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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NUTRITION DISTRIBUTION, LLC, an
Arizona limited liability company,

Plaintiff,

v.

ENHANCED ATHLETE, INC., a
Wyoming corporation, DOES 1 through
10, inclusive,

Defendant.

No. 2:17-cv-01491-TLN-KJN

**ORDER DENYING MOTION FOR
SANCTIONS**

This matter is before the Court pursuant to Plaintiff Nutrition Distribution, LLC’s (“Plaintiff”) Motion for Sanctions (Mot. for Sanctions, ECF No. 8.) against Defendant Enhanced Athlete, Inc. (“Defendant”). Defendant filed an opposition (Opp. to Mot. for Sanctions, ECF No. 17), and Plaintiff filed a reply, (Reply to Mot. for Sanctions, ECF No. 20). For the reasons set forth below, the Court hereby DENIES Plaintiff’s Motion for Sanctions. (ECF No. 8.)

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 On September 17, 2017, Plaintiff filed a complaint against Defendant for false advertising
3 in violation of the Lanham Act § 43(a)(1)(B). (ECF No. 1.) The complaint alleges that
4 Defendant, who markets and sells supplements to body builders, gym users, fitness enthusiasts,
5 and athletes, falsely advertised several of its products containing Selective Androgen Receptor
6 Modulators (“SARMs Products”) on its website by “downplaying or expressly denying any
7 negative side effects.” (ECF No. 1 at 2.) Specifically, Plaintiff alleges that medical experts have
8 concluded that the sale of SARMs Products is “highly dangerous to public safety.” (ECF No. 1 at
9 2.) Therefore, Plaintiff alleges “Defendant knew, or should have known that its SARMS Products
10 are not recognized as safe and effective for any of the uses suggested by Defendant[,] and
11 therefore Defendant has knowingly and materially participated in a false, misleading and
12 dangerous advertising campaign to promote and sell its [SARMs Products].” (ECF No. 1 at 3.)

13 On September 13, 2017, Defendant filed an answer. (ECF No. 6.) Shortly thereafter, on
14 September 17, 2017, Defendant emailed a newsletter (“First Newsletter”) to its customers,
15 informing them of the lawsuit Plaintiff filed against it, and encouraging them to take action and
16 voice their opinions regarding the lawsuit. (ECF No. 8-2.) In addition to emailing the First
17 Newsletter, Defendant also posted it on its website. (ECF No. 8 at 4.) The First Newsletter
18 explained that Tauler Smith LLP, Plaintiff’s attorney, had a history of filing these types of
19 lawsuits and “ha[s] been fairly successful extorting small business owners for tens of thousands
20 of dollars.” (ECF No. 8-2 at 1.) It stated that Plaintiff and his attorney “were attempting to take
21 away your right to choose what you can and cannot experiment on yourself.” (ECF No. 2 at 1.)
22 The First Newsletter then described actions taken in an “equally baseless” lawsuit, where the
23 defendant’s supporters contacted the plaintiff’s law firm to express their views, and in some cases
24 took improper action to disrupt the firm in an effort to persuade the plaintiff to withdraw the
25 lawsuit. (ECF No. 2 at 2–3.) While the First Newsletter stated that the recipients should not
26 engage in illegal conduct, it nonetheless provided the following list of actions taken in the other
27 lawsuit:

1 Fax Machine: Sent 50-100 pages of all black paper as to burn through all their
2 toner and overheat fax Machine[.] Put the number in a robodialer so no other
3 faxes can be received since line constantly busy[.]

4 Phone number: Called to tell their opinion about the lawsuit[.] Called to tell their
5 experience with SARMS and how it benefited them[.] Just called and hung up[.]
6 Put number in robo dialer and/or signed it up to various promotion sites so it was
7 constantly receiving phone calls from solicitors. Filled up voicemail so no other
8 clients were able to leave messages[.] Kept phone line ringing 24/7 so no other
9 clients could reach the attorney, thus crippling their ability to operate[.]

10 Web Site: Some of the more advanced customers were able to create a DDOS
11 attack on the site, shutting it down entirely. Customers would go to the web site of
12 the Plaintiff, make an order and then call their own credit card company and
13 dispute the charge. Over 1% chargebacks results in the loss of credit card
14 merchant account, thus shutting down the web site's ability to make online sales.

15 Emails: Fans emailed all members of the staff of the law firm multiple times a day
16 asking legitimate questions or making valid statements so as not to run afoul of
17 harrasment [sic] charges. They did this so that internal pressure from the office
18 resulted in the law suit not being worth the loss of other business.

19 Physical Address: Fans would show up to the office and make it very clear as to
20 what they thought about the attorney attempting to threaten their freedom of
21 choice. Nails and other debris kept getting found all over the parking lot[.]
22 Homeless people were paid to go into the office and make it a rather unpleasnt
23 [sic] place[.]

24 (ECF No. 8-2 at 2–3.)

25 The First Newsletter then sought the contact information of those personally involved
26 with Plaintiff or Plaintiff's counsel, Tauler Smith LLP, including “[g]irl friend’s or wife’s names,
27 places of employment [sic], phone numbers or addresses.” (ECF No. 8-2 at 3.) Additionally, it
28 provided the email addresses of employees at Tauler Smith LLP, and told customers that a 50%
off sale would be provided when the lawsuit was withdrawn. (ECF No. 8-2 at 3–5.)

On September 18, 2017, the day after the First Newsletter was posted, Defendant issued a
subsequent newsletter (“Second Newsletter”), urging its supporters to stay within the confines of
the law, including exercising their free speech rights by expressing only positive messages. (ECF
No. 8-5.) The Second Newsletter noted that Defendant did not want its supporters to take action
that would detract from the positive message of consumer freedom to purchase lawful products.
(ECF No. 8-5.) It specifically stated in bold: “**We are sending this out to reiterate that we in**

1 **no shape or form want you to participate in any illegal activity.”** (ECF No. 8-5.) By
2 September 20, 2017, three days after the initial posting, the portions of the First Newsletter that
3 described improper conduct were removed from Defendant’s website.¹ (ECF No. 11-1 at 74–77.)

4 Following the two newsletters, several of Defendant’s customers emailed and called
5 Tauler Smith LLP. (ECF No. 8-3.) Many of these emails simply voiced people’s discontent over
6 the lawsuit and asked Plaintiff to reconsider the lawsuit. (ECF No. 8-3.) Other emails were crude
7 or gibberish. (ECF No. 8-3.) For example, one email read: “What right do you have to tell us
8 what what [sic] we can put in or body??? Alcohol is one of the number one killers in the world,
9 but it's OK. Same with tobacco . . . Why don't you put your efforts towards shutting them down
10 instead of a little suppliment [sic] site.” (ECF No. 8-3 at 1.) Another read as follows: “I am
11 emailing you to voice my discontent over the lawsuit you are filing against Enhanced Athlete. As
12 Americans our freedoms are shrinking everyday and this lawsuit perpetuates this trend. Think
13 about some of the freedoms you enjoy everyday. Maybe its [sic] the occasional drink after a
14 stressful day. Your cigarette smoke break or even the cup of coffee? Now imagine that being
15 taking away. I am sure this falls on deaf ears but hopefully you reconsider.” (ECF No. 8-3 at
16 25.) In all, Plaintiff submitted documentation of 55 emails and 20 calls purportedly sent by
17 Defendant’s customers. (ECF Nos. 8-3; 8-4.)

18 Plaintiff also claims that following the newsletters, Plaintiff’s counsel received three
19 threats of violence. (ECF No. 8 at 8.) First, Plaintiff claims that Defendant’s co-founder and
20 online persona, Dr. Tony Huge, published a physical threat of violence directly at Plaintiff’s
21 counsel when he posted a personal conversation in which an unknown person stated that
22 Plaintiff’s counsel “underestimates the power of our community and the ability to fuck up his
23 life.” (ECF No. 8 at 8.) However, Plaintiff does not provide the publication, but instead provides
24 a screen shot of what appears to be a private conversation. (ECF No. 8-11.) Additionally, Dr.

25 ¹ Plaintiff and Defendant dispute when the First Newsletter was taken down. Plaintiff claims that it was
26 removed as of September 26, 2017 (ECF No. 11-1 at 2), while Defendant claims it was removed within 48 hours of
27 its original posting, (ECF No. 17 at 12). Based on the evidence provided, the Court finds that the portion of the First
28 Newsletter describing improper conduct taken in other lawsuits was removed by September 20, 2017. The exhibit
supporting Plaintiff’s claim that the First Newsletter remained up until September 26, 2017 does not include the
improper conduct language. (ECF No. 11-1 at 74–77.)

1 Huge's response to the unknown person states "Don't do anything stupid." (ECF No. 8-11.)
2 From the conversation, it appears that Dr. Huge is telling the unknown individual to not engage in
3 misconduct, including violent behavior. (ECF No. 8-11.) Second, Plaintiff claims that Dr. Huge
4 commented to a Sacramento Business Journal that Plaintiff's counsel was "putting himself in
5 jeopardy" by filing the case and that he would be "surprised if [Tauler] makes it out alive." (ECF
6 No. 8 at 8-9.) Third, Plaintiff claims that a random Facebook user commented on a Facebook
7 post to "order 66 Robert Tauler." (ECF No. 8-10.) Plaintiff claims that this term, coined from a
8 Star Wars scene, is a common internet reference to commit murder. (ECF No. 8 at 8.)
9 Defendant, conversely, maintains that there is no support that the post is a reference to commit
10 murder, and in the bodybuilder community, "order 66" essentially means to publicly criticize
11 someone. (ECF No. 17 at 19.)

12 II. STANDARD OF LAW

13 A district court "has the inherent authority to impose sanctions for bad faith, which
14 includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir.
15 2001). "The most common utilization of inherent powers is a contempt sanction levied to
16 'protect[] the due and orderly administration of justice' and 'maintain[] the authority and dignity
17 of the court.'" *Primus Auto. Fin. Servs. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) (quoting
18 *Cooke v. United States*, 267 U.S. 517, 539 (1925)). However, "[b]efore awarding sanctions under
19 its inherent powers, however, the court must make an explicit finding that counsel's conduct
20 'constituted or was tantamount to bad faith.'" *Id.* (quoting *Roadway Exp., Inc. v. Piper*, 447 U.S.
21 752, 767 (1980)).

22 A party demonstrates bad faith where it "knowingly or recklessly raises a frivolous
23 argument, or argues a meritorious claim for the purpose of harassing an opponent." *Id.* at 649.
24 "A party also demonstrates bad faith by 'delaying or disrupting the litigation or hampering
25 enforcement of a court order.'" *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)).
26 "The bad faith requirement sets a high threshold," and is not necessarily met even when a
27 litigant's behavior is outrageous, inexcusable, and appalling. *Id.* "A court must, of course,
28 exercise caution in invoking its inherent power, and it must comply with the mandates of due

1 process, both in determining that the requisite bad faith exists and in assessing fees.” *Chambers*
2 *v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). “Because of their very potency, inherent powers must be
3 exercised with restraint and discretion.” *Id.* at 44.

4 III. ANALYSIS

5 Plaintiff argues that Defendant’s newsletters were solicitations for “recipients to engage in
6 a campaign to harass [Plaintiff and its counsel], in order to obtain settlement leverage in this
7 action,” and thus constituted bad faith. (ECF No. 8 at 4.) Plaintiff also contends that the phone
8 calls, emails, and threats it received as a result of the newsletters constituted bad faith. (ECF No.
9 8 at 13.) Defendant, conversely, argues that the issue on Plaintiff’s Motion is not whether
10 Defendant engaged in civil harassment, but rather whether Defendant acted in bad faith. (ECF
11 No. 17 at 17.) Defendant maintains it has not acted in bad faith because within 24 hours of the
12 issuance of the First Newsletter, it sent out the Second Newsletter urging “its supporters to
13 confine their speech and actions to positive and lawful protests,” and took down the First
14 Newsletter shortly thereafter. (ECF No. 17 at 6.) Moreover, Defendant contends that its conduct
15 did not result in any delay to Plaintiff’s lawsuit, which is proceeding apace. (ECF No. 17 at 17.)
16 Finally, Defendant argues that Defendant and its customers’ conduct is protected by the First
17 Amendment. (ECF No. 17 at 14.) For the reasons discussed below, the Court finds that
18 Defendant did not act in bad faith.

19 Bad faith includes a broad range of willful improper conduct. *Fink*, 239 F.3d at 992.
20 However, bad faith is only demonstrated when the judicial process is abused. *See Ass’n of Flight*
21 *Attendants v. Horizon Air Indus.*, 976 F.2d 541, 549 (9th Cir. 1992) (“A court’s inherent authority
22 extends only to remedy abuses of the judicial process.”). For example, bad faith is demonstrated
23 where a party “knowingly or recklessly raises a frivolous argument, or argues a meritorious claim
24 for the purpose of harassing an opponent.” *Batarse*, 115 F.3d at 649. “A party also demonstrates
25 bad faith by ‘delaying or disrupting the litigation or hampering enforcement of a court order.’”
26 *Id.* (quoting *Hutto*, 437 U.S. at 689 n.14).

27 Here, Plaintiff fails to demonstrate how Defendant abused the judicial process. While the
28 Court is deeply troubled by Defendant’s First Newsletter and its implication that Defendant’s

1 customers should use illegal means to disrupt Plaintiff's counsel's business to obtain a withdrawal
2 of the lawsuit, the Court also finds that within 24 hours of the issuance of the First Newsletter,
3 Defendant issued a Second Newsletter clarifying its intentions. The Second Newsletter explicitly
4 informed Defendant's customers to follow the law and only engage in legal conduct protected by
5 the First Amendment. Additionally, within 72 hours, Defendant took down the portions of the
6 First Newsletter that contained examples of improper conduct. Therefore, Defendant was merely
7 encouraging others to utilize their First Amendment right. There is no question that encouraging
8 others to partake in lawful speech is protected under the First Amendment. If Defendant's
9 customers chose to engage in improper conduct that interfered with the judicial process,
10 Defendant cannot be held responsible once Defendant made clear that such actions should not be
11 taken.

12 However, the evidence establishes that neither Defendant, nor Defendant's customers,
13 engaged in any of the improper tactics set forth in the First Newsletter, such as placing nails in
14 Plaintiff's counsel's parking lot, hiring homeless people to go into Plaintiff's counsel's office, or
15 harassing significant others, nor did they make credible threats of violence against Plaintiff's
16 counsel. Rather, Defendant and Defendant's customers expressed their views on Plaintiff's
17 lawsuit in an effort to persuade Plaintiff and its counsel to withdraw the lawsuit, albeit in colorful
18 and hyperbolic language at times. It is clear that these phone calls, emails, and social media posts
19 did not inhibit the judicial process, as within a week of the issuance of the First Newsletter,
20 Plaintiff filed this Motion (ECF No. 8), an Opposition to Defendant's Ex Parte Application for
21 Expedited Discovery (ECF No. 11), and a state court action against Defendant alleging the same
22 conduct at issue in this Motion, (ECF No. 18-2).² Therefore, the litigation is proceeding
23 uninterrupted, and Plaintiff has failed to demonstrate any abuse of the judicial process.
24 Accordingly, the Court finds Defendant's conduct does not constitute bad faith and is not subject
25 to sanctions.

26 ² The Court takes judicial notice of the state court filing. Under Federal Rule of Evidence 201, a Court may
27 take judicial notice of a "fact that (1) is not subject to reasonable dispute because it generally is known within a trial
28 court's territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot
reasonably be questioned." Fed. R. Evid. 201. "The court may take judicial notice of its own records in other cases,
as well as records of an inferior court in other cases." *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

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IV. CONCLUSION

For the foregoing reasons, the Court hereby DENIES Plaintiff's Motion for Sanctions.

IT IS SO ORDERED.

Dated: May 30, 2018



Troy L. Nunley
United States District Judge