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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DR. LOKESH TANTUWAYA MD, INC.

Plaintiff,

v.

JETSUITE, INC. and SUPERIOR AIR
CHARTER, LLC

Defendants.

Case No.: 19-cv-49-W-BLM

**ORDER GRANTING DEFENDANTS
JETSUITE, INC. AND SUPERIOR AIR
CHARTER LLC'S MOTION FOR
MONETARY SANCTIONS AND REPORT
AND RECOMMENDATION FOR ORDER
GRANTING DEFENDANTS' MOTION
FOR TERMINATING SANCTIONS AND
TO DISMISS ACTION**

[ECF No. 36]

Currently before the Court is Defendants JetSuite, Inc. and Superior Air Charter, LLC's ("Defendants") October 25, 2023 Motion for Monetary and Terminating Sanctions and to Dismiss Action Pursuant to Fed. R. Civ. P. 37(b)(2) ("MTD"). ECF No. 36. For the reasons set forth below, this Court **RECOMMENDS** that Defendants' MTD be **GRANTED**.

PROCEDURAL BACKGROUND

On January 8, 2019, Defendants JetSuite Inc. ("JetSuite") and Superior Air Charter, LLC ("SAC") removed this action from Superior Court of California, County of San Diego. ECF No. 1. On February 15, 2019, Defendants answered Plaintiff's Complaint. ECF No. 6. On March 25, 2019, Magistrate Judge Major held a Case Management Conference and subsequently issued a scheduling order regulating all pre-trial and discovery deadlines. ECF Nos. 9, 10. On April 26,

1 2019, Defendants filed a Motion to Stay Civil Action Pending Resolution of Criminal Proceedings,
2 which was granted by District Judge Thomas J. Whelan on August 19, 2019. See ECF Nos. 11,
3 14. On June 2, 2020, Defendant SAC filed a notice of Bankruptcy Filing. See ECF No. 17. On
4 December 13, 2022, District Judge Whelan vacated the stay on the case. ECF No. 25. On January
5 23, 2023, Magistrate Judge Major issued an amended scheduling order regulating pre-trial and
6 discovery deadlines. ECF No. 29.

7 On August 18, 2023, counsel for Defendants contacted the Court regarding a discovery
8 dispute. ECF No. 32 at 1; see Hon. Barbara L. Major Chamber Rules-Civil Cases, Rule V(A).
9 Despite counsel for Defendant notifying Plaintiff's counsel about the August 18, 2023 discovery
10 conference call seventy-two (72) hours in advance pursuant to the undersigned Judge's
11 Chamber Rules, Plaintiff's counsel did not participate in the discovery conference call. Id.; see
12 Hon. Barbara L. Major Chamber Rules-Civil Cases, Rule V(B). The Court issued an Order Setting
13 a Briefing Schedule on August 18, 2023 regarding the discovery dispute. ECF No. 32. On August
14 21, 2023, Defendants filed a Motion to Compel Responses to Discovery Pursuant to Fed. R. Civ.
15 P. 37(a) and Request for Monetary and Terminating Sanctions ("MTC"). ECF No. 33. Plaintiff did
16 not file an Opposition. See Docket. Defendants filed a reply on September 11, 2023. ECF No.
17 34.

18 On September 27, 2023, the Court entered an Order Granting Defendants' Motion to
19 Compel Responses to Discovery and Imposing Monetary Sanctions. ECF No. 35. Plaintiff was
20 ordered to produce responsive documents to Defendants' Requests for Production, set one, Nos.
21 1, 10-11, 13, 16-19, 22-24, 27-28, 31-34, 38-39 and to provide substantive, complete responses
22 to Defendant JetSuite's Interrogatories, set one, without objection within fourteen (14) days of
23 the order. ECF No. 34 at 11. In addition, the Court imposed monetary sanctions and ordered
24 Plaintiff and Plaintiff's counsel, James McDanel of the Law Offices of James McDanel, to pay
25 \$1,425.00 to Defendants by October 13, 2023 for their failure to respond to Defendants' written
26 discovery, engage in meet and confer efforts, and respond to the MTC. Id. Plaintiff's counsel
27 was ordered to file a declaration of payment by October 20, 2023. Id.

1 Plaintiff failed to provide responsive documents and interrogatory responses pursuant to
2 this Court's September 27, 2023 order. MTD at 4; Declaration of Laura M. Booth in Support of
3 Motion for Terminating Sanctions and to Dismiss Action ("Booth Decl.") at ¶ 25. Plaintiff's counsel
4 failed to file a declaration of payment. See Docket; Booth Decl. at ¶ 26. Plaintiff and Plaintiff's
5 counsel did not pay the monetary sanction, and, on October 30, 2023, the Court issued an Order
6 to Show Cause Why Sanctions Should Not Be Imposed ("OSC") wherein the Court ordered
7 Plaintiff's counsel to appear and set the OSC hearing for November 15, 2023. ECF No. 37 at 1.
8 The OSC hearing was held on November 15, 2023, at 2:00 p.m. in Courtroom 2A, United States
9 District Court, 940 Front Street, San Diego, California 92101. ECF No. 39. Plaintiff's counsel did
10 not appear.¹ Id. Plaintiff's counsel has not filed a motion seeking to withdraw from his
11 representation of Plaintiff. See Docket.

12 Defendants filed the instant MTD on October 25, 2023. ECF No. 36. Plaintiff's response
13 was due on or before November 17, 2023. ECF No. 38 at 1. Plaintiff did not file an opposition.
14 See Docket. Defendants did not file a Reply in Support of their MTD. Id.

15 **DISCOVERY BACKGROUND**

16 On March 22, 2019, Defendants served Plaintiff with Requests for Production of
17 Documents, set one. MTD at 2; ECF No. 36-2. On May 2, 2019, Plaintiff served written responses
18 to Defendants' Requests for Production, set one, ("RFP") and committed to produce responsive
19 documents to RFPs 1, 9-11, 13, 16-19, 22-24, 27-28, 31-34, 38-39 after any stay of the case
20 concluded. Id.; ECF No. 36-3. On March 6, 2023, Defendant JetSuite served Interrogatories, set
21 one, on Plaintiff. Id.; ECF No. 36-4.

22 On March 7, 2023, Defendants requested Plaintiff comply with his prior commitment to
23 produce responsive documents to Defendants' RFPs. Id. at 3; ECF No. 36-5. Plaintiff's counsel
24 _____

25 ¹ Plaintiff's counsel called Magistrate Judge Major's chambers at 1:56 p.m. on November 15,
26 2023, four (4) minutes prior to the start of the OSC, to request a telephonic appearance at the
27 OSC hearing. Judge Major's Judicial Law Clerk informed Plaintiff's counsel that he was ordered
28 to appear in person so no telephonic appearance would be allowed, and that he could file a
declaration explaining why he failed to appear in person as ordered. Plaintiff's counsel did not
file any document or submit any explanation. See Docket.

1 responded on March 15, 2023, stating that he was “in the process of communicating” with
2 Plaintiff, and would “follow[] up on the production of documents.” Id.; ECF No. 36-6. Plaintiff’s
3 counsel also requested a 30-day extension for the Request for Production, set one. Id. After that
4 30-day period passed, Defendants sent another request for Plaintiff to comply with his prior
5 commitment to produce responsive documents. Id.; Booth Decl. at ¶ 11. Defendants state they
6 did not receive a response to their multiple attempts to communicate with Plaintiff’s counsel and
7 have not received any responsive documents. Id. at 4; Booth Decl. at ¶¶ 18, 25.

8 Per this Court’s January 20, 2023 Scheduling Order, the parties’ expert designations were
9 due July 14, 2023, and supplemental designations were due August 11, 2023. ECF No. 29 at 2.
10 Defendants served their expert designation on July 14, 2023. MTD at 3; ECF No. 36-8.
11 Defendants state that, as of October 25, 2023, they have not been served with Plaintiff’s expert
12 designation. MTD at 3; Booth Decl. at ¶ 15.

13 On August 10, 2023, Defendants notified Plaintiff that they intended to file a motion to
14 compel responses and/or dismiss this action. MTD at 3; ECF No. 36-9. The following day,
15 Defendants again contacted Plaintiff and expressed a willingness and availability to meet and
16 confer. Id.; ECF No. 36-10. On August 15, 2023, Defendants contacted Plaintiff again,
17 attempting to schedule an informal discovery conference call with Magistrate Judge Major’s law
18 clerk regarding Defendants’ proposed motion to compel. Id.; ECF No. 36-11. Defendants stated
19 that they did not receive a response to their correspondence or request for participation in an
20 informal discovery conference. Id.; Booth Decl. at ¶ 18. Further, according to the Court’s January
21 23, 2023, Scheduling Order, all expert discovery was to be completed by November 10, 2023.
22 See ECF No. 29 at 3.

23 Despite this Court’s September 27, 2023 order granting Defendants’ MTC discovery,
24 Plaintiff failed to respond to Defendant JetSuite’s interrogatories and failed to produce any
25 responsive documents. MTD at 4; Booth Decl. at ¶ 25; see also ECF No. 35.

26 **LEGAL STANDARD**

27 **A. Federal Rule of Civil Procedure 16(f)**

28 Pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 16(f),

1 the court may issue any just orders, including those authorized by Rule
2 37(b)(2)(A)(ii)-(vii), if a party or its attorney: (A) fails to appear at scheduling or
3 other pretrial conference; (B) is substantially unprepared to participate—or does
4 not participate in good faith in the conference; or (C) fails to obey a scheduling or
5 other pretrial order.

6 Fed. R. Civ. P. 16(f)(1). “Instead of or in addition to any other sanction, the court must order
7 the party, its attorney, or both to pay the reasonable expenses—including attorney’s fees—
8 incurred because of any noncompliance with this rule, unless the noncompliance was
9 substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ.
10 P. 16(f)(2).

11 **B. Federal Rules of Civil Procedure 37 & 41**

12 Rule 37 of the Federal Rules of Civil Procedure empowers this Court to issue sanctions
13 against a party for failing to make disclosures or cooperate in discovery. A court may order
14 sanctions if “a party, after being properly served with interrogatories under Rule 33 or a request
15 for inspection under Rule 34, fails to serve its answers, objections, or written response.” Fed. R.
16 Civ. P. 37(d)(1)(A)(ii). If a party “fails to obey an order to provide or permit discovery, including
17 an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue” an
18 appropriate sanction order. Fed. R. Civ. P. 37(b)(2)(A). “The Ninth Circuit has held that a party’s
19 failure to produce documents as ordered is considered sufficient prejudice to establish
20 sanctionable conduct.” Hullinger v. Anand, 2016 WL 7444620, at *8 (C.D. Cal. Aug. 19, 2016)
(quoting Apple Inc. v. Samsung Elcs. Co., Ltd., 2012 WL 2862613, at *1-2 (N.D. Cal. July 11,
2012)). Rule 37 authorizes a court to consider and impose the following sanctions:

- 21 (i) directing that the matters embraced in the order or other designated facts be
22 taken as established for purposes of the action, as the prevailing party claims;
23 (ii) prohibiting the disobedient party from supporting or opposing designated
24 claims or defenses, or from introducing designated matters in evidence;
25 (iii) striking pleadings in whole or in part;
26 (iv) staying further proceedings until the order is obeyed;
27 (v) dismissing the action or proceeding in whole or in part;
28 (vi) rendering a default judgment against the disobedient party; or
(vii) treating as contempt of court the failure to obey any order except an order to
submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii).

1 Dismissal is a harsh penalty that “should be imposed only in extreme circumstances.”
2 Meeks v. Nunez, 2017 WL 908733, at *10 (S.D. Cal. Mar. 8, 2017) (quoting Wyle v. R.J. Reynolds
3 Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983)). Under Rule 37, terminating sanctions are
4 only appropriate if the conduct of the disobedient party is “due to willfulness, bad faith, or fault
5 of the party.” Id. (quoting United States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857
6 F.2d 600, 603 (9th Cir. 1988) (citation omitted)).

7 Pursuant to Fed. R. Civ. P. 41(b), “[i]f the plaintiff fails to prosecute or to comply with
8 these rules or a court order, a defendant may move to dismiss the action or any claim against
9 it.” Fed. R. Civ. Proc. 41(b). “Dismissal under Rule 41(b) is a sanction, to be imposed only in
10 ‘extreme circumstances.’” Edwards v. Marin Park, Inc., 356 F.3d 1058, 1063 (9th Cir. 2004)
11 (quoting Dahl v. City of Huntington Beach, 84 F.3d 363, 366 (9th Cir. 1996) and United States
12 ex rel. Wiltec Guam, Inc., 857 F.2d at 603). A dismissal for lack of prosecution must be
13 supported by a showing of unreasonable delay. Ortega v. Kimble, 2022 WL 4376784, at *1 (D.
14 Arizona, Sep. 22, 2022) (quoting Nealey v. Transportation Maritima Mexicana, S.A., 662 F.2d
15 1275, 1280 (9th Cir.1980)).

16 The Ninth Circuit has set forth five factors to be considered by the court in selecting the
17 appropriate sanction under both Rule 37 and Rule 41:

- 18 (1) The public’s interest in expeditious resolution of litigation; (2) the court’s need
19 to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4)
20 the public policy favoring disposition of cases on their merits; and (5) the
availability of less drastic sanctions.

21 Hullinger, 2016 WL 7444620, at *8 (quoting Valley Engineers Inc. v. Electyric Engineering Co.,
22 158 F.3d 1051, 1057 (9th Cir. 1998)); see also Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir.
23 1991) (quoting Thompson v. Housing Authority of City of Los Angeles, 782 F.2d 829, 831 (9th
24 Cir. 1986)). This test is a disjunctive balancing test, so not all five factors must support dismissal.
25 See Valley Eng’rs Inc., 158 F.3d at 1051 (observing that the five-factor test “amounts to a way
26 for a district judge to think about what to do, not a series of conditions precedent” to dismissal);
27 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (explaining that dismissal is
28 appropriate when four factors support dismissal or where three factors “strongly” support

1 dismissal). When a court order is violated, the first two factors support terminating sanctions
2 while the fourth factor, the public policy favoring disposition of the cases, does not support
3 dismissal. See Adriana Int'l Corp v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990); see also
4 Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1991). Therefore, the third and fifth factors
5 are ultimately determinative of the result. Adriana Int'l Corp., 913 F.2d at 1412. When
6 considering evidentiary, issue or terminating sanctions, factors three and five "become
7 particularly important." Id.

8 **C. Civil Local Rule 83.1**

9 Civil Local Rule 83.1 addresses sanctions for noncompliance with rules:

10 Failure of counsel, or of any party, to comply with these rules, with the Federal
11 Rules of Civil or Criminal Procedure, or with any other of the Court may be grounds
12 for imposition by the Court of any and all sanctions authorized by statute or rule
13 or within the inherent power of the Court, including, without limitation, dismissal
of any actions, entry of default, finding of contempt, imposition of monetary
sanctions or attorneys' fees and costs, and other lesser sanctions.

14 For violations of these Local Rules or of a specific court order, the Court may, in
15 imposing monetary sanctions, order that the monetary sanctions be paid to the
Miscellaneous Fines, Penalties and Forfeitures, Not Otherwise Classified, fund of
the United States Treasury.

16
17 **DISCUSSION**

18 In their MTD, Defendants argue that Plaintiff's Complaint should be dismissed in its
19 entirety as Plaintiff failed to comply with this Court's orders, and for failure to prosecute this
20 action. MTD at 4, 9. Specifically, Plaintiff failed to comply with this Court's order to serve
21 responses to Defendants' interrogatories, produce documents, and pay monetary sanctions by
22 October 20, 2023. Id. at 2. Further, Defendants request an order awarding Defendants the
23 reasonable expenses, including attorney's fees, incurred in making this motion. Id. Defendants
24 argue that the Court has the authority to dismiss Plaintiff's case under Fed. R. Civ. P. 37(b)(2)
25 and to grant Defendants reasonable expenses including attorney's fees under Fed. R. Civ. P.
26 37(a)(5)(A). Id. at 4, 8.

27 //

1 **A. Violation of this Court's Orders**

2 On September 27, 2023, the Court granted Defendants' first MTC, and ordered Plaintiff
3 to: (1) produce responsive documents to Defendants' RFPs, Nos. 1, 10-11, 13, 16-19, 22-24,
4 27-28, 31-34, 38-39 and Defendant JetSuite's Interrogatories, Set One, without objection within
5 fourteen days of the order; (2) pay monetary sanctions in the amount of \$1,425.00 to defense
6 counsel by October 13, 2023; and (3) file a declaration of payment by October 20, 2023. ECF
7 No. 35 at 11. Plaintiff failed to: (1) produce any discovery responses (see MTD at 4; Booth Decl.
8 at ¶¶ 26-27); (2) pay sanctions to Defendants (see MTD at 4; Booth Decl. at ¶ 26); and (3) file
9 a declaration of payment (see Docket). The Court specifically warned Plaintiff that additional
10 failures to comply with discovery obligations or court orders may result in additional monetary
11 sanctions, evidentiary sanctions, or dismissal of the case. ECF No. 35 at 11.

12 On October 30, 2023, the Court issued an OSC and scheduled a hearing for November
13 15, 2023, ordering Plaintiff's counsel to appear in person and show cause why sanctions should
14 not be imposed for his failure to follow this Court's order. See ECF No. 37. Again, in violation of
15 the Court Order, Plaintiff's counsel failed to appear for the OSC hearing. See ECF No. 39. The
16 Court notes that Plaintiff's counsel was aware of the OSC hearing as he called Judge Major's
17 chambers to request a telephonic appearance at the OSC four (4) minutes prior to the start of
18 the hearing.

19 The facts clearly establish that Plaintiff failed to comply with the Court's orders. The issue
20 then, is the appropriate sanction. For dismissal under Fed. R. Civ. P. 37(b) and 41(b), the
21 conduct of the disobedient party must be due to willfulness, bad faith, or fault of the party."
22 Meeks, 2017 WL 908733, at *10 (quoting United States ex rel. Wiltec Guam, Inc., 857 F.2d at
23 603. This factor does not require a finding of wrongful intent or any particular mental state. See
24 United States v. Lee, 2016 WL 11281164, at *2 (S.D. Cal. Dec. 6, 2016). "Disobedient conduct
25 not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad
26 faith, or fault." Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994) (citing Henry v. Gill
27 Indus., 983 F.2d 943, 948 (9th Cir. 1993). "A single willful violation may suffice depending on
28 the circumstances." United States v. Approximately \$30,000.00 in U.S. Currency, 2015 WL

1 5097707, at *8 (E.D. Cal. Aug. 28, 2015) (citing Valley Engineers, Inc., 158 F.3d at 1056, cert.
2 denied, 526 U.S. 1064 (1999)) and Ortiz-Rivera v. Municipal Government of Toa Alta, 214 F.R.D.
3 51, 57 (D.P.R.2003) (disobedience of court orders in and of itself constitutes extreme misconduct
4 and warrants dismissal)). The Ninth Circuit has held that dismissal is appropriate when the
5 "district court determines 'that counsel or a party has acted willfully or in bad faith in failing to
6 comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard
7 of those rules or orders.'" Meeks, 2017 WL 908733, at *6 (citing Sigliano v. Mendoza, 642 F.2d
8 309, 310 (9th Cir. 1981) (quoting G-K Props. v. Redevelopment Agency, 577 F.2d 645, 647 (9th
9 Cir. 1978)) (citing Nat'l Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)).

10 The Court finds that Plaintiff and his lawyer knowingly, intentionally, and willfully failed
11 to comply with court orders. In this Court's September 27, 2023 Order granting Defendants'
12 MTC, the Court ordered Plaintiff to provide discovery and warned Plaintiff that "additional failures
13 to comply with discovery obligations or court orders may result in additional monetary sanctions,
14 evidentiary sanctions, or dismissal of the case." See ECF No. 35 at 9. Despite the warning and
15 with notice of the potential consequences for failure to comply, Plaintiff failed to participate in
16 discovery, pay sanctions, file any document, respond to the OSC, or appear in court for the OSC
17 as ordered. Plaintiff's counsel's telephone call to the undersigned Judge's chambers four (4)
18 minutes prior to the OSC hearing establishes that he received this Court's orders, knew what he
19 was required to do, and intentionally refused to comply with the Court's orders. Accordingly, the
20 Court finds that Plaintiff's failures to follow this Court's specific orders to produce documents
21 and interrogatory responses, pay sanctions, file a declaration of payment, and appear for the
22 OSC hearing were done knowingly, willfully, and voluntarily and the decision was entirely within
23 the control of Plaintiff and his attorney.

24 **B. Plaintiff's Failure to Engage in Discovery**

25 The evidence also clearly establishes that Plaintiff knowingly, intentionally, and willfully
26 failed to participate in the discovery process. While it is unclear whether Plaintiff served any
27 discovery on Defendants because Plaintiff did not file any pleadings in response to the Court's
28 orders and Defendants did not provide the information, it is clear that Plaintiff did not respond

1 to Defendants' discovery. Plaintiff did not produce responsive documents to Defendants' RFPs
2 served on March 22, 2019, or respond to Defendant JetSuite's interrogatories, set one, served
3 on March 6, 2023. MTD at 4; Booth Decl. ¶ 8-9. On March 15, 2023, Plaintiff's counsel advised
4 defense counsel that he would provide responsive documents to the March 2019 request, which
5 established that Plaintiff was aware of his discovery obligations. See MTD at 3; Booth Decl. at ¶
6 10. Counsel for Defendant made repeated attempts to obtain the discovery and to meet and
7 confer with Plaintiff's counsel regarding the discovery disputes, but Plaintiff's counsel has
8 continually refused to communicate with defense counsel after the March 15, 2023
9 communication, approximately nine (9) months ago. Booth Decl. at ¶¶ 3-18; ECF Nos. 36-5, 36-
10 6, 36-7, 36-9, 36-10, 36-11. Similarly, Plaintiff failed to designate experts or serve his expert
11 designations upon Defendants as required by Fed. R. Civ. P. 26(a)(2)(D)(i). Id. at 3; Booth Decl.
12 at ¶¶ 12, 14-15.

13 Plaintiff and Plaintiff's counsel were given ample warning and opportunity to cure the
14 deficiencies regarding their failure to conduct and respond to fact and expert discovery, failure
15 to participate in meet and confer efforts, and failure to comply with this Court's discovery orders.
16 In addition, Plaintiff's counsel's November 15, 2023 phone call to Judge Major's chambers
17 confirmed that Plaintiff received the Court's orders. Accordingly, the Court finds that Plaintiff
18 knowingly, intentionally, and willfully failed to engage in the discovery process and unreasonably
19 delayed the litigation.

20 **C. Factors for Dismissal**

21 As discussed below, all of the factors identified by the Ninth Circuit support the Court's
22 decision to recommend dismissal of this case pursuant to Rules 37 and 41. See Valley Engineers,
23 158 F.3d at 157; Ferdik, 963 F.2d at 1261; Hullinger, 2016 WL 7444620, at *8.

24 1. Public Interest in Expedient Resolution of Litigation and the Court's Need 25 to Manage its Dockets

26 The first two factors represent the interest of judicial economy and weigh in favor of
27 dismissal. Here, Plaintiff filed this action over five years ago, on December 5, 2018. Although
28 this case was stayed from August 19, 2019, until December 13, 2022 (see ECF No. 25), in the

1 twelve months since the stay was vacated, Plaintiff has not taken any action to move this case
2 toward resolution. Plaintiff has not designated experts, designated rebuttal experts, produced
3 expert disclosures, or responded to Defendants' discovery requests, and has not communicated
4 with Defendants' counsel since March 2023. Additionally, he has repeatedly failed to comply with
5 this Court's orders. Accordingly, the Court finds that Plaintiff has unreasonably delayed in
6 prosecuting this action. See Ortega, 2022 WL 4386784, at *2 (finding unreasonable delay when
7 the plaintiff did not participate in discovery nor respond to court orders over a five-month
8 period). Plaintiff's failures have negatively impacted both the public's interest in the expeditious
9 resolution of litigation and the Court's need to manage its docket. Both of these factors weigh
10 in favor of dismissal.

11 2. The Risk of Prejudice to the Party Seeking Sanctions

12 The consideration of prejudice is an important factor in deciding a motion for a dismissal
13 and should receive more weight than the other factors. Meritage Homeowners' Ass'n v. bank of
14 New York Mellon, 2017 WL 9471669, at *4 (D. Or. Dec. 3, 2017) (citing Henry, 983 F.2d at 948
15 and Banga v. Experian Info. Solutions, 2009 WL 2407419, *1 (N.D. Cal. Aug. 4, 2009)). "A
16 defendant suffers prejudice if the plaintiff's action impairs the defendant's ability to go to trial
17 or threatens to interfere with the rightful decision of the case." In re Phenylpropanolamine (PPA)
18 Products Liability Litigation, 460 F.3d 1217, 1228 (9th Cir. 2006) (quoting Adriana Int'l Corp.,
19 913 F.2d at 1412 and citing Malone v. U.S. Postal Serv., 833 F.2d 128, 131 (9th Cir. 1987) and
20 In re Eisen, 31 F.3d 1447, 1453 (9th Cir. 1994)). Failing to produce documents as ordered is
21 considered sufficient prejudice. Id. (citing Adriana Int'l Corp, 913 F.2d at 1412). "Prejudice
22 normally consists of loss of evidence and memory, it may also consist of costs or burdens of
23 litigation, although it may not consist of the mere pendency of the lawsuit itself." Id. (citing In
24 re Eisen, 31 F.3d at 1453 and Pagtaluan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002)).

25 Here, Plaintiff has repeatedly and consistently refused to participate in the litigation
26 process, produce required discovery, and comply with judicial orders, which has severely
27 prejudiced Defendants. As a result of Plaintiff's conduct, Defendants have had to spend time
28 and money (1) preparing and serving requests for production of documents and interrogatories

1 without receiving any response or document production from Plaintiff, (2) attempting to meet
2 and confer with Plaintiff to informally resolve discovery disputes, (3) retaining and designating
3 experts, (4) preparing and filing a motion to compel, and (6) preparing and filing the instant
4 MTD. Despite Defendants' efforts, Plaintiff has not produced discovery nor provided an excuse
5 or explanation for the inaction. Discovery has closed and Defendants need to consider and
6 possibly draft motions for summary judgment and prepare for trial. ECF No. 29 at 1-3. They are
7 unable to do so because Plaintiff has not produced any discovery or participated in the litigation.
8 As such, it is clear that Plaintiff's conduct has severely impaired Defendants' ability to go to trial
9 in this matter. See Mendia v. Garcia, 2018 WL 509977, at *11 (N.D. Cal. Jan. 23, 2018) (finding
10 that plaintiff's conduct was sufficiently prejudicial against defendants to warrant dismissal as
11 "Defendants have been forced to expend time and resources attempting to secure [plaintiff's]
12 cooperation by filing motions (including the instant Motion) and attending in-person meet and
13 confer sessions, a motion hearing, and a deposition where Plaintiff did not to appear. Plaintiff's
14 refusal to produce discovery has also impaired Defendants' ability to adequately defend against
15 Plaintiff's claims."). Therefore, this factor also weighs in favor of dismissal.

16 3. Public Policy Favoring Disposition of Cases on Their Merits

17 The Court finds that the fourth factor also weighs in favor of dismissal. While public policy
18 favors disposition of cases on their merits, "a case that is stalled or unreasonably delayed by a
19 party's failure to comply with deadlines and discovery obligations cannot move forward toward
20 resolution on the merits." In re Phenylpropanolamine, 460 F.3d at 1228. As such, this factor
21 "'lends little support' to a party whose responsibility it is to move a case toward disposition on
22 the merits but whose conduct impedes progress in that direction." Id. (quoting In re the EXXON
23 VALDEZ, 102 F.3d 429, 433 (9th Cir. 1996) (noting that plaintiffs' total refusal to provide
24 discovery obstructed resolution of their claims on the merits); In re Eisen, 31 F.3d at 1454
25 (giving weight to the plaintiff's failure to specify why it is important that his actions be resolved
26 on their merits); Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991) (observing
27 that it is the responsibility of the moving party to move toward disposition on the merits).
28

1 It has been over nine months since Plaintiff's counsel last contacted Defense counsel and
2 the discovery window has closed and yet Plaintiff has not made any effort to move this case
3 toward a resolution on the merits. Plaintiff's apparent abandonment of this case overcomes the
4 public policy and favors dismissal.

5 4. Availability of Less Drastic Sanctions

6 "[B]ecause dismissal is so harsh a penalty, it should be imposed only in extreme
7 circumstances." Meeks, 2017 WL 908733, at *5. Before imposing a dismissal sanction, a court
8 must consider the "impact of the sanction and the adequacy of less drastic sanctions." United
9 States ex rel. Wiltec Guam, Inc., 857 F.2d at 604 (quoting Malone, 833 F.2d at 131 and United
10 States v. Nat'l Med. Enter., 792 F.2d 906, 912 (9th Cir. 1986)). In Kahaluu Constr. Co., the Ninth
11 Circuit opined that "the district court is generally required to discuss alternative sanctions; but,
12 in exceptional cases, where it is clear that no other alternative would have been reasonable, we
13 may affirm a dismissal or default judgment despite the absence of such a discussion." Id. (citing
14 Halaco Eng'g Co. v. Costle, 843 F.2d 376, 381 (9th Cir. 1998)) ("consideration of less severe
15 penalties must be a reasonable explanation of possible and meaningful alternatives."). If a court
16 fails to warn a claimant "explicitly or implicitly that their procedural lapses might result in a
17 judgment against them" then it places that court's order of dismissal "in serious jeopardy." Id.
18 at 605. In sum, a "three-part analysis determines whether a court properly considered the
19 adequacy of less drastic sanctions: (1) did the court explicitly discuss the feasibility of less drastic
20 sanctions and explain why alternative sanctions would be inappropriate, (2) did the court
21 implement alternative sanctions before ordering dismissal, and (3) did the court warn the party
22 of the possibility of dismissal before actually ordering dismissal?" U.S. Equal Emp't Opportunity
23 Com'n, 2009 WL 1287757, at *4 (quoting Adriana Int'l. Corp., 913 F.2d at 1412-13). All three of
24 these factors support the Court's dismissal recommendation.

25 The Court has considered and rejected the possibility of lesser sanctions. Monetary
26 sanctions were ineffective in forcing Plaintiff to comply with his discovery obligations and court
27 orders were ignored. As a result, monetary sanctions are not appropriate now. The Court also
28 has considered evidentiary sanctions, but finds they are unlikely to be successful given the fact

1 that Plaintiff has refused to participate in the discovery and litigation process despite the Court's
2 warning that such a failure could result in evidentiary or dismissal sanctions. In addition,
3 "evidentiary sanctions are most appropriate when a party fails to provide one specific type of
4 discovery." See Chambers v. Janssen Pharmaceuticals, Inc., 2018 WL 3706695, at *6 (S.D. Cal.,
5 Aug. 3, 2018). Here, Plaintiff has not provided any discovery so there is no appropriate
6 evidentiary sanction or jury instruction. See Alexis v. Rogers, 2017 WL 1967328, at *7 (S.D.
7 Cal., May 12, 2017) ("evidentiary sanctions would not be appropriate in this case as Plaintiff has
8 refused to engage in any discovery or litigation since at least January 2017. As such, any
9 evidentiary sanction would have to be broad, excluding a significant amount of evidence and
10 essentially preventing Plaintiff from presenting her case").² Finally, the Court repeatedly warned
11 Plaintiff that continued failures to participate in discovery and comply with Court orders could
12 result in dismissal of his case. See ECF No. 35 at 11; ECF No. 29 at 3. Despite repeated warnings,
13 court orders, and the imposition of monetary sanctions, Plaintiff refused to comply or litigate
14 this case. As a result, the Court finds that this factor also weighs in favor of a dismissal sanction.

15 5. Conclusion

16 For the reasons set forth above, the Court finds that Plaintiff knowingly, intentionally, and
17 willfully failed to comply with Court orders and the discovery process and, therefore, all of the
18 Hullinger factors weigh in favor of dismissal. See Hullinger, 2016 WL 7444620, at *8 (quoting
19 Valley Engineers Inc., 158 F.3d at 1057). Further, the Court finds that Plaintiff has unreasonably
20 delayed in prosecuting this action which further warrants dismissal. See Ortega, 2022 WL

23 ² Citing Leon v. IDX Sys. Corp., 464 F.3d 951, 960–61 (9th Cir. 2006) (affirming a dismissal
24 sanction where an evidentiary sanction would have been "futile" and a jury instruction that
25 created a presumption in favor of defendants still "would leave [d]efendants equally helpless to
26 rebut any material that [p]laintiff might use to overcome the presumption.") and Anheuser-
27 Busch, Inc. v. Natural Beverage Distrib., 69 F.3d 337, 352 (9th Cir. 1995) (affirming a dismissal
28 sanction because plaintiff's repeated violations of the court's orders and concealment of
documents demonstrated that "dismissal was the only real alternative," where "the court
anticipate[d] continued deceptive misconduct" and there was no "reasonable assurance that the
truth would be available.").

1 4386784, at *2. The Court, therefore, recommends that Defendants' motion be granted and the
2 instant case dismissed with prejudice.

3 **D. Defendants are Entitled to the Reasonable Expenses, Including Attorney's**
4 **Fees, Incurred in Bringing the MTD**

5 Defendants seek to recover the \$1,140 they spent in attorney's fees preparing and filing
6 the current MTD. Under Fed. R. Civ. P. 37, the movant's reasonable expenses, including
7 attorney's fees, must be awarded if the motion is granted and no exceptions apply:

8 If the motion is granted—or if the disclosure or requested discovery is provided
9 after the motion was filed—the court must, after giving an opportunity to be heard,
10 require the party or deponent whose conduct necessitated the motion, the party
11 or attorney advising that conduct, or both to pay the movant's reasonable
12 expenses incurred in making the motion, including attorney's fees. But the court
13 must not order this payment if:

- 14 (i) the movant filed the motion before attempting in good faith to obtain the
15 disclosure or discovery without court action;
16 (ii) the opposing party's nondisclosure, response, or objection was substantially
17 justified; or
18 (iii) other circumstances make an award of expenses unjust.

19 Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

20 Fee awards, are subject to two conditions. Superior Consulting Servs., Inc. v. Steeves-
21 Kiss, No. 17-CV-06059-EMC, 2018 WL 2183295, at *1 (N.D. Cal. May 2018), aff'd by 786
22 Fed.Appx. 648 (2019) (citing Fed. R. Civ. P. 11(c)(2), (4)). The award must be limited to fees
23 directly resulting from the violation, and the fees awarded must be reasonable. Fed. R. Civ. P.
24 37(b)(2)(C) ("the court must order the disobedient party, the attorney advising that party, or
25 both to pay the reasonable expenses, including attorney's fees, caused by the failure");
26 Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178, 1186, n. 5 (2017) ("Rule-based and
27 statutory sanction regimes similarly require courts to find such a causal connection before
28 shifting fees.") (quoting Fed. R. Civ. P. 37(b)(2)(C)). A "court can shift only those attorney's fees
incurred because of the misconduct at issue ... [The] causal connection ... is appropriately
framed as a but-for test: The complaining party [] may recover only the portion of his fees that
he would not have paid but for the misconduct." Goodyear Tire, 137 S.Ct. at 1186–87.

1 The Court grants Defendants' request for reasonable expenses as Plaintiff did not oppose
2 the instant MTD and no exception to an award of reasonable expenses applies. First, but for
3 Plaintiff's failure to comply with his discovery obligations and this Court's orders, Defendants
4 would not have needed to bring the instant MTD. Next, Defendants tried to obtain Plaintiff's
5 discovery responses and document production through the meet and confer process but Plaintiff
6 refused to participate or even respond to counsel's communications. Third, there is no
7 substantial justification for Plaintiff's failure to comply with court orders and to engage in the
8 litigation process. Lastly, the Court is not aware of any fact that would make an award of
9 expenses unjust. As the Court finds that an award of reasonable expenses is appropriate and
10 no exception applies, the issue is whether Defendant's requested expenses are reasonable.

11 Defendants seek monetary sanctions of \$1,140.00, which constitutes the costs incurred
12 in preparing and filing the instant MTD. Booth Decl. at ¶ 27. Counsel for Defendant, Ms. Booth,
13 states that she spent two (2) hours preparing the MTD and that her billing rate is \$570 per hour
14 (2.0 x \$570 = \$1,140). *Id.* After reviewing Ms. Booth's declaration and considering the lack of
15 objection, the Court finds that Ms. Booth's hourly rate is reasonable and in line "with those
16 prevailing in the community for similar services by lawyers of reasonably comparable skill,
17 expertise, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). The Court also finds
18 that the requested two (2) hours for preparing the instant MTD is extremely reasonable. Finally,
19 the Court notes that Plaintiff failed to oppose the request for sanctions or to object to the hourly
20 rate requested and the time spend by counsel drafting the MTC. *See* Docket.

21 For the reasons set forth above, the Court finds that monetary sanctions are appropriate.
22 The Court further finds that Plaintiff did not provide any substantial justification for his failure to
23 comply with his discovery obligations or follow this Court's orders and there are no "other
24 circumstances [that] make an award of expenses unjust." *See* Fed. R. Civ. P. 37(d). Accordingly,
25 the Court **GRANTS** Defendants' request for monetary sanctions in the amount of \$1,140.00 and
26 orders Plaintiff and his attorney, James McDanel of the Law Offices of James McDanel, to pay
27 by **January 5, 2024**. This sanction is in addition to the monetary sanction ordered in
28 September 2023.

1 **RECOMMENDATION**

2 For the reasons set forth above, the Court finds that Plaintiff has knowingly, intentionally,
3 and willfully failed to comply with Court orders, refused to respond to discovery or take any
4 efforts to move this case toward resolution, and unreasonably delayed the resolution of this case
5 to the detriment of Defendants. As a result, and after considering all the requisite factors, the
6 Court **RECOMMENDS** that the District Judge issue an order (1) approving and adopting this
7 Report and Recommendation and (2) granting Defendants’ Motion to Dismiss.³

8 **IT IS HEREBY ORDERED** that any written objections to this Report must be filed with
9 the Court and served on all parties **no later than January 3, 2024**. The document should be
10 captioned “Objections to Report and Recommendation.”

11 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the Court
12 and served on all parties **no later than January 10, 2024**. The parties are advised that failure
13 to file objections within the specified time may waive the right to raise those objections on
14 appeal of the Court’s order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

15 **IT IS SO ORDERED.**

16 Dated: 12/19/2023

17 
18 Hon. Barbara L. Major
19 United States Magistrate Judge
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26 ³ Additionally, Civil Local Rule 7.1(f)(3)(c) states that “[i]f an opposing party fails to file the
27 papers in the manner required by Civil Local Rule 7.1.e.2, that failure may constitute a consent
28 to the granting of a motion or other request for ruling by the Court.” Accordingly, Plaintiff’s lack
of opposition to the instant motion is another factor in support of the Court’s recommendation
for granting Defendants’ Motion to Dismiss.