



1 in this lawsuit is not what Plaintiff truly seeks. Plaintiff is challenging the search and seizure that  
2 led to a criminal conviction. Although this Court has held that he can proceed on his claim  
3 because he pled no contest in his criminal case, and thus a ruling regarding the search and seizure  
4 would not invalidate that conviction, it has never been clear what damages Plaintiff suffered aside  
5 from that conviction. Moreover, it has long appeared that Plaintiff had the misplaced hope that  
6 this case would result in an overturn of his criminal conviction. Thus, the failure of Plaintiff to  
7 identify damages in the course of discovery and Plaintiff's failure to appear for the discovery  
8 hearing are not merely technical rule violations—they are symptoms that Plaintiff cannot obtain  
9 his true goal through this litigation.

10 **I. BACKGROUND**

11 On August 24, 2015, Plaintiff Bruce Berna filed a First Amended Complaint (“FAC”) in  
12 this action. (ECF No. 6.) The FAC alleged that Defendants had illegally searched the trailer that  
13 Plaintiff had been living in and that he had been arrested and convicted based on that illegal  
14 search.

15 In the findings and recommendations that certain claims in Plaintiff's complaint go  
16 forward, this Court discussed the limitations of *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), and  
17 stated:

18 The Court wishes to note that its decision only concerns whether Plaintiff has  
19 stated a viable legal claim. The Court does not decide what remedies will be  
20 available to Plaintiff if he succeeds on this claim. Plaintiff should be aware that  
21 this part of his claim only survives precisely because it will not legally invalidate  
22 his plea or conviction. In other words, to the extent Plaintiff filed this case in  
23 order to overturn his conviction, he should know at the outset of this case that he  
24 will not accomplish that goal through this lawsuit.

25 (ECF No. 9, at 6-7).

26 The Court initially attempted to schedule the case on May 25, 2016, but Plaintiff failed to  
27 appear for the scheduling conference. (ECF No. 26) The Court set an order to show cause  
28 hearing and ordered Plaintiff to file a written response to the order to show cause. (ECF No. 25).  
Plaintiff did not file any written response, but appeared at the order to show cause hearing. The  
Court discharged the order to show cause and issued a scheduling order for the case. (ECF No.

1 28) The Court also advised Plaintiff that it would not tolerate further failures to appear or failures  
2 to obey court orders and warned that sanctions would issue for any future violations. (ECF No.  
3 28.) Finally, the Court again advised Plaintiff that, even were he to prevail on his claims, he  
4 would likely have difficulty proving that he had suffered damages as a result of Defendants'  
5 conduct and he would not be able to overturn the criminal conviction that had resulted because of  
6 Defendants' search of his trailer.

7 On August 25, 2016, the Court conducted an informal discovery dispute conference  
8 between the parties based on Plaintiff's refusal to respond to any of Defendants' discovery  
9 requests. (ECF No. 32) Plaintiff was instructed to respond to the outstanding discovery requests.  
10 On September 12, 2016, Defendants filed a motion to compel, stating that Plaintiff had still not  
11 responded to their discovery requests. (ECF No. 35) Defendants also requested sanctions for  
12 Plaintiff's failure to cooperate with discovery. The motion was properly served on Plaintiff. Both  
13 parties were informed that telephonic appearances were permitted for the hearing and dial in  
14 information was distributed. (ECF No. 36.)

15 The Court held a hearing on the motion to compel on October 21, 2016 at 10:00 a.m.  
16 Catherine Woodbridge appeared telephonically for Defendants. Plaintiff failed to appear at the  
17 hearing. (ECF No. 37) Plaintiff did not file any opposition to the motion to compel, nor did he  
18 file any request for a continuance or otherwise notify the Court that he would not be able to  
19 appear. The Court issued a second order to show cause requiring Plaintiff to file a written  
20 response explaining his failure to appear. (ECF No. 38) On October 31, 2016, Plaintiff filed a  
21 letter stating that he forgot about the court hearing and explaining that it was difficult for him to  
22 travel to Fresno on a regular basis. (ECF No. 39).

## 23 **II. DISCUSSION**

### 24 **A. Legal Standard**

25 Rule 37(d) of the Federal Rules of Civil Procedure provides, in relevant part, that if "a  
26 party, after being properly served with interrogatories under Rule 33 or a request for inspection  
27 under Rule 34, fails to serve its answers, objections, or written response," the court "where the  
28 action is pending may, on motion, order sanctions." The allowable sanctions include, among

1 others, “dismissing the action or proceeding in whole or in part.” Fed. R. Civ. P. 37(b)(2)(A)(v),  
2 37(d)(3). Courts have discretion in imposing sanctions. *Payne v. Exxon Corp.*, 121 F.3d 503, 507  
3 (9th Cir. 1997). A court is permitted to impose the sanction of dismissal or default under Rule  
4 37 only in “extreme circumstances” where the violation is “due to willfulness, bad faith, or fault  
5 of the party.” *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir.1996). “[D]isobedient conduct not  
6 shown to be outside the control of the litigant’ is all that is required to demonstrate willfulness,  
7 bad faith, or fault.” *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993), *quoting Fjelstad*  
8 *v. Am. Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985). “A court may consider prior  
9 misconduct when weighing a subsequent sanction motion.” *Adriana Intern. Corp. v. Thoeren*,  
10 913 F.2d 1406, 1411 (9th Cir. 1990).

11 To determine whether to dismiss an action pursuant to Rule 37(b)(2)(C), a district court  
12 must consider five factors:

13 (1) the public's interest in expeditious resolution of litigation; (2) the court's need  
14 to manage its docket; (3) the risk of prejudice to the [opposing party]; (4) the  
15 public policy favoring disposition of cases on their merits; and (5) the availability  
16 of less drastic sanctions.’ *Payne*, 121 F.3d at 507, *quoting Malone v. U.S. Postal*  
*Serv.*, 833 F.2d 128, 130 (9th Cir.1987). Where a court order is violated, the first  
and second factors will favor sanctions and the fourth will cut against them. *Id.*

17 *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir.2004).

18 The Ninth Circuit Court of Appeals has stated that this multi-factor test is “not  
19 mechanical,” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th  
20 Cir. 2007), and the court “need not make explicit findings regarding each of these factors,” *Leon*  
21 *v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Rather, the test “provides the district court  
22 with a way to think about what to do, not a set of conditions precedent for sanctions or a script  
23 that the district court must follow.” *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096. “What is most  
24 critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is  
25 whether discovery violations threaten to interfere with the rightful decision of the case.” *Id.* at  
26 1097.

27 Courts may also impose sanctions, including terminating sanctions, as part of their  
28 inherent power “to manage their own affairs so as to achieve the orderly and expeditious

1 disposition of cases” or based on a failure to comply with court orders. *Chambers v. NASCO,*  
2 *Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Pagtalunan v. Galazza*, 291 F.3d  
3 639, 642 (9th Cir. 2002). In both instances, the Ninth Circuit has held that the same five-factor  
4 test utilized in the context of Rule 37 sanctions applies. *Leon*, 464 F.3d at 958 n. 4; *Pagtalunan*,  
5 291 F.3d at 642.

### 6 **B. Analysis**

7 The first of the enumerated factors “always favors dismissal.” *Pagtalunan*, 291 F.3d at  
8 642. Plaintiff has participated only intermittently in this case and, even then, only after the Court  
9 has issued orders requiring him to do so. The public interest thus favors expeditious resolution of  
10 the case.

11 The second factor, the Court’s need to manage its docket, also weighs in favor of  
12 dispositive sanctions. Plaintiff has failed to appear for both his initial scheduling conference and  
13 for a properly noticed hearing on Defendants’ motion to compel. He has failed to oppose the  
14 Motion to Compel and has offered no justification for his refusal to participate in the discovery  
15 process. The Court need not spend its resources attempting to ensure that Plaintiff appears to  
16 prosecute his own action. *Sec. Ins. Co. of Hartford v. Cibus Ins. Servs., Inc.*, No. Civ.S-05-2620  
17 DFL DAD, 2006 WL 3388549, at \*2 (E.D. Cal. Nov. 22, 2006) (defendant’s failure to appear at  
18 order to show cause hearing favored dismissal based on court’s need to manage docket). Nor  
19 should it be required to take any other steps to ensure that its orders are obeyed.

20 The third factor requires a showing that there is a risk of prejudice to the party in whose  
21 favor the sanctions would be awarded because of the opposing party’s actions. Put more simply,  
22 Plaintiff’s actions in this case must have “impaired [the defendants’] ability to proceed to trial or  
23 threatened to interfere with the rightful decision of the case.” *Pagtalunan*, 291 F.3d at 642, *citing*  
24 *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987); *Saunders v. Cty. of San*  
25 *Bernardino*, No. EDCV150188FMOKKX, 2015 WL 8769979, at \*4 (C.D. Cal. Dec. 14, 2015)  
26 (“a plaintiff’s refusal to produce evidence in discovery supporting plaintiff’s claim presumptively  
27 shows the claim is meritless and prejudices a defendant’s ability to present its defense.”). A  
28 failure to produce documents can constitute sufficient prejudice to warrant dispositive sanctions.

1 *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990) (“the repeated failure of  
2 Adriana to appear at scheduled dispositions compounded by their continuing refusal to comply  
3 with court-ordered production of documents constitutes an interference with the rightful decision  
4 of the case”). Plaintiff has failed to cooperate in the discovery process and to appear for properly  
5 noticed hearings. The non-expert discovery cutoff date is now less than two months away. Since  
6 the inception of this case, Defendants have stated that they plan to file at least one dispositive  
7 motion on the issues of damages and/or statute of limitations. Consequently, their discovery  
8 requests have focused on those issues. Because Plaintiff has refused to respond to the requests,  
9 however, Defendants have been unable to prepare or file any such motion. The third factor thus  
10 weighs in favor of dismissal.

11 This conclusion is further supported by the nature of the discovery at issue. Defendants  
12 seek discovery on what damages, if any, Plaintiff suffered other than his criminal conviction.  
13 Defendants have contended that the only damages Plaintiff sought relate to this criminal  
14 conviction, which cannot be challenged in this proceeding. By failing to respond to discovery,  
15 Plaintiff has failed to either enumerate damages cognizable in this case, or provide Defendants  
16 with a firm admission that Plaintiff in fact seeks improperly to overturn his conviction through  
17 this proceeding. In this way, the failure of Plaintiff to respond to discovery has hampered  
18 Defendants from appropriately developing their defense.

19 The fourth factor, the public policy favoring disposition of cases on their merits, weighs  
20 against dismissal. The weight it brings to Plaintiff’s side of the ledger is minimal, however,  
21 because his conduct in this case has precluded Defendants from engaging in a vital portion of the  
22 discovery process. *In re Exxon Valdez*, 102 F.3d 429, 433 (9th Cir. 1996) (“The overwhelming  
23 weight of the factors supporting dismissal overcomes the policy favoring disposition of cases on  
24 their merits. But even that policy lends little support to appellants, whose total refusal to provide  
25 discovery obstructed resolution of their claims on the merits”). The fourth factor “lends little  
26 support to a party whose responsibility it is to move a case toward disposition on the merits but  
27 whose conduct impedes progress in that direction.” *In re Phenylpropanolamine (PPA) Prods.*  
28 *Liability Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006). Plaintiffs bear the responsibility of

1 prosecuting the cases they file; a plaintiff that files a case but then abandons the case whenever it  
2 suits him is not promoting the disposition of his case on its merits. Moreover, again, it is unclear  
3 whether Plaintiff has a claim that will provide him with the relief he seeks.

4 The fifth factor, the availability of less drastic alternatives, weighs in favor of dismissal.  
5 Plaintiff is proceeding *in forma pauperis*, making it unlikely that monetary sanctions will induce  
6 him to cooperate or to prosecute his case. *Sanchez v. Rodriguez*, 298 F.R.D. 460, 466 (C.D. Cal.  
7 2014) (“because plaintiff is proceeding in forma pauperis due to documented indigency, plaintiff  
8 would be unable to pay a monetary sanction and the imposition of such a sanction would be futile  
9 as a means of inducing him to comply with this Court’s discovery orders.”). The Court also  
10 previously issued an order to show cause after Plaintiff failed to appear for a hearing. After the  
11 order was discharged, the Court warned Plaintiff that any further failures to appear would not be  
12 tolerated. The order to show cause (and later warning) does not appear to have induced Plaintiff  
13 to participate in this litigation or appear for scheduled hearings, however. Nor would evidentiary  
14 sanctions make sense: Defendants’ discovery requests target information related to damages and  
15 a potential statute of limitations defense. If the Court were to grant some evidentiary sanction—  
16 precluding Plaintiff from offering any evidence of damages or from opposing a statute of  
17 limitations argument—the result would be the same as if the Court issued dispositive sanctions.  
18 The fifth factor thus supports the issuance of terminating sanctions. *Anheuser-Busch, Inc. v.*  
19 *Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995) (terminating sanctions  
20 appropriate where party’s conduct illustrates “an abiding contempt and continuing disregard” for  
21 court orders).

22 After an evaluation of the relevant factors, the Court determines that Plaintiff’s failures to  
23 appear, to prosecute his case, and to respond to discovery requests are the result of willfulness  
24 and bad faith and interfere with the rightful decision of the case. Terminating sanctions under  
25 Rule 37, the Court’s inherent power to manage its own docket, and for Plaintiff’s failure to obey  
26 court orders are therefore warranted. It also appears that Plaintiff may not be prosecuting this  
27 case because it ultimately will not accomplish his goal of overturning his criminal conviction  
28 even if he were to prove that the underlying search was in fact illegal.

1 **III. RECOMMENDATION**

2 For the reasons outlined above, the Court RECOMMENDS that:

- 3 1. Defendants’ Motion to Compel and Request for Sanctions (ECF No. 35) be  
4 GRANTED; and,  
5 2. Plaintiff’s claims be DISMISSED.

6 These findings and recommendations will be submitted to the United States District Judge  
7 assigned to this case pursuant to the provisions of Title 28 of the United States Code section  
8 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations,  
9 the parties may file written objections with the Court. The document should be captioned  
10 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that  
11 failure to file objections within the specified time may waive the right to appeal the District  
12 Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d  
13 1153, 1156-57 (9th Cir. 1991).

14  
15 IT IS SO ORDERED.

16 Dated: November 10, 2016

/s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE

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