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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 OFFICE DEPOT, INC.,

No. C 06-80356 SI

9 Plaintiff,

ORDER RE: MOTIONS

10 v.

(Docs. 170, 173 175, 176, 185)

11 JOHN ZUCCARINI,

12 Zuccarini.
13 _____/

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15 On September 7, 2010, the Court filed an Order granting in part and denying in part judgment
16 creditor DS Holdings' and intervener United States' amended motion to authorize the sale of domain
17 names and distribute the proceeds ("Sale Order"). Doc. 169. On September 13, the Court filed an Order
18 denying DS Holdings' application for findings of contempt against judgment debtor John Zuccarini
19 ("Contempt Denial Order"). Doc. 172. Both in response and independently, DS Holdings and Zuccarini
20 have filed a variety of motions, regarding which the Court rules as follows.
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22 **I. Doc. 170**

23 Zuccarini filed an amended motion to strike on September 9, 2010, doc. 170, requesting that the
24 Court strike DS Holdings' court filing of August 30, 2010, doc. 159. Zuccarini makes a confusing
25 argument that the document should be stricken because it was not responsive to the Court's August 25,
26 2010 Order. Doc. 158. The August 25 Order related to DS Holdings' and the United States' motion
27 to authorize the sale of domain names and distribute the proceeds, and it requested that the they respond
28 to a certain argument contained in one of Zuccarini's filings. The August 30, 2010 filing related to DS

1 Holdings' motion for a finding of contempt against Zuccarini. Zuccarini is correct that it was not
2 responsive—but it was not purported to be responsive. It was completely unrelated. If the amended
3 motion to strike was not mooted by the Contempt Denial Order, the Court would deny it on the merits.

4 Zuccarini's amended motion to strike is DENIED.

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6 **II. Doc. 173**

7 On September 10, Zuccarini filed objections to the Court's Sale Order. Doc. 173. Also listed
8 in the document heading were two motions. The first was a "motion to order DS Holdings to produce
9 waiver of assignment rights by registrars for domain names owned by Zuccarini." The second was a
10 "motion to rescind order of 9/07/2010." Inside of the document, Zuccarini makes arguments regarding
11 the first motion listed in the heading, and regarding what he called his "motion to allow proper time to
12 respond to amended auction proposal."

13 Zuccarini's objections and motions are, in effect, a motion for reconsideration. As such, the
14 motions are improper because he failed to seek leave of this Court before filing them, as required by
15 Civil Local Rule 7-9(a). Had Zuccarini sought leave of Court, the motions would have been denied
16 because Zuccarini has not established any of the requirements of that rule:

- 17 (1) That at the time of the motion for leave, a material difference in fact or law exists
18 from that which was presented to the Court before entry of the interlocutory order for
19 which reconsideration is sought. The party also must show that in the exercise of
20 reasonable diligence the party applying for reconsideration did not know such fact or law
21 at the time of the interlocutory order; or
22 (2) The emergence of new material facts or a change of law occurring after the time of
23 such order; or
24 (3) A manifest failure by the Court to consider material facts or dispositive legal
25 arguments which were presented to the Court before such interlocutory order.

26 *See* Civil Local Rule 7-9(b). The only argument that raises any new issues is Zuccarini's argument that
27 he was not given sufficient time to respond to DS Holdings' and the United States' amended auction
28 proposal. Zuccarini indicates that the original proposal had T.R.A.F.F.I.C. as auctioneer and that the
amended proposal has Rick Latona as auctioneer. But Zuccarini does not object to Rick Latona being
auctioneer, indicate what response he would have provided had he been given the opportunity, or
otherwise explain how he was prejudiced by the purported error. Zuccarini's prior objection to
T.R.A.F.F.I.C. was specific to a purported conflict of interest regarding that specific auction house. *See*

1 doc. 8. Therefore, the Court would deny Zuccarini's motions even they were properly filed as a motion
2 for reconsideration.

3 Accordingly, Zuccarini's motions are DENIED.
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5 **III. Doc. 175**

6 On September 14, Zuccarini filed a document containing three motions: (1) "Motion to disallow
7 auction of domain names and to return all domain names to Zuccarini based on transfer of domain
8 names executed on expired, invalid writ of execution"; (2) "Motion to Court to clarify order of
9 9/13/2010 as to what actions the court considers to constitute threatening, improper conduct, and
10 interfering with the action of domain names"; and (3) "Motion to deny DS Holdings distribution of
11 revenues and to order receiver to distribute all rev[enu]es to the IRS based on fraudulent transfer of
12 domain names by expired writ."

13 Like Zuccarini's motions in document 173, Zuccarini's first motion is, in effect, a motion for
14 reconsideration of the Sale Order. It is based on his understanding of court proceedings that occurred
15 in 2006 and 2007. These are not new facts, materially different facts, or previously presented arguments
16 that the Court failed to consider. Zuccarini has failed to meet the requirements of Civil Local Rule 7-
17 9(a), either by requesting leave to file a motion for reconsideration, or by establishing any of the
18 requirements for such a motion to be granted.

19 Zuccarini's request for clarification of the Contempt Denial Order merits slightly more
20 discussion. On September 13, the Court denied DS Holdings' application for findings of contempt
21 against Zuccarini. Doc. 172. However, the Court noted that it would "not condone future threatening
22 or improper conduct," and the Court admonished Zuccarini "that if he attempts to interfere with the
23 Court-approved auction process, the Court will be prepared to consider a renewed request for a finding
24 of contempt and/or appropriate sanctions." *Id.* Zuccarini is concerned that this order is unclear.
25 Zuccarini now asks the Court "what specific actions The Court considers to constitute threatening,
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1 improper conduct.”¹ The Court does not need to clarify the order, as the order clarifies itself.
2 Threatening and improper conduct, as contemplated by the order, is conduct whereby Zuccarini attempts
3 to interfere with the Court-approved auction process. Moreover, the Court already indicated what type
4 of actions are prohibited, as it specifically found that the activities that formed the basis of DS Holdings’
5 motion were designed to derail the auction and then prohibited Zuccarini from engaging in actions
6 designed to derail the auction.

7 Zuccarini’s third motion is a motion to deny DS Holdings distribution of revenues. This motion
8 is premature. The Court has already denied without prejudice DS Holdings’ and the United States’
9 motion to authorize distribution of the auction proceeds. The Court ordered DS Holdings and the United
10 States to file a proposed distribution plan. If and when DS Holdings and the United States file their
11 proposed distribution plan, the Court will then be in the position to consider any of Zuccarini’s
12 objections thereto.

13 Accordingly, Zuccarini’s motions are DENIED.
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15 **IV. Doc. 176**

16 The next motion, a second application for a finding of contempt against Zuccarini, was filed by
17 DS Holdings on September 14, 2010. DS Holdings requests that Zuccarini be found in contempt for
18 a variety of acts undertaken before the Court’s Contempt Denial Order. As explained in the Contempt
19 Denial Order, a party seeking a finding of contempt must show by clear and convincing evidence that
20 another party has violated a court order. *See* doc. 172; *In re Dual-Deck Video Cassette Recorder*
21 *Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). The actions identified by DS Holdings in its second
22 application were not undertaken in violation of any court order. Therefore, DS Holdings’ motion is
23 DENIED. (Doc. 176.)

24 However, the Court once against admonishes Zuccarini not to interfere with the Court-approved
25 auction process. And the Court once again informs DS Holdings that, if Zuccarini does attempt to
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27 ¹ In a September 27 order, the Court requested that DS Holdings respond to Zuccarini’s
28 September 14 motions, and in particular provide guidance to the court as to whether the Contempt
Denial Order should be clarified in any way, and if so, how. DS Holdings has chosen not to respond.

1 interfere in violation of a preexisting court order, the Court is prepared to consider a renewed request
2 for a finding of contempt and/or appropriate sanctions.

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4 **V. Doc. 185**

5 The final pending motion before the Court in this case is Zuccarini's motion for contempt and
6 sanctions against DS Holdings' attorney, filed September 28, 2010. Doc. 185. Zuccarini argues that
7 by signing DS Holdings' second application for a finding of contempt, a motion that was sure to be
8 denied, DS Holdings' attorney violated Federal Rule of Civil Procedure 11(b).

9 Civil Local Rule 7-8(a) requires that any request for sanctions be brought through a separately
10 filed and noticed motion. *See also* Fed. R. Civ. P. 11(c)(2) (requiring motions for Rule 11 sanctions "be
11 made separately from any other motion"). Zuccarini tacked his motion onto his brief opposing DS
12 Holdings' second application for a finding of contempt. Therefore, it is improperly brought.

13 Even if it had been brought properly, the Court would deny the motion.

14 Although Zuccarini labels the motion as one for contempt and sanctions, he does not explain
15 why a finding of contempt would be appropriate. As discussed above, a finding of contempt can only
16 be made against a person who has violated a court order. Zuccarini does not argue that DS Holdings'
17 attorney violated a court order.

18 Rather, the only argument Zuccarini makes is for Rule 11 sanctions. Under the Federal Rules
19 of Civil Procedure, Rule 11 sanctions may be imposed against an attorney, law firm, or party when a
20 pleading is filed for an improper purpose such as harassment or delay; when the claims, defenses or
21 contentions are unwarranted under the either the existing law; or when the allegations or factual
22 contentions are without evidentiary support and unlikely to have evidentiary support after further
23 investigation and discovery. *See* Fed. R. Civ. P. 11(b)–(c). "A Rule 11 motion for sanctions must be
24 served on opposing counsel twenty-one days before filing the motion with the court, providing the
25 opposing counsel a safe harbor . . . to give the offending party the opportunity . . . to withdraw the
26 offending pleading and thereby escape sanctions. *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d
27 815, 826 (9th Cir. 2009) (internal quotation marks omitted) (omissions in original); *see also* Fed. R. Civ.
28 P. 11(c)(2). Failure to provide the required notice precludes an award of Rule 11 sanctions.

1 *Winterrowd*, 556 F.3d at 826. Here the motion was filed with the Court 14 days after DS Holdings’
2 second application, meaning that the 21-day safe harbor requirement could not have been met.

3 Additionally, while the primary purpose of Rule 11 is to deter baseless court filings, this goal
4 must be considered in light of the fact that, in an adversary system of litigation, the essence of the
5 lawyer’s task is to present issues of facts and law “as favorably as fairly possible” in support of the
6 client’s claim. *See United Nat. Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001).
7 Therefore, judges should “impose sanctions on lawyers for their mode of advocacy only in the most
8 egregious situations, lest lawyers be deterred from vigorous representation of their clients.” *See id.*
9 (citing *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 341 (2d Cir. 1999)). Even if
10 Zuccarini’s motion for sanctions had met the more technical requirements of a Rule 11 motion, the
11 Court would not exercise its discretion to grant sanctions.

12 Zuccarini’s motion for contempt and sanctions is DENIED.
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14 **VI. CONCLUSION**

15 For the foregoing reasons, the Court DENIES all of Zuccarini’s and DS Holdings’ motions
16 contained in the above-discussed filings. (Docs. 170, 173, 175, 176, 185.)
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18 **IT IS SO ORDERED.**

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20 Dated: December 1, 2010

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23 SUSAN ILLSTON
24 United States District Judge
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