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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HEROIC ERA, LTD,)	
)	
Plaintiff(s),)	No. C10-2458 SBA (BZ)
)	
v.)	
)	ORDER DENYING SANCTIONS
EVONY, LLC, et al.,)	
)	
Defendant(s).)	
_____)	

Evony, LLC and Regan Mercantile, LLC (collectively "Evony") have moved for an order imposing sanctions against Derek A. Newman ("Newman") and Derek Linke ("Linke"), counsel for plaintiff and counterdefendant, Heroic Era, Ltd. ("Heroic Era"), pursuant to 28. U.S. § 1927. By its motion, Evony asks the court to find Newman and Linke personally responsible for fees and costs incurred by Evony after July 30, 2010, in the amount of \$368,385.15. For the reasons set forth below, Evony's motion is **DENIED**.

On June 3, 2010, Heroic Era sued Evony seeking a declaratory judgment that Heroic Era did not misappropriate Evony's trade secrets in the development of Heroic Era's

1 Ceasary game, and did not infringe on Evony's copyright
2 interests, and seeking relief for tortious interference with
3 business relations. (Docket No. 1.) On August 13, 2010,
4 Evony counterclaimed for (1) copyright infringement under 17
5 U.S.C. §§ 501 et seq.; and (2) misappropriation of copyright.
6 (Docket No. 19.)

7 I previously found that Heroic Era, almost from the
8 outset of this litigation, failed to comply with its discovery
9 obligations. (See Docket No. 108.) Based on its non-
10 compliance, I ordered Heroic Era to produce certain documents
11 and a Rule 30(b)(6) witness for deposition by March 9, 2011.
12 (Docket No. 78.) I also warned Heroic Era that failure to
13 abide by my Order could result in sanctions pursuant to Rule
14 37(b)(2)(A), such as the entry of Heroic Era's default on
15 Evony's counterclaims. (Id.) On March 9, 2011, Heroic Era's
16 counsel notified the court that Heroic Era would not produce
17 documents or a corporate witness - a direct violation of my
18 Order. I then struck Heroic Era's complaint and dismissed its
19 action against Evony with prejudice. (Docket No. 89.) I also
20 struck Heroic Era's answer to the counterclaim and ordered
21 Evony to move for a default judgment to prove-up its damages.
22 After Judge Armstrong referred that motion to me (Docket Nos.
23 92, 93), I issued a Report and Recommendation. Judge
24 Armstrong adopted it and entered judgment in favor of Evony on
25 its counterclaims in the amount of \$608,213.37. (Docket No.
26 125.) Part of that judgment included an award of \$368,385.15
27 in attorneys' fees and costs. (Docket No. 108.) Evony then
28 filed this motion to have its attorneys' fees and costs

1 imposed as sanctions against Newman and Linke. Following a
2 referral from Judge Armstrong, I held a hearing at which
3 Mssrs. Newman and Linke appeared.

4 Under 28 U.S.C. § 1927, “[a]ny attorney . . . who so
5 multiplies the proceedings in any case unreasonably and
6 vexatiously may be required by the court to satisfy personally
7 the excess costs, expenses, and attorneys’ fees reasonably
8 incurred because of such conduct.” 28 U.S.C. § 1927.

9 Imposition of costs under this statute requires a finding of
10 recklessness on the part of the attorney sanctioned. See
11 Lahiri v. Universal Music & Video Distribution Corp., 606 F.3d
12 1216, 1219 (9th Cir. 2010).

13 A court also has the inherent authority to sanction
14 parties for bad faith conduct in the course of litigation.
15 See Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991). This
16 authority is independent of, and not constrained by, statutory
17 sources of authority for imposing such sanctions. Id. at 50.
18 In order to sanction a party pursuant to this inherent
19 authority, a court must find that the party acted in bad
20 faith. See Primus Auto. Fin’l Servs., Inc. v. Batarse, 115
21 F.3d 644, 648 (9th Cir. 1997). Bad faith means that the party
22 or attorney acted “vexatiously, wantonly, or for oppressive
23 reasons.” Id. “Bad faith is present when an attorney
24 knowingly or recklessly raises a frivolous argument, or argues
25 a meritorious claim for the purpose of harassing an opponent.”
26 In re Keegan Mgmt. Co., Sec. Litiq., 78 F.3d 431, 436 (9th
27 Cir. 1996). Bad faith can also consist of “delaying or
28 disrupting the litigation.” Hutto v. Finney, 437 U.S. 678,

1 689 n.14 (1978).

2 Initially, Evony recites a number of discovery abuses
3 perpetrated by Heroic Era and seeks to hold counsel liable for
4 them. Evony asserts that Newman and Linke impeded the
5 discovery process by failing to produce responsive documents
6 in response to Evony's requests for production, refusing to
7 meet and confer regarding witness depositions, and waiting
8 until the proverbial eleventh hour before informing Evony that
9 no 30(b)(6) witness would appear for deposition as expected.
10 Evony further argues that even after the court's March 9, 2011
11 Order requiring Heroic Era to produce all documents withheld
12 on privilege grounds, no documents were produced (presumably
13 because no investigation by counsel was performed concerning
14 the merits of the noninfringement claim).

15 In response, Newman and Linke point out they provided
16 substantive discovery responses to Evony's written demands,
17 and that Heroic Era provided Evony with "several gigabytes of
18 computer data" as well as interrogatory responses and the
19 graphic files Heroic Era used to create the *Caesary* game,
20 among other documents and data.¹ (See Pl.'s Opp. p. 3.)

21 As I stated during the hearing, I am troubled by what appears
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23 ¹ At the hearing, Evony argued that the computer data
24 produced was "garbage." Evony's counsel provided the court
25 with a copy of the production, which the court has reviewed.
26 There are a number of files on the CD that the court could not
27 open, either because they are corrupt or because they require a
28 special program. While the production does not appear to be as
substantive as Linke represented it to be, it does contain what
appear to be responsive documents and graphics, and Linke
represented to the court during the hearing that he worked with
Heroic Era to collect responsive documents and produced
everything in his possession.

1 to have been discovery gamesmanship on the part of both
2 parties' counsel. They have regularly accused each other of
3 many wrongs, and from the court's recollection, neither party
4 is absolved from having utilized overly-aggressive or ill-
5 conceived techniques.² I previously warned Linke that conduct
6 such as canceling a meet and confer session only four minutes
7 prior to its scheduled time was inconsistent with the manner
8 in which this court expects its attorneys to conduct
9 themselves. Nonetheless, I find that sanctions pursuant to
10 section 1927 are not warranted. Based on Linke's
11 representations regarding the reasons for the discovery
12 difficulties encountered in this case, I find insufficient
13 evidence of the bad faith or abuse required to impose
14 sanctions under section 1927 or this court's inherent powers.
15 While Linke's approach to this lawsuit was at times
16 questionable, his conduct was not so egregious to warrant the
17 imposition of sanctions. See Lahiri v. Universal Music and
18 Video Distrib. Corp., 606 F.3d 1216, 1223 (9th Cir. 2010)
19 ("The district court's authority to sanction attorneys under §
20 1927 and its inherent disciplinary power must be exercised
21 with restraint and discretion."). That discovery abuses
22 occurred is undisputed; that is why Evony obtained a default
23 judgment for over \$600,000. What Evony has not established is
24 that it was Linke and Newman, and not Heroic Era, who were

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26 ² For example, Evony's motion to compel Heroic Era's
27 Rule 3-16 corporate disclosure statement (Docket No. 37) as a
28 means for obtaining discovery was, as stated at that hearing,
one of the least meritorious disputes that the court has ever
had to resolve.

1 responsible for the "blatant discovery abuses and litigation
2 misconduct." (Def.'s Mot. p. 3.)

3 Second Evony claims that Newman and Linke continued to
4 litigate Heroic Era's noninfringement claim without any
5 evidentiary support and "in the face of uncontroverted
6 evidence undermining the claim." (Def.'s Mot. p. 6.) Evony
7 asserts that soon after Heroic Era's complaint was filed,
8 Evony provided Newman and Linke with excerpts of an expert
9 analysis (the "Frappier Analysis") that demonstrated that
10 Heroic Era's *Caesary* game infringed Evony's copyrighted code.³
11 Nevertheless, Evony claims that Newman and Linke continued to
12 pursue Heroic Era's noninfringement claim and made "no effort
13 to investigate whether the claim" had any merit. (Def.'s Mot
14 p. 8.)

15 Evony also asserts that Newman and Linke should have
16 dismissed Heroic Era's tortious interference claim after they
17 received the Frappier Analysis. Evony asserts that the
18 tortious interference claim is dependent on the
19 noninfringement claim, and that because the Frappier Analysis
20 demonstrated there was no viable claim for noninfringement,
21 there was also no viable claim for tortious interference.

22 In response, Newman and Linke claim that the Frappier
23 Analysis was not a full report, and that the report's limited
24 synopsis, which Newman and Linke were not permitted to share

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26 ³ The Frappier Analysis was provided to Newman and
27 Linke on or about July 30, 2010. (Def.'s Mot. p. 24.) Evony
28 asserts that the Frappier Analysis demonstrated that the source
code utilized to create the *Caesary* game was identical to the
source code utilized to create Evony's game, so much so that
the typographical errors in the source codes matched.

1 with their client, was not sufficient grounds to abandon
2 Heroic Era's noninfringement claim.⁴ Simply put, Newman and
3 Linke argue that they were under no obligation to accept the
4 Frappier Analysis as "gospel" and dismiss Heroic Era's
5 complaint. During the hearing, Linke represented to the court
6 that he did in fact investigate the noninfringement claim by
7 (1) reviewing the Frappier Analysis and discussing it with
8 Heroic Era; (2) logging online to play both the Caesary game
9 and Evony's game to compare the games; and (3) locating
10 approximately twenty witnesses with knowledge of how the
11 Caesary game was created and disclosing those names to Evony.⁵

12 As I stated at the hearing, I do not believe that Linke's
13 approach to this case resulted in a duplication or
14 multiplication of proceedings. I agree with Newman and Linke
15 that Heroic Era was under no obligation to dismiss its lawsuit
16 based on the Frappier Analysis given that it was only a
17 partial report drafted by Evony's expert witness, and that
18 Heroic Era disputed its analysis. Ultimately, Evony obtained
19 a favorable result; Heroic Era's complaint was stricken and a
20 judgment against Heroic Era was entered in the amount of
21 \$608,213.37. I believe that the relief granted under Rule 37
22 is adequate to redress Evony for any difficulties it may have

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24 ⁴ Newman also states that he never reviewed the
Frappier Analysis and only had limited involvement in the case.

25 ⁵ After the hearing, the court issued an order
26 requiring Linke to submit his time records for the periods of
May 2010 to August 2010 and November 15, 2010 to December 20,
27 2010. The records reflect that Linke did have multiple
discussions with his contact at Heroic Era regarding discovery
28 responses and deposition preparation, consistent with the
representations he made to the court during the hearing.

1 encountered in this case and therefore decline to impose
2 additional sanctions. I also do not believe that Linke acted
3 in subjective bad faith, which is a necessary finding before
4 the court can support a sanction of attorneys' fees under
5 section 1927. Lobato v. Bank of Am., N.A., Case No. 10-106,
6 2010 U.S. Dist. LEXIS 69194, at *6 (N.D. Cal. July 12, 2010)
7 (declining to impose sanctions because "[s]uspicious are not
8 sufficient to warrant imposition of Section 1927 sanctions ...
9 and the sworn record here is too thin to support a finding
10 that subjective bad faith has motivated [counsel's] conduct in
11 this proceeding"); see also In Re Keegan Management Co., 78
12 F.3d 431, 436 (9th Cir. 1196).

13 It is therefore **ORDERED** that Evony's motion is **DENIED**.

14 Dated: November 21, 2011

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16 Bernard Zimmerman
17 United States Magistrate Judge

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