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10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ROBERT JACOBSEN, an individual,)
14)
Plaintiff,)
15 v.)
16)
MATTHEW KATZER, an individual, and)
17 KAMIND ASSOCIATES, INC., an Oregon)
corporation dba KAM Industries,)
18)
Defendants.)
19)
_____)

No. C06-1905-JSW
**ADMINISTRATIVE MOTION TO TAKE
DEFENDANTS' MOTION FOR RULE 11
SANCTIONS OFF CALENDAR FOR
LACK OF SERVICE**
Courtroom: 2, 17th Floor
Judge: Hon. Jeffrey S. White

20 INTRODUCTION

21 Plaintiff respectfully asks the Court to take Defendants' Motion for Rule 11 Sanctions off
22 calendar. Defendants never served upon Plaintiff the motion [Docket 184] they actually filed prior
23 to filing it with the Court. The new version of the motion has significant changes including a
24 newly added section on Rule 11 that was not present in the "draft" motion Mr. Jerger served on
25 counsel for Plaintiff on November 2, 2007. Counsel for Plaintiff objects to the motion for lack of
26 service and notice. The motion should be taken off calendar, and Jerger should be ordered not to
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1 file it until 21 days have passed.¹ He should also be ordered not to set hearings for closed dates.

2 FACTS

3 On October 31, 2007, Plaintiff filed a Motion for Leave to File a Second Amended
4 Complaint, and in the Alternative, Motion for Final Judgment Under Rule 54(b) as to
5 Cybersquatting Cause of Action.

6 On November 2, 2007, Defendants, through their counsel, sent a 5-page motion for
7 sanctions to counsel for Plaintiff, challenging Plaintiff's motion. A true and correct copy of
8 Defendants' "draft" sanctions motion, with the letter that accompanied it, is attached as Exhibit A.

9 On November 28, 2007, Defendants, through their counsel, filed with the Court a
10 completely redrafted 9-page motion for sanctions. The new motion had numerous additions,
11 changes and deletions. The added material included an entirely new section on Rule 11. It also
12 included new sanctions that were not present in the earlier "draft" motion.

13 Defense counsel provided an affidavit admitting that he sent the "draft" version of the
14 motion to counsel for Plaintiff on November 2, 2007. Declaration of R. Scott Jerger in Support of
15 Defendants' Motion for Sanctions [Docket 184], at ¶ 3. Thus, defense counsel admits he never
16 sent to counsel for Plaintiff the sanctions motion he actually filed with the Court.

17 In contradiction of this Court's Standing Order ¶ 2, defense counsel set the matter for a
18 hearing on a date, January 18, 2007, that was closed.

19 ARGUMENT

20 Because Defendants did not comply with the requirements of Rule 11 and Rule 5, counsel
21 for Plaintiff respectfully asks the Court to take the matter off calendar, and to bar defense counsel
22 Robert Scott Jerger from filing the motion until 21 days have passed. Plaintiff also asks the Court
23 to order Jerger to set matters only on dates that are open, per this Court's Standing Order ¶ 2.

24 Defendants never served Plaintiff with the motion for sanctions as required by Rule 11.
25 Plaintiff objects to the motion for lack of service. This Court may disregard any motion for lack of
26 service. Civ. L. R. 5-6(b); Elam v. Kaiser Found. Health Plan, Inc., No. C-05-4179 MMC, 2005

27 _____
28 ¹ At a later date, Plaintiff will file an Opposition describing why Defendants' Motion for Sanctions
is not warranted.

1 WL 3590991, at *5 (N.D. Cal. Dec. 30, 2005). This Court may order an appropriate sanction for
2 violation of the Federal Rules of Civil Procedure. See Civ. L.R. 1-4. Here, it is appropriate to take
3 the matter off calendar and bar Defendants from re-filing until 21 days have passed.

4 Rule 11 requires a motion for sanctions under the rule be served 21 days before it is
5 presented to the Court. “[The motion] shall be served as provided in Rule 5, but shall not be filed
6 with or presented to the court unless, within 21 days after service of the motion ..., the challenged
7 paper ... is not withdrawn or appropriately corrected.” Fed. R. Civ. P. 11(c)(1)(A) (emphasis
8 added). The purpose of the 21-day safe harbor is for the party against whom sanctions are sought
9 to have an opportunity to consider the challenged paper and the grounds for sanctions, so that she
10 may correct the challenged paper. Holgate v. Baldwin, 425 F.3d 671, 679 (9th Cir. 2005).

11 For service to be proper, Rule 5 requires that a copy of a motion, later filed with the Court,
12 be sent to counsel for Plaintiff. “Service under Rule 5(a) ... on a party represented by an attorney
13 is made on the attorney.” Fed. R. Civ. P. 5(b)(1). “Service under Rule 5(a) is made by: [...]
14 [m]ailing a copy to the last known address of the person served.” Id. 5(b)(2)(B) (emphasis added).
15 The rules require defense counsel to send to opposing counsel the copy of the paper that he later
16 files with the Court. See id. 5(a), 5(b)(2)(B), 5(d) and 5(e) (for written motions, the paper must be
17 filed with the Court and a copy must be served on opposing counsel). “As the Advisory
18 Committee Note to the 1993 amendment indicates, the safe harbor period begins to run only upon
19 service of the proposed Rule 11 motion upon the party against whom sanctions are sought.”
20 Charles A. Wright & Arthur Miller, 5A Federal Practice & Procedure § 1337.2 (emphasis added).

21 Defense counsel admits he filed with this Court a different motion rather than the motion he
22 sent to counsel for Plaintiff on November 2, 2007. The sanctions motion Mr. Jerger filed has
23 significant changes not present in the “draft” motion. The “draft” motion is only 5 pages. The
24 motion filed with the Court is 9 pages and a complete redraft of the earlier motion. Defense
25 counsel added an entirely new Rule 11 section in the later version. No such Rule 11 section was
26 present in the earlier version. He added arguments related to Civil Local Rule 7-9(a). He also
27 added new sanctions. He added, deleted, and changed other material. Counsel for Plaintiff never
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