UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 10-1333 JVS (MLGx)	Date	January 20, 2012
Title	FTC v. Lights of America Inc., et al.		

Present: The Honorable	James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)
Order Denying Defendants' Motion for Sanctions (Fld 11-30-11)

Defendants Lights of America ("LOA"), Usman Vakil, and Farooq Vakil (collectively "Defendants") move this Court to issue sanctions against Plaintiff Federal Trade Commission ("FTC") for the FTC's failure to implement a litigation hold in this matter when litigation became reasonably foreseeable. (Joint Stip., Docket No. 139.) Defendants allege that the FTC's failure to implement a litigation hold resulted in spoliation of evidence. Defendants seek terminating sanctions, or in the alternative, an adverse inference sanction. (Id. 2.) The FTC opposes the Motion.[1] For the following reasons, the Motion is DENIED.

I. Background

The underlying action in this case is a civil complaint brought by the FTC against Defendants for violations of section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." The FTC alleges that Defendants deceptively marketed LOA's LED lamps by overstating their claimed light output and lifetime, without substantiation. (First Amended Compl. "FAC" ¶¶ 90-95, Docket No. 42.) The FTC contends that these allegations are corroborated by independent test results published by the Department of Energy ("DOE") and Defendants' own testing. (Joint Stip. 2.)

[1] FTC has opposed this Motion via the Joint Stipulation, pursuant to Local Rules 37-1 and 37-2.

proceedings."[2] Leon, 464 F.3d at 958 (quoting Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995)). In determining whether dismissal is warranted, the Court must weigh 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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

when future litigation is "probable," which means "more than a possibility." Realnetworks, Inc. v. DVD Copy Control Ass'n, 264 F.R.D. 517, 524 (N.D. Cal. 2009) . In this case, the FTC issued a CID to LOA to determine whether LOA could substantiate its claims regarding its LED products. At oral argument, LOA argued that this CID should have triggered the FTC's own internal litigation hold because it was a "pre-litigation, discovery CID," and not an "investigatory CID"; however, a sworn FTC declaration makes clear that the FTC uses CIDs to obtain information "in furtherance of" its investigations. (Declaration of Robert S. Kaye "Kaye Decl." ¶ 3, Docket No. 139-37.) After receiving information in response to a CID, the FTC evaluates that data to determine whether an investigation warrants enforcement action. (Id.) In LOA's case, the FTC needed to evaluate LOA's response to the CID to determine whether LOA's claims were substantiated before it could decide whether the investigation warranted enforcement action. Because many FTC investigations involve the use of a CID conclude without litigation, the issuance of a CID does not make litigation "probable." LOA argues that, in this case, litigation was probable when the FTC issued the CID because at that point, the FTC already possessed the CALiPER test results for certain LOA products, which, LOA argues, put the FTC on notice of LOA's potentially false or unsubstantiated claims. Further, LOA asserted during argument that the FTC operates as a referral agency, prosecuting the claims referred to it from the DOE. However, the FTC is an independent agency that proceeds with enforcement action only once it has completed its own investigation. (See Kaye Decl. ¶¶ 3-6.) While the CALiPER testing suggested that certain LOA products did not perform at advertised levels, the testing did not answer the substantiation inquiry. The FTC needed to obtain information from LOA, in response to the CID, before it could determine whether LOA substantiated its claims. In sum, litigation was not "probable" at the time the FTC issued the CID.

Additionally, while the FTC's privilege logs may tend to show that the FTC conducted its investigation of Defendants "in anticipation of litigation," the FTC has since revoked its work product claim and has produced these documents to the extent they do not assert another privilege over them. (Joint Stip. 14.) The FTC asserts that the initial work product designation was overinclusive and was asserted by then-new trial counsel who had not worked on the matter prior to implementation of the litigation hold. (Joint Stip. 14.) The Court does not find that the 2011 privilege log, which has since been revised to exclude the documents related to the investigation, bears significantly on

the issue of whether the FTC foresaw litigation in 2009.[6] Accordingly, the FTC was not obligated to impose a litigation hold at the beginning of the full-phase investigation or the issuance of the CID.[7]

While the FTC erred in failing to place Ms. Mack and Mr. Burton under the litigation hold in April 2010, Defendants have not shown that this likely resulted in the loss of evidence. Defendants contend that the absence of the litigation hold on Ms. Mack and Mr. Burton has caused Defendants prejudice because the FTC cannot produce a complete set of its communications with the DOE and its contractors, including PNNL. (Joint Stip. 9.) However, Defendants have not substantiated this assertion. Mere speculation that documents must have been destroyed in the absence of a litigation hold is insufficient to show spoliation. Kinally, 2008 WL 4850116, at * 6. Moreover, in Kinnally

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 10-1333 JVS (MLGx)

2. Whether the FTC's 45-Day Auto-Delete Policy Resulted in Spoliation

While Defendants contend that the FTC's auto-delete policy caused the deletion of email communications relevant to Defendants' claims and defenses (Joint Stip. 21), the policy provides for the proper storage of communication subject to a litigation hold, and Defendants have not produced any evidence of spoliation due to this policy. The FTC's E-Discovery Guidelines provide that relevant electronically stored information ("ESI") must be preserved in the Outlook Archive, and that duplicates must be deleted. (Shortnacy Decl., Ex. R.) Accordingly, the FTC's auto-delete policy is consistent with its duty to preserve relevant material.

The FTC's E-Discovery Guidelines and the archiving practices employed by the FTC attorneys working on this case, discussed infra section III.A.1, show that the FTC's policies and practices were consistent with its duty to preserve relevant evidence. Moreover, to the extent that the auto-delete policy caused the inadvertent loss of any relevant email correspondence, that is not a sanctionable offense. Federal Rule of Civil Procedure 37(e) in4 -1.1674 TD.0003 1LOlET2547.0007 Tc "[a]bs -1..0018 Tw31-Day

because it did not have possession or control over their documents. MGA Entm't, Inc. v. Nat'l Prods. Ltd., 2011 WL 4550287, at *2 (C.D. Cal. Oct. 3, 2011). "The party seeking production of the documents . . . bears the burden of proving that the opposing party has such control." Id. (quoting United States v.

relevant documents. The FTC responded to Defendants' requests for production by identifying the employees who worked on the LOA matter, and then each person completed a file inventory form to identify whether and where they stored documents related to this matter. (Nelson Decl., Ex. U, Kaye Dep. p. 187-189.) Defendants have not given any reason why this collection method was inadequate in producing relevant documents.

In sum, the Court finds that a search of the FTC's electronic information systems was not necessary for the FTC to satisfy its duty to preserve and produce relevant evidence.

B. The Appropriateness of Sanctions

In this case, there is no evidence that the FTC "engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings." Leon, 464 F.3d at 958 (quoting Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995)). Because the Court finds no evidence of the FTC's purposeful wrongdoing, the Court declines to levy a terminating sanction. Further, there is insufficient evidence to show that the FTC spoliated relevant documents or, to the extent that any relevant document was inadvertently lost, that Defendants suffered any prejudice at a result. Accordingly, an adverse inference is also unwarranted.

IV. Conclusion

For the foregoing reasons, the Motion is DENIED.

IT IS SO ORDERED.

The Court directs counsel to meet, confer and submit, forthwith, a Stipulation and proposed Order setting forth a briefing schedule and hearing date for any summary judgment motions to be filed.

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