

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE STILLAGUAMISH TRIBE OF
INDIANS,

Plaintiff,

v.

DAVID L. NELSON, et al.,

Defendants.

CASE NO. C10-327RAJ

ORDER GRANTING IN PART
AND DENYING IN PART
NELSON DEFENDANTS'
MOTION TO COMPEL

This matter comes before the court on the Nelson defendants' motion to compel discovery. Dkt. # 248. On March 10, 2012, the Nelson defendants served their second discovery requests on plaintiff. On April 11, 2012, plaintiff The Stillaguamish Tribe of Indians responded to the discovery. On April 26, 2012, counsel for the Nelson defendants, Andrew Shafer, left a voice mail for counsel for plaintiff at approximately 11 a.m., and sent two e-mails¹ at 12:57 p.m. and 1:22 p.m. to discuss plaintiff's responses. Dkt. #249 (Shafer Decl.) ¶ 4, Ex. C; # 265 (Supp. Shafer Decl.) ¶ 2, Ex. 1. Mr. Shafer

¹ The first e-mail states: "I will call you today at 3 p.m. pursuant to LR 37(g) to discuss STOI's responses to Nelson's Second discovery requests." Dkt. # 265-1 (Ex. 1 to Supp. Shafer Decl.). The second email provides a substantive discussion, and reiterates the 3 p.m. call. Dkt. # 265-2 (Ex. 2 to Supp. Shafer Decl.).

1 attempted to set up a conference call for 3:00 p.m. the same day, but when he called,
2 plaintiff's counsel was not available. Dkt. # 249 (Shafer Decl.) ¶ 5. Mr. Shafer explains
3 that he had to file the motion to compel on April 26, 2012 to have it properly noted
4 before the close of discovery. *Id.* ¶ 6. Mr. Shafer also explains that because of trial
5 preparation in another case, he did not have time to focus on plaintiff's responses until
6 the morning of April 26, 2012. *Id.* ¶ 7. The Nelson defendants filed the motion to
7 compel on April 26, 2012. On May 3, 2012, the parties held a substantive discussion
8 regarding the motion to compel. Dkt. # 265 (Supp. Shafer Decl.) ¶ 5, Ex. 3. This
9 substantive discussion resolved some of the issues addressed in the motion. Dkt. # 265-3
10 (Ex. 3 to Supp. Shafer Decl.). Plaintiff filed its opposition on May 7, 2012, but did not
11 alert the court to the substantive discussion that narrowed some of the issues. Dkt. # 262.
12 The Nelson Defendants filed their reply on May 11, 2012, and narrowed the issues before
13 the court. Dkt. # 264. After narrowing the issues, the Nelson defendants now seek an
14 order to compel responses to interrogatory 16, and requests for production ("RFP") 29-
15 32, 35-38, 41-42 and 54-55. Additionally, both parties have moved for sanctions.

16 **A. Sanctions**

17 1. Nelson Defendants

18 The Nelson defendants seek sanctions against plaintiff pursuant to Fed. R. Civ. P.
19 37(b)(2) (Dkt. #248 (Mot.) at 9) and 37(c)(1) (Dkt. # 264 (Reply) at 7). In order to
20 impose sanctions pursuant to Rule 37(b)(2), there must be a failure to obey a discovery
21 order. Fed. R. Civ. P. 37(b)(2). The Nelson defendants point to a prior discovery order
22 on their first set of discovery requests. However, plaintiff complied with that order, and
23 that order is not relevant to the Nelson defendants' second discovery requests.² The
24 Nelson defendants raise Rule 37(c)(1) for the first time in reply, and plaintiff has not had
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26 ² The Nelson defendants' motion for sanctions is also denied because the court finds that
27 the Nelson defendants did not meet and confer in good faith. Fed. R. Civ. P. 37(a)(5).

1 an opportunity to respond. Nevertheless, the court finds it inappropriate to issue
2 sanctions pursuant to Rule 37(c)(1) at this time, because the Nelson defendants have not
3 provided any evidence that responsive documents have been withheld. The Nelson
4 defendants' inability to find documents is not evidence that plaintiff failed to produce the
5 documents. As long as plaintiff produced documents as they are kept in the usual course
6 of business, there is no requirement to organize and label them to correspond to the
7 categories in the request. *See* Fed. R. Civ. P. 34(b)(E)(i) & (ii). The court notes that
8 plaintiff's responses do not state whether documents were produced as they were kept in
9 the regular course of business. Dkt. # 263-1 (Ex. A to Baker Decl.). For the RFPs at
10 issue (29-32, 35-38, 54-55), plaintiff must supplement its response and state whether the
11 documents were produced as kept in the usual course of business. If the documents were
12 not produced as kept in the usual course of business, plaintiff must identify by bates-
13 stamp number all responsive documents.

14 2. Stillaguamish

15 Plaintiff moves the court for sanctions in its opposition because the Nelson
16 defendants filed the discovery motion before they met and conferred. Dkt. # 262 at 11.
17 The Nelson defendants had an opportunity to respond in their reply.

18 Before filing a motion to compel discovery, the moving party must certify that he
19 or she has "in good faith conferred or attempted to confer with" opposing party. Fed. R.
20 Civ. P. 37. Local Civil Rule 37 provides that a good faith effort to confer requires a face-
21 to-face meeting or telephone conference, and that a party who fails to meet and confer in
22 good faith may be subject to sanctions as provided in General Local Rule 3. Local Rules
23 W.D. Wash. CR 37(a)(1)(A). General Rule 3 provides: "An attorney or party who
24 without just cause fails to comply with any of the Federal Rules of Civil or Criminal
25 Procedure, or these rules, or orders of the court . . . may, in addition to, or in lieu of the
26 sanctions and penalties provided elsewhere in these rules, be required by the court to
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1 satisfy personally such excess costs, and may be subject to such other sanctions as the
2 court may deem appropriate.” *Id.* GR 3(d). On April 13, 2012, the court warned the
3 parties: “The court expects counsel to treat each other with professional courtesy. The
4 court also expects the parties to read and abide by the Federal Rules of Civil Procedure
5 and the Local Civil Rules, including meet and confer requirements. The parties are on
6 notice that future violations of the court rules may result in sanctions.” Dkt. # 231
7 (emphasis added).

8 The court acknowledges counsel’s busy schedule. However, Mr. Shafer has been
9 aware of this court’s discovery deadlines since August 4, 2011. Dkt. # 131. While
10 counsel attempted to meet and confer the same day it filed the motion, the court cannot
11 conclude that it was a good faith effort. Counsel’s busy schedule does not justify
12 violating the Federal Rules of Civil Procedure, Local Rules, or this court’s prior order.
13 Given that counsel’s failure to meet and confer in good faith was caused by counsel’s
14 own delay in reviewing the responses, the court finds it appropriate to sanction Mr.
15 Shafer, rather than his client.

16 Accordingly, the court ORDERS Mr. Shafer to pay \$1,500 to plaintiff for
17 violating the Federal Rules of Civil Procedure, Local Rules, and the court’s prior order.

18 **B. Interrogatory 16**

19 Interrogatory 16 states: “Itemize all damages which you contend Nelson caused
20 by virtue of any of Nelson’s activities in connection with claims 1 through 6 as set forth
21 in STOI’s Third Amended Complaint.” Dkt. # 249-1 at 7 (Ex. A to Shafer Decl.).
22 Plaintiff responded: “the Tribe’s current estimation of its damages is set forth in the
23 expert reports accompanying Plaintiff’s Expert Witness Disclosure, dated March 14,
24 2012. The Tribe’s investigation and discovery regarding the damages caused by Nelson
25 remains ongoing, and the Tribe will supplement its response to this Interrogatory as
26 appropriate under the Federal Rules.” *Id.*

1 Plaintiff argues that the comprehensive reports analyze its damages, and that the
2 issue is premature in light of the fact that the depositions of Nelson and Chapman have
3 not taken place. While the expert reports have been identified, it is unclear to the court
4 and to the Nelson defendants whether the expert reports provide the universe of damages
5 information (minus any information that may be received from the depositions of Nelson
6 and Chapman). Plaintiff must supplement its response no later than July 6, 2012 to state
7 whether the estimation of damages is set forth entirely in the expert reports. If there are
8 additional sources, it must state what those sources are.

9 **C. RFPs 29-32, 35-38, 41-42, 54-55**

10 Plaintiff's response to each of these RFPs is the same: "In accordance with the
11 Civil Rules, the Tribe has previously made its initial disclosures and produced documents
12 responsive to Defendants' discovery requests, and the Tribe may rely on such disclosures
13 and documents at trial. The Tribe will supplement its disclosures and document
14 productions as appropriate under the Civil Rules, and will submit its trial exhibits in
15 accordance with the Court's Scheduling Order (Dkt. 131)." Dkt. # 249-1 (Ex. A to
16 Shafer Decl.) at 10. However, it is unclear whether **all** responsive documents have been
17 produced. Additionally, it is unclear how the depositions of the Nelson and Chapman
18 defendants affect whether plaintiff has produced all responsive documents in its control.

19 Plaintiff must supplement its responses to state whether all responsive documents
20 have been produced for each of these RFPs no later than July 6, 2012.

21 **D. Conclusion**

22 For all the foregoing reasons, the court GRANTS in part and DENIES in part the
23 Nelson defendants' motion to compel. Dkt. # 248. The court also DENIES the Nelson
24 defendants' request for sanctions, and GRANTS plaintiff's request for sanctions. Mr.
25 Shafer is ORDERED to pay \$1,500 to plaintiff no later than June 15, 2012 for violating
26 the Federal Rules of Civil Procedure, Local Rules, and the court's prior order.

1 Plaintiff must serve supplemental responses as follows:

2 RFPs 29-32, 35-38, 41-42, 54-55:

3 No later than July 6, 2012, plaintiff must supplement its response and state
4 whether the documents were produced as kept in the usual course of business. If the
5 documents were not produced as kept in the usual course of business, plaintiff must
6 identify by bates-stamp number all responsive documents. Plaintiff must also state
7 whether all responsive documents have been produced. The court reserves the right to
8 exclude any late-produced documents on a properly noted motion *in limine*, depending on
9 the circumstances.

10 Interrogatory 16:

11 Plaintiff must supplement its response no later than July 6, 2012 to state whether
12 the estimation of damages is set forth entirely in the expert reports. If there are additional
13 sources, it must state what those sources are.

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15 Dated this 21st day of May, 2012.

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18 The Honorable Richard A. Jones
19 United States District Judge
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