Attorney for Plaintiff
GEORGE GREEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF GRENADINE

GEORGE GREEN,	Case No. 54321
Plaintiff,	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO REQUIRE UNDERTAKING TO MAINTAIN LIS PENDENS
v.	
MAUDE WHITE, JOHN WHITE,	
Defendants.	[Code Civ. Proc. § 405.34]
_____/	Date: Time: Dept.:

Defendants seek an order under Code of Civil Procedure § 405.34 requiring plaintiff to post an undertaking as a condition of maintaining a notice of lis pendens on their property, but they do not explain why they are entitled to the order. They do not challenge the lis pendens as inappropriate or improperly recorded by moving to expunge it. They purport to explain a motion for an undertaking as a supplement or alternative to a motion to expunge, but that is *all* they do. Except for a conclusory estimate of their costs to litigate this case through trial and appeal, their memorandum is entirely generic.

Being generic, defendants' argument is necessarily both insufficient and wrong. Defendants erroneously suggest (1) that § 405.34 establishes *every* defendant's right to an undertaking as a condition to maintaining a lis pendens, and (2) that the filing of a lis

pendens entitles a prevailing defendant to its legal fees *in the underlying action*. Both propositions must be accepted if an undertaking is to be required on defendants' showing, but neither proposition is true. A defendant who invokes § 405.34 has the burden of showing the justice of requiring an undertaking in any amount. Moreover, the defendant has the burden of showing what amount is needed to cover the damages likely to result from maintaining the lis pendens—not from maintaining the underlying action—if the defendant ultimately prevails. Having made neither showing, defendants here are not entitled to an undertaking.

ARGUMENT

1. Defendants bear the burden of proving that plaintiff should post an undertaking and the burden of justifying an amount not exceeding the damages likely to be caused by maintaining the lis pendens.

Section 405.34, unlike other provisional remedy statutes, does not expressly require the court to impose a bond in the ordinary case, and it is silent on which party has the burden of proof on a motion for an undertaking. This aspect of the statute has not been construed by any appellate court. But in the view of a leading treatise, the burden of showing that a bond is appropriate is on the moving party. 3 R. Weil & I. Brown, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, § 15:156, at 15-22 ("Burden of proof on moving party (defendant)").

Weil & Brown's reading of § 405.34 is supported by a comparison with the statutes dealing with motions to *expunge* a lis pendens and the appropriateness of requiring a *defendant*'s bond as a condition for expungement. See Code Civ. Proc. § 405.31 (underlying action not containing real property claim) and § 405.32 (claimant's failure to establish claim's probable validity). Those sections make clear that, on a motion to expunge, a lis pendens must be expunged without requiring a defendant's bond

unless the plaintiff persuades the court not only that the lis pendens is facially valid but also that the underlying claim is probably good. *Id.*, § 405.30; 3 Weil & Brown, *supra*, § 15:113-114, at 15-.19. Placing the burden of proof on the party *opposing* a motion is, of course, contrary to ordinary motion practice. *Id.*, § 15:113. Presumably, that is why the statutes specify the burden-shifting as they do. Since § 405.34 does *not* similarly specify any shift in burden, the natural reading is that the burden lies on the usual party—the moving party.

Defendants offer no explicit argument why plaintiff must bear what should, by ordinary rules of statutory construction, be their burden. To be sure, they quote the Legislative Comment that § 405.34 "brings the lis pendens procedure into line with provisional remedy practice generally, in which the party receiving the provisional relief is typically required to provide an undertaking." But as they also recognize, the Comment adds: "Decisions regarding an undertaking requirement are to be governed by normally applicable equitable principles."

Normally applicable equitable principles allow the court considerable scope in deciding whether to require an undertaking at all and to set an amount, even where the likelihood of damages resulting from the imposition of provisional relief is established. Thus defendants' own arguments show that they have the burden of justifying the order they seek.

2. Defendants have not carried their burden of proof.

Defendants do not show what damages they might suffer *as a result of maintaining the lis pendens*. Nor do they mention what circumstances led to the action in the first place, the merits of the action, the appropriateness of the lis pendens, the parties' relative financial strength, or plaintiff's ability to post an undertaking in any amount. Their factual showing is limited to their attorney's (unsupported) estimate of $75,000-$100,000

to defend plaintiff's case through trial plus $25,000 to $50,000 if an appeal is taken.

A defendant who prevails in an underlying action may recover on an undertaking required under § 405.34 "upon a showing that . . . . (b) the person seeking recovery suffered damages *as a result of the maintenance of the notice*." Code Civ. Proc. § 405.34. This provision shows that the lis pendens undertaking, if any, should be limited to the estimated amount defendants would be entitled to as lis pendens damages. Defendants' showing—their estimated litigation costs and attorney's fees—is not relevant to their motion because it does not relate to the lis pendens. Defendants' litigation costs will not be higher if the lis pendens is maintained nor lower if it is not. Thus defendants' showing is not a sufficient basis on which to order plaintiff to post any bond at all.

Defendants' citations to *On v. Cow Hollow Properties* (1990) 222 Cal.App.3d 1568, 1573 (decided under former Code Civ. Proc. § 409.1(b)) and *Abba Rubber Company v. Seaquist* (1991) 235 Cal.App.3d 1, 15-16 (preliminary injunction) are not on point. *On* held that the defendants' recovery of the plaintiff's $60,000 lis pendens bond should be credited toward the defendants' attorneys' fees in the underlying action, reducing the balance due the defendants by that amount. The basis for the fee award (and the apparent justification for the $60,000 bond) was a contractual fee-shifting provision that governed the underlying action. Defendants cite no similar provision here.

Abba Rubber Company held that a $1,000 undertaking for a preliminary injunction against soliciting plaintiff's customers was improperly set and was probably too low. Explaining how to review (or set) such an undertaking, the court discussed the need to show a causal link between the *preliminary injunction* (*not* the filing of the action) and the estimated damages the undertaking should cover:

> In reviewing the trial court's estimation [sic], the first step is to identify the types of damages which the law allows a restrained party to recover in the event that the issuance of the injunction is determined to have been

> unjustified. The sole limit imposed by the statute is that *the harm must have been proximately caused by the wrongfully issued injunction*. (§ 529, subd. (a).) Case law adds only the limitation that the damages be reasonably foreseeable. (*Rice v. Cook* (1891) 92 Cal. 144, 148 [28 P. 219] [not "'remote'"]; *Handy v. Samaha* (1931) 117 Cal.App. 286, 290 [3 P.2d 602] ["'reasonably anticipated'"].)
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> *Abba Rubber Co.*, 235 Cal.App.3d at 14 (emphasis added).

Defendants quote a different passage from the *Abba Rubber* opinion, in which the court observed that defending against a preliminary injunction valid and regular on its face may require the defendant to defend against the main action in order to show that the preliminary injunction was unjustified. Thus a defendant's estimated attorneys' fees for litigating the underlying action could be a part of the required undertaking. *Id.* at 15-16.[1] But that reasoning does not apply to a free-standing § 405.34 motion (such as defendants have made here), because a lis pendens is not issued by a court and therefore does not depend on any preliminary showing. Absent a motion to expunge, there is not and cannot be any preliminary occasion for disputing the merits of the underlying case. Thus there is no basis for setting an undertaking to include defense costs in the underlying action.

If defendants' reasoning were correct, a defendant served with a lis pendens could always force the plaintiff to withdraw the notice or risk paying the defendant's litigation costs for the entire action. Nothing in § 405.34, or anywhere else in the law, supports such a drastic (and unjust) change in the rule that each side bear its own attorney's fees.

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[1]Of course, if the court thought plaintiff a likely winner, it might discount the defendant's estimate by the defendant's low likelihood of success. *Id.* at 16, fn. 8. Conversely, if it thought the plaintiff's case certain to be dismissed before trial, the court might appropriately refuse to require an undertaking in the amount necessary to try a case to judgment.

CONCLUSION

In sum, defendants' *only* evidence in support of their motion for an undertaking is a conclusory estimate of what their fees and costs would be if plaintiff fought them through trial. That evidence is not even relevant to the motion, let alone a sufficient basis for deciding what amount, if any, could justly be required in the circumstances of this case. Having failed to carry their burden of proof, defendants are not entitled to an undertaking in any amount. Their motion should therefore be denied.

Dated: _____

Respectfully submitted,

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Attorney for Plaintiff
GEORGE GREEN