UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-10434-GW-KS 2:21-cv-07145-GW-KS	Date	April 12, 2023
Title	*Genevieve Morton v. Twitter, Inc. et al*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

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

PROCEEDINGS: **IN CHAMBERS - TENTATIVE RULING ON DEFENDANT TWITTER'S MOTION FOR CONTEMPT AND ENTRY OF A SEPARATE JUDGMENT [229], PLAINTIFF'S MOTION FOR RELIEF OF ORDERS [237], and PLAINTIFF'S MOTION TO CONSOLIDATE 2:22-MC-00012 AND FOR CONTEMPT AGAINST TWITTER, INC. [69]**

Attached hereto is the Court's Tentative Ruling on Motions, presently set for April 13, 2023 at 8:30 a.m.

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Initials of Preparer DBE

Genevieve Morton v. Twitter; Case Nos. 2:20-cv-10434; 2:21-cv-07145
Tentative Rulings on: (1) Defendant's Motion for Contempt, (2) Plaintiff's Motion for Reconsideration, and (3) Plaintiff's Motion to Consolidate and for Contempt

I. Background

Before the Court are three separate motions filed in two related cases brought by Plaintiff Genevieve Morton ("Plaintiff" or "Morton") against Defendant Twitter, Inc ("Defendant" or "Twitter") and other Defendants. *See generally Morton v. Twitter, Inc. et al.* ("*Morton I"),* Case No. 2:20-cv-10434-GW-(JEMx); *Genevieve Morton v. Twitter, Inc. et al.* ("*Morton II*"), Case No. 2:21-cv-07145-GW-(JEMx). The underlying claims in both actions stem from the unauthorized use of Plaintiff's photographs by users on Twitter. The Court presumes familiarity with the factual background, which has been discussed in further detail in the Court's previous orders. *See, e.g.*, ECF No. 214.[1]

Plaintiff initiated the first in this series of related actions on November 13, 2020. *See* ECF No. 2. On September 9, 2021, Plaintiff brought the second action against Twitter and other entities concerning similar conduct. *See Morton II*, ECF No. 1. She brought a third action on August 8, 2022. *See generally Genevieve Morton v. Twitter, et. al.* ("*Morton III*"), Case No. 5:22-cv-01482-GW-KS. On February 19, 2021, the Court dismissed all causes of action in *Morton I*, except for the first claim of copyright infringement. *See* ECF No. 30. On September 30, 2021, the Court consolidated *Morton I* and *Morton II* for pre-trial purposes. ECF No. 62. On October 20, 2022, the Court dismissed the copyright claims in *Morton I/II* at summary judgment because Plaintiff had not established her ownership of the copyrights in the materials at issue. *See* ECF No. 214 ("Ruling on *Morton I/II*"). On February 2, 2023, the Court dismissed *Morton III* with prejudice on the grounds that Plaintiff's claims were precluded by the Ruling on *Morton I/II*. *Morton III*, ECF Nos. 53, 55. Plaintiff did not file an appeal of either order by the applicable deadlines (November 21, 2022 and March 6, 2023, respectively).

A. Discovery Sanctions and Contempt Orders in *Morton I/II*

In *Morton I/II*, Twitter sought discovery regarding Plaintiff's ownership of the copyrights at issue, and there arose repeated discovery disputes over this requested discovery. *See* ECF No. 125. On February 11, 2022, Defendant Twitter filed a Motion to Compel Sanctions. *See* ECF No.

[1] All docket citations refer to the docket in *Morton I*, unless otherwise noted.

109. Through its motion, Twitter alleged that Plaintiff had failed to comply with four previously issued discovery orders, *i.e.* August 3, 2021 Order (ECF No. 53), September 15, 2021 Order (ECF No. 58), November 4, 2021 Order (ECF No. 81), and January 12, 2022 Order (ECF No. 97.). Pursuant to Rule Fed. R. Civ. P. 37(b)(2)(A), Twitter sought to exclude certain evidence, compel Plaintiff's deposition, and attorneys' fees incurred in bringing the prior three Motions to Compel and the Motion for Sanctions. In its Motion for Sanctions, Defendant Twitter sought attorneys' fees totaling $128, 626.75. *See* ECF No. 109. On March 17, 2022, Magistrate Judge McDermott partially granted the motion and recommended the Court issue a sanctions order precluding Plaintiff from relying on the statutory presumption of ownership for the asserted copyrights, based on her failure to comply with the four prior Orders. *See* ECF No. 125. At the direction of Judge McDermott, Twitter filed a Proposed Report and Recommendation implementing the sanction on March 21, 2022. ECF No. 126. The next day, this Court adopted the Report and Recommendation and issued an order precluding Plaintiff from relying on the statutory presumption of ownership. ECF No. 127 ("Preclusion Sanctions Order").

Judge McDermott's March 17, 2022 Order also requested that Twitter submit a revised attorneys' fees request in line with its tentative analysis. *See* ECF No. 125 at 7. After Defendant submitted a revised request, this Court determined that it would grant revised attorneys' fees totaling $112,531.43. *See* ECF No. 129 ("Monetary Sanctions Order"). The Court's Monetary Sanctions Order, which was issued on April 4, 2022, stated that Plaintiff and her counsel, Jennifer Holliday, were ordered to split payment for $112,531.43 and make the payment within 30 days of issuance of the Monetary Sanctions Order. *Id.* at 2.

Plaintiff and her counsel failed to tender payment by May 4, 2022. On July 25, 2022, Twitter filed a motion for contempt based on Plaintiff's failure to pay. ECF No. 194. The Court granted Twitter's motion on August 22, 2022 and found Plaintiff and Holliday in contempt of Court. *See* ECF No. 201 ("Contempt Order"). The Contempt Order ordered Plaintiff and Holliday to pay Twitter $112,531.43 by September 22, 2022, and further ordered a per diem fine of $100 per day for each day following that deadline until Plaintiff and Holliday paid in full. ECF No. 201. The Court also warned Plaintiff that, "[m]oving forward, the Court will not hesitate to order any available sanction within its inherent authority against Plaintiff and Plaintiff's counsel for additional misconduct." *Id.* at 7. Plaintiff and Holliday did not make any payments by the deadline. Nevertheless, on October 3, 2022, the Court extended the deadline for payment to

October 31, 2022 and reduced the per diem fine to $35 per day. ECF No. 221 ("Revised Contempt Order"). According to Twitter, Plaintiff and Holliday still have not made any payment. *See* ECF No. 229-6 ¶ 4.

Now before the Court are two motions filed in *Morton I*: (1) Twitter's Motion For Contempt and Entry of a Separate Judgment ("Second Motion for Contempt") (ECF No. 229), filed January 30, 2023; and (2) Plaintiff's Motion for Relief of Orders ("Motion for Reconsideration") (ECF No. 237), filed March 3, 2023.

In its Second Motion for Contempt, Twitter moves for an order, set out in a separate judgment: (1) holding Plaintiff and Holliday in contempt of Court; (2) increasing the per diem fee to $100 as of the date of the Court's order; (3) granting post-judgment interest; and (4) granting Twitter its costs and attorneys' fees incurred in connection with Twitter's contempt motion and its efforts to enforce the judgment. ECF No. 229 at 7. Twitter further requests a referral of Holliday to the California State Bar. *Id.* at 6.

In her Motion for Reconsideration, Plaintiff moves for reconsideration of the Court's Preclusion Sanctions Order and Monetary Sanctions Order. Plaintiff asserts a number of grounds for vacating the these Orders, including the existence of procedural defects, mistakes of law and fact, fraud, and a change in the governing law.

B. Plaintiff's DMCA Subpoena

Separately, on January 20, 2022, Plaintiff requested the Clerk of the Court to issue a subpoena ("Subpoena") to Twitter in the matter of *In Re: DMCA Subpoena to Twitter, Inc.*, 2:22-mc-00012. *See Morton II*, ECF No. 69-1, Ex. A. Plaintiff issued the subpoena pursuant to section 512(h) of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), which authorizes a copyright owner to seek information sufficient to identify alleged infringers. On January 31, 2022, Twitter served objections to the Subpoena, claiming that – in addition to seeking information regarding the identity of the purported infringer of the photographs of Plaintiff – the Subpoena sought information such as direct messages sent from the infringer's account, which go beyond the permissible scope of section 512(h) and would require Twitter to disclose the user's private information. *Morton II*, ECF No. 69-1, Ex. B. Twitter agreed to provide information it believed fell within the scope of section 512(h) and produced such responsive documents. *See Morton II*, ECF No. 72-1. However, Twitter did not comply with all of Plaintiff's requests or move to quash the Subpoena.

The third motion now before the Court is Plaintiff's Motion to Consolidate 2:22-mc-00012 and for Contempt Against Twitter ("Motion to Consolidate") (*Morton II*, ECF No. 69), filed in *Morton II* on March 10, 2023. Plaintiff's Motion to Consolidate argues that the Court should exercise jurisdiction over the enforcement of the Subpoena as the Twitter user involved in the Subpoena remains as a defendant in *Morton II*. Plaintiff also asks the Court to hold Twitter in contempt for its failure to comply with the Subpoena.

II. Legal Standards

A. Motions for Contempt

A party shall be held in civil contempt where they disobey a "specific and definite court order by fail[ing] to take all reasonable steps within [their] power to comply." *Weiss v. Espresso Roma Corp.*, No. 19-cv-00112- HSG, 2020 U.S. Dist. LEXIS 162512, at *4 (N.D. Cal. Sept. 4, 2020); *see Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) ("'Civil contempt...consists of a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply.' The contempt 'need not be willful.'" (quoting *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) and *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987))); *Perry v. O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985) ("[C]ivil contempt need not be willful to justify a discretionary award of fees and expenses as a remedial measure.").

"The moving party has the burden of showing by clear and convincing evidence that the [nonmoving party] violated a specific and definite order of the court." *FTC v. Affordable Media*, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) (citation omitted). Once the moving party has established that the nonmoving party has violated an order, the burden shifts to the "contemnors to demonstrate why they were unable to comply." *Stone v. City & Cnty. of S.F.*, 968 F.2d 850, 856 n.9 (9th Cir. 1992) (once the moving party has established that an order was violated, the burden "shifts to the contemnors to demonstrate why they were unable to comply."); *United States v. Bright*, No. 07-00311 ACK-KSC, 2009 U.S. Dist. LEXIS 15915, at *11-13 (D. Haw. Feb. 27, 2009) (contemnor must show "'categorically and in detail' why he is unable to comply" (citations omitted)).

There are only two recognized defenses to civil contempt: (1) substantial compliance with a court's order and (2) inability to comply. *See CFTC v. Fin. Tree*, No. 2:20-cv-01184-TLN-AC, 2021 U.S. Dist. LEXIS 34762, at *7 (E.D. Cal. Feb. 24, 2021).

Federal Rule of Civil Procedure 45(g) provides that a court "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it." Fed. R. Civ. P. 45(g); *see also Vincent v. BCC Partners, LLC*, Case No. SACV 12-142-DOC (RNBx), 2012 WL 12893998, at *1 (C.D. Cal. Feb. 9, 2012) (As provided in Rule 45, "[t]he only sanction available where a non-party witness fails without adequate excuse to obey a subpoena is a contempt citation."). "Contempt proceedings are instituted by the issuance of an Order to Show Cause ('OSC') why a contempt citation should not issue and a notice of a date for the hearing." *Alcalde v. NAC Real Est. Invs. & Assignments, Inc.*, 580 F. Supp. 2d 969, 971 (C.D. Cal. 2008); *see also Delis v. Sionix Corp.*, 2015 WL 12733439, at *2 ("A court may initiate contempt proceedings through an OSC why a contempt citation should not issue." (citing *Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1218 (9th Cir. 2004)).

B. Motion for Reconsideration

Under Federal Rule of Civil Procedure 60(b), "a court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, within reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). The decision whether to vacate a prior judgment is committed to the sound discretion of the district court. *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992).

A party invoking the catchall provision under Rule 60(b)(6) must satisfy three requirements: "The motion cannot be premised on another ground delineated in the Rule; it must be filed 'within a reasonable time,' *see* Fed. R. Civ. P. 60(c)(1); and it must demonstrate 'extraordinary circumstances' justifying reopening the judgment, *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Extraordinary circumstances occur where there are 'other compelling reasons' for opening the judgment." *Bynoe v. Baca*, 966 F.3d 972, 979 (9th Cir. 2020). A "clear and authoritative" change in the governing law may present extraordinary circumstances. *Id.* at 983 (quoting *Polites v. United States*, 364 U.S. 426, 433 (1960)).

C. Motion to Consolidate

Under the Federal Rules of Civil Procedure, "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). The Court's decision on a request to consolidate is discretionary, and that discretion is broad. *See Hall v. Hall*, 138 S.Ct. 1118, 1131 (2018); *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855-56 (9th Cir. 2016).

III. Discussion

A. Twitter's Motion for Contempt

Twitter's Second Motion for Contempt asks the Court to (1) again hold Plaintiff and Holliday in contempt for failure to comply with the Court's orders; (2) issue additional sanctions (including payment of Twitter's attorneys' fees associated with enforcing compliance); (3) issue a separate judgment on the sanctions award under Fed. R. Civ. P. 58(d); and (4) refer Holliday to the California State Bar. Twitter argues Plaintiff has violated a "specific and definite" order – *i.e.*, this Court's Revised Sanctions Order. Under the clear terms of that order, Plaintiff and Holliday were required to pay $112,531.43 by October 31, 2022 and incur a $35 per diem fine for every day they are late. *See* Revised Sanctions Order. Because Twitter has shown that Plaintiff and Holliday still have not paid any monetary sanctions whatsoever (and have not demonstrated any intent to do so), there is clear and convincing evidence for the Court to find them in contempt once again.

In response, Plaintiff raises a litany of objections, including that: (1) Twitter lacks standing to bring its motion and the Court lacks jurisdiction to hear it; (2) Twitter waived its right to modify of enforce the sanction awards because it did not timely file its motion; (3) the Court's Revised Sanctions Order provides inadequate notice that Plaintiff would suffer additional consequences for failing to comply; and (4) Twitter's motion is supported by inadmissible evidence. Thus, Plaintiff claims she had an "objectively reasonable basis" to be believe that her non-compliance with the Order was lawful. ECF No. 247 at 21. The Court would disagree.

i. *Standing and Subject Matter Jurisdiction*

First, Plaintiff objects on the grounds that neither Twitter nor its counsel have suffered an injury-in-fact arising from Plaintiff's non-compliance with the Court's order. ECF No. 247 at 9. Specifically, Plaintiff concludes from the fact that the Court ordered the fees to be paid to Twitter's former counsel Wilson Sonsini Goodrich & Rosati ("WSGR") that the fee award "is, and never

apparently was, Twitter's debt to collect." *Id.* at 8. Plaintiff further claims that the Court does not have subject matter jurisdiction to hear Twitter's motion because the *Morton I* case has been closed.

These arguments are unconvincing. Plaintiff cites no authority for the proposition that a court lacks jurisdiction to enforce its own orders following the entry of a final judgment. To the contrary, "[i]t is well established that a federal court may consider collateral issues after an action is no longer pending," such as enforcing its own orders and judgments, awarding sanctions, and settling attorneys' fees disputes. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (a court has the authority to "manage its proceedings, vindicate its authority, and effectuate its decrees"); *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 968 (9th Cir. 2014) ("There is no debate that a federal court properly may exercise ancillary jurisdiction 'over attorney fee disputes collateral to the underlying litigation' … even after the underlying litigation has concluded." (collecting cases)); *Cnty. Of Marin v. Martha Co*., 2018 WL 5279583, at *6 (N.D. Cal. July 6, 2018) ("Nonetheless, after the entry of judgment, a court retains ancillary jurisdiction for specific purposes, such as the enforcement of its orders and judgments.").

Because the Court has subject matter jurisdiction to hear Twitter's motion, there is no need for Twitter to establish an independent injury-in-fact arising from Plaintiff's failure to pay the Court-ordered fees. Nevertheless, the Court would find unpersuasive Plaintiff's argument that, because the Monetary Sanctions Order required Plaintiff and Holliday to tender payment to WSGR, any claim for the unpaid fees belongs solely to WSGR and Twitter has no right to enforce the Revised Sanctions Order.

ii. *Waiver*

Next, Plaintiff argues that by failing to include the fee award in its proposed final judgment or timely seek modification of the final judgment, Twitter has waived its right to enforce the fee award. ECF No. 247 at 9-12. Plaintiff charges Twitter with intentionally waiting to bring its motion until after the Court ruled Plaintiff was collaterally estopped from bringing its claims in *Morton III* based on the final judgment in *Morton I* and *Morton II*. *See Morton III*, ECF No. 53. Twitter disputes Plaintiff's characterization of the record, pointing to its previous Motion for Contempt and its direct attempts to obtain payment from Plaintiff as evidence it has attempted to enforce the sanctions award. ECF No. 249 at 4. Further, Twitter contends that it was not required

to separately identify the sanctions award in the final judgment because the award was merged into the final judgment, and the Court set the deadline for Plaintiff to comply for October 31, 2022 – eleven days after the final judgment was entered. *Id.* at 5.

The Court would agree with Twitter. Again, Plaintiff cites no authority for its assertion that failure to include a sanctions award in the final judgment constitutes a waiver of the right to enforce that award. Moreover, the record belies Plaintiff's claim that Twitter intentionally relinquished its right to enforce this Court's orders (as evidenced by Twitter's previous Motion for Contempt), or that Twitter's actions were "so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." *Salyers v. Metro. Life Ins. Co*., 871 F.3d 934, 938 (9th Cir. 2017).

Plaintiff also claims Twitter should be equitably estopped from enforcing the sanctions award because Twitter's purported failure to enforce the award "affected her right to appeal while another case was pending." ECF No. 247 at 2. Equitable estoppel requires showing that: "(1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has right to believe it is so intended, the (3) party invoking estoppel must be ignorant of true facts, and (4) he or she must detrimentally rely on the former's conduct." *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995) (citation omitted). Plaintiff has failed to show at least the second and fourth elements – that Twitter intentionally induced Plaintiff to take actions affecting her right to appeal – for the reasons just discussed.

iii. *Modification*

Plaintiff's next objection is that Twitter's former counsel did not timely seek modification of the Court's Monetary Sanctions Order prior to entry of the final judgment. Though it is not entirely clear, Plaintiff's argument appears to be that (1) because WSGR did not assign the right to the fee award to Twitter or its current counsel, those parties do not have an interest in enforcing the award; and (2) Twitter's Second Motion for Contempt seeks an untimely modification of the final judgment. The first of these arguments fails for the reasons previously discussed. The Court would also find second argument to be without merit. As Twitter points out, Twitter is not seeking a modification of the earlier judgment but rather a *new*, *separate* order pursuant to Rule 58(d). *See* ECF No. 229 at 7 ("Twitter requests that this Court enter a separate judgment under Rule 58."); *Vasquez v. Libre by Nexus, Inc.*, No. 17-CV-00755 CW, 2023 WL 360242, at *16 (N.D. Cal. Jan. 23, 2023) (declining the amend judgment but entering "new, separate judgments to facilitate the

collection of the civil contempt sanctions"). Such requests may be granted after the action has been dismissed and final judgment entered. *See, e.g.*, *Leads Club, Inc. v. Peterson*, No. CIV. 05CV1717-J-(JMA), 2008 WL 186504, at *4 (S.D. Cal. Jan. 22, 2008).

iv. *Notice*

Plaintiff further claims that she was not given sufficient notice that Plaintiff or Holliday counsel would be subject to any additional consequences for noncompliance beyond the $35 per diem fee. That is plainly incorrect. The Court's prior sanctions award warned Plaintiff, in no uncertain terms, that "the Court will not hesitate to order any available sanction within its inherent authority against Plaintiff and Plaintiff's counsel for additional misconduct." Contempt Order at 7. Plaintiff cannot continue to openly disobey the Court's Orders and then claim ignorance when she is once again held in contempt and sanctioned for her misconduct.

v. *Admissibility of Supporting Declarations*

Plaintiff seeks to strike the two declarations submitted in support of Twitter's Second Motion for Contempt. Plaintiff objects to the declaration of Victor Jih on the grounds that it is inadmissible hearsay, and to the declaration of Justin Griffin on relevance grounds. Local Rule 7-7 sets forth the required form and content of declarations: "Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F. R. Civ. P. 56(c)(4)." C.D . Cal. L. R. 7-7. Federal Rule of Civil Procedure Rule 56(c)(4), in turn, provides that any "declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P 56(c)(4).

Twitter has complied with these requirements. As to the declaration of Jih, Plaintiff does not explain specifically why she believes Jih's testimony is hearsay. She states only that Jih is "available to appear in Court" and therefore "should be required to testify … on the Motion." ECF No. 247 at 13. But that argument misses the point. Rule 56(c)(4) focuses of the admissibility of the evidence's contents, not its form. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). In other words, Jih's testimony is not rendered inadmissible hearsay merely because it was submitted in the form of a declaration. The only purported defect Plaintiff identifies with the substance of Jih's testimony is that she disagrees with Jih's characterization of the Court's Orders and believes he omitted material information. Those are not valid hearsay objections.

Plaintiff also objects to the Griffin's testimony that Twitter's counsel "has not received any

portion of the $112,531.43 in monetary sanctions and per diem fines" as irrelevant. ECF No. 247 at 15. Notwithstanding the fact that the Monetary Sanctions Order instructed Plaintiff to tender payment to Twitter's former counsel, evidence that Plaintiff paid Twitter's current counsel would undoubtedly be relevant to Twitter's Motion.

vi. *Criminal Sanctions*

Finally, Plaintiff contends that Twitter's motion seeks punitive, not remedial, sanctions, and therefore a criminal proceeding is required to adjudicate the motion. That contention is without merit. As Plaintiff acknowledges, civil contempt sanctions are intended "to coerce, rather than punish." *See Shillitani v. United States*, 384 U.S. 364, 368-70 (1966). None of the sanctions Twitter seeks suggests any intent to punish. Rather, they are simply means to compel Plaintiff to comply with this Court's Orders – as the previously ordered sanctions have proved insufficient to get Plaintiff to comply.

vii. *Requested Relief*

Based on the foregoing, the Court would not credit any of Plaintiff's purported justifications for her failure to pay and would find Plaintiff and Holliday again in contempt of Court. Furthermore, Plaintiff's prolonged defiance of numerous Orders from this Court necessitates the imposition of more severe sanctions. The Court previously lowered the per diem fine Plaintiffs were ordered to pay to $35 per day, but that amount has proven insufficient to compel compliance. The Court would therefore grant Twitter's request to increase the fine to $100 per day from the date this Order is made final until Plaintiff has made full payment of the previously ordered sanctions awards. *See RG Abrams Ins. v. Abrams*, No. 2:21- cv-00194-FLA (MAAx), 2021 U.S. Dist. LEXIS 216815, at *33 (C.D. Cal. Nov. 9, 2021) (ordering $100 daily fine until defendants complied with order requiring payment of fee sanctions); *Facebook, Inc. v. Power Ventures, Inc.*, No. 08-CV-05780-LHK, 2017 U.S. Dist. LEXIS 125541, at *48 (N.D. Cal. Aug. 8, 2017) (ordering $100 daily fine where party failed to pay Court-ordered fee sanctions). Twitter is also entitled to post-judgment interest at the applicable rate.

As for Twitter's requests for costs and fees associated with bringing this Motion, Twitter has failed to state the requested amount. Without any insight into the fees and costs Twitter seeks for the bringing of this Motion, the Court has no way to discern whether they are reasonable for purposes of granting this relief.

The Court would also grant Twitter's request pursuant to Rule 58(d) for a separate

judgment against Plaintiff and Plaintiff's counsel to assist Twitter in enforcing this Court's Orders. Twitter should resubmit a proposed judgment consistent with the foregoing and be prepared to discuss its requests to recover the fees incurred in bringing this motion.

Finally, Twitter requests that Holliday be referred to the California State Bar. Local Rule 83-3.1 provides:

> When alleged attorney misconduct is brought to the attention of the Court, whether by a Judge of the Court, any lawyer admitted to practice before the Court, any officer or employee of the Court, or otherwise, the Court may, in its discretion … refer the matter to an appropriate state bar agency for investigation and disposition ….

C.D. Cal. L.R. 83-3.1.

The Court would not find a referral appropriate at this point in time. Plaintiff does not specifically address Twitter's request, other than by rehashing arguments regarding the impropriety of the billing statements of Twitter's former counsel and asking the Court to "apply such referrals evenhandedly." ECF No. 247 at 25. Holliday's prior failure to comply with this Court's Sanction Orders may be due to an uniformed zealousness on her part rather than a complete lack of professionalism and "implicates attorney discipline, an important state interest." *Leads Club*, 2008 WL 186504, at *4. However, should Holliday's failure to comply continue, the Court would agree that reporting the matter to the State Bar would be warranted.

B. Plaintiff's Motion for Reconsideration

Plaintiff moves for reconsideration of the Court's Preclusion Sanctions Order and Monetary Sanctions Order. Plaintiff lists several reasons for vacating the Court's previous Orders, including that the Orders were based on mistakes of law and/or fact, Twitter's billing records in support of the underlying motions were fraudulent, and there was an authoritative change in law that the Court failed to apply. As to the Preclusion Sanctions Order, Plaintiff further argues she did not have sufficient time to object to the Report and Recommendation (ECF No. 126), as required by Rule 72, before it was adopted by the Court. And as to the Monetary Sanctions Order, Plaintiff further contends that Twitter's underlying motion did not follow the procedures set forth in Local Rule 37.

i. *Timeliness*

In opposition, Twitter first argues that, as a threshold matter, Plaintiff's request for reconsideration is barred because Plaintiff did not appeal the Court's judgment in *Morton I/II* within the time allowed. A motion under Rule 60(b) "must be made within a reasonable

time." Fed. R. Civ. P. 60(c)(1). "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981). Twitter cites several cases finding that a Rule 60(b) motion filed after the deadline for taking an appeal has passed is not made within a reasonable time. *See* ECF No. 244 at 7. In response, Plaintiff cites the Ninth Circuit's decision *Bynoe v. Baca*, 966 F. 3d 972, 980-82 (9th Cir. 2020), for the proposition that, where a change in the law is the basis for the motion under Rule 60(b)(6) (the catchall provision based on extraordinary circumstances), the inquiry is more flexible.

Plaintiff's argument that there was a change in the governing law is unsupported by the factual record in this case. As Twitter correctly points out, the Supreme Court issued its decision in *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941 (2022) on February 24, 2022 – several weeks before the Preclusion Sanctions Order and Monetary Sanctions Order were issued on March 22, 2022 and April 4, 2022, respectively. Plaintiff did not respond to this argument. Accordingly, Plaintiff has failed to show any change in the law that would warrant the Court finding an extraordinary circumstance under Rule 60(b)(6). Nor has Plaintiff provided any other reason why she lacked "the practical ability…to learn earlier of the grounds relied upon." *Ashford*, 657 F.2d at 1055.

Indeed, Plaintiff could have raised her objections to the Court's Orders on appeal, but she made a deliberate choice not to. Thus, under the cases cited by Twitter, Plaintiff's motion is untimely. *See, e.g.*, *Inland Concrete Enterprises, Inc. v. Kraft*, 318 F.R.D. 383, 411 (C.D. Cal. 2016) ("Circuit precedent…holds that a court may not find a 60(b)(1) motion to be filed 'within a reasonable time' unless it was filed within the time for taking an appeal." (collecting cases)); *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 & n.2 (9th Cir. 1982) (affirming denial where motion was filed 18 days after deadline to appeal expired, because "[a]llowing motions to vacate pursuant to Rule 60(b) after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments"). The Court would deny Plaintiff's Motion for Reconsideration on this ground alone, but for the sake of thoroughness will address some of Plaintiff's remaining arguments.

ii. *Mistake of Law or Fact*

Plaintiff claims that the Court committed a mistake of law by failing to properly apply the

Supreme Court's decision in *Unicolors,* S. Ct. 941. The Court already considered, and rejected, Plaintiff's argument regarding the applicability of the *Unicolors* holding in its Ruling on *Morton I/II*:

> [T]he Court cannot understand how *Unicolors*' holding – that either a lack of factual or legal knowledge can excuse an inaccuracy in a copyright registration under § 411(b)(1)(A)'s safe harbor – impacts this Court's discovery sanction barring Plaintiff's reliance on the statutory presumption of copyright ownership under § 410(c). But Plaintiff was not barred from relying on the presumption of ownership because of an inaccurate copyright registration. Rather, Plaintiff was precluded from relying on the statutory presumption of ownership because of her *repeated* failures to comply with discovery orders to produce documents related to the ownership of the photographs, including the registration documentation, alleged photographer agreements, and communications with the photographer. *See Morton I*-ECF No. 125 at 2-3. Contrary to Plaintiff's arguments, *Unicolors* does not speak to § 410(c).

ECF No. 214 at 7-8 (footnote omitted). That reasoning is equally applicable to Plaintiff's argument here. And, as previously stated, Plaintiff's Motion for Reconsideration is not the proper vehicle for relitigating an issue that has already been decided based on the exact same arguments. *See Van Kirk v. Loc. 469 United Ass'n of Journeymen*, No. CV-20-01961-PHX-SMB, 2022 WL 17404795, at *1 (D. Ariz. Dec. 2, 2022) ("[A] motion under Rule 60(b) is not a second opportunity for the losing party to make its strongest case, to rehash arguments, or to dress up arguments that previously failed.").[2]

iii. *Plaintiff's Remaining Arguments*

Plaintiff claims the Court's failure to strictly comply with Rule 72 warrants vacating the Preclusion Sanctions Order. Like Plaintiff's other arguments, however, the proper place to raise this argument would be on appeal – not on an untimely motion for reconsideration. Moreover, Plaintiff has not cited any authority for her claim that this defect warrants vacating the judgment. As Twitter points out, Plaintiff has failed to show any prejudice from the early adoption, as Plaintiff did not raise this objection until filing this Motion for Reconsideration eleven months after the Report and Recommendation was adopted.

Plaintiff's other arguments regarding Twitter's failure to follow Federal Rule of Civil Procedure 37(a)(5) and Local Rule 37, supposed issues with WSGR's billing records, and Judge

[2] On Reply, Plaintiff further argues that none of her discovery misconduct warranted the Court's decision to deny her the statutory presumption of ownership. *See* ECF No. 248 at 6-7. This is another improper attempt to re-assert an argument Plaintiff already made in her summary judgment briefing. *See* ECF No. 197 at 9, 12.

McDermott's voluntary recusal are all similarly flawed. Plaintiff either previously raised these arguments unsuccessfully, or could have raised them and chose not to. *See* ECF Nos. 129; 201 at 6. And in any event, Plaintiff has not persuasively explained why any of these purported defects meets the standard for vacating the Court's Orders set forth under Rule 60(b).

C. Plaintiff's Motion to Consolidate and for Contempt

Finally, Plaintiff moves to consolidate *Morton II* with the action involving Plaintiff's DMCA Subpoena. Plaintiff also moves for contempt against Twitter for its purported noncompliance with the Subpoena, asserting that Twitter should have either complied in full or moved to quash the Subpoena.

i. *Consolidation*

As a threshold matter, Twitter argues Plaintiff cannot enforce the Subpoena because she is not the owner of the copyright underlying the Subpoena. Section 512(h)(1) provides: "*A copyright owner* or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection." 17 U.S.C. § 512(h)(1) (emphasis added). Twitter cites the Court's Ruling on *Morton I/II*, in which the Court determined Plaintiff failed to establish her ownership rights in the works. In response, Plaintiff argues that at the time Twitter's compliance with the Subpoena was due, Plaintiff was the presumed owner of the copyright, and therefore Twitter's noncompliance is not excused. *Morton II*, ECF Nos. 69 at 11-12; 76 at 7. However, Plaintiff's argument shows, at most, that Twitter is not immune from a contempt action based on the Court's ruling which occurred after the purported noncompliance with the Subpoena. Plaintiff's argument does not change the fact that Plaintiff cannot *now* seek to enforce the Subpoena, which she seeks to do by consolidating the action involving the Subpoena with *Morton II*. Plaintiff's reply brief does not address this point. Accordingly, the Court would deny Plaintiff's request to consolidate the actions.[3]

ii. *Contempt*

Plaintiff argues Twitter should be held in contempt because it did not fully comply with the Subpoena or file a motion to quash or modify it – which Plaintiff claims Twitter was required to do under Federal Rule of Civil Procedure 45. *Morton II*, ECF No. 69 at 8. Section 512(h)

[3] Twitter also asserts that Plaintiff's Motion to Consolidate is an improper attempt to drag Twitter back into a case in which it is no longer a party. *See Morton II*, ECF No. 72 at 12. The Court is inclined to agree.

provides that "the remedies for noncompliance with the subpoena[] shall be governed to the greatest extent practicable by" the applicable Federal Rules of Civil Procedure (here, Rule 45). 17 U.S.C. § 512(h)(6). Plaintiff reads Rule 45(d)(3)(A), which lays out the grounds for which *a court* is required to quash a subpoena, to mean that *Twitter* was required to move to quash in order to object on those grounds. *See Morton II*, ECF No. 76 at 6, 11-12. Plaintiff cites no authority for this proposition other than the language of the Rule itself. Twitter, on the other hand, points to authority that once a nonparty who has been served a subpoena *duces tecum* objects to a request to produce documents, "the nonparty is not obligated to comply with the subpoena. If the parties are unable to resolve their dispute, the serving party may file a motion to compel." *Lo v. Federal Nat. Mortg. Ass'n*, No. 2:12-CV-01411-GMN, 2013 WL 2558614, at *4 (D. Nev., June 10, 2013); *see also Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 n. 5 (9th Cir.1983) ("Once the person subpoenaed objects to the subpoena ... the party seeking discovery must obtain a court order directing compliance."); Fed. R. Civ. P. 45(d)(2)(B)(ii). The Court does not share Plaintiff's reading of Rule 45. Because Twitter timely served objections to the Subpoena and Plaintiff did not move to compel, the Court would not find Twitter in contempt.[4]

IV. Conclusion

Based on the foregoing discussion, the Court would grant Twitter's Second Motion for Contempt in part, deny Plaintiff's Motion for Reconsideration, and Deny Plaintiff's Motion to Consolidate. The Court would once again find Plaintiff and Holliday in contempt of Court and order them to pay the full amount of sanctions fines incurred to date, plus a per diem fee of $100 as of the date of the final adoption of this Order and post-judgment interest. Twitter is to prepare an appropriate order in compliance with the Court's rulings.

[4] Plaintiff asserts several reasons the Subpoena was not overbroad and Twitter's objections were without merit. *See Morton II*, ECF No. 76 at 12-15. Twitter puts forth a number of arguments to the contrary. *See Morton II*, ECF No. 72 at 4-8. The Court need not address the proper breadth of the Subpoena and or the merits Twitter's objections because Plaintiff's Motion to Consolidate is not the proper procedural vehicle for compelling compliance. Plaintiff was required to have moved to compel compliance but failed to do so.