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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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10 Christine Baker,

) CV 07-8032-PCT-JAT

11 Plaintiff,

) **ORDER**

12 vs.

13 Trans Union LLC, et al.,

14 Defendants.

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17 Pending before the Court is a Motion to Dismiss or in the Alternative For Security of
18 Costs filed by Defendants Trans Union, Equifax Information Services, Experian Information
19 Solutions, and NCO Financial Systems (collectively referred to as “Defendants” for purposes
20 of this Order)(Doc. #135). Defendants filed this Motion after Plaintiff did not attend her
21 deposition noticed for January 16, 2009.

22 **I. Background**

23 The Court granted Defendants’ opposed Motion for Extension of Discovery and Case
24 Management Deadlines (Doc. #101) on October 21, 2008 (Doc. #109). After the Court filed
25 its Order extending the discovery cutoff, Defendant Equifax Services noticed Plaintiff’s
26 deposition for January 16, 2009 at the office of its local counsel in Phoenix, Arizona. (Doc.
27 #135).

28 On January 12, 2009, Plaintiff filed a Motion for Protective Order and for Sanctions

1 asking that the Court vacate her scheduled deposition because it would be inconvenient for
2 her to travel to Phoenix given the distance and the costs involved. (Doc. #126). On January
3 15, 2009, the Court struck Plaintiff's Motion for failure to obtain leave of Court in violation
4 of the Court's Rule 16 scheduling order. (Doc. #128). The Court's Rule 16 scheduling order
5 states that parties cannot file discovery motions without leave of court. Instead, they must
6 contact the Court on a conference call to set up a discovery dispute hearing.

7 Plaintiff did not appear for her January 16, 2009 deposition. Defendants state that
8 they expected Plaintiff to appear in light of the Court's January 15 Order and that Plaintiff
9 did not notify any of the Defendants that she would not appear. Plaintiff states that she
10 notified Ms. Hergenroether that she would not be attending the deposition, but does not
11 attach any proof of that notification.¹

12 As a result of Plaintiff's failure to appear for her deposition, Defendant sought another
13 extension of the discovery deadline (Doc. #129), which the Court granted (Doc. #134) on
14 January 27, 2009. The Court ordered Defendants to take Plaintiff's deposition by March 30,
15 2009.

16 **II. Analysis**

17 Defendants move pursuant to Federal Rules of Civil Procedure 37(d) and 41(b) to
18 dismiss this case with prejudice based on Plaintiff's failure to attend her deposition and her
19 violation of the Rule 16 scheduling order. As stated earlier, the Court's Rule 16 scheduling
20 order requires parties to call the Court on a conference call with any discovery disputes.
21 Plaintiff clearly violated that Order when she filed her discovery motion (Doc. #126).

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24 ¹Defendants argue that the Court should not consider Plaintiff's Reponse (Doc. #136)
25 to the pending Motion because it was not timely filed. Defendants urge the Court to deem
26 Plaintiff's untimely response as consent to dismissal under Local Rule of Civil Procedure
27 7.2(I). Even though Plaintiff did not file her Response in the time allotted by the Rules, the
28 Court will treat her Response as timely for the purposes of this Order only and will consider
it. Plaintiff is warned that she must make all her filings in a timely fashion. Future untimely
filings may be stricken and, if the untimely filing is a response to a motion, the filing may
be deemed as consent to the motion.

1 Nonetheless, the Court finds that dismissing Plaintiff's case for failing to abide by that
2 portion of the scheduling order would be unduly harsh. In fact, if the Court dismissed every
3 case in which the parties ignored the Court's discovery dispute procedure, it would have a
4 severely reduced docket. The Court therefore will analyze Defendants' Motion under
5 Federal Rule of Civil Procedure 37(d).

6 Rule 37(d) provides that the Court may order sanctions, upon motion, for a party's
7 failure to appear for the party's properly-noticed deposition. The Court may order, among
8 others, any of the following sanctions for a party's failure to attend: prevent the party from
9 supporting or opposing designated claims or defenses; strike pleadings in whole or in part;
10 stay further proceedings; or dismiss the action in whole or in part. Fed.R.Civ.P. 37(d)(3).
11 In addition to or instead of any of those sanctions, the Court must also order the party to pay
12 the reasonable expenses, including attorneys' fees, caused by the party's failure to attend the
13 deposition, "unless the failure was substantially justified or other circumstances make an
14 award of expenses unjust." Fed.R.Civ.P. 37(d)(3).

15 This Court has wide discretion in deciding whether to impose sanctions under Rule
16 37. *Lew v. Kona Hosp.*, 754 F.2d 1420, 1425 (9th Cir. 1985). That discretion is narrowed,
17 however, when the Court contemplates dismissing an action for a party's failure to appear
18 at a deposition. *Computer Task Group, Inc. v. Broby*, 364 F.3d 1112, 1115 (9th Cir.
19 2004)(internal quotations omitted). "Preclusive sanctions, such as dismissal of a case . . . ,
20 are disfavored." *Ritchie v. United States*, 451 F.3d 1019, 1026 (9th Cir.2006). The Court
21 should order dismissal only if the party's failure to appear at the deposition was due to
22 "willfulness, fault, or bad faith." *Computer Task Group*, 364 F.3d at 1115 (internal
23 quotations omitted).

24 In deciding whether to dismiss a case as a sanction for noncompliance with discovery,
25 the Court must weigh the following five factors: "(1) the public's interest in expeditious
26 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to
27 the opposing party; (4) the public policy favoring disposition of cases on their merits; and
28 (5) the availability of less drastic sanctions." *Id.* (internal quotations omitted).

1 While Plaintiff's failure to appear for her deposition led to an extension of the
2 discovery deadline, the failure has not yet made the Court's docket unmanageable. Nor have
3 Defendants suffered any prejudice beyond the costs and attorneys' fee associated with the
4 missed deposition and consequent motion to extend the discovery deadline. Presumably,
5 Defendants have now deposed Plaintiff in accordance with the Court's January 27 Order.
6 Additionally, the public policy favoring disposition on the merits weighs against dismissing
7 the case. Most importantly, the Court has less drastic sanctions at its disposal. After
8 weighing all five factors and noting that dismissal is a disfavored discovery sanction, the
9 Court will not dismiss this case for Plaintiff's failure to attend her deposition.

10 Defendants have requested in the alternative that the Court order Plaintiff to post a
11 bond for Defendants' costs in the amount of \$3,000. Defendants have not submitted any
12 documentation in support of that figure. Rather than order Plaintiff to post a bond, the Court
13 invites Defendants to file a motion with appropriate documentation for sanctions for the
14 actual costs, including attorneys' fees, incurred as a result of Plaintiff's failure to appear for
15 her January deposition. Defendants may seek Rule 54(b) language for a final judgment on
16 their motion for sanctions, if they choose to file one. Per the Court's January 27 Order,
17 Defendants must file their motion for monetary sanctions, if any, by April 30, 2009.

18 Further, to the extent Plaintiff intended her Response (Doc. #136) to serve as a request
19 for the defense attorneys' withdrawal from this case, or, in the alternative, to require
20 Defendants to "verify" their Motion and Reply, those requests are denied. Nor will the Court
21 give Plaintiff leave to file a motion for sanctions.

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24 Accordingly,

25 IT IS ORDERED DENYING Defendants Trans Union, Equifax Information Services,
26 Experian Information Solutions, and NCO Financial Systems's Motion to Dismiss or in the
27 Alternative For Security of Costs (Doc. #135).

28 IT IS FURTHER ORDERED that if Defendants choose to file a motion for monetary

1 sanctions, they must do so by no later than April 30, 2009.

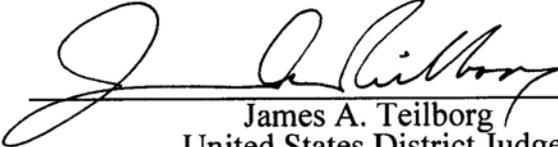
2 DATED this 14th day of April, 2009.

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James A. Teilborg
United States District Judge

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