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 STATE UNIVERSITY and ROBERT A. RAUCH, an individual.
 7

8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MARKETING INFORMATION MASTERS, INC., a California 12 corporation,, 13 Plaintiff, 14 v. 15 THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY 16 (erroneously sued herein as THE BOARD OF TRUSTEES OF THE 17 CALIFORNIA STATE UNIVERSITY SYSTEM, a public entity acting through 18 its subdivision SAN DIEGO STATE UNIVERSITY); and ROBERT A 19 RAUCH, an individual,, 20 Defendants.) CASE NO. 06CV 1682 JAH JMA) DEFENDANTS' OPPOSITION TO) PLAINTIFF'S EX PARTE) APPLICATION)) The Hon. John A. Houston)) ACTION FILED: 08/18/06)) Hearing Date: 05/05/08) Time: 2:30 p.m.) Dept.: 11
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22 **I. INTRODUCTION**

23 Plaintiff's *ex parte* request to belatedly file opposition briefs is too little, too
 24 late.

25 Plaintiff's opposition to defendants' Motion to Dismiss and a Motion for Rule
 26 11 Sanctions were due to be filed on or before April 21, 2008. Plaintiff failed to file
 27 any opposition or request an extension of time by that date.
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1 Defendants timely filed their reply briefs on April 28, 2008. *Thirty-minutes*
2 later – and *seven days* after plaintiff’s oppositions were due – plaintiff filed the
3 instant *ex parte* application. That application is not only untimely, it is completely
4 devoid of any “good cause” to support plaintiff’s dilatory request.

5 **II. ARGUMENT**

6 **A. Plaintiff’s Knowing and Intentional Failure to File Any Opposition**
7 **Cannot Constitute “Good Cause” for Granting an Extension of Time.**

8 Plaintiff was fully aware of the deadline for filing its oppositions. Plaintiff
9 admits this, saying it was “preparing to file such papers by the April 21, 2008 due
10 date” until the computer belonging to its counsel crashed on April 16, 2008. (*Ex*
11 *Parte*, page 3, lines 1-3.) Thus, there is no dispute as to whether plaintiff simply
12 forgot or miscalculated the opposition deadline. In this case, plaintiff acknowledges
13 that it was fully aware of the filing deadline, but nonetheless let that deadline pass
14 without filing an opposition or seeking an extension of time to do the same.

15 Plaintiff’s counsel, Greg Goonan, knew or should have known the Rules of
16 Civil Procedure well enough to understand the ramifications of failing to meet a
17 statutory filing deadline. By his own admission, Mr. Goonan has been practicing
18 law for “more than 22 years.” (See Exhibit “C” to Motion for Rule 11 Sanctions, at
19 page 1, ¶2.) In short, he is no novice. Moreover, it is reasonable for this Court to
20 expect that Mr. Goonan would be sufficiently familiar with this Court’s own Local
21 Rules, especially given that Mr. Goonan’s practice is located in San Diego.^{1/}

22 Thus, there is no dispute that plaintiff knew the deadline for filing its
23 opposition, and knew or should have known the ramifications for failing to comply
24 with that deadline. In light of this, it is reasonable to describe plaintiff’s failure to
25 timely file its oppositions as “intentional.” Plaintiff’s intentional failure to timely
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27 ^{1/}Local Rule 7.1(f)(3)(c) expressly provides that a party’s failure to timely file
28 opposition papers may be deemed to constitute that party’s “consent to the granting
of a motion. . . .” There is no reason to believe that Mr. Goonan was unaware of that
Rule. Indeed, the *ex parte* application makes no such representation.

1 file its oppositions cannot serve as the “good cause” necessary for the granting of an
2 order extending the time for the filing those briefs. Indeed, it would be incongruous
3 to hold that an intentional failure to timely comply with a statutory filing deadline
4 justifies an untimely request for an extension of time in which to extend that
5 deadline. This is precisely the mental gymnastics plaintiff asks this Court to engage
6 in how. Defendants respectfully submit that this Court should deny that request and
7 rule that plaintiff’s intentional failure to timely file its opposition warrants a denial of
8 plaintiff’s request for an extension of time.

9 **B. Plaintiff’s Computer Crash Five Days Prior to its Filing Deadline**
10 **Does Not Constitute “Good Cause” for Granting an Extension of Time.**

11 It is regrettable that Mr. Goonan’s computer crashed “late in the day on April
12 16, 2008.” (*Ex Parte*, page 3, lines 2-3.) However, that computer crash does not
13 support plaintiff’s belated request to file oppositions because the computer error
14 occurred *five days* before plaintiff’s April 21, 2008 filing deadline. Within those five
15 days, Mr. Goonan could have redrafted his oppositions or *timely* brought an *ex parte*
16 application seeking an extension of time. Notably, Mr. Goonan did neither.

17 It also appears that Mr. Goonan made no effort whatsoever contact this Court
18 to alert it to his predicament, and he certainly never communicated with defendants’
19 counsel to seek a stipulation regarding an extension of time. (Pink Decl., ¶ 2.) If Mr.
20 Goonan’s computer was beyond repair, the five days between April 16th and April
21 21st afforded him ample opportunity to buy, rent or borrow another computer.
22 Nothing prevented Mr. Goonan from using such an alternate computer to draft his
23 oppositions or his *ex parte* application for an extension of time. Again, it appears
24 that Mr. Goonan took no such affirmative steps to resolve the unfortunate
25 predicament in which he found himself. (*Ex Parte*, page 3, lines 6-8.)

26 Therefore, while defendants do not question Mr. Goonan’s tale of computer
27 woes, his computer crash does not constitute the “good cause” required for granting
28 plaintiff’s *ex parte* application. That computer crashed sufficiently in advance of

1 plaintiff's filing deadline to allow Mr. Goonan ample time to take appropriate
2 corrective measures without jeopardizing his client's right to oppose defendants'
3 motions. The fact that Mr. Goonan did not take those corrective measures does not
4 justify his much belated request for relief, and certainly does not amount to the "good
5 cause" required for the granting of plaintiff's *ex parte* application.^{2/}

6 **C. Plaintiff Needed Only Thirty-Minutes to Request An Extension of**
7 **Time Prior to its Filing Deadline, Yet Failed to Make Such a Request Until *After***
8 **the Defendants Filed their Reply Briefs.**

9 Plaintiff's counsel would have this Court believe that he was too busy to
10 timely seek an extension of time to file plaintiff's oppositions. This is nonsense. A
11 review of the filing record will reveal a thirty-minute passage of time between
12 defendants' filing of their reply briefs and plaintiff's filing of its *ex parte* application.
13 Defendants filed their replies at 10:48 a.m. and 10:51 a.m. respectively on the
14 morning of April 28, 2008. Plaintiff filed its *ex parte* application at 11:22 a.m. that
15 same morning. At the most, this amounts to 34 *minutes*.

16 Even assuming Mr. Goonan was extremely busy with his appellate argument
17 (scheduled for hearing on April 23, 2008 – two days *after* plaintiff's oppositions
18 were due) and his pretrial conference (scheduled for hearing on April 25, 2008 – *four*
19 days *after* plaintiff's oppositions were due), plaintiff's filing of the instant *ex parte*
20 application demonstrates that plaintiff needed no more than thirty minutes to file an
21 application for an extension of time. When one considers that Mr. Goonan's
22 computer crashed on April 16th, this means that Mr. Goonan had approximately 120
23 *hours* (or 240 half-hour increments) in which to draft and file a request for an
24 extension *before* missing plaintiff's statutory deadline to oppose. It is beyond
25 credulity to suggest that Mr. Goonan did not have a spare thirty minutes within those
26 120 hours to accomplish this.

27 _____
28 ^{2/}Any contrary conclusion would unjustly shift any potentially negative impact
of Mr. Goonan's failure to act from himself and his client to the defendants.

1 Because plaintiff needed only thirty-minutes to request an extension of time
2 prior to its filing deadline, and affirmatively failed to do so, Mr. Goonan's busy
3 schedule does not establish the good cause required for the relief plaintiff now seeks.

4 **D. Defendants Will be Unduly Prejudiced if this Court Grants Plaintiff's**
5 ***Ex Parte* Application.**

6 Under Local Rule 7.1(f), this Court may regard plaintiff's failure to oppose
7 defendants' motions as an implied consent for the granting of those motions. If
8 plaintiff is now given the right to belatedly oppose those motions, defendants will
9 lose the beneficial impact of Local Rule 7.1(f), and will be forced to incur the
10 substantial cost of drafting further reply briefs. That cost will be in addition to the
11 cost they have already incurred drafting the previously filed reply briefs, and
12 opposing plaintiff's dilatory *ex parte* application. Thus, it is specious to suggest, as
13 plaintiff does, that defendants will not be prejudiced by a granting of plaintiff's
14 application. Defendants most certainly will be.

15 It also bears mentioning – as discussed in defendants' underlying motions –
16 that if plaintiff had simply filed an appropriate Second Amended Complaint,
17 defendants would not have had to file their motions. Those motions were necessary
18 only after plaintiff's counsel insisted, without *any* legal support, that he was under no
19 obligation to amend the Second Amended Complaint. Consistent such recalcitrance,
20 plaintiff now seeks to drag defendants into a costly, time consuming and
21 unnecessary battle to reclaim a deadline that plaintiff knowingly and affirmatively let
22 pass. This Court should not reward such conduct; it should resolutely deny
23 plaintiff's *ex parte* application.

24 **III. CONCLUSION**

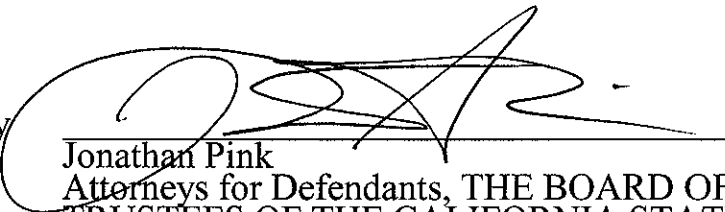
25 Plaintiff has failed to establish any "good cause" that would justify its belated
26 request for an extension of time. Plaintiff's computer crash occurred sufficiently in
27 advance of plaintiff's deadline to oppose defendants' motions that plaintiff could –
28 and *should* – have moved for any desired extension of time *before* April 21, 2008.

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Plaintiff's failure to do this must be deemed intentional and knowing. Accordingly, defendants respectfully submit that this Court should deny plaintiff's *ex parte* application in its entirety.

DATED: April 29, 2008

LEWIS BRISBOIS BISGAARD & SMITH LLP

By 

Jonathan Pink
Attorneys for Defendants, THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (erroneously sued herein as THE BOARD OF TRUSTEES OF THE CALIFORNIA UNIVERSITY SYSTEM, a public entity acting through its subdivision SAN DIEGO STATE UNIVERSITY); and ROBERT A RAUCH

DECLARATION OF JONATHAN PINK

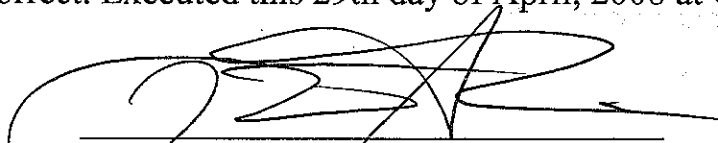
I, JONATHAN S. PINK, declare as follows:

1. I am an attorney at law duly licensed to practice before all of the courts of the State of California and am partner in the law firm of Lewis Brisbois Bisgaard & Smith, LLP, counsel of record for Defendants the Board of Trustees of the California State University (the "Trustees), and Robert A. Rauch (collectively, "Defendants") in the above-entitled lawsuit. As such, I have personal knowledge of the facts stated herein and if called upon as a witness, I could and would competently testify to the below facts which are personally known to me.

2. At no time following my filing of the defendants' underlying Motion to Dismiss the Second Amended Complaint and Motion for Rule 11 Sanctions did I ever receive any correspondence or telephonic communication from Mr. Goonan of any kind. Mr. Goonan did not contact me or my office to alert us of his computer problems, or to seek our stipulation regarding an extension of time for plaintiff to file its oppositions. The first I heard from Mr. Goonan following defendants' filing of its motions was when I received a copy of his proposed order with respect to plaintiff's instant *ex parte* application.

3. In addition to filing this Opposition electronically, I have provided a pdf copy of the same to Mr. Goonan and have directed my secretary to send Mr. Goonan a copy of this document by fax.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 29th day of April, 2008 at Costa Mesa, California.



Jonathan Pink