

1 I.

2 **BACKGROUND**

3 On January 29, 2015, Plaintiffs filed suit against Defendants, alleging various civil
4 rights claims pursuant to 42 U.S.C. § 1983 and state law claims arising out of an incident
5 of alleged excessive force by officers, including defendant Casey, on or about December
6 13, 2013. Dkt. 1, Complaint. Saunders claims she suffered “substantial general and
7 special damages, including but not limited to, great and severe physical injury, mental
8 and emotional distress, pain and suffering, psychiatric and psychological counseling and
9 therapy, medical treatment and medical bills, dental treatment and dental bills, lost wages
10 and other special damages; all in an amount to be shown at trial, in excessive [sic] of
11 \$10,000,000.00.” See Complaint. Saunders contends she is “still having major pain in
12 both elbows and both shoulders” as well as her neck, jaw, front teeth, and lower back,
13 and still has trouble using her right arm and hand. Dkt. 24, Declaration of Risa
14 Christensen in support of Motion (“Christensen Decl.”), ¶ 7, Ex. 6 (Interrogatory
15 Responses, No. 6).

16 On April 24, 2015, the Court issued a Scheduling and Case Management Order
17 setting the following relevant dates and deadlines: (1) October 27, 2015 Fact Discovery
18 Cut-Off; (2) November 10, 2015 Initial Expert Witness Disclosures; (3) January 11, 2016
19 Expert Discovery Cut-Off; (4) February 11, 2016 Dispositive Motion Cut-Off; and (5)
20 May 10, 2016 Trial. Dkt. 15.

21 On September 16, 2015, the parties submitted a Stipulation for an Independent
22 Medical Examination (“IME”) of Saunders to be held on Saturday, October 17, 2015 at
23 1:30 p.m. by Dr. Donald D. Kim. Dkt. 19. The parties also agreed as follows: “Dr. Kim
24 requires 48 hours notification in the event of cancellation and, should Plaintiff Heidi
25 Lynne Saunders fail[] to keep the appointment without proper notification, a non-
26 appearance fee of \$650 will be charged, along with any time the doctor has already spent
27 in preparing for the IME.” Id. On September 16, 2015, the Court issued an Order stating
28 that the IME of Saunders “shall go forward on Saturday, October 17, 2015, as set forth in

1 the stipulation.” Dkt. 20.

2 On October 16, 2015, the parties, including Saunders, attended mediation at
3 defense counsel’s office. Christensen Decl., ¶ 6; Dkt. 29, Declaration of Jerry L. Steering
4 in Opposition to Motion for Sanctions (“Steering Decl.”), ¶ 3. Saunders appeared “well,
5 or otherwise not ill.” Id. The parties were unable to reach a settlement. Dkt. 21.

6 On October 17, 2015, Saunders failed to appear for the IME. Christensen Decl., ¶
7 2; Steering Decl., ¶ 4.

8 On October 19, 2015, Defendants’ counsel emailed Plaintiffs’ counsel to initiate
9 meet and confer discussions regarding Saunders’ failure to appear for the IME.
10 Christensen Decl., Ex. 2. During a phone call later that day, Plaintiffs’ counsel
11 represented Saunders had told him on October 16, 2015 that she intended to appear for
12 the IME on October 17, 2015. Id. at ¶ 3. Plaintiffs’ counsel stated he would look into the
13 matter. Id. However, Plaintiffs’ counsel did not provide any subsequent response. Id.

14 Also on October 19, 2015, Saunders appeared in court on another matter in San
15 Bernardino County Superior Court. Id. at ¶ 6, Ex. 5.

16 On October 30, 2015, Defendants’ counsel sent correspondence to Plaintiffs’
17 counsel to follow-up on the October 19, 2015 conversation. Id. at ¶ 4. Defendants’
18 counsel offered to resolve the matter by seeking an order from the court to modify the
19 scheduling order to allow Saunders to appear at the IME on another date, if Saunders
20 agreed to pay \$4,051.05 for the amount incurred by Defendants as a result of Saunders’
21 failure to appear. Id. Plaintiffs’ counsel did not respond. Id.

22 On November 4, 2015, Defendants’ counsel requested a meeting to meet and
23 confer in person regarding Defendants’ intention to file a motion to dismiss Plaintiffs’
24 complaint based on Saunders’ failure to appear for the IME. Id. at ¶ 5. Once again,
25 Plaintiffs’ counsel did not respond. Id.

26 On November 6, 2015, Defendants’ counsel provided Defendants’ portion of the
27 joint stipulation to Plaintiffs’ counsel. Id. at ¶ 8. On November 10, 2015, Plaintiffs’
28 counsel finally responded by providing a note from a Physician’s Assistant (“PA”) dated

1 November 4, 2015, which stated as follows:

2 To whom it may concern: P[atien]t was seen and evaluated by me and was
3 deemed unable to make previous medial examiner apt secondary to multiple
4 factors. P[atien]t is willing and ready to reschedule this apt as able
5 secondary to physical and mental well-being. P[atien]t was incapacitated
6 due to stressor from Oct. 16 and thus couldn't attend Oct. 17, 2015.

7 P[atien]t is still being followed, evaluated and treated by me.

8 Id. at Ex. 9.¹

9 Defendants' counsel responded by email that the note was not acceptable or
10 believable. Id. at ¶ 9. Plaintiffs' counsel did not provide Plaintiffs' portion of the joint
11 stipulation. Id.

12 On November 16, 2015, Defendants filed the instant Motion seeking (1)
13 terminating sanctions, (2) evidentiary sanctions in the form of an order dismissing "any
14 and all of plaintiff's medical claims, damages and injuries, with prejudice and prohibit the
15 plaintiff from presenting any evidence at trial or dispositive motion as to any medical
16 injuries she claims she sustained as a result of the incident," and (3) monetary sanctions
17 in the amount of \$4,051.05. Dkt. 22, 28.²

18 Plaintiffs failed to comply with the Local Rules regarding participation and
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20 ¹ The Court notes the last two sentences of the note appear to have been written in a
21 different handwriting. Further, the note does not identify when Saunders was seen and
22 evaluated by the PA.

23 ² Defendants initially filed the instant Motion as a "Motion to Dismiss" and set it for
24 hearing on December 17, 2015 before the District Judge. Dkt. 22. On November 30,
25 2015, the District Court issued an Order finding Defendants' Motion was "a discovery
26 motion that should have been noticed for hearing before the Magistrate Judge." Dkt. 27.
27 Hence, the Court referred the Motion to the undersigned Magistrate Judge for decision.
28 Id. The Court noted "[e]xcept in egregious circumstances, a motion to compel is what
defendants should have filed to address plaintiff's non-compliance with discovery. The
fact that plaintiff's counsel did not cooperate in completing the joint discovery stipulation
is not enough to justify the imposition of terminating sanctions." Id.

1 preparation of a joint stipulation, and failed to file a timely opposition to the Motion.³

2 On December 8, 2015, Plaintiffs counsel filed a Declaration in Opposition to
3 Defendants’ Motion for Sanctions. Dkt. 29.

4 **II.**

5 **DISCUSSION**

6 **A. The Request for Terminating Sanctions is Denied Without Prejudice.**

7 **1. Relevant Law**

8 Rule 37(b)(2)(A)(v) of the Federal Rules of Civil Procedure authorizes the sanction
9 of dismissal against parties who disobey a court’s discovery orders, including an order
10 under Rule 35 requiring a party to submit to a physical or mental examination. See
11 National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S. Ct.
12 2778, 49 L. Ed. 2d 747 (1976); Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir.1981).
13 To justify the imposition of case-dispositive sanctions, the Court must find that the
14 discovery violations were due to “willfulness, bad faith, or fault of the party.”
15 Commodity Futures Trading Commission v. Noble Metals International, Inc., 67 F.3d
16 766, 770-71 (9th Cir. 1995), cert. denied, 519 U.S. 815, 117 S. Ct. 64, 136 L. Ed. 2d 26
17 (1996) (citations and internal quotations omitted); see also Societe Internationale v.
18 Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958). Disobedient conduct
19 not outside the control of the litigant is all that is required to demonstrate willfulness, bad
20 faith or fault. Henry v. Gill Industries, Inc., 983 F.2d 943, 948-49 (9th Cir. 1993). In
21 evaluating the propriety of sanctions, the Court considers “all incidents of a party’s

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23 ³ On November 23, 2015, Plaintiffs filed an ex parte application to continue the
24 hearing on Plaintiffs’ Motion from December 17, 2015 until February 4, 2016. Dkt. 25.
25 On November 24, 2015, the Court denied Plaintiffs’ ex parte application. Dkt. 26.
26 Plaintiffs’ counsel argues he was unaware he needed to participate in preparing a joint
27 stipulation prior to the District Court construing the Motion as a discovery motion.
28 Steering Decl., ¶ 14. However, the Court’s Scheduling Order and Order re: Summary
Judgment both require a joint brief for dispositive motions. Dkt. 15, 16. Hence,
Plaintiffs’ counsel’s failure to participate in preparing a joint stipulation is not excused.

1 misconduct.” Adriana International Corp. v. Thoeren, 913 F.2d 1406, 1411 (9th Cir.
2 1990), cert. denied, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991) (citation
3 omitted).

4 Courts apply a five-part test, with three subparts to the fifth part, to determine
5 whether a case-dispositive sanction is just:

6 (1) the public’s interest in expeditious resolution of litigation; (2) the court’s
7 need to manage its dockets; (3) the risk of prejudice to the party seeking
8 sanctions; (4) the public policy favoring disposition of cases on their merits;
9 and (5) the availability of less drastic sanctions. The sub-parts of the fifth
10 factor are whether the court has considered lesser sanctions, whether it tried
11 them, and whether it warned the recalcitrant party about the possibility of
12 case-dispositive sanctions. This “test” is not mechanical. It provides the
13 district court with a way to think about what to do, not a set of conditions
14 precedent for sanctions or a script that the district court must follow.

15 Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th
16 Cir. 2007) (internal quotation marks and citations omitted).

17 “Where a court order is violated, the first two factors support sanctions and the
18 fourth factor cuts against a default. Therefore, it is the third and fifth factors that are
19 decisive.” Tacori Enterprises v. Beverlly Jewellery Co., 253 F.R.D. 577, 582 (C.D. Cal.
20 2008) (quoting Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997)).

21 Regarding the third factor, a plaintiff’s refusal to produce evidence in discovery
22 supporting plaintiff’s claim presumptively shows the claim is meritless and prejudices a
23 defendant’s ability to present its defense. See, e.g., In re Phenylpropanolamine (PPA)
24 Products Liability Litigation, 460 F.3d at 1236; Morris v. Morgan Stanley & Co., 942
25 F.2d 648, 652 (9th Cir. 1991); see In re Exxon Valdez, 102 F.3d 429, 433 (9th Cir. 1996)
26 (plaintiffs’ “total failure to respond to discovery and the time consumed by attempting to
27 secure compliance” show prejudice); see also Payne, 121 F.3d at 508 (finding prejudice
28 where “plaintiffs’ repeated failure to provide documents and information in a timely

1 fashion prejudiced the ability of [defendants] to prepare their case for trial”) (citation
2 omitted).

3 The fourth factor is entitled to little weight where a plaintiff completely refuses to
4 cooperate in discovery, because “a case that is stalled or unreasonably delayed by a
5 party’s failure to comply with deadlines and discovery obligations cannot move forward
6 toward resolution on the merits.” See In re Phenylpropanolamine (PPA) Products
7 Liability Litigation, 460 F.3d at 1228 (fourth factor “lends little support to a party whose
8 responsibility it is to move a case toward disposition on the merits but whose conduct
9 impedes progress in that direction”) (citation and internal quotations omitted); In re
10 Exxon Valdez, 102 F.3d at 433 (policy favoring disposition on merits of little weight in
11 light of parties’ “total refusal to provide discovery”). “Noncompliant plaintiffs bear
12 responsibility for halting movement towards a merits resolution.” In re
13 Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d at 1237.

14 **2. Application**

15 Here, the Court finds Saunders’ failure to appear for the IME was willful. Henry,
16 983 F.2d at 948-49. Saunders was aware of the appointment and the 48-hour cancellation
17 policy. Dkt. 19. Saunders allegedly failed to communicate with her attorney, who claims
18 he was not aware she had failed to appear until informed by Defendants’ counsel.
19 Christensen Decl., ¶ 3; Steering Decl., ¶ 4. There is no evidence Saunders’ failure to
20 appear was outside her control.⁴ The Court also notes that failure to timely oppose a
21 motion “may be deemed consent to the granting” of the motion. L.R. 7-12.

22
23 ⁴ The Court finds the PA note inconclusive on this point and it does not explain her
24 failure to timely communicate with her attorney or the medical examiner’s office.
25 Plaintiffs’ counsel also attaches a copy of a document he characterizes as “October 30,
26 2015 hospital discharge papers for [Saunders] for her hospitalization for diabetes and
27 heart failure.” Steering Decl., ¶5, Ex. A. The document appears to be dated October 3,
28 2015. Id. It is clear the document does not purport to show Saunders was in the hospital
on October 17, 2015. Therefore, it is not relevant to explaining how her non-appearance
or failure to communicate was outside her control.

1 Because a court order was violated, the first two factors weigh in favor of
2 terminating sanctions. Tacori Enterprises, 253 F.R.D. at 582.

3 The third factor also weighs in favor of terminating sanctions, because Saunders’
4 “total failure to respond to discovery and the time consumed by attempting to secure
5 compliance” show prejudice. In re Exxon Valdez, 102 F.3d at 433.

6 The fourth factor cuts slightly against default, because it is not clear Saunders has
7 wholly failed or refused to cooperate in discovery. See Christensen Decl., Ex. 9 (PA note
8 stating Saunders “is willing and ready to reschedule this apt as able”); Steering Decl., ¶
9 29 (“She is more than willing to attend another scheduled defense medical
10 examination.”). However, the Court notes Saunders’ failure to timely communicate with
11 her attorney, her appearance at a hearing on October 19, 2015, and her failure to obtain a
12 doctor’s note until after Defendants’ counsel stated their intention to seek terminating
13 sanctions, evidences a troubling lack of interest or concern for diligently pursuing the
14 case.

15 At this point in the case, the fifth factor, the availability of lesser sanctions, weighs
16 against terminating sanctions. Defendants acknowledge there are other avenues and
17 sanctions available. For example, in addition to seeking monetary sanctions, Defendants
18 offered to stipulate to continue the discovery cut-off to allow additional time for Saunders
19 to attend the IME. Christensen Decl., ¶ 4. Defendants have not shown they would be
20 prejudiced by a brief continuance and only argue that the Court has discretion to decline
21 such a continuance. See Motion at 10-11. Further, should Defendants seek such an
22 order, Saunders’ failure to appear may yet be remedied by a second order directing her to
23 appear for examination. See e.g., Halliday v. Spjute, No. 1:07-CV-00620-AWI (GSA),
24 2015 WL 4922762, at *5 (E.D. Cal. Aug. 18, 2015). As the District Court noted,
25 “[e]xcept in egregious circumstances, a motion to compel is what [D]efendants should
26 have filed to address [Saunders’] non-compliance with discovery.” Dkt. 27. Rather than
27 seek a continuance of the discovery cut-off and move to compel Saunders’ appearance for
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1 the IME, Defendants here skipped straight to terminating sanctions.⁵ The Court has not
2 yet tried lesser sanctions in this matter. Further, the Court’s Order requiring Saunders to
3 appear for the IME only warns of monetary sanctions for failure to appear. Therefore, it
4 is possible less drastic sanctions may yet be effective.

5 In addition, dismissal of the entire action is not warranted because Saunders is the
6 only plaintiff who failed to obey a court order and it does not appear the IME will be
7 dispositive of all of Saunders’ claims. Guifu Li v. A Perfect Day Franchise, Inc., 281
8 F.R.D. 373, 392 (N.D. Cal. 2012).

9 Accordingly, Defendants’ request for terminating sanctions is **DENIED without**
10 **prejudice.**

11 **B. The Request for Evidentiary Sanctions is Denied Without Prejudice.**

12 When a party fails to obey an order to provide or permit discovery, Federal Rule of
13 Civil Procedure 37(b)(2)(A)(i) permits courts to issue an order “directing that the matters
14 embraced in the order or other designated facts be taken as established for purposes of the
15 action, as the prevailing party claims.” Fed. R. Civ. P. 37(b)(2)(A)(i). Rule
16 37(b)(2)(A)(ii) also permits courts to issue an order “prohibiting the disobedient party
17 from supporting or opposing designated claims or defenses, or from introducing
18 designated matters in evidence.” Fed. R. Civ. P. 37(b)(2)(A)(ii).

19 Defendants request an order making the following evidentiary findings: dismissing
20 “any and all of plaintiff’s medical claims, damages and injuries, with prejudice and
21 prohibit the plaintiff from presenting any evidence at trial or dispositive motion as to any
22 medical injuries she claims she sustained as a result of the incident.” Mot. at 11.

23 The Court recognizes and appreciates the evidentiary sanctions sought are
24 narrowly tailored to remedying the prejudice resulting from Saunders’ failure to appear at

25
26 ⁵ If Defendants wish to pursue this course of action, after they seek a continuance of
27 any applicable deadlines, the undersigned Magistrate Judge will consider a motion to
28 compel and/or for further sanctions filed in compliance with Local Rule 37-2 and, if
appropriate, a concurrent request for an expedited hearing.

1 an IME. However, as discussed above in section II.A., the Court has not yet had the
2 opportunity to try lesser sanctions. If the District Court denies a motion to continue
3 necessary deadlines or Saunders fails to appear for a rescheduled IME following the
4 granting of a motion to compel brought in compliance with Local Rules, the Court will
5 reconsider Defendants’ request for terminating and evidentiary sanctions. Therefore,
6 Defendants’ request for evidentiary sanctions is **DENIED without prejudice**.

7 **C. The Request for Monetary Sanctions is Granted.**

8 **1. Relevant Law**

9 When a party fails to obey an order to provide or permit discovery, “the court *must*
10 order the disobedient party, the attorney advising that party, or both to pay the reasonable
11 expenses, including attorney’s fees, caused by the failure, unless the failure was
12 substantially justified or other circumstances make an award of expenses unjust.” Fed. R.
13 Civ. P. 37(b)(2)(C). In addition, the Local Rules provide strict procedures with which
14 counsel must comply in bringing or opposing a discovery motion, including requiring a
15 pre-filing conference of counsel and joint stipulation, and specifically provide that “[t]he
16 failure of any counsel to comply with or cooperate in the foregoing procedures may result
17 in the imposition of sanctions.”⁶ L.R. 37 *et seq.*

18 ///

19 **2. Application**

20 Here, Saunders was warned her failure to appear at the IME would result in “a non-
21 appearance fee of \$650 [], along with any time the doctor has already spent in preparing
22 for the IME.” See Dkt. 19. Plaintiffs have failed participate in the preparation of a joint
23 stipulation, or timely oppose the Motion for Sanctions. Further, Saunders’ failure to
24 appear, or at least to provide 48 hours notice, is not substantially justified. Thus,
25 pursuant to Federal Rule of Civil Procedure 37(b)(2)(C) and Local Rule 37-4, sanctions

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27 ⁶ Despite a lengthy discussion of Plaintiffs’ counsel’s failure to comply with the
28 requirements for preparation of a joint stipulation, it is unclear whether Defendants are
seeking sanctions against Plaintiffs’ counsel pursuant to Local Rule 37-4.

1 are warranted. Accordingly, Defendants' request for monetary sanctions against
2 Saunders is **GRANTED** in an amount to be determined after further briefing.

3 Defendants request the amount of \$4,051.05 for Saunders' non-appearance.
4 However, Defendants have not provided evidentiary support for the amount requested.
5 The Court will determine the appropriate amount of monetary sanctions after reviewing
6 further evidentiary support. Defendants may file a declaration regarding the amount
7 reasonably incurred as a result of Saunders' failure to appear for the IME **no later than**
8 **December 17, 2015**. Plaintiffs may file objections to Defendants' declaration **no later**
9 **than December 23, 2015**.

10 **III.**
11 **CONCLUSION**

12 IT IS THEREFORE ORDERED that (1) Defendants may file a declaration
13 regarding the amount reasonably incurred as a result of Saunders' failure to appear for the
14 IME **no later than December 17, 2015**; (2) Plaintiffs may file objections to Defendants'
15 declaration **no later than December 23, 2015**; (3) Defendants' Motion for evidentiary
16 and terminating sanctions is denied without prejudice; and (4) the hearing on Defendants'
17 Motion currently set for December 17, 2015 is vacated.

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19 DATED: December 14, 2015

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21 _____
22 HONORABLE KENLY KIYA KATO
23 UNITED STATES MAGISTRATE JUDGE
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