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Docket Entry 165 - Filed Memorandum in Support of Motion to reconsider Plaintiff's Motion to Compel Answers to Interrogatories and for Attorneys Fees

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FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington

DEC 28 1972

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15 UNITED STATES DISTRICT COURT
16 WESTERN DISTRICT OF WASHINGTON

17 UNITED STATES OF AMERICA,)
18 et al,)
19)
20 Plaintiffs,)
21 vs.)
22 STATE OF WASHINGTON, et al,)
23)
24 Defendants.)

CIVIL NO. 9213
MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER
PLAINTIFFS' MOTION TO
COMPEL ANSWERS TO
INTERROGATORIES AND FOR
ATTORNEYS FEES

25 I. Facts

26 On August 18, and 25, 1972, plaintiffs in this case
27 propounded interrogatories to the defendant Department of Game.
28 Answers or objections to the interrogatories were due no later
29 than September 18 and 25, 1972, respectively. Rule 33 of the
30 Federal Rules of Civil Procedure provides in part:

Each interrogatory shall be
answered separately and fully in
writing under oath, unless it is
objected to, in which event
reason for objections shall be
stated in lieu of an answer. . . .
The party upon whom the inter-
rogatories have been served shall
serve a copy of the answers.

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1 and objections, if any, within
2 30 days after the service of
the interrogatories. . .

3 During the time allowed for answering or objecting
4 the Department of Game neither sought nor was granted formally or
5 informally an extension of time within which to answer. The
6 Department of Game made no response and to date--over four months
7 later, it has neither answered nor objected to any of the
8 interrogatories. See Affidavit of Stuart F. Pierson dated
9 November 30, 1972.

10 On November 30, 1972, plaintiffs filed a motion to
11 compel answers to the interrogatories and for expenses and for
12 attorneys fees pursuant to Rule 37. On December 8, 1972, the
13 matter came on for hearing. The Department of Game filed
14 nothing in opposition to the motion nor was any explanation
15 offered for the failure to answer, object or to seek additional
16 time to do so.

17 The court, without finding that the Department of
18 Game had substantial justification for its failure to act
19 nevertheless ruled from the bench that the Department of Game
20 would have until March 8, 1973--an additional ninety days from
21 the date the motion was heard to file its objections to
22 interrogatories.

23 II. Plaintiffs Suggest That
24 That Court's Order was Erroneous

25 Although the court might have the discretion to allow
26 additional time for the answering of interrogatories, it may not
27 under the Federal Rules of Civil Procedure allow additional time
28 for objections after the initial time for answering or objecting

1 has expired. With the passage of time came a waiver of any
2 objections.

3 The Rule is clear: The defendant must file an
4 objections in lieu of their answers in the event they feel
5 the interrogatories in question are such that they should not be
6 required to answer. This the defendant failed to do. The
7 defendant's failure to make such objections within the allotted
8 time is a waiver of his right to make later objection after a
9 motion to compel has been filed. Objections served after
10 expiration of the thirty days/^{period}are ineffective unless an extension
11 of time has been obtained. 4A Moore's Federal Practice Paragraph
12 3327, page 148. Böhlín v. Brass Rail Inc., 20 FRD 224 (S.D.N.Y.
13 1957). In revising the Rules in 1970 the intention was to put
14 more teeth in the rules for Discovery and the sanctions for
15 failure to provide a response to discovery requests. The notes
16 of the Advisory Committee in 1970 to amended Rule 37 state:

17 A provision is added to make clear
18 that a party may not properly
19 remain completely silent even when
20 he regards . . . a set of inter-
21 rogatories . . . as improper or objectionable. If
22 he desires . . . not to respond,
23 he must apply for a protective
24 order. see 4A Moore's Federal
25 Practice Paragraph 37.01[8] page
26 37-27 .

23 In order to avoid a waiver of objections, defendants
24 would be under a duty to show excusable neglect for its failure
25 to file objections within the allotted time and they have failed
26 to do so. McKeon v. Highway Truck Drivers, 28 FRD 592 (D. Del.
27 1961).

28 In this case we have a clear example of the defendant

1 Department of Game's failure or neglect to file the mandates of
2 Rule 33. The question of the defendant's justification for not
3 answering any particular interrogatory is not present or an
4 issue at this time. Here the matter is simple. Plaintiffs have
5 been required to file a motion to compel answers and to impose
6 sanctions due to the defendant's failure to do anything to take
7 any of the alternatives under the rules. Under the circumstances
8 only an order to answer, with appropriate sanctions, is warranted.
9 Plaintiffs object not only to the excessive amount of time
10 afforded to the Department in which to present its objections.
11 (The time would be excessive even if the order required answers.
12 More importantly, plaintiffs urge that the order necessarily
13 must have/answers and not merely objections. Nothing less
14 would comport with the rules.

15 III. Plaintiffs Are Entitled
16 To Expenses and Attorneys Fees

17 Although the sanctions for failure to answer inter-
18 rogatories or for improper objections in Rule 37(a)(4) require
19 granting of the motion of the party seeking discovery, plaintiffs
20 are here entitled to expenses and fees regardless of the court's
21 ruling on the motion. Rule 37(d) as amended, imposes tough sanctions
22 on parties failing to make any response. In addition to or
23 in place of a wide range of/other sanctions in the rule, it is provided
24 that:

25 The court shall require the party
26 failing to act or the attorney
27 advising him or both to pay the
28 reasonable expenses, including
29 attorneys fees, caused by the
30 failure. . . [Emphasis added]

31 The rule is mandatory on the court unless there is a specific

1 finding that the failure was substantially justified or other
2 factors would make the award unjust. And the failure to respond
3 may not be excused on the grounds that the discovery sought
4 is objectionable.

5 The rationale for providing immediate and severe
6 sanctions for a total failure to respond to discovery in Rule
7 37(d) is explained by Professor Moore:

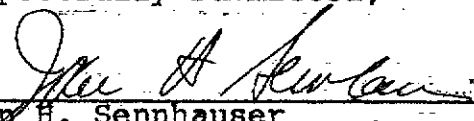
8 If it were unnecessary to seek a
9 court order requiring a response,
10 followed by a response setting
11 up objections, followed by a
12 second motion to resolve the
13 objections and order discovery,
14 the possibility for delay and
15 abuse would be apparent. Rule
16 37(d) makes it explicit that a
17 party properly served has an
18 absolute duty to respond, . . .
19 or serve answers or objections
20 to interrogatories served upon
21 him. . . Rule 37(d) deals, then,
22 with failure to make the initial
23 response required by the rules,
24 while subdivision (a) and (b)
25 provide a method of resolving
26 differences between the parties
27 and enforcing the court's deter-
28 mination. . . In this connection,
29 it is to be noted that while (b)
30 and (d) provide that the court may
require the party failing to comply
with the pertinent rule to pay the
expenses, including attorneys fees,
and "caused by the failure", (a) (4)
provides only for expenses incurred
in pursuing or resisting the motion.
In short, if the party from whom
discovery is sought complies with
the rule in question by making the
initial response, he has the right
to refuse discovery until compelled
by court order, subject to the expense
of determining the justification of
his refusal, but if he does not comply
with the rule, he is subject to the
sanctions set forth in Rule 37(d),

1 Here, there is no conceivable basis for a finding
2 of substantial justification for failing to respond. There was
3 no formal opposition to the motion to compel answers; there was
4 no explanation of the failure to answer or object. The only
5 possible explanation is that officials of the Department of Game
6 or its counsel was negligent in failing to follow Rule 33, in which
7 case, expenses and fees are clearly justified, and perhaps
8 should be assessed against the attorneys representing the defen-
9 dants.

10 CONCLUSION

11 This court should reconsider its disposition of plain-
12 tiffs' motion to compel answers to interrogatories. It should
13 provide reasonable time, not exceeding 30 days in which the
14 interrogatories must be answered. And expenses and costs caused
15 by the failure of the Department of Game to respond should be
16 awarded to plaintiffs. Such award should be assessed against
17 the Department, its officers, or its attorney, or each of them
18 as the court sees fit, in an amount demonstrated to reflect
19 reasonable expenses and fees.

20 Respectfully submitted,

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22 John H. Sennhauser
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