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12 **Plaintiffs' Local Counsel**

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

17 _____ : Case No. C-04-3181 (MJJ)
IN RE INVISION TECHNOLOGIES, INC. :
18 SECURITIES LITIGATION : **CLASS ACTION**

19 _____ :
This document relates to: : **PLAINTIFFS' REPLY MEMORANDUM IN**
20 : **SUPPORT OF MOTION FOR LEAVE TO FILE**
21 : **MOTION FOR RECONSIDERATION**
_____ :
ALL ACTIONS. :

22
23 Plaintiffs submit this Reply Memorandum in further support of Plaintiffs' Motion For Leave To
24 File Motion For Reconsideration of the Court's August 31, 2006 Order Granting Defendants' Motion to
25 Dismiss and in reply to Defendants' Response. Plaintiffs recognize that Civil Local Rule ("Civil L.R.")
26 7-9(d) seems to apply herein and provides that the Court will set any briefing schedule on the request for
27 leave to file a motion, but given that Defendants have submitted a response without Court permission,
28 Plaintiffs believe that they needed to submit a reply to such response.

ARGUMENT

1
2 Defendants argue that Plaintiffs cannot seek leave to file a motion for reconsideration pursuant to
3 Civil L.R. 7-9 because judgment has already been entered and that rule only applies before judgment is
4 entered. Defendants further argue that even if Plaintiffs could seek leave to file a motion under Civil
5 L.R. 7-9, here they cannot because sufficient grounds for such motion do not exist. Defendants are
6 wrong on each point.

7 On August 31, 2006, the Court entered Judgment in favor of Defendants, dismissing the Second
8 Amended Consolidated Complaint with prejudice. Within the applicable time period, Plaintiffs filed a
9 proposed Motion for Reconsideration pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil
10 Procedure. Such Rules provide a right to file such a motion after a judgment has been entered if it is
11 believed, *inter alia*, that a mistake was made by the Court. Indeed, while Defendants state that they are
12 not challenging the propriety of Plaintiffs' proposed motion for reconsideration and will address the
13 substance of that motion if the Court sets a briefing schedule (*see* Response at 1, n.1), Defendants do not
14 challenge the right of Plaintiffs to move for reconsideration under the Federal rules, only whether the
15 proper procedure is first to request leave to file such a motion.¹

17 According to Defendants, because Civil L.R. 7-9(a) provides that leave to file a motion for
18 reconsideration of an order needs to be sought before judgment is entered, they believe that a motion for
19 leave to file a motion for reconsideration is prohibited after judgment is entered. However, Civil L.R. 7-
20 9(a) contains no such prohibition. Moreover, the result of Defendants' interpretation of Civil L.R. 7-9(a)
21 would not prevent the filing of motions for reconsideration, which are permitted under the federal rules,
22 but would only require leave to file such a motion when judgment had not yet been entered. If, however,
23 judgment had already been entered, the filing of a request for leave to file a motion for reconsideration
24 would be inconsequential. Because Civil L.R. 7-9 appears to be ambiguous as to whether leave is
25 required in circumstances such as exist in the present case, Plaintiffs, in the exercise of caution, elected
26

27
28 ¹ If Defendants are correct that Plaintiffs do not first need to make a motion for leave to file their motion
for reconsideration, then Defendants' contentions as to Civil L.R. 7-9 are moot and Plaintiffs' Motion For
Reconsideration pursuant to Fed.R.Civ.P. 59(e) and 60(b) should be deemed filed.

1 to first seek leave to file the motion for reconsideration.

2 In addition, prior to filing the motion for leave to file the motion for reconsideration, Plaintiffs
3 sought guidance from the court clerk's office. Plaintiffs called the clerk's office and inquired as to
4 whether leave pursuant to Civil L.R. 7-9 first had to be obtained even if a judgment had already been
5 entered. A clerk responded that before *any* motion for reconsideration, leave pursuant to Civil L.R. 7-9
6 was required to be obtained. Plaintiffs explained the information received from the clerk to Defendants'
7 counsel and urged them not to file unnecessary papers with the Court, suggesting that if the Court
8 determined to consider the motion for reconsideration, leave would be granted and if not, it would be
9 denied. Defendants, however, ignored Plaintiffs' suggestion, disregarded Civil L.R. 7-9(d), which states
10 that papers are not to be submitted unless the Court so directs, and instead submitted their Response.
11

12 Defendants also submit an argument concerning the merits of the motion for leave, although they
13 claim that such motion should not have been filed. They contend that grounds for leave do not exist
14 because the Court addressed the issues in the August 31, 2006 Order. *See* Response at 1. However, as
15 the Plaintiffs demonstrated in their proposed Motion for Reconsideration, the Court either did not
16 consider the material change in facts or a mistake was made in their application. Indeed, the very
17 information that the Court required in order to deny the motion to dismiss was presented in the new facts
18 submitted by the Plaintiffs in the proposed Third Amended Consolidated Complaint.

19 Plaintiffs have fully complied with the Local Rules and the advice of the clerk in seeking leave to
20 file their motion for reconsideration. The procedures were proper and leave to file the motion for
21 reconsideration should be granted.²
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23
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25

26 ² Defendants citation to *Edgerly v. City and County of San Francisco*, 2005 WL 106790 (N.D. Cal. Jan.
27 13, 2005) does not require a different result. In that action, plaintiff made a motion for reconsideration under
28 Civil L.R. 7-9 without first obtaining leave of the court to file such a motion. *Id.* at *2. Here, Plaintiffs are
moving for reconsideration under Fed.R.Civ.P. 59(e) and 60(b) and, unlike the plaintiff in *Edgerly*, are first
seeking leave of the Court to file such a motion.

CONCLUSION

For all the reason stated above and in Plaintiffs' Motion For Leave To File a Motion For Reconsideration, Plaintiffs respectfully request that the Court grants Plaintiffs' motion for leave to file their motion for reconsideration of the Court's August 31, 2006 Order granting Defendants' motion to dismiss the Second Amended Consolidated Complaint.

Dated: September 27, 2006

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