UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	8:21-cv-01968-JVS (ADS)	Date	September 21, 2023
Title	ConsumerDirect, Inc. v. Pentius, LLC, et al.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Elsa Vargas	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion for Sanctions [203] [PUBLIC VERSION]**

Before the Court is the Motion for Sanctions filed by Defendant Array US, Inc. ("Array") against Plaintiff ConsumerDirect, Inc. ("ConsumerDirect"). (Motion ("Mot."), Dkt. No. 203.) Defendants Pentius, LLC, System Admin, LLC, and Pentops, LLC (collectively, "Pentius Defendants") joined Array's Motion. (Dkt. No. 206.) ConsumerDirect opposed the motion, and Array replied. (Opposition ("Opp'n"), Dkt. No. 214; Reply, Dkt. No. 216.) The Court asked Array to file a supplemental brief in support of its Motion. Array filed its supplemental brief. (Supplement, Dkt. No. 397.) ConsumerDirect responded. (Response, Dkt. No. 404.)

For the following reasons, the Court **GRANTS** the motion. The Court grants Array ten (10) days to brief the issue of the amount of attorneys' fees and costs for bringing this Motion. ConsumerDirect will have seven (7) days to file a response.

I. BACKGROUND

Throughout this matter, ConsumerDirect has represented to the Court and to Defendants that it had valid ownership interest in certain unregistered marks. Now, ConsumerDirect admits that a third-party has actually always owned the marks but argues that it had a right to enforce intellectual property rights based on a written agreement that has since been lost.

When ConsumerDirect filed suit in 2021, it alleged that it had "valid and subsisting ownership rights" in the unregistered marks "IDLOCK," "IDLOCK.COM," and "CREDITMONITORING.COM" (the "Marks"). (Complaint ("Compl."), Dkt. No. 1 ¶¶

15, 18, 57.) Specifically, ConsumerDirect claimed it "or its predecessor" continually used the Marks since 2009, but it started exclusively using the Marks at some later point in time. (See id. ¶ 15.)

When ConsumerDirect moved for a preliminary injunction, it represented that it had exclusive use of the Marks since 2015. (Dkt. No. 34, at 1, 3, 4, 11, 12.) ConsumerDirect declared that www.idlock.com and www.creditmonitoring.com were "its own websites." (Declaration of David Coulter ("Coulter Decl."), Dkt. No. 34-2 ¶¶ 2–3). ConsumerDirect's President and CEO, David Coulter ("Mr. Coulter"), explained that ConsumerDirect uses white label agreements with partners to display its financial services[1] on their partners' websites. (Id. ¶ 2.) ConsumerDirect also claimed in its Second Amended Complaint that it owned the "websites," idlock.com and creditmonitoring.com. (Second Amended Complaint ("SAC"), Dkt. No. 93 ¶¶ 20, 30.)

On March 25, 2022, the Court granted the motion for preliminary injunction and enjoined Array from using any of the marks at issue, including the Marks. (See Prelim. Inj. Order, Dkt. No. 89.) The Court relied on Mr. Coulter's declaration when finding that ConsumerDirect had valid and protectable ownership interest in the Marks. (Id. at 17, 18.)

Array went on to appeal the Court's grant of the preliminary injunction, which was affirmed by the Ninth Circuit. (Dkt. No. 187.) In its briefings, ConsumerDirect repeated the same assertions that it or its predecessor in interest continually used the Marks since 2009, but that the Marks were exclusive source identifiers for ConsumerDirect. (Dkt. No. 208, Ex. 5, at 5–6.)

In June 2022, ConsumerDirect settled with certain owners of the infringing Marks.[2] (Dkt. Nos. 216-2 to -4, Exs. A–C.) Then, ConsumerDirect voluntarily dismissed its claims relating to the Marks on November 15, 2022. (Dkt. No. 186.) It did so "as soon

[1] ConsumerDirect provides consumer self-help financial services, including credit reporting services and credit monitoring since 2009. (Coulter Decl., Dkt. No. 214-1 ¶ 3.) Its services allow consumers to view credit data from three credit bureaus, TransUnion, Equifax, and Experian. (Id.)

[2] Prior to June 2022, ConsumerDirect also entered into settlement agreements with other Defendants over the Marks. (See Declaration of Tyler Bexley ("Bexley Decl."), Dkt. No 216-1.)

as even a question arose about authority to bring those claims." (Opp'n at 3.) There are no remaining claims related to these Marks.

In or about February 2023, Array learned through discovery that ConsumerDirect did not, in fact, "own" the Marks.[3] Instead, a nonparty, Consumer Information Systems ("CIS"), owned the Marks. (Transcript of Anthony Costantino ("Costantino Tr."), Dkt. No. 208, Ex. 1, at 8:9–24.)

In March 2023, ConsumerDirect admitted it does not own the Marks. (Dkt. No. 208, Ex. 26, at 4–4 (admitting in answers to Requests for Admission that it does not own the Marks). But it continues to represent that it had a right to pursue litigation related to the Marks based on an agreement with CIS. (Id. at 6–7; Opp'n at 2.) It argues that at the time the Complaint and Motion for Preliminary Injunction were filed, CIS agreed that ConsumerDirect would be responsible for protecting the brands and the domains. (Declaration of Steve Reger ("Reger Dec."), Dkt. No. 214-3 ¶¶ 3–5, 7.) But only later during 2022 did it realize that the written agreement memorializing such understanding could not be located. (Id. ¶ 7.)

Array and Pentius Defendants (collectively, "Defendants") contend no such agreement was ever entered. (See Mot. at 2.) Array accuses ConsumerDirect of knowing from the beginning that it never owned the Marks or had any legal authorization to pursue this litigation, then quietly dismissing the action after obtaining a preliminary injunction to prevent this from coming to light, and backdating a fake agreement to make it appear that it was given the right to pursue these claims in 2020. (Id. at 2–10.)

ConsumerDirect argues that these allegations are simply untrue. (Opp'n at 2.) It maintains its position that an agreement *was* reached in 2020, but that the countersigned version was never provided *or* it was but was since destroyed inadvertently. (Coulter Decl., Dkt. No. 214-1 ¶ 14.)

A. The 2015 White Label Agreement and Amendments

[3] Array served a notice of subpoena to CIS's CEO for deposition testimony and documents. (Dkt. No. 208, Ex. 20.) Array came to believe that CIS actually owned the marks based on this testimony and the documents produced in February 2023. (Mot. at 10.)

In 2015, ConsumerDirect and CIS signed an agreement titled "White Label, Revenue Share & Hosting Agreement" (the "2015 Agreement") related to the domain www.creditmonitoring.com, which was owned by CIS. (Dkt. No. 205-1, Ex. 6 ("2015 Agreement").) A "white label" means that a product or service is produced by one company but "rebranded" by another for its own use or distribution. (Coulter Decl., Dkt. No. 214-1 ¶ 1 n.1.) ConsumerDirect partners with other financial services companies to create white labels for them, which allows their partners to display and use ConsumerDirect's financial services platform through domains owned by the partners. (Id. ¶ 3.) In this case, the domains were owned by CIS, so the parties entered the agreement so that ConsumerDirect's platform could be "white labeled" for use on these domains. (Id. ¶ 4.)

The 2015 Agreement was unique for ConsumerDirect. Typically, its partners would have built the websites. (Id.) But under this agreement, ConsumerDirect agreed to build out the entire website. (Id.) Under the 2015 Agreement, CIS granted a "limited, non-exclusive, royalty-free license to use the Licensed IP of the granting party solely for the limited purpose of this Agreement and the Product." (2015 Agreement ¶ 6.4.) The "white label" was defined as "creditmonitoring.com." (Id. ¶ 1.11.) And it provided that CIS's "primary web domain name: CreditMonitoring.com" was a "white label" version of "SmartCredit.com," which was owned by ConsumerDirect. (Id. at 1, 18.) The 2015 Agreement also provided that

> Each party agrees that the other party is, and will remain, the sole and exclusive owner of all right, title, and interest, throughout the world, to all Licensed IP of such other party, and any copies of the Licensed IP.
>
> Each party will maintain sole control and discretion over the prosecution and maintenance with respect to all intellectual property rights to the Licensed IP of such party.

(Id. ¶¶ 6.3, 6.4.) For each public page of the website, the phrase "Powered by ConsumerDirect" was present at the bottom. (Id. at 23.) In sum, ConsumerDirect provided the online platform, the financial services, controlled, secured, and maintained the site, and provided customer service. (Id. ¶ 3, Schedule E; Coulter Dec. ¶ 8.) But it

did not own the domains.[4] (2015 Agreement at 1.)

Later in 2015, the parties executed an addendum ("Amendment No. 1") to the 2015 Agreement, which granted ConsumerDirect the right to exclusively use the "domain IDLock.com for the purpose of fulfilling ConsumerDirect's obligations set forth in a white label agreement between ConsumerDirect and Apollo / Kinecta." (Addendum No. 1, Dkt. No. 208, Ex. 7.) At the time, ConsumerDirect and Apollo/Kinecta had entered into a separate white label agreement. (Coulter Decl., Dkt. No. 214-1 ¶ 5.) The addendum also provided that such rights granted to ConsumerDirect would be effective "so long as ConsumerDirect has any active obligation to Apollo / Kinecta." (Addendum No. 1 ¶ 10.18.1) But ConsumerDirect terminated the agreement it had with Apollo/Kinecta on January 4, 2019, so the domain www.idlock.com reverted back to CIS. (Coulter Decl., Dkt. No. 214-1 ¶ 7.)

In March 11, 2022, the parties executed a second amendment ("Amendment No. 2") in which "[a]ll rights, responsibilities and obligations originally attributed to both ConsumerDirect and [CIS] solely for creditmonitoring.com White Label shall equally apply to the idlock.com White Label, retroactively effective to January 1, 2022." (Addendum No. 2, Dkt. No. 208, Ex. 8 ¶ 1.11.1.)

None of these amendments altered section 6.4, which gave each party the right to pursue litigation to protect its own respective intellectual property.

B. 2020 Amendment

ConsumerDirect believes that this changed—formally—in July 28, 2020, when a third amendment titled "Amendment to White Label, Revenue Share & Hosting Website" ("2020 Amendment") was executed. (See Dkt. No. 208, Ex. 12.) Array contends no such agreement exists and accuses ConsumerDirect of backdating a document in May 2022 to make it appear as though ConsumerDirect and CIS agreed on July 28, 2020—before filing the lawsuit—to give ConsumerDirect authority to pursue legal action for the Marks.

[4] "Domain" refers to the address on the internet where a "web site" can be found. 5 McCarthy on Trademarks and Unfair Competition § 25A:10 (5th ed.).

On May 25, 2022, Mr. Reger emailed Mr. Costantino, asking him to "take a look at" a draft version of the amendment. (Dkt. No. 208, Ex. 11.) Mr. Costantino testified that this email was unprompted because he had not received any prior explanation about the need for a third amendment. (Costantino Tr. 34:1–5.) After the email was sent, Mr. Reger told Mr. Costantino that it was "time sensitive and that we needed to get it executed by Friday" before that weekend. (Id. at 34:6–19.) Mr. Reger emailed Mr. Costantino a second time that day with a scanned, PDF version of the amendment signed by Mr. Coulter on July 28, 2020. (Dkt. No. 208, Ex. 12.)

On May 26, 2022, Mr. Coulter emailed a Word version of the amendment to Mr. Reger. (Dkt. No. 208, Ex. 13.) The metadata of this document shows that it was created and modified the previous day. (Id.) Mr. Coulter explains that he had converted a PDF into a Word document that day before emailing it to Mr. Reger, so the metadata reflects the date of conversion, not the creation of the original Word document. (Coulter Decl., Dkt. No. 214-1 ¶ 16.) Mr. Coulter then emailed Mr. Costantino multiple, different scanned versions of the agreement, each signed by Mr. Coulter. (Dkt. No. 208, Exs. 14–16.)

Mr. Coulter explains that the only versions he could find were hard copies, so he scanned these to himself and forwarded them to Mr. Reger to assist his efforts to find the fully executed version. (Coulter Decl., Dkt. No. 214-1 ¶ 14.) He then scanned these to Mr. Costantino because he was not sure "which version" ended up as final. (Id. ¶ 15.) He sent all versions to Mr. Costantino to assist him in looking for the countersigned version. (Id.)

On Friday, May 27, 2022, Mr. Coulter called Mr. Costantino to discuss why the amendment was needed. (Costantino Tr. 35:6–24.) Mr. Coulter explained that the amendment was needed for an internal audit to "square" things away within ConsumerDirect. (Id. at 35:18–24.) But Mr. Costantino was "not comfortable" signing it "without a better explanation as to why." (Id. at 36:7–11.)

But during a lunch on Saturday, May 28, 2022, Mr. Reger told Mr. Costantino that ConsumerDirect could not find the signed 2020 amendment and asked Mr. Costantino to provide a fully executed copy. (Reger Decl. ¶ 10.) According to Mr. Reger, "Mr. Costantino did not deny that the amendment had been signed, or that ConsumerDirect had the right to pursue the claims." (Id.)

Yet, a few days later on May 31, 2022, Mr. Costantino wrote to Mr. Coulter and Mr. Reger, declining to sign the amendment and expressing some confusion for its need. (See Dkt. No. 208, Ex. 17, at 3.) In response on June 29, 2022, Mr. Reger urged Mr. Costantino to sign the amendment because ConsumerDirect "got a preliminary injunction against the behavior but to get a formal order we need the document permission from you." (Id. at 2). He again asked for Mr. Costantino's signature, explaining that the "temporary injunction" would terminate unless CIS signs the agreement. (Id.) He added that a "formal grant" was needed to obtain a permanent injunction, but that CIS could always "revoke it in the future." (Id.)

After ConsumerDirect dropped its claims relating to the Marks in November, (Dkt. No. 186), Mr. Reger emailed Mr. Costantino to inform him that the amendment was no longer needed, (Dkt. No. 208, Ex. 18).

When ConsumerDirect was asked by Array in December 2022 to produce written documents showing that it had a right to sue to enforce ownership of the Marks, it produced an unsigned agreement because it could not locate the "countersigned" version. (Dkt. No. 208, Ex. 21.) But ConsumerDirect's explanation was that the version signed by Mr. Costantino was "inadvertently overridden awhile back" in a Dropbox folder. (Id.)

Mr. Coulter recalls the parties having executed an amendment in July 2020 "formalizing the understanding that it was ConsumerDirect's responsibility to protect the brands and domains." (Coulter Decl., Dkt. No. 214-1 ¶ 12.) Because the amendment was negotiated and executed in the middle of a pandemic, he believes things were misplaced and normal business practices were disrupted. (See id. ¶ 14.) As a result, he believes either the document was saved in a Dropbox folder that was accidently overridden or that Mr. Costantino forgot to return the countersigned version. (Id.) But he maintains the belief that a countersigned version *was* signed. (Id.)

But whether or not there was a formal, written agreement, it was always his understanding that ConsumerDirect always had the legal right to pursue claims related to idlock.com and creditmonitoring.com because (1) ConsumerDirect had built the content of the websites and (2) it had CIS's support based on his understanding of communications with Mr. Costantino and Mr. Reger. (Id. ¶ 13.)

Mr. Reger also shares this belief, "even if not formally documented in the

agreements." (Reger Decl. ¶ 4.) Mr. Reger and Mr. Costantino maintained a longstanding personal relationship over twenty years and often shared meals together. (Id.) Because of the "familiar nature" of the relationship, "not all understandings between [them] were always formally documented." (Id.) In an email from Mr. Costantino to Mr. Reger on March 4, 2021, Mr. Costantino complained of "spoof sites" of idlock.com and creditmonitoring.com and says, "If your legal team feels that I can trademark them [the Marks] or protect them I am willing to do so." (Dkt. No. 214-13, Ex. J.) It is this email that lead Mr. Reger to believe that CIS supported ConsumerDirect in pursuing the infringement claims. (Reger Decl. ¶ 6.)

C. Forensic Report

Following the June 12, 2023 hearing on Array's Motion for Sanctions, the Court stayed the Motion and ordered the parties to retain a third-party forensic expert to assist the Court in determining when the CIS Amendment was created. (Order, Dkt. No. 235.) ConsumerDirect and Array agreed to retain Setec Investigations as the third-party expert. (Joint Stipulation of Third Party Forensic Investigation, Dkt. No. 267-1 (sealed).) Michael Kunkel ("Kunkel") conducted the Forensic Report and reported his findings to the Court. (Forensic Report of Michael Kunkel ("Forensic Report") (sealed).) In conducting his report, Kunkel had access to Mr. Coulter's computer, USB drive, phone, personal and work email, and Dropbox account; Mr. Reger's computer, phone, personal and work email, and Dropbox account; Rachel Phan's computer and work email; Rita Sjamsudi's computer and work email; and ConsumerDirect's Slack Channels. (Id. at 2.) In the Forensic Report, Kunkel analyzed metadata of files and file contents.[5] (Id. at 3.) Kunkel "did not locate any version of the CIS Amendment with timestamps prior to May 2022." (Id.) But Kunkel "did locate a series of email messages and versions of the CIS Amendment were exchanged between David Coulter and Steve Reger, and sent to Tony Costantino between May 24, 2022, and May 30, 2022." (Id.; see also id., Exs. B-R.) After examining emails, chats, and other documentation, Kunkel "found no evidence the CIS Amendment existed prior to May 24, 2022." (Id. at 10.) Based on his experience and the evidence he found, Kunkel concluded that "the CIS Amendment did not exist prior to May 24, 2022." (Id.)

[5] Metadata is "data about data" and "can include embedded timestamps." (Forensic Report at 3.)

Array moves for terminating sanctions and monetary sanctions based on ConsumerDirect's "fraud on not just the parties, but the Court itself." (Mot. at 14.) It argues that ConsumerDirect engaged in bad faith conduct when (1) it knowingly and falsely represented to the Court that it owned the Marks; and (2) attempted to "cover up its lies" by "scrambling to either acquire the Marks from CIS or rapidly settle the claims related to the Marks" *after* successfully obtaining a preliminary injunction. (Mot. at 15, 17.)

After a telephonic status conference, the Court asked Array to file a supplemental brief asking for other sanctions beyond terminating sanctions and ConsumerDirect to file a response. In its supplemental brief, Array asked the Court to grant an adverse inference instruction as an alternative to terminating sanctions. (Supplement at 4–5.)

II. LEGAL STANDARD

Federal courts have inherent powers to fashion an "appropriate sanction for conduct which abuses the judicial process." Am. Unites for Kids v. Rousseau, 985 F.3d 1075, 1088 (9th Cir. 2021) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991). This includes, among other things, dismissing a case in its entirety and awarding attorneys' fees. Id.; Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 107 (2017). The more punitive the potential sanctions, the greater the procedural protections are afforded to the sanctioned individual. Am. Unites for Kids, 985 F.3d at 1088.

To impose a sanction pursuant to the court's inherent authority, the court "must find either: (1) a willful violation of a court order; or (2) bad faith." Id. at 1090. A willful violation of a court's order does not require a finding of improper motive, but bad faith requires "proof of bad intent or improper purpose." Id. A party acts for an "improper purpose" when it "attempt[s] to influence or manipulate proceedings . . . in order to gain tactical advantage." Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001). Before the court imposes sanctions based on bad faith, it must "make an explicit finding that the sanctioned party's conduct constituted or was tantamount to bad faith." Am. Unites for Kids, 985 F.3d at 1088 (internal quotation marks omitted).

Bad faith can be found in a "variety of conduct stemming from a full range of litigation abuses." Haeger v. Goodyear Tire & Rubber Co., 813 F.3d 1233, 1244 (9th Cir. 2016) (quotation marks omitted), rev'd on other grounds, 137 S. Ct. 1178, 1189 (2017).

This includes "delaying or disrupting the litigation," destroying or fabricating evidence, Leon v. IDX Sys. Corp., 464 F.3d 951, 961 (9th Cir. 2006) (internal quotation marks omitted), or taking "actions in litigation for an improper purpose," Chambers, 504 U.S. at 49. Fraud upon the court "or actions that cause 'the very temple of justice defiled' support a bad faith finding." Haeger, 813 F.3d at 1244 (quoting Chambers, 501 U.S. at 46).

Engaging in a scheme to intentionally mischaracterize evidence through misleading or inaccurate discovery responses or the "failure to correct the false impressions created" is tantamount to bad faith. See id. at 1245–46 (upholding finding of bad faith where a party withheld key documents in a bad faith attempt to hide responsive documents); Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1132 (9th Cir. 1995).

The Ninth Circuit has never resolved "whether a bad faith finding must be supported by clear and convincing evidence, or whether a lesser quantum of evidence suffices" for the purposes of imposing sanctions pursuant to a court's inherent authority. Haeger v. Goodyear Tire & Rubber Co., 793 F.3d 1122, 1131 (9th Cir. 2015); see also Singh v. Holder, 649 F.3d 1161, 1165 n.7 (9th Cir. 2011) (defining clear and convincing evidence "between a preponderance of the evidence and proof beyond a reasonable doubt"). But cf. Trendsettah USA, Inc. v. Swisher Int'l, Inc., 31 F.4th 1124, 1134 (9th Cir. 2022) (requiring clear and convincing evidence of intentional misrepresentation for fraud on the court for relief under Rule 60(b)(3)); Ahearn ex rel. NLRB v. Int'l Longshore & Warehouse Union, Locs. 21 & 4, 721 F.3d 1122, 1129 (9th Cir. 2013) (requiring clear and convincing evidence for a finding of civil contempt). Nevertheless, the Court applies the clear and convincing standard.

Under the Court's inherent authority, "one permissible sanction is an assessment of attorney's fees, . . . instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side." Goodyear, 581 U.S. at 107 (internal quotation marks omitted). Such sanctions against a bad actor are limited to the legal fees the innocent party would not have incurred "but for" the misconduct. Id. at 104, 108. Such an award is intended to be compensatory, not punitive. Id. at 108–09. This "granular inquiry" requires a court to evaluate the close causal link between the misconduct and the "individual expense items or categories of such items." Lu v. United States, 921 F.3d 850, 863 (9th Cir. 2019).

But in "exceptional cases" in which the bad faith activity can be traced to the start of the entire litigation, a court may award fees "in one fell swoop" without having to trace each legal fee to a specific bad act. Chambers, 501 U.S. at 1187; Lu, 921 F.3d at 863. To make a blanket award, a court must "explain why the entirety of the case, or some portion of the case, was initiated in 'complete bad faith.'" Lu, 921 F.3d at 863.

In exercising its inherent power, the Court "may impose sanctions including, where appropriate, default or dismissal." Thompson v. Hous. Auth. of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986), cert. denied 479 U.S. 829 (1986); TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir. 1987) ("Courts have inherent equitable powers to dismiss actions or enter default judgments[.]")

Terminating sanctions are imposed "only in extreme circumstances and only where the violation is due to willfulness, bad faith, or fault of the party." In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996) (internal quotation marks omitted); Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995) (finding terminating sanctions appropriate where "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings"). Before imposing terminating sanctions, courts must balance the following factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Leon, 464 F.3d at 958 (citation omitted).

Courts have imposed terminating sanctions under their inherent authority for fraud on the court. See, e.g., CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n, No. 14-CV-1191, 2019 U.S. Dist. LEXIS 209319, at *19 (S.D. Cal. Dec. 4, 2019) (imposing terminating sanctions pursuant to the court's inherent authority given "the extensive perjury"); Arnold v. Cnty. of El Dorado, No. 2:10-CV-3119, 2012 U.S. Dist. LEXIS 112398, at *14 (E.D. Cal. Aug. 9, 2012) ("[P]erjury on any material fact strikes at the core of the judicial function and warrants a dismissal of one's right to participate at all in the truth seeking process."); Sun World, Inc. v. Olivarria, 144 F.R.D. 384, 390 (E.D. Cal. 1992) (issuing terminating sanctions where litigant "committed a fraud on the court" by submitting a forged document and committing perjury); Am. Rena Int'l Corp. v. Sis-Joyce Int'l Co., No. CV 12-6972, 2015 U.S. Dist. LEXIS 189271, at * 1–34 (C.D. Cal. Dec. 14, 2015) (imposing terminating sanctions under the court's inherent power where

defendants filed false declarations, did not withdraw those declarations, and relied on those declarations in subsequent filings).

If the Court can dismiss a case for fraud on the court under its inherent authority, then the Court can issue a less drastic sanction, such as an adverse inference instruction, for similar conduct. Pursuant to its inherent authority, "[a] district court may, among other things, dismiss a case in its entirety, bar witnesses, exclude other evidence, award attorneys' fees, or assess fines." Am. Unites for Kids, 985 F.3d at 1088; see also Forte v. Cnty. of Merced, No. 1:11-CV-00318, 2015 U.S. Dist. LEXIS 12816, at *28 (E.D. Cal. Feb. 3, 2015) ("Upon a finding of bad faith, courts can levy an assortment of sanctions under their inherent power, including monetary awards, attorneys' fees, adverse inference jury instructions, and even dismissal of claims.").

III. DISCUSSION

A. Whether ConsumerDirect Acted in Bad Faith When Continuing to Litigate Despite Lacking Legal Authority to Pursue Claims

ConsumerDirect maintains its position that CIS agreed in 2020 to provide ConsumerDirect legal authority to pursue trademark claims based on the Marks. (Coulter Decl., Dkt. No. 214-1 ¶ 12.)

There is no evidence that the 2020 Amendment existed. The only person who could recall the existence of this agreement is Mr. Coulter, who still cannot remember whether a countersigned version was ever provided, although he insists it was "eventually countersigned." (Id.) Yet, there are no email communications from Mr. Coulter's email addresses or other employees at ConsumerDirect. Nor does he remember whether the parties had telephone conversations, which regularly occurred between the parties, about the changes CIS requested. (See id.) There is no evidence that scanned copies or draft versions were emailed to CIS in 2020. Nor is there evidence of emails of scanned copies from a scanner to Mr. Coulter or any employee at ConsumerDirect in 2020.[6] There are

[6] Mr. Coulter testified that when a document is scanned on ConsumerDirect's printer, it is emailed to an email address with an attachment. (Dkt. No. 208, Ex. 3, Coulter Tr. 222:22–223:1.) But no emails reflecting this fact was produced. Had it been produced, it might have strengthened the claim that the negotiations of this amendment did occur in 2020, but not that the amendment was fully

no electronic copies or hard copies showing fax records.

Mr. Coulter testified that he did not remember who drafted the document, who sent the document to CIS, or whether it was faxed or emailed. (Dkt. No. 208, Ex. 3, Coulter Tr. 209:13–210:1; 211:3–212:4.) Because there are no email records of these correspondences and fax records that went back to 2020, his best guess was that hard copies were faxed to Mr. Costantino, who then faxed back the countersigned version, which was then saved in the new Dropbox system, and then was overridden at an unknown point in time. (Id. 209:7–210:1, 211:7–212:4, 213:18–24, 215:13–23.) Simply put, other than Mr. Coulter's statements, there is no evidence that the parties entered into this amendment in 2020.

Given the dearth of evidence, the Court finds that no formal agreement was ever reached. Indeed, the only evidence of this agreement's existence were the hard copies signed by Mr. Coulter and his testimony that this agreement was eventually reached in 2020. (Coulter Decl., Dkt. No. 214-1 ¶ 12; Dkt. No. 208, Exs. 12–15.) On the other hand, Mr. Costantino testified being confused about receiving a copy of the drafts and being wary about the need for a third amendment. (Costantino Tr. 34:1–5.) [7] He insists that there was no "memorialization of the previous agreement" because "[i]t was actually changing the previous agreement." (Id. at 36:7–11.)

The evidence also strongly suggests that ConsumerDirect realized that there was no such agreement. If there was, it would not have attempted to secure a new one. After examining Mr. Coulter's and Mr. Reger's computer, phone, personal and work email address, and Dropbox account, Kunkel did not find any evidence about the CIS Amendment existing prior to May 2022. (Forensic Report at 10.) Instead, Kunkel found several email exchanges between Mr. Coulter and Mr. Reger in late-May 2022 concerning the CIS Amendment. (Id.) On May 24, 2022, Mr. Coulter sent Mr. Reger an

executed in 2020.

[7] ConsumerDirect makes too much of the "admission" that Mr. Costantino makes when asked whether it was "possible" a draft amendment was emailed to him. (See Dkt. 214, Ex. V, Costantino Tr. 95:3–11.) After stating numerous times that he produced all the drafts of addendums to the 2015 Agreement that he had seen, he stated it was simply "unknown" whether it was possible some drafts that he had not seen existed somewhere. (Id.)

email with the quoted language to include in the CIS Amendment, providing ConsumerDirect legal authority to pursue trademark claims based on the Marks. (Id., Ex. B.) On May 25, 2022, the quoted language appeared for the first time in the first draft of a word document for the CIS Amendment. (Id., Ex. D.1.) Then, later that same day, the document was signed and scanned with Mr. Coulter's signature that was dated as 2020. (Id., Ex. F.1.) On May 26, 2022, Mr. Reger emailed Mr. Coulter, indicating that he noticed the change Mr. Coulter made regarding section 10.18.3 on remuneration. (Id., Ex. K.) Mr. Coulter again signed the document and dated it as though it was signed in 2020. (Id., Ex. M.1.) After reviewing the metadata for all of these documents, Kunkel "did not locate any version of the CIS Amendment with timestamps prior to May 2022." (Id. at 3.) Thus, the metadata and email exchanges between Mr. Coulter and Mr. Reger establishes that the document was backdated.

Additionally, ConsumerDirect provided conflicting explanations for why it wanted CIS to sign the amendment. First it claimed that the amendment was needed for an internal audit. (Costantino Tr. 35:6–24.) Then, it said that the amendment had already been executed, so CIS needed to provide the countersigned version.[8] (Reger Decl. ¶ 10.) Then, a month later, ConsumerDirect urged CIS to sign the amendment, explaining ConsumerDirect needed a "formal grant" to obtain a permanent injunction and CIS could always "revoke it in the future." (Ex. 17.) Finally, months later, ConsumerDirect went back to its explanation that the agreement existed but was lost. (Ex. 21.) In the end, CIS never agreed to sign the amendment, so ConsumerDirect dropped its claims relating to the Marks in November 2022 and then told CIS the amendment was no longer needed. (See Costantino Tr. 79:13–23.)

Based on the foregoing, the Court finds that ConsumerDirect could not credibly claim after May 26, 2022, that it had an existing agreement with CIS to continue to bring claims on behalf of idlock.com and creditmonitoring.com. ConsumerDirect knew by May 26, 2022, that it did not have an agreement relinquishing CIS's exclusive authority to bring this action based on the Marks. In order to obtain the authority to continue pursuing its claims, ConsumerDirect made subsequent, urgent requests to CIS to sign

[8] Mr. Costantino's email to Mr. Reger a few days later contradicts this story. (Dkt. No. 208, Ex. 17, at 3.) Mr. Constantino's email suggests that it was his impression that this was a completely new amendment, not one that was already signed. (See id.)

over a "formal grant" of such rights. It would not have done so had it believed it already had such rights. These communications establish that it knew it had no agreement with CIS to prosecute the claims based on the Marks. Despite knowing that it had no legal authority to continue prosecuting the claims related to the Marks, it obtained settlements with the alleged infringers, did not dismiss its claims relating to the Marks until months later, and still later claimed and continues to claim that its authority stemmed from a written agreement.

Based on ConsumerDirect's actions, Array asks the Court to grant terminating sanctions or an adverse inference instruction in the alternative. (Supplement at 4–5.) In addition, Array asks for monetary sanctions. (Id. at 5–6.)

Given the factual record, the Court finds that the 2020 CIS Amendment did not exist. Thus, ConsumerDirect committed fraud on the court by continuing to lie about the existence of the CIS Amendment in its sworn declarations and depositions. Accordingly, under its inherent authority, the Court finds that an adverse inference instruction, attorneys' fees and costs for bringing this Motion for Sanctions, and payment of expert fees for the Forensic Report are appropriate. Because ConsumerDirect voluntarily dismissed the claims attached to the infringing Marks, the Court finds that terminating sanctions are unwarranted given that the remaining claims are unrelated to ConsumerDirect's fraud on the court.

The Court will state the following adverse inference instruction to the jury.

> Where a witness deliberately testifies untruthfully about something important, you may choose not to believe anything that witness says. On the other hand, if you think the witness testifies untruthfully about some things but tells the truth about others, you may accept the part you think is true and ignore the rest.
>
> In evaluating the credibility of David Coulter and Steve Reger, you should be aware of the following: In filings made with the Court in this case, ConsumerDirect falsely claimed that it owned intellectual property rights that actually belonged to a company called Consumer Information Systems, or "CIS." In its filings with the Court, including sworn declarations signed by Coulter and Reger under penalty of

perjury, ConsumerDirect claimed that CIS signed a document giving ConsumerDirect authority to file claims on behalf of CIS. The Court finds based on the factual record that there was no such document and that ConsumerDirect, Coulter, and Reger fabricated that document, backdated it, and then lied to the Defendants and to the Court under oath.

Based on the foregoing, you may disregard the testimony of Coulter and Reger in its entirety. However, as noted above, if you find that Coulter or Reger testify truthfully as to some matters, you may accept the testimony as to those matters.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion. The Court grants Array ten (10) days to brief the issue of the amount of attorneys' fees and costs for bringing this Motion. ConsumerDirect will have seven (7) days to file a response.

IT IS SO ORDERED.