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Attorneys for Defendants Matthew Katzer and Kamind Associates, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT JACOBSEN, an individual,

Plaintiff,

vs.

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

Defendants.

Case Number C06-1905-JSW

Hon. Jeffrey S. White
Courtroom 2, 17th Floor
Date: January 18, 2008
Time: 9:00a.m.

DEFENDANTS' RESPONSE TO PLAINTIFF'S AMENDED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT, AND IN THE ALTERNATIVE, MOTION FOR FINAL JUDGMENT UNDER RULE 54(B) AS TO CYBERSQUATTING CAUSE OF ACTION

STATEMENT OF ISSUES TO BE DECIDED

1. Should this Court grant Plaintiff's second motion for leave to file a motion for reconsideration of this Court's dismissal of Plaintiff's cybersquatting cause of action?
2. Should this Court enter final judgment on the dismissed cybersquatting cause of action?

STATEMENT OF RELEVANT FACTS

Pursuant to this Court's Civil Minute Order [Dkt.#166] dated September 14, 2007, Plaintiff was instructed to serve a copy of Plaintiff's proposed second amended complaint on Defendants by October 26, 2007. Plaintiff was given until October 31, 2007 to file a motion for leave to file a second amended complaint should Defendants object to the filing of the second amended complaint.

Plaintiff served two versions of a second amended complaint on Defendants on October 26, 2007. Defendants responded by letter of the same date, stating that they did not object to the filing of a second amended complaint, however Defendants did object to the filing of two second amended complaints. *See* Exhibit D to Aff'd of Victoria K. Hall [Dkt.#176-6] in support of Plaintiff's Motion Regarding Scheduling Plaintiff's Motion for Leave to File Second Amended Complaint and Scheduling Settlement Conference and CMC Dates. Defendants also expressed concern over the inclusion of the dismissed cybersquatting claim in "Version A" of the second amended complaint. *Id.*

On October 31, 2007, Plaintiff filed a "Motion for leave to File Second Amended Complaint, and in the Alternative, Motion for Final Judgment under Rule 54(b) as to Cybersquatting Cause of Action." [Dkt.#174]. On November 2, 2007, Plaintiff filed an "Amended Motion for leave to File Second Amended Complaint, and in the Alternative, Motion for Final Judgment under Rule 54(b) as to Cybersquatting Cause of Action," which contains some non-substantive changes to the original motion (hereinafter "amended motion") [Dkt.#177]. Given the confused, contradictory and meandering prose of the amended motion, it is hard to discern the true nature of the amended motion and the relief requested. However, it is

clear that this amended motion is not a motion for leave to file a second amended complaint. There is no need for a motion to file a second amended complaint as Plaintiff concedes that Defendants did not oppose the filing of a second amended complaint. Amended Motion at 2. Rather, this amended motion is a second motion for reconsideration of Plaintiff's dismissed cybersquatting claim (for which leave has not been granted by this Court) contained in the first amended complaint. Plaintiff concedes (as he must) that the substance of his amended motion is that of a motion for reconsideration. Amended Motion at 6. Plaintiff's amended motion requests that this Court (1) reconsider its dismissal of the cybersquatting cause of action, and then, based on this ruling, (2) "pick" which submitted version of the second amended complaint that this Court will "accept for filing." *See* Amended Motion at 7. Additionally, Plaintiff's amended motion seeks, in the alternative, final judgment under Fed. R. Civ. P. 54(b) on the dismissal of the cybersquatting cause of action.

According to Plaintiff, "Version A" of the second amended complaint contains the cybersquatting claim and "Version B" does not. Amended Motion at 3. This appears to be the only difference between "Version A" and "Version B," however Defendants have not compared every line of each 69-page complaint at this time.

Plaintiff previously filed a motion for leave to file a motion for reconsideration of the dismissal of this claim on September 4, 2007 [Dkt.#159-2]. This Court denied this motion for leave to file a motion for reconsideration on September 5, 2007 [Dkt.#161]. Plaintiff's second motion for reconsideration of the cybersquatting claim contains exactly the same legal argument presented in the first motion for reconsideration and argued by Plaintiff in response to the motion to dismiss.

ARGUMENT

1. Plaintiff's Second Motion for Reconsideration

Plaintiff noticed his second motion for reconsideration without first obtaining leave from this Court to file his motion in violation of this Court's local rules. Civ. L.R. 7-9(a). Plaintiff's

second motion for reconsideration also repeats the *exact* same argument made by plaintiff in defense of his cybersquatting cause of action in his previous motion for reconsideration and at oral argument in violation of this Court's local rules (Civ. L.R. 7-9(c)), *i.e.* the argument that this Court misunderstood Plaintiff's argument regarding the domain name. *Cf.* Amended Motion for leave to File Second Amended Complaint, and in the Alternative, Motion for Final Judgment under Rule 54(b) as to Cybersquatting Cause of Action [Dkt.# 177] with Motion for Reconsideration of August 17, 2007 Ruling [Dkt.# 159-2] pages 2-3. The only difference is that plaintiff now has the transcript of the hearing, however the argument remains exactly the same. Defendants intend, by separate motion, to seek sanctions against Plaintiff for filing this second motion for reconsideration in violation of this Court's local rules and Fed. R. Civ. P. 11. By noticing this second motion for reconsideration as a motion for leave to file an amended complaint, Plaintiff has worked prejudice on Defendants by forcing them to respond and incur attorney fees defending this second motion for reconsideration.

In addition to not repeating any argument, a motion for leave to file a motion for reconsideration must demonstrate: (1) a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought, (2) the emergence of new materials facts or a change of law occurring at the time of such order, or (3) a manifest failure by the Court to consider materials facts or dispositive legal arguments. Civ. L.R. 7-9(b)(1)-(3). Plaintiff's ordering of the transcript does not satisfy this showing.

As this Court has already held, "Plaintiff's contention that the Court misunderstood his argument at the hearing does not constitute a changed material fact and does not alter the Court's ruling on Defendants' motion to dismiss." Order Denying Motion for Leave to File Motion for Reconsideration at 2 [Dkt.#161]. Plaintiff's ordering of the transcript does nothing to change this ruling and does not constitute a "material difference" in facts from those facts presented to this Court on this claim. Similarly, ordering the transcript does not constitute the "emergence"

of new material facts as this Court was present at the hearing and this Court has already considered plaintiff's oral argument at the hearing. Finally, as evidenced by this Court's Order Denying Motion for Leave to File Motion for Reconsideration, this Court has considered plaintiff's legal arguments and found them unpersuasive, therefore plaintiff has not shown a "manifest failure by the Court to consider…legal argument." Plaintiff has failed to show any reason why he should be allowed to file a second motion for reconsideration or why he should be allowed to repeat arguments already made on two occasions to this Court. Therefore, plaintiff's motion for leave to file a motion for reconsideration should be denied.

2. Motion for Final Judgment per Fed. R. Civ. P. 54(b)

Plaintiff seeks, in the alternative, final judgment under Fed. R. Civ. P. 54(b) as to the dismissal of the cybersquatting cause of action. Pursuant to Fed. R. Civ. P. 54(b), this Court has discretion to "direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Absent seriously important reasons, both the spirit of Fed. R. Civ. P. 1 and the interests of judicial administration counsel against certifying claims based on interlocking facts, in routine cases, that will likely lead to successive appeals. *Wood v. GCC Bend*, 422 F.3d 873 (9th Cir. 2005). Rule 54(b) certifications are the exception, not the rule. *Curtiss-Wright Corp. v. General Electric Co.*, 446 US 1, 10, 100 S. Ct. 1460, 1466 (1980).

In interpreting the 54(b) standard, the Supreme Court has held a district court must determine (after determining that the order finally disposes of a cognizable claim for relief) whether there is any just reason for delay in entering an order as a judgment. In making this determination:

> a district court must take into account judicial administrative interests as well as the equities involved. Consideration of the former is necessary to assure that application of the Rule effectively "preserves the historic federal policy against piecemeal appeals."... It was therefore proper for the District Judge here to consider such factors as whether the claims under review were separate from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court

> would have to decide the same issues more than once even if there were subsequent appeals.

Id. at 8.

Thus, if the unadjudicated claims are closely related to those decided, then the district court should generally refuse to enter judgment under Rule 54(b). In this case, the cybersquatting claim arises out of the same "bad faith" allegations of infringement that are present in the patent and copyright claims in this lawsuit and are thus closely related to the unadjudicated claims in this case. As Plaintiff states in his amended motion, "[f]acts relevant to cybersquatting are also relevant to showing that Defendants engaged in a pattern of infringing JMRI and others' intellectual property, and claiming JMRI and other's [sic] IP as their own…". Amended Motion at 5.

Even if the adjudicated and unadjudicated claims are distinct, the Plaintiff must make an affirmative showing of a hardship or injustice that will result if judgment is not entered in order for this Court to enter judgment under Rule 54(b). *See e.g. Burlington Northern R.R. v. Bair*, 754 F.2d 799, 800 (8th Cir. 1985); *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999, 1012 (3rd Cir. 1992). In this case, Plaintiff has failed to make any showing of hardship or injustice that will result if immediate appellate review is not granted. This is because Plaintiff will not suffer any injustice or hardship as he awaits final judgment. As this Court has already found, based on Plaintiff's submissions, the domain name at issue has already been transferred to Plaintiff. Order Granting Defendant's Motion to Dismiss, Granting in Part and Denying in Part Defendants' Motion to Strike, and Denying Plaintiff's Motion for Preliminary Injunction [Dkt.# 158] at 5-6. No identifiable judicial administrative interest would be served by an immediate appeal of Plaintiff's claim. Plaintiff's claim consists solely of Plaintiff's request for money damages under the Lanham Act and Plaintiff will experience no hardship if judgment is not immediately entered on this claim.

Plaintiff has already appealed this Court's denial of his motion for a preliminary injunction to the appellate court, where briefing is presently being conducted. This Court should

deny Plaintiff's request for certification of the cybersquatting claim under Rule 54(b) in order to prevent "piecemeal appeals" in this case.

3. Statutory Damages under the Copyright Act

In violation of this Court's previous August 17, 2007 Order ([Dkt.# 158] at 7), both versions of Plaintiff's complaint seek statutory damages and attorney fees under 17 U.S.C. §§ 504, 505. Both the plain language of 17 U.S.C. § 412 and this Court's previous August 17, 2007 Order make clear that Plaintiff cannot seek an award of statutory damages or attorney fees as provided by 17 U.S.C. §§ 504, 505. Plaintiff is, apparently, willfully violating this Court's Order in a misguided effort to "preserve the record for appeal." *See* Amended Motion at 6. Defendants will address this issue through a timely dispositive motion and in a separate motion for sanctions in response to a final, operative second amended complaint.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff's motion for leave to file a motion for reconsideration and deny Plaintiff's request for final judgment under Fed. R. Civ. P. 54(b).

Dated: November 19, 2007

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on November 19, 2007, I served Matthew Katzer's and KAM's RESPONSE TO PLAINTIFF'S AMENDED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT, AND IN THE ALTERNATIVE, MOTION FOR FINAL JUDGMENT UNDER RULE 54(B) AS TO CYBERSQUATTING CAUSE OF ACTION on Robert Jacobsen and his attorney Victoria Hall via first class mail and email to the following address:

Victoria K. Hall
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/s/
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