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5 Specially Appearing for
JOHN STEELE

6
7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA

9
10 INGENUITY 13 LLC,

11 Plaintiff,

12 v.

13 JOHN DOE,

14 Defendants.

Case No.: CV-12-8333- ODW(JCx)

**RESPONSE TO ORDER TO SHOW
CAUSE WHY SANCTIONS SHOULD
NOT BE LEVIED**

Judge: Hon. Otis D. Wright, II

Courtroom: 11

Date: April 2, 2013

Time: 10:00 A.M.

Complaint Filed: September 27, 2012

Trial Date: None

15
16
17 **I. INTRODUCTION**

18
19 This Court has no jurisdiction, limited authority, and lacks sufficient evidence to
20 sanction John Steele (“Steele”) pursuant to the Court’s Orders to Show Cause (“OSC”)
21 issued on March 14, 2013 (Dkt 86) and February 7, 2013 (Dkt 48). The February 7,
22 2013 OSC was directed exclusively at Brett L. Gibbs (“Gibbs”) as counsel of record to
23 Plaintiffs AF Holdings LLC and Ingenuity 13 LLC, based on his alleged conduct in
24 five related cases: AF Holdings LLC v. Doe, No. 2:12-cv-6636-ODW(JCx) (C.D. Cal.
25 filed Aug. 1, 2012); AF Holdings LLC v. Doe, No. 2:12-cv-6669-ODW(JCx) (C.D. Cal.
26 filed Aug. 2, 2012); Ingenuity 13 LLC v. Doe, No. 2:12-cv-6662-ODW(JCx) (C.D. Cal.
27 filed Aug. 2, 2012); Ingenuity 13 LLC v. Doe, No. 2:12-cv-6668-ODW(JCx) (C.D. Cal.
28 filed Aug. 2, 2012); and Ingenuity 13 LLC v. Doe, No. 2:12-cv-8333-ODW(JCx) (C.D.

1 Cal. filed Sept. 27, 2012)(hereinafter “the subject cases”). See Dkt 57, at 1:15-2:3.

2 The March 14th OSC amended the prior OSC to include the threat of sanctions
3 against numerous other individuals and entities, including Plaintiffs AF Holdings LLC
4 (“AF Holdings”); Ingenuity 13 LLC (“Ingenuity 13”); Prenda Law (“Prenda”), who
5 employed Gibbs in an ‘Of Counsel’ role; Prenda’s principal, attorney Paul Duffy
6 (“Duffy”); Angela Van Den Hemel, a Prenda Law paralegal; Steele and Paul Hansmeier
7 (“Hansmeier”), attorneys who were also ‘Of Counsel’ to Prenda; Steele Hansmeier
8 PLLC (“Steele Hansmeier”), Prenda’s predecessor; Peter Hansmeier, a technical
9 consultant to Prenda and 6881 Forensics, LLC, his employer; Livewire Holdings LLC
10 (“Livewire”), a purported parent company of Prenda; Mark Lutz (“Lutz”) the CEO of
11 AF Holdings and Ingenuity 13; and Alan Cooper (“Cooper”), a purported corporate
12 representative of AF Holdings.

13 At the April 2, 2013 OSC hearing, the Court invited Steele to testify in response
14 to the March 14th OSC, or not. Dkt 103, at 6:20-21. When Steele elected for the latter,
15 relying on his Fifth Amendment privilege against compelled testimony, the Court
16 indicated it would draw reasonable inferences against him and ended the hearing. Dkt
17 103, at 7:3-9:7. However, the reasonable inferences the Court may draw against Steele
18 are limited, based on the lack of evidence against Steele before this Court. Moreover,
19 because of the criminal nature of these proceedings, where the Court has raised and
20 clearly made up its mind against Steele on questions of fraud and has threatened
21 incarceration, Steele’s invocation of the Fifth Amendment may not be used to formulate
22 presumptions against him.

23 As further discussed below, the lack of evidence of Steele’s involvement in the
24 subject cases leaves the Court lacking jurisdiction over Steele, and applicable law and
25 the procedural posture of those cases further dictates the Court’s statutory and inherent
26 authority to issue sanctions against Steele is severely limited.

1 II. STEELE RENEWS HIS OBJECTION TO JURISDICTION

2 In federal court, challenging jurisdiction does not constitute an appearance and is
3 not consent to personal jurisdiction. “[W]here a party has filed a timely and
4 unambiguous objection to the court's jurisdiction, . . . the party has not consented to
5 jurisdiction . . . even if the party has preserved its own options by simultaneously
6 asserting whatever claims or defenses it has ...” *SEC v. Ross*, 504 F3d 1130, 1149 (9th
7 Cir. 2007) citing *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330 n. 1 (9th Cir.
8 1984). Steele’s former counsel filed an Ex Parte Application challenging personal
9 jurisdiction immediately after Steele was first made aware of the Court’s March 5 Order
10 requiring his appearance at the March 11, 2013 OSC hearing, thereby preserving
11 Steele’s jurisdictional objection for appeal throughout the proceedings that followed.

12 In objecting to this Court’s jurisdiction, Steele declared under oath that he did not
13 live in California or perform legal services in California. Dkt 83 at ¶3. Regardless, on
14 March 14, this Court denied Steele’s Ex Parte Application, finding that: “Based on the
15 papers filed and the evidence presented during the March 11, 2013, hearing, the Court
16 concludes there is at least specific jurisdiction over [Steele] because of [his] pecuniary
17 interest and active, albeit clandestine participation in these cases.”¹ See Dkt 86, at 1:18-
18 21. However, no evidence was presented at the March 11 hearing or beforehand that
19 can support a conclusion that Steele actively (or clandestinely) participated in the
20 subject cases, nor that Steele has or had a pecuniary interest in any of these cases.

21 In determining whether jurisdiction exists, this Court should not rely on the
22 irrelevant evidence presented by Morgan Pietz (“Pietz”) regarding Steele’s alleged
23 participation in two matters from the Northern District which predated the filing of all
24 the subject cases by nearly a year or more, and predated the existence of Prenda Law.
25 See e.g. Dkt 108-5, at 66:6-68:16 (admitting, over Gibbs’ counsel’s objection,
26

27 _____
28 ¹ The lack of evidence before this Court relating to Steele’s alleged pecuniary interest is
addressed more fully in Section IV, below.

1 declarations regarding Steele's alleged involvement in two Northern District cases).
2 Such minimal contact with California cannot constitute the type of "continuous and
3 systematic" contacts that render a defendant essentially "at home in the forum State"
4 and thereby subject to general jurisdiction here. *Goodyear Dunlop Tires Operations,*
5 *S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011). Nor do these alleged contacts create
6 specific jurisdiction. See *Id.*, at 2855 ("minimum contacts" exist when the claim arises
7 out of defendant's forum-related activities and the defendant purposefully availed him or
8 herself of the privilege of conducting activities locally); see also *Douglas Furn. Co. of*
9 *Calif., Inc. v. Wood Dimensions, Inc.*, 963 F.Supp. 899, 902 (CD Cal. 1997)(finding the
10 mere act of sending letters threatening legal action, without more, did not constitute
11 "purposeful availment").

12 Similarly, Prenda attorney Brett L. Gibbs' testimony fails to support a finding of
13 jurisdiction over Steele, as his testimony lacks specificity regarding Steele's
14 involvement in the subject cases or any California cases, and is otherwise inconsistent
15 or contradicted by others.² For example, although Gibbs claimed he was supervised by
16 Steele and Hansemeier at Prenda Law, when pressed for specifics about the degree of
17 supervision he received, Gibbs only offered that Steele and Hansemeier gave him
18 authority to file certain cases here. See Dkt 108-5, at 77:8-24. Gibbs' further testimony
19 has revealed he had significant autonomy in handling the cases. See Dkt 108-5, at
20 77:25-78:4 (claiming Steele and Hansemeier "gave me certain parameters [pursuant to]
21 which I could settle the case myself."); see also Dkt 108-5, at 79:1-5 (regarding the
22 decision to dismiss cases in this Court Gibbs noted: "As counsel of record here, I just
23 kind of broke down like a cost benefit analysis of those cases. And they said, basically,
24 go ahead and dismiss them."); see also Dkt 58, at ¶5 (claiming Steele and Hansemier
25 provided him with "guidelines").

26
27 ² See Dkt 108-5 at 94:3-9 (wherein Gibbs' opposing counsel in another matter Jason
28 Sweet tells the Court he had a conversation with Gibbs in October 2012 wherein Gibbs
claimed he was "national counsel for AF Holdings and that any settlement negotiations
were to be made through him.")

1 Faced with this weak evidence, even Pietz was left grasping at straws when
2 arguing for this Court’s jurisdiction over Steele. See Dkt 52 at 19:8-10 (claiming Steele
3 remained “heavily involved” in Prenda by referencing Steele’s LinkedIn profile, which
4 makes no mention of Prenda); see also *Id.* (mischaracterizing a Forbes article as linking
5 Prenda to Steele, when the article actually references only Steele Hansmeier as “his
6 firm,” and describes Prenda Law as “another firm that pursues these types of case
7 [sic].”)

8 **III. THIS COURT’S AUTHORITY TO SANCTION STEELE IS LIMITED**

9 This Court has both statutory and inherent authority to issue sanctions.
10 Statutorily, the Court may impose sanctions under FRCP Rule 11 and 28 USC §1927, as
11 well as under this Court’s Local Rules, which are generally coextensive with the Court’s
12 inherent powers to sanction conduct before it. However, under each of these sources of
13 power, the Court’s authority is limited, as discussed below.

14 **1. Limits On The Court’s Authority To Issue Sanctions Under Rule 11**

15 Rule 11 imposes an affirmative duty on a party or counsel to investigate the law
16 and facts before filing. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.
17 1987). Specifically, Rule 11(b) mandates that any pleading submitted to the Court is
18 deemed certified by the filing attorney that after a reasonable inquiry, the pleading (1) is
19 not being presented for an improper purpose, such as to harass, cause unnecessary
20 delay, or needlessly increase the cost of litigation; (2) the claims, defenses and other
21 legal contentions are warranted by existing law; (3) the factual contentions have
22 evidentiary support. Rule 11(c)(1) and (3) allows the Court to issue an order to show
23 cause regarding perceived violations of Rule 11(b), and to impose an appropriate
24 sanction on any attorney, law firm, or party that the Court finds violated the rule or is
25 responsible for the violation, following notice and a reasonable opportunity to respond.

26 Although the 1993 Committee Notes on Amendments to Rule 11 suggest that the
27 court may consider ordering sanctions against non-filing persons, such as other
28 attorneys in the firm, co-counsel, or a party personally, sanctions against non-filing

1 persons should be reserved for cases where “substantial restrictions” are imposed “on
2 the discretion of individual [filing] attorneys,” and, “the court must, to the extent
3 possible, limit the scope of the sanction proceedings to the record.” *See* Comm. Notes
4 on Am. to Fed. R. Civ. P. 11 (1993). As further discussed in Sections IV herein,
5 whatever minimal evidence may be cited to support a conclusion that Steele imposed
6 any restrictions whatsoever on Gibbs is undermined by Gibbs own testimony, and
7 otherwise does not satisfy the ‘substantial restriction’ standard.

8 In addition, although the Court retains jurisdiction to award sanctions even after
9 voluntary dismissal of actions, monetary sanctions under Rule 11 may not be imposed
10 sua sponte by the court following dismissal, unless the Court’s OSC Re: Rule 11
11 Sanctions was issued prior to dismissal. FRCP 11(c)(5)(B). Here, the Court’s initial
12 OSC Re: Rule 11 Sanctions was issued on February 7, 2013, after all five of the actions
13 referred to in the OSC were already voluntarily dismissed. Under these circumstances,
14 monetary sanctions under Rule 11 cannot be issued against Steele or anyone else
15 referenced in the Court’s OSCs.

16 **2. Limits On The Court’s Authority To Sanction Steele Under**
17 **28 U.S.C. § 1927**

18 Sanctions under 28 USC §1927 are limited to attorney misconduct for
19 “multiplying the proceedings in any case unreasonably and vexatiously.” By its own
20 terms, §1927 only applies to unnecessary filings and tactics once a lawsuit has begun;
21 §1927 cannot be applied to sanction an attorney for filing a Complaint. *In re Keegan*
22 *Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996). Moreover, sanctions under 28
23 USC §1927 “must be supported by a finding of subjective bad faith.” *Id.*, at 436. “Bad
24 faith is present when an attorney knowingly or recklessly raises a frivolous argument, or
25 argues a meritorious claim for the purpose of harassing an opponent.” *Id.*, quoting
26 *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir.1986)). A filing is frivolous if it
27 “is *both* baseless *and* made without a reasonable and competent inquiry.” *In re Keegan*
28 *Mgmt. Co., Sec. Litig.*, *supra*, at 434. No evidence before this Court suggests any post-

1 Complaint filings were made with the requisite level of subjective bad faith by anyone,
2 much less with Steele's input.

3 §1927 sanctions are also only applicable to direct violations by counsel of record,
4 and aren't imposed for vicarious liability. *Pratt v. California*, 11 F. App'x 833, 836 (9th
5 Cir. 2001)(sanctions awarded under §1927 against co-counsel because they were also
6 counsel of record for plaintiff); see also *FM Industries, Inc. v. Citicorp Credit Services,*
7 *Inc.*, 614 F3d 335, 340–341 (7th Cir. 2010). Thus, "Section 1927 cannot reach conduct
8 of a party who is not involved in an action before the sanctioning court at the time of the
9 conduct." *GRiD Systems Corp. v. John Fluke Mfg. Co., Inc.*, 41 F3d 1318, 1319 (9th
10 Cir. 1994). Here, Steele was not counsel of record, nor does the evidence show that he
11 was involved in any actions before the Court which multiplied the proceedings
12 unreasonably and vexatiously. Thus, the Court should not sanction Steele under §1927.

13 **3. Limits On The Court's Authority To Sanction Steele Under Its** 14 **Inherent Powers**

15 As the Supreme Court has emphasized: "because inherent powers are shielded
16 from direct democratic controls, they must be exercised with restraint and discretion."
17 *Roadway Express, Inc. v. Piper*, 447 US at 764, 100; *In re Peters*, 642 F3d 381, 384
18 (2nd Cir. 2011)("when court is accuser, fact finder and sentencing judge all in one,
19 restraint and discretion required"). Thus, when the conduct in question is addressed by
20 sanctioning powers such as Rule 11, the court ordinarily may not rely on its inherent
21 powers. *Chambers v. NASCO*, 501 U.S. 32, 51-52 (1991)(only if the court determines
22 other rules are not "up to the task," may the court rely on its inherent sanctions power).

23 As with sanctions under 28 USC §1927, in order to impose sanctions under its
24 inherent powers, the Court must make a specific finding that the attorney acted in "bad
25 faith." *Primus Automotive Fin'l Services, Inc. v. Batarse* (9th Cir. 1997) 115 F3d 644,
26 650. The "bad faith" requirement is supposed to present "a high threshold." *Mendez v.*
27 *County of San Bernardino*, 540 F3d 1109, 1131–1132 (9th Cir. 2008). Moreover, a
28 "clear and convincing" evidentiary standard should apply to such findings. See

1 *Shepherd v. American Broadcasting Cos., Inc.* 62 F3d 1469, 1477 (DC Cir. 1995).

2 In addition, the Court's inherent power to sanction is generally not extended to
3 litigation conduct occurring in other venues. *See Children's Ctr. for Developmental*
4 *Enrichment v. Machle*, (6th Cir. 2010) 612 F3d 518, 524 ("Such a conclusion would
5 infringe on the power of other judges to manage their own affairs."). Similarly, inherent
6 power sanctions are generally based on the sanctioned party's own individual conduct,
7 without regard to misconduct by other parties or attorneys (*see Primus Automotive Fin'l*
8 *Services, Inc. v. Batarse*, 115 F3d 644, 650 (9th Cir. 1997)), and sanctions may only be
9 imposed on non-parties or counsel of record if that person or entity *controls* the
10 litigation and is responsible for the abusive conduct. *Lockary v. Kayfetz*, 974 F2d 1166,
11 1169 (9th Cir. 1992).

12 As further discussed in Section IV below, whatever evidence can be cited to
13 support a conclusion that Steele controlled the litigation of the subject cases or was
14 responsible for alleged abusive conduct in those case is disputed by Gibbs own
15 testimony, and otherwise does not constitute 'clear and convincing' evidence to
16 establish bad faith on Steele's part. Accordingly, this Court should not sanction Steele
17 under its inherent power.

18 **a. Limits On The Court's Authority To Sanction Under**
19 **The Local Rules**

20 Because the Court's authority to issue sanctions under the Local Rules stems
21 from the Court's inherent authority, all of the limitations addressed above also apply to
22 sanctions under the Local Rules. Local Rule 83-3 is silent regarding who may be a
23 proper subject of sanctions under the Rule. However, Local Rules 83-1 and Rule 83-2
24 form the foundation for Rule 83-3 sanctions. These underlying rules include the
25 disclaimer that any attorney who appears for any purpose submits to the discipline of
26 the Central District in all respects pertaining to the conduct of the litigation. See Rule
27 83-2.6. In addition, Rule 83-3.1.2 provides that the standards for professional conduct
28 from the California State Bar Act, the California Rules of Professional Conduct, and

1 “the decisions of any court applicable thereto,” provide the basis for disciplinary action.
2 In short, the Local Rules govern only the conduct of members of the USDC for the
3 Central District of California, which Steele is not. Because discipline imposed under
4 Local Rule 83-3 must be directed to an attorney admitted to practice before the Central
5 District, sanctions against Steele under the Local Rules are not appropriate.

6 **b. Limits On The Court’s Authority To Sanction Steele For**
7 **Contempt**

8 This Court is apparently contemplating issuing sanctions pursuant to its contempt
9 power. See 2/7/13 OSC at 1:22, 8:5, 11:3-4; see also 3/14/13 OSC at 1:25-28. This
10 power is also limited. The power to punish contempt and to coerce compliance with
11 issued orders is based on statutes and the Court’s inherent authority. *Int’l Union, United*
12 *Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994); see also 18 U.S.C. §401.
13 However, this power must be exercised with restraint. See *Roadway Express, Inc. v.*
14 *Piper*, 447 U.S. 752, 764–65 (1980). Unconditional sanctions (i.e. where the contemnor
15 has no opportunity to reduce or avoid the fine through compliance) are considered
16 “criminal” sanctions, even if only comprised of a small fine. See *In re Lehtinen*, 564
17 F3d 1052, 1059 (9th Cir. 2009). Because of their punitive (rather than coercive)
18 character, criminal sanctions “may not be imposed on someone who has not been
19 afforded the protections that the Constitution requires of such criminal proceedings.”
20 *Bagwell*, supra, 512 US at 826. Except in limited circumstances, i.e. those involving
21 “direct contempt” committed in the Court’s presence, or the imposition of “petty” fines,
22 due process for criminal contempt requires the full range of procedures applicable to
23 criminal trials, such as an independent prosecutor, cross-examination, a jury trial, proof
24 beyond reasonable doubt, etc. *Id.*, at 838–839.³ Because the Court has not afforded
25 these procedural protections to Steele and civil contempt sanctions do not appear to be
26 at issue, contempt sanctions against Steele are not appropriate.

27 ³ Notably, the 5th amendment privilege against self-incrimination can be invoked when
28 one is facing “criminal” contempt sanctions. *Gompers v. Bucks Stove & Range Co.*, 221
U.S. 418, 444 (1911).

1 **IV. THE COURT MAY NOT SANCTION STEELE OR DRAW ADVERSE**
2 **INFERENCES AGAINST HIM BASED ON HIS INVOCATION OF HIS**
3 **5TH AMENDMENT PRIVILEGE AGAINST COMPELLED TESTIMONY**

4 When Steele elected to exercise his Fifth Amendment right against compelled
5 testimony at the April 2, 2013 OSC hearing, the Court indicated it would draw
6 reasonable inferences and ended the hearing. Dkt 103, at 7:3-9:7. As discussed below,
7 the reasonable inferences the Court may draw against Steele are limited based on
8 insufficient evidence regarding Steele before this Court. Moreover, because of the
9 criminal nature of these proceedings, wherein the Court has made allegations of fraud,
10 tax evasion, and threatened potential incarceration⁴, Steele's invocation of the Fifth
11 Amendment may not be used to formulate presumptions against him. The Supreme
12 Court has made clear that an inference of guilt may not be drawn from a defendant's
13 failure to testify about facts relevant to his case. *Griffin v. California*, 380 U.S. 609
14 (1965). Rather, "[t]he privilege serves to protect the innocent who otherwise might be
15 ensnared by ambiguous circumstances." *Slochower v. Board of Higher Education*, 350
16 U.S. 551, 557-558 (1956); see also *Ohio v. Reiner*, 532 U.S. 17 (2001). Accordingly,
17 Steele is permitted, as he did, to invoke his 5th Amendment rights against compelled
18 testimony, while maintaining a claim of innocence regarding all charges against him.

19 Further, because the court initiated these sanction proceedings, they are "akin to
20 contempt" proceedings, and Steele's conduct must be judged in that light. That is, the
21 "reasonableness" of Steele's conduct is not at issue, only whether it was contemptuous.
22 *See Gonzales v. Texaco, Inc.*, 344 Fed. Appx. 304, 308-09 (9th Cir. 2009). Aside from
23 the lack of evidence against Steele to support a finding of contempt, as discussed above,
24 because this Court has failed to provide Steele with the procedural protections necessary
25 to impose criminal contempt sanctions, such sanctions are unavailable against Steele.

26 **A. Steele Cannot Be Sanctioned For The Alleged Lack Of Reasonable**
27 **Investigation Of Copyright Infringement Prior To Filing Complaints**
28 **In The Subject Cases**

Although the Court is contemplating issuing sanctions under Rule 11(b)(3) based

⁴ See, e.g., Dkt 48 at pp.9-11; Dkt. 86 at pp. 1-3; and Dkt 108-5 at 15:9-11 and 15:17-18.

1 on the alleged filing of the subject Complaints without a factual foundation (Dkt 48, at
2 4:12-5:10), it is clear the Court's position is based on a misapplication of applicable law
3 to the subject BitTorrent technology. See *Id.*, (criticizing use of an "IP snapshot,"
4 erroneously concluding partial downloads are unusable, and requiring pre-filing
5 evidence showing that Defendants downloaded the entire copyrighted work). These
6 misunderstandings are addressed at length in Prenda Law's Response to the OSC, so
7 those arguments need not be repeated by Steele. See Dkt 108, at 14:15-21, 24-25, 15:1-
8 21:22; 108-1.

9 More importantly, the evidence and argument submitted does not reference
10 Steele's involvement in the pre-filing investigation of the subject cases; only Gibbs' and
11 Peter Hansemeier's involvement is referenced. See Dkt 49, at 12:8-14:2, 16:21-18:2,
12 20:18-21:27, and Dkt 58, ¶¶7-8. Accordingly, sanctions cannot be imposed upon Steele
13 in relation to the filing of Complaints in the subject cases.

14 **B. Steele Cannot Be Sanctioned For Any Alleged Lack Of Reasonable**
15 **Investigation Of Alleged Infringers' Identities Prior To Naming Them**
16 **In The Subject Cases**

17 Similarly, the Court is contemplating issuing sanctions under Rule 11(b)(3) based
18 on the alleged lack of reasonable investigation of actual infringers' identities in the
19 subject cases prior to naming them as Doe Defendants. Dkt 48, at 2:18-4:11; 5:11-7:26.
20 Again, Prenda Law's Response to the OSC addresses numerous problems with the
21 Court's conclusions and suggestions⁵ regarding what constitutes a reasonable
22 investigation of a BitTorrent infringer's identity, and Steele joins those arguments by
23 reference. See Dkt 108, at 14:25-27, 23:10-27:25; 108-1.

24 ⁵ The Court's suggestion that "old-fashioned stakeout may be in order" overlooks the
25 crucially important fact that the subject infringement would have necessarily happened
26 many months prior to the stakeout (i.e. prior to the filing of a Complaint, the initiation
27 of discovery, and obtaining the IP address holder's home address from the ISP). It is
28 therefore puzzling how the Court could conclude that persons within the subscriber's
home many months later may be correlated with tracking data from many months before
to assist with a "determination of who would have been in the subscriber's home when
the download was initiated."

1 Without exception, *all* of the argument and evidence submitted on this issue
2 refers *exclusively* to Gibbs' own personal investigation of the infringers' identity. See
3 Dkt 49 18:3-20:15, 22:1-24:7; Dkt 50, ¶¶26-39, 42; Dkt (3/11) 97:23-101:25.
4 Accordingly, sanctions cannot be imposed upon Steele in relation to naming the alleged
5 infringers in the subject cases.

6 **C. Steele Cannot Be Sanctioned For Any Alleged Failure To Comply With**
7 **Discovery Orders**

8 The Court's initial OSC invokes the Court's contempt power and Local Rule 83-3
9 when discussing Gibbs' alleged violation of two orders requiring Plaintiffs to cease
10 discovery efforts relating to previously issued subpoenas to Verizon Online LLC, an
11 ISP. Dkt 48, at 8:1-28. As noted above, the Court may not sanction Steele for contempt
12 because Steele was not provided the procedural safeguards required for imposing
13 contempt sanctions, and sanctions are unavailable against Steele under the Local Rules
14 because he is not a member of the Central District of California bar.

15 Furthermore, in response to the Court's OSC, Gibbs testified that he "caused the
16 Order to be served on the registered agents for service of process of Verizon Online
17 LLC to ensure that Verizon Online LLC had notice not to respond to the subpoenas that
18 had already been served." Dkt 50, at ¶21. At the March 11 hearing, Gibbs' attorney
19 added that "Gibbs had a conversation with Mr. Hansmeier and told him that he thought
20 that this order should be served on the ISP's. Mr. Hansmeier advised Mr. Gibbs that
21 would be done. Mr. Hansmeier later advised Mr. Gibbs that his request had been taken
22 care of." Dkt 108-5, at 9:23-10:2. Gibbs then testified consistently with his attorney's
23 representations. Dkt 108-5, at 102:6-12. These representations made to this Court do
24 not involve or implicate Steele at all, nor does any other evidence before this Court
25 suggest Steele had anything to do with any alleged disobedience of this Court's
26 discovery orders. Accordingly, the Court may not impose sanctions upon Steele based
27 on Gibbs' alleged failure to comply with the Court's discovery orders.

1 **D. Steele Should Not Be Sanctioned For Any Alleged “Fraud Upon The Court”**

2 The Court’s February 7, 2013 OSC raised three concerns regarding a suspected
3 “fraud on the Court” involving Alan Cooper’s renouncement of any involvement with
4 AF Holdings and accusation that his purported signature on assignment agreements
5 attached to Complaints in the subject cases was not genuine⁶. The Court stated: “First,
6 with an invalid assignment, Plaintiff has no standing in these cases.” Dkt 48, at 9:8.
7 Apparently re-articulating the same concern, the Court added: “Second, by bringing
8 these cases, Plaintiff’s conduct can be considered vexatious, as these cases were filed
9 for a facially improper purpose.” Dkt 48, at 9:9-10. As both Gibbs and Prenda/Duffy/
10 Van Den Hemel noted in their Responses To The OSC, the Court is mistaken about the
11 law in this regard; the signature of the assignee is irrelevant to the validity of the
12 assignment, so long as the assignor signs. See Dkt 49, at 25:9-26:19; Dkt 108, at 11:24-
13 12:9.; see also 17 U.S.C. 204(a). Lastly, the Court stated: “the Court will not idle while
14 Plaintiff defrauds this institution.” Dkt 48, at 9:10-11. However, even if the Court were
15 to discount the evidence submitted impugning Cooper’s credibility and blame Steele for
16 this “fraud,” it hardly rises to the level of fraud upon the court recognized by the Ninth
17 Circuit, i.e., “a fraud perpetrated by officers of the court so that the judicial machinery
18 cannot perform in the usual manner its impartial task of adjudging cases that are
19 presented for adjudication.” *In re Intermagnetics Am., Inc.*, 926 F.2d 912, 916 (9th Cir.
20 1991).

21 Regarding any other alleged fraud the Court may consider, as Section III above
22 makes clear, except in rare circumstances not present here, this Court is not empowered
23 to sanction Steele or anyone else based on conduct occurring entirely outside of the
24 subject cases and the Central District. Based on its prior statements, the Court may
25 have erroneously felt otherwise before. Dkt 108-5, at 29:14-22 (over Gibbs’ counsel’s
26 objection that the Court’s inquiry about non-Central District cases was “beyond the

27 _____
28 ⁶ Regarding this issue, Steele joins the argument of Prenda/Duffy/Van Den Hemel at
Dkt 108, pgs. 10:27-11:23.

scope of the OSC,” and “not what this OSC is about,” the Court responded: “Well, it has become about it. It has become about fraudulent filings in federal court” generally).

E. Steele Cannot Be Sanctioned For Any Alleged Failure To Notify The Court Of All Parties That Have A Financial Interest In The Outcome Of Litigation

Apparently, the Court is considering sanctioning Steele and others based on an alleged violation of Local Rule 7.1-1 which is designed “[t]o enable the Court to evaluate possible disqualification or recusal,” and requires litigants to “list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations, clearly identified as such) that may have a pecuniary interest in the outcome of the case.”

First, as noted in Section III. 3.a. above, this Court may not sanction Steele for violating the Central District Local Rules. Second, sanctioning anyone for a technical violation of a Local Rule intended solely to allow the court to determine whether recusal is warranted would be improper, as Judge Wright’s potential recusal has never been at issue in the subject cases. Indeed, because Judge Wright believes the attorneys purportedly involved in the subject cases may be the persons omitted from the Certification Of Interested Parties, he would have already recused himself had his relationship with those attorneys so required. See Dkt 108-5, at 17:7-14. Third and most importantly, no evidence has been p[resented to this Court suggesting Steele had any involvement with the preparation of the Certification of Interested Parties. See Dkt 108-5, at 79:6-17 (when asked whether he had a discussion with Steele regarding the Certificate Of Interested Parties, Gibbs eventually responds “I don’t know”). Accordingly, Steele is not subject to sanctions on this issue.

F. Steele Cannot Be Sanctioned For Allegedly Misrepresenting The Nature And Relationship Of The Individuals And Entities Named in the OSCs

Although the Court has not specified the sanctionable misrepresentations it is referring to, the Court has apparently concluded such misrepresentations have occurred. See Dkt 86, at 1:28- 2:2 (“it appears that these persons, and their related entities, may

1 have defrauded the Court through their acts and representations in these cases.”); Dkt
2 108-5, at 58:21-25 (wherein the Court implies officers of the court have knowingly
3 made misrepresentations to the court). Disturbingly, the Court’s apparent conclusions
4 about the relationships between the persons and entities named in the March 14, 2013
5 OSC wholly ignores evidence to the contrary. Compare, e.g., Dkt. 69-1, pp. 21:18-2,
6 38:22-39:15, 40:8-12 (regarding who owns AF Holdings) with Dkt 108-5, at 114:5-8 (I
7 do have the picture, and I know who the client is. We have talked about the client, and
8 the client has been running everything. Yeah, I know who the client is”); see also Dkt
9 108-5 at 19:15-18 (suggesting Prenda law is “controlled by Mr. Steele.”)

10 However, Steele cannot be sanctioned for any of these alleged misrepresentations
11 made to this Court regarding the relationships among the parties and entities named in
12 the Court’s March 14 OSC because Steele has taken no actions nor made any
13 representations to this Court of any kind, nor is there any evidence before this Court that
14 he acted or was otherwise involved in anyone else’s alleged misrepresentations to this
15 Court.

16 **G. Steele Cannot Be Sanctioned For Any Alleged Failure To File A Notice Of**
17 **Related Cases**

18 Because this Court did not identify the alleged failure to file a Notice of Related
19 Cases as a potential basis for sanctions in any of its OSCs, sanctions against anyone on
20 this issue would be improper. Regardless, Gibbs testified that he believed the Northern
21 District of California and “almost every court ... told us in no uncertain terms that these
22 [types of] cases weren't related. Therefore, that informed my belief in terms of whether
23 we wanted to relate [the subject cases] or not.” Dkt 108-5, at 81: 2; see also 108-8
24 (Northern District order finding 25 of Plaintiffs’ cases unrelated). These contrary
25 judicial decisions indicates reasonable minds can differ on this subject, and that Gibbs
26 cannot be sanctioned for his good faith belief a Notice of Related Cases was not
27 warranted. Gibbs also testified he didn’t know whether Steele was involved in any
28 discussion regarding whether to file a Notice of Related Cases or not. See Dkt 108-5, at

84:6-12. Because there is no evidence before this Court suggesting Steele was involved with this issue, he cannot be sanctioned on this basis.

H. Steele Cannot Be Sanctioned For Any Alleged Failure To Make a *Pro Hac Vice* Appearance Before the Court

An out-of-state attorney must apply for *pro hac vice* admission in a case if that attorney appears in court, signs pleadings, or is the exclusive contact with the client or opposing counsel in a case. *Winterrowd v. American Gen. Annuity Ins. Co.*, 556 F3d 815, 825 (9th Cir. 2009). The evidence before the Court does not demonstrate Steele appeared in any of the subject cases, signed any pleadings in any of the subject cases, or was the exclusive contact with the client or opposing counsel in any of the subject cases. Instead, as the Court docket for each of the subject cases demonstrates, Gibbs was counsel of record in each of the subject cases and signed all the pleadings in each of the subject cases on behalf of Prenda, and Gibbs testified that he had contact with both clients. See Dkt 58, at ¶¶7-8; Dkt 108-5, at 78:9-14, 90:2-8 (Gibbs testified that he had contact with Mark Lutz, who Gibbs knew to be CEO of both Ingenuity 13 and AF Holdings). So, even assuming *arguendo* that Steele had some degree of involvement in the subject cases, the evidence demonstrates he did not have exclusive contact with the client in those cases, and no evidence suggests Steele had any, let alone exclusive, contact with opposing counsel in any of the subject cases. Thus, Steele cannot be sanctioned for failing to make a *pro hac vice* appearance before the Court.

I. Steele Cannot Be Sanctioned For Any Failing To Appear At The March 11, 2013 Hearing

On March 5, 2013, this Court issued an Order that Steele would have to appear before this court on March 11, 2013. But, as Steele previously argued, this Court lacked jurisdiction to order him to appear because he resided outside California, was not a party to any of the subject cases, had not appeared in any of the subject cases, and was not counsel of record to any party in any of the subject cases.⁷

⁷ Steele hereby joins section IV(B)(6) of the brief filed on behalf of Prenda Law, Inc., Paul Duffy, and Angela Van Den Hamel and does not restate the arguments contained therein.

1 Moreover, Steele did not receive reasonable notice of the nature of the
2 proceedings he was ordered to appear in on March 11, nor what was expected of him
3 besides his appearance. In fact, the Order did not even require that the appearance had
4 to be personal rather than telephonic. Further, Steele received insufficient notice to
5 accommodate cross-country travel or information regarding who would pay for such
6 travel. In fact, he was not served until late Wednesday, March 6, 2013, less than three
7 business days before the hearing. Based on these factors, the Court's Order for Steele
8 to appear on Monday, March 11, 2013 at 1:30 P.M. was improper.

9 Notwithstanding the pending question regarding the Court's jurisdiction over him
10 as a witness, out of respect for the Court and its Order, Steele made himself
11 telephonically available for the approximately three-hour long hearing on the afternoon
12 of March 11, 2013. Although the Court and the parties were advised of his availability,
13 nobody requested that Steele provide any information. So, that he was available to
14 appear telephonically, rather than personally, had no impact on the proceedings and
15 further appeared on April 2, 2013.

16 In summary, Steele had justification for not appearing in person on March 11,
17 2013. Yet, he still specially appeared. His telephonic availability had no impact on the
18 proceedings given that he was never called to testify. As such, it would be both
19 inappropriate and inequitable to issue sanctions against him based on any determination
20 that he failed to comply with the order to appear.

21
22
23 Dated: April 10, 2013

MURPHY, PEARSON, BRADLEY & FEENEY

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25
26 By /s/ Timothy J. Halloran
27 Timothy J. Halloran
28 Attorneys for
JOHN STEELE