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6 **UNITED STATES DISTRICT COURT**  
7 **NORTHERN DISTRICT OF CALIFORNIA**  
8 **SAN FRANCISCO DIVISION**  
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10 RANDALL RAY MITCHELL,

11 Plaintiff,

12 v.

13 ACUMED, LLC,

14 Defendant.  
15

Case No. 11-cv-00752 SC (NC)

**ORDER GRANTING MOTION  
FOR SANCTIONS**

Re: Dkt. Nos. 43, 56

16  
17 Defendant Acumed moves for evidentiary, issue, terminating, and monetary  
18 sanctions under Federal Rule of Civil Procedure 37 after the Court granted its motion to  
19 compel discovery responses. Acumed has provided evidence that it attempted in good  
20 faith to obtain the discovery without court action as required under the local rules. The  
21 Court GRANTS the motion for sanctions and awards Acumed its reasonable attorneys'  
22 fees incurred in bringing the motion to compel and the motion for sanctions in the total  
23 amount of \$10,000.00. The request for evidentiary, issue, or terminating sanctions is  
24 DENIED, as the Court finds that plaintiff's tardiness was not in bad faith and that  
25 Acumed has not been prejudiced by the delay.

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## I. BACKGROUND

Plaintiff Mitchell filed his original complaint against Acumed in California Superior Court, Marin County, pleading eight causes of action relating to injuries plaintiff allegedly sustained after a device manufactured by Acumed was surgically inserted into his body. Ntc. Removal, Ex. E, Dkt. No. 1. Acumed removed the action to federal court on February 18, 2011. *Id.*

On August 12, 2011, plaintiff's counsel, J. Frank George, advised defense counsel that due to continuing medical issues, he intended to associate in attorney Robert Ingram. Mot. Sanctions at 1, Dkt. 56. Attorney Ingram filed his appearance for plaintiff, styled as "Association of Counsel," on August 23, 2011. Dkt. No. 40.

On September 21, 2011, Acumed served requests for production of documents, interrogatories, and requests for admission. Mot. Compel at 7, Dkt. No. 43. Plaintiff repeatedly sought extensions of time to respond, which Acumed granted. *Id.* Despite these numerous extensions, plaintiff failed to serve any response to written discovery and failed to appear at both his scheduled deposition and requested medical examination. *Id.* at 9-10. Plaintiff's counsel also canceled all scheduled third party witness depositions. *Id.* at 10-12.

Having received no response to the discovery requests by the deadline, Acumed filed a motion to compel on December 18, 2011 and a related motion for sanctions on December 29, 2011. Dkt. Nos. 43,56. The District Court referred Acumed's motion, and all further discovery motions, to this Court under Civil Local Rule 72. Dkt. No. 45.

Acumed seeks issue, evidentiary, terminating, and monetary sanctions against plaintiff and his counsel. Mot. Sanctions at 9. Plaintiff's oppositions to the respective motions were due January 3 and January 12, 2012; none was filed. On January 4, 2012, the Court issued a notice requiring plaintiff to file a discovery status conference statement by January 18. Dkt. No. 59. Plaintiff and his counsel failed to comply with this order. The Court then issued an order to show cause directed to plaintiff's counsel, Robert Ingram, why sanctions should not be imposed against plaintiff and his counsel for

1 their failure to comply with court orders. Order Show Cause, Dkt. No. 65. At the  
2 January 25 hearing on Acumed's discovery motions and Order to Show Cause, Mr.  
3 Ingram, only, appeared for plaintiff. The Court granted Acumed's motion to compel and  
4 took the motion for sanctions under submission. Min. Order, Dkt. No. 68.

## 5 **II. STANDARD OF REVIEW**

6 Federal Rule of Civil Procedure 37 provides that if a motion to compel discovery  
7 is granted, or if the requested discovery is provided after the motion was filed, the court  
8 must require the party whose conduct necessitated the motion, or the attorney advising  
9 the conduct, or both, to pay for the movant's reasonable expenses incurred in making the  
10 motion, including attorneys' fees. FED. R. CIV. P. 37(a)(5)(A). Rule 37 clarifies that the  
11 court "must not order this payment" if the opposing party's nondisclosure was  
12 "substantially justified" or circumstances exist that "make an award of expenses unjust."  
13 FED. R. CIV. P. 37(a)(5)(A)(ii)-(iii). A party that fails to respond to interrogatories,  
14 request for inspection or attend his own deposition may also incur evidentiary, issue, and  
15 even terminating sanctions. FED. R. CIV. P. 37(d).

16 Civil Local Rule 37-4 requires a party seeking sanctions, including an award of  
17 attorneys' fees, in connection with a dispute about disclosure or discovery under Rule 37  
18 to file a declaration (1) stating the facts and circumstances supporting the motion, (2)  
19 describing the party's efforts to secure compliance without court intervention, and (3)  
20 providing itemized billing records that relay the unnecessary expenses incurred due  
21 directly to the other party's violation. Civil L.R. 37-4(b). The moving party must also  
22 provide appropriate justification for the hourly rates claimed. *Id.*

## 23 **III. DISCUSSION**

24 There are four distinct sanctions issues before the Court: whether issue sanctions  
25 are proper; whether evidentiary sanctions may be imposed; whether terminating  
26 sanctions are appropriate; and whether monetary sanctions in the form of attorneys' fees  
27 and costs are warranted.

1     **A.     Acumed Not Entitled to Evidentiary, Issue, or Terminating Sanctions**

2             Acumed alleges that Plaintiff's inaction and lack of involvement in the discovery  
3 process has prejudiced and substantially impeded Acumed's ability to defend itself.  
4 Mot. Sanctions at 9. Acumed further asserts that plaintiff has not shown substantial  
5 justification for his failure to respond to discovery and that no circumstances exist to  
6 make an award of expenses unjust. *Id.* at 11. Acumed accordingly seeks: (1) issue  
7 sanctions establishing the Acumed devices implanted in plaintiff's wrist were not  
8 defective, that Acumed's warnings were adequate, that Acumed did not breach any  
9 warranties, and that Acumed was not negligent in any manner; (2) evidentiary sanctions  
10 that plaintiff be precluded from presenting any evidence at trial that contradicts any of  
11 the matters admitted due to plaintiff's failure to respond to Acumed's request for  
12 admissions; and (3) terminating sanctions dismissing plaintiff's claim in its entirety  
13 based on discovery violations. Mot. Sanctions at 12-16.

14             Dismissal, default judgment, and sanction orders taking the plaintiff's allegations  
15 as established and awarding judgment on that basis are "the most severe penalty," and  
16 are authorized only in "extreme circumstances." *United States ex rel. Wiltec Guam, Inc.*  
17 *v. Kahaluu Constr. Co.*, 857 F.2d 600, 603 (9th Cir. 1988) (citing *Fjelstad v. American*  
18 *Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985)). To justify the imposition of  
19 such a harsh sanction, the court must find the violations were "due to willfulness, bad  
20 faith, or fault of the party." *Id.* at 603.

21             While the Court in no way condones the plaintiff's, or his counsel's, conduct  
22 during the course of discovery, plaintiff's inaction here does not constitute "extreme  
23 circumstances" to warrant issue, evidentiary, or terminating sanctions. *See id.* (failure to  
24 appear at deposition not "extreme circumstance" to warrant terminating sanctions). Nor  
25 does the Court find that plaintiff, or his counsel, acted in bad faith as Plaintiff's counsel,  
26 Mr. George, was ill and undergoing medical treatment out of state. Finally, the Court  
27 does not find that the late production of the documents, responses to interrogatories, and  
28 responses to requests for admission has resulted in any prejudice to Defendant, other

1 than attorneys' fees unfairly incurred. The District Court granted the parties' joint  
2 motion to continue the trial and related pretrial deadlines. Dkt. No. 60. Accordingly,  
3 Acumed's request for evidentiary, issue, and terminating sanctions is DENIED.

4 **B. Attorneys' Fees and Costs**

5 The only question remaining is whether any monetary sanctions should issue.  
6 Acumed seeks its attorneys' fees for filing the underlying motion to compel, the motion  
7 to continue trial, and the currently pending motion for sanctions. Mot. Sanctions at 11.  
8 The Court has authority to issue monetary sanctions under Rule 37(a)(5) (for the  
9 underlying motion to compel) and Rule 37(b) (for the currently pending motion for  
10 sanctions). FED. R. CIV. P. 37(a)-(b). Under both rules, reasonable attorneys' fees are to  
11 be awarded unless the nonmoving party's actions were substantially justified or there are  
12 other circumstances that would make an award unjust. FED. R. CIV. P. 37(a)-(b).

13 Acumed seeks monetary sanctions in the total amount of \$23,187.00. Mot.  
14 Sanctions at 11. Specifically, Acumed seeks \$11,005.50 for attorneys' fees relating to  
15 the motion to compel; \$6,001.50 for attorneys' fees incurred relating to the motion to  
16 continue trial; and \$6,180.00 for attorneys fees' incurred relating to the motion for  
17 sanctions. *Id.*

18 With respect to all three motions, neither plaintiff's nor his counsel's actions were  
19 substantially justified. Though Mr. George has been undisputably dealing with serious  
20 medical issues, Mr. Ingram appeared as counsel for plaintiff prior to issuance of any  
21 discovery requests. *See* Mot. Sanctions at 7-8. Ingram was provided all discovery  
22 requests, served with all court orders, and copied on all related correspondence. Millier  
23 Decl. at ¶¶ 4-5, Dkt. No. 44.

24 Under the Standard of Professional Conduct set forth in Civil Local Rule 11-4,  
25 Mr. Ingram had an obligation to comply with Court Rules, discharge his duties to his  
26 client, and to practice with honesty, care and decorum. By waiting until January 25,  
27 2012 to respond to the mounting discovery failures, Mr. Ingram failed his obligations to  
28 the Court and his client.

1 Most notably, plaintiff failed to provide any discovery responses until after the  
2 Court granted Acumed's motion to compel. The Court also finds that there are no  
3 circumstances that would make an award of attorneys' fees to Acumed unjust. One  
4 counsel's medical condition does not excuse his co-counsel and plaintiff from failing to  
5 abide by their discovery obligations and the orders of this Court. Nor does Mr. Ingram's  
6 understanding that he was only to "back up" Mr. George (Dkt. No. 66 at 1), constitute a  
7 cognizable excuse under Rule 37. Accordingly, the Court grants Acumed reasonable  
8 attorneys' fees relating to filing the motion to compel, motion to continue trial, and  
9 motion for sanctions.

10 The Court finds, however, that the amount of fees requested is excessive.  
11 Acumed asks for more than \$11,000 for the underlying motion to compel, representing  
12 50.3 hours of work, approximately \$6,000 for the motion to continue trial, representing  
13 27.9 hours of work, and approximately \$6,000 for the motion for sanctions, representing  
14 28 hours of work. Aney Decl. at 6-7, Dkt. No. 58. Acumed provides proper justification  
15 for counsels' hourly rates. *See id.* Counsel's brief statement as to the number of hours  
16 allegedly spent drafting the motions and related documents does not meet the itemization  
17 and particularity standards set forth in Local Rule 37-4. *See* Local Rule 37-4(b)(3) ("If  
18 attorney fees or other costs or expenses are requested, itemize with particularity the  
19 otherwise unnecessary expenses, including attorney fees, directly caused by the alleged  
20 violation or breach, and set forth an appropriate justification for any attorney-fee hourly  
21 rate claimed.").

22 In addition, the Court notes that none of the motions are particularly complex; the  
23 procedural history and factual background sections of all three motions are nearly  
24 identical; the legal arguments are simple; and no substantive legal issues are raised in the  
25 motions as Plaintiff had simply failed to respond to discovery. *See* Mot. Compel; Mot.  
26 Sanctions; Mot. Continue Trial. Additionally, given that Plaintiff filed no opposition to  
27 either motion, Defendants' replies to the motion to compel and motion for sanctions  
28 were redundant and superfluous. Accordingly, the Court awards Acumed \$10,000.00 in

1 fees for all work conducted on the motion to compel, the motion to continue trial, and  
2 the motion for sanctions, including appearance at the hearing.

3 **IV. CONCLUSION AND ORDER**

4 The Court GRANTS Defendant's motion for monetary sanctions in the amount of  
5 \$10,000.00. Plaintiff and his counsel are jointly and severally liable for payment.  
6 Plaintiff and his counsel shall pay this amount to Acumed no later than May 30, 2012.

7 Any party may object to this nondispositive pretrial order within 14 days of this  
8 Order. *See* Civil Local Rule 72-2.

9 IT IS SO ORDERED.

10 DATED: March 8, 2012

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NATHANAEL M. COUSINS  
United States Magistrate Judge