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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054966
Party	Plaintiff Scott R. Smith
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Submission	Motion for Sanctions
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SCOTT R. SMITH, an individual, Petitioner, vs. COOK COLLECTION ATTORNEYS, P.L.C., a California corporation, Respondent.	)	Cancellation No. 92054966 Registration No. 3257604

COOK COLLECTION ATTORNEYS, P.L.C.'S
SECOND MOTION FOR ENTRY OF PREFILING ORDER

COOK COLLECTION ATTORNEYS, P.L.C. ("Respondent") hereby moves the United States Patent and Trademark Office ("TTAB") for the issuance of a prefiling order upon SCOTT R. SMITH ("SMITH"), barring SMITH from filing any further Petitions to Cancel, challenge, or litigate the trademarks of Cook Collection Attorneys, P.L.C. This motion replicates the prior motion filed by Respondent with this court on 12/30/11.

The difference with this motion is that SMITH on 1/26/12 filed dismissals without prejudice, to the below-listed proceedings pending before the TTAB:

1. PETITIONER'S WITHDRAWAL OF PETITION FOR CANCELLATION for Cancel Registration No. 3414311.

2. PETITIONER'S WITHDRAWAL OF PETITION FOR CANCELLATION for Cancel Registration No. 3257604.

The filings of the withdrawals, in the face of the pending motions to dismiss, for both of these Petitions constitutes a concession that the motions to dismiss were well-taken and that the motions would have been granted.

Under the law of malicious prosecution or Rule 11, the filing of a dismissal of a complaint by a plaintiff in the face of a Rule 12(b)(6) motion, or state law demurrer, generally constitutes an admission that the dismissal or demurrer is well taken. This rule likewise would apply before the TTAB, and the inference is that the motions brought by Respondent to dispose of these Petitions

would have been granted, and granted without leave to amend. The fountain of case law which supports this proposition arises out of malicious prosecution cases in which a plaintiff dismisses an action. A court may examine the dismissal, particularly a voluntary dismissal, to see whether or not the termination reflects upon the defendant's underlying innocence or liability. In *Rena v. Rigel USA, Inc.* (Cal. Ct. App., July 21, 2010, B217613) 2010 WL 2840067, the court stated as follows:

> "A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] '*It is not enough, however, merely to show that the proceeding was dismissed.'* [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits."* (*Eels v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855.) "* '*The key is whether the termination reflects on the underlying defendant's innocence. [Citations.] If the resolution of the underlying litigation "*leaves some doubt as to the defendant's innocence or liability[, it] is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff."* ([Citation), italics in original.) "* '*A termination [by dismissal] is favorable when it reflects "*the opinion of someone, either the trial court or the prosecuting party, that the action lacked merit or if pursued would result in a decision in favor of the defendant."

A court itself makes the determination to determine the culpability of the "prosecuting party." Such a determination is a question of law, and not fact. *See Schaffer v. Donner Management Co.* (Cal. Ct. App., Feb. 27, 2007, D047866) 2007 WL 593563, in which the court stated:

> "A voluntary dismissal without prejudice may be a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808.) However, where the underlying proceeding was not terminated on the merits, the reasons underlying the termination must be examined to see if they reflect the opinion of the court or the prosecuting party that the defendant was innocent. (See *Eells v. Rosenblum, supra,* 36 Cal.App.4th at p. 1855.) In determining whether the termination of the underlying litigation reflects the underlying defendant's innocence, the focus is not on the defendant's view of his innocence, but on the court or dismissing plaintiff's opinion that the defendant is innocent. (*Ibid.; Haight v. Handweiler, supra,* 199 Cal.App.3d at p. 89.) If there is a conflict in the record regarding the circumstances explaining the dismissal, the determination of the reasons is a question of fact. (*Fuentes v. Berry, supra,* 38 Cal.App.4th at p. 1808.) If the factual circumstances of the dismissal are undisputed, the issue of favorable termination is a question of law. (*Pattiz v. Minye, supra,* 61 Cal.App.4th at p. 826.)"

A dismissal without prejudice likewise may constitute a concession that the underlying case was meritless, as determined by the court. *See Golden West Builders, Inc. v. Kotic* (Cal. Ct. App., Aug. 11, 2010, B217206) 2010 WL 3156541, in which the court stated:

> "Generally, "*a voluntary dismissal, though expressly made '*without prejudice,'* is a favorable termination which will support an action for malicious prosecution.

> [Citations.]"* (*MacDonald v.. Joslyn* (1969) 275 Cal.App.2d 282, 289.) That is because "*[a] voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits."* (*Eells v. Rosenblum* (1995) 36 Cal.App .4th 1848, 1855.) To determine whether the voluntary dismissal reflects on the merits, the court must examine the reasons for the dismissal. (*Ibid.*) The dismissal is a termination on the merits "* '*if it reflects the opinion of either the court or the prosecuting party that the action would not succeed.'* [Citation.]"* (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 27.)
>
> There is no merit to Kotick's contention that the trial court's determination of "*favorable termination"* was improper, in that it was made on the basis of an inference, rather than admissible evidence."

In both motions to dismiss, Respondent demonstrated that Petitioner lacked the slightest standing and that the purpose of these Petitions was to coerce Respondent to abandon representation of EMI on the grounds that Respondent would face the threat of forfeiting valuable real property, i.e. Squeeze Trademark and the COOK Trademark, and expend enormous amounts of time in defending its trademarks. This court can independent make these findings, the effect of which would be to further buttress the motion for a prefiling order, along with other sanctions.

Standing is more than a technical defense, such as the statute of limitations. Standing goes to the core of any litigation in which standing protects parties from litigation brought by interlopers, strangers, or those only with a peripheral interest, but an ulterior claim. Standing protects parties from litigation sought by others to further their political, social, religious, or personal goals. Article III Constitutionally mandates that a party have standing to justify the pendency of a "case or controversy." As a Constitutional imperative, the federal courts can only adjudicate claims brought by parties who have a "stake in the outcome," rather than those parties who seek to use a proceeding to further non-judicial goals, such as this case, to thwart enforcement of a judgment arising out of another court.

I. PREFILING ORDER.

In Cancellation No. 92054966 (Squeezebloodfromturnip Trademark, hereinafter "Squeeze Trademark"), Respondent sought a prefiling order, commencing at page 9, lines 25-28, and continuing through to page 24. Respondent incorporates this motion by reference. This motion is still pending before this court.

II. RULE 11 MOTIONS SURVIVE THE FILING OF A DISMISSAL.

A Rule 11 motion will survive the filing of the dismissal of a complaint as the court retains jurisdiction to rule on the Rule 11 motion, even if the underlying action is dismissed. This has always been the state of the law, as laid down by *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 397-98 [110 S.Ct. 2447, 2457, 110 L.Ed.2d 359]. In that case, the Supreme Court made it abundantly clear that a dismissal does not deprive the court of jurisdiction to rule on a Rule 11 motion. The court stated as follows:

> "Both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their language, are completely compatible. Rule 41(a)(1) limits a litigant's power to dismiss actions, but allows one dismissal without prejudice. Rule 41(a)(1) does not codify any policy *398 that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction. As noted above, a voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "*stop, think and investigate more carefully before serving and filing papers."* Amendments to Federal Rules of Civil Procedure, 97 F.R.D. 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules) (Mar. 9, 1982)."

Other cases have likewise consistently held that Rule 11 motions are viable notwithstanding the dismissal of the underlying complaint. *See Nelson v. Napolitano*, 657 F.3d 586; *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90; *Schering Corporation and Key Pharmaceutical, Inc. v. Vitarine Pharmaceuticals, Inc. And Major Pharmaceuticals Corp.*, 889 F.2d 490; *In re Bath and Kitchen Fixtures Antitrust Litigation*, 535 F.3d 161; and *Aadvark Child Care and Learning Center, Inc. v. The Township of Concord, et al.*, 288 Fed.Appx. 16, 2008 WL 2916305 (C.A.3 Pa.)).

Therefore, this court can still act upon the pending motion for a prefiling order.

III. WHAT ARE THE IMPLICATIONS OF THE WITHDRAWALS IN THE FACE OF THE MOTION FOR A PREFILING ORDER?

These withdrawals constitute dismissals without prejudice of the two Petitions filed before the TTAB and are filed in the face of motions to dismiss the Petitions on the merits. These

withdrawals constitute an admission that the Petitions are meritless based upon the grounds as raised in the motions to dismiss.

SMITH has now filed a total of four meritless Petitions, two of which were lodged against Entrepreneur Media, Inc. and two against EMI's collection counsel. This really amounts to a total of four meritless Petitions to Cancel, in which the two Petitions against EMI's trademarks were dismissed with prejudice, and the two Petitions against EMI's counsel were abandoned and dismissed in the face of a stout motion to dismiss.

The court therefore has before it four separate Petitions whose sole purpose is to injure, damage, and effectively terrorize EMI and its lawyers by attempting to destroy their valuable property. SMITH has lost his case at the Ninth Circuit in that on 1/10/12, the Ninth Circuit rendered its Memorandum opinion affirming the judgment of nondischargeability. SMITH's conduct in attacking the trademarks of EMI's lawyer could only be interpreted as an attempt of coercion and distraction, hoping to frighten off the lawyer for the fear of losing world class intellectual property.

This case is extremely close to the facts in *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007). That case revolved around an ADA litigant filing frivolous actions against local restaurants. The District Court issued a prefiling order predicated upon contrived claims. (Pages 1053-1054) The court upheld the prefiling order based upon the authority allowed under 28 U.S.C. § 1651(a) (Page 1057). The court cited multiple factors (page 1058) generally consisting of a history of vexatious, harassing or duplicative lawsuits, a bad faith motive, whether the litigant is represented by counsel, needless expense, and whether or sanctions would be adequate. (Page 1058). The court noted that frivolous litigation also arises from claims which are totally false or grossly exaggerated. (Page 1061) As indicated in the original motion for prefiling order, Respondent has met this burden.

The filing of these withdrawals, however, further buttresses Respondent's entitlement to a prefiling order. The withdrawals constitute a concession that the dismissal motions would be well taken and that the court, if hearing the dismissal motions, would have necessarily granted relief. Such relief would have constituted a dismissal with prejudice. The dismissals themselves have

sought to serve SMITH's ultimate motive of forcing his adversaries to expend their time and money in needless actions, and otherwise accrue great expense which would otherwise make unattractive enforcement against SMITH himself. What SMITH has done is made enforcement against him a very expensive and difficult proposition in that SMITH responds by causing the judgment creditor, and now his lawyer, to spend money and time in defending their own property interest. As indicated by the Declaration of David J. Cook, approximately 20 plus hours were spent in filing the two dismissal motions. The Cook law firm spent significant sums of monies in protecting its trademark rights. More time is being spent in filing these papers. The Cook law firm now has sunk over $10,000 or more in time in dealing with SMITH's frivolous Petitions. If SMITH's goal was to cause financial loss as a price to pay in the enforcement of judgment against SMITH, SMITH has succeeded beyond his wildest dreams. If his strategy is to make collection of the judgment against him painful and expensive, he has succeeded.

SMITH admittedly is an extortionist, as his emails demanding money, all of which are set forth on pages 19 and 20 of the original prefiling motion, demonstrate that the purpose of his Petitions was to demand payment of money. SMITH specifically states on December 29, 2011, the following:

> ". . . So I am willing to withdraw my cases against your trademarks if you agree to abandon them and to provide reasonable compensation for my time, etc." (Email dated December 29, 2011 and marked *Exhibit "S"* to original motion.)

This email came as a shock, in that the demand for money based upon a frivolous filing, coupled with a demand to abandon valuable property, is the precise type of criminal conduct which would be an offense under Title 18 of this Code. Respondent, of course, rejected this claim, which now has led to the withdrawal of these Petitions.

The court is faced with four failed Petitions, two of which were filed against EMI's trademarks in which the Petitions were dismissed with prejudice, and now the two Petitions filed against EMI's lawyers which were withdrawn. The motive of filing these Petitions is to injure EMI and its lawyers, by accruing enormous expense and effort. SMITH only displays subjective and objective bad faith in prosecuting these Petitions, and that they have served no purpose. In all of these cases, SMITH has not demonstrated the slightest standing. SMITH is not represented by

counsel and cannot blame counsel for "bad advice." EMI and Respondent have been unduly burdened by these Petitions, not only for the expense incurred, but by the aggravation and time accrued in defense of these Petitions. A prefiling order is the appropriate remedy, as monetary sanctions are useless. These are the perfect facts which justify a prefiling order.

IV. WHY SHOULD THE TTAB ISSUE A PREFILING ORDER, GIVEN THE DISMISSALS OF THESE PROCEEDINGS?

Molski v. Evergreen Dynasty Corp. makes it very clear that prefiling orders are exceedingly rare and require an enormous showing. They are not lightly granted and are "extreme." (Page 1057) A prefiling order requires a "cautious review of the pertinent circumstances." (Page 1057) Stated in the vernacular, a prefiling order is a tall order.

This is the case for a prefiling order. This case is very close to the vindictive actions of those who seek to oppress parties from invoking their Constitutional rights out of the civil rights era, the action of criminals seeking to intimidate witnesses, and the actions of the malicious seeking to frighten, coerce, or deter parties or their lawyers from prosecuting righteous claims. Filing frivolous Petitions to destroy valuable intellectual property, such as trademarks, is an act of intimidation and a threat. This court should view this conduct by SMITH as an act of maliciousness and threat of destruction which seeks to undermine the administration of justice and deter others from free access to the courts. Letting SMITH "off the hook" lets SMITH profit from his maliciousness. SMITH withdrew his Petitions because he thought that he could escape the rigors of responding to the motion for a prefiling order. That would make SMITH, in his mind, the victor. This court ought to reject this strategy, and bar SMITH from any further filings.

V. CONCLUSION.

Both EMI and Respondent have been the target of expensive and protracted Petitions filed in this court seeking to destroy EMI and Respondent's valuable personal property. All of these Petitions have been meritless and the Petitions against EMI by the court have been already dismissed. SMITH withdrew the two Petitions against Respondent. Once the court finds that these Petitions have been meritless at all times, and brought in subjective bad faith, this court can enter a prefiling order barring any further relief sought by SMITH.

DATED: January 27, 2012

COOK COLLECTION ATTORNEYS

By:_____

DAVID F. COOK
Attorneys for Respondent
COOK COLLECTION ATTORNEYS, P.L.C.

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CERTIFICATE OF SERVICE

SCOTT R. SMITH
5714 Folsom Blvd., Suite 140
Sacramento, CA 95819

I declare:

I am employed in the County of San Francisco, California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 165 Fell Street, San Francisco, CA 94102. On the date set forth below, I served the attached:

COOK COLLECTION ATTORNEYS, P.L.C.'S SECOND MOTION FOR ENTRY OF PREFILING ORDER

on the above-named person(s) by:

__XXX__ (BY MAIL) Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed to the person(s) served above.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 27, 2012 at San Francisco, California.

Robert J. Perkiss