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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DANIELLE TRUJILLO, as Guardian Ad Litem for KADEN PORTER, a minor, on behalf of himself and others similarly situated, *et al.*,

Plaintiffs,

v.

AMETEK, INC., a Delaware corporation; SENIOR OPERATIONS, LLC, a limited liability company; and DOES 1 through 100, inclusive,

Defendants.

Civil No. 15cv1394 GPC (BGS)

**ORDER DENYING ATTORNEY'S FEES AND COSTS ASSOCIATED WITH SPOILIATION MOTION**

On November 20, 2015, the Honorable Gonzalo P. Curiel, referred Plaintiffs' Motion for Sanctions and Preservation to the Honorable Bernard G. Skomal, United State Magistrate Judge, for decision. [ECF Nos. 45-46.] On March 4, 2016, the Court granted in part and denied in part Plaintiff's motion for an adverse inference jury instruction finding that Defendant Ametek acted negligently; therefore, a severe adverse inference instruction was inappropriate. [ECF No. 54 at 12:12-15:14.] Consequently, the Court ordered:

"In order to place Plaintiffs in substantially the same position as they would have been absent the failure of Ametek to sample initial vapor emissions before the activation of the SSD and AES systems, the Court finds Ametek must cease operation of the pilot test SSD and AES units in order to restore soil vapor

1 conditions at Magnolia Elementary to those similar to condition before pilot testing  
2 was initiated. Plaintiff's experts shall also be permitted to collect vapor samples at  
3 the re-startup of the SSD and AES systems. Finally, to prevent any further  
4 negligent or inadvertent spoliation at the property the Court also requires Ametek  
5 to provide Plaintiffs with 30-days notice before conducting further remediation  
6 efforts at Magnolia Elementary.”

7 [ECF No. 54 at 15:15-23.]

8 Given the intersection of this spoliation issue with discovery in general, as well as  
9 the parties' failure to successfully meet and confer about a site inspection and testing  
10 schedule, the Court in its order requested a declaration from Plaintiff's counsel  
11 concerning the reasonable attorney fees and costs associated with bringing the spoliation  
12 motion in order to determine a monetary sanction. Fed. R. Civ. P. 37 (a)(3)(B)(iv); Fed.  
13 R. Civ. P. 37(a)(5)(A)-(C). The Court asked only for a declaration as to the attorney's  
14 fees and costs associated with the spoliation motion. [ECF No. 16:11-14.] The Court also  
15 requested a response from Defendant Ametek. [ECF No. 16:15-16.]

16 In response to the Court's request for a supplemental declaration, Plaintiff  
17 submitted a declaration requesting not only attorney's fees and costs pertaining to the  
18 spoliation motion, but also expert fees and costs, which the Court did not request. [ECF  
19 No. 55.] Defendant filed its response as ordered by the Court arguing that neither the  
20 reimbursement of fees and costs for the spoliation motion, nor reimbursement of expert  
21 fees, which Plaintiff suggested, were available to the Court under its inherent power  
22 because only negligence, without more, was found. [ECF No. 57.]

23 Defendant is correct. As opposed to a fee award sanction under Federal Rule of  
24 Civil Procedure 37, which governs failures to cooperate in discovery that may be  
25 negligent, the payment of fees and costs associated with a spoliation motion are  
26 impermissible under the Court's inherent power without a finding of bad faith or at the  
27 very least, recklessness with something more such as an improper purpose. *See e.g.*  
28 *Keithley v. The Home Store, Inc.* 2008 WL 3833384, \*3 (N.D. Cal. 2008) (observing that

1 “[a]lthough there is some ambiguity in the case law as to the state of mind required to  
2 support the imposition of sanctions under the Court’s inherent power (*see United Medical*  
3 *Supply v. U.S.*<sup>1</sup>, 77 Fed. Cl. 257, 266-67 (2007), the Ninth Circuit has concluded that  
4 sanctions are available under the Court’s inherent power if ‘preceded by a finding of bad  
5 faith or conduct tantamount to bad faith,’ such as recklessness ‘combined with an  
6 additional factor such as frivolousness, harassment or an improper purpose..... Sanctions  
7 for violations of Rule 37, by contrast, may be imposed for negligent conduct.” (quoting  
8 *Fink v. Gomez*, 239 F.3d 989, 994 (9<sup>th</sup> Cir. 2001)). Specifically, in *Fink*, the Ninth Circuit  
9 summarized its holdings on the scope of intent needed to warrant sanctions under the  
10 inherent power stating:

11 “mere recklessness, without more, does not justify sanctions under a court's  
12 inherent power. But the cases ... make clear that sanctions are available if the court  
13 specifically finds bad faith or conduct tantamount to bad faith. Sanctions are  
14 available for a variety of types of willful actions, including recklessness when  
15 combined with an additional factor such as frivolousness, harassment, or an  
16 improper purpose. Therefore, we hold that an attorney's reckless misstatements of  
17 law and fact, when coupled with an improper purpose, such as an attempt to  
18 influence or manipulate proceedings in one case in order to gain tactical advantage  
19 in another case, are sanctionable under a court's inherent power.”

20 *Id.* at 993-94.

21 Here, the Court found in its March 4, 2016 Order that it was careless for Ametek to  
22 go forward with pilot testing when it had received Plaintiff’s preservation letters and it  
23 had received Plaintiff’s emails asking for a meet-and-confer before any remediation

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25 <sup>1</sup>The U.S. Court of Federal Claims in *United Medical Supply Co., Inc.*, presented an  
26 overview of the parameters of the Court’s inherent power and opined that under a more flexible  
27 approach to constructing a sanction that is just and proportionate “repeated acts of gross  
28 negligence, particularly if accompanied by inaccurate representations to the court that serve to  
mask and perpetuate the spoliation, can be met with the same or a more severe sanction than a  
single act of bad faith.” 77 Fed. Cl. 257, 271 (2007). While this Court found Ametek to be  
negligent in the way it handled the meet-and-confer process and pilot testing scheduling, it did  
not make a finding of gross negligence.

1 occurred. The Court further determined, however, that improper purpose or conduct  
2 tantamount to bad faith had not been shown because organizations other than Ametek,  
3 namely the California Department of Toxic Substance Control and the Cajon Valley  
4 Union School District, which were not parties to the litigation, also controlled the  
5 scheduling of pilot testing and remediation efforts.

6 The Court notes that discovery was not yet open in this case when the allegation of  
7 spoliation arose because a motion to dismiss was pending before Judge Curiel and the  
8 parties had not yet had an Early Neutral Evaluation Conference. Because discovery was  
9 not open and there was no formal inspection request made, Federal Rule of Civil  
10 Procedure Rule 37<sup>2</sup> is unavailable as a source of authority for the Court to apportion  
11 reasonable expenses for the spoliation motion. The spoliation motion was brought only  
12 under the Court's inherent power, therefore monetary sanctions may not be imposed  
13 without a finding of recklessness and an additional factor of frivolousness, harassment or  
14 improper purpose on behalf of Ametek, which this Court did not find. Accordingly, the  
15 fees and costs requested<sup>3</sup> in Plaintiff's declaration are **DENIED**. The Court's Order  
16 dated March 4, 2016 is **AMENDED** to exclude payment of reasonable attorney fees and  
17 costs associated with bringing the spoliation motion. The remainder of the Court's Order  
18 March 4, 2016 is unaffected.

19 **IT IS SO ORDERED.**

20 DATED: September 2, 2016

21   
22 Hon. Bernard G. Skomal  
23 U.S. Magistrate Judge  
24 United States District Court

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25 <sup>2</sup>For example, if a motion to compel an inspection under Federal Rule of Civil Procedure  
26 34 is granted in part and denied in part, the Court may apportion reasonable expenses for the  
27 motion. Fed.R.Civ.P. 37(a)(5)(C).

28 <sup>3</sup>Similarly, payment of expert fees, which were addressed in Plaintiff's declaration, but not  
requested or awarded by the Court, are also unavailable absent a finding of bad faith. *Chambers*  
*v. Nasco, Inc.*, 501 U.S. 32, 50, 111 S. Ct. 2123, 115 L.Ed.2d 27 (1991); *Mathis v. Spears*, 857  
F.2d 759 (Fed. Cir. 1988) (noting that full expert witness fees may be awarded under the inherent  
powers upon a finding of bad faith).