E-FILED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 13-6429-GHK (PJWx)	Date	November 14, 2014
Title	*Raquel Chavez v. Wal-Mart Stores Inc.*		

Presiding: The Honorable	**GEORGE H. KING, CHIEF U. S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order Re:** (1) Chavez's Motion to Dismiss Case [Dkt. 56]; Walmart's Motion for Attorney's Fees and Costs [Dkt. 62]

This matter is before us on the Parties' above-captioned Motions. We have considered the papers filed in support of and in opposition to the Motions and deem them appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows:

I. Background

Plaintiff Raquel Chavez ("Chavez") filed this class action on September 3, 2013, alleging that Defendant Wal-Mart Stores, Inc. ("Walmart") sold her a Banzai Hydro Blast Waterslide ("Banzai waterslide") that featured deceptive packaging images designed to make the product look larger than its actual size. (Dkt. 1, at 5-6.) On behalf of herself and others similarly situated, Chavez sought restitution, damages, and injunctive relief based on California's Consumers Legal Remedies Act ("CLRA") and New Jersey's Consumer Fraud Act ("CFA"), as well as other state consumer protection laws. (Dkt. 1, at 18-25.)

At her deposition on August 27, 2014, Chavez revealed that she had not in fact bought the Banzai waterslide from Walmart; her sister, Christina Nunez, had bought it. (Dkt. 57-7, Petersen Decl., Ex. F at 29:12-14, 29:17-24.) Chavez and her sister were planning a barbecue to celebrate the birth of Chavez's new daughter, and the waterslide was purchased for the occasion. (Dkt. 60-1, Supp. Germain Decl., Ex. 1, 24:6-24.) Chavez and her sister looked at the Banzai waterslide together online, but the actual purchase was made using her brother-in-law's credit card and the product was sent to her sister's house. (Petersen Decl., Ex. F at 25:23-25, 28:19-23.) The costs of the barbecue were split between Chavez and her sister with her sister buying the waterslide and Chavez buying the food. (Supp. Germain Decl., Exhibit 1, 75:19-76-19.)

Shortly after the deposition, Chavez filed her Motion to Dismiss, seeking to voluntarily dismiss this action with prejudice. Chavez states in the Motion that "in light of certain new facts which were revealed for the first time in her deposition on August 27, 2014, and after discussions with her counsel,

[she] no longer wishes to pursue her claims against" Walmart. (Dkt. 56, Mot. at 4.) In its Opposition to her Motion to Voluntarily Dismiss, Walmart asked us to condition the dismissal on the payment of costs and attorney's fees by Chavez and her attorneys. (Dkt. 57, Opp. at 13.) Chavez is represented by the firms Ridout Lyon and Ottoson LLP, Rosman and Germain LLP, and Zimmerman Reed PLLP (collectively, "Counsel"). Chavez filed a Reply to Walmart's Opposition. (Dkt. 58.) On September 26, 2014, Walmart filed a Motion for Attorney's Fees and Costs. (Dkt. 62.) Chavez filed an Opposition, and Walmart filed a Reply. (Dkts. 68, 69.)

II. Discussion

A. Voluntary Dismissal

After the defendant has filed an answer or a motion for summary judgment in an action, the plaintiff may voluntarily dismiss the action only by stipulation or court order. Fed. R. Civ. P. 41(a)(1-2). When ruling on a motion to voluntarily dismiss, the district court must determine whether the defendant will suffer some plain legal prejudice as a result of the dismissal. *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996).

"Legal prejudice" means "prejudice to some legal interest, some legal claim, [or] some legal argument." *Id.* at 97. Substantial expense arising from litigation is not legal prejudice. *Id.* Voluntary dismissal by court order under Rule 41(a)(2) is ordinarily without prejudice, but when it is with prejudice—as Chavez seeks here—that is another factor weighing against any finding of legal prejudice to the defendant. *See Smith v. Lenches*, 263 F.3d 972, 976 (9th Cir. 2001).

There appears to be no genuine dispute between the parties concerning legal prejudice. Walmart does not use the phrase "legal prejudice" even once in its Opposition to the Motion for Voluntary Dismissal, and our own research reveals no potential harm to Walmart's legal interest, claims, or defenses by dismissal of this action. If this case is dismissed, Walmart would remain free to raise whatever arguments it wishes in any other lawsuit concerning the same or similar facts. Moreover, since this is a request for dismissal with prejudice, Chavez will not be able to reassert her claims. Walmart will have a definitive, favorable resolution of this case—the very opposite of legal prejudice.

Walmart is less interested in defeating Chavez's attempt to voluntarily dismiss her suit than in recovering attorney's fees and costs as condition of the dismissal. Accordingly, we must turn to the question of whether the voluntary dismissal should be conditioned on the payment of fees or costs.

B. Attorney's Fees and Costs as a Condition of Dismissal

Walmart argues that either Chavez or her Counsel should be required to pay Walmart's fees and costs. Rule 41(a)(2) permits us to impose fees and costs on the plaintiff as a condition of dismissal as a matter of course or pursuant to a fee-shifting statute, but fees and costs may be imposed on counsel only if there is an independent statutory basis for imposing sanctions. *See* William W. Schwartzer, et al., *Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 16-G*, 16:366, 16:367.1; *see also Heckethorn v. Sunan*

Corp., 992 F.2d 240, 242 (9th Cir. 1993) ("Given the presumption that an attorney is generally not liable for fees unless that prospect is spelled out, it would be incongruous to conclude from the broad language of Fed.R.Civ.P. 41(a)(2) that an attorney could be sanctioned by authority of this rule alone.").

i. Payment of Fees and Costs by Chavez

a. On Terms the Court Considers Proper

A court may grant a plaintiff's request for voluntary dismissal "on terms that the court considers proper." Fed. R. Civ. P. 41 (a)(2). Whether to impose costs and attorney's fees as a condition of dismissal is within our discretion. *Stevedoring Servs. of Am. v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989). Factors that have been recognized by the Ninth Circuit as relevant to this decision include, but are not limited to, the conduct of the opposing party and the closeness of the legal issues that the case presented. *See Herman v. Zamora*, 178 F.3d 1299 (9th Cir. 1999) (finding no abuse of discretion where court refused to award costs and fees because defendant had been uncooperative during litigation); *Stevedoring Servs. of Am.*, 889 F.2d at 922 (no abuse of discretion in refusing to award costs and fees because plaintiff sought dismissal only after losing on a legal issue that "presented a close question"). Factors that have been recognized by other circuit courts of appeals include "(1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment is pending." *Gross v. Spies*, 133 F.3d 914 (4th Cir. 1998) (citing *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir. 1996); *Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987)).

Considering the unique circumstances of this case, we decline to condition dismissal on Plaintiff's payment of Walmart's fees and costs. This litigation was still in its early stages. No class certification had been filed and the end of discovery is many months away. Walmart has not indicated that it spent any time preparing for trial yet. Moreover, while the revelation that Chavez did not buy the Bonzai waterslide casts doubt on her standing and her adequacy as a lead plaintiff, there is no evidence at this stage that the substance of this class action was frivolous. There also is no evidence of delay or lack of diligence on Chavez's part.

Furthermore, Chavez seeks voluntary dismissal with prejudice. Some circuits have concluded that a court can never impose fees and costs on a plaintiff as a condition of dismissal when it is sought with prejudice. *See Colombrito v. Kelly*, 764 F2d 122, 134 (2nd Cir. 1985); *Cauley v. Wilson*, 754 F2d 769, 771 (7th Cir. 1985). The Ninth Circuit has not yet embraced this view. *See Beard v. Sheet Metal Workers Union, Local 150*, 908 F.2d 474, 477 n.2 (9th Cir. 1990). We think dismissal with prejudice is at least a factor to be considered in deciding whether to condition dismissal on the payment of fees and costs. By seeking voluntary dismissal with prejudice, Chavez is forever surrendering her claim, which means there is no need for us to impose conditions as a way of protecting Walmart from incurring duplicative expenses in future litigation. *See Colombrito*, 764 F.2d at 134 ("The reason for denying a fee award upon dismissal of claims with prejudice is simply that the defendant, unlike a defendant

against whom a claim has been dismissed without prejudice, has been freed of the risk of relitigation of the issues just as if the case had been adjudicated in his favor after a trial, in which event (absent statutory authorization) the American Rule would preclude such an award.") *cf. Westlands Water Dist.*, 100 F.3d at 97 (noting that payment of fees and costs is an appropriate condition in a dismissal *without prejudice* to compensate defendants for the expense incurred during litigation).

b. CLRA

Walmart also argues that Chavez should pay Walmart attorney's fees because there is an independent statutory basis for awarding them under the CLRA. The CLRA permits an award of attorney's fees "to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." Cal. Civ. Code § 1780. Walmart is not entitled to attorney's fees under the CLRA because it cannot demonstrate Chavez's prosecution was in bad faith.

Determining bad faith under the CLRA is a subjective inquiry. *Corbett v. Hayward Dodge, Inc.*, 119 Cal. App. 4th 915, 924 (2004). When considering whether an action was brought in bad faith, a court may consider "evidence of an improper motive[, which] may be established by the circumstances such as evidence of personal animus or purposeful use of dilatory tactics for purpose of delay." *Id*. at 926. Attorney's fees may not be imposed "solely on a finding that the [plaintiff's] prosecution was frivolous or without reasonable cause." *Id.* at 924. (internal quotation marks omitted). When a tactic or action utterly lacks merit, a court is entitled to infer the party knew it lacked merit yet pursued the action for some ulterior motive. *Id.* at 928 (citing *Summers v. City of Cathedral City*, 225 Cal. App. 3d 1047 (1990). However, it is within a court's discretion not to draw that inference if convinced the party was acting in the good faith belief the action was meritorious. *Id.*

Walmart urges us to conclude that Chavez brought this action in bad faith because she allegedly lied in the many pleadings and written discovery responses when she stated that she "purchased" the product. In Walmart's view she "lied for financial gain—to obtain a refund or partial refund of money for a product she did not purchase." (Opp. at 14.) But the evidence suggests that Chavez genuinely believed, and continues to believe, that she purchased the Banzai waterslide. Even in the deposition in which she admitted that her sister paid for the product, she *still* referred to having "purchased" the product. (*See* Supp. Germain Decl., Ex.1, 20:12-14 ("Q. Did you purchase a hydro blast water park in July of 2011? A. Yes"); *id.* at 21:23-22:1 ("Q. Who was with you at the time of purchase? A. Myself and Cristina. Q. Did you make the purchase together? A. Yes.").) In fact, Chavez maintained this position in virtually the same breath as she admitted to having not paid for the slide.

> Q. As you sit here today, how much do you believe you should receive in compensation due to your complaints about the product?
> A. What I paid for my water slide.
> Q. How much?
> A. 611.
> Q. Did you pay any of that money?

A. My sister did, but we did have a barbeque, so I purchased the food so she purchased the water slide.

Id. at 75:19-76:2.

Walmart's argument that Chavez acted in bad faith rests on two assumptions: (1) that Chavez did not, as a factual matter, "purchase" the waterslide and (2) it should have been so obvious to her that she did not truly purchase the waterslide that we may infer that her claims to having purchased the waterslide were willful lies. As to the first assumption, while the definition of "purchase" may be susceptible to a precise legal meaning in a given context, like a statute, a non-lawyer's use of the term is not necessarily so precise. Based on the depositions, Chavez appears to have honestly thought that since she paid for the food for the barbeque and she was the one who got to keep the waterslide after the event was over, she had in fact "purchased" the waterslide even though her sister actually bought it. We are not convinced that her belief was disingenuous.

Walmart also notes that Chavez produced a bank statement in her Rule 26(a)(1) initial disclosures to support her claim to having purchased the waterslide and that the bank statement turned out to have been her sister's, not hers. On this basis, Walmart claims that Chavez must have lied to her own counsel, misrepresenting the bank statement as hers. We reject this argument because Chavez's deposition answers do not indicate she was trying to mislead anyone. In the deposition, Chavez freely admitted that the bank statement was not hers:

Q. Do you recognize this?
A. Yes.
Q. Can you tell me what this is?
A. Hmm, my sister's bank statement.
. . .
Q. Is your name at all associated with this bank account or this bank statement?
A. No.
Q. So this bank statement doesn't reflect any of your transactions?
A. No.
Q. Did you make any of these other purchases? Have you ever used your sister's check or your sister's credit card or your sister's debit card for any purchases?
A. No.
Q. Did you get this from your sister?
A. Yes.

(Dkt. 7, Petersen Decl., Ex. F at 78:17-23, 79:6-18.) As a matter of common sense, it would be odd for Chavez to willfully deceive Counsel by telling them that the bank statement was hers, but then casually admit that it wasn't as soon as Walmart's counsel asked her about it in the deposition. Walmart's counsel did not even have to ask, "Whose bank statement is this?" Chavez volunteered the information as soon as she was asked, "What is this?" If Chavez had any interest in manipulating the legal process

for her own gain, we think it unlikely that she would torpedo her own claims with such frank admissions.

Walmart's citation of *Pickman v. Am. Exp. Co.*, 2012 WL 1357636 (N.D. Cal. Apr. 17, 2012) is inapposite for the reasons we have just explained. In *Pickman*, the plaintiff "within a span of a few months [] filed, voluntarily dismissed and re-filed three actions (including [a] patently frivolous action) in multiple jurisdictions" in an effort to have her case heard in a favorable forum. *Id*. at *3 (quoting defendant's motion). The district court found that the filing of the three actions with this forum-shopping ulterior motive was bad faith, especially since the third action was filed in violation of Rule 41 and the doctrine of res judicata. *Id.* at *4. Unlike *Pickman*, there is no evidence of an ulterior or improper motive on Chavez's part. Accordingly, Walmart is not entitled to attorney's fees pursuant to the CLRA.

c. CFA

Walmart also argues that Chavez must pay for attorney's fees under New Jersey's CFA in light of *Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006). Pursuant to Section 56:8-19 of the N.J.S., the CFA provides that:

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

The language of the statute appears to contemplate recovery of attorney's fees only as an additional remedy for a person who has suffered an "ascertainable loss" as a result of a violation of CFA. Logically, then, that should make it impossible for a defendant to recover attorney's fees when it defeats a CFA claim because a defendant could not be a "person who suffers any ascertainable loss" as a result of an act that is unlawful under the CFA—only a plaintiff can.

The New Jersey Supreme court appears to have followed this interpretation in its cases discussing the CFA. *See Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 21 (2004) ("A prevailing *plaintiff* in an action under the Consumer Fraud Act is entitled to reasonable attorneys' fees, filing fees, and costs.") (emphasis added); *Weinberg v. Sprint Corp.*, 173 N.J. 233, 253 (2002) ("[T]he *plaintiff* with a bona fide claim of ascertainable loss that raises a genuine issue of fact requiring resolution by the factfinder would be entitled to seek also injunctive relief when appropriate, and to receive an award of attorneys' fees. . . .") (emphasis added); *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 24 (1994) ("[W]e determine that an award of treble damages and attorneys' fees is mandatory under N.J.S.A. 56:8-19 if a consumer-fraud *plaintiff* proves both an unlawful practice under the Act and an ascertainable loss.") (emphasis added).

When the CFA was signed into law, the Governor of New Jersey similarly emphasized that plaintiffs would be able to recover attorney's fees without mentioning that defendants would have the same right: "[T]he bill provides a private right of action for consumers against those who violate the Consumer Fraud Act. Under this provision the consumer will be entitled to triple damages, reasonable attorney's fees, and reasonable costs of suit." *Skeer v. EMK Motors, Inc.*, 187 N.J. Super. 465, 472 (App. Div. 1982) (quoting Press Release of Gov. Cahill (June 29, 1971)). Furthermore, the New Jersey Supreme Court has stated that the purpose of awarding attorney's fees under the statute is "to ensure that the financial cost to the private plaintiff was minimized and compensation maximized." *Cox*, 138 N.J. at 24. That goal would be ill-served if plaintiffs were liable to pay attorney's fees to a defendant.

Delta Funding supports this understanding of the statute, at least in part. According to the court, "an award of attorney's fees and costs to *prevailing plaintiffs* is mandatory" under CFA. *Delta Funding*, 189 N.J. at 42 (emphasis added). The New Jersey Supreme Court does make a few broader-seeming statements in *Delta Funding* that suggest defendants may also be able to recover attorney's fees. *Id.* at 44 ("The CFA . . . provide[s] mandatory attorney's fees and costs to prevailing *parties*.") (emphasis added); *id.* ("[D]efendants may not limit a consumer's ability to pursue the statutory remedy of attorney's fees and costs when it is available to prevailing *parties*.") (emphasis added). But given that the question of whether defendants can seek attorney's fees under CFA was not actually presented in *Delta Funding* and given that the New Jersey Supreme Court had stated many other times that plaintiffs can recover attorney's fees without suggesting that defendants could, too, we believe these statements in *Delta Funding* were either inartful phrasing[1] or nonbinding dicta.

In its Reply, Walmart notes that the district court in *In re Bayer Corp. Combination Aspirin Products Mktg. & Sales Practices Litig.* ("*Bayer*"), 2013 WL 4735641 (E.D.N.Y. Sept. 3, 2013) concluded that the CFA permits defendants to recover fees if a plaintiff's action is frivolous, groundless, or without legal merit. The *Bayer* court does not explain how it reached this conclusion, which is not supported by the text of the statute or any case law of which we are aware. Walmart also cites a number of cases that demonstrate the unsurprising proposition that a defendant can recover attorney's fees if it asserts *counterclaims* under the CFA. *See, e.g.*, *Nejmeh v. Forbes*, 2008 WL 4830968 (N.J. Super. Ct. App. Div. Nov. 10, 2008); *USA Home Improvement v. Park*, 2005 WL 3772488 (N.J. Super. Ct. App. Div. Feb. 21, 2006). Walmart has not asserted counterclaims under the CFA. These cases are inapposite.

In light of the foregoing, we decline to impose fees and costs as condition of dismissal under Rule 41(a)(2) and Walmart is not entitled to recover attorney's fees or costs from Chavez based on any fee-shifting provision in the CLRA or the CFA.

ii. Payment of Fees and Costs by Counsel

[1] Technically, the statute does apply to "parties," not just "plaintiffs," because it applies to defendants asserting counterclaims as well. N.J.S.A. § 56:8 (permitting a person to "bring an action or assert a counterclaim"). Allowing full relief to a defendant/counterclaimant is consistent with the view that only those who have suffered an ascertainable loss are entitled to fees and costs.

Walmart also seeks to condition the voluntary dismissal of this action on payment of attorney's fees and costs by Chavez's counsel. Walmart claims there are three different bases for sanctioning Chavez's counsel: (1) Rule 41(a)(2) itself, (2) 28 U.S.C. § 1927, and (3) the court's inherent power.

a. On Terms the Court Considers Proper

First, Walmart claims that because Rule 41(a)(2) permits a court to order payment of attorney's fees by counsel *either* when there is an independent statutory basis for doing so or when there are "exceptional circumstances." (Mot. Fees at 16.) But only the former is permissible under Ninth Circuit law. In *Heckethorn v. Sunan Corporation*, the Ninth Circuit explicitly stated that Rule 41(a)(2) does not "provide an independent basis for sanctioning lawyers." 992 F.2d 240, 242 (9th Cir. 1993). To impose sanctions as a condition for ordering dismissal, there must be under some other basis for ordering the sanctions, such as a violation of Rule 11 or section 1927. *Id.* While Walmart does not necessarily characterize the payment of attorney's fees and costs by Counsel as a "sanction," it appears that it would be considered a sanction under Ninth Circuit law, no matter what it is called. *Cf. Heckethorn*, 992 F.2d at 242 ("Though the district court indicated its order was not punitive, the condition imposes a monetary obligation on [plaintiff's counsel] and so is equivalent to a sanction against [plaintiff's counsel]."); *Zambrano v. City of Tustin*, 885 F.2d 1473, 1476 n.6 (9th Cir. 1989) ("While the jury fees were styled as a 'cost,' in this case they are, in reality, a sanction [of counsel] and were imposed as such.").

Walmart cites three district court cases as authority for imposing attorney's fees on counsel under Rule 41(a)(2) in "exceptional circumstances" without any statutory authority, but none is convincing. One is from Florida where *Heckethorn* and Ninth Circuit law are not binding. *See Tesma v. Maddox-Joines, Inc.*, 254 F.R.D. 699 (S.D. Fla. 2008). Another is from a district court within the Ninth Circuit, but the opinion predates *Heckethorn* and therefore was effectively overruled to the extent that it is inconsistent with the higher court's decision. *See Tabra, Inc. v. Treasures de Paradise Designs, Inc.*, 1992 WL 73463 (N.D. Cal. Jan. 13, 1992). The remaining case, *Rodriguez v. Serv. Employees Int'l*, 2011 WL 4831201 (N.D. Cal. Oct. 12, 2011), is not inconsistent with the standards we have just described. The *Rodriguez* court makes a passing reference to imposing fees and costs as a condition under "exceptional circumstances," but it does so (1) while discussing the views of other courts outside the Ninth Circuit and (2) while discussing the separate issue (discussed above) of whether attorney's fees and costs should ever be imposed on a plaintiff, as opposed to plaintiff's counsel, when the plaintiff moves to voluntarily dismiss with prejudice. *Id.* at *3. *Rodriguez* does not suggest that there is any authority contrary to *Heckethorn* that would allow us to impose attorney sanctions as a condition on a Rule 41(a)(2) dismissal in the absence of some independent basis for the sanctions.

In its Reply, Walmart clarifies that it was never trying to argue that Rule 41 provides a basis for sanctions in and of itself, but that such imposition of fees and costs requires both independent statutory basis *and* exceptional circumstances. (Reply at 11-13.) This is a curious argument since it places an even greater burden on Walmart, requiring it to prove both that there is a statutory basis for damages and that there are exceptional circumstances warranting imposition of attorney's fees and cost. In any event, we disagree. Nowhere in *Heckethorn* does the Ninth Circuit suggest that there is an additional "exceptional circumstances" requirement for the imposition of attorney's fees, and we are aware of no

other Ninth Circuit so holding. The sole question is whether there is an independent basis to impose sanctions and whether the court will exercise its discretion to impose them as a condition of dismissal.

b. 28 U.S.C. § 1927

Under section 1927, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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." According to the Ninth Circuit, "[t]he use of the word 'may'—rather than 'shall' or 'must'—confers substantial leeway on the district court when imposing sanctions." *Haynes v. City & Cnty. of San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012).

An attorney's "[r]ecklessness suffices for § 1927 sanctions"; a finding of bad faith is not required. *Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010); *see also Jensen v. Phillips Screw Co.*, 546 F.3d 59, 64 (1st Cir. 2008) ("Bad faith is not an essential element [of section 1927 sanctions], but a finding of bad faith is usually a telltale indicium of sanctionable conduct."); *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) ("Although subjective good faith on the part of a non-attorney party appellant may in some instances excuse otherwise unreasonable conduct, we are entitled to demand that an attorney exhibit some judgment. To excuse objectively unreasonable conduct by an attorney would be to state that one who acts with 'an empty head and a pure heart' is not responsible for the consequences."). The Ninth Circuit has not authoritatively defined "recklessness" in the section 1927 context, but it tentatively stated in one case that it "might" be defined as "a departure from ordinary standards of care that disregards a known or obvious risk of material misrepresentation." *In re Girardi*, 611 F.3d 1027, 1038 n.4 (9th Cir. 2010).

Counsel's conduct may be negligent, but not reckless. To find Counsel reckless, we would need to conclude that the failure to investigate the basis of Chavez's claim was a gross deviation from the standard of care normally expected of an attorney. But it is not that surprising that Counsel did not scrutinize Chavez's assertions more closely. There was nothing implausible about her claim on its face—why should Counsel doubt that she really bought a waterslide from Walmart? Similarly, when she produced a bank statement that appeared to validate her claim, there was little reason for Counsel to grill her over the fact that her name didn't appear on statement. None of this is to say that Counsel's behavior was optimal. If they had been more careful and diligent in interviewing their client before filing this lawsuit, or had more thoroughly vetted her as a lead plaintiff for the class, they might have caught this problem with her claim. But Counsel's carelessness, unfortunate as it is, does not rise to the level of disregarding a known or obvious risk of making a material misrepresentation.

c. Court's Inherent Power

Finally, Walmart urges us to sanction Counsel based on the court's inherent power. When litigants or counsel act in bad faith, a court has inherent power to award fees and costs as a sanction for their behavior. *See Chambers v. NASCO, Inc.*, 501 US 32, 43 (1991). Since we have already found that Counsel was not reckless, it follows that they did not act in bad faith.

E-FILED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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Accordingly, there is no independent statutory basis for us to sanction Counsel with the payment of Walmart's attorney's fees and costs as a condition of dismissal.

III. CONCLUSION

For the foregoing reasons, Chavez's Motion to Dismiss is **GRANTED**. This case is **DISMISSED with prejudice** with no conditions imposed on Chavez or Counsel. Walmart's Motion for Attorney's Fees and Costs is **DENIED**.

IT IS SO ORDERED.

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Initials of Deputy Clerk Bea