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

MARK OTTOVICH, et al.,

Plaintiffs,

v.

CITY OF FREMONT, et al.,

Defendants.

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No. C 09-4181 MMC

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS**

Before the Court is defendants' motion, filed December 19, 2012, to dismiss the above-titled action based on plaintiff's failure to pay court-ordered sanctions. No opposition has been filed. Having read and considered the papers submitted in support of the motion, the Court deems the motion appropriate for decision on the moving papers, hereby VACATES the hearing scheduled for March 8, 2013, and rules as follows.

On November 16, 2012, the Court issued an order directing plaintiff to appear at a deposition set by the Court, pursuant to Federal Rule of Civil Procedure 37(a), and granting sanctions to defendants in the form of attorneys' fees, pursuant to Rule 37(d). (See Order, filed Nov. 16, 2012.) To date, no payment of the monetary sanctions has been made. (See Decl. of Arlene Helfrich ¶ 13.)


Defendants, citing Rule 37(b), argue that the Court may issue an order "dismissing the action or proceeding in whole or in part," see Fed. R. Civ. Pro. 37(b)(2)(A)(v), where, according to defendants, "a party fails to obey an order granted under Rule 37(a)," (see

1 Mot. at 3:11-20). The language on which defendants rely, however, when read in context,  
2 does not support defendants' position. Rather, the rule provides for such sanctions only if a  
3 party "fails to obey an order to provide or permit discovery." See Fed. R. Civ. Pro.  
4 37(b)(2)(A). A failure to pay court-ordered sanctions is not a failure to "provide or permit  
5 discovery."

6 Accordingly, defendant's motion is hereby DENIED, without prejudice to defendants  
7 filing a motion to dismiss in the event plaintiff fails to appear at his court-ordered deposition  
8 on January 23, 2013.

9 **IT IS SO ORDERED.**

10 Dated: January 9, 2013

  
MAXINE M. CHESNEY  
United States District Judge

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