

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOSE SILVA,)	Case No.:12-CV-05347-LHK
)	
Plaintiff,)	ORDER GRANTING IN PART AND
v.)	DENYING IN PART DEFENDANT’S
)	MOTION FOR SANCTIONS
TEKSYSTEMS, INC.,)	
)	
Defendant.)	
)	

Currently before the Court is Defendant TEKsystems, Inc.’s Motion for Terminating, Evidentiary and Monetary Sanctions and to Disqualify Plaintiff’s Counsel. ECF No. 15 (the “Sanctions Motion”). A hearing was held on July 25, 2013 (the “July 25 hearing”). Having considered the parties’ submissions, the relevant law, and the arguments of the parties, the Court hereby GRANTS in part and DENIES in part Defendant’s Sanctions Motion.

1. Background of the Instant Motion

Defendant filed the Sanctions Motion on May 20, 2013. Plaintiff filed an Opposition on June 3, 2013, ECF No. 18 (“Opposition”), and Defendant filed a Reply on June 10, 2013, ECF No. 19 (“Reply”). While the Sanctions Motion was pending, Defendant filed a Motion to Stay Proceedings on June 14, 2013. ECF No. 20 (“Motion to Stay”). Plaintiff filed an Opposition to the Motion to Stay on June 17, 2013. ECF No. 21. On June 27, 2013, Defendant filed a Supplemental

1 Brief in Support of the Motion to Stay (“Defendant’s Supplemental Stay Brief”). On June 28,
2 2013, Plaintiff filed an additional supplemental brief, ECF No. 24 (“Plaintiff’s Supplemental Stay
3 Brief”), to which Defendant filed an additional reply, ECF No. 25. On July 8, 2013, the Court
4 granted a partial stay of discovery, and issued its tentative rulings on the Sanctions Motion. See
5 ECF No. 26. (“Stay Order”). The Court ordered the parties to meet and confer in light of the
6 Court’s tentative ruling, and to file a status report on the results of their meet and confer effort. See
7 id. at 6. On July 12, 2013, Defendant filed a Status Report, ECF No. 29 (“Defendant’s Status
8 Report”), and Plaintiff filed a Status Report, ECF No. 30 (“Plaintiff’s Status Report.”). On July 25,
9 2013, Defendant filed a Supplemental Sanctions Brief. ECF No. 31 (“Supplemental Sanctions
10 Brief”).

11 This extensive briefing reveals that it is undisputed that Plaintiff made a recording of his
12 conversation with his former supervisors (Defendant’s employees), without the knowledge of these
13 supervisors (the “disputed recording”). See Sanctions Mot. at 1. It is also undisputed that
14 Plaintiff’s counsel failed to produce the disputed recording in initial disclosures or in response to
15 discovery requests until May of 2013, and affirmatively misrepresented that Plaintiff had produced
16 all material responsive to Defendant’s discovery requests. See id. Defendant contends, and
17 Plaintiff does not dispute, that conversations between Plaintiff and his supervisors are a “critical
18 part” of Plaintiff’s case, in which Plaintiff seeks compensation for work he allegedly performed
19 off-the-clock for Defendant. Id.

20 Plaintiff’s counsel initially represented that he did not identify the disputed recording in
21 Plaintiff’s disclosures because Plaintiff’s counsel intended to use the disputed recording only for
22 impeachment, and did not produce it in response to discovery requests because he wanted to first
23 get the supervisors’ testimony about whether the recorded meeting was intended to be confidential.
24 ECF No. 15-1, Decl. of Michael S. Kun in Support of Sanctions Mot. (“Kun Decl.”), Exh. 21.
25 Plaintiff’s counsel acknowledges that if the recorded meeting had been confidential, Plaintiff could
26 be subject to both criminal and civil liability for making the recording without his former
27 supervisors’ knowledge or consent. Opp’n to Sanctions at 5.

28 Later, Plaintiff’s counsel represented that he was unaware of the disputed recording until

1 shortly after seeking Plaintiff's initial disclosures on January 8, 2013, and chose not to disclose the
2 disputed recording until May 8, 2013, after deposing the recorded former supervisors and
3 determining whether disclosure of the recording risked subjecting Plaintiff to civil or criminal
4 liability. See Opp'n to Sanctions at 5 (citing Decl. of Robert S. Nelson in Opposition to Sanctions
5 Mot. ("Nelson Sanctions Decl.") ¶ 3); Opp'n to Sanctions at 8. Defendant states that it did not
6 receive the disputed recording until May 14, 2013. Sanctions Mot. at 7.

8 **2. The Court DENIES Terminating Sanctions**

9 As noted in the Court's Stay Order, the Court does not find that the current record supports
10 the imposition of terminating sanctions, in light of the availability of less drastic sanctions that can
11 sufficiently address the prejudice suffered by Defendant. See *Leon v. IDX Systems Cor.*, 464 F.3d
12 951, 958 (9th Cir. 2006) (citing *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337,
13 348 (9th Cir. 1995) (articulating the five factors a court should consider in assessing the propriety
14 of dismissal: (1) the public's interest in expeditious resolution of litigation; (2) courts' needs to
15 manage their own dockets; (3) the risk of prejudice; (4) the public policy of favoring disposition of
16 cases on the merits; and (5) the availability of less drastic sanctions).¹

17 Defendant represents that it has been prejudiced by Plaintiff's conduct because, if Plaintiff
18 had timely disclosed the disputed recording, Defendant would have "immediately sought to
19 conduct discovery on the recording and attempted to determine if there were other records," and
20 "deposed Plaintiff immediately . . . before Plaintiff had much time to concoct a tale about this
21 recording or others that he made." Defendant's Supplemental Brief at 4. Defendant also
22 represents that it would have propounded different discovery and conducted witness interviews
23 differently. *Id.*

24 As indicated in the Stay Order, the Court does not find the delay from January to May of

25 ¹ The cases relied on by Defendant in support of its motion for terminating sanctions involve
26 significantly more egregious conduct. See, e.g., *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488
27 (9th Cir. 1991) (granting terminating sanctions when plaintiff's counsel altered the substance of
28 plaintiff's testimony in a deposition transcript); *Valley Engineers Inc. v. Elec. Eng'g Co.*, 158 F.3d
1051, 1053-54 (9th Cir. 1998) (granting terminating sanctions when defendant's attorneys failed to
produce a crucial piece of evidence that was responsive to a request for production for over three
years, violated court orders by failing to produce it for two years, and warnings and monetary
sanctions had proved ineffective).

1 2013 is sufficiently prejudicial to warrant terminating the case, given that discovery is not
2 scheduled to close until August 29, 2013. The Court also finds that the less drastic evidentiary and
3 monetary sanctions ordered below will sufficiently address the prejudice suffered by Defendant,
4 while allowing the case to proceed to a disposition on the merits.

5
6 **3. The Court DENIES Disqualifying Sanctions**

7 Similarly, as indicated in the Stay Order, the Court does not find disqualification of counsel
8 merited at this point. While the Court’s “paramount” concern in considering a motion to disqualify
9 should be “the preservation of public trust in the scrupulous administration of justice and the
10 integrity of the bar[. . .] disqualification is a drastic course of action that should not be taken
11 simply out of hypersensitivity to ethical nuances or the appearance of impropriety.” DeLuca v.
12 State Fish Co., Inc., 217 Cal. App. 4th 671 (2013) (quoting Roush v. Seagate Technology, LLC,
13 150 Cal. App. 4th 210, 218–219 (2007)). Because of their susceptibility to tactical abuse,
14 “[m]otions to disqualify counsel are strongly disfavored.” See Visa U.S.A., Inc. v. First Data
15 Corp., 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003).

16 In this case, Plaintiff’s counsel argues that disqualification would delay resolution and
17 possibly derail the case if Plaintiff is unable to find new counsel. Opp’n to Sanctions at 10. As
18 indicated in the Stay Order, the Court does not find Plaintiff’s counsel’s conduct sufficiently
19 egregious to warrant such a result. See Stay Order at 3. Rather, as discussed below, the Court
20 finds that less drastic sanctions can adequately remedy the harm caused by Plaintiff’s counsel’s
21 misconduct.

22 **4. The Court GRANTS in part and DENIES in part Defendant’s Motion for
23 Evidentiary and Monetary Sanctions**

24 The Court finds that evidentiary and monetary sanctions pursuant to Federal Rule of Civil
25 Procedure 26(g) (“Rule 26(g)”) provide the appropriate remedy in the instant case. Rule 26(g)
26 requires that every discovery response be signed by an attorney, and specifies that the attorney’s
27 signature “certifies that to the best of the [person’s] knowledge, information, and belief formed
28 after a reasonable inquiry” that the response is complete and correct. See R & R Sails Inc. v. Ins.
Co. of State of PA, 251 F.R.D. 520, 525 (S.D. Cal. 2008) (quoting Fed. R. Civ. P. 26(g)). Rule

1 26(g)(3) specifically provides that “if a certification violates this rule without substantial
2 justification, the court . . . must impose an appropriate sanction on the signer, the party on whose
3 behalf the signer was acting, or both. The sanction may include an order to pay the reasonable
4 expenses, including attorney’s fees, caused by the violation.”

5
6 Plaintiff’s counsel does not contest that he failed to supplement Plaintiff’s initial disclosures
7 once Plaintiff’s counsel learned of the disputed recording. Nor does he contest that he signed and
8 served responses to document requests stating that all responsive documents had been produced,
9 while withholding the disputed recording (which would have been responsive to the requests).

10 Rather, Plaintiff contends that he was not obligated to supplement his initial disclosures
11 because he planned to use the recording solely to impeach Messrs. Randazzo and Hughes at trial.
12 Opp’n at 11. However, because the content of the disputed recording is central to Plaintiff’s case,
13 this cannot justify Plaintiff’s failure to comply with his discovery obligations. See Robert Kubicek
14 Architects & Associates, Inc. v. Bosley, No. 11-01945, 2013 WL 998222 (D. Ariz. Mar. 13, 2013)
15 (“If [a] document has independent relevancy to the merits of the case, the document is not ‘solely
16 for impeachment’ and must be disclosed to opposing counsel.”) (citing Klonoski v. Mahlab, 156
17 F.3d 255, 270 (1st Cir. 1998)). Moreover, Plaintiff’s explanation for his failure to disclose the
18 disputed recording was his desire to depose Messrs. Randazzo and Hughes before they knew of the
19 existence of the recording. See Opp’n at 14; Decl. of Michael S. Kun in Support of Motion, Ex.
20 21.

21 The Court finds Plaintiff has failed to present a substantial justification for his failure to
22 comply with Rule 26(g), and GRANTS in part Defendant’s request for monetary and evidentiary
23 sanctions. Because Plaintiff’s misconduct denied Messrs. Randazzo and Hughes an opportunity to
24 properly prepare for their depositions, the Court determines that the appropriate sanction for
25 Plaintiff’s misconduct is to strike their deposition testimony in its entirety, including for
26 impeachment purposes. Plaintiff suggests that the entire depositions need not be struck, because
27 parts of the testimony “involved material issues not in any way related to the recording,” such as
28 “how much off-the-clock overtime Plaintiff worked,” and “whether Defendant made any effort to
prevent Plaintiff from continuing to work off-the-clock.” Plaintiff’s Status Report at 4. However,

1 the Court finds that these issues overlap substantially with the content of the disputed recording, in
2 which Messrs. Randazzo and Hughes discuss with Plaintiff his off-the-clock overtime and
3 Defendant's responses. See also Defendant's Status Report at 5 ("The overwhelming majority of
4 the deposition related to the issues that are covered on the recording – Defendant's operations,
5 Plaintiff's employment, and Plaintiff's assignment at Cisco.").

6
7 Additionally, the Court GRANTS Defendant's request that Plaintiff pay defense counsel's
8 fees and costs for preparation and defense of Messrs. Randazzo and Hughes for the stricken
9 depositions. Defendant's counsel, Michael S. Kun, declared that he spent in excess of 14.0 hours
10 preparing for and defending the depositions of Hughes and Randazzo, at a billing rate of \$517.50,
11 for a total of \$7,245.00. See Declaration of Defendant's Counsel Michael S. Kun, ECF No. 51-1, ¶
12 20. Kun also declared that he spent \$350 in travel costs. *Id.* The Court DENIES Defendant's
13 request that Plaintiff pay all costs and fees associated with the instant motion. Rather, Plaintiff
14 must pay the costs of the 3 hours Kun spent preparing the Reply to the Sanctions Motion. Based
15 on Kun's billing rate of \$517.50, this totals \$1,552.50. See *id.* At the July 25 hearing, Plaintiff did
16 not object to these amounts, which total \$9,147.50. Accordingly, by August 23, 2013, Plaintiff
17 shall deliver to Michael S. Kun a check made payable to TEKsystems, Inc., for the total amount of
18 \$9,147.50.

19 The Court DENIES Defendant's request to entirely exclude the disputed recording. Rather,
20 its use will be limited to impeachment purposes only. Plaintiff has represented that was the only
21 purpose for which he intended to use it, and Defendant indicated that it was prepared to stipulate to
22 the Court's tentative ruling.²

23 **5. Plaintiff's Privilege Log**

24 In the Stay Order, the Court expressed concern that in response to document requests

25 ² Because Plaintiff has represented that he seeks to use the disputed recording for impeachment
26 purposes only, the Court need not decide whether the recording must be excluded under Penal
27 Code § 632(d). Even if the recording were inadmissible because it contravened § 632, "testimony
28 as to the content of a recorded conversation is admissible, to the extent that the witness or deponent
'enjoys an untainted recall,'" and the recording itself would be admissible, as necessary, to
impeach Defendant's witnesses testimony. See *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 667
(9th Cir. 2003) (citing *Frio v. Superior Court of Los Angeles*, 203 Cal. App. 3d 1480, 1493 (1988)).

1 seeking recordings Plaintiff made of conversations with Defendant's employees, Plaintiff
2 responded that he "has been unable to locate any non-privileged documents." See Stay Order at 6.
3 Accordingly, the Court ordered Plaintiff to produce an updated and complete privilege log to
4 Defendant by July 10, 2013. Id. Plaintiff has failed to produce such a privilege log. Plaintiff
5 represents that he has not provided an updated privilege log because no privileged documents are
6 being withheld. See Plaintiff's Status Report at 4-5 ("Plaintiff could not have provided a privilege
7 log because there was nothing to log."). At the July 25, 2013 hearing, Plaintiff's counsel provided
8 inconsistent statements. For example, Plaintiff's counsel initially stated that he had never provided
9 a privilege log because he had never withheld documents on the basis of privilege. However, when
10 Defendant pointed to Plaintiff's privilege log, (Second Supplemental Decl. of Michael S. Kun in
11 Support of Defendant's Supplemental Sanctions Brief, Ex. 31), Plaintiff's counsel clarified that he
12 had in fact withheld e-mails between himself and his client before the lawsuit was filed. As an
13 officer of the Court, Plaintiff's counsel represented at the hearing that there are no other privileged
14 documents. The Court accepts this representation and declines to issue any sanctions based on
15 Plaintiff's failure to produce an updated privilege log.

16
17 **6. Discovery and Case Schedule**

18 The previously stayed discovery may now proceed. As ordered at the July 25, 2013
19 hearing, by August 1, 2013, Plaintiff shall produce verified supplemental interrogatory responses to
20 Interrogatory Nos. 1, 4, 5, 6, 19, and 21. The response to Interrogatory No. 19 shall specifically
21 address the time of day that Plaintiff recorded the conversation, a summary of the substance and
22 contents of the conversation, whether Plaintiff concealed the recording device, and the date he
23 provided the recording to his attorney. The response to Interrogatory No. 21 shall specifically
24 address the date and time of Plaintiff's communications with Tushar Papat, the location of these
25 communications, and a summary of the substance and contents of the communications. Plaintiff
26 shall supplement his document production by August 1, 2013.

27 Any further discovery disputes shall be brought before Magistrate Judge Howard Lloyd.
28 The case schedule remains as set in the Case Management Order of January 9, 2013. ECF No. 12.

IT IS SO ORDERED.

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Dated: July 25, 2013



LUCY H. KOH
United States District Judge