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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual,

Plaintiff,

v.

MATTHEW KATZER, an individual, and KAMIND ASSOCIATES, INC, an Oregon corporation dba KAM Industries,

Defendants.

No. C-06-1905-JSW

MOTION FOR RULE 11 SANCTIONS AND SANCTIONS UNDER THE COURT'S INHERENT POWER AGAINST ROBERT SCOTT JERGER

Date: February 8, 2006
Time: 9:00 a.m.
Courtroom: 2, 17th Floor
Judge: Hon. Jeffrey S. White

SUMMARY OF ARGUMENT

Ignoring facts and the law, Robert Scott Jerger filed a frivolous Opposition to Plaintiff's Amended Motion for Leave to File a Second Amended Complaint, and a frivolous Motion for Sanctions Against Victoria K. Hall.

A filing is frivolous if it is both baseless and made without reasonable and competent inquiry into the law and facts. Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990).

Jerger did not investigate the facts. Jerger exhibited a total failure to review his own filings, those of opposing counsel, and the transcripts. Jerger misstated numerous facts to this Court. For instance, Jerger – although present at the Sept. 14, 2007 hearing – completely ignored that this Court gave a direct order to counsel for Plaintiff to file a motion for leave to file the amended complaint, whether or not Defendants consented to filing the amended complaint. Had Jerger investigated the facts, he would have never filed the Opposition or the Motion for Sanctions.

Jerger did not investigate the law. Had Jerger done so, he would have known that Plaintiff had a legal basis to make his arguments, and thus no Rule 11 motion could lie.

A reasonable and competent inquiry would have shown that facts and the law support Plaintiff. He had to file the Amended Motion for Leave to File a Second Amended Complaint, per this Court's direct order to his counsel, and he had the right to file the motions that he did.

Jerger filed the Opposition and Motion for Sanctions for an improper purpose – to delay litigation, increase costs, and interfere with Plaintiff's appellate briefing.

Jerger has once again presented overruled case law, Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548 (9th Cir. 1986), to this Court as binding precedent. This is not the first time Jerger has engaged in misconduct relating to citation of precedent. Correcting Jerger's various miscitations works prejudice against Plaintiff, who must devote space in his 15-page limit to correct these miscitations. The Court should sanction Jerger under its inherent powers to ensure that in the future, Jerger does not present overruled case law as binding precedent, does not engage in further misrepresentation of precedent, and does not fail to cite mandatory Ninth Circuit precedent.

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NOTICE OF MOTION

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that, on Friday, February 8, 2008, at 9:00 a.m. in Courtroom 2, 17th floor of the San Francisco Division of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff Robert Jacobsen will ask the Court to impose sanctions against Robert Scott Jerger.

I. MOTION

Plaintiff moves for this Court to impose Rule 11 sanctions against Robert Scott Jerger for failing to investigate the facts and law before he filed his recent Opposition to the Amended Motion for Leave to File a Second Amended Complaint, and Motion for Rule 11 Sanctions against Plaintiff's counsel. He also moves for this Court to impose Rule 11 sanctions against Mr. Jerger for filing the opposition and the Rule 11 motion for an improper purpose – to interfere with Plaintiff's appeal in the Federal Circuit, and to delay litigation to the detriment of the Court and Plaintiff. This motion is based on the following.

II. ISSUES TO BE DECIDED

1. Did Robert Scott Jerger, counsel for Defendants, violate Rule 11 when he failed to investigate the facts before filing his Motion for Rule 11 Sanctions against Plaintiff's counsel, Victoria K. Hall and his Opposition to the Amended Motion for Leave to File a Second Amended Complaint?

2. Did Mr. Jerger violate Rule 11 when he failed to investigate the law before filing his Motion for Rule 11 Sanctions and his Opposition to the Amended Motion for Leave to File a Second Amended Complaint?

3. Did Mr. Jerger violate Rule 11 when he filed his Motion for Rule 11 Sanctions and his Opposition to the Amended Motion for Leave to File a Second Amended Complaint to interfere with Plaintiff's appeal in the Federal Circuit, and to delay litigation to the detriment of the Court and Plaintiff?

4. Should Plaintiff be awarded attorneys fees and costs for Mr. Jerger's Rule 11 violations?

5. Should the Court impose fines and other non-monetary sanctions on Mr. Jerger for his Rule 11 violations?

6. Should the Court impose sanctions under its inherent powers for Mr. Jerger's repeated misrepresentations of case law?

III. FACTS

Robert Scott Jerger, counsel for Defendants, recently filed Defendants Matthew Katzer and KAMIND Associates, Inc.'s Motion for Sanctions Under Civil L.R. 7-9(c) and Fed. R. Civ. P. 11 Against Victoria K. Hall [hereinafter Motion for Rule 11 Sanctions] and his Opposition [hereinafter Opposition] to Plaintiff's Amended Motion for Leave to File a Second Amended Complaint and in the Alternative, Motion for Final Judgment under Rule 54(b) as to Cybersquatting Cause of Action [hereinafter Amended Motion for Leave and Rule 54(b) Motion]. Mr. Jerger made numerous factually incorrect statements in both his Motion for Rule 11 Sanctions and his Opposition. The following identify these incorrect statements, and the correct information and its source. Where appropriate, facts on why Mr. Jerger knew, or should have known, the correct information are identified. The numerous errors demonstrate a total lack of investigation on Jerger's part.

Mr. Jerger's incorrect statement: Mr. Jerger states that counsel for Plaintiff repeated arguments related to cybersquatting on two occasions prior to filing the most recent motion. Motion for Rule 11 Sanctions at 4 lines 13-16, and at 5 line 21; Opposition at 3, lines 19-22. at 3 line 26 to 4 line 3.

Correct statement:

(1) On the first occasion, Mr. Jerger filed the motion to dismiss under Rule 19 for failure to join a necessary party. [Docket 100], at 9-11. Declaration of Victoria K. Hall [hereinafter Hall Decl.] Ex. A. Counsel for Plaintiff responded to those arguments. She also made arguments that Mr. Jerger could not raise those in his second motion to dismiss because those arguments were available to him when he filed his first motion to dismiss, and Rule 12(g) barred the arguments. [Docket 123], at 14-15. Hall Decl. Ex. B. Mr. Jerger replied to those arguments. [Docket 127], at 5. Hall Decl. Ex. C. The January 19, 2007 hearing was directed to those arguments. Transcript of Jan. 19, 2007, at 18-21. Hall Decl. Ex. D. Counsel for Plantiff made an additional argument that if Plaintiff modified the relief sought and did not seek transfer of the domain name, then the cause of

action should remain. Id. at 18-20. She also sought an attorney fee award to bring an in rem action in the Eastern District of Virginia. Id. at 19. As the transcript reveals, no one discussed whether Plaintiff was bringing an in rem action in the Northern District of California, and whether that in rem action could be maintained if Plaintiff obtained transfer in a UDRP proceeding. On August 17, 2007, this Court issued its order, dismissing the cybersquatting claim as moot. The Court erroneously stated that counsel for Plaintiff said the cybersquatting claim was in rem. [Docket 158] at 5-6.

(2) On the second occasion, counsel for Plaintiff filed a motion for leave to file a motion for reconsideration. [Docket 159]. Hall Decl. Ex. E. Although her client and her process server had diligently sought the transcript from the January 19, 2007 hearing, the transcript was not available. Exhibit E (Exhibit A (motion for reconsideration) at 2-3). She filed the motion on her best belief. Id. at 3. An appeals court uses the transcript, not a counsel's best belief about what was said. See Fed. R. App. P. 10 (the record on appeal includes the transcript). The Court rejected Plaintiff's "contention" – Plaintiff's belief that the Court misunderstood his argument. [Docket 161] at 2.

(3) In the most recent motion, the transcript, whose contents are sworn to by the court reporter and only recently became available, showed that the Court erred. The argument in the Amended Motion for Leave is that, not mere belief, but the evidence shows this Court misunderstood Plaintiff's arguments.

Mr. Jerger filed the initial motion, read Plaintiff's counsel opposition, and responded to it. Mr. Jerger also argued the motion on January 19, 2007. Thus, Mr. Jerger knows, or should know, what was argued initially. As counsel representing Defendants, Mr. Jerger knows that the transcript was unavailable. He receives reports from ECF when the transcript is filed. He received the motion for leave to file a motion for reconsideration, which stated that the transcript was unavailable, and that counsel for Plaintiff was stating that to the best of her belief, she had not made the adverse representation that the Court attributed to her. Mr. Jerger could have called the court reporter to confirm whether the transcript had been ordered or if the Plaintiff, his counsel, and their process server, had been attempting to order the transcript for 4 months. Since he filed an appeal in another

matter, Mr. Jerger knows or should know that the transcript is the evidence of what happened at the hearing – not an attorney's best recollection.

Mr. Jerger's incorrect statement: Mr. Jerger stated that counsel for Plaintiff sent him copies of the proposed Second Amended Complaint on October 26. Mr. Jerger implied that counsel for Plaintiff had violated this Court's order to send Mr. Jerger the proposed Second Amended Complaint by October 19. Motion for Rule 11 Sanctions at 2, lines 10-11; Opposition at 2, lines 11-12.

Correct statement: This Court ordered counsel for Plaintiff to send Mr. Jerger the proposed Second Amended Complaint by October 19. Minute Entry [Docket 166]; Sept. 14, 2007 transcript, at 20-22. Exhibit F (relevant pages of transcript). Counsel for Plantiff did so. Hall Decl. Ex. G (email exchange between V. Hall and R. Jerger, dated mid-October 2007, re proposed Second Amended Complaint).

As shown by the email exchange in Exhibit G, Mr. Jerger knew that he received the two proposed Second Amended Complaints on October 19, 2007 – not October 26, 2007.

Mr. Jerger's incorrect statement: Mr. Jerger received the Second Amended Complaints on October 26, 2007 and responded the same day. Motion for Rule 11 Sanctions at 2, lines 10-11; Opposition at 2, line 12.

Correct statement: Mr. Jerger did not "respond the same day" he received the proposed Second Amended Complaints. See Hall Decl. Ex. G. He had, and used, the full week this Court gave him to respond.

Again, as shown by the email exchange in Exhibit G, Mr. Jerger knew that he received the two proposed Second Amended Complaints on October 19, 2007 – not October 26, 2007.

Mr. Jerger's incorrect statement: Counsel for Plaintiff "willfully" violated this Court's Aug. 17, 2007 order by including statutory damages for the new versions of JMRI, and attorneys' fees,

which the Court specifically ordered stricken in its order. Opposition at 7, lines 4-11.

Correct statement: This Court had only JMRI version 1.7.1 before it. Statutory damages for this version have been removed, and now Plaintiff seeks actual damages. This Court ordered Plaintiff to strike from the relief 17 U.S.C. Sec. 504 (statutory damages) only, not Sec. 505 (attorneys fees) as to this version. Aug. 17, 2007 order at 7-8. Different facts apply to the newly added versions, and those versions were not before the Court.

Mr. Jerger also received this order since he was on ECF. He has no reason not to know this information.

Mr. Jerger's incorrect statement: Counsel for Plaintiff filed a motion for reconsideration, for which leave has not been granted. There was no need to file a motion for leave to file a Second Amended Complaint. "Plaintiff concedes (as he must) that the substance of his amended motion is that of a motion for reconsideration." Motion for Sanctions under Rule 11 at 4, lines 2-7; Opposition at 3, line 2-7.

Correct statement:

(1) This Court, in a direct order at the Sept. 14, 2007 hearing, told counsel for Plaintiff that she must file a motion for leave to file the Second Amended Complaint, even if Mr. Jerger agreed to its filing. Transcript of Sept. 14, 2007 [hereinafter Sept. 14, 2007 transcript], at 12-13. Exhibit F (relevant pages of transcript). See also id. at 11-12 (Mr. Jerger asks if discussion is regarding filing an amended complaint, and the court states that it relates to filing a motion for leave to file an amended complaint). Civil Local Rule 7-12 requires that, even if the parties stipulate to the filing of the Second Amended Complaint, counsel for Plaintiff still must file a stipulation with a proposed order. "Every stipulation requesting judicial action must be in writing signed by all affected parties or their counsel. A proposed form of order may be submitted with the stipulation and may consist of an endorsement on the stipulation of the words, 'PURSUANT TO STIPULATION, IT IS SO ORDERED,' with spaces designated for the date and the signature of the Judge." Civ. L. R. 7-12.

(2) The Amended Motion for Leave and Rule 54(b) Motion have three parts. There is a motion for leave to file a Second Amended Complaint (version A). There is a motion for leave to file a Second Amended Complaint (version B). Finally, if the Court does not accept version A, then there is a motion for final judgment under Rule 54(b) as to cybersquatting cause of action. If Mr. Jerger consented to the filing of version A, then the only question left was whether the Court would accept this version, and whether it required a motion for leave to file a motion for reconsideration. This motion is not noticed. If the Court required a motion for leave to file a motion for reconsideration, the argument is present. Mr. Jerger completely fails to address how the Rule 54(b) Motion could be a motion for reconsideration.

Mr. Jerger represented Defendants at the Sept. 14, 2007 hearing. He knew that this Court gave counsel for Plaintiff a direct order to file a motion for leave to file the Second Amended Complaint. He also received Plaintiff's reply memorandum on November 21, 2007, which stated that the Court had issued this direct order to counsel for Plantiff. [Docket 183] at 4, lines 4-5. This reply memorandum also stated that Civil Local Rule 7-12 also required counsel for Plaintiff to file a motion. Id. at 4, lines 6-7. Mr. Jerger failed to explain why these statements were incorrect – and he could not, since the evidence shows they are irrefutable.

Mr. Jerger's incorrect statement: "[O]rdering the transcript" is the new fact that Plaintiff raises. Motion for Sanctions under Rule 11 at 5, lines 14-16; Opposition at 4, lines 19-20, at 4 line 24 – 5 line 2.

Correct statement: It is not the ordering of the transcript, but the transcript itself and its contents. The evidence the Court believed it had, was that counsel for Plaintiff represented the cybersquatting cause of action as in rem. The newly available evidence – the transcript which the Federal Circuit will use, not counsel's best belief – shows that Plaintiff never made the adverse statement that this Court attributed to her.

Mr. Jerger has the Amended Motion for Leave. Nowhere does Plaintiff describe the new fact as

"ordering the transcript". It's clear that the transcript itself is the new evidence not available previously.

Mr. Jerger's incorrect statement: Plaintiff is noticing a second motion for reconsideration. Motion for Rule 11 Sanctions at 5, lines 22-26; Opposition at 3, lines 25-26.

Correct statement: Plaintiff has noticed an Amended Motion for Leave to File a Second Amended Complaint, as this Court ordered his counsel to do. Plaintiff has noticed the Rule 54(b) Motion. Mr. Jerger makes no argument that this motion could possibly be a motion for reconsideration. The notice is, plain on the face of the motion, only for the Amended Motion for Leave and the Rule 54(b) Motion heard Jan. 18, 2008. If a motion for leave to file a motion for reconsideration is required, the Court can resolve the matter without hearing, or can add it to the calendar. Plaintiff does not require that matter to be heard on Jan. 18, 2008.

Again, Mr. Jerger has the Amended Motion for Leave, was present at the Sept. 14, 2007 hearing, and should have the transcript from that hearing. He also has the reply memorandum for that Motion, which states that the Court ordered Plaintiff to file the motion for leave.

Mr. Jerger's incorrect statement: The motion for reconsideration repeats the exact same grounds, Motion for Sanctions under Rule 11 at 4, lines 24-25; Opposition at 4, line 1-2.

Correct statement: The motion for leave to file a motion for reconsideration was based on one ground. The motion for leave to file a second amended complaint is based on three grounds. All are argued in detail and supported by newly available evidence – the transcript.

Mr. Jerger's incorrect statement: Plaintiff's motion fails to state any appropriate grounds for reconsideration. See Motion for Sanctions under Rule 11 at 7, lines 2-8; Opposition at 4 line 14 – 5 line 8.

Correct statement: When it issued its opinion, the Court believed one set of facts to be true. As the transcript shows, the Court was in error. Prior to the Court's issuing its order dismissing

cybersquatting as moot, Plaintiff had no way of knowing the Court held a belief that counsel for Plaintiff represented the claim as in rem. Mr. Jerger has pointed to nothing in the transcript that indicates that counsel for Plaintiff represented the cause of action, pending in the Northern District of California, as in rem. Nor can he. The full transcript is available as Exhibit D so that he has no further excuse for failing to investigate. As shown by the transcript, Plaintiff represented that cybersquatting could remain if he elected not to seek the domain name. The Court's statement that the cybersquatting was in rem is a change in facts that counsel for Plaintiff could not be aware of. The Court's statement was a new fact to Plaintiff – and for that matter, per the transcript, to Defendants. With all due respect to the Court, it also indicates a manifest failure by the Court to consider the arguments.

Mr. Jerger's incorrect statement: Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548 (9th Cir. 1986) permits an award of sanctions for a motion for reconsideration, like Plaintiff's. Motion for Sanctions under Rule 11 at 6, lines 17-19.

Correct statement: Once again, Mr. Jerger cites overruled case law and presents it as binding precedent. Unioil was noted as overruled by the Ninth Circuit by In re: Keegan Management Securities Litigation, 78 F.2d 431, 434-35 (9th Cir. 1995) (stating Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) (en banc) overruled Unioil). Assuming that the result in Unioil would be the same after Keegan, from the limited facts in the opinion, it appears that the attorney repeated the exact same argument. Here, argument at the Jan. 19, 2007 hearing was directed to Rule 19 arguments and an alternative offered by Plaintiff to bring an in rem proceeding in the Eastern District of Virginia. The argument in the motion for leave to file a motion for reconsideration is that, based on counsel's best belief and without the transcript available, the Court misunderstood what Plaintiff argued at the January hearing. [Docket 159]. Hall Decl. Ex. E. This is a different argument than the earlier argument. The argument in this motion is not merely counsel's belief that the Court misunderstood her argument at the Jan. 19, 2007 hearing – it's the evidence of the transcript proves the Court erred. Amended Motion for Leave, at 3-4. Thus, the three arguments are completely different.

Mr. Jerger was present at the January hearing, and prepared the filings for that hearing. He has both later motions. He knows well what was argued.

Mr. Jerger's incorrect statement: The motion for reconsideration is meritless. Motion for Sanctions under Rule 11 at 6, line 23.

Correct statement: Although this Court believed counsel for Plaintiff stated the cybersquatting claim pending in the Northern District of California was in rem, the transcript shows she never made that adverse statement. Transcript of Jan. 19, 2007 hearing, at 18-21. Hall Decl. Ex. D. Mr. Jerger cannot locate any quote where counsel for Plaintiff made this statement. This statement's absence in the previously unavailable transcript is a fact this Court has not considered before.

Mr. Jerger was present at the January 2007 hearing. He also had the relevant portions of the transcript available to him as Exhibit C in the Amended Motion for Leave. He also could have purchased the transcript. The transcript is attached as Exhibit D to the Hall Declaration, so Mr. Jerger can raise no further excuse for his failure to investigate.

IV. ARGUMENT

A. Jerger Filed a Frivolous Opposition and Motion for Rule 11 Sanctions

Robert Scott Jerger filed a frivolous Opposition and Motion for Rule 11 Sanctions without investigating the law or the facts. He also filed the motions for an improper purpose – to delay litigation and to increase costs. Either is sufficient for finding that Mr. Jerger has violated Rule 11. For these reasons, this Court should sanction Robert Scott Jerger by requiring him to pay the attorney's fees of Plaintiff's counsel, the costs of bringing this motion and defending against his motion, and any other fines the Court finds will deter similar future conduct. The Court should also sanction him under its inherent powers.

Robert Scott Jerger filed a frivolous Motion for Rule 11 Sanctions on November 28, 2007. He also filed a frivolous Opposition to the Amended Motion for Leave on November 19, 2007. A filing is frivolous if it is both baseless and made without reasonable and competent inquiry into the

law and facts. Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990). Jerger's Motion for Rule 11 Sanctions is both baseless and was made without reasonable and competent inquiry into the law and facts. As a filing, a Rule 11 motion itself, if made without the proper inquiry, can form the basis of Rule 11 sanctions. See Fed. R. Civ. P. 11.

Mr. Jerger's motion and opposition are baseless. A filing is baseless if, from an objective perspective, it is unsupported by the law or the facts. Holgate v. Baldwin, 425 F.3d 671, 676 (9th Cir. 2005). E.g., In re Grantham Bros., 922 F.2d 1438, 1442 (9th Cir. 1991).

B. Jerger Ignored the Facts

Mr. Jerger ignored the facts. Here, completely ignoring that this Court ordered Plaintiff to file a motion for leave to file a Second Amended Complaint, Jerger argued that the Amended Motion for Leave and the Rule 54(b) motion are both a motion for reconsideration. He argues that any effort to restore the cybersquatting claim is meritless, but he pointed to no place in the January 19, 2007 transcript showing that counsel for Plaintiff made the adverse statements this Court attributed to her. And he cannot – because counsel for Plaintiff never made the adverse statement that the cybersquatting claim was in rem. The long list of factually incorrect statements, shown above, prove his total failure to investigate the facts behind his motion and opposition. As he has now been provided with the evidence in the attached exhibits, Mr. Jerger has no excuse for continuing to press his baseless allegations.

C. Jerger Ignored the Law

Mr. Jerger ignored the law. "A court may not impose sanctions where the attorney conducted a reasonable inquiry and determined that any papers filed with the Court are well-grounded in fact, legally tenable, and not imposed for some improper purpose." Newton v. Thomason, 22 F.3d 1455 (9th Cir. 1994) (citation, quotation and ellipsis removed). As shown above, the Amended Motion for Leave and Rule 54(b) Motion are well-grounded in fact. The Court ordered Plaintiff to file a motion for leave. If a motion for leave to file a motion for reconsideration is required, then under Civil Local Rule 7-9(b), the basis for that motion has been laid and is legally tenable. The Amended Motion for Leave and Rule 54(b) Motion are not imposed for an improper purpose, but to reduce costs, avoid several years of unnecessary litigation

expenses and a trip to the Federal Circuit, and to streamline the litigation. There is nothing improper about these purposes behind the Amended Motion for Leave and Rule 54(b) Motion. Thus, Mr. Jerger's allegations are not supported by the law.

D. Jerger Did Not Conduct a Reasonable and Competent Inquiry

Mr. Jerger did not conduct a reasonable and competent inquiry into the law and facts before filing his motion. "The reasonable inquiry test is meant to assist courts in discovering whether an attorney, after conducting an objectively reasonable inquiry into the facts and law, would have found the [motion] to be well-founded." Holgate, 425 F.3d at 677. No attorney would have found Mr. Jerger's motion well-founded, either legally or factually. Jerger relied on Unioil, a case which the Ninth Circuit has overruled. A cursory check using Westlaw or Lexis would have shown him that Unioil had been overruled. Thus, the facts in that case may have turned out differently under the new law. Mr. Jerger leaves out this information in the hope that the Court will miss it. Unable to find support in published precedent for his cause, Jerger was forced to resort to an unpublished case, Martinis v. Barbanell, No. 98-55877, 2000 WL 262578 (9th Cir. Mar. 7, 2000). Mr. Jerger stated that the facts were nearly identical. They are not. In Martinis, an attorney had apparently repeated the exact same argument as in an earlier motion, and had presented no grounds for doing so. Here, as shown above, the first round of argument was directed toward Mr. Jerger's motion to dismiss for failure to join a necessary party under Rule 19. Mr. Jerger has no excuse for misrepresenting this because he wrote the motion and argued it at the hearing. The second argument, in the Sept. 4, 2007 motion, was based on Plaintiff's counsel's best belief and made without key evidence, the transcript, which Plaintiff had diligently sought. Again, Mr. Jerger has no excuse for his failure to investigate – he receives these filings via ECF. The argument in the Amended Motion for Leave is based on the previously unavailable transcript – not the "ordering of the transcript", as Jerger states. And that key evidence, sworn to by the court reporter and which the Federal Circuit will rely upon, shows that counsel for Plaintiff never made the adverse statement this Court attributed to her when it dismissed cybersquatting. Thus, the facts here are completely different from those in the unpublished Martinis case. No reasonable attorney could consider these cases similar. As for the facts, Jerger misstated them numerous times as shown

above – so often, it implies an intentional and complete disregard for the record. He mischaracterized Plaintiff's Amended Motion for Leave and Rule 54(b) Motion both as a motion for reconsideration. He incorrectly stated that no Motion for Leave was required when this Court from the bench specifically ordered counsel for Plaintiff to file this motion. He misstated that counsel for Plaintiff had made the "exact same arguments twice before" when the initial hearing was directed to Jerger's Rule 19 arguments and the Sept. 4 2007 motion, with no transcript available, was based on counsel's belief. Without citation to the transcript, Jerger states any motion for reconsideration is meritless. But the transcript proves that counsel for Plaintiff never made the adverse statement this Court attributed to her, and the Federal Circuit will find that with merit and reverse. Thus, no reasonable attorney would find Jerger's motion or opposition well-founded.

E. Jerger Filed for an Improper Purpose

Mr. Jerger made the Motion for Rule 11 Sanctions and Opposition to the Amended Motion for Leave for an improper purpose – to harass, delay litigation and increase costs. Stalling litigation and increasing costs are a basis for Rule 11 sanctions. G.C. & K.B. Investments, Inc. v. Wilson, 326 F.3d 1096, 1109-10 (9th Cir. 2003); Fed. R. Civ. P. 11(b)(1). Jerger's Opposition to the Amended Motion for Leave, his Motion for Rule 11 Sanctions, and other activities before this court, were calculated to interfere with Plaintiff's opening appellate brief. Jerger knew that counsel for Plaintiff would have to spend a month of Plaintiff's 60-day appellate briefing period on drafting the Second Amended Complaint. Jerger simply found a way to eat up the remaining 30-day period – through ridiculous objections to a simple administrative motion, a baseless opposition to the motion for leave to file the amended complaint, and filing a Rule 11 motion. As a result of Jerger's absurd objections to scheduling matters, and filing this motion, Plaintiff was forced to seek an extension at the Federal Circuit in early November. Even then, Jerger put off responding to counsel for Plaintiff's request on the Federal Circuit motion. Furthermore, Jerger only made the objections and filed his Rule 11 motion to buy time before he has to file an Answer on his clients' behalf. Either version of the Second Amended Complaint contains devastating and irrefutable detail about the activities of Jerger's clients and their intellectual property attorney. Jerger filed the

Opposition and Motion for Rule 11 Sanctions to delay the inevitable – Defendants will be liable for cybersquatting. As stated earlier, Plaintiff has presented to this Court the compelling key evidence which this Court has not considered before, which the Federal Circuit will rely upon, and which will very likely result in a reversal of this Court's order dismissing cybersquatting. If this Court does not grant Plaintiff's Amended Motion for Leave, then during settlement discussions, Plaintiff will have to weigh whether it is worth it to him to abandon the claim or wait to the end of trial to appeal to reinstate the claim. Given the $100,000-plus value of the claim, and the near certain chance that the Federal Circuit will restore the cybersquatting claim, Plaintiff will be less likely to settle the case in February 2008 if the Court does not restore cybersquatting or enter final judgment under Rule 54(b) . This Court will have a case on its docket for several years longer than it otherwise would have, and will very likely have a reversal of cybersquatting on its record. Jerger's motion and delays are motivated by an improper purpose and should be sanctioned.

F. Jerger Should be Sanctioned Under the Court's Inherent Powers

The Court should sanction Jerger under its inherent powers. A Court can sanction a litigant for misrepresenting case law. Berger v. City of New Orleans, 273 F.3d 1095 (5th Cir. 2001) (issuing show cause order to counsel for misrepresenting precedent); Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (inherent in representation to the Court is that litigant stated existing law accurately and correctly, and did not distort it through selective cropping, doctored quotations, and the like). Indeed, this Court threatened sanctions against a litigant for misciting precedent. United States v. Univ. of S.F., No. C 04-03440 JSW, 2006 WL 335316 (N.D. Cal. Feb. 14, 2006) at *2. Mr. Jerger has repeatedly misrepresented precedent, failed to cite mandatory precedent, and presented as binding precedent that which has been overruled. In his first Motion to Dismiss, Jerger presented, as binding precedent, to this Court an antitrust theory that had been overruled by the U.S. Supreme Court 20 years earlier, and which had been recognized by the Ninth Circuit as overruled. Compare Defendants' Motion to Dismiss [Docket 42] at 6 with Plaintiff's Opposition [Docket 75] at ii, 4. In his Second Motion to Dismiss, Jerger engaged in selective cropping of the Sun Microsystems decision nearly identical to that which brought sanctions on the appellant in Precision Metals. In Precision Metals, a DOJ attorney was

sanctioned for selective cropping after "omitt[ing] directly relevant language from what was represented as precedential authority, which effectively changed the meaning of at least one quotation, and which intentionally or negligently misled the court." Precision Metals, 315 F.3d at 1350. In Sun Microsystems, the Ninth Circuit stated:

> Whether this is a copyright or a contract case turns on whether the compatibility provisions help define the scope of the license. Generally, a "copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement" and can sue only for breach of contract. Graham v. James, 144 F.3d 229, 236 (2d Cir.1998) (citing Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1338-39 (9th Cir 1990). If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement. See S.O.S., Inc. v. Payday, Inc., 886 F.2d 1981, 1987 (9th Cir. 1989); Nimmer on Copyright, § 1015[A] (1999).

Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1121 (9th Cir. 1999). In Jerger's representation of Sun Microsystems, Jerger never stated that a copyright holder waives his right to sue only for activities within the scope of the license. Second Motion to Dismiss [Docket 100] at 7-8. Jerger argued for a broad interpretation of the Artistic License when the S.O.S. decision, mandatory Ninth Circuit authority which Jerger never cited in his the Second Motion to Dismiss, states the contrary. And if Jerger quoted from Sun Microsystems, he had S.O.S. in front of him, as shown above. These are just a few examples. Mr. Jerger now represents to this Court that Unioil is good law, when it has been overruled. Jerger's actions prejudice Plaintiff because Plaintiff must devote parts of his 15-page limit to addressing these repeated misrepresentations and miscitations. For these reasons, Plaintiff asks the Court to award attorneys fees and costs, and impose fines on Mr. Jerger for his most recent sanctionable conduct – failing to note that Unioil was overruled. In the alternative, because of Jerger's pattern of misconduct, Plaintiff asks the Court to require Mr. Jerger to include the following three statements at the end of each future filing and sign under the penalty of perjury:

- I have either checked the case law cited herein using KeyCite or Sheppards and represent that none has been overruled, unless otherwise noted.
- I have researched the case law and found no mandatory precedent that has not been cited.
- I have read the case law I cited. I have quoted it in a manner that accurately reflects

what the case law represents.

Plaintiff believes this would put a halt to Mr. Jerger's various types of misrepresentation of the case law. One sanction or the other is necessary, because without it, Jerger will continue, unchecked.

Plaintiff served the motion and a draft of the memorandum on Mr. Jerger on December 6, 2007. See Hall Decl. Ex. H. Without countering any of the facts stated above, or pointing to any part of the transcript or record to refute the stated facts, Jerger responded that this motion "has no legal or factual merit." Id. To permit early briefing and to set the hearing for Jan. 18, 2008, Mr. Jerger waived the 21-day safe harbor. Id.

V. SUMMARY

For the reasons stated above, the Court should sanction Robert Scott Jerger for filing a motion in violation of Rule 11. The current attorneys fees and costs are approximately $4,000. The Court should award attorney's fees and costs, and levy any appropriate fine and sanction against Mr. Jerger to deter any future similar conduct. Without a sanction, it is clear that Mr. Jerger will continue his misconduct unchecked.

Respectfully submitted,

DATED: December 11, 2007

By /s/

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