

1 Plaintiff's Eighth Amendment claims against Defendant T. Cagle for excessive force and against
2 Defendant R. Perez for failure to intervene.

3 **A. Relevant Procedural History**

4 Following the screening of Plaintiff's first amended complaint, discovery was opened in
5 this action on August 20, 2013. (ECF No. 33.) Defendants have since unsuccessfully attempted
6 to take Plaintiff's deposition four times. (Declaration of Arthur B. Mark III, ECF No. 128-2, ¶ 2.)

7 Defendants first noticed Plaintiff's deposition on March 6, 2014. (Mark Decl., Ex. A.)
8 On April 4, 2014, the Court granted Plaintiff a postponement of his deposition pending resolution
9 of his request for appointment of counsel, and directed the parties to file supplemental
10 information regarding Plaintiff's current mental functioning and psychological condition. (ECF
11 No. 57.) Based on the supplemental health records submitted by Plaintiff and information
12 submitted by Defendants regarding Plaintiff's GED classes, the Court denied Plaintiff's motion
13 for counsel on June 17, 2014. (ECF No. 71.)

14 Defendants served a second notice of deposition on June 18, 2014. (Mark Decl., ¶ 3, Ex.
15 B.) Plaintiff appeared, but stated that he had not received the notice of deposition and was not
16 prepared to proceed. (Mark Decl. ¶ 4, Ex. C.) Defendants' counsel noticed Plaintiff's deposition
17 a third time on August 8, 2014. (Mark Decl., Ex. D.) Plaintiff did not provide advance notice to
18 Defendants' counsel that he could not proceed. (Mark Decl. ¶ 5.) Defendants' counsel made two
19 attempts to secure Plaintiff's appearance on the day of the deposition, but Plaintiff refused to
20 appear. (Mark Decl. ¶ 5, Ex. E.)

21 On August 8, 2014, Plaintiff filed a motion requesting a stay of this action or, in the
22 alternative, appointment of counsel, due to his imminent transfer to an intermediate care facility
23 on the basis of his mental health status. (ECF No. 81.) Defendants filed an opposition, while
24 Plaintiff filed a renewed motion for appointment of counsel and a motion requesting a ruling on
25 his motion for appointment of counsel. (ECF Nos. 87, 96, 97.)

26 On December 19, 2014, the Court granted Plaintiff's request for a stay of this action,
27 finding that the serious nature of Plaintiff's mental health issues, including repeated placement in
28 a crisis bed and in an Acute Psychiatric Program, supported a stay. (ECF No. 100.) The action

1 was stayed for 90 days to allow Plaintiff an opportunity to gather materials, secure his legal
2 documents, and marshal evidence of his mental status for any renewed motion for the
3 appointment of counsel, and the parties were directed to submit written status reports regarding
4 Plaintiff's mental health and ability to prosecute this action. (Id.)

5 On March 18, 2015, Plaintiff renewed his motion for the appointment of counsel. In
6 support, Plaintiff submitted a letter from his psychiatrist, Dr. Sanmukan Surulinathan of DSH-
7 Stockton. (ECF No. 107.) On March 20, 2015, Defendants filed a status report regarding
8 Plaintiff's mental health status and ability to prosecute this action, also relying on Dr.
9 Surulinathan's report. (ECF No. 108.) Plaintiff also filed numerous motions requesting judicial
10 notice, (ECF Nos. 103, 116, 122), subpoenas, (ECF Nos. 102, 104, 119), sanctions, (ECF Nos.
11 107, 122), and motions for counsel, (ECF Nos. 107, 109, 112, 117, 122). The Court ultimately
12 denied all of Plaintiff's motions, including his requests for counsel, finding that Plaintiff's
13 documented mental health issues have not precluded Plaintiff from a consistent ability to
14 articulate his claims in this action. (ECF No. 125.)

15 Pursuant to the Court's amended scheduling order, Defendants' counsel served a fourth
16 notice of deposition setting Plaintiff's deposition for May 13, 2016. (Mark Decl. ¶ 7, Ex. F.)
17 Plaintiff did not provide advance notice that he was unwilling to proceed with his deposition, or
18 that he did not intend to appear. (Mark Decl. ¶ 7.) Plaintiff again refused to appear for his
19 deposition. (Mark Decl. ¶ 7, Ex. G.)

20 On May 19, 2016, Defendants filed a motion for terminating sanctions on the basis of
21 Plaintiff's refusal to cooperate with his deposition and failure to prosecute. (ECF No. 128.)
22 Following the Court's June 21, 2016 order directing Plaintiff to file a response to the motion,
23 (ECF No. 130), Plaintiff filed an opposition on July 1, 2016, (ECF No. 131). Defendants filed a
24 reply on July 8, 2016. (ECF No. 132.) Plaintiff filed a sur-reply, (ECF No. 136), and Defendants
25 filed a motion to strike Plaintiff's unauthorized sur-reply, (ECF No. 137). Plaintiff filed a motion
26 for the Court to accept Plaintiff's sur-reply together with a motion to appoint counsel on August
27 4, 2016. (ECF No. 139.)

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1 On July 11, 2016, Defendants filed a motion to modify Defendants' deadlines in the
2 scheduling order. (ECF No. 134.) Plaintiff filed an opposition on July 21, 2016, (ECF No. 135),
3 and Defendants filed a reply on July 28, 2016, (ECF No. 138). Plaintiff filed a sur-reply, (ECF
4 No. 140), and Defendants filed a motion to strike the sur-reply, (ECF No. 142). Plaintiff filed a
5 response to Defendants' motion on August 22, 2016, together with a further motion to appoint
6 counsel. (ECF No. 144.)

7 Plaintiff filed a motion for summary judgment on the pleadings on August 8, 2016, (ECF
8 No. 141), and a further motion to appoint counsel on August 17, 2016, (ECF No. 143).
9 Defendants filed an opposition to Plaintiff's motions for the Court to accept his sur-reply to
10 Defendants' motion for terminating sanctions and further motions to appoint counsel on August
11 24, 2016, (ECF No. 145), and an opposition to Plaintiff's motion for summary judgment on
12 August 29, 2016, (ECF No. 146.) Plaintiff filed replies on September 12, 2016. (ECF Nos. 147,
13 148.)

14 Plaintiff filed an addition to his pending motions for voluntary appointment of counsel,
15 which was docketed as another motion to appoint counsel, on December 13, 2016. (ECF No.
16 149.) Defendants filed an opposition on December 16, 2016, and Plaintiff filed a reply on
17 January 3, 2017. (ECF Nos. 150, 151.)

18 Also pending are Plaintiff's motions to clarify and request for a status update regarding
19 his motions for appointment of counsel.¹ (ECF Nos. 153, 154.)

20 The above summarizes merely part of the proceedings in this case. The docket currently
21 stands at 154 entries. While this case has been pending, the Court has postponed Plaintiff's
22 deposition and stayed this action in order to address Plaintiff's mental health status on his ability
23 to litigate this action and provide deposition testimony. In response to Plaintiff's repeated
24 motions requesting appointment of counsel, (see ECF Nos. 18, 35, 55, 73, 81, 96, 97, 107, 116,
25 120, 122), the Court has consistently determined that Plaintiff's mental health status has not
26 impeded his ability to present the merits of his claims without the assistance of counsel.
27 Nevertheless, he has repeatedly refused to appear or cooperate with Defendants' attempts to take

28 ¹ These motions are GRANTED, pursuant to the instant order.

1 his deposition, or to otherwise advance this matter toward disposition on the merits.

2 **II. Discussion**

3 **A. Plaintiff's Motions to Appoint Counsel**

4 As Plaintiff has previously been informed, he does not have a constitutional right to
5 appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997),
6 withdrawn on other grounds, 154 F.3d 952, 954 n. 1 (9th Cir. 1998), and the Court cannot require
7 an attorney to represent Plaintiff pursuant to 28 U.S.C. §1915(e)(1). Mallard v. United States
8 District Court for the Southern District of Iowa, 490 U.S. 296, 298 (1989). However, in certain
9 exceptional circumstances the Court may request the voluntary assistance of counsel pursuant to
10 section 1915(e)(1). Rand, 113 F.3d at 1525.

11 Without a reasonable method of securing and compensating counsel, the Court will seek
12 volunteer counsel only in the most serious and exceptional cases. In determining whether
13 “exceptional circumstances exist, the district court must evaluate both the likelihood of success
14 on the merits [and] the ability of the [plaintiff] to articulate his claims pro se in light of the
15 complexity of the legal issues involved.” Id. (internal quotation marks and citations omitted).

16 Plaintiff continues to assert as his primary justification for the appointment of counsel the
17 limitations resulting from his documented mental health issues. (ECF Nos. 139, 143, 144, 149.)
18 In addition, Plaintiff argues that the justice system is treating him unfairly, his case would have
19 progressed more quickly with the appointment of counsel, and his incarceration limits his ability
20 to litigate this action. As discussed throughout this order, the Court has repeatedly addressed and
21 dismissed these arguments.

22 Further, the Court has allowed Plaintiff several opportunities to submit supplemental
23 evidence to support the asserted limitations imposed by his mental health status, and continues to
24 find that Plaintiff's filings in this action do not substantiate such limitations. As noted in the
25 Court's most recent order regarding Plaintiff's motions to appoint counsel, Plaintiff's filings
26 remain directed, coherent, and supported by relevant evidence. (ECF No. 125.) It is only
27 Plaintiff's repeated refusal to participate in his deposition, as discussed below, that prevents this
28 action from proceeding.

1 Thus, the Court does not find the exceptional circumstances necessary for the appointment
2 of counsel at this time, and Plaintiff's motions shall be denied.

3 **B. Motion for Sanctions**

4 Defendants move for terminating sanctions due to Plaintiff's failure to attend and
5 cooperate in his deposition on three separate occasions. Defendants argue that even after the
6 Court's determination that Plaintiff was able to provide deposition testimony and to litigate this
7 case, Plaintiff repeatedly refused to appear at his duly noticed deposition. Defendants contend
8 that Plaintiff's repeated failures to appear constitute the willful non-compliance needed for a
9 dismissal pursuant to Federal Rule of Civil Procedure 37(b)(2). (ECF No. 128-1.)

10 In opposition, Plaintiff reasserts the limitations imposed by his mental health, and
11 contends that it is an undue burden for the Court to expect him to adequately conduct discovery
12 given his severe anxiety and other mental health issues. Plaintiff argues that he is in no condition
13 to be deposed, and if he had been appointed counsel years ago, this case would have been
14 resolved. (ECF No. 131.)

15 In reply, Defendants reiterate that Plaintiff relies only on his *pro se* status and mental
16 health to justify his refusal to provide deposition testimony, and that his opposition makes clear
17 that he has no intention of cooperating with his deposition. In addition, Defendants argue that
18 Plaintiff is attempting to manipulate the discovery process, prolong this litigation, and use his
19 failure to cooperate as leverage for repeatedly seeking appointment of pro bono counsel. (ECF
20 No. 132.)

21 In his sur-reply, Plaintiff argues that Defendants have mischaracterized the facts in this
22 matter.² Plaintiff states that the first time Defendants' counsel attempted to depose him, he did
23 not have his legal property and had nothing but a crayon to write to the courts, and that he had not
24 slept for three days prior to the most recent deposition attempt. Plaintiff reiterates that his mental
25 health symptoms affect his ability to conduct discovery and adequately present his case, and the
26 case would have resolved years ago had he been appointed counsel. Plaintiff further states that he

27 ² Defendants' request to strike, (ECF No. 137), is HEREBY DENIED. The Court considered the substance of
28 Plaintiff's sur-reply in reaching its determination.

1 will not “continue allowing c/o’s to assault [him] and do nothing. If this process proves to be
2 futile then yes I will resort to violence to protect my self!”³ (ECF No. 136.)

3 **C. Legal Standard**

4 On motion, the Court may order sanctions against a party for failure, after being served
5 with proper notice, to appear for that person’s deposition. Fed. R. Civ. P. 37(d)(1)(A)(i). Such
6 sanctions may include prohibiting the disobedient party from supporting or opposing designated
7 claims or defenses, or from introducing designated matters in evidence. Fed. R. Civ. P.
8 37(b)(2)(A). The Court also may dismiss the action or proceeding in whole or in part. Id.
9 Dismissal and default are such drastic remedies, they may be ordered only in extreme
10 circumstances—i.e., willful disobedience or bad faith. In re Exxon Valdez, 102 F.3d 429, 432
11 (9th Cir. 1996). Even a single willful violation may suffice depending on the circumstances.
12 Valley Eng’rs Inc. v. Elec. Eng’g Co., 158 F.3d 1051, 1056 (9th Cir. 1998) (dishonest
13 concealment of critical evidence justified dismissal).

14 Additionally, District courts have the inherent power to control their dockets and “[i]n the
15 exercise of that power they may impose sanctions including, where appropriate, . . . dismissal.”
16 Thompson v. Hous. Auth., 782 F.2d 829, 831 (9th Cir. 1986). Terminating sanctions may be
17 warranted where “discovery violations threaten to interfere with the rightful decision of the case.”
18 Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1097 (9th Cir. 2007).

19 **D. The Court Finds Plaintiff’s Non-Compliance Has Been Willful**

20 **1. Plaintiff’s Repeated Refusal to Appear for His Deposition**

21 This action has been pending since July 2011, and Plaintiff shows little interest in
22 advancing this litigation in the absence of appointment of pro bono counsel or fulfilling his
23 discovery obligations. The original discovery period in this action opened in 2013. (ECF No.
24 33.) Defendants have noticed Plaintiff’s deposition four times, and Plaintiff has failed to appear
25 or cooperate on three occasions, without advance notice. (Mark Decl., ¶¶ 2–7.) Instead, Plaintiff
26 has filed numerous motions to stay this action and for appointment of counsel, asserting

27 ³ To the extent Plaintiff asserts in his filings that he will resort to violence should the Court rule against him in this
28 litigation, Plaintiff is admonished that any similar behavior in the future will result in sanctions being levied upon
him. Such sanctions may include monetary sanctions, striking a motion or pleading, or dismissal of the entire action.

1 repeatedly that he is unable to proceed in this litigation absent the appointment of counsel. (See
2 ECF Nos. 18, 35, 55, 73, 81, 96, 97, 107, 116, 120, 122, 139, 143, 144, 149, 154.) Plaintiff has
3 continued to file such motions even after the Court’s determination that Plaintiff was able to
4 provide deposition testimony and litigate this action without the assistance of counsel.

5 Plaintiff’s discovery obligation under the Federal Rules of Civil Procedure does not
6 permit him to abdicate his responsibility to appear for a properly noticed deposition. In addition,
7 Plaintiff’s pro se status does not excuse intentional non-compliance with discovery rules and
8 court orders. See Lindstedt v. City of Granby, 238 F.3d 933, 937 (8th Cir. 2000) (affirming
9 sanction of dismissal, holding that “[a] pro se litigant is bound by the litigation rules as is a
10 lawyer, particularly here with the fulfilling of simple requirements of discovery); see also Warren
11 v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994) (holding that district court could not decline to
12 impose any sanction for violation of Fed. R. Civ. P. 11 simply because plaintiff was proceeding
13 pro se).

14 Plaintiff has known since 2014 that he would be required to appear and cooperate in a
15 deposition. Plaintiff’s deposition was noticed on four separate occasions—March 6, 2014; June
16 18, 2014; August 8, 2014; and April 11, 2016—yet Plaintiff repeatedly refused to appear or
17 cooperate. Although the Court denied Defendants’ motion to compel Plaintiff’s deposition, it did
18 so without prejudice, and ultimately found that Plaintiff’s mental health did not preclude him
19 from litigating this action and participating in discovery accordingly. (ECF Nos. 100, 125.)
20 Nevertheless, Plaintiff again refused to submit to examination by deposition, constituting willful
21 discovery disobedience warranting terminating sanctions. See Henry v. Gill Indus., Inc., 983
22 F.2d 943, 946 (9th Cir. 1993).

23 **2. The Court Has Considered and Rejected Plaintiff’s Objections to** 24 **Attending his Deposition**

25 Throughout this action, Plaintiff has filed more than a dozen motions for appointment of
26 counsel asserting that he is unable to litigate this action or conduct discovery without
27 representation. However, the Court has addressed these contentions and repeatedly found that
28 Plaintiff’s pro se status, incarceration, and documented mental health issues do not constitute the

1 exceptional circumstances necessary for the appointment of counsel. (ECF Nos. 22, 36, 71, 80,
2 100, 125.)

3 Moreover, the Court has previously granted Plaintiff a postponement of his deposition as
4 well as a stay of this action, in order to specifically address his current mental health status. On
5 both occasions, the Court considered supplemental information submitted by both parties, and
6 concluded that Plaintiff's mental health issues did not prevent him from articulating his claims
7 and presenting directed and coherent filings. (ECF Nos. 71, 125.) Following both of those
8 orders, Defendants' counsel duly re-noticed Plaintiff's deposition, Plaintiff gave no indication
9 that he would not appear, yet Plaintiff failed to appear or cooperate.

10 Furthermore, the extensive docket in this action belies Plaintiff's assertions that he is
11 unable to advance this case without the assistance of counsel. In spite of his documented mental
12 health limitations, Plaintiff has continued to file numerous motions presenting cogent arguments
13 and relevant evidence demonstrating his understanding of the issues at hand. The Court does not
14 find that Plaintiff's renewed motions for appointment of counsel have presented any new
15 information or circumstances that would excuse his subsequent failures to participate in his
16 deposition. On the contrary, Plaintiff continues to file coherent and directed motions articulating
17 his position.

18 Plaintiff may not continue to delay the progress of this action by refusing to cooperate in
19 discovery in the hopes that he will eventually be appointed counsel, after the Court has repeatedly
20 informed him that his situation does not present the exceptional circumstances necessary for the
21 appointment of pro bono counsel. The Court finds that Plaintiff's unjustified failure to participate
22 in discovery in response to his failure to obtain counsel constitutes willful and bad faith disregard
23 for the discovery process.

24 **E. Terminating Sanctions are Appropriate**

25 In determining whether to dismiss an action, the Court must consider several factors:
26 (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its
27 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
28 cases on their merits; and (5) the availability of less drastic sanctions. Henderson v. Duncan, 779

1 F.2d 1421, 1423 (9th Cir. 1986); Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988). The
2 amount of prejudice resulting from the discovery violations and the availability of less drastic
3 sanctions are said to be “key factors.” Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990).

4 Here, the first two factors, the public’s interest in expeditious resolution of litigation and
5 the Court’s need to manage its docket, weigh in favor of dismissal. See Yourish v. Cal.
6 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) (“[T]he public’s interest in expeditious resolution of
7 litigation always favors dismissal.”). This case has been pending since 2011. It has more than
8 150 docket entries in what should be a relatively straightforward excessive force and failure to
9 intervene claim. But even with so many docket entries, the case is mired in a longstanding
10 discovery dispute which should have been resolved by Plaintiff’s participation in his duly noticed
11 deposition.

12 Defendants are entitled to know the facts upon which Plaintiff bases his claims. Since
13 nearly the inception, Plaintiff has consistently failed to advance his case, and instead, has engaged
14 in dilatory and evasive tactics, including numerous and duplicative requests for appointment of
15 counsel. This case has become an undue consumption and waste of limited judicial resources to
16 manage and address Plaintiff’s filings.

17 This Court has not lost sight of the strong interest in resolving cases on the merits. But
18 even this strong interest in deciding cases on the merits cannot override a litigant’s conduct in
19 refusing to participate in the discovery process, insisting on multiplying the proceedings, and
20 wasting judicial resources. As detailed throughout these findings and recommendations, and as is
21 located throughout the docket in the case, the Court has devoted inordinate amounts of time to
22 deal with what should be limited-in-scope claims.

23 The third factor, risk of prejudice to Defendants, also weighs in favor of dismissal. There
24 is a rebuttable presumption of prejudice to a defendant that arises when a plaintiff unreasonably
25 delays litigation. In re Eisen, 31 F.3d 1447, 1452–53 (9th Cir. 1994). “To prove prejudice, a
26 defendant must establish that plaintiff’s actions impaired defendant’s ability to proceed to trial or
27 threatened to interfere with the rightful decision of the case.” Pagtalunan v. Galaza, 291 F.3d
28 639, 642 (9th Cir. 2002) (citing Malone v. U.S. Postal Serv., 833 F.2d 128, 131 (9th Cir. 1987)).

1 The risk of prejudice is considered in relation to plaintiff's reason for defaulting. Id. (citing
2 Yourish v. Cal. Amplifier, 191 F.3d 983, 991 (9th Cir. 1999)).

3 Plaintiff's refusal to participate in his deposition substantially hinders Defendants' ability
4 to investigate and defend against his allegations, particularly in light of the time that has elapsed
5 since the events in this case transpired. Now, seven years into this case and four years since first
6 requested, Defendants are no further along in learning the evidence which supports Plaintiff's
7 claims than when the case was filed. A deposition is necessary for Defendants to question
8 Plaintiff with respect to the events alleged in the complaint, the circumstances surrounding the
9 events alleged in the complaint, any injuries received, and what damages he is claiming. As a
10 result of Plaintiff's conduct, Defendants have been forced to expend time and resources
11 attempting to secure his cooperation by filing motions (including the instant Motion for
12 Sanctions) and responding to Plaintiff's copious motions. The inability to fully defend the case or
13 to move forward with any potential dispositive motions, coupled with the delay, is prejudicial to
14 Defendants.

15 The fourth factor—public policy favoring disposition of cases on their merits—is greatly
16 outweighed by the factors in favor of dismissal discussed herein. When a case has stalled or is
17 unreasonably delayed by a party's failure to comply with discovery obligations, the case cannot
18 move toward resolution on the merits. Thus, the fourth factor—public policy favoring disposition
19 of cases on their merits—is not compelling when it is thwarted by the Plaintiff's dilatory and
20 evasive conduct.

21 Finally, the Court considered lesser sanctions, but no lesser sanction is warranted.
22 Evidentiary sanctions would be ineffective, as Plaintiff would still be able to testify to
23 information that he has withheld and the Court would have no practical way of excluding such
24 testimony. Monetary sanctions are worthless because of Plaintiff's *in forma pauperis* status. He
25 would likely be unable to pay any monetary sanctions, making such sanctions of little use. Given
26 Plaintiff's repeated and willful failures to cooperate with his deposition, and his stated
27 unwillingness to proceed in this action without the appointment of counsel, the Court finds that a
28 lesser sanction, such as an order compelling Plaintiff's deposition attendance and resetting of

1 dates, would be futile and serve only to further delay the advancement of this litigation and
2 compound the prejudice to Defendants.

3 Thus, the Court finds that there are no other, lesser sanctions that would be satisfactory or
4 effective. The Ninth Circuit has explained that “[a] district court need not exhaust every sanction
5 short of dismissal before finally dismissing a case, but must explore possible and meaningful
6 alternatives.” Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir.1986). Here, Plaintiff’s
7 deposition was first noticed in 2014, then re-noticed on three later dates, yet Plaintiff has
8 remained uncooperative. Given the numerous attempts Defendants have made to take Plaintiff’s
9 deposition, Plaintiff’s insistence on filing numerous and repetitive motions in a manner that
10 demonstrates an intention to delay this action until he is appointed counsel, and the substantial
11 prejudice to Defendants, the Court finds that lesser sanctions would be ineffective and insufficient
12 to address Plaintiff’s willful behavior and bad faith.

13 Finally, Rule 37 requires “the party failing to act . . . to pay the reasonable expenses,
14 including attorney’s fees, caused by the failure, unless the failure was substantially justified or
15 other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(d)(3). As noted
16 previously, Plaintiff is proceeding *in forma pauperis* in this action, which makes it unlikely that
17 he would be able to pay any monetary sanction. Thus, the imposition of such a sanction would be
18 unjust, and no monetary sanctions will be issued.

19 **III. Conclusion and Order**

20 Accordingly, the Court HEREBY ORDERS as follows:

- 21 1. Plaintiff’s motions to appoint counsel, (ECF Nos. 139, 143, 144, 149), are DENIED,
22 without prejudice;
- 23 2. Defendants’ motion for terminating sanctions, (ECF No. 128), is GRANTED and this
24 action is DISMISSED, with prejudice, due to Plaintiff’s repeated refusal to attend and
25 cooperate in his deposition and failure to prosecute. See Fed. R. Civ. P. 37(d)(1)(A)(i);
26 Fed. R. Civ. P. 41(b); L.R. 110;
- 27 3. Defendants’ motion to modify Defendants’ deadlines in the scheduling order, (ECF No.
28 134), is DENIED as moot;

- 1 4. Defendants' motion to strike Plaintiff's unauthorized sur-reply, (ECF No. 137), is
- 2 DENIED;
- 3 5. Plaintiff's motion to accept Plaintiff's sur-reply, (ECF No. 139), is GRANTED;
- 4 6. Defendants' motion to strike Plaintiff's unauthorized sur-reply, (ECF No. 142), is
- 5 DENIED, as moot;
- 6 7. Plaintiff's motion for summary judgment, (ECF No. 141), is DENIED as moot;
- 7 8. Plaintiff's motions to clarify and for status update, (ECF Nos. 153, 154), are GRANTED;
- 8 9. The Clerk of the Court is directed to close this case.

9
10 IT IS SO ORDERED.

11 Dated: April 4, 2018

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE