1 2 3 4 5 6 7 8 9 10	R. Scott Jerger (pro hac vice) (Oregon State Bar #Field Jerger LLP 621 SW Morrison, Suite 1225 Portland, OR 97205 Tel: (503) 228-9115 Fax: (503) 225-0276 Email: scott@fieldjerger.com John C. Gorman (CA State Bar #91515) Gorman & Miller, P.C. 210 N 4th Street, Suite 200 San Jose, CA 95112 Tel: (408) 297-2222 Fax: (408) 297-2224 Email: jgorman@gormanmiller.com Attorneys for Defendants Matthew Katzer and Kamind Associates, Inc.	(202337)
11		
12	UNITED STATES DISTRICT COURT	
13	NORTHERN DISTRICT OF CALIFORNIA	
14	SAN FRANCISCO DIVISION	
15 16	ROBERT JACOBSEN, an individual, Plaintiff,	Case Number C06-1905-JSW Hearing Date: December 4, 2009 Hearing Time: 9:00am Place: Ct. 11, Floor 19
17	N/C	Hon. Jeffrey S. White
18	VS.	
19 20	MATTHEW KATZER, an individual, and KAMIND ASSOCIATES, INC., an Oregon corporation dba KAM Industries,	DEFENDANTS MATTHEW KATZER AND KAMIND ASSOCIATES, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S
21 22	Defendants.	MOTION FOR LEAVE TO FILE UNTIMELY DOCUMENTS
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Case Number C 06 1905 JSW Defendants' Response

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STATEMENT OF ISSUES TO BE DECIDED

1. Is Plaintiff's motion for leave proper under the Civ. Local Rules?

STATEMENT OF FACTS

This Court ordered the parties to complete summary judgment briefing on November 20, 2009 [Dkt# 357]. That happened. In their Reply brief, Defendants pointed out that Plaintiff's could not rely on unsworn expert reports at summary judgment under Fed. R. Civ. P. 56. Plaintiff has filed an unnoticed Motion for Leave in response.

ARGUMENT

Briefly, in reply to Plaintiff's response to the objection, the change in Federal Rule of Civil Procedure 56(c) discussed by Plaintiff is irrelevant to the issue at hand. Fed. R. Civ. P. 56(e) requires that affidavits in support of summary judgment be sworn as discussed in Defendants' Reply brief.

More importantly, Plaintiff's substantive, un-noticed motion for leave to supplement the record with untimely, sworn expert reports does not comply with this Court's Civil Local Rules. Plaintiff's motion, filed on Thanksgiving eve, is not an administrative motion as it deals with the substantive issues of admissibility. Plaintiff's motion does not comply with Civ. Local Rule 7-1 because it was not duly noticed pursuant to Civ. Local Rule 7-2 nor is it in the proper form of a motion as required by Civ. Local Rule 7-2.

Plaintiff's failure to comply with this Court's Local Rules works prejudice on Defendants. Under this Court's local rules, Defendants have until 21 days before the hearing date to respond to this motion. However, Plaintiff has not set a hearing for this motion and the parties are well within 21 days of the summary judgment hearing.

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Defendants' Response

¹ Plaintiff's unsworn expert reports are not relevant to summary judgment since they deal with opinions, not issues of fact.

Defendants object to the admissibility of both the Einhorn report and the Perens report (1) for purposes of summary judgment and (2) under Fed. Rule of Evidence 702. Defendants have already briefed their objection regarding admissibility during summary judgment. Defendants will timely file substantive Fed. Rule of Evidence 702 and *Daubert* objections to these expert reports when the parties file their *motions in limine*, pursuant to a future pre-trial scheduling order.²

CONCLUSION

Based on the above, Defendants respectfully request that Plaintiff's Motion for Leave to file untimely sworn expert reports be denied.

Dated November 25, 2009.

Respectfully submitted,

/s/Scott Jerger

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CERTIFICATE OF SERVICE

Defendants' Response

² The undersigned and Plaintiff's counsel McGowan have agreed to confer on a briefing schedule for pre-trial motions, including *motions in limine*, next week.

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I certify that on November 25, 2009, I served Matthew Katzer's and KAM's RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE on the following parties through their attorneys via the Court's ECF filing system: David McGowan Victoria K. Hall Warren Hall Attorney for Robert Jacobsen 5998 Alcala Park Law Office of Victoria K. Hall San Diego, CA 92110 3 Bethesda Metro Suite 700 Bethesda, MD 20814 /s/ Scott Jerger R. Scott Jerger (pro hac vice) Field Jerger LLP

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