VIRGINIA:

BEFORE THE FOURTH DISTRICT, SECTION II SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
Isaac Philip Rabicoff VSB Docket No. 22-042-125771

SUBCOMMITTEE DETERMINATION
PUBLIC REPRIMAND WITHOUT TERMS

On December 08, 2022, a meeting was held in this matter before a duly convened Fourth District, Section II Subcommittee consisting of Sean A.O. Sherlock, Esq., Foster S.B. Friedman, Esq., and Jennifer J. Krischer. During the meeting, the Subcommittee voted to approve an agreed disposition for a Public Reprimand Without Terms pursuant to Part 6, § IV, ¶ 13-15.B.4. of the Rules of the Supreme Court of Virginia. The agreed disposition was entered into by the Virginia State Bar, by Renu M. Brennan, Bar Counsel, and Isaac P. Rabicoff, Respondent.

WHEREFORE, the Fourth District, Section II Subcommittee of the Virginia State Bar hereby serves upon Respondent the following Public Reprimand without Terms:

I. FINDINGS OF FACT

1. Respondent has been licensed to practice law since 2013, when he was licensed in Illinois. In October 2019, Respondent was licensed to practice law in the Commonwealth of Virginia. Respondent is also licensed to practice before the United States Patent and Trademark Office. According to Respondent, the jurisdictions he most frequently files patent infringement cases are in Delaware, Texas (Western District), Illinois (Northern District), and California (Northern District).

2. From July 2018 through October 2020, Respondent filed 49 patent infringement lawsuits in the United States District Court, Northern District of California (sometimes referred to herein as "the Court"). At the time Respondent filed the 49 lawsuits, Respondent was not admitted to practice law before the Court.

3. In 29 of the 49 cases Respondent filed, Respondent did not seek admission to appear *pro hac vice* or pay the *pro hac vice* application fee.

RESPONDENT'S MISREPRESENTATIONS AS TO *PRO HAC VICE* APPLICATION AND MISCONDUCT IN *CEDAR LANE TECHNOLOGIES INC. V. BLACKMAGIC DESIGN INC.*, CASE NO. 20-CV-01302-VC (N.D. Cal.)

4. On February 20, 2020, Respondent filed a patent infringement suit on behalf of Cedar Lane Technologies Inc. *(Cedar Lane Technologies Inc. v. Blackmagic Design Inc*., Case No. 20-cv-01302-VC "the Cedar Lane Lawsuit") in the United States District Court, Northern District of California. Respondent appeared as "Pro Hac Vice admission to be filed."

5. Respondent served as lead counsel in and for the entirety of the Cedar Lane Lawsuit. Attorney Kirk Anderson, admitted in California and a member of the Northern District of California Bar, was co-counsel in the Cedar Lane Lawsuit.

6. On May 6, 2020, Respondent appeared as "Pro Hac Vice admission pending" on Cedar Lane Technology's motion to continue hearing and extend time to serve defendant.

7. As of May 6, 2020, Respondent had not applied for *pro hac vice* admission in the Cedar Lane Lawsuit.

8. On June 26, 2020, defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

9. On July 1, 2020, Respondent and Anderson filed a first amended complaint. Anderson appeared as lead counsel. Respondent appeared as "Pro Hac Vice admission to be filed." Respondent was lead counsel at the time of the filing of the first amended complaint. Respondent did not file an application for *pro hac vice admission* for three months.

10. On July 6, 2020, Respondent and Anderson filed a second amended complaint without consent of defendant or leave of court as required by Fed. R. Civ. P. 15. Respondent and Anderson identified Anderson as lead counsel although Respondent was acting as lead counsel. Respondent still appeared as "Pro Hac Vice admission to be filed." Respondent did not file a pro hac vice application until October 29.

11. In response to the second amended complaint, defendant filed a Notice of Non-Opposition to Entry of Second Amended Complaint, which explained that the second amended complaint was defective under Fed. Civ. Pro. 15(a)(2) because Cedar Lane had amended its complaint once as of right and had not received defendant's permission before amending a second time. Notwithstanding the defect, defendant did not object to the second amended complaint. The Court ordered the second amended complaint was the operative complaint.

12. On July 20, 2020, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), defendant filed motions to dismiss and strike the second amended complaint. Defendant also filed its answer.

13. On July 31, 2020, Respondent and Anderson filed a third amended complaint without seeking leave of court or obtaining the defendant's consent, as required by Rule 15. Anderson was again identified as lead counsel although Respondent was still acting as lead counsel. Respondent still appeared as "Pro Hac Vice admission to be filed," even though Respondent did not file a *pro hac vice* until October 29.

14. On August 14, 2020, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), defendant filed motions to dismiss and strike the third amended complaint.

15. Respondent filing as "of Counsel" while acting as lead counsel, opposed the motion to strike arguing, in contravention of Rule 15's clear language, that Rule 15 allows a plaintiff to amend its pleadings as of right every time the defendant files a new motion under Rule 12(b), (e), or (f). As the Court later observed, Respondent's argument "defied Rule 15's plain language" and common sense. Rule 15 provides that a party "may amend a pleading *once* as a matter of course within … 21 days after service of a motion under Rule 12(b)," but that for "other amendments" and "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a) (emphasis added).

16. On August 6, 2020, the Court scheduled a hearing for October 1, 2020, on defendant's motions to dismiss.

17. On October 1, 2020, Respondent did not appear at the hearing on the motions to dismiss and strike. Respondent emailed the Court about 15 minutes after the start stating that "he inadvertently attempted to connect through the zoom information provided on Judge's website."

18. The Court granted defendant's motion to strike the third amended complaint and issued an order to show cause as to why the case "should not be dismissed for failure to prosecute, and why counsel for Cedar Lane should not be sanctioned for their repeated failure to comply with Rule 15 and their misinterpretations regarding the language of Rule 15 in their submissions to the Court."

19. The Court required Respondent and Anderson to respond separately to the order of show cause.

20. Respondent authored the response to the show cause. Respondent, however, listed himself as "of Counsel." The response stated that the parties had reached an out-of-court agreement thus mooting the question of whether the case should be dismissed for failure to prosecute.

21. In the response, Respondent and Anderson stated that they failed to appear on October 1 "because the hearing was scheduled two days after it was docketed, [so] counsel's scheduling procedure – which would include double-checking the docket—was less rigorous than usual."

22. In his personal declaration, Respondent stated that the Court scheduled the hearing two days before the hearing. In fact, the Court scheduled the hearing eight weeks in advance.

23. Respondent further declared he was "lead counsel," contradicting his identification on the pleadings as "Of Counsel," and he misinterpreted Rule 15 as allowing the plaintiffs to file a new complaint after each motion to dismiss.

24. On October 29, 2020, Respondent finally filed an application for admission *pro hac vice* in the Cedar Lane Lawsuit. Respondent named Anderson as local co-counsel. Respondent provided a Colorado address for Anderson. Respondent did not provide a local California address for Anderson[1].

25. On November 3, 2020, the Court asked Respondent to provide a summary of all cases in which he appeared before the Northern District of California in the past five years.

26. On November 12, 2020, the Court conducted a hearing on the show cause and ordered Respondent to submit an updated appearance chart by November 13.

27. At the hearing on the show cause, Respondent and Anderson stated that Respondent authored the opposition brief and served as lead counsel for the entirety of the lawsuit.

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[1] See United States District Court, Northern District of California, Civil Local Rule 11-3(a)(3).

11-3. Pro Hac Vice

> (a) Application. An attorney who is not a member of the bar of this Court may apply to appear pro hac vice in a particular action in this district by submitting to the Clerk, together with the written application, a true and correct copy of a certificate of good standing or other similar official document issued by the appropriate authority governing attorney admissions for the relevant bar. Said certificate or other document must be dated no more than one year prior to the date of application for admission. The applicant must also submit an oath certifying the following:
>
> > (3) That an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel.

NOVEMBER 19, 2020 ORDER IMPOSING SANCTIONS AND REFERRING RESPONDENT TO STANDING COMMITTEE ON PROFESSIONAL CONDUCT

28. By Order entered November 19, 2020 ("Rule 11 Sanctions and Referral Order"), attached as Exhibit A hereto, the Court found:

> Rule 11 sanctions are warranted against [Respondent] based on the objectively frivolous arguments and misleading statements he made. First, the argument he advanced in the opposition brief—that Rule 15 allows a plaintiff to amend its complaint as a matter of right every time the defendant files a Rule 12(b) motion—is objectively frivolous. The argument defies Rule 15's plain language, which provides that a party "may amend its pleading *once* as a matter of course within … 21 days after service of a motion under Rule 12(b)," but that for "other amendments" and "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a) (emphasis added). This argument also defies common sense, as it would allow plaintiffs to endlessly file new complaints in response to every new motion to dismiss. During the hearing on the order to show cause, both [Respondent] and Anderson admitted that the interpretation advanced in the opposition brief was objectively frivolous. And although [Respondent] maintained that at the time he wrote the brief he made an honest mistake about Rule 15's interpretation—and only later understood the objectively frivolous nature of his argument—[Respondent] was put on notice of Rule 15's clear requirements when [defendant] filed its notice of non-opposition to the second amended complaint.
>
> Moreover, the manner in which [Respondent] quoted Rule 15 in his opposition brief was misleading Specifically, [Respondent] quoted Rule 15 in the context of making the following assertion: "The Federal Rules allow a party to amend pleadings as of right '21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.'" But [Respondent] selectively omitted the key phrase which immediately precedes the quoted language and provides that a party can amend pleadings "once as a matter of course" 21 days after service of a Rule 12(b) motion, not every time a Rule 12(b) motion is filed.
>
> These were not the only deceptive statements [Respondent] made. He also argued in the response to the order to show cause (and in his personal declaration in support of the response) that his failure to register and appear for the October 1 hearing was in part due to the Court having scheduled the hearing

> two days prior, on September 29. But the October 1 hearing was scheduled on August 6, eight weeks before it occurred. What happened on September 29 was that the parties received notice (and instructions) that they must pre-register to appear by Zoom in advance of the hearing. [Respondent] thus attempted to suggest that the Court was somehow responsible for his failure to appear at the hearing because he did not receive adequate notice, when in fact he was on notice for two months. In addition, [Respondent's] representations to the Court about his role in this case have been misleading. He alternately described himself as "of Counsel" and "Pro Hac Vice admission to be filed" on the filings but asserted in his declaration that he is "Lead Counsel." [Respondent] has not provided a satisfactory answer for these discrepancies. Moreover, considering all of the circumstances in this case, including his responses and demeanor during the hearing on the order to show cause, the Court finds the position [Respondent] took regarding Rule 15 amounts to bad faith. Sanctions are thus also justified under the Court's inherent authority. [citation omitted].

29. By the Rule 11 Sanctions and Referral Order, the Court imposed sanctions of $1,000 pursuant to Rule 11 against Respondent and referred Respondent to the Standing Committee of Professional Discipline in the Northern District of California ("Standing Committee"). The Court stated:

> Mr. Rabicoff is a serial filer of patent lawsuits in the Northern District of California, he is not admitted to practice in this district. Sometimes he seeks pro hac vice admission in these lawsuits, which is improper for someone who practices regularly here. But often Rabicoff does not even bother to seek pro hac vice admission or pay the required fee. Instead, he settles or otherwise dismisses the suits before his failure to seek admission or pay the fee is detected by the Court. Rabicoff is thus referred to the Northern District's Standing Committee on Professional Conduct for further investigation into whether he has been systematically violating the local rules or otherwise acting illegally or unethically in connection with this patent law practice in this district.

30. On December 8, 2020, Respondent paid the $1,000 sanction.

31. By a motion to alter or amend judgment filed by Respondent December 16, 2020, Respondent apologized "for the procedural irregularities and sloppiness in the way he handled this case." Respondent disputed that he acted in bad faith or made deceptive statements.

32. By Order entered January 26, 2021, the Court denied Respondent's request for reconsideration of the Rule 11 Sanctions and Referral Order.

33. Respondent did not appeal the Rule 11 Sanctions and Referral Order. The Rule 11 Sanctions and Referral Order was final as of February 25, 2021[2].

STANDING COMMITTEE ON PROFESSIONAL CONDUCT'S INVESTIGATION OF AND FINDINGS RE: RESPONDENT

34. The Chairman of the Standing Committee assigned two members to investigate Respondent.

35. According to one of the two investigating members, the only issue before them was Respondent's serial filings. The Standing Committee made no findings with regard to Respondent's bad faith, unethical conduct, or whether Respondent made any deceptive statements to the Court.

36. On January 24, 2022, the Standing Committee issued its final report proposing an informal resolution that:

> (i) By February 28, 2020, Respondent pay $9,193.00, the pro hac vice fees for the 29 matters he filed in the Northern District in the two years prior to the Rule 11 Sanctions and Referral Order.
>
> (ii) Respondent agrees, going forward, that he will regularly review and comply with the local rules and file his pro hac vice applications and pay accompanying pro hac.

37. By Order entered February 4, 2022, the Court approved the Standing Committee's informal resolution and ordered the matter closed upon receipt of the fees.

38. On February 16, 2022, Respondent paid the $9,193.00.

39. By letter dated May 11, 2022, Respondent reported the November 2020 Rule 11 Sanctions and Referral Order to the VSB.

[2] Pursuant to Fed. R. App. P. 4(a)(1)(A) an appeal must be filed within 30 days.

II. NATURE OF MISCONDUCT

Respondent's conduct constitutes misconduct in violation of the following provisions of the California Rules of Professional Conduct.[3]

RULE 3.1 Meritorious Claims and Contentions

(a) A lawyer shall not:

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:

(1) knowingly*[4] make a false statement of fact or law to a tribunal*[5] or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

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[3] Pursuant to Virginia Rule of Professional Conduct, Rule 8.5(b), the California Rules of Professional Conduct apply to Respondent's misconduct.

RULE 8.5 Disciplinary Authority; Choice Of Law

(b) Choice of Law. In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;

[4] An asterisk (*) identifies a word or phrase defined in California Rule 1.0.1 Terminology.

RULE 1.0.1.(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances.

RULE 1.0.1 (g-1) "person" has the meaning stated in Evidence code section 175.
"Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." Cal. Evid. Code § 175

[5] RULE 1.0.1 (m) "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

> (c) engage in conduct involving dishonesty, fraud*[6], deceit, or reckless or intentional misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;

III. PUBLIC REPRIMAND WITHOUT TERMS

Accordingly, having approved the agreed disposition, it is the decision of the Subcommittee to impose a Public Reprimand Without Terms and Isaac P. Rabicoff is hereby so reprimanded. Pursuant to Part 6, § IV, ¶ 13-9.E of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs.

FOURTH DISTRICT, SECTION II
SUBCOMMITTEE
OF THE VIRGINIA STATE BAR

By: _____
Sean A. O. Sherlock, Esq.
Chair

[6] RULE 1.0.1.(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

CERTIFICATE OF MAILING

I certify that on December 12, 2022, a true and complete copy of the Subcommittee Determination (Public Reprimand Without Terms) was sent by email, certified mail, and first-class mail to Isaac P. Rabicoff, Respondent, at isaac@rabilaw.com and 5680 King Centre Drive, Suite 645, Alexandria, VA 22315, Respondent's last address of record with the Virginia State Bar.

Renu M. Brennan
Bar Counsel

VSB Exhibit A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CEDAR LANE TECHNOLOGIES INC., Plaintiff, v. BLACKMAGIC DESIGN INC., Defendant.	Case No. 20-cv-01302-VC **ORDER IMPOSING SANCTIONS AND REFERRING ATTORNEY RABICOFF TO STANDING COMMITTEE ON PROFESSIONAL CONDUCT**

While representing plaintiff Cedar Lane Technologies in this patent infringement suit, Isaac Rabicoff and Kirk Anderson: (i) repeatedly flouted Rule 15 by filing multiple amended complaints without seeking leave from the Court or consent from defendant Blackmagic Design; (ii) made objectively frivolous and misleading arguments in defending their defective filings; and (iii) failed to appear at a hearing on Blackmagic's motions to strike and dismiss. The Court issued an order to show cause why Rabicoff and Anderson should not be sanctioned for this conduct. In response, both attorneys made misleading statements about the procedural history of the case.

Rule 11 sanctions are warranted against Anderson because, as he now admits, he took positions in his filings that were objectively frivolous. Sanctions pursuant to both Rule 11 and the Court's inherent authority are warranted against Rabicoff because he took the same objectively baseless positions and did so in bad faith.

Furthermore, the process of investigating the above-referenced misconduct revealed potential larger-scale misconduct by Rabicoff. It turns out that although Rabicoff is a serial filer of patent lawsuits in the Northern District of California, he is not admitted to practice in this district. Sometimes he seeks pro hac vice admission in these lawsuits, which is improper for

someone who practices regularly here. But often Rabicoff does not even bother to seek pro hac vice admission or pay the required fee. Instead, he settles or otherwise dismisses the suits before his failure to seek admission or pay the fee is detected by the Court. Rabicoff is thus referred to the Northern District's Standing Committee on Professional Conduct for further investigation into whether he has been systematically violating the local rules or otherwise acting illegally or unethically in connection with his patent law practice in this district.

I

This case was filed by Cedar Lane against Blackmagic alleging patent infringement. Throughout the lawsuit, Anderson and Rabicoff have served as attorneys for Cedar Lane. Anderson is licensed in California and is a member of the Northern District of California bar; Rabicoff is licensed in Illinois and Virginia and is not a member of this district's bar. On the original complaint, Anderson appeared as lead counsel and Rabicoff as "Pro Hac Vice admission to be filed."

After Blackmagic filed a motion to dismiss, Cedar Lane filed a first amended complaint, as it was entitled to do under Federal Rule of Civil Procedure 15(a)(1). Five days later, and before Blackmagic had responded to the first amended complaint, Cedar Lane filed a second amended complaint. On both the first and second amended complaints, Anderson appeared as lead counsel and Rabicoff as "Pro Hac Vice admission to be filed."

In response to the second amended complaint, Blackmagic filed a "Notice of Non-Opposition to Entry of Second Amended Complaint." The notice explained that the filing of the second amended complaint was defective under Federal Rule of Civil Procedure 15 because Cedar Lane had already amended its complaint once as of right, and had not received Blackmagic's written consent or the Court's permission before amending a second time, as required under the rule. *See* Fed. R. Civ. P. 15(a)(2). Blackmagic further explained that it did not oppose the entry of the second amended complaint despite this defect, and requested permission to file a new motion to dismiss if the Court accepted the new complaint. The Court ordered that the second amended complaint would become the operative complaint and denied the first

motion to dismiss as moot. Blackmagic then moved to dismiss the second amended complaint.

Eleven days later, Cedar Lane filed a third amended complaint, with Anderson still appearing as lead counsel and Rabicoff as "Pro Hac Vice admission to be filed." Blackmagic filed a motion to strike this complaint on the ground that Cedar Lane had once again failed to comply with Rule 15's requirements by amending its pleadings without receiving written consent from Blackmagic or permission from the Court.

Cedar Lane opposed Blackmagic's motion to strike. In the opposition brief, Cedar Lane argued that it had complied with Rule 15 because the rule allows a plaintiff to amend its pleadings as of right *every time* the defendant files a new motion under Rule 12(b), (e), or (f). Anderson was listed as lead counsel on this brief and Rabicoff was listed as "of Counsel."

On October 1, a hearing was held on Blackmagic's motion to dismiss and motion to strike. Neither Anderson nor Rabicoff pre-registered for the hearing, as the parties were told they were required to do, and neither showed up for the hearing itself. Rabicoff emailed the Court about 15 minutes after the start of the hearing stating that there had been a "misunderstanding" about how to connect via zoom and that he "inadvertently attempted to connect through the zoom information provided on Judge's website." This email was not seen until after the hearing had ended.

The Court granted Blackmagic's motion to strike the third amended complaint and issued an order to show cause as to why the case "should not be dismissed for failure to prosecute, and why counsel for Cedar Lane should not be sanctioned for their repeated failure to comply with Rule 15 and their misrepresentations regarding the language of Rule 15 in their submissions to the Court." The Court later clarified that the order to show cause applied to both Anderson and Rabicoff, and that each must respond separately.

In their response to the order to show cause, on which Anderson appeared as lead counsel and Rabicoff as "of Counsel," Rabicoff and Anderson first noted that the question of whether the case should be dismissed for failure to prosecute had become moot because the parties had reached an out-of-court agreement. Shortly after, the parties filed a joint stipulation of dismissal

with prejudice, with each side bearing its own costs, expenses, and attorney's fees.

Also in the response, Anderson and Rabicoff explained that their failure to appear for the October 1 hearing was in part "because the hearing was scheduled two days after it was docketed, [so] counsel's scheduling procedure—which would include double-checking the docket—was less rigorous than usual." Both Rabicoff and Anderson also asserted in their personal declarations that the Court had scheduled the October 1 hearing only two days before the hearing itself. Rabicoff further declared that he was "lead counsel" in the action, and that he had not intentionally violated Rule 15 but had simply misinterpreted the rule as allowing the plaintiffs to file a new complaint after each new motion to dismiss. Anderson, in contrast, declared that he knew Rule 15 did not allow this, but that he had not adequately reviewed either the complaints or the opposition brief before they were filed.

In response to a request by the Court, Rabicoff also submitted a chart with information about his history of litigation in the Northern District of California over the past five years.[1] The Court has not verified any of the information in Rabicoff's chart, but it represents that from July 2018 through October 2020 he filed 49 lawsuits in this district. All of them were patent cases in which he says he served as lead counsel. In 29 of the 49 cases, Rabicoff did not seek admission to appear pro hac vice or pay the pro hac vice application fee. In one case, a law firm associate appeared and filed the pro hac vice application and fee, but Rabicoff, acting as lead counsel, did not. Anderson served as local counsel in six of Rabicoff's 49 cases.

Two weeks before the hearing on the order to show cause (and after the parties had submitted a stipulation to dismiss the case), Rabicoff filed his motion to appear pro hac vice, naming Anderson as local co-counsel. The address for Anderson that Rabicoff provided was a Colorado address; no local California address was provided. At the hearing, the lawyers stated that it was Rabicoff who had authored the opposition brief and who had served as lead counsel for the entirety of the lawsuit.[2]

[1] This chart was supplemented and updated after the hearing on the order to show cause.
[2] Both Rabicoff and Anderson submitted proposed supplemental declarations after the hearing on

II

Federal Rule of Civil Procedure 11 provides that when an attorney presents "a pleading, written motion, or other paper" to a court, the attorney "certifies that to the best of [his or her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law" and "the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(2), (b)(3). Representations that are "legally frivolous" or "factually misleading" are sanctionable. *Truesdell v. Southern California Permanente Medical Group*, 293 F.3d 1146, 1153 (9th Cir. 2002). A Court may issue monetary sanctions against an attorney on its own initiative if it issues an order to show cause before voluntary dismissal or settlement of the case. Fed. R. Civ. P. 11(c)(3), (c)(5)(B). Sanctions imposed under Rule 11 on a court's own initiative are ordinarily only proper when an attorney's conduct is something akin to contempt of court. *See United National Insurance Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1116 (9th Cir. 2001).

Courts can also impose monetary sanctions under their inherent authority if an attorney acts in bad faith or engages in conduct "tantamount to bad faith." *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). This encompasses a "broad range of willful improper conduct," including when an attorney's actions are simultaneously reckless and frivolous. *Id.* at 992, 994.

Rule 11 sanctions are warranted against Rabicoff based on the objectively frivolous arguments and misleading statements he made. First, the argument he advanced in the opposition brief—that Rule 15 allows a plaintiff to amend its complaint as a matter of right every time the defendant files a Rule 12(b) motion—is objectively frivolous. The argument defies Rule 15's plain language, which provides that a party "may amend its pleading *once* as a matter of course within . . . 21 days after service of a motion under Rule 12(b)," but that for "other amendments" and "[i]n all other cases, a party may amend its pleading only with the opposing party's written

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the order to show cause; the motion to consider those supplemental filings is granted.

consent or the court's leave." Fed. R. Civ. P. 15(a) (emphasis added). The argument also defies common sense, as it would allow plaintiffs to endlessly file new complaints in response to every new motion to dismiss. During the hearing on the order to show cause, both Rabicoff and Anderson admitted that the interpretation advanced in the opposition brief was objectively frivolous. And although Rabicoff maintained that at the time he wrote the brief he made an honest mistake about Rule 15's interpretation—and only later understood the objectively frivolous nature of his argument—Rabicoff was put on notice of Rule 15's clear requirements when Blackmagic filed its notice of non-opposition to the second amended complaint.

Moreover, the manner in which Rabicoff quoted Rule 15 in his opposition brief was misleading. Specifically, Rabicoff quoted Rule 15 in the context of making the following assertion: "The Federal Rules allow a party to amend pleadings as of right '21 days after service of a responsive pleading or **21 days after service of a motion under Rule 12(b)**, (e), or (f), whichever is earlier.'" But Rabicoff selectively omitted the key phase which immediately precedes the quoted language and provides that a party can amend pleadings "once as a matter of course" 21 days after service of a Rule 12(b) motion, not every time a Rule 12(b) motion is filed.

These were not the only deceptive statements Rabicoff made. He also argued in the response to the order to show cause (and in his personal declaration in support of the response) that his failure to register and appear for the October 1 hearing was in part due to the Court having scheduled the hearing two days prior, on September 29. But the October 1 hearing was scheduled on August 6, eight weeks before it occurred. What happened on September 29 was that the parties received notice (and instructions) that they must pre-register to appear by Zoom in advance of the hearing. Rabicoff thus attempted to suggest that the Court was somehow responsible for his failure to appear at the hearing because he did not receive adequate notice, when in fact he was on notice for two months. In addition, Rabicoff's representations to the Court about his role in this case have been misleading. He alternately described himself as "of Counsel" and "Pro Hac Vice admission to be filed" on the filings, but asserted in his declaration that he is "Lead Counsel." Rabicoff has not provided a satisfactory answer for these

discrepancies. Moreover, considering all of the circumstances in this case, including his responses and demeanor during the hearing on the order to show cause, the Court finds that the position Rabicoff took regarding Rule 15 amounts to bad faith. Sanctions are thus also justified under the Court's inherent authority. *See Fink*, 239 F.3d at 994.

Rule 11 sanctions are also warranted against Anderson. As Anderson acknowledged, he had a continuing obligation as local co-counsel and as signatory to the briefs to ensure that they did not contain frivolous arguments or misleading statements. He stated that he knew at the time the opposition brief was filed that its interpretation of Rule 15 was objectively frivolous, but that he simply did not review the brief before filing it or know that this was the argument it advanced. For purposes of Rule 11, this does not matter: an attorney certifies that a motion makes nonfrivolous arguments by "signing, filing, [or] submitting" it. Fed. R. Civ. P. 11(b). Anderson did all three, and his failure to review the brief before he signed and filed it was reckless. And although Anderson would be sanctioned based on that conduct alone, he made things worse by signing, filing, and submitting the response to the order to show cause, which, as described above, wrongfully implied that Rabicoff's failure to appear at the October 1 hearing was partially due to the Court having scheduled the hearing two days before it occurred. Anderson's declaration in support of the response made similar representations. At the hearing on the order to show cause, Anderson stated that his understanding of the schedule came from Rabicoff, but it was obvious by that time that Rabicoff could not be trusted to truthfully tell him what was happening. Anderson could have and should have verified this information himself before signing the response or submitting the sworn declaration.

However, unlike Rabicoff, Anderson does not appear to have proceeded in bad faith. He certainly should have been far more vigilant in complying with his duties as local counsel and reviewing the filings he signed and filed, and his conduct was reckless. But he does not seem to be the one primarily responsible for the false representations made to the Court.

III

When there is reason to believe an attorney has engaged in unprofessional conduct, the

Court may, in addition to ordering sanctions, refer the matter to the Northern District of California's Standing Committee on Professional Conduct. *See* Civil Local Rule 11-6. Rabicoff is referred to the Committee for an investigation into the broader practices discussed in this order. Specifically, Rabicoff's chart asserts that he has filed 49 patent cases in this district in just over two years. Attorneys who regularly practice in the Norther District of California must be admitted to practice here; they may not appear pro hac vice. *See* Civil Local Rule 11-3. Moreover, Rabicoff appears to be engaging in a deliberate scheme to avoid paying pro hac vice fees—he has failed to seek admission to proceed pro hac vice or pay the corresponding fee in 30 of the 49 cases listed on his chart.

It bears emphasis that the Court has not investigated whether the information provided in Rabicoff's chart is complete or accurate. Nor has the Court fully explored all the potential rule violations that Rabicoff has committed. The Court requests that the Committee more thoroughly investigate and evaluate Rabicoff's practices and report back to the Court in writing with its findings.

IV

Anderson is sanctioned $500 under Rule 11 for his frivolous arguments and misrepresentations in the opposition brief and in response to the order to show cause. Rabicoff is sanctioned $1,000 pursuant to Rule 11 and the Court's inherent authority for his frivolous arguments and misrepresentations in the opposition brief and in response to the order to show cause. Payment shall be made to the Clerk of the Court within 14 days of this order. Rabicoff is also referred to the Northern District's Standing Committee on Professional Conduct for further investigation into his practices of filing patent lawsuits in this Court.

Rabicoff's motion to appear pro hac vice is denied.

The parties' stipulation to dismiss the case with prejudice—filed after the order to show cause was issued—is now granted.

IT IS SO ORDERED.

Dated: November 19, 2020



VINCE CHHABRIA
United States District Judge