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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7 EUREKA DIVISION
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9 LORENZO FOSSELMAN JR.,

No. CV 06-00375 PJH (NJV)

10 Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SANCTIONS**

11 v.

12 RANDOLPH GIBBS, M.D.; ALLISON
13 BRAGER; C. KATES, LVN; CHARLES
14 DUDLEY LEE, M.D., Health Care Manager; and
C. MATHEWS, MTA,

15 Defendants.
_____ /

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17 This is a civil rights case filed pro se by a state prisoner. On March 18, 2008 and September
18 25, 2008, the court granted Plaintiff's two motions to compel discovery (Documents 52 & 58). On
19 July 20, 2009, Plaintiff filed a motion for sanctions asserting that Defendants failed to comply with
20 these discovery orders, which was denied (Document 93). On October 29, 2009, Plaintiff filed a
21 motion for reconsideration, which was granted (Document 102). The denial of the motion for
22 sanctions was vacated and determination on the motion for sanctions was referred to Magistrate
23 Judge Nandor Vadas. On March 18, 2010, Defendants were granted summary judgment with the
24 district court preserving this Court's jurisdiction over the sanctions motion (Document 103).

25 On March 18, 2010, Defendants were ordered to submit additional briefing by April 1, 2010
26 detailing their compliance with previous discovery orders (Document 106). Additional briefing was
27 required because Defendants' responses to Plaintiff's motion for sanctions and motion for
28 reconsideration were inadequate to determine their compliance with the court's discovery orders.
Defendants have not responded and have failed to meet the requirements of this order. As the order

1 provided, Defendants' failure to respond is interpreted as a concession that Defendants have not
2 complied with the court's discovery orders and are subject to sanctions.

3 Under Federal Rule of Civil Procedure 37(b)(2), the court must order a party who fails to
4 obey a discovery order to pay reasonable expenses, including attorney fees, incurred by the other
5 party as a result of this failure to the other party. Sanctions may be avoided if the noncomplying
6 party can show the failure was substantially justified or other circumstances make an award of
7 expenses unjust. Defendants have conceded that they have not complied with two orders compelling
8 discovery and have provided no evidence that this noncompliance was substantially justified, despite
9 multiple opportunities to do so.

10 The decision to impose sanctions under Rule 37 is at the Court's discretion. *National*
11 *Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *Forro Precision, Inc.*
12 *v. IBM*, 673 F.2d 1045, 1053 (9th Cir. 1982). Plaintiff requests reasonable attorney fees, but this is
13 inappropriate as Plaintiff is proceeding pro se. *Kay v. Ehrler*, U.S. 432, 435 (1991). Plaintiff also
14 requests that the Court order Defendants to pay the Court \$100.00 per day until they comply with the
15 discovery orders. Under Rule 37(b), Plaintiff is only entitled to "reasonable expenses," which
16 includes actual costs incurred as a result of misconduct, and not consequential damages. *See Lee v.*
17 *Walters*, 172 F.R.D. 421, 436 (D. Or. 1997). Plaintiff's entitlement to reasonable expenses is limited
18 to those caused by Defendants' noncompliance with the first and second discovery orders
19 (Document 52 & 58). This includes Plaintiff's actual costs incurred in bringing his second motion to
20 compel (Document 60), reply for the second motion to compel (Document 67), his motion for
21 sanctions (Document 86), and his motion for reconsideration (Document 96). Reasonable expenses
22 do not include actual costs incurred in bringing Plaintiff's first motion to compel (Document 28),
23 which was prior to Defendants' noncompliance with the court's discovery orders. *See Toth v. Trans*
24 *World Airlines, Inc.*, 862 F.2d 1381, 1386 (9th Cir. 1988).

25 The Court **GRANTS** Plaintiff's motion for sanctions and **ORDERS** Plaintiff to outline all
26 actual costs associated with bringing the various motions described above by April 21, 2010. Actual
27 costs associated with bringing these motions include costs such as photocopying and postage.
28 Plaintiff is instructed to provide the information in the document attached to this order to account for

1 actual costs. If Plaintiff does not submit his actual costs by April 21, 2010, the Court will interpret
2 this as Plaintiff's statement that he did not incur any reasonable expenses as a result of Defendants'
3 noncompliance. Defendants are **ORDERED** to pay all costs determined to be reasonable expenses
4 as a result of their noncompliance with the court's discovery orders.

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7 **IT IS SO ORDERED.**

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10 Dated: April 7, 2010



NANDOR J. VADAS
United States Magistrate Judge

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PLAINTIFF'S ACTUAL COSTS

- 1) Second Motion to Compel (Document 60) Photocopying: \$_____ Postage: \$_____
Other (describe): \$_____ _____

- 2) Reply to Second Motion to Compel (Document 67) Photocopying: \$_____ Postage: \$_____
Other (describe): \$_____ _____

- 3) Motion for Reconsideration (Document 86) Photocopying: \$_____ Postage: \$_____
Other (describe): \$_____ _____

- 4) Motion for Sanctions (Document 96) Photocopying: \$_____ Postage: \$_____
Other (describe): \$_____ _____
