

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**MARINE POWER HOLDING, LLC**

**CIVIL ACTION**

**VERSUS**

**NO: 14-912**

**MALIBU BOAT, LLC**

**SECTION: "P" (4)**

**ORDER**

Before the Court is Malibu Boat, LLC's **Motion for Sanctions (R. Doc. 120)** seeking an Order to impose sanctions against Marine Power for not complying with the Court's January 29, 2016 Order. *See* R. Doc. 109. The motion is opposed. R. Doc. 122.

**I. Background**

The Court in its previous orders detailed the facts surrounding the claims. *See e.g.* R. Docs. 108, 191. Therefore, a detailed recitation is not included here. This is a breach of contract claim regarding the manufacturing and supply of engines for sports boats manufactured by Malibu.<sup>1</sup>

As to the instant motion, Malibu argues that Marine Power has not complied with the Court's January 29, 2016, order to supplement its responses to Interrogatory Nos. 1, 2, 4, 5, 12 and Request for Production Nos. 21 and 22. Malibu argues that sanctions should be imposed in the form of prohibiting Marine Power from offering any testimony or other evidence at trial for discovery requests that were not adequately answered in compliance with the Court's order. R. Doc. 120-1, p. 4.

In response, Marine Power maintains that the instant motion is frivolous as it has fully complied with the Court's previous Order. Marine Power argues that Malibu's motion is based on "mischaracterizations and/or slanted interpretations" of the Court's prior ruling. R. Doc. 129, p. 7.

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<sup>1</sup> Malibu asserted a number a counterclaims that it voluntarily dismissed on May 18, 2016. *See* R. Doc. 171.

Further, Marine Powers seeks attorneys' fees and costs incurred in responding to the instant motion.  
R. Doc. 129.

## **II. Standard of Review**

Rule 26(b)(1) provides that “[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense.” Fed.R.Civ.P. 26(b)(1). The Rule specifies that “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* The discovery rules are accorded a broad and liberal treatment to achieve their purpose of adequately informing litigants in civil trials. *Hebert v. Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Nevertheless, discovery does have “ultimate and necessary boundaries.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Furthermore, “it is well established that the scope of discovery is within the sound discretion of the trial court.” *Coleman v. Amer. Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994).

Federal Rule of Civil Procedure 37 provides that a Court may award sanctions against a party who fails to comply with a discovery order, including ordering either the disobedient party, the attorney advising that party, or both, to pay reasonable expenses, including attorney's fees. “The sanctions available under Rule 37(b) . . . are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of a production order when the failure ‘was due to inability fostered neither by its own conduct nor by circumstances within its control.’” *Dorsey v. Acad. Moving & Sotrage, Inc.*,

423 F.2d 858, 860 (5th Cir. 1970) (citing *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958)).

### **III. Analysis**

Malibu argues that sanctions should be imposed against Marine Power for its alleged failure to supplement its discovery responses in accordance with the Court's December 21, 2015, oral ruling and its January 29, 2016 written Order. R. Doc. 120-1, p. 1. The requested sanctions range from Marine Power being prohibited from offering testimony or other evidence to an adverse inference for requests that were not adequately supplemented.

In response, Marine Power contends that it fully complied with the Court's order. R. Doc. 129, p. 2. Marine Power also seeks attorneys' fees and costs incurred having to respond to the instant motion. *Id.* at 1. During oral argument, the Court heard each contested interrogatory in turn. The position of each party and the Court's rulings are delineated below.

#### **A. Interrogatory No. 1**

Interrogatory No.1 seeks that for each engine that Marine Power manufactured under the subject purchase order it identify: (1) the date the engine was completed and the serial number assigned to the engine, (2) the date that the engine was placed into Marine Power's inventory, (3) the date that the engine was delivered to Malibu, and (4) the location of the engine if it was not delivered or accepted by Malibu whether sold to a third-party or not. Malibu previously contends that Marine Power's chart produced in response to the request did not provide a "completion date or inventory date" for the engines. R. Doc. 47-1, p. 3.

The Court previously ordered that for any engine for which Marine Power does not have documents referencing completion date, it should state that the completion date is unknown.

Further, to the degree it does not have the information requested by the Malibu, it should affirmatively state that it does not have the information. R. Doc. 109, p. 5.

In noncompliance with the Order, Malibu states that Marine Power has failed to provide completion dates or affirmatively state that it does not have such information for the engines allegedly manufactured pursuant to its obligations under the subject purchase order. *Id.* at 3.

In response, Marine Power states that it has produced all relevant engine work orders and supplemented its response to state that it does not routinely maintain completion dates for its engines. R. Doc. 129, p. 7. Thus, some but not all work orders contain an engine completion data. *Id.* at 2.

During oral argument, counsel for Malibu stated that Marine Power provided the dates that the engines were serialized but such a date does not show when the engine was completed. Counsel explained that serialization is an accounting method and does not incorporate when the engine was completed. Counsel represented that the completion dates were provided for some but not all. Further, counsel stated that Marine Power's supplemented response does not affirmatively state which engines do not have completion dates. Counsel directed to the Court to a chart that lists the subject engines, the serial numbers, and includes a "completion date" column which has dates for some but states "no date" for others. Counsel generated the chart from documents provided by Marine Power.

In response, Marine Power reiterated that it complied with the Court's previous order and produced all responsive information and stated that it did not routinely maintain data regarding completion dates for engines.

After listening to the argument of each party, the Court examined the provided charts. The Court noted that the charts include a "completion date" column that states "no date" for engines

that data was not provided. The Court reasoned that it is clear from the chart which engines do not have completion dates. Therefore, Malibu clearly has the information that it seeks. Accordingly, the motion for sanctions is denied as to this issue.

**B. Interrogatory No. 2**

Interrogatory No. 2 seeks that Marine Power: (1) describe its damages in detail, (2) provide the calculations used for each item of damages claimed, and (3) identify all documents or communications that support its claimed damages. R. Doc. 47-1, p. 3.

The Court previously ordered that for every cost item that is identified on Marine Power's charts which reflect its damages calculations that it also provided documentation to support its numbers. If Marine Power does not have supportive documentation for the numbers on the charts, the Court ordered Marine Power to state affirmatively whether there are backups that support the serial numbers referenced on the charts and either produce the backups or respond that they are not available. R. Doc. 109, p. 5.

Malibu states that Marine Power inadequately responded that "it has produced or is producing herewith all documents in its possession used to prepare" the charts. However, Malibu argues that Marine Power failed to designate which documents supports the numbers that are delineated on the charts and its expert report. R. Doc. 120-1, p. 5.

Marine Power contends that it has provided all documents in its in possession to support its damage assessment. R. Doc. 129, p. 3.

During oral argument, counsel for Malibu reiterated that the Court's previously ordered Marine Power to produce the backups to support its damages calculation. In particular, counsel stated that he has not been provided documentation as to how Marine Power calculated its cost to manufacture each engine. Further, they were provided an expert report that now centers damages

on lost profits instead of the cost of each engine. Counsel for Malibu also noted that Marine Power has produced a chart entitled “Marine Power Miscellaneous Damages” in response to the request. However, the chart includes unspecific descriptions and damages estimates that are difficult to understand.

The Court questioned whether Marine Power’s damages calculations are based on its previous calculation of the cost to produce the engines. Counsel for Marine Power clarified that its damages are now based on his expert report which is based on the purchase order price for each engine. Counsel for Malibu agreed that this clarification settles the issue. Regarding the chart entitled “Marine Power Miscellaneous Damages,” the Court ruled that a deposition is a more appropriate means to clarify the chart. Accordingly, Malibu’s request as to this issue is denied.

**C. Interrogatories Nos. 4 and 5**

Interrogatory Nos. 4 and 5 seek that Marine Power identify all parts, equipment, goods, and supplies that were in its possession or acquired before and after April 15, 2015, the date the purchase order was terminated, which it claims were purchased in order to fulfill purchase order 557. R. Doc. 47-2, p. 7. The Court previously ordered that to the degree to which Marine Power is not able to determine the inventory quantity on hand as of April 15, 2014, that it should supplement its written response to affirmatively state so as its position. R. Doc. 109, p. 8.

Malibu maintains that Marine Power’s supplemented response to Interrogatories Nos. 4 and 5 refers it to previously produced charts, purchase orders, and invoices which do not reflect the actual quantity of materials in its inventory on April 15, 2014. R. Doc. 120-1, p. 6. Further, the responses also do not affirmatively state that they are unable to determine the inventory quantity, as of April 15, 2014, of parts, equipment, goods, and supplies that were purchased allegedly to fulfill the purchase order. Malibu notes that Marine Power has provided documentation that shows

when its inventory items were ordered but such information does not show the quantity of parts in its possession on April 15, 2014. *Id.* at 6. Malibu argues that Marine Power should be barred from offering any testimony at trial as to the parts, equipment, goods, or supplied allegedly purchased in reliance on the subject purchase order that were in its possession on April 15, 2014.

In response, Marine Power argues that materials produced to Malibu, including purchase orders, indicate when all of the inventory items were ordered. R. Doc. 129, p. 4. Marine Power maintains that Malibu is essentially trying to force Marine Power to do its work for it by reviewing the underlying documents and producing a chart. *Id.* at 4.

Counsel for Malibu did not address this request during oral argument as he skipped from Interrogatory No. 2 to Interrogatory No. 12. Marine Power states that the purchase order and other documentation that it has produce indicate when all of the inventory items were ordered. However, the charts to which Marine Power's supplemented responses direct the Court do not reflect the actual quantity of parts, equipment, goods, or supplied in its inventory on April 15, 2014. *See* R. Doc. 47-5, p. 70-72. Although Marine Power has produced information which reflects when parts were ordered or purchased, it has not represented that it produced responsive documents that reflect which parts were in its possession on April 15, 2014.<sup>2</sup> Accordingly, Malibu's requests is granted as to Interrogatory Nos. 4 and 5 and Marine Power is reordered to respond to the requests as written to identify all parts, equipment, goods, and supplies in its possession on April 15, 2014. If Marine Power is unable to determine the inventory quantity on hand as of April 15, 2014, than it should supplement its written responses to state affirmatively so as its position.

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<sup>2</sup> Marine Power writes "[h]owever, the various purchase orders and other documentation that Marine Power has produced to Malibu indicate exactly when all of the inventory items were ordered. Thus Malibu's argument is unfounded." R. Doc. 129, p. 4.

**D. Interrogatory No. 12**

Interrogatory No 12 seeks information regarding engines, which were built for the purchase order, that were sold to third parties, profit from the sale, and work that was required to modify the engines for sale. *Id.* The Court previously ordered Marine Power to supplement their responses by providing the parts numbers and also provide the cost associated with each. R. Doc. 109, p. 10.

Malibu contends that Marine Power has not complied with the Court's order to identify the parts that were sold to third parties and provide the cost associated with each. *Id.* Malibu stated that Marine Power produced 1,220 pages of bill of materials for individual engines that were allegedly built for the purchase order. R. Doc. 120-1,p. 8. However, the documents do not reflect engines that were sold to third parties. *Id.*

Marine Power argues that it has produced work orders and bill of materials for all engines that were sold to third parties which are responsive to the request. *Id.* at 5.

During oral argument, Counsel for Malibu conceded that they have the request information as it was provided in the bill of materials. The Court stated that any confusion regarding the chart can be clarified during a deposition. Accordingly, this issue is denied as moot.

**E. Request for Production Nos. 21 and 22**

Request for Production Nos. 21 and 22 seeks documents supporting Marine Power's assertion that Jay Vetzal is a liar and thief. *Id.* at 9. Malibu states that Marine Power did not provide a privilege log as ordered by the Court for documents withheld as privileged for these requests. *Id.*

Marine Power argues that it previously withdrew its privilege objection; thus a privilege log is not necessary. R. Doc. 129, p. 7.

Counsel for Malibu agreed to withdraw this issue from its instant motion. Accordingly, this issue is denied as moot.



**F. Marine Power's Request for Attorneys' Fees and Costs**

Marine Power also seeks attorneys' fees and costs incurred having to respond to the instant motion. *Id.* at 1. Counsel for Marine Power stated that counsel spent a great deal of time responding to a motion that its argues is frivolous. Further, counsel stated that the motion was filed without Malibu conferring with it to attempt to resolve the matter amicably.

In response, counsel for Malibu stated that although the Court ruled against it for a number of requests that does not mean that its motion was frivolous.

Marine Power's opposition does not cite the federal rule by which it seeks attorneys' fees and costs. It also does not argue that the motion was filed "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" which would implicate Federal Rule of Civil Procedure 11.

Federal Rule of Civil Procedure 37(a)(5)(B), which provides that if a motion to compel disclosure or discovery is denied, the court must require the movant to pay the non-movant its reasonable expenses incurred in opposing the motion. Fed.R.Civ.P. 37(a)(5)(B). However, Malibu's instant motion is not to a motion to compel disclosure or discovery. Further, "[t]he Court is not aware of any other provision of Federal Rule of Civil Procedure 37 that would authorize an award of attorney's fees to the non-moving party when a motion for sanctions for failure to comply with a court order is denied." *See American Registry of Radiologic Technologists v. Bennet*, 939 F. Supp. 2d 695, 713 (W.D. Tex. 2013). Accordingly, Marine Power's request for attorneys' fees and costs is denied.

**IV. Conclusion**

Accordingly,

**IT ORDERED** that Malibu Boat, LLC's **Motion for Sanctions (R. Doc. 120)** is **GRANTED in part, DENIED in part, and DENIED AS MOOT** in part.

**IT IS GRANTED** as to Interrogatory Nos. 4 and 5 to the extent that Marine Power is reordered to respond to the requests as written to identify all parts, equipment, goods, and supplies in its possession on April 15, 2014. If Marine Power is unable to determine the inventory quantity on hand as of April 15, 2014, than it should supplement its written responses to state affirmatively so as its position. Marine Power shall supplement its responses no later than **seven (7)** days from the signing of this Order.

**IT IS DENIED** as to Interrogatory Nos. 1 and 2.

**IT IS DENIED AS MOOT** as to Interrogatories No. 12 and Request for Production Nos. 21, and 22.

**IT IS FURTHER ORDERED** that Marine Power's request for attorney's fees and costs is **DENIED**.

New Orleans, Louisiana, this 21<sup>st</sup> day of June 2016.



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**KAREN WELLS ROBY**  
**UNITED STATES MAGISTRATE JUDGE**