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

JLG ENTERPRISES, INC.,

Plaintiff,

v.

EXCALIBUR SIRES, INC.,

Defendant,

CASE NO. 1: 10-cv-02138-AWI-SKO

**ORDER GRANTING IN PART AND
DENYING IN PART AS MOOT PLAINTIFF
JLG ENTERPRISES, INC.’S MOTION TO
COMPEL**

(Document 60)

EXCALIBUR SIRES, INC.,

Counter-Claimant,

v.

JLG ENTERPRISES, INC.,

Counter-Defendant.

I. INTRODUCTION

On June 1, 2011, Plaintiff JLG Enterprises, Inc., (“JLG”) filed a motion to compel based on Defendant Excalibur Sires, Inc.’s (“Excalibur”) complete failure to provide responses to Plaintiff’s outstanding discovery requests consisting of Interrogatories, Requests for Admission (“RFAs”) and Requests for Production of Documents (“RFPs”). (Doc. 60.) Excalibur filed a statement of non-opposition to the motion and a declaration from counsel in opposition to JLG’s request for

1 sanctions on June 14, 2011. (Docs. 63, 63-1.) JLG subsequently filed a reply on July 22, 2011.
2 (Doc. 65.)

3 This matter is taken under submission pursuant to Local Rule 230(g), and the June 29, 2011,
4 hearing is VACATED. Upon consideration of the pleadings, Plaintiff's motion to compel is
5 GRANTED IN PART and DENIED IN PART AS MOOT.

6 II. FACTUAL BACKGROUND

7 On September 10, 2010, JLG filed a complaint in Stanislaus County Superior Court against
8 Excalibur, which was removed on November 15, 2010, on the basis of diversity. 28 U.S.C.
9 § 1332(a); *see also* 28 U.S.C. § 1441(a). Excalibur filed an answer and counterclaim on November
10 22, 2010, and filed an amended answer and counterclaim on April 1, 2011, pursuant to stipulation.
11 (Docs. 6, 53-56.)

12 On March 22, 2011, the Court granted JLG's application for an order authorizing the sale of
13 livestock, and on March 31, 2011, issued an order authorizing that sale. (Docs. 49, 52.) On June 14,
14 2011, JLG deposited the funds from the livestock sale into a trust account with the Clerk of the Court.
15 (Doc. 64.)

16 JLG propounded discovery requests consisting of Interrogatories, RFPs, and RFAs, on April 6,
17 2011. (Doc. 62, ¶ 2.) Excalibur's responses were due no later than May 6, 2011. (Doc. 62, ¶ 3.)
18 Excalibur did not request nor did the parties stipulate to an extension of time. (Doc. 62, ¶ 3.) JLG's
19 counsel declares that he attempted meet and confer efforts on May 11, 13, and 23, 2011, and offered
20 Excalibur an additional week to provide responses. (Doc. 62, ¶¶ 4-6.) Excalibur failed to respond.
21 (Doc. 62, ¶ 3.) Accordingly, on June 1, 2011, JLG filed the instant motion.

22 JLG's motion seeks a Court order compelling Excalibur to provide responses to the
23 Interrogatories, RFAs and FRPs, and seeks monetary sanctions pursuant to Fed. R. Civ. P. Rule
24 37(a)(5) and (d)(3) for attorney's fees and costs in the total amount of \$2,500 as follows: \$1,500 (7.5
25 hours x \$200 per hour) to prepare the motion and to meet and confer; and \$1,000 (5.0 hours x \$200
26 per hour) for the anticipated preparation of a reply brief and attendance at the hearing for this motion.
27 (Doc. 62, ¶ 7.) JLG also seeks an appropriate monetary sanction pursuant to Fed. R. Civ. P. Rule
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1 37(d)(A) and (B) based on Excalibur’s abuse of the discovery process for its complete failure to
2 respond to the discovery requests. (Doc. 61, 5:3-26.)

3 On June 14, 2011, Excalibur filed a notice of non-opposition to the motion and a declaration
4 from counsel in opposition to the requested sanctions. (Docs. 63, 63-1.) JLG filed a reply on June
5 22, 2011.

6 III. DISCUSSION

7 A. JLG’s Requests for Admission

8 The failure to timely respond to RFAs results in automatic admission of the matters requested.
9 Fed. R. Civ. P. Rule 36(a)(3). “No motion to establish the admissions is needed because Federal Rule
10 of Civil Procedure 36(a) is self executing.” *Fed. Trade Comm. v. Medicor LLC*, 217 F. Supp. 2d
11 1048, 1053 (C.D. Cal. 2002); *Garcia v. City of Ceres*, No. CV F 08-1720 LJO SKO, 2010 WL
12 2490917, at *4 n.5 (E.D. Cal. June 16, 2010). Once admitted, the matter is conclusively established
13 “unless the court, on motion, permits the admission to be withdrawn or amended.” Fed. R. Civ. P.
14 Rule 36(b). Accordingly, to the extent that JLG is seeking an order compelling a response to the
15 RFAs, that request is DENIED AS MOOT.

16 B. JLG’s Interrogatories

17 Fed. R. Civ. P. Rule 33(b)(1)(B) requires that, unless otherwise agreed upon, the responding
18 party must serve its answers and any objections to interrogatories within thirty (30) days after being
19 served. Additionally, Fed. R. Civ. P. Rule 33(b)(3) and (5) requires that each interrogatory, “to the
20 extent it is not objected to, be answered separately and fully in writing and under oath” and signed
21 by the answering party. Any untimely objection to the interrogatory is waived, unless the court
22 excuses the failure for good cause. Fed. R. Civ. P. Rule 33(b)(4).

23 JLG’s Interrogatories were served on April 6, 2011, but no responses were received by the
24 May 6, 2011, deadline. (Doc. 62, ¶¶ 2, 3.) No extensions were requested or stipulated to and the
25 responses remain outstanding. (Doc. 62, ¶¶ 3-6.) As such, the Court GRANTS JLG’s motion to
26 compel Interrogatory responses and orders Excalibur to serve written responses to JLG’s
27 Interrogatories within thirty (30) days from the date of this order. All objections to the Interrogatories
28 have been waived.

1 **C. JLG’s Requests for Production of Documents**

2 Pursuant to Fed. R. Civ. P. Rule 34(a), a party may request production of documents. Fed.
3 R. Civ. P. Rule 34(b)(2)(B) requires parties answering RFPs to “either state that inspection and
4 related activities will be permitted as requested or state an objection to the request, including the
5 reasons” in each response. If the party to whom the request was directed fails to appropriately
6 respond, Fed. R. Civ. P. Rule 37(a) allows the requesting party to “move for an order compelling
7 disclosure or discovery.”

8 JLG’s RFPs were served on April 6, 2011, but no responses were received by the May 6,
9 2011, deadline. (Doc. 62, ¶¶ 2, 3.) As Excalibur failed to provide responses, the Court GRANTS
10 JLG’s motion to compel RFPs and orders Excalibur to serve responses within thirty (30) days from
11 the date of this order. All objections to the RFPs have been waived. If Excalibur determines that
12 there are no documents responsive to any given RFP, it shall so state in a written answer to the RFPs.

13 **D. Sanctions and Apportionment of Fees and Costs**

14 Pursuant to Fed. R. Civ. P. Rule 37(a)(5)(c), if a motion to compel discovery responses is
15 granted in part and denied in part, and if the Court gives the non-responsive party an opportunity to
16 be heard, then the court may “apportion the reasonable expenses for the motion.” JLG requests
17 attorney’s fees for 12.5 hours at a rate of \$200.00 per hour, totaling \$2,500.00 (7.5 hours to prepare
18 the motion and to meet and confer and 5.0 hours in anticipation of preparing the reply and appearing
19 at the hearing.) (Doc. 62, ¶ 7.)

20 Excalibur was afforded an opportunity to be heard in opposition to JLG’s motion to compel
21 and did so by submitting a notice of non-opposition. (Doc 63; See Fed. R. Civ. P. Rule 37 advisory
22 committee’s note, 1993 amendments (an opportunity to be heard includes both written submissions
23 and oral hearings).) Plaintiff’s motion to compel has been granted in part and denied in part, and
24 some apportionment of the reasonable expenses for the motion may be appropriate.¹

27 ¹ The Court finds that JLG’s reply was essentially unnecessary as Excalibur filed a notice of non-opposition.
28 Further, the hearing for this motion has been vacated. Accordingly, apportionment for the expenses associated with these
actions is inappropriate.

1 JLG also seeks additional monetary sanctions pursuant to Fed. R. Civ. P. Rule 37(d)(A) and
2 (B) based on Excalibur's complete failure to respond to the discovery requests. (Doc. 61, 5:3-26.)
3 If a party fails to respond to discovery, sanctions may be imposed even in the absence of a prior court
4 order. Fed. R. Civ. P. Rule 37(d). The Court "must require the party failing to act or the attorney
5 advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the
6 failure unless the failure was substantially justified or other circumstances make an award of expenses
7 unjust." Fed. R. Civ. P. 37(d)(3); *See also*, Fed. R. Civ. P. 37(5)(A)(i-iii).

8 Here, there is no basis to require Excalibur's counsel to pay sanctions as he had no
9 communication with and has not received documentation from his client. (Doc. 63-1, ¶¶ 3-5.)
10 Further, the Court notes that the declaration from Excalibur's counsel, Gregory L. Myers, states that
11 JLG's counsel, Eric J. Sousa, had been informed via email by Excalibur's Chief Executive Officer
12 that Mr. Myers "no longer represented" him.² (Doc. 63-1, ¶ 4.) As such, only Excalibur is
13 responsible for sanctions related to JLG's reasonable attorney's fees related to this motion.

14 The Court will hold in abeyance its decision to impose monetary sanctions and award any
15 apportionment of reasonable attorney's fees alleged until Excalibur has provided responses to JLG's
16 Interrogatories and RFPs. JLG shall file a status update forty-five (45) days from the date of this
17 order reporting whether Excalibur has complied with the order and whether there are any disputes
18 regarding the responses provided.

19 III. CONCLUSION

20 Accordingly, IT IS HEREBY ORDERED THAT:

- 21 1. JLG's motion to compel responses from Excalibur to Requests for Admission is
22 DENIED AS MOOT.
- 23 2. JLG's motion to compel responses to Interrogatories and Requests for Production
24 of Documents is GRANTED.

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² To the extent that Mr. Myers (or Excalibur) seeks to end his representation of Excalibur, Mr. Myers would
be required to file a motion to withdraw as counsel. Local Rule 182(d).

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- 3 Excalibur is ORDERED to serve written responses to JLG's Interrogatories and
Requests for Production of Documents within thirty (30) days from the date of this
order.
4. JLG is ordered to file a status report regarding Excalibur's compliance with this
order within forty-five (45) days from the date of this order.

IT IS SO ORDERED.

Dated: June 24, 2011

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE