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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SOLADIGM, INC.,

CASE NO. 5:11-cv-05416 EJD

Plaintiff(s),

**ORDER DENYING PLAINTIFF'S
MOTION TO DECLARE DEFENDANT A
VEXATIOUS LITIGANT**

v.

MIN MING TARNG,

[Docket Item No(s). 204]

Defendant(s).

I. INTRODUCTION

This action for declaratory judgment, breach of contract, breach of confidential relationship and unfair competition was commenced by Plaintiff Soladigm, Inc.¹ (“Plaintiff”) on November 8, 2011. See Docket Item No. 1. A year later, Plaintiff and Defendant Min Ming Tarnng (“Defendant”) reached a written resolution of all claims at a settlement conference supervised by a magistrate judge. See Docket Item No. 147. But in the end, the parties could not agree to a stipulated dismissal and appeared before this court in order to address that issue. See Docket Item No. 174. After considering the arguments for and against enforcement of the settlement agreement, the court found that it constituted a complete document to which all parties had agreed and, as contemplated in the agreement, dismissed this action with prejudice on December 17, 2012. See Docket Item No. 179.

Unfortunately, the case lives on despite the settlement and dismissal. Indeed, the court has

¹ According to its more recent pleadings, Plaintiff has changed its name to View, Inc.

1 issued five orders in response to eight motions - all filed by Defendant - since January, 2013. See
2 Docket Item Nos. 186, 203, 224, 228, 231. One of those orders warned Defendant that his conduct
3 could result in the imposition of sanctions or his designation as a vexatious litigant. See Docket
4 Item No. 186.

5 Presently before the court is Plaintiff’s motion requesting just that - an order declaring
6 Defendant a vexatious litigant. See Docket Item No. 204. Plaintiff also requests a pre-filing order
7 requiring Defendant to obtain leave of court before filing anything related to this case. Defendant,
8 as would be expected, disagrees with Plaintiff’s request in written opposition. See Docket Item No.
9 209.

10 Whether Defendant’s conduct to this point supports a vexatious declaration is a close
11 question. After careful review, however, the court will find that Defendant’s actions have not
12 become vexatious - *yet*. Accordingly, Plaintiff’s motion will be denied for the reasons explained
13 below.

14 II. LEGAL STANDARD

15 Federal courts may subject vexatious litigants to pre-filing orders pursuant to the All Writs
16 Act. See 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress
17 may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to
18 the usages and principles of law.”); see also Moy v. United States, 906 F.2d 467, 469 (9th Cir. 1990)
19 (“[I]t is clear that the district court has authority to issue pre-filing injunctions pursuant to 28 U.S.C.
20 § 1651.”). Such orders should not be issued lightly; they are “an extreme remedy that should rarely
21 be used.” Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007). “Courts should
22 not enter pre-filing orders with undue haste because such sanctions can tread on a litigant’s due
23 process right of access to the courts.” Id.

24 There can come a time, though, when an abusive litigant’s right of access must be curtailed
25 by court order so as to control the type of “[f]lagrant abuse of the judicial process” that “enables one
26 person to preempt the use of judicial time that properly could be used to consider the meritorious
27 claims of other litigants.” De Long v. Hennessey, 912 F.2d 1144, 1148 (9th Cir. 1990). This can be
28 especially pertinent to individuals proceeding without counsel because “fewer sanctions are

1 available against a pro per litigant.” Doran v. Vicorp Rests., Inc., 407 F. Supp. 2d 1115, 1118 (C.D.
2 Cal. 2005). Absent an available means of restraint, such as an order requiring a litigant to obtain
3 leave of court prior to filing documents, some cases may never come to an end.

4 The Ninth Circuit has articulated factors for the district courts to examine before issuing a
5 pre-filing order:

6 First, the litigant must be given notice and a chance to be heard before
7 the order is entered. Second, the district court must compile ‘an
8 adequate record for review.’ Third, the district court must make
9 substantive findings about the frivolous or harassing nature of the
plaintiff’s litigation. Finally, the vexatious litigant order ‘must be
narrowly tailored to closely fit the specific vice encountered.’

10 Molski, 500 F.3d at 1057 (quoting De Long, 912 F.2d at 1147-48) (internal citations omitted).

11 III. DISCUSSION

12 Of the four factors relevant to the issuance of a pre-filing order, it is the third factor requiring
13 substantive findings that is the most important to this analysis. The court proceeds to it directly
14 because it is dispositive.

15 Whether Defendant’s litigation activity can be determined “frivolous or harassing” depends
16 on “‘both the number and content of the filings as indicia’ of the frivolousness.” De Long, 912 F.2d
17 at 1148 (quoting In re Powell, 851 F.2d 427, 431 (D.C. Cir. 1988). “An injunction cannot issue
18 merely upon a showing of litigiousness.” Moy, 906 F.2d at 460. Defendant’s “claims must not only
19 be numerous, but also be patently without merit.” Id.

20 Here, Defendant’s filings can be described in various ways using various adjectives. Many
21 are in excess of the page limitations imposed by the Civil Local Rules, some to a great extent.
22 Others contain page after page of pictures, Chinese characters, or self-made charts, the relevance of
23 which is not always clear. Still others contain various parts of pleadings previously filed or are
24 simply the re-filing of motions previously denied. A couple of Defendant’s filings appear to include
25 altered copies of e-mails or manufactured evidence. Furthermore, Defendant has filed a series of
26 pleadings which attempt to raise claims against Plaintiff and other parties even though this case has
27 been dismissed. These filings could be found frivolous or harassing.

28 But other filings were not entirely improper. For example, Defendant’s motion for new trial,

1 although unsuccessful, was nonetheless presented with some arguable basis in law and required
2 analysis by the court in the ensuing order. And the recently-filed motion to disqualify the court,
3 while perhaps misguided, could also be characterized as non-frivolous under a liberal construction
4 of the pleading. This motion was still pending at the time Defendant filed the disqualification
5 motion, after all.

6 Defendant walks both sides of the fence, into and out of frivolity. Without doubt, he has
7 been a litigious individual. Litigiousness alone, however, is not enough to justify a pre-filing order.
8 Moreover, the number and content of Defendant's filings to date show that Defendant has not yet
9 stepped so far into the realm of frivolity such that he has moved from being just litigious to being
10 impermissibly vexatious. On these grounds, Plaintiff's motion will be denied.


11 That said, Defendant should not take comfort in this result. If Defendant continues to engage
12 in frivolous behavior, the court will issue its own Order to Show Cause why he should not be
13 subjected to a pre-filing order, and will reconsider the conduct described in this Order when making
14 that determination. Before filing anything further, Defendant should keep in mind that this case has
15 been *dismissed* and is *closed*. It is only under a very limited set of circumstances that motions or
16 additional documents should be filed in a dismissed, closed case. Absent those limited
17 circumstances, any further attempts by Defendant to unjustifiedly maintain this litigation will be met
18 with orders summarily terminating or striking the motion, request or improper pleading.

19 **IV. ORDER**

20 Plaintiff's Motion to Declare Defendant a Vexatious Litigant (Docket Item No. 204) is
21 DENIED. The hearing scheduled for May 17, 2013, is VACATED.

22 **IT IS SO ORDERED.**

23
24 Dated: May 9, 2013


EDWARD J. DAVILA
United States District Judge

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