

1 In this action, Plaintiffs allege that Defendants Rick Rizzolo and his ex-wife Lisa Rizzolo
2 conspired to defraud Plaintiffs from collecting on their underlying bodily injury claim and
3 settlement agreement by concealing and alienating the ownership of Defendant Rick Rizzolo's
4 assets. Plaintiffs allege claims for conspiracy to defraud, common law fraud and violation of the
5 Nevada Uniform Fraudulent Transfer Act. In addition to seeking compensatory and punitive
6 damages, Plaintiffs seek an order of avoidance of the transfers or obligations assumed by the
7 Defendants to the extent necessary to satisfy the Henrys' claim, an injunction against any further
8 disposition of the Defendants' assets, and the appointment of an examiner or, if necessary, a
9 receiver to take charge of Defendants' assets. *Amended Complaint (#143)*.

10 Plaintiffs served their first sets of interrogatories and requests for production of documents
11 on Defendant Rick Rizzolo on October 1, 2008. The interrogatories and requests for production
12 sought information and documents relating to Defendants' assets and/or the transfer of those assets.
13 Mr. Rizzolo served his initial answers and responses to Plaintiffs' discovery requests on October
14 31, 2008 in which he objected to each of Plaintiffs' discovery requests on the grounds that they are
15 irrelevant and not calculated to lead to the discovery of admissible evidence. The basis for Mr.
16 Rizzolo's objections was that Plaintiffs were required to obtain a judgment on their underlying
17 claim before Defendant was required to respond to discovery about his assets. Subject to this
18 objection, Defendant answered some of the interrogatories and produced some documents.

19 Plaintiffs' filed their first motion to compel (#42) against Defendant Rick Rizzolo on
20 December 9, 2008. Plaintiffs requested that the Court overrule Mr. Rizzolo's objections and order
21 him to provide full and complete discovery responses. While that motion was pending, Mr.
22 Rizzolo served his first Supplemental Answers to First Set of Interrogatories on December 29,
23 2008. Mr. Rizzolo also served Supplemental Production of Documents which were signed by his
24 attorney on December 8, 2008. It is unclear when the supplemental responses to requests for
25 production were actually served.¹

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28 ¹ Plaintiffs did not attach copies of the actual discovery requests and responses to their renewed motion to compel. At the February 25th hearing, the Court ordered Plaintiffs to file a copy

1 On February 3, 2009, the undersigned magistrate judge denied Plaintiffs' motion to compel,
2 without prejudice, based on the court's doubt as to whether Plaintiffs had a viable underlying claim
3 against Defendant Rick Rizzolo. *Order* (#73). Plaintiffs timely objected to that order and, on
4 March 23, 2009, District Judge Pro overruled order (#73) and granted Plaintiff's motion to compel
5 discovery. *See Order* (#117). In his order, Judge Pro stated: "Plaintiffs' claim is contingent, but
6 otherwise viable, and potentially would be frustrated by allegedly wrongful asset transfers.
7 Plaintiffs must therefore be permitted to pursue the discovery at issue in support of their claims for
8 conspiracy to defraud, common law fraud and violation of the UFTA." *Id.*, p. 3.

9 Defendant Rick Rizzolo served his second "Supplemental Answers to Plaintiffs' First Set of
10 Interrogatories and Supplemental Production of Documents" on April 20, 2009. As of that date,
11 Mr. Rizzolo was no longer represented by counsel. His supplemental answers and responses were
12 handwritten. It appears, however, that they were served on his behalf by his former attorneys, Patti
13 Sgro & Lewis. Following the retention of his current counsel in the latter part of 2009, and after
14 demands for further supplementation by Plaintiffs' counsel, Defendant Rizzolo served his "Third
15 Supplemental Answers to First Set of Interrogatories" in January 2010. Defendant Rizzolo also
16 served his "Second Supplemental Answers to First Set of Requests for Production" in January 2010
17 and his "Third Supplemental Answers to First Set of Requests for Production" on February 25,
18 2010.

19 In their Renewed Motion to Compel (#279), Plaintiffs assert that Defendant Rick Rizzolo
20 has still not provided fully responsive answers to interrogatories and responses to request for
21 production of documents. Plaintiffs also argue that information and documents obtained through
22 discovery from other sources, such as Mr. Rizzolo's Federal Probation records, show that he has
23 failed to disclose assets in his previous answers to interrogatories or responses to request for
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26 the discovery requests and responses as a supplement to their motion. Plaintiffs did so on March 2,
27 2009. *See Plaintiffs' Supplement to Renewed Motion to Compel* (#301). The Court also ordered
28 the Defendant to file a supplement listing the documents that Defendant has produced to Plaintiffs
since the parties' meet and confer conferences in December 2009. Defendant did so on March 5,
2010. *See Defendant's Supplemental Summary of Documents Referenced at Hearing* (#306).

1 production. Plaintiffs therefore request that Mr. Rizzolo be again ordered to provide fully
2 responsive discovery responses and that the Court also impose “appropriate” sanctions upon him
3 pursuant to Fed.R.Civ.Pro. 37 for his concealment of or failure to disclose information and
4 documents relating to his assets or the transfer of assets. Plaintiffs’ counsel argued at the hearing
5 on this motion that the “appropriate” sanction would be to strike Mr. Rizzolo’s answer and enter his
6 default.

7 DISCUSSION

8 A. Motion to Compel Further Discovery Responses

9 Rule 26(b)(1) of the Federal Rules of Civil Procedure authorizes discovery regarding any
10 matter, not privileged, that is relevant to the claim or defense of any party. Plaintiffs’ renewed
11 motion to compel again addresses the relevance of information and documents relating to the assets
12 of a defendant in an action brought pursuant to the Nevada Uniform Fraudulent Transfer Act. NRS
13 112.150. Defendant Rizzolo continues to assert that Plaintiffs should not be allowed to conduct
14 discovery regarding his assets because they have not obtained a judgment on their underlying claim
15 and there is no basis to support Plaintiffs’ fraudulent transfer claims. *Defendant’s Opposition*
16 (*#284*), p. 4. As stated above, those arguments were rejected by Judge Pro in his March 23, 2009
17 order. Judge Pro also subsequently denied Defendant’s motions to dismiss and stay discovery
18 based on the same arguments. *See Transcript of Proceedings (#199)* (Re: September 15, 2009
19 Motion Hearing), pp. 36-37. Pursuant to Judge Pro’s March 23, 2009 order, Defendant was and is
20 required to provide full and complete responses to Plaintiffs’ discovery requests.

21 In his opposition to Plaintiffs’ renewed motion to compel, Defendant states that many of the
22 documents requested by Plaintiffs were seized from him by the Federal Government in connection
23 with the criminal prosecution of Mr. Rizzolo and his business. Defendant also argues that some of
24 the records have already been obtained by Plaintiffs through subpoenas issued to Defendants’
25 former attorneys. In some of his responses to Plaintiffs’ discovery requests and his opposition,
26 Defendant has cited a “collateral source rule”-- indicating that the requested documents can be
27 obtained from other persons or entities.

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1 Rule 34(a)(1)(A) of the Federal Rules of Civil Procedure requires the responding party to
2 produce requested documents that are in his possession, custody or control. Documents in the
3 actual possession of a third person are deemed to be in responding party's control if he has the legal
4 right to obtain the documents on demand. *Klesch & Company, Ltd. v. Liberty Media Corp.*, 217
5 F.R.D. 517, 520 (D.Colo. 2003), citing *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D.
6 108, 110 (D.Colo. 1992). Some courts have construed Rule 34 more broadly to include the
7 "practical ability to obtain the materials sought upon demand." *Id.*, citing *Securities and Exchange*
8 *Commission v. Credit Bankcorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000) and *Prokosch v.*
9 *Catalina Lighting, inc.*, 193 F.R.D. 633, 636 (D.Minn. 2000). See also *Moreno v. Autozone, Inc.*,
10 2008 WL 906510 (N.D.Cal. 2008). A party generally has the legal right to obtain statements
11 regarding his own accounts from his bank. *Klesch*, 217 F.R.D. at 520, citing *Dietrich v. Bauer*,
12 2000 WL 1171132 (S.D.N.Y. 2000); *Hamstein Cumberland Music Group v. Williams*, 2008 WL
13 2682697 (N.D.Okla. 2008) at *6. *Hamstein* also held that defendant, as grantor of a trust, could
14 obtain trust documents upon demand from the trustee. *Id.*, at *3.

15 A responding party is not relieved of his obligation to produce requested documents in his
16 control by simply directing the requesting party to obtain them from a third person who has actual
17 possession of them. The requesting party, of course, may agree to accept an authorization for
18 release of records in lieu of their actual production. The court can also limit discovery pursuant to
19 Rule 26(b)(2)(C) if the requested documents or information can be obtained from some other
20 source that is more convenient, less burdensome or less expensive. A responding party does not
21 comply with his obligations, however, by failing to timely obtain and produce requested documents
22 in his control and then only belatedly offer to provide the requesting party with an authorization for
23 release of records. The court in *Hamstein*, 2008 WL 2682697 at *6, for example, held that where
24 the defendant failed to obtain and produce account statements in her control, it was an appropriate
25 sanction to require her to pay the plaintiffs' costs in obtaining the documents through third party
26 subpoenas.

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1 **1. Bank Accounts, Investment Accounts and Credit Card Statements.**

2 Defendant's bank account statements, investment account statements and credit card
3 statements are the type of records that defendant has the legal right to obtain on demand. The Court
4 addresses the evidence regarding the production of these records as follows:

5 (a) Bank Accounts: Plaintiffs' Request No. 23 requested that Defendant Rizzolo
6 "produce documents which record, reflect, or relate to defendant's domestic and/or foreign bank
7 accounts, regardless of whether the same was held in sole or joint names since September 20, 2001,
8 to the present." Mr. Rizzolo did not produce any documents in his initial response to this request
9 served on October 30, 2008. In his first supplemental responses to the requests for production
10 served in December 2008, Defendant referenced attached "Exhibit 'F.'" Neither party has informed
11 the Court, however, as to what was contained in Exhibit "F."

12 In his "Supplemental Answers to Plaintiffs' First Set of Interrogatories and Supplemental
13 Production of Documents" served on April 20, 2009, Defendant Rizzolo supplemented his response
14 to Request No. 23 by identifying a bank account with Bank of America and two accounts from
15 Nevada State Bank. His response also stated: "Statements ordered." In his "Second Supplemental
16 Answers to First set of Requests for Production" served on or about January 4, 2010, Defendant
17 stated in regard to Request No. 23: "No supplement. Additionally, this request is subject to the
18 collateral source rule, and as such, Plaintiff may subpoena the account statements directly from the
19 bank." Plaintiffs' Interrogatory No. 3 asked Defendant to "state the full description and present
20 location and ownership of any asset or property you presently possess." In his "Third Supplemental
21 Answers to First Set of Interrogatories" served on or about January 4, 2010, Defendant Rizzolo
22 identified another account number at Nevada Commerce Bank with a reported a balance of
23 \$280.00. He also identified an Oppenheimer investment account number with a reported balance of
24 \$0.63 (sixty-three cents).

25 Despite the statement in his April 20, 2009 supplemental discovery response that bank
26 account statements had been ordered, Defendant apparently did not produce copies of any of his
27 bank account statements to Plaintiffs. In his *Supplemental Summary of Documents (#306)*, filed on
28 March 5, 2010, Defendant states that no documents are available for his closed Nevada State Bank

1 and Bank of America accounts. Defendant has not stated, however, whether he has made any
2 attempt to obtain the records of these accounts from the banks. Likewise, Defendant has not shown
3 that he has attempted to obtain the full records regarding the Lions Limited Partnership account at
4 Nevada Commerce Bank or his Oppenheimer & Co. investment account. While the reported
5 balances for these two accounts appear to be minimal, Plaintiffs are entitled to obtain the complete
6 statements for these accounts since September 2001 or their beginning, if later (and if such
7 information is still available from the institutions), in order to trace the transfer of assets and
8 possibly prove the basis for their fraudulent transfer claims. The Court therefore orders Defendant
9 to request complete statements for the foregoing accounts from his banks, if available, and produce
10 them to the Plaintiffs.

11 (b) Credit Card Accounts: Plaintiffs' requests for production did not specifically
12 request credit card account statements. Credit card statements would arguably fall within the scope
13 of Request No. 18, which was a "catchall" request for "documents otherwise pertaining to the
14 assets of the Defendant." Interrogatory No. 3 asked Defendant to "state the full description and
15 present location and ownership of any asset or property you presently possess." In his "Third
16 Supplemental Answers to First Set of Interrogatories" served on January 4, 2010, Defendant
17 identified the last four digits of an American Express credit card account number and a
18 MasterCard/Visa credit account number. According to Defendant's *Supplemental Summary of*
19 *Documents (#306)*, he has produced the American Express account statements from January 1,
20 2008 to the present and has produced the MasterCard statements for the periods March 2008 to
21 February 2009 and April 2009 to February 2010. It does not appear that Defendant has produced
22 statements for all periods in which he has had the MasterCard account, and it is unclear whether he
23 has produced statements for all periods in which he has had the American Express card.
24 Accordingly, the Court will order the Defendant to request complete statements for these accounts,
25 if available, from the credit card providers and produce them to Plaintiffs.

26 (c) Investment Accounts: Request No. 7 requested production of statements of accounts
27 with securities brokerage firms, dividend statements, earnings reports or similar documents which
28 reflect, refer, or relate to any stocks, bonds, debentures, certificates of deposit or any other security

1 owned by Defendant alone or jointly with another person since September 1, 2001. In his
2 Supplemental Response to this Request served in December 2008, Defendant referred to attached
3 Exhibit "E." Again, neither party has informed the Court what information was contained in
4 Exhibit "E." In his April 20, 2009 "Supplemental Answers to Plaintiffs' First Set of Interrogatories
5 and Supplemental Production of Documents", Defendant identified an IRA account with Primerica
6 which had a balance of \$61,714.91. In his "Third Supplemental Answers to First Set of
7 Interrogatories" served in January 2010, Defendant also listed an account with Energy Transfer
8 Partners, LP with a reported balance of \$10,334.00. These investment accounts were also listed in
9 Defendant's "Second Supplemental Answers to First Set of Requests for Production" served in
10 January 2010. According to Defendant's *Supplemental Summary of Documents (#306)*, he has
11 provided Plaintiffs with a 2008 IRS Form 1065 for the Energy Transfer Partners, LP account. He
12 states that there are no documents available for the Primerica IRA account. Again, it is likely that
13 Defendant can obtain statements for these investment accounts from the financial institutions. The
14 Court does not know, however, what information these institutions can or will provide in response
15 to a request from the account holder. The Court orders Defendant to request any and all available
16 statements from the institutions regarding these accounts and produce them to Plaintiffs. Defendant
17 is also ordered to request and produce any records relating to his former Oppenheimer investment
18 account. Of course, if Defendant actually possesses documents relating to these accounts, he is
19 ordered to produce them to Plaintiffs.

20 **2. Tax Returns**

21 The dispute between the parties on this motion related to production of Defendant Rizzolo's
22 2008 federal income tax return. Shortly before the hearing on the motion, Defendant's counsel
23 informed the Plaintiffs that Mr. Rizzolo did not file a tax return for 2008 because his income was
24 too small to require a filing. Because Defendant has now sufficiently demonstrated that he did not
25 file a income tax return for 2008, there is nothing that the Court can order him to produce in regard
26 to this request.

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1 **3. Trust Information**

2 Interrogatory No. 12 asked Defendant to list any property he holds or has held as trustee of a
3 testamentary trust since September 20, 2001, and identify any trust he has created or contributed to
4 for the benefit of others since September 20, 2001. In his initial answer to this interrogatory,
5 Defendant stated that at one time, he and his former wife created a family trust for estate planning
6 purposes, but that he was informed and believes that the trust was never funded. In a supplemental
7 answer, Defendant repeated this answer, but also added that the title to the family home may have
8 been placed in this trust prior to the Rizzolos' divorce. Defendant stated, however, that he is
9 informed that there is no such trust in existence today. In his second supplemental answer,
10 Defendant additionally stated that he was a trustee for Bart Rizzolo years ago, but could no longer
11 manage a trust after his felony conviction.

12 Request No. 13 requested Defendant to produce all documents which reflect, refer, record or
13 relate to any trust under which Defendant is or was a settlor or beneficiary, at any time from
14 September 20, 2001 to the present. In his initial response to this request, Defendant attached an
15 Exhibit "A." Once again, neither party has described the content of Exhibit "A" to the Court.
16 Defendant has not otherwise supplemented this response. The Court is informed, however, that
17 Plaintiffs have obtained trust documents either from Co-Defendant Lisa Rizzolo or through
18 subpoenas served on Defendants' estate planning attorneys.

19 In their renewed motion to compel, Plaintiffs refer to "The RLR Trust," the existence of
20 which has been established during discovery. Plaintiffs further state that this trust had an account at
21 the Capital Security Bank Limited, which is apparently an offshore bank. Plaintiffs further state
22 that Mr. Rizzolo deposited \$990,000 into this account from the proceeds of the sale of a
23 Philadelphia club in which he had some interest. *See Motion (#279)*, pp. 6, 13. The Court was
24 informed during the hearing that this deposit occurred in 2008. Although the information provided
25 to the Court is very sketchy, there is apparently no dispute that Mr. Rizzolo received money relating
26 to an investment in a Philadelphia "enterprise" and this money was deposited in a trust which he
27 controls or at one time controlled. *See Defendant's Supplemental Summary of Documents (#306)*,
28 p. 3 ("the partial return of a monetary, non-ownership investment in the Philadelphia enterprise

1 which resulted in a loss, also disclosed to Plaintiffs and the Government, as well as through
2 information already obtained from the deposition of attorney John Dawson.”) It is unclear,
3 however, what documents or records Plaintiffs have obtained regarding this trust or the trust
4 account at the Capital Security Bank Limited. As stated above, to the extent that Defendant
5 Rizzolo controls “The RLR Trust,” he should be able to obtain trust documents and the trust’s bank
6 account statement, and produce those documents to Plaintiffs. *Hamstein Cumberland Music Group*
7 *v. Williams*, 2008 WL 2682697 (N.D.Okla. 2008) at *3.

8 Accordingly, the Court will order Defendant to supplement his discovery responses by
9 providing a full and complete answer to Interrogatory No. 12, regarding his former or current
10 interest as trustor, trustee or beneficiary in “The RLR Trust” and to provide all documents in his
11 possession, custody or control relating to that trust, including a complete copy of its bank account
12 statements. Alternatively, Defendant must provide the Plaintiffs with a complete statement as to
13 why he is unable to produce documents relating to “The RLR Trust,” including its bank account
14 statements. Defendant Rizzolo must also provide full and complete information about his interest
15 in the Philadelphia club or “enterprise” and the \$990,000 he reportedly received in relation to that
16 enterprise. The Court notes that there are probably several interrogatories to which such
17 information is responsive.

18 **4. Other Items**

19 Plaintiffs request that Defendant be required to provide information or documents regarding
20 other assets or obligations. The Court addresses these items as follows:

21 (a) 1958 Corvette Automobile: Plaintiffs’ discovery requests were served on October 1,
22 2008. According to the U.S. Probation Office records that the Court previously ordered produced
23 to Plaintiffs, Defendant sold a 1958 Corvette automobile in August 2008. Interrogatory No. 5
24 asked Defendant to state the cost, location and estimated present value of each item of personal
25 property owned by Defendant, including vehicles, since September 20, 2001. Although it would
26 probably be difficult for Defendant to fully respond to this interrogatory in regard to every item of
27 personal property that he owned since September 20, 2001, he should have been able to completely
28 respond to this interrogatory in regard to the 1958 Corvette that he sold only one to two months

1 before the interrogatories were served. It appears, however, that the only information Defendant
2 has ever provided about the vehicle is that it was sold. Defendant is therefore ordered to more fully
3 respond to Interrogatory No. 5 in regard to the Corvette.

4 The Court is not convinced that Defendant has completely and adequately responded to
5 Interrogatory No. 5 in regard to describing all of the other personal property assets he has owned
6 since September 20, 2001, including valuable jewelry, or in describing the personal property he
7 presently owns. This is an area that Defendants' counsel will likely explore during a deposition of
8 Mr. Rizzolo. To the extent that discovery shows that Mr. Rizzolo has not fully and timely
9 disclosed his prior or present assets, he may be subject to sanctions.

10 Request No. 14 requested that Defendant produce all documents which relate to the transfer
11 of any real or personal property since September 20, 2001. To the extent that Defendant has any
12 records regarding the 1958 Corvette or other items of personal property, he is ordered to produce
13 them. The Court, however, will not order Defendant to produce records that he does possess or
14 control.

15 (b) Insurance Policies: Defendant has produced information on a life insurance policy,
16 apparently on his life, that was awarded to Lisa Rizzolo in their divorce action. There presumably
17 is a policy of automobile insurance on the vehicle that Defendant regularly uses and Defendant is
18 ordered to produce a copy of the insurance policy. If Defendant does not have the actual
19 automobile insurance policy, he should be able to obtain a declarations page for the policy from the
20 insurance company upon request or demand. Defendant Rizzolo is therefore ordered to produce his
21 automobile insurance policy(s) or the declarations page of such policy(s).

22 (c) Loans and Documents Relating to Living Arrangements, Allowance to Son:
23 Defendant is ordered to produce any documents relating to loans made to "Faraci," "M. Farris," and
24 "S. Stein" and any documents relating to his living arrangement at the residence of Cliff Diamond
25 that are in his possession, custody or control. If the loans or terms of his living arrangements are
26 not memorialized in any writing, then Defendant should so state in his supplemental response. To
27 the extent Defendant has documents relating to financial support that Defendant provides to his son
28 or receives from his father, he is also ordered to produce such documents. The Court finds that the

1 interrogatories referenced by Plaintiffs in their motion do not necessarily ask for information about
2 loans to other persons, allowances paid by Defendant to his son or financial support that Defendant
3 has received from his father. These issues can, in any event, be more fruitfully explored in a
4 deposition of Defendant.

5 **B. Plaintiffs' Request for Sanctions**

6 Fed.R.Civ.Pro. 37(b)(2) provides that if a party fails to obey an order to provide or permit
7 discovery, the court may make such orders in regard to the failure as are just. The rule includes a
8 list of sanctions that the court may impose, including the severe sanctions of dismissing the action
9 or entering a default judgment. The court may also enter an order treating as a contempt of court
10 the party's failure to obey the court's order. Rule 37(b)(2) also provides that the court shall require
11 the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable
12 expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was
13 substantially justified or that other circumstances make an award of expenses unjust.

14 Plaintiffs' counsel argued at the February 25th hearing that the severe sanction of striking
15 Mr. Rizzolo's answer and entering his default is appropriate. In regard to imposition of severe
16 sanctions, *Henry v. Gill Industries*, 983 F.2d 943, 948 (9th Cir. 1993) states:

17 "Because the sanction of dismissal is such a harsh penalty, the district
18 court must weigh five factors before imposing dismissal: (1) the
19 public's interest in expeditious resolution of litigation; (2) the court's
20 need to manage its dockets; (3) the risk of prejudice to the party
21 seeking sanctions; (4) the public policy favoring disposition of cases
22 on their merits; and (5) the availability of less drastic sanctions."
23 *Porter v. Martinez*, 941 F.2d 732,733 (9th Cir. 1991) (citations and
24 internal punctuation omitted).

25 The key factors are prejudice and the availability of lesser sanctions. *Henry*, 983 F.2d at
26 948, citing *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990). For dismissal or default to be
27 proper, the conduct to be sanctioned must also be due to willfulness, fault or bad faith by the losing
28 party. *Henry*, 983 F.2d at 947-48, citing *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334,
1337 (9th Cir. 1985); see also *Valley Engineers Inc. v. Electric Engineering Company*, 158 F.3d
1051 (9th Cir. 1998); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348
(9th Cir. 1995) (applying same test under court's inherent power to sanction). In deciding whether

1 dismissal or default is warranted, the court may consider all of the offending party's discovery
2 conduct. *Henry*, 983 F.2d at 947, citing *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1411 (9th
3 Cir. 1990).

4 In *Henry*, the plaintiff failed to provide relevant documents in response to requests for
5 production of documents and repeatedly delayed the taking of his deposition by cancelling it at the
6 last minute. Plaintiff argued that defendant was not prejudiced because it eventually obtained all
7 discovery it was seeking, including his deposition. The court stated, however, that a defendant
8 suffers prejudice if plaintiff's actions impair defendant's ability to go to trial or threaten the rightful
9 decision of the case. It also noted that as a result of plaintiff's wrongful delaying tactics, a key
10 witness for defendant became unavailable. The court also found that lesser sanctions had been tried
11 to obtain plaintiff's compliance and had failed. Therefore, the availability of lesser sanctions was
12 not a factor weighing against imposition of the severe sanction of dismissal. The court also
13 rejected plaintiff's assertion that his conduct was not willful or in bad faith. The court stated that
14 "disobedient conduct not shown to be outside the control of the litigant' is all that is required to
15 demonstrate willfulness, bad faith or fault." *Henry*, 983 F.2d at 948, citing *Fjelstad*, 762 F.2d at
16 1341.

17 In *Anheuser-Busch, Inc. v. Natural Beverage Distributors, Inc.*, 69 F.3d 337, 348 (9th Cir.
18 1995), the court stated that dismissal is warranted where a party has engaged deliberately in
19 deceptive practices that undermine the integrity of judicial proceedings. The court held that
20 plaintiff was prejudiced by defendant's failure to produce the documents because it was forced to
21 rely on incomplete and spotty evidence in presenting its defense to the counterclaim. *Anheuser-*
22 *Busch, Inc.*, 69 F.3d at 353-354. The court also rejected defendant's argument that plaintiff was
23 not prejudiced because the documents were produced two months before the scheduled
24 commencement of trial. The court noted that it has "squarely rejected the notion that a failure to
25 comply with the rules of discovery is purged by belated compliance. (citations omitted)."

26 In *Valley Engineers Inc. v. Electric Engineering Company*, 158 F.3d 1051, 1057 (9th Cir.
27 1998), the court stated that it is not always necessary for the court to first impose less severe
28 sanctions or to give any explicit warning of the dismissal or default sanction. The court stated that

1 “[t]he significance of warning is that a sanction may be unfair if the party could not have realized
2 that it was in jeopardy of so severe a consequence if it was in error regarding its discovery posture.
3 Rule 37 tells all lawyers and their clients that dismissal is possible if they violate discovery orders,
4 and direct warnings or other circumstances may make it clear that it is a real risk of continued
5 violation in the particular case.” The court further stated:

6 What is most critical for case-dispositive sanctions, regarding risk of
7 prejudice and of less drastic sanctions, is whether the discovery
8 violations “threaten to interfere with the rightful decision of the
9 case.” *Adriana*, 913 F.2d at 1412. While contumaciousness toward
10 the court needs a remedy, something other than case-dispositive
11 sanctions will often suffice. Dismissal is appropriate where a
12 “pattern of deception and discovery abuse made it impossible” for
13 the district court to conduct a trial “with any reasonable assurance
14 that the truth would be available.” *Id.*, at 1057-58, citing *Anheuser-
15 Busch, Inc.*, 69 F.3d at 352.

16 *Id.*, 158 F.3d at 1057-58.

17 Plaintiffs have failed to demonstrate that the severe sanction of rendering a default
18 judgment is warranted at this time. This does not mean, however, that Defendant Rizzolo’s
19 conduct in responding to discovery since Judge Pro granted Plaintiffs’ motion to compel on March
20 23, 2009 has been proper or acceptable. Defendant has not fully complied with his obligations to
21 disclose his assets or transfer of assets in response to Plaintiffs’ discovery requests. The Court is
22 particularly troubled by the information that Defendant did not disclose the deposit of \$990,000
23 into the “RLR Trust” bank account in 2008. It is not sufficient for Defendant to respond by stating
24 that information regarding this matter has been discovered by Plaintiffs through other means. The
25 information provided by Plaintiffs about this matter is very sketchy, however, and does not provide
26 this Court with a sufficient factual record upon which to base a sanctions order.

27 This case is not yet at the point where Plaintiffs’ ability to prove their case or obtain a fair
28 trial on the merits has been prejudiced such that the severe sanction of default judgment is
29 appropriate. Such prejudice and the imposition of severe sanctions may still be avoided if
30 Defendant complies with his discovery obligations and produces information and/or documents in
31 compliance with this order. The Court also notes that while a default judgment against Mr.
32 Rizzolo will be of benefit to the Plaintiffs, it will not provide the relief that Plaintiffs seek in this

1 case. Plaintiffs seek to discover what assets Defendant presently has and where and to whom
2 Defendant has transferred assets for purposes of attempting to establish fraudulent transfers, to set
3 those transfers aside and recover the assets for purposes of satisfying Plaintiffs' underlying claim.
4 The Court's power to hold Mr. Rizzolo in civil contempt is likely to be the most effective method
5 for coercing him into complying with the Court's discovery orders if he refuses to comply
6 voluntarily. Mr. Rizzolo is therefore cautioned that the Court *will* impose sanctions upon him, up
7 to and including contempt and/or recommending entry of a default judgment against him, if he fails
8 to fully comply with this order, as well as previously entered order (#117).

9 The Court will not award Plaintiffs expenses relating to this motion pursuant to Rule
10 37(b)(2). First, it appears that prior to the filing of this motion, Defendant's counsel was making
11 some effort to obtain and produce information and documents in response to Plaintiffs' counsel's
12 demands. Although this Court finds that those responses were still inadequate, the circumstances
13 make an award of fees and costs on this motion unjust. In addition, Plaintiffs' inadequately
14 supported motion to compel and motion for sanctions makes an award of fees and costs
15 inappropriate. The Defendant is also cautioned, however, that the Court will in the future award
16 Plaintiffs reasonable attorneys fees and costs if they are required to bring further motions to obtain
17 Defendant's compliance with court orders. Accordingly,

18 **IT IS HEREBY ORDERED** that Plaintiffs' Renewed Motion to Compel Defendant Rick
19 Rizzolo to Answer and Respond to Kirk Henry's First Set of Interrogatories and Requests for
20 Production and for Appropriate FRCP 37 Sanctions (#279) is **granted** in accordance with the
21 foregoing provisions of this order.

22 **IT IS FURTHER ORDERED** that Defendant shall provide full and complete discovery
23 responses within thirty (30) days of this order. Defendant's responses shall include any and all
24 documents that the Court has ordered him to request and obtain from banks, financial institutions,
25 credit card providers or other persons or entities. To the extent such documents have been
26 requested, but not yet received by Defendant, he shall provide full and complete information
27 showing that he has requested such documents and when he or his counsel expect to receive and
28 produce such documents. To the extent Defendant is unable to produce information and

1 documents that the Court has ordered him to produce, he shall provide a full and complete
2 explanation under oath setting forth the reasons why such information or documents cannot be
3 provided.

4 DATED this 11th day of March, 2010.

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7 GEORGE FOLEY, JR.
8 United States Magistrate Judge
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