

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RADIO CITY, INC., et al.,
Plaintiffs,
v.
CELESTRON ACQUISITION, LLC, et al.,
Defendants.

Case No. [5:20-cv-03642-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR TERMINATING SANCTIONS; GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE; DENYING AS MOOT ADMINISTRATIVE MOTION FOR LEAVE TO FILE SUR-REPLY; GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Re: ECF Nos. 319, 322, 372, 381

Pending before the Court are Defendants’ motions for terminating sanctions and to strike, motion for leave to file sur-reply, and Plaintiff’s motion for leave to file a fourth amended complaint (“FAC”). The Court addresses these motions concurrently because they arise from the same set of facts. The Court heard oral arguments on Defendants’ motion for terminating sanctions and motion to strike on April 6, 2023. The Court finds Plaintiff’s motion appropriate for decision without oral argument pursuant to Civil Local Rule 7-1(b).

For the reasons discussed herein, the Court GRANTS IN PART AND DENIES IN PART Defendants’ motion for terminating sanctions and motion to strike at ECF Nos. 322 and 372; DENIES AS MOOT Defendants’ administrative motion for leave to file a sur-reply at ECF No. 319; and GRANTS Plaintiff’s motion for leave to file an amended complaint at ECF No. 381.

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1 **I. BACKGROUND**

2 Discovery in this putative antitrust class action has been a lengthy and arduous journey,
3 with both parties engaging in needless inappropriate and uncooperative conduct resulting in
4 numerous discovery disputes before the Court. The facts giving rise to these motions are
5 regrettably exemplary of this conduct.

6 Defendants Celestron Acquisition, LLC; David Shen; Suzhou Synta Optical Technology
7 Co., Ltd.; Nantong Schmidt Opto-Electrical Technology Co. Ltd.; Synta Technology Corp.; SW
8 Technology Corporation; Synta Canada International Enterprises Ltd.; Olivon Manufacturing Co.
9 Ltd.; Joe Lupica; Dave Anderson; Olivon USA; and Pacific Telescope Corp. (collectively
10 “Moving Defendants”) move for terminating sanctions and to strike Plaintiff’s opposition to
11 Defendants’ motion following the deposition of Maline Fish, the co-owner of the now-defunct
12 company, Radio City, LLC (“Radio City”), the sole Named Plaintiff in this action. *See* Third Am.
13 Compl. (“TAC”), ECF No. 188. According to the Moving Defendants, Ms. Fish admitted that she
14 destroyed evidence in December 2022 during her deposition on February 1, 2023. *See* Mot. for
15 Terminating Sanctions (“Mot. for Sanctions”) 11, ECF No. 322.

16 In the months leading up to Ms. Fish’s deposition, the parties met and conferred multiple
17 times throughout November and December 2022. A recurring issue at these meetings was
18 whether Plaintiff had produced all responsive information to Defendants’ discovery requests.
19 Defendants’ requests for production (“RFP”) sought Radio City’s transaction-level sales data,
20 including pricing, product numbers (or SKUs), profit margins, customer information and other
21 purchase and sales information. Decl. of Shauna A. Izadi ¶ 29, ECF No. 33-1; *see also* ECF No.
22 322-5, Ex. 4. Defendants’ RFP Nos. 166 and 170 specifically requested “[a]ll documents
23 sufficient to identify all of your customers since January 1, 2010” and documents relating to
24 “direct or indirect customers’ resale of any product manufactured, supplied or distributed by
25 defendants.” ECF No. 322-13, Ex. 12.

26 After receiving responses to these RFPs, Defendants repeatedly expressed concern over

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1 gaps in customer and sales information. *See e.g.*, ECF No. 322-19, Ex. 18; 11/01/2022 Tr. 61:10–
2 17, ECF No. 322-17, Ex. 16 (“We have incomplete records concerning you customers.”); Order re
3 January 6, 2023 Discovery Dispute (“January 13 Order”), ECF No. 296 (“Defendants complain
4 that DPPs have not been forthcoming about the sources of responsive documents and their search
5 for responsive documents, and that DPPs document production to date is not sufficient to identify
6 all of DPPs customers.”). In fact, Defendants served five meet and confer letters concerning
7 deficiencies in production and inquiring into Plaintiff’s search protocol. Mot. for Sanctions at 16.

8 On numerous occasions BraunHagey & Borden LLP, interim lead counsel (hereinafter,
9 “Lead Counsel”), assured Defendants that they had fulfilled their obligations and produced all the
10 requested documents in their possession. For example, during the parties meet and confer on
11 November 1, 2023, Lead Counsel stated, “I believe you have everything that Radio City has” in
12 response to Defendants’ inquiry whether plaintiff produced “the full list of the customers to whom
13 Radio City sold telescopes.” 11/01/2022 Tr. 30:13–19, 31:1–7. On November 17 and 21, Lead
14 Counsel again confirmed that Plaintiff produced all hard copies of purchase orders and invoices in
15 their possession. ECF No. 322-20, Ex. 19. On December 1, in response to Defendants’
16 November 18 and 21 letter briefs, Lead Counsel contended that Defendants inaccurately
17 “assert[ed] that DPPs have not produced transactional data responsive to Defendants’ RFPs” and
18 assured Defendants’ counsel that “we have provided all relevant hard-copy documents in Radio
19 City’s possession, custody, or control,” and that “all potentially relevant files have been collected
20 and reviewed in accordance with Radio City’s discovery obligations and the parties’ agreements,
21 as outlined above.” ECF No. 26, Ex. 25.

22 On January 6, 2023, the parties appeared before Magistrate Judge DeMarchi to resolve
23 their dispute concerning Plaintiff’s response to Defendant’s RFP No. 170. Judge DeMarchi issued
24 the following Order:

25 For the avoidance of doubt, the Court orders DPPs to produce
26 documents sufficient to identify all customers since January 1, 2010,
27 and overrules DPPs’ written objections to this request. It is not a
28 sufficient response to this RFP No. 170 for DPPs to disclose

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purchasing documents or transaction-related documents that do not identify customers. If responsive information is known to exist in the form of ESI, such as a database that may be queried or a spreadsheet maintained on a computer, DPPs must produce that information, regardless of whether it has been captured by agreed search terms. In the circumstances DPPs describe (i.e. small business, enterprise software system destroyed by fire), ***the Court expects counsel for DPPs to ask their clients or client representatives to assist in locating responsive sources of information.*** If DPPs ultimately determine that hardcopy sales reports and sales invoices reflecting transactions with customers are the only surviving records that are responsive to RFP No. 170, then DPPs will have satisfied their obligations with respect to this request by producing those documents.

January 13 Order at 2 (emphasis added).

Pursuant to Judge DeMarchi’s Order, Plaintiff produced approximately 27,000 additional documents ten days later which had been obtained from Dan and Maline Fish. Izadi Decl. ¶ 45. On January 31, 2023, at a subsequent discovery hearing before Judge DeMarchi, Lead Counsel represented to the Court that they had “produced everything.” *Id.* ¶ 46.

However, the parties’ dispute did not end there. On February 1, 2023, Defendants deposed Radio City’s Maline Fish. Mot. for Sanctions at 23. During her deposition, Ms. Fish admitted to disposing of boxes containing discoverable, relevant information covering the period of July 2014 through December 2016 sometime shortly before Christmas of 2022. *Id.* The boxes included UPS shipping reports and documents relating to sales records and reports, which contained item numbers, pricing, margins, and other relevant information. *Id.* at 11. Ms. Fish confirmed that she had not provided these documents to counsel at any time before they were destroyed. *Id.* at 9.

Tensions between the parties have continued to build since Ms. Fish’s deposition. In the February 10, 2023 joint status report, Plaintiff conceded that Ms. Fish “disposed of a handful of redundant documents last year,” but buffered this admission by noting that Ms. Fish did so “in the ordinary course of her business practices.” ECF No. 320 at 2. Defendants contend that Radio City is no longer an adequate class representative due to Ms. Fish’s conduct. *Id.*

On February 9, 2023, Defendants filed an administrative motion seeking leave to file a sur-reply to the pending motion to dismiss Plaintiff’s third amended complaint (“TAC”) on the

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1 grounds that Ms. Fish also admitted during her deposition that she was aware that she had a claim
2 against Defendants since 2006, and thus the claims occurred outside the statute of limitations.
3 ECF No. 319. Days later, Moving Defendants also moved for terminating sanctions.

4 Plaintiff opposes terminating sanctions, asserting that sanctions would be inequitable to the
5 proposed class. Plaintiff's Opp'n to Defs.' Mot. for Terminating Sanctions Against Pl. ("Opp'n to
6 Mot. For Sanctions"), ECF No. 341. Plaintiff's opposition to the motion for terminating sanctions
7 includes a declaration from Christopher Groves, who Plaintiff retained to provide economic
8 analysis in connection with the motion for terminating sanctions. *See* Decl. of Christopher Groves
9 in Support of Pl.'s Opp'n to Defs.' Mot. for Terminating Sanctions ("Groves Decl."), ECF No.
10 344-1. Specifically, Mr. Groves' report assesses the impact of the spoliated evidence "on the
11 parties' abilities to perform economic analysis with respect to liability, damages and class
12 certification if data in those reports were missing." *Id.* ¶ 3.

13 In their motion for sanctions, Defendants assert that they reached out to Lead Counsel
14 multiple times to schedule Mr. Groves' deposition to no avail. Lead Counsel refused to make Mr.
15 Groves available and objected to producing him until after the Undersigned issued an order
16 regarding the parties' overarching deposition disputes. *See* Order re January 6, 2023 Discovery
17 Dispute, ECF No. 296. On March 22, 2023, Judge DeMarchi ordered Plaintiff to "make Mr.
18 Groves available for deposition by defendants on or before March 31, 2023." Order re March 21,
19 2023 Discovery Dispute re Groves Deposition ("March 21 Order"), ECF No. 366. Plaintiffs were
20 ordered to "advise defendants by no later than noon March 23, 2023 of three days and times
21 during which Mr. Groves is available for deposition." *Id.*

22 Plaintiff did not comply with the Court's Order. As a result, Defendants did not have the
23 opportunity to depose Mr. Groves to determine the foundation and factual basis for his opinions in
24 advance of the April 6, 2023 hearing before the Undersigned. Defendants therefore ask the court
25 to strike his declaration because Defendants were not afforded the opportunity to meaningfully
26 oppose his declaration. *See* Defs.' Mot. to Strike Pl.'s Opp'n ("Mot. to Strike") 3, ECF No. 372.

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1 The Court heard oral arguments on both motions on April 6, 2023.

2 Around this time, Plaintiff moved for leave to file a fourth amended complaint adding
3 three additional class representatives. *See* Pl.’s Mot. for Leave to File Am. Compl. (Mot. for
4 Leave to File Am. Compl.”), ECF No. 381. Defendants oppose this request. *See* Opp’n to Mot.
5 for Leave to File Am. Compl. (Opp’n to Mot. for Leave to File Am. Compl.”), ECF No. 396.

6 * * *

7 **II. MOTION FOR TERMINATING SANCTIONS**

8 Defendants move for terminating sanctions based on Plaintiff’s spoliation of evidence.
9 Plaintiff does not dispute that Radio City’s Maline Fish destroyed evidence.

10 District courts have the authority to sanction litigants for discovery abuses pursuant to the
11 Federal Rules of Civil Procedure and the “inherent power of the federal courts” to prevent abuse
12 of the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991); *see also In re*
13 *Matter of Yagman*, 796 F.2d 1165, 1187 (9th Cir. 1986). In the Ninth Circuit, sanctions are
14 generally appropriate for disobedient conduct that is within the litigant’s control. *Id.* Even where
15 a litigant eventually produces documents, “[b]elated compliance with discovery orders does not
16 preclude the imposition of sanctions.” *N. Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d
17 1447, 1451 (9th Cir. 1986).

18 Federal Rule of Civil Procedure 37(b)(2), in relevant part, authorizes sanctions where a
19 party “fails to obey an order to provide or permit discovery,” permitted that “the established issue
20 bears a reasonable relationship to the subject of discovery that was frustrated by sanctionable
21 conduct.” *Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir. 2001). The standard for sanctionable
22 misconduct under Rule 37 is one of objective reasonableness. *Network Appliance, Inc. v. Bluearc*
23 *Corp.*, No. 03-CV-5665 MHP, 2005 WL 1513099, at *2 (N.D. Cal. June 27, 2005), *aff’d*, 205 F.
24 App’x 835 (Fed. Cir. 2006).

25 In addition to Rule 37 sanctions for violation of a court order, the Ninth Circuit has
26 recognized a district court’s “inherent discretionary power to make appropriate evidentiary rulings

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1 in response to the destruction or spoliation of relevant evidence” which “includes the power where
2 appropriate to order the exclusion of certain evidence.” *Glover v. BIC Corp.*, 6 F.3d 1318, 1329
3 (9th Cir. 1993). A court may therefore sanction a party who prejudices their opponent through
4 destruction of evidence when the party had reason to know such evidence was relevant to the
5 litigation. *Id.* “A trial court’s discretion regarding the form of a spoliation sanction is broad, and
6 can range from minor sanctions, such as the awarding of attorneys’ fees, to more serious sanctions,
7 such as dismissal of claims or instructing the jury that it may draw an adverse inference.” *Apple*
8 *Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1135 (N.D. Cal. 2012). The party who fails to
9 comply with its discovery obligations bears the burden of showing substantial justification or that
10 other sanctions would be unjust. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994).

11 Defendants request that the Court levies terminating sanctions, or, in the alternative, issue
12 an irrebuttable adverse inference instruction, as well as monetary sanctions. The Court first
13 addresses whether terminating sanctions are appropriate.

14 **A. Terminating Sanctions**

15 Sanctions—particularly terminating sanctions—should be used sparingly. “[S]anctions are
16 appropriate only in extreme circumstances and where the violation is due to willfulness, bad faith,
17 or fault of the party.” *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)
18 (quotations and citations omitted). With these guardrails in mind, the Ninth Circuit developed a
19 test to determine when terminating sanctions are appropriate. The moving party must show that:
20 “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its
21 docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring
22 disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Leon v. IDX*
23 *Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (quotations and citations omitted). Although a
24 district court need not examine each factor, the court must find “willfulness, fault, or bad faith” to
25 sanction dismissal of an action. *Id.* The court must also consider less severe alternatives to
26 dismissal. *Id.*

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1. Willfulness, Fault, or Bad Faith

As an initial matter, the Court finds that Plaintiff acted willfully, with fault, and/or in bad faith by consciously disregarding its obligations to preserve relevant evidence during the course of litigation. *See, e.g., Apple*, 881 F. Supp. 2d at 1147 (explaining that “willfulness” can be shown by the “conscious disregard” of a party’s obligations); *Hamilton v. Signature Flight Support Corp.*, No. 05-CV-0490 CW (MEJ), 2005 WL 3481423, at *7 (N.D. Cal. Dec. 20, 2005) (collecting cases). “The duty to preserve evidence [] includes an obligation to identify, locate and maintain, information that is relevant to specific, predictable, and identifiable litigation.” *Apple*, 881 F. Supp. 2d at 1136 (internal quotation and citation omitted). “The duty to preserve also includes information in the possession of those employees likely to have relevant information—the ‘key players’ in the case.” *Brown v. Albertsons, LLC*, No. 16-CV-01991-JADPAL, 2017 WL 1957571, at *5 (D. Nev. May 11, 2017) (internal quotations and citation omitted). Lead Counsel does not dispute the relevance of the destroyed evidence nor deny that Plaintiff had an ongoing duty to preserve the evidence at issue.

The record is replete with assurances from Lead Counsel that they would follow up with their client to confirm no records are missing and, later, representations that they have produced everything in Plaintiff’s possession. These representations were made over the course of multiple months. From late October to mid-December 2022, Lead Counsel denied accusations that they had not produced all relevant discoverable documentation and simultaneously failed to communicate with their client regarding evidence production and preservation.¹ The Court finds it particularly troubling that Lead Counsel represented they only first learned of the destruction of evidence by their client following relatively straightforward questioning by Defendants during Ms. Fish’s deposition, where Ms. Fish recalled that counsel did not ask her to produce this information and that she “didn’t know” that she needed to produce it. M. Fish Dep., ECF No. 322-2, Ex. 1 at

¹ Ms. Fish’s declaration states that she had approximately 8 or 9 conversations with Lead Counsel about documents and discovery between November 2022 and the date of her deposition in early February 2023. Decl. of Maline Fish (“Fish Decl.”) ¶ 15, ECF No. 341-3.

1 121:11–16, 121:24–122:1. Ms. Fish also noted that there were additional potentially relevant
2 documents still in her home that she has not provided to counsel, such as inventory reports. *Id.* at
3 120:17–121:16. Lead Counsel’s failure to produce these documents in the first instance and
4 failure to ensure that their client preserved relevant evidence during litigation is inexcusable.

5 Indeed, Ms. Fish knew or should have been aware of her duty to preserve this evidence. A
6 “party’s destruction of evidence qualifies as willful spoliation if the party has ‘some notice that the
7 documents were potentially relevant to the litigation before they were destroyed.’” *Leon*, 464 F.3d
8 at 959 (citation omitted). When asked why she did not produce the spoliated evidence to counsel
9 and instead destroyed it, Ms. Fish responded that she “gave [] counsel what they asked for, and I
10 don’t recall them asking.” M. Fish Dep., at 120:1–4. At no point during her deposition did Ms.
11 Fish state that she thought the documents were irrelevant to the litigation, nor did she provide any
12 other justification that would suggest she did not understand her duty to preserve the evidence. In
13 fact, in her declaration, Ms. Fish states that she “understood that Radio City needed to save its
14 documents and turnover any documents that related to its telescope business in this case.” Fish
15 Decl. ¶ 9. Despite this understanding, Ms. Fish did not check with Lead Counsel before disposing
16 of the documents nor did she inform them after she disposed of them. *Id.* ¶ 19. Destroying
17 evidence during litigation simply because counsel “did not ask for it” is not accidental conduct;
18 Plaintiff consciously disregarded her duties to preserve evidence. Lead Counsel either did not
19 advise her of the importance of this evidence or neglected their obligation to secure the evidence.

20 2. *Leon* Factors

21 Turning to the *Leon* test, the first two factors—the public’s interest in expeditious
22 resolution of litigation and the court’s need to manage its dockets—tend to favor terminating
23 sanctions where the misconduct has delayed the action’s resolution.² *Facebook, Inc. v. OnlineNIC*

24
25 ² Conversely, “[t]he fourth factor – ‘public policy favoring disposition of cases on their merits’ –
26 usually cuts against sanctions.” *Facebook, Inc.*, 2022 WL 2289067, at *10. An exception is
27 where prejudice to the moving party “is so great that it outweighs this factor.” *WeRide Corp. v.*
28 *Kun Huang*, No. 18-CV-07233-EJD, 2020 WL 1967209, at *11 (N.D. Cal. Apr. 24, 2020).
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1 *Inc.*, No. 19-CV-07071-SI (SVK), 2022 WL 2289067, at *10 (N.D. Cal. Mar. 28, 2022) (citing
2 *Comput. Task Grp. Inc. v. Brothby*, 364 F.3d 1112, 1115 (9th Cir. 2004)). Here, Plaintiff’s
3 misconduct has unnecessarily extended discovery that resulted in additional motion practice and
4 hearings before both Judge DeMarchi and the Undersigned.

5 The third and most important *Leon* factor “looks to whether the [spoliating party’s] actions
6 impaired the [non-spoliating party’s] ability to go to trial or threatened to interfere with the
7 rightful decision of the case.” *Leon*, 464 F.3d at 959 (alterations in original).

8 Courts in the Ninth Circuit have found prejudice where another
9 party’s failure to produce documents forced the non-spoliating party
10 to “rely on incomplete and spotty evidence,” *Anheuser-Busch*, 69
11 F.3d at 354; where the plaintiff engaged in a mass deletion of 2,200
12 files from his work computer during litigation, *Leon*, 464 F.3d at 959–
13 60; and where a defendant engaged in mass destruction of emails and
14 email accounts, *WeRide*, 2020 WL 1967209, at *10–11.

15 *Facebook, Inc.*, 2022 WL 2289067, at *10.

16 Defendants argue the spoliation of 18 months of sales reports and UPS shipping reports
17 may impair their defense. The allegations in this case involve claims of price-fixing, dividing the
18 market, restricting supply, charging monopolistic prices, and stealing competitor pricing
19 information. *See* Third Am. Compl. ¶¶ 2, 17, 49, 50, 85, 115-18, ECF No. 188. Plaintiff alleges
20 that, as a result of these conspiracies, Defendants charged purchasers “supracompetitive” and
21 “unlawfully inflated” prices. *Id.* ¶¶ 3, 23. Information concerning Plaintiff’s sales, inventory,
22 customers, purchases, costs, and margins are therefore relevant to any defense against these
23 allegations. Indeed, the Ninth Circuit recognizes that missing or “spotty” evidence can impair a
24 party’s defense. *See Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 354 (9th Cir.
25 1995) (affirming the district court’s finding that the spoliation resulted in plaintiff relying on
26 “spotty evidence” which “severely impaired” plaintiff’s defense).

27 _____
28 Defendants argue that the fourth factor weighs in their favor because Radio City destroyed the
only copies of documents that are relevant to the issues in this case and vital to their defense. Mot.
for Sanctions at 27. Because the Court finds that the prejudice to Defendants do not rise to the
requisite level to warrant terminating sanctions, the fourth factor does not weigh in Defendants’
favor.

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1 Ms. Fish admitted that not all the “specifics” of the destroyed reports are included in the
2 records that the Defendants were given, noting that much of the information contained in the
3 destroyed reports is probably available in the macro in other reports but not in the “granular,”
4 which could only be found in the destroyed reports. M. Fish Depo., ECF No. 322-2 at 127:18–
5 128:9. Plaintiff attempts to argue that the destruction was “harmless” because Defendants “have
6 not been deprived of any material documents.” Opp’n at 12. Generally, where evidence has been
7 destroyed, “there is no way to know what the spoliated evidence would have revealed.” *Apple*,
8 881 F. Supp. 2d at 1150; *see also Facebook, Inc.*, 2022 WL 2289067, at *10 (“Any moving party
9 is at a disadvantage to show prejudice because a moving party who seeks evidence cannot prove
10 that relevant evidence existed but was destroyed.”) (quoting *John v. Cnty. of Lake*, No. 18-CV-
11 06935-WHA (SK), 2020 WL 3630391 at *7 (N.D. Cal. July 3, 2020)).

12 Plaintiff characterizes the spoliated evidence as “composite reports” of financial
13 information which purportedly contains information that is available to Defendants in other forms,
14 such as purchasing invoices and annual sales reports from Celestron, Meade, and Orion. *Id.* at 13.
15 During her deposition, Ms. Fish described the destroyed documents as monthly computer records
16 for five different categories: (1) open invoice reports, (2) register reports, (3) inventory reports, (4)
17 used and consignment report, and (5) used sale report. M. Fish Dep. at 109:2–7. She stated that
18 the “used and consignment report” showed the used product that was sold in the store (as opposed
19 to the new inventory which is included in the “inventory report”). *Id.* at 109:10–14, 22–25. When
20 asked if there was any way to retrieve copies of the information contained in the “register report”
21 and the “financial report” after it had been destroyed, Ms. Fish responded in the negative and
22 confirmed that she had not provided copies of the reports to counsel before she destroyed them,
23 although she noted that the information contained in those reports are available in other forms,
24 such as financial statements. *Id.* at 110:21–111:4; 111:12–112:3.

25 Ms. Fish also confirmed that the information contained in the “inventory report” and the
26 “used sale report” cannot be found elsewhere. *Id.* at 116:8–117:24 (describing the information as

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1 being “lost forever”). Ms. Fish admitted that she did not look at the dates on the documents before
2 she destroyed them. *Id.* at 118:19–22. Regarding the UPS reports, Ms. Fish noted that, while the
3 destroyed reports would include relevant customer information, Radio City rarely shipped
4 telescopes. *Id.* at 126:2–11.

5 In sum, while Defendants have shown that they will be prejudiced by the spoliation of
6 evidence, Defendants have fallen short of showing that this prejudice meets the high standard that
7 would warrant terminating sanctions. For example, in *WeRide*, the court found that the destruction
8 of evidence was “so sweeping” that the action could not be resolved on the merits. *WeRide Corp.*,
9 2020 WL 1967209, at *11. The spoliation of evidence in *WeRide* involved the destruction of
10 almost a years’ worth of emails through the deletion of email accounts and company-wide deletion
11 of emails on its servers, alteration or deletion of misappropriated source code, and wiping all ESI
12 from numerous electronic devices. *Id.* at *3–8. The evidence spoliated in *WeRide* was “critical”
13 to the moving party’s trade secret claims such that “spoliation of this source code [] robbed
14 WeRide of any chance to test AllRide’s offered theory of independent development and to
15 affirmatively prove its case.” *Id.* at *14. Defendants have not convincingly shown that the
16 evidence destroyed by Ms. Fish is nearly as sweeping or as detrimental to their defense as was the
17 circumstance in *WeRide*.

18 Accordingly, the Court finds that imposition of terminating sanctions is inappropriate
19 under *Leon*. See *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1059
20 (S.D. Cal. 2015) (“The risk of prejudice to the party seeking sanctions and the availability of less
21 drastic sanctions are the decisive factors in the Ninth Circuit’s test to determine whether case
22 dispositive sanctions are justified.”).

23 **B. Less Drastic Sanctions**

24 Although Defendants contend that lesser sanctions would not sufficiently cure the
25 prejudice to Defendants, they alternatively propose that the Court issue an irrebuttable inference
26 instruction, in addition to attorneys’ fees in connection with the preparation and prosecution of this

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1 motion. Mot. for Sanctions at 30–31. Plaintiff argues that terminating sanctions or the “lesser
2 sanctions” like an adverse inference instruction would be inequitable and prejudicial to unnamed
3 members of the class. Opp’n at 17.

4 Sanctions levied for the destruction of evidence “should be designed to: (1) deter parties
5 from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who
6 wrongfully created the risk; and (3) restore the prejudiced party to the same position he would
7 have been absent the wrongful destruction of evidence by the opposing party.” *Apple*, 881 F.
8 Supp. 2d at 1136 (internal quotations and citations omitted).

9 **1. Attorneys’ Fees**

10 “[A] district court may [] award sanctions in the form of attorneys’ fees against a party or
11 counsel who acts in bad faith, vexatiously, wantonly, or for oppressive reasons,” such as where a
12 party has spoliated evidence. *Leon*, 464 F.3d at 958. Similarly, violation of a court order under
13 Rule 37(b) permits the Court “order the disobedient party, the attorney advising that party, or both
14 to pay the reasonable expenses, including attorney’s fees, caused by the failure. . . .” Fed. R. Civ.
15 P. 37(b)(2)(C).

16 Both Plaintiff’s and Lead Counsel’s conduct provides a sufficient basis for awarding fees.
17 For the reasons already discussed, Plaintiff willfully failed to preserve relevant evidence by
18 destroying boxes of business documents spanning 18-months and failing to timely produce
19 approximately 27,000 documents. Lead Counsel also failed to properly oversee discovery by
20 failing to locate relevant discoverable information and failing to preserve and timely produce that
21 information. “While, of course, it is true that counsel need not supervise every step of the
22 document production process and may rely on their clients in some respects, counsel is responsible
23 for coordinating her client’s discovery efforts.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422,
24 435 (S.D.N.Y. 2004) (internal quotations and citation omitted). The Court finds that attorneys’
25 fees arising from the preparation and litigation of this motion are appropriate based on this
26 misconduct, as well as to deter future misconduct and restore Defendants to the position they

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1 would have been in had Plaintiff faithfully fulfilled its discovery obligations. *Id.* at 437 (ordering
2 the payment of the costs of the motion for sanctions).

3 An assessment of attorneys' fees shall be determined separately once Defendants identify
4 the amount and support for monetary sanctions it seeks to recover.

5 2. Disqualification of Radio City as Class Representative

6 While Defendants do not seek this sanction specifically, the Court considers
7 disqualification of the named plaintiff. Plaintiff asks the Court to deny Defendants' request for
8 terminating and evidentiary sanctions as inequitable and unduly prejudicial to the class. Opp'n to
9 Mot. for Sanctions at 16–17. Plaintiff suggests that a more appropriate remedy would be to order
10 Plaintiff to substitute a new class representative. *Id.* at 16. The Court agrees.

11 Courts in the Ninth Circuit have addressed issues regarding the adequacy of named
12 plaintiffs as class representatives or the adequacy of class counsel prior to class certification. *See*
13 *Testone v. Barlean's Organic Oils, LLC*, No. 19-CV-169 JLS (BGS), 2021 WL 22611, at *5 (S.D.
14 Cal. Jan. 4, 2021) (collecting cases). Many courts in this district have declined to find inadequacy
15 of a class representative at the pleading stage, deferring such findings until the class certification
16 stage. *See, e.g., Huricks v. Shopkick, Inc.*, No. 14-CV-2464 MMC, 2014 WL 4954662, at *2–3
17 (N.D. Cal. Oct. 1, 2014); *Perez v. State Farm Mut. Auto. Ins. Co.*, No. 06-CV-01962 JW, 2011
18 WL 8601203, at *2–3 (N.D. Cal. Dec. 7, 2011); *Krzesniak v. Cendant Corp.*, No. 05-CV-05156
19 MEJ, 2007 WL 640594, at *3–4 (N.D. Cal. Feb. 27, 2007). The Court finds that the conduct of
20 the plaintiffs in these cases are distinguishable from Radio City.

21 None of the conduct for which defendants sought disqualification of plaintiff as class
22 representative in *Huricks*, *Perez*, or *Krzesniak* involved the destruction of evidence. For example,
23 in *Huricks*, Judge Chesney denied defendant's motion to disqualify plaintiff from acting as class
24 representative based on allegations of "potential conflict" between plaintiffs and lead counsel.
25 *Huricks*, 2014 WL 4954662, at *2–3. The court explained that nothing in the record at this stage
26 indicated that any potential issue pertaining to the adequacy of the named plaintiffs or class

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1 counsel must be addressed prior to class certification. *Id.* at *3. In *Perez*, defendants sought
 2 disqualification based in part on allegations that plaintiff lied in her insurance application. *Perez*,
 3 2011 WL 8601203, at *2. Judge Ware noted that “[a] plaintiff should not be disqualified as a
 4 class representative simply because the defendant *may* have good defenses against that plaintiff,”
 5 such as a *potential* defense of rescission. *Id.* (internal quotations omitted) (emphasis added). In
 6 *Krzesniak*, a wage and hour class action, defendants raised issues concerning plaintiff’s individual
 7 retaliation lawsuit, his “anatomistic relationship” to defendant (his former employer), and his
 8 alleged credibility problems. *Krzesniak*, 2007 WL 640594, at *2. Magistrate Judge James denied
 9 the motion based on the incomplete record before the court, making it “unable to conduct the
 10 rigorous analysis required by Rule 23.” *Id.* at *3.

11 Unlike *Huricks*, *Perez*, or *Krzesniak*, disqualification of Radio City is based on more than
 12 mere allegations of suspected misconduct or potential but unrealized issues concerning
 13 adequacy—all of which are more appropriately raised at the class certification stage and after the
 14 record has been fully developed. Here, Ms. Fish *admitted* to the destruction of a substantial
 15 amount of evidence during litigation which would render her atypical and inadequate to serve as
 16 class representative. Courts outside this circuit have disqualified plaintiffs from serving as class
 17 representative prior to class certification based on plaintiff’s destruction of evidence. *See e.g.*,
 18 *Mooradian v. FCA US, LLC*, 286 F. Supp. 3d 865, 870 (N.D. Ohio 2017) (finding that plaintiff
 19 spoliated evidence and levying a sanction disqualifying plaintiff from serving as a class
 20 representative); *Tomassini v. FCA US LLC*, No. 3:14-CV-1226-MADML, 2020 WL 1938834, at
 21 *6 (N.D.N.Y. Apr. 22, 2020) (“Plaintiff Hromowyk is disqualified from acting as a class
 22 representative because his actions have made him an atypical member.”). Conversely, in
 23 *Akaosugi*, Judge Alsup declined to levy sanctions based on spoliation “the record did not show
 24 that plaintiff Nguyen permanently destroyed any documents.” *Akaosugi v. Benihana Nat. Corp.*,
 25 282 F.R.D. 241, 257 (N.D. Cal. 2012). Copies of the documents were available elsewhere. *Id.*
 26 *Akaosugi* is distinguishable because Radio City did, in fact, permanently destroy evidence. *Id.* At

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1 the class certification stage, Judge Alsup concluded that plaintiff was not an adequate class
2 representative due to his spoliation misconduct and found that “issues unique to plaintiff . . . will
3 impede plaintiff[’s] [] ability to vigorously represent the class.” *Id.* In this case, the Court finds
4 that disqualification is appropriate prior to class certification.

5 Because of the undisputed fact that Radio City spoliated evidence, the Court finds that
6 Radio City is not fit to serve as a class representative. Ms. Fish’s conduct has rendered Radio City
7 “an atypical member of the class by giving [defendant] [] numerous possible defenses against []
8 [it] that would not apply to the class as a whole.”³ *Mooradian*, 286 F. Supp. 3d at 870. In
9 exercising its discretionary authority, the Court disqualifies Radio City from serving as a class
10 representative.

11 **3. Irrebuttable Adverse Inference Instruction**

12 In addition to attorneys’ fees, “a trial court also has the broad discretionary power to permit
13 a jury to draw an adverse inference from the destruction or spoliation against the party or witness
14 responsible for that behavior.” *Glover*, 6 F.3d at 1329. Defendants request that the Court issue an
15 irrebuttable adverse inference instruction that Radio city acted with a culpable state of mind and
16 destroyed evidence that was relevant to its claims. Mot. for Sanctions at 31–31. Because the
17 Court disqualifies Radio City from serving as Class Representative, Defendants’ request for an
18 adverse inference instruction against Plaintiff is moot.

19 **C. Sanctions Against Plaintiff Radio City**

20 In conclusion, the Court declines to levy terminating sanctions against Plaintiff. Instead,
21 the Court orders the following sanctions: (1) Plaintiff must pay reasonable attorneys’ fees and
22 costs arising from this motion and (2) Radio City is disqualified from serving as class
23 representative.

24 * * *

25 _____
26 ³ At this time the Court does not decide whether Radio City could later participate as a class
27 member if a class action is later approved.

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III. MOTION TO STRIKE

Defendants request that the Court “stri[k]e pleadings in whole or in part” pursuant to Rule 37(b)(2)(A)(iii). Specifically, Defendants move to strike Plaintiff’s opposition in its entirety, or, in the alternative, strike the declaration of Plaintiff’s expert, Christopher Groves.

As discussed above, the court may impose sanctions against a party for failure to obey a court order compelling discovery. Fed. R. Civ. Pro. 37(b)(2)(A); *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Const. Co., Inc.*, 857 F2d 600, 602 (9th Cir. 1988). A court may sanction a disobedient party by striking pleadings, staying further proceedings pending compliance, or terminating the action by default or dismissal. Fed. R. Civ. P. 37(b)(2)(A)(iii)–(iv).

There are five factors that a court must consider before striking a pleading, such as witness testimony, or declaring default: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Bd. of Trs. of Laborers Health & Welfare Tr. Fund for N. California v. Kudsk Const., Inc.*, No. 12-CV-165-CW, 2012 WL 3010981, at *2 (N.D. Cal. July 23, 2012) (quoting *Hester*, 2012 U.S. App. LEXIS 14683, at *14, 2012 WL 2914108 (quotations omitted)).

Plaintiff submitted expert testimony from Christopher Groves, a data analyst, in support of its opposition to Defendants’ motion for terminating sanctions. *See* Groves Decl.; ECF No. 341-2. Plaintiff retained Mr. Groves to opine as to the spoliated evidence (i.e., the composite reports) and what impact, if any, the missing evidence has on “the parties’ abilities to perform economic analysis with respect to liability, damages and class certification.” *Id.* ¶ 3. Mr. Groves based his opinion on the assumption that much of the spoliated evidence “is available elsewhere in the record and that any missing information is immaterial.” *Id.* His report concludes that Defendants are not materially affected by the missing data. *Id.* ¶ 11.

Plaintiff did not file an opposition to this motion but nonetheless relied in part on Groves’ conclusions in support of Plaintiff’s argument at the hearing. It is undisputed that Plaintiff failed

1 to produce Mr. Groves for a Court-ordered deposition prior to March 31. *See* March 21 Order;
2 Frost Decl. in support of Defs.’ Mot. to Strike (“Frost Decl.”) ¶¶ 21–22, ECF No. 372-1. The
3 purpose of Judge Demarchi’s Order was to ensure that Defendants had the opportunity to examine
4 the foundation and factual basis for Mr. Groves’ opinions *before* the April 4 hearing. Mot. to
5 Strike at 19–20; Frost Decl. ¶ 23. Plaintiffs have not provided any excuse for failing to comply
6 with the Court’s Order. The Court therefore finds that the public’s interest in expeditious
7 resolution of litigation, the court’s need to manage its docket, the risk of prejudice Defendants, and
8 the public policy favoring the disposition of cases on their merits all favor striking Mr. Groves’
9 declaration.

10 Accordingly, the Court strikes Christopher Groves’ declaration and any references to Mr.
11 Groves’ opinion in Plaintiff’s opposition.

12 * * *

13 **IV. MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

14 Plaintiff moves to file a fourth amended complaint to add new representative plaintiffs.
15 Pursuant to Rule 15, “[t]he Court should freely give leave [to amend pleadings] when justice so
16 requires.”⁴ Fed. R. Civ. P. 15(a)(2). Rule 15’s “policy of favoring amendments to pleadings
17 should be applied with ‘extreme liberality.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186
18 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). A court
19 should resolve a motion for leave to amend “with all inferences in favor of granting the motion.”
20 *Griggs v. Pace Am. Grp.*, 170 F.3d 877, 880 (9th Cir. 1999) (citations omitted).

21 Courts consider multiple factors and “may exercise its discretion to deny leave to amend
22 due to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure
23

24 ⁴ Defendants argue that the Court should assess Plaintiff’s motion for leave to amend under Rule
25 16, which applies to motions to amend where the court has entered a case schedule that establishes
26 a timetable for amending pleadings an that deadline has expired. Opp’n to Mot. for Leave to File
27 Am. Compl. at 5–6 (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271,1294 (9th Cir 2000)). No
28 such order has been entered in this case.

1 deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . [and]
2 futility of amendment.” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th Cir.
3 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182, (1962)) (alterations in original). Prejudice to
4 the opposing party “carries the greatest weight.” *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d
5 1048, 1052 (9th Cir. 2003).

6 The Court begins with “the touchstone of the inquiry under rule 15(a)” —prejudice to the
7 non-moving party. *Id.* District courts have recognized that undue prejudice can occur “when the
8 amendment includes entirely new and separate claims, adds new parties, or at least entails more
9 than an alternative claim or a chance in the allegations of the complaint and when additional
10 discovery is expensive and time-consuming.” *See, e.g., Conte v. Jakks Pac., Inc.*, 981 F. Supp. 2d
11 895, 909 (E.D. Cal. 2013), *aff’d*, 563 F. App’x 777 (Fed. Cir. 2014); *Luckett v. Conlan*, 561
12 F.Supp.2d 970, 977 (N.D. Ill. 2008). In these situations, the prejudice arises from the assertion of
13 new causes of action at later stages in the proceedings. *See, e.g., Graiser v. Visionworks of Am.,*
14 *Inc.*, No. 1:15-CV-2306, 2016 WL 4729301, at *1 (N.D. Ohio Sept. 12, 2016); *Conte*, 981 F.
15 Supp. at 909. Here, Plaintiff does not seek to add any new claims.

16 Plaintiff intends to add the following three new parties to ensure adequate representation
17 for all members of the class: (1) Aurora Astro Products LLC, a Washington State limited liability
18 company; (2) Pioneer Cycling & Fitness, LLP, a Minnesota limited liability partnership; and (3)
19 Jason Steele, an individual resident of Texas. Mot. for Leave to File Am. Compl. at 5. While the
20 addition of new class representatives will require Defendants to engage in additional discovery,
21 “the court is not convinced that this burden will be so unfair as to justify denial of plaintiff’s
22 motion.” *In re: Facebook Priv. Litig.*, No. 10-CV-02389-RMW, 2015 WL 2453734, at *5 (N.D.
23 Cal. May 22, 2015); *see also Adams v. AllianceOne, Inc.*, No. 08-CV-0248 JAH (WVG), 2010
24 WL 11508283, at *3 (S.D. Cal. Apr. 16, 2010) (“[T]he taking of an additional deposition does not
25 amount to substantial prejudice.”).

26 Moreover, amendment will not adversely impact Defendants in terms of the pending
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1 motions. This case is procedurally unique; Plaintiff requests leave to file a fourth amended
2 complaint while there are pending motions to dismiss and strike Plaintiff's third amended
3 complaint, the operative complaint. Because of these unique circumstances, the new proposed
4 class representatives agree to allow Defendants' pending motions attacking the pleadings to apply
5 to their claims to prevent any additional work, such as re-filing, on Defendants' part. Mot. for
6 Leave to File Am. Compl. at 12.

7 Finally, Defendants assert that Plaintiff was not diligent in seeking leave to amend and
8 makes this request in bad faith. The Court disagrees. First, Lead Counsel did not unduly delay
9 seeking leave to amend the complaint because the amendment is based on the admissions made by
10 Ms. Fish in February 2023, and Lead Counsel moved for leave to amend in April 2023. *See*
11 *Walintukan v. SBE Ent. Grp., LLC*, No. 16-CV-01311-JST, 2017 WL 635278, at *3 (N.D. Cal.
12 Feb. 15, 2017) (finding no undue delay where "the FAC is based largely on information learned
13 during discovery."). Defendants essentially argue that the spoliation of evidence is a result of
14 Lead Counsel's failure to uphold its duties to preserve evidence and respond to discovery requests,
15 and therefore it is something that Lead Counsel should have been aware of sooner. While
16 disturbing and disappointing, these failings are appropriately addressed in the Court's ruling on
17 Defendants' motion for sanctions. *See infra* Section II. Second, Lead Counsel seeks leave to and
18 for the purpose of protecting the class, which does not constitute bad faith. *Adams*, 2010 WL
19 11508283, at *3 (finding no bad faith where plaintiff sought leave to amend to "ensure that the
20 interests of the class are adequately protected.").

21 Moreover, "[w]here a named plaintiff's claims become moot, courts in the Ninth Circuit
22 permit the substitution of a proper class representative to allow the suit to proceed." *In re:*
23 *Facebook Priv. Litig.*, 2015 WL 2453734, at *4 (citing *Lierboe v. State Farm Mut. Auto. Ins. Co.*,
24 350 F.3d 1018, 1023 n.6 (9th Cir.2003)). Here, the Court disqualified Radio City, the sole named
25 plaintiff, from serving as class representative and therefore the addition of named plaintiffs are
26 required for the case to proceed. Accordingly, the court treats the instant motion to amend to add

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1 class representatives as one seeking the substitution of a named plaintiff following the moot—
2 or, in this case, disqualification—of a prior plaintiff’s claims. *See In re: Facebook Priv. Litig.*,
3 2015 WL 2453734, at *4.

4 Turning to futility, the Court finds that this factor likewise favors granting leave to
5 amend. Futility “includes the inevitability of a claim’s defeat on summary judgment,” *California*
6 *v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004), and when the amendments do not
7 adequately plead a cause of action and could not survive dismissal, *Moore v. Kayport Package*
8 *Exp., Inc.*, 885 F.2d 531, 537 (9th Cir. 1989). While Defendants contend that amendment is futile,
9 Opp’n to Mot. for Leave to File Am. Compl. at 2–3, their contention is conclusory and fails to
10 establish any basis for finding futility. Defendants attempt to argue that the newly proposed class
11 representatives inadequately represent the proposed class, *id.* at 3–4, but adequacy is not for the
12 Court to decide on a motion for leave to amend. *Walintukan*, 2017 WL 635278, at *3.

13 Accordingly, the *Foman* factors weigh in favor of granting Plaintiff’s request for lave to
14 file a fourth amended complaint.

15 * * *

16 **V. CONCLUSION**

17 Based on the foregoing, the Court:

18 1. GRANTS IN PART AND DENIES IN PART Defendants’ motion for
19 terminating sanctions at ECF No. 322. Defendants’ request for a sanction dismissing the
20 case is DENIED, the request for an irrebuttable inference instruction is DENIED AS
21 MOOT, and the request for attorneys’ fees is GRANTED. In addition, Radio City is
22 DISQUALIFIED from serving as class representative.

23 The Court will set a separate hearing to determine the amount of attorneys’ fees.
24 The parties shall stipulate or file a joint statement with a proposed briefing schedule on or
25 before **September 8, 2023**.

26 2. GRANTS IN PART AND DENIES IN PART Defendants’ motion to strike at ECF

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No. 372. The Court DENIES Defendant’s request to strike Plaintiff’s opposition in its entirety and GRANTS Defendants’ request to strike the Declaration of Christopher Grove at ECF No. 341-1. In addition, any reference to the Grove Declaration in Plaintiff’s opposition will be STRICKEN and disregarded by the Court.


3. DENIES AS MOOT Defendants’ administrative motion for leave to file a sur-reply at ECF No. 319. This motion is based entirely on admissions made by Maline Fish during her deposition. Because Radio City is disqualified from serving as class representative, Defendants’ request is moot.

4. GRANTS Plaintiff’s motion for leave to file an amended complaint at ECF No. 381. Pursuant to the sanction, Plaintiff shall substitute but not add the proposed class representatives for Radio City. Plaintiff shall file the fourth amended complaint no later than **September 1, 2023**.

As discussed in this Order, the filing of the FAC will not affect the pending motion to dismiss the third amended complaint at ECF No. 206.

IT IS SO ORDERED.

Dated: August 25, 2023



EDWARD J. DAVILA
United States District Judge