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

SQUARE D. COMPANY,

Plaintiff,

No. CIV S-08-1312 JAM EFB PS

vs.

CHAWN PHILLIP ANDERSON,  
HEATHER MARIE APODACA,  
formerly d/b/a AA & M ELECTRIC,  
and AA & M ELECTRIC, INC.,

ORDER

Defendants.

On December 15, 2009, defendants filed a motion for sanctions against defendants Chawn Anderson and Heather Apodaca, formerly d/b/a AA&M Electric (“defendants”) for failing to comply with two court orders compelling discovery. Dckt. No. 71. Specifically, plaintiff “seeks sanctions in the form of striking Defendants’ answer and entering default judgments against Defendants pursuant to Rules 37(b)(2)(A)(iii) and (vi), respectively.” *Id.* at 1. Plaintiff noticed the motion for hearing on January 6, 2010. *Id.*

On October 1, 2009, the undersigned issued an order granting plaintiff’s motion to compel discovery based on defendants’ complete and total failure to provide initial disclosures or to respond to any discovery request, and ordered defendants to provide plaintiff with that discovery on or before October 16, 2009. Dckt. No. 57 at 2. The undersigned also granted

1 plaintiff's request for discovery sanctions; ordered defendants to make payment to plaintiff's  
2 counsel, on or before October 16, 2009, in the amount of \$2,032.50; and ordered defendants to  
3 file an affidavit, on or before October 20, 2009, stating that they had fully complied with the  
4 order. *Id.* at 3. The order admonished defendants "that failure to comply with orders of this  
5 court, the Local Rules, or the Federal Rules of Civil Procedure, 'may be grounds for imposition  
6 by the Court of any and all sanctions authorized by statute or Rule or within the inherent power  
7 of the Court.'" *Id.*

8 On November 24, 2009, the undersigned issued an order granting plaintiff's motion to  
9 compel defendants to appear for deposition and request for sanctions; directed defendants "to  
10 appear for deposition at plaintiff's counsel's Sacramento offices within fourteen days . . . and to  
11 coordinate precise dates and times for those depositions with plaintiff's counsel"; and directed  
12 defendants to pay \$1716.63 to plaintiff's counsel within thirty days and to file with the Clerk an  
13 affidavit within fourteen days thereafter which states that they have paid the sum. Dckt. No. 70  
14 at 4. Plaintiff's December 15 motion to compel contends that defendants have not complied with  
15 the October 1, 2009 order or the November 24, 2009 order. Dckt. No. 71.

16 Because defendants failed to timely respond to plaintiff's December 15 motion, on  
17 December 31, 2009, the undersigned ordered defendants to file an opposition or statement of  
18 non-opposition to plaintiff's motion and to show cause, on or before January 20, 2010, why  
19 plaintiff's motion should not be granted, and why their answer should not be stricken and default  
20 judgment entered against them. Dckt. No. 72. The order again reminded defendants that pro se  
21 litigants are bound by the rules of procedure and that failure to comply with the Federal Rules of  
22 Civil Procedure and Local Rules may be ground for dismissal, judgment by default, or other  
23 appropriate sanction. The order also specifically stated that "[i]f defendants fail to respond to  
24 this order to show cause or fail to respond to plaintiff's motion, the undersigned will recommend  
25 that plaintiff's motion be granted; that defendants' answer be stricken; and that default judgment  
26 be entered against defendants." Court records reflect that defendants have once again failed to

1 respond to this court's orders.

2 Federal Rule of Civil Procedure 37(b)(2) provides that “[i]f a party or a party’s officer,  
3 director, or managing agent . . . fails to obey an order to provide or permit discovery, . . . the  
4 court where the action is pending may issue further just orders. They may include the following:  
5 . . . (iii) striking pleadings in whole or in part; [and/or] (vi) rendering a default judgment against  
6 the disobedient party . . . .” Local Rule 110 further provides that “[f]ailure of counsel or of a  
7 party to comply with these Rules or with any order of the Court may be grounds for imposition  
8 by the Court of any and all sanctions authorized by statute or Rule or within the inherent power  
9 of the Court.”

10 The undersigned acknowledges that terminating sanctions, including the entry of default  
11 judgment, is very severe. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d  
12 1091, 1096 (9th Cir. 2007). The Ninth Circuit has “constructed a five-part test, with three  
13 subparts to the fifth part, to determine whether a case-dispositive sanction under Rule 37(b)(2) is  
14 just: ‘(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to  
15 manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy  
16 favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.’”  
17 *Id.* “The sub-parts of the fifth factor are whether the court has considered lesser sanctions,  
18 whether it tried them, and whether it warned the recalcitrant party about the possibility of  
19 case-dispositive sanctions.” *Id.* at 1096, n.10. “The list of factors amounts to a way for a district  
20 judge to think about what to do, not a series of conditions precedent before the judge can do  
21 anything, and not a script for making what the district judge does appeal-proof.” *Id.* at 1096.

22 The most critical factor to be considered in case-dispositive sanctions is whether “a  
23 party’s discovery violations make it impossible for a court to be confident that the parties will  
24 ever have access to the true facts.” *Valley Eng’rs v. Electric Eng’g Co.*, 158 F.3d 1051, 1058  
25 (9th Cir. 1998). “Where a court order is violated, the first and second factors will favor  
26 sanctions and the fourth will cut against them. . . . Therefore, whether terminating sanctions [is]

1 appropriate in [such a] case turns on the third and fifth factors.” *Computer Task Group, Inc. v.*  
2 *Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004) (citing *Malone v. U.S. Postal Serv.*, 833 F.2d 128,  
3 130 (9th Cir. 1987)).

4 As noted in the December 31, 2009 order, defendants have twice been ordered to produce  
5 discovery in this case and have completely disregarded those orders. They were also ordered to  
6 respond to plaintiff’s current motion for sanctions and to the December 31 order to show cause,  
7 and failed to do so. Therefore, the first and second factor weigh in favor of terminating  
8 sanctions. Additionally, because defendants have been completely unresponsive to plaintiff’s  
9 numerous attempts to conduct discovery in this case, plaintiff will be prejudiced by its inability  
10 to access facts and evidence in this case. Further, the court has twice monetarily sanctioned  
11 defendants, and has warned defendants on several occasions that their conduct could result in  
12 sanctions, including the striking of their answer and entry of default against them. In fact, the  
13 December 31 order to show cause specifically stated that a failure to respond *would* result in  
14 terminating sanctions. Yet, defendants have not paid the monetary sanctions and still have not  
15 responded to plaintiff’s attempts to conduct discovery or to the court’s orders. Therefore, it  
16 appears that less drastic sanctions are no longer available. Although the public policy favoring  
17 disposition of cases on their merits will always weigh against entry of default judgment, the  
18 undersigned finds that a case-dispositive sanction under Rule 37(b)(2) is just. Accordingly, the  
19 undersigned intends to recommend that plaintiff’s motion for sanctions be granted, defendants’  
20 answer be stricken, and default judgment be entered against defendants.

21 However, the undersigned is unable to recommend the entry of default judgment against  
22 defendants without information and supporting documentation regarding the appropriate  
23 judgment amount. In the December 31, 2009 order, the undersigned stated that “[i]f defendants  
24 fail to respond to this order to show cause and/or fail to file an opposition to plaintiff’s motion,  
25 plaintiff shall file, on or before January 27, 2010, a proposed order and default judgment against  
26 all defendants, including defendant AA&M Electric, Inc., and any necessary supporting

1 documentation.”<sup>1</sup> Dckt. No. 72 at 4. Court records reflect that plaintiff has not complied with  
2 that requirement. Therefore, the hearing on plaintiff’s motion for sanctions will be continued  
3 and plaintiff will be directed to file the required proposed order and default judgment, as well as  
4 all necessary supporting documentation, by February 10, 2010.

5 Accordingly, IT IS HEREBY ORDERED that:

6 1. The hearing date of February 3, 2010 on plaintiff’s motion for sanctions is continued  
7 to February 24, 2010 at 10:00 a.m. in Courtroom No. 24.

8 2. Plaintiff shall file, on or before February 10, 2010, a proposed order and default  
9 judgment against all defendants, including defendant AA&M Electric, Inc., and any necessary  
10 supporting documentation.

11 3. On or before February 17, 2010, defendants may file a response, if any, to plaintiff’s  
12 filing.

13 SO ORDERED.

14 DATED: January 29, 2010.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE

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25 <sup>1</sup> On November 16, 2009, the undersigned issued findings and recommendations which  
26 recommended that plaintiff’s motion for default judgment against defendant AA & M Electric,  
Inc. be granted; that default judgment be entered against defendant AA & M Electric, Inc.; and  
that plaintiff be awarded \$285.660.00 actual damages. Dckt. No. 69 at 7.