Edward J. McFetridge Inn of Court

September 11, 2019

"Kristofferson v. Cooper: An Ethical Attorney is Born"

California Rules of Professional Conduct

State Bar Rule 1.3 - Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

State Bar Rule 3.1 - Meritorious Claims and Contentions

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;* or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

State Bar 3.3 - Candor to the Court

(a) A lawyer shall not:

(1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority.

Guidelines for Professional Conduct

These Guidelines for Professional Conduct are adopted to apply to all lawyers who practice in the United States District Court for the Northern District of California. Lawyers owe a duty of professionalism to their clients, opposing parties and their counsel, the courts, and the public as a whole. Those duties include, among others: civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence.

These Guidelines are structured to provide a general guiding principle in each area addressed followed by specific examples which are not intended to be all-encompassing.

Every attorney who enters an appearance in this matter shall be deemed to have pledged to adhere to the Guidelines. Counsel are encouraged to comply with both the spirit and letter of these Guidelines. Nothing in these Guidelines, however, shall be interpreted to contradict or supersede any Order of the Court or agreement between the parties. The Court does not anticipate that these Guidelines will be relied upon as the basis for a motion; rather, it is the Court's expectation that they will be followed as Guidelines.

These Guidelines should be read in the context of the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Northern District of California (including, specifically, Civil Local Rule 11-4), the standards of professional conduct required of members of the State Bar of California, and all attorneys' underlying duty to zealously represent their clients. Nothing in these Guidelines should be read to denigrate counsel's duty of zealous representation. However, counsel are encouraged to zealously represent their clients within highest bounds of professionalism. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance the service to justice.

1. Responsibilities to the Public

A lawyer should always be mindful that the law is a learned profession and that among its goals are devotion to public service, improvement of the administration of justice, and the contribution of uncompensated time and civic influence on behalf of persons who cannot afford adequate legal assistance.

2. Responsibilities to the Client

A lawyer should work to achieve his or her client's lawful and meritorious objectives expeditiously and as economically as possible in a civil and professional manner.

For example:

a. A lawyer should be committed to his or her client's cause,but should not permit that loyalty to interfere with giving the client objective and independent advice.

b. A lawyer should advise his or her client against pursuing positions in litigation (or any other course of action) that do not have merit.

3. Scheduling

A lawyer should understand and advise his or her client that civility and courtesy in scheduling meetings, hearings, and discovery are expected as professional conduct.

For example:

a. A lawyer should make reasonable efforts to schedule meetings, hearings, and discovery by agreement whenever possible and should consider the scheduling interests of opposing counsel, the parties,witnesses, and

the court. Misunderstandings should be avoided by sending formal notice after agreement is reached.

b. A lawyer should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations.

c. A lawyer should not engage in delay tactics in scheduling meetings, hearings, or discovery.

d. A lawyer should try to verify the availability of key participants and witnesses before a meeting,hearing, or trial date is set. If that is not feasible, a lawyer should try to do so immediately after the meeting, hearing,or trial date is set so that he or she can promptly notify the court and opposing counsel of any likely problems.

e. A lawyer should (i) notify opposing counsel and, if appropriate, the court as early as possible when scheduled meetings, hearings, or depositions must be cancelled or rescheduled, and (ii) provide alternate dates for such meetings, hearings, or depositions when possible.

4. Continuances and Extensions of Time

Consistent with existing law and court orders, a lawyer should agree to reasonable requests for extensions of time when the legitimate interests of his or her client will not be adversely affected.

For example:

a. A lawyer should agree to reasonable requests for extensions of time or continuances without requiring motions or other formalities.

b. Unless time is of the essence, a lawyer should agree as a matter of courtesy to first requests for reasonable extensions of time, even if the requesting counsel previously refused to grant an extension.

c. After agreeing to a first extension of time, a lawyer should consider any additional requests for extensions of time by balancing the need for prompt resolution of matters against (i) the consideration that should be extended to an opponent's professional and personal schedule, (ii) the opponent's willingness to grant reciprocal extensions, (iii) the time actually needed for the task, and (iv) whether it is likely that a court would grant the extension if asked to do so.

d. A lawyer should be committed to the notion that the strategy of refusing reasonable requests for extensions of time is inappropriate, and should advise clients of the same.

e. A lawyer should not seek extensions or continuances for the purpose of harassment or extending litigation.

f. A lawyer should not condition an agreement to an extension of time on unfair or extraneous terms, except those a lawyer is entitled to impose, such as (i) preserving rights that could be jeopardized by an extension of time or (ii) seeking reciprocal scheduling concessions.

g. By agreeing to extensions, a lawyer should not seek to cut off an opponent's substantive rights, such as his or her right to move against a complaint.

h. A lawyer should agree to reasonable requests for extensions of time when new counsel is substituted for prior counsel.

5. Service of Papers

The timing and manner of service of papers should not be calculated to disadvantage or embarrass the party receiving the papers.

For example:

a. A lawyer should not serve documents, pleadings, or motions on the opposing party or counsel at a time or in a way that would unfairly limit the other party's opportunity to respond.

b. A lawyer should not serve papers so soon before a court appearance that it inhibits the ability of opposing counsel to prepare for that appearance or to respond to the papers if permitted by law.

c. A lawyer should not serve papers (i) simply to take advantage of an opponent's known absence from the office, or (ii) at a time or in a manner designed to inconvenience an opponent.

d. A lawyer should serve papers by personal delivery, facsimile transmission, or email when it is likely that service by mail, even when allowed, will prejudice the opposing party.

e. A lawyer should serve papers on the individual lawyer known to be responsible for the matter at issue and should do so at his or her principal place of business.

f. A lawyer should never use the mode, timing, or place of serving papers primarily to embarrass a party or witness.

6. Punctuality

A lawyer should be punctual in communications with others and in honoring scheduled appearances.

For example:

a. A lawyer should arrive sufficiently in advance of trials, hearings, meetings, depositions, or other scheduled events so that preliminary matters can be resolved.

b. A lawyer should promptly notify all other participants when the lawyer will be unavoidably late.

c. A lawyer should promptly notify the other participants when he or she is aware that a participant will be late for a scheduled event.

7. Writings Submitted to the Court

Written materials submitted to the court should always be factual and concise, accurately state current law, and fairly represent the parties' positions without unfairly attacking the opposing party or opposing counsel.

For example:

a. Facts that are not properly introduced as part of the record in the case should not be used in written briefs or memoranda of points and authorities.

b. A lawyer should avoid denigrating the intelligence, ethics, morals, integrity, or personal behavior of the opposing party, counsel, or witness, unless such matters are at issue in the proceeding.

8. Communications with Opponents or Adversaries

A lawyer should at all times be civil, courteous, and accurate in communicating with opponents or adversaries, whether in writing or orally.

For example:

a. A lawyer should not draft letters (i) assigning a position to an opposing party that the opposing party has not taken, or (ii) to create a "record" of events that have not occurred.

b. A lawyer should not copy the court on any letter between counsel unless permitted or invited by the court.

9. Discovery

A lawyer should conduct discovery in a manner designed to ensure the timely, efficient, cost effective and just resolution of a dispute.

When propounding or responding to written discovery or when scheduling or completing depositions, a lawyer should be mindful of geographic or related timing limitations of parties and non-parties,as well as any relevant language barriers, and should not seek to use such limitations or language barriers for an unfair advantage.

A lawyer should promptly and completely comply with all discovery requirements of the Federal Rules of Civil Procedure.

For example:

As to Depositions:

a. A lawyer should take depositions only (a) where actually needed to learn facts or information, or (b) to preserve testimony.

b. In scheduling depositions, a lawyer shall follow the requirements of Civil Local Rule 30-1, should be cooperative in noticing depositions at mutually agreeable times and locations and shall accommodate the schedules and geographic limitations of opposing counsel and the deponent where it is possible to do so, while also considering the scheduling requirements in the litigation.

c. A lawyer representing a deponent that requires translator services or other special requirements shall promptly advise the noticing party of such requirements sufficiently in advance of a scheduled deposition so that counsel may seek to reasonably accommodate the deponent. A lawyer should be respectful of any translation or other special requirements that a particular deponent might have and should not seek to take unfair advantage of such requirements during a deposition.

d. When a deposition is scheduled and noticed by another party for the reasonably near future, a lawyer should ordinarily not schedule another deposition for an earlier date without the agreement of opposing counsel.

e. A lawyer should only delay a deposition if necessary to address legitimate scheduling conflicts. A lawyer should not delay a deposition for bad faith purposes.

f. A lawyer should not ask questions about a deponent's personal affairs or question a deponent's integrity where such questions are irrelevant to the subject matter of the deposition.

g. A lawyer should avoid repetitive or argumentative questions or those asked solely for purposes of harassment.

h. A lawyer representing a deponent or another party should limit objections to those that are well founded and necessary for the protection of his or her client's interest. A lawyer should remember that most objections are preserved and need be made only when the form of a question is defective or privileged information is sought.

i. Once a question is asked, a lawyer should not coach the deponent or suggest answers, whether through objections or other means.

j. A lawyer should not direct a deponent to refuse to answer a question unless the question seeks privileged information, is manifestly irrelevant, or is calculated to harass.

k. A lawyer should refrain from self-serving speeches during depositions.

l. A lawyer should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

As to Requests for Production of Documents:

a. A lawyer should limit requests for production of documents to cover only those documents that are actually and reasonably believed to be needed for the prosecution or defense of an action. Requests for production of documents should not be made to harass or embarrass a party or witness, or to impose an inordinate burden or expense on the responding party.

b. A lawyer should not draft requests for production of documents so broadly that they encompass documents that are clearly not relevant to the subject matter of the case.

c. In responding to requests for production of documents, a lawyer should not interpret the requests in an artificially restrictive manner in an attempt to avoid disclosure.

d. A lawyer responding to requests for production of documents should withhold documents on the grounds of privilege only where appropriate.

e. A lawyer should not produce documents in a disorganized or unintelligible fashion, or in a manner calculated to hide or obscure the existence of particular documents.

f. A lawyer should not delay producing documents to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

As to Interrogatories:

a. A lawyer should use interrogatories sparingly and never use interrogatories to harass or impose undue burden or expense on the responding party.

b. A lawyer should not read or respond to interrogatories in a manner designed to ensure that responses are not truly responsive.

c. A lawyer should not object to interrogatories unless he or she has a good faith belief in the merit of the objection. Objections should not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, a lawyer should answer the unobjectionable portion.

10. Motion Practice

Motions should be filed or opposed only in good faith and when the issue cannot be otherwise resolved.

For example:

a. Before filing a motion, a lawyer should engage in a good faith effort to resolve the issue. In particular, civil discovery motions should be filed sparingly.

b. A lawyer should not engage in conduct that forces opposing counsel to file a motion that he or she does not intend to oppose.

c. In complying with any meet and confer requirement in the Federal Rules of Civil Procedure or other applicable rules, a lawyer should speak personally with opposing counsel or a self-represented party and engage in a good faith effort to resolve or informally limit all applicable issues.

d. Where rules permit an *ex parte* application or communication to the court in an emergency situation, a lawyer should make such an application or communication only where there is a bona fide emergency—i.e., when the lawyer's client will be seriously prejudiced if the application or communication were made with regular notice. This applies, *inter alia*, to applications to shorten an otherwise applicable time period.

11. Dealing with Nonparty Witnesses

It is important to promote high regard for the legal profession and the judicial system among those who are neither lawyers nor litigants. A lawyer's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility and be designed to leave the witness with an appropriately good impression of the legal profession and the judicial system.

For example:

a. A lawyer should be courteous and respectful in communications with nonparty witnesses.

b. Upon request, a lawyer should extend professional courtesies and grant reasonable accommodations, unless doing so would materially prejudice his or her client's lawful objectives.

c. A lawyer should take special care to protect a witness from undue harassment or embarrassment and to state questions in a form that is appropriate to the witness's age and development.

d. A lawyer should not issue a subpoena to a nonparty witness for inappropriate tactical or strategic purposes, such as to intimidate or harass the nonparty.

e. As soon as a lawyer knows that a previously scheduled deposition will or will not go forward as scheduled, the lawyer should notify all applicable counsel.

f. A lawyer who obtains a document pursuant to a deposition subpoena should,upon request, make copies of the document available to all other counsel at their expense even if the deposition is canceled or adjourned.

12. ***Ex Parte* Communications with the Court**

A lawyer should not communicate *ex parte* with a judicial officer or his or her staff on a case pending before the court, unless permitted by law or Local Court Rule.

For example:

a. Even where applicable laws or rules permit an *ex parte* application or communication to the court, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party before making such an application or communication. A lawyer should make reasonable efforts to accommodate the schedule of an opposing party or his or her counsel to permit them to participate in the *ex parte* proceedings.

13. **Settlement and Alternative DisputeResolution**

A lawyer should raise and explore the issue of settlement and alternative dispute resolution in every case as soon as the case can be evaluated.

For example:

a. A lawyer should always attempt to de-escalate any controversy and bring the parties together.

b. A lawyer should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial. In every case, a lawyer should consider whether his or her client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation, or other form of alternative dispute resolution.

c. A lawyer should advise his or her client at the outset of the availability of alternative dispute resolution.

d. A lawyer involved in an alternative dispute resolution process should participate in good faith, and should not use the process for purposes of delay or other improper purposes.

14. Trial and Hearings

A lawyer should conduct himself or herself in trial and hearings in a manner that promotes a positive image of the legal profession, assists the court in properly reviewing the case, and displays appropriate respect for the judicial system.

For example:

a. A lawyer should be punctual and prepared for all court appearances.

b. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and the judge with courtesy and civility.

c. A lawyer should only make objections during a trial or hearing for legitimate and good faith reasons. A lawyer should not make such objections only for the purpose of harassment or delay.

d. A lawyer should honor requests made by opposing counsel during trial that do not prejudice his or her client's rights or sacrifice a tactical advantage.

e. While appearing before the court, a lawyer should address all arguments, objections, and requests to the court, rather than addressing them directly to opposing counsel.

f. While appearing in court, a lawyer should demonstrate sensitivity to any party, witness, or other lawyer who has requested, or may need, accommodation as a person with physical or mental impairment. This will help foster full and fair access to the court for all persons.

15. Default

A lawyer should not seek an opposing party's default to obtain a judgment or substantive order without giving that opposing party sufficient advance written warning to allow the opposing party to cure the default.

16. Social Relationships with Judicial Officers or Court-Appointed Experts

A lawyer should avoid even the appearance of impropriety or bias in relationships with judicial officers, arbitrators, mediators, and independent court-appointed experts.

For example:

a. When a lawyer is assigned to appear before a judicial officer with whom the lawyer has a social relationship or friendship beyond normal professional association, the lawyer should notify opposing counsel (or a self-represented party) of the relationship.

b. A lawyer should disclose to opposing counsel (or a self-represented opposing party) any social relationship or friendship between the lawyer and an arbitrator, mediator,or any independent court appointed expert taking a role in the case, so that the opposing counselor party has the opportunity to object to such arbitrator, mediator, or expert receiving the assignment parties.

17. Privacy

All matters should be handled with due respect for the privacy rights of parties and non-parties.

For example:

a. A lawyer should not inquire into, nor attempt to use, nor threaten to use, facts about the private lives of any party or other individuals for the purpose of gaining an unfair advantage in a case. This rule does not preclude

inquiry into sensitive matters that are relevant to a legitimate issue, as long as the inquiry is pursued as narrowly as is reasonably possible and with due respect for the fact that an invasion into private matters is a necessary evil.

b. If it is necessary for a lawyer to inquire into such matters,the lawyer should cooperate in arranging for protective measures designed to ensure that the private information is disclosed only to those persons who need to present it as relevant evidence to the court.

18. Communication About the Legal System and With Participants

Lawyers should conduct themselves with clients, opposing counsel, parties and the public in a manner consistent with the high respect and esteem which lawyers should have for the courts, the civil and criminal justice systems, the legal profession and other lawyers.

For example:

a. A lawyer's public communications should at all times and under all circumstances reflect appropriate civility, professional integrity, personal dignity, and respect for the legal system. This rule does not prohibit good faith, factually based expressions of dissent or criticism made by a lawyer in public or private discussions having a purpose to motivate improvements in our legal system or profession.

b. A lawyer should not make statements which are false, misleading, or which exaggerate, for example, the amount of damages sought in a lawsuit, actual or potential recoveries in settlement or the lawyer's qualifications, experience or fees.

c. A lawyer should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.

d. A lawyer should not fail or refuse without justification to respond promptly by returning phone calls or otherwise responding to calls and letters of his or her clients, opposing counsel and/or self-represented parties.

e. A lawyer who is serving as a prosecutor or defense counsel should conduct himself or herself publicly and within the context of a particular case in a manner that shows respect for the important functions that each plays within the criminal justice system, keeping in mind that the defense of an accused is important and valuable to society as is the prosecution.

f. A lawyer should refrain from engaging in conduct that exhibits or is intended to appeal or engender bias against a person on account of that person's race, color, religion,sex, national origin, sexual orientation, or disability, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers or any other participants.

19. Redlining

A lawyer should clearly identify for other counsel or parties all changes that a lawyer makes in documents.

The Court gratefully acknowledges its reliance on the Santa Clara County Bar Association's Code of Professionalism.

2019 WL 3891714
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

MICHAEL R. RATTAGAN, Plaintiff,
v.
UBER TECHNOLOGIES, INC., Defendant.

Case No. 19-cv-01988-EMC
|
08/19/2019

EDWARD M. CHEN, United States District Judge

ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS AND DISMISSING PLAINTIFF'S FIRST AMENDED COMPLAINT Docket Nos. 23, 27

***1** Plaintiff Michael Rattagan is a lawyer based in Argentina. He asserts five causes of action—breach of fiduciary duty, deceit, fraud, intentional infliction of emotional distress, and negligence—stemming from allegations that Defendant Uber Technologies, Inc. retained him to provide legal support for the launch of new operations in Buenos Aires, proceeded without engaging his services, and subjected him to intense public backlash and ultimately criminal prosecution. Uber moves for sanctions against Rattagan, contending that his claims are based on a false factual premise. It also moves to dismiss the First Amended Complaint ("FAC").

I. BACKGROUND

Plaintiff Michael Rattagan alleges that he was retained by Defendant Uber Technologies, Inc. to help it prepare to launch operations in Buenos Aires. Rattagan now sues Uber Technologies, alleging that Uber Technologies continued to present him as its legal representative in Argentina even though it ultimately launched its Buenos Aires operations without his help or knowledge, causing Rattagan to be personally exposed to public backlash and criminal prosecution for Uber Technologies' flouting of Argentine law. Rattagan asserts five causes of action: (1) breach of fiduciary duty, (2) deceit, (3) fraud, (4) intentional infliction of emotional distress, and (5) negligence.

In his original complaint, Rattagan named three Uber entities as defendants: the U.S.-based Uber Technologies, Inc. as well as Uber International, BV ("UIBV") and Uber International Holdings, BV ("UIHBV"), companies formed under the laws of the Netherlands with their principal place of business in Amsterdam. Docket No. 1 ¶ 5. (UIBV and UIHBV are hereinafter collectively referred to as the "Uber International Entities.") He alleged that "[Uber Technologies] controls UIBV and UIHBV, and [Uber Technologies] directed and authorized all of UIBV's and UIHBV's operational decisions...from Uber [Technologies'] San Francisco headquarters." *Id.* The complaint explained that Rattagan was hired as the "legal representative of certain Uber subsidiaries in [Argentina]," *id.* ¶ 1, apparently referring to the Uber International Entities which became foreign shareholders ("Shareholders") of the Argentinian Subsidiary, Docket No. 1 ¶¶ 14– 15. However, the remainder of the allegations in that complaint were directed simply at "Uber" generally, without differentiation between the three entities.

Shortly after Rattagan initiated this suit, the three Uber entities notified his counsel of their belief that that the complaint contained a "fatal jurisdictional defect," namely that "[d]iversity jurisdiction does not encompass a foreign plaintiff, such as Mr. Rattagan, suing foreign defendants," such as the Uber International Entities. Sanctions Mot. at 2; *see* Docket No. 27-1 ¶ 8. Rattagan thereafter filed the FAC, removing the Uber International Entities as defendants and redefining "Uber" to mean only Uber Technologies. FAC at 1. Otherwise, the FAC was largely unchanged from the original complaint with one exception – Mr.Rattagan had removed the part of the original complaint that explained "Uber International, BV ('UIBV') is a company formed under the laws of the Netherlands with its principal place of business in Amsterdam. Uber International Holdings, BV ('UIHBV') is a company formed under the laws of the Netherlands with its principal place of business in Amsterdam. On information and belief, UTI controls UIBV and UIHBV, and UTI directed and authorized all of UIBV's and UIHBV's operational decisions relevant hereto from Uber's San Francisco headquarters." Docket No. 1, ¶ 5; Docket No. 15, ¶ 5. The import of the amendment was that all of the allegations previously directed at the three Uber entities collectively were now asserted solely against Uber Technologies.

***2** Uber Technologies attacks Rattagan's FAC in two ways. First, it moves for sanctions against Rattagan, contending that his claims are based on a factual premise—that there was an attorney-client and contractual relationship between

Rattagan and Uber Technologies—that is false, because it was Uber's international subsidiaries that retained and contracted with Rattagan. *See* Docket No. 27 ("Sanctions Mot."). It alleges that his claims in the FAC—that he had a contractual relationship with Uber Technologies—are "demonstrably untrue." Sanctions Mot. at 2. Second, Uber Technologies moves to dismiss the FAC under Rule 12(b)(6), arguing that even taking Rattagan's allegations as true, they fail to state a claim. *See* Docket No. 23 ("MTD").

II. MOTION FOR SANCTIONS

Uber contends the FAC is predicated upon "on factual contentions that [he] and his counsel know to be untrue." Sanctions Mot. at 1. Uber believes that the FAC contains "at least two allegations that Mr. Rattagan knows to be untrue: (1) that Uber Technologies 'and Mr. Rattagan agreed that Mr. Rattagan would' serve as the 'legal representative' for a new Argentine entity...; and (2) the existence of an attorney-client relationship between Mr. Rattagan and Uber Technologies." *Id.* at 4. Uber contends that all of Mr. Rattagan's claims are predicated on these false factual allegations. Uber therefore seeks an order from this Court dismissing the Amended Complaint and awarding Uber the fees it incurred in connection with the sanctions motion and the motion to dismiss. *Id.* at 1.

A. Legal Standard

Federal Rule of Civil Procedure 11 states that "[b]y presenting to the court a pleading, written motion, or other paper...an attorney or unrepresented party [is] certif[ying] that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:...the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). Where Rule 11 is violated, "the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1). The moving party bears the burden to demonstrate that sanctions are justified. *See* *Tom Growney Equip., Inc. v. Shelly Irrigation Dev., Inc.*, 834 F.2d 833, 837 (9th Cir. 1987).

Where a Rule 11 motion is directed at a complaint, the court must determine that: (1) the complaint is legally or factually baseless from an objective perspective, and (2) the attorney has not conducted a reasonable and competent inquiry before signing and filing it. *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005). A claim that has some plausible basis, even a weak one, is sufficient to avoid **sanctions** under **Rule 11**. *See* *United Nat'l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1117–18 (9th Cir. 2001). However, the existence of a non-frivolous claim in a complaint does not immunize it from **Rule 11 sanctions**. *Holgate*, 425 F.3d at 677.

Rule 11 also contemplates a safe harbor provision that requires that parties filing for **Rule 11 sanctions** "give the opposing party 21 days first to withdraw or otherwise correct the offending paper." *Holgate*, 425 F.3d at 678 (internal quotations omitted). This ensures that "a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation." *Id.* Here, Uber filed the motion for sanctions on July 2, 2019, at which point the safe harbor period commenced. *See id.*; Docket No. 27. Rattagan filed an opposition brief two weeks later on July 16, 2019. *See* Docket No. 30. Far from withdrawing or otherwise correcting the FAC, Rattagan continued to assert that "Uber [Technologies] appointed Mr. Rattagan to be its legal representative in connection with Uber's expansion into Argentina" and to marshal evidence in support of that claim. Docket No. 30 at 3. Furthermore, at no other point before (or after) July 23, 2019 (21 days after the motion for sanctions was filed) did Rattagan withdraw his FAC or take other curative steps.

III. ANALYSIS

A. Rattagan's Allegations

***3** The FAC alleges that "Uber [Technologies] named Mr. Rattagan as its official legal representative in [Argentina]." FAC ¶ 2. It also alleges that Uber Technologies took specific actions to engage Rattagan's services in Argentina. *See, e.g.*, *id.* ¶ 13 ("Uber [Technologies] enlisted Mr. Rattagan to assist in the creation of an Argentine subsidiary...."), ¶ 15 ("Uber [Technologies] and Mr. Rattagan agreed that Mr. Rattagan would act as the Shareholders' legal representative in Argentina.").

Based on these allegations, the FAC explicitly asserts that Uber Technologies had a direct attorney-client and

contractual relationship with Rattagan. *See* FAC ¶¶ 80, 87 ("Uber [Technologies] was obligated to disclose the concealed facts due to its attorney/client and contractual relationship with Mr. Rattagan...."); *id.* ¶ 100 ("Uber [Technologies] owed a duty of care to Mr. Rattagan based on...their attorney/client and contractual relationship...."). The assertion of such a direct relationship – rather than an indirect relationship through Uber Technologies' control over the Uber International Entities – is corroborated by the deletion of the allegation in the original complaint. "On information and belief, UTI controls UIBV and UIHBV, and UTI directed and authorized all of UIBV's and UIHBV's operational decisions relevant hereto from Uber's San Francisco headquarters." Docket No. 1, ¶ 5; Docket No. 15, ¶ 5. B. Uber Technologies' Evidence

Uber asserts that Rattagan knew the above allegations to be false. Sanctions Mot. at 5–6. Uber submits several exhibits to substantiate its contention that Rattagan knew from the beginning that it was the Uber International Entities, not Uber Technologies, that engaged him in preparation for the Argentina launch:

- A legal document from May 2013 showing that Rattagan registered with the Argentine government as legal representative for "Uber International Holding B.V." Docket No. 27-1 ("Shin Decl."), Exh. E.

- Invoices that Rattagan addressed to "Uber International Holding BV" for his services. *Id.*, Exh. F.

- An April 2016 email from Rattagan to Enrique Gonzalez in which Rattagan clarified, "For the record, we were not hired by [Uber Technologies employee] Ryan Black but by Liesbeth ten Brink, Director Legal – Europe, Uber International B.V." *Id.*, Exh. D.

- A March 2013 email from Rattagan to Liesbeth ten Brink stating, "We are glad to hear about Uber International B.V.'s expansion plans in to Argentina. We will be delighted to provide you and your company with all the necessary support." *Id.*, Exh. B at 1. His email further states, "I look forward to working with you in Uber International's South American expansion." *Id.* at 2.

- A legal memorandum from Rattagan addressed to Liesbeth ten Brink at "Uber International B.V." *Id.*, Exh. C.

C. Rattagan's Response

In his opposition brief, Rattagan doubles down on the FAC's allegations. He continues to insist that "Uber [Technologies] appointed Mr. Rattagan to be its legal representative in connection with Uber's expansion into Argentina." Docket No. 30 ("Sanctions Opp.") at 3. He marshals several pieces of evidence purporting to support his claims.

First, Rattagan relies on two news articles to assert that "[i]t is common knowledge that Uber [Technologies] directs expansion into new markets" and that "Uber [Technologies] directs its foreign subsidiaries – such as the Uber International Entities – to facilitate its expansion abroad." *Id.* at 3–4. However, neither article provides direct support for Rattagan's allegation that Uber Technologies had a direct legal relationship with him; they merely discuss the corporate relationship between Uber Technologies and its international subsidiaries. While the article may bolster his prior allegation that Uber controlled the Uber International Entities and directed their operations, he deleted that allegation in the FAC.

***4** Second, Rattagan claims that his allegations are substantiated by the fact that when the "fallout from the launch came to fruition," it was Salle Yoo, Uber Technologies' Chief Legal Officer, and Todd Hamblet, Uber Technologies' Managing Counsel, who "handle[d] Mr. Rattagan's situation." Sanctions Opp. at 4 (citing FAC ¶¶ 46–47). According to Rattagan, "[i]t is the conduct of Uber, as directed by these individuals, that forms the basis of much of Mr. Rattagan's complaint." *Id.* Rattagan's claims in this action primarily arise from Uber Technologies' alleged conduct leading up to and immediately following the Buenos Aires launch. By Rattagan's own account, Yoo and Hamblet did not become involved until May 26, 2016, after *Rattagan* "s[ought] [their] direct involvement" by "reach[ing] out" to them. FAC ¶ 46. Rattagan's interactions with Yoo and Hamblet after the launch do not prove a direct attorney-client relationship between Uber Technologies and Mr. Rattagan, especially prior to the Argentina launch. Indeed, Hamblet's declaration "to support Mr. Rattagan in his criminal defense," Sanctions Opp. at 5, states that Hamblet's "responsibilities include managing the corporate governance for Uber Technologies, Inc. and its related entities, including Uber B.V., a Dutch entity." Docket No. 30-1 ("Rosenfeld Decl."), Exh. B ¶ 1. Mr. Hamblet makes clear that "Rattagan and his firm did [work] for *Uber International B.V. and Uber International Holding B.V.*," and that "Rattagan was appointed solely and exclusively to act as

the legal representative of the *two foreign entities*." *Id.* ¶¶ 3, 5 (emphases added).

Third, Rattagan submits emails of "pre-litigation discussions" between the parties, in which Uber Technologies' Senior Litigation Counsel "demand[ed] that Mr. Rattagan delete from any complaint he may file any reference to, or information derived from, communications with Uber personnel (including any of Uber's in-house lawyers), legal conclusions, and references to purported unlawful or illegal conduct, all of which violate his duty of loyalty.' " Sanctions Mot. at 4–5 (quoting Rosenfeld Decl., Exh. C at 2). Rattagan contends that Uber Technologies' references to a "duty of loyalty" and "attorney client privilege" in this email concede the existence of an attorney-client relationship. Rosenfeld Decl., Exh. C at 1–2. It is true that there is some ambiguity in this email as to which Uber entities are in an attorney-client relationship with Rattagan, because the email throughout refers to the Uber International Entities and Uber Technologies collectively as "Uber." *Id.* at 1. But the email's second sentence clarifies that:

> As Mr. Rattagan well knows, Uber International Holdings, BV and Uber International, BV (these entities and Uber Technologies, Inc. are referred to herein as "Uber") retained him and his law firm to provide legal advice in connection with the registration of an entity in Argentina. As an attorney, he owes the duty of utmost loyalty, and cannot put his interests before his clients'.

Id. at 1. This sentence indicates that it was "Uber International Holdings, BV and Uber International, BV," as distinguished from "Uber Technologies, Inc.," that "retained [Rattagan] and his law firm to provide legal advice." *Id.* It is also notable that Rattagan himself clarified any ambiguity on this point in his April 2016 email to Enrique Gonzalez: "For the record, we were not hired by [Uber Technologies employee] Ryan Black but by Liesbeth ten Brink, Director Legal – Europe, *Uber International B.V.*" Shin Decl., Exh. D (emphasis added).

The bottom line is that Rattagan has produced no evidence to substantiate his allegations of a direct "attorney/client and contractual relationship" with Uber Technologies. Instead, the evidence introduced by Uber Technologies shows that the direct legal relationship that existed was between the Uber International Entities and Rattagan, and further that Rattagan was fully aware of this fact, as demonstrated by his communications and billing invoices. *See* Shin Decl., Exhs. B–E. D. Summary

On this record, the Court concludes that Rattagan presented the Court with a complaint that was inaccurate and misleading. While Mr. Rattagan could have advanced a theory that Uber Technologies was somehow legally responsible based on its indirect control over Uber International Entities with whom Mr. Rattagan contracted (whether via an alter ego or other theory), Mr. Rattagan deleted that allegation and worded the FAC so as to imply a direct relationship with Uber Technologies. As a result, Uber Technologies has met its burden of showing that Rattagan's "complaint is...factually baseless from an objective perspective." *Holgate*, 425 F.3d at 676; *see also Song FI, Inc. v. Google, Inc.*, No. C 14-5080 CW, 2016 WL 4180214, at *3 (N.D. Cal. Aug. 8, 2016) (holding that allegations in complaint were "objectively baseless" where "[p]laintiffs present no evidence to support" them). Further, the record suggests that Rattagan's counsel did not "conduct[ ] a reasonable and competent inquiry before signing and filing [the FAC]." *Holgate*, 425 F.3d at 676. Rattagan's lawyers had access to all the evidence submitted in connection with this motion, and they should have been aware that the evidence did not support Rattagan's claims of a contractual relationship with Uber Technologies. Rattagan's counsel thus violated its duty under Rule 11(b)(3) to ensure that Rattagan's "factual contentions have evidentiary support...to the best of the [their] knowledge, information, and belief." Accordingly, the Court **GRANTS** Uber Technologies' Motion for Sanctions and will "impose an appropriate sanction." Fed. R. Civ. P. 11(c)(1).

E. Remedy

***5** A sanction under Rule 11 "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." Fed. R. Civ. P. 11(c)(4). Examples of nonmonetary sanctions include "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs;...[and] referring the matter

to disciplinary authorities." Fed. R. Civ. P. 11, Advisory Committee Notes (1993).

Uber Technologies asks the Court for an order dismissing the FAC and awarding the fees Uber Technologies incurred in preparing the motion for sanctions and motion to dismiss. Because false factual premises underpin the FAC as it is currently framed, the Court **DISMISSES** the FAC in its entirety. *See Hunt v. Sunny Delight Beverages Co.*, No. 818CV00557JLSDFM, 2018 WL 6786265, at *4 (C.D. Cal. Dec. 18, 2018) ("Striking the entire First Amended Complaint is appropriate because Plaintiffs' sanctionable misrepresentations taint the entire pleading."); *see also* Fed. R. Civ. P. 11, Advisory Committee Notes (1993) (one factor to consider is "whether [the improper conduct] infected the entire pleading"). However, Rattagan is given leave to amend, because the Court cannot rule out the possibility that one or more legal claims may be properly stated against Uber Technologies, even if Uber did not have a formal contractual relationship with Mr. Rattagan. *See* *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) ("Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint.").

As for monetary **sanctions**, **Rule 11** instructs that an award of "reasonable attorney's fees and other expenses directly resulting from the violation" is permissible where "warranted for effective deterrence." Fed. R. Civ. P. 11(c). In this case, Uber Technologies notified Rattagan on three occasions prior to filing the motion for sanctions that Rattagan's key allegations lacked a factual basis. *See* Shin Decl. ¶ 8. Undeterred, Rattagan persisted in pressing his claims without attempting to allege accurate facts and reframe his legal claims. As a result, the parties and the Court have had to suffer a needless round of motion work. Monetary sanctions may be assessed where "Plaintiffs' counsel continued to make...factual assertions even when confronted with evidence presented by Defendants that their assertions were wrong." *Brown v. Royal Power Mgmt., Inc.*, No. C-11-4822 EMC, 2012 WL 298315, at *3 (N.D. Cal. Feb. 1, 2012).

Although, Uber Technologies requested an award that would cover the work its attorneys completed in preparing both the Motion for Sanctions and the Motion to Dismiss (for a total of $86,415), the Court finds it reasonable to order an award for the fees Uber Technologies incurred in connection with the sanctions briefing only. The total amount of that award will be $28,731.50. Counsel for Uber Technologies represents that the following table shows the fees associated with that work; it reflects the "two attorneys who worked on briefing and preparing the Motions," and "discounted rates for each of the two timekeepers." *Id.* ¶ 4.

Shin Decl. ¶¶ 5–6.

IV. CONCLUSION

For the forgoing reasons, the Court **GRANTS** Uber Technologies' motion for sanctions, **DISMISSES** the FAC with leave to amend, and **AWARDS** Uber Technologies fees in the amount of $28,731.50. Because the complaint is dismissed pursuant to the granting of **Rule 11 sanctions**, the Court does not reach Defendant's motion to dismiss. The amended complaint shall be filed within thirty (30) days from the date of this order.

***6** This order disposes of Docket Nos. 23 and 27.

IT IS SO ORDERED.

Dated: August 19, 2019

EDWARD M. CHEN

United States District Judge

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United States District Court, N.D. California.

William USCHOLD, et al., Plaintiffs,
v.
CARRIAGE SERVICES, INC., Defendant.

Case No. 17-cv-04424-JSW (EDL)
|
Signed 01/17/2019

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ORDER REGARDING DISCOVERY DISPUTES

Re: Dkt. No. 51

ELIZABETH D. LAPORTE, United States Magistrate Judge

***1** Before the Court are several disputes raised by Defendant Carriage Services, Inc. Plaintiffs William Uschold, Jose Alamendarez, Tiana Naples, and Ton Saechao's (together, "Plaintiffs") discovery responses and Plaintiffs' counsel's conduct during depositions. This is a putative class action alleging that Defendant failed to reimburse Plaintiffs for business expenses they incurred while working for Defendant and violated the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. The presiding judge referred this case to the undersigned for discovery purposes.

Defendant filed the pending discovery letter on December 18, 2018, noting that Plaintiffs failed to provide their portion of the letter in a timely fashion. Plaintiffs responded that they would file their position on the discovery disputes by December 24, 2018 but did not do so. The Court ordered Plaintiffs to file their response by December 28, 2018, which they timely filed. After reviewing the letters, the Court ordered Defendant to file a reply letter.

I. BACKGROUND

Plaintiffs allege that they are former employees of Defendant in event planning and/or sales. Sec. Am. Compl., ¶¶ 6-9. In the course of performing their jobs, Plaintiffs allege that they used their personal vehicles for work-related travel, incurring costs for gas, vehicle registration, maintenance, and toll fare. Id., ¶ 13. Plaintiffs were also required to use their personal cell phones for work-related calls. Id., ¶ 15. Defendant had a policy of not reimbursing employees for use of their personal vehicles or cell phones, and even though Defendant provided eight company phones in their office there were not enough company phones for all employees to use. Id., ¶¶ 14, 16. Plaintiffs were also expected to attend work meetings or events outside of regular business hours, which required them to use their home office space, printing, and other personal resources without compensation. Id., ¶¶ 17-18.

Plaintiffs filed their complaint in state court on July 3, 2017, asserting that Defendant: (1) violated Cal. Lab Sec. 2802 for failure to reimburse for necessary work expenditures and losses, and (2) violated California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Dkt. No. 1, Ex. A. Defendant removed the case to federal court on August 4, 2017. Id. Defendant filed two motions to dismiss the complaint. Plaintiffs agreed to amend their complaint after receiving Defendant's motion to dismiss the first amended complaint. Dkt. No. 15. The Court granted the second motion to dismiss and gave Plaintiffs leave to amend. Dkt. No. 33. Plaintiffs file a second amended complaint on April 4, 2018, which Defendant answered on April 11, 2018. Dkt. Nos. 37-38.

II. DISCUSSION

A. Plaintiffs' Discovery Responses

Defendant served initial requests for production ("RFPs") and interrogatories on each named Plaintiff in May, with Plaintiffs' responses due on June 25, 2018. The parties agreed to a two-week extension to respond, but Plaintiffs did not serve responses or objections by the extended deadline. The parties subsequently agreed to a further extension to July 18, 2018 to serve responses. Plaintiffs again failed to serve responses or objections. On July 24, 2018, a new attorney for Plaintiffs became involved with the case. Defense counsel requested that the parties meet and confer about the

discovery responses, but Plaintiffs' counsel never responded to that request. Defense counsel raised the issue in their joint statement before the initial case management conference, and Plaintiffs explained that: "Plaintiffs inadvertently missed the deadline for serving discovery responses due to internal staffing changes, trial deadlines, and discovery obligations in other matters. Those issues have been resolved and Defendant is informed that responses will be served by August 10, 2018." Dkt. No. 44 at 4.

***2** Plaintiffs eventually served responses and objections to Defendant's RFPs and interrogatories on August 17, 2018, although Plaintiffs later withdrew each of their asserted objections. Defendant contends that the responses were incomplete and remain so even after meeting and conferring with Plaintiffs' counsel into December 2018 and seeks an order requiring Plaintiffs to serve complete responses, as well as an order that Plaintiffs waived objections. Plaintiffs argues that they have served amended discovery responses and produced all responsive documents they have in their possession, custody, and control. In their December 28, 2018 letter, Plaintiffs acknowledged that "they did not serve timely written discovery responses and waived objections." Pls' Letter at 1.

"A party seeking discovery may move for an order compelling an answer, designation, production, or inspection" if "a deponent fails to answer a question," "a party fail to answer an interrogatory," or "a party fails to produce documents." Fed. R. Civ. P. 37(a)(3)(B). "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir. 1992) (citation omitted); see also Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."); Fed. R. Civ. P. 34(b)(2)(C) ("An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest."); Lam v. City & Cnty. of San Francisco, 2015 WL 4498747, at *2 (N.D. Cal. July 23, 2015) (nothing that "some courts 'read into Rule 34 the discretion granted under Rule 33(b)(4) (dealing with interrogatories) to excuse untimely objections to requests for production' ") (quoting Cal. Prac. Guide: Civ. P. Before Trial § 11:1905 (The Rutter Guide 2015)).

The Court orders the following relief:

a. RFP No. 1: This request sought "[a]ll documents relating to your employment with [Defendant] and/or the allegations of your Second Amended Complaint ..." Plaintiffs responded to RFP No. 1 as follows: "After a diligent search and reasonable inquiry, Plaintiff has not located any responsive documents in [their] possession, custody, or control."

"A client is ... bound by his attorney's failure to raise timely objections during the trial process." Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 460 (N.D. Cal. Jan. 12, 1978) (citing Curry v. Wilson, 405 F.2d 110, 112 (9th Cir. 1968)). "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." Richmark, 959 F.2d at 1473; see also Miller v. Pancucci, 141 F.R.D. 292, 302 (C.D. Cal. Jan. 21, 1992) (finding waiver of attorney-client privilege objections when the party claiming the privilege never produced a privilege log). However, waiver for failure to raise a strictly timely objection is not automatic where there are "potentially harsh consequences associated with waiver." Liguori v. Hansen, 2012 WL 760747, at *11 (D. Nev. Mar. 6, 2012). In Burlington Northern & Santa Fe Railyard Co. v. United States, 408 F.3d 1142, 1147 (9th Cir. 2005), the court ruled that a court should use Rule 34's 30-day time period as a "default guideline" for waiver of privilege under Rule 26 using a "case-by-case determination," based on: "(1) The degree to which the objection or assertion or privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged; (2) The timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline is sufficient); (3) The magnitude of the document production; and (4) Other particular circumstances of the litigation that make responding to discovery unusually easy or unusually hard." Id. at 1149.

***3** Defendant points to recent deposition testimony as evidence that there are almost certainly documents that are responsive to this request, or responsive documents existed, possibly after Plaintiffs' duty to preserve was triggered. It notes that during one of the depositions taken in this case Plaintiffs' counsel objected to questions regarding communications "about this lawsuit" such as "group e-mails, where I send an e-mail to all the clients or vice versa." Defendant also raises the possibility that Plaintiffs' counsel has any documents in his files

about his investigation of the allegations before filing the complaint. Defendant seeks what would otherwise be privileged documents because Plaintiffs confirmed in their own letter that they "do not dispute that they did not serve timely written discovery responses and waived objections." Pls' Letter at 1. There is no evidence that Plaintiffs have produced a privilege log.

Plaintiffs conceded that they waived their objections by serving belated objections and responses and then later withdrawing the objections they had raised. In addition, each of these factors weighs in favor of waiver. Plaintiffs withdrew their objections (assuming they objected to the production of privileged documents) and have not produced a privilege log. They have hindered discovery in this case by delaying their responses to Defendant's requests for many months and it seems unlikely that there is significant discovery that is being withheld on privilege grounds. Plaintiffs stated in their letter that they have not withheld any documents on privilege grounds, but counsel's statement regarding group emails to Plaintiffs suggests that may not be the case. Accordingly, the Court concludes that Plaintiffs have waived all objections, including objections regarding privilege.

In addition to as-yet produced privileged material, Defendant also points to Plaintiff Naples' testimony that she communicated with other Plaintiffs by email and text message, but, according to Defendant, she has represented that those documents have not been produced because she replaced the phone used to make those communications. Even if she did replace the phone, that does not explain why those communications have not been produced from other Plaintiffs.

Defendant has established that there is a strong possibility that Plaintiffs have additional responsive documents that they have not yet produced. Plaintiffs are ordered to produce any responsive documents in their possession, custody, or control, including privileged documents or any other documents they are withholding under any objection. If Plaintiffs contend that they have produced all documents, then they must provide a written confirmation to Defendant under oath that they have completed their production. Finally, Plaintiffs must explain in writing and under oath whether they had responsive documents after their duty to preserve arose that are no longer in existence.

- RFP No. 8: This document request seeks Plaintiffs' tax returns from 2012 to the present. Each Plaintiff responded that '[a]fter a diligent search and reasonable inquiry, Plaintiff has not located any responsive documents in [their] possession, custody, or control."

  Defendant states that Plaintiffs acknowledged in a meet and confer session that they have the right and ability to obtain their tax returns from the IRS. Defendant states that Plaintiff Alamendarez has not produced any tax returns for 2012 and Plaintiff Saechao has not produced any tax returns for 2012 and 2013. Plaintiffs Uschold and Naples testified that they did not file tax returns for the years for which they have not produced tax returns.

  "Control is defined as the legal right to obtain documents upon demand." Id. (quoting United States v. Int'l Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989)). If, as it appears, the Internal Revenue Service ("IRS") permits taxpayers to request copies of tax returns, then Plaintiffs must request the missing, responsive tax returns immediately and produce them to Defendant.

***4** • RFP No. 17: The next disputed document request seeks Plaintiffs' cellphone statements and call logs. Defendant represents that no Plaintiff has produced these records. Plaintiff Alamendarez's response stated that he had not located any responsive documents and the rest of the Plaintiffs identified Bates ranges in their responses that did not contain the requested cellphone statements or call logs.

  Despite not producing the documents in response to the request, Plaintiffs identified these records in their initial disclosures, which require a party to provide "a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(ii). However, during counsel's meet and confer on this dispute, Plaintiffs' counsel stated that each Plaintiff tried but could not obtain the records from their cellphone carriers. Defendant notes that Plaintiff Alamendarez's deposition testimony contradicts this representation, as he testified that his carrier told him that his records could be obtained by submitting an online request and that he had requested them as instructed. Plaintiff Alamendarez

could not, however, provide an explanation about why the records had not been obtained or produced.

Plaintiffs have not established that they are unable to obtain the requested records from their cellphone carriers. The evidence is to the contrary. Plaintiffs must request the responsive documents immediately from their carriers. See Quintana v. Claire's Boutique, Inc., 2014 WL 3371847, at *2-3 (N.D. Cal. July 9, 2014). If their carriers refuse to provide the records, Plaintiffs must provide Defendant with sworn statements about why they could not obtain the records. See Ortiz v. Amazon.com LLC, 2018 WL 2383210, at *1-2 (N.D. Cal. May 25, 2018).

- Interrogatory No. 5: This interrogatory sought information about the vehicles that Plaintiff Alamendarez claims he drove for work purposes while at CSI, including the timeframe and number of work-related occurrences. His original and amended responses identified two vehicles but did not identify timeframes or the number of claimed work-related occurrences. Plaintiff Alamendarez has not offered an explanation for why he did not or cannot provide the information sought. Plaintiff Alamendarez is ordered to further amend his interrogatory response to provide responses about timing and the number of work-related occurrences immediately.

- Interrogatory No. 6(h), (i): This interrogatory sought information about Plaintiff Uschold's vehicle use while working at CSI. Defendant explains that Plaintiffs' counsel emailed amended responses dated October 19, 2018, but did not serve or verify those responses. Rule 33 requires "[t]he responding party [to] serve its answers and any objections" and also provides that "[t]he person who makes the answers must sign them, and the attorney who objects must sign any objections." Fed. R. Civ. P. 33(b)(2), (b)(5) (emphasis added). Plaintiff Uschold must immediately serve his amended responses on Defendant and verify them.

- Interrogatory No. 11: This interrogatory asked Plaintiffs to "identify all correspondence or communication through which [they] requested that [CSI] provided reimbursement to [them] for the expenses [they] claim[ ] to have incurred for work-related purposes." Plaintiffs Uschold, Naples, and Saechao responded that they were not aware of any "correspondence" or "documents" about the information sought, but Defendant objects that they did not respond to the request about "communications." Plaintiffs Uschold, Naples, and Saechao are ordered to further amend their interrogatory responses to address any "communications" beyond correspondence or documents in which they made requests for correspondence.

***5** Aside from the tax returns, which Plaintiffs may be delayed in obtaining from the IRS because of the current government shutdown, and the cellphone records, Plaintiffs are otherwise required to produce responsive documents that are in their custody, possession, or control; provide sworn affidavits; and serve amended responses within five (5) days of this Order. Plaintiffs must request their tax returns and cellphone records within two (2) days of this Order and produce them to Defendant without delay once they have received the documents from the IRS and cellphone carriers.

B. Depositions

1. Plaintiffs' Counsel's Conduct at Earlier Depositions

Defendant has also moved for an order prohibiting Plaintiffs' counsel from instructing his clients not to answer on any grounds other than those expressly permitted under Rule 30(c)(2) and an order prohibiting Plaintiffs' counsel from making speaking objections or coaching the deponents or impeding the depositions. The gravamen of Defendant's motion is that Plaintiff's counsel made numerous improper objections to deposition questions based on privacy objections, which resulted in a significant waste of time and Defendant's inability to obtain testimony.

Before analyzing the substance of Plaintiffs' privacy objections, the Court will address Plaintiff's counsel's conduct at the depositions and in its December 28, 2018 submission to this Court. The Northern District of California's Guidelines for Professional Conduct require that "[w]ritten materials submitted to the court should always be factual and concise, accurately state current law, and fairly represent the parties' positions without unfairly attacking the opposing party or opposing counsel." Northern District of California's Guidelines for Professional Conduct, ¶ 7. They also require counsel to be civil in their communications with other parties. Id., ¶ 8. Accusing opposing counsel of intentionally misleading the Court, as Plaintiffs' counsel did in his December 28, 2018 letter, is a serious charge and unnecessarily inflammatory. The parties have a dispute

and casting aspersions on the other side, particularly where accusations are unsubstantiated, is not helpful to resolve the issues before the Court. This unprofessional conduct will not be tolerated.

Similarly, Plaintiffs' counsel's conduct during the depositions left much to be desired. Counsel engaged in lengthy, argumentative speaking objections and, at least once, gave a speech impugning the conduct of other attorneys. These actions violate the Federal Rules of Civil Procedure, the Northern District of California's Guidelines for Professional Conduct, and the presiding judge's standing order on depositions which expressly prohibits "[s]peaking objections or those calculated to coach the deponent." Judge White, Standing Order for Civil Practice, Deposition Guidelines, ¶ 4; Fed. R. Civ. P. 30 (c)(2) ("An objection must be stated concisely in a nonargumentative and nonsuggestive manner."); Northern District of California, Guidelines for Professional Responsibility, ¶ 9(g) ("Once a question is asked, a lawyer should not coach the deponent or suggest answers, whether through objections or other means."), (k) ("A lawyer should refrain from self-serving speeches during depositions.").

Plaintiffs' counsel's conduct also falls below expectations for producing documents before depositions. Defendant conducted depositions of Plaintiffs Uschold and Alamendarez in early December and Plaintiffs produced their incomplete tax returns the night before their depositions. Plaintiffs acknowledge that they produced Plaintiffs' Uschold and Alamendarez's tax returns on the eve of their depositions but contend that the timing of the production was due to their need to review and properly redact the documents after a search for the documents that included contacting third parties and searching storage units. This is not an excuse for the late production. The deposing party must be given sufficient time to review relevant documents and prepare for the deposition, an opportunity that Plaintiffs' counsel denied Defendant with respect to the tax returns. See Northern District of California, Guidelines for Professional Conduct, ¶ 9(f) ("A lawyer should not delay producing documents to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason."). If Plaintiffs needed significant time to contact third parties and search storage units, it was their duty to undertake that search well in advance of the deposition to permit enough time for a timely production of the tax returns before the depositions.

***6** Turning to the substance of Plaintiffs' privacy objections, the Court concludes that Plaintiffs have not carried their burden to establish that the deposition testimony Defendant seeks is privileged. The California Constitution "expressly grants Californians a right of privacy." Williams v. The Superior Court of Los Angeles County, 3 Cal. 5th 531, 552 (2017) (citing Cal. Const., art. I, § 1). The right to privacy is not, however, a complete bar to discovery. Instead, as Plaintiffs recognize, it is necessary to balance the right to privacy against the needs of litigation. See Saca v. J.P. Molyneux Studio Ltd., 2008 WL 62181, at *3-4 (E.D. Cal. Jan. 4, 2008) (citing cases). A party waives this protection when she puts that topic at issue in the litigation. Doe v. City of San Diego, 2013 WL 6577065 at *7 (S.D. Cal. Dec. 13, 2013).

To aid in the Court's determination of whether the need for the information outweighed whatever privacy interest Plaintiffs had in the information, Defendant provided a summary of the deposition topics to which Plaintiffs objected and Defendant's position on why the information sought is relevant to the litigation. The Court rules as follows:

a. Other employment and businesses: Multiple Plaintiffs refused to testify about their employment after CSI. Defendant argues that this is relevant background information and Plaintiffs have no privacy interest in this information. See Lee v. Pep Boys, 2015 WL 9268118, at *4 (N.D. Cal. Dec. 21, 2015) ("The privacy right protects personnel information, including an employee's confidential human resources file and records relating to discipline or demotions, but not the facts of employment itself."). Defendant also contends that this is relevant to credibility and bias, for example, to the extent that Plaintiffs were communicating to their subsequent employers while still employed at CSI and shared their expense-related complaints or conveyed other biases.

   Defendant also notes that Plaintiff Uschold testified about business-expense deductions on tax returns for a separately owned business, possibly for the same property that he allegedly used for work-related purposes while employed at CSI, although he made no similar deductions for unreimbursed expenses at CSI. Defendant argues this could be evidence about damages and credibility.

   The background information about Plaintiffs' employment history is not privileged and may be discovered. See Lee, 2015 WL 9268118, at *4.

Moreover, even if it were conditionally privileged, the need to obtain the information would be relevant for those Plaintiffs like Uschold who had some overlap between discussions with subsequent employers and their employment with CSI. The testimony is also relevant to Plaintiff Uschold's damages and credibility, considering his apparently different treatment of work-related expenses incurred while working at CSI and his subsequent employer. Thus, the Court overrules Plaintiffs' privacy objection to questions about Plaintiffs' work histories.

b. Tax preparers: Plaintiff Uschold refused to identify who helps him prepare his taxes. Defendant contends that this information is relevant to the issue of why he claimed business expenses for one employer but not for CSI. Defendant argues that this tax preparation information is also relevant because Plaintiff Naples pleaded guilty to conspiracy to file false tax returns while employed at CSI. See United States v. Cooper et al. – Tiana Naples, Case No. 2:14-cr-00022-JAM-2 (E.D. Cal., plea entered April 12, 2016), Dkt. No. 106. As a result, it argues that information about tax preparation could be relevant to credibility and adequacy for class representatives.

***7** This information might have some relevance for the reasons Defendant sets forth. The privacy objections about the identity of their tax preparers are overruled.

c. Identity of family members: Plaintiffs have refused to name their family members on privacy grounds. Defendant contends that this information is relevant because Plaintiffs seek expenses that they allegedly incurred while living with or using the property of their families. Based on the transcript excerpts that Defendant provided to the Court, it is apparent that at least some of the Plaintiffs lived with relatives at the time they allege that they were working out of their homes. Identifying the relatives' identifies will assist Defendant in corroborating or disproving Plaintiffs' allegations about the extent that they worked from home and the expenses incurred. Plaintiffs have also not established a strong privacy interest in keeping the names of relatives private. Accordingly, the Court overrules Plaintiffs' privacy objection to questions asking them to identify relatives.

d. Damages evidence: Many of Plaintiffs' privacy objections were made in response to questions about Plaintiffs' home mortgages and other financial arrangements. Defendant argues that these questions go to Plaintiffs' damages and that it is entitled to confirm whether and what amount of expenses were incurred when Plaintiffs allegedly worked from their homes, which requires inquiry into who owns the property Plaintiffs used, the property's value, and who paid for the expenses. This line of questions is relevant because it focuses on the central issue of Plaintiffs' claim that they should have been reimbursed for their expenses when they worked at home, including for the use of home office space.

With respect to questions seeking the name of Plaintiffs' mortgage lenders, Defendant argues that it is entitled to conduct third-party discovery to confirm Plaintiffs' testimony about their expenses, particularly because of the lack of documents produced by Plaintiffs. If Plaintiffs are not personally providing sufficient information about the expenses they are claiming, then Defendant is entitled to issue subpoenas to obtain the discovery it needs to defend Plaintiffs' damages claims. Thus, the Court overrules Plaintiffs' privacy objections regarding questions about the expenses they are claiming in this case and the information Defendant needs to determine the bases for those expenses, including information about Plaintiffs' mortgages.

e. Witnesses with knowledge of claims: The last category concerns testimony about the identity of witnesses with knowledge of claims and, specifically, a man named Tyrone Dangerfield. Plaintiff Uschold identified Mr. Dangerfield in his interrogatory responses as a person he may rely upon to prove or support his claim. Defendant represents that Plaintiff Uschold has described Mr. Dangerfield as his "brother," "good friend," and a coworker at CSI. Since Plaintiff Uschold inserted Mr. Dangerfield into this case and anticipates relying on Mr. Dangerfield to prove his case, Plaintiff Uschold has waived his privacy objection regarding his relationship with Mr. Dangerfield. Accordingly, the Court overrules the privacy objection as to Mr. Dangerfield and any other individuals Plaintiffs have identified as having knowledge about their claims or upon whom they intend to rely for evidence supporting their case or to challenge Defendant's defenses.

***8** The parties have entered into a protective order for this case. The Court has overruled Plaintiffs' objections to answering questions about the topics discussed above, but their deposition testimony may receive protection from future

public disclosure if it is entitled to confidential treatment under the terms of the protective order and the applicable legal standards.

Finally, the Court can only rule on the topics that were presented to it, but there may be additional issues that are explored in the future (see the next section for a discussion of further depositions) to which Plaintiffs object on privacy grounds. Counsel should consult the Court's rulings and proceed in good faith when posing deposition questions or objecting to them to avoid unnecessary disruptions and motion practice.

2. Further Depositions

In light of Plaintiffs' privacy objections and their belated and incomplete discovery responses, Defendant seeks an order authorizing further depositions of Plaintiffs who have already been deposed. The Court grants Defendant's request. Plaintiffs must submit to further depositions. The Court does not, however, have an adequate basis to determine how much additional time is necessary for each Plaintiff. The parties are ordered to meet and confer to agree on the amount of time that Defendant needs to depose each Plaintiff based on the supplemental responses and document productions they provide and the deposition topics that they must revisit, as required by this order.

C. Sanctions

Defendant requests monetary sanctions against Plaintiffs for the cost of further depositions and for Defendant's costs in bringing its motion. Rule 37 provides that if a motion to compel a discovery response, including deposition testimony, document production, or answers to an interrogatory, is granted, then "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5). Sanctions are not allowed if "(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A). Rule 30 also provides that the Court "may impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).

Since the Court has granted Defendant's motion in nearly all regards, an award of monetary sanctions may be warranted for at least Defendant's costs in bringing the motion. At this time, however, the Court will not rule on Defendant's request. Local Rule 7-8 and this Court's standing discovery order require a sanctions motion to be filed separately and noticed for a hearing date. L.R. 7-8(a); Dkt. No. 54, Standing Discovery Order, ¶ 3. The motion and the sanction requested must be supported by declarations. L.R. 7-2(d), 7-5. Accordingly, Defendant's request for sanctions is denied without prejudice to a later request that complies with the Local Rules.

***9 IT IS SO ORDERED.**

All Citations

Slip Copy, 2019 WL 3282961