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12 PRENDA LAW, INC.

13 **UNITED STATES COURT OF APPEALS**  
14 **FOR THE NINTH CIRCUIT**

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SAN DIEGO, CALIFORNIA 92101

15 INGENUITY 13 LLC,

16 Plaintiff,

17 and

18 PRENDA LAW, INC.,

19 Movant – Appellant,

20 v.

21 JOHN DOE,

22 Defendant - Appellee.

Ninth Circuit Case No. 13-55881

Underlying District Court Case No.  
2:12-cv-8333-ODW(JCx)

**KLINEDINST PC'S MOTION TO  
WITHDRAW AS COUNSEL FOR  
PRENDA LAW, INC.**

District Court Judge: Hon. Otis D. Wright, II  
Magistrate Judge: Hon, Jacqueline Chooljian  
Complaint Filed: September 27, 2012  
Trial Date: None set

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1 MEMORANDUM OF POINTS AND AUTHORITIES  
2 IN SUPPORT OF APPLICATION TO WITHDRAW AS COUNSEL  
3

4 I. INTRODUCTION

5 Heather Rosing, David Majchrzak, and Philip Vineyard of the law firm  
6 Klinedinst PC (collectively, "Klinedinst"), current counsel of record for Prenda  
7 Law, Inc. ("Prenda") in the Ninth Circuit and in the recently concluded Order to  
8 Show Cause ("OSC") proceedings held in the Central District (which are the  
9 subject of Prenda's appeal), hereby apply to this court for an order authorizing  
10 Klinedinst's withdrawal as counsel for Prenda. Klinedinst's representation of  
11 Prenda was expressly limited to the OSC proceedings, and given the district court's  
12 recent Order Issuing Sanctions against Prenda Law, among others, those  
13 proceedings have effectively concluded.

14 On May 17, 2013, Klinedinst filed with the district court (i) an executed  
15 stipulation between Klinedinst and Prenda authorizing Klinedinst's withdrawal as  
16 counsel and (ii) a proposed order for the withdrawal. The district court denied  
17 Klinedinst's request on the very same day and thereafter, pursuant to its inherent  
18 authority, imposed a condition for withdrawal that Prenda retain substitute counsel.  
19 By this Motion, Klinedinst requests that the Court of Appeals vacate the district  
20 court's order and permit Klinedinst to withdraw as counsel to Prenda. The bases  
21 for this request are that Prenda and Klinedinst mutually agreed that Klinedinst  
22 would not act as Prenda's counsel after the conclusion of the OSC; Prenda  
23 consented to the withdrawal; the case law relied upon by the district court to deny  
24 the stipulation and proposed order actually supports Klinedinst's withdrawal; and  
25 despite the foregoing, Klinedinst remains as counsel for Prenda in this appeal and  
26 in any later action before the district court.

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1 **II. STATEMENT OF RELEVANT FACTS**

2 On February 7, 2013, the district court issued an OSC regarding Sanctions,  
3 ordering Plaintiff’s counsel, Brett Gibbs, to appear before the court to respond to  
4 several allegations of improper behavior and attempted fraud on the court. At  
5 pages 10-11 of that order, the court stated it would consider whether sanctions,  
6 including fines and incarceration, were appropriate “to deter future misconduct.”<sup>1</sup>  
7 On March 5, 2013, in response to submissions filed by Gibbs and Morgan Pietz,  
8 counsel for an alleged putative John Doe in the underlying litigation, the district  
9 court ordered, relevant to this motion, out-of-state non-parties John Steele, Paul  
10 Hansmeier, Paul Duffy, and Angela Van Den Hemel to appear before the court on  
11 March 11, 2013, for the OSC hearing.<sup>2</sup> The order was silent on the reasons why  
12 the non-parties were to appear.

13 On March 7, 2013, Klinedinst was retained to specially appear on behalf of  
14 the non-parties at the March 11 hearing, and on March 8, 2013, Klinedinst filed an  
15 ex parte application for an order withdrawing the court’s previous order for the  
16 non-parties’ appearance, based on a lack of jurisdiction and unreasonable notice.<sup>3, 4</sup>  
17 After a lengthy March 11 OSC hearing at which Klinedinst specially appeared and  
18 its clients made themselves available to the court by phone, the district court  
19 denied on March 14, 2013, the non-parties’ ex parte application and amended its  
20 February 7, 2013, OSC regarding Sanctions to encompass Steele, Hansmeier,  
21 Duffy, Van Den Hemel, Prenda, two of Prenda’s clients (AF Holdings, LLC and  
22 Ingenuity 13, LLC), and several other persons and companies alleged to have ties  
23 to one or more of the summoned non-parties.<sup>5, 6</sup> The March 14 order also  
24 instructed the non-parties and Prenda, among others, to appear at a further OSC

25 <sup>1</sup> ECF No. 48, 10:27-28; 11:1-2. All references to the ECF are for the underlying  
26 district court litigation.  
27 <sup>2</sup> ECF No. 66.  
28 <sup>3</sup> Declaration of Heather Rosing, attached hereto, at ¶5.  
<sup>4</sup> ECF Nos. 81-85, 91.  
<sup>5</sup> ECF No. 93, 6:15-25; 7:1-3; 20:23-25; 21:1-2.  
<sup>6</sup> ECF No. 86, 1:18-22; 2:3-21.

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1 hearing on March 29, 2013, which was later continued to April 2, 2013, upon the  
2 court's own order.<sup>7, 8</sup>

3 Prior to the April 2, 2013, OSC hearing, separate counsel were retained to  
4 represent non-parties Steele and Hansmeier. These counsel made special  
5 appearance for the respective clients at the April 2 hearing.<sup>9</sup> Klinedinst continued  
6 to represent Duffy, Van Den Hemel, and Prenda.<sup>10</sup> However, Klinedinst disclosed  
7 to its remaining clients, on numerous occasions, that its representation would  
8 extend only so far as the defense of the OSC proceedings and include any transfer  
9 of information to subsequent counsel to ensure the clients' interests were protected  
10 in the litigation thereafter.<sup>11</sup> Duffy, Van Den Hemel, and Prenda accepted these  
11 conditions as they continued their representation through Klinedinst.<sup>12</sup>

12 On May 6, 2013, the district court filed its Order Issuing Sanctions against  
13 Gibbs, Steele, Hansmeier, Duffy, Prenda, and Prenda's clients, AF Holdings and  
14 Ingenuity 13, LLC. In doing so, the district court triggered a litany of requests by  
15 Steele, Hansmeier, Duffy, and Van Den Hemel to substitute in and specially appear  
16 in this matter in lieu of their counsel.<sup>13</sup> The court granted all of those requests.<sup>14</sup>  
17 All of those persons with the exception of Van Den Hemel filed Notices of Appeal  
18 with the district court.<sup>15</sup> As noted, Klinedinst electronically filed on May 17, 2013,  
19 with the district court an executed stipulation between Klinedinst and Prenda  
20 permitting the former to withdraw as counsel and a proposed order seeking the  
21 court's approval of that withdrawal.<sup>16</sup> The court refused to sign that order, stating  
22 that it would only permit Klinedinst's withdrawal upon Prenda's retention of  
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24 <sup>7</sup> ECF No. 86, 2:22-23.  
25 <sup>8</sup> ECF No. 88.  
26 <sup>9</sup> ECF No. 103, p. 3.  
27 <sup>10</sup> ECF No. 103, p. 2.  
28 <sup>11</sup> Rosing Dec., ¶5.  
<sup>12</sup> Rosing Dec., ¶5; *see also* the Stipulation, ECF No. 144.  
<sup>13</sup> ECF Nos. 131, 133, 135, 143; Rosing Dec., ¶6.  
<sup>14</sup> ECF Nos. 134, 137, 139, 146.  
<sup>15</sup> ECF Nos. 140, 154, 155.  
<sup>16</sup> ECF No. 144.

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1 subsequent counsel.<sup>17</sup>

2           Prenda is a corporation and unable to appear before the district court on a

3 *pro se* basis.<sup>18</sup> Nonetheless, Prenda agreed to Klinedinst’s limited scope of

4 representation for purposes of the OSC proceedings only, as verified by Prenda in

5 the executed stipulation. Within days of the court’s May 6, 2013, order, Klinedinst

6 provided in writing guidance to Prenda on the consequences itinerant to the

7 preclusion of a corporation appearing *pro se* before the federal courts, the retention

8 of subsequent counsel, and immediate issues to address with any Notice of Appeal

9 Prenda might file.<sup>19</sup> Once the district court denied Klinedinst’s withdrawal,

10 Klinedinst carried on as Prenda’s counsel, filing within three days a Notice of

11 Appeal and an Application for a Stay of the Proceedings and Enforcement of the

12 Sanctions Order on behalf of Prenda – all above and beyond the limited scope of

13 representation that Klinedinst was supposed to have. Thus, having protected their

14 client’s interests, and pursuant to the Central District’s Local Rules 83-2.9.2.1 and

15 83-2.9.2.3 and this Court’s Circuit Rule 27, Klinedinst requests the Ninth Circuit to

16 vacate the district court’s May 17, 2013, order and grant Klinedinst’s motion to

17 withdraw as counsel of Prenda.

18 **III. ARGUMENT**

19 **A. Authorities for Klinedinst’s Motion to Withdraw**

20 Central District Local Rule 83-2.9.2.1 states the following:

21           *Motion for Withdrawal.* An attorney may not withdraw as

22 counsel except by leave of court. An application for leave to

23 withdraw must be made upon written notice given

24 reasonably in advance to the client and to all other parties

25 who have appeared in the action.

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26 <sup>17</sup> ECF No. 147.

27 <sup>18</sup> Central District of California L.R. 83-2.10.1.

28 <sup>19</sup> Rosing Dec., ¶7. Klinedinst would, if it could, disclose the specific advice, but it does not wish to breach the attorney-client privilege and offers the general subject matter of its guidance solely to satisfy its legal obligations for this motion to withdraw. *See, e.g., Huntington Learning Ctrs., Inc. v. Educ. Gateway, Inc.*, 2009 U.S. Dist. LEXIS 69618 at 4.

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1 Similarly, Local Rule 83-2.9.2.3, in relevant part, states the following:

2 ***Corporation or Unincorporated Associations.*** An attorney  
3 requesting leave to withdraw from representation of a  
4 corporation or unincorporated association shall give written  
5 notice to the corporation or unincorporated association of  
6 the consequences of its inability to appear *pro se*.

6 Central District Local Rule 83-2.9.2.4 concludes the following:

7 ***Delays by Substitution of Attorneys.*** Unless good cause is  
8 shown and the ends of justice require, no substitution or  
9 relief of attorney will be approved that will cause delay in  
10 prosecution of the case to completion.

10 Finally, the Ninth Circuit’s Circuit Rule 27-11(a)(6) states that a motion  
11 requesting the withdrawal of counsel effectively stays “the schedule for record  
12 preparation and briefing pending the Court’s disposition of the motion.”

13 **B. Klinedinst Has Performed The Duties Required To Permit Its**  
14 **Withdrawal as Prenda’s Counsel**

15 Nowhere in the Central District’s Local Rules or the Appellate Court’s  
16 Circuit Rules is there a requirement that before counsel for a corporate client may  
17 withdraw as counsel of record, that client must retain subsequent counsel. Thus,  
18 the district court must have imposed this requirement through its discretionary  
19 authority, but the factors justifying that imposition are not present in the instant  
20 matter. The court quoted in its order the analysis that must be undertaken to  
21 determine whether a request for withdrawal should be denied or granted.<sup>20</sup> The  
22 questions to be considered constitute the following:

- 23 1. The reasons why withdrawal is sought;
- 24 2. The prejudice withdrawal may cause to other litigants;
- 25 3. The harm withdrawal might cause to the administration of justice; and
- 26 4. The degree to which withdrawal will delay resolution of the case.

27 *See Huntington Learning Ctrs., Inc. v. Educ. Gateway, Inc.*, 2009 U.S. Dist.

28 <sup>20</sup> ECF, No. 147, 1:21-27.

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1 LEXIS 69618 at 2 (“*HLC*”).

2 Indeed, *HLC* – the legal authority cited in this court’s order denying  
3 Klinedinst’s original request for withdrawal – is a limited scope of representation  
4 case addressing an attorney attempting to withdraw from representation of its  
5 corporate client, despite a looming deadline for a responsive pleading; *i.e.*, with the  
6 client facing a potential default if it did not retain new counsel to replace the  
7 withdrawing counsel. *Id.* at 3. Similar to counsel in *HLC*, Klinedinst has a limited  
8 scope of representation – to defend Prenda through the OSC proceedings. Identical  
9 to the client in *HLC*, Prenda has consented to Klinedinst’s withdrawal. *Id.* Finally,  
10 there is no mention anywhere in *HLC* that the corporate client had retained  
11 subsequent counsel or that the Central District imposed such a condition on  
12 withdrawal. All of these factors, as Judge Gutierrez of the Central District  
13 commented, serve to “weigh in favor of granting the motion [to withdraw].” *Id.*

14 With these similarities in mind, the remaining comparison between this case  
15 and *HLC* only strengthens the conclusion that Klinedinst must be permitted to  
16 withdraw. For example, Judge Gutierrez analyzed whether the opposing party  
17 would be prejudiced by the withdrawal of counsel due to any delay in prosecuting  
18 the matter. *Id.* Because the plaintiff in *HLC* could seek a default from the  
19 unrepresented corporation if the latter failed to file a responsive pleading, prejudice  
20 to the plaintiff was “negligible.” *Id.* Here, there is no opposing party, and there is  
21 no case to litigate, as it was dismissed back in January 2013. The prejudice prong  
22 of the court’s analysis does not even arise to “negligible.” The fact that there is no  
23 case to litigate also militates a finding that Klinedinst’s withdrawal cannot possibly  
24 delay resolution of the underlying case or cause harm to the administration of  
25 justice, the latter factor further ameliorated by the fact that the court administered  
26 its justice in the form of a sanctions order.<sup>21</sup> Simply, the four-pronged analysis  
27 used by the Central District to guide its discretionary authority leads to only one

28 <sup>21</sup> ECF No. 130.

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1 conclusion – Klinedinst should be permitted to withdraw as counsel of record for  
2 Prenda.

3 The one issue upon which counsel in *HLC* stumbled was its failure to  
4 provide a written explanation to its client of the consequences of failing to obtain  
5 subsequent representation. *Id.* at 4. That is not the case here. As highlighted in  
6 the attached Declaration of Heather Rosing, Klinedinst provided in writing to  
7 Prenda on several occasions the consequences of any failure to retain subsequent  
8 counsel. Thus, with all loose ends tied up, there is no basis to delay Klinedinst’s  
9 withdrawal any longer.

10 C. **Circuit Rule 27-11 Ameliorates Any Prejudice To Prenda Or Any**  
11 **Other Party to Its Appeal**

12 Federal Rules of Appellate Procedure and Circuit Rule 27 inherently  
13 authorize motions to withdraw as counsel. Specifically, Circuit Rule 27-11  
14 provides special arrangements for such a motion by staying the schedule for record  
15 preparation and briefing of the appeal. Thus, Prenda is not prejudiced by  
16 Klinedinst’s withdrawal, as it will have sufficient time to retain and brief  
17 subsequent counsel as this Court considers Klinedinst’s motion. Further, Prenda  
18 has been on notice since the beginning of the underlying OSC proceedings that it  
19 would need to retain counsel for any legal issues arising after the OSC ruling. The  
20 stay in the proceedings assures that there are no irregularities going forward with  
21 the appeal.

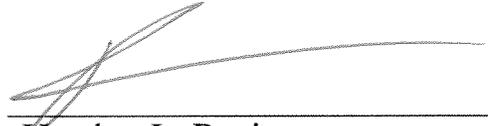
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1 **IV. CONCLUSION**

2 Based on the foregoing facts and legal authorities and Klinedinst's  
3 exhibition of good faith and strident efforts in the protection of Prenda's legal and  
4 financial interests, the Court should vacate the district court's earlier order denying  
5 Klinedinst's withdrawal and, in turn, grant Klinedinst's motion before this Court,  
6 thereby permitting Klinedinst to withdraw as Prenda's counsel.

7  
8 Klinedinst PC

9  
10 DATED: May 22, 2013

11 Bv: 

12 Heather L. Rosing  
13 David M. Majchrzak  
14 Philip W. Vineyard  
15 Attorneys Specially Appearing for  
16 PRENDA LAW, INC.

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