



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.<sup>1</sup>

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28 <sup>1</sup> Plaintiffs did not attach copies of the actual discovery requests and responses to their renewed motion to compel. At the February 25<sup>th</sup> 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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25           the discovery requests and responses as a supplement to their motion. Plaintiffs did so on March 2,  
26 2009. *See Plaintiffs' Supplement to Renewed Motion to Compel* (#301). The Court also ordered  
27 the Defendant to file a supplement listing the documents that Defendant has produced to Plaintiffs  
28 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.

28 . . .

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 25<sup>th</sup> 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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