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

TERESA ANN MARTINEZ and  
 TIFFANY CURTIS, on behalf of themselves  
 and all persons similarly situated,

No. C 13-00319 WHA

Plaintiffs,

v.

**ORDER GRANTING MOTION  
 FOR DISMISSAL AS TO  
 PLAINTIFF MARTINEZ UNDER  
 FRCP 37(b)(2)**

EXTRA SPACE STORAGE, INC., a  
 Maryland corporation, EXTRA SPACE  
 MANAGEMENT, INC., a Utah corporation,  
 and DOES 1 through 100, inclusive,

Defendants.

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**INTRODUCTION**

In this putative class action plagued with resistance to proper discovery, defendants move to dismiss plaintiff Teresa Ann Martinez from the lawsuit with prejudice under Rule 37(b) of the Federal Rules of Civil Procedure due to her persistent refusal to submit to a deposition or obey court orders. For the reasons set forth below, the motion is **GRANTED**.

**STATEMENT**

In September 2009, plaintiff contracted with defendants to rent a storage space at their California facility. Plaintiff placed approximately \$500 worth of belongings in the storage space. At an unspecified point, defendants determined that plaintiff was delinquent in paying her rent for the storage space. Defendants contracted with third-party auctioneers to auction plaintiff's belongings in early 2010. After the auction, defendants allegedly sent the auction proceeds from

1 California, where the auction occurred, to their corporate offices in Utah. Plaintiff alleges  
2 auctions and transfers were a regular practice.

3 In December 2012, plaintiff filed a putative class action in California state court;  
4 defendants removed here. Plaintiff alleges that the auction violated several provisions of  
5 California's Self-Service Storage Facility Act, California Business and Professions Code § 21700  
6 et seq., and alleges a claim for conversion; two California claims under the Unfair Competition  
7 Act, California Business and Professions Code § 17200 et. seq, and under Interference with  
8 Statutory Rights, California Civil Code § 52.1; and one federal RICO claim, 18 U.S.C. 1962.

9 Defendants Extra Space Storage, Inc. and Extra Space Management, Inc. move by letter  
10 brief to dismiss plaintiff Martinez for failing to appear for her properly-noticed depositions a total  
11 of three times (Dkt. No. 79). On September 25, 2013, plaintiff's counsel was ordered by the  
12 undersigned judge to set a date on which Martinez would appear for her deposition (Dkt. No. 70).  
13 Plaintiff was warned that if she failed to appear for her third scheduled deposition, she would be  
14 dismissed from the lawsuit. Plaintiff's counsel was further ordered to pay \$200 to defense  
15 counsel for his unexcused failure to appear at the discovery conference on that day to partially  
16 compensate for the waste of defense counsel's time. Following a meet and confer, the parties  
17 agreed that Martinez would appear for her deposition on Wednesday, October 9; she failed to do  
18 so yet again.

19 On October 16, plaintiff was ordered to show cause for her failure to attend the October 9  
20 deposition (Dkt. No. 83). Martinez's response was due by Thursday, October 17 at 5 p.m. Now  
21 five days later, no response has yet been filed.

## 22 ANALYSIS

23 Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure states in relevant part:

24 If a party . . . fails to obey an order to provide or permit discovery . . . the  
25 court in which the action is pending may make such orders in regard to the  
failure as are just, and among others the following:

26 (C) An order striking out pleadings or parts thereof, or staying further  
27 proceedings until the order is obeyed, or dismissing the action or  
28 proceeding or any part thereof, *or rendering a judgment by default against  
the disobedient party*[.]

1 FRCP 37(b)(2)(A) (emphasis added). Similarly, Rule 37(d) states in relevant part:

2 The court where the action is pending may, on motion, order sanctions if:

3 (i) a party . . . fails, after being served with proper notice, to appear for  
4 that person's deposition.

5 (3) Sanctions may include any of the orders listed in Rule 37(b)(2). . . .  
6 Instead of or in addition to these sanctions, the court may require the party  
7 failing to act, the attorney advising that party, or both to pay the  
8 reasonable expenses, including attorney's fees, caused by the failure.

9 FRCP 37(d). Here, defendants move for dismissal of Martinez with prejudice due to plaintiff's  
10 conduct in hindering defendants' legitimate discovery efforts (Dkt. No. 79).

11 A district court should consider five factors — known as the *Malone* factors — before  
12 ordering a sanction of dismissal under FRCP 37: (1) the public's interest in expeditious  
13 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the  
14 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the  
15 availability of less drastic sanctions. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007,  
16 1022 (9th Cir. 2002) (citing *Malone v. United States Postal Serv.*, 833 F.2d 128, 130 (9th  
17 Cir.1987).

18 Where a court order is violated, the first two factors support sanctions and the fourth  
19 factor cuts against a default. Therefore, it is the third and fifth factors that are decisive.

20 A defendant suffers prejudice if the plaintiff's actions impair the defendant's ability to go  
21 to trial or threaten to interfere with the rightful decision of the case. *Id.* at 131. Delay alone has  
22 been held to be insufficient prejudice. *See United States for the Use and Benefit of Wiltec Guam,*  
23 *Inc. v. Kahaluu Construction Co.*, 857 F.2d 600, 604 (9th Cir.1988). Failure to produce  
24 documents as ordered, however, is considered sufficient prejudice. *Securities and Exchange*  
25 *Comm'n v. Seaboard Corp.*, 666 F.2d 414, 417 (9th Cir.1982).

26 Here, the repeated failure of Martinez to appear at scheduled depositions compounded by  
27 her continuing refusal to comply with court orders constitutes an interference with the orderly  
28 resolution of the action. Therefore, prejudice has been established under *Malone*.

The fifth factor of the *Malone* test is violated if dismissal is imposed without first  
considering the impact of the sanction and the adequacy of less drastic sanctions. *Malone*, 833

1 F.2d at 131. Our court of appeals conducts a three-part analysis when determining whether a  
2 district court has properly considered the adequacy of less drastic sanctions: (1) did the court  
3 explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions  
4 would be inappropriate, (2) did the court implement alternative sanctions before ordering  
5 dismissal, and (3) did the court warn the party of the possibility of dismissal before actually  
6 ordering dismissal? *Malone*, 833 F.2d at 132.

7 *First*, three attempts have been made to obtain plaintiff Martinez’s deposition; none were  
8 availing. Before applying this sanction, a prior order told Martinez for a third time to provide a  
9 deposition and plaintiff’s counsel was fined for failing to appear at a discovery conference  
10 (Dkt. No. 70). Plaintiff Martinez was warned that if she failed to abide by the order, “her case  
11 [would be] dismissed for lack of prosecution and for violating this order” (*ibid.*). Still, plaintiff  
12 failed to attend her scheduled deposition. An order was then issued to allow plaintiff to show  
13 cause for failing to attend the deposition (Dkt. No. 83). No response was given. Martinez has  
14 not complied with past sanctions, and there is no reason to believe she would in the future.  
15 Therefore, the requirement that alternative sanctions be considered before imposing dismissal has  
16 been satisfied.

17 *Second*, as set out above, the undersigned judge did impose alternative sanctions before  
18 dismissing the action, thus satisfying the second prong of the test to determine whether a district  
19 court has imposed alternatives to dismissal.

20 *Third*, the September 25 order specifically warned plaintiff that a failure to appear at her  
21 deposition would mean her dismissal from the lawsuit (Dkt. No. 70). This satisfies the  
22 requirement that the court identify the party's action that will lead to the sanction.

23 The five-part test announced in *Malone* is viewed as a balancing test. Here, the first three  
24 factors weigh in favor of sanctions, dismissal and default. The fifth factor, consideration of  
25 alternatives, also weighs in favor of dismissal or default in light of the undersigned judge’s  
26 repeated use of alternative sanctions and his warning of dismissal.


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**CONCLUSION**

After careful consideration of the *Malone* factors, and pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, defendants' motion to dismiss plaintiff Martinez *with prejudice* is hereby **GRANTED**. As for plaintiffs' counsel's conduct, it may be taken into consideration in the subsequent motion for class certification.

**IT IS SO ORDERED.**

Dated: October 22, 2013.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE