

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ROBERT HEATH, ET AL.,
Plaintiffs,
v.
GOOGLE LLC,
Defendant.

Case No. [15-cv-01824-BLF](#)

ORDER DISMISSING NON-RESPONSIVE OPT-IN PLAINTIFFS WITHOUT PREJUDICE

[Re: ECF 324]

On August 6, 2018, this Court issued an Order to Show Cause Why the Non-Responsive Plaintiffs Should Not Be Dismissed, ordering eight Opt-In Plaintiffs¹ (“the Non-Responsive Plaintiffs”) to file a written response explaining why they should not be dismissed from this action pursuant to Federal Rule of Civil Procedure 37 for failing to respond to written discovery as ordered by the Court. See ECF 324. The deadline to respond was August 31, 2018, but the Non-Responsive Plaintiffs did not file a response. For the reasons that follow, the Court **DISMISSES WITHOUT PREJUDICE** the Non-Responsive Plaintiffs.

I. BACKGROUND

After the Court conditionally certified a class of individuals in this case, two-hundred and seventy-two individuals opted in to the collective action lawsuit as party plaintiffs, including the eight Non-Responsive Plaintiffs. In July 2017, Plaintiff Cheryl Fillekes and the Opt-In Plaintiffs and Defendant Google LLC (“Google”) disputed the content and scope of written discovery in this action. On July 27, 2017, Magistrate Judge Howard R. Lloyd settled the dispute by ordering 75 randomly selected Opt-In Plaintiffs to respond to eight requests for production and four

¹ The non-responsive Opt-In Plaintiffs are [REDACTED], and [REDACTED].

1 interrogatories and ordering Google to select 35 Opt-In Plaintiffs to depose. See ECF 185. Six
2 Non-Responsive Plaintiffs were served via counsel with these requests on September 7, 2017, and
3 two Non-Responsive Plaintiffs were served via counsel on March 2, 2018. See McInerney Decl. ¶
4 2, ECF 314-1. Each of the Non-Responsive Plaintiffs failed to respond. *Id.*

5 On July 31, 2018, Google moved this Court to issue an order to show cause why the Non-
6 Responsive Plaintiffs should not be dismissed. See ECF 314. Plaintiffs opposed. See ECF 320.
7 On August 6, 2018, this Court granted Google’s administrative motion and issued an order to
8 show cause to the Non-Responsive Plaintiffs, requiring a response by August 31, 2018 and
9 warning that failure to respond would cause dismissal of the Non-Responsive Plaintiffs. See ECF
10 323, 324. The Non-Responsive Plaintiffs did not respond by the deadline.

11 On August 1, 2018, Plaintiffs’ counsel moved to withdraw as attorneys of record for six of
12 the Non-Responsive Plaintiffs, indicating they had been unable to reach the six Non-Responsive
13 Plaintiffs and had thus notified the six on January 25, 2018 that they would be moving to
14 withdraw as counsel. See *Mot. to Withdraw* at 3, ECF 316. On August 8, 2018, Plaintiffs’
15 counsel moved to withdraw as attorneys of record for the other two Non-Responsive Plaintiffs,
16 having provided them notice on July 25, 2018. See *Mot. to Withdraw* at 3, ECF 328.

17 **II. LEGAL STANDARD**

18 Federal Rule of Civil Procedure 37 provides specific sanctions a Court is permitted to
19 impose if a party fails to comply with a court order. Where a party disobeys a discovery order,
20 Fed. R. Civ. P. 37(2)(A) allows the Court where the action is pending to “dismiss[] the action or
21 proceeding in whole or in part,” among other potential sanctions. See Fed. R. Civ. P. 37(2)(A)(v).
22 To determine whether to dismiss a case for failure to comply with a court order, the court must
23 weigh five factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
24 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
25 favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.”
26 *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987) (quoting *Thompson v. Housing*
27 *Authority*, 782 F.2d 829, 831 (9th Cir. 1986)).

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1 **III. DISCUSSION**

2 Having considered the five Malone factors, the Court holds that dismissal of the Non-
3 Responsive Plaintiffs without prejudice is warranted here. The first two factors—the public’s
4 interest in expeditious resolution of litigation and the court’s need to manage its docket—both
5 favor dismissal here. Because the Non-Responsive Plaintiffs have failed to respond both to orders
6 from the Court and to requests from their own counsel, this Court and the parties have had to
7 spend unnecessary time litigating the issues, and the Plaintiffs’ non-responsiveness has increased
8 Google’s discovery burden. See *Alvarez v. Farmers Ins. Exch.*, No. 14-CV-00574-WHO, 2015
9 WL 5769614, at *1 (N.D. Cal. Oct. 2, 2015). Moreover, Google was and continues to be
10 prejudiced by this non-responsiveness because it was deprived of discovery useful to any
11 decertification or summary judgment motion it might file. See ECF 314 at 4. Finally, the Court
12 cannot contrive a less drastic sanction, as the Non-Responsive Plaintiffs have failed to respond to
13 both discovery requests and their counsels’ communications for the last 6–8 months. They
14 provide no evidence as to why this non-responsiveness is warranted or indicating that they might
15 suddenly begin to comply with the Court’s orders. Indeed, they failed to respond to the Court’s
16 order to show cause. And though the public policy favoring disposition on the merits weighs
17 against dismissal, the Court dismisses the Non-Responsive Plaintiffs without prejudice to their
18 ability to demonstrate good cause for their failures to comply with Court orders thus far.

19 Accordingly, the Non-Responsive Plaintiffs are **DIMISSED WITHOUT PREJUDICE**
20 from this action. Plaintiffs’ counsel shall serve this Order on the Non-Responsive Plaintiffs and
21 shall file a certificate of service **on or before September 11, 2018.**

22 **IT IS SO ORDERED.**

23
24 Dated: September 5, 2018



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26 BETH LABSON FREEMAN
27 United States District Judge