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7 IN THE UNITED STATES DISTRICT COURT FOR THE
8 NORTHERN DISTRICT OF CALIFORNIA
9 OAKLAND DIVISION
10

11 AF HOLDINGS LLC,)
12 Plaintiff,)
13 v.)
14 JOHN DOE,)
15 Defendant.)

No. 4:12-cv-02049-PJH
Judge: Hon. Phyllis J. Hamilton
**NOTICE OF MOTION AND
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**
Date: November 5, 2012
Time: 9:00 a.m.
Courtroom: 3, 3rd Floor

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17 **NOTICE OF MOTION AND MOTION**

18 **PLEASE TAKE NOTICE** that on November 5, 2012 at 9:00 a.m., or as soon thereafter as
19 the matter can be heard, in the courtroom of the Honorable Judge Phyllis J. Hamilton, located at the
20 Oakland Federal Courthouse, Courtroom 3, 3rd Floor, 1301 Clay Street, Oakland, CA 94612,
21 Plaintiff will move for an order granting Plaintiff leave to file its Second Amended Complaint and
22 further ordering that the Amended Complaint submitted with this motion be deemed filed.
23

24 Plaintiff's motion will be based on this Notice of Motion and Motion, the following
25 Memorandum of Points and Authorities, Plaintiff's Second Amended Complaint (Exhibit 1), and the
26 [Proposed] Order filed herewith, on all of the files and records of this action, and on any additional
27 material that may be elicited at the hearing (if necessary) of this motion.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

Pursuant to Federal Rule of Civil Procedure (“FRCP”) 15(a)(2), Plaintiff requests the Court grant it leave to Amend its First Amended Complaint. The Second Amended Complaint that Plaintiff wishes to submit is attached hereto as Exhibit A. (*See* Exhibit A to Motion.) This Court should grant Plaintiff’s motion because justice so requires.

On June 16, 2012, Plaintiff filed its First Amended Complaint against “John Doe and Josh Hatfield.” (ECF No. 14.) In that First Amended Complaint, Plaintiff only alleged one count against Defendant Josh Hatfield (“Defendant Hatfield”)—negligence—and the remaining claims for copyright infringement and contributory infringement against a then-unidentified Defendant John Doe (“Defendant Doe”).¹ On June 30, 2012, Defendant Hatfield filed “Defendant Hatfield’s Notice of Motion and Motion to Dismiss First Amended Complaint or, Alternatively, Motion for a More Definite Statement.” (ECF No. 17.)

On September 4, 2012, the Court granted Defendant Hatfield’s motion. (ECF No. 27.) In doing so, the Court expressly dismissed Plaintiff’s negligence count with prejudice because it found “that amendment would not correct the deficiencies in this claim...” (*Id.*) The Court preserved the additional claims. Further, the Court noted that Defendant had not yet named and/or served a defendant, and set a timeline for doing so. (*Id.*)

At this point, after further investigation since filing its First Amended Complaint, Plaintiff believes it has a reasonable basis to name and serve Defendant Hatfield as the direct and contributory infringer in this case. Plaintiff, therefore, would like to do so. In order to do so,

¹ In the First Amended Complaint it was not clear, *at that time*, whether Defendant Hatfield and Defendant Doe were in fact the same person—i.e. whether Defendant Hatfield infringed on, and was involved with a civil conspiracy relating to, Plaintiff’s copyrighted works. Plaintiff expressed through the following statement: “At this stage of the litigation Plaintiff does not know if Defendant Doe is the same individual as Josh Hatfield...” (ECF No. 14 fn.1).

1 however, Plaintiff requires an order from the Court granting it leave to file the attached Second
2 Amended Complaint (Exhibit 1).

3 **II. LEGAL STANDARD**

4 Pursuant to FRCP 15(a)(2), “a party may amend its pleading only with the opposing party’s
5 written consent or the court’s leave.” “[FRCP] Rule 15(a) declares that leave to amend ‘shall be
6 freely given when justice so requires’; this mandate is to be heeded.” *Forman v. Davis*, 371 US 178
7 (1962). The Ninth Circuit has repeatedly reaffirmed that leave to amend is to be granted with
8 “extreme liberality.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *see also*
9 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“Absent prejudice, or
10 a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule
11 15(a) in favor of granting leave to amend.”) (emphasis in original); *United States v. Webb*, 655 F.2d
12 977, 979 (9th Cir. 1981) (courts should be guided by policy favoring decisions on the merits “rather
13 than on the pleadings or technicalities”); *Cooper Development Co. v. Employers Insurance of*
14 *Wausau*, 765 F. Supp. 1429, 1432 (N.D. Cal. 1991) (courts have been “quite liberal” in granting
15 leave to amend). This sentiment is also echoed in all of the practice guides. *See, e.g., Moore, 3-15*
16 *Moore’s Federal Practice - Civil* § 15.14 (“A liberal, pro-amendment ethos dominates the intent and
17 judicial construction of Rule 15(a).”). The factors for denying a motion to amend—i.e. “bad faith,
18 undue delay, prejudice to the opposing party, and futility of amendment”—are not present in this
19 case.
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22 **III. ARGUMENT**

23 On September 4th, 2012, this Court, in its order granting Defendant’s Motion to Dismiss
24 Plaintiff’s negligence cause of action, asserted that

25
26 there is no indication that AF Holdings has served the ‘Doe’ defendant with the
27 summons and complaint...Accordingly, no later than October 5, 2012, AF
28 Holdings shall file a proof of service showing service of the summons and

1 complaint. If AF Holdings fails to do so, the complaint will be dismissed
2 without prejudice.

3 (ECF 26 at 8.) Plaintiff wishes to comply with the Court's command. Before doing so, however, it
4 must amend its First Amended Complaint to name the infringer in this case.² As Plaintiff stated
5 months ago in its original and amended complaints, "At this stage of the litigation Plaintiff does not
6 know if Defendant Doe is the same individual as Josh Hatfield..." (ECF Nos. 1, 14 at n.1 Having
7 engaged in further investigation since initially filing this case, *at this stage*, Plaintiff has a good faith
8 basis to believe that Josh Hatfield is the infringer and wishes to name Josh Hatfield as the Defendant
9 in the case.
10

11 Plaintiff's complaint is timely and it should be allowed. The Court's September order has
12 indicated that Plaintiff must serve a defendant in this case. Before doing so, however, Plaintiff must
13 name a defendant. In order to do that, Plaintiff needs leave from the Court. Plaintiff is requesting
14 that here to comply with the Court's own order.

15 There is no prejudice to Defendant here. As of this time, no Initial Case Management
16 Conference has taken place. The Court, on its own volition, reset the hearing for October 11, 2012.
17 (See ECF No. 25.) In other words, at this juncture, no Case Management Schedule has been issued.
18 To that end, no order has issued setting a deadline for filing amendments of the pleadings. At this
19 point, prior to the Case Management Conference, no such a deadline has been conceived. At this
20 early stage in the case, there would be no harm to either party in allowing a party to amend its
21 pleadings.
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23 Moreover, Plaintiff offers its Second Amended Complaint in good faith and without undue
24 delay. Since filing its First Amended Complaint, Plaintiff has discovered new information about
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26 ² Plaintiff's counsel reached out to counsel for Defendant to ask if his client would consent to this amendment without
27 putting more of a burden on the Court. Defendant's attorney put certain stipulations on this consent, terms that Plaintiff
28 would not agree to (nor did Plaintiff's counsel truly understand, especially in light of the minimal request). All said and
done, Defendant's consent was not given per Rule 15(a)(2). Plaintiff now seeks leave of the Court.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 28, 2012, all individuals of record who are deemed to have consented to electronic service are being served a true and correct copy of the foregoing document using the Court’s ECF system, in compliance with Local Rule 5-6.

_____/s/ Brett L. Gibbs, Esq._____
Brett L. Gibbs, Esq.