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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

U.S. LEGAL SUPPORT, INC.,
Plaintiff,
v.
AMEEN HOFIONI, ET AL.,
Defendants.

No. 2:13-cv-1770 LKK AC

ORDER

On January 8, 2014, the court held a hearing on Plaintiff's December 19, 2013 motion for contempt and sanctions. James D. McNairy appeared for Plaintiff. David S. Elkins appeared for Defendants. On review of the motion, the documents filed in support and opposition, upon hearing the arguments of counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

RELEVANT PROCEDURAL BACKGROUND

Plaintiff commenced this action on August 26, 2013. Four days later, Plaintiff filed a motion for a temporary restraining order, an order to show cause regarding issuance of a preliminary injunction, an order to preserve evidence, and an order for expedited discovery. ECF No. 5. Ultimately, these motions were resolved through a stipulated preliminary injunction ("SPI") and order for expedited discovery, entered by the court on September 24, 2013. ECF No. 24.

1 This matter is proceeding on a first amended complaint filed January 3, 2014 asserting
2 seven causes of action: (i) misappropriation of trade secrets under California’s codification of the
3 Uniform Trade Secrets Act, Cal. Civ. Code §§ 3426-3426.11; (ii) breach of contract; (iii) breach
4 of the duty of loyalty; (iv) breach of the duty of confidence; (v) statutory unfair competition,
5 under Cal. Bus. & Prof. Code § 17200; (vi) conversion; and (vii) fraud. Plaintiff seeks, inter alia,
6 injunctive relief, compensatory and punitive damages, disgorgement, and the imposition of a
7 constructive trust.

8 **FACTS RELEVANT TO DISPUTE**

9 Relevant to the instant dispute is the language of Paragraph 4 of the September 24, 2013
10 SPI, in which the parties stipulated to preserve evidence, including electronic evidence:

11 Defendants, and all persons or entities acting on their behalf, for
12 their benefit or in active concert or participation with them, are
13 hereby **ORDERED to preserve, and not destroy, damage, or**
14 **alter in any way**, any documents or other evidence that are
15 potentially relevant to Plaintiff’s claims, including, but not limited
16 to, any of Plaintiff’s Confidential Information that is contained or
17 reasonably may be contained in any data repository, whether stored
18 on paper or other physical media, including; [¶] Defendants’ . . .
19 electronic devices, including . . . personal digital assistants (e.g.,
20 iPads, “smart phones,” etc.) . . .

21 SPI ¶ 4, ECF No. 23 at 6 (emphasis added).

22 The parties also agreed to engage in electronically stored information (“ESI”) discovery
23 pursuant to a Forensic Inspection Protocol Agreement (“the FIPA”). SPI ¶ 6. As to the Ameen
24 Hofioni and Morgan Albanese (“the Individual Defendants”), the SPI provided as follows:

25 Hofioni and Albanese are hereby **ORDERED** to provide for
26 forensic investigation, imaging, analysis, and discovery under the
27 FIPA (collectively, “forensic investigation”), electronic access to
28 their personal e-mail accounts and physical access to smartphones
and to personal computer(s), laptop(s) and/or tablet computer(s) in
their possession, custody or control and that they used during the
period April 1 through July 31, 2013. They must additionally
provide for forensic investigation any electronic devices, media,
online accounts capable of storing information, network storage
locations, servers, instant message accounts or logs, and privately
owned virtual repositories that contain or may reasonably contain
any documents or other evidence that are potentially relevant to
Plaintiff’s claims and that are in of the respective Individual
Defendants’ possession, custody, or control.

1 SPI ¶ 6(a).

2 The parties conferred extensively to finalize the language of the FIPA, with each side now
3 accusing the other of delaying that process. See Pl.’s Memo of P. & A. in Supp. of Mot. for
4 Contempt & Sanctions (“Pl.’s Motion”) at 6; Defs.’ Opp’n to Pl.’s Motion (“Defs.’ Opp’n”) at 5.
5 Though the parties have outlined in detail those negotiation efforts, the undersigned declines to
6 delve into the particulars as they are irrelevant to the ultimate resolution of Plaintiff’s motion.

7 On November 15, 2013, the parties held a teleconference with the forensic neutral who
8 would conduct a forensic investigation pursuant to the FIPA to determine where the imaging of
9 the Individual Defendants’ iPhones and Hofioni’s iPad (“the personal electronic devices”) would
10 occur. During this conference call, defense counsel Stacie Yee remarked that the Individual
11 Defendants were continuing to use their personal electronic devices following entry of the SPI.
12 Surprised at this revelation, Plaintiff’s counsel asked the forensic expert whether continued use of
13 the personal electronic devices could overwrite or delete data. McNairy Decl. ¶ 26. The forensic
14 expert responded that this could occur. Id.

15 Following the November 15, 2013 conference call, the parties attempted to clarify their
16 respective positions regarding the Individual Defendants’ duty to ensure that data would not be
17 lost on the personal electronic devices, both pursuant to their duty to preserve and pursuant to the
18 SPI. These discussions revealed Plaintiff’s position that the personal electronic devices should
19 have been quarantined or imaged at the outset of this litigation whereas Defendants assumed that
20 quarantining the personal electronic devices was unnecessary absent particular circumstances not
21 present in this case.

22 Though the FIPA had yet to be finalized at the time of the hearing, the imaging of the
23 personal electronic devices was accomplished on December 2-3, 2013.

24 SUMMARY OF THE PARTIES’ POSITIONS

25 Plaintiff argues that the Individual Defendants and their counsel violated both the duty to
26 preserve and Paragraph 4 of the SPI by continuing to use the personal electronic devices after
27 receiving notice of this action and after the SPI was signed by Judge Karlton. Plaintiff asserts
28 that these devices should have been quarantined pending imaging lest potentially relevant

1 evidence be deleted. Plaintiff moves for a finding of contempt pursuant to the court's inherent
2 powers and pursuant to Federal Rule of Civil Procedure 37(b)(2). Plaintiff also seeks sanctions,
3 including monetary sanctions and an adverse inference instruction.

4 Defendants counter that the duty to preserve does not necessitate quarantining the at-issue
5 devices, that the SPI does not direct or imply that the personal electronic devices are to be
6 quarantined, and that Plaintiff has failed to show prejudice. Defendants ask that Plaintiff's
7 motion be denied and that instead Plaintiff be sanctioned in an amount sufficient to compensate
8 Defendants for responding to this motion.

9 LEGAL STANDARDS

10 Federal Rule of Civil Procedure 37(b)(2) provides for a range of sanctions based on a
11 party's failure to comply with a court order including striking the pleadings in whole or in part,
12 claim or issue preclusion, dismissal, and entry of default judgment. Further, instead of or in
13 addition to the aforementioned sanctions, under Rule 37(b)(2)(C) "unless the failure was
14 substantially justified or other circumstances make an award of expenses unjust," the court "must
15 order the disobedient party, the attorney advising that party, or both to pay the reasonable
16 expenses, including attorney's fees, caused by the failure."

17 A court also has the inherent authority to sanction certain conduct by a party or attorney.
18 See Chambers v. NASCO, Inc., 501 U.S. 32 (1991). "Because of their very potency, inherent
19 powers must be exercised with restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32,
20 44 (1991).

21 A finding of bad faith is not required for sanctions under either Rule 37 or the court's
22 inherent powers. See Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

23 DISCUSSION

24 The issue before the court is whether Defendants violated their duty to preserve and/or the
25 SPI's language directing the Individual Defendants "to preserve, and not destroy, damage, or alter
26 in any way, any documents or other evidence that are potentially relevant to Plaintiff's claims"
27 when they continued to use their personal electronic devices before the devices were imaged.
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1 A. Violation of the SPI

2 The court turns first to Plaintiff's claim that Defendants violated the terms of the SPI
3 through their continued use of the personal electronic devices. Plaintiff asserts that the Individual
4 Defendants' failure to stop using their personal electronic devices as required by the SPI
5 authorizes a finding of contempt and appropriate sanctions both on the Individual Defendants and
6 their counsel. But as Plaintiff's counsel was advised at the January 8, 2014 hearing on its motion,
7 the court is disinclined to impose any sanctions or a finding of contempt for any alleged violation
8 of the SPI. This is because the court does not construe a stipulated preliminary injunction,
9 entered into pursuant to Federal Rule of Civil Procedure 65 and signed by the district judge, to be
10 a "discovery order" over which the undersigned has authority absent specific referral.

11 Accordingly, Plaintiff's motion is denied to the extent it seeks sanctions for violation of the SPI.

12 B. Duty to Preserve

13 As to Defendants' duty to preserve, "[t]he failure to preserve electronic or other records,
14 once the duty to do so has been triggered, raises the issue of spoliation of evidence and its
15 consequences." Thompson v. U.S. Dep't of Housing & Urban Dev., 219 F.R.D. 93, 100 (D. Md.
16 2003). Spoliation is the destruction or material alteration of evidence, or the failure to otherwise
17 preserve evidence, for another's use in litigation. See Ashton v. Knight Transp., Inc., 772 F.
18 Supp. 2d 772, 799-800 (N.D. Tex. Feb. 22, 2011).

19 "A party seeking sanctions for spoliation of evidence must prove the following elements:
20 (1) the party having control over the evidence had an obligation to preserve it when it was
21 destroyed or altered; (2) the destruction or loss was accompanied by a 'culpable state of mind';
22 and (3) the evidence that was destroyed or altered was 'relevant' to the claims or defenses of the
23 party that sought the discovery of the spoliated evidence[.]" Goodman v. Praxair Servs., Inc., 632
24 F. Supp. 2d 494, 509 (D. Md. 2009) (quoting Thompson, 219 F.R.D. at 101); see Victor Stanley,
25 Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 520-21 (D. Md. 2010); In re Napster, Inc. Copyright
26 Litig., 462 F. Supp. 2d 1060, 1070-78 (N.D. Cal. 2006); Zubulake v. UBS Warburg LLC
27 ("Zubalake IV"), 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

28 Before determining whether any sanctions are appropriate, the court must first determine

1 whether any spoliation has occurred. Plaintiff retained two experts to purportedly determine the
2 nature and extent of the alleged data destruction caused by the Individual Defendants' continued
3 use of their personal electronic devices. See Greenfield Decl.; Kirtley Decl. But neither of these
4 declarations shed any light on what was actually lost. Instead, they discuss the memory
5 capabilities of these sorts of devices and what could potentially be lost through continued use.
6 See Greenfield Decl. ¶¶ 7-10, ECF No. 37-2. Mr. Greenfield declared that “[w]ithout a forensic
7 preservation, data loss can occur and would be unrecoverable.” Id. ¶ 12. Mr. Kirtley declares
8 that continued use of the devices “will compound the potential loss of data” and that “[t]he nature
9 of the electronic storage that these devices employ (i.e., volatile or flash memory), combined with
10 a much smaller total amount of memory to store data in, makes it more likely that data has been
11 overwritten when compared to a traditional desktop or laptop PC that has a hard drive.” Kirtley
12 Decl. ¶¶ 9-10. Neither of these experts identifies any actual loss of data nor provides any forensic
13 analysis of the personal electronic devices at issue.

14 As Plaintiff has not submitted any evidence bearing on the issue of spoliation, the court
15 cannot conclude or even reasonably infer that spoliation, let alone spoliation of *relevant* evidence,
16 has in fact occurred. Plaintiff contends that the continued use of the personal electronic devices is
17 “an absolute certainty,” but it also admits that “[t]he full extent of [Plaintiff]’s prejudice is yet to
18 be revealed given that no analysis of the forensic images of the At Issue Devices has yet
19 occurred.” Pl.’s Mot. at 18. Mere speculation is an insufficient basis for a finding of spoliation.
20 Tri-County Motors, Inc. v. American Suzuki Motor Corp., 494 F. Supp. 2d 161, 177 (E.D.N.Y.
21 July 3, 2007) (“[S]peculative assertions as to the existence of documents do not suffice to sustain
22 a motion for spoliation of evidence.”). See also Gomez v. Stop & Shop Supermarket Co., 670
23 F.3d 395 (1st Cir. 2012) (“It is a proposition too elementary to require citation of authority that
24 when there is no evidence to begin with, a claim of spoliation will not lie.”); Apple, Inc. v.
25 Samsung Electronics Co., Ltd., 881 F. Supp. 2d 1132, 1147 (N.D. Cal. July 25, 2012) (in finding
26 spoliation, court relied on ‘statistical contrast’ depicted by the fact that several key Samsung
27 employees who were alleged to have continued to have a biweekly automatic destruction policy
28 did not produce any emails in response to discovery requests whereas other, similarly-situated

1 employees produced thousands of emails); Passlogix, Inc. v. 2FA Technology, LLC, 708 F. Supp.
2 2d 378, 420 (S.D.N.Y. Apr. 27, 2010) (spoliation found after evidence was submitted showing
3 that 143 written communications were deleted); Nucor Corp. v. Bell, 251 F.R.D. 191, 197-98
4 (D.S.C. Feb. 1, 2008) (evidence submitted showing alteration or loss of data, including the loss of
5 over 1,564 event log entries and twelve restore points, and the loss of 73.3 MB of data due to
6 installing / uninstalling a program); Hamilton v. Signature Flight Support Corp., 2005 WL
7 3481423, at * 4 (N.D. Cal. 2005) (review of surveillance videos convinced the court that
8 Defendant destroyed at least a portion of the evidence); Zubulake IV, 220 F.R.D. at 221 (there is
9 “no reason to believe” that additional evidence would support Plaintiff’s claim where substantive
10 sampling did not contain relevant information). Because Plaintiff has not made a specific
11 showing that spoliation has in fact occurred, its motion must be denied as premature.

12 Accordingly, IT IS HEREBY ORDERED that Plaintiff’s December 19, 2013 motion for
13 contempt and sanctions is denied without prejudice.

14 DATED: January 15, 2014

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16 ALLISON CLAIRE
17 UNITED STATES MAGISTRATE JUDGE
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