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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. 2:11-cv-2826-MCE-EFB

vs.

DEBRA L. CAMPBELL;  
GARY D. CAMPBELL,

Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

On November 14, 2012, the undersigned heard plaintiff's motion for sanctions, as well as plaintiff's motion for an order to show cause why defendants should not be held in contempt. *See* Dckt. Nos. 23, 24. Attorney Boris Kukso appeared at the hearing on behalf of plaintiff; no appearance was made on behalf of defendants. For the reasons stated on the record at the hearing, as well as for the additional reasons stated herein, the undersigned recommends that plaintiff's motion for sanctions be granted and plaintiff's contempt motion be denied.

BACKGROUND

On August 20, 2012, the court granted plaintiff's motion to compel defendants to provide their initial disclosures and to respond to plaintiff's April 27, 2012 discovery. The court ordered defendants to provide plaintiff with those disclosures and that discovery on or before September 3, 2012. Dckt. No. 20 at 3-4. The court also granted plaintiff's request for discovery sanctions

1 and directed plaintiff to submit a declaration regarding its reasonable expenses incurred in  
2 making the motion to compel. *Id.* at 4. The August 20, 2012 order admonished defendants that  
3 “failure to comply with this order and/or continued failures to comply with the Local Rules  
4 and/or the Federal Rules of Civil Procedure may result in the imposition of sanctions, including  
5 monetary sanctions and/or the striking of defendants’ answer and entry of their default. *See* E.D.  
6 Cal. L.R. 110; Fed. R. Civ. P. 37(b)(2).” *Id.* Then, on August 27, 2012, after plaintiff filed a  
7 declaration regarding its expenses, the undersigned issued an order directing plaintiff to  
8 reimburse plaintiff in the total amount of \$1,656 within fourteen days, or by September 10, 2012.  
9 Dckt. No. 22.

10 Plaintiff’s counsel sent a letter to defendants’ counsel on August 31, 2012, advising him  
11 of the deadline to respond to court ordered discovery requests and to make the \$1,656 court  
12 ordered payment. Kukso Decl., Dckt. No. 23-1, ¶ 3, Ex. 1; *see also* Dckt. No. 24-2. On August  
13 31, 2012, plaintiff’s counsel received an email from defendants’ counsel stating that he was  
14 mailing the discovery responses that day. *Id.* ¶ 4, Ex. 2. Plaintiff’s counsel received an envelope  
15 on September 7, 2012 from defense counsel (postmarked August 31, 2012), containing  
16 defendants’ discovery responses, but not their initial disclosures. *Id.* ¶ 5. Therefore, plaintiff’s  
17 counsel emailed defense counsel informing him that the envelope did not contain the initial  
18 disclosures. *Id.* ¶ 5, Ex. 3. Plaintiff’s counsel then sent a letter to defense counsel on September  
19 10, 2012, once again informing him that the envelope did not contain defendants’ initial  
20 disclosures, requesting that the initial disclosures be provided immediately, and reminding  
21 defense counsel that the court ordered defendants to pay \$1,656. *Id.* ¶ 6, Ex. 4. Another letter  
22 was sent on September 18, 2012, requesting that the initial disclosures be provided immediately  
23 and informing defense counsel that defendants are in violation of the court’s August 20 and  
24 August 27, 2012 orders. *Id.* ¶ 7, Ex. 5. Plaintiff still did not receive defendants’ initial  
25 disclosures or the \$1,656 payment; therefore, on September 25, 2012, plaintiff filed its motions  
26 for sanctions and contempt. *Id.* ¶¶ 8, 9.

1 Consistent with the pattern noted above, defendants have failed to file any response to  
2 either of plaintiff's motions. Therefore, on October 18, 2012, the undersigned continued the  
3 hearing on the motions and ordered defendants to respond to both of the motions and to show  
4 cause why the motions should not be granted, why their answer should not be stricken and why  
5 default judgment should not be entered against them, why they should not be held in contempt of  
6 court, and why they should not be required to pay additional monetary sanctions. Dckt. No. 26.  
7 The order further provided that "[f]ailure of defendants to respond to this order to show cause or  
8 . . . to file an opposition to either motion will be deemed a statement of non-opposition to that  
9 motion, and may result in a recommendation that plaintiff's motion(s) be granted, that  
10 defendants' answer be stricken and default judgment be entered against them, that they be held  
11 in contempt, and/or that defendants be required to pay additional monetary sanctions." *Id.* at 5.

12 Those warnings have had no effect. Defendants failed to respond to the order to show  
13 cause, failed to file a response to the motions, and failed to appear at the November 14 hearing.  
14 Very plainly, defendants continue to be in violation of the court's orders.

15 MOTION FOR SANCTIONS

16 Plaintiff moves for sanctions against defendants Gary and Debra Campbell pursuant to  
17 Federal Rule of Civil Procedure 37 and Local Rule 110 for not complying with this court's  
18 August 20 and August 27, 2012 orders requiring defendants to provide their initial disclosures  
19 under Federal Rule of Civil Procedure 26(a)(1) and requiring defendants to pay \$1,656 for that  
20 failure. Dckt. No. 23 (citing Dckt. Nos. 20, 22). Plaintiff requests that defendants' answer be  
21 stricken and default entered against them, or, in the alternative, that defendants be prohibited from  
22 introducing any evidence or witnesses that have not been identified in initial disclosures as was  
23 required by the August 20, 2012 order. Dckt. No. 23 at 2. Plaintiff also contends that a  
24 monetary penalty should be imposed on defendants and their attorney, including, but not limited  
25 to, the expenses of bringing the motion for sanctions. *Id.*

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1 Federal Rule of Civil Procedure 37(b) provides that if a party “fails to obey an order to  
2 provide or permit discovery, . . . the court where the action is pending may issue further just  
3 orders,” including an order “striking pleadings in whole or in part[,] rendering a default  
4 judgment against the disobedient party[, and/or] treating as contempt of court the failure to obey  
5 any order . . . .” Fed. R. Civ. P. 37(b)(2)(A)(iii), (vi), (vii). Local Rule 110 also provides that  
6 “[f]ailure of counsel or of a party to comply with these Rules or with any order of the Court may  
7 be grounds for imposition by the Court of any and all sanctions authorized by statute or Rule or  
8 within the inherent power of the Court.” E.D. Cal. L.R. 110.

9 The drastic terminating sanction of entry of default judgment against a defendant is  
10 “appropriate only in ‘extreme circumstances’ and where the violation is ‘due to willfulness, bad  
11 faith, or fault of the party.’” *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).  
12 This standard is met by “[d]isobedient conduct not shown to be outside the litigant’s control.”  
13 *Id.* As discussed below, it is a standard that is met here.

14 The Ninth Circuit has developed a five part test to evaluate whether a terminating  
15 sanction under Rule 37 is just: “(1) the public’s interest in expeditious resolution of litigation;  
16 (2) the court’s need to manage its dockets; (3) the risk of prejudice to the [party seeking  
17 sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the  
18 availability of less drastic sanctions.” *Valley Engineers, Inc. v. Electric Engineering Co.*, 158  
19 F.3d 1051, 1057 (9th Cir. 1998). The third and fifth factors, prejudice and availability of less  
20 drastic sanctions, are the decisive factors. *Id.* The fifth factor, the availability of less drastic  
21 sanctions, “involves consideration of three subparts: whether the court explicitly discussed  
22 alternative sanctions, whether it tried them, and whether it warned the recalcitrant party about  
23 the possibility of dismissal.” *Id.* “What is most critical for case-dispositive sanctions, regarding  
24 risk of prejudice and of less drastic sanctions, is whether the discovery violations ‘threaten to  
25 interfere with the rightful decision of the case.’” *Id.*

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1 Here, defendants still have not complied with this court's August 2012 orders requiring  
2 them to produce their initial disclosures and to pay a monetary sanction for failing to do so.  
3 They also still have not responded to plaintiff's motions for sanctions and contempt, and still  
4 have not responded to this court's October 2012 order to show cause, despite being warned that a  
5 failure to respond could result in the striking of their answers, an entry of default judgment, a  
6 finding that defendants are in contempt of court, and/or the imposition of additional monetary  
7 sanctions. Then, defendants failed to make any appearance at the November 14 hearing on the  
8 motions for sanctions and contempt.

9 No doubt terminating sanctions are a drastic measure. However, such sanctions are  
10 warranted here in light of defendants' numerous failures to fully participate in the discovery  
11 process and their repeated failures to comply with court orders and this court's local rules despite  
12 strong warnings as to the consequences and the attempt to obtain compliance through monetary  
13 sanctions. Less drastic measure have had little effect. With regard to the factors discussed  
14 above, the public's interest in expeditious resolution of litigation and the court's need to manage  
15 its dockets (factors one and two) favor the imposition of terminating sanctions since defendants  
16 are electing to only selectively participate in the action and have chosen to ignore numerous  
17 court orders requiring that participation. Additionally, the risk of prejudice to plaintiff (factor  
18 three) favors terminating sanctions since plaintiff's prosecution of this action is being hindered  
19 by defendants' selective participation in the case. Further, the availability of less drastic  
20 sanctions (factor five) also favors terminating sanctions because the undersigned has explicitly  
21 discussed and tried imposing monetary sanctions *and* has warned defendants that their failure to  
22 respond to the motions and/or to the order to show cause could result in terminating and/or  
23 monetary sanctions. However, neither of those less drastic approaches was successful. Instead,  
24 defendants elected not to pay the monetary sanctions, elected not to respond to the order to show  
25 cause, and elected not to appear at the November 14 hearing. Therefore, the only factor  
26 weighing against imposing terminating sanctions is factor four, which considers the public

1 policy favoring disposition of cases on their merits. That factor is strongly not outweighed by  
2 the other factors discussed above. Accordingly, it appears that terminating sanctions against  
3 Gary and Debra Campbell are warranted here, as well as monetary sanctions to cover the  
4 reasonable expenses incurred by plaintiff in bringing its motion for sanctions and appearing at  
5 the November 14 hearing thereon.

6 CONTEMPT MOTION

7 Plaintiff also moves the court to order defendants to appear and show cause why they  
8 should not be held in contempt of court for their failure to comply with this court's August 27,  
9 2012 order; to order defendants to explain why they failed to comply with the court's August 27,  
10 2012 order; and to adjudge defendants in contempt of court and order appropriate sanctions,  
11 including, but not limited to, paying the costs plaintiff incurred in bringing its motion for  
12 contempt, daily coercive fines, or coercive confinement. Dckt. No. 24 at 2-3.

13 In light of the recommendation of both terminating sanctions and additional monetary  
14 sanctions, the compulsory powers of civil contempt to compel compliance with the underlying  
15 discovery orders is no longer necessary. With an entry of default judgment plaintiff will no  
16 longer need the underlying discovery that has to date not been produced. Accordingly, an order  
17 to defendants to appear and show cause why they should not be held in contempt is unnecessary  
18 at this time.<sup>1</sup> Accordingly, plaintiff's contempt motion will be denied without prejudice.

19 CONCLUSION

20 In light of the foregoing, IT IS HEREBY ORDERED that:

- 21 1. Within seven days of the date of this order, plaintiff's counsel shall submit a  
22 declaration regarding the reasonable expenses incurred in bringing the motion for sanctions; and  
23 2. Plaintiff's contempt motion, Dckt. No. 24, is denied.

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26 <sup>1</sup> Plaintiff's counsel agreed with that assessment at the November 14, 2012 hearing.

1 IT IS FURTHER RECOMMENDED that:

2 1. Plaintiff's motion for sanctions, Dckt. No. 23, be granted;

3 2. The answers filed by Gary Campbell and Debra Campbell be stricken;

4 3. The Clerk be directed to enter default against Gary Campbell and Debra Campbell  
5 pursuant to Federal Rule of Civil Procedure 55(a);

6 4. Defendants Gary Campbell and Debra Campbell be required to reimburse plaintiff's  
7 counsel for the reasonable expenses incurred in connection with the motion for sanctions; and

8 5. Plaintiff be ordered to file a motion for entry of default judgment within 14 days of the  
9 clerk's entry of the defendant's default.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
12 after being served with these findings and recommendations, any party may file written  
13 objections with the court and serve a copy on all parties. Such a document should be captioned  
14 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
15 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
16 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

17 Dated: November 28, 2012.

18   
19 EDMUND F. BRENNAN  
20 UNITED STATES MAGISTRATE JUDGE