MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (AUGUST 6, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCILWAIN, LLC,
AKA Timothy J. McIlwain, Attorney at Law,

Plaintiff-Appellant,

v.

HAGENS BERMAN SOBOL SHAPIRO LLP,

Defendant-Appellee.

and

STEVE BERMAN, ESQUIRE; ET AL.,

Defendants.

No. 20-15445

D.C. No. 4:18-cv-03127-CW

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted August 4, 2021**
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

McIlwain, LLC ("McIlwain") appeals the district court's grant of summary judgment to Hagens Berman Sobol Shapiro LLP ("Hagens Berman") and revocation of McIlwain's appearance pro hac vice.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review a district court's grant of summary judgment de novo. *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). We review the district court's supervision of attorney conduct for abuse of

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1 McIlwain also seeks to reopen two of the the district court's decisions in *Keller v. Electronic Arts, Inc*, Case No. 2009-cv-1967-CW (N.D. Cal.). Those cases are not properly before this panel and we decline to address these arguments.

McIlwain also purports to appeal the district court's denial of its motion for sanctions, but fails to make any substantive argument in support of this claim. We therefore deem this argument waived and decline to address it. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (we "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief").

Timothy McIlwain argues that if his pro hac vice status is revoked, he should be permitted to appear pro se, but he failed to raise this issue in district court. *See In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) ("Generally, arguments not raised in the district court will not be considered for the first time on appeal.").

discretion. *See Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996); *see also In re United States*, 791 F.3d 945, 955 (9th Cir. 2015) ("We normally review a denial of a motion to appear pro hac vice for abuse of discretion." (quotations and citation omitted)).

The district court properly granted summary judgment to Hagens Berman on McIlwain's breach of contract claim. The parties do not dispute that California law applies. Under California law, the fee-splitting agreement McIlwain seeks to enforce is unenforceable because it is "[c]ontrary to an express provision of law," or "[c]ontrary to the policy of express law." *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.* (*Sheppard Mullin*), 6 Cal. 5th 59, 73 (2018) (quoting Cal. Civ. Code § 1667). No matter whether the New Jersey or the California Rules of Professional Conduct apply, McIlwain's failure to inform and obtain Hart's consent prior to signing the specific fee agreement and proposed settlement violated those rules. *See* Cal. Rules of Pro. Conduct R. 2-200 (1992) ("A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless. . . [t]he client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division[.]"); N.J. Rules of Pro. Conduct R. 1.5(e) (2004) ("[A] division of fee between lawyers who are not in the same firm may be made only if . . . the client is notified of the fee division . . . and . . . the client consents to the participation of the all the lawyers involved[.]"). "California courts have held that a contract or transaction involving attorneys may be declared unenforceable for violation of the Rules of Professional Conduct[.]"

Sheppard Mullin, 6 Cal. 5th 73; *see also Chambers v. Kay*, 29 Cal. 4th 142, 156–58 (2002) (refusing to enforce fee division agreement undertaken without written client consent on ground that arrangement violated Rules of Professional Conduct). Without an enforceable contract, McIlwain has no claim for breach. Moreover, McIlwain fails to challenge the district court's grant of summary judgment on McIlwain's other claims for breach of the implied covenant of good faith and fair dealing and intentional interference with prospective economic advantage, and accordingly, we affirm the decision of the district court granting summary judgment on all grounds.

We also affirm the district court's revocation of Timothy McIlwain's appearance pro hac vice. McIlwain does not seriously dispute that he violated numerous local rules and rules of professional conduct, but instead suggests that these violations "were not of such egregious nature that would warrant revocation of his pro hac vice appearance." Having reviewed the number and severity of McIlwain's violations, we conclude the district court did not abuse its discretion in revoking McIlwain's pro hac vice appearance.

AFFIRMED.[2]

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[2] We deny Hagens Berman's motion to dismiss or summarily affirm.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING MOTION FOR SUMMARY JUDGMENT (FEBRUARY 10, 2020)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MCILWAIN, LLC,

Plaintiff,

v.

STEVE W. BERMAN, ET AL.,

Defendants.

Case No. 18-cv-03127 CW

Before: Hon. Claudia WILKEN, United States District Judge.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendant Hagens Berman Sobol Shapiro LLP (Hagens Berman) moves for summary judgment with respect to all three claims that Plaintiff McIlwain, LLC (McIlwain) has asserted against it. McIlwain opposes the motion. For the reasons set forth below, the Court GRANTS the motion in its entirety.

BACKGROUND

I. Procedural history

This action arises out of the breach of an alleged contract to split attorneys' fees between three law firms: McIlwain, non-party Lanier Law Firm, and Defendant Hagens Berman. *See* Compl. ¶ 9 at 5.[1] The attorneys' fees to be apportioned were those that the Court would award to these three law firms after approving the settlement of three similar putative class actions filed against Electronic Arts (EA), in which the plaintiffs sought damages arising out of EA's use of student-athletes' images and likenesses in video games (right-of-publicity actions).

One of these actions was filed in 2009 by McKenna McIlwain LLP on behalf of plaintiff Ryan Hart in the Superior Court of New Jersey; it was subsequently removed to the District of New Jersey and captioned *Hart v. Electronic Arts Inc.,* Case No. 09-cv-05990 *(Hart).* Ryan Hart was initially represented by McKenna McIlwain LLP; that firm was replaced by Timothy McIlwain[2] in July 2013. *See Hart,* Docket Nos. 60, 61. Timothy McIlwain withdrew as counsel for Ryan Hart in November 2013. No class was ever certified in *Hart.* Timothy McIlwain was never

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[1] The paragraph numbers in the complaint repeat several times; accordingly, paragraph numbers, as well as page numbers, are cited in this order.

[2] Timothy McIlwain is a "solo practitioner" operating as "McIlwain LLC a/k/a Timothy J. McIlwain, Attorney at Law." *See* Complaint ¶ 1 at 1. Timothy McIlwain is the principal of McIlwain. Timothy McIlwain Decl. ¶ 1, Docket No. 134.

appointed as interim class counsel, and Ryan Hart was never appointed as interim class representative.

The remaining two actions were filed by Hagens Berman: one in the Northern District of California, captioned *Keller v. Electronic Arts, Inc.,* Case No. 09-cv-1967 *(Keller),* and the other in the District of New Jersey, captioned *Alston v. Electronic Arts,* Case No. 13-cv-5157 *(Alston).* Collegiate Licensing Company (CLC) was the second defendant in *Keller.*

The plaintiffs in *Keller, Alston,* and Hart were referred to as the "right-of-publicity plaintiffs" because they asserted claims on behalf of putative classes under the right-of-publicity laws of California and New Jersey.

A fourth action, captioned *O'Bannon v. NCAA,* Case No. 09-cv-3329 *(O'Bannon)* was filed by Hausfeld LLP. It asserted claims on behalf of putative classes against the National Collegiate Athletic Association (NCAA), EA, and CLC under the Sherman Act, 15 U.S.C. § 1. The plaintiffs in this action were referred to as the "antitrust plaintiffs."

On January 15, 2010, this Court consolidated *O'Bannon* and *Keller* along with several other pending related actions into an action captioned *In re NCAA Student-Athlete Name & Likeness Licensing Litigation,* Case No. 09-cv-1967. *O'Bannon,* Docket No. 139. On that date, the Court appointed Hausfeld LLP and Hagens Berman as co-lead counsel in the consolidated case, with Hausfeld LLP taking primary responsibility for the *O'Bannon* plaintiffs' antitrust claims and Hagens Berman taking primary responsibility for the *Keller* plaintiffs' right-of-publicity claims.

As described in more detail below, the right-of-publicity plaintiffs and antitrust plaintiffs in the actions described above reached a global settlement with EA, and their counsel moved for, and were awarded, attorneys' fees and costs when the Court approved the settlement.

In the present action, McIlwain asserts three claims against Hagens Berman, the remaining Defendant[3]: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) interference with prospective economic advantage. All of these claims arise out of Hagens Berman's failure to split with McIlwain, pursuant to an alleged fee-splitting agreement, the attorneys' fees that the Court awarded it when the Court approved the settlement of the right-of-publicity claims against EA.

McIlwain moved for partial summary judgment on its claim for breach of contract on May 2, 2019. Docket No. 86. The Court denied the motion on October 22, 2019. Docket No. 121.

The Court held a further case management conference on November 19, 2019, during which the Court set, at Hagens Berman's request, a briefing schedule for a motion for summary judgment by Hagens Berman. *See* Minutes and Case Management

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[3] The Court dismissed McIlwain's claims against individual defendants Steve Berman, Robert B. Carey, and Leonard W. Aragon, all of whom are partners at Hagens Berman. *See* Order of November 5, 2018, Docket No. 66; Order of November 21, 2018, Docket No. 68.

Order, Docket No. 127. McIlwain did not oppose this request at the case management conference.[4]

II. Relevant undisputed facts[5]

Timothy McIlwain of "Timothy McIlwain, Attorney at Law, LLC" became counsel for Ryan Hart in *Hart* on July 10, 2013. *Hart,* Docket Nos. 60, 61. Timothy McIlwain is the principal of McIlwain LLC. Timothy McIlwain Decl. ¶ 1, Docket No. 134. McIlwain is located in New Jersey, Compl. ¶ 1 at 1, and Timothy McIlwain is licensed to practice in New Jersey, *see* Docket No. 73.

McIlwain produced a document in this litigation titled "Class Representative/Attorney Representation Agreement," which appears to set forth the terms of the attorney-client relationship between the "Law Offices Timothy McIlwain [sic], Attorney at Law, LLC" and Ryan Hart. Timothy McIlwain Decl., Ex. 20, Docket No. 134-1 at 108-09. This document is not signed by Ryan Hart. *See id.,* Docket No. 134-1 at 109. The document states, in relevant part:

CLIENT understands that the ATTORNEYS

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[4] McIlwain requests that the Court deny Hagens Berman's present motion for summary judgment as untimely. *See* Opp'n at 10-11, Docket No. 133. This request is not well-taken. Hagens Berman filed the present motion on November 21, 2019, which was the deadline set by the Court during the November 19, 2019, case management conference. *See* Minutes and Case Management Order, Docket No. 127. Accordingly, the present motion is timely.

[5] McIlwain's opposition contains a number of assertions that are not supported by any admissible evidence or other materials that the Court can consider in deciding the present motion. These unsupported assertions are therefore omitted from this order.

> reserve the right to determine all litigation tactics on behalf of CLIENT, including adding other class representatives to the matter and bringing in additional law firms to work with the ATTORNEYS on the case, who will be compensated either in the same manner as ATTORNEYS or in another manner to be determined by ATTORNEYS.

Id. ¶ 4, Docket No. 134-1 at 108. Ryan Hart testified at his deposition, which took place in August 2019, that he did not recall previously receiving or signing this document. Ryan Hart Dep. Tr. at 17, Docket No. 124-1 at 129. Ryan Hart also testified, however, that "back then [he] w[as] okay with" the provision of this unsigned agreement that provides that the "attorneys reserve the right to determine all litigation tactics for the client, including adding other class representatives to the matter and bringing in additional law firms . . . who will be compensated either in the same manner as attorney or in another manner to be determined by attorneys." *Id.* at 38-39, 70-71, Docket No. 134-1 at 4-7.

In a letter dated September 4, 2013, Timothy McIlwain notified Ryan Hart of an upcoming mediation with EA, which was scheduled for September 10, 2013. Timothy McIlwain Decl., Ex. 21, Docket No. 134-1 at 112-14. In the same letter, Timothy McIlwain requested Ryan Hart's written consent to add the Lanier Law Firm as co-counsel in *Hart* and to permit Timothy McIlwain to share with the Lanier Law Firm any attorneys' fees he was awarded in *Hart*. Specifically, the letter states:

> While you have agreed to the Lanier Law Firm joining us, the rules of professional

> conduct require that legal services agreements be agreed to in writing. As I have stated, the Lanier Law Firm joining your case will not require you to pay more in legal fees. . . . I have agreed to share my attorney fee with the Lanier Law Firm on a sliding scale that entitles them to 25% of my attorney fee if the case resolves at mediation and will increase to as high as 50% of the total attorney fees approved by the court in connection with your case after mediation. Enclosed please find an email exchange between the Lanier Law Firm and me from July 31, 2013 until August 1, 2013, which codifies our agreement on the shared attorney fee. Again, I know you have agreed to this, but if you could review this letter and fax/email back your signature indicated below that you agree to the my [sic] shared attorney fee with the Lanier Law Firm that would be helpful prior to mediation.

Id. This letter does not request Ryan Hart's consent to add as co-counsel, or to share attorneys' fees with, any other law firm. The letter was apparently signed by Ryan Hart on September 4, 2013. *Id.* Various members of the Lanier Law Firm, including Mark Lanier and Eugene Egdorf, were admitted pro hac vice as counsel for Ryan Hart in *Hart* on August 27, 2013. *Hart,* Docket No. 69.

McIlwain has not submitted a similar letter showing that Ryan Hart consented to adding Hagens Berman as co-counsel or consenting to McIlwain sharing attorneys' fees with Hagens Berman.

On September 10, 2013, the plaintiffs in the right-of-publicity actions and *O'Bannon* participated in a mediation with EA before mediator Randall Wulff. The parties could not reach a settlement on September 10 but they continued to negotiate. Carey Decl. ¶ 16, Docket No. 111.

On September 24, 2013, the mediator, Randall Wulff, emailed counsel who participated in the mediation, stating that "[a]ll parties have accepted the mediator's proposal, which includes the agreements among plaintiffs' counsel regarding allocation that were finalized today. I have asked Jamie to reach out immediately to plaintiffs' counsel and start the documentation process." Aragon Decl., Ex. W, Docket No. 124-1 at 246.

Also on September 24, 2013, Eugene Egdorf of the Lanier Law Firm wrote an email to Steve Berman of Hagens Berman, and copied Robert Carey of Hagens Berman and Timothy McIlwain; this email states:

> I am writing to confirm what I understand our agreement to be regarding the current proposal from Randy Wulffe [sic] to settle the EA litigation (Hart, Keller, and O'Bannon). Please confirm our agreement and advise of any changes.
>
> 1. We agree to work together in the submission of applications for fees and expenses;
> 2. We agree to support each other concerning the substance and merits of our fee submissions;

3. We agree to support each other and collectively, as appropriate, contest any applications for fees and expenses from other firms;

4. For any fee award or agreement to our firms (Hagens Berman, The Lanier Law Firm, and Tim McIlwain), we agree to consider those as a joint award which will be pooled together for our collective group;

5. From that joint award to our collective group, irrespective of the methodology, substance and distribution ordered by the Court, we agree that 60% of such fees will be paid to Hagens Berman, and the remaining 40% to Lanier and McIlwain;

6. Each of the firms can submit a request for recovery of their reasonable expenses, and we will support each other in that regard;

7. Lanier and McIlwain will be added as counsel to the Keller case against the NCAA; the above agreement concerning the distribution of fees on a 60/40 basis will NOT apply to that relationship, which will instead be governed by either a future separate agreement or by Court Order.

Aragon Decl., Ex. H, Docket No. 124-1 at 121 (fee-splitting agreement). Hagens Berman's Rule 30(b)(6)'s designee, Robert Carey, testified that the "60/40 percentage" referred to in this email chain was discussed and agreed to on September 10, 2013, but the parties "just waited two weeks to confirm it." Hagens Berman Rule 30(b) (6) Dep. Tr. at 24, Aragon Decl., Ex. V, Docket No. 124-1 at 244.

On September 26, 2013, counsel for the right-of-publicity plaintiffs and the *O'Bannon* antitrust plaintiffs signed a term sheet providing, among other things, that EA would pay $40 million to settle the claims asserted, or that could have been asserted, against it and CLC.[6] Term Sheet at 1, Carey Decl., Ex. A, Docket No. 125-1 at 2. Timothy McIlwain signed this term sheet as "Plaintiffs' Counsel in *Hart*"; this document does not mention McIlwain LLC. *Id.* at 5, Docket No. 125-1 at 6. In exchange, "the parties" agreed, in relevant part, to "cooperate in the preparation and presentation to the Court of a long-form agreement for approval by the Court." *Id.* at 2, Docket No. 125-1 at 3. The term sheet expressly stated that the agreement would be "subject to Court approval." *Id.*

Ryan Hart first learned about the settlement through the media, not Timothy McIlwain. Hart Dep. Tr. at 25, Aragon Decl., Ex. J, Docket No. 124-1 at 131. Ryan Hart testified at his deposition that he never gave Timothy McIlwain or the Lanier Law Firm permission to enter into a settlement with respect to *Hart*. *Id.* at 26, Docket No. 124-1 at 132.

Ryan Hart rehired Keith McKenna, who had initially represented him in *Hart*, after he learned that Timothy McIlwain signed the term sheet without his consent. *Id.* at 20, Docket No. 124-1 at 130. On October 3, 2013, Ryan Hart, through his new counsel, sent a letter to Timothy McIlwain requesting that he file a notice of substitution indicating that Ryan Hart's new counsel was Keith McKenna of the McKenna Law Firm, LLC. Timothy McIlwain Decl., Ex. 12, Docket No.

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[6] CLC was not a party to the term sheet but was one of the settlement's released parties.

134-1 at 40. Keith McKenna filed a notice of appearance as counsel for Ryan Hart on October 10, 2013. *Hart,* Docket No. 77. Ryan Hart testified that he did not authorize Timothy McIlwain to work on *Hart* after he terminated him as his counsel. Hart Dep. Tr. at 29, Aragon Decl., Ex. J, Docket No. 124-1 at 133.

An email dated October 10, 2013, shows that Robert Carey of Hagens Berman wrote to members of the Lanier Law Firm regarding the "dispute" with Ryan Hart, stating that, based on the advice of an "ethics expert," Hagens Berman "cannot share information relating to the settlement (at least in sofar [sic] as it relates to Hart)," and that "ER 1.9 may preclude you from participating further with any client, unless the Hart/McIlwain fee agreement provides for multiple representation." Aragon Decl., Ex. I, Docket No. 124-1 at 123.

On October 16, 2013, members of the Lanier Law Firm withdrew as counsel for Ryan Hart in *Hart. Hart,* Docket No. 79.

On November 7, 2013, Timothy McIlwain and Ryan Hart's new counsel, Keith McKenna and Arthur Owens, entered into a "stipulation and agreement between counsel" pursuant to which Timothy McIlwain, in relevant part, consented to "[m]ove forward with the settlement" and "withdraw [his] appearance" in *Hart.* Timothy McIlwain Decl., Ex. 14, Docket No. 134-1 at 65. Additionally, this agreement states that "McIlwain does not object to Hagens Berman or Lum Law firm [sic] and/or McKenna being settlement counsel"; that "McIlwain is willing to assist in obtaining affidavits for additional class representatives as requested"; that "McIlwain retains the right to comment, but not control the settlement agreement

and motion for approval"; that "McIlwain, McKenna and Lum law firm retain the right to file their fee application and retain the right to respond to objections"; that the parties will be subject to "[c]onfidentiality except as may be required between the parties to support the fee application or by law and will undertake the efforts to file the agreement under seal"; and that "McIlwain agrees to take no action in any of the four (4) cases listed in the term sheet until disposition of the settlement including appeal except as provided above and except to the extent that the final settlement agreement is materially different from the term sheet." *Id.* This document was signed by Timothy McIlwain but contains references to a McIlwain "law firm." *See id.* at 2, Docket No. 134-1 at 66.

On November 11, 2013, Timothy McIlwain withdrew as counsel for Ryan Hart in *Hart. Hart,* Docket No. 98.

Counsel for the right-of-publicity plaintiffs (not including McIlwain) and the *O'Bannon* antitrust plaintiffs continued to negotiate the settlement with EA; these negotiations lasted months. Carey Decl. ¶ 36, Docket No. 125. In the process, they modified certain terms of the proposed settlement, particularly with respect to how to allocate the settlement fund among the various classes of plaintiffs. *Id.* ¶ 36, 47.

The right-of-publicity plaintiffs, the *O'Bannon* antitrust plaintiffs, and EA ultimately finalized the settlement, which they filed in July 2014. Aragon Decl., Ex. U, Docket No. 124-1. Counsel for the right-of-publicity plaintiffs and the *O'Bannon* antitrust plaintiffs moved for awards of attorneys' fees and costs. Timothy McIlwain also moved for an award of fees and costs

on the ground that he had been counsel for Ryan Hart in *Hart.*

On August 18, 2015, this Court entered an order resolving the motions for fees and costs, which was later corrected on December 15, 2015. In that order, the Court awarded, in relevant part, $696,700 in fees from the EA settlement to Timothy McIlwain and the Lanier Law Firm, collectively, as former counsel in *Hart,* based on their lodestar; and $5,721,000 in fees from the EA settlement to Hagens Berman, as counsel for the *Keller* right-of-publicity plaintiffs, based on its lodestar. *Keller,* Order at 2-3, Docket No. 1285.

On August 19, 2015, this Court granted final approval to the settlement between the right-of-publicity and antitrust plaintiffs and EA. *See Keller,* Docket No. 1243.

Hagens Berman admits that it did not split with McIlwain the $5,721,000 in fees that the Court awarded to it from the EA settlement. Answer ¶ 20, Docket No. 69.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.,* 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's

evidence, if supported by affidavits or other evidentiary material. *Celotex,* 477 U.S. at 324; *Eisenberg,* 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

> The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000).

If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim or defense, it is not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evi-

dence negating the non-moving party's claim. *Id.; see also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 885 (1990); *Bhan v. NME Hosps., Inc.,* 929 F.2d 1404, 1409 (9th Cir. 1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the non-moving party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan,* 929 F.2d at 1409.

If the moving party discharges its burden by negating an essential element of the non-moving party's claim or defense, it must produce affirmative evidence of such negation. *Nissan,* 210 F.3d at 1105. If the moving party produces such evidence, the burden then shifts to the non-moving party to produce specific evidence to show that a dispute of material fact exists. *Id.*

If the moving party does not meet its initial burden of production by either method, the non-moving party is under no obligation to offer any evidence in support of its opposition. *Id.* This is true even though the non-moving party bears the ultimate burden of persuasion at trial. *Id.* at 1107.

ANALYSIS

Hagens Berman moves for summary judgment on all three claims in the complaint, which the Court addresses below, in turn.

I. Breach of Contract

The first claim in the complaint is for breach of contract. Compl. ¶ 1-21 at 3-8. This claim is premised on allegations that Hagens Berman breached the fee-

splitting agreement by, among other things, failing to split with McIlwain the fees it was awarded after the Court approved the settlement with EA. *Id.*

Under California law[7], "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman,* 51 Cal. 4th 811, 821 (2011).

Hagens Berman argues that it is entitled to judgment as a matter of law as to McIlwain's claim for breach of contract on the grounds that: the fee-splitting agreement is unenforceable because (1) it violates New Jersey Rule of Professional Conduct (RPC) 1.5(e), (2) a condition precedent to the contract never occurred (namely, the consummation of the September 26, 2013, term sheet), and (3) Hagens Berman timely rescinded the agreement because of a unilateral mistake (specifically, Hagens Berman's mistaken belief that McIlwain had agreed to the fee-splitting contract and term sheet with the consent of Ryan Hart). Hagens Berman further argues that, even if the fee-splitting agreement is enforceable, McIlwain's claim for breach of contract fails because McIlwain never performed its obligations under the agreement.

As discussed below, the Court concludes that the fee-splitting agreement is unenforceable because it violates New Jersey RPC 1.5(e) and therefore violates public policy. Thus, the Court will grant Hagens Ber-

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[7] Both parties agree that all three claims in the complaint are governed by California law.

man's summary judgment motion as to McIlwain's claim for breach of contract.

"Under general principles of California contract law, a contract is unlawful, and therefore unenforceable, if it is '[c]ontrary to an express provision of law' or '[c]ontrary to the policy of express law, though not expressly prohibited.'" *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.,* 6 Cal. 5th 59, 73 (2018) (quoting Cal. Civ. Code § 1667) (alterations in the original). "California courts have held that a contract or transaction involving attorneys may be declared unenforceable for violation of the Rules of Professional Conduct[.]" *Id.* Whether a contract is unenforceable based on these principles is a question of law. *See McIntosh v. Mills,* 121 Cal. App. 4th 333, 343 (2004).

Here, Hagens Berman argues that the fee-splitting agreement is unenforceable because it violates New Jersey RPC 1.5(e); this rule provides:

> (e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
>
> (2) the client is notified of the fee division; and
>
> (3) the client consents to the participation of all the lawyers involved; and

(4) the total fee is reasonable.

N.J. RPC 1.5(e).

California contract law precludes a court from enforcing an agreement to divide attorneys' fees between lawyers of different law firms if the agreement violates the California Rules of Professional Conduct (RPC), because any such agreement would violate public policy. In *Chambers v. Kay,* 29 Cal. 4th 142, 161 (2002), the Supreme Court of California held that an agreement to divide attorneys' fees was unenforceable on the ground that the arrangement was undertaken without written client consent in violation of California RPC 2-200.[8] The court reasoned that the California RPC had been adopted with its approval in order to "protect the public and to promote respect and confidence in the legal profession." *Id.* at 158. In light of the public-policy purpose underlying the California RPC, the Supreme Court of California concluded that it would be "absurd" for a court to aid an attorney in enforcing a contract that violated the RPC. *Id.* at 161 ("[I]t would be absurd for this or any other court to

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[8] California RPC 2-200 provides, in relevant part:

> A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:
>
> (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
>
> (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

aid Chambers in accomplishing a fee division that would violate the rule's explicit requirement of written client consent and would subject Chambers to professional discipline.").

Likewise, under New Jersey contract law, an agreement among lawyers that violates the New Jersey RPC violates public policy and is therefore unenforceable. *Jacob v. Norris, McLaughlin & Marcus,* 128 N.J. 10, 17 (1992) (noting that the New Jersey RPCs "establish the state's public policies with respect to attorney conduct" and holding that "[c]ontracts that violate the RPCs violate public policy, and courts must deem them unenforceable"). The Supreme Court of New Jersey adopted the New Jersey RPC for the same purpose that the Supreme Court of California adopted the California RPC, namely to regulate the practice of law and protect the public interest. *See id.* In light of the public-interest purpose of the New Jersey RPC, it follows that an agreement among lawyers that violates the New Jersey RPC would violate public policy and would therefore be unenforceable under California, as well as New Jersey, contract law. *Cf. Chambers,* 29 Cal. 4th at 126.

Here, Hagens Berman has met its burden as the moving party by pointing to the absence of evidence showing that the fee-splitting agreement at issue satisfied the requirements of New Jersey RPC 1.5(e). As noted above, the record shows, and McIlwain does not dispute, that Timothy McIlwain was licensed at all relevant times to practice law in New Jersey and that McIlwain is a New Jersey law firm; accordingly, the fee-splitting agreement at issue is subject to the New Jersey RPC. New Jersey RPC 1.5(e) requires, among other things, that the client be "notified of the

fee division" and that the client consent "to the participation of all lawyers involved." N.J. RPC 1.5(e). There is no evidence showing that McIlwain notified Ryan Hart of its fee-splitting agreement with Hagens Berman, or that Ryan Hart consented to the participation of Hagens Berman as McIlwain's co-counsel. The absence of this evidence supports the conclusion that the fee-splitting agreement did not comply with New Jersey RPC 1.5(e) and therefore is unenforceable.

In its opposition, McIlwain fails to show that a genuine dispute exists as to whether the fee-splitting agreement complied with New Jersey RPC 1.5(e). First, McIlwain appears to argue that the fee-splitting agreement was subject to the California RPC (specifically, California RPC 2-200) instead of the New Jersey RPC. *See* Opp'n at 12-13, Docket No. 133. McIlwain, however, cites no authority or facts to establish that its obligations as counsel to Ryan Hart were governed by the California RPC instead of the New Jersey RPC. Accordingly, McIlwain's reliance on the California RPC, and California RPC 2-200 in particular, is misplaced.[9]

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[9] Even if the fee-splitting agreement were subject to California RPC 2-200, the agreement would still be unenforceable because there is no evidence that McIlwain complied with that rule in connection with the agreement. RPC 2-200 requires, among other things, that the client consent to a fee-division among attorneys of different firms "in writing . . . after a full disclosure has been made in writing that a division of fees will be made and the terms of such division." *See* Cal. RPC 2-200. Here, McIlwain has pointed to no writing showing that it disclosed to Ryan Hart either that it would divide its fees with Hagens Berman, or the terms of any such division. The absence of evidence that McIlwain made these written disclosures is sufficient to

Second, McIlwain argues that Ryan Hart consented to the fee-splitting agreement because Ryan Hart "ratified" it during his deposition for this litigation, which took place in August 2019, and because Ryan Hart signed a document titled "Duties of Class Representatives," which was attached to another document that Ryan Hart did not sign titled "Class Representative/Attorney Representation Agreement." *See* Opp'n at 12-13, 4. Even when viewing this evidence in the light most favorable to McIlwain, it does not give rise to a genuine dispute as to whether McIlwain complied with New Jersey RPC 1.5(e).

The portions of Ryan Hart's deposition that McIlwain cites show that Ryan Hart testified that he agreed to McIlwain "bring[ing] in other law firms" (without further specification as to which law firms) and that he was "okay" with McIlwain "shar[ing] fees with another attorney" as stated in the unsigned "Class Representative/Attorney Representation Agreement." *See* Ryan Hart Dep. Tr. at 70-71. The testimony of Ryan Hart and the unsigned document just described do not suggest compliance with New Jersey RPC 1.5(e), because neither shows that McIlwain notified Ryan Hart of the specific fee apportionment with Hagens Berman, or of Hagens Berman's participation as co-

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conclude that the fee-splitting agreement at issue violates California RPC 2-200 and is unenforceable under *Chambers,* 29 Cal. 4th at 126. McIlwain's reliance on *Mink v. Maccabee,* 121 Cal. App. 4th 835 (2004), for the proposition that client consent under California RPC 2-200 need not be obtained until the fees in question are divided is unavailing, because here, as noted, McIlwain's breach-of-contract claim is defeated by the lack of evidence that McIlwain made the written disclosures required by RPC 2-200 at any time.

counsel to McIlwain.[10] *See* In *Whitehead v. Stull, Stull & Brody,* No. CV 17-4704 (SRC), 2019 WL 1055756, at *8 (D.N.J. Mar. 5, 2019) (holding that New Jersey Rule 1.5(e) requires disclosure to the client of "the parameters of the fee arrangement" in question, including "the proceeds among counsel" and the "division of labor or responsibilities among co-counsel," and that a failure to disclose these matters to the client renders the fee-division agreement unenforceable for "fail[ure] to satisfy the requirements of RPC 1.5(e)").

Because there is no genuine dispute that the fee-splitting agreement at issue violated New Jersey Rule 1.5(e), the Court concludes that the agreement violates public policy and is therefore unenforceable. Accordingly, McIlwain's claim for breach of contract fails as a matter of law. In light of this conclusion, the Court need not reach Hagens Berman's alternative arguments as to this claim.

II. Breach of the implied covenant of good faith and fair dealing

The second claim in the complaint is for breach of the implied covenant of good faith and fair dealing.

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[10] Notably, as discussed above, McIlwain disclosed to Ryan Hart, in writing (via a letter dated September 4, 2013), its fee-splitting agreement with the Lanier Law Firm, including the terms of the agreed-upon fee division, and it requested Ryan Hart's consent to that fee-splitting agreement and the addition of the Lanier Law Firm as co-counsel. Timothy McIlwain Decl., Ex. 21, Docket No. 134-1 at 112-14. In that letter, McIlwain stated that he was seeking Ryan Hart's written consent because the "the rules of professional conduct require" it. *Id.* McIlwain points to no similar writing with respect to its fee-splitting agreement with Hagens Berman.

Compl. ¶¶ 22-26 at 8-9. This claim is predicated on Hagens Berman's alleged breach of the fee-splitting agreement. *Id.*

"The implied promise [of good faith and fair dealing] requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." *Egan v. Mutual of Omaha Ins. Co.,* 24 Cal. 3d 809, 818 (1979). "In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Love v. Fire Ins. Exchange,* 221 Cal. App. 3d 1136, 1153 (1990.) "The implied covenant of aood faith and fair dealing does not impose substantive terms and conditions beyond those to which the parties actually agreed." *Avidity Partners, LLC v. State of California,* 221 Cal. App. 4th 1180, 1204 (2013) (citation omitted). Thus, "[t]he implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation." *Foley v. Interactive Data Corp.,* 47 Cal. 3d 654, 683684 (1988).

Hagens Berman moves for summary judgment on McIlwain's claim for breach of the implied covenant of good faith and fair dealing on the ground that the claim fails because it depends on the fee-splitting agreement, which is unenforceable.

In its opposition, McIlwain does not squarely address, or cite any authority that contradicts, Hagens Berman's argument that this claim fails to the extent that the fee-splitting agreement is unenforceable. *See* Opp'n at 18-19.

A claim for breach of the implied covenant of good faith and fair dealing cannot exist without an enforceable contract. *See Foley,* 47 Cal. 3d at 683-684 (holding that the implied covenant "is a contract term" and "rests upon the existence of some specific contractual obligation"). Because McIlwain's claim for breach of the implied covenant of good faith and fair dealing was predicated on the fee-splitting agreement, which this Court has concluded is unenforceable, the claim fails as a matter of law. Accordingly, the Court will grant Hagens Berman's motion for summary judgment as to this claim.

III. Intentional interference with prospective economic advantage

The third claim in the complaint is for intentional interference with prospective economic advantage (IIPEA). Compl. ¶¶ 27-32 at 1-10. This claim is predicated on allegations that Hagens Berman interfered with McIlwain's expected economic advantage from the fee-splitting agreement by refusing to split with McIlwain the attorneys' fees that it received after the Court approved the settlement with EA. *Id.*

An IIPEA claim requires "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Marsh v. Anesthesia Serv. Med. Group. Inc.,* 200 Cal. App. 4th 480, 504 (2011). "California recognizes a cause of action against noncontracting parties who

interfere with the performance of a contract." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 513 (1994). "However, consistent with its underlying policy of protecting the expectations of contracting parties against frustration by outsiders who have no legitimate social or economic interest in the contractual relationship, the tort cause of action for interference with contract does not lie against a party to the contract." *Id.* (citations omitted).

Hagens Berman moves for summary judgment on McIlwain's IIPEA claim on the ground that the claim, which is predicated on Hagens Berman's alleged interference with the fee-splitting agreement to which it is a party, fails as a matter of law because an IIEPA claim can be asserted only against a person or entity that is not a party to the contract at issue.

In its opposition, McIlwain appears to concede that its IIPEA claim against Hagens Berman fails as a matter of law. *See* Opp'n at 3 (stating that its IIPEA claim "became moot with the dismissal of the individual partners from the case").

Because McIlwain's IIEPA claim against Hagens Berman is premised on alleged interference with the fee-splitting agreement, and it is undisputed that Hagens Berman is a party to that agreement, the claim fails as a matter of law. *See Applied Equip.*, 7 Cal. 4th at 513 (holding that "the tort cause of action for interference with contract does not lie against a party to the contract").

CONCLUSION

For the reasons set forth above, the Court GRANTS Hagens Berman's motion for summary

judgment with respect to all three claims in the complaint. The Clerk shall enter judgment against Plaintiff McIlwain and in favor of Defendants. Defendants shall recover their costs. The Clerk shall terminate the action.

IT IS SO ORDERED.

/s/ Claudia Wilken
United States District Judge

Dated: February 10, 2020

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING IN PART AND DENYING IN PART MOTION TO REVOKE PRO HAC VICE ADMISSION AND FOR MONETARY SANCTIONS (SEPTEMBER 9, 2019)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MCILWAIN, LLC,

Plaintiff,

v.

STEVE W. BERMAN, ET AL.,

Defendants.

Case No. 18-cv-03127 CW

(Dkt. No. 93)

Before: Hon. Claudia WILKEN,
United States District Judge.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO REVOKE PRO HAC VICE ADMISSION AND FOR MONETARY SANCTIONS

In this action for breach of contract and related claims, Defendant Hagens Berman Sobol Shapiro LLP

(Hagens Berman) moves for an order revoking the pro hac vice admission of Timothy Joseph McIlwain (McIlwain), who is counsel for Plaintiff McIlwain, LLC (Plaintiff). Docket No. 93. McIlwain filed an untimely opposition to the motion. Docket No. 95. For the reasons set forth below, the motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

On January 31, 2019, McIlwain, an out-of-state attorney, filed an application under Civil Local Rule 11-3 to appear pro hac vice as counsel for Plaintiff. Application at 1, Docket No. 73. There, McIlwain represented, among other things, that he was an active member in good standing of the bar of the United States District Court for the District of New Jersey, and that his local co-counsel would be Josh Schein. *Id.* He also declared under penalty of perjury that he would "familiarize [him]self with, and abide by, the Local Rules of this Court, especially the Standards of Professional Conduct for attorneys and the Alternative Dispute Resolution Local Rules." *Id.* The Court granted the application on February 4, 2019, "subject to the terms and conditions of Civil L.R. 11-3." Order at 2, Docket No. 74.

Hagens Berman now moves for an order revoking McIlwain's pro hac vice admission and for an order sanctioning McIlwain, under 28 U.S.C. § 1927 and the Court's inherent power, in the amount of the attorneys' fees and costs it incurred in connection with the present motion. Hagens Berman contends, and McIlwain does not dispute in his untimely opposition, that McIlwain has failed to comply with his obligations under Civil Local Rule 11, which include

complying with the local rules and the applicable standards of professional conduct. Although some of McIlwain's problematic conduct as described in the motion involves repeated failures to comply with discovery obligations, Hagens Berman has not filed a discovery letter brief or taken any other action to seek Court intervention in connection with such conduct.

LEGAL STANDARD

I. Pro hac vice admission

An attorney who is not a member of the bar of this Court may apply to appear pro hac vice in a particular action in this district by submitting to the Clerk a certificate of good standing issued by the appropriate authority governing attorney admissions for the relevant bar, a written application, and an oath certifying: (1) that he or she is an active member in good standing of the bar of a United States Court or of the highest court of another State or the District of Columbia; (2) that he or she agrees to abide by the standards of professional conduct set forth in Civil Local Rule 11-4[1], and to become familiar with the local rules and alternative dispute resolution programs of this Court and, where applicable, with

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[1] Civil Local Rule 11-4 requires every attorney admitted to practice in this Court under Civil Local Rule 11 to: (1) be familiar and comply with the standards of professional conduct required of members of the State Bar of California; (2) comply with the local rules; (3) maintain respect due to courts of justice and judicial officers; (4) practice with the honesty, care, and decorum required for the fair and efficient administration of justice; (5) discharge his or her obligations to his or her client and the Court; and (6) assist those in need of counsel when requested by the Court.

the bankruptcy local rules; and (3) that an attorney, identified by name and office address, who is a member of the bar of this Court in good standing and who maintains an office within the State of California, is designated as co-counsel. Civil L.R. 11-3(a).

The assigned judge "shall have discretion to accept or reject the application." Civil L.R. 11-3(c). "When a district court admits an attorney pro hac vice, the attorney is expected to follow local rules." *In re Bundy,* 840 F.3d 1034, 1047 (9th Cir. 2016) (citation omitted).

A district court may revoke an attorney's pro hac vice admission under its inherent power "to control admission to its bar and to discipline attorneys who appear before it." *Lasar v. Ford Motor Co.,* 399 F.3d 1101, 1118 (9th Cir. 2005) (citation and internal quotation marks omitted). "Pro hac vice counsel, once admitted, are entitled to notice and an opportunity to respond before being disqualified and having their status revoked." *Cole v.* U.S. *Dist. Court For Dist. of Idaho,* 366 F.3d 813, 822 (9th Cir. 2004). That said, the "opportunity to be heard does not require an oral or evidentiary hearing on the issue . . . the opportunity to brief the issue fully satisfies due process requirements." *Lasar*, 399 F.3d at 1112 (internal citation and quotation marks omitted). "These minimal procedural requirements give an attorney an opportunity to argue that his actions were an acceptable means of representing his client, to present mitigating circumstances, or to apologize to the court for his conduct." *Id.* at 1110 (citation omitted).

II. Sanctions under 28 U.S.C. § 1927

Any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927; *see also Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.,* 210 F.3d 1112, 1117 (9th Cir. 2000) ("Section 1927 authorizes the imposition of sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced."). "The imposition of sanctions under § 1927 requires a finding of bad faith." *Pac Harbor Capital,* 210 F.3d at 1118. An attorney subject to sanctions under Section 1927 is "entitled to due process, including notice and an opportunity to be heard. However, an opportunity to be heard does not require an oral or evidentiary hearing on the issue." *Id.* (internal citation and quotation marks omitted). "The opportunity to brief the issue fully satisfies due process requirements." *Id.* (citation omitted).

III. Sanctions under the Court's inherent authority

A district court's inherent authority to impose civil sanctions "can be invoked even if procedural rules exist which sanction the same conduct." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 49 (1991). "[A]n assessment of attorney's fees is undoubtedly within a court's inherent power." *Id.* at 45. That said, a finding of "bad faith or conduct tantamount to bad faith" is required to impose sanctions under the court's inherent authority. *Fink v. Gomez,* 239 F.3d 989, 994 (9th Cir. 2001).

ANALYSIS

I. Revoking McIlwain's pro hac vice admission is warranted

Hagens Berman moves for an order revoking McIlwain's pro hac vice admission. Hagens Berman contends that the relief it seeks is warranted because McIlwain has failed to meet his obligations under Civil Local Rule 11, as follows: (1) McIlwain failed to participate meaningfully and promptly in conferences required by Rule 26(f) and meet-and-confers required by the local rules; (2) McIlwain failed to timely produce complete responses to discovery requests and to exchange ESI information required by Rule 26; (3) McIlwain made misrepresentations and false promises regarding the timing and scope of his discovery responses and other matters, and has ignored communications regarding this litigation; (4) McIlwain failed to attend a mediation in person[2], failed to ensure that other counsel for Plaintiff would appear in his stead, and failed to notify Hagens Berman of the fact that no counsel would appear in person at the mediation on behalf of Plaintiff; and (5) McIlwain failed to submit a mediation statement as required by ADR Local Rule 6-7. Motion at 1-11, Docket No. 93.

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[2] McIlwain represents that he was unable to attend the mediation in person because his flight was cancelled. He provides no explanation, however, for why he was unable to arrange for other counsel to attend the mediation in person in his stead, or why he was unable to purchase another flight. *See* Opp'n at 8, Docket No. 95; McIlwain Decl. ¶ 1, Docket No. 96.

In his opposition, which was untimely[3], McIlwain does not dispute any of Hagens Berman's assertions with respect to his conduct. *See* Opp'n at 2-3, Docket No. 95. McIlwain simply asserts, in conclusory fashion, that "there is good cause" for any failure on his part to comply with any rule or deadline, namely a "personal matter involving the custody of [his] 3 year old daughter in the state of Kentucky." *Id.* at 2. McIlwain does not elaborate on this personal matter or explain why it would justify his failure to comply with applicable rules. *Id.* The remainder of McIlwain's opposition is devoted to accusing Hagens Berman of misconduct, but McIlwain does not explain why any such misconduct, even if committed, would have any bearing on the issues raised in the present motion.[4] *See id.* at 4-10.

Because McIlwain does not dispute that he has violated the local rules and the rules of professional conduct as described in Hagens Berman's motion, the Court concludes that revoking McIlwain's pro hac vice admission is warranted. McIlwain's pro hac vice admission expressly was "subject to the terms and conditions of Civil L.R. 11-3." *See* Order at 2, Docket No. 74. Civil Local Rule 11-3 requires an out-of-state attorney seeking to appear in this Court pro hac vice to certify under oath that he will abide by the rules of professional conduct described in Civil Local Rule

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[3] Although McIlwain's opposition was tardy, the Court has reviewed and considered it and its attachments for the purpose of resolving the present motion.

[4] McIlwain states in his opposition that he will submit other supporting materials "under separate cover for in camara [sic] review," but he has not lodged any materials. The record is limited to documents that are publicly accessible on ECF.

11-4, which include the local rules of this district. *See* Civil L.R. 11-4. McIlwain's implicit admission that he has failed repeatedly to comply with these rules is sufficient to revoke his right to appear pro hac vice in this action.

Separately, the docket reflects multiple instances of McIlwain's failure to abide by applicable rules and practices. *See, e.g.*, Order of March 5, 2019, at 2 (noting in response to a letter that McIlwain filed that "[t]his letter and the requests therein do not comply with the Court's standing orders or the local rules of this District"). The Court has instructed McIlwain on several occasions to comply with all applicable rules. *See, e.g., id.* ("The parties are reminded to consult and comply with all applicable standing orders and local rules. In the future, the Court will not consider any filings or requests made in violation of any applicable standing order or local rule."). Yet, McIlwain has continued to disregard the Court's orders requiring compliance with applicable rules. One of the most recent examples of McIlwain's indifference to the Court's orders and applicable rules is McIlwain's opposition to the present motion[5], which he filed three days late.[6] *See* Docket No. 95.

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[5] The opposition was due by August 13, 2019; McIlwain filed his opposition on August 16, 2019. *See* Docket No. 95. McIlwain states in his opposition that Hagens Berman agreed to a two-day extension of the deadline to file an opposition, which Hagens Berman does not dispute. The opposition still would have been late even if the two-day extension had had any legal effect. The two-day extension was ineffectual, however, because McIlwain never sought a Court order approving any such extension as required by Civil Local Rule 6-1(b). *See* Civil L.R. 6-1(b) (requiring a court order for any enlargement of time that alters

Where, as here, "an out-of-state attorney suggests through his behavior that he will not 'abide by the court's rules and practices,' the district court may reject his pro hac vice application." In *re Bundy,* 840 F.3d at 1042 (citation omitted). In light of McIlwain's pattern of disregard of applicable rules and procedures, and in an effort to promote the orderly administration of justice, the Court revokes McIlwain's pro hac vice admission. *See In re U.S.,* 791 F.3d 945, 957 (9th Cir. 2015) ("[A] court's decision to deny pro hac vice admission must be based on criteria reasonably related to promoting the orderly administration of justice, or some other legitimate policy of the courts[.]").

II. Monetary sanctions are not warranted at this time

Hagens Berman requests that the Court sanction McIlwain under 28 U.S.C. § 1927 and its inherent authority in the amount of the attorneys' fees and

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a deadline that involves papers required to be filed or lodged with the court). A request for an extension must be filed no later than fourteen days before the scheduled event or deadline. *Id.*

[6] Another example of a failure to comply with applicable rules is McIlwain's "objection to reply evidence." *See* Docket No. 104. A party may file objections to reply evidence "within 7 days after the reply is filed," but such objections "may not include further argument on the motion." *See* Civil L.R. 7- 3(d)(1). McIlwain filed his objection eight days after the reply was filed, so it is untimely. Moreover, the objection fails to comply with Civil Local Rule 7-3(d)(1) for the additional reason that it contains further argument on the motion. In any event, McIlwain's objection has no impact on any of the findings and conclusions herein, which do not rely on any of the materials to which McIlwain objects.

costs it incurred in filing the present motion. This request is predicated on the same violations of local rules and standards of professional conduct that formed the basis of its request to revoke McIlwain's pro hac vice admission. In its opening brief, Hagens Berman did not specify either a precise amount, or even an estimate, of the fees and costs it would seek as a sanction; in its reply brief, Hagens Berman specified for the first time that it seeks $22,514 in fees and $510 in costs, which it claims represent seventy percent of the fees and costs it incurred in preparing and filing the present motion. *See* Reply at 1, Docket No. 97.

The Court declines to impose monetary sanctions on McIlwain at this time. First, Hagens Berman failed to include in its opening brief an estimate or range, much less a precise amount, of the fees and costs it would request as a sanction against McIlwain; it waited to provide detailed information about its requested fees and costs until it filed its reply. *See generally* Motion, Docket No. 93; Reply at 1, Docket No. 97. The lack of specificity in Hagens Berman's opening brief as to the amount of monetary sanctions at stake deprived McIlwain of sufficient notice and an opportunity to fully respond in writing to the request for monetary sanctions.

Second, Hagens Berman has not shown that McIlwain's conduct was in bad faith or was tantamount to bad faith. To warrant the imposition of sanctions under either 28 U.S.C. § 1927 or the Court's inherent authority, the conduct at issue must rise to the level of bad faith or its equivalent. *See Pac Harbor Capital,* 210 F.3d at 1118 ("The imposition of sanctions under § 1927 requires a finding of bad faith."); *Fink v. Gomez,* 239 F.3d at 994 (holding that a finding of "bad faith or

conduct tantamount to bad faith" is required to impose sanctions under the court's inherent power). Here, based on the record, the Court cannot conclude that McIlwain's conduct was the equivalent of bad faith, which would warrant sanctions, as opposed to being the result of mere negligence without more, which would not warrant sanctions. *See MGIC Indem. Corp. v.* Moore, 952 F.2d 1120, 1121–22 (9th Cir. 1991) (reversing imposition of sanctions where the conduct at issue was "as consistent with negligence as with bad faith").

Finally, Hagens Berman has not shown that a sanction of more than $20,000 would be properly tailored to the conduct at issue. Hagens Berman has cited no case in which a court has imposed a sanction of more than $20,000 based on behavior and circumstances similar to those at issue here.

Accordingly, Hagens Berman's request for monetary sanctions is DENIED.

CONCLUSION

Hagens Berman's motion is GRANTED IN PART and DENIED IN PART. The motion for an order revoking Timothy Joseph McIlwain's pro hac vice admission is GRANTED. The request for an award of attorneys' fees and costs as a sanction against McIlwain is DENIED.

Nothing in this Order is intended to resolve any dispute arising from a failure by any party to comply with its discovery obligations. As has been stated in prior Orders, any discovery disputes must be addressed and resolved pursuant to the preferred procedures of Magistrate Judge Cousins.

Joshua Schein and Eric Rouen are counsel for Plaintiff McIlwain, LLC. *See* Docket Nos. 72, 92. All parties and their counsel are ordered comply with upcoming deadlines, which include: (1) the close of discovery on August 30, 2019; (2) the deadline for Hagens Berman to file an opposition to Plaintiff's motion for partial summary judgment, which is September 13, 2019; the deadline for Plaintiff to file a reply in support of its motion for partial summary judgment, which is September 27, 2019; the hearing on the motion for partial summary judgment, which will be held on October 15, 2019, at 2:30 p.m. *See* Docket No. 91.

IT IS SO ORDERED.

/s/ Claudia Wilken
United States District Judge

Dated: September 9, 2019

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING AND REHEARING EN BANC (SEPTEMBER 20, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MCILWAIN, LLC,
AKA Timothy J. McIlwain, Attorney at Law,

Plaintiff-Appellant,

v.

HAGENS BERMAN SOBOL SHAPIRO LLP,

Defendant-Appellee.

and

STEVE BERMAN, ESQUIRE; ET AL.,

Defendants.

No. 20-15445

D.C. No. 4:18-cv-03127-CW
Northern District of California, Oakland

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Fed. R. App. P. 40. The full court has been advised of the petition for rehearing *en banc*, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing or rehearing *en banc*, (Dkt. No. 43), is therefore DENIED.

RELEVANT STATUTORY PROVISION INVOLVED 15 U.S.C. § 1681e

15 U.S.C. § 1681e

(a) Disclosure of fact of preparation

A *person* may not procure or cause to be prepared an *investigative consumer report* on any *consumer* unless—

(1) it is clearly and accurately disclosed to the *consumer* that an *investigative consumer report* including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the *consumer,* not later than three days after the date on which the report was first requested, and (B) includes a statement informing the *consumer* of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the *consumer* prepared pursuant to *section 1681g(c) of this title;* and

(2) the *person* certifies or has certified to the *consumer reporting agency* that—

(A) the *person* has made the disclosures to the *consumer* required by paragraph (1); and

(B) the *person* will comply with subsection (b).

(b) Disclosure on request of nature and scope of investigation

Any *person* who procures or causes to be prepared an *investigative consumer report* on any *consumer* shall, upon written request made by the *consumer* within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1), make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the *consumer* not later than five days after the date on which the request for such disclosure was received from the *consumer* or such report was first requested, whichever is the later.

(c) Limitation on liability upon showing of reasonable procedures for compliance with provisions

No *person* may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b).

(d) Prohibitions

(1) Certification

A *consumer reporting agency* shall not prepare or furnish an *investigative consumer report* unless

the agency has received a certification under subsection (a)(2) from the *person* who requested the report.

(2) Inquiries

A *consumer reporting agency* shall not make an inquiry for the purpose of preparing an *investigative consumer report* on a *consumer* for *employment purposes* if the making of the inquiry by an employer or prospective employer of the *consumer* would violate any applicable Federal or *State* equal employment opportunity law or regulation.

(3) Certain public record information

Except as otherwise provided in *section 1681k of this title,* a *consumer reporting agency* shall not furnish an *investigative consumer report* that includes information that is a matter of public *record* and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished.

(4) Certain adverse information

A *consumer reporting agency* shall not prepare or furnish an *investigative consumer report* on a *consumer* that contains information that is adverse to the interest of the *consumer* and that is obtained through a personal interview with a neighbor, friend, or associate of the *consumer* or with another *person* with whom the *consumer* is

acquainted or who has knowledge of such item of information, unless—

(A) the agency has followed reasonable procedures to obtain confirmation of the information, from an additional source that has independent and direct knowledge of the information; or

(B) the *person* interviewed is the best possible source of the information.