

2. An opinion from the Northern District of California sanctioning a defendant's former outside counsel for failing to adequately supervise the defendant's discovery responses.

In *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 16-cv-06370-EJD (VKD), 2020 WL 2838806 (N.D. Cal. June 1, 2020), U.S. Magistrate Judge Virginia K. Demarchi of the Northern District of California issued sanctions against one Defendant's former outside counsel for failing to adequately supervise the Defendant's discovery responses and finding that counsel's withdrawal from representation did not substantially justify its failure to supervise.

In this postjudgment collections action, Plaintiff submitted document and interrogatory requests directed to enforcement of its judgment. Unsatisfied with one Defendant's responses, Plaintiff had filed a motion to compel and argued, among other things, that the Defendant's counsel (who signed the responses) had not taken a sufficiently active role in supervising the Defendant's collection and production of documents. *Id.* at \*2. Defendant acknowledged that its counsel had not personally collected documents but had instead provided guidance to Defendant about what to collect for production. In response to the motion, the Court ordered Defendant to "submit a declaration from a person with knowledge describing with specificity how [Defendant] conducted a search for documents responsive to [Plaintiff's] post-judgment document requests." Defendant did not do so, indicating that it was "unable to locate any individual competent to sign a declaration" to comply with the Court's order. *Id.* at \*3.

Plaintiff moved for sanctions against both the Defendant and its counsel, citing Federal Rule of Civil Procedure 26(g)(1)(A) and arguing that Defendant's counsel falsely certified Defendant's interrogatories and document requests as complete and accurate. Plaintiff sought monetary sanctions alongside enhanced discovery supervision by Defendant's counsel. *Id.* at \*3. Magistrate Judge Demarchi quickly dismissed Plaintiff's primary argument, explaining that Rule 26(g)(1)(A) applies only to initial disclosures, not discovery responses.

However, Magistrate Judge Demarchi also considered Plaintiff's arguments under Rule 26(g)(1)(B), which provides that counsel's signature on a discovery response operates as a certification by counsel that the discovery response is (i) consistent with the Federal Rules of Civil Procedure and warranted by existing law, (ii) not interposed for an improper purpose, and (iii) neither unreasonable nor unduly burdensome or expensive. Plaintiff had argued generally that Defendant's counsel failed to take steps to ensure that Defendant complied with Plaintiff's discovery requests.

Magistrate Judge Demarchi noted that "Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." *Id.* at \*4 (quoting Fed. R. Civ. P. 26 advisory comm. note, 1983 amdt., subdivision (g)). However, she agreed with Plaintiff that counsel "cannot fulfill its obligations under Rule 26(g) if it does not know, and does not inquire into, what [Defendant] did to search for responsive documents or whether [Defendant] followed its advice." *Id.* at \*5. "It is not enough for counsel to provide advice and guidance to a client about how to search for responsive documents, and then not inquire further about whether that advice and guidance were followed."

Magistrate Judge Demarchi did not “conclude that counsel must always personally conduct or directly supervise a client’s collection, review, and production of responsive documents,” but she found that the circumstances presented by Plaintiff’s motion led to the conclusion that Defendant’s counsel did not make a reasonable effort to ensure that Defendant produced all the documents responsive to Plaintiff’s requests and therefore violated its obligations under Rule 26(g)(1)(B). *Id.* at \*5-6. In particular, Magistrate Judge Demarchi held that the situation had merited additional care because Defendant and its counsel knew the Court and Plaintiff were “concerned about steps [Defendant] might take to frustrate enforcement of the judgment against it.” Nevertheless, counsel acknowledged that it did not know what decisions Defendant made about how to proceed with document collection or how it conducted the search for responsive documents.

Having found a violation of Rule 26(g), Magistrate Judge Demarchi noted that she must impose “sanctions for violation of counsel’s certification obligations unless it finds ‘substantial justification’ for the violation.” *Id.* at \*6. In this regard, counsel cited a pending motion to withdraw as substantial justification for its supervisory failure. *Id.* at \*7. Despite claiming that it could not fully respond as facts and communications related to its oversight were “confidential, privileged, and potentially prejudicial to [Defendant],” counsel’s brief also asserted that “ ‘non-confidential and non-privileged information’ ” demonstrate[d] [its] compliance with Rule 26(g).” Therefore, Magistrate Judge Demarchi found, by the terms of their own brief, counsel admitted that they were not “prevented from complying with its duty of reasonable inquiry with respect to the document production at issue.”

Finding no substantial justification, Magistrate Judge Demarchi imposed sanctions. First, noting that counsel no longer represented Defendant, Magistrate Judge Demarchi declined to require former counsel to actively supervise Defendant’s collection, review, and production of documents. Doing so would have been “inconsistent with the order of withdrawal and ineffective, given the presiding judge’s findings in support of [former counsel’s] motion to withdraw.” Rather, Magistrate Judge Demarchi ordered Defendant’s new counsel of record to ensure compliance with Defendant’s discovery obligations. Magistrate Judge Demarchi also imposed monetary sanctions jointly against Defendant and its former counsel, directing payment for attorneys’ fees and costs for the motions and hearings related to the violations at issue.