

1 **I. BACKGROUND**

2 Plaintiff originally filed the instant suit on March 10, 2016. Following screening,
3 he filed the operative first amended complaint on July 21, 2017. Since that time, Plaintiff has filed
4 a variety of motions appearing reflecting an apparent impatience with the litigation process.
5 Filings of significance to the instant motions include at least four filings related to Magistrate
6 Judge consent, see ECF Nos. 5, 7, 148, and 176, the latter two of which appear to be demands that
7 Defendant consent to have the case heard by a Magistrate Judge.

8 Defendant’s motion for terminating sanctions arises out of an ex parte
9 communication in the form of letter Plaintiff mailed to former defense counsel Deputy Attorney
10 General Derrek Lee. In this letter, which was mailed directly to the Attorney General’s Office and
11 does not appear to have been submitted to this Court², Plaintiff once more appealed to Defendant
12 (or rather, Defendant’s former counsel) to consent to Magistrate Judge jurisdiction.

13 Plaintiff wrote that he was requesting that defense counsel³ (hereinafter
14 “Counsel”) consent to the Magistrate Judge assigned to the case, who had worked on the case for
15 “so long” and “acknowledged [sic] most of it,” because that judge would be “fair for both of us.”
16 ECF No. 178-1, pg. 6. He expressed that his objective was “[t]o have this case finish this year,”
17 which would “save your resource, [sic] and time also [sic] to the court.” Id. Plaintiff noted that
18 the incident in question had occurred seven years prior and suggested that previous “D.A.
19 counselors” (apparently referring to former defense counsel) had “tracked this case, as longer
20 [sic] they can,”⁴ which was why he had consented to a Magistrate Judge. Id. at 5. Plaintiff
21 requested that Counsel “[d]o to other [sic] what[] you wants to done [sic] for you.”

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24 ² Defendant has included a copy of the letter as an exhibit to their Motion for
Terminating Sanctions. See ECF No. 178-1, pgs. 5-7.

25 ³ The Court distinguishes between Defendant and Defendant’s counsel because this
26 appears to be almost entirely a dispute between Plaintiff and defense counsel, with little or no
involvement from Defendant himself.

27 ⁴ Plaintiff, who is a native Tongan speaker and speaks English as a second language,
28 uses the word “track” throughout his “motion” in what is clearly a mistranslation. Plaintiff has
requested an interpreter in the past, ECF Nos. 4, 106, 131, 167, which has been opposed by
Defendant, ECF No. 108, and denied by this Court, ECF Nos. 27, 109, 136.

1 Before concluding with a reiteration of his request and his justification for making
2 it, Plaintiff wrote, “If you tracks [sic] again this case in a longer way: I can follow you[] [w]hat
3 ever you goes [sic] until[] I have my justice.” Id. at 6. It is this last statement which forms the
4 basis of Defendant’s request for terminating sanctions.

5 Plaintiff responded to Defendant’s motion by indicating that he had been surprised
6 to receive it, and that “never in his mind” would Counsel misinterpret his letter to former defense
7 counsel Mr. Lee. See ECF No. 185, pg. 2. Plaintiff states that he believed Counsel had refused to
8 consent to a Magistrate Judge because Counsel was trying to delay proceedings for as long as
9 possible, and because Counsel knew that it would be many years before a District Judge could
10 hear the case. See id. at 2-3. Plaintiff states in his response to Defendant’s motion that he could
11 not come up with another reason for the refusal to consent beyond “abuse[,] delay, harassing [sic]
12 the court and Plaintiff.” Id. at 3.

13 Plaintiff avers that he had never intended to threaten Mr. Lee but had “honestly
14 ask[ed]” that defense counsel consent to Magistrate Judge jurisdiction in order to “speed the case”
15 because it would benefit both Plaintiff and Defendant *and* lighten the load on the courts. See id. at
16 4. Plaintiff states that he was “never in Knowledge [sic] his english [sic] words will
17 misinterptation [sic] by Mr. Grecea.” Id. He also explains that when he had written “follow him
18 for my justice,” he had meant that he would “follow” whatever choice Defendant’s counsel made
19 and pursue his case even if defense counsel still refused to consent to Magistrate Judge
20 jurisdiction and it took another six or seven years to go to trial before a District Judge, if
21 necessary. See id.

22 Plaintiff then cites to the Model Penal Code and another secondary source related
23 to the criminal law, see id. at 5, before formally requesting sanctions for “disobey[ing] and
24 disrespect[ing]” the Court and “not obey to his dockets [sic].” Id. at 6. Plaintiff’s specific
25 contention is slightly unclear, but it appears that he takes issue with the timing of Defendant’s
26 status report, and either believes that it was untimely submitted or that defense counsel had filed
27 their request for an extension of time to file their status report in order to control the Court’s
28 processes and further delay the adjudication of Plaintiff’s case. See id. at 7. Plaintiff requests that

1 the Court “punishes [sic] the counsel from his disobey [sic] the Court’s order” by stopping defense
2 counsel from further controlling and delaying Plaintiff’s case and pretrial proceedings and
3 ordering Defendant’s counsel to pay \$1,500.00. See id. at 7-8.

4 Plaintiff then filed a document he titles “Motion – Request: Protective Order. Of
5 Some Abuse of the Legal System Under: Fed. R. Civ. P. 26(c) and Admonish Motion to Stop.
6 Improper Conduct, Frivolous Filings.” ECF No. 187, pg. 1. This filing includes a reiteration of
7 Plaintiff’s previous request for sanctions and allegations of willful docket manipulation. Plaintiff
8 begins by citing several rules of the criminal law, including Fed. R. Crim. P. 16(d)(1) and the
9 right to a speedy trial in criminal cases. See id. Plaintiff alleges that current defense counsel Mr.
10 Grecea has, in addition to continuing previous defense counsel’s deliberate procedural delays,
11 violated his right to a speedy trial. See id. Plaintiff further alleges that defense counsel
12 “disrespected” the Court’s September 9, 2021, order to file a status report. See id.

13 Once again, it is unclear whether Plaintiff takes issue with the timing of
14 Defendant’s status report (submission of which has been stayed pending resolution of
15 Defendant’s Motion for Terminating Sanctions), or with defense counsel’s request an extension
16 of time to file that report. See id. at 2-3. Plaintiff then makes reference to an apparent December
17 2019 court order concerning pretrial statements, which does not appear on the docket, as well as
18 “Exhibit C,” which is not included with Plaintiff’s filing. See id. at 3. Plaintiff also includes the
19 phrases “due process” and “equal protection,” without elaboration. See id. at 5.

20 Finally, without leave of court, Plaintiff filed an untimely motion for judgment on
21 the pleadings. See ECF No. 196. He appears to contend that the Sixth and Fourteenth
22 Amendments grant him a right to counsel, access to the courts, and a speedy trial. See id. at 2.
23 Plaintiff alleges that defense counsel has deprived him of his right to due process before the
24 deprivation of life, liberty, or property. See id. Plaintiff notes that he is 72 years of age, and then
25 asks that this Court grant his motion under his Eighth Amendment right to “protect[ion] of safety
26 and health” and freedom from cruel and unusual punishment. See id. He asks that the Court let
27 him “have his justice Before [sic] he die [sic].” Id.

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1 **II. DISCUSSION**

2 The parties have filed competing motions for sanctions. Plaintiff has also filed a
3 motion for judgment on the pleadings. For the reasons discussed below, the Court finds that
4 sanctions are not warranted and that Plaintiff’s motion for judgment on the pleadings is
5 procedurally deficient.

6 **A. The Parties’ Motions for Sanctions**

7 Defendant seeks terminating sanctions based on perceived misconduct by Plaintiff.
8 In response, Plaintiff seeks monetary and other sanctions against defense counsel for allegedly
9 delaying proceedings for strategic advantage. For the reasons discussed below, the undersigned
10 recommends that the parties’ sanctions motions be denied.

11 1. Defendant’s Motion

12 Defendant contends that Plaintiff’s ex parte letter to former defense counsel
13 Derrek Lee constituted a “written threat of violence . . . sent in bad faith, and with the sole
14 purpose of harassing and intimidating defense counsel into offering litigation concessions to
15 Plaintiff.” ECF No. 178, pg. 1. Defendant begins with a generalized soliloquy about “an anti-law
16 enforcement current that has swept society as of late,” and argues that threats from prisoners are
17 an embodiment of that trend, requiring a zero-tolerance response. Id. at 8.

18 Defendant asserts that, because Plaintiff is proceeding in forma pauperis, monetary
19 sanctions will not deter future threats. See id. Defendant argues that Plaintiff’s statement that “If
20 you tracks again this case in a longer way I can follow you whatever you goes until I have my
21 justice” constitutes a threat so menacing that the only adequate response is termination. See ECF
22 No. 178, pg. 9, 11 (citing ECF No. 178-1, pg. 6). Defendant construes this statement as a “stern
23 threat” that Plaintiff will “follow Deputy Attorney General Derrek Lee wherever he goes, until
24 Plaintiff has “[his] justice,” if defense counsel continues to decline Magistrate Judge jurisdiction.
25 See ECF No. 178, pgs. 8-9.

26 Defense counsel also points to a letter Plaintiff sent to Mr. Lee in a companion
27 case, Sekona v. Horowitz, No. 2:17-cv-0479-JAM (DMC). In that letter, Plaintiff wrote:

28 After our deposition on [January 20, 2021] I want to request to

1 your [sic] for a settlement. Because I thought you a Chinese but a African
2 Amerian [sic] because of Lee name. Because of I am pro-se [sic]. Also
3 you a represents the Californian Citizen all. [sic] The rights and truths.
4 [sic] And I acknowledge you understanding the racism and discrimination,
5 outside and inside the prisons [sic].

6 ECF No. 178-1, pg. 9.

7 Defendant does not construe the latter statement as a threat but characterizes it as a “racial
8 innuendo[.]” Defense counsel argues that these two statements, in combination, render this case
9 “one of the few exceptional circumstances in which terminating sanctions are necessary to
10 adequately condemn this uniquely reprehensible type of litigation misconduct.” ECF No. 178, pg.
11 11. Defendant characterizes Plaintiff’s behavior as “the epitome of willful, bad faith conduct,”
12 and thus satisfies the requirement that conduct justifying terminating sanctions be willful, in bad
13 faith, or the fault of the party against whom the sanctions are sought. See id. Defendant goes on
14 to argue that courts “[should not] attempt to remedy this issue with mere admonishments, which
15 have proven ineffective in setting an example and curbing misconduct.”

16 The Court must weigh five factors before imposing the harsh sanction of dismissal.
17 See *Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000); *Malone v. U.S. Postal*
18 *Service*, 833 F.2d 128, 130 (9th Cir. 1987). Those factors are: (1) the public's interest in
19 expeditious resolution of litigation; (2) the court's need to manage its own docket; (3) the risk of
20 prejudice to opposing parties; (4) the public policy favoring disposition of cases on their merits;
21 and (5) the availability of less drastic sanctions. See id.; see also *Ghazali v. Moran*, 46 F.3d 52, 53
22 (9th Cir. 1995) (per curiam). A warning that the action may be dismissed as an appropriate
23 sanction is considered a less drastic alternative sufficient to satisfy the last factor. See *Malone*,
24 833 F.2d at 132-33 & n.1.

25 Dismissal has been held to be an appropriate sanction for failure to follow local
26 rules, see *Ghazali*, 46 F.3d at 53, failure to comply with an order to file an amended complaint,
27 see *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992), failure to inform the district court
28 and parties of a change of address pursuant to local rules, see *Carey v. King*, 856 F.2d 1439,
1440-41 (9th Cir. 1988) (per curiam), failure to appear at trial, see *Al-Torki v. Kaempfen*, 78 F.3d

1 1381, 1385 (9th Cir. 1996), and discovery abuses, see Henry v. Gill Indus., Inc., 983 F.2d 943,
2 948 (9th Cir. 1993). However, a terminating sanction, “‘whether default judgment against a
3 defendant or dismissal of a plaintiff’s action, is very severe,’ and ‘[o]nly willfulness, bad faith,
4 and fault justify terminating sanctions.’” United Fin. Cas. Co. v. Ratte, No. 1:19-cv-0739 LJO
5 JLT, 2019 U.S. Dist. LEXIS 208337, at *4 (E.D. Cal. Dec. 2, 2019) (quoting Conn. Gen. Life Ins.
6 Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1097 (9th Cir. 2007)).

7 a. The public’s interest in expeditious resolution of litigation

8 Defendant argues that terminating sanctions are supported by the fact that this case
9 has been pending since 2016, and “Plaintiff’s behavior will have the net effect of delaying
10 litigation even further.” ECF No. 178, pg. 18. Though “the public’s interest in expeditious
11 resolution of litigation always favors dismissal,” Yourish v. Cal. Amplifier, 191 F.3d 983, 990
12 (9th Cir. 1999), this Court finds that Defendant’s contention is unpersuasive. Plaintiff’s desire for
13 a speedy resolution to his case is well-evidenced by Plaintiff’s myriad filings urging Defendant to
14 consent to a Magistrate Judge, respond to the complaint, agree to settlement negotiations, etc.

15 b. The court’s need to manage its own docket

16 Somewhat more persuasive is Defendant’s argument that terminating sanctions
17 would support the Court’s ability to manage its docket, given that the docket already exceeds 170
18 entries. See ECF No. 178, pg. 18. The length of the docket is excessive, and replete with
19 unnecessary or redundant filings. This factor counsels toward a grant of terminating sanctions,
20 though only minimally given consideration of other factors, discussed below, such as the potential
21 for prejudice and the desirability of a resolution on the merits.

22 c. The risk of prejudice to opposing parties

23 The prejudice from terminating sanctions is obviously quite high for Plaintiff and
24 low for Defendant. Given the rather innocuous nature of the letter Defendant now characterizes
25 so grave as to require dismissal as punishment, any consideration of prejudice must tilt further
26 against imposition of the harsh sanction of dismissal. This finding is further supported by the
27 somewhat hyperbolic nature of Defendant’s arguments.

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1 d. The public policy favoring disposition of cases on their merits

2 “Public policy favors disposition of cases on the merits. Thus, this factor weighs
3 against dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998). When
4 weighed against a speedy resolution that results from a dismissal on grounds unrelated to the
5 merits of Plaintiff’s case, which is ready for trial, the Court finds that the desire for a disposition
6 on the merits counsels against terminating sanctions.

7 e. The availability of less drastic sanctions

8 As previously noted, this Court is unpersuaded by Defendant’s contentions that
9 Plaintiff’s status as a prisoner serving a life sentence and the fact that he is proceeding *pro se*
10 indicate that less drastic sanctions will be ineffective. This circuit has held that less severe
11 sanctions may be available for litigants who are genuinely remorseful for their conduct.
12 See Howard v. Harris, 744 F. App’x 364, 367 (9th Cir. 2018). While, as Defendant observes, and
13 this Court does not dispute, monetary sanctions may be meaningless in the end to a plaintiff
14 proceeding in forma pauperis, see ECF No. 178, pg. 19, it does not follow that the only other
15 sanction available is termination. It is not apparent that Plaintiff has received so much as a
16 warning or admonishment regarding potentially sanctionable behavior.

17 2. Plaintiff’s Motions

18 As previously noted, Plaintiff filed a number of related and highly similar
19 responses to Defendant’s motion. Pending before the Court are two motions related to sanctions
20 against defense counsel – ECF Nos. 185 and 187. It appears – although Plaintiff’s motion is
21 poorly written and meandering – that Plaintiff seeks sanctions on the basis of what he views as
22 Counsel’s disobedience and disrespect of the Court, particularly “not obey to his dockets”
23 (apparently referring to Plaintiff’s belief that Counsel is ignoring orders on the docket). ECF No.
24 185, pg. 6. It also appears that the sanctions Plaintiff seeks are that Counsel be prevented from
25 “furture [sic] control, delay this case” and that Counsel be ordered to pay \$1,500 in damages. Id.
26 at 7, 8.

27 It is not apparent, and Plaintiff has not actually presented any specific evidence,
28 that Counsel has either disregarded this Court’s orders or acted disrespectfully. Plaintiff’s

1 assertions that Defendant did not properly file pretrial reports or schedule a settlement meeting,
2 id. at 6, appear to be based on a misreading of the docket. This Court specifically denied
3 Plaintiff's Motion for Settlement Offer (ECF No. 114). Furthermore, Defendant's first pre-trial
4 status report, ECF No. 157, appears to be timely, and this Court relieved Defendants of their duty
5 to file a second status report, see ECF Nos. 182, 197. Therefore, the undersigned recommends
6 that Plaintiff's motions related to sanctions both be denied.

7 **B. Plaintiff's Motion for Judgment on the Pleadings**

8 On October 30, 2018, this Court issued a discovery and scheduling order. See
9 ECF No. 79. The Court set the discovery deadline of March 4, 2019 and set a 90-day deadline for
10 dispositive motions following the discovery cut-off. See id. at 2. The deadline for dispositive
11 motions was in June 2019. Defendant requested and was granted leave to file a late motion for
12 judgment on the pleadings. See ECF No. 161.

13 Plaintiff filed his motion for judgment on the pleadings in June 2022 – three years
14 late. Plaintiff's motion was not filed with leave of court and has been filed after the dispositive
15 motion filing deadline. The Court recommends Plaintiff's motion for judgment on the pleadings
16 be denied as untimely.

17 **III. CONCLUSION**

18 Based on the foregoing, the undersigned recommends that:

- 19 1. Defendant's motion for terminating sanctions, ECF No. 178, be denied.
20 2. Plaintiff's motions for sanctions, ECF Nos. 185 and 187, be denied; and
21 3. Plaintiff's motion for judgment on the pleadings, ECF No. 196, be denied
22 as untimely.

23 These findings and recommendations are submitted to the United States District

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1 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
2 after being served with these findings and recommendations, any party may file written
3 objections with the court. Responses to objections shall be filed within 14 days after service of
4 objections. Failure to file objections within the specified time may waive the right to appeal. See
5 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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Dated: August 22, 2022



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE