

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IVAN CORONADO and TAMMI
CORONADO,

Plaintiffs,

v.

NATIONAL DEFAULT SERVICING
CORPORATION, SELECT PORTFOLIO
SERVICING INC., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC., WELLS FARGO BANK, N.A.,
successor by merger to Wells Fargo Bank
Minnesota, N.A., f/k/a Northwest Bank
Minnesota, N.A., solely as trustee for
Structured Asset Mortgage Investment II Inc.,
Bear Stearns Mortgage Funding Trust 2006-
AR4, Mortgage Pass-Through Certificates,
Series 2006-AR4,

Defendants.

Case No. 1:15-CV-01844-MCE-SKO

**FINDINGS AND RECOMMENDATIONS
THAT THE DISTRICT COURT IMPOSE
TERMINATING SANCTIONS AND
DISMISS THIS CASE**

Before the Court are the following two motions: (1) Defendant Select Portfolio Servicing, Inc.’s (“Defendant Select”) Motion for Terminating Sanctions, or in the Alternative for Issue and Evidentiary Sanctions, and to Modify Scheduling Order (“Defendant Select’s Motion”), (Doc. 29); and (2) a Motion for Reconsideration and for Terminating Sanctions, or in the Alternative for Issue and Evidentiary Sanctions (the “Remaining Defendants’ Motion”), (Doc. 30), brought by

1 Defendants National Default Servicing Corporation, Mortgage Electronic Registration Systems,
2 Inc., and Wells Fargo Bank, N.A., as trustee (together, the “Remaining Defendants”). For the
3 reasons provided herein, the undersigned recommends that the presiding district court judge
4 GRANT Defendant Select’s Motion, (Doc. 29), and the Remaining Defendants’ Motion, (Doc.
5 30), insofar as all Defendants request that the Court impose terminating sanctions and dismiss this
6 action, in its entirety.

7 I. BACKGROUND

8 This action arises out of Plaintiffs’ purported default on the mortgage for certain property
9 and Defendants’ subsequent election to sell the property. Plaintiffs have proceeded *pro se* since
10 the inception of this case.

11 On May 20, 2015, Plaintiffs filed the Complaint against Defendants¹ in the Superior Court
12 of California, County of Fresno. (Doc. 1, Ex. 4.) Defendant Select then removed this case to this
13 Court on December 9, 2015.² (Doc. 1.)

14 The Complaint includes the following claims against all Defendants: (1) First Cause of
15 Action—violation of the California Homeowners Bill of Rights; (2) Second Cause of
16 Action—violation of California Civil Code § 2923.5; (3) Third Cause of Action—negligence; (4)
17 Fourth Cause of Action—violation of California Business and Professions Code Section 17200, *et*
18 *seq.*, (5) Fifth Cause of Action—constructive fraud; (6) Sixth Cause of Action—slander of title;
19 (7) Seventh Cause of Action—quiet title; (8) Eighth Cause of Action—declaratory relief; (9)
20 Ninth Cause of Action—injunctive relief. (*See id.*, Ex. 4 ¶¶ 42–128.) Beyond the declaratory and
21 injunctive requests included in the Eighth and Ninth Causes of Action, the Complaint also
22 includes requests for (1) special, general, compensatory, treble, and punitive damages, (2)
23 restitution, and (3) attorneys’ fees and costs. (*See id.* at 31.)

24 On May 15, 2016, Defendant Select propounded first sets of interrogatories to each
25

26 ¹ The Complaint included Central Pacific Mortgage Company as a defendant in this action. (*See* Doc. 1, Ex. 4.)
27 While this action was pending in state court, Plaintiffs voluntarily dismissed Central Pacific Mortgage Company as a
28 defendant. (*See id.*, Ex. 1.) As such, Central Pacific Mortgage Company is no longer a defendant in this case.

² In its Notice of Removal, Defendant Select asserts that the removal was timely because it was “filed less than thirty
days after [Defendant Select] received notice of Plaintiffs’ voluntary dismissal of the only non-diverse
defendant—Central Pacific Mortgage Company.” (Doc. 1 ¶ 3.)

1 Plaintiff (the “Discovery Requests”). (*See* Doc. 13, Ex. 2 at 2–31.) The Discovery Requests
2 pertained to a wide range of topics, such as evidence supporting all of Plaintiffs’ claims and the
3 damages Plaintiffs allegedly suffered. (*See id.* at 10–14, 25–29.) The Remaining Defendants did
4 not propound the Discovery Requests and the Discovery Requests do not otherwise indicate that
5 the Remaining Defendants joined with Defendant Select in propounding these interrogatories.
6 (*See id.* at 2–31.)

7 On June 29, 2016, Defendant Select filed a motion to compel, in which it requested that the
8 Court compel responses to the Discovery Requests, as well as additional requests for production of
9 documents. (Doc. 13.) In an order entered on August 1, 2016, the undersigned granted this
10 motion to compel and ordered Plaintiffs “to respond, without objections, to the [Discovery
11 Requests] by no later than August 26, 2016.”³ (Doc. 18.)

12 On October 11, 2016, Defendants filed a Motion for Terminating Sanctions or in the
13 Alternative for Issue and Evidentiary Sanctions (the “First Motion for Terminating Sanctions”).
14 (Doc. 20.) In the First Motion for Terminating Sanctions, Defendants asserted that Plaintiffs had
15 “failed to provide any responses to the” Discovery Requests. (*Id.* at 5 (emphasis omitted).)
16 Defendants argued that the Court should therefore “dismiss this matter, with prejudice.” (*Id.* at
17 11.)

18 In its order entered on December 2, 2016 (together with the undersigned’s August 1, 2016
19 order, the “Discovery Orders”), the undersigned denied the First Motion for Terminating
20 Sanctions without prejudice as to Defendant Select. (Doc. 26 at 1–2.) As the Remaining
21 Defendants did not propound the Discovery Requests—or otherwise join Defendant Select in
22 propounding the Discovery Requests—the undersigned denied the First Motion for Terminating
23 Sanctions *with* prejudice as to the Remaining Defendants. (*Id.* at 2.) The undersigned also again
24 ordered “Plaintiffs to provide full responses, without objections, to [the Discovery Requests] by no
25

26 ³ In the August 1, 2016 order, the undersigned also ordered Plaintiffs to respond, without objections, to certain
27 document requests propounded by Defendant Select on March 15, 2016. (*See* Doc. 18 at 3 & 6.) However,
28 Defendants do not argue in either Defendant Select’s Motion or the Remaining Defendants’ Motion that these
document requests form the basis for any sanctions. (*See* Docs. 29 & 30.) As such, the document requests Defendant
Select propounded on March 15, 2016 are not at issue for purposes of the instant Findings and Recommendations.

1 later than Friday, December 16, 2016.”⁴ (*Id.*) Finally, the undersigned ordered that it would “hold
2 a hearing regarding the status of this matter on Wednesday, December 21, 2016.” (*Id.*)

3 The undersigned subsequently held a status conference on December 21, 2016. (Doc. 27.)
4 Plaintiffs failed to appear at this status conference. (Doc. 28 at 2.) During this status conference,
5 Defendants indicated that they would again file motions for terminating sanctions. (*Id.*)
6 Defendants also stated that they would seek reconsideration of the undersigned’s December 2,
7 2016 order, insofar as the undersigned denied the First Motion for Terminating Sanctions *with*
8 prejudice as to the Remaining Defendants. (*Id.*) The undersigned therefore provided the
9 following briefing schedule for these motions: (1) Defendants could “file their motions for
10 terminating sanctions and reconsideration of the” undersigned’s December 2, 2016 order “by no
11 later than January 3, 2017;” (2) “Plaintiffs [could] file an opposition brief to these motions by
12 January 17, 2017;” and (3) “Defendants [could] file their reply brief in support of these motions by
13 January 24, 2017.” (*Id.*)

14 On January 3, 2017, Defendant Select filed Defendant Select’s Motion, (Doc. 29), and the
15 Remaining Defendants filed the Remaining Defendants’ Motion, (Doc. 30). To date, Plaintiffs
16 have not filed an opposition to either Defendant Select’s Motion or the Remaining Defendants’
17 Motion. Defendants also have not filed any reply briefs in support of these two motions.

18 On February 8, 2017, the undersigned held a hearing regarding Defendant Select’s Motion
19 and the Remaining Defendants’ Motion. (Doc. 35.) “Plaintiffs did not make an appearance at this
20 hearing despite a phone call by defense counsel to [Plaintiffs’] last known telephone number” at
21 the designated time for the hearing. (Doc. 36.) At this hearing, “Defendants state[d] . . . that, to
22 date, Plaintiffs . . . failed to comply with” the undersigned’s August 1, 2016 order by not
23 responding, without objections, to the Discovery Requests. (*Id.*) As such, in an order entered on
24 the same date, the undersigned cautioned “Plaintiffs that [the undersigned] will recommend that
25 the district court *dismiss this entire case* if Plaintiffs fail to respond to [the Discovery Requests] by

26 ⁴ In its December 2, 2016 order, the undersigned ordered “Plaintiffs to retain counsel, if they so choose, by Friday,
27 December 9, 2016.” (Doc. 26 at 2.) The undersigned further ordered that, “[i]f Plaintiffs choose to retain counsel, . . .
28 Plaintiffs’ counsel must notice their appearance on the docket for this case no later than December 9, 2016.” (*Id.* at 2.)
To date, no counsel has noticed an appearance on behalf of Plaintiffs on the docket for this case.

1 no later than Wednesday, February 22, 2017.” (*Id.*) The undersigned’s February 8, 2017 order
2 was served on Plaintiffs by mail and there is no indication on the docket for this case that
3 Plaintiffs did not receive this order—or, indeed, any of the undersigned’s orders.

4 On February 23, 2017, Defendants filed notice “that Plaintiffs have not responded (in any
5 way whatsoever) to [the Discovery Requests], to date.” (Doc. 38 at 2.) The docket for this case
6 does not otherwise provide any indication that Plaintiffs have responded to the Discovery
7 Requests.

8 Finally, in the Remaining Defendants’ Motion, the Remaining Defendants first request that
9 the undersigned reconsider its December 2, 2016 order to the extent the undersigned denied the
10 First Motion for Terminating Sanctions *with* prejudice as to the Remaining Defendants. (*See* Doc.
11 30 at 8–12.) In an order entered on February 8, 2017, the undersigned granted the Remaining
12 Defendants’ Motion, but only “to the extent the [Remaining] Defendants request[ed]
13 reconsideration of the [undersigned’s] December 2, 2016 order.” (Doc. 37 at 5.) The undersigned
14 therefore modified its December 2, 2016 order by denying the First Motion for Terminating
15 Sanctions *without* prejudice as to the Remaining Defendants. (*Id.*) Consequently, the Remaining
16 Defendants’ request for reconsideration in the Remaining Defendants’ Motion, (*see* Doc. 30 at 8–
17 12), has been resolved, but the remainder of this motion—including the Remaining Defendants’
18 request for terminating sanctions, (*see id.* at 13–18)—is still pending before the Court.

19 II. STANDING FOR THE REMAINING DEFENDANTS

20 The undersigned must address a preliminary issue before turning to Defendants’ requests
21 for terminating sanctions. In particular, only Defendant Select propounded the Discovery
22 Requests that are the subject of the undersigned’s Discovery Orders. (*See, e.g.,* Doc. 13, Ex. 2 at
23 2–31.) However, *all* Defendants now request terminating sanctions for Plaintiffs’ failure to follow
24 the Discovery Orders by not responding to the Discovery Requests. (*See* Doc. 29 at 16; Doc. 30 at
25 22.) Nonetheless, for the reasons that follow, the undersigned finds that all Defendants have
26 standing to seek this sanction.

27 In *Payne v. Exxon Corp.*, the Ninth Circuit addressed a case where the district court
28 dismissed the entire action against two defendants due to the plaintiffs’ failure to comply with a

1 discovery order, even though only one of the defendants propounded the discovery that was the
2 subject of the discovery order. 121 F.3d 503, 507 (9th Cir. 1997). In addressing the plaintiffs’
3 argument that dismissal of the claims against both defendants was improper, the *Payne* court noted
4 that Federal Rule of Civil Procedure 37(b)(2)—which provides for terminating sanctions, *see* Fed.
5 R. Civ. P. 37(b)(2)(A)(v)—does not include a “standing limitation” that “limit[s] the district
6 court’s dismissal authority to claims against the party who propounded discovery,” *Payne*, 121
7 F.3d at 510. As such, “[u]nder Rule 37(b)(2), [a plaintiff’s] willful and repeated violations of
8 discovery orders [gives] the district court authority to dismiss the entire ‘action or proceeding.’”
9 *Id.*

10 Ultimately, the *Payne* court affirmed the district court’s dismissal of the entire action based
11 on the plaintiffs’ “failure to comply with court orders” relating to discovery and the corresponding
12 prejudice to both defendants. *Id.* On the latter point, the *Payne* court stated that the non-
13 propounding defendant was prejudiced by the plaintiffs’ conduct because, in pertinent part, this
14 defendant “cooperated in [the propounding defendant’s] later efforts to secure adequate responses
15 . . . and joined in [the propounding defendant’s] final motion to dismiss” for failure to comply
16 with a discovery order. *Id.*; *see also Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1059
17 (9th Cir. 1998) (affirming the district court’s dismissal of the entire action for failure to comply
18 with discovery orders—even though the orders related to discovery propounded by only one
19 defendant—as (1) the discovery “was important to all the parties, because the claims were
20 materially similar, and all the other parties were working together on discovery with [the
21 propounding defendant] taking the lead,” and (2) the plaintiff’s “violations of court orders
22 regarding discovery had seriously impaired the public interest in expeditious resolution” of the
23 case).

24 In this case, all Defendants are represented by the same counsel. (*See, e.g.*, Doc. 30 at 22.)
25 Additionally, the Remaining Defendants state that they intended to rely on Plaintiffs’ responses to
26 the Discovery Requests. (*See, e.g., id.* at 2, 10–12.) Indeed, the Remaining Defendants note that
27 the Discovery Requests “inquired into subject matter relevant to common defenses” and
28 Defendant Select is “the attorney-in-fact” for the Remaining Defendants under a limited power-of-

1 attorney agreement “and was therefore acting on both its own behalf as well as its co-Defendants’
2 behalf in propounding the” Discovery Requests. (*Id.* at 10–11.) Based on these uncontroverted
3 assertions, the undersigned finds that all Defendants suffered prejudice by Plaintiffs’ failure to
4 comply with the Discovery Orders by not responding to the Discovery Requests.

5 In short, the Remaining Defendants—like the defendants in *Payne*—intended to rely on
6 Plaintiffs’ responses to the Discovery Requests and suffered prejudice by Plaintiffs’ failure to
7 comply with the undersigned’s Discovery Orders relating to the Discovery Requests. As such,
8 pursuant to *Payne* and its progeny, the undersigned finds that the Remaining Defendants may seek
9 dismissal of Plaintiffs’ claims against the Remaining Defendants, even though these Defendants
10 did not propound the Discovery Requests. The undersigned now turns to Defendants’ requests for
11 terminating sanctions.

12 III. TERMINATING SANCTIONS

13 All Defendants request that the Court impose terminating sanctions and dismiss this entire
14 action due to Plaintiffs’ failure to comply with the Discovery Orders. (*See, e.g.*, Doc. 29 at 16;
15 Doc. 30 at 22.) For the following reasons, the undersigned agrees with Defendants’ position and
16 recommends that the presiding district court judge dismiss this case, in its entirety.

17 A. Standard

18 Federal Rule of Civil Procedure 37(b)(2)(A) provides that, “[i]f a party . . . fails to obey an
19 order to provide or permit discovery, . . . the court where the action is pending may issue further
20 just orders.” Those further orders “may include” a wide range of sanctions, such as adverse
21 inferences, “striking pleadings in whole or in part,” and dismissal of “the action or proceeding in
22 whole or in part.” Fed. R. Civ. P. 37(b)(2)(A); *see, e.g., Wyle v. R.J. Reynolds Indus., Inc.*, 709
23 F.2d 585, 589 (9th Cir. 1983) (“Federal Rule of Civil Procedure 37 authorizes the district court, in
24 its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of
25 discovery or with court orders enforcing those rules.” (citations omitted)). “In evaluating the
26 propriety of sanctions, the [c]ourt considers ‘all incidents of a party’s misconduct.’” *Blundell v.*
27 *Cty. of L.A.*, No. CV 08-2212-DDP (EX), 2010 WL 344320, at *4 (C.D. Cal. Jan. 29, 2010)
28 (quoting *Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1411 (9th Cir. 1990)). Further, “[a]

1 terminating sanction . . . is very severe,” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*,
2 482 F.3d 1091, 1096 (9th Cir. 2007), “and is to be imposed only in extreme circumstances,”
3 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) (citation omitted). “The
4 appropriateness of a sanction is within the discretion of the [c]ourt.” *Raygoza v. City of Fresno*,
5 297 F.R.D. 603, 606 (E.D. Cal. 2014).

6 **B. Willfulness, Bad Faith, and Fault**

7 As an initial matter, “[o]nly ‘willfulness, bad faith, and fault’ justify terminating
8 sanctions.” *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096 (quoting *Jorgensen v. Cassidy*, 320 F.3d
9 906, 912 (9th Cir. 2003)). This prerequisite “does not require wrongful intent.” *Sanchez v.*
10 *Rodriguez*, 298 F.R.D. 460, 463 (C.D. Cal. 2014). Instead, “[d]isobedient conduct not shown to
11 be outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault.”
12 *Jorgensen*, 320 F.3d at 912 (citation omitted). “Delay, failure to appear for depositions, failure to
13 answer interrogatories resulting from a party being out of town, and misunderstanding a party’s
14 own counsel are not matters outside of a party’s control.” *Nat’l Corp. Tax Credit Funds III, IV,*
15 *VI, VII v. Potashnik*, No. CV 07–3528 PSG (FMOx), 2010 WL 457626, at *4 (C.D. Cal. Feb. 4,
16 2010) (citing *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 949 (9th Cir. 1993)).

17 Here, there is no indication in the record that Plaintiffs did not receive either the Discovery
18 Requests or the undersigned’s Discovery Orders. Nonetheless, Plaintiffs have failed to offer any
19 explanation, whatsoever, as to why they failed—and continue to fail—to comply with the
20 Discovery Orders. As such, Plaintiffs have not shown that their disobedient conduct in failing to
21 comply with the Discovery Orders was outside of their control. Consequently, the undersigned
22 finds that the “willfulness, bad faith, and fault” prerequisite to dispositive sanctions is satisfied.
23 *See, e.g., Henry*, 983 F.2d at 949 (finding that the “willfulness, bad faith, or fault” requirement
24 was satisfied where none of the plaintiff’s “various explanations for his discovery misconduct . . .
25 persuade[d]” the court “that circumstances outside his control caused his transgressions”);
26 *Sanchez*, 298 F.R.D. at 463–64 (finding that the plaintiff’s noncompliance with a discovery order
27 satisfied the “willfulness, bad faith, or fault” requirement where the plaintiff “received the
28 discovery requests, the motion to compel, and the order granting the motion to compel,” yet the

1 plaintiff did “not attempt[] to show that his repeated failure to comply with discovery obligations .
2 . . was outside his control” (citation omitted)).

3 **C. The Factor Analysis**

4 In addition to the willfulness, bad faith, and fault prerequisite, the Ninth Circuit has stated
5 that “[c]ourts are to weigh” the following “five factors in deciding whether to dismiss a case for
6 failure to comply with a court order”: (1) “the public’s interest in expeditious resolution of
7 litigation;” (2) “the court’s need to manage its docket;” (3) “the risk of prejudice to the
8 defendants;” (4) “the public policy favoring disposition of cases on their merits;” and (5) “the
9 availability of less drastic sanctions.” *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460
10 F.3d 1217, 1226 (9th Cir. 2006) (citation omitted). “These factors are ‘not a series of conditions
11 precedent before the judge can do anything,’ but a ‘way for a district judge to think about what to
12 do.’” *Id.* (quoting *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998)).
13 The undersigned shall address each of the pertinent factors, in turn.

14 15 1. First and Second Factors—Public’s Interest in Expeditious Resolution and the 16 Court’s Need to Manage its Docket

17 The first two factors of this analysis clearly favor dismissal, as is always the case when a
18 party fails to comply with a court order. *See, e.g., Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406,
19 1412 (9th Cir. 1990) (“Where a court order is violated, the first two factors support sanctions . . .
20 .”). In particular, Plaintiffs’ failure to comply with the Discovery Orders hindered the public’s
21 interest in the expeditious resolution of this matter—which Defendant Select removed to this
22 Court over a year ago in December 2015, (*see* Doc. 1)—by stalling this litigation at the discovery
23 phase, *see, e.g., Gonzales v. Mills*, No. 1:09–cv–1549 AWI DLB, 2011 WL 976713, at *5 (E.D.
24 Cal. Mar. 16, 2011) (finding that “[t]he public’s interest in expeditious resolution of litigation
25 favor[ed] dismissal” where the “case ha[d] been pending for over a year and a half, yet it [was]
26 apparent that the case [was] not ready for trial”); *cf. Yourish v. Cal. Amplifier*, 191 F.3d 983, 990
27 (9th Cir. 1999) (“[T]he public’s interest in expeditious resolution of litigation always favors
28 dismissal.”). Additionally, Plaintiffs’ conduct in failing to abide by either of the Discovery Orders
has prevented the Court from managing its docket by preventing any merits-based resolution of

1 this matter and thereby needlessly clogging the Court’s docket. *See, e.g., Gonzales*, 2011 WL
2 976713, at *5 (noting that courts in this District carry “overly congested” dockets “and stalled
3 cases due to a lack of prosecution aggravate the situation”); *cf. Armstrong v. Spearman*, No. 1:13–
4 cv–00246–AWI–SAB (PC), 2015 WL 5021664, at *2 (E.D. Cal. Aug. 21, 2015) (“[T]he Eastern
5 District of California is one of the busiest federal jurisdictions in the United States and its District
6 Judges carry the heaviest caseloads in the nation, [so] the [c]ourt’s interest in managing its docket
7 weighs in favor of terminating the action.”). The undersigned therefore finds that the first two
8 factors weigh in favor of dismissal.

9 2. Fourth Factor—Public Policy in Favor of Disposing of Cases on the Merits

10 Skipping to the fourth factor, there is, of course, a “strong public policy favoring
11 disposition of cases on their merits.” *In re Sucato*, 152 F.3d 929, at *1 (9th Cir. 1998); *see, e.g.,*
12 *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (“Cases should be decided upon their merits
13 whenever reasonably possible.” (citing *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814
14 (9th Cir. 1985))). As a terminating sanction does not dispose of an action on its merits, this factor
15 “cuts against case-dispositive sanctions.” *Valley Eng’rs Inc.*, 158 F.3d at 1057 (citation omitted).

16 Nonetheless, the Ninth Circuit has noted that “a case that is stalled or unreasonably
17 delayed by a party’s failure to comply with deadlines and discovery obligations cannot move
18 forward toward resolution on the merits.” *In re Phenylpropanolamine*, 460 F.3d at 1228.
19 Consequently, this fourth “factor lends little support to a party whose responsibility it is to move a
20 case toward disposition on the merits but whose conduct impedes progress in that direction.” *Id.*
21 (citations omitted).

22 Here, Plaintiffs’ failure to comply with either of the undersigned’s Discovery Orders has
23 stalled this litigation and made it a remote possibility, at best, that this matter will reach any
24 conclusion based on the merits. As such, the fourth factor is entitled to little weight in this
25 analysis, *see, e.g., id.*, and a dispositive sanction is appropriate if the remaining factors weigh in
26 favor of dismissal, *see, e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951, 960–61 (9th Cir. 2006) (stating
27 that “the public policy favoring disposition of cases on their merits, . . . standing alone, is not
28 sufficient to outweigh the other four factors” (citation omitted)); *cf. Winters v. Jordan*, No. 2:09–

1 cv-0522-JAM-KJN PS, 2013 WL 5780819, at *10 (E.D. Cal. Oct. 25, 2013) (“Dismissal is
2 proper ‘where at least four factors support dismissal or where at least three factors strongly
3 support dismissal.’” (quoting *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998))).

4 Thus, as is always the situation “[w]here a court order is violated, the first two factors
5 support sanctions and the fourth factor cuts against” a dispositive sanction. *Adriana Int’l Corp. v.*
6 *Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). “Therefore, it is the third and fifth factors that are
7 decisive.” *Id.*

8 3. Third Factor—Risk of Prejudice

9 Turning next to the third factor—the risk of prejudice to the defendants—the Ninth Circuit
10 noted that “[a] defendant suffers prejudice if the plaintiff’s actions impair the defendant’s ability to
11 go to trial or threaten to interfere with the rightful decision of the case.” *In re*
12 *Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006) (citations
13 omitted). “Failing to produce documents as ordered is considered sufficient prejudice.” *Id.*
14 (citation omitted). “The law also presumes prejudice from unreasonable delay.” *Id.* (citation
15 omitted). “However, this presumption of prejudice is a rebuttable one and if there is a showing
16 that no actual prejudice occurred, that factor should be considered” *In re Eisen*, 31 F.3d
17 1447, 1452–53 (9th Cir. 1994) (citation omitted). “The district court’s finding of prejudice” shall
18 be accorded “substantial deference because the district court is in the best position to assess
19 prejudice.” *In re Phenylpropanolamine*, 460 F.3d at 1228 (citation omitted).

20 In the present matter, the prejudice factor weighs in favor of dispositive sanctions for three
21 distinct reasons. First, Defendants suffered prejudice due to Plaintiffs’ failure to comply with the
22 Discovery Orders regarding the Discovery Requests. *See, e.g., Adriana Int’l Corp.*, 913 F.2d at
23 1412 (stating that “[f]ailure to produce documents as ordered . . . is considered sufficient
24 prejudice” under the third factor (citing *SEC v. Seaboard Corp.*, 666 F.2d 414, 417 (9th Cir.
25 1982))). Second, Plaintiffs’ conduct in failing to comply with the Discovery Orders has
26 prejudiced Defendants by infringing on their ability to prepare and execute their defenses, or to
27 otherwise make litigation decisions that are informed by Plaintiffs’ responses to the Discovery
28 Requests. *See, e.g., Armstrong v. Spearman*, No. 1:13-cv-00246-AWI-SAB (PC), 2015 WL

1 5021664, at *2 (E.D. Cal. Aug. 21, 2015) (“The failure to obtain discovery information
2 significantly impairs the [d]efendants’ ability to go to trial . . . and to make rightful and informed
3 decisions as to whether . . . defense[s] should be explored.”). Finally, Plaintiffs’ failure to comply
4 with the Discovery Orders has needlessly stalled this litigation, thereby creating a presumption of
5 prejudice. *See, e.g., In re Phenylpropanolamine*, 460 F.3d at 1227 (“The law . . . presumes
6 prejudice from unreasonable delay.” (citations omitted)). For each of these reasons, the
7 undersigned finds that the third factor weighs in favor of dispositive sanctions.

8 4. Fifth Factor—Availability of Lesser Sanctions

9 As to the fifth factor—the availability of less drastic sanctions—the Ninth Circuit stated
10 that “[t]he district court abuses its discretion if it imposes a sanction of dismissal without first
11 considering the impact of the sanction and the adequacy of less drastic sanctions.” *Malone v. U.S.*
12 *Postal Serv.*, 833 F.2d 128, 131–32 (9th Cir. 1987) (quoting *United States v. Nat’l Med. Enters.,*
13 *Inc.*, 792 F.2d 906, 912 (9th Cir. 1986)). This final factor includes the following three “sub-
14 parts”: (1) “whether the court has considered lesser sanctions;” (2) whether the court “tried” lesser
15 sanctions; and (3) “whether [the court] warned the recalcitrant party about the possibility of case-
16 dispositive sanctions.” *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091,
17 1096 (9th Cir. 2007) (citing *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir.
18 1998)). “While helpful and encouraged, explicit discussion of alternatives is not necessary for a
19 dismissal order to be upheld.” *In re Phenylpropanolamine*, 460 F.3d at 1229 (citing *Malone*, 833
20 F.2d at 132). Further, “[w]arning that failure to obey a court order will result in dismissal can
21 itself meet the consideration of alternatives requirement.” *Id.* (citations omitted); *see, e.g.,*
22 *Estrada v. Speno & Cohen*, 244 F.3d 1050, 1057 (9th Cir. 2001) (stating that “explicit discussion
23 by the district court of the feasibility of alternatives when ordering dismissal . . . would be
24 superfluous or unnecessary” under some “circumstances,” such as where the court warns “a party
25 that a future failure to obey a court order will result in” termination of the case).

26 In the present matter, the undersigned has considered lesser sanctions, such as evidence or
27 issue sanctions. However, the Discovery Requests address a wide range of topics, such as the
28 purported bases for (1) Defendants’ liability for all of Plaintiffs’ claims, and (2) any damages

1 Plaintiffs allegedly suffered due to Defendants’ conduct. (*See* Doc. 13, Ex. 2 at 2–31.) As such, if
2 the Court imposed evidence or issue sanctions related to the Discovery Requests, those lesser
3 sanctions would, in effect, dispose of this entire case. The undersigned therefore finds that lesser
4 sanctions are not a viable alternative in this matter. *See, e.g., Davis v. Cty. of L.A.*, Case No. CV
5 15-09343-VAP (DTB), 2017 WL 655083, at *6 (C.D. Cal. Jan. 11, 2017) (finding that “no lesser
6 sanctions” were “available to the [c]ourt” where “the discovery still outstanding relates both to
7 damages and liability”).

8 Further, Plaintiffs received sufficient warning regarding the looming potential of
9 terminating sanctions. In particular, in its order entered on February 8, 2017, the undersigned
10 stated the following: “The Court . . . CAUTIONS Plaintiffs that it will recommend that the district
11 court *dismiss this entire case* if Plaintiffs fail to respond to [the Discovery Requests] . . . by no
12 later than Wednesday, February 22, 2017.” (Doc. 36 (emphasis in original).) As such, Plaintiffs
13 were informed of the severe and dispositive consequences of their continued recalcitrance in
14 failing to comply with either of the Discovery Orders by not responding to the Discovery
15 Requests. Nonetheless, Defendants notified the undersigned on February 23, 2017 that Plaintiffs
16 failed to respond “in any way whatsoever” to the Discovery Requests. (Doc. 38 at 2.) Plaintiffs
17 have not provided any representation to the Court contradicting this statement by Defendants.

18 Plaintiffs’ failure to respond to the Discovery Requests despite an explicit warning from
19 the undersigned as to the consequence of dismissal is itself sufficient to satisfy the fifth factor.
20 *See, e.g., In re Phenylpropanolamine*, 460 F.3d at 1229 (“Warning that failure to obey a court
21 order will result in dismissal can itself meet the consideration of alternatives requirement.”
22 (citations omitted)). The undersigned therefore finds that the factor pertaining to the consideration
23 of lesser sanctions weighs in favor of terminating sanctions.

24 5. Additional Consideration—Pursuit of Truth

25 As a corollary to the aforementioned factors, the Ninth Circuit also stated that, “[i]n
26 deciding whether to impose case-dispositive sanctions, the most critical factor is not merely delay
27 or docket management concerns, but truth.” *Conn. Gen. Life Ins. Co. v. New Images of Beverly*
28 *Hills*, 482 F.3d 1091, 1097 (9th Cir. 2007). “Federal Rule of Civil Procedure 1 requires that the

1 rules be construed to secure the ‘just’ resolution of disputes.” *Id.* However, “[t]rue facts must be
2 the foundation for any just result.” *Valley Eng’rs Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1058
3 (9th Cir. 1998). As such, “[t]he most critical factor to be considered in case-dispositive sanctions
4 is whether ‘a party’s discovery violations make it impossible for a court to be confident that the
5 parties will ever have access to the true facts.’” *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1097
6 (quoting *Valley Eng’rs Inc.*, 158 F.3d at 1058). Stated differently, “[w]hat is most critical for
7 case-dispositive sanctions . . . is whether the discovery violations ‘threaten to interfere with the
8 rightful decision of the case.’” *Valley Eng’rs Inc.*, 158 F.3d at 1057 (quoting *Adriana Int’l Corp.*
9 *v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990)).

10 In this case, Plaintiffs have consistently failed to comply with either of the undersigned’s
11 Discovery Orders regarding the Discovery Requests. Defendant Select propounded the Discovery
12 Requests in May 2016, (*see* Doc. 13, Ex. 2 at 14–15, 29–30), so this discovery has remained
13 outstanding for almost a year. Further, Plaintiffs have provided no indication that they shall
14 comply with the Discovery Orders by adequately responding to the Discovery Requests.

15 In short, Plaintiffs’ conduct has completely stalled this litigation. As such, there is little
16 likelihood that this matter will reach any merits-based resolution, let alone a disposition based on
17 the truth. The undersigned therefore finds that Plaintiffs’ failure to comply with the Discovery
18 Orders has prevented a rightful ultimate determination in this case and, consequently, dispositive
19 sanctions are warranted. *See, e.g., Valley Eng’rs Inc.*, 158 F.3d at 1057.

20 In summary, the vast majority of the pertinent factors weigh heavily in favor of the
21 imposition of terminating sanctions. While the public policy in favor of merits-based resolutions
22 weighs against dispositive sanctions, to some extent, this factor is readily outweighed by the
23 remaining factors. *See, e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951, 960–61 (9th Cir. 2006)
24 (stating that “the public policy favoring disposition of cases on their merits, . . . standing alone, is
25 not sufficient to outweigh the other four factors” (citation omitted)); *Winters v. Jordan*, No. 2:09–
26 cv–0522–JAM–KJN PS, 2013 WL 5780819, at *10 (E.D. Cal. Oct. 25, 2013) (“Dismissal is
27 proper ‘where at least four factors support dismissal or where at least three factors strongly
28 support dismissal.’” (quoting *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998))).

1 The undersigned thus recommends that the presiding district court judge impose terminating
2 sanctions on Plaintiffs and dismiss this case.

3 **IV. CONCLUSION**

4 For the reasons set forth above, the undersigned RECOMMENDS that the presiding
5 district court judge GRANT Defendant Select's Motion, (Doc. 29), and the Remaining
6 Defendants' Motion, (Doc. 30), insofar as all Defendants request that the Court impose
7 terminating sanctions on Plaintiffs. The undersigned therefore RECOMMENDS that the presiding
8 district court judge impose terminating sanctions on Plaintiffs and dismiss this case, in its entirety,
9 *with prejudice*. See, e.g., *Matus v. Manfredi*, No. CV F 05-1384 LJO (NEW) WMW, 2007 WL
10 587226, at *5 (E.D. Cal. Feb. 23, 2007) (dismissing an action *with prejudice* due to the "plaintiffs'
11 failure to comply with [an] order to provide discovery responses").

12 These Findings and Recommendations shall be submitted to the United States District
13 Court Judge assigned to this case pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
14 twenty-one (21) days after being served with these Findings and Recommendations, the parties
15 may file written objections with the Court. E.D. Cal. Local Rule 304(b). Any written objections
16 to these findings and recommendations should be captioned "Objections to Magistrate Judge's
17 Findings and Recommendations." The parties are advised that failure to file objections within the
18 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
19 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20 As the undersigned recommends that the presiding district court judge dismiss this action,
21 the undersigned STAYS all pending deadlines in this matter pending the district court judge's
22 determination regarding these Findings and Recommendations.

23 Finally, the undersigned DIRECTS the Clerk to mail a copy of these Findings and
24 Recommendations to Plaintiffs at their address, as listed on the docket for this case. (See Doc. 14
25 (providing Plaintiffs' notice of a change of address, which corresponds to the address currently
26 provided for Plaintiffs on the docket for this case).)
27 IT IS SO ORDERED.

28 Dated: April 5, 2017

/s/ Sheila K. Oberto

UNITED STATES MAGISTRATE JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28