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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL ZIEHLKE,)	1:08-cv-1802-AWI-GSA
)	
Plaintiff,)	
)	ORDER GRANTING MOTIONS TO COMPEL
v.)	
)	ORDER DENYING SANCTIONS IN PART
THE CITY OF ANGELS CAMP, and)	
CHRIS COMFORT, individually and as)	(Documents 19 & 23)
employee of the CITY OF ANGELS)	
CAMP, TONY TACHEIRA, individually)	
and as the CHIEF OF POLICE OF THE)	
CITY OF ANGELS CAMP, and DOES)	
1 through 20, inclusive,)	
)	
Defendants.)	

I.

INTRODUCTION

On July 6, 2009, Defendants City of Angels Camp, Chris Comfort and Tony Tacheira (hereinafter “Defendants”) filed a Motion to Compel Answers to Special Interrogatories (Doc. 19) and a Motion to Compel Production of Documents (Doc. 23) based on Plaintiff Michael Ziehlke’s lack of compliance with discovery. More particularly, Defendants contend Plaintiff has wholly failed to respond to Defendants’ first set of special interrogatories and first set of request for production of documents. Plaintiff did not oppose the motions.

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1 A hearing was scheduled for August 7, 2009, at 9:30 a.m. After reviewing the motions
2 and related pleadings, the Court determined that these matters were suitable for decision without
3 oral argument pursuant to Local Rule 78-230(h). Thus, the hearing previously calendared for
4 August 7, 2009, was vacated. (See Doc. 27.) Having considered all materials submitted, and as
5 discussed more fully below, Defendants' Motions to Compel Answers to Special Interrogatories
6 and Production of Documents are GRANTED. Defendants' requests for related sanctions are
7 GRANTED IN PART.

8 **II.**

9 **RELEVANT PROCEDURAL HISTORY**

10 On November 24, 2008, Plaintiff filed a complaint asserting (1) violations of Title 42 of
11 the United States Code section 1983 and Title 28 of the United States Code section 1343, (2)
12 false arrest and imprisonment, and (3) malicious prosecution. (Doc. 1.) Answers were filed on
13 behalf of all Defendants on February 9, 2009. (Docs. 6-8.)

14 On July 6, 2009, Defendants filed a Motion to Compel Answers to Special
15 Interrogatories, after serving the discovery request upon Plaintiff on March 16, 2009. (Doc. 19.)
16 Defendants also filed a Motion to Compel Production of Documents, having served the request
17 for production, set one, upon Plaintiff on March 10, 2009. (Doc. 23.)

18 Plaintiff did not oppose the motions or otherwise respond.

19 **III.**

20 **DISCOVERY DISPUTE**

21 **A. *Special Interrogatories***

22 On March 16, 2009, Defendants propounded the first set of specially prepared
23 interrogatories to Plaintiff. (Doc. 21 at ¶ 2 & Ex. A.)

24 On April 20, 2009, after Plaintiff's time to respond to the discovery had expired,
25 Defendants' counsel wrote to Plaintiff's counsel to request the responses be provided within ten
26 days in order to avoid a motion to compel. (Doc. 21 at ¶ 3 & Ex. B.) Defense counsel received
27 no response. (Doc. 21 at ¶ 4.)

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1 Thereafter, hoping to avoid the instant motion, Defendants noticed Plaintiff's deposition
2 for June 23, 2009. On June 22, 2009, Plaintiff's counsel advised Plaintiff would be unable to
3 attend his deposition. During the conversation between counsel for the parties, Plaintiff's
4 counsel advised defense counsel that discovery responses were forthcoming and should be
5 expected on Friday of that week. Defense counsel confirmed the agreement in a letter dated June
6 23, 2009. (Doc. 21 at ¶ 5 & Ex. C.)

7 On July 1, 2009, when Plaintiff had again failed to provide any response to the
8 outstanding discovery, defense counsel wrote to Plaintiff's counsel asking that the discovery
9 responses be provided no later than July 6, 2009. (Doc. 21 at ¶ 6 & Ex. D.)

10 As of July 6, 2009, Defendants had received neither the discovery responses outstanding,
11 nor a response to the correspondence of June 23 or July 1, 2009. (Doc. 21 at ¶ 7.)

12 ***B. Request for Production of Documents***

13 On March 10, 2009, Defendants propounded the first set of request for documents to
14 Plaintiff. (Doc. 25 at ¶ 2 & Ex. A.)

15 On April 20, 2009, after Plaintiff's time to respond to the discovery had expired,
16 Defendants' counsel wrote to Plaintiff's counsel to request the responses be provided within ten
17 days in order to avoid a motion to compel. (Doc. 25 at ¶ 3 & Ex. B.) Defense counsel received
18 no response. (Doc. 25 at ¶ 4.)

19 Thereafter, hoping to avoid the instant motion, Defendants noticed Plaintiff's deposition
20 for June 23, 2009. On June 22, 2009, Plaintiff's counsel advised Plaintiff would be unable to
21 attend his deposition. During the conversation between counsel for the parties, Plaintiff's
22 counsel advised defense counsel that discovery responses were forthcoming and should be
23 expected on Friday of that week. Defense counsel confirmed the agreement in a letter dated June
24 23, 2009. (Doc. 25 at ¶ 5 & Ex. C.)

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26 outstanding discovery, defense counsel wrote to Plaintiff's counsel asking that the discovery
27 responses be provided no later than July 6, 2009. (Doc. 25 at ¶ 6 & Ex. D.)

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1 As of July 6, 2009, Defendants had received neither the discovery responses outstanding,
2 nor a response to the correspondence of June 23 or July 1, 2009. (Doc. 25 at ¶ 7.)

3 ***C. Remedies Requested by Defendants***

4 Defendants seek an order compelling Plaintiff to provide answers to the special
5 interrogatories, set one, served March 16, 2009, and to produce documents responsive to the
6 request for production of documents, set one, served March 10, 2009. Additionally, Defendants
7 seek sanctions against Plaintiff or his attorney in the total sum of \$864.00. (See Docs. 19 & 23.)

8 **IV.**

9 **DISCUSSION**

10 ***Scope of Discovery***

11 Rule 26(b) of the Federal Rules of Civil Procedure establishes the scope of discovery and
12 states in pertinent part:

13 Parties may obtain discovery regarding any matter, not privileged, that is
14 relevant to the claim or defense of any party, including the existence, description,
15 nature, custody, condition, and location of any books, documents, or other
16 tangible things and the identity and location of persons having knowledge of any
17 discoverable matter. For good cause, the court may order discovery of any matter
18 relevant to the subject matter involved in the action. Relevant information need
19 not be admissible at trial if the discovery appears reasonably calculated to lead to
20 the discovery of admissible evidence.

21 “The party who resists discovery has the burden to show that discovery should not be
22 allowed, and has the burden of clarifying, explaining, and supporting its objections.” *Oakes v.*
23 *Halvorsen Marine Ltd.*, 179 F.R.D 281, 283 (C.D. Cal. 1998); *Nestle Foods Corp. v. Aetna*
24 *Casualty & Surety Co.*, 135 F.R.D. 101, 104 (D. N.J. 1990).

25 Here, Plaintiff was served various forms of written discovery which are authorized by the
26 Federal Code of Civil Procedure. The requests appear relevant to Plaintiff’s claims. (See Doc.
27 21 at Ex. A & Doc. 25 at Ex. A.) However, Defendants have not received any response to either
28 the special interrogatories, set one, or request for production of documents, set one. Plaintiff has
failed to respond in any fashion. Thus, Plaintiff shall be ordered to comply with Defendants’
discovery requests.

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1 ***Discovery Sanctions***

2 Rule 33(b)(1)(B) of the Federal Rules of Civil Procedure requires that unless otherwise
3 agreed upon, the responding party must serve its answers and any objections to interrogatories
4 within thirty days after being served. Additionally, subdivisions (b)(3) and (5) of that rule
5 requires that each interrogatory, “to the extent it is not objected to, be answered separately and
6 fully in writing and under oath” and signed by the answering party. Any untimely objection to
7 the interrogatory is waived unless the court excuses the failure for good cause. Fed. R. Civ. P.
8 33(b)(4). Finally, Rule 34(b)(2)(B) of the Federal Rules of Civil Procedure requires parties
9 answering requests for production of documents “either state that inspection and related activities
10 will be permitted as requested or state an objection to the request including the reasons” in each
11 response.

12 If a *party* fails to respond to discovery, sanctions may be imposed even in the absence of a
13 prior court order. Fed. R. Civ. P. 37(d). The court on motion may order sanctions “[i]f a party, after
14 being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34,
15 fails to serve its answers, objections or written response.” Fed. R. Civ. P. 37(d)(1)(A)(ii). “A failure
16 described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was
17 objectionable, unless the party failing to act has a pending motion for a protective order under Rule
18 26(c).” Fed. R. Civ. P. 37(d)(2).

19 For a party’s failure to respond to discovery, Rule 37(d) of the Federal Rules of Civil
20 Procedure authorizes the Court to take action including:

- 21 1. Designating facts as established;
- 22 2. Refusing to allow the disobedient party to support or oppose designated claims or
 defenses;
- 23 3. Prohibiting the disobedient party from introducing designated matters in evidence;
- 24 4. Striking pleadings or parts thereof;
- 25 5. Staying further proceedings until an order is obeyed;
- 26 6. Dismissing an action, proceeding or any part thereof; or
- 27 7. Rendering a default judgment against the disobedient party; or
- 28 8. Treating as contempt of court the failure to obey any order except an order to
 submit to a physical or mental examination.

 Moreover, in lieu of any such order, or in addition thereto, the Court “must require the
party failing to act or the attorney advising that party or both to pay the reasonable expenses,

1 including attorney's fees, caused by the failure unless the failure was substantially justified or
2 other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3). An award of
3 expenses does not require a showing of wilfulness or improper intent; rather the standard is
4 whether there was a substantial justification for the losing party's conduct. *Id.* Even without a
5 prior discovery order, discovery misconduct may be punished under the Court's "inherent
6 powers" to manage its affairs. *Uniguard Security Ins. Co. v. Lakwork Eng. Mfg Corp.*, 982 F.2d
7 363, 368 (9th Cir. 1992).

8 Here, sanctions are warranted because Plaintiff has failed to comply with his discovery
9 obligations. Plaintiff has failed to respond in any fashion to discovery requests sent more than
10 four months ago, and offers no explanation for his failure to do so. Thus, Plaintiff's failure to
11 comply was not substantially justified nor do the circumstances make such an award unjust.

12 ***Request for Attorney's Fees***

13 Defendants seek attorneys fees in the total sum of \$864.00 for the preparation of
14 correspondence to Plaintiff's counsel, both motions to compel, as well as anticipated attendance
15 at the hearing on the motions. (Doc. 21 at ¶ 8 & Doc. 25 at ¶ 8.)

16 More particularly, Defendants provided the following itemization for each motion:

- | | | | |
|----|-----|---|-------------|
| 17 | (1) | Letters of April 20, 2009, June 23, 2009,
and July 1, 2009, requesting discovery
(.6 hrs @ \$135.00/hr [x 2]) | \$ [162.00] |
| 18 | | | |
| 19 | (2) | Preparation of Motion
(1.6 hrs @ \$135.00/hr [x 2]) | \$ [432.00] |
| 20 | | | |
| 21 | (3) | Appearance at Hearing
(1 hr @ \$135.00/hr [x 2]) | \$ [270.00] |
| 22 | | | |

23 Because this Court vacated the hearing date and took the motions under submission
24 without oral argument (*see* Doc. 27), the cost for defense counsel's anticipated time for travel
25 and court appearance related to the motions is stricken. Additionally, because defense counsel
26 prepared single letters concerning both sets of outstanding discovery (*cf.* Doc. 21 at Exs. B-D to
27 Doc. 25 at Exs. B-D), the Court finds it unreasonable to award counsel attorney's fees related to
28 what amounts to a total of six letters rather than the three actually sent. Thus, one-half the

1 claimed amount is stricken. Otherwise, the number of hours and the hourly rate in light of the
2 work performed are reasonable.

3 **CONCLUSION AND ORDER**

4 For the reasons discussed above, this Court hereby ORDERS as follows:

- 5 1. Defendants' motions to compel Plaintiff's responses to Specially Prepared
6 Interrogatories, Set One, and Request for Production of Documents, Set One, are
7 GRANTED;
- 8 2. Plaintiff is ordered to provide, without objections, written responses to
9 Defendants' Specially Prepared Interrogatories, Set One, and Request for
10 Production of Documents, Set One, within ten (10) days from the date of this
11 Order;
- 12 3. Plaintiff MICHAEL ZIEHLKE is to pay the firm of BORTON, PETRINI, LLP
13 monetary sanctions in the total sum of \$513.00 (\$81 + \$432) within thirty (30)
14 days from the date of this Order.

15
16
17 IT IS SO ORDERED.

18 **Dated: August 6, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE