

No.

In the Supreme Court of the United States

THERMOLIFE INTERNATIONAL LLC, RONALD L. KRAMER,
AND MUSCLE BEACH NUTRITION LLC, PETITIONERS

v.

BPI SPORTS, LLC, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958), the Court held that a federal court's authority to dismiss a case for discovery noncompliance arises from Rule 37, not from Rule 41(b) or any free-floating "inherent power." In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991), in a 5-4 decision, the Court pushed back and "discern[ed] no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct."

The questions presented are:

1. Whether an imposition of sanctions against a party and not its attorney under a court's inherent authority can be upheld by the mere talismanic recitation of the phrase "bad faith" when courts are in conflict about whether an inherent-authority sanction requires bad faith and when the appeals court does not rely on the district court's key finding on bad faith.

2. Whether an imposition of sanctions under a court's inherent authority can be affirmed based on conduct that was not sanctionable under Federal Rule of Civil Procedure 37.

PARTIES TO THE PROCEEDING BELOW

Petitioners ThermoLife International LLC, Ronald L. Kramer, and Muscle Beach Nutrition LLC were defendants-appellants in the district court and appellants in the court of appeals. Respondent BPI Sports, LLC was plaintiff in the district court and plaintiff-cross appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that neither ThermoLife International LLC, nor Muscle Beach Nutrition LLC, is a publicly held corporation, and no publicly held corporation owns 10% or more of either of them.

RELATED PROCEEDINGS

BPI Sports, LLC v. ThermoLife International LLC,
Nos. 23-1068, -1625, -1112, United States Court of Appeals
for the Federal Circuit. Judgment entered June 16, 2025.

BPI Sports, LLC v. ThermoLife International LLC,
No. 0:19-cv-60505-RS, United States District Court for
the Southern District of Florida. Judgment entered
Oct. 25, 2021.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is not published in the Federal Reporter but can be found at 2025 WL 1683234 and reproduced at Pet. App. 1a-14a. The Federal Circuit's order denying petitioners' petition for panel rehearing and rehearing en banc is reproduced at Pet. App. 56a-57a.

The district court adopted the magistrate judge's Report and Recommendation on Plaintiff's motion for terminating sanctions, which is unreported and can be found at 2021 WL 2946170, Pet. App. 15-27a. The magistrate judge's Report and Recommendation on Plaintiff's motion for terminating sanctions is also unreported and can be found at 2021 WL 2583493, Pet. App. 28a-53a. A paperless order denying Plaintiff's motion for attorney's fees is reproduced at Pet. App. 54a-55a.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2025. A petition for rehearing was denied on September 2, 2025. Pet. App. 57a. On November 24, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 15, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

I. The Framework of the Authority to Sanction

A court's authority to sanction and impose an award of attorney's fees resides in a mixture of statutes, rules, and the unwritten, inherent authority of the court itself. Various statutes provide federal courts with the authority

to award attorney's fees. *E.g.*, 42 U.S.C. § 1988(b). Federal courts have also been granted authority to hold individuals in contempt and to sanction an attorney or other legal professional. 18 U.S.C. § 401; 28 U.S.C. § 1927.

Since 1938, Congress has provided rules governing civil litigation. "The Federal Rules establish explicit standards for, and explicit checks against, the exercise of judicial authority." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 67 (1991) (Kennedy, J., dissenting). The Federal Rules of Civil Procedure have several provisions enabling courts to impose fees and other sanctions on parties and their attorneys. *E.g.*, Fed. R. Civ. P. 11(c), 16(f), 26(g), 37(b). Codifying the boundaries on litigation conduct provides a clearer demarcation of what conduct is permissible, thus permitting an attorney to fulfill his or her ethical obligations to vigorously advocate on a client's behalf.

Beyond the statutes and rules lies a court's inherent authority, or power, to impose sanctions on parties and their attorneys. "As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments." *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) (Tatel, J.). "Certain implied powers," as has long been understood, "must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court because they are necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *see also Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821); *Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993).

Unlike sanctioning powers codified in statutes and rules, the inherent powers are stated as being governed

only “by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). Because the inherent powers are non-textual, they must be exercised “with restraint and discretion.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). Inherent authority “is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function.” *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990), *quoted with approval and aff’d*, 501 U.S. 32, 42 (1991). “In short, the inherent power springs from the well of necessity, and sparingly so.” *Nat. Gas Pipeline*, 2 F.3d at 1407.

Additionally, the inherent authority to impose fees-based sanctions must be interpreted in the context of the American Rule against awarding fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247–50 (1975). Thus, the “restraint and discretion” required by inherent powers must account for the fundamental American Rule against awarding fees absent express congressional authorization.

Unfortunately, as foreshadowed by Justice Kennedy’s dissent in *Chambers*, the reach of inherent powers for policing litigation conduct has expanded beyond the interstices and has unnecessarily and confusingly encroached on areas governed by clearer statutes and rules. Courts now too often employ inherent powers to supplant—rather than supplement—statutes and rules governing sanctions and awards of attorney’s fees.

II. Proceedings Below

A. District Court

Petitioner ThermoLife International LLC (“ThermoLife”) is America’s leading innovator in amino-acid nitrate supplements. Pet. App. 2a. ThermoLife was the first to make a dietary supplement containing “creatine nitrate,” which has numerous benefits including increasing vasodilation. ThermoLife is owned by Petitioner Ronald L. Kramer (“Kramer”), one of the inventors of the patented dietary supplements. Pet. App. 10a–11a. ThermoLife generally does not manufacture or sell supplements. Pet. App. 2a. It instead licenses its patent rights to the leading supplement manufacturers, including Cellucor. *Id.*

Respondent BPI Sports, LLC (“BPI”) sells exercise supplements, including creatine products, but Respondent chose not to license ThermoLife’s patents. *Id.* Respondent therefore could not sell competing creatine nitrate exercise supplements without infringing ThermoLife’s patents. *Id.* Respondent felt it was losing sales to a ThermoLife-licensed creatine nitrate exercise supplement called CRTN-3. Pet. App. 3a. Respondent sued ThermoLife for false advertising and unfair competition. Pet. App. 32a–33a. The flaw with Respondent’s legal theory was that CRTN-3 was sold not by ThermoLife but by a separate company, Petitioner Muscle Beach Nutrition LLC (“MBN”). Pet. App. 32–34a. MBN was a distinct legal entity, also owned by Petitioner Kramer. Pet. App. 2a.

ThermoLife had licensed its patents to MBN via an oral patent license so MBN could sell its CRTN-3 product. Pet. App. 17a. Despite this arrangement, Respondent initially sued only ThermoLife, and not MBN. Pet. App. 44a–45a. Respondent also did not allege an alter-ego or any other theory that would impute any false-

advertising liability on the patent licensor ThermoLife. Pet. App. 32a–34a.

In February 2020, during discovery, Respondent sought documents from ThermoLife about its third-party licenses, including patent licenses with MBN. Pet. App. 34a–35a. Because the patent license between ThermoLife and MBN was an oral agreement, ThermoLife produced a written memorialization of the oral license (the “License Agreement”). *Id.* Petitioner Kramer (owner of both ThermoLife and MBN) prepared the document with counsel’s understanding, and ThermoLife then produced the document in response to Respondent’s document request. Pet. App. 23a–24a. No discovery request at that time obligated ThermoLife to provide any further information about the documents produced. Pet. App. 34a–35a.

In April 2020, Respondent then served additional discovery seeking more information about the License Agreement. Pet. App. 35a–36a. ThermoLife’s former attorney objected because the discovery was “not relevant to any claim or defense in this action.” Pet. App. 21a–22a. At this point, MBN still had not been added to the case as defendant. Eventually, in June 2020, Respondent’s motion to amend was granted, finally adding MBN as a defendant in the second amended complaint. Pet. App. 33a–34a.

During the dispute, ThermoLife offered to compromise because so little was at issue. Pet. App. 33a–34a. ThermoLife agreed to alter-ago liability over its licensee MBN, thereby mooting the discovery dispute, with the hope of avoiding unnecessary discovery expenses on an issue that, in Petitioners’ view, was irrelevant. *Id.*

Still not satisfied, Respondent pressed forward with motions to compel. Pet. App. 35a–37a. Relevant here was Respondent’s second motion, which challenged ThermoLife’s objections to producing more discovery about the License Agreement, such as metadata. *Id.*

On June 19, 2020, the magistrate judge held a hearing on the motions to compel. Pet. App. 5a. During the hearing, Petitioners' former counsel explained that ThermoLife was "figur[ing] out a way to streamline this case going forward" because it had "already expended hundreds of thousands of dollars to defend the case." Dkt. 122, at 45; Pet. App. 33a-34a. At the hearing's end, the judge granted in part and denied in part Respondent's motions. Pet. App. 12a. The judge also denied BPI's request for fees under Rule 37, stating:

[T]he fact that we ended up having a two-hour hearing show that the issues in this case are nuanced and complicated, and that the parties' respective positions were substantially justified under Rule 37(a)(5), so I am going to not shift any costs[.]

Dkt. 122 (93:1-15); *see also* Pet. App. 55a.

On July 15, 2020, in full compliance with the court's order, ThermoLife supplemented its discovery. Pet. App. 23a-24a. Petitioners also explained that, in March 2020, Kramer created the License Agreement "to memorialize in writing the oral agreement that was reached between Muscle Beach and ThermoLife, on or about March 16, 2017." *Id.* This discovery response was the first time Petitioners had to state how and why Kramer (owner of both companies and effective grantor of the license) created the written license memorialization. *Id.*

Petitioners thus had produced complete and accurate discovery in full compliance with the court's order on the motions to compel. *Id.* Respondent did not seek additional discovery on these points and did not file another motion to compel. *Id.*

Months after the hearing on the motion to compel, Respondent changed tactics and filed a motion for sanctions under Rule 37, 28 U.S.C. § 1927, and inherent authority, accusing Petitioners and their former attorney

of perpetrating a fraud on the court. Pet. App. 39a. Respondent contended, based solely on attorney argument, that the License Agreement was “fabricated.” Pet. App. 20a–21a, 24a.

On November 18, 2020, the magistrate judge held a hearing on Respondent’s motion for sanctions. Pet. App. 16a. Following the hearing, the magistrate judge recommended sanctions under inherent authority only and expressly stated that the court “need not consider whether sanctions against Defendants are appropriate under Rule 37.” Pet. App. 50a–52a. The magistrate’s decision, based solely on its inherent powers, relied heavily on its belief that “Kramer fabricated a written agreement,” Pet. App. 23a, 42a, 47a, yet the decision did not identify any false statement by Petitioners or any evidence that was destroyed or not produced, Pet. App. 20a–21a, Petitioners never violated a court order. The district court adopted the recommendation in a separate opinion. Pet. App. 15a–27a.

Petitioners’ former counsel was not sanctioned despite his primary role in the discovery dispute. Pet. App. 25a–26a. The sanction permeated the trial because the sanction included an instruction to the jury about Kramer’s “attempt to manufacture favorable evidence.” Pet. App. 24a–26a.

After a three-day trial, the jury found Petitioners not liable for false patent marking. Pet. App. 5a–6a. The jury also found liability for false advertising and state-law unfair competition law. *Id.* Petitioners then moved for judgment as a matter of law on the false-advertising and unfair-competition claims. Pet. App. 6a–11a. The district court denied the motion, and Petitioners subsequently appealed to the Federal Circuit.¹

¹ Respondent cross-appealed on a separate ground, and the Federal Circuit later dismissed it as moot. Pet. App. 7a.

B. Federal Circuit

In a non-precedential opinion, the appeals court unanimously ruled in Petitioners' favor on the substantive false-advertising and unfair-competition claims. Pet. App. 7a–11a. Petitioners thus became the prevailing parties for all claims tried to the jury.

Nonetheless, the appeals court affirmed the sanctions decision for two limited reasons. Pet. App. 11a–14a. First, it concluded that Petitioners' argument about *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218 (11th Cir. 2017), was “misplaced,” including their point that *Purchasing Power* requires conduct that could be done only in bad faith. Pet. App. 11a–13a.

Second, without relying on the purported license “fabrication,” the appeals court relied on facts solely related to the “substantially justified” discovery dispute. Pet. App. 13a. The court did not affirm any finding of evidence fabrication or any purported “fraud on the court”—both findings that were critical to the district court's inherent-powers invocation. *See* Pet. App. 11a–14a. The panel instead specifically “assum[ed] Appellants did not fabricate the License Agreement.” Pet. App. 13a.

Yet the court did not explain how the other conduct alone—without the purported license-fabrication finding—was sufficient to unlock a court's inherent powers. Pet. App. 11a–14a. Nor did the appeals court address the fact that the remaining findings of purported support were all subsidiary to the discovery objections made by Petitioners' counsel—the same objections that the magistrate judge previously found were substantially justified. Pet. App. 11a–14a, 55a. Nor did the appeals court address whether it was proper for the district court to invoke the inherent authority to sanction when Respondent's request for fees was denied under Rule 37. Pet. App. 11a–14a.

On July 30, 2025, Petitioners filed a petition for panel rehearing and rehearing en banc. Pet. App. 56a–57a. On September 2, 2025, the Federal Circuit denied the petition. Pet. App. 56a–57a.

REASONS FOR GRANTING THE PETITION

Nearly thirty-five years ago, this Court in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), in a 5-4 decision held that “a court may assess attorney’s fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Chambers* created a conflict with *Societe Internationale* by injecting uncertainty about when statutes and rules are “up to the task” to address sanctionable conduct or when the nebulous inherent powers should be invoked. The conflict and uncertainty have led to a deep conflict about the requirement of bad faith and whether it must be established before unlocking a court’s inherent power to sanction.

The deep-seated conflict has led to this case, where Petitioners reasonably objected to discovery, were not sanctioned under Rule 37, but were later sanctioned under the court’s inherent authority. The appeals court affirmed on a basis which can be understood as relying on the same conduct that was deemed non-sanctionable under Rule 37—except for one finding that was critical for the district court’s decision. That legal approach should not stand. It is a direct result of the deep conflict and confusion about whether a court can invoke inherent powers instead of an applicable Rule, whether bad faith is necessary, and what conduct satisfies bad faith in the inherent-powers context.

The status quo creates wholly inconsistent outcomes, thereby defeating Congress’s primary goal in enacting the Federal Rules: uniformity in the federal courts. Justice Kennedy’s dissent was prophetic in recognizing that “the lack of any legal requirement other than the

talismanic recitation of the phrase ‘bad faith’ will foreclose meaningful review of sanctions based on inherent authority.” *Chambers*, 501 U.S. at 69 (Kennedy, J., dissenting). He warned of the “pernicious practical effects” that will flow from unnecessarily expanding the inherent-powers sanction. *Id.* at 67.

The years following *Chambers* have witnessed a sharp and concerning increase in the reliance on inherent powers to sanction, even when such sanctions would not be available under applicable rules or statutes. This case presents an opportunity for the Court to fix that trend. The petition should be granted.

Alternatively, the petition should be held pending disposition of the petition in *McNair v. Johnson*, No. 25–808 (S. Ct. filed Jan. 6, 2026), which presents the question of whether an inherent-powers sanction requires bad faith or a lower standard of “unintentional or merely negligent conduct.”

I. The Conflict and Uncertainty in Applying the Inherent Power to Sanction

The Federal Circuit’s decision follows decades-long uncertainty and a circuit conflict about when a court can invoke its inherent authority, or power, to issue sanctions not based on any statute or rule. This Court’s two primary cases have offered conflicting views. In view of that tension, federal courts of appeals have taken different approaches. Several circuits require a bad-faith finding before a court may unlock its inherent authority to sanction. Other circuits hold that some types of sanctions may be imposed under a court’s inherent authority without a finding of bad faith. In still other formulations, it is not entirely clear if bad faith is required. The conflicting approaches lead to widely disparate outcomes.

Even where bad faith is required to invoke inherent authority, there is no firm legal standard, guidance, or

definition to instruct courts about when litigation misconduct is so egregious that it could only be committed in bad faith. Courts must comply with due process when assessing bad faith, and the lack of a uniform definition hampers the due-process mandate because parties and their counsel have no reasonable notice about the metes and bounds of permissible versus forbidden advocacy.

A. The Conflict Between *Societe Internationale* and *Chambers*

Forty years ago, the en banc Third Circuit characterized inherent authority to sanction as “nebulous” and “shadowy”: “Despite historical reliance on inherent powers, including Supreme Court jurisprudence dating back to 1812, the notion of inherent power has been described as nebulous, and its bounds as ‘shadowy.’” *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc) (quoting Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 485 (1958)). The obscure nature of the unwritten sanction power has continued, in large part due to tension in this Court’s precedent that warrants review.

1. In 1958, this Court reversed a sanction imposed under a court’s inherent power. In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958), the Court held that a federal court’s authority to dismiss a case for discovery noncompliance arises from Rule 37, not from Rule 41(b) or any free-floating “inherent power.” The Court emphasized that because Rule 37 specifically enumerates sanctions for failure to obey discovery orders—including dismissal—courts should rely on that rule rather than invoke inherent powers, which can “obscure analysis” and risk exceeding the framework of the Rules. *Id.*

For over three decades, *Societe Internationale* was the leading guidance from this Court on when and how a court could unlock its inherent authority to sanction by

imposing fees for a discovery dispute. *See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 996 (10th Cir. 1977) (“Certainly *Societe* is the starting point in our analysis of the matter.”). Appellate and district courts operated under the understanding that inherent powers should not be invoked when existing statutes and rules adequately addressed the conduct.

2. In 1980, the Court revisited the inherent authority to sanction and reaffirmed that these powers must be exercised “with restraint and discretion.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). That case involved a civil rights action brought against Roadway Express by two former employees and an unsuccessful job applicant. *Id.* at 754. During the litigation, counsel for the plaintiff did not comply with discovery requirements and other court orders and also failed to make timely filings. *Id.* at 755. Roadway Express moved to dismiss the lawsuit under Rule 37 and for an award of attorney’s fees and costs. *Id.* The district court granted the motion, awarding fees against the plaintiff’s counsel pursuant to three statutes. *Id.* at 756. The court of appeals vacated and remanded, holding that the three statutes did not authorize the award of attorney’s fees. *Id.* at 757.

On certiorari, this Court affirmed the statutory interpretation but remanded for a determination of whether the plaintiff’s counsel’s litigation conduct was in bad faith, in which case the district court was authorized to assess attorney’s fees in the exercise of its inherent powers. The Court stated that, “in narrowly defined circumstances,” a court has the inherent power to assess attorney’s fees against counsel but cautioned that, “[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.” *Id.* at 764.

3. In 1991, with the Court’s most recent evaluation of inherent powers in *Chambers v. NASCO, Inc.*, 501 U.S. 32

(1991), jurisprudential uncertainty came to a head. *Chambers* assessed particularly egregious conduct and, in doing so, lowered the standard (in the eyes of some) for when a court can impose inherent-authority sanctions instead of statute- or rules-based sanctions.

The petitioner G. Russell Chambers was the sole shareholder and a director of Calcasieu Television and Radio, Inc. *Id.* at 35. He entered a contract with NASCO, Inc. to sell a television station. *Id.* at 35–36. Shortly after, Chambers decided not to sell the television station and attempted to get out of the contract. *Id.* at 36. When NASCO prepared to file suit in federal district court, Chambers and his attorneys began a series of tactics to harass and delay NASCO, to deprive the court of jurisdiction, and to frustrate specific performance. *Id.* at 36–37. Chambers, with the help of his attorney, sold the property to a trust created by them and operated by Chambers’ relatives. *Id.* Despite repeated warnings, contempt sanctions, and injunctions, the tactics continued for several years. *Id.* at 38. Chambers also filed baseless motions and pleadings trying to delay NASCO’s suit. *Id.* Shortly before trial, Chambers stipulated that the contract was enforceable and that he had breached it. *Id.* at 38–39. The district court subsequently entered judgment against Chambers and granted NASCO specific performance. *Id.* at 39. Even after the judgment, Chambers removed station equipment from service and persuaded television-station officials to oppose NASCO’s pending FCC application. *Id.*

The Fifth Circuit, ruling from the bench immediately after oral argument, dismissed Chambers’ appeal as frivolous, imposed appellate sanctions, and remanded with instructions for further consideration of sanctions under Rule 11, 28 U.S.C. § 1927, and the court’s inherent authority. *Id.* at 40. On remand, the district court determined that Rule 11 was “insufficient” and that § 1927

applied only to attorneys. *Id.* at 41. Reasoning that courts possess the inherent power to levy sanctions in response to abusive litigation practices, the court assessed all of NASCO's attorneys' fees against Chambers personally, totaling \$996,644.65 for the entire amount of NASCO's litigation fees and costs. *Id.* at 40–41. The Fifth Circuit affirmed. *Id.* at 42.

The majority in *Chambers* viewed a court's inherent authority as an independent basis for sanctioning bad-faith conduct. *Id.* at 46. Despite the availability of 28 U.S.C. § 1927 and Rule 11, the Court “discern[ed] no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct.” *Id.* The other “mechanisms” for imposing sanctions were, in the majority's view, “not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.” *Id.* The majority explained that, “[a]t the very least, the inherent power must continue to exist to fill in the interstices.” *Id.*

In the majority's view, the other sanctioning mechanisms did not “warrant[] a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct.” *Id.* at 50. “This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions.” *Id.* But the majority went further and held that “simply because that conduct could also be sanctioned under the statute or the Rules” was not a reason to limit the inherent powers. *Id.*

The majority then explained that, “when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power.” And then it added a further caveat: “But if in the informed discretion of the court, neither the

statute nor the Rules are up to the task, the court may safely rely on its inherent power.” *Id.* The majority did not explain when the Rules are not “up to the task.” *See id.*

In short, under the majority opinion, a district court should consider whether the conduct could be sanctioned under the Rules before it relies upon its inherent authority, but resort to the inherent authority is not “forbidden” “simply because that conduct could also be sanctioned under the statute or the Rules.” *Id.* at 50. It all depends on whether the Rules are “up to the task,” but even that is undefined.

Justice Scalia dissented. He agreed that “fee shifting as a sanction can only be imposed for litigation conduct characterized by bad faith.” *Id.* at 59. But he also concluded that not “*all* sanctions imposed under the courts’ inherent authority require a finding of bad faith,” e.g., “a court has the power to dismiss when counsel fails to appear for trial, even if this is a consequence of negligence rather than bad faith.” *Id.* (emphasis in original).

Justice Kennedy dissented, joined by Chief Justice Rehnquist and Justice Souter. *Id.* at 60–77. The dissenters concluded that the district court erred in using its inherent-sanctioning power “without prior recourse to controlling Rules and statutes.” *Id.* at 61. Under the American Rule, they argued, the allocation of the costs of litigation is a matter to be determined by the legislature, not the courts. *Id.* at 61–62. The dissent explained that Congress exercised, by direct action and delegation, the prerogative by providing district courts with a comprehensive list of Federal Rules and statutes to address litigation abuses. *Id.* at 62 (listing numerous Federal Rules and statutes). Accordingly, the majority’s holding that a court may resort to inherent powers when Federal Rules or statutes cover the same conduct is an

intrusion on Congress's prerogative. *Id.* at 62–63. “By allowing courts to ignore express Rules and statutes on point, however, the Court treats inherent powers as the norm and textual bases of authority as the exception.” *Id.* at 63.

3. Without doubt, “[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case.” *Id.* at 64. Justice Kennedy’s prescient dissent foresaw the judiciary’s expansion on the reliance of inherent powers to sanction litigants while looking past the more democratic statutes and rules governing such conduct. As he noted:

Upon a finding of bad faith, courts may now ignore any and all textual limitations on sanctioning power. By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the Rules and statutes, today’s decision will render these sources of authority superfluous in many instances. A number of pernicious practical effects will follow.

Id. at 67.

Chambers has been widely understood as expanding the scope of the inherent-powers sanction, particularly when imposing fee awards. Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge is Like an 800-Pound Gorilla*, 14 Rev. Litig. 195, 196–97 (1994); Alexander B. Rotbart, *Sanctions and the Inherent Power: The Supreme Court Expands the American Rule’s Bad Faith Exception for Fee Shifting—Chambers v. NASCO, Inc.*, 16 Nova L. Rev. 1527, 1564 (1992). The inherent-powers sanction has transformed from a “narrow exception” to a widely used, yet ill-defined hammer for imposing sanctions, even when sanctions are unwarranted under applicable statutes and rules. Courts would, not long ago, emphasize that “the threshold for the use of inherent power sanctions is high,” *Chaves v. M/V*

Medina Star, 47 F.3d 153, 156 (5th Cir. 1995), but less so now, as the safeguards for restraining the inherent powers have been eroded, *see Chambers*, 501 U.S. at 49 n.14 (“[B]ecause individual rules address specific problems, in many instances it might be improper to invoke one when another directly applies.”).

Additionally, since *Chambers*, the line between statutory and rules-based sanctions and inherent-authority sanctions has further blurred. *Chambers* no doubt created conflict with *Societe Internationale*. *Chambers* certainly recognized that a “court ordinarily should rely on the Rules rather than the inherent power . . . [b]ut if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power[s],” which “must continue to exist to fill in the interstices.” *Chambers*, 501 U.S. at 46, 50.

But that recognition was far fuzzier than the Court’s guidance in *Societe Internationale*. *See, e.g.*, Charles M. Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 *Cardozo L. Rev.* 1035, 1037 (2022) (“The scope of inherent judicial authority is frustratingly vague and its use in particular cases is frequently unpredictable.”); Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 *Sedona Conf. J.* 613, 631–43 (2016) (summarizing how “Supreme Court opinions reflect a less than consistent approach to inherent authority”); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc) (“Despite historical reliance on inherent powers, including Supreme Court jurisprudence dating back to 1812, the notion of inherent power has been described as nebulous, and its bounds as ‘shadowy.’” (citing Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 *Colum. L. Rev.* 480, 485 (1958), and Robert E. Rodes, et al., *Sanctions Imposable*

for Violations of the Federal Rules of Civil Procedure 179 n.466 (Federal Judicial Center 1981)).

B. The Long-Standing Circuit Conflict

The conflict between *Societe Internationale* and *Chambers* has contributed to the present-day conflict among the circuit courts on when and how to unlock the inherent authority to sanction and award fees. *See, e.g., United States v. Seltzer*, 227 F.3d 36, 41 (2d Cir. 2000) (“[W]e note that there is a split among the circuits and even within some circuits evidencing confusion about a district court’s power to impose sanctions under the inherent powers doctrine.”).

The conflict among the appeals courts is particularly profound because, in some instances, it is unclear if courts require bad faith for all instances of applying inherent-authority sanctions. The conflict is compounded by the inherently vague understanding of “bad faith” and its various verbal formulations. Thus, too frequently, a court will state that it requires bad faith and state that it finds bad faith, but, in reality, the conduct at issue is far from the level of egregiousness needed to unlock a court’s inherent powers. With little guidance, limitation, or definition of “bad faith,” sanctions are imposed in an entirely inconsistent manner, thus making it impossible for counsel or their attorneys to know what constitutes “bad faith” in the context of inherent authority. *Chambers*, 501 U.S. at 68 (Kennedy, J., dissenting) (“[T]he Court’s bad-faith standard, at least without adequate definition, thwarts the first requirement of due process, namely, that [a]ll are entitled to be informed as to what the State commands or forbids.” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))).

1. Many circuits have stated that a finding of bad faith is required before a court can unlock its inherent power to sanction. This includes the Second, Fifth, Seventh, Tenth, and D.C. Circuits. *Ben E. Keith Co. v. Dining All, Inc.*, 80

F.4th 695, 701 (5th Cir. 2023); *Yukos Cap. S.A.R.L. v. Feldman*, 977 F.3d 216, 235 (2d Cir. 2020) (“[C]lear and convincing evidence of bad faith is a prerequisite to an award of sanctions under the [district] court’s inherent power.”); *Ebmeyer v. Brock*, 11 F.4th 537, 546 (7th Cir. 2021); *United States v. Wallace*, 964 F.2d 1214, 1219 (D.C. Cir. 1992) (“By contrast with section 1927, it is settled that a finding of bad faith is required for sanctions under the court’s inherent powers.”); *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1227 (10th Cir. 2015) (“A court’s inherent power gives it the authority to impose ‘a sanction for abuse of the judicial process, or, in other words, for bad faith conduct in litigation.’” (quoting *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015))).

2. Until recently, the Eleventh Circuit required bad faith to unlock a court’s inherent power to sanction. There, “[i]nvocation of a court’s inherent power requires a finding of bad faith.” *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995); accord *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1314 (11th Cir. 2021) (“This power is ‘unlock[ed]’ only upon a finding of bad faith.”); *Hernandez v. Acosta Tractors Inc.*, 898 F.3d 1301, 1306 (11th Cir. 2018) (“[I]n order for a court to impose a sanction pursuant to its inherent authority, it must make a finding that the sanctioned party acted with subjective bad faith.”).

The Eleventh Circuit has recently taken a different tack. In *McNair v. Johnson*, the Eleventh Circuit has joined the First and Eighth, *see infra*, in holding that inherent-authority sanctions can issue even for “unintentional or merely negligent conduct.” 143 F.4th 1301, 1308 n.4 (11th Cir. 2025). This decision is currently the subject of a pending petition. *See McNair v. Johnson*, No. 25-808 (S. Ct. filed Jan. 6, 2026).

3. The Fourth Circuit has stated that bad faith is important for imposing inherent sanctions but has not

expressly stated that it is a requirement. *E.g.*, *Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 276–77 (4th Cir. 2022) (“Inherent ... in both the court’s authority to impose sanctions and in Section 1927, is an element of bad faith.”). The court in *Harvey* did hold that sanctioning the plaintiff and his attorney was error “because the conduct the court cited as grounds for the award does not demonstrate bad faith.” *Id.* at 277 (footnote omitted).

4. Still other courts employ seemingly looser or more flexible standards. Shortly after *Chambers*, the Eighth Circuit carved out its more flexible path. *Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) (explaining that, in its view, the bad-faith requirement does not extend “to every possible disciplinary exercise of the court’s inherent power, especially because such an extension would apply the requirement to even the most routine exercises of inherent power”).

The First Circuit adopted a similarly looser standard. *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (holding that “bad faith is not essential” to sanction under inherent authority for destruction of evidence). Perhaps going further, the First Circuit stated that, if “evidence is mishandled through carelessness,” then that is enough for inherent-power sanctions. *Id.* at 447 (citing *Nation-Wide Check Corp., Inc. v. Forest Hills Distrib., Inc.*, 692 F.2d 214, 219 (1st Cir. 1982)). Of course, mere “carelessness” is typically indicative of negligence, not bad faith. *E.g.*, *Trade Well Int’l v. United Cent. Bank*, 778 F.3d 620, 627 (7th Cir. 2015) (equating carelessness with negligence and stating “[n]egligence, however, is not enough to support a finding of bad faith.”).

The Ninth Circuit too seems accepting of conduct that may be, but not necessarily is, equivalent to bad faith. *E.g.*, *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1090 (9th Cir. 2021) (“When acting under its inherent authority to impose a sanction, as opposed to applying a

rule or statute, a district court must find either: (1) a willful violation of a court order; or (2) bad faith.”).

The Third Circuit has advanced a similar, less-definitive approach, holding that bad faith is only “usually” necessary. *E.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 181 (3d Cir. 2002) (“[A]n award of fees and costs pursuant to the court’s inherent authority to control litigation will *usually* require a finding of bad faith.” (emphasis added)); *accord Martin v. Brown*, 63 F.3d 1252, 1265 (3d Cir. 1995) (“*Usually*, the inherent power that a district court retains to sanction attorneys also requires bad faith.” (emphasis added)); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 n.11 (3d Cir. 1994) (“Thus, a court need not *always* find bad faith before sanctioning under its inherent powers.” (emphasis added)).

5. Even within circuits stating that bad faith is required, courts offer conflicting and inconsistent proclamations. *E.g.*, *United States v. Mottweiler*, 82 F.3d 769, 772 (7th Cir. 1996) (“Negligent failure to be present when the jury returns could support a civil order requiring counsel to reimburse one’s adversary, and the judicial system, for the expenses to which that delict leads.”); *Seltzer*, 227 F.3d at 41 (holding that, “[u]nder circumstances such as these, sanctions may be justified absent a finding of bad faith given the court’s inherent power ‘to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases’” (quoting *Chambers*, 501 U.S. at 43)).

6. Ultimately, the conflict and confusion with inherent powers become particularly acute in the award of attorney’s fees as sanctions. *Chambers* made clear that “bad faith” is a requirement to award fees as an inherent-authority sanction. 501 U.S. at 47 (“[T]he narrow exceptions to the American Rule effectively limit a court’s inherent power to impose attorney’s fees as a sanction to

cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders."); *see also id.* at 59 (Scalia, J., dissenting). *Id.* at 47. Some courts abide by this "narrow exception" guidance. *E.g., In re Charbono*, 790 F.3d 80, 88 n.3 (1st Cir. 2015) ("[W]here an inherent-power sanction does not take the form of an award of attorneys' fees . . . a finding of bad faith is not ordinarily required.").

At the same time, *Chambers* described an assessment of attorney's fees as a "less severe sanction." 501 U.S. at 45. Describing a fee award as a "less severe sanction" as compared to dismissal, for example, sends a mixed message at best, particularly when other more severe sanctions are imposed and affirmed without any finding of bad faith.

C. The Federal Circuit's Erroneous Ruling Worsens the Conflict and Uncertainty

Review is further warranted because the appeals court's affirmance is wrong. Here, the Federal Circuit applied Eleventh Circuit precedent.² But the Federal Circuit's interpretation and application of Eleventh Circuit law have only added to the "unnecessary confusion." Infected by that confusion, the Federal Circuit ultimately failed to explain how Petitioners' conduct (without the fabrication accusation) supported the sanctions award when such conduct was not sanctionable under Rule 37.

1. The Federal Circuit's confusion with its misinterpretation and misapplication of the Eleventh Circuit's *Purchasing Power* decision leads to its incorrect conclusion that the two categories of conduct amounted to bad faith. The Federal Circuit concluded that *Purchasing*

² The Federal Circuit had exclusive jurisdiction over the appeal based on the false patent marking claim, and Eleventh Circuit law applied to the sanctions issue.

Power “does not mean that a district court is required to find that bad faith is the only explanation for the bad conduct at issue before issuing sanctions.” Pet. App. 12a.

But Eleventh Circuit law has been otherwise. “The key to unlocking a court’s inherent power is a finding of bad faith.” *Purchasing Power*, 851 F.3d at 1223; *see also supra*. The Federal Circuit’s misreading of the “only explanation” requirement adds further uncertainty to an already muddled issue.³

2. The Federal Circuit failed to assess whether a routine discovery dispute about the relevancy of discovery—a dispute that was not sanctionable under Rule 37—was transformed into sanctionable conduct under the court’s inherent authority. The appeals court’s affirmance does not rest on conduct that can reasonably be viewed as rising to the level of bad faith and thus sufficient to unlock the inherent authority. The appeals court offered no explanation why affirmance was proper even though the court was not relying on the district court’s fundamental premise of a so-called fabricated agreement. The appeals court merely included a talismanic recitation of the phrase “bad faith” without more. Pet. App. 13a.

3. The Federal Circuit’s affirmance also contravenes Eleventh Circuit law by sanctioning a party for conduct that is solely attributable to an attorney’s strategic decision-making. The Eleventh Circuit has stated with clarity that a court cannot “rel[y] solely on the actions of counsel” “[t]o support its findings of bad faith and otherwise sanctionable conduct.” *Byrne v. Nezhat*, 261 F.3d 1075, 1123 (11th Cir. 2001). In the Eleventh Circuit, “the rule that the sins of the lawyer are visited on the

³ As noted, the recent *McNair* decision indicates that at least one panel in the Eleventh Circuit concluded that bad faith is not always needed for inherent sanctions.

client does not apply in this context, and a court must specify conduct of the plaintiff herself that is bad enough to subject her to sanctions.” *In re Porto*, 645 F.3d 1294, 1304 (11th Cir. 2011).

Here, the Federal Circuit affirmed the sanctions decision based solely on two categories of actions (and three factual actions) that are solely in the purview of counsel. Ultimately, the Federal Circuit’s erroneous interpretation of Eleventh Circuit law is a product of the amorphous and conflicting law on inherent authority.

D. The “Amorphous” Nature of Inherent Authority Warrants This Court’s Intervention

The current conflict and uncertainty with the inherent-powers doctrine in the context of sanctions, particularly when awarding attorney’s fees, have created multiple problems.

1. The currently vague guidance on inherent-powers sanctions leads to numerous instances where a court prematurely unlocks its inherent powers to impose sanctions when the conduct at issue can and should be dealt with by an applicable statute or rule. The latter is what *Societe* advises and what some appeals courts likewise teach. *E.g.*, *Martin*, 63 F.3d at 1265 (“[A] court’s inherent power should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists.”). *Chambers*, on the other hand, gives internally conflicting guidance—“ordinarily” versus “up to the task”—on when the conduct at issue is adequately addressed by a Rule. 501 U.S. at 46. It offers no insight about when a rule is not “up to the task.”

The Second Circuit and others have noted this confusion: “Although the district courts possess this inherent power, its invocation may be ‘needless and confusing’” when a rule directly applies to the conduct at

issue. *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 144 n.7 (2d Cir. 2010) (quoting 8B Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2282 (3d ed. 2010)).

The far better approach is the “no other basis” standard. *Martin*, 63 F.3d at 1265. It comports with the non-democratic nature of inherent powers by maximizing reliance on the more democratic statutes and rules. *See Roadway Express*, 447 U.S. at 764 (“Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”).

“In general, then, courts first should turn to specific rules tailored for the situation at hand, such as Rule 37, to justify sanctions.” *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 900 (8th Cir. 2009). “Then, as an alternative basis for support or in circumstances where specific rules are insufficient, i.e., when ‘there [is] a need,’ it may be appropriate to invoke their inherent authority.” *Id.* (quoting *Societe Internationale*, 357 U.S. at 207). The Second Circuit relied on *Societe Internationale*’s explanation that employing the inherent power “to dismiss an action for failure to comply with discovery orders ‘can only obscure analysis of the problem’ when Rule 37 specifically covers such situations.” *S. New England Tel.*, 624 F.3d at 144 n.7 (quoting *Societe Internationale*, 357 U.S. at 207); *see also Sentis*, 559 F.3d at 899 (“[W]e emphasize that the better practice is to apply Rule 37 where appropriate and not allow an exercise of inherent power to “obscure’ the Rule 37 analysis.” (quoting *Societe Internationale*, 357 U.S. at 207)).

2. Worse, situations result—as in the present case—where conduct is deemed non-sanctionable under the most applicable rule, but then a court imposes sanctions for the same conduct under the nebulous inherent-powers standard. *Cf. United States v. Rogers Cartage Co.*, 794 F.3d 854, 863 (7th Cir. 2015) (reversing the inherent-

authority sanctions order because “Rule 11 was adequate for the court’s purposes”).

The Federal Circuit’s affirmance in the present case exemplifies why courts should not be permitted to use the inherent powers to impose sanctions when the conduct at issue is not sanctionable under an applicable statute or rule. Under Rule 37, Petitioners were found to have been substantially justified in their objections to the sought-after discovery, but the Federal Circuit now affirms inherent-authority sanctions based solely on that same conduct.

Using inherent powers in lieu of applicable statutes and rules leads to other disparities. In the Third Circuit, for imposing attorney’s fees under § 1927, “a finding of willful bad faith on the part of the offending lawyer is a prerequisite.” *Hackman v. Valley Fair*, 932 F.2d 239, 242 (3d Cir. 1991). But the Third Circuit’s “usually bad-faith” standard is not as stringent, meaning that lesser offensive conduct that does not implicate § 1927 would nonetheless fall within the reaches of the looser inherent-powers grasp.

3. The present conflict increases the likelihood of sanctions that cannot reasonably be seen as bad faith. With the current conflict and amorphousness comes a lack of consensus about what constitutes sanctionable conduct under a court’s inherent power. Each new application of a court’s inherent authority pushes the boundaries, and before long, it becomes a prime example of “precedential drift,” with the exceptions swallowing the rules.

This drift stems in part from the inherently vague definition of “bad faith.” *Chambers*, for example, used the phrase “bad faith, vexatiously, wantonly, or for oppressive reasons,” 501 U.S. at 33, but whether any meaningful differences exist among the separate terms is not certain. As Justice Kennedy’s dissent correctly observed, the lack of guidance, limitation, or definition of what constitutes

bad faith “thwarts the first requirement of due process, namely, that [a]ll are entitled to be informed as to what the State commands or forbids.” *Id.* at 68 (quotation omitted).

Here, the conduct the Federal Circuit deemed sufficient to support a bad-faith determination was the same discovery-dispute conduct about the License Agreement and its creation. Pet. App. 13a. While the district court ultimately overruled Petitioners’ discovery objections, the magistrate judge found the parties’ positions to be substantially justified and therefore declined to award fees under Rule 37. Substantially justified conduct should not and cannot be sufficient to support a bad-faith determination under inherent powers.

The outcome in *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219 (10th Cir. 2015), illustrates the status quo’s problem and the egregiousness of the Federal Circuit’s affirmance here. In *Sun River Energy*, the failure to disclose a relevant insurance policy was not substantially justified under Rule 37, but there was no finding that “counsel acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* at 1227–28. The Tenth Circuit therefore reversed the sanction under the inherent authority. *Id.* at 1231.

In other words, the Tenth Circuit understood that the conduct transgressed the lower standard for Rule 37 fees but was not bad enough for inherent-authority sanction. That outcome is effectively the opposite of what Petitioners faced in the present case. Under the Federal Circuit’s affirmance, the conduct did not meet the lower standard for Rule 37 fees but somehow warranted fees under the higher standard for inherent-authority sanctions.

Of course, the reversal of inherent-authority sanctions in *Sun River Energy* should not be surprising. Discovery disputes occur every day in litigation.

Attorneys routinely object to discovery, those objections are sometimes overruled, but that does not turn every overruled objection into sanctionable conduct under the inherent-powers doctrine. Moreover, where a court finds substantial justification, the court must do more than merely resort to a “talismanic recitation of the phrase ‘bad faith.’” *Chambers*, 501 U.S. at 69 (Kennedy, J., dissenting). After all, “Rule 37(c)(1) requires only the absence of substantial justification—a less stringent standard characterized as ‘not justified to a high degree, but ... justified to a degree that could satisfy a reasonable person.’” *Sun River Energy*, 800 F.3d at 1227 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Accordingly, when a court finds that a party’s objections to discovery were “substantially justified” and thus not sanctionable under Rule 37, that same conduct should not be deemed “bad faith” in order to invoke the court’s inherent powers to issue sanctions, including attorney’s fees. To do so is an improper end-run around the clear rules and guidelines applicable to litigation and discovery.

4. The status quo of inherent-authority precedent too often leads to the imposition of sanctions on parties for conduct that is solely attributable to their attorneys. The lack of suitable guardrails and meaningful appellate review leaves parties, such as Petitioners, suffering the consequences of a sanction attributable solely to their counsel’s conduct and decision-making.

Courts have, time and again, warned that, “[i]f an attorney, rather than a client, is at fault, the sanction should ordinarily target the culpable attorney.” *Republic of Philippines*, 43 F.3d at 74. *But see Link*, 370 U.S. at 633–36 (affirming dismissal of case with prejudice *sua*

sponte for lack of prosecution because the plaintiff's attorney did not appear at a pre-trial conference).⁴

The Eleventh Circuit and others have detailed how “[s]anctionable conduct by a party’s counsel does not necessarily parlay into sanctionable conduct by a party.” *Byrne v. Nezhad*, 261 F.3d 1075, 1123 (11th Cir. 2001); *accord Gallop v. Cheney*, 660 F.3d 580, 583–84 (2d Cir. 2011) (sanctioning only counsel because the client “did not spearhead her litigation strategy, but rather relied heavily upon her attorneys to draft the relevant documents and provide advice in pursuing this litigation”); *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 873 (10th Cir. 1987).

Those guardrails on sanctioning parties for an attorney’s conduct are often overlooked when proceeding via inherent powers as opposed to apply the Federal Rules and statutes. A court’s authority to sanction must therefore be exercised with heightened restraint, particularly when the alleged misconduct stems from reliance on legal counsel.

The Federal Circuit’s basis for affirming cannot reasonably be seen as a valid example of “vindicat[ing] the District Court’s authority over a recalcitrant litigant.” *Hutto v. Finney*, 437 U.S. 678, 691 (1978). Petitioners were never deemed to have violated a court order. They reasonably objected to discovery requests about a then-non-party and a license agreement that had no bearing on the claims being litigated. When their objections were overruled by the court, Petitioners provided complete discovery, and the court found that their positions were “substantially justified,” per Rule 37.

⁴ Douglas R. Richmond, *Sanctioning Clients for Lawyers’ Misconduct – Problems of Agency and Equity*, 2012 Mich. St. L. Rev. 835, 847–48 (2012) (noting that “courts wisely appear to be retreating from the holding in *Link*”).

II. The Issue is Exceptionally Important and Recurring

The issue of inherent-authority sanctions is extremely important for litigants and their counsel alike. Judges, litigants, and attorneys are entitled to a clear answer on what restraint or standard (if any) controls a federal court's imposition of a compensatory sanction under its inherent powers.

First, due process requires that parties involved in litigation be given clear notice of when actions may be sanctionable under a court's unwritten inherent powers. Sanctions imposed under such an "amorphous" power are very likely to chill the enforcement of important legal rights, and they are likely to inhibit attorneys from fully advocating on behalf of clients, for fear of stepping past the fuzzy line between safe territory and the minefield of sanctions.

Attorneys representing the parties also deserve fair notice of the metes and bounds of a court's inherent power to sanction. Those clear metes and bounds are better conveyed through statutes and rules. The Rules Committee, together with this Court and Congress, continue to work to improve the precision and effectiveness of the Federal Rules of Civil Procedure.

Second, the issue of inherent-authority sanctions is a growing concern. From 1980 through 1984, there were only 32 decisions from the courts of appeals and 30 district court decisions addressing "inherent authority" or "inherent power" in the context of sanctions. The number of cases increased dramatically after *Chambers*. The four years after *Chambers*, from 1992 through 1996, there were 218 appellate decisions and 281 district court decisions. And from 2020 through 2024, there were 226

appellate and 5,976 district court decisions.⁵ The data illuminates the alarming increase in the courts' use of inherent powers to sanction.

III. The Case is an Excellent Vehicle for Resolving the Questions Presented

This case is an excellent vehicle to address the conflict and uncertainty with unlocking and applying a court's inherent authority to award attorney's fees as a sanction. The Federal Circuit's error is clear, and the correction of that error would undo the sanctions ruling.

The Federal Circuit's affirmance rests on three undisputed factual elements. The affirmance provides a clear factual basis for the court's decision. Furthermore, the affirmance is expressly not predicated on the alleged fabrication of evidence, which was the primary reason why the district court believed (mistakenly) that Petitioners committed a "fraud on the court." Thus, per the affirmance, the inherent authority to sanction is not predicated on any fraud on the court or fabrication of evidence, but rests on a routine discovery dispute.

The Federal Circuit's affirmance also presents, in a single dispute, a finding that conduct that does not warrant sanctions under Rule 37 is later deemed to warrant sanctions under inherent powers. That stark conflict offers an opportunity to refine the

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the

⁵ The data were obtained using the following search query: "((inherent w/3 authority OR power) w/25 sanction)" in the Westlaw "Federal Courts of Appeals" and "Federal District Courts" databases.

petition should be held pending disposition of the petition in *McNair v. Johnson*, No. 25–808.

Respectfully submitted.

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JANUARY 2026

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT, FILED JUNE 16, 2025**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1068, 2023-1625, 2023-1112

BPI SPORTS, LLC,

Plaintiff-Cross-Appellant,

v.

THERMOLIFE INTERNATIONAL LLC, RONALD
L. KRAMER, MUSCLE BEACH NUTRITION LLC,

Defendants-Appellants.

Appeals from the United States District Court for
the Southern District of Florida in No. 0:19-cv-60505-RS,
Judge Rodney Smith.

Decided: June 16, 2025

Before REYNA, CUNNINGHAM, and STARK, *Circuit Judges.*

REYNA, *Circuit Judge.*

The parties cross-appeal a final judgment of the U.S.
District Court for the Southern District of Florida of false
advertising under the Lanham Act and unfair competition

Appendix A

under state law, and a sanctions order. As to the appeal, we reverse the judgment and affirm the district court's sanctions order. We dismiss the cross-appeal as moot.

BACKGROUND**I.**

Creatine nitrate is an amino-acid nitrate used in dietary supplements. At the time of the trial, appellant ThermoLife International LLC (“ThermoLife”) owned several patents covering creatine nitrate. J.A. 2015, J.A. 2228. Appellant Ronald Kramer is the president, chief executive officer, and sole owner of ThermoLife and the chief executive officer of appellant Muscle Beach Nutrition (“MBN”) (ThermoLife, Mr. Kramer, and MBN, hereinafter “Appellants” or “defendants”). J.A. 369, ¶¶47-48.

ThermoLife licensed its patented creatine nitrate technology to manufacturers, including MBN. *See* J.A. 1278. From 2017 to 2021, MBN sold a creatine nitrate product called “CRTN-3.” J.A. 2000-02, J.A. 2320. The label for CRTN-3 listed the benefit of “increase[d] vasodilation,” in addition to other benefits. J.A. 2001.

Cross-appellant BPI Sports, LLC (“BPI” or “plaintiff”) manufactures and sells dietary nutritional supplements and competes with licensees of ThermoLife. J.A. 365-66, J.A. 669.

*Appendix A***II.**

On February 26, 2019, BPI sued ThermoLife and Mr. Kramer in the U.S. District Court for the Southern District of Florida for false advertising under the Lanham Act and unfair competition under state law in connection with CRTN-3, as well as false patent marking under the Patent Act.¹ J.A. 200-18. In April 2019, BPI filed an amended complaint. J.A. 45. ThermoLife and Mr. Kramer moved to dismiss the amended complaint, arguing that the allegations in the complaint related to MBN, ThermoLife’s licensee, and not ThermoLife and Mr. Kramer. J.A. 23. In other words, it asserted BPI was suing the wrong party. *Id.*

Before MBN was added to the suit, the parties disputed discovery of information surrounding an alleged license agreement between ThermoLife and then non-party MBN. In February 2020, BPI served ThermoLife and Mr. Kramer its first set of discovery requests, seeking “[a]ll licenses to the ThermoLife patents, including licenses with any . . . third parties[.]” J.A. 25. On March 20, 2020, ThermoLife produced an alleged license agreement between ThermoLife and MBN (“License Agreement”). *Id.* The License Agreement listed an effective date of March 16, 2017, but was otherwise undated. *Id.* Mr. Kramer signed the document on behalf of both companies. *Id.*

1. BPI filed other claims before the district court, none of which reached trial or are at issue in this appeal.

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Notably, and undisputedly, Mr. Kramer created the License Agreement on March 9, 2020, in an alleged attempt to memorialize a pre-existing “oral/implied” license between ThermoLife and MBN. *Id.* Also undisputedly, ThermoLife and Mr. Kramer did not inform BPI in its March 20, 2020, production that Mr. Kramer had created the License Agreement on March 9, 2020. J.A. 17.

On April 3, 2020, BPI served ThermoLife and Mr. Kramer its second set of discovery requests, seeking to obtain additional information about the License Agreement. J.A. 25-26. ThermoLife and Mr. Kramer objected, arguing that such information was irrelevant because MBN was not a party to the suit nor an alleged alter ego of the defendants. J.A. 26. On May 26, 2020, BPI filed a second motion to compel.² *Id.*

On June 5, 2020, following a partial grant of defendants’ motion to dismiss the amended complaint, BPI filed its second amended complaint, adding MBN as a defendant. J.A. 23. On June 10, 2020, defendants notified the district court that they would agree to indemnify MBN and to be held jointly and severally liable for any judgment against MBN if the court maintained the existing pretrial deadlines. J.A. 23-24. On June 18, 2020, defendants filed their answer to the second amended complaint, admitting that MBN was an alter ego of ThermoLife. J.A. 24.

2. BPI had previously filed a motion to compel discovery following defendants’ March 20, 2020, production. J.A. 49.

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At the June 19, 2020, hearing, the district court ordered defendants to provide necessary information about the License Agreement. J.A. 26. Defendants produced the underlying metadata for the License Agreement, revealing that Mr. Kramer created the License Agreement on March 9, 2020. J.A. 27.

On September 24, 2020, BPI filed a motion seeking sanctions against the defendants and their attorney, based on Mr. Kramer's creation of the License Agreement. J.A. 28. BPI argued that the creation was done in bad faith and constituted a fraud on the court. *Id.*

On July 14, 2021, the district court ordered sanctions against the defendants but not their attorney ("Sanctions Order"). J.A. 19. The district court found that Mr. Kramer acted in bad faith by knowingly fabricating the License Agreement and repeatedly obstructing discovery to conceal this fraud. J.A. 15, J.A. 34-35. The district court ordered that (1) the License Agreement be excluded from trial, (2) an adverse instruction be given to the jury concerning Mr. Kramer's attempt to manufacture favorable evidence and its effect on his overall credibility, and (3) BPI be awarded reasonable fees and costs incurred with its motion for sanctions and two motions to compel discovery concerning the License Agreement. J.A. 19, J.A. 37-38.

In October 2021, BPI tried its three claims to the jury. *See* J.A. 500. The jury found that BPI showed false advertising and unfair competition but awarded zero damages. J.A. 5263-66. The jury found in favor of the

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defendants as to the false patent marking claim.³ J.A. 5266. The district court entered final judgment on October 25, 2021. J.A. 75.

On November 22, 2021, BPI moved for a new trial under Federal Rule of Civil Procedure 59 (“Rule 59 motion”) based on an alleged compromise verdict. J.A. 3945-53. Defendants renewed a motion for judgment as a matter of law (“JMOL”) under Federal Rule of Civil Procedure 50 (“Rule 50 motion”), arguing that BPI failed to meet its burden of showing false advertising and unfair competition. J.A. 3954. The district court denied both motions. J.A. 3-8.

On October 25, 2022, one year after judgment was entered, defendants moved under Federal Rule of Civil Procedure 60(b) (“Rule 60(b) motion”) for relief from the judgment and the court’s Sanctions Order. J.A. 3998. The district court denied this motion as untimely. J.A. 9.

The parties cross-appeal their respective denied motions. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

3. BPI does not appeal the false patent marking finding. We thus leave that portion of the judgment undisturbed. *See Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 261 F.3d 1329, 1335 nn.3-4 (Fed. Cir. 2001).

*Appendix A***DISCUSSION****I.**

As a threshold matter, BPI’s false advertising claim under the Lanham Act and its unfair competition claim under state law rise and fall together in this case. *See, e.g., Suntree Techs., Inc. v. Ecosense Int’l, Inc.*, 693 F.3d 1338, 1343 (11th Cir. 2012); *see also* Appellants’ Br. 69-70; Cross-Appellant’s Br. 57-58 (“BPI relies on the same arguments advanced above [concerning the Lanham Act claim] to support its position . . . on unfair competition.”). BPI’s belated attempt at oral argument to argue otherwise is waived. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (“Our law is well established that arguments not raised in the opening brief are waived.”).

Appellants appeal the district court’s (1) denial of its Rule 50 motion for JMOL, (2) issuance of the Sanctions Order, and (3) denial of its Rule 60(b) motion. BPI cross-appeals the district court’s denial of its Rule 59 motion. For the reasons discussed below, we reverse the district court’s denial of Appellants’ Rule 50 motion for JMOL and enter judgment in favor of Appellants. We affirm the district court’s Sanctions Order as to the attorneys’ fees. In light of our reversal of the judgment, Appellants’ appeal of the denial of its Rule 60(b) motion and BPI’s cross-appeal are moot. *eSimplicity, Inc. v. United States*, 122 F.4th 1373, 1376 (Fed. Cir. 2024). We thus dismiss the cross-appeal as moot and do not address Appellants’ Rule 60(b) challenge.

*Appendix A***II.**

We review the denial of post-trial motions for JMOL under regional circuit law, here the Eleventh Circuit. *Wordtech Sys., Inc. v. Integrated Networks Sols., Inc.*, 609 F.3d 1308, 1312 (Fed. Cir. 2010). “Under Eleventh Circuit law, we review a district court’s denial of JMOL de novo, viewing all evidence in the light most favorable to the nonmoving party[.]” *Omega Pats., LLC v. CalAmp Corp.*, 13 F.4th 1361, 1368 (Fed. Cir. 2021) (citing *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1257 (11th Cir. 2017)). “JMOL should be granted only when the [moving party] presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action.” *Id.* (quotations omitted).

To prove a false advertising claim under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), a plaintiff must establish five elements: “(1) a false or misleading advertisement (2) that deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented product or service affects interstate commerce; and (5) the plaintiff has been, or is likely to be, injured by the false advertising.” *J-B Weld Co. v. Gorilla Glue Co.*, 978 F.3d 778, 796 (11th Cir. 2020). The failure to establish any one of the five elements is fatal to a party’s claim. *See id.*

Here, Appellants argue that they are entitled to JMOL because no reasonable jury could have found that various elements of BPI’s false advertising claim were met. *See* Appellants’ Br. 34, 44, 57. We agree with Appellants that

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no reasonable jury could have found in favor of BPI under the falsity element of a false advertising claim, i.e., that CRTN-3 label's statement of "increase vasodilation" was literally false. On that basis, we reverse the judgment, and we need not reach Appellants' arguments concerning the other elements of BPI's false advertising claim.

The falsity element is "satisfied if the challenged advertisement is literally false, or if the challenged advertisement is literally true, but misleading." *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1308 (11th Cir. 2010) (quotations omitted). As an initial matter, only literal falsity is at issue in this appeal. On the verdict form, the jury concluded that CRTN-3's label of "increase[d] vasodilation" was literally false. J.A. 5263. On that same form, the jury did not reach whether the alleged misrepresentation was misleading. *Id.* On appeal, BPI does not argue that to the extent we disagree with the jury verdict on the literal falsity element, we should affirm on the alternative ground that CRTN-3's statement of "increase[d] vasodilation" was misleading. Cross-Appellant's Br. 46-50. BPI's one conclusory statement that Appellants' advertisement was "misleading" in a subsection header of its brief, Cross-Appellant's Br. 46, does not preserve for appeal any argument that the advertisement was misleading. *SmithKline*, 439 F.3d at 1320 (noting that "mere statements of disagreement" with the lower court do not amount to a developed argument). Thus, we focus our analysis only on the literal falsity element.⁴

4. And in any event, no reasonable jury could have concluded that CRTN-3's statement of "increase vasodilation" was misleading. If an advertisement is not literally false—as is the

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Here, no reasonable jury could have concluded that CRTN-3's statement of "increase vasodilation" was literally false. BPI's own evidence shows that the dosage disclosed in CRTN-3's label would "cause vasodilation" for people weighing 113 pounds or less. *See* J.A. 776, 199:8-13 (BPI's expert testifying that "[i]n order for 319.4 milligrams of [creatine] nitrate [in CRTN-3] to cause vasodilation, the body weight would have to be about 113 pounds"). Thus, BPI's own expert admits that it is not literally false that CRTN-3 "increase[s] vasodilation."

BPI argues that CRTN-3's "increase vasodilation" statement is "literally false" because the evidence shows that the dosage amount of creatine nitrate needed for "an average adult in the U.S. weighing 177 pounds" is more than the amount disclosed in CRTN-3. Cross-Appellant's Br. 46-47. This argument, however, supports the conclusion that CRTN-3's "increase vasodilation" statement is not literally false. BPI, like its expert, concedes that CRTN-3 increases vasodilation in some people. BPI's argument fails because there is no statement on the label that, for instance, the product "increases vasodilation" for the "average adult . . . weighing 177 pounds." It merely stated

case here—the movant must provide evidence that the misleading statement resulted in consumer deception. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002). While consumer surveys or market research are not required, a moving party must provide "expert testimony or other evidence." *Id.* (quotations omitted). Here, BPI presented no evidence to the jury that CRTN-3's label of "increase vasodilation" deceived consumers into purchasing CRTN-3 and thus BPI's misleading claim necessarily fails. *See* Appellants' Br. 54, 57; Cross-Appellant's Br. 46-50.

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that it will “increase vasodilation.” J.A. 2001. BPI provides no legal or factual support for its theory that CRTN-3’s statement of “increase vasodilation” applies only to the “average adult . . . weighing 177 pounds.”

Because no reasonable jury could find CRTN-3’s statement of “increase vasodilation” is literally false, BPI’s Lanham Act claim for false advertising necessarily fails. We reverse the district court’s judgment as to the false advertising and unfair competition claims.⁵

III.

Appellants appeal the district court’s Sanctions Order. Appellants’ Br. 70. We note that Appellants’ challenge is largely mooted by our reversal of the judgment. Because we enter judgment in Appellants’ favor, Appellants’ challenges to portions of the Sanctions Order concerning an adverse jury instruction and other evidentiary issues are no longer at issue. *eSimplicity, Inc.*, 122 F.4th at 1376. The only portion of the Sanctions Order that remains ripe for review is the district court’s award of attorneys’ fees. For the reasons discussed below, we affirm the district court’s Sanctions Order as to the attorneys’ fees.

A district court has inherent authority, which is governed “by the control necessarily vested in courts to

5. As previously noted, the unfair competition claim is dependent on the false advertising claim. Also, as previously noted, we leave the portion of the judgment as to the false patent marking claim undisturbed. *See Advanced Cardiovascular*, 261 F.3d at 1335 nn.3-4.

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manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quotations omitted). A court may exercise this power to sanction a party who has acted in bad faith after making such a finding. *Id.* at 45-46; *see also Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223 (11th Cir. 2017). “The inherent power must be exercised with restraint and discretion.” *Purchasing Power*, 851 F.3d at 1225. It is a remedy “for rectifying disobedience, regardless of whether such disobedience interfered with the conduct of the trial.” *Id.*

Appellants argue that the district court’s Sanctions Order runs afoul of *Purchasing Power*. Appellants’ Br. 71-72. According to Appellants, *Purchasing Power* requires a district court to first determine that bad faith was the “only” explanation for the alleged sanctionable conduct before unlocking its inherent power to sanction. Appellants’ Br. 72. And according to Appellants, the district court did not make this finding, and thus, its use of its inherent authority was erroneous. *Id.* We disagree with Appellants’ reading of *Purchasing Power*. That case provides that “in the absence of direct evidence of subjective bad faith, this standard can be met if an attorney’s conduct is so egregious that it could only be committed in bad faith.” 851 F.3d at 1224-25. In other words, *a party* may show bad faith by establishing that the conduct was so egregious, it was only committed in bad faith. This proposition does not mean that *a district court* is required to find that bad faith is the only explanation for the bad conduct at issue before issuing sanctions. Appellants’ reading of *Purchasing Power* is misplaced.

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Appellants argue that the Sanctions Order is based on a “clearly erroneous view of the evidence,” and thus should not stand. Appellants’ Br. 73. In particular, Appellants argue that they did not “fabricate[]” the License Agreement for use in the litigation below. Appellants’ Br. 73-74. But, even assuming Appellants did not fabricate the License Agreement, the district court rested its Sanctions Order on additional, sufficient findings. The district court found that Appellants (1) withheld information surrounding the circumstances of the License Agreement until compelled to release this information and (2) attempted to prevent discovery of the circumstances surrounding the creation of the License Agreement. J.A. 16-17 (finding that Mr. Kramer “initially tried to pass” the License Agreement “off as legitimate to advance his case” and “impeded the presentation of [BPI’s] case”); J.A. 17 (“During discovery, *after compelled to do so by the Court*, Defendants disclosed the metadata associated with the License Agreement[.]” (emphasis added)); *id.* (noting that Appellants “tried to prevent discovery of the circumstances surrounding the License Agreement” by offering to indemnify and hold MBN harmless if the court maintained the existing pretrial deadlines). These findings are not clearly erroneous and are sufficient to support a bad faith determination. *Chambers*, 501 U.S. at 46 (noting that bad faith may exist where a “fraud has been practiced upon [the court], or that the very temple of justice has been defiled” (quotations omitted)). Thus, we see no error in the district court’s sanction of attorneys’ fees. *Purchasing Power*, 851 F.3d at 1225 (explaining that a district court’s inherent power “is for rectifying disobedience” and for “vindicating judicial authority”).

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In sum, the district court did not abuse its discretion in issuing its Sanctions Order. We affirm the Sanctions Order as to the attorneys' fees.

CONCLUSION

We have considered the parties' remaining arguments and find them unpersuasive. We reverse the judgment of false advertising under the Lanham Act and unfair competition under state law. We affirm the district court's Sanctions Order. We dismiss the cross-appeal.

**JUDGMENT REVERSED, SANCTIONS ORDER
AFFIRMED, CROSS-APPEAL DISMISSED**

COSTS

No costs.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ENTERED JULY 14, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-60505-CIV-SMITH

BPI SPORTS, LLC,

Plaintiff,

v.

THERMOLIFE INTERNATIONAL, LLC, *et al.*,

Defendants.

Entered July 14, 2021

ORDER AFFIRMING AND ADOPTING REPORT AND RECOMMENDATION TO DISTRICT JUDGE

This matter is before the Court on the United States Magistrate Judge’s Report and Recommendation to District Judge [DE 226], in which the Magistrate Judge recommends that the Court grant in part Plaintiff’s Motion for Terminating and Monetary Sanctions [DE 143] (the “Motion”). Defendants filed Objections [DE 229], and Plaintiff filed a Response to Defendants’ Objections [DE 238]. For the reasons that follow, the United States Magistrate Judge’s Report and Recommendation is AFFIRMED and ADOPTED.

*Appendix B***I. PROCEDURAL BACKGROUND**

On September 24, 2020, Plaintiff filed its Motion under seal, seeking sanctions against Defendants and their attorney Gregory Collins based on: (i) Defendant Ronald Kramer's creation of a License Agreement for use in litigation; (ii) Defendants' production of inaccurate financial records that under-report Defendant Muscle Beach Nutrition's profits; (iii) attorney Collins' allegedly perjured statements in two declarations filed with the Court; (iv) attorney Collins' overall conduct during the proceedings; (v) Defendants' overall litigation conduct; and (vi) Defendant Kramer's conduct at an unrelated patent hearing. On October 15, 2020, Defendants filed their Response in Opposition [DE 151]. Plaintiff filed its Reply [DE 159] on October 26, 2020. The Court referred this matter to the United States Magistrate Judge for a report and recommendation [DE 152]. In addition to the parties' filings, on November 18, 2020, the Magistrate Judge held a hearing, at which the parties had the opportunity to present their respective arguments.¹ On February 25, 2021, the Magistrate Judge issued her Report and Recommendation. The Magistrate Judge concluded that the record supports a finding that sanctions are warranted against Defendants but not against attorney Collins. The Magistrate Judge recommends that (i) Defendants be precluded from introducing into evidence or otherwise using the License Agreement in their case-in-chief; (ii) the jury be advised of Defendant Kramer's

1. The transcript for the November 18, 2020 hearing is available at [DE 192].

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attempt to manufacture favorable evidence, and its effect on his overall credibility; and (iii) Plaintiff be awarded reasonable fees and costs incurred in connection with the Motion and the two prior motions to compel discovery regarding the License Agreement

II. STANDARD OF REVIEW

The district court must make a *de novo* determination of the portions of the report and recommendation to which a specific objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

III. DISCUSSION

Defendants argue that the Report and Recommendation applies the incorrect standard for the Court's inherent power and that the Report and Recommendation incorrectly assumes that ThermoLife and Muscle Beach Nutrition did not have an oral license agreement prior to the creation of the License Agreement at issue. Defendants also argue that the Magistrate Judge did not identify facts sufficient to unlock the Court's inherent powers, the Magistrate Judge assessed credibility without hearing live testimony,² and the sanctions recommended are

2. Defendants argued that the Magistrate Judge assessed credibility without hearing live witness testimony and therefore asserts that the Court must assess witness credibility *de novo*. The Court will not address this issue because Defendants' objection is deficient, in that they failed to specifically identify any credibility determinations purported made in error by the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3); S.D. Fla. Loc.

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inappropriate and unrecognized in the Eleventh Circuit. Defendants therefore request that the Court reject the Magistrate Judge's Report and Recommendation. In response, Plaintiff requests that the Report and Recommendation be adopted in full.

1. The Report and Recommendation Applies the Correct Legal Standard for the Court's Inherent Powers

“It has long been understood that ‘certain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. 32, 7 (1812)). “These powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Chambers*, 501 U.S. at 43 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). The Court's inherent powers include the authority to regulate litigation and impose “reasonable and appropriate” sanctions on the parties, as well as their counsel, for abusive practices. *See Martin v. Automobile Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1335 (11th Cir. 2002). This authority includes the inherent power

Mag. R. 4(a)(1). Moreover, to the extent that Defendants seek to object to the Court's use of deposition testimony in lieu of live testimony, Defendants expressly agreed to forgo live testimony at the November 18, 2020 hearing and rely instead on the deposition transcript of Defendant Kramer. (*See* DE 179.)

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to sanction the parties for a fraud upon the Court. *See id.* (citing *Chambers*, 501 U.S. at 44; *In re E.I. DuPont De Nemours & Company-Benlate Litigation*, 99 F.3d 363, 367 (11th Cir. 1996) (“[e]very district court ‘has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud.’”)). In order to “exercise its inherent power a court must find that the party acted in bad faith.” *Martin*, 307 F.3d at 1335; *see JTR Enterprises, LLC v. Columbian Emeralds*, 697 F. App’x 976, 986 (11th Cir. 2017) (“[t]he key to invoking a court’s inherent power to sanction is a finding of bad faith.”). Bad faith may be found when a party commits a fraud on the court. *Barash v. Kates*, 585 F. Supp. 2d 1347, 1362 (S.D. Fla. 2006) (citing *Chambers*, 501 U.S. at 46). In the Eleventh Circuit, a fraud on the court must be established by clear and convincing evidence. *Gupta v. United States AG*, 556 F. App’x 838, 840 (11th Cir. 2014) (citing *Booker v. Dugger*, 825 F.2d 281, 283 (11th Cir. 1987)).

In their Objections, Defendants argue that the Magistrate Judge applied the incorrect legal standard for unlocking the Court’s inherent power to sanction Defendants. In support of their argument, Defendants cite to *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218 (11th Cir. 2017)³ and *Meunier Carlin*

3. To the extent that Defendants attempt to compare the present situation to that in *Purchasing Power*, the present situation is clearly distinguishable. In *Purchasing Power*, the Eleventh Circuit reversed a district court’s imposition of sanctions on plaintiff’s counsel. 851 F.3d at 1228. The district court had expressly applied a recklessness standard and found that the plaintiff’s counsel acted recklessly when he failed to adequately

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& Curfman, LLC v. Scidera, Inc., 813 F. App'x 368 (11th Cir. 2020) for the position that “recklessness” or “reckless misstatements” alone do not amount to bad faith and are insufficient to satisfy the court’s inherent power standard. Notably, each case involves a finding of bad faith with respect to counsel, not a named party.

In her Report and Recommendation, the Magistrate Judge applied the correct legal standard for unlocking the Court’s inherent power. The Magistrate Judge applied the clear and convincing evidence standard and concluded that “Plaintiff has shown by clear and convincing evidence that Defendant Kramer knowingly created a document for use in this litigation to advance his case and impede the efficient presentation of Plaintiff’s case.” (Report and Recommendation [DE 226] (the “R&R”) at 11.) The Magistrate Judge concluded further that “Defendant Kramer fabricated a written agreement that did not exist prior to this lawsuit, and initially tried to pass it [] off as legitimate.” (R&R at 15.) Finally, the Magistrate Judge found that “the circumstances surrounding the creation of the License Agreement, coupled with its seemingly innocuous production during discovery and Defendants’ subsequent tactical attempts to [stymie] discovery on this issue, provide clear and convincing evidence of Defendants’ bad faith. . . .” (R&R at 3.) Thus, in contrast to Defendants’

investigate the plaintiff’s citizenship before representing to the court that diversity jurisdiction existed. *Id.* at 1223. Accordingly, the Eleventh Circuit reversed, finding that the district court applied the incorrect legal standard for unlocking the court’s inherent power to sanction counsel because “recklessness alone does not constitute conduct tantamount to bad faith.” *Id.* at 1223.

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argument, the Magistrate Judge’s finding of bad faith was not based on “reckless misstatement” alone, but rather based on her findings that Defendants had committed a fraud upon the Court when Defendant Kramer knowingly fabricated evidence to advance his case and repeatedly attempted to obstruct discovery of their fraud. A fraud committed on the Court is sufficient to find that a party has acted in bad faith, and thus warrants imposition of sanctions. *See Barash*, 585 F. Supp. 2d at 1362 (citing *Chambers*, 501 U.S. at 46) (“bad faith may be found where the court finds that a ‘ . . . fraud has been practiced upon it, or that the very temple of justice has been defiled.”).

2. The Report and Recommendation Clearly Indicates that the Magistrate Judge Considered Defendants’ Argument Regarding an Oral Agreement and Subsequently Discounted the Argument

Defendants argue that the Report and Recommendation does not consider their arguments regarding a purported oral license agreement that existed between Defendants ThermoLife and Muscle Beach Nutrition. Defendants also assert that the License Agreement is irrelevant, and Defendant Kramer created the document to memorialize a prior existing oral agreement. The record clearly shows that the Magistrate Judge considered Defendants’ arguments and found not only that the arguments were unconvincing, but also disingenuous. (R&R at 12-13 (“it is disingenuous for Defendants to argue that the License Agreement was irrelevant when the parties disputed the relationship between the corporate entities.”)) The Court

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has repeatedly instructed Defendants that the License Agreement is relevant to the discovery on the claims and defenses at issue in this case. (R&R at 12 (citing to the record).) The Magistrate Judge notes that, at the time Defendants disclosed the License Agreement to Plaintiff, there was a dispute regarding the relationship between Defendant ThermoLife and Muscle Beach, and Defendants' main defense in the case was that Plaintiff incorrectly sued ThermoLife instead of the correct party, Muscle Beach. (R&R at 12 (citing DE 16 at 3,4, 8; DE 89 at 5, 8).) Likewise, the Magistrate Judge considered, and subsequently dismissed, Defendants' argument that the License Agreement was simply a "memorialized" pre-existing oral or implied agreement. (*See* R&R at 13.)

3. The Magistrate Identified Sufficient Facts to Warrant Unlocking the Court's Inherent Powers

Defendants argue that the Magistrate Judge did not identify facts sufficient to unlock the Court's inherent powers. Defendants assert that the present circumstances are similar to those at issue in *Purchasing Power*.

First, the circumstances at issue in *Purchasing Power* are clearly distinguishable from the circumstances at issue in this case. As discussed above, in *Purchasing Power*, the Eleventh Circuit reversed a district court's imposition of sanctions on the plaintiff's counsel because the district court applied the incorrect legal standard for assessing bad faith. 851 F.3d at 1228. Here, the Magistrate Judge applied the correct legal standard. The Eleventh Circuit

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also found that the district court’s conclusion—that “there is no evidence [plaintiff’s counsel] investigated [defendant’s] citizenship—was not supported by the record evidence. *Purchasing Power*, 851 F.3d at 1225. Here, the Magistrate Judge’s conclusions are supported by the record.

Second, the Court finds that the Magistrate Judge identified sufficient facts to warrant unlocking the Court’s inherent power, and the Magistrate Judge’s conclusion is supported by the record evidence. The Magistrate Judge concluded that Defendant Kramer knowingly fabricated a written document for use in litigation, initially tried to pass it off as legitimate to advance his case, and impeded the presentation of Plaintiff’s case. (R&R at 11, 15.) In reaching her conclusion, the Magistrate Judge considered not only the License Agreement itself, but also “the circumstances surrounding the creation of the License Agreement, . . . its seemingly innocuous production during discovery[,] and Defendants’ subsequent tactical attempts to [stymie] discovery on the issue.” (R&R at 3.) In addition to the written briefs submitted by the parties, the Magistrate Judge also held a hearing, during which the parties presented argument and responded to the Magistrate Judge’s inquiries. (R&R at 1, n.1.)

The record reflects that Defendants disclosed the License Agreement in March 2020. (DE 143-1, 181-1.) The License Agreement purports to have an effective date of March 16, 2017. (DE 143-1.) During discovery, after compelled to do so by the Court, Defendants disclosed the metadata associated with the License Agreement,

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which indicated that the document had been created by Defendant Kramer on March 9, 2020. (DE 143-3, 143-4, 181-1.) Moreover, the terms of the License Agreement did not reflect the actual terms purportedly governing the relationship between ThermoLife and Muscle Beach. (*See* DE 143-1; R&R at 13 (citing Sanctions Hr'g Tr. [DE 192] 132:15-16).) The Magistrate Judge also considered the circumstances surrounding the parties' contentious discovery. Despite disclosing the License Agreement in March 2020, Defendants did not claim that the License Agreement represented a purported oral agreement until after Plaintiff suspected irregularities surrounding the document. The Magistrate Judge found that the Defendants then tried to prevent discovery of the circumstances surrounding the License Agreement by (i) filing an Expedited Request before the District Judge and offering to indemnify and hold Muscle Beach harmless if the Judge maintained the existing pretrial deadlines; (ii) admitting alter ego liability for Muscle Beach; (iii) arguing before the Magistrate Judge that admission of alter ego liability foreclosed Plaintiff's right to discovery. (R&R at 14 (citing Discovery Hr'g Tr. 88:19-22; Sanctions Hr'g Tr. 46:10-49:21).) In effect, the record evidence leads to a conclusion that, after Plaintiff identified suspicious circumstances relating to the fabricated document, Defendants sought to prevent discovery of their fraud.

4. The Sanctions Recommended by the Magistrate Judge are Appropriate and Warranted

In her Report and Recommendation, the Magistrate Judge recommends, in part, that Defendants be precluded

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from introducing into evidence or otherwise using the License Agreement in their case-in-chief and the jury be advised of Defendant Kramer's attempt to manufacture favorable evidence and its effect on his overall credibility. (R&R at 18.) Defendants argue that the Magistrate Judge's recommendation that "the jury be advised of Defendant Kramer's attempt to manufacture favorable evidence and its effect on his overall credibility" is a novel sanction created by the Magistrate Judge and unrecognized in the Eleventh Circuit. Defendants claim that an adverse jury instruction is not warranted. Defendants have not cited to any authority that would indicate the proposed sanctions are inappropriate or excessive under these circumstances.

The Court finds the proposed jury instruction appropriate for the circumstances in this case. "[W]hen determining an appropriate sanction pursuant to the court's inherent power, a court must balance the interest in sufficiently punishing and deterring the abusive conduct with the interest of allowing a full and fair trial on the merits." *Quantum Communs. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249, 1251, 1268-70 (S.D. Fla. 2007) (entering default judgment and imposing attorneys' fees against the defendant after finding that the defendant lied under oath, failed to produce documents during discovery, and filed a bad-faith bankruptcy petition to avoid litigation); see *Bashir v. AMTRAK*, 119 F.3d 929, 931 (11th Cir. 1997) ("an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith."); *Vargas v. Peltz*, 901 F. Supp. 1572, 1580 (S.D. Fla. 1995) (dismissing case when "[p]laintiff . . . attempted,

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by fraudulent means, to ‘enhance’ her case through the introduction of fabricated [evidence] and through fictionalized testimony concerning how she supposedly received the [evidence].”). “Litigants must know that the courts are not open to persons who would see justice by fraudulent means.” *Id.* at 1582.

Accordingly, it is

ORDERED that the Magistrate Judge’s Report and Recommendation [DE 226] is **AFFIRMED** and **ADOPTED**.

1. Plaintiff’s Motion for Terminating and Monetary Sanctions [DE 143] is **GRANTED IN PART**.
2. Defendants are hereby precluded from introducing into evidence or otherwise using the License Agreement in their case-in-chief.
3. The jury will be advised of Defendant Kramer’s attempt to manufacture favorable evidence and its effect on his overall credibility.
4. Plaintiffs are hereby entitled to reasonable attorneys’ fees and costs incurred in connection with the Motion and the two prior motions to compel discovery regarding the License Agreement. Plaintiffs are directed to file a supplement, including billing records, to support any request for attorneys’ fees and costs incurred.

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DONE AND ORDERED in Fort Lauderdale, Florida
on this 14th day of July, 2021.

s/Rodney Smith
RODNEY SMITH
UNITED STATES DISTRICT JUDGE

**APPENDIX C — REPORT AND
RECOMMENDATION OF THE UNITED STATES
DISTRICT COURT, SOUTHERN DISTRICT OF
FLORIDA, ENTERED FEBRUARY 25, 2021**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-CIV-60505-SMITH/VALLE

BPI SPORTS, LLC,

Plaintiff,

v.

THERMOLIFE INTERNATIONAL, LLC,
MUSCLE BEACH NUTRITION LLC,
AND RONALD L. KRAMER,

Defendants.

Entered February 25, 2021

**REPORT AND RECOMMENDATION
TO DISTRICT JUDGE**

THIS CAUSE is before this Court on Plaintiff BPI Sports, LLC's Motion for Terminating and Monetary Sanctions (the "Motion"). (ECF No. 143). U.S. District Judge Rodney Smith referred the Motion to the undersigned for a Report and Recommendation. (ECF No. 152).

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Accordingly, having reviewed the Motion, Defendants' response (ECF No. 151), Plaintiff's reply (ECF No. 159), having held an evidentiary hearing, and being otherwise fully advised in the premises, the undersigned respectfully recommends that the Motion be **GRANTED IN PART** for the reasons set forth below.¹

I. THE MOTION FOR SANCTIONS

On September 24, 2020, Plaintiff filed the instant Motion for Sanctions. (ECF No. 143). In the Motion, Plaintiff seeks sanctions against Defendants and their attorney Gregory Collins based on: (i) Defendant Ronald Kramer's ("Kramer") creation of a License Agreement (as further defined below) on March 9, 2020 for use in the litigation; (ii) Defendants' production of allegedly false financials that under-report Defendant Muscle Beach Nutrition's (as defined below) profits by deducting costs paid for by Defendant ThermoLife International, LLC ("ThermoLife"); (iii) attorney Collins' allegedly

1. On November 18, 2020, the undersigned held a four-hour evidentiary hearing on this Motion and also on Plaintiff's Third Motion to Compel (as defined below), (ECF No. 148). (ECF No. 184) (11/18/20 hearing minutes); *see also* (ECF No. 192) (11/18/20 hearing transcript) ("Sanctions Hr'g Tr."). In advance of the hearing, the parties filed a Joint Stipulation, agreeing to the admissibility of Plaintiff's pre-marked exhibits (Pl. Exhs. 1-39, 41), Defendants' pre-marked exhibits (Def. Exhs 1-22), and Exhibit 40-Rev, all of which the Court admitted into evidence during the hearing. *See* (ECF No. 179) (Joint Stipulation); (Sanctions Hr'g Tr. 7:7-14). The parties also agreed to forego live witness testimony and rely instead on the deposition transcript of Defendant Kramer. (ECF No. 179); (Pl. Exh. 33)(the "Kramer Dep.").

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perjured statements in two declarations filed with the Court, *see* (ECF Nos. 65-1 and 69-1); (iv) attorney Collins' overall conduct during the proceedings (including bullying, yelling, making threats and intimidating tactics during deposition and meet and confers, and emailing a purportedly unjustified Rule 11 motion that was never filed); (v) Defendants' overall litigation conduct (including discovery obfuscation and alleged forum shopping in another lawsuit filed by ThermoLife against Plaintiff); and (vi) Defendant Kramer's conduct at an unrelated patent hearing (including alleged threats, intimidation, and bullying). *See generally* (ECF No. 143).

Based on these purported procedural and substantive abuses, Plaintiff asks the Court to enter a default judgment against Defendants and sanction attorney Collins, pursuant to the Court's inherent powers, 28 U.S.C. § 1927, and/or Federal Rule of Civil Procedure 37.² (ECF No. 143 at 5, 21-26). Plaintiff argues that no sanction short of default will adequately remedy the cumulative effect of these abuses, which render Defendants' evidence

2. Plaintiff also requests fees and costs under Rule 54(d)(2) (B). *Id.* Additionally, on October 14, 2020, Plaintiff filed a separate motion to compel production of documents responsive to BPI's Third Set of Requests for Production to Defendants. (ECF No. 148) ("Plaintiff's Third Motion to Compel"). In the Third Motion to Compel, Plaintiff seeks to obtain communications between Defendants and their counsel under the crime-fraud exception to the attorney-client privilege regarding the circumstances surrounding the creation of the License Agreement document. *Id.* The undersigned will address Plaintiff's Third Motion to Compel by separate order.

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generally untrustworthy and tarnish the integrity of the judicial proceedings. (Sanctions Hr'g Tr. 36:24-37:8, 37:16-21).

In response, Defendants assert that they have not violated any court orders, have provided all discovery, Plaintiff has not suffered any prejudice, and there is simply no sanctionable conduct under any of the rules or the Court's inherent powers. (ECF No. 151 at 2-3). As to Plaintiff's allegation that Defendants manufactured the License Agreement during the litigation, Defendants argue that Defendant Kramer simply "memorialized" a pre-existing oral/implied agreement, which is a common practice in intellectual property cases, so that no fraud was committed on Plaintiff or the Court. *Id.* at 7-10.

This Report will focus on whether Defendant Kramer and his attorney acted in bad faith in creating the License Agreement for use in this litigation. A finding of bad faith unlocks this Court's "inherent powers" to sanction parties and attorneys who knowingly perpetrate a fraud on the Court. *Chambers v. NASCO Inc.*, 501 U.S. 32, 43-51, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991); *Barnes v. Dalton*, 158 F.3d 1212, 1214 (S.D. Fla. 1998). Here, as discussed more fully below, the undersigned finds that the circumstances surrounding the creation of the License Agreement, coupled with its seemingly innocuous production during discovery and Defendants' subsequent tactical attempts to stymie discovery on this issue, provide clear and convincing evidence of Defendants' bad faith so as to warrant the imposition of sanctions pursuant to the Court's inherent powers.

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Nevertheless, the undersigned finds that sanctions are not warranted in connection with the other alleged misconduct, singly or in combination. Specifically, the undersigned finds that: (i) questions regarding the accuracy of the Muscle Beach financials can adequately be addressed through cross-examination and impeachment at trial; (ii) attorney Collins' statements in two Declarations filed with the Court, *see* (ECF Nos. 65-1 and 69-1), do not rise to the level of perjury; and (iii) attorney Collins' and Defendant Kramer's individual conduct and overall litigation strategy may not be a model for civility, but do not warrant the extreme sanction Plaintiff requests. Thus, Plaintiff's Motion is denied as to these allegations.

II. RELEVANT PROCEDURAL BACKGROUND

This case has a long litigation history, which is accurately stated in the Motion and Defendants' response and will not be recounted here. *See generally* (ECF Nos. 143, 151); *see also* (ECF Nos. 181, 182 at 2) (Plaintiff's Chronology of Events, to which Defendants do not substantively object). In summary, Plaintiff filed the initial Complaint in February 2019 alleging claims under the Lanham Act, 15 U.S.C. § 1125(a), unfair competition, trade libel, libel per se, and tortious interference with business relations. (ECF No. 1). In April 2020, Plaintiff filed its Amended Complaint. (ECF No. 12). Subsequently, Defendants ThermoLife and Kramer moved to dismiss the Amended Complaint, arguing *inter alia* that the allegations in the Amended Complaint related to Muscle Beach Nutrition LLC ("Muscle Beach"), one of ThermoLife's licensees, and not to Defendants ThermoLife

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and Kramer. (ECF No. 16 at 3, 4, 8) (generally alleging that BPI was, in effect, suing the wrong company).

On June 5, 2020, following a partial grant of Defendants' motion to dismiss the Amended Complaint and upon obtaining leave of Court, *see* (ECF Nos. 37, 91), Plaintiff filed the Second Amended Complaint ("SAC"), which remains the operative pleading. (ECF No. 92). Notably, the SAC added Defendant Muscle Beach as a party to the action. The SAC alleges violations of the Lanham Act, unfair competition, and false patent marketing against all Defendants. *Id.* ¶¶ 115-136.

On June 10, 2020, five days after the filing of the SAC, Defendants filed an Expedited Request for a Telephonic Status Conference with the District Judge. *See* (ECF No. 98) (the "Expedited Request"). In the Expedited Request, Defendants ThermoLife and Kramer advised the District Judge that they had agreed to "indemnify, defend, and hold harmless" Muscle Beach and agreed to be "held jointly and severally liable for any judgment against [Muscle Beach] in order to streamline this action including any remaining discovery and the issues for trial," contingent upon the Court maintaining the then-existing pretrial schedule, despite the filing of the SAC. (ECF No. 98 at 2-4). On June 16, 2020, the District Judge denied the Expedited Request, stating, in part, "consistent with the Rules, Plaintiff is entitled to discovery; Defendants cannot unilaterally limit Plaintiff's discovery rights. In sum, regardless of any indemnification agreement between Defendants, Defendants must comply with rules and law governing this action." (ECF No. 108).

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On June 18, 2020, two days after the District Court's rejection of ThermoLife and Kramer's attempt to limit the scope of discovery by offering to indemnify and hold Muscle Beach harmless, Defendants ThermoLife and Kramer filed their Answer and Affirmative Defenses ("Answer") to the SAC. (ECF No. 113). Defendant Muscle Beach separately filed its Answer to the SAC on July 7, 2020. (ECF No. 135). Relevant to the instant Motion, after having spent months arguing that Muscle Beach was a separate entity and that Plaintiff had sued the wrong entities, Defendants' Answers admitted that "ThermoLife and Muscle Beach are alter egos of each other, with ThermoLife controlling Muscle Beach." (ECF Nos. 113 ¶¶ 64 n.1, 68 n.2, 135 ¶¶ 64 n.1, 68 n.2).

III. RELEVANT DISCOVERY MOTIONS

Plaintiff's current Motion is the latest in a series of motions aimed at obtaining documents relevant to a purported license agreement between ThermoLife and Muscle Beach. The relevant discovery requests and resulting motions to compel are summarized below.

*First Request for Production to
Defendants ThermoLife and Kramer and
Subpoena to then Non-Party Muscle Beach*

In February 2020, Plaintiff served its First Requests for Production ("RFP") on Defendants ThermoLife and Kramer. *See* (ECF Nos. 62 at 2, 62-2, 181 at 2). Specifically, RFP No. 11 to ThermoLife requested the production of "[a]ll licenses to the ThermoLife patents, including licenses

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with any of the third parties named (or the associated products listed) on <http://www.no3-t.com/patents/> or docket entry number 22-5.” (ECF No. 62-2 at 20). In response, on March 20, 2020, ThermoLife, through its attorney Collins, produced a document titled “Purchase and License Agreement,” purporting to be the License Agreement between ThermoLife and Muscle Beach (the “License Agreement”). (ECF Nos. 143-1, 181 at 2). The License Agreement listed an effective date of March 16, 2017, but was otherwise undated and signed by Defendant Kramer on behalf of both companies. *See* (ECF No. 143-1); (Sanctions Hr’g Tr. 20:5-9). Notably, nothing in the License Agreement or ThermoLife’s written response to RFP No. 11 alerted Plaintiff that the License Agreement was, in fact, created during this litigation on March 9, 2020 by Defendant Kramer purportedly to “memorialize” a pre-existing oral/implied license between ThermoLife and Muscle Beach. (ECF No. 143-1); (Sanctions Hr’g Tr. 19:4-24).

Relatedly, on February 21, 2020, Plaintiff served a subpoena on then non-party Muscle Beach requesting production of any license agreements with ThermoLife. (ECF No. 181 at 2). On April 2, 2020, Muscle Beach’s attorney Matthew Wolf produced a second copy of the License Agreement that had been previously produced by attorney Collins on behalf of ThermoLife. (Sanctions Hr’g Tr. 26:7-13); *see also* (Pl. Exh. 4).

**Second Discovery Requests to
ThermoLife and Kramer**

On April 3, 2020, Plaintiff propounded its Second Set of Discovery Requests to Defendants ThermoLife

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and Kramer. (ECF Nos. 87-2, 97 at 3, 181 at 2). The goal of these requests was, among other things, to obtain additional information regarding the relationship between ThermoLife and then non-party Muscle Beach, including electronic discovery regarding the License Agreement that had been produced in March 2020. (ECF No. 87 at 2-5). For example, in RFP Nos. 1-3, Plaintiff sought native files (including Word and PDF versions) of the License Agreement and the underlying metadata. *Id.* at 6. Interrogatory No. 1 sought basic information about the circumstances surrounding the creation and execution of this document (author, date, signatory, place, and witnesses). *Id.* Defendants refused to provide discovery, objecting that this discovery “[was] not relevant to any claim or defense in this action” because Plaintiff had not pled alter ego and “[Muscle Beach] is not a party to this lawsuit.” (ECF No. 89 at 8-9). Consequently, Plaintiff filed its Second Motion to Compel on May 26, 2020. *See generally* (ECF No. 87). In the Second Motion to Compel, Plaintiff asserted that it had a right to discover the “bona fides” of the License Agreement. *Id.* at 6.

**Discovery Hearing on Plaintiff’s First and
Second Motions to Compel and ThermoLife’s
and Kramer’s Amended Responses**

On June 19, 2020, the undersigned held a hearing on Plaintiff’s First and Second Motions to Compel. (ECF Nos. 62, 87); *see also* (ECF Nos. 115, 118). At the conclusion of the hearing, the undersigned granted in part Plaintiff’s motions to compel, ordering Defendants ThermoLife and Kramer to provide amended responses to Plaintiff’s

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interrogatories and RFPs regarding the creation of the License Agreement and providing additional information regarding its financial business dealings with Muscle Beach. *See generally* (ECF No. 122) (6/19/20 hearing transcript) (“Discovery Hr’g Tr.”). In doing so, the undersigned found that despite ThermoLife and Kramer’s judicial admission of alter ego liability in the Answer filed the day before the hearing, the License Agreement remained relevant to the issues in the case. (Discovery Hr’g Tr. 88:16-18); *see also id.* 89:24-90:1 (“Defendants’ decision to indemnify Muscle Beach and to admit alter ego doesn’t alter the parties’ discovery obligations going forward.”). The undersigned reiterated that “the license agreement is a very important part of this litigation” and that Defendants’ admission of “alter ego liability does not change the scope of the discovery as to the underlying licensing agreement.” *Id.* 89:5-10.

In compliance with the Court’s Order, ThermoLife and Kramer supplemented their discovery responses on July 15, 2020. (ECF No. 143-4) (ThermoLife’s Amended Responses to Plaintiff’s Second Set of Interrogatories); (ECF No. 143-8, Pl. Exh. 15) (Kramer’s Amended Responses to Plaintiff’s Second Set of Interrogatories). In its response, ThermoLife included the underlying metadata for the License Agreement, which showed that the License Agreement had been created on March 9, 2020 by Defendant Kramer, almost one year after the filing of the instant lawsuit and after Plaintiff had propounded its discovery requests to ThermoLife and Kramer, and issued a subpoena to then non-party Muscle Beach. *See* (ECF No. 143-3, Pl. Exh. 8). More specifically, in response to

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Interrogatory No. 1, which asked ThermoLife to “[d]escribe the circumstances surrounding the creation and execution of the License Agreement],” ThermoLife stated:

On or about March 9, 2020, Ron Kramer created the [License Agreement] between [Muscle Beach] and [ThermoLife] to memorialize in writing the oral agreement that was reached between Muscle Beach and ThermoLife, on or about March 16, 2017, when Mr. DeLuca was still a part-owner of Muscle Beach. To create the [License Agreement], Mr. Kramer accessed one of ThermoLife’s other license agreements in a Microsoft Word document. Mr. Kramer does not remember which licensing agreement he accessed. Using another purchase and license agreement from the same time period of early 2017 as a template, Mr. Kramer made the necessary edits to the document, using Microsoft Word. When Mr. Kramer was done making edits to the document, he printed off the document. He did not save the modified [License Agreement] in Microsoft Word.

With the document printed off, he signed the document on behalf of both [Muscle Beach] and ThermoLife. He then handed the agreement to administrative assistant Cynthia Andrade. On March 9, 2020, Ms. Andrade created a PDF of the document. The native PDF file and the metadata associated with the PDF file have been produced in response to BPI’s requests

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for production, along with this interrogatory response.

The PDF document was then sent to [Muscle Beach's] counsel, Matt Wolf for production in response to a subpoena that was served upon [Muscle Beach] by [Plaintiff]. On April 2, 2020, in an email from [Matt Wolf, Muscle Beach's counsel] to [Plaintiff's counsel], Matt Wolf provided a native of the PDF file, which has been reproduced along with this amended response.

(ECF No. 143-4 at 3-4, Pl. Exh. 9).

**Plaintiff's Motion for Sanctions
and November 18, 2020 Hearing**

On September 24, 2020, Plaintiff filed the instant Motion seeking sanctions against Defendants and attorney Collins based on Defendant Kramer's creation of the License Agreement, which Plaintiff claims was done in bad faith and constitutes a fraud on the Court. (ECF No. 143 at 15, 21, 23). Thus, Plaintiff asks the Court to enter a default judgment against Defendants and to sanction attorney Collins for these purported abuses, pursuant to the Court's inherent powers, 28 U.S.C. § 1927, and/or Rule 37.³ *Id.* at 5, 23.

3. The parties disagree on whether Plaintiff's motion properly seeks sanctions against attorney Collins, or only against Defendants. Although some parts of Plaintiff's Motion refer only to sanctions against Defendants while other sections refer

*Appendix C***IV. LEGAL STANDARDS**

The Court has “an inherent power to regulate litigation and sanction the parties, as well as their counsel, for abusive practices.” *Brandt v. Magnificent Quality Florals Corp.*, No. 07-20129-CIV, 2009 U.S. Dist. LEXIS 134426, 2009 WL 899925, at *4 (S.D. Fla. Mar. 31, 2009), *aff’d*, 371 F. App’x 994 (11th Cir. 2010); *Spolter v. Suntrust Bank*, 403 F. App’x 387, 390 (11th Cir. 2010) (noting that federal courts have the inherent power to sanction parties and lawyers). This includes the “inherent power to sanction a fraud upon the Court, which sanction can include dismissal of a case.” *Gyasi v. M/V “ANDRE,”* No. 07-23282-CIV, 2008 U.S. Dist. LEXIS 3380, 2008 WL 162644, at *2 (S.D. Fla. Jan. 16, 2008). “Invocation of a court’s inherent power requires a finding of bad faith.” *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995) (citation omitted); *Brown Jordan Int’l, Inc. v. Carmicle*, No. 0:14-CV-60629-ROSENBERG/BRANNON, 2016 U.S. Dist. LEXIS 25879, 2016 WL 815827, at *34-35 (S.D. Fla. Mar. 2, 2016), *aff’d*, 846 F.3d 1167 (11th Cir. 2017); *Amlong*

to sanctions against attorney Collins, the Motion is sufficiently clear to put attorney Collins on notice that sanctions were being sought against him. *See, e.g.*, (ECF No. 143 at 21, 22-24) (discussing sanctions under 28 U.S.C. § 1927, which can only be imposed on attorneys); *id.* at 18-21, 24 (discussion of allegedly perjured Declarations by attorney Collins). Nonetheless, because the undersigned ultimately concludes that Plaintiff has not established the requisite bad faith necessary for the imposition of sanctions under either the Court’s inherent powers or § 1927 against attorney Collins, Defendants’ argument that Plaintiff’s motion fails to comply with due process notice requirements is moot and need not be addressed. (Sanctions Hr’g Tr. 67:11-14, 68:10-69:7).

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& Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1251 (11th Cir. 2007) (“[B]efore a court can impose sanctions on an attorney under its inherent powers, it must make a finding of bad faith.”) (citation omitted).

In determining whether sanctions are appropriate under the bad faith standard, “the inquiry will focus primarily on the conduct and motive of a party, rather than on the validity of the case.” *Barash v. Kates*, 585 F. Supp. 2d 1347, 1362 (S.D. Fla. 2006) (quotation omitted). “Bad faith exists when the court finds that a fraud has been practiced upon it, or that the very temple of justice has been defiled, or where a party or attorney knowingly or recklessly raises a frivolous argument, delays or disrupts the litigation, or hampers the enforcement of a court order.” *Brown Jordan Int’l*, 2016 U.S. Dist. LEXIS 25879, 2016 WL 815827, at *35. However, “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.” *Chambers*, 501 U.S. at 44; *see also Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223 (11th Cir. 2017) (same). Thus, courts in this District have held that “fundamentally penal” sanctions, such as dismissals or an award of attorneys’ fees, require proof by clear and convincing evidence. *See, e.g., In re Brican Am. LLC Equip. Lease Litig.*, 977 F. Supp. 2d 1287, 1293 n.6 (S.D. Fla. 2013); *JTR Enters., LLC v. An Unknown Quantity*, 93 F. Supp. 3d 1331, 1367 (S.D. Fla. 2015), *aff’d sub nom. JTR Enters., LLC v. Columbian Emeralds*, 697 F. App’x 976 (11th Cir. 2017).

*Appendix C***V. DISCUSSION****A. Sanctions against Defendants are Warranted under the Court's Inherent Powers**

Based on the record before the court, the undersigned finds that sanctions are warranted against Defendants Kramer, ThermoLife, and Muscle Beach. Here, Plaintiff has shown by clear and convincing evidence that Defendant Kramer knowingly created a document for use in this litigation to advance his case and impede the efficient presentation of Plaintiff's case. Moreover, Kramer produced the License Agreement through ThermoLife in its March 2020 discovery responses and through Muscle Beach in its April 2020 response to Plaintiff's subpoena.⁴

Plaintiff argues that Defendants' overall conduct, especially relating to the fabrication of the License Agreement, is so abusive as to constitute an "unconscionable scheme" that warrants the ultimate sanction of a judgment against Defendants, as well as costs and fees. *See generally* (ECF No. 143 at 5-25). In response, Defendants

4. Before discussing the evidence of bad faith, which supports sanctions, the undersigned notes that, contrary to Defendants' argument, Plaintiff need not seek Rule 11 sanctions before proceeding under § 1927 or the Court's inherent powers. (Sanctions Hr'g Tr. 68:2-8; 75:23-76:4). That is simply not the law. *See Chambers*, 501 U.S. at 33 ("Requiring the court to apply the other mechanisms to discrete occurrences before invoking the inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves.").

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do not dispute the Court's inherent authority to impose such sanctions, but argue that: (i) ThermoLife's admission of alter ego liability makes the Muscle Beach License Agreement irrelevant; (ii) Defendants disclosed and explained the circumstances surrounding the creation of the License Agreement, so that neither Plaintiff nor the fact-finding process was prejudiced; (iii) Kramer lawfully memorialized a pre-existing oral/implied agreement that existed since March 2017 between ThermoLife and Muscle Beach; and (iv) Defendants did not act purposefully or in bad faith. *See generally* (ECF No. 151); *see also* (Sanctions Hr'g Tr. 103:21-107:22). For the reasons discussed below, the undersigned disagrees.

First, the License Agreement is relevant to discovery on the claims and defenses at issue. Indeed, as to the License Agreement, both the District Judge and the undersigned have previously warned Defendants that they cannot seek to limit the scope of discovery by first agreeing to indemnify and hold Muscle Beach harmless and then by admitting alter ego liability in their Answers. *See, e.g.*, (ECF No. 108) (District Judge: "Defendants cannot unilaterally limit Plaintiff's discovery rights" by agreeing to indemnify Muscle Beach); (Discovery Hr'g Tr. 88:16-18) (undersigned: "[D]espite Defendants' judicial admission of alter ego, [the License Agreement] remains relevant to the issues in this case, and should be produced"); *id.* 89:24-90:1 (undersigned: "Again, Defendants' decision to indemnify Muscle Beach and to admit alter ego doesn't alter the parties' discovery obligations going forward."); *id.* 90:5-10 (undersigned: "[T]he licensing agreement is a very important part of this litigation" and "to judicially

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admit alter ego liability does not change the scope of the discovery as to the underlying licensing agreement.”).

Second, when the License Agreement was produced to Plaintiff in March 2020, the operative complaint was the Amended Complaint and there was a dispute as to the relationship between the corporate entities. At that time, Defendants ThermoLife and Kramer’s main defense was that Plaintiff had incorrectly sued ThermoLife, and that the correct defendant was its licensee, Muscle Beach. *See, e.g.*, (ECF No. 16 at 3, 4, 8) (Motion to Dismiss); *see also* (ECF No. 89 at 5, 8) (Defendants’ Opposition to Plaintiff’s Second Motion to Compel). To be clear, the SAC, which alleged alter ego liability and added Muscle Beach as a party defendant, was not filed until June 2020. Moreover, Defendants did not admit alter ego liability until June 18 and July, 7, 2020. (ECF Nos. 113 ¶¶ 64 n.1, 68 n.2, 135 ¶¶ 64 n.1, 68 n.2). Thus, it is disingenuous for Defendants to argue that the License Agreement was irrelevant when the parties disputed the relationship between the corporate entities.

Third, Defendant Kramer’s argument that he simply “memorialized” a pre-existing oral/implied agreement with Muscle Beach, and that such “memorializations” are “extremely common in intellectual property cases,” (Sanctions Hr’g Tr. 66:1-2), ignores the stark contrast between his purported “memorialization” and that accepted by courts as legitimate in other intellectual property cases. (Sanctions Hr’g Tr. 82:1-12, 99:14-15). For example, in *Balsamo/Olson Grp., Inc. v. Bradley Place Ltd. P’ship*, 966 F. Supp. 757, 763 (C.D. Ill. 1996), the newly

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created document evidenced an arms-length agreement and expressly stated that it was a “memorialization” of an earlier oral agreement.⁵ *Id.* at 761 n.9. In contrast, Kramer’s newly created document did not alert Plaintiff that the License Agreement was a memorialization until compelled to do so by this Court. (Discovery Hr’g Tr. 88:19-22). Further obfuscating the authenticity of the License Agreement, the License Agreement did not reflect the date on which it was memorialized, was signed by Defendant Kramer for both parties, and did not reflect the actual terms that purportedly governed the relationship between ThermoLife and Muscle Beach.⁶ (ECF No. 143 at 4). Thus, the License Agreement simply does not reflect the true course of conduct between the parties. (Sanctions Hr’g Tr. 132:15-16). Furthermore, sanctions are appropriate under the court’s inherent powers when a party fabricates evidence to enhance his case. *See, e.g., Vargas v. Peltz*, 901 F. Supp. 1572, 1580 (S.D. Fla. 1995) (dismissing case when “[p]laintiff . . . attempted, by fraudulent means, to ‘enhance’ her case through the introduction of fabricated [evidence] and through fictionalized testimony concerning how she supposedly received the [evidence]”). Here, circumstantial evidence

5. *Balsamo* is also factually distinguishable as it relates to an issue of statutory standing requirements, and not sanctions.

6. Indeed, the terms contained in the License Agreement bore little resemblance to the terms described by ThermoLife and Kramer in discovery. For example, although the License Agreement did not include any payment terms, the record reflects that ThermoLife purportedly loaned funds to Muscle Beach, which Muscle Beach was obligated to repay. (Sanctions Hr’g Tr. 132:15-16).

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suggests that Defendant Kramer tried to enhance his case by manufacturing a written License Agreement at a time when the license was a disputed issue in the case.

Next, Defendants' argument that sanctions are unwarranted because they were forthright in producing the License Agreement and in disclosing the circumstances surrounding its creation rings hollow and sounds of revisionist history. (ECF No. 151 at 3); (Sanctions Hr'g Tr. 122:5-124:2). Although Defendants produced the License Agreement in ThermoLife's March 2020 Response to Plaintiff's First Set of Request for Production, nowhere in that response did ThermoLife indicate that this document was a memorialization of an existing oral or implied license. (Sanctions Hr'g Tr. 19:4-8: Pl. Exh. 2). Rather, Defendants waited until Plaintiff suspected the irregularities surrounding the License Agreement, and then tried to foreclose discovery on the issue: (i) first by filing the Expedited Request before the District Judge and offering to indemnify and hold Muscle Beach harmless if the Judge maintained the existing pretrial deadlines (despite the filing of the SAC adding Muscle Beach as a defendant); (ii) then by filing their Answers admitting alter ego liability for Muscle Beach; and (iii) lastly before the undersigned by arguing that their admission of alter ego liability foreclosed Plaintiff's right to discovery on the License Agreement, which was now irrelevant. The record clearly reflects Defendants' vigorous objections to discovery requests about the License Agreement; Defendants did not produce the underlying metadata and a narrative explaining the circumstances surrounding the execution of the License Agreement until ordered

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by the Court. *See generally* (Discovery Hr’g Tr. 88:19-22); *see also* (Sanctions Hr’g Tr. 46:10-49:21). Simply put, Defendants cannot escape sanctions because they eventually rectified their misconduct after being ordered by the Court. *See, e.g., TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987) (confirming district court’s entry of default judgment against defendant who committed perjury during depositions, even though defendant clarified the statements under questioning by the district judge before trial started).

Furthermore, bad faith includes situations where a party purposely “tamper[s] with the evidence.” *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). Here, Defendant Kramer fabricated a written agreement that did not exist prior to this lawsuit, and initially tried to pass it off as legitimate. Defendant Kramer’s belated explanation that he created the License Agreement in response to a Request for Production is unconvincing. *See* (Sanctions Hr’g Tr. 43:5-9); *also* (Kramer Dep. 228:1-6) (“Well, you know, when Mr. Wolf was badgering my attorney, I gave this agreement to memorialize the license so he would understand that there was no, really no difference in the terms of this license than any other previous licenses from ThermoLife.”). Defendants were not asked to fabricate a license; they were asked to produce existing licenses. If no written license existed, then Defendant Kramer could have explained that an oral or implied license had existed, as he tried to convince the Court during the hearing. *See, e.g.,* (Sanctions Hr’g Tr. 96:3-19; 115:13-116:1); *see also* (Kramer Dep. 153:2-154:1) (Kramer’s testimony that he was knowledgeable about the legality of oral and implied

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licenses). Moreover, according to Defendants, Kramer is a sophisticated litigant who “does a lot of IP.” (Sanctions Hr’g Tr. 79:24-80:4). Against this backdrop, it is evident that the goal of Kramer’s conduct was to advance the defenses in the lawsuit. Accordingly, the undersigned recommends that the Motion be granted as to Defendant Kramer and Defendants ThermoLife and Muscle Beach based on the clear and convincing evidence of Kramer’s bad faith in fabricating the License Agreement, and ThermoLife’s and Muscle Beach’s knowing production of the License Agreement.

B. Sanctions Against Defense Counsel are Not Warranted

The above notwithstanding, the undersigned finds insufficient evidence to sanction attorney Collins either through use of the Court’s inherent powers or pursuant to 28 U.S.C. § 1927.⁷ As with inherent powers, sanctions under § 1927 require a finding of bad faith. During the hearing, the undersigned questioned Plaintiff’s counsel about Plaintiff’s request for sanctions against attorney

7. Section 1927 provides that “[a]ny 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.” *See generally, McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001), amended on reh’g, 311 F.3d 1077 (11th Cir. 2002) (citing 28 U.S.C. § 1927). The statute was designed to sanction attorneys who willfully abuse the judicial process by conduct tantamount to bad faith. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003) (citation omitted).

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Collins. *See* (Sanctions Hr’g Tr. 34:7-35:21). In response, Plaintiff’s counsel ambivalently stated, “My position at this point is to defer to the court on how [the issue of sanctions against attorney Collins] resolves itself. We did include 1927 as a remedy.” *Id.* 35:8-10. Counsel later suggested that the Court might wish to conduct an *in camera* review of emails between attorney Collins and Defendants to determine the attorney’s role in the incident and “if the Court feels like there’s something to support this argument, so be it I don’t want to create facts that don’t exist and I don’t want to argue that situations exist that don’t [exist].” *Id.* 46:16-23.

Given counsel’s lukewarm pursuit of sanctions against attorney Collins, coupled with the lack of evidence that attorney Collins was personally involved in, directed, or advised Defendant Kramer to create the License Agreement, the undersigned declines to invoke its inherent authority or § 1927 to sanction attorney Collins, finding no evidence that attorney Collins acted in bad faith. *See, e.g., id.* 43:15-20 (Plaintiff’s counsel’s admission that he “[could not] say that anybody directed anybody to do it.”); *see also id.* 42:1-19 (referring to Kramer’s deposition testimony that he did not recall any emails with counsel); *id.* 116:2-18 (Defendants’ counsel’s discussion of lack of evidence that Defendant Kramer sought the advice of counsel before creating the License Agreement); *id.* 129:24-130:1 (Defendants’ counsel argument that there is “no evidence that Mr. Collins had any scienter, that he was trying to commit fraud upon this court at all.”). Accordingly, the undersigned recommends against an award of sanctions against attorney Collins.

*Appendix C***VI. RECOMMENDED SANCTIONS AGAINST DEFENDANTS**

Plaintiff argues that no lesser sanction other than default is appropriate to punish Defendants, deter future misconduct, and restore the integrity of the proceedings. *Id.* 36:24-40:18); *see also* (ECF No. 143 at 1). Where documents are fabricated and used in support of claims, courts often find that only dismissal “can insure against abuse of the judicial process” *Benjamin v. BWIA Airlines*, No. 07-20017-CIV, 2009 U.S. Dist. LEXIS 139403, 2009 WL 10667416, at *7 (S.D. Fla. Jan. 13, 2009). Moreover, dismissal or default judgment is particularly appropriate where the fabricated evidence concerns a “pivotal” or “linchpin” issue in the case. *Quantum Commc’ns Corp. v. Star Broad., Inc.*, 473 F. Supp.2d 1249, 1269 (S.D. Fla. 2007) (citing *Vargas*, 901 F. Supp. at 1582; *Nichols v. Klein Tools, Inc.*, 949 F.2d 1047, 1049 (8th Cir. 1991)). Plaintiff argues that the License Agreement was such a linchpin issue. (Sanctions Hr’g Tr. 192:3-4, 28:10).

Although not a “linchpin” document, the License Agreement was directly relevant to a disputed issue in the case, and its existence served to advance Defendants’ case. But defaulting a defendant is a “drastic remedy” that should only be used in “extreme situations.” *Perlman v. Theodule*, No. 09-80477-CIV, 2010 U.S. Dist. LEXIS 151844, 2010 WL 11505826, at *1 (S.D. Fla. Aug. 10, 2010) (citation omitted). With this in mind, and after considering Defendants’ actions, the prejudice to Plaintiff’s case (including wasted time and labor), and the Court’s interest in promoting fairness and protecting the integrity of the

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judicial system, the undersigned concludes that lesser sanctions will serve to preserve the integrity of the judicial system and deter future misconduct by Defendants, while also ensuring Plaintiff's right to a fair trial. *See, e.g., Rybner v. Cannon Design, Inc.*, No. 95 CIV. 0279 (SS), 1996 U.S. Dist. LEXIS 12068, 1996 WL 470668, at *6 (S.D.N.Y. Aug. 20, 1996) (finding lesser sanctions in the form of jury instructions and award of fees and costs were "adequate to protect the integrity of the judicial system" despite plaintiff's fabrication of evidence and perjury). Lastly, the undersigned need not consider whether sanctions against Defendants are also appropriate under Rule 37.

Accordingly, the undersigned recommends that: (i) Defendants be precluded from introducing into evidence or otherwise using the License Agreement in their case-in-chief; (ii) the jury be advised of Defendant Kramer's attempt to manufacture favorable evidence, and its effect on his overall credibility;⁸ and (iii) Plaintiff be awarded reasonable fees and costs incurred in connection with this Motion and the two prior motions to compel discovery regarding the License Agreement, ECF Nos. 62 and 87.

8. *See Rybner*, 1996 U.S. Dist. LEXIS 12068, 1996 WL 470668, at *6 (permitting charge to jury that plaintiff's falsehood under oath should be "considered seriously . . . in assessing [plaintiff's] credibility"); *Bernal v. All Am. Inv. Realty, Inc.*, 479 F.Supp.2d 1291, 1293-94 (S.D. Fla. 2007) (allowing jury instruction regarding defendant's spoliation of evidence and procurement of false evidence, "which [the jury] may consider in assessing his credibility").

*Appendix C***VII. RECOMMENDATION**

Accordingly, for the reasons discussed above, the undersigned respectfully **RECOMMENDS** that Plaintiff's Motion for Sanctions (ECF No. 143) be **GRANTED IN PART**. More specifically: (i) Defendants should be precluded from introducing into evidence or otherwise using the License Agreement in their case-in-chief; (ii) the jury should be advised of Defendant Kramer's attempt to manufacture favorable evidence and its effect on his overall credibility; and (iii) Plaintiff should be awarded reasonable fees and costs incurred in connection with this Motion and the two prior motions to compel discovery regarding the License Agreement, ECF Nos. 62, 87.⁹

Within fourteen (14) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to any of the above findings and recommendations as provided by the Local Rules for this District. 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). Failure to timely object waives the right to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3-1 (2020); *see Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

9. Toward that end, upon a ruling on this Report, the Court should also direct that Plaintiff file a supplement, including billing records, to support the requested attorney's fees and costs incurred in connection with the discovery motions and this Motion.

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DONE AND ORDERED in Chambers at Fort
Lauderdale, Florida, on February 24, 2021.

/s/ Alicia O. Valle
ALICIA O. VALLE
UNITED STATES
MAGISTRATE JUDGE

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APPENDIX D — RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(FT LAUDERDALE)
CIVIL DOCKET FOR CASE #: 0:19-cv-60505-RS

BPI SPORTS, LLC
v.
THERMOLIFE INTERNATIONAL LLC *et al*

Assigned to: Judge Rodney Smith
Referred to: Magistrate Judge Alicia O. Valle
Case in other court:
USCA Federal Circuit, 23-01068
USCA Federal Circuit, 23-01112
USCA Federal Circuit, 23-01625
Cause: 15:1125 Trademark Infringement (Lanham Act)

Date Filed: 02/26/2019
Date Terminated: 02/10/2022
Jury Demand: Defendant
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Appendix D

06/19/2020 115 PAPERLESS ORDER granting in part and denying in part Plaintiff's Motion to Compel, and Plaintiff's Second Motion to Compel for the reasons stated on the record at the June 19, 2020 hearing. Accordingly, Defendants must produce amended responses to Plaintiff's Interrogatories and RFPs by July 1, 2020. To the extent any responsive documents contain privileged information, Defendants may assert the specific privilege being claimed and prepare an appropriate privilege log. *See McMullen v. GEICO Indem. Co.*, No. 14-CV-62467, 2015 WL 2226537, at *3 (S.D. Fla. May 13, 2015); *NIACCF, Inc. v. Cold Stone Creamery, Inc.*, No. 12-cv-20756, 2014 WL 4545918, *5 (S.D. Fla. Sept. 12, 2014) (discussing requirements of a proper privilege log). Finally, Plaintiff's request for attorney's fees in connection with the filing of the Motions is denied in that Defendants' position was substantially justified. *See Fed. R. Civ. P. 37(a)(5)(A)* (ii). Signed by Magistrate Judge Alicia O. Valle on 6/19/2020. (sr00) (Entered: 06/19/2020)

**APPENDIX E — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
FILED SEPTEMBER 2, 2025**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1068, 2023-1625, 2023-1112

BPI SPORTS, LLC,

Plaintiff-Cross-Appellant,

v.

THERMOLIFE INTERNATIONAL LLC, RONALD
L. KRAMER, MUSCLE BEACH NUTRITION LLC,

Defendants-Appellants.

Appeals from the United States District Court for
the Southern District of Florida in No. 0:19-cv-60505-RS,
Judge Rodney Smith.

**ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST,
REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and
STARK, *Circuit Judges*.¹

PER CURIAM.

1. Circuit Judge Newman did not participate.

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ORDER

ThermoLife International LLC, Ronald L. Kramer and Muscle Beach Nutrition LLC filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

September 2, 2025

Date