

REQUEST FOR STIPULATION

April 28, 2023

Aloha e Cox Fricke LLP ~

In preparation for filing the Opening Brief by May 15, 2023, my research clarified expectations surrounding RCCH Rule 28. Believe I have determined conclusively that the ICA should vacate the dismissal and reinstate the claim for good cause.

We can save the ICA time by stipulating as such and returning to the lower court. I would consider merging the tort and discrimination claims, as was initially our strategy. We could move forward to resolve this long-running dispute. If necessary, I will include this request with my brief if we are unable to come to an agreement.

Please respond by EOB, Monday, May 1, 2023.

You provided two cases in the April 25, 2023 hearing: *Wei v. State of Hawaii* and *Boudette v. Barnette*. Although the court had restricted my use of federal standards relative to Rule 28, the judge did not similarly restrict you when you cited the two. They are part of the record. And, I believe I am now justified to include my federal citation:

If there is “a reasonable prospect that plaintiff ultimately will be able to serve defendant properly,” the proper course of action is to quash service and permit a plaintiff another opportunity to complete service rather than dismiss the case.

Charles Alan Wright & Arthur R. Miller, 5B Federal Practice and Procedure § 1354 (3d ed. 2004).

NOTICE

“Although *Wei* does not raise the point, the district court apparently did not fulfill Rule 4(j)'s requirement of giving him notice of its intention to dismiss the action.” *Wei v. Hawaii*, 763 F.2d 370, 371 (9th Cir. 1985)

You cited four cases before the ICA in your motion to dismiss (Dkt No. 104). I concluded: Reviewing all four (4) cases of dismissal, two actions are common to all: (1) court (or clerk) informed Appellant that the time to file documents had expired; and (2) Appellant did not timely file an opening brief or appropriate dismissal.

There appears to be a courtesy practice of notifying parties of a pending dismissal for want of service or pleading. The circuit court did not provide notice. Likely judge and court were overwhelmed due to the pandemic. Was an extraordinarily chaotic time for everyone.

GOOD CAUSE

Second, "In order to avoid dismissal for failure to serve the complaint and summons within 120 days after filing, as prescribed by Fed.R.Civ.P. 4(j), a plaintiff must show "good cause." *Fimbres v. United States*, 833 F.2d 138, 139 (9th Cir. 1987); Fed.R. Civ.P. 4(j)." *Boudette v. Barnette*, 923 F.2d 754, 755-56 (9th Cir. 1991)

At a minimum, "good cause" means excusable neglect. A plaintiff may also be required to show the following: (a) the party to be served personally received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed. *Hart v. United States*, 817 F.2d 78, 80-81 (9th Cir. 1987). *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991)

(a) it is undisputed that defendants received actual notice of the lawsuit, as I mailed you a copy of the amended complaint, and your team retrieved the initial complaint that formed the basis of the Rule 11 sanctions motion;

(b) defendants would not suffer prejudice, as defendants could have filed the Rule 11 sanctions motion anytime after May 1, 2021 and I requested as such numerous times; and

(c) plaintiff would be severely prejudiced if the complaint was dismissed, as it would be time barred.

Wei does not contend that either he or his attorney attempted to serve the defendants, cf. *Geller*, 602 F. Supp. 501, was confused about the requirements for service of process, cf. *Arroyo*, 102 F.R.D. 516, or was prevented from effecting service within the 120 day limit by factors beyond his control. Cf. *Moorehead v. Miller*, 102 F.R.D. 834 (D.V.I. 1984). *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985)

I pointed out in my Motion to Enlarge to circuit court (Dkt No. 46), which you ridiculed at hearing March 3, 2022, that court closures confused me. In addition, I have been clear that I am not competent to manage this legal matter pro se. That's the reason I paid money to hire counsel. I was confused about the requirements for service of process. In desperation, I attempted service. At hearing April 25, 2022, you reported to the judge I had in fact served defendants improperly. I failed to get either of my two motions included in the March 3, 2022 hearing, as I did not understand how to properly submit and file a motion.

I have consistently argued that the Rule 11 sanctions motion prevents me from obtaining counsel, and as you refuse to file your charges, this obstacle to competent representation creates a factor beyond my control.

Please provide a response by EOB, Monday, May 1, 2023. Thank you.

/s/Scott Goold