

1 of Ashman's current counsel. For the reasons set forth below, the motions to dismiss and to
2 disqualify counsel will be denied. The motion to compel the return of documents will be
3 granted, and the motion to preclude use of the documents will be granted in part.
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5 I. BACKGROUND

6 Solectron is an international electronics manufacturer and supply chain services provider.
7 On July 21, 2003, Solectron hired Ashman as an IT server administrator for its Milpitas,
8 California facility. Ashman was fifty-two years old when he was hired. As a condition of
9 employment, Ashman signed Solectron's Employee Proprietary Information Agreement, which
10 required that employees return all company documents upon termination.² Shortly after his
11 hiring, Ashman was diagnosed with a form of cancer. Ashman thereafter took two medical
12 leaves of absence, the first lasting from September 9, 2003 until November 21, 2003. The
13 second leave of absence began on October 22, 2004 and ended when Ashman returned to work
14 on February 21, 2005.
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16 During the fall of 2004, concurrent with Ashman's second leave of absence, Solectron
17 began to reorganize its workforce in a cost-reduction effort. This reorganization included
18 employee layoffs. After Ashman returned from his second leave of absence, he learned that he
19 had been designated for layoff. The parties dispute the sequence of events with respect to the
20 notice provided to Ashman regarding his termination. Solectron claims that Ashman was
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24 ² The relevant portion of the Agreement states:

25 Returning Company Document [sic]. I agree that, at the time of leaving
26 the employ of the Company, I will deliver to the Company (and will not
27 keep in my possession or deliver to anyone else) any and all devices,
28 records, data, notes, reports, proposals, lists [sic], correspondence,
specifications, drawings, blueprints, sketches, materials, equipment, other
documents or property, or reproductions of any aforementioned items
belonging to the Company, its successors or assigns.

1 notified upon or shortly after his return to work on February 21, 2005. Ashman alleges that
2 rather than informing him immediately of his termination, Solectron instead appointed him to
3 help with administrative aspects of the reorganization. According to Ashman, part of this task
4 included accessing certain documents associated with the reorganization. Ashman alleges that as
5 a result of such access he discovered a document indicating that he had been designated for
6 a result of such access he discovered a document indicating that he had been designated for
7 layoff. Ashman claims that he then confronted a supervisor with his concerns and was assured
8 that his position was safe. Ashman alleges that Solectron then removed this document from its
9 computer network. By Ashman's account, on March 14, 2005 Solectron informed Ashman that
10 he had been designated for layoff and that his last day of employment would be March 31, 2005.
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12 Shortly after his termination, Ashman filed a discrimination complaint with the Equal
13 Employment Opportunity Commission ("EEOC"). The complaint alleged that Ashman was
14 terminated due to his age and/or medical condition. As part of the complaint process, Ashman
15 provided the EEOC with Solectron documents that Ashman had obtained while employed.
16 Solectron asserts not only that Ashman's use of the documents violated the terms of his
17 employment agreement, but also that Ashman provided documents that he had no authority to
18 possess even while he was employed.
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20 Ashman also provided the EEOC with documents obtained after his termination. In June
21 2006, Solectron initiated an audit of its e-mail accounts and discovered that an individual was
22 logging into Solectron's computer network and reading the e-mail communications of high-level
23 Solectron managers. Solectron reported this incident to local law enforcement authorities in
24 Milpitas, who determined that Ashman was responsible for the activity. Ashman subsequently
25 was arrested and admitted that he had been accessing internal Solectron e-mails and other
26 documents in order to obtain evidence to bolster his EEOC complaint. On July 19, 2007,
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1 Ashman pled no contest to a misdemeanor violation of Cal. Penal Code § 502(c)(2). Solectron
2 reported this incident to the EEOC as part of its defense against the discrimination charge.
3 Notwithstanding Ashman’s actions, on December 19, 2007 the EEOC issued a right to sue letter.
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5 Ashman filed the instant action on March 13, 2008, and the operative FAC was filed on March
6 18, 2008.

7 Ashman served his initial disclosures pursuant to Fed. R. Civ. P. 26 on July 1, 2008.
8 Included in the disclosures were multiple documents that appeared to have been obtained both
9 during his employment and after his termination. The disclosures also included a number of
10 privileged documents. Solectron then contacted Ashman’s counsel and demanded the return of
11 all Solectron documents in Ashman’s possession. Solectron also requested that Ashman
12 voluntarily dismiss the FAC or replace his counsel in light of the fact that Ashman’s current
13 counsel had viewed privileged Solectron documents. In response, Ashman’s counsel refused to
14 return the documents and argued that Ashman’s actions were justified in light of Solectron’s
15 failure to produce certain documents during the initial round of discovery.
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18 II. DISCUSSION

19 A federal court has inherent power to impose sanctions “to prevent abuses, oppression,
20 and injustice.” *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888). When a party wrongfully obtains
21 documents outside the normal discovery process, a number of different types of sanctions are
22 available. These include dismissal of the action, the compelled return of all documents,
23 restrictions regarding the use of the documents at trial, disqualification of counsel, and monetary
24 sanctions. *See Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 324-27 (S.D.N.Y. 1997).
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26 A. Dismissal of the FAC

27 Dismissal is a “harsh sanction,” and courts must consider multiple factors when
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1 considering such a request, including “(1) the public’s interest in expeditious resolution of
2 litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to the party seeking
3 sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the
4 availability of less drastic sanctions.” *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69
5 F.3d 337, 348 (9th Cir. 1995) (quoting *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir.
6 1993)). The party to be sanctioned must have acted in bad faith. *Id.* at 348. Moreover, there
7 must be a relationship between the behavior in question and the merits of the case such that the
8 “transgression ‘threaten[s] to interfere with the rightful decision of the case.’” *Id.* (quoting *Wyle*
9 *v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir.1983)).³
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12 Solelectron analogizes the instant case to *Jackson v. Microsoft Corp.*, 211 F.R.D. 423
13 (W.D. Wash. 2002), in which the court sanctioned the plaintiff by dismissing the complaint. In
14 *Jackson*, the plaintiff was a former employee who alleged various civil rights violations by his
15 employer. After the litigation began, it was discovered that prior to his termination the plaintiff
16 had come into the possession of two compact disks containing approximately 10,000 e-mail
17 messages copied from his former employer’s computer network without authorization. *Id.* at
18 426. The court found that the plaintiff’s “conduct was willful and exemplifies the bad faith with
19 which he has pursued this litigation.” *Id.* at 431. It concluded that the plaintiff’s “astonishing
20 pattern of deceptive acts and fraudulent testimony” were serious offenses and warranted
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24 ³ Similar considerations were identified by the Ninth Circuit in a decision preceding
25 *Anheuser-Busch*. In *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988), the court
26 listed the following relevant factors: “(1) the existence of certain extraordinary circumstances; (2)
27 the presence of willfulness, bad faith or fault by the offending party; (3) the efficacy of lesser
28 sanctions; (4) the relationship or nexus between the misconduct drawing the dismissal sanction
and the matters in controversy in the case; and finally, as optional considerations where
appropriate, (5) the prejudice to the party victim of the misconduct, and (6) the government
interests at stake.”

1 dismissal of the case, especially because the plaintiff never gave a credible explanation as to how
2 he had obtained the documents or as to why he failed to produce the documents after months of
3 litigation. *Id.* at 432. The court also found that any lesser sanction would not outweigh the
4 prejudice to the former employer. *Id.*

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6 Solectron argues that Ashman’s conduct is at least as egregious as that described in
7 *Jackson*. It asserts that Ashman’s bad faith is evidenced by his continuous and unlawful access
8 to Solectron’s computer network after the date of his termination, his use of the unlawfully
9 obtained documents in both the EEOC investigation and the instant action, and the lack of any
10 real justification as to why all of the documents should not be returned, despite repeated written
11 requests by Solectron. Solectron argues that it has suffered irreparable prejudice from
12 Ashman’s actions and that dismissal is the only adequate sanction. In response, Ashman argues
13 that his actions were justified in light of his concern that Solectron would delete incriminating
14 documents, thereby preventing any chance that he would succeed at trial. In essence, Ashman
15 asserts that he had to act in order to prevent possible spoliation of the evidence. Ashman also has
16 repeatedly justified his conduct as being a protected activity under applicable anti-discrimination
17 law.⁴

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20 While Ashman’s claim that he was trying to preserve evidence may tend to show that he
21 did not act with subjective bad faith, Ashman is bound by the same discovery rules as any other
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25 ⁴ Ashman suggests that the instant case is distinguishable from *Jackson* because any
26 misappropriation occurred prior to the commencement of formal litigation and thus his actions
27 did not violate any order of the Court or procedural rules. However, other courts have rejected
28 this distinction. *See, e.g., Fayemi*, 174 F.R.D. at 324 (“a court must be able to sanction a party
that seeks to introduce improperly obtained evidence; otherwise the court, by allowing the
wrongdoer to utilize the information in litigation before it, becomes complicit in the
misconduct.”). *See also Jackson*, 211 F.R.D. at 432 (dismissing case where plaintiff obtained
documents prior to initiating litigation).

1 litigant. Discovery self-help is not a protected activity. *See O'Day v. McDonnell Douglas*
2 *Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996) (anti-retaliation clause of ADEA “protects
3 reasonable attempts to contest an employer’s discriminatory practices; it is not an insurance
4 policy, a license to flaunt company rules or an invitation to dishonest behavior.”). However, the
5 Court is inclined to agree with Ashman that dismissal would be too severe a sanction,
6 particularly because the primary policy of resolving litigation on the merits is not outweighed by
7 actual prejudice to Solectron. Most if not all of the relevant documents taken by Ashman will be
8 produced by Solectron during discovery, and there is no evidence that Ashman or his counsel
9 have engaged in improper conduct since the instant litigation was commenced. Moreover, as
10 discussed in further detail below, lesser sanctions are available as a remedy. *See Halaco*, 843
11 F.2d at 381.

14 B. Return of Documents and Restrictions on Future Use

15 Obviously, the Court has within its power to order the return of the documents. *See, e.g.*,
16 *Herrera v. Clipper Group, L.P.*, No. 97-CIV-560, 1998 WL 229499, at *3 (S.D.N.Y. May 6,
17 1998) (proper remedy was to order the plaintiff to return all documents and pay for the costs of
18 bringing the motion). The Court also may impose restrictions on the use of the documents during
19 the remainder of the litigation. *See Fayemi*, 174 F.R.D. at 326 (precluding any use of improperly
20 obtained documents at trial); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, No. 08 Civ.
21 4810, 2008 WL 4866165, at *21-22 (S.D.N.Y. Oct. 23, 2008) (improperly obtained e-mails
22 limited to impeachment purposes only).

23 In the instant case, the documents at issue (except for privileged documents) likely would
24 have been produced by Solectron. In such circumstances, courts have been hesitant to exclude
25 the use of such documents entirely. *See Herrera*, 1998 WL 229499, at *5. Moreover, excluding
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1 or severely limiting the use of the documents in the instant action may create a “windfall strategic
2 advantage” for Solectron because at least several of the documents at issue form the crux of
3 Ashman’s allegations. *See id.* Accordingly, within seven days of this order Ashman shall return
4 all Solectron documents in his possession, whether in electronic or hard-copy form, and any
5 copies that remain in his possession shall be destroyed. Ashman is barred from using or referring
6 to any privileged content within the documents. After all the documents are returned to
7 Solectron, Ashman will be permitted to use any document produced by Solectron during the
8 normal course of discovery. Ashman will be responsible for the expenses incurred by Solectron
9 in connection with making the instant motions. *See Herrera*, 1998 WL 229499, at *3.⁵
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12 C. Disqualification of Counsel

13 Solectron argues that on two independent grounds Ashman’s counsel should be
14 disqualified. First, Solectron contends that counsel violated ethical rules by not returning
15 documents, especially privileged documents, that counsel knew were obtained unlawfully.
16 Second, Solectron argues that because counsel is aware of the privileged content of some of the
17 documents, counsel consciously or subconsciously will put that knowledge to use
18 notwithstanding any constraints imposed by the Court. *See Herrera*, 1998 WL 229499, at *4.
19 While counsel’s actions are cause for concern, the Court concludes that the severe sanction of
20 disqualification is not appropriate at this time, assuming that going forward Ashman and his
21 counsel comply with the Court’s instructions regarding the return of all Solectron documents and
22 the prohibitions regarding privileged material. This conclusion is without prejudice to a future
23 motion by Solectron in the event that Ashman or his counsel misuse the information of which
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28 ⁵ To avoid confusion, any expenses incurred by Solectron in connection with the instant motions during the period from August 29, 2008 through November 21, 2008 are reimbursable.

1 they have become aware.

2 **III. ORDER**

3 Accordingly, IT IS HEREBY ORDERED that (1) the motion to dismiss is DENIED; (2)
4 the motion to compel the return of all improperly obtained documents is GRANTED; (3) the
5 motion to exclude the use of the improperly obtained documents is GRANTED IN PART; and
6 (4) the motion to disqualify counsel is DENIED. Within seven days of the date of this order,
7 Ashman shall return all documents to Solectron in accordance with the instructions set forth
8 above. Ashman shall be responsible for the expenses incurred by Solectron in connection with
9 making the instant motions.
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11 IT IS SO ORDERED.

12 DATED: December 1, 2008

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16 JEREMY FOGEL
17 United States District Court
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1 This Order has been served upon the following persons:

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