Michael A. Sweet (SBN 184345)
msweet@foxrothschild.com
Jack Praetzellis (SBN 267765)
jpraetzellis@foxrothschild.com
Fox Rothschild LLP
345 California Street, Suite 2200
San Francisco, CA 94104
Telephone: (415) 364-5540
Facsimile: (415) 391-4436

Attorneys for Plaintiff E. Lynn Schoenmann,
Chapter 7 Bankruptcy Trustee for
Artem Koshkalda

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Artem Koshkalda, individually and as Sole Shareholder and Transferee of ART, LLC, Plaintiff, vs. Seiko Epson Corporation and Epson America, Inc. and Does 1 – 50, inclusive, Defendant(s).	Case No. 2:18-CV-05087-FMO-AGR **NOTICE OF PLAINTIFF'S VOLUNTARY DISMISSAL OF ACTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)(A)(i)**

WHEREAS, Artem Koshkalda ("Koshkalda") is the debtor in a bankruptcy case now pending in the United States Bankruptcy Court for the Northern

District of California, No. 18-30016 (the "Bankruptcy Case"), which was commenced on January 5, 2018;

WHEREAS, E. Lynn Schoenmann ("Trustee Schoenmann") is the duly ap-pointed and serving trustee in bankruptcy for the estate of Koshkalda (the "Estate");

WHEREAS, the claims alleged in the above-captioned action are the proper-ty of the Estate, for which only Trustee Schoenmann is empowered and authorized to act;

WHEREAS, when it was called to the attention of the Bankruptcy Court supervising the Bankruptcy Case that Koshkalda had filed this action during the pen-dency of the Bankruptcy Case, the Bankruptcy Court ruled that Koshkalda lacked the authority to commence this action; and

WHEREAS, the Bankruptcy Court entered its order on June 28, 2018, a copy of which is attached hereto as Exhibit 1, in para. 2 specifically authorizing Trustee Schoenmann to dismiss this action; NOW,

THEREFORE, Trustee Schoenmann, as the true plaintiff herein, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), gives notice that this action is voluntarily dismissed in its entirety, with prejudice. The defendants herein have not filed an answer or motion for summary judgment in this action. Accordingly, pursuant to Rule 41(a)(1)(A)(i) this action is dismissed upon the filing of this Notice and without order of the court.

Dated: July 18, 2018

FOX ROTHSCHILD LLP

By: */s/Michael Sweet*
Attorneys for Plaintiff
E. Lynn Schoenmann,
Chapter 7 Bankruptcy Trustee for
Artem Koshkalda

EXHIBIT 1

ENTERED ON DOCKET
JUNE 28, 2018
EDWARD J. EMMONDS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

SIGNED AND FILED: JUNE 28, 2018
/S/
HANNAH L. BLUMENSTIEL
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

IN RE:	)	CASE NO. 18-30016
	)	HLB
ARTEM KOSHKALDA,	)	
	)	CHAPTER 7
DEBTOR.	)	

ORDER GRANTING IN PART DEBTOR'S MOTION TO COMPEL ABANDONMENT

On June 28, 2018, the court held a hearing on Debtor's Motion to Compel Abandonment of Epson Litigation and Appeal Rights (the "Motion"). Appearances were as noted on the record. Upon due consideration of the pleadings and argument of the parties, and for the reasons stated on the record, the court **ORDERS** as follows:

(1) The Motion is **GRANTED** to the extent necessary to permit Debtor to pursue and defend the

Infringement Action [Seiko Epson Corp. et al. v. InkSystem LLC et al., Case No. 3:16-cv-00524 RJC-VPC in the United States District Court for the District of Nevada, Reno Division] through the entry of judgment and through any appeals arising from the Infringement Action.

(2) In all other respects, the Motion is **DENIED** and the Chapter 7 Trustee is specifically authorized to dismiss the action recently commenced in the United States District Court for the Central District of California [Artem Koshkalda etc. v. Seiko Epson Corp. et al., Case No. 2:18-cv-0527-FMO-AGR] in light of the concession by Debtor's Counsel that Debtor did not possess the authority to commence that action.

****end of order****

Proof of Service

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to this action. My business address is: Fox Rothschild LLP, 345 California Street, Suite 2200, San Francisco, CA 94104-2670.

On July 19, 2018, 1 served the following document(s):

NOTICE OF PLAINTIFF'S VOLUNTARY DISMISSAL OF ACTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(A)(1)(A)(I)

on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelope(s) addressed as follows:

Bankruptcy Counsel for Artem Koshkalda

Greg Rougeau
Brunetti Rougeau
235 Montgomery Street
Suite 410
San Francisco, CA 94104

X [**BY FIRST CLASS MAIL**]: I placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for çollecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and

mailing, it is deposited in the ordinary course of business with the United States Postal Service in a scaled envelope with postage fully prepaid.

X [**FEDERAL**] I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed this 19th day of July at San Francisco, California.

/s/ Peggy Basa
Peggy Basa

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARTEM KOSHKALDA, Plaintiff, v. SEIKO EPSON CORPORATION, et al., Defendants.	Case No. CV 18-5087 FMO (AGRx) ORDER RE: PENDING MOTION

Having reviewed and considered all the briefing filed with respect to plaintiff Artem Koshkalda's ("plaintiff" or "Koshkalda") Motion to Set Aside Notice of Voluntary Dismissal[] (Dkt.16, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed.R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001),and concludes as follows.

BACKGROUND

Plaintiff is the owner and sole shareholder of ART, LLC. (See Dkt. 1, Complaint at ¶ 2). According to plaintiff, his company was in the business of selling office supplies, including printers and printer ink cartridges. (See id. at ¶ 12). By 2016, almost all the ink cartridges plaintiff sold were of defendants Seiko Epson Corporation and Epson America, Inc.'s (collectively, "defendants") brand. (See id. at ¶ 14). Defendants are manufacturers of printers and ink cartridges. (See Dkt. 16-1, Memorandum ("Memo") at 1). Plaintiff accuses defendants of making wrongful

complaints to U.S. Customs agents, in which they represented that plaintiff was selling counterfeit Epson cartridges, when in fact plaintiff was importing genuine Epson cartridges. (See Dkt. 1, Complaint at ¶¶ 18-21). Plaintiff also accuses defendants of initiating a lawsuit in Nevada federal court in order to wrongfully seize the ink cartridges. (See id. at ¶¶ 22-41).

For their part, defendants accuse plaintiff and ART LLC of being the centerpiece of "a sophisticated global network" of counterfeit ink cartridge producers. (See Dkt. 17, Opposition to Motion[] ("Opp.") at 3). Upon discovering plaintiff's counterfeiting activities, which were being conducted out of Reno, Nevada, (see id.), defendants filed a lawsuit in Nevada federal court, asserting trademark infringement on September 8, 2016. (See Dkt. 18-1, Exh. C, Civil Docket at ECF 162 & 168).[30] On September 13, 2016, the Nevada court entered an

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[30] Plaintiff argues that the court may not take judicial notice of defendants' exhibits. (See Dkt. 20, Reply at 5-6). However, as plaintiff concedes, (see id.), the court may "take[] judicial notice of the existence and legal effect of the documents submitted by [defendants], but does not judicially notice the truth of the matters asserted in them." U.S. Bank, N.A. v. Miller, 2013 WL12114100, *4 (C.D. Cal. 2013); see also Neylon v. Cty. of Inyo, 2016 WL 6834097, *5 (E.D. Cal.2016) ("Federal courts may take judicial notice of the proceedings from other courts, including judgments, orders, and minutes. However, facts and factual findings contained within court documents generally are not the proper subject of judicial notice.") (internal citations omitted).

order authorizing the seizure and impoundment of, inter alia, counterfeit Epson products in plaintiff's possession. (See Dkt. 1-1, Exh. A, Temporary Restraining Order & Order for Seizure and Impoundment). On October 21, 2016, the Nevada court entered a preliminary injunction confirming the September13, 2016, order. (See Dkt. 18-1, Exh. E, Preliminary Injunction Order at ECF 219).

On August 3, 2017, the magistrate judge in the Nevada action recommended imposition of terminating sanctions against Koshkalda and ART LLC due to their "repeated disobedience and failure to comply with the court's orders[.]" (Dkt. 18-1, Exh. F, Report and Recommendation at ECF 226, 229). The district judge adopted the magistrate judge's recommendation, and struck Koshkalda and ART LLC's answer and ordered the clerk to enter default. (See id., Exh. H, Order at ECF 246). On February 3, 2018, the Nevada court entered default judgment against Koshkalda and ART LLC. (See id., Exh. M, Transcript of Motion Hearing at ECF 288).

Separately, on January 5, 2018, plaintiff filed a Chapter 11 bankruptcy petition, for both himself and ART LLC, in the United States Bankruptcy Court for the Northern District of California. (See Dkt. 1, Complaint at ¶ 9). The bankruptcy court converted the matter to a chapter 7 bankruptcy, and appointed a trustee in March 2018. (See id. at ¶ 10).

On June 8, 2018, approximately six months after plaintiff filed for bankruptcy, he filed suit in this court, alleging causes of action for: (1) wrongful seizure pursuant to 15 U.S.C. §1116(d)(11); (2) intentional interference with prospective economic advantage; (3) conversion; and (4) unfair competition,

in violation of California Business and Professions Code §§ 17200 et seq.(Dkt. 1, Complaint at ¶¶ 42-71).

On June 28, 2018, the bankruptcy court entered an order authorizing the trustee to dismiss the present action. (See Dkt. 15, Voluntary Dismissal[], Exh. 1, Order Granting in Part Debtor's Motion to Compel Abandonment at ECF 62) (holding that "the Chapter 7 Trustee is specifically authorized to dismiss the action recently commenced in the United States District Court for the Central District of California . . . in light of the concession by Debtor's Counsel that Debtor did not possess the authority to commence that action."). On July 19, 2018, the bankruptcy trustee fileda notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I). (See Dkt. 15). The trustee dismissed this lawsuit with prejudice. (See id. at 2). Subsequently, plaintiff brought the instant Motion, asking the court to set aside the dismissal. (See Dkt. 16, Motion).

DISCUSSION

Plaintiff invokes Federal Rule of Civil Procedure 60(b) in arguing that the trustee's dismissal should be set aside. (See Dkt. 16-1, Memo at 5). This Rule provides that:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been

discovered in time to move for a new trial under Rule59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

I. MISTAKE.

Plaintiff first argues that the trustee's voluntary dismissal should be set aside under Fed.R. Civ. P. 60(b)(1) due to mistake. (See Dkt. 16-1, Memo at 6). Specifically, plaintiff claims that the trustee believed that, by dismissing the instant action with prejudice, plaintiff would be free to refile it in a Nevada court. (See id.). Plaintiff points to a September 13, 2018, bankruptcy hearing at which counsel for defendants said that the trustee dismissed this action with prejudice because "she thinks the dismissal with prejudice in [Los Angeles] simply was, in essence, a preclusion of refiling the action in [Los Angeles] but not precluding [plaintiff] from filing it in Reno." (Dkt. 16-2, Declaration of Michael J. Hansen ("Hansen Decl.") at ¶ 14) (quoting hearing transcript). According to plaintiff, the trustee did not contest this characterization. (See Dkt. 16-1, Memo at 6). Instead, she told the bankruptcy court that her dismissal of this case was "not an assessment in any way, shape

or form of the merits of [the instant] claims[.]" (Dkt. 16-2, Hansen Decl. at ¶ 15) (quoting hearing transcript).

However, the record indicates that the trustee knew what she was doing when she dismissed this action with prejudice. In an August 16, 2018, filing before the bankruptcy court, the trustee stated that "[t]he contentions that [Koshkalda] wishes to make concerning the 'Seized Products' are included in the scope of the [Nevada action], which – after all – were seized pursuant to orders issued in that action." (Dkt. 18-1, Exh. R, Trustee's Opposition to Debtor's Motion to Compel[] at ECF 321-22). The trustee explained her decision to dismiss the present action with prejudice: "A dismissal without prejudice would have left open the possibility of this improper action being refiled by the Debtor, and countenanced the Debtor's continuing attempt to multiply and fragment litigation that has its source in the contentions of the parties in the Infringement Action in the Reno District Court. Solely to prevent that possibility, the Trustee filed the dismissal with prejudice." (Id. at ECF 322).

In any event, even assuming that the trustee was under the mistaken belief that dismissal with prejudice would preserve plaintiff's present claims, relief under Rule 60(b)(1) still would not be warranted. This is because a court generally will not grant Rule 60(b)(1) relief where a party's own mistake as to the law leads to an adverse judgment. See, e.g., Jacobsen v. People of the State of Cal., 2016 WL 7616705, * 7 (E.D. Cal. 2016) ("Rule 60(b)(1) does not excuse ignorance, carelessness, or inexcusable neglect for mistakes of law[.]"). In Latshaw v. Trainer Wortham &Co., Inc., 452 F.3d 1097 (9th Cir. 2006),

the Ninth Circuit discussed Rule 60(b)(1) within the context of mistakes of law arising from attorney error. The Latshaw court held that Rule 60(b)(1) does not "provide relief on account of excusable neglect to the alleged attorney-based mistakes of law at issue here." Id. at 1101; see also Engleson v. Burlington N. R. Co., 972 F.2d 1038, 1043(9th Cir. 1992) ("Neither ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1).") (internal quotation marks omitted); Yapp v. Excel Corp., 186 F.3d 1222, 1231 (10th Cir. 1999) (Rule 60(b)(1) relief not appropriate because "a party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes."); Cashner v.Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996) ("If the mistake alleged is a party's litigation mistake, we have declined to grant relief under Rule 60(b)(1) when the mistake was the result of a deliberate and counseled decision by the party.").

In sum, the record indicates that the trustee knew what she was doing when she dismissed the instant action with prejudice. However, even assuming the trustee dismissed the instant action with prejudice based upon her mistaken view of the law, such a mistake does not furnish grounds for plaintiff's requested relief.

II. NEWLY DISCOVERED EVIDENCE.

Plaintiff next argues that the voluntary dismissal should be set aside under Rule 60(b)(2) due to newly discovered evidence. (See Dkt. 16-1, Memo at 6-9). This new evidence consists of defendants'

assertion of the common interest privilege over some of their communications with the trustee. (See Dkt. 16-1, Memo at 6-7). From this, plaintiff infers that defendants "and the Trustee have been in cahoots adverse to Plaintiff for more than six (6) months," (id. at 7), and that "the Trustee was sharing attorney-client communications with [defendants] in a shared effort to harm Plaintiff." (Id. at 8). Beyond defendants' assertion of a common interest privilege, plaintiff points to the fact that he offered to purchase the claims in this action from the trustee for $60,000, but the trustee chose to dismiss this case with prejudice rather than take the offer. (See id. at 3-4).

Contrary to plaintiff's assertion that defendants and the trustee "had secretly agreed to work together adverse to Plaintiff," (Dkt. 20, Reply at 13), the record indicates that a more plausible explanation for the trustee's conduct is that defendants and the trustee were both concerned that plaintiff might be hiding assets of his estate from the trustee. (See Dkt. 17, Opp. at 13). Indeed, defendants asserted the common interest privilege only with respect to some of the communications they had with the trustee about this specific subject, i.e., whether to accept plaintiff's offer to purchase the claims. (See id.). This explanation also accounts for why the trustee did not accept Koshkalda's $60,000 offer. Since she was uncertain of the source of these funds, the trustee may well have been disinclined to sell the rights to bring this lawsuit to plaintiff.

Finally, it is well-settled that "bankruptcy trustees [] owe fiduciary duties to the estate and creditors, and in some situations, to the debtor." Slaieh v. Simons, 584 B.R. 28, 41 (Bankr. C.D.Cal. 2018). Where the trustee violates these duties, "the

Supreme Court has established the general proposition that bankruptcy trustees may be held personally liable[.]" In re Ferrante, 51F.3d 1473, 1478 (9th Cir. 1995). Under the circumstances here, the court is unwilling to hold that the bankruptcy trustee was colluding with defendants in order to harm plaintiff's interests, particularly where there is no apparent motive for the trustee to have done so, (see, generally, Dkt.16, Motion; Dkt. 20, Reply), and where this conspiracy, to the extent it also harmed the estate, could have exposed the trustee to personal liability.[31]

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[31] The court also concludes that the trustee's purported admission before the bankruptcy court that she was taking a "hands off" approach to this lawsuit, (see Dkt. 16-1, Memo at 7) does not constitute new evidence of the kind that warrants Rule 60(b)(2) relief. See Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) ("Relief from judgment on the basis of newly discovered evidence is warranted if . . . the newly discovered evidence [is of] such magnitude that production of it earlier would have been likely to change the disposition of the case.") (internal quotation marks omitted). Plaintiff's speculation that the bankruptcy court would not have empowered the trustee to dismiss this action if it had known earlier that the trustee saw herself as taking a hands off approach does not satisfy this standard. See In re Baumann, 2017WL 4581954, *1 (S.D. Cal. 2017) ("Rule 60 provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances.") (internal quotation marks omitted).

In short, the court concludes that plaintiff has not come forward with new evidence that warrants setting aside the voluntary dismissal.[32]

CONCLUSION

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

Based on the foregoing, IT IS ORDERED THAT plaintiff's Motion to Set Aside Notice of Voluntary Dismissal[] (**Document No. 16**) is **denied**.[33]

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[32] For the same reason, the court rejects plaintiff's argument that the purported conspiracy between defendants and the trustee constitutes "unique circumstances" which justify relief under Rule 60(b)(6). (See Dkt. 16-1, Memo at 9-12).

[33] The court declines to award Rule 11 sanctions against plaintiff. (See Dkt. 17, Opp. at 19-20). The court is not convinced that plaintiff's Motion was brought "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation[.]" Fed. R. Civ.P. 11(b)(1); see also Johnson v. Hewlett-Packard Co., 2014 WL 3703993, *6 (N.D. Cal. 2014) (noting that sanctions "are an extraordinary remedy that courts should resort to sparingly," and declining to impose sanctions even where "Plaintiffs' counsel appears to have unnecessarily multiplied the proceedings in this litigation").

Dated this 3rd day of September, 2019.

/s/
Fernando M. Olguin
United States District Judge

FILED
SEP 15 2020
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTEM KOSHKALDA, individually and as sole Shareholder and Transferee of ART, LLC, Plaintiff-Appellant, v. SEIKO EPSON CORPORATION; et al., Defendants-Appellees, and E. LYNN SCHOENMANN, Trustee	No. 19-56187 D.C. No. 2:18-cv-05087-FMO-AGR MEMORANDUM[34]

[34] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Submitted September 8, 2020 [35]

Before: TASHIMA, SILVERMAN, and OWENS, Circuit Judges.

Artem Koshkalda appeals pro se from the district court's orders denying his motions to set aside his voluntary dismissal of this action. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion the district court's ruling on motions brought under Federal Rule of Civil Procedure 60(b). *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010). We affirm.

The district court did not abuse its discretion in denying Koshkalda's Rule 60(b) motions to set aside the bankruptcy trustee's voluntary dismissal of this action because Koshkalda presented no basis for such relief. *See* Fed. R. Civ. P. 60(b); *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993) (explaining that Rule 60(b)(6) relief has been used "sparingly" and requires "extraordinary circumstances").

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[35] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).