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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Tracee Croomes,

10 Plaintiff,

11 vs.

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13 Stream Global Services - AZ, Inc.,

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15 Defendant.

No. CV11-0141-PHX-JAT

**ORDER**

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17 Pending before the Court is Defendant’s Motion to Dismiss Due to Plaintiff’s Non-  
18 compliance with Discovery Requests, Doc. 22, and Plaintiff’s Motion for Extension of Time,  
19 Docs. 30 & 33.<sup>1</sup> The Court now rules on the motions.

20 **I. BACKGROUND**

21 Plaintiff pro se Tracee Croomes filed this employment discrimination case against  
22 Defendant. On November 18, 2011, Defendant served Plaintiff with Defendant’s First Set  
23 of Non-Uniform Interrogatories and Requests for Production. Doc. 18. On November 29,  
24 2011, Defendant served Plaintiff with its Notice of Deposition of Plaintiff Tracee Croomes.  
25 Doc. 21. The deposition was scheduled for December 28, 2011 at 9 a.m., at the offices of  
26 Farhang and Medcoff, PLLC in Phoenix, Arizona. Doc. 22 at 2. On December 21, 2011,  
27 Defendant mailed a letter to Plaintiff stating that Defendant had not yet received responses

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<sup>1</sup> Plaintiff’s response and motion were twice filed. Docs. 30 & 33 are identical.

1 to its discovery requests and reminding Plaintiff of her upcoming deposition. *Id.* Defendant  
2 also called Plaintiff to remind her of the deposition but was unable to reach Plaintiff. *Id.* at  
3 3.

4 Plaintiff did not appear for her deposition on December 28, 2011, and contacted  
5 Defendant's counsel at approximately 4:30 p.m. on December 28, 2011 stating that she  
6 needed to reschedule the deposition. *Id.* Plaintiff alleges that she confused the dates and  
7 misread the Defendant's letters. Docs. 30 & 33 at 1. Plaintiff subsequently filed responses  
8 to Defendant's discovery requests, but objects to two of the interrogatories. Doc. 42.

## 9 **II. SANCTIONS**

### 10 **A. Legal Standard**

11 Federal Rule of Civil Procedure 37(d)(1)(A) states that, on motion, a court "may order  
12 sanctions if (i) a party . . . fails, after being served with proper notice, to appear for that  
13 person's deposition; or (ii) a party, after being properly served with interrogatories under  
14 Rule 33 . . . fails to serve its answers, objections, or written response." FED.R.CIV.P.  
15 37(d)(1)(A). Sanctions may include directing facts to be taken as established for the purposes  
16 of the action; prohibiting a party from arguing claims or introducing evidence; striking  
17 pleadings in whole or in part; staying further proceedings; dismissing the action in whole or  
18 in part; and rendering a default judgment. FED.R.CIV.P. 37(d)(3), 37(b)(2)(A). Severe  
19 sanctions, such as taking allegations as established, awarding a default judgment, or  
20 dismissing a claim, are "authorized only in extreme circumstances." *Refrac. Int'l, Ltd. v.*  
21 *Hitachi, Ltd.*, 921 F.2d 1247, 1254 (9th Cir. 1990) (citation omitted).

22 Dismissal of a complaint is only appropriate if the party absent at the deposition has  
23 evinced "willfulness, bad faith, or fault," *id.*, but a district court has "considerable discretion"  
24 to impose dismissal under such circumstances. *See Wanderer v. Johnson*, 910 F.2d 652, 656  
25 (9th Cir. 1990). The Ninth Circuit has applied a five-factor test in determining whether a  
26 party's conduct justifies the "harsh sanction of dismissal." *Anheuser-Busch, Inc. v. Natural*  
27 *Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995). The court should weigh "(1) the  
28 public's interest in expeditious resolution of litigation; (2) the court's need to manage its

1 dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring  
2 disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Id.*  
3 (quoting *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993)); *see also Refrac Int’l*,  
4 921 F.2d at 1254. “The first two of these factors favor the imposition of sanctions in most  
5 cases, while the fourth cuts against . . . a dismissal sanction. Thus the key factors are  
6 prejudice and the availability of lesser sanctions.” *Henry*, 983 F.2d at 948 (quoting  
7 *Wanderer*, 910 F.2d at 656 (omission in original)).

8 “A defendant suffers prejudice if the plaintiff’s actions impair the defendant’s ability  
9 to go to trial or threaten to interfere with the rightful decision of the case.” *Adriana Int’l*  
10 *Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). While delay alone is insufficient  
11 prejudice, failure to produce documents when ordered is sufficient prejudice. *Id.* The Ninth  
12 Circuit has held that failure to appear at a deposition is not prejudice if the deposition was  
13 in fact taken before the motion for sanctions was heard. *See United States for the Use and*  
14 *Benefit of Wiltec Guam, Inc. v. Kahaluu Const. Co.*, 857 F.2d 600, 604 (9th Cir. 1988)  
15 (finding no prejudice when the plaintiff’s deposition, though delayed, had been taken before  
16 the date of the contempt motion hearing).

17 In evaluating the availability of lesser sanctions, a court must consider the “impact of  
18 the sanction and the adequacy of less drastic sanctions.” *Id.* (citing *Malone v. U.S. Postal*  
19 *Serv.*, 833 F.2d 128, 132 (9th Cir. 1987)). The Ninth Circuit has promulgated a three-factor  
20 analysis for determining whether a district court has considered alternatives to dismissal: (1)  
21 Whether the court explicitly discussed the feasibility of less drastic sanctions and explained  
22 why alternative sanctions would be inappropriate, (2) whether the court implemented  
23 alternative sanctions before ordering dismissal, and (3) whether the court warned the party  
24 of the possibility of dismissal before actually ordering dismissal. *Malone*, 833 F.2d at 132.

25 Regardless of whether dismissal is an appropriate sanction, the court “must instead  
26 of or in addition to [any other] sanctions, . . . require the party failing to act, the attorney  
27 advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused  
28 by the failure, unless the failure was substantially justified or other circumstances make an

1 award of expenses unjust.” FED.R.CIV.P. 37(d)(3). An award of expenses is appropriate even  
2 if the failure to appear was negligent and not willful. *Lew v. Kona Hosp.*, 754 F.2d 1420,  
3 1426-27 (9th Cir. 1985); *see also Marquis v. Chrysler Corp.*, 577 F.2d 624, 642 (9th Cir.  
4 1978). The imposition of sanctions for mere negligent failure to appear is justified by the  
5 “possibility of light sanctions.” *Lew*, 754 F.2d at 1426 (quoting FED.R.CIV.P. 37 advisory  
6 committee notes). Light sanctions occur when a court declines to award the other types of  
7 sanctions that Rule 37(d)(3) permits and thus only awards reasonable expenses. *See Lew*, 754  
8 F.2d at 1426.

9         Despite Rule 37(d)(3)’s requirements, a court may nevertheless decline to award  
10 reasonable expenses if the party who has failed to appear was “substantially justified or other  
11 circumstances make an award of expenses unjust.” FED.R.CIV.P. 37(d)(3). “[T]he burden of  
12 showing substantial justification and special circumstances is on the party being sanctioned.”  
13 *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994). A party’s failure to appear at  
14 a deposition is substantially justified if there is “a good faith dispute concerning a discovery  
15 question.” *Id.* (citation omitted). An award of expenses is unjust when it has been the party’s  
16 attorney, rather than the party, that has caused the failure to appear at the deposition. *See*  
17 *Hyde & Drath*, 24 F.3d at 1172. Financial indigence by itself does not necessarily make an  
18 award of expenses unjust. *See Bosworth v. Record Data of Maryland, Inc.*, 102 F.R.D. 518,  
19 521 (D. Md. 1984) (there is no per se rule for imposing or not imposing Rule 37 sanctions  
20 against an indigent plaintiff pro se).

## 21         **B. Discussion**

22         Defendant has moved for Plaintiff’s complaint to be dismissed with prejudice, or in  
23 the alternate, for an award of expenses incurred as a result of Plaintiff’s failure to appear for  
24 her noticed deposition. Doc. 22 at 5. Defendant’s motion complies with Rule 37(d)(1)(B)’s  
25 certification requirement, and Plaintiff does not dispute that she failed to appear at her  
26 properly noticed deposition. The Court thus first applies the five-factor test from *Anheuser-*  
27 *Busch* to determine whether dismissal of Plaintiff’s complaint is warranted as a sanction for  
28 Plaintiff’s noncompliance with the discovery requirement.

1           The first two factors, the public’s interest in expeditious resolution of litigation and  
2 the court’s need to manage its dockets, favor the imposition of sanctions. The fourth factor,  
3 the public policy favoring the disposition of cases on their merits, cuts against a dismissal  
4 sanction. *Henry*, 983 F.2d at 948; *Wanderer*, 910 F.2d at 656. Accordingly, the Court turns  
5 to the “key factors [of] prejudice and the availability of lesser sanctions.” *Henry*, 983 F.2d  
6 at 948 (quoting *Wanderer*, 910 F.2d at 656). In evaluating prejudice, the relevant question  
7 is whether Plaintiff’s failure to appear at her deposition interfered with Defendant’s ability  
8 to defend itself against her claims and obtain a decision in the case. *See Wanderer*, 910 F.2d  
9 at 656.

10           Plaintiff’s singular failure to appear at her deposition does not rise to the level of  
11 noncompliance shown by the defendants in *Wanderer*, where the defendants not only failed  
12 to appear at their depositions, but repeatedly failed to comply with court orders to produce  
13 documents. There, the Ninth Circuit held that the defendants’ actions were prejudicial.  
14 *Wanderer*, 910 F.2d at 656. Nor does Plaintiff’s failure to appear irreparably prejudice  
15 Defendant. *See Henry*, 983 F.2d at 948 (finding irreparable prejudice when the plaintiff’s  
16 refusal to engage in discovery needlessly prolonged the case and resulted in a key defendant  
17 being unable to participate in the case prior to his death). In this case, Plaintiff’s failure to  
18 appear has not affected Defendant’s ability to defend itself. In fact, Defendant and Plaintiff  
19 agree that, if the case is not dismissed, the deadlines for discovery and dispositive motions  
20 should be extended. Therefore, this factor weighs against dismissal of Plaintiff’s case.

21           In evaluating the fifth *Anheuser-Busch* factor, the availability of lesser sanctions, the  
22 Court applies the three-factor analysis from *Malone v. United States Postal Service*. The first  
23 factor concerns a district court’s adequate explanation of its reasoning in imposing sanctions  
24 and is not relevant here. The second factor evaluates whether a court has implemented  
25 alternative sanctions before ordering dismissal. *Malone*, 833 F.2d at 132. This is Plaintiff’s  
26 first failure to follow the discovery rules; therefore, the Court has not had a prior opportunity  
27 to implement any sanctions. It would be improper for the Court to order dismissal when the  
28 Court has not previously implemented lesser alternative sanctions. This factor thus weighs

1 in favor of the availability of lesser sanctions. The third factor of the *Malone* test requires  
2 that a court has warned the party of the possibility of dismissal before ordering dismissal. *Id.*  
3 Because the Court has not previously warned Plaintiff of the possibility of dismissal, actually  
4 ordering dismissal would be inappropriate. *Cf. Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d  
5 298, 302-03 (2d Cir. 2009) (dismissing a plaintiff pro se’s employment discrimination claim  
6 for plaintiff’s failure to appear at a deposition after “repeated and explicit warnings” that  
7 noncompliance with numerous court orders would result in dismissal). Accordingly, the two  
8 relevant *Malone* factors weigh in favor of the availability of lesser sanctions. Based on this,  
9 the Court finds that the fifth *Anheuser-Busch* factor weighs against the dismissal of Plaintiff’s  
10 case.

11       Since both of the key *Anheuser-Busch* factors weigh against the dismissal of  
12 Plaintiff’s case, dismissal is not appropriate. Plaintiff’s failure to appear at her deposition is  
13 not “extreme circumstances.” *Refrac. Int’l*, 921 F.2d at 1254.

14       In the alternative, Defendant asks the Court to award reasonable expenses, including  
15 attorneys’ fees, for Plaintiff’s failure to appear at her deposition. Rule 37(d)(3) requires the  
16 Court to award Defendant such expenses, unless Plaintiff satisfies her burden of proving that  
17 her failure to appear at her deposition was substantially justified or that other circumstances  
18 make an award of expenses unjust. Plaintiff admits that she failed to appear at the deposition  
19 because she “confused the dates and miss-read [sic] the letters from defendant.” Doc. 30 at  
20 1. There is no evidence of a good faith discovery dispute that would substantially justify  
21 Plaintiff’s nonappearance. Accordingly, Plaintiff was not substantially justified in failing to  
22 appear at her deposition, and the circumstances do not make an award of reasonable expenses  
23 unjust.

24       Defendant shall, on or before fourteen (14) days from the date of this Order, file a  
25 motion for reasonable expenses, including attorneys’ fees, incurred as a result of Plaintiff’s  
26 failure to appear at her deposition. The motion must comply with Local Rule of Civil  
27 Procedure 54.2. At the time that such motion is filed, the Court may then consider Plaintiff’s  
28 arguments in determining whether the requested expenses are reasonable.

1 Furthermore, Plaintiff shall, on or before seven (7) days from the date of this Order,  
2 appropriately comply with all discovery requests.<sup>2</sup>

3 **III. EXTENSION OF DEADLINES**

4 Plaintiff moves for an extension of the discovery deadline and the dispositive motion  
5 deadline. Docs. 30 & 33 at 2. Defendant agrees that the Court should extend the deadlines.  
6 Doc. 22 at 4-5.

7 **IV. CONCLUSION**

8 Accordingly,

9 **IT IS ORDERED** denying in part and granting in part Defendant's Motion to Dismiss  
10 Due to Plaintiff's Non-compliance with Discovery Requests (Doc. 22) as set forth herein.

11 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Extension of Time (Docs.  
12 30 & 33) is granted as follows:

13 The discovery deadline set in this Court's November 22, 2011 Order (Doc. 20 at 1)  
14 is extended from January 9, 2012 to April 30, 2012.

15 The dispositive motion deadline set in this Court's November 22, 2011 Order (Doc.  
16 20 at 1) is extended from January 30, 2012 to May 30, 2012.<sup>3</sup>

17 **IT IS FURTHER ORDERED** that, within 7 days of the date of this Order, Plaintiff  
18 shall appropriately comply with all pending discovery requests as set forth herein.

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20 <sup>2</sup> The Court notes that Plaintiff has filed a Motion to Object to Non-Uniform  
21 Interrogatories from Defendant (Doc. 42). All Parties are reminded that, pursuant to this  
22 Court's Rule 16 Scheduling Order, Doc. 12 at 4, the Parties shall jointly contact the Court  
23 via conference call to request a telephonic conference prior to filing any written discovery  
24 motions. Accordingly, the Court will not consider Plaintiff's objection to Defendant's Non-  
25 Uniform Interrogatories (Doc. 42). If Plaintiff continues to object to any of Defendant's  
26 discovery requests, Plaintiff shall follow the procedure outlined in this Court's Rule 16  
27 Scheduling Order (Doc. 12).

28 <sup>3</sup> The Court notes that Defendant has already filed a Motion for Summary Judgment  
(Doc. 35) currently pending before this Court and has not obtained leave of Court to file  
more than one motion for summary judgment as required by this Court's Rule 16 Scheduling  
Order (Doc. 12 at 4). Accordingly, the extension of the dispositive motion deadline shall  
only apply to Plaintiff.

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**IT IS FINALLY ORDERED** that, within 14 days of the date of this Order, Defendant shall file a motion for attorneys' fees incurred as a result of Plaintiff's failure to appear at her deposition, in compliance with LRCiv 54.2.

DATED this 7th day of March, 2012.

  
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James A. Teilborg  
United States District Judge