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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 STEWART TITLE GUARANTY
12 COMPANY,

13 Plaintiff,

14 v.

15 2485 CALLE DEL ORO, LLC *et al.*,

16 Defendants.
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Case No.: 15-CV-2288-BAS(WVG)

**REPORT AND
RECOMMENDATION ON
PLAINTIFF’S MOTION FOR
SANCTIONS, RECOMMENDING
(1) TERMINATING SANCTIONS,
(2) PAYMENT OF EXPENSES, AND
(3) CRIMINAL CONTEMPT
PROCEEDINGS**

[Doc. No. 45.]

20 Plaintiff brings this motion for terminating and monetary sanctions against
21 Defendants Gettel and Conix VRC, LLC (collectively, “Defendants”). To understand this
22 Court’s recommendations, it is necessary to lay out the tortured history of this case, which
23 the Court sets forth below and now summarizes. The email correspondence between
24 opposing counsel reveal that while Plaintiff has been exceptionally patient and cooperative
25 since the beginning of the case, Defendants and their attorney, Joseph Sammartino
26 (“Defense Counsel” or “Mr. Sammartino”), have delayed and ultimately completely
27 abdicated their discovery obligations despite a Court Order compelling their compliance.
28 Plaintiff’s counsel has tried mightily for months to obtain discovery informally. Defense

1 Counsel continuously promised Plaintiff's counsel that Defendants would provide the
2 requested discovery informally and lulled Plaintiff's counsel into believing that production
3 was imminent. During this process, Plaintiff's counsel's correspondence were often
4 outright ignored for days or weeks without a response. It was only when it became apparent
5 that Defendants had no intention of following through on their promises that Plaintiff was
6 left with no other option than to engage the Court and propound formal discovery.
7 However, even the authority of the Court proved insufficient to prod Defendants into
8 complying with their discovery responsibilities, and they ignored a Court Order compelling
9 them to comply. To date, Defendants and Defense Counsel have provided *no* discovery to
10 Plaintiff¹ and have violated multiple Court Orders. Then, when faced with the prospect of
11 case-dispositive and monetary sanctions, they failed to file *any* response to the instant
12 motion for sanctions and failed to appear at the sanctions hearing.

13 Left with no alternative in light of Defendants' and Mr. Sammartino's complete
14 failure to provide discovery, repeated violations of the Court's Orders, and failure to appear
15 at the sanctions hearing, this Court recommends² (1) granting Plaintiff's motion for
16 terminating sanctions, (2) striking Defendants Gettel and Conix VRC, LLC's Answers,
17 (3) entering default judgment and judgment in favor of Plaintiff, and (4) ordering \$6,275
18 in payment of expenses to be paid jointly and severally by Defendants and Defense
19 Counsel. Additionally, the undersigned Magistrate Judge certifies the facts below pursuant
20 to 28 U.S.C. § 636(e)(6), recommends criminal contempt proceedings against Mr.
21 Sammartino, and reporting to the State Bar of California.

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26 ¹ Beyond providing initial disclosures under Federal Rule of Civil Procedure 26(a)(1).

27 ² Because this Court finds terminating—*i.e.*, dispositive—sanctions are appropriate, the
28 undersigned may only issue a report and recommendation for the district judge's
consideration. *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015).

1 **I. BACKGROUND**

2 Plaintiff Stewart Title filed its complaint on October 13, 2015, alleging fraud, RICO
3 violations, negligence and other claims against Defendants 2485 Calle del Oro, LLC,
4 Courtland Gettel, Jeffrey Greenberg, Conix VRC, LLC, Kathryn Nighswander, and
5 Lynette Moreno.³ (Doc. No. 1.)⁴ Defendants Gettel, Nighswander, and Conix VRC, LLC
6 all filed answers on February 10, 2016. (Doc. Nos. 16-18.)⁵

7 Defendant Gettel, who has pleaded guilty to his involvement, and other co-
8 conspirators were involved in a criminal scheme to defraud private real estate lenders out
9 of tens of millions of dollars. (16-CR-1099-WQH, Doc. Nos. 10-11.) Plaintiff was just
10 one of eight victims who was defrauded out of millions of dollars, all of whom have now
11 filed petitions seeking restitution from Gettel and his co-conspirators of the \$33.6 million
12 swindled from them. (*Id.*, Doc. Nos. 22, 24-26, 28, 29.) The United States supports most
13 of the victims' efforts to recoup their losses. (*Id.*, Doc. No. 41.) Gettel has agreed to
14 provide restitution to his victims and forfeit his ill-gotten gains. (*Id.*, Doc. Nos. 10, 12.)
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17 ³ After being served with summons, defendants 2485 Calle del Oro, LLC, Jeffry Greenberg,
18 and Lynette Moreno failed to respond. The Court ordered that a motion for default
19 judgment may be filed after the case is resolved against the non-defaulting defendants.
(Doc. No. 25.)

20 ⁴ All pin-cite page references to documents filed on the Court's CM/ECF system refer to
21 the page number electronically-generated by the system, not to the document's native
22 pagination.

23 ⁵ Kathryn Nighswander has since filed for bankruptcy, which resulted in an automatic stay
24 of these proceedings against her. (*See* Doc. No. 42-1 at n.1.) Additionally, defendants
25 Greenberg and Gettel have been indicted on fraud-related charges in the Southern District
26 of California and District of Arizona. (*See* S.D. Cal. Nos. 16-CR-1076-WQH, 16-CR-
27 1077-WQH, 16-CR-1099-WQH; D. Ariz. No. 16-CR-1064-CKJ-BGM.) Sentencing for
28 Gettel is currently set for September 25, 2017. (No. 16-CR-1099-WQH, Doc. No. 57.)
Sentencing for Greenberg is currently set for October 2, 2017 in two cases, which include
the case transferred from the District of Arizona by consent. (No. 16-CR-1076-WQH, Doc.
No. 30; No. 16-CR-1077-WQH, Doc. No. 24.)

1 As Plaintiff stated in a July 1, 2016, joint status report in the instant case, “[i]f Stewart
2 determines that recovery from these trusts is not viable, Stewart will consider dismissing
3 this action and seek recovery through the [criminal] restitution orders.” (Doc. No. 53 at 2.)
4 However, there are multiple victims all fighting for some pro-rata share of any funds the
5 United States may be able to obtain through forfeiture and off-sets from the sale of any of
6 the involved properties. Accordingly, Plaintiff’s prospect of obtaining full recovery is slim.

7 In the instant civil case, the Magistrate Judge originally assigned to the case ordered
8 that an Early Neutral Evaluation (“ENE”) occur on May 25, 2016. (Doc. No. 19.) The
9 parties also were instructed to make initial disclosures on May 4th and lodge a joint
10 discovery plan on May 11th, which they did. (*Id.*; *see also* Doc. No. 26.)

11 However, an ENE was not held. After receiving and considering the parties’ ENE
12 statements, the prior Magistrate Judge converted the ENE to an attorneys-only telephonic
13 status conference. (Doc. No. 27.) The Magistrate Judge ordered a joint status report be
14 lodged on July 1, 2016 before the status conference that was to be held on July 8, 2016.
15 (Doc. No. 28.) In anticipation of the report and status call, on June 29, 2016, Plaintiff
16 spoke with Mr. Sammartino about Defendants providing informal discovery regarding the
17 financial status of Defendant Gettel’s trust accounts. This call was memorialized in an
18 email the same day at 3:48 p.m. (Doc. No. 42-3, Ex. B.) Less than two hours later, Defense
19 Counsel responded via email that “[his] clients [were] willing to provide the information
20 requested below.” (*Id.*) The informal discovery Defense Counsel agreed to produce
21 included information about the financial status of the trusts related to Gettel’s various
22 entities, including “copies of the trusts, the identity of the banks that the trusts use, bank
23 account numbers, a list of the entities they have funded and the amounts that they funded,
24 and any bank statements for the trusts’ accounts or other documents regarding the trusts’
25 financial situations.” (*Id.*)

26 The parties lodged their joint status report on July 1, 2016, representing to the
27 Magistrate Judge that they were working well together and that Defendants had agreed to
28 provide documents informally to Plaintiff. (Doc. No. 53 at 2-3.) The parties requested a

1 30-day continuance of the July 8, 2016 status conference. (*Id.*) The Court granted the
2 request based upon the positive representations made by the parties, set the next status
3 conference for August 8, 2016, and ordered that another joint status report be lodged on
4 August 1, 2016. (Doc. No. 29.) With additional time granted, Plaintiff emailed Mr.
5 Sammartino on July 8, 2016 for an update on when the informal discovery would be
6 provided. (Doc. No. 42-3, Ex. B.) Defense Counsel did not respond. Plaintiff again
7 emailed Defense Counsel on July 14, 2016 and asked for the same information. (*Id.*) Mr.
8 Sammartino briefly responded that same day after his six-day silence, stating only that
9 “[he] was working on getting it for [Plaintiff].” Defense Counsel provided no explanation
10 of what was being done to acquire the information or when he expected to produce it to
11 Plaintiff. Then radio silence ensued for eight days. When he failed to produce the promised
12 informal discovery, Plaintiff again emailed him on July 22, 2016, asking for another status
13 update. (*Id.*) Mr. Sammartino again did not respond.

14 On August 1, 2016, the parties owed the Magistrate Judge another joint status report,
15 but Defense Counsel’s last communication to Plaintiff occurred on July 14, 2016, over two
16 weeks earlier. Plaintiff reached out to Defense Counsel via email on August 1, 2016, at
17 10:18 a.m., and addressed two points: that Plaintiff still had not received the informal
18 discovery and referenced an attached document, which appears to have been a draft of the
19 joint status report due that same day. (Doc. No. 42-3, Ex. C.) Three minutes later, Mr.
20 Sammartino replied via email stating that he had not responded to Plaintiff’s earlier email
21 because his wife had been in the hospital,⁶ reassured Plaintiff that he continued to work on
22 obtaining the informal discovery, and promised he would produce it as soon as he received
23 it. (*Id.*) In fact, Defense Counsel represented in this email that his clients were eager to
24 resolve the matter and that “requests have been made to the appropriate banks and financial
25 institutions.” (*Id.*) He also suggested for the first time that the delay may be due to the
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28 ⁶ Defense Counsel did not provide any details about the nature or length of the hospital stay.

1 banks not responding to his requests. (*Id.*) In an email exchange later that same day,
2 Defense Counsel suggested to Plaintiff that the joint status report ought to ask for a 45-
3 day—rather than a 30-day—continuance to allow him to represent to the Court that he had
4 “done everything possible” to get the requested documents. (*Id.*) Mr. Sammartino
5 suggested that he could “most likely get [] a declaration or affidavit from Ms. Nighswander
6 that there is nothing in any of the trust accounts.” (*Id.*) As far as this Court knows, Defense
7 Counsel never produced a declaration from Nighswander nor an explanation for its non-
8 production.⁷

9 The joint status report was lodged on August 1, 2016 as directed, and while it was
10 still positive in tone, the report indicated only that Defense Counsel was continuing his
11 efforts to obtain discovery without providing a description of the efforts being made. (Doc.
12 No. 53 at 6 (paragraph 3).) The original Magistrate Judge granted the parties’ request for
13 a 45-day continuance and scheduled the next status report to be lodged on September 13,
14 2016 with the status conference to be held on September 22, 2016. (Doc. No. 30.)

15 On September 12, 2016, the day before the next joint status report was due, Plaintiff
16 sent an email to Defense Counsel. (Doc. No. 42-3, Ex. D.) In this email, Plaintiff lamented
17 that no documents had yet been produced and surmised that Defense Counsel had not
18 received them yet. Less than an hour later, Mr. Sammartino responded via email offering
19 an explanation for the delay but confirming that he had received nothing and was “still
20 working on it.” (*Id.*) The joint status report, which was nearly a carbon copy of the
21 previous one, was lodged on September 13, 2016. (Doc. No. 53 at 7-10.) It offered an
22 explanation for the delay in producing the documents to Plaintiff, reiterated that Mr.
23 Sammartino was continuing his efforts, and again requested a 45-day continuance. (*Id.*)
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26 ⁷ At the sanctions hearing, Plaintiff’s counsel informed the Court that Plaintiff had received
27 *no* discovery, which the Court infers includes the Nighswander declaration. However, it
28 appears Defendants did engage in the exchange of initial disclosures under Federal Rule of
Civil Procedure 26(a)(1) but then failed to further participate in discovery after they did so.

1 The original Magistrate Judge granted the third continuance request and set the next status
2 conference for November 14, 2016, with a joint status report due by October 31, 2016.
3 (Doc. No. 31.)

4 Weeks passed with no production from Defendants. Consistent with past practice,
5 Plaintiff's counsel emailed Mr. Sammartino on October 28, 2016, seeking an update on his
6 progress on producing the promised discovery. (Doc. No. 42-3, Ex. E.) Defense Counsel
7 responded three days later, on October 31, 2016, stating that he "did not have much of an
8 update. I am not sure how to show that there are no bank accounts for certain entities. I
9 am supposed to be close on the ones that had accounts." (*Id.*) The joint status report was
10 lodged on time and reflected the status as described in Defense Counsel's email. (*See Doc.*
11 *No. 53 at 11-14.*) For the fourth time, the parties requested a 30-day continuance, but this
12 time the original Magistrate Judge denied the request and ordered the parties to file an
13 expedited discovery schedule by November 10, 2016. (Doc. No. 32.) The next status
14 conference was set for November 14, 2016. (*Id.*)

15 The parties' Expedited Joint Discovery Plan, lodged on November 11, 2016,
16 reflected that they understood the necessity to move the case along with alacrity from that
17 point forward. In the discovery plan, the parties agreed that discovery responses would be
18 provided within 20 days of service rather than the customary 30 days allowed by the rules.
19 (Doc. No. 53 at 19.) The discovery plan also alerted the original Magistrate Judge to
20 several privilege issues that could cause a delay in obtaining the discovery, not the least of
21 which was Plaintiff's belief that Mr. Sammartino might need to be deposed based on his
22 involvement in providing a legal opinion letter which was relied upon by Plaintiff. (*Id.* at
23 24.) The parties believed that all of the discovery could be completed within four months.
24 (*Id.* at 19.)

25 With the joint discovery plan in mind, the original Magistrate Judge issued a Case
26 Management Order on November 18, 2016, setting March 7, 2017, as the deadline for
27 completion of fact discovery. (Doc. No. 34.) However, Plaintiff did not spring into
28 immediate action with formal discovery. Rather, Plaintiff again attempted to informally

1 obtain information about the trust accounts for purposes of serving subpoenas on the
2 financial institutions. In a series of emails and voice messages in January 2017, Plaintiff
3 yet again pressed Defense Counsel to turn over this information. (Doc. No. 42-3, Ex. G.)
4 On January 19, 2017, Mr. Sammartino responded via email that he wanted to consult with
5 his clients again but promised that “[Plaintiff] should have everything by tomorrow at the
6 latest.” (*Id.*) “Tomorrow” passed with no production, and Plaintiff’s email inquiry to Mr.
7 Sammartino on January 20, 2017 went unanswered. (*Id.*; Doc. No. 45-1 at 9.)

8 After months of seeking discovery informally, Plaintiff finally gave up. Formal
9 discovery commenced when Plaintiff served Requests for Production of Documents and
10 Interrogatories on January 25, 2017. (Doc. No. 42-3, Exs. H-M.) Pursuant to the expedited
11 discovery plan, responses were due no later than February 14, 2017. (Sanctions Motion,
12 Doc. No. 45-1 at 9.) Once in January shortly after service and then again in early February
13 2017, Plaintiff attempted via email to discuss with Defense Counsel the formal discovery
14 Plaintiff had propounded. (*Id.*) Mr. Sammartino responded on January 30, 2017 that he
15 was in a meeting and would call when he was finished. (Doc. No. 42-3, Ex. N.) He never
16 called as promised. (Doc. No. 45-1 at 10.)

17 In the morning on February 14, 2017—the day Defendants’ discovery responses
18 were due—Plaintiff left Defense Counsel a voicemail message and sent him an email
19 requesting that the discovery be provided electronically. (Doc. No. 42-3, Ex. O.) Plaintiff
20 did not receive discovery responses, and Mr. Sammartino did not return Plaintiff’s
21 voicemail or email. (Doc. No. 45-1 at 10.) After a week of not hearing from Defense
22 Counsel, Plaintiff again reached out to make contact with him. In a series of emails and
23 voicemail messages on February 21, 23, and 24, Plaintiff implored Defense Counsel to
24 respond to discuss the delay in providing the discovery. (*Id.*) Plaintiff’s efforts were met
25 with complete silence. (Doc. No. 45-1 at 10.)

26 Plaintiff contacted the original Magistrate Judge on February 24, 2017 about the
27 situation and Mr. Sammartino’s failure to meet and confer. (Doc. No. 36.) The Court set
28 a telephonic status call for February 28, 2017. (*Id.*) Although Defense Counsel had been

1 incommunicado with Plaintiff, he participated in the status call and explained that he was
2 out of the country and did not have access to his email. (Doc. No. 42-3, Ex. P.) The Court
3 granted the parties' request to extend fact discovery to June 19, 2017. (Doc. No. 39.)
4 During the status call, Defense Counsel represented that discovery responses would be
5 provided within two weeks (Doc. Nos. 40; 42-3, Ex. Q), but as before, no responses were
6 provided despite Defense Counsel's promise to "continue working on all of this asap to
7 meet the new deadlines." (Doc. No. 42-3, Ex. Q.)

8 Two weeks later, on March 14, 2017, Plaintiff emailed Mr. Sammartino to again
9 request that the responses be provided electronically. (Doc. No. 42-3, Ex. R.) When no
10 responses came, Plaintiff persistently tried to reach Defense Counsel via telephone and
11 email several more times on March 17, 20, and 21. (Doc. No. 42-3, Ex. S.) Defense
12 Counsel did not respond to any of Plaintiff's correspondence. (Doc. No. 45-1 at 11.) Once
13 again, on March 22, 2017, Plaintiff notified the original Magistrate Judge of the failure to
14 provide discovery and requested another status conference. (Doc. Nos. 40; 42-3, Ex. S.)
15 A status conference was set for March 24, 2017 at 10:00 a.m. (Doc. No. 40.)

16 On March 23, 2017, at 7:27 p.m., in an email to Plaintiff's counsel, Mr. Sammartino
17 provided some explanations why he had been unable to provide discovery and advised that
18 he would not be available for the status call the next morning with the original Magistrate
19 Judge. (Doc. No. 42-3, Ex. T.) Rather than personally informing the Court or formally
20 requesting to move the status call to accommodate his conflicting schedule, Defense
21 Counsel chose instead to fail to appear, have Plaintiff explain to the Court the reason for
22 his absence, and have Plaintiff convey the information in the email. (*Id.*) The status
23 conference was held as scheduled notwithstanding Mr. Sammartino's failure to appear.
24 (Doc. No. 41.) The Court authorized Plaintiff to file a motion to compel discovery by
25 March 31, 2017, which it did, but the motion also sought sanctions that the Court had not
26 authorized. (*Id.*; Doc. No. 42.) Neither Defense Counsel nor his clients filed any
27 opposition to the motion to compel, which was then granted by the Court. (Doc. No. 44.)
28

1 Additionally, the original Magistrate Judge authorized Plaintiff to file a motion for
2 sanctions. That motion is presently pending before the Court. (Doc. No. 45.)

3 The original Magistrate Judge then recused on May 8, 2017, and the undersigned
4 was randomly assigned to the case. (Doc. No. 46.) After reviewing the history of the
5 litigation and its present posture, on May 19, 2017, this Court ordered further briefing on
6 the pending sanctions motion and set a hearing for July 14, 2017 at 2:00 p.m. (Doc. No.
7 47.) In that Order, all Defendants and Mr. Sammartino were expressly ordered to appear
8 at the hearing. Defense Counsel and his clients also were ordered to file a response to the
9 sanctions motion by June 16, 2017. As of the date of this Report and Recommendation,
10 Defendants and Defense Counsel have filed neither a response nor even a request to file an
11 untimely response. Moreover, Defendants and Mr. Sammartino all failed to appear at the
12 sanctions hearing.⁸ Attorney Peter Scott appeared at the hearing for Plaintiff and provided
13 additional information sought by the Court. (*See* Hrg. Tr., Doc. No. 52.)

14 II. DISCUSSION

15 Never before has this Court experienced an attorney or party who so steadfastly
16 failed to meaningfully participate in the discovery process after multiple reassurances to
17 opposing counsel and to the Court and a formal Order compelling compliance. Where, as
18 here, there is such a complete and profound failure to cooperate, this Court is left with no
19 option than to recommend terminating sanctions against Defendants Gettel and Conix
20 VRC, LLC.⁹ Additionally, this Court also sees no other option than to recommend an
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23 ⁸ At least Defendant Gettel can excuse his failure to appear at the sanctions hearing with
24 his current incarceration in federal jail. However, the Court does not know why Defense
25 Counsel failed to appear, and Defense Counsel has provided no justification or reason—
26 plausible or otherwise—for any of his conduct in this case.

27 ⁹ To be clear, this Court is not recommending terminating sanctions against Kathryn
28 Nighswander given her status in bankruptcy nor has Plaintiff moved for terminating
sanctions against her. (Doc. No. 45-1.) Due to Nighswander's bankruptcy, Plaintiff did
not move to compel her discovery responses. (Doc. No. 42-1 at 5.) Thus, unlike Gettel

1 award of expenses to be jointly and severally paid by Defendants and Mr. Sammartino,
2 initiation of criminal contempt proceedings against Mr. Sammartino, and reporting to the
3 State Bar of California.

4 **A. Terminating Sanctions Against Defendants Gettel and Conix VRC, LLC**

5 **1. Legal Standard**

6 Broad sanctions may be imposed against a person or party for failure to obey a prior
7 court order compelling discovery. Fed. R. Civ. P. 37(b)(2)(A). The types of sanctions
8 available following a party's failure to comply with such an order are diverse and include
9 striking pleadings in whole or in part, dismissing the action or proceeding in whole or in
10 part, and rendering a default judgment against a disobedient party. Fed. R. Civ. P.
11 37(b)(2)(A)(iii), (v), (vi). Which sanction is most appropriate under the circumstances is
12 within the Court's discretion, and the Court is not bound to impose the least serious
13 sanction possible. *See Chrysler Corp. v. Carey*, 186 F.3d 1016, 1022 (8th Cir. 1999) ("The
14 district court is not constrained to impose the least onerous sanction available, but may
15 exercise its discretion to choose the most appropriate sanction under the circumstances.").

16 "Where the sanction results in default, the sanctioned party's violations must be due
17 to the willfulness, bad faith, or fault of the party." *Hester v. Vision Airlines, Inc.*, 687 F.3d
18 1162, 1169 (9th Cir. 2012) (internal quotations and citation omitted). "[D]isobedient
19 conduct not shown to be outside the control of the litigant is all that is required to
20 demonstrate willfulness, bad faith, or fault." *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948
21 (9th Cir. 1993) (internal quotations and citation omitted); *see also In re:*
22 *Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1233 (9th Cir. 2006).
23 Even if disobedience of the court order is the fault of the party's attorney alone, terminating
24 sanctions may nonetheless be appropriate. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633
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26
27 and Conix VRC, LLC, Nighswander is not in violation of a Court Order compelling
28 production of discovery. And as noted above, the Court will address the non-responding
defendants at a later date. *See, supra*, n.3.

1 (1962); *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1523 (9th Cir. 1990)
2 (“A plaintiff cannot avoid dismissal by arguing that he or she is an innocent party who will
3 be made to suffer for the errors of his or her attorney. The established principle is that the
4 faults and defaults of the attorney may be imputed to, and their consequences visited upon,
5 his or her client.”) (citations omitted); *see Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89,
6 92 (1990) (service on attorney constitutes notice to clients); *Cnty. Dental Servs. v. Tani*,
7 282 F.3d 1164, 1168 (9th Cir. 2002) (“Under this circuit’s precedent, a client is ordinarily
8 chargeable with his counsel’s negligent acts.”).

9 Once the Court finds that discovery violations are the result of willfulness, bad faith,
10 or are the fault of the party, it must weigh five factors in determining whether to impose
11 terminating sanctions: (1) public interest in expeditious resolution of litigation; (2) the
12 court’s need to manage its own docket; (3) prejudice to other parties from the discovery
13 violations; (4) public policy favoring disposition of cases on the merits; and (5) whether
14 less drastic sanctions are available and would provide effective deterrence for the particular
15 violation. *Hester*, 687 F.3d at 1169 (terminating sanctions proper absent prior imposition
16 of lesser sanctions where party’s willful bad conduct showed lesser sanctions would be
17 “pointless”); *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 788 (9th Cir. 2011) (internal
18 quotations and citation omitted). Where, as here, “a court order is violated, factors 1 and
19 2 support sanctions and 4 cuts against case-dispositive sanctions, so 3 and 5, prejudice and
20 availability of less drastic sanctions, are decisive.” *Valley Eng’rs v. Electric Eng’g Co.*,
21 158 F.3d 1051, 1057 (9th Cir. 1998) (citation omitted).

22 **2. Discussion**

23 **a. Willfulness, Bad Faith, and Fault**

24 The continuous violations of Defendants’ discovery obligations in this case—which
25 ultimately culminated in their violation of a Court Order compelling production of
26 discovery—were willful, in bad faith, and the fault of Defendants and Mr. Sammartino.
27 After months of promises to Plaintiff and the Court that informal discovery was
28 forthcoming, Defendants failed to deliver any discovery. Then, after Plaintiff commenced

1 formal discovery, Defendants—through Defense Counsel—continued their malfeasance
2 and failed to meet production deadlines and ultimately completely failed to produce any
3 formal discovery responses. Even after the Court formally ordered Defendants to produce
4 discovery, they—through Defense Counsel—failed to comply with a direct Court Order to
5 do so. Throughout this time and to the present day, they have provided no justification—
6 concrete or otherwise—for this abject failure, which was in direct conflict with Mr.
7 Sammartino’s continuing reassurances that he had sought the information and it was
8 forthcoming soon after his representations were made.

9 As early as June 29, 2016, Defense Counsel promised to provide the pertinent
10 documents requested informally by Plaintiff. (Doc. No. 42-3, Ex. B.) His promises were
11 made not only to Plaintiff but also to the original Magistrate Judge. Defense Counsel
12 repeatedly represented that his clients were willing to disclose the trust and other bank
13 documents.¹⁰ These representations over the course of the last twelve months left Plaintiff
14 and the Court with the very reasonable impression that Defendants and Mr. Sammartino
15 were actively working to comply with Plaintiff’s requests. Now, over a year later, after
16 numerous informal requests, formal discovery requests, and multiple extensions of time to
17 respond, Defendants have produced nothing. It may be true, as Defense Counsel seems to
18 have suggested in one of his emails to Plaintiff’s counsel, that he and his clients were to
19 some extent reliant upon banks and other financial institutions to provide the documents
20 requested. Perhaps these matters were not a high priority for the banks and some delay
21 was to be expected—a point noted by Defense Counsel in his August 1, 2016, email when
22 he ensured that “the requests have been made to the appropriate banks and financial
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25 ¹⁰ Doc. No. 42-3, Ex. B (“I am working on getting [the informal discovery] for you.”); Ex.
26 C (“[R]equests have been made to the appropriate banks and financial institutions” and “I
27 can tell the court that I’ve done everything possible to get the financial documents you are
28 requesting.”); Ex. D (“I have not received anything; but I am still working on it”); Ex. Q
 (“Your email is accurate, and we are on the same page. I will continue working on all of
 this asap to meet the new deadlines.”).

1 institutions.” (Doc. No. 42-3, Ex. C.) But it strains credulity to believe that after nearly a
2 year, the banks and financial institutions still have not provided the information requested
3 back in mid-2016.

4 There can only be two explanations for Defendants’ failure to produce the discovery.
5 A request for bank and trust records was never made in the first place. Or, in the alternative,
6 Defense Counsel and his clients failed to diligently follow up on the requests. If the first
7 is true, a serious ethical breach occurred here given Mr. Sammartino’s multiple
8 representations to the Court. If the latter is true, then Defense Counsel and his clients are
9 also to blame for not following up on the banks’ lackadaisical efforts. The Court does not
10 know which scenario is the case since Defendants and their counsel failed to explain
11 themselves in these proceedings despite being afforded at least three opportunities to do
12 so. First, they failed to respond to Plaintiff’s motion to compel discovery. Next, they
13 ignored a clearly-established briefing schedule and failed to file any response to Plaintiff’s
14 sanctions motion. And then, on the day when they would have had one final opportunity
15 to provide the Court *some* explanation for any of their conduct in this case, they failed to
16 appear for the sanctions hearing. Defendants and Defense Counsel did not deign to defend
17 themselves or comply with the Court’s orders even when faced with the great specter of
18 severe sanctions. What the Court is left with, then, is a history of broken promises that
19 Defendants were diligently pursuing and would produce discovery. Giving Mr.
20 Sammartino the benefit of the doubt that he had actually requested information and
21 documents from the financial institutions, in the end, Defendants failed to produce any
22 such discovery. Perhaps a valid reason for the non-production exists. Perhaps Defendants
23 and Defense Counsel acted in good faith. However, the Court is left in the dark given that
24 Defendants simply failed to produce the discovery after extensive promises without giving
25 the Court any reason to believe that this failure was due to anything besides their deliberate
26 choice not to comply with their obligations and a direct Court Order. At this point, it appears
27 Defendants and their counsel have capitulated and completely abandoned this case.

28

1 Defendants' continuing reassurances and representations to the Court, combined
2 with the fact that no discovery was ever produced and their apparent abandonment of this
3 case, amount to bad faith and willful violation of a Court Order compelling compliance
4 with discovery obligations. Such willfulness can be nothing other than Defendants' and
5 Defense Counsel's collective fault. This is the only plausible conclusion the Court can
6 conjure given the dearth of any evidence to the contrary. The Court has no evidence before
7 it to find otherwise. Given this conclusion that the violation of the Court Order compelling
8 discovery responses was willful, in bad faith, and Defendants' fault, default is an
9 appropriate sanction. This Court now turns to weigh the five factors related to imposition
10 of this case-dispositive sanction. *See Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169
11 (9th Cir. 2012).

12 **b. The Public's Interest in Expeditious Resolution Favors**
13 **Terminating Sanctions**

14 Twenty-one months into this litigation, the case remains floundering in initial stages
15 of discovery. Where other cases would have either proceeded to trial or at the very least
16 would have been approaching the dispositive motions filing deadline by now, this case has
17 gone nowhere due to Defendants' and Mr. Sammartino's delay and failure to comply with
18 their most basic discovery obligations. As attorney Peters informed the Court at the
19 sanctions hearing, Plaintiff has received no discovery in this case. (Hrg. Tr., Doc. No. 52
20 at 8-9.) Were this case to proceed forward, the parties would be starting litigation in its
21 initial stages with no expectation that Defendants' future discovery compliance would be
22 any better than in the past. This would further delay a case that ordinarily should have
23 been resolved or at least close to resolution by now. Such a result would frustrate the
24 public's interest in expeditious resolution of cases and controversies. Indeed, the progress
25 of this case to date has already frustrated this public interest. This factor weighs in favor
26 of terminating sanctions. *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 788 (9th Cir. 2011).

1 **c. The Court’s Need to Manage its Docket Favors Terminating**
2 **Sanctions**

3 This case certainly has hindered the Court’s management of its docket, as the Court
4 has been required to engage in more extensive supervision of this matter than should have
5 been necessary. Defendants’ and Defense Counsel’s conduct necessitated the prior
6 Magistrate Judge’s involvement on multiple occasions to hold status conferences and
7 supervise their compliance with the most basic obligation to provide discovery. Their
8 continued failure to comply necessitated entertaining a motion to compel. And their further
9 steadfast failure to comply has now necessitated a formal sanctions motion before this
10 Court, a hearing, this Report and Recommendation, and an eventual hearing and final Order
11 by the District Judge. This case has also been assigned to four different district and
12 magistrate judges. All of this, of course, has transpired while the Court manages its heavy
13 civil and criminal caseloads. None of this burden on the Court’s collective docket was
14 necessary and could have been easily avoided by Defendants and Defense Counsel simply
15 following through with their promises to Plaintiff’s counsel and to this Court by complying
16 with their discovery obligations. However, Defendants’ and their counsel’s extended
17 delays and broken promises have burdened the Court’s management of its docket in one of
18 the busiest districts in the country. This factor weighs in favor of terminating sanctions.
19 *Dreith*, 648 F.3d at 788.

20 **d. Plaintiff Has Suffered Substantial Prejudice From Defendants’**
21 **Discovery Violations**

22 A party suffers prejudice if the opposing party’s actions impair its “ability to go to
23 trial or threaten to interfere with the rightful decision of the case.” *Adriana Int’l Corp. v.*
24 *Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990); *see also Conn. Gen. Life Ins. Co. v.*
25 *New Images of Beverly Hills*, 482 F.3d 1091, 1097 (9th Cir. 2007) (upholding default
26 sanctions in plaintiff’s favor where defendant and his attorney knowingly deceived and
27 acted in bad faith). While “[d]elay alone has been held to be insufficient prejudice[,] . . .
28 [f]ailure to produce documents as ordered, . . . is considered sufficient prejudice.” *Adriana*

1 *Int'l Corp.*, 913 F.2d at 1412 (citations omitted). “In deciding whether to impose case-
2 dispositive sanctions, the most critical factor is not merely delay or docket management
3 concerns, but truth.” *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1097 (9th Cir. 2007); *see also*
4 *Valley Eng’rs v. Electric Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998) (“What is most
5 critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic
6 sanctions, is whether the discovery violations threaten to interfere with the rightful decision
7 of the case.”) (internal quotations and citation omitted).

8 Here, Defendants’ and their counsel’s collective bad conduct has caused Plaintiff
9 prejudice, irreparable harm, has frustrated the pursuit of truth, and ultimately threatens to
10 interfere with the rightful decision of this case. The continued failure to produce any
11 discovery has completely prevented Plaintiff from progressing beyond the initial stages of
12 this case. The case has been at a standstill for an extended period of time while Plaintiff
13 has patiently awaited discovery promised to be produced on multiple occasions. When Mr.
14 Sammartino repeatedly broke his promises, Plaintiff’s counsel was reduced to essentially
15 begging Defense Counsel to comply with his past promises. Yet, Plaintiff has received
16 nothing despite months of reassurances of imminent production, representations of the
17 same to the Court, and a formal Order compelling production. All of Plaintiff’s efforts
18 have been to no avail, and the litigation posture Plaintiff finds itself in now is no different
19 than before it embarked on this long, arduous journey. With no information to litigate its
20 claims, Plaintiff cannot notice and effectively take depositions. Plaintiff cannot file
21 dispositive motions. Plaintiff certainly cannot effectively take the case to trial. Plaintiff’s
22 severely compromised litigation posture now is solely the result of Defendants’ and Mr.
23 Sammartino’s discovery violations, which have interfered and will continue to interfere
24 with the search for truth and the ultimate rightful decision of the case.

25 Moreover, given Defendants’ and Defense Counsel’s recalcitrant and obstructionist
26 conduct to date, they are highly likely to continue this conduct in the future. This Court is
27 doubtful that they will fully comply—or comply at all—with discovery obligations, and it
28 would not be beyond comprehension to believe that they may even withhold certain

1 damaging discovery to which Plaintiff is rightfully entitled. In such a situation, Plaintiff
2 would highly likely continue to suffer prejudice, and the search for the full truth and rightful
3 resolution of this case would certainly be obstructed. *See generally Conn. Gen. Life Ins.*
4 *Co.*, 482 F.3d at 1097 (“Where a party so damages the integrity of the discovery process
5 that there can never be assurance of proceeding on the true facts, a case dispositive sanction
6 may be appropriate.”) (internal quotations and citation omitted).

7 This case was filed in 2015 alleging conduct that dates back to July 15, 2014 and the
8 loss of \$1.8 million. To date, Plaintiff has not received any discovery and without it,
9 Plaintiff cannot possibly prosecute its claims. “[E]very litigant has a capacious right to
10 another’s proof.” Amir Schachmurove, *Policing Boilerplate: Reckoning and Reforming*
11 *Rule 34’s Popular—yet Problematic—Construction*, 37 N. Ill. U. L. Rev. 205, 251 (2017).
12 Without Defendants’ proof, Plaintiff is dead in the water. Defendants and their counsel
13 have made it impossible for Plaintiff, despite Plaintiff counsel’s continued valiant and
14 patient efforts, to adequately prepare itself for trial or any other proceedings in this case.
15 *See Dreith*, 648 F.3d at 788. This factor heavily favors terminating sanctions.

16 **e. Although Public Policy Favors Resolution on the Merits, in this**
17 **Case, There is No Indication That Policy Can be Achieved**

18 The Court acknowledges that the “fourth factor, resolution of cases on their merits,
19 *always* weighs against dismissal.” *Id.* (citation omitted) (emphasis added). Accordingly,
20 the Court should so find in accordance with binding authority.

21 The foregoing notwithstanding, this Court is rather skeptical that this public policy
22 would be satisfied were this case to continue. In fact, based on the history of this case, it
23 is quite clear this will not happen due to Defendants’ steadfast unwillingness to participate.
24 Filed in 2015, this case stalled right out of the gate and has not proceeded past the most
25 basic stage of holding an Early Neutral Evaluation. And when the stakes were at the
26 highest for Defendants and their counsel, they failed to participate in these sanctions
27 proceedings in their own defense. Thus, going forward, the Court has no confidence that
28 Defendants or Mr. Sammartino will participate in good faith in any manner such that the

1 case can be decided on the merits and allow the public policy to be honored. The foregoing
2 observations notwithstanding, this factor weighs against terminating sanctions, but just
3 barely in light of the Court’s concerns.

4 **f. Less Drastic Sanctions Would Have No Impact in this Case**

5 Although there are a variety of lesser sanctions available to the Court to address
6 Defendants’ conduct, the only one this Court believes is appropriate given the egregious
7 facts and circumstances of this case is “rendering a default judgment against the
8 disobedient party.” Fed. R. Civ. P. 37(b)(2)(vi). Only this sanction will adequately address
9 the complete abdication of Defendants’ and Mr. Sammartino’s responsibilities in this case.

10 From what the Court has seen and experienced, monetary sanctions alone would do
11 nothing to ameliorate the prejudice Plaintiff has suffered to date, would not ensure Plaintiff
12 would not continue to suffer prejudice, and would not ensure that Defendants and their
13 counsel will fully comply with their obligations in the future.¹¹ Indeed, the specter of
14 terminating sanctions and an award of expenses has done nothing to spur Defendants and
15 Defense Counsel into action. If these serious proceedings had no impact on them, mere
16 monetary sanctions alone stand no chance of motivating them.

17 Staying the proceedings until the order is obeyed, as Rule 37(b)(2)(A)(iv) allows,
18 would also be ineffective here. For months, Defense Counsel repeatedly promised that
19 discovery responses and information would be produced imminently and strung Plaintiff
20 and the Court along as a result. Promise after promise was broken, and the Court’s Order
21 compelling compliance went ignored. Defendants’ and their counsel’s course of conduct
22 in this case demonstrates they are not interested in participating in good faith and have in
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25 ¹¹ The monetary award the Court recommends *infra* is distinguishable from the lesser
26 sanction of monetary sanctions the Court discusses here. The expense award recommended
27 below is compensatory, required by Rule 37, and flows from the Court’s grant of Plaintiff’s
28 motion to compel and the sanctions motion for violations of the Court’s Orders. In that
sense, the award below is not a sanction so much as it is an award of expenses to reimburse
Plaintiff as Rule 37 requires.

1 fact abandoned their case. Staying proceedings only prolongs this already-aged case,
2 would not vindicate the harm Plaintiff has already suffered, and likewise would not ensure
3 compliance with discovery obligations. If a Court Order did nothing to compel
4 compliance, a stay would also be ineffective. This is especially true when the defense here
5 has demonstrated it will not comply regardless of the consequences.

6 Additionally, the lesser sanction of prohibiting the defense from presenting defenses
7 or “from introducing designated matters in evidence,” under Rule 37(b)(2)(A)(ii), would
8 be a cumbersome process and would likely be ineffective anyway. The Court’s major
9 concern is that the defense will continue to be absent from this case given its track record
10 to date. Precluding defenses and evidence at trial in the distant future would do little to
11 address what is the overarching problem of the defense’s immediate absence from this case.
12 As a practical matter, to impose this sanction, the case has to be at the trial or dispositive
13 motion stages, but this case may never proceed that far if Defendants and Defense Counsel
14 continue to delay or fail to participate at all. Imposing a sanction at some far-off point in
15 the horizon would not only fail to properly address the defense’s transgressions to date, it
16 would also fail to motivate the defense to actively participate in this case. After all, if the
17 threat of imminent terminating sanctions did nothing to motivate them to at least defend
18 themselves, a preclusive sanction that would be imposed after the defense actually made
19 an effort and participated in the case would be shrugged off as meaningless. The same can
20 be said for the sanction suggested by Rule 37(b)(2)(A)(i), “directing that the matters
21 embraced in the order or other designated facts be taken as established for purposes of the
22 action, as the prevailing party claims.”

23 None of these lesser sanctions would address the harm and prejudice suffered by
24 Plaintiff or reasonably ensure Defendants’ and Defense Counsel’s cooperation in the
25 future. Accordingly, this factor heavily weighs in favor of terminating sanctions.

26 **3. Conclusion**

27 While the Court is unable to determine how much, if any, knowledge Defendants
28 personally had regarding the discovery fiasco in this case, the one thing that is certain is

1 that Defendants Gettel and Conix VRC, LLC were served with a summons and were aware
2 that they were being sued. This was sufficient to trigger their individual attention to this
3 lawsuit and be proactive in defending it. As the Supreme Court has long held, case-
4 dispositive sanctions are still appropriate even if the violative conduct was solely the
5 party's attorney's fault. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962);¹² *Maples*
6 *v. Thomas*, 565 U.S. 266, 280-81 (2012); *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd.*
7 *P'ship*, 507 U.S. 380, 396-97 (1993) (holding that the appellate court erred in *not*
8 attributing an attorney's failure to the client). As the Supreme Court has explained, this is
9 because the party "voluntarily chose this attorney as his representative in the action, and
10 he cannot now avoid the consequences of the acts or omissions of this freely selected agent.
11 Any other notion would be wholly inconsistent with our system of representative litigation,
12 in which each party is deemed bound by the acts of his lawyer-agent and is considered to
13 have notice of all facts, notice of which can be charged upon the attorney." *Link*, 370 U.S.
14 at 633. Accordingly, Defendants bear responsibility for their counsel's conduct, as there
15 is no evidence to support, let alone suggest, that Defendants did anything to prod Mr.
16 Sammartino into action. Nor is there evidence to support, let alone suggest, that they
17 sought Defense Counsel's withdrawal because they were dissatisfied with the lack of
18 progress or pace of this case. Litigation is not a spectator sport where a party retains an
19 attorney and then sits back on the sidelines to watch the action unfold. As Federal Rule of
20 Civil Procedure 1 instructs, parties are as responsible and accountable as their attorney in
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23 ¹² The Court acknowledges that an exception exists "when an attorney abandons his client
24 without notice, and thereby occasions the default [because h]aving severed the principal-
25 agent relationship, an attorney no longer acts, or fails to act, as the client's representative."
26 *Maples*, 565 U.S. at 281. However, there is no indication that Defense Counsel abandoned
27 Defendants here, as Mr. Sammartino told Plaintiff and the Court that he had been in contact
28 with Defendants all along. Moreover, as Plaintiff's counsel informed the Court at the
sanctions hearing, Mr. Sammartino apparently continues to represent "Gettel-related
defendants" in state court cases and has appeared on their behalf there. (Hrg. Tr., Doc. No.
52 at 10-11; *see also, infra*, nn.18-19.)

1 ensuring that the Rules are “construed, administered, and employed . . . to secure the just,
2 speedy, and inexpensive determination of every action and proceeding.” Defendants and
3 Defense Counsel have collectively failed to abide by this basic mandate.

4 “At some point, litigation must come to an end. That point has now been reached.”
5 *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1042 (9th Cir. 2011).
6 Defendants have ignored their clear responsibilities under the “[t]he Federal Rules of Civil
7 Procedure [which] exist to move a case forward to disposition, and to do so promptly and
8 expeditiously.” *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 790 (9th Cir. 2011). They have
9 failed to do so time and again despite promising the Court they would comply, and they
10 have ignored a direct Court Order compelling their compliance. Their sustained
11 misconduct, failures, and violations amount to willfulness and bad faith. Although “a
12 default judgment sanction is a harsh penalty imposed only in extreme circumstances,”
13 *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169 (9th Cir. 2012) (internal quotations
14 and citation omitted), this case presents such extreme circumstances. Lesser sanctions have
15 been considered and would not adequately address Defendants’ serious and pervasive
16 conduct. Only the imposition of the most drastic sanction—default—will address
17 Defendants’ continued and rank indifference to the litigation and the Court’s Orders. Of
18 the five factors the Court must consider, four factors overwhelmingly favor imposition of
19 terminating sanctions and entry of default judgment. Accordingly, this Court recommends
20 that Plaintiff’s motion for terminating sanctions be granted, that Defendants Gettel and
21 Conix VRC, LLC’s Answers be stricken, and that a judgment of default be entered.

22 **B. Payment of Expenses, Contempt, and Reporting to the State Bar**

23 This Court also recommends payment of expenses to Plaintiff by Defendants and
24 Mr. Sammartino, jointly and severally. The Court further recommends initiating criminal
25 contempt proceedings against Mr. Sammartino and reporting to the State Bar of California.

26 **1. Payment of Expenses**

27 Two separate expense-shifting provisions in Federal Rule of Civil Procedure 37
28 apply to this case. First, when a party files a motion to compel compliance with discovery

1 obligations, the movant must be reimbursed for its efforts in doing so. Accordingly, Rule
2 37 provides that once a motion seeking to compel discovery is granted,

3 the court *must*, after giving an opportunity to be heard, require the party . . .
4 whose conduct necessitated the motion, the party or attorney advising that
5 conduct, *or both* to pay the movant’s reasonable expenses incurred in making
6 the motion, including attorney’s fees. But the court must not order this
7 payment if:

- 8 (i) the movant filed the motion before attempting in good faith to
9 obtain the disclosure or discovery without court action;
- 10 (ii) the opposing party’s nondisclosure, response, or objection was
11 substantially justified; or
- 12 (iii) other circumstances make an award of expenses unjust.

13 Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). In addition to this provision, when a party
14 *fails to comply* with a court order, the Rules mandate that the “the court *must* order the
15 disobedient party, the attorney advising that party, *or both* to pay the reasonable expenses,
16 including attorney’s fees, caused by the failure” instead of or in addition to terminating
17 sanctions. Fed. R. Civ. P. 37(b)(2)(C) (emphasis added). The award of expenses under
18 this provision is mandatory unless Defendants and/or their counsel can show that their
19 conduct was “substantially justified” or if “other circumstances make an award of expenses
20 unjust.” *Id.*

21 Here, both of these provisions apply. First, Plaintiff sought and was granted a Court
22 Order by the former Magistrate Judge that ordered Defendants to respond to Plaintiff’s
23 discovery requests. (Doc. No. 44.) Thus, at a minimum, Plaintiff is entitled to fees and
24 costs under Rule 37(a)(5)(A). Plaintiff counsel’s itemized billing statements¹³ reflect a

25 ¹³ Plaintiff has provided billing statements which the Court has reviewed. Plaintiff’s
26 attorneys’ billing rates, hours expended and costs to pursue the discovery and these
27 sanctions are all reasonable and justifiable. Those expenses also appear directly related to
28 Plaintiff’s efforts in seeking discovery, a motion to compel, and these sanctions
proceedings.

1 total of \$4,050 in fees incurred in meet and confer efforts with Defense Counsel,
2 preparation of the motion to compel, and related tasks.

3 Next, when Defendants and their counsel ignored and failed to comply *in toto* with
4 that Order, Plaintiff filed the instant motion for sanctions. Thus, Rule 37(b)(2)(C)
5 mandates an award of expenses related to the instant sanctions motion, which flows directly
6 from Defendants' violation of the motion to compel. The billing statements show Plaintiff
7 incurred an additional \$1,100 in drafting and finalizing the instant motion. That amount
8 appears eminently reasonable given the quality of the motion. Additionally, Plaintiff
9 incurred \$1,125 to have attorney Peter Scott travel to, and appear at, the sanctions hearing.¹⁴
10 This amount is also reasonable given that the Court required Scott to appear in person. In
11 total, Plaintiff incurred \$2,225 in expenses necessitated by the instant sanctions motion.

12 By operation of both mandatory expense-shifting provisions cited above, Plaintiff is
13 entitled to \$6,275 in expenses.¹⁵ That is, of course, unless any of the exceptions listed in
14 Rule 37 apply. As explained below, the exceptions do not apply.

15 **a. Plaintiff Has Acted With Extraordinary Good Faith**

16 Plaintiff has done everything possible to avoid arriving at this point today. From the
17 very beginning, Plaintiff has attempted to work with Defense Counsel informally and
18 cooperatively to obtain the requested documents. For months, Plaintiff dutifully and
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21 ¹⁴ Mr. Scott represented he was permitted to bill 4 hours of one-way travel time at \$250 per
22 hour, but would not permitted to bill his return time. (Hrg. Tr., Doc. No. 52 at 11.)
23 Additionally, the hearing 30 minutes for an additional \$125 in expenses.

24 ¹⁵ The Supreme Court recently examined the extent of fee and expense recovery in the
25 context of courts imposing sanctions under their inherent authority "to sanction a litigant
26 for bad-faith conduct by ordering it to pay the other side's legal fees." *Goodyear Tire &*
27 *Rubber Co. v. Haeger*, 581 U.S. ___, 137 S. Ct. 1178, 1183-84 (2017). In that context, the
28 Court acknowledged that rule-based sanctions regimes, such as Rule 37(b)(2)(C), limit the
amount of recoverable fees and expenses to those directly related to, or "caused by," the
discovery misconduct. *Id.* at 1186 n.5. Plaintiff has reasonably sought no more than what
it incurred directly from Defendants' discovery violations.

1 painstakingly sought discovery from Defendants through their counsel. Plaintiff
2 graciously and professionally agreed to production extensions all in the hope of receiving
3 even one tidbit of information from Defendants. Along the way, Plaintiff’s counsel was
4 often ignored and forced to continually follow up on prior communications. What Plaintiff
5 received in return was more excuses and delays. Even orders of the Court were ineffective
6 in securing the discovery Plaintiff sought to prosecute its case. As detailed above, Plaintiff
7 resorted to the instant sanctions motion after exhausting all other avenues and after giving
8 Defendants and Mr. Sammartino multiple opportunities—met with silence or delay—to
9 fulfill their obligations and promises. Nothing about Plaintiff’s course of conduct in this
10 case leads this Court to believe that Plaintiff has acted in anything but good faith before it
11 sought the Order to compel. The “lack of good faith” exception in Rule 37(a)(5)(A)(i) does
12 not apply.

13 **b. There is No Apparent Justification for the Violations**

14 Because Defendants and their counsel failed to file a response to the sanctions
15 motion and then failed to appear at the hearing, the Court is left with no explanation or
16 justification for their sustained failure to produce discovery or to comply with an Order
17 compelling production. If a justification exists, it is a mystery to this Court, as Defendants
18 and Mr. Sammartino did not take advantage of the ample opportunities the Court provided
19 to explain their conduct. Without any input from Defendants and Mr. Sammartino
20 whatsoever, there is no apparent justification for their violations. The “substantially
21 justified” exceptions in Rule 37(a)(5)(A)(ii) and Rule 37(b)(2)(C) do not apply.

22 **c. The Court is Unaware of Any Other Circumstances that Would**
23 **Make an Award of Expenses Unjust**

24 Likewise, the Court is not aware of any other circumstances that would make an
25 award of expenses unjust. Defendants and their counsel were given multiple opportunities
26 to inform the Court of any such circumstances, and they failed to avail themselves of those
27 opportunities. Awarding payment of expenses to Plaintiff is just in this case. In fact, under
28 the circumstances of this case, *not* awarding expenses to Plaintiff would be unjust. Plaintiff

1 patiently attempted to meet and confer with Defense Counsel for months, gave Defendants
2 and Mr. Sammartino multiple opportunities to comply with their promises to produce
3 discovery, and agreed to jointly ask the Court for multiple extensions of time for
4 Defendants to comply. When none of this worked, Plaintiff was forced to seek, and was
5 awarded, an order compelling Defendants' compliance. When even that did not work and
6 it seemed apparent that Defendants would not comply with their obligations, Plaintiff
7 turned to the final remaining option and filed the motion now pending before the Court.
8 As a result of the lengthy road to the current juncture, Defendants' and Mr. Sammartino's
9 conduct foisted unnecessary expenses upon Plaintiff. Thus, not awarding expenses to
10 Plaintiff would be unjust. The "other circumstances" exceptions in Rule 37(a)(5)(A)(iii)
11 and Rule 37(b)(2)(C) do not apply.

12 **d. Defendants and Mr. Sammartino Should Pay Expenses Jointly and**
13 **Severally**

14 The question now becomes upon whom the burden should fall to pay Plaintiff's
15 expenses. Both Rule 37(a)(5)(A) and Rule 37(b)(2)(C) allow the Court to impose the
16 obligation to pay expenses on the disobedient party, the party's attorney, or both. The
17 Court recommends that the entire defense team be made to jointly and severally pay the
18 expenses.

19 First, Defendants should be liable for payment of expenses because the ultimate
20 responsibility for the conduct of the case rests with them. Even if the delays and failures
21 in this case were Defense Counsel's fault alone, Defendants are nonetheless liable given
22 that their attorneys' actions and conduct are imputed to them. *See Link v. Wabash R.R.*
23 *Co.*, 370 U.S. 626, 633 (1962); *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519,
24 1523 (9th Cir. 1990). Moreover, there is some indication that Defendants may have had
25 some responsibility for the delay—though to what extent they were responsible is not
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1 clear.¹⁶ For these two reasons, Defendants should be responsible for payment of expenses.
2 However, they should not be solely responsible given Mr. Sammartino's conduct in this
3 case.

4 Other than Defense Counsel's self-serving emails that he had either talked to his
5 clients who were in the process of obtaining the records or that his clients were being aloof,
6 there is no evidence before this Court to indicate that the failure to provide discovery lies
7 exclusively at Defendant's feet to the exclusion of Mr. Sammartino's own disengagement
8 and dilatory conduct. Defense Counsel personally strung Plaintiff's counsel along for
9 months with promises of imminently forthcoming discovery.¹⁷ These pronouncements
10 were damning for Defense Counsel because after months of pledging that documents
11 would be produced, nothing happened and no plausible explanation was given. The best
12 that can be said is that Mr. Sammartino was not working diligently—or at all—and that
13 production was never imminent. The worst that can be said is that Mr. Sammartino was
14 intentionally deceptive. Neither scenario favors Mr. Sammartino.

15 Additionally, the Court granted the parties extensions of time based, in part, on
16 Defense Counsel's personal representations and promises. Along the way, Defense
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19 ¹⁶ Although there is *some* indication, it is fleeting. It may be the case that Defense Counsel
20 was having difficulty communicating with Defendant Gettel as he stated in his March 23,
21 2017 email to Plaintiff's counsel. (Doc. No. 42-3, Ex. T.) But this was the first time Mr.
22 Sammartino hinted that his clients may be the problem. Up to this point and for the
23 previous ten months, Defense Counsel's emails never even suggested that there were
24 attorney-client communication problems. For example, in an email dated July 1, 2016,
25 Defense Counsel stated that "[his] clients are willing to provide the information requested
26 below." (Doc. No. 42-3, Ex. B.) In an email dated January 19, 2017, Defense Counsel
27 stated that he wanted to consult with his clients again but that [Plaintiff] should have
28 everything by tomorrow at the latest." (Doc. No. 42-3, Ex. G.) And in a status call with
the original Magistrate Judge on February 28, 2017, Defense Counsel represented that the
discovery responses would be provided in two weeks. (Doc. Nos. 40; 42-3, Ex. Q.)

¹⁷ See, e.g., Doc. 42-3, Ex. E ("I am supposed to be close on the ones that had accounts.");
Ex. G ("[Plaintiff] should have everything by tomorrow [January 20, 2017] at the latest.")

1 Counsel repeatedly broke those promises with little, if any, real explanation. And, if any
2 explanation absolving Mr. Sammartino exists, he chose to ignore the last opportunity he
3 had to provide them when he failed to appear at the sanctions hearing.¹⁸ If Defense Counsel
4 was having client control problems that caused any of the delay or failures in this case, he
5 simply could have explained as much to the Court either by filing *something* as the
6 sanctions briefing Order required or appeared at the sanctions hearing and informed the
7 Court of any difficulties. Mr. Sammartino did neither. What remains, then, is Defense
8 Counsel’s history of personally assuring Plaintiff and the Court that discovery was
9 forthcoming and then failing to produce anything. Accordingly, Defense Counsel’s
10 conduct contributed to the delay in this case and the violations of the Court’s Order
11 compelling discovery. He should therefore also be liable for the expenses Plaintiff incurred
12 in seeking the Order to compel and these sanctions proceedings that flowed from the
13 violation of that Order.

14 Based on the foregoing, Defendants and Mr. Sammartino should be jointly and
15 severally liable and responsible for payment of \$6,275 in expenses. *See Curtis v.*
16 *Illumination Arts, Inc.*, 33 F. Supp. 3d 1200, 1223 (W.D. Wash. 2014) (imposing
17 \$15,695.00 Rule 37(b)(2)(C) sanctions jointly and severally upon defendants and their
18 counsel); *Paige v. Consumer Programs, Inc.*, 248 F.R.D. 272, 278 (C.D. Cal. 2008)
19 (imposing \$15,695.00 Rule 37(a)(5)(A) sanctions jointly and severally upon plaintiffs and
20 their counsel).

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24 ¹⁸ Defense Counsel appears to have been active in other cases related to this litigation.
25 According to attorney Scott, the last communication Plaintiff’s attorneys had with Defense
26 Counsel in relation to this case was in an email dated March 23, 2017. (Doc. No. 42-3, Ex.
27 T.) However, Mr. Scott stated that he represents clients in state court actions against
28 “Gettel-related defendants” who are represented by Defense Counsel in those actions.
(Hrg. Tr., Doc. No. 51 at 10.) As recently as a month before the July 14 sanctions hearing,
Mr. Scott appeared at a state court hearing at which Defense Counsel also appeared. (*Id.*)

1 **2. Criminal Contempt Proceedings**

2 Left with no other option in the face of Mr. Sammartino’s continued violations of
3 Court Orders and failure to appear at the sanctions hearing, this Court recommends
4 initiation of criminal contempt proceedings to vindicate the authority of the Court and
5 punish his completed acts of disobedience.

6 **a. Legal Standard: Civil and Criminal Sanctions**

7 Federal Rule of Civil Procedure 37(b)(2)(A)(vii) permits the Court to treat “as
8 contempt of court the failure to obey any order except an order to submit to a physical or
9 mental examination.” There are two types of contempt sanctions, and the question here is
10 which contempt proceeding is most appropriate.

11 A court’s contempt powers are broadly divided into two categories: civil contempt
12 and criminal contempt. “The difference between criminal and civil contempt is not always
13 clear. The same conduct may result in citations for both civil and criminal contempt.”
14 *United States v. Rylander*, 714 F.2d 996, 1001 (9th Cir. 1983) (citation omitted). In
15 distinguishing between criminal and civil contempt, courts must look to the sanction’s
16 “character and purpose.” *Int’l Union, UMWA v. Bagwell*, 512 U.S. 821, 827 (1994). “The
17 purpose of civil contempt is coercive or compensatory, whereas the purpose of criminal
18 contempt is punitive.” *Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, 539 F.3d 1039,
19 1042 (9th Cir. 2008). The civil contemnor is said to “carr[y] the keys of his prison in his
20 own pocket,” whereas the criminal contemnor “is furnished no key, and he cannot shorten
21 the term by promising not to repeat the offense.” *Bagwell*, 512 U.S. at 828-29.

22 **i. Civil Contempt**

23 “Sanctions for civil contempt may be imposed to coerce obedience to a court order,
24 or to compensate the party pursuing the contempt action for injuries resulting from the
25 contemptuous behavior, or both.” *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376,
26 1380 (9th Cir. 1986). “Compensatory awards are limited to ‘actual losses sustained as a
27 result of the contumacy.’” *Id.* (emphasis omitted). When considering a coercive fine to
28 make a defendant comply with a court order, the court should consider ““the character and

1 magnitude of the harm threatened by continued contumacy, and the probable effectiveness
2 of any suggested sanction in bringing about the result desired.” *Whittaker Corp. v.*
3 *Execuair Corp.*, 953 F.2d 510, 516 (9th Cir. 1992) (quoting *United States v. United Mine*
4 *Workers*, 330 U.S. 258, 304 (1947)).

5 The civil contempt power of a magistrate judge are as follows:

6 Upon the commission of any such act . . . where . . . the act constitutes
7 a civil contempt, the magistrate judge shall forthwith certify the facts to a
8 district judge and may serve or cause to be served, upon any person whose
9 behavior is brought into question under this paragraph, an order requiring such
10 person to appear before a district judge upon a day certain to show cause why
that person should not be adjudged in contempt by reason of the facts so
certified.

11 28 U.S.C. § 636(e)(6)(B)(iii). The assigned district judge then hears the evidence to
12 determine whether the conduct warrants punishment and may impose contempt sanctions
13 in the same manner and to the same extent as for a contempt committed before the district
14 judge. *See id.*; *see also In re Kitterman*, 696 F. Supp. 1366, 1370 (D. Nev. 1988).

15 **ii. Criminal Contempt**

16 A basic proposition exists that “all orders and judgments of courts must be complied
17 with promptly.” *Maness v. Meyers*, 419 U.S. 449, 458 (1975). “Persons who make private
18 determinations of the law and refuse to obey an order generally risk criminal contempt
19 even if the order is ultimately ruled incorrect.” *Id.*

20 Whether “contempt is civil or criminal turns on the nature of the sanction” involved.
21 *Kelly v. Wengler*, 822 F.3d 1085, 1097 (9th Cir. 2016). “The test . . . is what does the court
22 primarily seek to accomplish by imposing the sanction?” *Shell Offshore, Inc. v.*
23 *Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016) (internal quotations and citation
24 omitted). While civil contempt is remedial and for the benefit of the opposing party,
25 criminal contempt is punitive and designed to vindicate the authority of the court and
26 punish the contemnor. *See, e.g., Int’l Union, UMW v. Bagwell*, 512 U.S. 821, 827-28
27 (1994); *United States v. Doe*, 125 F.3d 1249, 1256 (9th Cir. 1997); *In re Sequoia Auto*
28 *Brokers*, 827 F.2d 1281, 1283 (9th Cir. 1987). “A criminal sanction . . . generally seeks to

1 punish a ‘completed act of disobedience.’” *Ahearn ex rel. N.L.R.B. v. Int’l Longshore &*
2 *Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1129 (9th Cir. 2013) (quoting *Bagwell*,
3 512 U.S. at 828).

4 “Criminal contempt is established when there is a clear and definite court order, the
5 contemnor knows of the order, and the contemnor willfully disobeys the order.” *United*
6 *States v. Doe*, 125 F.3d 1249, 1254 (9th Cir. 1997) (internal quotations and citation
7 omitted).

8 A magistrate judge’s authority with respect to criminal contempt is primarily divided
9 into two types. First, when contemptuous behavior occurs “in the magistrate judge’s
10 presence so as to obstruct the administration of justice,” a magistrate judge has the power
11 to invoke summary criminal contempt sanctions. 28 U.S.C. § 636(e)(2). Second, when
12 contemptuous behavior occurs outside the presence of the magistrate judge, a magistrate
13 judge may certify such facts to the district judge and order the contemnor to appear for a
14 show cause hearing. 28 U.S.C. § 636(e)(6)(B)(ii).

15 **b. Discussion**

16 Here, criminal contempt proceedings are most appropriate because the nature and
17 intent of the contempt sanctions recommended are to vindicate the authority of the Court
18 and punish Defense Counsel in the face of his continued failures which have ultimately
19 resulted in defiance of court orders. Mr. Sammartino has violated *four* Orders of the Court,
20 all of which up to this point have gone unpunished. Most egregiously, Mr. Sammartino
21 failed to appear at the sanctions hearing after this Court expressly ordered him to appear.

22 First, the original Magistrate Judge issued a scheduling order setting March 7, 2017,
23 as the deadline for fact discovery. Plaintiff propounded formal requests for production of
24 documents on January 25, 2017. Defendants’ responses were due by February 14, 2017.
25 When no production occurred, Plaintiff requested a status conference with the original
26 Magistrate Judge which occurred on February 28, 2017. The Magistrate Judge granted an
27 extension of time to complete fact discovery after Defense Counsel promised to provide
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1 responses to Plaintiff’s request in two weeks’ time. Still Defense Counsel violated the
2 Scheduling Order when he failed to provide any response.

3 Second, Defendants and their counsel continued to fail to provide responses even
4 after the original Magistrate Judge granted Plaintiff’s motion to compel discovery and
5 expressly ordered them to do so. To date, Plaintiff has received no discovery.

6 Third, this Court ordered Defendants and their counsel to respond to Plaintiff’s
7 motion for sanctions. (Doc. No. 47 ¶ 1 (“Defendants *and defense counsel shall* jointly file
8 a . . . response/opposition to each and every allegation lodged against them collectively
9 *and individually* by Plaintiff in the pending sanctions motion”) (emphasis added).
10 Although Plaintiff’s sanctions motion was replete with accusations against Defense
11 Counsel individually, Mr. Sammartino filed nothing in response to those allegations.

12 Finally, this Court expressly ordered Mr. Sammartino to appear at the sanctions
13 hearing. (Doc. No. 47 ¶ 3 (“**Defense counsel and all individual and representative**
14 **Defendants are ordered to appear in person.**”) (emphasis in original).) Such an express,
15 direct order left no doubt that Defense Counsel’s personal appearance was mandatory. But
16 Mr. Sammartino failed to appear.¹⁹

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20 ¹⁹ This Court has no reason to believe that Mr. Sammartino has not received any of the
21 filings in this case. In this District, all attorneys are required to register as electronic filers
22 and accept service of case filings electronically via the Court’s Electronic Case Filing
23 System. S.D. Cal. Civ. L. R. 5.4(a). Documents filed on the Court’s electronic docket are
24 deemed served upon all parties through their registered filer attorneys. *Id.* § 54(c). Mr.
25 Sammartino has registered his email address with the Court, and that email address is
26 identical to the address reflected on Defense Counsel’s State Bar member profile as well
27 as his firm’s website. Additionally, attorney Scott informed the Court that Defense
28 Counsel had been active in related state court cases and made an appearance in those cases
as recently as a month before the sanctions hearing. Thus, the inference this Court draws
is that Mr. Sammartino is available, has chosen to participate and make appearance in
related state court matters, and has consciously elected for unknown reasons to ignore
proceedings in this case as well as disregard this Court’s orders.

1 When considering which type of contempt—civil or criminal—is appropriate in this
2 case, Defense Counsel’s conduct convinces this Court that civil contempt sanctions are not
3 the proper sanction and would not be effective in gaining Mr. Sammartino’s compliance
4 for three reasons. First, as a practical matter, given the recommendation above for
5 imposition of terminating sanctions, it is now moot whether Defense Counsel should be
6 compelled to comply with the former Magistrate Judge’s discovery order and actually
7 produce some discovery. Given the recommendation that a judgment of default be entered,
8 civil contempt to compel production of discovery now would be a pointless exercise.
9 Second, even if discovery production was not futile, Mr. Sammartino’s course of conduct
10 strongly foretells that civil contempt proceedings will not have the intended effect of
11 gaining compliance. This is because even when faced with the litany of allegations against
12 him personally in Plaintiff’s sanctions motion and Plaintiff’s request for monetary
13 sanctions, Defense Counsel did nothing. If these great consequences had no impact on him
14 to this point, additional sanctions in the form of monetary civil contempt sanctions will
15 likewise continue to have no impact. Finally, civil contempt is not necessary to compensate
16 Plaintiff for losses sustained as a result of the contemptuous conduct because Rule 37
17 contains two applicable reimbursement provisions, and this Court has recommended
18 reimbursement of Plaintiff’s actual losses under those provisions. Ultimately, given the
19 above, the intent and purpose of civil contempt do not fit the circumstances of this case.

20 Rather, this Court recommends criminal contempt proceedings because the nature
21 of the contemptuous conduct is completed acts of disobedience of the Court’s Orders and
22 open disregard of the Court’s authority. As a result, the intended purpose of the sanction
23 is to vindicate the authority of the Court, which has to this point been flouted by a member
24 of the State Bar and an officer of the court. This sanction is also necessary to punish the
25 contemnor for this disobedient conduct. All of the circumstances discussed in detail above,
26 including most egregiously Defense Counsel’s recent flouting of direct court orders and
27 failure to appear as expressly ordered, amounts to open, intentional defiance of the Court’s
28 authority. The Court simply cannot tolerate or ignore such conduct from an officer of the

1 court. Because the purpose of any contempt sanction at this stage would be to punish
2 Defense Counsel’s completed acts of disobedience—rather than to compensate Plaintiff or
3 coerce compliance with a court order—criminal contempt proceedings are appropriate.

4 **3. Reporting to the State Bar of California**

5 California Business and Professions Code § 6068(o) requires attorneys to self-report
6 imposition of judicial sanctions of \$1,000 or more. Given Mr. Sammartino’s conduct and
7 failure to comply with court orders in this case, the Court should direct the Clerk of Court
8 to forward a copy of the Court’s final order to the State Bar of California to ensure that the
9 reporting is completed.²⁰

10 **IV. CONCLUSION**

11 This Court RECOMMENDS that Plaintiff’s motion for terminating sanctions be
12 GRANTED. Accordingly, this Court further RECOMMENDS that the Court (1) strike
13 Defendants Gettel and Conix VRC, LLC’s Answers, (2) enter default judgment in favor of
14 Plaintiff, and (3) impose \$6,275 in payment of expenses, to be paid jointly and severally
15 by Defendants and Defense Counsel. Additionally, the undersigned Magistrate Judge
16 certifies the facts above pursuant to 28 U.S.C. § 636(e)(6), recommends criminal contempt
17 proceedings against Defense Counsel. This Court further RECOMMENDS that a final
18 Order sanctioning Defense Counsel be forwarded to the State Bar of California by the Clerk
19 of Court.

20 This Report and Recommendation is submitted to the United States District Judge
21 assigned to this case pursuant to the provisions of 28 U.S.C § 636(b)(1) and Federal Rule
22 of Civil Procedure 72(b).

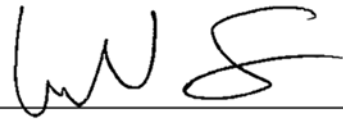
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26 ²⁰ The Order may be sent to the following contact point at the State Bar’s Office of Chief
27 Trial Counsel: Cecelia Horton-Billard, Esq.
28 State Bar of California Intake Unit
845 S. Figueroa Street
Los Angeles, CA 90017

1 **IT IS ORDERED** that **no later than August 22, 2017**, any party to this action may
2 file written objection with the Court and serve a copy on all parties. The document shall be
3 captioned "Objections to Report and Recommendation."

4 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
5 the court and served on all parties **no later than August 29, 2017**. The parties are advised
6 that failure to file objections within the specific time may waive the right to raise those
7 objections on the appeal.

8 **IT IS SO ORDERED.**

9 DATED: August 7, 2017



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11 Hon. William V. Gallo
12 United States Magistrate Judge
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