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21

22 **UNITED STATES DISTRICT COURT**
23 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
24

25 CORY SPENCER, an individual;
26 DIANA MILENA REED, an
individual; and COASTAL
27 PROTECTION RANGERS, INC., a
28 California non-profit public benefit

CASE NO. 2:16-cv-02129-SJO (RAOx)
**PLAINTIFFS' RESPONSE TO
DEFENDANT BLAKEMAN'S
OBJECTIONS TO MAGISTRATE
JUDGE OLIVER'S REPORT AND
RECOMMENDATION**

1 corporation,

2 Plaintiffs,

3 v.
4

5 LUNADA BAY BOYS; THE
6 INDIVIDUAL MEMBERS OF THE
7 LUNADA BAY BOYS, including but
8 not limited to SANG LEE, BRANT
9 BLAKEMAN, ALAN JOHNSTON
10 AKA JALIAN JOHNSTON,
11 MICHAEL RAE PAPAYANS,
12 ANGELO FERRARA, FRANK
13 FERRARA, CHARLIE FERRARA,
14 and N. F.; CITY OF PALOS VERDES
15 ESTATES; CHIEF OF POLICE JEFF
16 KEPLEY, in his representative
17 capacity; and DOES 1-10,

18 Defendants.

Complaint Filed: March 29, 2016
Trial Date: February 6, 2018

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1 **I. INTRODUCTION**

2 In his Objection to Magistrate Judge Oliver’s Report and Recommendation
3 (the “Report”), Defendant Blakeman concedes, as he must, that he violated Rule
4 37(e) by failing to preserve evidence (text messages exchanged between co-
5 defendants) that is now lost and cannot be restored or replaced through additional
6 discovery. Despite his spoliation of evidence and the resulting prejudice to
7 Plaintiffs, he asserts he should not be sanctioned and there should be no
8 consequences. This Court should reject his unfounded “objections” to the Report.

9 **II. ARGUMENT**

10 **A. Plaintiffs Supported Their Motion With Evidence.**

11 Contrary to Defendant Blakeman’s assertion, Plaintiffs submitted evidence
12 with their motion proving that relevant electronically stored information was lost
13 because Blakeman failed to take *any* steps to preserve it. (Dkt. No. 508-1.)
14 Plaintiffs also submitted evidence that Blakeman acted with an intent to deprive
15 Plaintiffs of this evidence. (*Id.*) Ignoring this evidence, Blakeman claims no
16 sanctions are warranted. Blakeman fails to set forth a logical basis for this
17 argument, and in any event, his attempt to reargue his opposition to Plaintiffs’
18 motion do not constitute an “objection.” *See Rosado-Gonzalez v. Alejandro Otero*
19 *Lopez Hosp.*, 836 F.Supp. 2d 48, 51 (D. P.R. 2011) (objections are not a second
20 opportunity to present arguments previously raised).

21 As to Defendant Blakeman’s intent to deprive in particular, Plaintiffs
22 submitted evidence of Blakeman’s conduct throughout the discovery process from
23 which an intent to deprive could be inferred. (Dkt. No. 508-1.) Plaintiffs also cited
24 two cases in which courts inferred an intent to deprive based on discovery
25 misconduct. (*See* Dkt. No. 508-1, pp. 13, 15 (citing *Compass Bank v. Morris*
26 *Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1058 (court found that the party’s
27 “obstructionist behavior” amounted to the “willful destruction or loss of evidence”)
28 and *Consumer Financial Protection Bureau v. Morgan Drexen, Inc.*, 101 F.Supp. 3d

1 856, 871 (defendants’ intent “strongly suggest[ed]” by discovery conduct.) Thus,
2 although Judge Oliver ultimately found Plaintiffs’ evidence of the requisite intent to
3 deprive “insufficient at this time” (Dkt. No. 538, p. 20), Plaintiffs unquestionably
4 submitted evidence in support of their sanctions motion. The Court’s finding
5 recognized that “[i]t would be unfair to expect Plaintiffs to have been able to fully
6 probe spoliation and the intent behind the destruction or failure to preserve
7 evidence” in light of Defendants’ discovery misconduct to date, which is why Judge
8 Oliver recommend giving Plaintiffs the opportunity to further explore the issue of
9 intent and to present such evidence at trial. (Dkt. No. 538, p. 20.)

10 Additionally, Blakeman’s general assertion that Plaintiffs’ motion lacked
11 evidentiary support is not a proper objection. *See* Fed. R. Civ. P. 72(b)(2);
12 *McCulloch v. Tharratt*, 2017 WL 6398611, *1 (S.D. Cal. Dec. 15, 2017) (“[t]he
13 federal rules require specific written objections; generalized or blanket objections do
14 not trigger the *de novo* review requirement”); *Johnson v. Gains*, 2011 WL 765851,
15 *1 (S.D. Cal. Feb. 24, 2011) (“[o]bjections to a report in its entirety do not satisfy”
16 Rule 72(b)(2)’s specificity requirement). Blakeman’s misplaced and general
17 objections should therefore be overruled.

18 **B. Blakeman’s Rule 11 Sanction Request Is Improper and Meritless.**

19 The Court should reject Blakeman’s request for Rule 11 sanctions against
20 Plaintiffs. To start, Blakeman bases this request on his unfounded assertion that
21 Plaintiffs failed to provide any evidentiary support for their motion. As explained
22 above, Plaintiffs submitted evidence in support of their motion.

23 Moreover, Blakeman’s request is procedurally improper. Where a party seeks
24 sanctions under Rule 11, it must follow the safe harbor process, including service of
25 the motion 21 days before it is filed to enable the other party to withdraw or correct
26 the alleged violation. Fed. R. Civ. P. 11(c)(2). And where a party fails to adhere to
27 the mandatory procedure, the motion must be denied. *Radcliffe v. Rainbow Const.*
28 *Co.*, 254 F.3d 772, 788-79 (9th Cir. 2001); *Kinney v. Bridge*, 2017 WL 130240, *2

1 (N.D. Cal. Jan. 13, 2017). Blakeman did not comply with this process.

2 Further, to the extent a court enters sanctions on its own initiative under Rule
3 11(c)(3), “*sua sponte* sanctions should ‘be imposed only in situations that are akin to
4 a contempt of court.’” *Kinney*, 2017 WL 130240 at *2, *citing Barber v. Miller*, 146
5 F.3d 707, 711 (9th Cir. 1998). A party requesting an order from the court, by
6 definition, is not a court acting on its own initiative. Additionally, this Court
7 previously found that “good cause” existed to permit Plaintiffs’ motion to be heard
8 and the Magistrate recommended that Plaintiffs’ motion be granted in part. (Dkt.
9 Nos. 520, 538.) Blakeman has not offered any explanation as to how Plaintiffs’
10 actions are “akin to contempt of court” under these circumstances, nor could he.

11 Finally, Blakeman's reliance on *Burnette v. Godshall*, 828 F.Supp. 1439 (N.D.
12 Cal. 1993) is misplaced. The Court in *Burnette* issued Rule 11 sanctions after the
13 plaintiff amended her complaint to add a frivolous RICO claim, noting that “an
14 attorney’s responsibility to conduct a reasonable prefiling investigation is
15 particularly important in RICO claims.” *Id.* at 1448. *Burnette* is inapplicable here.
16 Whereas in *Burnette*, the plaintiff’s frivolous RICO claim was almost immediately
17 dismissed (and required a “particularly important” prefiling investigation),
18 Plaintiffs’ motion was factually supported and *granted in part*.

19 Accordingly, because there is no basis to award Rule 11 sanctions against
20 Plaintiffs, Defendant Blakeman’s request should be denied.

21 **C. The Court Has The Authority To Order Monetary Sanctions**
22 **Under Rule 37(e)(1).**

23 Defendant Blakeman erroneously contends that the Court cannot award
24 monetary sanctions under Rule 37(e) absent a finding of bad faith. Federal Rule of
25 Civil Procedure 37(e) was recently amended to specify the “measures a court may
26 employ if [electronically stored] information that should have been preserved is
27 lost.” Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment; *see*
28 *Oppenheimer v. City of La Habra*, 2017 WL 1807596 at *4 (C.D. Cal. Feb. 17,

1 2017). The Advisory Committee Note explains that, because of these changes, a
2 court may no longer rely on its inherent authority for the imposition of sanctions
3 under this Rule. *Oppenheimer*, 2017 WL 1807596 at *4.

4 Blakeman acknowledges this change but misunderstands its application, and
5 cites to stale legal authority predating the Rule change. *See* Opp’n at 4:24-26. He
6 surmises that “this district court’s ability to award monetary sanctions must pull
7 from its inherent authority,” Opp’n at 4:16-17, and that such an award requires a
8 finding of bad faith. *Id.* at 4:22-24. He claims there is no evidence he acted in bad
9 faith, and thus the award of monetary sanctions was in error. But the Rule itself –
10 and not the Court’s inherent authority – provides the basis for the Magistrate’s
11 ruling, as the Report acknowledges. (Dkt. No. 538 at 10:2-9.)

12 Under Rule 37(e)(1), courts are not required to make a finding of bad faith or
13 intent before imposing monetary sanctions. *See Matthew Enterprise, Inc. v.*
14 *Chrysler Group LLC*, 2016 WL 2957133, *3 (N.D. Cal. May 23, 2016). The
15 spoliator’s intent to deprive the other party of the use of the information (i.e., bad
16 faith) is only relevant when a court considers sanctions under subdivision (e)(2).
17 *Matthew Enterprise, Inc.*, 2016 WL 2957133 at *3. In other words, sanctions under
18 (e)(1) are appropriate when the court finds prejudice, but not intent. *Id.*; *see also*
19 *First Financial Security, Inc. v. Freedom Equity Group, LLC*, 2016 WL 5870218,
20 *2 (N.D. Cal. Oct. 7, 2016).

21 Moreover, courts may order a “broad” range “of curative measures” under
22 subdivision (e)(1) that are ‘entrusted to the court’s decision’ when evidence that
23 should have been preserved is lost or destroyed. *Oppenheimer*, 2017 WL 1807596
24 at *11 (internal citations omitted); *see also Matthew Enterprise, Inc.*, 2016 WL
25 2957133 at *3 (“Rule 37(e) intentionally leaves to the court’s discretion exactly
26 what measures are necessary.”); Fed. R. Civ. P. 37(e)(1). The only limit upon the
27 “curative measures” a court may impose under Rule 37(e)(1) is that such measures
28 must not have the same effect as those permitted under subdivision (e)(2). Advisory

1 Committee Note. The corrective measures set forth in subdivision (e)(2) do *not*
2 include the imposition of monetary sanctions. *See* Fed. R. Civ. P. 37(e)(2). Courts
3 may therefore impose monetary sanctions as a remedy under Rule 37(e)(1), and
4 regularly do so. *See, e.g., Blumenthal Distributing, Inc. v. Herman Miller, Inc.*,
5 2016 WL 6609208, *26 (C.D. Cal. July 12, 2016 (awarding monetary sanctions in
6 the form of attorney’s fees and expenses under Rule 37(e)); *Matthew Enterprise,*
7 *Inc.*, 2016 WL 2957133 at *5 (awarding sanctions under Rule 37(e)(1) including
8 “reasonable attorney’s fees [] incurred in bringing this motion.”).

9 Accordingly, after finding that Defendant Blakeman violated Rule 37(e)(1) by
10 his prejudicial spoliation of evidence, Magistrate Judge Oliver properly
11 recommended monetary sanctions against Blakeman as a curative measure.

12 **III. CONCLUSION**

13 Blakeman fails to assert a single, valid objection. His argument that
14 Plaintiffs’ request for sanctions under Rule 37(e)(2) lacked evidence is undermined
15 by the docket itself and Judge's Oliver’s Report. Further, his Rule 11 sanctions
16 request is procedurally flawed and unwarranted here, where Plaintiffs’ motion was
17 not frivolous and was adequately supported. Finally, monetary sanctions were
18 properly awarded under Rule 37(e)(1), which does not require a finding of bad faith.
19 Plaintiffs therefore ask this Court to adopt the Report and Recommendation in full.

20 DATED: January 9, 2018

HANSON BRIDGETT LLP

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22
23 By: /s/ Samantha D. Wolff
24 SAMANTHA D. WOLFF
25 Attorneys for Plaintiffs
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