

1 JOSEPH RUSSONIELLO (CSBN 44332)  
United States Attorney  
2 JOANN M. SWANSON (CSBN 88143)  
Chief, Civil Division  
3 VICTORIA R. CARRADERO (CSBN 217885)  
Assistant United States Attorney

4 450 Golden Gate Avenue, Box 36055  
5 San Francisco, California 94102  
Telephone: (415) 436-7181  
6 Facsimile: (415) 436-6748  
Email: victoria.carradero@usdoj.gov

7 Attorneys for Defendant

12 DEAN APOSTOL

13 Plaintiff,

14 v.

15 TOM VILSACK, SECRETARY OF THE  
16 UNITED STATES DEPARTMENT OF  
AGRICULTURE

18 Defendant.

19 ) NO. C 09-1807-MEJ

20 )  
21 )  
22 )  
23 )  
**PROPOSED ORDER ON DEFENDANT'S  
NOTICE OF MOTION AND MOTION TO  
DISMISS FOR FAILURE TO PROSECUTE,  
FAILURE TO COMPLY WITH COURT  
ORDERS AND FAILURE TO PROVIDE  
DISCOVERY**

24 Date: April 8, 2010

25 Time: 10:00 a.m.

26 Department: Courtroom B, 15<sup>th</sup> Floor

27 Judge: Honorable Maria-Elena James

Defendant's Motion to Dismiss Plaintiff's Action for Failure to Prosecute, Failure to Comply with Court Orders, and Failure to Provide Discovery pursuant to Federal Rules of Civil Procedure 37(b),  
37(d), and 41(b) came on for hearing on ~~April~~<sup>May</sup> 6, 2010 at 10:00 a.m. Plaintiff was represented by Arlo Garcia Uriarte and Defendant was represented by Assistant United States Attorney Victoria R. Carradero.

After considering the papers filed in support of and in opposition to the motion, the pleadings on file in this action, and having heard oral argument, the Court hereby **GRANTS** Defendant's motion pursuant to Rule 41(b).

## I. STATEMENT OF FACTS

The history of this litigation is contained in the discovery letter brief on Plaintiff's failure to appear for deposition, Docket Entry No. 16 (resubmitted again as Docket Entry No. 20 when Plaintiff failed to comply with the Court's January 14, 2010 order), as well as in other discovery letter briefs. Docket Entry Nos. 17, 21-22 and 26. For brevity's sake, the Court will not restate that history here.

As a result of Plaintiff's failure to comply with discovery obligations and court orders, the Court issued two Orders to Show Cause ("OSC"). Docket Entry Nos. 23 and 25. The first OSC required Plaintiff to show cause why sanctions should not be imposed for his failure to comply with discovery obligations, as well as his failure to comply with this Court's January 14, 2010 Order. Docket Entry No. 23. The Court ordered Plaintiff to file a declaration by January 28, 2010, and set a hearing on February 4, 2010. *Id.* On January 25, 2010, Plaintiff's attorney filed a declaration stating that he did not open the ECF notification containing the Court's January 14, 2010 order. Docket Entry No. 24. The declaration further stated that Plaintiff suffers from a depressive disorder and that Plaintiff told him that he left the United States for the Philippines because "he needed to recuperate after spending many months in the United States." *Id.*

On January 25, 2010, the Court issued a second OSC. Docket Entry No. 25. The order stated that Plaintiff’s counsel’s explanation is “unacceptable,” that Plaintiff “has an obligation to vigorously prosecute his case,” and that the “vigorous prosecution of a case does not include leaving the country for months at a time without notice to the Court or opposing counsel.” *Id.* Accordingly, the Court vacated the February 4th OSC hearing, ordered Plaintiff himself and not his counsel to show cause why this case

[PROPOSED] ORDER ON DEFENDANT'S MOTION TO DISMISS  
Case No. C 09-1807-MEJ

1 should not be dismissed for failure to prosecute, and ordered Plaintiff to file a declaration by February  
 2 11, 2010. *Id.* The Court set an OSC hearing on February 18, 2010. *Id.*

3 At the February 18, 2010 OSC hearing, Plaintiff did not appear, though his counsel did. At the  
 4 hearing, Plaintiff's counsel stated that "for one reason or another when the mediation date came close,  
 5 [Plaintiff] decided to leave the country for his own health benefits," and that since December 2009 it has  
 6 been very difficult for his attorney "to receive some sort of guidance from him directly." Declaration of  
 7 Victoria R. Carradero in Support of Defendant's Motion to Dismiss ("Carradero Decl."), Ex. 1  
 8 (February 18, 2010 OSC Hearing Transcript, pp. 2:22-24; 3:8-9). His counsel represented that "[t]he  
 9 only information he has from him is that in [Plaintiff's] own mind he intends to return to the United  
 10 States March of 2010." *Id.*, at 3:9-11. Plaintiff's counsel further represented that he has communicated  
 11 to Plaintiff the Court's interest and Defendant's interest and his duty for vigorously prosecuting this  
 12 action." *Id.*, 3:12-14.

13 The Court ordered Plaintiff's deposition to occur on March 24<sup>th</sup> and March 25<sup>th</sup>, 2010 and stated that  
 14 the Court is "going to put the matter back on with a warning to [Plaintiff] that if he hasn't attended the  
 15 deposition, [the Court] is intending to dismiss the case." Carradero Decl., Ex. 1 (February 18, 2010 OSC  
 16 Hearing Transcript, pp. 4:25-5:15). The Court further stated: "Okay, Counsel, I want to make this clear,  
 17 that if your client is not cooperating, I'm going to start issuing sanctions, including terminating sanctions  
 18 and dismissal of his claim. Do you understand?" *Id.*, at 10:11-15. Plaintiff's counsel responded that he  
 19 understood and would communicate that to his client. *Id.*, at 10:16-19.

20 Following the OSC hearing, the Court immediately issued two orders setting a February 25<sup>th</sup> deadline  
 21 for Plaintiff to submit a second SSA release consent form, a March 10<sup>th</sup> deadline for Plaintiff to produce  
 22 all outstanding discovery and for Dr. Lee to produce Plaintiff's medical records, and dates of March 24-  
 23 25 for Plaintiff's deposition. Docket Entry Nos. 27 and 30. The Court also extended all pretrial  
 24 deadlines by three weeks. Docket No. 27, ¶¶ 5-6.

25 Following the OSC, Defendant noticed Plaintiff's deposition for 9:30 a.m. on March 24<sup>th</sup> and March  
 26 25<sup>th</sup> and made arrangements for a court reporter, videographer and interpreter. Carradero Decl., ¶ 4; Ex.  
 27 2. The February 25<sup>th</sup> and March 10<sup>th</sup> discovery deadlines set by the Court came and went without

1 compliance by Plaintiff.<sup>1/</sup> *Id.*, ¶ 6. As the deposition date neared and neither Plaintiff nor his counsel  
 2 communicated with Defendant as to the status of it, Defendant's counsel became concerned about  
 3 incurring cancellation costs (which ranged in the amount of \$1,000-\$2,500) if Plaintiff failed to appear.

4 *Id.*

5 Accordingly, on March 18, 2010, Defendant's counsel sent Plaintiff's counsel a letter and email  
 6 notifying him of the cancellation charges and advising him that if Plaintiff failed to notify Defendant that  
 7 he would not appear for deposition by the cancellation deadline and/or failed to appear for deposition on  
 8 March 24, 2010, Defendant would seek sanctions against Plaintiff in an amount not less than the  
 9 cancellation fees incurred. Carradero Decl., ¶ 7, Exs. 4-5. On Saturday, March 20<sup>th</sup>, Plaintiff's counsel  
 10 sent an email stating "Victoria, I would cancel the depositions. No word from my client." *Id.* Ex. 5. On  
 11 Monday, March 22, 2010 at approximately 11:32 a.m., Defendant's counsel received a follow up  
 12 voicemail from Plaintiff's counsel stating that he wanted to make sure that counsel received his email  
 13 and that Defendant should cancel the deposition as he has not heard anything from his client and has not  
 14 received any indication that Plaintiff was traveling for the deposition. *Id.*, ¶ 7. Accordingly, based on  
 15 Plaintiff's counsel's email and voicemail, Defendant's counsel notified the vendors to cancel the  
 16 reservations so as not to incur the cancellation fees. *Id.* Plaintiff did not appear at Defendant's counsel's  
 17 office on March 24<sup>th</sup> or 25<sup>th</sup>. *Id.*, ¶ 8. Defendant heard nothing further from either Plaintiff or his  
 18 counsel. *Id.*

19 Defendant contends that his discovery plan for this case included obtaining written discovery from  
 20 Plaintiff, including his medical records from his treating psychiatrist Dr. Paul Lee and other documents  
 21 responsive to various requests. Carradero Decl., ¶ 9. Once those records and documents had been  
 22 obtained and reviewed, Defendant intended to depose Plaintiff, followed by other witnesses revealed by  
 23 the written discovery. *Id.* Defendant also intended to have an IME conducted of Plaintiff by a retained  
 24 expert, as expert disclosures are due April 19, 2010, less than one month away. *Id.*

25 Defendant contends that because of Plaintiff's interference with Defendant's attempts to conduct

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26       1/      In the interim, Defendant continued to move this matter forward by requesting Plaintiff to  
 27 stipulate to an Independent Mental Examination ("IME"). Carradero Decl., ¶ 5. Neither Plaintiff nor his  
 28 counsel substantively responded to Defendant. *Id.*, Ex. 3. Rather, Plaintiff's counsel stated that he has  
 not had any contact with his client. *Id.*

discovery, Defendant will not be able to conduct fact and expert discovery within the currently-ordered deadlines. Carradero Decl., ¶ 10. Defendant contends that even if the information and documents were provided today, there is now insufficient time for Defendant to review that information, depose Plaintiff, have the IME conducted and an expert report prepared by the April 19<sup>th</sup> deadline. *Id.* Defendant also contends that even scheduling and noticing additional depositions by the new May 14<sup>th</sup> discovery deadline would be extremely challenging. *Id.*

## II. ANALYSIS

As discussed in more detail below, Plaintiff has had ample opportunity to comply with the Court's rules and deadlines, but Plaintiff has chosen to ignore his discovery obligations, Defendant's meet and confer efforts, the Court's orders, and the Federal Rules of Civil Procedure. Because of Plaintiff's failure to prosecute this case, failure to comply with the court's orders, and failure to provide discovery, especially in light of repeated inquiries by Defendant's counsel and several court orders requiring compliance, the Court finds that this case is suitable for dismissal with prejudice pursuant to Rule 41(b).

### A. The Court Find Dismissal Of This Action Appropriate For Failure To Prosecute And Comply with Court Orders

Rule 41(b) of the Federal Rules of Civil Procedure allows for the involuntary dismissal of an action due to the failure of the plaintiff "to prosecute or to comply with these rules or any order of the court." Fed. R. Civ. Proc. 41(b).

A federal district court has the inherent power to dismiss a case sua sponte for failure to prosecute or to comply with court orders. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-31 (1962); *see also Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884). "The power to invoke this sanction is necessary in order to prevent undue delays in disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Link*, 370 U.S. at 629-30. The "inherent power" of the court, is "governed not by rule or statute but by the control necessarily vested in courts to manage their affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*, at 630-31. Moreover, in appropriate circumstances, the Court may dismiss a complaint for failure to prosecute even without notice or hearing. *Id.*, at 633.

In determining whether dismissal is warranted, the Court must weigh five factors:

- (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy

1 favoring disposition of cases on their merits; and (5) the availability of less drastic  
 2 sanctions. . . . Although beneficial to the reviewing court, a district court is not required  
 3 to make specific findings on each of the essential factors.

4       *Moneymaker v. CoBen*, 31 F.3d 1447, 1451 (9<sup>th</sup> Cir. 1994) (citations omitted). “A reviewing court will  
 5 give deference to the district court to decide what is unreasonable ‘because it is in the best position to  
 6 determine what period of delay can be endured before its docket becomes unmanageable.’” *Id.*, quoting  
 7 *Ash v. Cvetkov*, 739 F.2d 493, 496 (9<sup>th</sup> Cir. 1984).

8       In *Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9<sup>th</sup> Cir. 1991), the Ninth Circuit affirmed the  
 9 dismissal with prejudice of the plaintiff’s entire action, noting that, among other things, the plaintiff had  
 10 “repeatedly failed to respond to correspondence from [defendants] regarding discovery.” *Id.* at 652.  
 11 While the Ninth Circuit agreed that “there is indeed a policy favoring disposition on the merits, it is the  
 12 responsibility of [the plaintiff] to move towards that disposition at a reasonable pace, and to refrain from  
 13 dilatory and evasive tactics.” *Id.* The Ninth Circuit also noted that “there is no requirement that every  
 14 single alternative remedy be examined by the court before the sanction of dismissal is appropriate. The  
 15 reasonable exploration of possible and meaningful alternatives is all that is required.” *Id.* If alternatives  
 16 are discussed by the parties in their papers, the court need not make express findings regarding  
 17 alternatives. *Id.*

18       As discussed below, the weighing of the five factors favors dismissal of the case.

19       **1. The Public’s Interest In Expeditious Resolution Weighs In Favor Of Dismissal**

20       “The public’s interest in expeditious resolution of litigation always favors dismissal.” *Yourish v.*  
 21 *Cal. Amplifier*, 191 F.3d 983, 990 (9<sup>th</sup> Cir. 1999). Plaintiff has repeatedly refused to appear for  
 22 deposition in the 11 months that his case has been pending, wilfully failed to provide outstanding  
 23 discovery to discovery requests that were served back in October 2009, refused to respond to  
 24 Defendant’s meet and confer efforts, and wilfully failed to comply with several court orders (including  
 25 orders where the Court permitted Plaintiff additional time to comply, *see e.g.*, Docket Entry Nos. 19, 25,  
 26 27, 30). Whether standing alone or taken together, each of these incidents demonstrates that Plaintiff has  
 27 unnecessarily delayed this proceeding. Plaintiff’s failure to cooperate with counsel and the Court is not  
 28 harmless. His conduct has substantially hindered the Court’s and Defendant’s ability to move this case  
 toward disposition and indicates that Plaintiff refuses to litigate this action diligently or comply with the

rules. *Godfrey v. Astrue*, No CV 07-003336 SS, 2010 U.S. Dist. LEXIS 7578 at \* 5 (January 29, 2010, C.D. Cal. 2010) (granting motion to dismiss for failure to prosecute where plaintiff failed to comply with discovery deadlines, failed to respond to defendant's motions and the court's order, and failure to attend a court hearing); *see also Ferdik v. Bonzelet, et al.*, 963 F.2d 1258, 1261 (9<sup>th</sup> Cir. 1992) (upholding district court's dismissal of action where case dragged on for over a year and a half before dismissal, during which time it consumed large amounts of the court's valuable time that it could have devoted to other cases on the docket); *see also Moneymaker*, 31 F.3d at 1452 (upholding dismissal where Plaintiff failed to take any substantive action in his case until after the motion to dismiss was filed: "Anything Moneymaker did to move his actions to trial was after he was forced to do so and he "cannot use his actions after the motion to dismiss was filed as evidence of his diligence in prosecuting the suit.") quoting *Fidelity Philadelphia Trust Co., v. Pioche Mines Consol., Inc.*, 587 F.2d 27, 29 (9<sup>th</sup> Cir. 1978). Thus, the first factor weighs in favor of dismissal.

## **2. The Court's Need To Manage Its Docket Weighs In Favor Of Dismissal**

"It is incumbant upon the Court to manage its docket without being subject to routine noncompliance of litigants." *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9<sup>th</sup> Cir. 2002). Here, the Court has already given Plaintiff ample time to prosecute this action and extensions of time to comply with the Court's directives. Docket Entry Nos., 19, 23, 25, 27, 30. Rather than take advantage of these opportunities, Plaintiff continues to ignore the Court's orders. The result has been that both Defendant and the Court have spent a considerable amount of time trying to manage this litigation and move it forward. Docket Entry Nos. 16-23, 25, 27, 30. Subjecting the parties and the Court to continue in a futile process will not achieve the necessary outcome and will only result in further delay, inefficiency, and prejudice. Thus, the second factor weighs in favor of dismissal.

## **3. The Risk Of Prejudice To Defendant Weighs In Favor Of Dismissal**

When considering prejudice, the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of actual prejudice to defendant from the failure. *Moneymaker*, 31 F.3d at 1452-53. Though the presumption is rebuttable, "[t]he law presumes injury from unreasonable delay." *Id.*, at 1453. Further, "[a] civil defendant suffers prejudice if the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case. *Adriana*

1       *Int'l Corp., v. Thoeren*, 913 F.2d 1406, 1412 (9<sup>th</sup> Cir. 1990). As the Ninth Circuit teaches,  
 2       “[u]nnecessary delay inherently increases the risk that witnesses’ memories will fade and evidence will  
 3       become stale.” *Pagtalunan*, 291 F.3d at 643 (9<sup>th</sup> Cir. 2002). Further, “the failure to produce documents  
 4       as ordered...is considered sufficient prejudice.” *Adriana Int'l Corp.*, 913 F.2d at 1412.

5       Here, the Court is satisfied that Plaintiff’s dilatory conduct has caused prejudice to Defendant.  
 6       Plaintiff has refused to participate in the discovery process and this litigation, substantially prejudicing  
 7       Defendant’s ability to defend itself. Plaintiff refuses to appear for deposition, has interfered with  
 8       production of Dr. Lee’s records, and has refused to provide other outstanding discovery, despite repeated  
 9       court orders. *Adriana Int'l Corp.*, 913 F.2d at 1412 (finding prejudice where repeated failure of plaintiff  
 10      to appear at scheduled dispositions compounded by plaintiff’s continuing refusal to comply with court-  
 11      ordered production of documents constitutes an interference with the rightful decision of the case).  
 12      Plaintiff also refuses to properly meet and confer with Defendant to resolve issues. Docket Entry Nos.  
 13      16-18, 20-22, 26. Plaintiff’s conduct has also increased the burdens on Defendant by requiring repeated  
 14      efforts by Defendant to meet and confer with Plaintiff on discovery and scheduling issues, only to have  
 15      Plaintiff and his counsel fail to engage. Docket Entry Nos. 16-22, 26. This, in turn, has increased the  
 16      burdens on the Court because Defendant is forced to file repeated discovery motions, *id.*, and the Court  
 17      is left to resolve these matters and issue repeated orders, which subsequently go ignored by Plaintiff.  
 18      Docket Entry Nos., 19, 23, 25, 27, 30. *Godfrey*, 2010 U.S. Dist. LEXIS 7578 at \*6 (finding prejudice  
 19      and granting motion to dismiss where plaintiff failed to participate in the discovery process: “the court is  
 20      mindful that [plaintiff’s] failure to comply with discovery deadlines has increased the burdens on  
 21      [defendant], both financial and otherwise, by forcing it to file a motion to compel and a motion to extend  
 22      the discovery deadline.”]. Defendant’s ability to prepare a motion for summary judgment is also  
 23      substantially impaired by Plaintiff’s refusal to comply with discovery rules. Such interference with  
 24      Defendant’s ability to prepare this motion threatens the Court’s ability to issue a rightful decision on it  
 25      and efficiently adjudicate this matter.

26      Moreover, the Court has already moved the deadlines in this case once before due to the substantial  
 27      delay caused by Plaintiff. Docket Entry No. 27, ¶¶ 5-6. Under the current Court-ordered schedule for  
 28      this case, Defendant still does not have sufficient time to complete discovery, including, but not limited

1 to Plaintiff's deposition and an IME required for expert disclosures on April 19, 2010.

2 Further, the underlying event in this matter, Plaintiff's termination, occurred nearly three years ago  
 3 (with various other allegations, though time barred, having occurred several years before that). Docket  
 4 Entry No. 1 (Plaintiff's Complaint). Thus, Plaintiff's delay further endangers witness' memories and the  
 5 integrity of evidence. *Pagtalunan*, 291 F.3d at 643 (9<sup>th</sup> Cir. 2002); *Morris*, 942 F.2d at 652 ("[W]e may  
 6 presume from the length of time that has elapsed between the events at issue here and the present, that  
 7 [defendant's] ability to present its case has been prejudiced.")

8 "Where a party offers a poor excuse for failing to comply with a court's order, the prejudice to the  
 9 opposing party is sufficient to favor dismissal." *Godfrey*, 2010 U.S. Dist. LEXIS 7578 at \*5 (January  
 10 29, 2010, C.D. Cal. 2010). Here, Plaintiff has offered no excuse for failing to respond to Court orders.

11 For these reasons, the third "prejudice" element favors dismissal. *Godfrey*, *supra* at \*5.

12 **4. The Public Policy Favoring Resolution On The Merits Does Not Outweigh Plaintiff's  
 13 Failure To Comply With Procedural Rules And Court Orders**

14 Notwithstanding the public policy favoring disposition on the merits, it is the responsibility of the  
 15 moving party to move toward that disposition at a reasonable pace, and to refrain from dilatory and  
 16 evasive tactics. *Morris*, 942 F.2d at 652. Plaintiff has not discharged this responsibility despite having  
 17 ample time. Under these circumstances, the public policy favoring resolution of disputes on the merits  
 18 does not outweigh Plaintiff's failure to provide discovery or comply with Court orders. *Godfrey*, at \* 7-  
 19 \*8 (dismissing case sua sponte for Plaintiff's failure to prosecute and obey court orders); *Lucy v. Soc.  
 20 Sec.*, No. CV 07-4850 AG (CW), 2010 U.S. Dist. LEXIS 11008 (February 4, 2010, C.D. Cal. 2010)  
 21 (granting Defendant's motion to dismiss for failure to effect service, failure to comply with court orders,  
 22 and failure to prosecute). Rather, the other four factors strongly outweigh any policy for resolution on  
 23 the merits.

24 **5. No Less Drastic Alternatives Are Reasonably Likely To Work**

25 No other less drastic sanctions appear reasonably likely to accomplish the necessary result.  
 26 Accordingly, as it is highly unlikely that less drastic alternatives will change Plaintiff's chosen course of  
 27 conduct, the fifth factor also weighs in favor dismissal.

28 Importantly, the Court has attempted to avoid outright dismissal by providing Plaintiff with ample  
 opportunity and encouragement to comply with his obligations and court orders, and repeatedly warning

Plaintiff of his obligation to vigorously prosecute this action and of the consequences if he failed to do so. Docket Entry Nos. 19, 23, 25, 27, 30. The Court has, therefore, explored meaningful alternatives to dismissal. *Ferdik*, 963 F.2d at 1262 (upholding district court's dismissal of action where district court tried less drastic alternatives before dismissing action). Sanctions other than dismissal do not appear to be appropriate given that Plaintiff has failed to participate in his own litigation.

Ordering plaintiff to respond to discovery is not a reasonable alternative. The Court has already provided Plaintiff with ample time and has issued several orders which Plaintiff has violated, including, Docket Entry Nos. 23, 25, 27 and 30. Plaintiff and his counsel have also failed to comply with the most basic of the Court's orders regarding resolving discovery disputes. Standing Order on discovery; Docket Entry No. 19. Defendant and the Court have already expended a significant amount of time trying to resolve discovery and scheduling issues with Plaintiff and move this matter forward, all to no avail. Docket Entry Nos. 16-22, 26. Plaintiff and his counsel plainly fail to engage. *Id.* Subjecting the parties and the Court to continue in a futile process will not achieve the necessary outcome. Monetary sanctions also would not provide Defendant with the information it needs to defend this case. Moreover, it is highly unlikely that Plaintiff would comply with a court order for monetary sanctions when he has failed to comply with all other court orders. Evidentiary sanctions also would not remedy the substantial delay and would not provide Defendant with all of the information that it needs to fully prepare its defenses.

Plaintiff has shown that he is unwilling to comply with Court orders, procedural rules, and his obligations to vigorously prosecute this action. Plaintiff's refusal to engage in this litigation renders alternatives futile. Accordingly, the fifth factor also weighs in favor of dismissal.

#### B. Plaintiff's Failure To Provide Discovery Also Warrants Dismissal

Defendant also moves to dismiss this action pursuant to Federal Rule of Civil Procedure 37.

Federal Rule of Civil Procedure 37(b)(2) provides in part the following:

(A) For not obeying a discovery order. If a party or a party's officer, director, or managing agent...fails to obey an order to provide or permit discovery... the court where the action is pending may issue further just orders. They may include...

(v) dismissing the action or proceeding in whole or in part.  
Fed. R. Civ. Proc. 37(b)(2)(A)(v).

Federal Rule of Civil Procedure 37(d) provides in part the following:

1                   **(d) Party's Failure to Attend Its Own Deposition,  
2                   Serve Answers to Interrogatories, or Respond to  
3                   a Request for Inspection.**

4                   **(1) In General.**

5                   (A) Motion: Grounds for Sanctions. The court where the  
6                   action is pending, may on motion, order sanctions if:

- 7                   (i) a party or a party's officer, director or managing agent...  
8                   fails, after being served with proper notice, to appear for  
9                   that person's deposition;

10                  ...  
11                  **(3) Types of Sanctions.** Sanctions may include any of  
12                  the orders listed in Rule 37(b)(2)(A)(i)-(vi).

13                  Here, the Court's February 18<sup>th</sup> and 19<sup>th</sup> orders required: (1) Plaintiff to provide a second SSA  
14                  consent release form to Defendant by February 25, 2010; (2) Plaintiff to produce all outstanding  
15                  discovery to Defendant by March 10, 2010 (3) Plaintiff's medical records for Dr. Lee to be produced by  
16                  March 10, 2010; and (4) Plaintiff to appear for deposition on March 24-25, 2010. Docket Entry Nos. 27,  
17                  30. In addition to the sanction warnings issued in the Court's prior orders (*see* Docket Entry Nos. 19,  
18                  23, 25), the Court specifically warned that if Plaintiff failed to appear for his deposition, his case could  
19                  be dismissed. Carradero Decl., Ex. 1 (4:25-5:15; 10:11-15). The Court's order on medical records  
20                  further warned Plaintiff that if Dr. Lee did not produce the medical records or if Plaintiff interfered with  
21                  the production, that the Court would consider imposing sanctions, including terminating sanctions.  
22                  Docket Entry No. 30, 2:27-3:1.

23                  Despite this additional opportunity for Plaintiff to fulfill his discovery obligations and the Court's  
24                  warning of the consequences if he failed to do so, none of these deadlines were complied with.  
25                  Plaintiff's counsel continues to represent that he has had no contact with his client. Carradero Decl., ¶¶  
26                  7-8, Ex. 5.

27                  Though it is not required for the Court to rule on this portion of Defendant's motion since it finds  
28                  that dismissal is warranted pursuant to Rule 41(b), the Court notes that for the same reasons set forth  
above, Plaintiff's failure to provide discovery also warrants dismissal under Federal Rule of Civil  
Procedure 37. *Adriana Int'l Corp.*, 913 F.2d 1406 (affirming dismissal of case for discovery abuses,  
pursuant to FRCP 37 where, among other things, plaintiff failed to produce documents and appear for  
deposition in violation of court and special master orders).

**III. CONCLUSION**

This matter has been pending for nearly one year. In that time, Plaintiff has failed to comply with the

Court's orders, has refused to provide discovery, and has utterly failed to participate in this litigation. Plaintiff has not even communicated with Defendant or the Court to explain his lack of participation or Plaintiff has also failed to respond to the third order to show to try to place the matter back on track. cause. (Dkt. #40.)

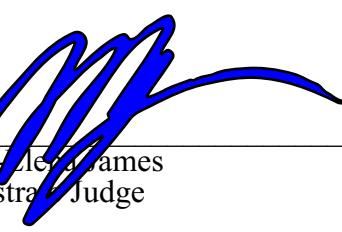
The Court and Defendant have a right to expect the Plaintiff to take some action to move his case along, particularly where his lack of action has been repeatedly brought to his attention and he has been given numerous chances. This case has completely stalled, prejudicing Defendant and interfering with this Court's ability to timely and efficiently adjudicate the matter and manage its docket.

Accordingly, the Court finds that dismissal of this action with prejudice is warranted pursuant to Rule 41(b) in light of Plaintiff's failure to prosecute and comply with court orders.

Defendant's motion to dismiss Plaintiff's action with prejudice is hereby **GRANTED** as set forth above. This dismissal will operate as an adjudication on the merits and will thus be with prejudice to Plaintiff's refiling of a new action in federal court based on the same allegations. *Owen v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9<sup>th</sup> Cir.2001) (dismissal for failure to prosecute is treated as an adjudication on the merits); *Godfrey*, 2010 U.S. Dist. LEXIS 7578 at \*7 (January 29, 2010, C.D.Cal. 2010) (same).

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Judgment is entered in favor of Defendant. The Clerk is ordered to enter the Order and Judgment, ~~serve the Order and Judgment on all parties and counsel~~ and close the file.

DATED: May 6, 2010

  
Hon. Maria-Zuleta James  
Chief Magistrate Judge