimately
15 be able to collect any fees and costs awarded to him in this action.

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17 **C. The Requested Security Amount is Reasonable**

18 Defendant herein has requested \$50,000 in security for costs and attorney's fees. This amount
19 is in line with the amounts previously required in BitTorrent infringement cases in this district.
20 Indeed, the three BitTorrent infringement cases discussed herein led to orders requiring the Plaintiff
21 to post undertakings in the amount of \$48,000 (Trinh & Magsumbol) and \$50,000 (Navasca).
22 Defendant's request in this matter is in line with these prior bond amounts. Notably, the requested
23 amount is far lower than successful defense counsel have received in other BitTorrent infringement
24 cases. For example, the court in *Elf-Man v. Lamberson* awarded over \$100,000 to a successful
25 BitTorrent defendant whose case did not proceed even to summary judgement. 2015 WL 11112498
26 (E.D. Wash. Jan. 9, 2015). See also *Atlantic Recording Corp. v. Anderson*, 2008 WL 185806
27 (D.Or. 2008)(awarding upwards of \$100,000 to peer to peer infringement defendant) .

1 Moreover, as set forth in detail in the Ranallo Declaration filed concurrently herewith, \$50,000
2 represents a conservative estimate of the total reasonable fees that might be incurred in this matter.
3 This case could require numerous depositions of various parties, including the questionable
4 German-based entity “Mavrickeye, U.G.”, which was purportedly responsible for harvesting IP
5 addresses for these lawsuits. Moreover, this case could require the analysis significant amounts of
6 ESI, including examination of the software and data responsible for identifying the IP address at
7 issue herein as being used for the upload or download of the work at issue. As such, Defendant
8 requests that this court require an undertaking of \$50,000, in line with factually comparable
9 decisions in this district and a reasonable estimate of potential costs and fees.

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IV. CONCLUSION

For the reasons set forth herein, Defendant requests that this Court grant the instant motion, and require Dallas Buyers Club, LLC to post an undertaking in the amount of \$50,000 within 30 days of entry of an Order requiring the same. Plaintiff is undeniably an out-of-state entity, and Defendant has established more than a “reasonable possibility” of ultimately obtaining judgment in this matter.

DATED: July 14, 2016 NICHOLAS RANALLO, ATTORNEY AT LAW

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this 14th day of July, 2016, a true and correct copy of the foregoing was transmitted to counsel or record for Plaintiff via ECF, electronic mail, and by regular mail to Plaintiff’s counsel of record.

/s/ Nicholas R. Ranallo

Nicholas Ranallo, Attorney at Law