

3. In *Optrics v. Barracuda Networks Inc.*, 2021 WL 411349, 17-cv-04977-RS (N.D. Cal. Feb. 4, 2021), Magistrate Judge Thomas S. Hixson granted Defendant's motion for monetary sanctions against Plaintiff and its former counsel to compensate Defendant for fees and costs incurred as a result of Plaintiffs' prolonged discovery misconduct and repeated violations of court orders.

In this dispute involving claims and counterclaims for trademark infringement, breach of contract, and deceptive business practices, Plaintiff's "failures to comply with discovery orders and obligations were protracted and plentiful, with the problems going on for over a year." *Id.* at *2. Issues emerged early on, as Plaintiff's initial data collection efforts were limited to self-collection, and Plaintiff failed to retain an e-discovery vendor until approximately two months after Defendant had served its first set of document requests.

Moreover, rather than relying on its e-discovery vendor to drive data collection, Plaintiff's custodians "personally ran keyword searches" through their emails using a basic search function, which, as one custodian acknowledged, did not search the content of attachments and printed to PDF only those emails the custodian deemed responsive to Defendant's requests based on their subject line alone. *Id.* at *5. In short, as Magistrate Judge Hixson put it, "[a] client-led search like the one here, where [Plaintiff] had no experience with electronic discovery, was not reasonable." *Id.* at *7.

Additionally, as Plaintiff's Rule 30(b)(6) designee testified, even though Plaintiff knew it was under threat of litigation with Defendant since 2013, it never issued a litigation hold instructing its employees not to delete any data related to Defendant. Similarly, prior to 2017, Plaintiff had "no system in place for archiving emails," and "[e]ven when using [archiving software], individual backups were retained for only 30 days," a policy that remained in place "[e]ven after months of discovery disputes." According to Magistrate Judge Hixson, Plaintiff's "failure to put in place a litigation hold or even to check whether it could extend the 30-day retention period for its data storage software was a substantial violation of its duty to preserve documents and potentially led to a loss of relevant data." *Id.* at *13.

Magistrate Judge Hixson described Plaintiff's repeated failures to comply with its discovery obligations and the court's discovery orders, despite numerous extensions of its time to comply with the same. Plaintiff failed to produce all of the documents it had agreed to produce and failed to adequately prepare its witnesses for document custodian 30(b)(6) depositions. *Id.* at *3. Plaintiffs also failed produce a privilege log and declarations explaining why certain categories of documents do not exist. *Id.* at *6. Ultimately, Magistrate Judge Hixson gave Defendant "the green light to move for sanctions," and Defendant did so. *Id.* at *4.

Based on the Plaintiff's discovery conduct, which could be traced back before the litigation, continued throughout discovery, and represented a "flagrant indifference" to the court's orders, Magistrate Judge Hixson concluded that "[s]anctions [were] warranted here, both under Rule 37 and pursuant to the Court's inherent power." *Id.* at *6. Magistrate Judge Hixson found that Plaintiff "both unreasonably delayed and also prevented the completion of full discovery" and constituted bad faith. *Id.* at *6-7. In particular, Magistrate Judge Hixson held that because Plaintiff's conduct "forced [Defendant] to incur additional attorneys' fees" and "forced the Court to expend considerable resources beyond what was necessary," "monetary sanctions [were] clearly warranted[.]"

Magistrate Judge Hixon next turned to the amount of fees to be awarded. He noted that fee awards are subject to two conditions under Fed. R. Civ. P. 37(b)(2)(C): They must be limited to fees directly resulting from the violation and must be reasonable. *Id.* at *8. Defendant argued that it had incurred numerous categories of fees as a result of Plaintiff's conduct, including fees for reviewing Plaintiff's deficient productions, custodial depositions, motion practice and court hearings, nonparty discovery, and bringing the motion for sanctions. *Id.* at 7. Magistrate Judge Hixon addressed each of these categories, awarding the full amount requested for some and half of the fees requested for others. *Id.* at *9-10. Ultimately, Magistrate Judge Hixon awarded fees and costs to Defendant in the amount of \$202,035, which he concluded was "a reasonable and appropriate deterrent given the extraordinary discovery misconduct and repeated violations of Court orders in this case." *Id.* at *19. Further, because, in Magistrate Judge Hixon's view, "both [Plaintiff] and its former counsel failed in their responsibilities," he imposed these monetary sanctions "jointly and severally" against Plaintiff and its former counsel. *Id.* at *21-22.