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Honorable James L. Robart

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN JACOBSEN, CONNIE
JACOBSEN, RYAN KILDEA and ARICA
KILDEA,

Plaintiffs,

vs.

MARK DRISCOLL and JOHN SUTTON
TURNER,

Defendants.

No. 2:16-CV-00298 JLR

PLAINTIFFS' OPPOSITION TO
DEFENDANTS TURNER AND
DRISCOLL MOTIONS TO DISMISS
WITH PREJUDICE AND TURNER'S
MOTION FOR SANCTIONS

NOTED ON MOTION CALENDER:
JULY 8, 2016

I. INTRODUCTION

Defendants Turner and Driscoll move to dismiss the complaint filed against them in this matter because they were not served within the 90-day period required under Fed. R. Civ. P 4(m). Defendant John Sutton Turner's Motion to Dismiss for Failure to Serve Pursuant to Fed. R. Civ. P. 4(m) and for Sanctions Based on the Court's Inherent Power at Dkt. # 4 at p.

1 1, 10 (hereinafter “Turner’s MTD”); Defendant Mark Driscoll’s Fed. R. Civ. P. 4(m) Motion
2 to Dismiss at Dkt. 7 at p. 1 (hereinafter Driscoll MTD). Turner requests dismissal with
3 prejudice and Driscoll requests dismissal, but with prejudice only if Turner’s motion to
4 dismiss with prejudice is granted. Driscoll MTD at p. 3.

5
6 Turner makes an additional request for sanctions, consisting of dismissal with
7 prejudice and attorney’s fees, pursuant to the Court’s inherent power. Turner MTD at pp. 8-
8 11. Plaintiffs do not object to dismissal without prejudice because they did not serve
9 Defendants within the 90-day period prescribed by Rule 4(m). Plaintiffs do, however, oppose
10 Turner’s request for sanctions of dismissal with prejudice and “attorney fees and sanctions in
11 the amount of \$4,240.” Turner MTD at p. 10. Plaintiffs also object to Driscoll’s request for
12 dismissal with prejudice.

13
14 Plaintiffs did not serve the Defendants within the prescribed 90-day period because
15 the funds they had expected to raise to prosecute this matter did not materialize. *See*
16 Declaration of Brian Jacobsen at ¶10 (hereinafter “B.Jacobsen Decl.”); Declaration of Connie
17 Jacobsen at ¶3 (hereinafter “C.Jacobsen Decl.”); Declaration of Arica Kildea at ¶¶2-3
18 (hereinafter “A.Kildea Decl.”); Declaration of Ryan Kildea at ¶¶2-3 (hereinafter “R.Kildea
19 Decl.”). Plaintiffs, therefore, do not object to dismissal without prejudice pursuant to Rule
20 4(m).

21 II. STATEMENT OF FACTS

22
23 Turner in particular asserts an array of odd allegations, untruths, half-truths and
24 irrelevant claims throughout his motion and declaration in support of his claim that Plaintiffs
25 and their counsel acted in bad faith in filing the complaint. Because Turner makes claims of

1 bad faith regarding some of the content of the complaint, in addition to other claims, it is
2 necessary to revisit some of the evidence and allegations found in the complaint.

3 Turner seems to think it sinister that only he and Driscoll were named in the lawsuit,
4 Turner MTD at p.2, because there were apparently over a dozen board members and over 50
5 church elders at Mars Hill Church (MHC) while he was there. *Id.* Though only Driscoll and
6 Turner are named Defendants, there are ten nonparty co-conspirators identified in the
7 complaint. *See* Complaint at Dkt. #1 at pp. 5-13. Moreover, the evidence linking Turner and
8 Driscoll to the allegations in the complaint was overwhelming and easily satisfied the
9 heightened pleading requirements for RICO and fraud claims. And while Turner only worked
10 at MHC for three and a half years, Turner MTD at p. 2, it is that same three and a half year
11 period during which it is alleged that “Defendants and their co-conspirators engaged in a
12 continuing pattern of racketeering activity” *Id.* at p. 2.

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14
15 Turner also sees an evil purpose in Plaintiffs’ months-long efforts to bring the parties
16 to mediation rather than to court. *See* Turner MTD at 2; Turner Decl. at ¶¶ 7, 8. And Turner
17 acknowledges Plaintiffs’ efforts to raise money for the litigation through a GoFundMe
18 account, Turner Decl. at ¶11, but then argues that Plaintiffs never really meant to serve them
19 because “Plaintiffs and their counsel sought to harass, disparage, and defame Mr. Turner
20 through the public act of filing a lawsuit.” Turner MTD at p.4. Turner avoids addressing the
21 obvious question of what Plaintiffs and their counsel intended to do if sufficient funds had
22 been raised to prosecute the case because the answer is clear-Defendants would have been
23 served. Turner also apparently sees bad faith in what he derides as “recruitment,” *id.* at ¶9,
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1 which was nothing more than Plaintiffs’ efforts to inform former MHC members about the
2 litigation.”¹

3 Turner and Driscoll both argue that because Plaintiffs’ counsel did not respond to Mr.
4 Bigby’s offer to accept service, the non-response is evidence of bad faith. *See* Turner MTD at
5 p. 4; Driscoll MTD at p. 2. It was not bad faith. At the time Plaintiffs’ counsel received the
6 offer to waive service from Mr. Bigby, Plaintiffs did not have sufficient funds to begin
7 prosecution of the case as they had expected. Fahling Decl. at ¶9 (hereinafter “Fahling
8 Decl.”). Since the only possible response Plaintiff’s counsel could give to Mr. Bigby was that
9 his clients lacked the resources to proceed, he chose not to respond. *Id.* Plaintiffs’ counsel
10 believed it would be unethical to disclose the financial difficulty his clients were having. *Id.*
11 And with nearly two months still remaining to effect service of process before the 90-day
12 period for service expired, Plaintiffs’ counsel anticipated that Plaintiffs would raise the
13 necessary funds to prosecute the case and allow him to accept Mr. Bigby’s offer to waive
14 service. *Id.* If sufficient funds to proceed had been available, Plaintiff’s counsel would have
15 immediately accepted waiver of service by Mr. Bigby, and proceeded to serve Driscoll as
16 well. *Id.*

19 **1. Efforts to Contact Turner**

20 Though failing to meet with someone who has wronged you is not evidence of bad
21 faith, as part of his bad faith theory, Turner claims Plaintiffs failed to meet with him when he
22 “reached out”. Turner MTD at pp. 3-4. Turner “reached out” only after the lawsuit was filed
23

25 ¹ FRCP 23(c)(2)(b) uses the term giving “notice” to describe the process of informing similarly situated
26 potential plaintiffs about their opportunity to participate in litigation.

1 and Plaintiffs' were instructed not to communicate with him because of the pending
2 litigation. Fahling Decl. at ¶8. However, in April 2014, Brian Jacobsen had an email
3 exchange with Turner where he made it clear that he was not satisfied with Turner's response
4 regarding Turner's signature on the ResultSource contract that scammed the New York
5 Times Best Seller List, yet Turner never followed up with Mr. Jacobsen until after the lawsuit
6 was filed. B.Jacobsen Decl. at ¶2. Then, on April 21, 2015, Mr. Jacobsen sent Turner a
7 private message on Facebook. *Id.* at ¶3. Facebook recorded that Turner had seen the message
8 the same day. *Id.* Turner never responded to the message. *Id.*

9
10 Turner knew the Plaintiffs preferred mediation over a lawsuit, Turner Decl. at ¶¶7-8.
11 Mr. Jacobsen had reached out to him, Turner had Mr. Jacobsen's email address and he had
12 plenty of opportunity to contact the Jacobsens. B.Jacobsen Decl. at ¶4. In spite of these facts,
13 Turner did not contact the Jacobsen's until after the lawsuit was filed. *Id.* In that email
14 communication to the Jacobsens, which Turner sent through a third party, he made the
15 following statements: "It would be my hope that this meeting could take place without
16 attorneys . . .," and "I would ask that this communication be totally off the record and I would
17 ask the Jacobsens and Kildeas to not communicate a possible meeting with anyone. Bringing
18 attorneys into this discussion might hamper or even block Christian reconciliation." *Id.* at ¶5.
19 On advice of their counsel, Plaintiffs did not respond to Turner. *Id.*; Fahling Decl. at ¶8.

20 21 **2. Reasons for Filing the Lawsuit**

22 The Plaintiffs only goal in the filing of the lawsuit against Driscoll and Turner was to
23 hold Defendants legally accountable for their wrongful actions which caused injury to them,
24 and to the many others they defrauded. B.Jacobsen Decl. at ¶6; C.Jacobsen Decl. at ¶¶7-8;

1 R.Kildea Decl.” at ¶5; A.Kildea Decl. at ¶5. However, if the Defendants had agreed to
2 mediation, the Jacobsens were willing to walk away from the over \$90,000 they had been
3 fraudulently induced to donate. B.Jacobsen Decl. at ¶6; C.Jacobsen Decl. at ¶7. When
4 Defendants refused to be held accountable through mediation, the Jacobsens and the Kildeas
5 were left with no choice but to file the lawsuit, claiming as damages the donations they would
6 never have made if they had known the truth about Defendants’ fraudulent practices.
7 B.Jacobsen Decl. at ¶6; C.Jacobsen Decl. at ¶7; R.Kildea Decl.” at ¶5; A.Kildea Decl. at ¶5.

9 Plaintiffs and their counsel never had a desire for retribution nor to harass Turner or
10 Driscoll. They also had no desire for personal notoriety or publicity. Fahling Decl. at ¶1;
11 B.Jacobsen Decl. at ¶7; C.Jacobsen Decl. at ¶8; R.Kildea Decl.” at ¶5; A.Kildea Decl. at ¶5..
12 One of the most difficult aspects for Plaintiffs in publicly challenging Turner and Driscoll
13 was to put themselves in the public eye. B.Jacobsen Decl. at ¶7; C.Jacobsen Decl. at ¶8. Long
14 before the lawsuit was filed, the Jacobsens lost many friends and were the subjects of many
15 personal attacks, including in social media and elsewhere on the Internet. *Id.*

17 Turner also claims “[t]his lawsuit has damaged [his] professional career by dragging
18 his name ‘through the mud’ in a very public forum.” Turner MTD at p.6. Turner’s name had
19 been “drug through the mud in very public forums” long before this lawsuit was filed. *See*
20 B.Jacobsen Decl., Exhibit A (contains a list of only a small portion of links on the Internet to
21 negative media coverage of MHC, Turner and Driscoll, from April 2012 through December
22 2014).

1 **3. Turner, a Harvard Business Grad Who had worked for Middle Eastern**
2 **Royalty and who had been CEO of a Company with Nearly 1600**
3 **Employees, Knew Exactly what He was doing**

4 In September 2011, before Turner signed the contract between MHC and
5 ResultSource, Driscoll announced the transfer of responsibilities from Pastor Jamie Munson
6 to Turner. Driscoll wrote, “Pastor Dave and I agree that Sutton Turner should function as our
7 highest-ranking ‘king.’ [Driscoll taught a leadership concept called “triperspectivalism,” in
8 which leaders tend to be “prophets,” “priests,” or “kings.”]. Sutton is new to staff, but not to
9 ministry. He is a former executive pastor of a large church. Educationally, he is a graduate of
10 Texas A&M, the SMU Cox School of Business, and Harvard Business School.
11 Professionally, he has recently served as the CEO of a company that has nearly 1,600
12 employees. Prior to that he served as the CEO of another company that under his leadership
13 grew from 0 to 500 employees in the first year.”² In April 2012, Turner wrote more about
14 his business experience: “Before I got hired at Mars Hill, I spent a few years in Qatar and the
15 U.A.E. working for Middle Eastern royalty. These were billion-dollar businesses with
16 thousands of employees. Money was no object. We could ring up the charges, rack up
17 personal expenses, and the Sheikh just kept filling the account.” *Id.*

18
19 In September of 2011, before Turner signed the ResultSource contract, an MHC
20 internal memo inquired whether Driscoll “would like to proceed with the Real Marriage
21 Campaign” which would promote his book, *Real Marriage*, by getting it on the New York
22 Times best seller list. Complaint at Dkt. 1 at p. 24. The means used to accomplish that end
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24
25 ² See <https://wenatcheethehatchet.blogspot.com/2012/04/sutton-turner-explains-we-serve-king.html> (last
26 accessed June 29, 2016) (the MHC link cited in the blog has since been scrubbed).

1 required the expenditure of MHC funds to promote the project. *Id.* The memo concluded with
2 a warning, “[i]f this information was ever made public it could be viewed by the IRS or
3 someone muckraking that a large giving campaign was set up for the personal profit of Mark
4 Driscoll” and “[a]s a result of this giving campaign, you will make a royalty of [sic] every
5 one of the books that is given away. So in a sense it could be conjectured that you’re making
6 money directly off of a Mars Hill fundraiser.” *Id.* at pp. 25-26.
7

8 Internal Revenue Code section 501(c)(3) conditions exemption from federal income
9 taxation for churches on the organization being one where “no part of the net income of
10 which inures to the benefit of any private shareholder or individual.” During the period of the
11 *Real Marriage* campaign financed by MHC, as a result of three raises in one year, Turner’s
12 salary increased from \$60,000 plus a \$66,000 housing allowance on April 1, 2011, to
13 \$153,000 plus a \$72,000 housing allowance effective April 6, 2012. *See Mars Hill Church –*
14 *Executive Elders, Compensation Study, June 2012*
15 <http://wp.production.patheos.com/blogs/warrenthrockmorton/files/2014/11/MHCCompStudy>
16 [2012.pdf](#) (last accessed June 28, 2016). In a FY2013 memo, Turner recommended Driscoll’s
17 salary for FY 2013 be raised to \$650,000 from \$503,000, plus a housing allowance of
18 \$200,000. *See Turner Memo re: Driscoll Salary,*
19 [http://wenatcheethehatchet.blogspot.com/2014/10/sutton-turner-memo-recommended-](http://wenatcheethehatchet.blogspot.com/2014/10/sutton-turner-memo-recommended-raise.html)
20 [raise.html](#) (last accessed June 29, 2016).
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23 His high-level business experience and Ivy League education notwithstanding, Turner
24 attempts to deflect onto others the responsibility for his actions, stating that during his time at
25 MHC “he reported to over a dozen board members and led Mars Hill Church with over fifty
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1 church elders,” yet “only Mr. Turner was named in the lawsuit alongside Mark Driscoll.”
2 Turner MTD at p. 2. Turner and Driscoll were the only named defendants because they are
3 the only ones whose “fingerprints” are consistently found in the fraudulent acts perpetrated at
4 MHC.

5
6 Furthermore, Turner strikes a blow against another strawman of his own making
7 when he complains that “the Plaintiffs misled the Court and the public that Mr. Turner . . . as
8 President of Resurgence Publishing, profited from the sales of Real Marriage. *Id.* What the
9 Plaintiffs actually alleged was “[o]n information and belief, RICO Defendants and their co-
10 conspirator Bruskas all signed an MHC Resolution which provided that, that [sic] Turner was
11 authorized and directed to enter into a Services Agreement and Trademark Licensing
12 Agreement (with Resurgence Publishing, Inc.) on behalf of MHC. *Resurgence Publishing,*
13 *Inc. participated, either directly or indirectly, in the RICO Defendants’ racketeering*
14 *activities by receiving financial benefit from the Real Marriage campaign.”* Complaint at
15 Dkt. 1 at p. 8 (emphasis provided). The Complaint also alleges, that “this scheme has been
16 fairly described as a ‘scam,’ and resulted in personal inurement to Driscoll and Turner.
17 Donations designated for each of these projects, or in the case of the Real Marriage
18 campaign, general funds, were used by RICO Defendants and their co-conspirators for
19 improper purposes. *Id.* at pp. 2-3.

21 **4. More Compelling Evidence of Wrongdoing by Turner**

22
23 As part of his argument that Plaintiffs and their counsel were motivated by bad faith
24 in filing the lawsuit, Turner argues that “there is no evidence to support “Plaintiffs RICO
25 claims and “there is substantial evidence to refute it.” Turner MTD at p. 3. Even without the
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1 benefit of discovery, the 42-page complaint filed in this matter provides extensive and
2 detailed evidence of RICO violations by Defendants. *See generally*, Complaint. In addition to
3 the examples identified, *supra*, just a few more examples are provided below.

4 In November of 2011, the month Turner became an executive pastor at MHC, an
5 internal memo was distributed detailing the RICO Defendants' strategy to raise funds for
6 MHC expansion under the guise of raising funds for international missions. *Id.* at p. 16-19.
7 The memo describes how MHC would tap into MHC's sleeping giant of potential donors
8 who would be deceived by marketing Global Fund as a fund for international missions, when
9 Defendants actual intent was to use a majority of the donations for domestic expansion of
10 MHC. *Id.* Also, Rachel Macor, a former staffer in Mars Hill finance department, stated,
11

12 I believe that Mars Hill leadership knew from the start that donations to the
13 Global Fund were restricted and could not be used for unrestricted purposes.
14 In fact, there was a separate account for Global in the books to note this
15 distinction. During my time in the Finance Department, there was a pointed
16 emphasis to be sure that restricted funds were not co-mingled with general
17 funds. I believe that among the Financial Leadership Team (which includes
18 multiple CPA-level staff, who would know all the ins and outs of restricted
19 and unrestricted donations), there was a clear awareness that any restricted
20 funds could not be directed to the general fund. Without a doubt in my mind,
21 Mars Hill leadership knew what they were doing.”

22 *Id.* at pp. 22-23.

23 Clear evidence of Ms. Maco's allegation is found in the November 2011 memo:

24 Of the money that comes into the Global Fund, designate a fixed percentage
25 internally for highly visible, marketable projects such as mission trips,
26 orphan care, support for pastors and missionaries in the third world, etc.
(ten to fifteen strategic operations in locations where Mars Hill wants to be
long term). This percentage should be flexible (not a “tithe”), and not
communicated to the public. Support for Mars Hill Global would be
support for Mars Hill Church in general, but the difference and the draw
would be that a portion of Global gifts would also benefit projects that
spread the gospel and serve the needs of people around the world.

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Every podcast would begin with a 10-second spot from Pastor Mark, inviting people to come on mission with Mars Hill Global to spread the gospel and help the helpless. This message would promote the Mars Hill Global giving website.

For a relatively low cost (e.g. \$10K/month), supporting a few missionaries and benevolence projects would serve to deflect criticism, increase goodwill, and create opportunities to influence and learn from other ministries.

Many small churches who may consider joining Mars Hill hesitate because they do not believe we support “missions.” While we need to continue to challenge the assumptions underlying a claim, the Global Fund would serve as a simple, easy way to deflate such criticism and help lead change in these congregations.

Id. at p. 17.³

Evidence of a continuing pattern of racketeering activity by soliciting, through the internet and the mail, contributions for designated purposes, and then fraudulently using significant portions of those designated contributions for other, unauthorized purposes includes the period from 2012 through June 20, 2014, where thirty of the thirty-three videos promoting the Global Fund on the MHC website continued the deceptive solicitation practices of Defendants by featuring videos that focused exclusively, or almost exclusively on Ethiopia or India. *Id.* at p. 18. And in a video that preceded every sermon on the Mars Hill website from November 24, 2013 to April 27, 2014, Turner stated that both Mars Hill members and those who watch online should give to Mars Hill Global. The video begins with this,

³ A drop-down menu on the MHC website that listed the Global Fund as a fund separate from the General Fund, Campus Fund, Easter Fund, etc. Additionally, a video shows the Giving page on the Mars Hill website (pre-May 2014) that also lists the Global Fund as separate from the General Fund.” See

1 Howdy Mars Hill Church, Pastor Sutton Turner here and I'm in Ethiopia, and
2 I just want to thank Jesus for continuing to use Mars Hill Church to make
3 disciples and plant churches. Mars Hill Global is the arm of Mars Hill
4 Church that makes disciples and plant churches all over the world. We not
5 only do church planting, but we help better equip church planters. . . . So
6 whether you're a member of one of our Mars Hill Church locations in the
7 United States or you're one of 100,000 podcasters every single week, we
8 encourage you to pray about giving above and beyond your tithe to Mars Hill
9 Global.

10 *Id.*

11 Turner also claims that Plaintiffs "overlooked" and "ignored the fact that MHC
12 published financial statements, that it was audited by a private firm, and that the Evangelical
13 Council for Financial Accountability (ECFA) investigated MHC with respect to Mars Hill
14 Global and found that the actions MHC had taken were appropriate." Turner MTD at p. 5.
15 Nothing was overlooked or ignored, especially the facts, and that is why, as demonstrated
16 below, the ECFA and its President were named as nonparty co-conspirators.

17 In a June 2014 "Confidential Memo" from Turner to "Lead Pastors," Turner states
18 that he, another MHC pastor, and the MHC auditor from FY11, FY12, and FY14 (there is no
19 explanation why the auditor from FY13 was not present), had a 2 ½ hr. meeting with Busby
20 (ECFA President). Complaint at pp.10-11. In the memo, Turner indicates that the meeting
21 was prompted because, "[a]s many of you are probably aware, critics started blogging back in
22 April that Mars Hill was deceptive in our fundraising under Mars Hill Global. This triggered
23 an investigation in May that completed yesterday." The memo reflects that Busby thought
24 changes made by MHC were "great and he would not do anything differently." *Id.* ECFA

25 https://www.youtube.com/watch?feature=player_embedded&v=a4EFX3-RXyg (last accessed February, 23,
26 2016). Complaint at p. 23.

1 then put out a statement saying MHC is a “Member in Good Standing.” *Id.* Busby’s
2 endorsement of MHC disregarded ECFA’s avowal that its Seven Standards of Responsible
3 Stewardship “are not standards that allow for grading on the curve. Rather, they are pass-fail
4 standards. ECFA members must comply with all of the standards, all of the time.” *Id.* Busby
5 knew MHC failed the test, yet he deliberately deceived MHC donors by declaring MHC to be
6 a “Member in Good Standing.” *Id.*

8 In his “Confidential Memo,” Turner also stated that “ECFA, our auditors, and Board
9 of AA [Board of Advisors and Accountability], have full access to this information, but it
10 will not be made public.” *Id.* This total lack of transparency was designed to hide from
11 donors the fraudulent solicitation engaged in by Defendants. Furthermore, Defendants’ *post*
12 *hoc* changes, such as Turner claims, Turner MTD at pp. 5-6, were made only after
13 Defendants fraudulent practices were exposed and do not magically undo the fraud they
14 engaged in for nearly three and one half years.

16 Regarding the Campus Fund, Turner does not dispute the allegation that “it was only
17 after some major donors (those donating \$1,000 or more to the Campus Fund) began
18 complaining because they did not see their donations being used for their respective MHC
19 campuses that the defendants asked those donors if it was ok if their donations were
20 redirected to other uses.” Complaint at p. 35, instead he denies that funds were redirected
21 without donor consent, but couples the claim, not with a denial that major donors complained
22 that their funds weren’t being used as designated, but with the non-responsive assertion that
23 after “MHC stopped accepting Campus Funds, the existing unspent donations were used by
24

1 each designated campus until they were depleted.” In other words, it was only after they got
2 caught that Defendants applied the designated funds as they were intended.

3 III. LEGAL ARGUMENT

4 In pertinent part, Fed. R. Civ. P. 4(m) provides, “If a defendant is not served within
5 90 days after the complaint is filed, the court—on motion or on its own after notice to the
6 plaintiff—must dismiss the action without prejudice against that defendant or order that
7 service be made within a specified time.” Defendants are correct that neither of them was
8 served within the time prescribed by the Rule. Turner MTD at p. 7; Driscoll MTD at p. 1.
9 Turner is mistaken, however, that the Court can dismiss “Plaintiffs’ claims against him with
10 prejudice pursuant to FRCP 4(m)” Turner MTD at 7, 10. A dismissal pursuant to “Rule
11 4(m) does not permit dismissal with prejudice.” *Bowling v. Hasbro, Inc.*, 403 F.3d 1373,
12 1376 (Fed. Cir. 2005) (“Because this case is limited to procedural matters not unique to
13 patent law, we defer to the law of the regional circuit, in this case the Ninth Circuit”).
14 Plaintiffs still have not raised the funds necessary to prosecute their case and therefore do not
15 oppose dismissal without prejudice pursuant to Rule 4(m).
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17
18 Turner, however, also invokes the Courts inherent power to sanction, requesting that
19 this Court dismiss the complaint with prejudice and award attorney fees. Turner MTD at p.
20 10. Driscoll, though, seeks dismissal with prejudice “if the Court is inclined to dismiss the
21 case against Turner with prejudice.” Driscoll MTD at p. 3. Turner argues that Plaintiffs and
22 their counsel acted in bad faith and that “[t]he sole purpose of filing the lawsuit was to
23 disparage the character of Mr. Turner,” Turner MTD at p. 10; Driscoll does not invoke the
24 inherent power of the court but instead suggests, “[a]rguably, Fed. R. Civ. P. 41(b) dismissal
25

1 might be an appropriate remedy (adjudication on the merits) given the fact that plaintiffs
2 ignored Turner's counsel's overtures." Driscoll MTD at p. 3. Plaintiffs oppose the imposition
3 of sanctions by dismissal with prejudice as requested by Defendants, and Turner's request
4 that the Court impose the additional sanction of attorney's fees.

5
6 Defendants, though, do not cite a single case where a court has granted a motion to
7 dismiss with prejudice pursuant to FRCP 4(m). Nor does Turner cite a single case where
8 failure to serve a defendant because of financial inability to prosecute the case was
9 sanctioned.

10 Pursuant to the Court's inherent power, sanctions may be imposed "if the court
11 specifically finds bad faith or conduct tantamount to bad faith. *Fink v. Gomez*, 239 F.3d 989,
12 994 (9th Cir. 2001). The Ninth Circuit has "emphasized, however that '[t]he bad faith
13 requirement sets a high threshold.'" *Mendez v. County of San Bernardino*, 540 F.3d 1109,
14 1132 (9th Cir. 2008) (internal citation omitted). The *Mendez* Court observed that "[e]ven in a
15 case where the district court described a litigant's arguments as 'totally frivolous,'
16 'outrageous' and 'inexcusable' and called his behavior 'appall[ing],' we nonetheless refused
17 to equate this characterization of conduct as synonymous with a finding of bad faith." *Id*
18 (internal citation omitted).

19
20 Turner offers no evidence that Plaintiffs or their counsel acted in bad faith. The
21 evidence before the Court is that Plaintiffs, through their counsel, filed a 42-page complaint
22 replete with facts supporting their RICO and fraud claims against Defendants, as well as
23 declarations from Plaintiffs and their counsel that establish that they fully intended to serve
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1 Defendants, but did not do so only because the funding they expected did not materialize, and
2 that they had no intention to harass and disparage Defendants.

3 While it is true that Plaintiffs and their counsel turned out to be wrong in their belief
4 that there would be sufficient donations to the GoFundMe account to serve the Defendants
5 and prosecute the case after filing the lawsuit, it is also true that a mistaken belief is not bad
6 faith.
7

8 CONCLUSION

9 For the foregoing reasons, Plaintiffs and their counsel respectfully request that this
10 Court deny Defendants' Motions to Dismiss with prejudice and Turner's Motion for
11 sanctions, including attorney's fees. Plaintiff does not object to dismissal without prejudice of
12 the claims against Defendants.

13 DATED: July 5, 2016

14 LAW OFFICE OF BRIAN FAHLING

15 By: /s/Brian Fahling

16 WSBA #18894

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18 Kirkland, WA 98033

19 Telephone: 425.202.7092

20 Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 5th, 2016, I mailed via First Class Mail and Email, and electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

VIA CM/ECF

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DATED this 5th day of July, 2016, in Kirkland, Washington.

/s/ Brian Fahling
Brian Fahling