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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Youngevity International, et al.,
Plaintiffs,
v.
Todd Smith, et al.,
Defendants.

Case No.: 16-CV-704-BTM-JLB
**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
SANCTIONS FOR WITNESS
TAMPERING [ECF No. 180]**

Before the Court is Plaintiffs' motion for sanctions for witness tampering (ECF No. 180). For the reasons discussed below, the Court grants in part and denies in part Plaintiffs' motion.

I. FACTUAL BACKGROUND

Plaintiffs and Counterclaim Defendants (collectively "Youngevity") move the Court to impose sanctions against Defendants Todd Smith ("Smith") and Wakaya Perfection, LLC ("Wakaya") for witness tampering. Youngevity claims that Smith sent text messages to Rick Anson ("Anson") and David Smith with the intent of influencing their deposition testimony.

Rick Anson is the CEO and founder of LiveWell, LLC. In November 2015, Anson began working for Wakaya as the Vice President of Product Development and LiveWell began producing and supplying its products for Wakaya. Anson

1 and Wakaya entered into a Royalty Agreement and LiveWell entered into a
2 licensing agreement with Wakaya. In 2016, LiveWell's relationship with Wakaya
3 came to an end with Anson serving Wakaya a Notice of Default in December
4 2016. The Notice of Default alleges that Wakaya violated and breached
5 numerous responsibilities and duties under the agreement between Wakaya and
6 LiveWell. Several of these alleged breaches are issues on which Youngevity
7 grounds its own causes of action. Anson's and LiveWell's relationship with
8 Wakaya terminated on or about January 16, 2017. Shortly thereafter, Anson was
9 hired as Youngevity's Vice President. Both parties designated Anson as a
10 witness and agreed to take his deposition on July 7, 2017 in Tempe, Arizona.

11 Youngevity alleges that Smith attempted to suppress the Notice of Default.
12 On the same day that Smith received Anson's Notice, he sent Anson the
13 following text message:

14 Got your letter. Let's talk and work things out Soon! Also, by way of
15 advice. You had better ensure that this letter remains confidential.
16 You have made some very serious allegations which if publicized
17 would make you liable for defamation and libel. Your claims are
18 false. You do not at this stage have judicial immunity. You leak
19 anything like this letter to anyone and I can't protect you. Be careful.

20 Anson testified in his deposition that the text message made him feel
21 uncomfortable.

22 Youngevity also claims that Smith intended to intimidate Anson the
23 night before his deposition when he sent Anson the following text message:

24 Hello Rick— I hope you arrived in AZ safely. As
25 you prepare your thoughts for tomorrow, please realize
26 that I know what the magic ingredient is to the LuvCap
27 you supplied to us. Not on the label though. I wonder if
28 Clay and others are aware. Not a good thing legally for
someone of Clay's reputation. See you in the morning. ;)

Shhhhhhhh!

1 It is important to note that Clay Carley is a director and prominent investor
2 in LiveWell. On the day of the deposition, Smith was asked to leave the
3 deposition by his counsel when Youngevity's counsel shared the content of the
4 text message. Anson testified at the deposition that he felt intimidated by the
5 text. He also stated that he interpreted the first text referencing the Notice of
6 Default as a threat. However, despite feeling threatened and intimidated, Anson
7 stated that Smith's actions did not affect his testimony. Smith subsequently
8 apologized for sending Anson the text message.

9 Youngevity also argues that Smith intended to interfere with the testimony
10 of David Smith, co-founder and co-owner of Great American Clay Company
11 ("GAC"), a Wakaya supplier. On June 15, 2017, David Smith sent Todd Smith,
12 Defendant Blake Graham, counsel for Youngevity and Wakaya, Lynn Jenkins,
13 GAC's other co-founder and co-owner, and Jamie Kidd, a Wakaya employee, an
14 email that stated the following:

15 Todd, Both Lynn [Jenkins] and I received yet another urgent text
16 message from you today saying we need to talk because Youngevity
17 was pushing things in regards to a deposition and that we needed to
18 talk today. You have our attorneys name and contact information.
19 You know Lynn and I both have legal representation. Please do not
20 continue in your attempts to circumvent by contacting us directly. I
21 thank you in advance for your cooperation in this regard.

22 On June 28, 2017 at his deposition, David Smith testified that Smith sent
23 him repeated text messages even after he asked Smith to stop contacting him.
24 Though he was told by Lynn that Smith had an interest in discussing his
25 deposition, David Smith never spoke to Smith personally about it. Youngevity
26 contends that Smith's repeated text messages demonstrates Smith's attempts to
27 change David Smith's deposition testimony.

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II. DISCUSSION

A. Bad Faith

Courts are vested with the inherent authority to sanction conduct which abuses the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991). While a court’s inherent power “extends to a full range of litigation abuses,” it must make a finding that the litigant “engaged in bad faith or wilful disobedience of a court’s order.” *Fink v. Gomez*, 239 F.3d 989, 992 (quoting *Chambers*, 501 U.S. at 46–47). The Court here finds by clear and convincing evidence that Smith acted in bad faith in texting Anson, but not David Smith.

While regretful now that he sent Anson the text messages at issue, Smith intended to influence Anson’s testimony. First, Smith threatened Anson with libel and defamation if he discussed the Notice of Default or its content with anyone. Second, he texted Anson the night before his deposition and threatened to disclose the ingredients of one of LiveWell’s products. While he was unsuccessful in influencing Anson’s testimony, Smith nevertheless intended to do so. As to David Smith, however, it is not clear what Smith’s intentions were. David Smith testified that he could only speculate as to why Smith was attempting to contact him. The Court has not seen the messages that Smith sent David Smith and based on the evidence before it, it does not find that he acted in bad faith.

B. Remedy

Having found that Smith engaged acted in bad faith as to Anson, the Court must fashion the appropriate remedy. Youngevity specifically moves for monetary sanctions against Smith for the cost of two depositions and the bringing of this motion, for a referral of the matter to the United States Attorney for investigation and potential prosecution under 18 U.S.C. § 1512(b)(1), and for the Court to make a finding that the content of Anson’s Notice of Default is true and admissible against Smith and Wakaya.

1 First, the Court hereby awards Youngevity the cost of bringing this motion.
2 Under its inherent powers, “a court may assess attorney’s fees when a party
3 acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Chambers*,
4 501 U.S. at 45–46. Here, Smith intended to influence Anson’s testimony.
5 Accordingly, Youngevity is entitled to reasonable attorney’s fees for the work
6 performed in bringing this motion. However, the Court declines to award
7 Youngevity the cost of Anson’s deposition because as he testified, Smith did not
8 succeed in influencing his testimony.

9 As to Youngevity’s request for a referral to the United States Attorney’s
10 Office, the Court also declines to exercise its authority in such manner. Courts
11 have referred instances of perjury in civil cases before it to the U.S. Attorney for
12 investigation and prosecution. *Neal v. LaRIVA*, 765 F.3d 788, 791 (7th Cir.
13 2014); *SEC v. Payton*, 176 F. Supp. 3d 346, 354 (S.D.N.Y. 2016); *In re Actos*
14 *(Pioglitazone) Prods. Liability Litigation*, No. 6:12-CV-00064-RFD, 2014 WL
15 2624943, at *7 (W.D. La. June 11, 2014). The Court chooses not to make such a
16 referral in this case. First, the case did not involve perjury. Second, Smith did
17 not hide his actions and seems to understand that they were improper. Third, the
18 actions did not take place before the Court and Plaintiffs can bring them to the
19 attention of the U.S. Attorney. Instead, the Court hereby enjoins Smith and
20 Wakaya from harassing or intimidating any of Plaintiffs’ and Counterclaim
21 Defendants’ witnesses in this case as set forth below.

22 Lastly, while the Court declines to enter a finding that the content of the
23 Notice of Default is true, the Court finds that a properly tailored adverse inference
24 instruction is appropriate and will not cause unfairness to Smith or Wakaya. The
25 Court will give the following instruction:

26 Youngevity has offered evidence that Todd Smith tried to suppress
27 the Notice of Default written by LiveWell, L.L.C. and tried to influence
28 Rick Anson’s testimony. After considering all of the pertinent facts
and circumstances, you may, but are not obligated to, infer that any

1 evidence you find that Mr. Smith attempted to suppress or influence
2 was favorable to Youngevity and unfavorable to him and Wakaya.

3 **III. CONCLUSION AND ORDER**

4 For the reasons discussed above, Youngevity's motion for sanctions for
5 witness tampering is **GRANTED IN PART** and **DENIED IN PART**. The Court
6 grants Youngevity's request for fees and costs it incurred in bringing this motion.
7 A motion for fees and costs shall be calendared for April 13, 2018 at 11:00 a.m.
8 The injunction provided for herein shall take effect immediately and the Court will
9 give an adverse inference instruction as set forth above.

10 Todd Smith and Wakaya, and his and its agents, and employees, are
11 enjoined and restrained from, directly or through others, harassing, threatening,
12 intimidating or influencing, or attempting to do so, any of Plaintiffs' and
13 Counterclaim Defendants' witnesses. Todd Smith and Wakaya shall not
14 communicate with any of Plaintiffs' and Counterclaim Defendants' witnesses
15 other than Wakaya employees, agents or representatives, except when counsel
16 for Smith or Wakaya are participating in the communication.

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18 **IT IS SO ORDERED.**

19 Dated: February 6, 2018



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22 Barry Ted Moskowitz, Chief Judge
23 United States District Court
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