

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL WHITE, AI7031,  
Plaintiff,  
v.  
X. GONZALES, et al.,  
Defendant(s).

Case No. [21-cv-04221-CRB](#) (PR)

**ORDER GRANTING MOTION FOR  
TERMINATING SANCTIONS AND  
DISMISSING ACTION WITHOUT  
PREJUDICE**

(ECF No. 46)

Plaintiff, a prisoner at Kern Valley State Prison (KVSP), filed this pro se action for damages under 42 U.S.C. § 1983 alleging that on May 21, 2019, while he was incarcerated at Salinas Valley State Prison (SVSP), correctional officer defendants failed to protect him from an attack by another prisoner in violation of the Eighth Amendment. Currently before the court for decision is defendants’ motion for terminating sanctions under Federal Rules of Civil Procedure 37(b)(2) based on plaintiff’s repeated failure to respond to their request for production of documents and/or comply with the court’s orders. Plaintiff has not responded to the motion. For the reasons that follow, the motion for terminating sanctions will be granted, and this action will be dismissed without prejudice.

**RELEVANT BACKGROUND**

On January 25, 2022, the court screened the operative First Amended Complaint (FAC) pursuant to 28 U.S.C. § 1915A(a) and found that, liberally construed, plaintiff’s allegations that SVSP correctional officers A. Tapia and X. Gonzales stepped back and let another prisoner chase, trip and beat him up while handcuffed states a cognizable “failure-to-protect Eighth Amendment claim under § 1983” against Tapia and Gonzales and ordered them served. ECF No. 10 at 2. The court also set a dispositive motion deadline within 90 days and informed the parties that they could conduct discovery without “further court order.” Id. at 5. On April 4, 2022, the dispositive motion deadline was extended to July 24, 2022. ECF No. 16.

1     A.     First Court Order to Respond to Discovery

2             On July 15, 2022, defendants filed a notice of discovery dispute and request for extension  
3 of time to file a dispositive motion after plaintiff failed to appear at a noticed deposition on July 8,  
4 2022. ECF No. 23. The court ordered plaintiff “to appear and testify for an oral deposition” and  
5 extended the dispositive motion deadline to October 7, 2022. ECF No. 24 at 1. Plaintiff appeared  
6 and testified at a re-noticed deposition “on August 22, 2022.” EFC No. 46 at 3.

7     B.     Second Court Order to Respond to Discovery

8             On August 12, 2022, defendants served plaintiff with requests for written admissions and  
9 interrogatories and production of documents. Id. By September 14, 2022, plaintiff had not  
10 responded to the discovery requests or contacted defendants’ counsel. Id.

11             On September 22, 2022, defendants filed a second notice of discovery dispute and request  
12 for extension of time to file a dispositive motion. ECF No. 26. On October 21, 2022, the court  
13 ordered plaintiff “to respond to duly served interrogatories and requests for production” and  
14 extended the dispositive motion deadline to December 6, 2022. EFC No. 27 at 2.

15             On October 28, 2022, plaintiff filed a letter requesting additional copies and time to  
16 respond to the discovery requests. ECF No. 28. On October 31, 2022, defendants filed a  
17 statement of non-opposition noting that upon receipt they had mailed plaintiff additional copies of  
18 their discovery requests and requesting a continuance of the dispositive motion deadline. EFC No.  
19 29. On November 29, 2022, the court granted the parties’ requests for an extension of time to  
20 complete ongoing discovery and file a dispositive motion and extended the dispositive motion  
21 deadline to January 13, 2023. EFC No. 30.<sup>1</sup>

22     C.     Third Court Order to Respond to Discovery

23             By January 5, 2023, plaintiff had “not responded” to defendants’ requests for written  
24 admissions and interrogatories and production of documents. ECF No. 33 at 3. Defendants  
25 consequently filed a third notice of discovery dispute and request for extension of time to file a  
26

---

27             <sup>1</sup> On December 8, 2022, plaintiff filed a motion for extension of time (dated December 1,  
28 2022) which the court dismissed as moot because the motion “appears to have crossed in the mail  
with the court’s [November 29, 2022 order] granting the parties an extension of time to complete  
ongoing discovery and file a dispositive motion.” ECF No. 32 at 1 (citation omitted).

1 dispositive motion. Id. On January 27, 2023, the court ordered plaintiff “to respond to duly  
2 served interrogatories and requests for production” and extended the dispositive motion deadline  
3 to March 14, 2023. EFC No. 35 at 2. On March 14, 2023, the dispositive motion deadline was  
4 extended to May 15, 2023. ECF No. 38.

5 On April 13, 2023, defense counsel “met and conferred” with plaintiff and agreed to grant  
6 plaintiff an additional three weeks to respond to the outstanding discovery requests. EFC No. 46-1  
7 at ¶ 4. On May 9, 2023, plaintiff “sent responses” to the requests for written admissions and  
8 interrogatories “but did not send responses” to the request for production of documents. Id. at ¶ 5.  
9 In a letter to defense counsel, plaintiff “explained that he was unable to get any documents  
10 because he could not access the law library.” Id.

11 On May 4, 2023, the court extended the dispositive motion deadline to June 14, 2023.  
12 ECF No. 40.

13 D. Defendants’ First Motion for Terminating Sanctions

14 On June 12, 2023, defendants filed their first motion for terminating sanctions under  
15 Federal Rule of Civil Procedure 37(b)(2) based on plaintiff’s repeated failure to respond to their  
16 request for production of documents. EFC No. 41. The court promptly set a briefing schedule,  
17 but plaintiff did not respond to the motion. See EFC Nos. 42 & 43. On August 18, 2023, the  
18 court nonetheless denied the motion without prejudice:

19 Although plaintiff did not respond to the motion, defendants note in  
20 their supporting papers that plaintiff responded to their request for  
21 admissions and interrogatories and explained in a letter that he could  
22 not respond to their request for production of documents because of  
23 his “inability to access the law library.” ECF No. 41 at 4. Plaintiff  
specifically wrote to defendants, “due to not being able to go to law  
library I could not get everything I need like medical report, and the  
documents you asked for I’ll be sending them next when I’m able to  
go to the law library.” Id. No. 41-1 at 8.

24 Good cause appearing therefor, prison officials shall provide plaintiff  
25 with reasonable access to the prison law library at Kern Valley State  
26 Prison (KVSP) so that he may respond to defendants’ request for  
27 production of documents by no later than September 8, 2023. By no  
later than October 6, 2023, defendants shall file motion for summary  
judgment under Rule 56 or, if appropriate, renew their motion for  
terminating sanctions under Rule 37(b)(2).

28 ECF No. 44 at 1.



1 but a “way for a district judge to think about what to do.” Valley Eng’rs Inc. v. Elec. Eng’g Co.,  
2 159 F.3d 1051, 1057 (9th Cir. 1998). “The first two of these factors favor the imposition of  
3 sanctions in most cases, while the fourth cuts against a default or dismissal sanction. Thus, the key  
4 factors are prejudice and availability of lesser sanctions.” Wanderer v. Johnston, 910 F.2d 652,  
5 656 (9th Cir. 1990).

6 These rules apply not only to litigants represented by counsel, but to self-represented  
7 parties as well. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must  
8 follow the same rules of procedure that govern other litigants.”), overruled on other grounds by  
9 Lacey v. Maricopa Conty., 693 F.3d 896 (9th Cir. 2012) (en banc). While “[a] party’s lack of  
10 counsel may be considered in evaluating the willfulness of discovery violations and the failure to  
11 obey court orders and in weighing the other factors regarding dismissal, [] pro se status does not  
12 excuse intentional noncompliance with discovery rules and court orders.” Arellano v. Blahnik,  
13 No. 16-cv-2412-CAB-MSB, 2019 WL 2710527, at \*5 (S.D. Cal. June 28, 2019) (quoting Sanchez  
14 v. Rodriguez, 298 F.R.D. 460, 470 (C.D. Cal. 2014)), report and recommendation adopted by  
15 2019 WL 3429232 (S.D. Cal. July 30, 2019); see also Gordon v. Cnty. of Alameda, No. 06-cv-  
16 2997-SBA, 2007 WL 1750207, at \*5 (N.D. Cal. June 15, 2007) (“pro se plaintiffs must abide by  
17 the rules of discovery, and when they fail to do so in bad faith dismissal is warranted”).

## 18 DISCUSSION

19 Before imposing a terminating sanction under Rule 37(b)(2), a court must find that the  
20 litigant’s violations of discovery orders were “due to willfulness, bad faith, or fault of the party.”  
21 Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994) (citing Wyle v. R.J. Reynolds Indus.,  
22 709 F.2d 585, 589 (9th Cir. 1983)). Willfulness is defined as disobedient conduct “within the  
23 litigant’s control.” Ejelstad, 762 F.2d at 1341; accord United States v. Sumitomo Marine & Fire  
24 Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980) (“[D]ismissal . . . may [not] be imposed when failure  
25 to comply with discovery orders is due to circumstances beyond the disobedient party’s control.”).

26 Here, plaintiff repeatedly has violated the court’s orders to respond to defendants’ request  
27 for production of documents. Defendants first served plaintiff with their request for production of  
28 documents on August 12, 2022. On October 21, 2022, after plaintiff failed to respond to the

1 request, the court ordered him to do so. Then on January 27, 2023, after plaintiff still had not  
2 responded to the request, the court again ordered him to do so. On May 9, 2023, plaintiff  
3 responded to defendants' requests for written admission and interrogatories but did not respond to  
4 the request for production of documents. As a result of plaintiff's continued failure to respond to  
5 their request for production of documents, defendants filed their first motion for terminating  
6 sanctions on June 12, 2023. Plaintiff did not respond to the motion but in letter to defense counsel  
7 explained that he was unable to respond to the request for production of documents because he  
8 was unable to access the law library. On August 18, 2023, the court considered plaintiff's  
9 explanation to defense counsel and denied the motion for terminating sanctions without prejudice  
10 and ordered prison officials to provide plaintiff with reasonable access to the prison law library so  
11 that he could respond to defendants' outstanding request for production of documents by  
12 September 8, 2023.

13 To date, plaintiff has not responded to defendants' August 12, 2022 request for production  
14 of documents, in violation of the court's October 21, 2022, January 27, 2023 and August 18, 2023  
15 orders. Nor has he responded to defendants' second motion for terminating sanctions or attempted  
16 to show that his continued failure to comply with the discovery obligations imposed on him by the  
17 Federal Rules of Civil Procedure and this court's orders was and/or is outside of his control. See  
18 Fjelstad, 762 F.2d at 1341. Defendants by contrast have submitted evidence that plaintiff has  
19 made no effort to access the law library to respond to their request for production of documents  
20 despite defense counsel writing plaintiff a letter informing him of the court's ruling and of the  
21 process for requesting access to the law library. Under the circumstances, the court finds that  
22 plaintiff's disobedient conduct falls within his control and is willful. See id.

23 The court next must weigh the five factors set out in Malone to help it determine whether  
24 dismissal is appropriate in this case. See Malone, 833 F.2d at 130.

25 A. Factors 1 and 2: Public's Interest in Expeditious Resolution and Docket Management

26 The Ninth Circuit has held that the first two Malone factors "favor the imposition of  
27 sanctions in most cases." Wanderer, 910 F.2d at 656. For the first factor, "[t]he public's interest  
28 in expeditious resolution of litigation always favors dismissal." Pagtalunan v. Galaza, 291 F.3d

1 639, 642 (9th Cir. 2002) (quoting Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)).  
2 For the second factor, the court’s need to manage its docket, “[w]hen a litigant’s failure to comply  
3 with discovery obligations required the Court to address such non-compliance, this factor weighs  
4 in favor of dismissal.” Arellano, 2019 WL 2710527, at \*8 (citing Pagtalunan, 291 F.3d at 642).  
5 “The trial judge is in the best position to determine whether a delay in a particular case interferes  
6 with docket management and the public interest.” Pagtalunan, 291 F.3d at 642 (citation omitted).

7 Here, the first two Malone factors weigh in favor of dismissal. Defendants served plaintiff  
8 with their request for production of documents over 18 months ago. Since then, the court has had  
9 to address multiple notices and motions of discovery disputes and issue multiple orders regarding  
10 plaintiff’s continued failure to respond to defendants’ request for production of documents and/or  
11 to comply with its orders. In addition, the court has had to grant multiple extensions of time and  
12 modifications of its scheduling orders in what should have been a straight-forward prisoner § 1983  
13 failure-to-protect action solely due to plaintiff’s continued failure to respond to defendants’  
14 request for production of documents and/or to comply with the court’s orders. Under the  
15 circumstances, the court finds that the first and second Malone factors weigh in favor of dismissal.  
16 See Arellano, 2019 WL 2710527, at \*8 (“When a litigant’s failure to comply with discovery  
17 obligations required the Court to address such non-compliance, this factor weighs in favor of  
18 dismissal”); see also Calderon v. Holland, No. 13-cv-1974-LJO-BA, 2014 WL 950367, at \*2  
19 (E.D. Cal. Mar. 11, 2014) (finding public’s interest in expeditiously resolving case and court’s  
20 interest in managing docket weighed in favor of dismissal “because the petition has been pending  
21 for a lengthy period.”).

22 B. Factor 3: Prejudice to Defendants

23 The third Malone factor “looks to whether the [plaintiff’s] actions impaired [the  
24 defendants’] ability to go to trial or threatened to interfere with the rightful decision of the case.”  
25 Kahaluu, 857 F.2d at 604 (citation omitted). The pendency of the lawsuit alone is not enough to  
26 warrant dismissal, but “[u]nnecessary delay inherently increases the risk that witnesses’ memories  
27 will fade and evidence will become stale.” Pagtalunan, 291 F.3d at 643 (citation omitted).  
28 Accordingly, a “presumption of injury arises from the occurrence of unreasonable delay in

1 prosecuting an action.” Anderson v. Air West, 542 F.2d 522, 524 (9th Cir. 1976). This  
 2 presumption of prejudice to the opposing party “can be overcome only with an affirmative  
 3 showing of just cause by the” party who has failed to prosecute the action and/or failed to comply  
 4 with court orders. In re Eisen, 31 F.3d 1447, 1452–53 (9th Cir. 1994). Importantly, “[f]ailing to  
 5 produce documents as ordered is considered sufficient prejudice” as a matter of law. Allen v.  
 6 Bayer Corp. (In re Phenylpropanolamine (PPA) Prod. Liab. Litig.), 460 F.3d 1217, 1227 (9th Cir.  
 7 2006) (citing Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990)).

8 Here, the third Malone factor weighs in favor of dismissal. Plaintiff’s continued failure to  
 9 respond to defendants’ August 12, 2022 request for production of documents as ordered by the  
 10 court may be considered prejudicial in this case due to the unnecessary and prolonged delay it has  
 11 caused. See id. at 1227; Hernandez v. City of El Monte, 138 F.3d 393, 400–01 (9th Cir. 1998).

12 As defendants point out, plaintiff’s failure to respond has caused them “to seek numerous  
 13 extensions of time to conduct basic discovery” and forced them to file multiple notices of  
 14 discovery dispute and motions for terminating sanctions. EFC No. 46 at 7. Plaintiff’s disobedient  
 15 conduct has caused a delay of more than 18 months in this case and “the law presumes injury from  
 16 [such] unreasonable delay.” Anderson, 542 F.2d at 524. Plaintiff’s continued failure to respond to  
 17 defendants’ request for production of documents also has prejudiced defendants by preventing  
 18 them from properly ascertaining if there is any probative evidence of deliberate indifference and  
 19 the extent of any damages suffered. See Bradford v. Marchak, No. 14-cv-1689-JLO-BAM, 2018  
 20 WL 3046974, at \*7 (E.D. Cal. June 19, 2018) (defendants entitled to know facts upon which  
 21 plaintiff bases claims and documents which support claims), report and recommendation adopted  
 22 by 2018 WL 10923433 (E.D. Cal. July 9, 2018). Under the circumstances, the court finds that the  
 23 third Malone factor weighs in favor of dismissal. Accord id. at \*8 (finding inability to fully  
 24 defend case or move forward with potential dispositive motions due to plaintiff’s failure to comply  
 25 with discovery, coupled with delay, prejudicial to defendants).

26 C. Factor 4: Public Policy Favoring Disposition on Merits

27 The public policy favoring disposition of cases on their merits typically weighs against  
 28 dismissal. Pagtalunan, 291 F.3d at 643. But when the disobedient party’s behavior has impeded



1 disposition on the merits, this factor “lends little support.” Allen, 460 F.3d at 1228. District courts  
 2 in this circuit accordingly have found that disposition of cases on their merits is not furthered by  
 3 litigants who refuse to provide discovery needed for preparation of a defense against his claim.  
 4 See Sanchez, 298 F.R.D. at 465 (“public policy favoring disposition on their merits is not  
 5 furthered by litigants . . . who refuse to provide discovery needed for preparation of a defense  
 6 against his claims”) (emphasis in original); Meeks v. Wells Fargo Bank, No. 13-cv-1261-KJM-  
 7 DAD, 2014 WL 295171, \*2 (E.D. Cal. Jan. 27, 2014) (same); Bratton v. Ontario Police Dep’t, No.  
 8 13-cv-1404-DOC, 2013 WL 6798003, \*3 (C.D. Cal. Dec. 17, 2013) (same).

9 Here, plaintiff’s continued failure to respond to defendants’ request for production of  
 10 documents has caused significant delay and prevented this case from progressing towards  
 11 resolution on the merits. Under the circumstances, the court finds that the fourth Malone factor  
 12 has little weight and will be considered a neutral factor. Accord Arellano, 2019 WL 2710527, at  
 13 \*9 (considering fourth Malone factor a neutral factor where plaintiff’s willful acts have prevented  
 14 disposition of case on merits).<sup>4</sup>

15 D. Factor 5: Availability of Less Drastic Sanctions

16 Under the fifth and final Malone factor, district courts must consider less severe  
 17 alternatives and discuss them before electing to dismiss. See Kahaluu, 857 F.2d at 604 (citing  
 18 Halaco Engineering Co. v. Costle, 842 F.2d 376, 381 (9th Cir. 1988)). Reviewing courts consider  
 19 whether a district court discussed the feasibility of less severe sanctions, implemented alternative  
 20 sanctions prior to dismissal, or warned the party of the possibility of dismissal. Malone, 833 F.2d  
 21 at 132. But although “reasonable exploration of possible and meaningful alternatives” is required,  
 22 the court need not examine every possible alternative. Anderson, 542 F.2d at 525. “Warning a  
 23 plaintiff that failure to obey a court order will result in dismissal can suffice to meet” this  
 24 requirement. Id.; see also Kahaluu, 857 F.2d at 605 (Although “[a]n explicit warning is not  
 25 always required, at least in a case involving ‘egregious circumstances,’” “[i]n other circumstances,

---

26  
 27 <sup>4</sup> To the extent that the fourth Malone factor may weigh against dismissal, that weight is  
 28 mitigated by the court’s decision to dismiss without prejudice. See Cardiff v. Tingy, No. 98-cv-  
 20998-JW, 2006 WL 1343441. \*3 (N.D. Cal. May 17, 2006) (“Because this Court chooses to  
 dismiss this action without prejudice . . . the weight of [the fourth factor] is mitigated.”).

1 the failure to warn may place the district court's order in serious jeopardy.”).

2 Defendants argue that the court warned plaintiff that failure to comply with its orders  
3 “could result in dismissal of his claims” and that less drastic sanctions would be ineffective. EFC  
4 No. 46 at 9. The court agrees. The court ordered plaintiff to respond to defendants’ request for  
5 production of documents on October 21, 2022 and on January 27, 2023. And again, on August 18,  
6 2023, after denying without prejudice defendants’ first motion for terminating sanctions and sua  
7 sponte ordering prison officials to provide plaintiff with reasonable access to the law library so  
8 that he could respond to the request for production of documents by no later than September 8,  
9 2023. The court also provided plaintiff with extensions of time to respond again and again and  
10 generally warned him that failure to prosecute or comply with the court’s orders could result in the  
11 dismissal of his case. But to date plaintiff has not responded to the request for production of  
12 documents or the pending motion for terminating sanctions, or even sought access to the law  
13 library which he told defense counsel he needed to comply. Nor has plaintiff informed the court  
14 of his intentions or desire to continue litigating this case. In sum, plaintiff’s history of non-  
15 compliance forecloses any assumption that a new extension or order to comply would be fruitful.

16 Less drastic sanctions under Rule 37(c) would likely be ineffective in this case. Monetary  
17 sanctions are unlikely to hold much sway here because plaintiff is proceeding in forma pauperis  
18 and lacks funds to pay a monetary sanction. Accord Morrow v. Sacramento DEA, No. 13-cv-  
19 2188-GEB-KJN, 2014 WL 907349, \*3 (E.D. Cal. Mar. 7, 2014) (“[I]n light of plaintiff’s in forma  
20 pauperis status, the court has little confidence that plaintiff would pay monetary sanctions if they  
21 were imposed in lieu of dismissal.”); Oppedahl v. Orange Cnty. Healthcare Agency, No. 13-cv-  
22 1388-MWF, 2014 WL 495624, \*2 (C.D. Cal. Feb. 6, 2014) (“Other possible sanctions for  
23 plaintiff’s failures are not appropriate with respect to a pro se prisoner litigant seeking to proceed  
24 in forma pauperis.”). Nor has this case progressed far enough for evidentiary sanctions to be  
25 threatened against plaintiff. See Cardiff, 2006 WL 1343441, at \*2. Under the circumstances, the  
26 court finds that less drastic sanctions than dismissal are not appropriate in this case.

27 The court nonetheless recognizes that dismissal is a severe sanction. But dismissal as a  
28 terminating sanction may be with or without prejudice. See In re Jee, 799 F.2d 532, 534 n.2 (9th

1 Cir. 1986). One consideration pertinent in determining whether dismissal should be with or without  
2 prejudice is whether the court previously warned plaintiff that failure to obey a court order would  
3 result in dismissal. Dismissal with prejudice may be inappropriate if “the Court has never  
4 explicitly warned plaintiff that he faced the ultimate sanction” for lack of prosecution. North v.  
5 Persons, No. 14-cv-0847-VBF-AJW, 2016 WL 4035719, at \*8 (C.D. Cal. May 20, 2016)  
6 (emphasis added). As noted earlier, the court here generally warned plaintiff that failure to  
7 prosecute or comply with the court’s orders could lead to the dismissal of his case. But the court  
8 never explicitly warned plaintiff that failure to respond to defendants’ request for production of  
9 documents would result in his entire case being dismissed with prejudice. Under the  
10 circumstances, the court finds that “it would upset notions of fundamental fairness” to dismiss this  
11 case with prejudice “while failing to give notice of its inclination to impose this extreme remedy.”  
12 Id. at \*8 (citation and internal quotation marks omitted). Dismissal without prejudice, “a  
13 significantly lesser sanction than dismissal with prejudice,” is more appropriate in this case.  
14 Gravel v. Ulrich, No. 15-cv-0219-PSG-RAO, 2016 WL 578244, at \*2 (C.D. Cal. Jan. 14, 2016),  
15 report and recommendation adopted by 2016 WL 593429 (C.D. Cal. Feb. 12, 2016).

16 In sum, consideration of the five Malone factors weighs in favor of dismissal as a  
17 terminating sanction. But in view of the fifth Malone factor, the court will dismiss the action  
18 without prejudice.


19 **CONCLUSION**

20 For the foregoing reasons, defendants’ motion for terminating sanctions under Rule 37  
21 (ECF No. 46) is GRANTED and this action is DISMISSED without prejudice.

22 The clerk is directed to close the case and terminate all pending motions as moot.

23 **IT IS SO ORDERED.**

24 Dated: April 16, 2024

25   
26 CHARLES R. BREYER  
27 United States District Judge  
28