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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OPTRICS INC,
Plaintiff,
v.
BARRACUDA NETWORKS INC,
Defendant.

Case No. [17-cv-04977-RS](#) (TSH)

**ORDER GRANTING MOTION FOR
SANCTIONS**

Re: Dkt. No. 234

United States District Court
Northern District of California

Optrics Inc. filed its complaint against Barracuda Networks Inc. on August 27, 2017 and its Second Amended Complaint (“SAC”) on April 26, 2018. ECF Nos. 1, 51. Barracuda filed its Answer and Counterclaims to the SAC on July 26, 2018, ECF No. 63, and its Amended Counterclaims (“ACC”) on June 16, 2020, ECF No. 307. It asserted counts for declaration of trademark ownership, declaration of domain name ownership, and breach of contract under the parties’ 2013 Reseller Agreement. After Optrics failed to comply with several discovery orders in this matter, the Court authorized Barracuda to move for sanctions, and it did so. ECF No. 234. Optrics filed an opposition to the Motion for Sanctions (the “Sanctions Motion”), ECF No. 286, as did Optrics’ former counsel, ECF Nos. 288, 289. Barracuda filed a Reply, ECF No. 297, as did one of Optrics’ former counsel, ECF No. 305. The parties settled their underlying dispute on January 25, 2021, ECF No. 358, but the settlement does not moot the request for monetary sanctions, ECF No. 359. For the reasons set forth below, the Court **GRANTS** the Motion for Sanctions.

I. BACKGROUND

Barracuda is an American company that provides network security products and services for data storage and recovery, content security, and networking application and delivery. Optrics

1 is a Canadian engineering firm specializing in information technology and computer networks.
2 Optrics was a reseller of Barracuda products and services over a thirteen-year period until the
3 relationship was terminated in May 2017. ACC ¶ 27. In 2013, Barracuda and Optrics entered into
4 a reseller agreement which, among other things, set forth the terms by which Optrics could
5 purchase various products and support services from Barracuda and resell them to third parties
6 under the banner of Cudamail, an anti-spam filtering service whose core ran on Barracuda
7 hardware and software. ACC ¶¶ 28-29. In August 2017, Optrics filed suit against Barracuda,
8 bringing trademark, contract, and other claims stemming from allegedly unfair and deceptive
9 business practices by Barracuda during the parties' thirteen-year business relationship. After
10 multiple rounds of motions to dismiss, Barracuda answered Optrics' SAC on July 26, 2018, and
11 brought three counterclaims of its own, two for declaratory relief, and one for breach of contract.
12 ECF No. 63. Months of discovery disputes and discovery violations by Optrics began in June
13 2019. On February 11, 2020, with discovery still mired in disputes, the parties stipulated to
14 Optrics dismissing its SAC with prejudice. ECF No. 225. Two days later, on February 13,
15 Optrics' counsel, Herbert L. Terreri and Grace R. Neibaron, moved to withdraw after being
16 terminated by Optrics. ECF No. 227. Barracuda filed its Sanctions Motion on February 25. The
17 Court granted the Motion to Withdraw on February 28, ECF No. 241, and granted Barracuda leave
18 to amend its counterclaims on June 11, ECF No. 303. The core allegation that undergirds the
19 counterclaims is Barracuda's assertion that Optrics sold or licensed, or attempted to sell or license,
20 Barracuda's Cudamail Trademark and Cudamail URL (the "Cudamail IP") to j2 Global, Inc. in
21 violation of the 2013 Reseller Agreement between the parties.

22 **A. Optrics' Violations of Court Orders**

23 Optrics' failures to comply with discovery orders and obligations were protracted and
24 plentiful, with the problems going on for over a year. Barracuda served its first set of document
25 requests on March 21, 2019. Decl. of B. Ostergaard in Supp. of Optrics' Opp'n to Sanctions Mot.
26 ("Ostergaard Opp'n Decl.") ¶ 13, ECF No. 285-6. The issues began early on. Optrics' initial data
27 collection efforts were limited to self-collection by Optrics' partners. Declaration of Richard
28 Cheng, ECF No. 232-6, ¶ 10. Only in May 2019 was an e-discovery vendor retained (CloudNine),

1 but it did not manage the data collection effort either, which continued to be self-collection.
2 Ostergaard Opp'n Decl. ¶ 13. Magistrate Judge Elizabeth D. Laporte noted in a June 28, 2019
3 order that Optrics had failed to join in two discovery letters prepared by Barracuda and did not file
4 anything in response, "seemingly consistent with [a] pattern of agreeing to supplement and/or
5 amend its discovery responses promptly and then missing the deadlines." ECF 88. Judge Laporte
6 noted that Optrics had also "belatedly" responded to Barracuda's meet and confer efforts and
7 ordered Optrics to "honor its agreements with [Barracuda] by July 11, 2019." To the extent it
8 disputed any of the issues Barracuda raised in its discovery letters, Judge Laporte ordered it to
9 meet and confer no later than July 3 and file a "targeted opposition with supporting
10 documentation," but cautioned that Optrics should recognize that it may be deemed to have
11 waived untimely arguments or objections.

12 On July 11, 2019, Judge Laporte issued another discovery order. ECF 91. She noted that
13 on July 9, Optrics had filed a response to Barracuda's discovery letters, but that the response did
14 not comply with her June 28 order because Optrics filed it a day late and failed to provide
15 supporting documentation as directed. She again noted that Optrics had failed to comply with
16 court and agreed-to deadlines. She rejected Optrics' proportionality argument in opposition to a
17 specific request for production ("RFP") and warned Optrics that it "may not unilaterally limit its
18 production of documents responsive to this request as it pleases." Among other things, she
19 ordered Optrics to produce a privilege log and any remaining responsive documents to
20 Barracuda's first set of requests for the production of documents by August 5, 2019.

21 On July 31, 2019, Optrics requested additional time to complete production, from August 5
22 to August 13, 2019. Second Joint Status Update, ECF No. 95. On August 2, Judge Laporte
23 extended the deadline as requested by Optrics, and directed it to produce a privilege log and all
24 remaining responsive documents to Barracuda's first of requests by August 13. ECF No. 97.
25 Optrics requested another extension on August 13, this time until August 31. ECF No. 100. On
26 August 15, Judge Laporte granted that extension, but warned, "this shall be [Optric]'s final
27 extension without responding to an order to show cause." ECF No. 102. She authorized
28 Barracuda to take a custodian of records deposition of Optrics and ordered Optrics to "certify

1 under penalty of perjury that its document production is substantially complete by August 30,
2 2019.” *Id.*

3 Optrics informed the Court on August 20, 2019 that it was still in the process of retaining
4 an e-discovery firm, the Canadian firm Heuristica. ECF No. 103. On August 30, it informed the
5 Court that it had yet to complete production of internal emails relevant to Barracuda’s RFP 13.
6 ECF No. 110.

7 On September 17, 2019, Judge Laporte issued a discovery order. ECF No. 114. She noted
8 Optrics had not completed production by the August 30 deadline or provided any anticipated date
9 of completion. She deferred ruling on a request by Barracuda for an order to show cause but noted
10 an order “may well be appropriate, in order to address the immediate issues of establishing
11 genuine deadlines for the rest of production after a very belated start by [Optrics].” “The Court,”
12 she wrote, “recognizes that [Optrics] initiated the lawsuit and should have been prepared to engage
13 in discovery but needlessly stalled its production by erroneously claiming that searching and
14 sorting of its data must take place on site at [its] offices [in Canada]. [Optrics] did not retain its
15 Canadian eDiscovery service provider . . . and provide its data to this service provider until after
16 August 20, 2019.” Even though Optrics had requested three extensions to produce documents
17 responsive to Barracuda’s RFPs, it had “failed to complete its production by the deadline it
18 requested every time.” Judge Laporte ordered Optrics to file by September 19, 2019 a schedule
19 that included “specific and realistic” deadlines for the production of documents, *id.* ¶ 1, and
20 ordered it to produce a privilege log and all remaining documents response to Barracuda’s first set
21 of requests by October 15, 2019, absent compelling circumstances demonstrated by a declaration
22 under penalty of perjury, *id.* ¶ 2. She registered “serious skepticism” over Optrics’ claims that it
23 did not have certain responsive documents that Barracuda had argued were missing from
24 production. *Id.* ¶ 3. She ordered that for each of those categories of documents, Optrics must
25 declare under penalty of perjury, “(1) what steps were taken to locate [them]; (2) if no responsive
26 documents exist, explain why they do not exist; and (3) to the extent [Barracuda] raised specific
27 concerns . . . explain why these documents do not exist.” *Id.* Lastly, she reiterated that Optrics
28 “may not unilaterally limit its production of documents responsive to Defendant’s First Set of

1 Requests for the Production of Documents as it pleases.” *Id.* ¶ 5.

2 Following Judge Laporte’s September 17 order, the Parties filed competing discovery
3 letters regarding a range of discovery violations that Barracuda argued Optrics had engaged in.
4 ECF Nos. 116, 117, 118. On October 7, Judge Laporte issued an order on those letters. ECF No.
5 119. She ordered the parties to file a joint discovery letter regarding a request by Optrics that the
6 Court issue letters rogatory to a court in Canada for the release of documents which Optrics had
7 argued could not be released based on Canadian privacy law. Barracuda had requested that the
8 Court issue an order to show cause. Judge Laporte held off on issuing one but directed that if
9 disputes remained after additional meet-and-confer efforts, Barracuda should submit a regularly
10 noticed and briefed motion for sanctions.

11 On October 25, the undersigned issued an order rejecting Optrics’ request for the issuance
12 of letters rogatory.¹ ECF No. 136. The Court noted that Optrics brought its lawsuit in a United
13 States federal court, thus subjecting itself to the rules of this Court, and “[h]aving chose to bring
14 this lawsuit here, [] cannot hide behind Canadian confidentiality laws as a shield to discovery
15 obligations.” *Id.* at 4. The Court ordered Optrics to produce all remaining documents responsive
16 to Barracuda’s first set of requests for production of documents by November 7, 2019. Optrics did
17 not comply.

18 On December 16, 2019, Optrics moved for the Court to modify the case scheduling order
19 and again asked for an extension of discovery, this time a two-month extension of all discovery
20 deadlines. ECF No. 154, 154-2. Judge Seeborg granted the request on January 6, 2020. ECF No.
21 167. However, he warned that “no additional dilatory tactics, stonewalling, or gamesmanship will
22 be tolerated within this two-month extension, and any such behavior will result in sanctions.” *Id.*
23 at 3.

24 On January 14, 2020, at a hearing on several competing discovery letters, Optrics’ counsel
25 informed the Court that its e-discovery counsel, Heuristica, had abruptly withdrawn from
26 representing it the night before. Later that day, the undersigned issue a discovery order. ECF No.

27

28 ¹ Judge Laporte retired from the bench in late 2019. Discovery disputes referred to and pending before her were reassigned to the undersigned.

1 180. The Court, having reviewed the testimony from the document custodian 30(b)(6) depositions
2 which it had previously authorized, found that Optrics had clearly failed to prepare for the
3 depositions and thus substantively impaired the value of those depositions and “thwart[ed] the
4 purpose of the Court’s order.” *Id.* at 4-5. In particular, Optrics had failed to provide the search
5 terms it used to search for documents. One of its two designated witnesses, Ostergaard, lacked
6 knowledge about whether any of Optrics employees used Gmail accounts to conduct business.
7 And Ostergaard had offered testimony contradictory to the other witness, Blair Zingle, about what
8 Optrics had done to respond to certain requests for production, whether preservation notices were
9 sent to Optrics employees, and what, if anything, Optrics did to collect Eudora email, what backup
10 or deletion policies Optrics had, who was responsible for searching the network drive and
11 electronic archiving, and whether the person responsible in fact did so. The Court ordered a
12 renewed Rule 30(b)(6) deposition of Optrics concerning those issues.

13 On January 28, 2020, Barracuda moved to compel Optrics’ compliance with the Court’s
14 September 17, 2019 (ECF No. 114) and January 14, 2020 (ECF No. 180) discovery orders. ECF
15 No. 205. The Court held a hearing on that motion on February 6, 2020. At the time of the
16 hearing, only days from the close of fact discovery, Optrics *still* had not found an e-discovery
17 specialist to take over data storage and management from Heuristica after it abruptly quit. Tr. of
18 Feb. 6, 2020 Mot. Hearing at 3:6-10, ECF No. 224. It still had not complied with the Court’s
19 September 17, 2019 order that it produce a privilege log and all remaining responsive documents
20 to Barracuda’s first set of requests for production. And it still had not complied with paragraph 3
21 of that order, directing it to file a declaration after substantially completing production of each
22 category of responsive documents outlined in that order. Furthermore, Terreri was unwilling or
23 unable to speak intelligently about when, *if ever*, Optrics would substantially complete production.
24 Barracuda informed the Court that Optrics had given it the search terms it used only five days
25 before the hearing, even though the Court ordered they be produced in its January 14 order.
26 Finally, Terreri informed the Court that Optrics’ Canadian counsel had told him that Optrics’ Rule
27 30(b)(6) witness, who was residing in Canada, might not even show up for a deposition planned in
28 the Bay Area on February 12 and 13, because Optrics feared he might be arrested upon arrival in

1 the United States, for reasons that were less than clear. The Court ordered Terreri to inform
2 Barracuda in advance if that was going to be the case, in order to spare Barracuda the expense of
3 having to prepare for the deposition.

4 In its February 7 order following the hearing, the Court noted again that Optrics was in
5 violation of paragraph 2 of the Court's September 17, 2019 order, and that because it did not know
6 if it had substantially completed any of the categories of production outlined in paragraph 3 of that
7 order and had not served the required declarations, it had "utterly defeat[ed] the purpose" of that
8 paragraph. ECF No. 219. The Court wrote:

9 Optrics is now way past any "limited" extension [to the deadlines in
10 the discovery orders], there are no declarations substantiating the
11 delay, and the circumstances could not be any less compelling. The
12 long and short of it is that Optrics unjustifiably delayed providing
13 documents to its ediscovery counsel at Heuristica, who have not
14 completed privilege review and who for the most part have stopped
15 working for Optrics. At the hearing, Optrics was unwilling to predict
16 when it will produce the privilege log it was supposed to produce four
17 months ago. The Court declines to issue another order telling Optrics
18 to comply with the previous order. The previous order was already
19 an order.

20 *Id.* at 1. The Court concluded that Barracuda had exhausted the discovery letter brief procedure
21 and gave it the green light to move for sanctions. *Id.* at 1-2.

22 On February 11, on the eve of the planned Rule 30(b)(6) deposition and mere days before
23 the close of fact discovery, Optrics signed a joint stipulation dismissing all its claims against
24 Barracuda. ECF No. 225. Optrics agreed to allow Barracuda to move forward on its
25 counterclaims and agreed not to oppose any attempt by Barracuda to amend its answer and
26 counterclaims. Judge Seeborg granted the dismissal on February 12. ECF No. 226. The
27 following day, Optrics' counsel moved to withdraw, explaining that they had been terminated.
28 ECF No. 227. In granting the motion, the Court gave Optrics 30 days to find new counsel,
cautioning that "[w]hile Optrics has the right to terminate existing counsel at any time, this right
does not entail a right to an open-ended stay until Optrics finds a suitable replacement." ECF No.
241 at 5.

B. Optrics' Failure to Preserve Electronic Data

Optrics' utter failure to meet discovery deadlines or comply with Court orders was not the

1 end of it. Optrics' Rule 30(b)(6) designee, Shaun Sturby, testified that Optrics knew it was under
 2 threat of litigation with Barracuda since 2013. Decl. of Richard Cheng in Supp. of Sanctions Mot.
 3 ("Cheng Decl."), ¶ 28, Ex. F., Feb. 7, 2020 Dep. of Shaun Sturby ("Sturby Dep.") at 70:11-16,
 4 ECF No. 236-6. Nevertheless, Optrics never issued a litigation hold instructing its employees not
 5 to delete any data related to Barracuda, *id.* at 70:17-71:8; Cheng Decl. ¶ 26, Ex. D, Sept. 7, 2019
 6 Dep. Tr. of Bording Ostergaard ("Ostergaard Dep.") at 113:19-114:1, ECF No. 236-4. Sturby
 7 testified that Optrics started using the email archiving software MailStore only in 2016 or '17, and
 8 that prior to 2016 Optrics had no system in place for archiving emails. *Id.* at 15:7-9, 49:7-11,
 9 70:6-8. He could not recall when Optrics began using StorageCraft to back up individual desktops
 10 but testified that it was not until after 2013, and he could not be sure if Optrics still used
 11 StorageCraft in 2017. *Id.* at 61:5-62:5. Prior to that, Optrics had no desktop backup system, and
 12 employees used only snapshots which are no longer accessible. *Id.* at 82:23-83:6. Even when
 13 using StorageCraft, individual backups were retained for only 30 days, after which the backups
 14 "disappeared," *id.* at 62:13-19, and Sturby testified that he didn't know whether that deletion
 15 feature could be changed or overridden to extend the retention period, *id.* at 80:6-10.² Even after
 16 months of discovery disputes, the retention policy was still 30 days. *Id.* at 54:6-10.

17 **C. Optrics Initially Drove Data Collection Itself**

18 Barracuda served its document requests in March 2019, and Optrics' counsel hired its first
 19 e-discovery vendor, CloudNine, in late April 2019. Cheng Decl. ¶ 25, Ex. C, Feb. 11, 2020 Dep.
 20 of CloudNine ("CloudNine Dep.") at 9:24-10:3, ECF No. 335-10. Ostergaard testified that he
 21 personally ran keyword searches of his emails using a basic search function on his email client,
 22 Eudora, and printed to PDF only those emails which he considered responsive. Ostergaard Dep. at
 23 57:5-14, 80:21-23, 101:19-25. According to Ostergaard, while identifying responsive emails he
 24 did not open or look at the content of emails generally, but instead relied on the subject line of
 25 emails and then sorted by sender. *Id.* at 57:7-58:6, 86:2-10. Furthermore, Ostergaard testified that

26 _____
 27 ² The Court recognizes Ostergaard's testimony that his Eudora emails were lost each time his data
 28 was migrated from PC to PC, but it is not clear from the deposition transcripts in the record that
 Ostergaard's PC was swapped out during the relevant time period. Therefore, the Court does not
 assign as much importance to this testimony as Barracuda would have it do.

1 he believed Eudora’s search feature did not search the content of attachments but only the emails
2 themselves. *Id.* at 103:3-10. He testified that after he uploaded to the network drive emails and
3 attachments which he believed were responsive, some were sent to Terreri’s office, some were
4 uploaded to CloudNine, and some were uploaded to another service whose name he couldn’t
5 recall. *Id.* at 97:22-98:3.

6 Additionally, Zingle testified that Optrics started out by doing self-searches of its
7 MailStore archive as well, before eventually providing the whole MailStore database to
8 CloudNine and subsequently Heuristica. Cheng Decl. ¶ 27, Ex. E, Sept. 27, 2019 Dep. Tr. of Blair
9 Zingle at 30:1-10, ECF No. 236-5. CloudNine, however, testified that it only received native
10 emails in Outlook PST format. CloudNine Dep. at 12:18-23. It also testified that it did not apply
11 any privilege terms to whatever data was provided by Optrics. *Id.* at 20:22-25. Sturby testified
12 that the network drive was never copied to be sent to Heuristica to search for potentially
13 responsive documents, and instead, Optrics itself, this time through Scott Young, again performed
14 searches on the drive to locate responsive documents. Sturby Dep. at 54:17-55:4. Sturby testified
15 that Young performed searches on various Optrics desktops in October 2019 using a basic
16 Windows search function. *Id.* at 60:7-14.

17 II. LEGAL STANDARDS

18 “It is well established that district courts have inherent power to control their docket[s].”
19 *Ready Transp., Inc. v. AAR Mfg.*, 627 F.3d 402, 404 (9th Cir. 2010) (quoting *Atchison, Topeka &*
20 *Santa Fe Ry. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998)). That power includes
21 sanctions and “permit[s] a district court to go as far as to dismiss entire actions to rein in abusive
22 conduct.” *Ready Transp.*, 627 F.3d at 404 (citing *Atchison*, 146 F.3d at 1074). However,
23 “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.
24 A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct
25 which abuses the judicial process.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *see*
26 *also Thompson v. Hous. Auth. of Los Angeles*, 782 F.2d 829, 830 (9th Cir. 1986) (per curiam)
27 (requiring a district court to weigh, among other factors, “the availability of less drastic sanctions”
28 before resorting to dismissal as a sanction). A court may assess attorneys’ fees pursuant to its

1 inherent power as a sanction for the “willful disobedience of a court order,” or “when a party has
2 ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Id.* at 45-46 (quoting
3 *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975)).

4 A court may also impose sanctions pursuant to Rule 37(b)(2) against a party who “fails to
5 obey an order to provide or permit discovery.” Fed. R. Civ. P. 37(b)(2)(A). The Rule “gives a
6 district judge discretion to make such orders . . . as are just in regard to a party’s failure to obey a
7 discovery order, including dismissal.” *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1056
8 (9th Cir. 1998) (quotation marks and citation omitted). The Rule lists a number of sanctions
9 which may be appropriate for a violation of a discovery, and provides, “[i]nstead of or in addition
10 to [those sanctions], the court must order the disobedient party, the attorney advising that party, or
11 both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the
12 failure was substantially justified or other circumstances make an award of expenses unjust.” Fed.
13 R. Civ. P. 37(b)(2)(A), (C). “Moreover, sanctions are appropriate even if the failure to respond
14 was not willful.” *Sabel v. City & Cty. of San Francisco*, 2017 WL 3670783, at *6 (N.D. Cal. Aug.
15 25, 2017) (citing *Lew v. Kona Hosp.*, 754 F.2d 1420, 1426 (9th Cir. 1985)).

16 III. DISCUSSION

17 Sanctions are warranted here, both under Rule 37 and pursuant to the Court’s inherent
18 power. As Judge Seeborg aptly noted, discovery in this matter “necessitated near constant
19 Magistrate Judge intervention and multiple adjustments to the case schedule.” ECF No. 303. And
20 to no avail. Judge Laporte first ordered Optrics to produce a privilege log and all documents
21 responsive to Barracuda’s first set of requests no later than August 5, 2019. Optrics requested
22 additional time to complete production, until August 13, and then requested another extension
23 until August 31. Judge Laporte granted both extensions but warned that no more would be
24 granted without Optrics having to respond to an order to show cause. But then Optrics missed that
25 deadline also. It still had not retained a Canadian e-discovery firm by August 20 and thus failed to
26 completed production by August 31. On September 17, Judge Laporte, noting that Optrics had
27 failed to complete production by any of the prior deadlines, set another cutoff date of October 15.
28 On October 7, amid still ongoing discovery disputes, she ordered Barracuda to file a motion for

1 sanctions if meet-and-confer efforts failed. Optrics missed the October 15 deadline. On October
2 25, the undersigned gave Optrics even more time, ordering it to produce all remaining responsive
3 documents by November 7, but Optrics did not meet that deadline either. It unjustifiably delayed
4 providing documents to its e-discovery counsel at Heuristica, who never completed privilege
5 review and abruptly stopped working for Optrics. On February 6, 2020, months after the
6 November 7 deadline, Optrics *still* had not produced a privilege log or fully complied with Judge
7 Laporte's September 17 order, including that order's directive that it provide declarations
8 explaining why certain categories of responsive documents do not exist. Worse yet, its counsel
9 had no idea of when, *if ever*, production would be completed. By the time the parties briefed the
10 sanctions motion and began settlement efforts with Judge Beeler, well into summer 2020, it *still*
11 hadn't been. Instead, after months of repeated Magistrate Judge intervention, repeated and
12 generous deadline extensions, multiple discovery hearings and orders, and several warnings that
13 sanctions were in the cards, Optrics withdrew its claims at the eleventh hour on the eve of an
14 important deposition. Optrics demonstrated a flagrant indifference to this Court's orders. By
15 dragging its feet and unjustifiably failing to produce documents or a privilege log in contravention
16 of several Court orders over the course of nearly a year, it effectively told the Court it did not care
17 what the Court orders.

18 Also, Optrics failed to put in place a litigation hold, and there is a strong possibility that it
19 lost potentially relevant documents as a result, it had a retention period of only 30 days on its data
20 preservation software and never bothered attempting to extend it, and it initially put its own people
21 in charge of collecting data to be produced. Lastly, Optrics clearly failed to prepare for its Rule
22 30(b)(6) depositions and thus substantively impaired the value of those depositions, forcing the
23 Court to order a renewed deposition. Optrics' conduct clearly warrants sanctions. *See UMG*
24 *Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.)*, 462
25 F. Supp. 2d 1060, 1067 (N.D. Cal. Oct. 24, 2006) ("As soon as a potential claim is identified, a
26 litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant
27 to the action.") (citations omitted); *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1137
28 (N.D. Cal. 2012) ("[I]t generally is recognized that when a company or organization has a

1 document retention policy, it ‘is obligated to suspend’ that policy and ‘implement a “litigation
 2 hold” to ensure the preservation of relevant documents’ after the preservation duty has been
 3 triggered.”) (quoting *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009));
 4 *Grove City Veterinary Serv., LLC v. Charter Practices Int’l, LLC*, 2015 WL 4937393, at *6 (D.
 5 Or. Aug. 18, 2015) (“[W]here a party’s failure to implement a litigation hold results in the
 6 destruction of relevant documents, it can result in sanctions against it.”) (citing *Knickerbocker v.*
 7 *Corinthian Coll.*, 298 F.R.D. 670, 682 (W.D. Wash 2014) (granting motion for sanctions where
 8 defendant failed to impose a litigation hold on documents in its possession, resulting in destruction
 9 of evidence).

10 **A. The Appropriate Sanction**

11 Barracuda had argued that the Court should issue terminating sanctions or preclusionary
 12 sanctions. However, the parties have settled, and those types of sanctions would therefore be
 13 meaningless at this stage. Also, the parties seem to anticipate another form of sanctions, monetary
 14 sanctions, are forthcoming. *E.g.*, Joint Status Update, ECF No. 359 (“Under the settlement terms,
 15 the parties will file a stipulation of dismissal after certain obligations are completed by Optrics and
 16 collection of any sanctions award issued by Judge Hixson.”).³ And indeed, monetary sanctions are
 17 clearly warranted here.

18 “Once a district court makes a finding of bad faith, it has the discretion to award sanctions
 19 in the form of attorneys’ fees against a party or counsel.” *Haeger v. Goodyear Tire & Rubber Co.*,
 20 813 F.3d 1233, 1246 (9th Cir. 2016) (citation and internal quotation marks omitted). Optrics’
 21 multiple discovery violations and repeated failures to comply with Court orders were willful and
 22 in bad faith. *See Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003) (“Disobedient conduct
 23 not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad
 24 faith, or fault.”); *Haeger*, 813 F.3d at 1246 (district court did not abuse discretion in finding bad
 25 faith where party, among other things, “adopted a plan of making discovery as difficult as

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 27
 28 ³ At the February 4, 2021 hearing, the parties confirmed on the record that terminating or preclusionary sanctions are moot in light of the settlement, but that the request for monetary sanctions is still live.

1 possible, providing only those documents they wished to provide, timing the production of the
2 small subset of documents they were willing to turn over such that it was inordinately difficult for
3 Plaintiffs to manage their case”).

4 Optrics has both unreasonably delayed and also prevented the completion of full discovery
5 by, among other things, initially attempting and failing to complete e-discovery on its own without
6 a proficient e-discovery vendor. Optrics initially attempted discovery by having its own partners
7 determine what documents were responsive, and then individually culling data using basic search
8 functions which often times wouldn't even search the content of emails or files and thus would
9 almost certainly have missed responsive data. *See* Cheng Decl. ¶¶ 10-12. A client-led search like
10 the one here, where Optrics had no experience with electronic discovery, was not reasonable. *See,*
11 *e.g., De Abadia-Peixoto v. U.S. Dep't of Homeland Sec.*, 2013 WL 4511925, at *2 (N.D. Cal.
12 2013) (“In the era of e-discovery, attorneys must take ‘responsibility for ensuring that their clients
13 conduct a comprehensive and appropriate document search.’”); *Markey v. Lapolla Indus., Inc.*,
14 2015 WL 5027522, at *19-20 (E.D.N.Y. 2015) (imposing sanctions in part because counsel was
15 “required to conduct a more thorough investigation of the discovery in Plaintiffs’ possession prior
16 to [service]” and “failed to adequately oversee Plaintiff’s document production...”);
17 *Knickerbocker*, 298 F.R.D. at 678 (“Counsel bear responsibility for coordinating their clients’
18 discovery production” and failure to do so may warrant sanctions.). Optrics’ failure to put in place
19 a litigation hold or even to check whether it could extend the 30-day retention period for its data
20 storage software was a substantial violation of its duty to preserve documents and potentially led
21 to a loss of relevant data. Also, Optrics belatedly engaged its first e-discovery specialist,
22 CloudNine, only to replace it with Heuristica in August 2019, only to have Heuristica abruptly
23 quit months later and throw into limbo the state of Optrics’ production all over again. Optrics
24 failed to produce a competent witness to testify regarding its ESI methodologies, failed to comply
25 with numerous discovery orders in spite of repeated warnings to do so, and failed to complete
26 document production or produce a privilege log. Optrics even went so far as entertaining the idea
27 of refusing to send witnesses to the United States to participate in a court-ordered deposition. This
28 conduct has not only forced Barracuda to incur additional attorneys’ fees but has also forced the

1 Court to expend considerable resources beyond what was necessary. Accordingly, the Court will
2 award attorneys' fees and related costs.

3 **a. Amount of Fees**

4 Barracuda's lead counsel, Karineh Khachatourian, states that the following attorneys
5 performed legal work in connection with Optrics' discovery violations at the following hourly
6 billing rates: herself (\$600/hr); Partner Phillip K. Wang (\$555/hr); Associate Nikolaus A.
7 Woloszczuk (\$475/hr); Associate Wanli Chen (\$425/hr); Associate Soyeon Jeong (\$400/hr).⁴
8 Decl. of K. Khachatourian in Supp. of Sanctions Mot. ("Fees Decl.") at ¶ 2, ECF No. 235;
9 Supplemental Fees Decl., ¶ 8, ECF No. 297-1.

10 According to Khachatourian, Barracuda incurred the following categories of fees and
11 related fee amounts:

12 (1)	analyzing Optrics' productions to identify missing categories of documents and formatting issues such as missing metadata and missing email attachments	\$53,304.88
13 (2)	drafting discovery letter briefs and court-ordered discovery status updates regarding Optrics' incomplete discovery responses and violations of court orders as well as related motions to seal due to Optrics' rejected confidentiality designations	\$42,447.32
14 (3)	preparing for and attending numerous court hearings regarding Optrics' incomplete discovery responses and violations of court orders	\$12,908.16
15 (4)	preparing for and taking two court-ordered Rule 30(b)(6) depositions of Optrics regarding its incomplete discovery responses and insufficient document collection efforts as well as deposing Optrics' former e-discovery vendor CloudNine regarding Optrics' insufficient document collection efforts	\$46,849.42
16 (5)	drafting a response to Optrics' request for letters rogatory which the Court denied as "unnecessary" as a condition for Optrics to produce documents in its possession	\$11,739.13
17 (6)	attorneys' fees for legal work performed by Canadian counsel in responding to Optrics' request for letters rogatory	\$12,048
18 (7)	opposing Optrics' December 2019 motion to modify the case schedule, ECF Nos. 154, 167	\$8,447.50

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⁴ Optrics does not challenge the hourly rate of any of Barracuda's counsel. The Court finds the rates reasonable. *See, e.g., Oldoerp v. Wells Fargo & Company Long Term Disability Plan*, 2014 WL 2621202, at *2 (N.D. Cal. June 12, 2014) (\$600 for lead attorney was a reasonable hourly rate for his services); *Rosenfeld v. U.S. Dep't of Justice*, 904 F. Supp. 2d 988, 1001-02 (N.D. Cal. 2012) (hourly rate of \$550 was reasonable for experienced attorney).

1	(8)	moving to quash Optrics' deposition subpoenas to Barracuda's lead trial counsel and to Barracuda's owner, Thoma Bravo LLC	\$22,699.88
2	(9)	obtaining discovery from non-party j2 Global, Inc., including filing a motion to compel in the Central District of California (Civil Action 19-mc-00146-PSG (PJWx)) and also having to oppose j2's motion for reconsideration and ex parte proceedings	\$147,092.99
3	(10)	drafting the motion for sanctions	\$56,064.44
4	(11)	preparing Barracuda's Reply Brief in Support of Motion for Sanctions	\$30,824.52
5	(12)	costs associated with court reporters and transcripts	\$5,233
6	Total		\$449,659.24

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10 Fees Decl. ¶¶ 3-6; Reply Fees Decl. ¶ 8, ECF No. 297-1. Optrics argues that Barracuda's fees are
11 excessive because it fails to show a causal link between its violations and some of the fees
12 claimed.

13 Fee awards, if awarded, are subject to two conditions. *Superior Consulting Servs., Inc. v.*
14 *Steeves-Kiss*, 2018 WL 2183295, at *1 (N.D. Cal. May 11, 2018), *aff'd* by 786 Fed. Appx. 648
15 (2019) (citing Fed. R. Civ. P. 11(c)(2), (4)). The award must be limited to fees directly resulting
16 from the violation, and the fees awarded must be reasonable. Fed. R. Civ. P. 37(b)(2)(C) ("the
17 court must order the disobedient party, the attorney advising that party, or both to *pay the*
18 *reasonable expenses*, including attorney's fees, *caused by the failure*") (emphasis added);
19 *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186, n. 5 (2017) ("Rule-based and
20 statutory sanction regimes similarly require courts to find such a causal connection before shifting
21 fees.") (quoting Rule 37(b)(2)(C)); Civ. L.R. 37-4 ("attorney fees, directly caused by the alleged
22 violation or breach"). A "court can shift only those attorney's fees incurred because of the
23 misconduct at issue. . . [The] causal connection . . . is appropriately framed as a but-for test: The
24 complaining party [] may recover only the portion of his fees that he would not have paid but for
25 the misconduct." *Goodyear Tire*, 137 S. Ct. at 1186-87 (citations and internal quotation marks
26 omitted). "Courts typically determine reasonableness by conducting a lodestar analysis of the
27 hours expended and the hourly rate charged." *Superior Consulting Servs., Inc. v. Steeves-Kiss*,
28 2018 WL 2183295, at *1 (N.D. Cal. May 11, 2018) (citing *McGrath v. Cty. of Nevada*, 67 F.3d

1 248, 252 (9th Cir. 1995)).

2 As a preliminary point, Optrics' argument that the undersigned limited sanctions to only
3 those incurred for those violations of Judge Laporte's September 17, 2019 order is wrong. The
4 Court did no such thing. Simply because the Court explicitly authorized Barracuda to "now move
5 for sanctions" after discussing Optrics' repeated and persistent violations of that particular order
6 does not mean that the Court intended to limit sanctions to only those incurred as a result of those
7 particular violations (though, arguably, all the fees Barracuda claims fall into that bucket, as they
8 were all incurred trying to force Optrics to finish production and produce a privilege log), and
9 nothing in the Court's order suggests that. *See* ECF No. 219. Also, that argument overlooks the
10 multiple other times the Court authorized sanctions.

11 The Court turns now to Optrics' specific objections to Barracuda's categories of fees:

12 (1) Optrics argues that fees incurred analyzing Optrics' productions to identify missing
13 categories of documents, metadata, and email attachments are part of normal discovery.
14 Barracuda counters that this is *not* a normal discovery activity, that parties ordinarily review
15 discovery for substance and "not to identify gaping holes in productions." Reply at 20. It also
16 argues that Optrics made the review more difficult and time consuming because of the poor way it
17 collected and produced documents, including producing emails with broken attachment links.
18 Both sides have a point. In a case with any significant document production, at least some
19 attorney time is spent checking on the completeness of the other side's document production.
20 However, in this case Optrics' discovery abuse and serial violations of Court orders inordinately
21 magnified the burden on Barracuda. Barracuda clearly incurred unnecessary fees sorting through
22 and trying to identify holes in Optrics' shoddy and staggered productions. Optrics complains that
23 Barracuda did not specify with precision the amount of work that "was not otherwise necessary"
24 for purposes of sanctionable costs, but given the nature of the harm inflicted on Barracuda, that
25 demands the impossible. Under the circumstances, it is reasonable to infer that Optrics'
26 misconduct at least doubled the amount of work Barracuda had to perform in this area.
27 Accordingly, the Court awards Barracuda half of these requested fees, for an amount of
28 \$26,652.44.

1 (2) Optrics argues that Barracuda has not shown is entitled to fees incurred drafting discovery
2 letter briefs and court-ordered discovery status updates because it intentionally lumped together all
3 discovery letter briefs into one total sum and didn't separate out briefing prepared in connection
4 with good-faith disputes. Barracuda counters that Optrics "does not identify even one example" of
5 a good-faith dispute, "[a]nd it cannot since BNI was forced to engage because of Optrics'
6 continued failure to comply." Reply at 21. The Court will again split the baby. It is true that the
7 solid majority of discovery briefing in this case related to Optrics' misconduct that is the subject
8 of this sanctions order. But it is also true that Optrics did not lose on every issue presented by that
9 briefing, *see* ECF No. 180 (ruling in Optrics' favor on a few issues), and even in a case without
10 sanctionable misconduct, there is often some discovery briefing. The Court awards Barracuda half
11 of its requested fees, or \$21,223.66.

12 (3) The same is true of the third category of fees. Optrics argues that the majority of discovery
13 disputes were not sanctionable and Barracuda has failed to demonstrate what time was spent
14 preparing and attending court hearings related to sanctionable conduct. But as noted, the solid
15 majority of the discovery disputes and hearings in this case related to the sanctionable conduct that
16 is the subject of this order. The Court awards half of these fees, or \$6,454.08.

17 (4) Optrics next contends that Barracuda should not recover fees and costs for the Rule
18 30(b)(6) depositions regarding Optrics' discovery efforts, arguing that such depositions are "very
19 common" and a "normal party of discovery." However, these particular Rule 30(b)(6) depositions
20 were Court-ordered precisely because of Optrics' sanctionable conduct that is the subject of this
21 order. *See* ECF No. 102. Further, the Court has no trouble concluding that but-for Optrics'
22 flagrant violations of Court orders and its Rule 30(b)(6) witnesses' inability to meaningfully
23 respond during depositions, Barracuda's deposition of CloudNine would not have been necessary.
24 It was not unreasonable for Barracuda to go forward with that deposition when it did.
25 Accordingly, the Court awards the full amount of these fees, \$46,849.42.

26 (5) The Court agrees with Optrics that its request for the issuance of letters rogatory to
27 Canadian courts and its arguments for the necessity of those letters was a good faith dispute and
28 therefore outside of sanctionable costs. The Court denies the amount which Barracuda claims for

1 drafting a response to Optrics' request.

2 (6) Similarly, the fees incurred by Barracuda's Canadian counsel in responding to Optrics'
3 requests for letters rogatory are denied.

4 (7) The Court also denies Barracuda's request for fees related to opposing Optrics' December
5 2019 motion to modify the case schedule. That motion was made in part because of events well
6 outside Optrics' control, and the motion was granted. The Court does not find that motion "was
7 part and parcel" of Optrics' discovery misconduct, as it was made in response to wildfires and
8 power grid shutdowns in the District.

9 (8) The Court allows half of the fees incurred by Barracuda in moving to quash Optrics'
10 deposition subpoenas of Barracuda's lead counsel and its owner, Thoma Bravo. Although Optrics
11 eventually withdrew the subpoena against Bravo because Bravo did not have any relevant
12 information, ECF No. 141, the Court is unable to find that the subpoena was served in bad faith.
13 By contrast, Optrics' service of a subpoena on Barracuda's lead outside counsel was in bad faith.
14 The Court quashed the subpoena because the information sought could be obtained from other
15 sources and because the subpoena easily failed the standard for deposing opposing counsel. ECF
16 Nos. 137. Because Barracuda does not break out the \$22,699.88 by subpoena for these two
17 motions to quash, the Court divides the number in half and awards \$11,349.94.

18 (9) The Court cannot award fees related to Barracuda's obtaining discovery from j2 in the
19 Central District of California. Barracuda served notice of its subpoena on j2 on March 19, 2019
20 (*see* ECF No. 286-5), two days before it served its first set of RFPs on Optrics (*see* Ostergaard
21 Decl., ¶ 13, ECF No. 285-5) and several months before Barracuda first raised any discovery issues
22 with the Court. *See* ECF Nos. 83, 87. Thus, the Court cannot conclude that Optrics' discovery
23 misconduct was the but-for cause of Barracuda's discovery practice against j2 in the Central
24 District.

25 (10) The Court awards the full amount of fees Barracuda incurred in drafting the
26 Sanctions Motion, \$56,064.44.

27 (11) The Court awards the full amount of fees Barracuda incurred in preparing its Reply
28 brief, \$30,824.52.

1 (12) The Court awards half the costs associated with court reporters and transcripts,
2 \$2,616.50, for the same reason as described above for category 2.

3 In total, the Court awards fees and costs in the amount of \$202,035.00. This sanction is a
4 reasonable and appropriate deterrent given the extraordinary discovery misconduct and repeated
5 violations of Court orders in this case.

6 **b. Who Should Pay**

7 Optrics spends a good portion of its Opposition attempting to shift blame away from itself
8 by asserting that its former counsel, and in particular Terreri, are responsible for all of its
9 discovery violations. According to Optrics, it complied with all of Terreri's instructions during
10 discovery and relied on its U.S. counsel and followed their advice. Optrics argues that Terreri and
11 Neibaron "began violating court orders as soon as discovery began, [but] the serious nature of
12 these violations was unknown to Optrics," and Optrics did not know and would not have
13 appreciated the significance of those violations. In Ostergaard's declaration, Ostergaard testified
14 that Terreri and Neibaron "never provided specific instructions or a document preservation or
15 back-up plan," and that they "initially gave Optrics only general suggestions, including sending a
16 link to an article about 'self-collection.'" Decl. of Bording Ostergaard in Supp. of Optrics' Opp'n
17 ¶¶ 12-13, ECF No. 286-1. According to Ostergaard, Terreri and Neibaron retained CloudNine, but
18 neither they nor CloudNine actively managed the data collection process. *Id.* ¶ 13. Ostergaard
19 testified that Terreri and Neibaron did not explain to Optrics the serious ramifications of violating
20 the Court's orders. *Id.* ¶ 18. They designated Ostergaard and Zingle as Optrics' 30(b)(6)
21 witnesses, but then did not adequately prepare them for their depositions. *Id.* ¶ 20. According to
22 Ostergaard, he expected Terreri and ESI attorneys to produce a privilege log to Barracuda before
23 the February 6 discovery hearing. *Id.* ¶ 23. He testified that Terreri advised Optrics that, "in order
24 to minimize potential monetary discovery sanctions, it should dismiss its SAC in its entirety," and
25 Optrics was uncomfortable doing so because it still desired to pursue claims. *Id.* ¶ 27. However,
26 Terreri explained that Optrics could still get the desired outcome if it prevailed against
27 Barracuda's counterclaims. *Id.* Ostergaard testified that Terreri never showed the stipulation to
28 anyone at Optrics and never informed Optrics that he had also agreed to allow Barracuda to amend

1 its counterclaims. *Id.* In its Opposition, Optrics argues that because the Court berated Terreri for
 2 his “dereliction of duty,” he discovered that “personal sanctions” were forthcoming. Opp’n at 13,
 3 ECF No. 286. According to Optrics, Terreri, put “on his heels” and in a haste to avoid sanctions,
 4 attempted to appease Barracuda at Optrics’ expense and negotiated a “one-sided stipulation . . .
 5 that was never shown to Optrics.” *Id.* at 1, 13. “That egregious stipulation,” Optrics argues,
 6 “hand-cuffed Optrics into dismissing all of its claims without receiving anything in return, while
 7 allowing [Barracuda] to continue seeking recovery on its counterclaims.” *Id.* at 1.

8 Terreri tells quite a different story.⁵ According to Terreri, he advised Optrics that Terreri
 9 Law could not and would not manage the collection of Optrics’ electronic data, and that it did not
 10 have the software or the personnel to manage the e-discovery. Supplemental Decl. of Terreri in
 11 Supp. of Reply to Optrics’ Opp’n (“Terreri Decl.”) ¶ 2, ECF No. 305-1. He testified that Optrics
 12 informed him that it intended to self-collect “and the risks were discussed,” and that Optrics
 13 “insisted on self-collection.” *Id.* at ¶ 4. “Optrics as a tech company assured [Terreri] that it would
 14 fully and completely search for and provide the responsive documents to the third[-]party vendor
 15 initially retained, CloudNine.” *Id.* Contrary to Optrics’ assertion, Terreri testified that “the
 16 potential of issue preclusion, terminating sanctions, and monetary sanctions were specifically and
 17 frequently discussed throughout the summer of 2019 through the termination of Terreri as counsel
 18” *Id.* ¶ 5. He testified that he told Optrics that Heuristica should collect and process all
 19 categories of document requests “as the most certain way to defend the completeness of its
 20 production and to locate any documents inadvertently not produced,” but that “Optrics did not
 21 authorize that work, and ESI attorneys were retained and asked to review and assist with
 22

23 ⁵ The Court **OVERRULES** Optrics’ objections (ECF No. 331) to Terreri’s Supplemental
 24 Declaration (ECF No. 305-1). Terreri was hamstrung in responding to Barracuda’s motion until
 25 Optrics filed its opposition throwing him under the bus. *See* California State Bar Formal Opinion
 26 No. 1997-151 (“even after withdrawing from the case or his employment is otherwise terminated,
 27 Attorney must continue to maintain Client’s confidential information, unless Client contends that
 28 the request for sanctions is based on conduct for which Attorney is solely responsible, and
 Attorney disputes this contention.”). Only after Optrics filed its opposition seeking to saddle its
 former counsel with all the blame was Terreri free to defend himself from Optrics’ assertions that
 he was to blame. *See id.* (“Attorney may *then* reveal Client’s confidential information to the
 extent necessary to defend himself against the client’s claim that he was responsible for the
 sanctions.”) (emphasis added). Terreri filed his supplemental declaration in a timely fashion.

1 defending the collection methods used as being adequate, in addition to other eDiscovery
2 assistance.” *Id.* ¶ 8. According to Terreri, ESI attorneys advised him that they had provided
3 Optrics with an estimate of \$50,000 as the cost of producing a privilege log, but Optrics did not
4 authorize the work. *Id.* ¶ 10. Terreri claims he spoke with Optrics about the need to authorize that
5 this work be performed and reiterated that, until the privilege log was created, it would remain in
6 violation of the Court’s order. *Id.* He claims he did not withdraw from representing Optrics
7 because he believed that Optrics would authorize the work and “had the means to come into
8 compliance with the [Court’s] orders.” *Id.* ¶ 11. However, Optrics never authorized the work
9 necessary to create a privilege log. *Id.* ¶ 16. Terreri insists the he did not advise Optrics to
10 dismiss the SAC to minimize potential discovery sanctions, and that there were “other compelling
11 reasons which were considered in deciding to dismiss the SAC in its entirety.” *Id.* ¶ 17.

12 Addressing Optrics’ assertions that it never saw the proposed stipulation, Terreri testified that
13 paper copies of the stipulation and all modifications and the final version were printed and shown
14 to Ostergaard and Young in a meeting at Terreri’s offices, and that each version was discussed.
15 *Id.* ¶ 20. Finally, Terreri testified that he expressly counseled Optrics “not to count on” a
16 guarantee that the Court would stay proceedings if Optrics discharged counsel, and that “if they
17 got one it would be unlikely to be lengthy.” *Id.* ¶ 21.

18 Faced with these competing statements and different versions of events, the Court has no
19 easy way to know who is telling the truth and who is lying on each specific point. But there is
20 also no need. What is certain is that both Optrics and its former counsel failed in their
21 responsibilities. Optrics cannot simply wash its hands of any responsibility by claiming that it
22 didn’t know what it was doing and Terreri and Neibaron never told it what to do. Optrics’ failure
23 to preserve evidence predated its outside counsel’s involvement by years. And Optrics’ disastrous
24 self-collection of documents was done by Optrics and its partners. Optrics also had Canadian
25 counsel. It was its Canadian counsel, not its U.S. counsel, who told Optrics that its data had to
26 stay and be searched in Canada. *See* July 22, 2019 Joint Status Update, ECF No. 94. This
27 necessitated hiring a Canadian e-discovery vendor, which took things to some extent out of U.S.
28 counsel’s hands. *See* Terreri Decl. ¶ 27 (“The full Heuristica database had a login for Terreri, but

1 the program and interface were foreign and Terreri was relying on Optrics to authorize ESI
 2 attorneys and Heuristica to work together to produce the documents and privilege log.”). It also
 3 shows that Optrics wasn’t getting e-discovery advice from U.S. counsel alone, and U.S. counsel
 4 wasn’t alone in calling the shots. Optrics’ excuse that it didn’t know the serious implications of
 5 disobeying court orders strains credulity—even if this is Optrics’ first experience with U.S.
 6 litigation, Canada has courts and any reasonable person understands that a court’s orders demand
 7 compliance. Optrics’ excuses are unavailing. But Optrics wasn’t alone in dropping the ball. The
 8 Federal Rules of Civil Procedure impose an affirmative duty upon lawyers to “engage in discovery
 9 in a responsible manner and to conduct a ‘reasonable inquiry’ to determine whether discovery
 10 responses were sufficient and proper.” *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 4858685, at
 11 *4 (S.D. Cal. Nov. 7, 2008) (quoting Fed. R. Civ. P. 26(g)); Fed. R. Civ. P. 26 Advisory
 12 Committee Notes (1983 Amendment) (“Rule 26(g) imposes an affirmative duty to engage in
 13 pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules
 14 26 through 37.”); *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 12699460, at *23 (C.D. Cal. Feb. 4,
 15 2015) (attorney “had an independent duty to supervise her client’s [discovery] compliance
 16 efforts”); *Steel v. Stoddard*, 2013 WL 12064545, at *11 (S.D. Cal. Feb. 15, 2013), order amended
 17 on denial of reconsideration, 2013 WL 12064546 (S.D. Cal. Apr. 12, 2013) (“The fact that an
 18 attorney may have engaged co-counsel to assist him in the conduct of a case does not relieve that
 19 counsel of record of his duty to supervise all aspects of the litigation.”). It wasn’t enough for
 20 Terreri and Neibaron to simply inform Optrics that they “could not and would not manage the
 21 collection of the electronic data” and then just keep moving for extensions while Optrics botched
 22 production, lost data, and missed deadline after deadline. Accordingly, the Court will impose
 23 sanctions jointly and severally against Optrics and Terreri and Neibaron.⁶

24
 25 ⁶ The Court has reviewed Neibaron’s separate opposition to the Sanctions Motion, ECF No. 288,
 26 and it does not persuade the Court that Neibaron’s participation in the litigation was so limited as
 27 to exclude her from liability. Neibaron’s assertion that she “had limited involvement in the
 28 advising and participating in the e-discovery process,” ECF 288 at 1, is belied by the record.
 Neibaron represented Optrics in discovery by signing subpoenas; attending most meet and confers
 regarding discovery; signing Optrics’ RFAs, interrogatories, and RFPs; attending hearings; and
 filing discovery status reports and extension requests. Reply Decl. of K. Khachatourian in Supp.
 of Sanctions Mot. ¶ 2, ECF No. 297-1. Her opposition, which is not accompanied by a declaration

IV. CONCLUSION

For the aforementioned reasons, Barracuda’s Motion for Sanctions is **GRANTED**. The Court **ORDERS** that monetary sanctions in the amount of \$202,035.00 are awarded in favor of Barracuda and against Optrics and its former counsel, Herbert L. Terreri and Grace R. Neibaron, jointly and severally, to compensate Barracuda for fees and costs incurred as a result of Optrics’ prolonged discovery misconduct and repeated violations of Court orders.

IT IS SO ORDERED.

Dated: February 4, 2021


THOMAS S. HIXSON
United States Magistrate Judge

United States District Court
Northern District of California

under penalty of perjury, states that Neibaron’s principal involvement in the case concerned the subpoenas to Thoma Bravo and Karineh Khachatourian. However, both subpoenas came to nothing because the former was withdrawn and the latter was quashed. This narrow description of Neibaron’s allegedly limited role in the case is radically inconsistent with the \$121,000 in legal fees that Optrics paid specifically for her legal services, *see* Ostergaard Decl., ¶ 29, ECF No. 285-5, which indicates a much broader involvement in the case.