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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

NICOLE LYON,

Case No. 1:16-cv-00401-DAD-SKO

Plaintiff,

**FINDINGS AND RECOMMENDATIONS  
THAT PLAINTIFF’S UNOPPOSED  
MOTION TO STRIKE DEFENDANT’S  
ANSWER PURSUANT TO FED. R. CIV. P.  
37(b)(2)(A)(iii) BE GRANTED AND  
DEFAULT ENTERED**

v.

BERGSTROM LAW, LTD.,

(Doc. 30)

Defendant.

**OBJECTIONS DUE: 14 DAYS**

**I. INTRODUCTION**

On December 28, 2016, Plaintiff Nicole Lyon filed a Motion to Strike Defendant’s Answer Pursuant to Fed. R. Civ. P. 37(b)(2)(A)(iii) based on Defendant Bergstrom Law, Ltd.’s failure to obey the Court’s Order entered November 2, 2016 (Doc. 27), to provide discovery and to pay attorney’s fees. (Doc. 30.) Defendant has not filed an opposition to the Motion.

Plaintiff’s motion is therefore deemed unopposed. After having reviewed the papers and supporting material, the matter is deemed suitable for decision without oral argument pursuant to Local Rule 230(g), and the Court hereby VACATES the hearing set for January 18, 2017. For the reasons set forth below, the undersigned RECOMMENDS that Plaintiff’s unopposed motion be GRANTED, that Defendant’s Answer be STRICKEN, and that the Clerk be DIRECTED to ENTER DEFAULT against Defendant.

1                                   **II.           PROCEDURAL AND FACTUAL BACKGROUND**

2           On March 24, 2016, Plaintiff filed a complaint alleging damages against Defendant, a law  
3 firm, for violations of (1) the Fair Debt Collections Practices Act (“FDCPA”), 15 U.S.C. §§ et  
4 seq., and (2) the Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), Cal. Civ. Code  
5 §§ 1788-1788.32. (Doc. 1.) Plaintiff alleges that sometime before February 2016, she fell behind  
6 in payments allegedly owed on a debt. (Doc. 1 at ¶ 24.) In or about February 2016, Defendant  
7 contacted Plaintiff by telephone “in an attempt to collect Plaintiff’s alleged debt and left Plaintiff a  
8 voicemail.” (*Id.* at ¶26.) Defendant, however, did not disclose in this voicemail message that the  
9 communication was from a debt collector. (*Id.* at ¶ 27.) Plaintiff alleges that this conduct violated  
10 15 U.S.C. § 1692e(11)’s required disclosure that the communication is from a debt collector. (*Id.*)  
11 Because this portion of the FDCPA is incorporated by reference in the Rosenthal Act, Plaintiff  
12 alleges that the conduct violated the Rosenthal Act as well. (*Id.* at ¶ 28.)

13           On October 14, 2016, Plaintiff filed a “Motion Regarding Discovery” based on Defendant  
14 Bergstrom Law, Ltd.’s complete failure to provide responses to Plaintiff’s outstanding discovery  
15 requests consisting of Interrogatories and Requests for Production of Documents. (Doc. 25.)  
16 Defendant did not file an opposition to the Motion. On November 2, 2016, the Court granted  
17 Plaintiff’s motion and ordered Defendant to serve written responses to Plaintiff’s Interrogatories  
18 and Requests for Production of Documents by November 9, 2016, and to pay Plaintiff’s attorney  
19 reasonable attorney’s fees in the amount of \$1,475.00 by December 2, 2016. (*See* Doc. No. 27.)

20           On November 3, 2016, Plaintiff’s counsel, Crosby S. Connolly, mailed, faxed and emailed  
21 Defendant and Jeremy Bergstrom, a partner in Defendant, notice of the Court’s November 2, 2016  
22 Order. (*See* Doc. 30, Ex. 2, Declaration of Crosby S. Connolly (“Connolly Decl.”), ¶ 9 and Ex.  
23 A.) On November 9 and 14, 2016, Mr. Connolly left voicemails with Yvonne McGovern, an  
24 attorney with Defendant, requesting an update as to the status of Defendant’s discovery responses.  
25 (*See id.* ¶¶ 10, 11.)

26           On November 14, 2016, Mr. Connolly spoke with a secretary in Defendant’s office who  
27 informed him that Mr. Bergstrom would be returning Mr. Connolly’s phone call “shortly.” (*See*  
28 *id.* ¶ 12.) The call went unreturned. (*See id.* ¶ 13.) That next day, Mr. Connolly once again

1 contacted Defendant and left a voicemail in its general mailbox inquiring as to the status of  
2 Defendant's discovery responses. (*See id.* ¶ 14.)

3 On November 16, 2016, Mr. Connolly and Robert L. Hyde, a partner at Hyde & Swigart,  
4 called Mr. Bergstrom to discuss Defendant's failure to comply with the Court's November 2, 2016  
5 Order. During this phone call, Mr. Bergstrom stated, among other things, that he was a "little  
6 behind" with his work load, and "had not read the Court Order." (*See id.* ¶ 15.) On November 21,  
7 2016, Plaintiff filed a "Notice of Defendant's Failure to Comply with the November 2, 2016 Court  
8 Order," indicating that Defendant had not complied with the Court's Order. (Doc. 28.)

9 On December 8, 2016, Mr. Connolly informed Ms. McGovern that Plaintiff intended to  
10 file a motion to strike Defendant's answer for refusing to comply with the Court's November 2,  
11 2016 Order. (*See id.* ¶ 16.) Plaintiff filed another "Notice of Defendant's Failure to Comply with  
12 the November 2, 2016 Court Order" on December 12, 2016, again advising the Court of  
13 Defendant's failure to comply. (Doc. 29.) On December 28, 2016, Plaintiff filed the present  
14 motion to strike pursuant to Fed. R. Civ. P. 37(b)(2)(A)(iii) (Doc. 30), to which Defendant did not  
15 file an opposition (*see* Docket). To date, Defendant has not complied with the Court's Order of  
16 November 2, 2016.

### 17 III. DISCUSSION

#### 18 A. Legal Standard

19 Under Federal Rule of Civil Procedure 37, the Court may impose sanctions against a party  
20 that fails to obey a court order to provide discovery, including "striking pleadings in whole or in  
21 part . . . ." Fed. R. Civ. P. 37(b)(2)(A)(iii). Before striking a pleading, and declaring default as a  
22 result, a court must consider: "(1) the public's interest in expeditious resolution of litigation; (2)  
23 the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public  
24 policy favoring the disposition of cases on their merits; and (5) the availability of less drastic  
25 sanctions." *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 788 (9th Cir. 2011). "Where a court order is  
26 violated, the first and second factors will favor sanctions and the fourth will cut against them."  
27 *Computer Task Group, Inc. v. Brothy*, 364 F.3d 1112, 1115 (9th Cir. 2004).

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1 In addition, “[w]here the sanction results in default, the sanctioned party’s violations must  
2 be due to the ‘willfulness, bad faith, or fault’ of the party.” *Jorgensen v. Cassidy*, 320 F.3d 906,  
3 912 (9th Cir. 2003) (quoting *Hyde & Drath v. Baker*, 24 F.3d 1162, 1167 (9th Cir. 1994)). *See*  
4 *also Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985). “Disobedient  
5 conduct not shown to be outside the control of the litigant is sufficient to demonstrate willfulness,  
6 bad faith, or fault.” *Hyde & Drath*, 24 F.3d at 1167. “A single willful violation may suffice  
7 depending on the circumstances.” *United States v. Approximately \$30,000.00 in U.S. Currency*,  
8 No. 1:13-CV-1542 GSA, 2015 WL 5097707, at \*8 (E.D. Cal. Aug. 28, 2015). *See also*  
9 *Probuilders Specialty Ins. Co. v. Valley Corp.*, No. C10-05533 EJD HRL, 2012 WL 6045753, at  
10 \*4 (N.D. Cal. Nov. 28, 2012) (“Although case-dispositive sanctions are usually reserved for  
11 repeated violations of court orders, even a single willful violation may suffice, depending on the  
12 circumstances.”).

13 **B. Analysis**

14 As in most cases, the first two factors “facially favor” Plaintiff. *See United States v.*  
15 *\$61,000.00 in U.S. Currency*, No. 2:11-CV-09384-ODW, 2013 WL 1867536, at \*2 (C.D. Cal.  
16 May 3, 2013). Defendant’s inaction has also caused Plaintiff prejudice: Plaintiff has not been able  
17 to obtain responses to Interrogatories and Requests for Production of Documents from Defendant,  
18 which in turn has “obstruct[ed] Plaintiff’s ability to adequately and reasonable [sic] pursue her  
19 case.” (Doc. 30 at 3:25-26.) While public policy generally favors a decision on the merits, less  
20 drastic measures here are unlikely to be effective. The Court imposed lesser sanctions in its  
21 November 2, 2016 Order, requiring Defendant to provide written responses to Plaintiff’s  
22 Interrogatories and Requests for Production of Documents and awarding reasonable attorney’s  
23 fees in the amount of \$1,475.00—to no avail. (*See* Doc. 27.) Defendant’s failure to comply with  
24 its discovery obligations and the Court’s November 2, 2016 Order—not to mention its failure to  
25 oppose this very motion—demonstrates that a lesser sanction would likely be met with continued  
26 disinterest.

27 Finally, Defendant’s failure to cooperate in discovery could not possibly have been caused  
28 by circumstances beyond its control. By entering an appearance and contesting this action,

