

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

**JAMES D. NIX,**  
**Plaintiff,**  
**vs.**  
**HUDSON BAYLOR CORPORATION,**  
***et al.,***  
**Defendants.**

**2:10-cv-00973 JWS**  
**ORDER AND OPINION**  
**[Re: Motions at Dockets 40 & 45]**

**I. MOTION PRESENTED**

At docket 40, defendant Hudson Baylor Corporation (“defendant”) moves to dismiss the case pursuant to Federal Rules of Civil Procedure 41(b) and 16(f)(1)(C). *Pro se* plaintiff James D. Nix (“plaintiff”) opposes the motion at docket 41. Defendant’s reply is at docket 43. Plaintiff filed a response to defendant’s reply (a sur-reply) at docket 44.

At docket 45, defendant moves to strike plaintiff’s sur-reply.

Oral argument was not requested with respect to either motion and would not assist the court.

1 **II. DISCUSSION**

2 **A. Motion at Docket 45**

3 Defendant correctly argues that plaintiff improperly filed a sur-reply. It is not  
4 necessary to strike the document, however, because the court will not consider  
5 plaintiff's sur-reply in resolving the motion at docket 40.

6 **B. Motion at Docket 40**

7 In the court's scheduling and planning order of August 1, 2011, the parties were  
8 advised that final witness lists were to be filed not later than February 6, 2012. The  
9 parties were warned that "[o]nly those witnesses disclosed in a timely filed witness list  
10 [would] be permitted to testify at trial."<sup>1</sup> Defendant filed its final witness list on  
11 February 6, 2012. Plaintiff did not file his witness list until April 30, 2012, when he  
12 responded to the present motion. Plaintiff's witness list contains only one name: Shelly  
13 Kirker.

14 Rule 16(f) provides that "[o]n motion or on its own, the court may issue any just  
15 orders, including those authorized by Rule 37(b)(2)(A)(ii)-(iv), if a party . . . fails to obey  
16 a scheduling . . . order."<sup>2</sup> Among other sanctions, Rule 37(b)(2) contemplates  
17 "dismissing the action . . . in whole or in part."<sup>3</sup> However, to determine whether a case  
18 dispositive sanction is appropriate, a court must consider "(1) the public's interest in  
19 expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the  
20 risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition  
21 of cases on their merits; and (5) the availability of less drastic sanctions."<sup>4</sup>  
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24 <sup>1</sup>Doc. 33 at 5.

25 <sup>2</sup>Fed. R. Civ. P. 16(f)(1)(C).

26 <sup>3</sup>Fed. R. Civ. P. 37(b)(2)(A)(v).

27 <sup>4</sup>*Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir.  
28 2007).

