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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

H.P.D. CONSOLIDATION, INC.,
Plaintiff,
v.
JOSE PINA, et al.,
Defendants.

Case No. [15-cv-05309-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
MOTION FOR ATTORNEYS’ FEES**

Docket No. 152

I. INTRODUCTION

Plaintiff H.P.D. Consolidation Inc., a provider of wine storage and logistics, brought the present action. Defendants are Jose Pina, aka Jose Piedra (“Pina”); Edwin Whitefield (“Whitefield”); David Borges (“Borges”); Michael Shemali (“Shemali”); Wines of the World, LLC, dba Hooked on Wine (“WOW”); Tri Cities Liquor & Spirits, LLC, dba Mid Columbia Wine & Spirits (“Tri Cities”); Hi-Time Wine Cellars (“Hi-Time”); Matt Myers, individually and dba Matt Myers Wine (“Myers”); Sandra Rodriguez and Eduardo Rodriguez (“the Rodriguezes”); Sandi’s Pet Place; and Belmont Wine Exchange, LLC (“Belmont Wine”) (together, Shemali, WOW, Tri Cities, Hi-Time, Myers, the Rodriguezes, Sandi’s Pet Place, and Belmont Wine are “Receiving Defendants”). Plaintiff alleges that Defendants engaged in a wine theft ring in violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 2315 (interstate transportation of stolen property), and 18 U.S.C. § 1341 (mail fraud).

Pending before the Court is Receiving Defendants’ motion for attorneys’ fees under 28 U.S.C. § 1927 and the Court’s inherent power. Receiving Defendants allege that Plaintiff and Plaintiff’s Counsel unreasonably and vexatiously multiplied the proceedings in this action; and that they initiated and pursued this action in bad faith. This Court grants Receiving Defendants’

1 motion for attorneys' fees in the amount of \$23,737.40 under 28 U.S.C. § 1927 but denies request
2 for sanctions under the Court's inherent power.

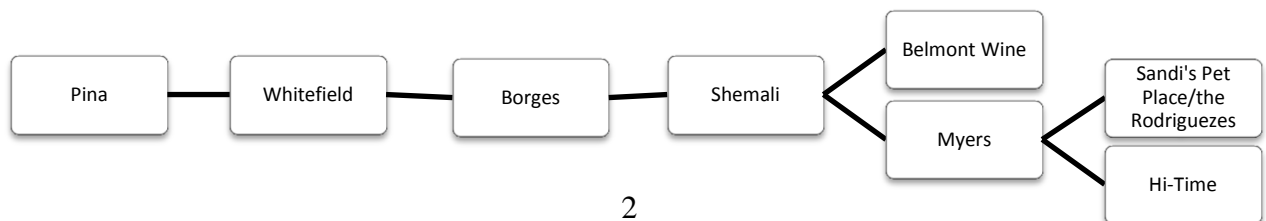
3 **II. BACKGROUND**

4 A. Factual Background

5 Plaintiff HPD Consolidation provides wine storage and logistics to the wine industry.
6 Docket No. 135 ("Second Amended Complaint" or "SAC") ¶ 19. According to the SAC, the
7 Receiving Defendants were involved in an enterprise to steal from Plaintiff's facility and then sell
8 the wines through various outlets. Plaintiff discovered that the wine was stolen when an employee
9 of a wine broker approached Plaintiff stating that she had seen Plaintiff's wine for sale on Hi-
10 Time's website. *Id.* ¶ 20. Subsequently, Plaintiff investigated the wine theft. *Id.*

11 In particular, Plaintiff alleges that Defendants formed, operated, and maintained a criminal
12 enterprise to steal wine from storage facilities in Napa County, California, including Plaintiff's
13 facility. *Id.* ¶ 22(a). Specifically, Plaintiff alleges that Defendant Pina took the wine from the
14 facility on at least five occasions. *Id.* ¶ 22(b), (f). Pina, a night shift supervisor at Plaintiff's
15 facility, removed the wine from Plaintiff's facility from 2013 to the early part of 2014. *Id.* ¶ 22(b).
16 Defendant Whitefield assisted and facilitated Defendant Pina in the theft by using Whitefield's
17 truck to transport stolen wine to Whitefield's shop. *Id.* Subsequently, Defendants Pina and
18 Whitefield transported the wine to Defendant Borges, a Senior Vice President in information
19 technology at Bank of America. *Id.* ¶ 22(b), (d). Defendant Borges sold the transported wine to
20 Defendant Shemali, a wine broker, and his entities (WOW and Tri-Cities), who in turn sold a
21 portion of the wine to Defendants Belmont Wine and Myers. *Id.* ¶ 22(g). Myers stored the
22 purchased wine at Sandi's Pet Place. *Id.* ¶ 22(r). Myers also transported the wine at Sandi's Pet
23 Place to a storage locker at Hi-Time, an online wine seller, or back to his home in Arizona. *See id.*
24 ¶ 22(p).

25 The following image depicts the sequence of events described above:



1 After the theft of wine was discovered and presumably reported to law enforcement,
2 Detective Brad Chambers of the Napa County Sherriff’s office called Defendant Shemali on
3 March 17, 2014, and notified him that the wine he purchased from Borges was stolen. Docket No.
4 152-24 Shemali Declaration ¶ 5; Docket No. 152-21 Khouri Declaration ¶ 5; Docket No. 152-23
5 Myers Declaration ¶ 7. Defendant Shemali then called Defendant John Khouri of Belmont Wine
6 and Defendant Myers to notify them of the stolen wine. *Id.* Defendants Myers and Belmont Wine
7 agreed to return the wine remaining in their possession, and, in exchange, Shemali agreed to
8 reimburse them for the amount paid for the wine. *Id.*

9 On March 26, 2014, Peter Stravinski, the owner of Plaintiff H.P.D. Consolidation, and
10 Defendant Shemali spoke by telephone regarding the stolen wine. After the call, Stravinski sent
11 an email to Defendant Shemali memorializing the conversation between Stravinski and Defendant
12 Shemali. *See* Shemali Declaration Ex. A; Docket No. 157 Stravinski Declaration ¶ 10. The email
13 provides that Shemali would

- 14 (a) send Stravinski complete list of the wines Defendant Shemali
- 15 and his companies obtained from Borges, Whitefield, and Pina; (b)
- 16 provide a list of all people and entities to whom stolen wine was
- 17 sold; (c) send copies of all checks with which Shemali paid for the
- 18 stolen wine; (d) return the stolen wine held by Shemali and his
- 19 companies; (e) advise Defendant Myers and Belmont Wine
- 20 Exchange that they were in possession of stolen wine; and (f) make
- 21 commercially reasonable efforts to recompense Myers and Belmont
- 22 Wine Exchange for the stolen wine.

23 Stravinski Declaration ¶ 10. The email further notes that the goal of returning the wine and
24 notifying Defendants Myers and Belmont Wine of the stolen wine is to “quickly and completely
25 demonstrate that none of us knowingly traffics in stolen property.” Shemali Declaration Ex. A ¶
26 (f).

27 On April 4, 2014, Defendant Shemali and Stravinski, accompanied by counsel for HPD,
28 Carl Motschiedler, met in Washington to discuss the disposition of the wine. *See* Shemali
Declaration ¶ 7; Stravinski Declaration ¶ 18; Docket No. 156 Motschiedler Declaration ¶ 3. At the
meeting, Shemali provided Plaintiff with spreadsheets detailing his transactions with Borges.
SAC ¶ 22(i); *id.* Exs. B, C.

Subsequently, Plaintiff spoke with Myers regarding Myers’ role in the wine theft. *See*

1 SAC ¶ 22(p). Myers stated “Plaintiff would have a difficult time ‘proving’ that the stolen wine
2 was ever in Myers’ possession because he made sure the shipping labels were not in his name.”

3 *Id.*

4 B. Procedural History

5 Plaintiff filed this lawsuit on November 19, 2015. *See* Docket No. 1 (“Original
6 Complaint”). Receiving Defendants moved to dismiss Plaintiff’s Original Complaint on February
7 25, 2016. *See* Docket No. 89 (“Motion to Dismiss the Original Complaint”). Rather than
8 opposing this motion, Plaintiff filed an amended complaint. *See* Docket No. 96 (“First Amended
9 Complaint” or “FAC”). Receiving Defendants moved to dismiss the FAC on April 4, 2016. *See*
10 Docket No. 102.

11 In response to Plaintiff’s opposition, counsel for Receiving Defendants sent a letter to
12 Plaintiff’s Counsel. *See* Docket No. 152-5 Foote Declaration Ex. 4. The letter warned that,
13 pursuant to Fed. R. Civ. P. 11(c)(2), sanctions would be filed against Plaintiff’s Counsel because
14 the FAC and the opposition to the motion to dismiss were without any evidentiary support. *See id.*
15 The motion proceeded to hearing.

16 This Court dismissed the FAC but granted Plaintiff leave to amend. *See* Docket No. 134
17 (September 22, 2016 Civil Minutes). This Court required Plaintiff to provide in any further
18 amended complaint:

19 greater specificity with regard to each Defendant’s knowledge of
20 and participation in the alleged enterprise; allegations as to the
21 enterprise separate from the alleged racketeering; facts supporting
22 the alleged mail fraud; and, where Plaintiff wishes to state a claim
under 18 U.S.C. § 1962(b) and (c), facts showing the relevant
Defendant had interest in, control over, and/or conducted the alleged
enterprise.

23 *Id.*

24 Plaintiff filed the Second Amended Complaint on October 14, 2016. *See* SAC. Receiving
25 Defendants moved to dismiss the SAC and served a Rule 11 motion seeking monetary sanctions in
26 the form of attorneys’ fees. *See* Foote Declaration ¶ 7. Pursuant to Rule 11 Safe Harbor
27 Provision, Fed. R. Civ. P. 11(c)(2), Receiving Defendants demanded that Plaintiff withdraw the
28 SAC within twenty-one days and dismiss all Receiving Defendants from the action. *See* Foote

1 Declaration, Ex. 5.

2 On November 28, 2016, Plaintiff's Counsel filed a request to voluntarily dismiss the action
3 against all Receiving Defendants without prejudice. *See* Docket No. 150. On November 29,
4 2016, this Court issued an order dismissing the case. *See* Docket No. 151.

5 Before this Court is Receiving Defendants' motion to recover attorneys' fees pursuant to
6 28 U.S.C. § 1927 and the Court's inherent power. *See* Docket No. 152 ("Motion for Attorneys'
7 Fees). Receiving Defendants contend sanctions are appropriate because Plaintiff's Counsel
8 unreasonably and vexatiously multiplied the proceedings in this action and initiated and pursued
9 this action in bad faith. *Id.*

10 **III. DISCUSSION**

11 A. Sanctions Under 28 U.S.C. § 1927

12 1. Legal Standard

13 Section 1927 provides for attorneys' fees when an attorney multiplies proceedings
14 unreasonably and vexatiously. *See* 28 U.S.C.A. § 1927 (West). Section 1927 sanctions do not
15 apply to initial proceedings, but instead apply to subsequent procedures because such sanctions are
16 designed to deter unnecessary multiplication of proceedings and tactics. *See In re Keegan Mgmt.*
17 *Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996).

18 Sanctions may be awarded under Section 1927 when attorney behaves recklessly and
19 frivolously. *See Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001); *see also B.K.B. v. Maui Police*
20 *Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002) (holding that recklessness plus knowledge or asserting
21 a frivolous argument which multiplies judicial proceedings sufficiently supports an award of
22 sanctions under Section 1927). Recklessness means "a departure from ordinary standards of care
23 that disregards a known or obvious risk of material misrepresentation." *See In re Girardi*, 611
24 F.3d 1027, 1038 n.4 (9th Cir. 2010). Frivolousness "should be understood as referring to legal or
25 factual contentions so weak as to constitute objective evidence of improper purpose." *Id.* at 1062.
26 A frivolous filing is one "that is both baseless and without reasonable competent inquiry." *Id.*
27 (quoting *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005)).

28 Plaintiff acted recklessly and frivolously in filing the SAC. In the Court's order dismissing

1 FAC (“the Court’s Order”), the Court had required Plaintiff to properly amend its complaint to
2 assert (1) greater specificity regarding each Defendant’s knowledge of and participation in the
3 alleged enterprise; (2) allegations as to the enterprise separate from the alleged racketeering; (3)
4 facts supporting the alleged mail fraud; and (4) facts showing the relevant Defendant had interest
5 in, control over, and/or conducted the alleged enterprise. *See* September 22, 2016 Civil Minutes.
6 However, in filing the SAC, Plaintiff failed to comply with all of the Court’s directions; much of
7 the SAC continues to lack the requisite specificity.

8 2. Greater Specificity to Each Defendant’s Knowledge

9 a. Shemali

10 In the FAC, Plaintiff conclusorily alleged Shemali’s knowledge, asserting that Borges
11 “determined the types and amounts of wine to steal” by “working with . . . Shemali”, FAC ¶ 21(d),
12 and that Borges organized and controlled the theft and “then communicated [to] Shemali . . . what
13 wine had been stolen and was available,” *id* ¶ 21(g). *See* September 22, 2016 Civil Minutes.

14 In the SAC, Plaintiff added more specific allegations to support the assertion that Shemali
15 must have known that the wine he obtained was stolen. Specifically, the SAC provides that “no
16 person or entity engaged in the commercial or retail sale or distribution of wine (as was Shemali)
17 could have reasonably believed that someone like Whitefield would have had access to the quality
18 wines that were stolen.” SAC ¶ 22(c). The SAC also alleges that the wines sold by Shemali to
19 Belmont Wine and Tri-Cities were “not available anywhere in the United States in the quantities,
20 vintage and price being offered by Borges [who is an unlicensed wine broker] and it should have
21 be[en] obvious to them that Borges and his associates were trafficking in stolen wine.” *Id.* ¶
22 22(k).

23 The specific allegations in the SAC support the assertion that Shemali knew the wine was
24 stolen. Thus, Plaintiff satisfied this Court’s Order requiring specificity as to Shemali’s
25 knowledge.

26 b. Myers

27 In the SAC, Plaintiff provides further support for the allegation that Myers knew the wine
28 was stolen. Unlike the FAC, Plaintiff did not merely argue that Myers “knowingly received stolen

1 wine” in a conclusory fashion. SAC ¶ 22(q). Plaintiff additionally alleged that the stolen wine
2 was “not available anywhere other than Plaintiff’s warehouse.” *Id.* ¶ 22(k). This allegation
3 indicates that Myers, a wine broker, would have known that he purchased stolen wine because it
4 could not have been purchased elsewhere other than from Plaintiff’s warehouse. Furthermore, the
5 SAC alleges that Myers stated during a conversation with HPD owner, Stravinski, “that Plaintiff
6 would have a difficult time ‘proving’ that the stolen wine was ever in Myers’ possession because
7 he made sure the shipping labels were not in his name.” SAC ¶ 22(p). This statement can be read
8 as an implicit admission by Myers that he knowingly purchased stolen wine.

9 Thus, the additional allegations in the SAC demonstrate culpable scienter. Plaintiff
10 complied with the Court’s Order requiring specificity as to Myers’s knowledge.

11 c. Belmont Wine

12 The SAC, however, fails to allege with specificity that Belmont Wine knew the wine was
13 stolen. Plaintiff merely alleges that it “should have been obvious” to Belmont Wine that Borges
14 trafficked in stolen wine. SAC ¶ 22(m). However, Plaintiff failed to allege that Belmont Wine
15 purchased wine directly from Borges; instead, the SAC alleges that “Shemali immediately sold a
16 large portion of this stolen wine to Belmont Wine.” *Id.* But since Shemali is a professional wine
17 broker, Belmont Wine had no obvious reason to suspect that the wine was stolen absent some
18 other indication.

19 The SAC thus fails to allege with sufficient specificity Belmont Wine’s knowledge that the
20 wine it purchased was stolen. Plaintiff thus failed to comply with this Court’s Order.

21 d. Sandi’s Pet Place and the Rodriguezes

22 The SAC alleges that Sandi’s Pet Place and the Rodriguezes “knowingly received stolen
23 wine” because sixteen shipping labels show that wine was shipped from Shemali to Sandi’s Pet
24 Place. SAC ¶ 22(r). Moreover, Sandi’s Pet Place “held [the wine] for Myers, delivered it to
25 Myers and /or to common carriers at the direction and authorization of Myers, and were thereafter
26 compensated by Myers on numerous occasions.” *Id.* Furthermore, according to the SAC, “it is
27 obvious that Sandi’s Pet Place and the Rodriguezes were acting as Myer’s ‘fence.’” *Id.* ¶ 22(p).

28 However, there are no allegations that the Rodriguezes knew anything about wine

1 distribution or the particular wines involved in these transactions. As such, the Rodriguezes had
2 no reason to suspect the wines were stolen. Nor is there any allegation that the Rodriguezes
3 directly communicated with Shemali or Borges about the sale. The shipping labels showing
4 Sandi's Pet Place as the destination provide no real probative value in establishing that the
5 Rodriguezes knew the wine shipped was stolen. The fact that Sandi's Pet Place received
6 compensation from Myers for receiving and storing is in itself not incriminating absent the
7 Rodriguezes' knowledge the wine was stolen; compensation could have simply been for providing
8 storage for Myers; it does not indicate such storage was done for a nefarious purpose.

9 Thus, the SAC still fails to allege with specificity facts that Sandi's Pet Place and the
10 Rodriguezes knowingly acted as a fence for Myers. Plaintiff thus failed to comply with this
11 Court's Order.

12 e. Hi-Time

13 As mentioned earlier, Plaintiff first discovered that the wine was stolen when another wine
14 broker's employee discovered Plaintiff's wine on Hi-Time's website. The SAC alleges that "Hi-
15 Time, also an experienced wine merchant, knew or should have known, that Shemali, WOW, Tri-
16 Cities, and Borges could not have access to quality wines," SAC ¶ 22(1), and attaches a copy of
17 shipping labels, one of which shows "one shipment to Hi-Time." Stravinski Declaration Ex. G.

18 However, the SAC fails to demonstrate Hi-Time's knowledge regarding the stolen wine.
19 There is no allegation that Hi-Time spoke to Shemali or Borges and was told the wine was stolen.
20 Since Hi-Time received the wine from a professional reseller, Myers, Hi-Time had no reason to
21 believe the wine was stolen absent any other indication.

22 By failing to provide greater specificity as to Hi-Time's knowledge of stolen wine,
23 Plaintiff failed to comply with this Court's Order in filing the SAC.

24 3. Allegations as to the Enterprise Separate From the Alleged Racketeering

25 a. All Receiving Defendants

26 The existence of an enterprise requires "(A) a common purpose, (B) a structure or
27 organization, and (C) longevity necessary to accomplish the purpose." *Eclectic Props. E., LLC v.*
28 *Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). The organization may be "formal or

1 informal,” but Plaintiff must show “that the various associates function as a continuing unit.”
2 *United States v. Turkette*, 452 U.S. 576, 583 (1981). Moreover, “[s]ome knowledge of the
3 enterprise is necessary as part of the requirement of showing association with the enterprise.”
4 *United States v. Brandao*, 539 F.3d 44, 51 (1st Cir. 2008).

5 In the SAC, Plaintiff specifically demonstrated a common purpose among Receiving
6 Defendants by alleging that Receiving Defendants engaged in an agreement “which came to pass
7 and which each defendant was involved . . . to steal wine from Plaintiff’s wine storage facility,
8 then s[ell], res[ell], distribut[e] and/or deliver[], offer the sale of the stolen wine.” SAC ¶ 26.
9 Plaintiff also showed a structure or organization by alleging that each Defendant played some role
10 in the wine theft ring: Pina, Whitefield, and Borges stole the wine from Plaintiff’s facilities;
11 “Borges immediately sold the wine to Shemali and his entities, WOW and Tri Cities, who then
12 immediately re-sold significant amounts of the stolen wine to Belmont Wine Exchange and
13 Myers”; subsequently, the wine was shipped to Sandi’s Pet Place, the Rodriguezes, and Hi-Time.
14 *Id.* ¶ 22. Additionally, Plaintiff alleged the longevity of the enterprise by providing that the
15 alleged wine theft “beg[an] in early 2013 and continu[ed] through at least 2015,” SAC ¶ 22(a); and
16 that the enterprise was “a well-oiled machine and had been ongoing for over a year-plus prior to
17 Plaintiff’s discovery of its existence.” *Id.* ¶ 22(o).

18 Thus, Plaintiff plausibly alleges in the SAC that an enterprise existed among some of
19 Receiving Defendants. However, enterprise allegations fail as to Belmont Wine, Sandi’s Pet
20 Place, and Hi-Time because, as discussed in Part 2(c)-(e), Plaintiff failed to sufficiently state that
21 they had knowledge of the enterprise.

22 4. Facts Supporting the Alleged Mail Fraud

23 a. All Receiving Defendants

24 HPD has brought three RICO claims based on 18 U.S.C. § 1962(b), (c), and (d). To
25 succeed on these claims, a party must provide that the relevant defendants engaged in a pattern of
26 racketeering activity. *Id.* A “‘racketeering activity’ means . . . any act which is indictable under
27 any of the following provisions of title 18, United States Code . . . section 1341 (relating to mail
28 fraud), . . . sections 2314 and 2315 (relating to interstate transportation of stolen property).” 18

1 U.S.C. § 1961(1). A “‘pattern of racketeering activity’ requires at least two acts of racketeering
2 activity.” *Id.* § 1961(5).

3 The SAC alleges that Receiving Defendants’ racketeering activity includes (1) mail fraud,
4 *see* 18 U.S.C. § 1341, and (2) interstate transportation of stolen goods, *see id.* §§ 2314-2315.
5 After the motion to dismiss the FAC, this Court directed Plaintiff to amend any future pleadings to
6 sufficiently allege mail fraud. *See* September 22, 2016 Civil Minutes.

7 Mail fraud applies to “any scheme or artifice to defraud,” or where someone “obtain[s]
8 money or property by means of false or fraudulent pretenses,” or “dispose[s] of” or “furnish[es]”
9 “any counterfeit coin, obligation, security, or other article.” 18 U.S.C. § 1341. This requires: “(1)
10 proof of a scheme to defraud, (2) using the mails or wires to further the fraudulent scheme, and (3)
11 specific intent to defraud.” *United States v. French*, 748 F.3d 922, 935 (9th Cir. 2014); *see, e.g.,*
12 *United States v. Rogers*, 321 F.3d 1226, 1229 (9th Cir. 2003) (affirming a mail fraud conviction
13 where the defendant orchestrated a large scale Ponzi scheme that sent fraudulent cashier’s checks
14 through the mail).

15 Moreover, Plaintiff’s claims predicated on mail fraud must comport with Rule 9(b). *See*
16 *Schreiber Distrib. Co. v. Serv-Well-Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986) (applying
17 Rule 9(b) to “fraudulent acts that form the alleged pattern of racketeering activity”). Plaintiff,
18 therefore, “must state with particularity the circumstances constituting fraud or mistake.” Fed. R.
19 Civ. P. 9(b).

20 In the FAC, Plaintiff recited that Receiving Defendants committed mail fraud but did not
21 state how. *See* FAC ¶¶ 3-4, 21(a), (m), 47, 53(m). The only relevant references are that
22 Defendants “ship[ped] the stolen wine,” *id.* ¶¶ 21(a), (l), (n), 53(a), (l), (n), and Myers “packaged
23 and mailed bottles of stolen wine,” *id.* ¶¶ 21(m), 53(m). This recitation in the FAC did not amount
24 to mail fraud, much less state facts with particularity. Unlike in *Rogers*, the FAC does not allege
25 that there was a false representation made by the shipper (Receiving Defendants) through the mail
26 or that counterfeit goods were sent through the mail. *See Rogers*, 321 F.3d at 1229; *see also*
27 *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir. 1977) (holding that mail fraud requires a
28 scheme to defraud and use of the mail in furtherance of that scheme).

1 In the SAC, Plaintiff added that Defendants engaged in “the sale of stolen wine online and
2 shipments and distributions through the mail.” SAC ¶ 22(a). However, this allegation does not
3 demonstrate that Receiving Defendants engaged in mail fraud. It adds nothing materially new to
4 the FAC.

5 Plaintiff’s mail fraud allegations continue to fail to state a claim, and Plaintiff’s failure to
6 amend the SAC to plead mail fraud with particularity violated this Court’s Order.

7 5. Facts Showing the Relevant Defendants Had Interest in, Control Over, and/or
8 Conducted the Alleged Enterprise

9 The September 22, 2016 Minute Order states that “where Plaintiff wishes to state a claim
10 under 18 U.S.C. § 1962(b) and (c),” Plaintiff must provide “facts showing the relevant Defendant
11 had interest in, control over, and/or conducted the alleged enterprise.” September 22, 2016 Civil
12 Minutes. Even though the Minute Order refers to both Sections 1962(b) and (c), the phrase
13 “interest in or control in” comes from Section 1962(b). This section provides that the defendant
14 must “acquire or maintain, directly or indirectly, any interest in or control of any enterprise” to be
15 held liable. 18 U.S.C.A. § 1962 (West). To state an interest under Section 1962(b), “a plaintiff
16 must allege that “1) the defendant’s activity led to its control or acquisition over a RICO
17 enterprise, and 2) an injury to plaintiff resulting from defendant’s control or acquisition of a RICO
18 enterprise.” *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 830 (9th Cir. 2003); *see also In re Nat’l*
19 *W. Life Ins. Deferred Annuities Litig.*, 467 F. Supp. 2d 1071, 1084 (S.D. Cal. 2006) (finding that
20 the plaintiff sufficiently alleged a claim under Section 1962(b) by alleging that the defendants
21 generated income from their scheme and conduct which led to its acquisition, maintenance, and
22 control of the enterprise).

23 a. Shemali

24 Plaintiff’s allegations seem to indicate that Shemali acquired or maintained interest in the
25 enterprise. Specifically, spreadsheets attached to the SAC indicate that Shemali generated income
26 by purchasing wine from Borges and reselling it. SAC Ex. B. The spreadsheets can also provide
27 a basis to infer that Shemali ordered the additional shipments of stolen wine he expected Borges to
28 obtain because the spreadsheets could be construed as evidencing a planned order by Shemali

1 from Borges to purchase stolen wine that was not available anywhere but in Plaintiff's warehouse.
2 *Id.* Ex. C. The SAC demonstrates Shemali's interest in the theft by alleging that Shemali held
3 close personal and business relationships with other participants in the alleged theft ring – Borges,
4 Belmont Wine, and Myers. *See* SAC ¶ 22(i). Thus, the SAC adequately demonstrates Shemali's
5 interest in the enterprise.

6 b. Myers

7 Myers's alleged conversation with HPD owner, Stravinski, demonstrates Myers's interest
8 in the enterprise. Myers stated "Plaintiff would have a difficult time 'proving' that the stolen wine
9 was ever in Myers' possession because he made sure the shipping labels were not in his name."
10 SAC ¶ 22(p). Plaintiff further stated that "Myers attempted to conceal his participation in the wine
11 theft ring by having some of the stolen wine shipped to Sandi's Pet Place." *Id.* ¶ 22(r). Therefore,
12 the SAC contains enough allegations to infer Myers' interest.

13 As to Belmont Wine, Sandi's Pet Place, the Rodriguezes, and Hi-Time, the SAC lacks
14 specific allegations of their knowledge, and this precludes claims under Section 1962(b).

15 c. Conclusion

16 In sum, Plaintiff violated this Court's Order because Plaintiff failed to properly allege
17 greater specificity (as ordered by the Court) regarding:

- 18 (a) Receiving Defendants' knowledge of the alleged enterprise as to
19 Belmont Wine, Hi-Time, Sandi's Pet Place, and the Rodriguezes;
20 (b) participation by Belmont Wine, Hi-Time, and Sandi's Pet Place
21 in the enterprise separate from the alleged racketeering;
22 (c) the alleged mail fraud as to all Receiving Defendants; and
23 (d) the allegation that Belmont Wine, Hi-Time, Sandi's Pet Place,
24 and the Rodriguezes had interest in, control over, and/or conducted
25 the alleged enterprise.

26 In doing so, Plaintiff's Counsel recklessly and frivolously delayed judicial proceedings in
27 violation of 28 U.S.C. § 1927. *See, e.g., Consumer Sols. Reo, LLC v. Hillery*, No. C-08-4357
28 EMC, 2010 WL 334417, at *2-3 (N.D. Cal. Jan. 28, 2010) (affirming an award of sanctions
pursuant to 28 U.S.C. § 1927 when counsel unreasonably and vexatiously asserted claims that the
court previously ordered were not reasonable).

1 B. Sanctions Under This Court’s Inherent Power

2 As noted above, sanctions under 28 U.S.C. § 1927 may not be awarded for initial
3 proceedings. *See In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 435 (9th Cir. 1996). Thus,
4 Receiving Defendants seek sanctions pursuant to the Court’s inherent power for Plaintiff initiating
5 and pursuing the entire action in bad faith. *See Motion for Attorneys’ Fees* at 3.

6 Sanctions under this Court’s inherent power impose “its own particular requirements, and
7 it is important that the grounds be separately articulated to assure that the conduct at issue falls
8 within the scope of the sanctions remedy.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir.
9 2002). This Court must find bad faith or willful misconduct to invoke its inherent authority to
10 sanction Plaintiff’s Counsel in the form of attorneys’ fees. *See Zambrano v. City of Tustin*, 885
11 F.2d 1473, 1481-82 (9th Cir. 1989) (finding that absent express statutory authority, courts can
12 impose sanctions in the form of attorneys’ fees, but only when there is a finding of bad faith or
13 willful disobedience of court rules or orders). The *Zambrano* holding was based on the American
14 Rule that dictates, absent express statutory authority, bad faith, or willful disobedience of a court
15 order, each party should bear the cost of its own attorneys’ fees. *Id.* at 1481; *see also Alyeska*
16 *Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (affirming the American Rule).

17 As such, a finding of bad faith or willful misconduct imposes a fairly high evidentiary
18 standard. Mere recklessness does not suffice. *Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir.
19 2001). Instead, recklessness must be “coupled with an improper purpose, such as an attempt to
20 influence or manipulate proceedings in one case in order to gain tactical advantage in another
21 case.” *Id.*; *see also Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993) (vacating
22 sanctions when there was no evidence that the attorney intended to mislead the court). These
23 sanctions “should be reserved for the ‘rare and exceptional case where the action is clearly
24 frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose.’”
25 *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997). For example,
26 sanctions can be imposed even if a party makes “truthful statement or a non-frivolous argument” if
27 done for an improper purpose. *Fink*, 239 F.3d at 992.

28 The Court finds that Receiving Defendants have not established Plaintiff’s initial filing of

1 the suit was in bad faith sufficient to invoke the inherent power of the Court to impose fee shifting
2 sanctions. Plaintiff did experience a substantial theft of wine; the investigation found that
3 numerous individuals and business bought and sold the stolen wine under circumstances
4 reasonably thought to be suspicious, at least in the first instance. Although ultimately (as found
5 herein), many of the allegations were found not sufficient to support a finding of knowledge that
6 the wine was stolen as to some of Receiving Defendants, the Court cannot say that the claims
7 against them were so baseless at the outset as to establish Plaintiff's bad faith in initiating this
8 case.

9 C. Attorneys' Fees

10 Because the Court has decided to award fees, it also decides: first, whether the requested
11 fees are supported; and second, whether the amount of requested fees is appropriate.

12 1. Support for Attorneys' Fees

13 Traditionally, the reasonableness of attorney's fees is "the number of hours reasonably
14 expended on the litigation multiplied by the reasonable hour rate." *Hensley v. Eckerhart*, 461 U.S.
15 424, 432 (1983). Accordingly, "the party seeking an award of fees should submit evidence
16 supporting the hours worked and the rates claimed." *Id.* Counsel is "not required to record in
17 great detail how each minute of his time was expended" but should "identify the general subject
18 matter of his time expenditures." *Id.* at 437. This Court has previously found that declarations by
19 attorneys of the party seeking attorneys' fees are sufficient to establish the reasonableness of fees.
20 *See Cyma (U.S.A.) Ltd. v. Lumondi, Inc.*, 2011 WL 1483394, Case No. C-09-2802 MHP (EMC),
21 at *2-3 (N.D. Cal. 2011). In addition, "counsel . . . should make a good faith effort to exclude
22 from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Id.* at 434.

23 Receiving Defendants' Counsel provided a declaration in support of the motion for
24 attorneys' fees, explaining Defendant's calculation of attorneys' lodestar. *See Foote Declaration*
25 ¶¶ 12-13. Also, counsel claims to have reduced hours which he believes were "duplicative,
26 excessive, or not necessary to defend this action." *Id.* ¶ 13.

27 2. The Amount of Attorney's Fees

28 Receiving Defendants request that this Court grant its motion for attorneys' fees under

1 Section 1927 for Plaintiff's Counsel to pay \$174,860 and/or under this Court's inherent authority
2 \$279,070 for the entire litigation. *See* Motion for Attorneys' Fees at 25. Since the Court grants
3 attorneys' fees under Section 1927 and not under the Court's inherent authority, the Court
4 determines the reasonableness of only the \$174,860 amount.

5 The hourly rates are reasonable. The reasonable hourly rates are generally determined by
6 the relevant community where the district court sits. *See Camacho v. Bridgeport, Financial, Inc.*,
7 523 F.3d 973, 979 (9th Cir. 2008); *see also Fallay v. S.F. City & Cty*, No. C-08-2261-CRB, 2016
8 WL 879632, at *6 (N.D. Cal. Mar. 8, 2016) (stating that courts are to look at customary rates
9 charged for work performed in the relevant legal community, the attorneys' reputation and
10 experience, the quality of services, complexity of the work performed, and the results). Here, the
11 relevant community is the San Francisco Bay Area.

12 The reasonableness of hourly rates is also determined by the level of experience.
13 *Camacho*, 523 F.3d at 979. The billable rates for Partners John Foote and Gregory O'Hara in the
14 instant case were \$600, and counsel's declaration notes that Partners Foote and O'Hara have been
15 practicing civil litigation for over thirty years. *See* Foote Declaration ¶¶ 9-15. The hourly rate for
16 Associate Karl Sung was \$400, and he has been practicing civil litigation for four years. *Id.*
17 Paralegal Lisa Phillips billed at \$300. *Id.* These rates fall within the range of reasonable hourly
18 rates for the local area given their respective experience. *See Prison Legal News v.*
19 *Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (finding that the district court did not abuse its
20 discretion when it awarded Bay Area attorneys practicing in federal civil litigation up to \$700 for a
21 partner with twenty-three years of experience, \$325 for an associate with five years of experience,
22 and \$190 for paralegals); *Gutierrez v. Wells Fargo, N.A.*, No. C 07-05923 WHA, 2015 WL
23 2438274, at *5 (N.D. Cal. May 21, 2015), *appeal dismissed* (Oct. 30, 2015) (awarding attorneys'
24 fees for partners who billed between \$475 and \$975 per hour; associates with hourly rates between
25 \$300 and \$490); *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 965 (N.D. Cal. 2014) (accepting
26 hourly rates ranging from \$355 to \$1,095 for partners and associates in the San Francisco Bay
27 Area).

28 The Court has reviewed submissions by Defendants' Counsel. In support of the requested

1 fees, Receiving Defendants' Counsel provided the number of hours by each lawyer's involvement
2 and attached a table detailing the breakdown of the amount of fees incurred by each Receiving
3 Defendant. *See* Foote Declaration Exs. 6-17.

4 Receiving Defendants request that this Court grant its motion for attorneys' fees under
5 Section 1927 in the amount of \$174,860, representing all the work incurred since the filing of the
6 motion to dismiss the Original Complaint. However, Receiving Defendants are only entitled to
7 attorneys' fees incurred after the Court granted Defendants' motion to dismiss the FAC; it was at
8 that point did Plaintiff's counsel violated this Court's Order, and thus it is only at this point did
9 some of Plaintiff's actions become sanctionable under Section 1927. Accordingly, the Court has
10 allocated fees per each Defendant to reflect the fees spent defending those claims which the Court
11 finds were frivolously advanced in the SAC. In making that allocation, the Court examined and
12 estimated the percentage of time spent responding to each such claim by any particular Receiving
13 Defendant.

14 a. Shemali

15 In regards to Shemali, Plaintiff violated this Court's Order when it failed to allege a pattern
16 of racketeering using mail fraud. The Court calculated the fee amount addressing this claim to be
17 \$3,950.

18 b. Myers

19 For Myers, Plaintiff likewise violated this Court's Order when it failed to allege a pattern
20 of racketeering using mail fraud. The Court calculated the fee amount for this violation to be
21 \$3,855.

22 c. Belmont Wine

23 As to Belmont Wine, Plaintiff violated this Court's Order when it failed to provide greater
24 specificity as to Belmont's knowledge, a pattern of racketeering under mail fraud, and interest or
25 control in the enterprise. The Court calculated the fee amount in responding to these claims total
26 \$5,222.40.

27 d. Sandi's Pet Place and the Rodriguezes

28 In regards to the Rodriguezes and Sandi's Pet Place, Plaintiff violated this Court's Order

1 when it failed to allege greater specificity to the Rodriguezes and Sandi's Pet Place's knowledge, a
2 pattern of racketeering under mail fraud, and interest or control in the enterprise. The fee amount
3 in responding to these claims total \$5,433.20.

4 e. Hi-Time

5 As to Hi-Time, Plaintiff violated this Court's Order when it failed to allege greater
6 specificity as to Hi-Time's knowledge, a pattern of racketeering under mail fraud, and interest or
7 control in the enterprise. The Court calculated the fee amount in responding to these claims total
8 \$5,276.80.

9 3. Conclusion

10 Adding the fee amounts discussed above, the Court grants a total amount of \$23,737.40 in
11 fees owed by Plaintiff under 28 U.S.C. § 1927.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court:

- 14 1. **GRANTS** Defendant's request for sanctions under 28 U.S.C. § 1927 in the amount
15 of \$23,737.40 allocated among Receiving Defendants as stated above; and
- 16 2. **DENIES** Defendant's request for sanctions under this Court's inherent power.

17 This order disposes of Docket No. 152.

18
19 **IT IS SO ORDERED.**

20
21 Dated: March 20, 2017

22
23 
24 EDWARD M. CHEN
25 United States District Judge

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