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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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12 Youngevity International, et al.,
13 Plaintiffs,
14 v.
15 Todd Smith, et al.,
16 Defendants.
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Case No.: 16-cv-704-BTM-JLB

**ORDER ADOPTING REPORT AND
RECOMMENDATION AND
VACATING ORDER AWARDING
ATTORNEY'S FEES**

[ECF Nos. 557, 561]

18
19 Before the Court are the objections filed by Plaintiffs and Counterclaim
20 Defendants Youngevity International, Corp. et al. ("Youngevity" or Plaintiffs), (see
21 ECF No. 561 ("Objs. to Am. R. & R. & Order" or "the Objections")), to the
22 Amended Report and Recommendation and Order, issued on July 2, 2018 by the
23 Magistrate Judge, awarding attorney's fees to Defendants Wakaya Perfection,
24 LLC., et al. ("Wakaya" or Defendants) under Federal Rule of Civil Procedure
25 37(b)(2)(C), (see ECF No. 557 ("Am. R. & R. & Order" or "the Magistrate Judge's
26 order").) For the reasons discussed below, the Court **ADOPTS** the R. & R. and
27 **VACATES** the order awarding attorney's fees to Wakaya.
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1 **BACKGROUND**

2 The Magistrate Judge observed that the parties had mistrust for one
3 another. (Am. R. & R. & Order at 2.) That is an understatement. The parties
4 have engaged in scorched earth litigation reminiscent of Mad Magazine’s cartoon
5 *Spy vs. Spy*. Over 70 depositions have been taken. Over 110 motions have
6 been filed, including 37 motions for summary judgment. In this judge’s thirty-two
7 years on the federal bench, I have seen nothing like this. Youngevity and
8 Wakaya are seeking to use the litigation to inflict a mortal wound on each other’s
9 businesses. The attorneys have unfortunately taken up their clients’ attitude.
10 Each side is lying in wait for the other to make a mistake so that it can then jump
11 out, proclaiming *gotcha*. The objections to the Magistrate Judge’s order arise
12 from this background.

13 Under Federal Rule of Civil Procedure Rule 37(b)(2)(C), a court can award
14 sanctions for violation of a protective order. Rule 37(b)(2)(C) provides that with
15 respect to payment of expenses for failure to comply with a court order,
16 the court must order the disobedient party, the attorney advising that
17 party, or both to pay the reasonable expenses, including attorney's
18 fees, caused by the failure, unless the failure was substantially
justified or other circumstances make an award of expenses unjust.

19 Fed. R. Civ. P. 37(b)(2)(C).

20 Here, Wakaya seeks sanctions for Youngevity’s violation of the protective
21 order for three disclosures designated as “Confidential—Attorney’s Eyes Only.”
22 Wakaya alleges that Youngevity violated the protective order by (1) publicly filing
23 the start dates of two Wakaya sales representatives, (2) disclosing the start date
24 of a distributor to deponents during their depositions, and (3) disclosing sales
25 data, contained in an expert report prepared by Youngevity’s own expert but
26 based on discovery produced by Wakaya, to Plaintiff and Counterclaim
27 Defendant Steve Wallach, Youngevity’s CEO. (See Am. R. & R. & Order at 2
28

1 (citing ECF No. 420, 3-5.) The Magistrate Judge recommends the denial of
2 sanctions other than an award of attorney’s fees to Wakaya, and Wakaya did not
3 object. The Court adopts this part of the R. & R.

4 **STANDARD**

5 The Court has reviewed the Magistrate Judge’s order, the Objections, and
6 the briefing by both parties that followed, pursuant to Federal Rule of Civil
7 Procedure 72(a), which provides that with respect to nondispositive matters,
8 “[t]he district judge in the case must consider timely objections and modify or set
9 aside any part of the order that is clearly erroneous or is contrary to law.”
10 Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A) (“A judge of the court may
11 reconsider any pretrial matter [first determined by a magistrate judge] where it
12 has been shown that the magistrate judge’s order is clearly erroneous or contrary
13 to law.”). The Ninth Circuit has reaffirmed that “[a] district judge may reconsider
14 a magistrate[] [judge’s] order in a pretrial matter if that order is ‘clearly erroneous
15 or contrary to law.’” *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002);
16 *see also Brown v. Wesley’s Quaker Maid, Inc.*, 771 F.2d 952, 954 (6th Cir. 1985)
17 (noting that the magistrate judge may rule directly on a “non-dispositive pretrial
18 motion such as a discovery motion” and that “[t]he scope of review is the ‘clearly
19 erroneous’ standard”).

20 **DISCUSSION**

21 Youngevity objects to the Magistrate Judge’s order, asserting that it is
22 based on clearly erroneous fact finding. The Court need not and does not reach
23 those objections, because the award of fees is vacated on other grounds.

24 Rule 37(b)(2)(C) authorizes attorney’s fees for violation of a protective
25 order unless “other circumstances make an award of expenses unjust.”
26 Fed. R. Civ. P. 37(b)(2)(C). In the Ninth Circuit, sanctions under Rule 37(b)(2)(C)
27 are “appropriate only in ‘extreme circumstances’ and where the violation is ‘due
28 to willfulness, bad faith, or fault of the party.’” *Fair Hous. of Marin v. Combs*, 285

1 F.3d 899, 905 (9th Cir. 2002) (citing *U.S. for the Use & Benefit of Wiltec Guam,*
2 *Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 603 (9th Cir. 1988)); see also
3 *Paterson v. Dunham*, 645 F. App'x. 535, 536 (9th Cir. 2016) (citing *Fair Hous. of*
4 *Marin*, 285 F.3d at 905) (holding that the district court did not abuse its discretion
5 in partially denying appellant's motion for sanctions because "sanctions are only
6 appropriate in extreme circumstances where the violation is due to willfulness,
7 bad faith, or fault of the party"). While "[d]isobedient conduct not shown to be
8 outside of the litigant's control" meets the Ninth Circuit's standard for granting
9 sanctions as a general matter, see *Fair Hous. of Marin*, 285 F.3d at 905, the
10 Ninth Circuit also recognizes that "not all disobedient conduct is of the same
11 order," see *In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217, 1248
12 n.19 (9th Cir. 2006).

13 Here, Wakaya produced about 116,000 documents and designated about
14 114,000 as confidential under the protective order. Even if Youngevity did make
15 improper disclosures in the few instances of which Wakaya complains in the
16 present motion, the circumstances are not sufficiently extreme as to warrant
17 sanctions. Indeed, the sheer volume of documents produced, ninety-eight
18 percent of which was deemed confidential, relative to the very minimal alleged
19 disclosures in the present motion, constitutes precisely the kind of circumstance
20 provided for in Rule 37(b)(2)(C) that would make an award of attorney's fees
21 unjust. Moreover, there is no showing of bad faith or prejudice. Given
22 Youngevity's adherence to the protective order otherwise, sanctions in the form
23 of attorney's fees would not be just.

24 This is not to say that the Court countenances violations of a court order or
25 rule. Youngevity's counsel are hereby admonished. All counsel for both
26 Plaintiffs and Defendants are admonished to follow rules and orders, especially
27 this district's Local Civil Rule 83.4, which details the standards and expectations
28 of professionalism required by lawyers who practice before this court. In

1 particular, the Court warns the parties to avoid the conduct that Rule 83.4 warns
2 against, including the prescriptions that attorneys must not “[k]nowingly
3 participate in litigation or any other proceeding that is without merit or is designed
4 to harass or drain the financial resources of the opposing party,”
5 CivLR 83.4(a)(2)(c), nor “[s]eek sanctions against or the disqualification of any
6 other attorney for any improper purpose,” CivLR 83.4(a)(2)(e).

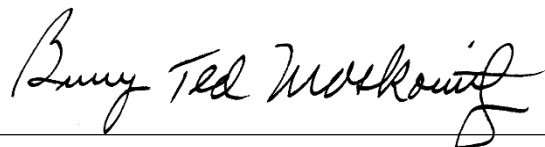
7 All counsel are warned that willful violations of rules or orders may result in
8 pro hoc vice authorization being revoked or disciplinary proceedings for those
9 already members of the bar of this court.

10 **CONCLUSION**

11 For the foregoing reasons, the award of attorney’s fees in the Magistrate
12 Judge’s order (ECF No. 557) is **VACATED**. Wakaya’s motion for sanctions (ECF
13 No. 337) is **DENIED**. No motion for reconsideration will be filed without leave of
14 the Court. In light of Wakaya’s pending motion for terminating sanctions, or, in the
15 alternative, issue, evidentiary, and monetary sanctions (ECF No. 552) based in
16 part on the disclosures addressed above that Wakaya argues are improper, this
17 Order is without prejudice to granting sanctions based on the record for that
18 motion. The Report and Recommendation as to not granting other sanctions is
19 **ADOPTED**.

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21 **IT IS SO ORDERED.**

22 Dated: January 10, 2018



Barry Ted Moskowitz, Chief Judge
United States District Court