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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCUS LANDRY AND DANIEL LANDRY,)	Case No. 08-3791 SC
)	
Plaintiffs,)	<u>ORDER DISMISSING ACTION</u>
)	
v.)	
)	
CITY AND COUNTY OF SAN FRANCISCO;)	
HEATHER FONG; FREDERICK SCHIFF;)	
CALLAWAY, #360; McCALL, #901;)	
PLAMA, #841; PERSONAL PROTECTIVE)	
SERVICES; PETE RODRIGUEZ; RENE)	
GARCIA; PAT YOUNG; JACK NYCE;)	
GARNER, #186; K. McARTHUR; WONG,)	
#2038; MARIANO, #2191; PARKER,)	
#121; CATHEY, #1090; HALLISY,)	
#794; RODRIGUEZ, #1976; JACKSON,)	
#275 and DOES 1 to 100,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now before the Court is a Motion for Terminating Sanctions or in the Alternative for Issue and Further Monetary Sanctions ("Motion") submitted by Defendant City and County of San Francisco ("San Francisco"). Docket No. 86. Defendants Personal Protective Services, Kevin McArthur, and Pete Rodriguez (collectively, "PPS") seek to join in the Motion. Docket No. 88 ("Joinder"). Plaintiffs Marcus Landry and Daniel Landry ("Plaintiffs") have filed an Opposition. Docket No. 89. San Francisco and PPS have filed

1 replies. Docket Nos. 91 ("PPS Reply"), 92 ("SF Reply"). The
2 parties appeared before the Court for a hearing on Friday, April 9,
3 2010. Having considered the submissions of all parties, as well as
4 the statements made at the hearing, the Court concludes that
5 terminating sanctions are appropriate and GRANTS the Motion.

6

7 **II. BACKGROUND**

8 This Motion represents the last in a series of sanctions and
9 discovery-related orders issued against Plaintiffs and their
10 counsel, Gregory Haynes ("Haynes"), during the course of this
11 action. San Francisco first moved for sanctions against Plaintiffs
12 on May 20, 2009, on the grounds that "plaintiffs have refused to
13 provide responses to defendants' interrogatories and document
14 requests and have refused to provide their initial disclosures."
15 Docket Nos. 23, 32. On June 18, 2009, Magistrate Judge James
16 ("Judge James"), the magistrate judge to whom discovery issues in
17 this matter have been referred, ordered Plaintiffs to provide
18 initial disclosures and respond to the interrogatories by June 26,
19 2009, but denied without prejudice San Francisco's request for
20 sanctions. Docket No. 39. Plaintiffs failed to comply with Judge
21 James' order, and failed to heed her rather explicit warning.

22 On June 30, 2009, San Francisco indicated in a letter to Judge
23 James that Plaintiffs had failed to meet the deadline for
24 compliance, and renewed their motion for sanctions. Docket No. 41.
25 At some point, Plaintiffs did provide responses to Defendants'
26 interrogatories, but in their responses, Plaintiffs refused to
27 identify any incidents of arrest or detention besides those
28 described in the Complaint. See Docket No. 75 ("Nov. 11, 2009

1 Letter") Exs. 1 ("M. Landry Responses") at 2, 2 ("D. Landry
2 Responses") at 2-3.¹ On July 30, 2009, Judge James issued an order
3 sanctioning Haynes in the amount of \$1500 for his failure to comply
4 with her previous order. Docket No. 52 ("First Sanction Order") at
5 2. Payment of the sanctions was due by August 20, 2009. Id.

6 Defendants deposed Marcus Landry on September 29, 2009. Per
7 Haynes' advice, Marcus Landry refused to answer a number of
8 questions related to his prior incidents of detention by police.
9 See Nov. 11, 2009 Letter Ex. 3 ("M. Landry Dep. Excerpts") at 81-
10 88, 90-97. Similarly, on October 1, 2009, Daniel Landry was
11 deposed, and he refused to answer similar questions upon the advice
12 of Haynes. Id. Ex. 4 ("D. Landry Dep. Excerpts") at 106-07.

13 On September 8, 2009, San Francisco indicated to Judge James
14 that Haynes had still not paid the \$1500 sanctions, and Judge James
15 issued an Order to Show Cause. Docket Nos. 59, 61. The show-cause
16 hearing was held on October 8, 2009, and Judge James ordered that
17 the sanctions increase by \$100 per day for every day after November
18 12, 2009, that the sanctions remain unpaid. Docket No. 70 ("Oct.
19 8 Order"). After the hearing, Haynes apparently engaged in an
20 altercation with counsel for San Francisco, Daniel Zaheer
21 ("Zaheer"). The incident report from Federal Protective Services
22 ("FPS") and the U.S. Marshal Field Report indicate that Haynes
23 repeatedly shouted profanity at Zaheer and the Inspectors who were
24 responding to the incident. Mot. Exs. 15 ("FPS Incident Report")
25 at 3, 6; 16 ("Marshal Field Report") at 3. When Haynes was asked
26 to leave, he "became assaultive towards the FPS officer," and was

27 _____
28 ¹ It is not clear when Defendants received these responses. The
responses bare the date of June 30, 2009. M. Landry Responses at
9; D. Landry Responses at 9.

1 "escorted out of the building without any physical contact." FPS
2 Incident Report at 3, 6.

3 Because of the various ongoing discovery disputes, on October
4 22, 2009, this Court vacated the trial date of January 11, 2010.
5 Docket No. 74. On November 11, 2009, San Francisco filed another
6 Motion to Compel with Judge James. Nov. 11, 2009 Letter at 1. The
7 city sought interrogatory answers related to Plaintiffs' prior
8 convictions, arrests, and police detentions, as well as answers to
9 deposition questions on the same topics. Id.

10 While the latest motion to compel was pending before Judge
11 James, this Court held a status conference on November 20, 2009.
12 The Court questioned both Zaheer and Haynes about the altercation
13 that occurred after the October 8, 2009 show-cause hearing,² and
14 informed them that the behavior of both attorneys was intolerable.
15 See Docket No. 79 ("Minute Order"). The Court further informed the
16 parties that it would not allow additional fighting between the
17 attorneys and ordered them to take any future disagreements
18 directly to this Court for determination. Id. The parties were
19 explicitly warned that, should they fail to cooperate in the
20 future, the Court would consider terminating sanctions.

21 On December 28, 2009, Judge James granted San Francisco's most
22 recent motion to compel, and ordered Plaintiffs to comply with the
23 city's discovery requests related to Plaintiffs' prior convictions,
24 arrests, and police detentions. Docket No. 83 ("Judge James'
25 Order"). Judge James also ordered Haynes to pay additional
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27 ² The Court also received a written account of the incident from
28 Haynes. Docket No. 80. Even if this incident is interpreted in
the best possible light, it is clear that the attorneys, and Haynes
in particular, acted in an inappropriate manner.

1 sanctions of \$835. Id. Haynes did not comply. Haynes has not
2 provided this Court with an explanation for his decision to flout
3 Judge James' Order, however counsel for San Francisco has indicated
4 that Haynes offered the following justification for his failure:
5 Haynes claimed that this Court's November 20, 2009 Minute Order,
6 which ordered the parties to bring their disputes to this court for
7 ruling, deprived Judge James of her authority to rule upon the
8 discovery dispute that was already pending before her. Docket No.
9 84 ("Mot. for Clarification") at 1-2. The Court finds this
10 argument to be specious. If Haynes actually believed that this
11 Court's Minute Order had cast any doubt of the legitimacy of Judge
12 James' subsequent ruling, he failed to notify this Court of this
13 belief, or to otherwise seek redress from the supposedly
14 unauthorized order. He simply refused to provide the discovery
15 that Judge James had explicitly ordered him to provide.

16 On February 3, 2010, this Court dispelled any basis for
17 doubting the authority of Judge James' discovery order, by posting
18 an order clarifying its earlier Minute Order. Docket No. 85
19 ("Clarification Order"). This Court stated that "[b]ecause Judge
20 James' Order addressed a dispute that was raised to her before this
21 Court's Minute Order, Judge James' Order is to have full force and
22 effect." Id. at 2. It added the following warning: "In light of
23 the previous friction addressed by this Court, the parties are
24 reminded that the Court can and will issue sanctions, up to and
25 including dismissal of this action, should the parties' misconduct
26 and meritless disagreement continue." Id.

27 On the day that this Court posted the Clarification Order,
28 Zaheer emailed Haynes with a suggested schedule for compliance with

1 Judge James' Order, as the original schedule had long since lapsed.
2 Mot. Ex. 17. As far as this Court knows, Haynes did not provide a
3 response, and Plaintiffs have not provided the discovery that had
4 been ordered by Judge James or by this Court.³ Id. Twenty-three
5 days later, on February 26, 2010, San Francisco filed the Motion
6 for terminating sanctions that is now before this Court.

7
8 **III. LEGAL STANDARD**

9 In addition to the explicit statutory authority codified by
10 Rule 37(b) of the Federal Rules of Civil Procedure, "courts have
11 inherent power to dismiss an action when a party has willfully
12 deceived the court and engaged in conduct utterly inconsistent with
13 the orderly administration of justice." Wyle v. R.J. Reynolds
14 Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983) (citing
15 Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802,
16 806 (9th Cir. 1982)). In determining whether to issue terminating
17 sanctions, district courts must weigh the following five factors:

18 (1) the public's interest in expeditious
19 resolution of litigation; (2) the court's need to
20 manage its dockets; (3) the risk of prejudice to
21 the party seeking sanctions; (4) the public
22 policy favoring disposition of cases on their
23 merits; and (5) the availability of less drastic
sanctions. The sub-parts of the fifth factor are
whether the court has considered lesser
sanctions, whether it tried them, and whether it
warned the recalcitrant party about the
possibility of case-dispositive sanctions.

24 Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d

25 _____
26 ³ At the hearing, the Court confronted Haynes about an email in
27 which he stated "I will not further respond." Haynes explained
28 that this was not a response to Zaheer's email of February 3, 2010,
but was in fact a response related to an earlier dispute with
Zaheer. Nevertheless, Haynes did not indicate that he ever
responded to Zaheer's reasonable request, and it remains undisputed
that Plaintiffs have not complied with Judge James' Order.

1 1091, 1096 (9th Cir. 2007) (footnotes omitted). "The list of
2 factors amounts to a way for a district judge to think about what
3 to do, not a series of conditions precedent before the judge can do
4 anything" Valley Eng'rs v. Electric Eng'g Co., 158 F.3d
5 1051, 1057 (9th Cir. 1998). Nevertheless, terminating sanctions
6 are only appropriate where "the losing party's noncompliance [is]
7 due to willfulness, fault, or bad faith." Computer Task Group,
8 Inc. v. Brotby, 364 F.3d 1112, 1115 (quoting Payne v. Exxon Corp.,
9 121 F.3d 503, 507 (9th Cir. 1997)). "Disobedient conduct not shown
10 to be outside the control of the litigant is sufficient to
11 demonstrate willfulness, bad faith, or fault." Hyde & Drath v.
12 Baker, 24 F.3d 1162, 1166 (9th Cir. 1994).

13

14 **IV. DISCUSSION**

15 Neither Plaintiffs' Opposition nor Haynes' statements at oral
16 arguments attempt to explain why Plaintiffs have failed to comply
17 with Judge James' most recent discovery order, or with this Court's
18 Clarification Order, which stated that Judge James' Order was to
19 have full force and effect. Most of the Opposition focuses on
20 unrelated aspects of disputes that Haynes has had with Defendants'
21 attorneys, including allegedly "false allegations" made by
22 Defendants, the minutia of the apparent assault, details concerning
23 unrelated conflicts with the city's other attorneys, and San
24 Francisco's earlier reluctance to make a certain defense witness
25 available for deposition by Haynes.⁴ None of this excuses

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27 ⁴ The Court is particularly dismayed by Plaintiffs' attempt to
28 divert this Court's attention by making hay out of an incident at a
deposition in which Zaheer allegedly "pushed [a] paper back at Mr.
Landry, hitting him." Opp'n at 4.

1 Plaintiffs' noncompliance with Judge James' Order. While Haynes'
2 repeated misconduct throughout this litigation serves to inform
3 this Court regarding the severity of the sanction that is
4 appropriate, and whether lesser sanctions may be futile, the
5 current Motion addresses Plaintiffs' open and repeated refusal to
6 comply with Judge James' Order of December 28, 2009, and this
7 Court's later orders directing, in no uncertain terms, compliance
8 with Judge James' Order. Plaintiffs have not offered any
9 satisfying basis for withholding sanctions for this willful
10 violation.

11 Plaintiffs have offered only limited discussion of Judge
12 James' Order, and most of this discussion focuses on the merits of
13 the Order, rather than Plaintiffs' noncompliance. Plaintiffs take
14 issue with "this letter" -- presumably the letter sent by San
15 Francisco to Judge James on November 11, 2009, which sought to
16 compel the discovery that was later directed in Judge James' Order.
17 Opp'n at 5-6. Plaintiffs claim that there was no meet and confer
18 "prior to seeking forth his letter," and that there "is no
19 information needed that has not been provided at the deposition."
20 Id. at 5. However, Plaintiffs fail to establish that they have
21 ever supplied the information that they were ordered to provide.
22 Moreover, Plaintiffs had the opportunity to address the merits of
23 San Francisco's motion to compel months ago, according to the
24 procedure for addressing discovery disputes that Judge James set
25 out in her earlier order of October 8, 2009. See Oct. 8 Order at
26 1. Plaintiffs' attempt to avoid sanctions by undermining the
27 propriety of Judge James' Order must fail. Judge James issued an
28 Order, and the Court sees no reason, either in the record or in any

1 of the flimsy or pretextual reasons now offered by Plaintiffs, for
2 disturbing it.

3 The Court now turns to the five-factor test outlined above to
4 determine whether dismissal of this suit is an appropriate response
5 to Plaintiffs' willful misconduct. Throughout this process, San
6 Francisco has continued to pursue, at public expense, information
7 that is immediately relevant to the damage element of Plaintiffs'
8 claims. Consideration of the public interest clearly favors swift
9 dismissal of this action, given that lesser sanctions will likely
10 result in nothing more than additional delays, and additional
11 public expense. This Court doubts that further prosecution of this
12 matter would be likely to result in a public benefit. Actions of
13 this nature can only serve the public when they are well founded
14 and faithfully prosecuted, yet Plaintiffs' conduct suggests that
15 they have little interest in seeing justice done. Plaintiffs'
16 chronic refusal to pursue this matter in good faith, and their open
17 defiance of multiple court orders, cast doubt on their motivation
18 for pursuing this litigation. Consideration of the public interest
19 therefore weighs in favor of dismissal.

20 Consideration of this Court's docket also weighs in favor of
21 dismissal. As San Francisco points out, "48 of this cases' 85
22 docket items have concerned plaintiffs' and plaintiffs' counsel's
23 misconduct." Mot. at 7. Plaintiffs' bad-faith refusal to
24 cooperate with Defendants' discovery requests, and to comply with
25 this Court's discovery orders, has wasted too much of the Court's
26 time and resources. The trial in this matter was scheduled to
27 occur last January, and has been delayed because of the continuing
28 discovery disputes and the inability of the parties -- particularly

1 Plaintiffs -- to cooperate. This factor weighs in favor of
2 dismissal.

3 The Court finds that Defendants would be prejudiced by a
4 failure to issue sanctions in this instance. San Francisco has
5 continued to seek information that is immediately relevant to its
6 defense in this matter. Plaintiffs' failure to provide this
7 information undermines Defendants ability to disprove one or more
8 of Plaintiffs' theories of damages. Moreover, "[w]here counsel
9 continues to disregard deadlines, warnings, and schedules set by
10 the district court, . . . a lack of prejudice to defendants is
11 [not] determinative." Henderson v. Duncan, 779 F.2d 1421, 1425
12 (9th Cir. 1986). This Court has repeatedly and unambiguously
13 ordered Plaintiffs to produce the requested information, and
14 Plaintiffs have openly flouted this Court's direction. At this
15 point, "the integrity of the district court is involved. In this
16 case, the district court did warn explicitly of the consequences of
17 counsel's dilatory behavior, and imposed a schedule for discovery.
18 . . ." Id. Even in the absence of prejudice to Defendants,
19 dismissal would be warranted.

20 As for "the public policy favoring disposition of cases on
21 their merits," this factor inherently disfavors dismissal.
22 Nevertheless, any interest in resolving this dispute on the merits
23 is undermined by Plaintiffs' failure to cooperate to ensure that
24 resolution on the merits will be based on a full record containing
25 all relevant facts.

26 Plaintiffs, and Haynes in particular, have already faced
27 multiple orders compelling production and issuing lesser sanctions.
28 They have been warned that they would face dismissal should their

1 noncompliance continue. Yet Plaintiffs continue to fail to
2 cooperate with Defendants' discovery requests in good faith, even
3 when repeatedly ordered to do so. Judge James previously
4 considered and tried lesser monetary sanctions against Haynes. See
5 First Sanction Order at 2; Judge James Order at 2. Haynes failed
6 to pay the first sanctions on time, and other monetary sanctions
7 remain outstanding. Plaintiffs' "compliance" with prior discovery
8 orders has been blatantly nonresponsive. See M. Landry Responses
9 at 2; D. Landry Responses at 2-3. This Court has warned Plaintiffs
10 that their conduct could lead to terminating sanctions, not once,
11 but on two separate occasions. See Minute Order; Clarification
12 Order at 2. In this case, the threat and efficacy of less drastic
13 sanctions has proven to be negligible. Upon consideration of all
14 factors, the relevant facts of this case, and the history of the
15 attorneys' conduct in this matter, the Court concludes that
16 dismissal is appropriate.

17

18 **V. CONCLUSION**

19 The Court finds that Plaintiffs have willfully defied the
20 orders of Judge James and of this Court. The repeated and
21 continuous nature of the misconduct, as well as the unprofessional
22 conduct of Haynes, fail to demonstrate even the modest levels of
23 civility necessary to carry a civil matter to trial. The monetary
24 sanctions ordered by Judge James in her order of December 28, 2009,
25 remain outstanding. The Court therefore concludes that terminating
26 sanctions are now appropriate.

27 The Court notes that Plaintiffs themselves have not been
28 especially cooperative throughout the prosecution of this matter,

1 although their refusal to cooperate during depositions was based at
2 least in part upon the advice of Haynes. Nevertheless, this
3 dismissal is based primarily upon the repeated misconduct of
4 Haynes. To the extent that this misbehavior was outside of their
5 control, Plaintiffs may have other avenues for seeking remedies
6 against their attorney, should they wish to pursue them. This
7 matter is DISMISSED WITH PREJUDICE.

8

9 IT IS SO ORDERED.

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11 Dated: April 9, 2010

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UNITED STATES DISTRICT JUDGE

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