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6
7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

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10 AF HOLDINGS, L.L.C., a St. Kitts and Nevis
limited liability company,

11 Plaintiff,
12 v.

13 DAVID HARRIS,
14 Defendant.

CASE NO.: 2:12-CV-02144-PHX-GMS

**COVER SHEET TO LODGED:
PROPOSED MOTION TO STRIKE,
OR IN THE ALTERNATIVE, A SUR-
REPLY TO THE NON-PARTIES'
REPLY IN SUPPORT OF THEIR
MOTION FOR ATTORNEYS' FEES**

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17 **LODGED: PROPOSED MOTION TO STRIKE, OR IN THE ALTERNATIVE, A SUR-
18 REPLY TO THE NON-PARTIES' REPLY IN SUPPORT OF THEIR MOTION FOR
19 ATTORNEYS' FEES IS ATTACHED HERETO**
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PARTIES' REPLY IN SUPPORT OF
THEIR MOTION FOR ATTORNEYS'
FEES**

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17 Plaintiff AF Holdings, L.L.C. ("Plaintiff"), through its undersigned counsel, hereby submits
18 its Motion to Strike, or in the Alternative, a Sur Reply to the Non-Parties Reply in Support of their
19 Motion for Attorney's Fees (ECF No. 93.) and as grounds therefore, states as follows:

20 The Court should grant Plaintiff's Motion to Strike because Movant's attempt—in its Reply
21 Brief—to introduce new evidence, new arguments and new requests for relief contravenes the Local
22 Rules and well-settled Ninth Circuit precedent. In the alternative, the Court should consider
23 Plaintiff's Sur-Reply to these newly-raised items.
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ARGUMENT

I. THE COURT SHOULD STRIKE MOVANT’S REPLY

The Court should strike Movant’s reply because it contravenes the Local Rules and well-settled Ninth-Circuit precedent. In particular, Movant’s reply raises new evidence, new arguments and new requests for relief. First, Movant for the first time introduces excerpts of record from a separate proceeding. (*See* ECF No. 93 at 5:15-17.) Leaving aside questions of admissibility, these citations are newly presented. Second, Movant raises new arguments, including, for example, that the failure of Plaintiff to send Movant a demand letter tends to show that Movant was never in a swarm with Harris. (*See id.* at 3:14-17.) Finally, Movant requests that the Court hold a *second* evidentiary hearing. (*Id.* at 7.)

Movant’s efforts blatantly contravene the Local Rules, well settled Ninth Circuit precedent and deprive Plaintiff of a meaningful opportunity to respond. *See* Local Rules Civ. 7.2 (“the moving party shall serve and file with the motion’s papers a memorandum setting forth the points and authorities relied upon in support of the motion”); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (*quoting Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990) (“where new evidence is presented in a reply to a motion ... district courts should not consider the new evidence without giving the non-movant an opportunity to respond.”)); *DocuSign, Inc. v. Sertifi, Inc.*, 2006 WL 3000134, *2 (W.D. Wash. 2006) (*citing United States v. Patterson*, 230 F.3d 1168, 1172 n.3 (9th Cir. 2000) (“It is well established that new arguments and evidence presented for the first time in Reply are waived.”)).

Because neither the Local Rules nor Ninth Circuit precedent permit Movant to raise new items, the Court should strike Movant’s Reply; or in the alternative, the Court should consider Plaintiff’s Sur-Reply.

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2 **II. PLAINTIFF’S SUR-REPLY**

3 **A. Movant is Not Eligible to Recover His Attorneys’ Fees**

4 In its Reply, Movant presents the straw man argument that non-parties are generally eligible
5 to recover attorneys’ fees under Federal Rules of Civil Procedure 45. (*See* ECF No. 93 at 2.) Yet,
6 Plaintiff did not argue that non-parties are ineligible to recover attorneys’ fees under the Federal
7 Rules. It is Plaintiff’s position that Movant is ineligible to recover his attorneys’ fees under the facts
8 and circumstances presented here.

9 In *Mount Hope v. Bash Back!*, 705 F.3d 418 (9th Cir. 2012), the Ninth Circuit focused on the
10 “logistical burden” placed on the subpoena recipient. *Id.* at 423, 427, 428. (“Our only Rule 45(c)(1)
11 sanction-specific case interprets “undue burden” as the burden associated with compliance.”).
12 Movant has not alleged—nor could he prove—any “logistical burden” that his ISP’s compliance
13 with a subpoena imposes on him personally. What Movant “is complaining about is essentially the
14 advocacy of [his] opponent, which [he] claims improperly added to [his] burden.” *Id.* at 429. This is
15 not a recoverable item under Rule 45.

16 **B. Movant’s Attacks on Plaintiff’s Technical Arguments are Misplaced**

17 Movant’s attacks on Plaintiff’s technical arguments are equally misplaced. As an initial
18 matter, in none of his filings did Movant attack the relevance of the information Plaintiff sought in
19 its subpoenas to Plaintiff’s direct infringement or contributory claims. This alone is a sufficient
20 ground for dismissing Movant’s motion. Information sought in a subpoena need only be relevant to
21 at least one claim—not all of them.

22 Further, Plaintiff never claimed that all of the IP addresses sought in its subpoena were in the
23 swarm on June 2011. As Plaintiff noted in its response to Movant’s motion for attorneys’ fees, a
24 given IP address/date combination is required to discover identifying information from an ISP. Yet,
there is nothing about subpoenaing identifying information that cuts off an individual’s participation
in a swarm. Plaintiff believes that substantially all of the individuals it identifies as participating in a

1 swarm continue to participate in the swarm long after the date/time of Plaintiff's first identification
2 of their swarm participation—just as Plaintiff believes both Defendant Harris and Movant did here.

3 **C. Movant's Arguments Regarding Plaintiff's Ownership are Unavailing**

4 Movant's counsel's fixation on Messrs. Duffy, Hansmeier and Steele is frankly bizarre. In
5 this matter Plaintiff's principal, Mr. Lutz, appeared before the Court on July 19, 2013 at the Order to
6 Show Cause hearing to answer the Court's questions and any other questions that might have been
7 posed to him. At the hearing, his testimony was consistent with his testimony before district courts
8 nationwide and the testimony of AF Holdings at the 30(b)(6) deposition referenced by the Movant.
9 While the Honorable Judge Wright arrived at different findings of fact, Mr. Lutz was never allowed
10 to testify at the show cause hearing that AF Holdings was subject to. Had Judge Wright allowed Mr.
11 Lutz to testify, he may have arrived at different conclusions. As the Court is aware, Judge Wright's
12 Order is currently on appeal before the 9th Circuit of Court of Appeals.

13 Movant fails to identify a single instance in which Duffy, Hansmeier or Steele has claimed to
14 own Plaintiff. Further, both Plaintiff and Mr. Lutz agree that none of these individuals have an actual
15 or beneficial ownership in it. The only proponents of the "de facto ownership" theory are anonymous
16 individuals and members of the makeshift pornography copyright infringement defense bar.

17 Further, Movant's selective cites from the Central District of California matter is extremely
18 disconcerting. While Movant references an e-mail sent by Georgia counsel claiming that Mr. Steele
19 has an "interest" in Plaintiff, Movant fails to disclose to this Court and cite in its Reply that the same
20 attorney filed an affidavit with the Central District Court, which states: "I have spoken infrequently
21 to Mr. John Steele over the past years. He has never indicated that he has an ownership interest in
22 any of the clients I have represented in Georgia, including AF Holdings LLC." *See Ingenuity 13 LLC*
23 *v. John Doe*, No. 2:12-cv-8333-ODW(Jcx) (C.D. Cal. Apr. 18, 2013) at ECF No. 123-1.

24 Other than the foregoing, Movant's sole basis for believing that Plaintiff is owned by Messrs.
Steele, Hansmeier and Duffy appears to be the fact that Mr. Lutz had been employed by Prenda Law,

1 that Movant—a nonparty—has never had access to Plaintiffs’ trust documents¹, and that there is a
2 phonetic similarity between Steele’s sister’s boyfriend’s last name and the name of the trust that
3 owns AF Holdings. Plaintiff believes that this “evidence” speaks for itself.

4 **D. Movant’s Newly-Raised Requests for Relief Should be Denied**

5 Movant’s request that the Court convene a *second* evidentiary hearing to explore the issue of
6 Plaintiff’s ownership structure misses the point that the Court already held a *first* hearing on this
7 very issue. At the July 19, 2013 hearing, Mr. Lutz was present and answered questions regarding the
8 ownership of Plaintiff. Movant has not shown good cause for a second hearing.

9 Dated this 16th day of September, 2013

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11 Law Offices of Steven James Goodhue

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13 By: /s/ Steven James Goodhue
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17 *Attorney for Plaintiff*
18 *AF Holdings, L.L.C.*

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24 ¹ Plaintiff is willing to submit a copy of its trust documents under seal to the Court if the Court so orders.

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3 I hereby certify that on September 16, 2013, I electronically filed the foregoing with the
4 Clerk of the Court for filing and uploading to the CM-ECF system which will send notifications of
5 such filing to all parties of record.

6 **A COPY** of the foregoing was mailed (or
7 served via electronic notification if indicated by
8 an “*”) on September 16, 2013, to:

9 Honorable G. Murray Snow *(snow_chambers@azd.uscourts.gov)
10 U.S. District Court
11 Sandra Day O’Connor Courthouse Suite 324
12 401 West Washington Street, SPC 82
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/s/ Steven James Goodhue