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6 Attorneys for Defendants,
7 Manuel Altamirano, Richard Turner, David Kinney and David Huffman

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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 ANTHONY JOHNSON, an individual,)
12 Plaintiff,)

13 vs.

14 MANUEL ALTAMIRANO, an)
15 individual, RICHARD TURNER, an)
16 individual; DAVID KINNEY, an)
17 individual, DAVID HUFFMAN, an)
18 individual, PAUL TYRELL, an)
individual, SEAN SULLIVAN, an)
19 individual, STORIX, INC., a California)
Corporation and DOES 1-5, inclusive,)
20 Defendants.)

Case No. 19CV1185-H-BLM

**DEFENDANTS' REPLY IN
SUPPORT OF AN ORDER
REQUIRING PLAINTIFF TO
COMPLY WITH STATUTORY
UNDERTAKING REQUIREMENT;
C.C.P. § 1030**

Hearing Date: October 7, 2019
Hearing Time: 10:30 a.m.

Judge: Hon. Marilyn L. Huff
Dept.: Courtroom 15A

Complaint Filed: June 24, 2019
Trial Date: Not Set

21 Defendants Manuel Altamirano, Richard Turner, David Kinney, and David
22 Huffman (collectively, "Defendants") hereby submit their Reply in support of an
23 Order Requiring Plaintiff to Comply with Statutory Undertaking Requirement
24 pursuant to Cal. Civ. Proc. Code § 1030.

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1 **I. INTRODUCTION**

2 There are only two requirements Defendants must satisfy for entitlement to an
3 order requiring Plaintiff to file an undertaking to secure an award of costs and
4 attorney’s fees under Cal. Civ. Proc. Code § 1030¹: 1) plaintiff resides out of state;
5 and 2) there is a reasonable possibility moving Defendants will obtain judgment..
6 Plaintiff admits he is an out-of-state plaintiff satisfying the first requirement. As to
7 the second requirement, Defendants have more than a reasonable possibility of
8 obtaining judgment for all the reasons stated in their moving papers and given their
9 success in previous litigation against Plaintiff Anthony Johnson (“Johnson”) based
10 on the same operative facts. The Court should grant Defendants’ motion for an
11 undertaking.

12 **II. DISCUSSION**

13 **A. Section 1030 requires an affidavit setting forth the costs incurred**
14 **through conclusion of the action**

15 Johnson opposes Defendants’ motion for an undertaking arguing that if
16 Defendants are successful on their motions attacking the pleadings, then they will not
17 incur any costs. Conversely, Johnson also argues that if Defendants’ motions
18 attacking the pleadings are not successful, then Defendants cannot establish they are
19 the “prevailing party” entitled to costs. Johnson’s arguments fall flat and ignore the
20 statutory requirements of Section 1030. Additionally, “prevailing party” analysis
21 does not apply in the context of Section 1030.

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28 ¹ All subsequent statutory references are to the Cal. Code of Civil Procedure unless otherwise indicated.

1 Section 1030 requires an affidavit in support of the grounds for the motion.
2 Specifically, Section 1030 states: “[t]he affidavit shall set forth the nature and
3 amount of the costs and attorneys’ fees the defendant has incurred and expects to
4 incur *by the conclusion of the action or special proceeding.*” Cal. Civ. Proc. Code §
5 1030(b) (emphasis added.) Thus, by its very language, Section 1030 requires
6 Defendants to include all costs and attorneys’ fees they anticipate incurring through
7 the conclusion of the matter. Defendants, in their moving papers, provided a
8 declaration setting forth the amount of costs and attorneys’ fees they anticipate
9 incurring in defense of Johnson’s sixth (6th) lawsuit against them and/or Storix, Inc.
10 Defendants complied with the statutory requirements of Section 1030 and contend
11 the grounds for the motion have been met such that the Court shall order Johnson to
12 file the undertaking. *See* Cal. Civ. Proc. Code § 1030 (c).

13 **B. Reasonable Possibility of Obtaining Judgment is the Standard Not**
14 **Prevailing Party**

15 In his opposition, Johnson cites the wrong standard to determine whether
16 Defendants are entitled to an undertaking. Johnson states “Defendants are required
17 to show a reasonable possibility of prevailing on all claims since otherwise they can’t
18 be the ‘prevailing party’ entitled to *any* costs.” (Opposition, p. 2.) But prevailing
19 party analysis is not required under Section 1030. Defendants are only required to
20 demonstrate a reasonable possibility of obtaining judgment. This is a very low
21 standard that only requires Defendants show it is reasonably possible Defendants will
22 win. *See Baltayan v. Estate of Getemyan*, 90 Cal.App.4th 1429, 1432 (2001).

23 As discussed above, this is the sixth lawsuit filed by Johnson against
24 Defendants and/or Storix. In each instance, Defendants successfully defended
25 against Johnson’s claims, which the underlying, operative facts can be categorized as
26 relating to the Copyright Action or based on actions taken by Defendants as directors
27 of Storix, to which Johnson, as a minority shareholder, takes issue.

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1 The instant complaint is merely a continuation of these previously litigated
2 issues and part of Johnson's ongoing campaign against Storix and Defendants.
3 Defendants' moving papers provide ample evidence as to why there is more than a
4 reasonable possibility they will obtain judgment. One primary reason is Defendants
5 success in the previous lawsuits filed by Johnson. Success in previous proceedings
6 based on the same operative facts can support a motion for an undertaking. *See*
7 *Baltayan*, 90 Cal.App.4th at 1427 (previous arbitrator's ruling supported defendants'
8 reasonable possibility of obtaining judgment). Given the favorable rulings against
9 Johnson in his previous lawsuits before this Court and in state court based on the
10 same or similar operative facts, Defendants have more than a reasonable possibility
11 of obtaining judgment in this action.

12 Moreover, Johnson's' opposition does not address any of Defendants evidence
13 in support of the motion for an undertaking nor does he address the reasonableness of
14 the amount requested. In effect, Johnson has submitted what amounts to a non-
15 opposition to Defendants' motion. Johnson should therefore be required to post an
16 undertaking in the amount requested and supported by Defendants' motion.

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1 **III. CONCLUSION**

2 Defendants have satisfied the statutory requirements of Section 1030 and
3 respectfully request the Court grant their motion for an undertaking in the amount of
4 \$85,000.00. Johnson's opposition does not satisfy his burden to overcome the
5 Defendants' grounds entitling them to a bond. Rather, Johnson cites to inapplicable
6 standards and fails to address or dispute any grounds in support of Defendants'
7 motion. Defendants' motion should be granted.

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9 Dated: September 30, 2019

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

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12 By: /s/ Marty B. Ready, Esq.
13 Michael P. McCloskey, Esq.
14 Marty B. Ready, Esq.
15 Attorneys for Defendant
16 Manuel Altamirano, Richard Turner,
17 David Kinnev and David Huffman
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15 KINNEY, an individual, DAVID HUFFMAN,)
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16 SEAN SULLIVAN, an individual, STORIX,)
INC., a California Corporation and DOES 1-5,)
17 inclusive,)

18 Defendant.)
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Case No. 19CV1185-H-BLM

CERTIFICATE OF SERVICE

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1 *Anthony Johnson v. Manuel Altamirano, et al.*
United States District Court, Southern District Case No. 19CV1185 JLS JLB

2
3 **CERTIFICATE OF SERVICE**

4 I, the undersigned, am employed in the county of San Diego, State of California. I am over
5 the age of 18 and not a party to the within action; my business address is 401 West A Street, Suite
1900, San Diego, California, 92101.

6 On September 30, 2019, I caused to be served the following document(s) described as
7 follows:

8 **DEFENDANTS' REPLY IN SUPPORT OF AN ORDER REQUIRING
9 PLAINTIFF TO COMPLY WITH STATUTORY UNDERTAKING
10 REQUIREMENT; C.C.P. § 1030**

11 on the following parties in this action:

12 ***Plaintiff, Pro Se***

13 Anthony J. Johnson
1728 Griffith Avenue
Las Vegas, NV 89104
Telephone: (619) 246-6549
Email: flydiversd@gmail.com

14 By the following method of service:

15 **BY MAIL** - As follows: I am "readily familiar" with the firm's practice of collection and
16 processing correspondence for mailing. Under that practice it would be deposited with the
17 U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego,
18 California in the ordinary course of business. The envelope was sealed and placed for
collection and mailing on this date following our ordinary practices. I am aware that on
motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in affidavit.

19 **BY E-MAIL OR ELECTRONIC TRANSMISSION** - Based on a court order or an
20 agreement of the parties to accept service by e-mail or electronic transmission, I caused the
21 documents to be sent to the persons at the e-mail addresses listed below. I did not receive,
within a reasonable time after the transmission, any electronic message or other indication
that the transmission was unsuccessful.

22 Executed on September 30, 2019, at San Diego, California. I declare under penalty of
23 perjury under the laws of the State of California, that the above is true and correct.

24
25 
26 Irene Gonzales