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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JONATHAN SORRELL,)	1: 09-cv-1465 AWI-GSA
)	
Plaintiff,)	
)	
v.)	
)	ORDER GRANTING MOTION TO COMPEL
KEL-TEC CNC INDUSTRIES, INC.,)	IN PART
)	
Defendant.)	
)	
)	(Document 18)

I. INTRODUCTION

On March 22, 2010, Defendant, Kel-Tec CNC Industries, Inc., (hereinafter “Kel-Tec” or “Defendant”) filed a Motion to Compel based on Plaintiff’s, Jonathan Sorrell’s, (hereinafter, “Plaintiff”) lack of compliance with discovery requests including Plaintiff’s complete failure to provide initial disclosures, as well as a Plaintiff’s complete failure to provide responses to Interrogatories and a Request for Production of Documents. (Doc. 18). Plaintiff did not file an opposition to the motion.

The matter was set for hearing on April 9, 2010 at 9:30 am.¹ Based on a review of the pleadings, the Court determined that the matter was suitable for decision without oral argument

¹ Pursuant to Local Rule 251(e) when there has been a complete and total failure to respond to a discovery request or order, the aggrieved party may bring a motion for relief withing fourteen (14) days notice. The responding party shall file a response to the motion not later than seven (7) days before the hearing date. The moving party may file and serve a reply thereto not less than two (2) court days before the hearing date. Accordingly, Defendant’s motion was properly noticed.

1 pursuant to Local Rule 230(c) and (g) and the hearing was vacated. Upon consideration of the
2 pleadings, Defendant's Motion to Compel is GRANTED IN PART.

3 **II. RELEVANT PROCEDURAL HISTORY**

4 On November 26, 2008, Plaintiff filed this action against Defendant in the Fresno County
5 Superior Court of California (Case No. 08CECG04151). Defendant removed this action pursuant
6 to [28 U.S.C. § 1446\(b\)](#) on August 20, 2009.² In the complaint, Plaintiff alleges that on or about
7 November 25, 2007, he was using a Kel-Tec SU-16 rifle when it catastrophically failed. Plaintiff
8 claims that this rifle is defective and he has asserted strict liability, negligence, and breach of
9 express and implied warranty causes of action against Defendant. Plaintiff is seeking
10 compensatory damages for his alleged injuries.

11 On November, 13, 2009, this Court issued a scheduling order requiring that the parties
12 exchange initial disclosures by December 21, 2009. (Doc. 17). The Court also set the non-expert
13 discovery deadline for August 6, 2010. Plaintiff filed the instant Motion to Compel on March 22,
14 2010, so the motion is timely filed.

15 **III. THE MOTION TO COMPEL**

16 *A. The Requested Discovery*

17 Defendant contends that Plaintiff has not served his initial disclosures despite repeated
18 attempts on January 7, January 27, and March 3, 2010, to meet and confer with the Plaintiff to
19 obtain the information. Declaration of John Tartaglia III, Esq. ("Tartaglia Decl.") dated March 22,
20 2010 at ¶¶ 1-6, 11-12 and attached Exhibits A, B and C. (Doc. 19 (1) -(4)). Moreover, on
21 November 23, 2009, Defendant served two discovery requests on Plaintiff including: 1)
22 Defendant's First Set of Interrogatories, and 2) Defendant's First Request for Production of
23 Documents. Exhibits D and E attached to Tartaglia Decl. (Doc. 19 (5) and (6)). The responses to
24 the discovery were initially due on December 23, 2009. However, the parties stipulated that
25 Plaintiff's response to the Interrogatories and Request for Production of Documents would be due
26 on January 27, 2010. Exhibit F attached to Tartaglia Decl. (Doc. 19 (7)). Despite this extension,
27

28 ² In the Notice of Removal Defendant asserts that it was not served with the complaint until July 22, 2009.
(Doc. 3). Plaintiff has not contested the removal of this action to this Court.

1 Plaintiff failed to provide any responses to the discovery by January 27, 2010. Tartaglia Decl. at ¶
2 10.

3 Defendant contends that several messages were left with Plaintiff's counsel prior to March
4 3, 2010. Defendant further asserts that when he spoke with Plaintiff's counsel on March 3, 2010,
5 he was advised that Plaintiff's counsel only had initial draft responses to Defendant's discovery
6 and responsive information still needed to be inserted. Tartaglia Decl. at ¶ 11. After the March 3,
7 2010 telephonic meet and confer session, Defendant's counsel advised Plaintiff's counsel that if
8 full and complete responses to Defendant's discovery were not received by March 10, 2010,
9 Defendant would file a motion to compel. Tartaglia Decl. at ¶ 11. Defendant contends that no
10 discovery responses were received and the instant motion was filed. Tartaglia Decl. at ¶ 12.

11 *B. Remedies requested:*

12 Kel-Tec requests the following remedies:

- 13 1. An order precluding Plaintiff from introducing any evidence, information or
14 witnesses at trial that Plaintiff failed to disclose in his initial disclosures, or
15 alternatively, that Plaintiff provide full and complete Rule 26(a)(1) disclosures;
- 16 2. An order precluding Plaintiff from offering any evidence, information or
17 documents sought by the written discovery requests, or alternatively, that Plaintiff
18 provide full and complete responses without any objections; and
- 19 2. Monetary sanctions requiring Plaintiff to pay reasonable expenses incurred in
20 bringing the Motion to Compel in the amount of \$2,145.00.

21 **IV. ANALYSIS & DISCUSSION**

22 **Scope Of Discovery**

23 [F.R.Civ.P. 26\(b\)](#) establishes the scope of discovery and states in pertinent part:

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

“The party who resists discovery has the burden to show that discovery should not be
allowed, and has the burden of clarifying, explaining, and supporting its objections.” [Oakes v.](#)

1 [Halvorsen Marine Ltd., 179 F.R.D 281, 283 \(C.D. Cal. 1998\)](#); [Nestle Foods Corp. v. Aetna](#)
2 [Casualty & Surety Co., 135 F.R.D. 101, 104 \(D. N.J. 1990\)](#).

3 Here, Plaintiff was served various forms of discovery including Interrogatories and a
4 Request for the Production of Documents which are authorized by the Federal Rules of Civil
5 Procedure. Defendant indicates that Plaintiff did not provide any responses to the discovery
6 requests. Moreover, Plaintiff has not provided any initial disclosures pursuant to the this Court's
7 scheduling order.

8 **Discovery Sanctions**

9 Fed. R. Civ. P 26(a)(1)(A)(i)-(iv) requires parties to provide certain information
10 concerning litigation. Fed. R. Civ. P 26(a)(1)(A)(i)-(iv). Moreover, Fed. R. Civ. P. 33(b)(1)(B)
11 requires that unless otherwise agreed upon, the responding party must serve its answers and any
12 objections to interrogatories within thirty days after being served. Additionally, Fed. R. Civ. P.
13 33(b)(3) and (5) requires that each interrogatory, "to the extent it is not objected to, be answered
14 separately and fully in writing and under oath" and signed by the answering party. Any untimely
15 objection to the interrogatory is waived unless the court excuses the failure for good cause. Fed.
16 R. Civ. P. 33(b)(4). Finally, Fed. R. Civ. P. 34(b)(2)(B) requires parties answering requests for
17 production of documents "either state that inspection and related activities will be permitted as
18 requested or state an objection to the request, including the reasons" in each response.

19 If a party fails to respond to discovery, sanctions may be imposed even in the absence of a
20 prior court order. [Fed.R.Civ. P. 37\(d\)](#). "If a party fails to provide information or identify a witness
21 as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply
22 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or was
23 harmless." Fed. R. Civ. P. 37(c)(1). In addition to or instead of this sanction, the court, may award
24 reasonable expenses, including attorney's fees, may inform the jury of the failure, and may impose
25 other appropriate sanctions including those listed in Rule 37(b)(2)(A)(i)-(iv). Fed. R. Civ. P.
26 37(c)(1)(A)-(C). Furthermore, the court on motion may order sanctions "[i]f a party, after being
27 properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to
28 serve its answers, objections or written response." Fed. R. Civ. P. 37(d)(1)(A)(ii). "A failure

1 described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was
2 objectionable, unless the party failing to act has a pending motion for a protective order under Rule
3 26(c).” Fed. R.Civ.P. 37(d)(2).

4 For a party’s failure to respond to discovery, Rule 37(d) authorizes the Court to take action
5 including:

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

16 [Fed.R.Civ.P. 37\(d\)](#) (cross referencing sanctions identified in Rule 37(b)(2) (A))

17 In lieu of any such order, or in addition thereto, the Court “must require the party failing to
18 act or the attorney advising that party or both to pay the reasonable expenses, including attorney’s
19 fees, caused by the failure unless the failure was substantially justified or other circumstances
20 make an award of expenses unjust.” [Fed. R. Civ. P. 37\(d\)\(3\)](#); *See also*, Fed. R. Civ. P. 37(5)(A)
21 (i-iii). An award of expenses does not require a showing of wilfulness or improper intent; rather
22 the standard is whether there was a substantial justification for the losing party’s conduct. *Id.*
23 Even without a prior discovery order, discovery misconduct may be punished under the Court’s
24 “inherent powers” to manage its affairs. [Uniguard Security Ins. Co. v. Lakwork Eng. Mfg Corp.](#),
25 [982 F.2d 363, 368 \(9th Cir. 1992\)](#).

26 Here, Plaintiff did not provide his initial disclosures, or any responses to the Interrogatories
27 or the Request for Production of Documents despite Defendant’s numerous attempts to meet and
28 confer. Moreover, Plaintiff has not filed an opposition to this motion indicating his non-
compliance was substantially justified. Although Defendant has requested an order excluding any
evidence at trial stemming from the discovery requests, the Court finds this sanction too harsh.
Moreover, the admissibility of evidence is a decision that is within the discretion of the trial judge
and will be made at the time of trial. However, the Court will grant Defendant’s alternative

1 request that Plaintiff serve his initial disclosures, as well as the responses to the Defendant's First
2 Interrogatory and First Request for Production of Documents.

3 Defendant has also requested sanctions in the amount of \$ 2,145.00. In support of the
4 request, Plaintiff's counsel indicated that the firm spent a total of ten hours to prepare this motion
5 at a rate of \$165.00. Defendant also anticipated spending three additional hours filing a reply to
6 any opposition. The Court finds that the number of hours and the billing rate is reasonable.
7 However, since an opposition was not filed, no reply was required and the amount requested will
8 be reduced accordingly. Therefore, Defendant will be awarded \$ 1,650.00 in attorney fees.

9 **V. CONCLUSION**

10 Based on the above, Defendant's Motion to Compel filed on March 22, 2010 is
11 GRANTED IN PART:

- 12 1. Plaintiff is ORDERED to serve his initial disclosures on Defendant within ten (10)
13 days after service of this order;
- 14 2. Plaintiff is ORDERED to serve written responses to Defendant's First Set of
15 Interrogatories and Defendant's First Request for Production of Documents within
16 ten (10) days after service of this order. Objections to the Interrogatories and the
17 Request for Production of Documents are deemed waived;
- 18 3. Plaintiff is ORDERED to pay Defendant a total of \$1,650.00 within thirty (30)
19 days after service of this order; and
- 20 4. Failure to comply with this order may result in the imposition of additional
21 sanctions including, but not limited to, additional monetary sanctions, and/or the
22 exclusion of evidence at the time of trial.

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IT IS SO ORDERED.

Dated: April 9, 2010

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE