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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CRYSTAL LAKES,

Plaintiff

vs.

BATH AND BODY WORKS, LLC,

Defendant

No. 2:16-CV-02989 MCE GGH

ORDER

Two discovery motions were at issue on December 7, 2014 before the undersigned in the above entitled case:<sup>1</sup>

1. A Fed.R.Civ.P 37(a)(3)(A) and (c)(1) motion for sanctions involving the failure to make, and then belatedly making, Fed.R.Civ.P. 26 initial disclosures, including in the alternative, a request to extend the discovery period-- the "Rule 26 motion"(ECF No. 20);

2. A motion to compel further discovery responses, Fed.R.Civ.P. (a)(3)(B) (ECF No.24).

The parties' appearances through counsel were placed on the record. The following order issues.

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<sup>1</sup> The parties' motion for a protective order is granted in a separately issued order.

1           *The Rule 26 Motion for Sanctions*

2           It is undisputed that defendant Bath and Body Works did not timely issue its Rule 26  
3 initial disclosures no matter how the time for disclosure is calculated. In the Pretrial Scheduling  
4 Order issued upon removal of this case, ECF No. 4, dated December 22, 2016, the initial  
5 disclosures were due 14 days after the ordered Rule 26 discovery conference, which itself was to  
6 be performed no later than 60 days after removal, i.e., initial disclosures were due 74 days after  
7 removal, or no later than March 6, 2017. Then, considering the parties' joint scheduling  
8 statement, ECF. No. 9 (March 3, 2017) as a "stipulation" under Rule 26(a)(1)(C), the disclosures  
9 were due by agreement on May 7, 2017.<sup>2</sup> Plaintiff timely filed her disclosures on May 8 (May 7  
10 was a Sunday), but defendant did not. Later, with defendant's initial disclosures *still* in default,  
11 plaintiff's counsel negotiated what he thought to be an "unopposed" stipulation to extend the  
12 initially ordered discovery timelines, in which the defaulting defendant was to be given until  
13 October 30, 2017, to file the then undisclosed initial disclosures. Rather than take hold of this life  
14 line, defendant spurned any extension of discovery cutoff, omitting to notice, or not caring, that it  
15 was therefore in default by months on sending plaintiff the initial disclosures. Plaintiff noticed a  
16 sanctions motion under Rule 37 (a)(3)(A) and (c)(1)(ECF No. 20). Afterwards, defendant made  
17 initial disclosures.

18           The motion was noticed pursuant to the correct local rule, L.R. ED Cal. 251(e), but the  
19 notice time was deficient by one day. The court initially took the motion under submission, but  
20 because of the one day deficient notice, moved the hearing date to December 7, 2017, and heard  
21 argument of counsel.

22           The initial disclosure requirements of Rule 26 serve several salutary purposes. These  
23 disclosures include much of what would ordinarily be disclosed by the opening discovery,  
24 boilerplate salvo. The disclosures help the receiving party to focus what other discovery needs to

25 \_\_\_\_\_  
26 <sup>2</sup> Rule 26(a)(1)(C) permits the parties to stipulate to an initial disclosure date, which would  
27 otherwise be required by the default date in the Rule (adopted in the Pretrial Scheduling Order as  
28 the date of initial disclosures). In this case, because the Pretrial Scheduling Order adopted the  
default date in Rule 26, the undersigned will find the disclosure date was the one area of the  
Pretrial Scheduling Order which could be changed absent a subsequent order of the court.

1 be done. Further, the disclosures, unless properly amended, bind the serving party in important  
2 respects regarding documents and witnesses thereby reducing the potential of “ambush” possible  
3 in the days of pre-Rule 26 initial disclosure requirements. Finally, one may become much more  
4 disposed to early settlement after a review of what the other side may be initially presenting in the  
5 way of documents and witnesses. See, Reed Const. Inc. v. James River Ins. Co., 2012 WL  
6 13024803 (W.D. Wash. 2012); Russo v. Network Solutions, 2008 WL 114908 (N.D. Cal. 2008).  
7 It is therefore important that the parties comply with the initial disclosure requirements. On the  
8 other hand, a failure to comply with these requirements should not be an automatic “gotcha”  
9 which fails to account for importance of prejudice from non-disclosure, and the presumptive need  
10 to decide cases on their merits. See R&R Sails Inc. v. Ins. Co. of Pa., 673 F.3d 1240, 1247 (9th  
11 Cir. 2012); Yety by Molly Ltd v. Deckers Outdoor, 259 F.3d 1101, 1106 (9th Cir. 2001).

12 Defendant attempts to excuse its default or tardiness by blaming the “innocent” default on  
13 a misunderstanding with previous counsel for defendant concerning whether the disclosures had  
14 been served. Whether or not there was an initial misunderstanding, there can be no doubt that  
15 upon the discussion and filing of the “unopposed” motion to extend discovery, defendant was on  
16 notice that the disclosures were months overdue.

17 After discussion at hearing the undersigned decided that the most appropriate “sanction”  
18 was the alternative request of plaintiff’s counsel—extend the non-expert discovery date. In  
19 addition, the parties were placed on notice that the disclosures were binding in important respects.

20 Accordingly:

21 1. Non-expert discovery is extended to April 30, 2018. No other dates in the Pretrial  
22 Scheduling Order, ECF No. 4, are extended.<sup>3</sup>

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25 <sup>3</sup> Except as provided in fn. 2, and this order, the case is controlled by the Pretrial Scheduling  
26 Order issued in this case, ECF No. 4. The submission of suggested dates in a joint status report  
27 are simply suggestions to the court, and until formalized by the court in an order, have no effect  
28 on the previously issued Order. Accordingly, as set forth in the Pretrial Scheduling Order, the  
parties’ expert designations commence 60 days after the close of discovery, ECF 4 at p.3, now  
April 30, 2018, i.e., expert designations commence no later than June 29, 2018. Dispositive  
motions are to be filed no later than 180 days after the close of non-expert discovery. Id. at 4.

