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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBIN LEE HOFFMANN,
Plaintiff,
v.
CORNING POLICE DEPARTMENT, et
al.,
Defendants.

No. 2:14-cv-2736 MCE KJN P

ORDER

Plaintiff is a former county jail inmate, proceeding pro se. Pending before the court is defendants’ motion to dismiss, or to exclude expert witness and for monetary sanctions. On January 11, 2018, oral argument was held. Plaintiff appeared by telephone, representing herself, and attorney Kevin J. Dehoff appeared on behalf of defendants. Upon review of the documents in support and opposition, the statements made at the hearing on this matter, and good cause appearing therefor, THE COURT FINDS AND ORDERS AS FOLLOWS:

I. Background

On February 3, 2017, the court issued its pretrial scheduling order. All non-expert discovery was to be completed by June 8, 2017, and discovery-related motions must conform to the requirements of the Federal Rules of Civil Procedure and this court’s Local Rules. (ECF No. 53 at 2.) As to expert disclosures,

1 The parties shall disclose any expert witnesses in accordance with the
2 specifications of Federal Rule of Civil Procedure 26(a)(2) no later than
3 **July 7, 2017**. Any rebuttal expert disclosures shall be made in
4 accordance with the specifications of Federal Rule of Civil Procedure
5 26(a)(2) no later than **August 7, 2017**. Expert disclosures shall be filed
6 with the court and served upon all other parties. The deadline for
7 expert witness discovery is **September 7, 2017**.

8 An expert witness not timely disclosed will not be permitted to testify
9 unless the party offering the witness demonstrates that: (a) the
10 necessity of the witness could not have been reasonably anticipated at
11 the time that the expert disclosures were due; (b) the court and
12 opposing counsel were promptly notified upon discovery of the
13 witness; and (c) the witness was promptly proffered for deposition.
14 Failure to provide the information required by Federal Rule of Civil
15 Procedure 26(a)(2) along with the expert disclosures may lead to
16 preclusion of the expert's testimony or other appropriate sanctions.

17 (ECF No. 53 at 4.) The order warned that the deadlines set in the order would be strictly
18 enforced, advised that the parties, including pro se parties, must comply, and that "failure to
19 comply with the terms of the order may result in the imposition of monetary and all other
20 appropriate sanctions, including dismissal or an order of judgment." (ECF No. 53 at 1.)

21 Defendants filed their expert witness disclosure on July 7, 2017, along with the expert's
22 qualifications and written report. (ECF No. 55.) Plaintiff filed her expert witness disclosure on
23 July 10, 2017, identifying Dr. Carole Lieberman as the expert witness, and included plaintiff's
24 statement concerning how Dr. Lieberman would testify. (ECF No. 56.) No expert report written
25 by Dr. Lieberman was provided. (Id.)

26 At the August 24, 2017 hearing, rather than exclude plaintiff's expert witness in light of
27 plaintiff's failure to provide the expert's written report,¹ the court provided plaintiff an
28 opportunity to have Dr. Lieberman deposed by opposing counsel, provided plaintiff would bear
all costs of her expert's expenses.² Plaintiff agreed. (ECF No. 69 at 5; 70 at 14-15.) Defendants'

23 ¹ At the hearing, the undersigned explained to plaintiff that he was "actually trying to be
24 somewhat over-accommodating because if [plaintiff] were an attorney [the] answer would be you
25 didn't file a Rule 26 report, you don't have a report from your expert, that expert is stricken,
26 period. [We] wouldn't be exploring these other options." (ECF No. 70 at 18.)

27 ² The court clarified that defendants were responsible for paying for the certified shorthand
28 reporter and their copy of the deposition transcript; all other expert expenses attendant to the
deposition, including travel, meals, preparation and deposition testimony, would be borne by
plaintiff. (ECF No. 69 at 5-6.)

1 motion to exclude expert witness was denied without prejudice, and plaintiff was granted sixty
2 days to “arrange for Dr. Lieberman to travel to Sacramento to be deposed, at plaintiff’s expense.”
3 (ECF No. 69 at 7.) Plaintiff was cautioned that the court was not inclined to extend the sixty day
4 period. (ECF Nos. 69 at 6; 70 at 20.)

5 Defendants attempted to arrange the deposition of Dr. Lieberman from August 25, 2017,
6 to September 21, 2017, without success. (ECF No. 87-2 at 2-5.) On September 21, 2017,
7 defendants filed a notice of deposition for Dr. Lieberman’s deposition to be held on October 11,
8 2017, in Sacramento, pursuant to the court’s prior order. (ECF No. 69 at 5.) Plaintiff attempted
9 to re-locate the deposition to Los Angeles, and on September 26, 2017, plaintiff emailed defense
10 counsel to advise that Dr. Lieberman was on vacation. (Id. at 5-6.) On October 5, 2017, defense
11 counsel wrote and emailed plaintiff to confirm the re-scheduling of the expert deposition to
12 October 20, 2017, and requested that Dr. Lieberman confirm her attendance. (Id. at 6.)³ On
13 October 11, 2017, plaintiff emailed defense counsel and confirmed that she would provide her
14 expert’s report before the October 20 deposition, and confirming her expert would be available by
15 telephone/video deposition on October 20, 2017. (Id. at 7.) Defense counsel responded on
16 October 11, 2017, stating his intent to proceed with the in-person deposition as properly noticed.
17 (Id.) On October 16, 2017, defense counsel’s assistant emailed plaintiff with a carbon copy to Dr.
18 Lieberman asking plaintiff to confirm that her expert would attend the October 20, 2017
19 deposition in person as noticed. On October 16, 2017, Dr. Lieberman responded to defense
20 counsel’s office that she would not be attending her deposition on October 20 because she was
21 not served with a subpoena and had not been paid to attend the deposition. (Id.) On October 17,
22 2017, defense counsel’s partner, Bruce Kilday, wrote a detailed response to plaintiff and Dr.
23 Lieberman, explaining that no subpoena was required because Dr. Lieberman was plaintiff’s
24 retained expert, and pursuant to court order, plaintiff was responsible for the expert fees related to
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26 ³ Defense counsel chose not to respond to plaintiff’s October 6, 2017 email which asked whether
27 defense counsel was going to offer to settle, or have plaintiff thrown in jail for not paying
28 sanctions, and claiming the judge and defense counsel are better “game[s]manship” players.”
(ECF No. 87-3 at 98.) Plaintiff included statements about karma and attempted murder. (Id.)

1 the deposition. (Id. at 8.) Mr. Kilday requested that Dr. Lieberman consider attending the
2 deposition as noticed. (Id.) On October 18, 2017, Dr. Lieberman emailed defense counsel's
3 office stating that she would not be attending the October 20, 2017 deposition. (Id.)

4 On November 3, 2017, defendants' motion for summary judgment was granted in part and
5 denied in part. (ECF No. 84.)

6 On November 7, 2017, defendants filed the instant motion. Defendants request the action
7 be dismissed based on plaintiff's failure to obey a court order and for the discovery abuse
8 surrounding her proposed expert's deposition.⁴ Fed. R. Civ. P. 37(b); 41(b). In the alternative,
9 defendants renew their motion to exclude Dr. Lieberman as an expert witness at trial (ECF No.
10 60), and seek monetary sanctions. Plaintiff filed an opposition, and defendants filed reply.

11 II. Motion to Dismiss

12 A. Terminating Sanctions

13 In regards to a party's failure to obey a court's discovery order, Federal Rule of Civil
14 Procedure 37(b)(2) provides, in relevant part:

15 **(2) Sanctions in the District Where the Action Is Pending.**

16 **(A) For Not Obeying a Discovery Order.** If a party or a party's
17 officer, director, or managing agent . . . fails to obey an order to
18 provide or permit discovery . . . , the court where the action is
19 pending may issue further just orders. They may include the
20 following:

21 (i) directing that the matters embraced in the order or other
22 designated facts be taken as established for purposes of the action,
23 as the prevailing party claims;

24 (ii) prohibiting the disobedient party from supporting or opposing
25 designated claims or defenses, or from introducing designated
26 matters in evidence;

27 (iii) striking pleadings in whole or in part;

28 (iv) staying further proceedings until the order is obeyed;

26 ⁴ Defendants include descriptions of plaintiff's actions throughout this action and prior to the
27 filing of the first motion to exclude Dr. Lieberman's deposition. However, the undersigned
28 confines the analysis of defendants' motion to the circumstances surrounding plaintiff's failure to
comply with the August 29, 2017 order requiring that, within sixty days, plaintiff arrange for Dr.
Lieberman's deposition in Sacramento. (ECF No. 69.)

- 1 (v) dismissing the action or proceeding in whole or in part;
- 2 (vi) rendering a default judgment against the disobedient party; or
- 3 (vii) treating as contempt of court the failure to obey any order
4 except an order to submit to a physical or mental examination.

5 . . .

6 (C) Payment of Expenses. Instead of or in addition to the orders
7 above, the court must order the disobedient party, the attorney
8 advising that party, or both to pay the reasonable expenses,
9 including attorney's fees, caused by the failure, unless the failure
10 was substantially justified or other circumstances make an award of
11 expenses unjust.

12 As the Ninth Circuit Court of Appeals has observed, “[a] terminating sanction, whether
13 default judgment against a defendant or dismissal of a plaintiff’s action, is very severe,” and
14 “[o]nly willfulness, bad faith, and fault justify terminating sanctions.” Conn. Gen. Life Ins. Co. v.
15 New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007); see also Leon v. IDX Sys.
16 Corp., 464 F.3d 951, 958 (9th Cir. 2006) (describing the sanction of dismissal as “harsh”);
17 Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004) (per curiam) (stating
18 that where “the drastic sanctions of dismissal or default are imposed, . . . the range of discretion is
19 narrowed and the losing party’s noncompliance must be due to willfulness, fault, or bad faith”).

20 The court considers five factors in evaluating whether a case-dispositive sanction imposed
21 pursuant to Federal Rule of Civil Procedure 37(b)(2) is justified: “(1) the public’s interest in
22 expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of
23 prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on
24 their merits; and (5) the availability of less drastic sanctions.” Conn. Gen. Life Ins. Co., 482 F.3d
25 at 1096; accord Computer Task Group, Inc., 364 F.3d at 1115. As to the fifth factor, the court
26 further considers “whether the court has considered lesser sanctions, whether it tried them, and
27 whether it warned the recalcitrant party about the possibility of case-dispositive sanctions.”
28 Conn. Gen. Life Ins. Co., 482 F.3d at 1096; accord Leon, 464 F.3d at 960. The Ninth Circuit
Court of Appeals has stated that this multi-factor test is “not mechanical,” Conn. Gen. Life Ins.
Co., 482 F.3d at 1096, and the court “need not make explicit findings regarding each of these
factors,” Leon, 464 F.3d at 958. Rather, the test “provides the district court with a way to think

1 about what to do, not a set of conditions precedent for sanctions or a script that the district court
2 must follow.” Conn. Gen. Life Ins. Co., 482 F.3d at 1096. “What is most critical for case-
3 dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether
4 discovery violations threaten to interfere with the rightful decision of the case.” Id. at 1097.

5 Courts may also impose sanctions, including terminating sanctions, as part of their
6 inherent power “to manage their own affairs so as to achieve the orderly and expeditious
7 disposition of cases.” Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The Ninth Circuit has
8 held that the same five-factor test utilized in the context of Rule 37 sanctions is applied when
9 considering sanctions under the court’s “inherent power.” Leon, 464 F.3d at 958 n.4.

10 On February 3, 2017, plaintiff was advised of this court’s power to impose sanctions,
11 including terminating sanctions, based on plaintiff’s failure to prosecute or to comply with court
12 orders. (ECF No. 52 at 8-9.) The parties were reminded in the scheduling order. (ECF No. 53 at
13 1.)

14 Defendants claim that they have refrained from seeking drastic sanctions to-date because
15 plaintiff is proceeding pro se, despite her prior litigation maneuvers, untimely and incorrect
16 filings, and representations of questionable authenticity over the years, and despite many
17 instances of sanctionable conduct. But defendants argue that her failure to arrange or to
18 cooperate in defendants’ efforts to arrange Dr. Lieberman’s deposition “exemplified deceptive
19 gamesmanship wasting defense counsel and staff’s time, and causing a needless loss of the
20 public’s financial resources.” (ECF No. 87-1 at 4.) Defendants contend that plaintiff’s
21 representations regarding the deposition of Dr. Lieberman “appear to have been a facade” (id.),
22 and plaintiff misled the defense for months regarding such deposition (ECF No. 87-1 at 16).

23 In her opposition to the instant motion, plaintiff claims that defendants have created a
24 “false narrative.” (ECF No. 89 at 2.) Yet, despite the detailed chronology provided by
25 defendants, along with copies of emails and correspondence supporting such narrative, plaintiff
26 fails to provide a detailed response addressing each communication, or explaining how the

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1 narrative is false. Plaintiff's opposition is essentially without substance,⁵ other than her new
2 pronouncement that she is unable to afford Dr. Lieberman's deposition expenses. At the hearing,
3 after being pressed by the undersigned, plaintiff identified the "false narrative" as defense
4 counsel's insistence that plaintiff speak with his secretary, not with the attorney.

5 But what is clear is that the deposition of Dr. Lieberman was not arranged within the
6 court's sixty day deadline, despite the court emphasizing such deadline, and despite the myriad
7 efforts of defense counsel and his staff to arrange such deposition. In addition, during the
8 hearing, it became clear that following the August 24, 2017 hearing, plaintiff made no
9 arrangements to pay Dr. Lieberman's expenses to prepare for and appear at the deposition, such
10 that the deposition was going to be arranged by October 28, 2017, or even take place. Even when
11 it became clear plaintiff could not afford Dr. Lieberman's deposition-related charges, plaintiff
12 failed to timely-inform defense counsel, such that the parties might simply stipulate that plaintiff
13 would not call Dr. Lieberman as an expert witness, rather than require the filing of a motion and a
14 hearing, further increasing everyone's time and expenses, including the court's. Thus, plaintiff is
15 in violation of the court's order, and unfairly increased the time, effort, and expenses incurred by
16 defense counsel.

17 That said, despite the numerous yet failed efforts defense counsel made to arrange the
18 deposition, the undersigned is unwilling at this juncture to impose the very drastic sanction of
19 terminating sanctions. The email exchanges between plaintiff and defense counsel and his staff
20 demonstrate she delayed the scheduling of the deposition, delayed expert witness discovery which
21 was to be completed by September 7, 2017, and certainly delayed a deposition that ultimately did
22 not, and would not, occur. The instant dispute has delayed the scheduling of the pretrial
23 conference and jury trial. But in the meantime defendants' motion for summary judgment was

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25 ⁵ Plaintiff also claims that she did not understand what she was doing at the hearing where she
26 agreed to pay for Dr. Lieberman's deposition in Sacramento, and now apparently believes she
27 should have declined. (ECF No. 89 at 2.) But plaintiff misunderstands the procedural posture of
28 her case at the time. Because plaintiff was required to provide the expert's written report at the
time the expert was disclosed, the expert must be excluded absent some alternative method to
enable defendants to discover Dr. Lieberman's expert opinion from Dr. Lieberman, not from the
plaintiff.

1 heard and decided, and the case has not yet been set for trial. Public policy favors resolution on
2 the merits, and there are less drastic sanctions available, as discussed below. Although plaintiff
3 did violate the court's order requiring plaintiff to arrange for Dr. Lieberman's deposition, the
4 lesser sanction of excluding such expert witness is appropriate. Therefore, defendants' motion to
5 dismiss this action as a sanction is denied.

6 B. Motion to Exclude Expert Witness

7 In the alternative, defendants renew their motion to exclude Dr. Lieberman as plaintiff's
8 expert witness. It is undisputed that plaintiff failed to provide Dr. Lieberman's signed written
9 report with plaintiff's July 5, 2017, expert disclosure, which is why the court provided plaintiff
10 with the opportunity to rectify such failure by making the expert available for deposition. Fed. R.
11 Civ. P. 26(a)(2)(B). If the proponent fails to provide information required by Rule 26(a)(2), the
12 court has discretion to issue sanctions under Rule 37(c)(1). See Fed. R. Civ. P. 37(c)(1); Yeti by
13 Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106-07 (9th Cir. 2001) (courts have wide
14 latitude to issue sanctions under 37(c)(1), and "have upheld the use of the sanction even when a
15 litigant's entire cause of action or defense has been precluded.").

16 The record makes clear that plaintiff did not timely arrange such deposition as required by
17 the August 29, 2017 order. Plaintiff denies she willfully did not provide the expert witness for
18 deposition, but now claims that she is unable to afford the fee Dr. Lieberman requested for a
19 deposition. (ECF No. 89 at 4.) Plaintiff provided a copy of Dr. Lieberman's October 25, 2017
20 statement. Despite waiving the \$7,700 balance due on previous work, the expert would require
21 an additional payment of \$11,200 to prepare the expert report, and to prepare and appear for
22 deposition. (ECF No. 89 at 7-8.) Plaintiff does not indicate the date⁶ she first learned of Dr.
23 Lieberman's deposition fees, but makes clear that plaintiff cannot afford to pay them. (Id.)

24 In light of plaintiff's failure to comply with the August 29, 2017 order, the court orders
25 that Dr. Lieberman be excluded as plaintiff's expert witness at trial.

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28 ⁶ At the hearing, plaintiff claimed she learned of such fees on the Monday before the Friday Dr. Lieberman was to appear for deposition.

1 C. Motion for Monetary Sanctions

2 In addition to excluding Dr. Lieberman as an expert at trial, defendants seek monetary
3 sanctions for plaintiff's discovery abuse in the sum of \$6,598.50, attorneys' fees defendants
4 allege were incurred during the lengthy discovery dispute addressed in their motion.⁷ (ECF No.
5 87-1 at 18.) Defendants did not provide a detailed billing statement. Rather, defense counsel
6 declares that his office spent 40 hours in this latest discovery dispute, including the original
7 motion to exclude Dr. Lieberman, countless emails and meet and confer letters, and the instant
8 motion, and that the firm's hourly rate varies from \$175 to \$225 per hour, depending on the
9 responding attorney's experience. (ECF No. 87-2 at 8.) Defendants' first motion to exclude Dr.
10 Lieberman was denied without prejudice, and no award of attorneys' fees or costs was made.
11 Defendants' generalized request, \$6,598.50, does not indicate what portion was expended on the
12 first motion, and what portion was expended following the August 29, 2017 order and in
13 connection with the instant motion. But the record makes clear that counsel and his staff
14 expended an inordinate amount of time unsuccessfully attempting to arrange Dr. Lieberman's
15 deposition.

16 Plaintiff appears to oppose monetary sanctions on the grounds that she cannot afford to
17 pay further sanctions due to \$100,000 in medical bills, she is scheduled for another surgery, and
18 she will now lose the \$8,000 paid to Dr. Lieberman because plaintiff cannot afford to pay the
19 expert's deposition expenses. (ECF No. 89 at 3.) Dr. Lieberman's October 27, 2017 statement is
20 dated after the deposition noticed for October 20, 2017, and after the myriad emails exchanged
21 between the parties prior thereto, but even if plaintiff first learned of the expert's expenses on
22 Monday, October 16, or October 27, such belated knowledge demonstrates that plaintiff did not
23 make good faith efforts to determine and pay her expert's fees early enough in the sixty day
24 period in order to ensure the deposition would be firmly set by the October 28, 2017 deadline.
25 Simply picking a deposition date is meaningless if the expert witness has not been paid fees to

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27 ⁷ Defendants did not incur the cost of a certified shorthand recorder because they inquired of Dr.
28 Lieberman beforehand, and no travel expenses were incurred because the deposition was to be held in Sacramento.

1 prepare and appear for the deposition.

2 Therefore, as explained at the hearing, the undersigned sanctions plaintiff in the amount of
3 \$1,000, payable to defense counsel's firm, Angelo, Kilday & Kilduff, LLP, for plaintiff's failure
4 to comply with the August 29, 2017 order, and for the additional attorneys' fees she caused
5 defense counsel and his staff to incur in attempting to arrange her expert's deposition. Plaintiff is
6 warned that her failure to pay the \$1,000 within thirty days from January 11, 2018, will result in a
7 recommendation that this action be dismissed as a sanction for her continued failure to comply
8 with court orders. Defense counsel shall file a notice of compliance when the sanctions are paid
9 in full.

10 III. Request for Discovery Responses & Sanctions

11 In her opposition, plaintiff asks the court to order defendants to respond to plaintiff's
12 special interrogatories and request for production of documents, while confirming such discovery
13 requests were untimely propounded. (ECF No. 89 at 4.) Because defendants failed to respond to
14 such discovery requests, plaintiff also requests the court sanction defense counsel under Rule 37
15 based on his failure to "make disclosure or cooperate in discovery." (ECF No. 89 at 4.)

16 However, because plaintiff's discovery requests were untimely propounded, defendants
17 were not required to respond. Moreover, plaintiff's request to reopen discovery was denied on
18 August 29, 2017. (ECF No. 69.) Thus, plaintiff's request is denied.

19 IV. Miscellaneous

20 The parties shall meet and confer to discuss whether this action should be set for
21 settlement conference⁸ and, if so, whether it should be scheduled before the undersigned or a
22 different magistrate judge. Within fourteen days, the parties shall advise the court accordingly.

23 As discussed at the hearing, the undersigned is aware of the difficulties pro se litigants
24 encounter in prosecuting their cases in federal court. To that end, plaintiff is informed that on
25 April 6, 2018, McGeorge Law School students will provide a "Pro Se Help Day" at the Eastern

26 ⁸ The undersigned proposed that defense counsel may opt to stay imposition of the \$1,000
27 sanctions to credit toward settlement, if the parties agree that settlement negotiations are
28 worthwhile, but cautioned that defendants are under no compulsion to do so, and are entitled to
decline settlement negotiations, particularly if the parties' demands are too far apart.

1 District courthouse. Pro se litigants with pending cases will be offered a chance to have orders
2 and filings reviewed, but without creating a formal attorney-client relationship. If plaintiff wishes
3 to seek such assistance, she must travel to Sacramento and bring appropriate documents for
4 review.

5 Accordingly, IT IS HEREBY ORDERED that:

6 1. Defendants' motion to dismiss this action as a sanction (ECF No. 87) is denied.

7 2. Defendants' motion to exclude Dr. Lieberman as plaintiff's expert witness (ECF No.
8 87) is granted. Plaintiff may not call Dr. Lieberman as a witness at trial.

9 3. Defendants' request for monetary sanctions (ECF No. 87) is partially granted; no later
10 than thirty days from January 11, 2018, plaintiff shall pay sanctions in the amount of \$1,000 to
11 Angelo, Kilday & Kilduff, LLP, 601 University Avenue, Suite 150, Sacramento, CA 95825.
12 Plaintiff's failure to remit the sum of \$1,000 within the thirty day period will result in a
13 recommendation that this action be dismissed. Defense counsel shall file a notice of compliance
14 when the sanctions are paid in full.

15 4. Plaintiff's request for discovery responses and sanctions (ECF No. 89) is denied.

16 5. Fourteen days from the date of this order, the parties shall inform the court whether a
17 settlement conference is requested, as set forth above.

18 Dated: January 12, 2018

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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