

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES - NORTHWEST DISTRICT**

PREMIER JETS INC.,)	CASE NO: BC672915
)	
Plaintiff,)	
)	(TENTATIVE) ORDER RE:
vs.)	DEFENDANT’S MOTION FOR
)	TERMINATING SANCTIONS,
SOCAL JETS INC.,)	EVIDENTIARY SANCTIONS, AND
)	MONETARY SANCTIONS
Defendant.)	
)	
)	Dept. U
)	8:30 a.m.
)	December 1, 2022

I. BACKGROUND

Plaintiff Premier Jets is an Oregon corporation that provides air ambulance services and private charters for domestic and international flights. Defendant SoCal Jets is a federally registered repair station for corporate jets. In the summer of 2016, Plaintiff retained Defendant to perform a “12,000-hour inspection” of Plaintiff’s Learjet aircraft, registered as N361PJ, along with related repair and maintenance work. The contract called for completion in three weeks. During the 12,000-hour inspection, the right-hand hydraulic pressure hose assembly and the right-hand fuel motive hose assembly were inadvertently switched. Defendant’s mistake required repairs by a third-party vendor. Defendant paid for the repairs and the N361PJ Learjet was returned in airworthy condition to Plaintiff, but Plaintiff was unable to use the Learjet for several months between late January and early November of 2017.

On August 18, 2017, Plaintiff filed this lawsuit against Defendant alleging causes of action for negligence and breach of contract. In its complaint, Plaintiff alleges monetary

damages for “costs to repair the damage caused by SoCal as well as the loss of use of the aircraft for an extended period of time.”

Defendant paid for the third-party repair costs for the N361PJ Learjet, and Defendant’s insurance carrier subsequently paid Plaintiff approximately \$420,000. The parties continue to dispute the amount of Plaintiff’s lost revenue due to loss of use.

On May 7, 2018, Defendant propounded document requests to obtain records relevant to Plaintiff’s loss of use claim. Plaintiff did not adequately respond, and, in fact, indicated it had no responsive documents to at least some of the requests. On April 18, 2019, the Court ordered Plaintiff to properly respond further to both Special Interrogatories, Set Two, and Requests for Production of Documents.

After Plaintiff failed to do so, Defendant moved for sanctions against Plaintiff for misuse of the discovery process. Finding good cause to impose sanctions against Plaintiff due to Plaintiff falsely claiming that it had produced everything in its possession, the Court imposed monetary and evidentiary sanctions against Plaintiff on December 6, 2019. Plaintiff had withheld critical Dispatch Internal Quote Sheets (“DIQS”), which provided detailed analysis of Plaintiff’s business operations, including documenting flight requests.

Nearly three years later, on August 10, 2022, at the deposition of Plaintiff’s operations manager/flight coordinator Michael Laramie, Defendant learned Plaintiff had further violated the Court’s April 18, 2019 discovery order by withholding additional key documents.

For the first time, Laramie revealed that Plaintiff created spreadsheets—separate from the DIQS—to track customer quotes and the reasons why a flight might not have been booked.

After the Laramie deposition, Plaintiff produced some spreadsheets, but they did not match what

Laramie described.¹ The spreadsheets provided to Defendant are missing information explaining why particular flights were not booked—information which speaks directly to Defendant’s claim for lost use.

On August 31, 2022, Defendant filed this motion for terminating, evidentiary, and monetary sanctions. On October 28, 2022, Plaintiff filed its opposition along with a request for judicial notice. On November 17, 2022, Defendant filed a reply and raised objections to declarations offered by Plaintiff.

II. REQUEST FOR JUDICIAL NOTICE

Plaintiff requests the Court take judicial notice of two documents: (1) a sample spreadsheet, or business record, created by Plaintiff’s employee; and (2) excerpts from the deposition transcript of Michael Laramie.

“Judicial notice may not be taken of any matter unless authorized or required by law.” Evid. Code § 450. The Court is not authorized to take judicial notice of business records or deposition transcripts. See Evid. Code §§ 450, 451. Plaintiff’s request is DENIED.

The proper method for offering evidence not judicially noticeable is by attaching it as an exhibit to the declaration of a witness with personal knowledge. Nonetheless, the Court will consider the sample spreadsheets and deposition transcript because the declaration of Michael Laramie establishes foundation for both exhibits.

III. EVIDENTIARY OBJECTIONS

¹ The Court notes that Plaintiff’s counsel, Arthur Willner, provided a declaration dated October 27, 2022, that Mr. Willner had no knowledge of the existence of the spreadsheets prior to Michael Laramie’s August 10, 2022 deposition. Based on the materials provided to the Court, the findings of discovery abuse herein relate to Plaintiff’s principals’ conduct, not to conduct of Plaintiff’s counsel.

Defendant raises twenty objections to the declaration of Arthur Willner. Objections numbered 1-18 and 20 are OVERRULED. Objection number 19 is SUSTAINED. The statement is hearsay and Michael Laramie's deposition testimony speaks for itself.

Defendant also raises three objections to the declaration of Roger Kelsay. All three objections are OVERRULED.

IV. LEGAL STANDARD

Under CCP 2023.030, the Court may, after appropriate notice and a hearing, impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

(a) The Court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.

(b) The Court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The Court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.

(c) The Court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence.

(d) The Court may impose a terminating sanction.

Code Civ. Proc § 2023.010 defines conduct subject to sanctions. Misuses of the discovery process include, but are not limited to, the following:

(d) Failing to respond or to submit to an authorized method of discovery;

- (f) Making an evasive response to discovery;
- (g) Disobeying a court order to provide discovery.

The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. If a lesser sanction fails to curb misuse, a greater sanction is warranted. Continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb the abuse. See *City of Los Angeles v. PricewaterhouseCoopers, LLC* (2022) 84 Cal.App.5th 466 (quoting *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992).

“A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.” *PricewaterhouseCoopers*, 84 Cal.App.5th 466 (quoting *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279–280).

V. DISCUSSION

a. Plaintiff continued to violate the Court’s discovery order after the Court imposed monetary and evidentiary sanctions.

Defendant argues that Plaintiff has repeatedly failed to produce critical, highly relevant, and responsive documents despite being Court-ordered to do so. Plaintiff argues it has fully responded to Defendant’s discovery requests.

“On receipt of a response to a demand for inspection, copying, testing, or sampling, the demanding party may move for an order compelling further response to the demand...” Code Civ. Proc. § 2031.310(a). “[I]f a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an

evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of, or in addition to, that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).” Code Civ. Proc. § 2031.310(i).

In this case, Defendant has continued to disobey Court orders after being sanctioned. On May 7, 2018, Defendant propounded its Request for Production of Documents, Set Two, which sought documents and communications relating to contracts Plaintiff was unable to perform due to Plaintiff’s lost use of the N361PJ Learjet. The request sought highly relevant information since Plaintiff contends it lost \$2,033,408.33 in revenue while the N361PJ Learjet was grounded. Defendant granted Plaintiff several extensions after the responses were due. Notwithstanding the extensions, on September 18, 2018, Defendant was forced to file a motion to compel responses to its requests for information related to Plaintiff’s loss of use claims. Plaintiff served responses before the hearing date, and its president, Roger Kelsay, verified (falsely) that all documents evidencing missed flights were produced.

Despite Kelsay’s verification, Plaintiff’s production of documents was deficient. An IDC was held on March 21, 2019, which resulted in the issuance of a stipulation and court order specifying that Plaintiff was to provide further responses to Defendant’s requests for documents and communications relating to loss of use. Picker Decl., Ex. M, Ex. N. Pursuant to the Court’s April 18, 2019 order, Plaintiff served further discovery responses and Kelsay once again (falsely) verified that all documents evidencing his company’s loss of use claim had been produced.

On May 10, 2019, Kelsay’s deposition was taken. The deposition notice required him to produce all documents that evidenced his company’s loss of use claims for each month the N361PJ Learjet was grounded. Picker Decl., Ex. R. At Kelsay’s deposition Plaintiff’s counsel represented that all documents had been produced. *Id.*, Ex. C; 7:02-9:07.

However, on August 1, 2019, Plaintiff's employee Morgan Jensen revealed during his deposition that Plaintiff had failed to produce its quote sheets—the DIQS. *Id.*, Ex. E; 6:6-12, 6:23-7:19, 10:3-21. Jensen explained the importance of the DIQS and why they speak to Plaintiff's claim of lost use. *Id.*; 18:24- 21:10.

Because of Plaintiff's failure to produce the DIQS—and Kelsay's false claims that Plaintiff had fully complied with Defendant's discovery requests—the Court granted Defendant's motion to impose sanctions for misuse of the discovery process on December 6, 2019. Pursuant to Code of Civil Procedure Section 2031.320(c), the Court imposed monetary sanctions equal to the reasonable expenses and attorney's fees to be incurred by Defendant to re-take the depositions of President Roger Kelsay and Operations Manager Morgan Jensen.

The Court's order also recommended that a modified version of CACI No. 203 be given to the jury at trial, informing the jury of Plaintiff's failure to produce the DIQS despite having the power and obligation to do so.

Kelsay's deposition resumed on January 14, 2020, and Defendant's deposition notice again asked Plaintiff to produce all documents supporting its economic/loss of use claims. Picker Decl., Ex. T. A second session of Jensen's deposition was taken on January 15, 2020, during which Jensen denied the existence of documents that tracked missed flights in addition to the DIQS. *Picker Decl., Ex. E, Excerpt of Second Jensen Deposition, Deposition pages 65-69.*

But on August 10, 2022, Defendant took the deposition of Plaintiff's flight coordinator and interim operations manager, Michael Laramie, who revealed that as part of Plaintiff's business, Plaintiff created and maintained detailed spreadsheets to track each customer quote so that Plaintiff could “[keep] track of what we've been doing throughout the months, you know, if—to where upper echelon knows, okay, who we've flown for, what kind of flights we're

doing.” *Laramie Deposition, page 42:11-20*. Laramie further stated that the unproduced spreadsheets listed “the customer, the dates flown, what kind of flight it would be, how much it was; and—and **if we didn’t fly it, the reason why we didn’t fly it.**” *Laramie Deposition, page 43:6-18*.

In other words, after five years of litigation, repeated discovery requests by Defendant, monetary sanctions, evidentiary sanctions, verified statements by Plaintiff’s president denying the existence of these spreadsheets, and a Court order directing Plaintiff to produce relevant documents, Plaintiff still failed, either negligently or deliberately, to produce critical documents—specifically, spreadsheets explaining why flights were missed—that were highly responsive to Defendant’s requests for production.

Laramie’s admission during his deposition on August 10, 2022 came after Kelsay twice verified under oath that Plaintiff had produced all responsive documents, after the Court issued an order requiring Plaintiff to produce all responsive documents, and after the Court imposed monetary and evidentiary sanctions for Plaintiff’s violation of that order.

Plaintiff argues in its opposition that it has produced over 7,000 documents in response to Defendant’s requests for production. Plaintiff’s argument is not persuasive. Regardless of how many documents Plaintiff produced, the issue is whether Plaintiff violated a court order by failing to produce highly relevant and responsive documents that go to the heart of its lost use claims.

Plaintiff also argues that it subsequently produced the spreadsheets in question. Defendant disputes the legitimacy of the spreadsheets, alleging that they do not match the spreadsheets described by Laramie in his deposition. Defendant notes that the spreadsheets produced by Plaintiff are missing the most crucial information described by Laramie—the

section that explains why flights were missed. This information speaks directly to Plaintiff's claims for lost use, as flights could have been missed for reasons other than the N361PJ Learjet being grounded.

Regardless of the disputed accuracy and completeness of Plaintiff's late-produced DIQS and spreadsheets, it is clear Plaintiff continued to violate the Court order after being sanctioned for failing to produce the spreadsheets in the first place. Kelsay, Plaintiff's President, knows the spreadsheets are both highly relevant and responsive to Defendant's request for production because he admitted in his deposition that he instructed his employees to keep track of missed flights for the purposes of this lawsuit. Supp. Picker Decl., Ex. 2; 126:25-130:25. Previous sanctions did not deter Plaintiff from continuing to violate the Court's order. Pursuant to Code of Civil Procedure Sections 2031.300(c), 2023.010, and 2023.030, additional sanctions are warranted.

b. Since previous sanctions have not deterred Plaintiff from withholding highly responsive documents, the appropriate course of action is for the Court to impose an evidentiary sanction barring Plaintiff from offering any evidence of lost revenue.

Defendant argues that terminating sanctions are warranted because monetary and evidentiary sanctions previously imposed by the Court have not deterred Plaintiff from violating the Court's order regarding the production of documents and communications relating to Plaintiff's claim of lost use. Plaintiff argues that any sanctions beyond the costs actually incurred by Defendant due to the late production of the spreadsheets are inappropriate.

"The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence." Code

Civ. Proc. § 2023.030(c). “Imposition of sanctions for misuse of discovery lies within the trial court's discretion and is reviewed only for abuse.” *Doppes, supra*, 174 Cal.App.4th at 991.

“The discovery statutes evince an incremental approach to discovery sanctions...If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions...where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.” *Id.* at 992 [citations omitted].

On December 6, 2019, the Court imposed monetary and evidentiary sanctions on Plaintiff for violating the Court’s April 18, 2019 order. Specifically, the Court’s evidentiary sanction recommended that the jury be instructed that jurors may consider the following: (1) Plaintiff created the DIQS; (2) Despite Kelsay verifying that Plaintiff had produced all documents responsive to Defendants request for information Plaintiff failed to produce the DIQS; and (3) Despite Kelsay’s second verification and a Court order mandating their production Plaintiff again failed to produce the DIQS.

Now, Plaintiff has failed to produce yet another set of highly responsive documents—the spreadsheets described by Laramie. Like the DIQS that accompany them, the spreadsheets are highly relevant to Plaintiff’s lost use claims. Plaintiff is claiming lost revenue (and thus lost profit) from being unable to convert customer quotes into flights because the N361PJ Learjet was grounded for repairs due to Defendant’s mistake while inspecting the aircraft. The question, however, is whether there were alternative reasons, unrelated to Defendant’s conduct, for Plaintiff being unable to complete those flights. Like the DIQS, the withheld spreadsheets help answer that question.

Defendant's expert opines in his supplemental declaration that Plaintiff's claims of lost revenue as a result of the N361PJ Learjet being grounded are not supported. Supp Weiner Decl. ¶ 3. Defendant's expert also states that the documents initially produced by Plaintiff did not allow for a meaningful study of the conversion of customer quotes into actual sales—directly contradicting Plaintiff's contention that it produced adequate documentation supporting its claims. *Id.* ¶ 4. Defendant offers persuasive evidence that strongly suggests the DIQS and spreadsheets were intentionally withheld by Plaintiff because they fail to support the amount of lost revenue claimed by Plaintiff.

Plaintiff has already been sanctioned for withholding the DIQS which speak to lost revenue. Those sanctions did not deter Plaintiff from withholding the spreadsheets described by Laramie which also speak to loss of use. And Defendant has been severely prejudiced by not having access to these the DIQS and spreadsheets.

Pursuant to Code of Civil Procedure Section 2023.030 and binding case law, due to the prior imposition of less severe sanctions and the ongoing egregious discovery violations herein, the Court finds the appropriate course of action is to impose an evidentiary sanction barring Plaintiff from offering any evidence of lost revenue.

Plaintiff argues such a sanction would essentially terminate the case since the only remaining dispute is over the amount of Plaintiff's lost revenue. The Court finds that under the circumstances of this case and Plaintiff's ongoing discovery violations spanning years of litigation, a *de facto* termination would not be overly harsh. “[W]hen a party repeatedly and willfully fails to provide certain evidence to the opposing party as required by the discovery rules, preclusion of that evidence may be appropriate, even if such a sanction proves

determinative in terminating the plaintiff's case.” *Biles v. Exxon Mobil Corp.*, (2004) 124 Cal. App. 4th 1315, 1327.

c. Defendant has been severely prejudiced by Plaintiff's repeated failure to produce the DIQS and spreadsheets.

The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse. *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293. The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should attempt to tailor the sanction to the harm caused by the withheld discovery. See *Doppes, supra*, 174 Cal.App.4th at 992.

Here, the withheld discovery was first the DIQS and then the spreadsheets described by Laramie in his deposition—five years into litigation. Plaintiff's repeated failure to produce these documents caused harm by impeding Defendant's ability to evaluate Plaintiff's lost use claims and by significantly increasing Defendant's fees and costs for this litigation.

Plaintiff argues that it ultimately produced both the DIQS and the spreadsheets. The DIQS were only produced after the Court sanctioned Plaintiff for not producing them. As for the spreadsheets, Plaintiff contends they served as the internal calculations of operations manager Ron Levesque in preparation for his meetings with Kelsay. Mr. Levesque recently passed away. Defendant could have deposed Levesque about the spreadsheets if Plaintiff had timely produced them. Instead, Plaintiff waited until after Levesque's death to produce the spreadsheets—leaving Defendant with little way to refute Plaintiff's contention that they are essentially nothing more than Levesque's personal notes. Nor is Defendant able to question Levesque about the meaning, context, legitimacy, or accuracy of the sheets produced. Notwithstanding Defendant's allegations that the true spreadsheets Laramie described in his deposition have either been altered

or are still being withheld, the spreadsheets Plaintiff produced are much less useful now that Levesque has passed. The Court takes a dim view of Plaintiff's apparent effort to pin the blame for Plaintiff's discovery abuses on Plaintiff's one employee who will never be able rebut Plaintiff's executives' contentions.

Defendant incurred significant, unnecessary expenses due to Plaintiff's failure to timely produce the DIQS and spreadsheets. Defendant's expert states he has been paid \$85,302.90 to date, but that the amount of work needed to complete his assignment would have involved much less time—and in turn much less expense to Defendant—had the documents been produced sooner. Weiner Decl. ¶ 5. And this does not include the attorney fees and costs Defendant has incurred and will incur from re-taking the depositions of the witnesses who can testify about the withheld documents.

Defendant's expert states that the native format of the spreadsheets, which Plaintiff finally produced on August 29, 2022, shows that Plaintiff's damage allegations are grossly exaggerated. Weiner Decl. ¶ 4. One might infer that Plaintiff withheld the spreadsheets because they discredit its lost revenue claims. Regardless of Plaintiff's motivation, its failure to produce the DIQS and spreadsheets was a willful violation of this Court's April 18, 2019 order.

Considering Plaintiff's repeated violations, it is this Court's responsibility to tailor sanctions to the harm Plaintiff has caused. See *Doppes*, 174 Cal.App.4th at 992. At this point, especially given Levesque's death, Plaintiff's repeated discovery violations have made it nearly impossible for Defendant to fairly evaluate and defend itself against Plaintiff's claims for lost revenue.

Accordingly, the Court imposes an evidentiary sanction barring Plaintiff from offering evidence of lost revenue at trial.

d. Should the parties fail to agree on the amount of sanctions, the Court will set a hearing to determine the appropriate amount.

Defendant also seeks \$106,725.00 in monetary sanctions. Pursuant to Code of Civil Procedure Sections 2031.310, 2031.320, and 2023.030, monetary sanctions against Plaintiff are warranted, although perhaps not in the amount suggested by defense counsel. The Court encourages the parties to reach a stipulation as to appropriate monetary sanctions. If the parties are unable to do so, given the high dollar amount of sanctions requested, the Court will schedule a hearing to determine the appropriate amount. Should a hearing be scheduled, the parties would be requested to submit briefs on the issue accordingly.

VI. CONCLUSION

Defendant's motion for terminating sanctions is **DENIED**.

Defendant's motion for evidentiary sanctions is **GRANTED**. **Plaintiff shall be barred from introducing evidence of its lost revenues at trial.**

Defendant's motion for monetary sanctions is **GRANTED** for an amount to be determined.

The parties are **ORDERED** to meet and confer in an effort to reach an agreement as to an appropriate sanction amount, in an amount less than \$106,725 requested by Defendant.

Should the parties be unable to reach an agreement, Defendant's motion for monetary sanctions shall be scheduled for a hearing.

Defendant is **ORDERED** to give notice.

DATED: December 1, 2022

Valerie Salkin
Judge of the Superior Court