UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 21-2105 JGB (KKx)**	Date	September 22, 2022
Title	***Focally LLC, et al. v. Win Elements, LLC, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING Plaintiff's Motion for Sanctions (Dkt. No. 48); and (2) VACATING the September 26, 2022 Hearing (IN CHAMBERS)

Before the Court is Plaintiff's motion for sanctions pursuant to Federal Rule of Civil Procedure 11. ("Motion," Dkt. No. 48). The Court finds this Motion appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court GRANTS Plaintiff's Motion and VACATES the September 26, 2022 hearing.

I. BACKGROUND

On December 17, 2021, Plaintiffs Graham Dugoni and Focally LLC filed a complaint against Win Elements LLC and John Nguyen. ("Complaint," Dkt. No. 1.) On March 8, 2022, Plaintiff Yondr, Inc. ("Yondr") substituted Mr. Dugoni and Focally LLC and filed an amended complaint. ("FAC," Dkt. No. 14.) The FAC alleges five causes of action: (1) willful patent infringement in violation of 35 U.S.C. § 271(A); (2) induced patent infringement in violation of 35 U.S.C. § 271(B); (3) contributory patent infringement in violation of 35 U.S.C. § 271(C); (4) unfair competition in violation of Cal. Bus. & Prof. Code § 17200 et seq.; and (5) declaration of patent invalidity. (See FAC.)

On March 22, 2022, Defendants filed a motion to dismiss the complaint. (Dkt. No. 17). On April 5, 2022, Defendants filed a motion for leave to file the motion to dismiss. (Dkt. No. 18.) Plaintiff opposed on April 18, 2022. (Dkt. No. 19.) Defendants replied on April 25, 2022. (Dkt.

No. 20.) The next day, Defendants filed a motion to strike Plaintiff's opposition. (Dkt. No. 21.) On May 5, 2022, the Court continued the hearing on these motions from May 5, 2022 to June 6, 2022. (Dkt. No. 22.). On May 16, 2022, Plaintiff opposed the motion to strike. (Dkt. No. 23.) On May 23, 2022, Defendants replied. (Dkt. No. 24.) On June 2, 2022, the Court struck the motion to dismiss for failure to comply with Local Rule 7-3. (Dkt. No. 29.) The Court ordered both parties to file declarations following a meet and confer if Defendants wished to refile the motion. (Id.) Both parties heeded the Court's Order and timely filed their declarations. (See Dkt. Nos. 30-32.) On July 6, 2022, Defendants filed a renewed motion to dismiss. (Dkt. No. 33.) Yondr opposed on July 18, 2022. (Dkt. No. 34.) Defendants replied on July 25, 2022. (Dkt. No. 35.)

On August 10, 2022, the Court granted Defendants' motion to dismiss. (Dkt. No. 41.) On August 23, 2022, Plaintiff filed a second amended complaint. (Dkt. No. 43.)

On August 26, 2022, Plaintiff filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11. ("Motion," Dkt. No. 48.) Defendants opposed on September 5, 2022. ("Opp.," Dkt. No. 51.) Plaintiff replied on September 12, 2022. ("Reply," Dkt. No. 53.)

On September 6, 2022, Defendants filed an additional motion to dismiss. (Dkt. No. 52.)

II. LEGAL STANDARD

Federal courts employ three mechanisms to sanction parties or lawyers for improper conduct: Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and the court's inherent powers. Lozano v. Yee Cabrera, 678 F. App'x 511, 513 (9th Cir. 2017).

A. Rule 11

Federal Rule of Civil Procedure 11 imposes a duty on attorneys to certify that (1) they have read the pleadings or the motions they file, and (2) the pleading or motion is well-grounded in fact, has a colorable basis in law, and is not filed for an improper purpose. Sec. Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1016 (9th Cir. 1997) (citing Fed. R. Civ. P. 11(b)). The Ninth Circuit has articulated two separate grounds for sanctions: if the paper is "frivolous" or filed for an improper purpose. Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990).

An attorney is subject to Rule 11 sanctions when they present to the court "claims, defenses, and other legal contentions . . . [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" Holgate v. Baldwin, 425 F.3d 671, 676–77 (9th Cir. 2005). An attorney may also be subject to Rule 11 sanctions when she includes factual allegations lacking evidentiary support. Fed. R. Civ. P. 11(b)(3). Claims must be made only when the attorney can certify that it is the result of a "reasonable inquiry." See Westlake N. Prop. Owners Ass'n v. City of Thousand Oaks, 915 F.2d 1301, 1305 (9th Cir. 1990). Improper purposes behind a filing include harassment,

causing unnecessary delay, or increasing the costs of litigation. Fed. R. Civ. P. 11(b)(1); Hudson v. Moore Bus. Forms, Inc., 836 F.2d 1156 (9th Cir. 1987).

A motion for sanctions "must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2) ("Safe Harbor Provision").

The party seeking sanctions has the burden of demonstration that sanctions are justified. Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833, 837 (9th Cir. 1987). A court has substantial discretion regarding the application of Rule 11 sanctions. See Committee Notes on Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 587 (1993). Cases warranting the imposition of sanctions for frivolous actions are "rare and exceptional." Operating Eng'rs Pension Trust v. A–C Co., 859 F.2d 1336, 1344 (9th Cir. 1988).

B. *28 U.S.C. § 1927*

28 U.S.C. § 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously" may be ordered by the court to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Imposition of sanctions under this section requires a finding of bad faith. Pac. Harbor Cap., Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000). Knowing or reckless conduct meets this subjective standard, but negligent conduct does not. Id.

C. Court's Inherent Powers

District courts may impose sanctions under their power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." In re Napster, Inc. Copyright Litigation, 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)). A court may assess attorney's fees as a sanction when "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons," including when a party has willfully disobeyed a court order. Chambers, 501 U.S. at 45 (internal quotations and citations omitted). A court may similarly impose attorney's fees as a sanction when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order." Id. at 46 (internal quotations and citation omitted). A court may even dismiss an action for a party's failure to prosecute or to comply with a court order. Link v. Wabash R. Co., 370 U.S. 626, 630 (1962) (citing F. R. Civ. P. 41(b)). These inherent powers of the court "must be exercised with restraint and discretion." Chambers, 501 U.S. at 44. "A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Id. at 44-45.

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III. DISCUSSION

Plaintiff alleges that Defendants' counsel, Frederic Douglas, has violated Rule 11 in "at least" five filings: (1) The first motion to dismiss (Dkt. No. 17) contained legal arguments contravening recent precedent and a "shoehorned[] but factually inaccurate anti-SLAPP argument"; (2) The motion for leave to file the motion to dismiss was improperly timed because it was filed *after* the motion to dismiss; (3) The motion to strike Plaintiff's opposition to the motion to dismiss primarily advanced a legally baseless argument that the opposition violated the formatting requirements of the Local Rules; (4) Mr. Douglas "blatantly perjured himself by fabricating a dialogue that never transpired" in his meet and confer declaration filed in response to the Court's June 2, 2022 order; and (5) The second motion to dismiss (Dkt. No. 33) was "nearly identical" to the first motion to dismiss (Dkt. No. 17) and therefore did not constitute an "objectively reasonable and competent pre-filing inquiry." (Motion at ii.)

Defendants' opposition largely ignores these substantive allegations, raising two procedural arguments: first, that the Motion violated Rule 11's "safe harbor" provision, and second, that Plaintiff failed to comply with L.R. 7-3 before filing the Motion. These arguments are addressed, and rejected, in turn.

A. Safe Harbor

A motion for sanctions "must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2) ("Safe Harbor Provision"). The safe harbor provision is strictly enforced. Holgate v. Baldwin, 425 F.3d 671, 678 (9th Cir. 2005). The proper procedure is for the party seeking sanctions to draft the Rule 11 motion, serve it on the opposing party, then wait 21 days to file it (if the basis for the motion is not withdrawn or corrected). Id.; see also Committee Notes on Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 591 (1993).

Plaintiff notes that it served a draft of the Motion on Mr. Douglas on August 4, 2022, and then waited 22 days to file it. (Reply at 7; Ex. A, Khalifeh Decl. ¶¶ 3-5.) Conceding this fact, as they must, Defendants raises a series of dubious arguments in an attempt to circumvent the clear mandate of the safe harbor provision.

Defendants seems to argue, as best as the Court can discern, that service of the draft motion on Mr. Douglas should not count, because the Motion that was later filed contained additional paragraphs. (Opp. at 16-17). Specifically, Defendants claim that the declarations submitted by Plaintiff's counsel, Omid Khalifeh and Lara Peterson, add a total of three paragraphs to the draft he was served. (Id.) A cursory inspection of the declarations reveals the absurdity of this argument. Paragraphs 21 and 22 of the Khalifeh Declaration simply note that (1) Mr. Douglas was served with the draft on August 4, 2022 and (2) Mr. Douglas refused to withdraw the offending filings during the safe harbor period. (Motion, Khalifeh Decl. ¶¶ 21-22.) Paragraph 22 of the Peterson Declaration notes the same fact: Mr. Douglas received notice of

Plaintiff's intent to seek sanctions and refused to voluntarily withdraw the filings. (Motion, Peterson Decl. ¶ 22.) The irony of Defendants' second, equally meritless safe harbor argument—that Mr. Douglas would need "time travel technology" to comply with the applicable withdrawal dates—is that it provides the obvious rejoinder to his first: one cannot swear under penalty of perjury that filings were not withdrawn during the safe harbor period until that period has passed. (See Opp. at 12). Such an assertion would appropriately appear only in the filed Motion, not the draft served on opposing counsel. The related contention that Plaintiff's counsel lacks "personal knowledge" of Mr. Douglas's refusal to withdraw the filings is similarly bizarre. (See id. at 16-17.) Plaintiff, like the Court, can readily determine that Mr. Douglas has not withdrawn any filings.

Defendants' counsel also asserts that it was "impossible" for him to comply with the safe harbor provision because a hearing date on one of the relevant filings was pending within this period. (Opp. at 10-13.) One of the bases for the Motion concerns Defendants' motion to dismiss, filed on July 6, 2022. (Dkt. No. 33.) Mr. Douglas received notice of the Motion on August 4, 2022. The Court ruled on the motion to dismiss on August 10, 2022. (Dkt. No. 41.) The safe harbor period concluded on August 25, 2022. Thus, Defendants' counsel argues that, "absent time travel," he was "unable to withdraw within 21 days" the motion to dismiss "after the August 4, 2022 alleged draft service date." (Opp. at 12.)

This argument fails. The safe harbor period runs from the day the party receives notice in the form of the draft motion for sanctions. Fed. R. Civ. P. 11(c)(2); Radcliffe v. Rainbow Const. Co., 254 F.3d 772, 789 (9th Cir. 2001); Barber v. Miller, 146 F.3d 707, 710-711 (9th Cir. 1998). The Ninth Circuit has squarely addressed, and rejected, Defendants' contention otherwise. Truesdell v. S. California Permanente Med. Grp., 293 F.3d 1146, 1151–53 (9th Cir. 2002). In Truesdell, the plaintiff filed an allegedly sanctionable complaint; eight days later, the defendant served a draft motion for sanctions; twenty days after the safe harbor period began, the court dismissed the complaint; twenty-seven days after service of the draft motion for sanctions, the defendant filed the motion. Id. at 1151. The Ninth Circuit held that the safe harbor period was still running even after the court's decision to dismiss, and that the plaintiff was afforded (more than) the full twenty-one-day period to withdraw the filing. Id. at 1152-53. Here, the fact that the Court ruled on one of the bases for the Motion during the safe harbor period does not deprive Mr. Douglas of any right afforded by that provision. "The mandatory safe-harbor period still was available" to him—"[c]ounsel simply elected not to take advantage of it." Id. at 1553.[1]

[1] Further, some courts have even found that technical noncompliance with the safe harbor provision does not preclude Rule 11 sanctions when a party has actual notice of an intention to seek sanctions. See, e.g., Cardillo v. Cardillo, 360 F. Supp. 2d 402, 419 (D.R.I. 2005). The Court finds that Plaintiff has fully complied with the provision and rejects Mr. Defendants' arguments to the contrary. Separately, the Court notes that the underlying purpose of the rule is to give a party an opportunity to (re)assess a filing and correct or withdraw it, if necessary. Over six weeks after he was put on notice of Plaintiff's intention to seek sanctions, Mr. Douglas has not once acknowledged the slightest error on his part or made any attempt to (continued . . .)

B. Central District of California Local Rule 7-3

Defendants next argue that the Motion fails to comply with Local Rule 7-3 and should be denied on that basis. The Court disagrees.

Local Rule 7-3 provides, in part: "[C]ounsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference shall take place at least seven (7) days prior to the filing of the motion." L.R. 7-3.

Plaintiff acknowledges that it failed to strictly comply with its Local Rule 7-3 obligation in certain respects, including omitting the requisite L.R. 7-3 statement in its notice of motion. (Motion at 5.) Plaintiff argues that (1) the parties discussed the substance of the Motion in detail on June 28, 2022, satisfying the meet and confer requirement and (2) Defendants suffered no prejudice from any technical violations of the Rule, excusing compliance with it. (Reply at 2-7.)

According to Plaintiff, the parties discussed the matters at issue in the Motion "ad nauseum" in a two hour and 15-minute June 28, 2022 conference of counsel conducted via Zoom. (Reply at 2, 3.) During the meeting, Mr. Douglas repeatedly offered a misleading account of counsels' discussion of each issue. (Id. at 3.) In response, Plaintiffs' counsel warned that Mr. Douglas could be held accountable for statements made under penalty of perjury. (Id.) Mr. Khalifeh warned Mr. Douglas that, if he chose to file another motion to dismiss, he would "review it with a fine-tooth comb." (Id.) If Plaintiff's counsel "found any indication that the motion was presented for an improper purpose . . . Plaintiff would not hesitate to file a [Rule 11] motion." (Id.) Mr. Douglas referred to either Plaintiff's counsel or Plaintiff's arguments as "silly and stupid." (Id.) Mr. Douglas concluded the conference by shutting off his video camera and muting himself. (Id.) As the meeting was ending, Mr. Khalifeh asked Mr. Douglas if he had anything to add. (Id.) Mr. Douglas did not respond. (Id.) Mr. Khalifeh said that he would thus end the meeting and, because Mr. Douglas remained silent, proceeded to do so. (Id.)

Defendant does not contest these facts. He urges the Court to deny the Motion because of Plaintiff's failure to request, and hold, a separate meet and confer session solely devoted to the Rule 11 issues.

In response, Plaintiff argues that Mr. Douglas was placed on notice of its intent to file the Motion during the June 28, 2022 conference and that counsel thoroughly discussed the same issues raised by the Motion at that meeting. (Reply at 5.) Moreover, Mr. Douglas's behavior during the meeting demonstrated a failure to engage in a good faith meet and confer; forcing Plaintiff's counsel to engage in another such session would be pointless. (Id.) Finally, Plaintiff's

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correct or withdraw any of his work product. If the Court believed that Mr. Douglas had any intention of availing himself of the safe harbor rule, rather than merely attempting to hide behind it, it would have afforded him that opportunity.

counsel offered to withdraw its Motion and engage in "yet another" Local Rule 7-3 meet and confer; Mr. Douglas refused and elected to file an opposition to the Motion instead. (Reply at 5.) Such a refusal demonstrates a lack of prejudice.

The Court finds that the June 28, 2022 conference put Mr. Douglas on notice of the possibility that this Motion would be filed and that Defendants suffered no prejudice from Plaintiff's technical noncompliance with Local Rule 7-3. If a party does not suffer any prejudice because of noncompliance with Local Rule 7-3, the Court may consider the merits of the motions. Reed v. Sandstone Properties, L.P., 2013 WL 1344912, at *6 (C.D. Cal. Apr. 2, 2013) ("Because Reed suffered no real prejudice as a result of the late conference, however, the court elects to consider the motion on the merits."); De Walshe v. Togo's Eateries, Inc., 567 F. Supp. 2d 1198, 1205 (C.D. Cal. 2008) ("[T]he Court finds that any potential violation of Local Rule 7-3 did not prejudice Plaintiff and the Court exercises its discretion to evaluate Defendant's motion on its merits."); Wilson-Condon v. Allstate Indem. Co., 2011 WL 3439272, at *1 (C.D. Cal. Aug. 4, 2011) ("[Defendant] does not appear to have suffered any prejudice from Plaintiff's failure to meet and confer sufficiently in advance, and [Defendant] was able to prepare and submit an opposition. Thus, it appears that no prejudice will result if the Court considers the motion to remand on the merits notwithstanding Plaintiff's failure to comply with Local Rule 7–3."); CarMax Auto Superstores California LLC v. Hernandez, 94 F. Supp. 3d 1078, 1088 (C.D. Cal. 2015) ("Failure to comply with the Local Rules does not automatically require the denial of a party's motion, ... particularly where the non-moving party has suffered no apparent prejudice as a result of the failure to comply") (collecting cases). Defendants make no attempt to demonstrate any prejudice suffered by noncompliance with Local Rule 7-3. The arguments raised in the opposition indicate a desire to wield the Rule as a shield to Plaintiff's allegations, rather than a genuine attempt to discuss and resolve the outstanding disputes.

Having rejected Defendants' procedural contentions, the Court proceeds to the merits of the Motion.

C. Merits

The Court addresses certain allegations made by Plaintiff in turn.

1. Misrepresentation of Authority

Plaintiff asserts that Defendants' first motion to dismiss (Dkt. No. 17) contained multiple frivolous arguments. (Motion at 11-13.) The Court addresses only the clearest violation: the use of bad law in support of an argument, without any reference to the opinion's reversal on the precise proposition cited by Defendant.

In its first motion to dismiss, Defendant claimed, "In many Districts, including this District, patent infringement plaintiff must provide a pleading that shows, element-by-element, how at least one patent claim is infringed." (Dkt. No. 17 at 22.) Defendant asserted that proposition in support of its argument that the complaint failed to satisfy pleading standards to

allege patent infringement or willful infringement. (Id. at 22-24.) One of the primary cases Defendant cited in support of this proposition was Bot M8 LLC v. Sony Corp. of Am., 2020 WL 418938 (N.D. Cal. Jan. 27, 2020), aff'd in part, rev'd in part and remanded, 4 F.4th 1342 (Fed. Cir. 2021). (Dkt. No. 17 at 22.) Defendant neglected to include any citation or reference to the Federal Circuit opinion reversing the district court opinion it cited on this exact point, which noted:

> Here, the district court instructed counsel for Bot M8 that it must "explain in [the] complaint every element of every claim that you say is infringed and/or explain why it can't be done." We disagree with the district court's approach and reiterate that a plaintiff "need not 'prove its case at the pleading stage.' " A plaintiff is not required to plead infringement on an element-by-element basis.

Bot M8 LLC v. Sony Corp. of Am., 4 F.4th 1342, 1352 (Fed. Cir. 2021) (internal citations omitted.)

A contention is frivolous when it is "legally or factually baseless from an objective perspective" and "made without a reasonable and competent inquiry." Holgate, 425 F.3d at 676. Misrepresentation of the law, including by ignoring or omitting "relevant and readily available precedent" that is adverse to a proposition cited by a lawyer, is a canonical example of sanctionable conduct. See, e.g., Engh v. United States, 658 F. Supp. 698, 704 (N.D. Ill. 1987).

Defendants never addresses this argument in the opposition. The Court finds that Defendant has conceded the issue. See Kroeger v. Vertex Aerospace LLC, 2020 WL 3546086, at *8 (C.D. Cal. June 30, 2020) (holding that plaintiff conceded argument by failing to address it in his opposition brief) (collecting cases); Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue") (citation and quotations omitted); Jenkins v. County of Riverside, 398 F.3d 1093, 1095 n. 4 (9th Cir.2005) (plaintiff abandoned claims by not raising them in opposition to motion for summary judgment); Apartment Ass'n of Greater Los Angeles v. City of Los Angeles, 2021 WL 2460634, at *7 (C.D. Cal. June 1, 2021).

Even if Defendants had not waived the argument, the Court agrees with Plaintiff: as an accomplished and experienced attorney, Mr. Douglas either knew, should have known, or, with some basic research, could have discovered, that the authority he had cited had been directly overturned by a higher court. Defendants' assertion of the proposition without a "reasonable and competent" inquiry was frivolous. See Holgate, 425 F.3d at 676.

2. Frivolous and Harassing Motion to Strike

Plaintiff argues that Defendants' motion to strike Plaintiff's opposition to dismiss (Dkt. No. 21) constituted a frivolous filing and was submitted with an improper purpose. The Court agrees.

Defendant wrote a lengthy motion that raised a single claim: Plaintiff's opposition should be stricken because the opposition brief was single-spaced (or at least not double-spaced), in violation of Local Rules 11-3.2 and 11.3.6. (Dkt No. 21). Defendant claimed that Plaintiff had improperly formatted its brief so that it did not exceed the twenty-five-page length limit of Local Rule 11-6. (Id.)

As Plaintiff explains, there was nothing wrong with the formatting in the opposition brief: it was filed using "exactly 24-point spacing," the same format that Plaintiff has used in all its other briefs and is commonly used by other parties. (Motion at 13.) The Court agrees that the brief fully complied with Local Rule 11-3.2, which requires double-spacing (among other things). L.R. 11-3.2. Defendants' argument to the contrary was objectively baseless and thus frivolous. Holgate, 425 F.3d at 676.

The irony of this thoughtless argument is that Defendants' counsel is guilty of the exact conduct he complains of. As the Court noted in its June 2, 2022 order striking Defendants' motion to dismiss for failure to comply with Local Rule 7-3: "The Court also advises Defendants' counsel to review the Local Rules which pertain to formatting, presentation, and argument headings if Defendants seek to refile the motion to dismiss. The now-stricken motion is rife with formatting, fonts, and argument heading issues." (Dkt. No. 29.) Since that warning, the Court has observed no improvement in the quality of Defendants' work product.

Of course, the real problem with Defendants' filing is not unclean hands but the sheer audacity of advancing such a meritless argument. Even if there were some minor formatting issues with an opponent's brief, no reasonable lawyer should consider it proper to devote an entire, twenty-eight-page motion (including a declaration and exhibits), as well as a reply (Dkt. No. 24), to an argument that the brief should be stricken on that technicality. A filing that is "harassing in part" may be sanctionable, even if there may have been an additional, proper purpose behind it. Townsend, 929 F.2d at 1362.

At some point, "successive motions and papers become so harassing and vexatious that they justify sanctions." Aetna Life Ins. Co. v. Alla Medical Services, Inc., 855 F.2d 1470, 1476. Defendants' conduct has forced Yondr to expend considerable time and resources responding to an onslaught of arguments for dismissal, and then defending its ability to have those arguments considered by the Court. A paper "filed in the context of a persistent pattern of clearly abusive litigation activity [] will be deemed to have been filed for an improper purpose and sanctionable." Id. This filing is simply the clearest example of a broader pattern of litigation strategy by Defendants that crosses the line from zealous advocacy into an excessive proliferation of disputes. Such behavior causes unnecessary delay, increases the costs of litigation, and wastes the Court's time. See Fed. R. Civ. P. 11(b)(1). Again, Defendants fail to respond to the merits of this claim, waiving argument on the issue. See, e.g., Stichting, 802 F. Supp. 2d at 1132. The Court finds that Defendants' motion to strike was frivolous and filed with an improper purpose.

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3. Misrepresentation of Statements in Meet and Confer Conference

Plaintiff argues that Mr. Douglas perjured himself in a declaration regarding the June 28, 2022 meet and confer conference, "fabricating at least one conversation that did not occur." (Motion at 17.) According to Plaintiff, during the meeting, Mr. Douglas claimed that Defendants' act of writing and publishing the "Pouch it Up" song to market their products was protected by the First Amendment and that Plaintiff's allegations concerning these activities should be stricken under California's anti-SLAPP statute. (Id.) Plaintiff's counsel attempted to explain that its allegations do not concern songwriting and publishing, except as to demonstrate Mr. Nguyen's direct involvement in product marketing. (Id.) To help justify his anti-SLAPP argument contained in the motion to dismiss, Mr. Nguyen claimed in his meet and confer declaration that Plaintiff's counsel stated the song constituted patent infringement; Plaintiff's counsel never said that. (Id.; Khalifeh Decl. ¶¶ 16-18.) Plaintiff's counsel had previously warned Mr. Douglas not to misrepresent their contentions during the conference or in subsequent declarations. (Id.; Khalifeh Decl. ¶ 15.)

Defendants do not respond to these allegations.[2] The Court is aware that there are often valid reasons why parties may disagree as to what transpired in a meet and confer conference. For instance, one party may have misheard (or misremembered) a statement or may have misunderstood an argument made by opposing counsel. As such, the Court would otherwise be inclined to give a lawyer the benefit of the doubt when an opponent asserts that the lawyer misrepresented a statement or admission during a conference. But Defendants' decision to ignore the substance of this serious allegation, as it has for each of the other grounds for sanctions, leaves the Court with little choice but to accept Plaintiff's representation of the facts. See, e.g., Kroeger, 2020 WL 3546086, at *8. Accordingly, the Court finds that Defendants' counsel committed sanctionable conduct in misrepresenting what transpired in the June 28, 2022 meet and confer conference.

4. Additional Arguments

As the Court finds sufficient grounds to impose sanctions on Defendants' counsel above, it finds it unnecessary to consider the additional contentions raised in the Motion, though some may also be meritorious. Because the Court finds that sanctions are warranted under Rule 11, it does not reach the arguments that sanctions should also be imposed under 28 U.S.C. § 1927 or the court's inherent powers. See Lozano, 678 F. App'x at 513.

If presented with one of Plaintiff's contentions in isolation, this Court might have been inclined to exercise its discretion against imposing sanctions. The Court does not take the decision to sanction a lawyer lightly and has routinely declined to do so when requested. Over

[2] The closest the opposition comes to even mentioning the accusation of perjury is a single contention: "Plaintiff fails to prove any alleged perjury or other improper statements, other than vague allegations comprising hearsay, conjecture, and bad animus that prevails in their conduct of this litigation to date[.]" (Opp. at 13.)

the nine months that this case has been pending, however, the Court has developed serious concerns about Mr. Douglas's "rare and exceptional" behavior. Operating Eng'rs Pension Trust v. A–C Co., 859 F.2d at 1344. Given the totality of Mr. Douglas's conduct over the course of the proceedings, the Court finds it necessary to impose sanctions to deter additional misconduct.

5. Nature of Sanctions

Having decided that sanctions are warranted, the Court must decide the nature of sanctions to impose. A sanction imposed under Rule 11 "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). "The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Id. If it finds it warranted, a court may award the party that prevails in a Rule 11 motion "reasonable expenses, including attorney's fees, incurred for the motion." Fed. R. Civ. P. 11(c)(2).

While Plaintiff's Motion requests the imposition of all these sanctions (Motion at iii), the Court declines to do so. The Court finds that an order to pay Plaintiff's attorney's fees and costs incurred in litigating the Motion will suffice to deter repetition of the conduct by Mr. Douglas and comparable conduct by others. See Fed. R. Civ. P. 11(c)(4). Mr. Douglas, not Defendants, must personally satisfy these fees and costs.

IV. CONCLUSION

For the reasons above, the Court **GRANTS** the Motion. Plaintiff is **ORDERED** to submit a request for attorney's fees and costs incurred in litigating the Motion by October 3, 2022, along with a proposed order to grant them as sanctions. The request shall be supported by a declaration detailing the fees and costs incurred. The proposed order shall require Mr. Douglas to pay Plaintiff such expenses by October 10, 2022 and submit a notice demonstrating that he has done so by the same date.

IT IS SO ORDERED.