

1 **** E-filed December 3, 2010 ****

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7 NOT FOR CITATION

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11 MARIA A. GARVIN, et al.,

No. C07-01571 HRL

12 Plaintiffs,

13 v.

14 LINDA TRAN, et al.,

15 Defendants.

**ORDER GRANTING PLAINTIFFS’
MOTION FOR SANCTIONS
AGAINST DEFENDANT GOLDEN
HILLS ASSOCIATES, INC. AND
STRIKING ITS ANSWER**

[Re: Docket No. 203]

16 **BACKGROUND**

17 On March 29, 2010 Plaintiffs served Defendant Golden Hills Associates, Inc. (“Golden
18 Hills”) with special interrogatories. (Docket No. 204 (“Chu Decl.”), ¶ 2.) Golden Hills failed to
19 respond, so Plaintiffs filed a motion to compel on June 11. (*Id.* at ¶¶ 3-4; Docket No. 186.) Golden
20 Hills did not file any opposition, and on July 29, this Court granted Plaintiffs’ motion and ordered
21 Golden Hills to respond without objection to Plaintiffs’ special interrogatories within 10 days.
22 (Docket No. 193 at 2.)

23 It has been over three months since this Court’s order and Plaintiffs still have not received
24 responses from Golden Hills. In September, Plaintiffs’ counsel sent a meet-and-confer letter to
25 counsel for Golden Hills, who stated that Golden Hills would serve its responses by October 15, but
26 so far it has not done so. (Chu Decl., ¶¶ 5-6.)

27 Plaintiffs now move the Court to sanction Golden Hills. (Docket No. 203 (“MFS”).)
28 Specifically, Plaintiffs request that the Court enter default against Golden Hills, or, in the

1 alternative, enter an order deeming Golden Hills to have admitted the allegations in the complaint
2 and precluding it from presenting a defense. (*Id.* at 6.) In addition, Plaintiffs request that Golden
3 Hills be required to pay Plaintiffs’ accrued expenses in relation to its motion. (*Id.*) Golden Hills did
4 not file any brief in opposition, and oral argument was heard on November 30.¹

5 **DISCUSSION**

6 Rule 37 allows a court to sanction a party for completely failing to respond to interrogatories
7 properly served upon it. FED. R. CIV. P. 37(d). A court may also sanction a party for failing to obey
8 a discovery order. FED. R. CIV. P. 37(b)(2). Under either provision, such sanctions may include:

- 9 (i) directing that the matters embraced in the order or other designated facts be taken
10 as established for purposes of the action, as the prevailing party claims;
11 (ii) prohibiting the disobedient party from supporting or opposing designated claims
12 or defenses, or from introducing designated matters in evidence;
13 (iii) striking pleadings in whole or in part;
14 (iv) staying further proceedings until the order is obeyed;
15 (v) dismissing the action or proceeding in whole or in part; or
16 (vi) rendering a default judgment against the disobedient party.

17 FED. R. CIV. P. 37(b)(2)(A)(i)-(vi) & (d)(1)(B)(3). A court may also treat the failure to obey any
18 order (except an order to submit to a physical or mental examination) as contempt of court. FED. R.
19 CIV. P. 37(b)(2)(A)(vii).

20 “A terminating sanction, whether default judgment against a defendant or dismissal of a
21 plaintiff’s action, is very severe. . . . Only ‘willfulness, bad faith, and fault’ justify terminating
22 sanctions.” *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096
23 (9th Cir. 2007) (citing *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003)).

24 The Ninth Circuit has constructed “a five-part test, with three subparts to the fifth part, to
25 determine whether a case-dispositive sanction under Rule 37(b)(2) is just: ‘(1) the public’s interest
26 in expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of
27 prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their

28 ¹ Counsel for Golden Hills also stated at oral argument that he did not oppose entry of default being entered against Golden Hills.

1 merits; and (5) the availability of less drastic sanctions.’ The sub-parts of the fifth factor are
2 whether the court has considered lesser sanctions, whether it tried them, and whether it warned the
3 recalcitrant party about the possibility of case-dispositive sanctions. This ‘test’ is not mechanical. It
4 provides the district court with a way to think about what to do, not a set of conditions precedent for
5 sanctions or a script that the district court must follow” *Id.* (internal and external citations
6 omitted).

7 The first four factors of the Ninth Circuit’s test all clearly favor sanctioning Golden Hills.
8 Golden Hills’s participation in this case has been non-existent and Plaintiffs are at a loss as to how
9 to proceed against it. And while public policy favors decisions on the merits, Golden Hills’s actions
10 so far have precluded such a decision. The fifth factor — the availability of lesser sanctions — also
11 favors sanctioning Golden Hills. Golden Hills has thus far shown no inclination to obey this Court’s
12 orders. Indeed, counsel for Golden Hills represented at oral argument that Golden Hills is aware of
13 the Court’s previous order and that it needs to respond to Plaintiffs’ special interrogatories. Golden
14 Hills’s blatant and willful disregard for this Court’s orders and the Federal Rules of Civil Procedure
15 is unacceptable. Left with little choice, this Court shall strike Golden Hills’s answer in this case.
16 FED. R. CIV. P. 37(b)(2)(A)(iii).

17 Plaintiffs’ also should get their expenses associated with filing this motion. Under Rule 37,
18 the court must order a disobedient party and/or that party’s attorney “to pay the reasonable expenses,
19 including attorney’s fees, caused by the failure [to obey a discovery order], unless the failure was
20 substantially justified or other circumstances make an award of expenses just.” FED. R. CIV. P.
21 37(b)(2)(C). Here, there is nothing to indicate that Golden Hills’s failure was justified in any way.
22 Plaintiffs’ counsel states that she has spent 4.2 hours in drafting and filing this motion, at a rate of
23 \$275 per hour, so the expenses have totaled the reasonable amount of \$1,155. (Chu Decl., ¶ 7.) The
24 total expenses requested in Plaintiffs’ motion is \$1,980, which accounts for three additional hours to
25 draft a reply brief and attend oral argument. (*Id.* at ¶ 8.) But since no reply brief was filed (other
26 than a notice of non-opposition, as Golden Hills did not file an opposition brief), the Court will
27 require Golden Hills to pay Plaintiffs’ expenses in the amount of \$1,155.
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CONCLUSION

Based on the foregoing, Plaintiffs' motion is GRANTED. The Court strikes Golden Hills's answer. Golden Hills is also ordered to pay Plaintiffs' attorneys' fees in the amount of \$1,155.

IT IS SO ORDERED.

Dated: December 3, 2010



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

1 **C07-01571 HRL Notice will be electronically mailed to:**

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14 **5:07-cv-01571-HRL Please see [General Order 45 Section IX C.2 and D](#); Notice has NOT been electronically mailed to:**

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18 **Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.**

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