

1 No. 52 at 9-30 (discovery requests).) Plaintiff's responses were due on February 2, 2023;
2 plaintiff did not respond or seek an extension. (ECF No. 57 at 8.)

3 On February 22, 2023, plaintiff appeared for deposition; during a discussion about the
4 overdue discovery responses, plaintiff claimed he needed additional time to respond, and counsel
5 for defendants advised he would seek modification of the scheduling order to resolve the
6 discovery issue. (Id.) Plaintiff stated he would send the discovery responses as soon as possible.
7 (Id.) Defendants sought and were granted extensions of the discovery and pretrial motions
8 deadlines. (ECF Nos. 50, 51.)

9 Plaintiff again failed to respond to the discovery requests or to seek additional time. (ECF
10 No. 57 at 9.) On April 10, 2023, defendants filed a motion to compel discovery responses, and
11 sought to modify the scheduling order. (ECF Nos. 52, 53.) On April 12, 2023, the undersigned
12 reminded plaintiff of his obligation to respond to the motion to compel under Local Rule 230(l),
13 and the discovery deadline was extended until the motion to compel was resolved. (ECF No. 54.)

14 On May 22, 2023, defendants' motion to compel was partially granted; plaintiff was
15 granted thirty days to file written responses and to show cause why the court should not deem
16 admitted defendants' requests for admissions and cautioned plaintiff that failure to respond to the
17 written discovery requests or to the court's order "may result in a recommendation that this action
18 be dismissed." (ECF No. 55.)

19 Plaintiff again failed to respond, both to the discovery requests and to the court's order.
20 Based on such failures, on July 11, 2023, the admissions were deemed admitted, and defendants
21 were directed to file an appropriate motion. (ECF No. 56.)

22 On July 13, 2023, defendants filed a motion to dismiss. Defendants argue that plaintiff
23 failed to respond to defendants' discovery requests and failed to comply with the court's order to
24 file responses to defendants' discovery requests and show cause why defendants' requests for
25 admissions should not be deemed admitted (ECF No. 55). (ECF No. 57.)

26 Plaintiff did not oppose the motion. Instead, plaintiff sought an extension of time to file
27 an amended complaint. On August 10, 2023, plaintiff's motion for extension of time to file an
28 amended complaint was denied based on plaintiff's failures to (1) address the pending motion to

1 dismiss, (2) respond to discovery, (3) respond to court orders, (4) provide specific facts as to why
2 amendment was sought, and (5) provide a proposed amended complaint. (ECF No. 59.) Plaintiff
3 was granted thirty days to file an opposition to the pending motion to dismiss. (Id.)

4 Plaintiff again failed to file an opposition. On September 28, 2023, plaintiff was reminded
5 that Local Rule 230(l) provides in part that “[f]ailure of the responding party to file written
6 opposition or to file a statement of no opposition may be deemed a waiver of any opposition to
7 the granting of the motion.” (ECF No. 60.) Further, plaintiff was advised that failure to comply
8 with the Local Rules “may be grounds for imposition of any and all sanctions authorized by
9 statute or Rule or within the inherent power of the Court.” Id. Finally, plaintiff was cautioned
10 that Rule 41(b) of the Federal Rules of Civil Procedure provides for the involuntary dismissal of
11 his case if he fails to prosecute or to comply with these rules or a court order. (ECF No. 60.)
12 Plaintiff was ordered to file an opposition to the motion to dismiss within thirty days. Plaintiff
13 did not file an opposition or otherwise respond.

14 Legal Standards

15 Rule 41(b) of the Federal Rules of Civil Procedure authorizes dismissal for a party’s
16 failure to comply with court orders. Id. District courts also have the inherent power to control
17 their dockets and “[i]n the exercise of that power they may impose sanctions including, where
18 appropriate, . . . dismissal.” Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986). A
19 court may also impose sanctions, including the sanction of dismissal, or terminating sanctions, on
20 a party who does not comply with discovery orders. Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii).

21 “The standards governing dismissal for failure to obey a court order are basically the
22 same” under Rule 37(b) and Rule 41(b). Malone v. U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir.
23 1987); see Yourish v. California Amplifier, 191 F.3d 983, 987 (9th Cir. 1999) (dismissal under
24 Rule 41(b) is “closely analogous” to the imposition of terminating sanctions under Rule 37(b));
25 Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1385 n.1 (9th Cir. 1988) (“The standards
26 governing dismissal for failure to obey court orders are the same under Fed. R. Civ. P.
27 37(b)(2)(C) or 41(b).”).

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1 However, when a party seeks terminating sanctions based on a violation of Rule 37(b), the
2 court’s “range of discretion is narrowed, and the losing party’s noncompliance must be due to
3 willfulness, fault, or bad faith.” Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997)
4 (quoting Henry v. Gill Indust., 983 F.2d 943, 946 (9th Cir. 1993)); see also In re Exxon Valdez,
5 102 F.3d 429, 432 (9th Cir. 1996) (dismissal under Rule 37(b) requires a threshold showing that
6 the violation is due to willfulness, bad faith, or fault of the non-moving party).

7 If the moving party meets such threshold showing, the court applies a “five-part test, with
8 three subparts to the fifth part” to determine whether terminating sanctions under Rule 37(b)(2)
9 are just:

- 10 (1) the public’s interest in expeditious resolution of litigation; (2) the
11 court’s need to manage its dockets; (3) the risk of prejudice to the
12 party seeking sanctions; (4) the public policy favoring disposition of
 cases on their merits; and (5) the availability of less drastic sanctions.

13 Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir.
14 2007) (footnote omitted).¹ “The sub-parts of the fifth factor are whether the court has considered
15 lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the
16 possibility of case dispositive sanctions.” Id. at 1096. Such five-part test “is not mechanical,” but
17 rather “provides the district court with a way to think about what to do, not a set of conditions
18 precedent for sanctions or a script that the district court must follow.” Id.

19 Discussion

20 Was plaintiff’s failure to respond to discovery willful?

21 The court may consider a party’s pro se status “in evaluating the willfulness of discovery
22 violations and the failure to obey court orders and in weighing the other factors regarding
23 dismissal, but pro se status does not excuse intentional noncompliance with discovery rules and
24 court orders.” Sanchez v. Rodriguez, 298 F.R.D. 460, 470 (C.D. Cal. 2014) (collecting cases).
25 “Disobedient conduct not shown to be outside the control of the litigant is sufficient to
26 demonstrate willfulness, bad faith, or fault.” Jorgensen v. Cassidy, 320 F.3d 906, 912 (9th Cir.
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28 ¹ These are the same five factors considered under Rule 41(b). Sanchez, 298 F.R.D. at 470.

1 2003) (citation omitted); see also Sanchez, 298 F.R.D. at 463 (noting that willfulness, bad faith,
2 and fault requirement “does not require wrongful intent”). In evaluating the propriety of
3 sanctions, the Court considers “all incidents of a party’s misconduct.” Adriana Int’l Corp. v.
4 Thoeren, 913 F.2d 1406, 1411 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

5 Here, the record reflects that plaintiff’s failure to respond was willful. Plaintiff failed to
6 respond to discovery requests and even after plaintiff told counsel for defendants that plaintiff
7 would send the discovery responses as soon as possible, plaintiff again failed to do so. Plaintiff
8 offers no explanation for his failure to respond to discovery requests propounded in December of
9 2022, and does not demonstrate that such failure was due to circumstances beyond his control.

10 Do the five factors support terminating sanctions?

11 The court next evaluates whether the five factors weigh in favor of imposing terminating
12 sanctions. Such factors provide a “way for a . . . judge to think about what to do,” rather than “a
13 series of conditions precedent before the judge can do anything.” In re Phenylpropanolamine
14 (PPA) Prod. Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006), quoting Valley Eng’rs v. Electric
15 Eng’g Co., 158 F.3d 1051, 1057 (9th Cir. 1998). “The most critical factor to be considered in
16 case-dispositive sanctions is whether ‘a party’s discovery violations make it impossible for a
17 court to be confident that the parties will ever have access to the true facts.’” Conn. Gen. Life
18 Ins. Co., 482 F.3d at 1097 (quoting Valley Eng’rs, 158 F.3d at 1057 (internal quotes and citation
19 omitted); see also Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990) (the amount of
20 prejudice resulting from the discovery violations and the availability of less drastic sanctions are
21 said to be “key factors”).

22 First, the public’s interest in expeditious resolution of litigation favors dismissal. This
23 action was filed on November 1, 2019. The first scheduling order issued in October of 2022, and
24 the written discovery requests were initially propounded to plaintiff in December. The resolution
25 of this action has been delayed for many months due to plaintiff’s failure to respond to discovery
26 requests. Plaintiff’s actions have prevented this case from proceeding in a timely fashion.

27 Turning to the second factor, the court’s need to manage its docket also favors dismissal.
28 District courts must be able to manage their dockets “without being subject to endless non-

1 compliance with case management orders.” In re PPA, 460 F.3d at 1227. Plaintiff’s failure to
2 respond to the written discovery requests has required multiple modifications to the scheduling
3 order.

4 The third factor, the risk of prejudice to the defendants, also favors dismissal. To prove
5 prejudice, a defendant must establish that plaintiff’s actions impaired defendant’s ability to
6 proceed to trial or threatened to interfere with the rightful decision of the case. Malone, 833 F.2d
7 at 131. As argued by defendants, the failure to respond to discovery is sufficient to show
8 prejudice. In re PPA, 460 F.3d at 1227 (citing Adriana, 913 F.2d at 1412). Plaintiff has not
9 responded to the written discovery requests or to subsequent court orders addressing plaintiff’s
10 failure to respond, thus impairing defendants’ ability to proceed to trial. It has now been over a
11 year since the court issued its first discovery order, and defendants have been unable to obtain
12 responses to their written discovery requests. Such unreasonable delay weighs in favor of
13 dismissal. It is also prejudicial to defendants to allow plaintiff to continue prosecuting this action
14 while depriving defendants of the right to conduct meaningful discovery.

15 The fourth factor, the public policy favoring disposition of cases on their merits, does not
16 favor dismissal. But this factor is outweighed by the factors in favor of dismissal discussed
17 herein. See Leon v. IDX Sys. Corp., 464 F.3d 951, 960-61 (9th Cir. 2006) (policy favoring
18 merits adjudication is not, without more, sufficient to outweigh other factors).

19 In connection with the fifth factor, the court must consider whether lesser sanctions are
20 appropriate. In this case, the undersigned finds that less drastic sanctions are not available.

21 The court previously imposed a lesser sanction when it ordered plaintiff to respond to the
22 written discovery and show cause why the request for admissions should not be deemed admitted.
23 The court then granted plaintiff two additional opportunities to respond to the motion to dismiss.
24 Also, the court provided plaintiff multiple warnings that his failure to provide discovery
25 responses would result in a recommendation that this action be dismissed. Despite such

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1 warnings, plaintiff failed to provide discovery responses and failed to respond to multiple court
2 orders.²

3 Moreover, the court has considered recommending monetary sanctions rather than
4 terminating sanctions, but finds that under the circumstances, ordering monetary sanctions would
5 be ineffective given plaintiff's indigency. Plaintiff was granted leave to proceed in forma
6 pauperis based on his showing of indigency. Plaintiff's failure to respond to court orders also
7 demonstrates that imposing monetary sanctions would not motivate plaintiff to provide discovery
8 responses or otherwise cooperate in the prosecution of this action. Therefore, the undersigned
9 finds that the lesser sanction of monetary sanctions is not available.

10 Conclusion

11 Four of the five factors weigh in favor of imposing terminating sanctions based on
12 plaintiff's failure to respond to discovery and court orders. Thus, it is recommended that
13 defendants' motion to dismiss be granted.

14 Monetary Sanctions

15 A court that imposes sanctions under Rule 37(b)(2)(A) "must" order the sanctioned party
16 to pay the reasonable expenses, including attorney's fees, incurred by the other party due to the
17 noncompliance with the discovery order "unless the failure was substantially justified or other
18 circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). While plaintiff's
19 failure to comply with discovery was not substantially justified, the undersigned declines to
20 recommend imposition of monetary sanctions under Rule 37(b)(2)(C) because such order would
21 be unjust considering plaintiff's indigency. Further, it would be unjust to impose monetary
22 sanctions where the court recommends terminating sanctions. See, e.g., Reddy v. Precyse
23 Solutions LLC, 2015 WL 3797297 (E.D. Cal. June 18, 2015) (finding the plaintiff willfully

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26 ² After the motion to dismiss was filed, plaintiff filed one motion for extension of time. (ECF
27 No. 58.) However, plaintiff failed to address the overdue discovery responses or the pending
28 motion to dismiss. Rather, plaintiff sought additional time to file an amended complaint to "add
components" that "needed to be added." (Id. at 1.) Plaintiff claimed his incarceration limited his
ability to access the prison law library. (Id. at 5.)

1 refused to comply with discovery orders and imposing terminating sanctions but denying as
2 unjust additional monetary sanctions).

3 Accordingly, IT IS HEREBY RECOMMENDED that:

- 4 1. Defendants' motion to dismiss (ECF No. 57) be granted; and
- 5 2. This action be dismissed with prejudice.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
11 objections shall be filed and served within fourteen days after service of the objections. The
12 parties are advised that failure to file objections within the specified time may waive the right to
13 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 Dated: November 13, 2023

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17 KENDALL J. NEWMAN
18 UNITED STATES MAGISTRATE JUDGE

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