

1 obtaining testimony from Defendant that would support its claims against him and has caused
2 Plaintiff to incur unnecessary attorney’s fees and costs associated with the depositions and related
3 motion practice. *Motion for Sanctions* (ECF No. 124), 4.

4 DISCUSSION

5 Rule 37(b) of the Federal Rules of Civil Procedure provides the court with a wide range of
6 sanctions for a party’s failure to adequately engage in discovery or comply with discovery orders.
7 “The Rule provides a panoply of sanctions, from the imposition of costs to entry of default.” *United*
8 *States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C.), *aff’d*, 166 F.R.D. 367 (M.D.N.C. 1996).
9 “Discovery sanctions serve the objectives of discovery by correcting for the adverse effects of
10 discovery violations and deterring future discovery violations from occurring.” *Taylor v. Illinois*, 484
11 U.S. 400, 425 (1988). The Ninth Circuit reviews a district court’s sanction order under an abuse of
12 discretion standard. *Sigliano v. Mendoza*, 642 F.2d 309 (9th Cir. 1981); *See also United States v.*
13 *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980); *David v. Hooker, Ltd.*, 560
14 F.2d 412, 418-19 (9th Cir. 1977); 6 J. Moore, *Federal Practice* s 37.08 (2d ed. 1976). Thus, the
15 district court has great latitude in imposing sanctions under Rule 37. *Lew v. Kona Hosp.*, 754 F.2d
16 1420, 1425–26 (9th Cir. 1985).

17 Rule 37(d)(1) specifically authorizes a court to issue sanctions when a party or its
18 representative, or a person designated under Rule 30(b)(6) or 31(a)(4), fails to appear for that person’s
19 deposition. Fed. R. Civ. P. 37(d)(1)(A)(i). Such sanctions may include (i) directing that the matters
20 embraced in the order or other designated facts be taken as established for purposes of the action, as
21 the prevailing party claims, (ii) prohibiting the disobedient party from supporting or opposing
22 designated claims or defenses, or from introducing designated matters into evidence, and (iii)
23 ordering the disobedient party to pay the reasonable expenses (including attorney fees) caused by the
24 party’s failure to appear. *See* Fed. R. Civ. P. 37(d)(3). The sanctions must, however, bear a
25 reasonable relationship to the subject of discovery that was frustrated by the sanctionable conduct.
26 *Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir.2001), *cert. denied sub nom.*, *McLachlan v. Simon*,
27 536 U.S. 941, 122 S.Ct. 2623, 153 L.Ed.2d 806 (2002). Such sanctions “are appropriate only in
28 ‘extreme circumstances’ and where the violation is ‘due to willfulness, bad faith, or fault of the

1 party.” *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.), *cert. denied*, 537 U.S. 1018,
2 123 S.Ct. 536, 154 L.Ed.2d 425 (2002) (citations omitted); *Computer Task Group, Inc. v. Brotby*, 364
3 F.3d 1112, 1115 (9th Cir.2004) (per curiam). “Disobedient conduct not shown to be outside the
4 litigant's control meets this standard.” *In re Phenylpropanolamine (PPA) Products Liability Litig.*,
5 460 F.3d 1217, 1233 (9th Cir.2006) (citations omitted).

6 Further, in deciding whether to grant a motion for sanctions under Rule 37(b)(2)(A) for
7 noncompliance with discovery, the Court should consider five factors: “(1) the public's interest in
8 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice
9 to [the party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits;
10 and (5) the availability of less drastic sanctions.” *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d
11 1007, 1022 (9th Cir.2002); *Computer Task Group, Inc.*, 364 F.3d at 1115. “Where a court order is
12 violated, the first two factors support sanctions and the fourth factor cuts against a default. Therefore,
13 it is the third and fifth factors that are decisive.” *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th
14 Cir.1997); *Computer Task Group, Inc.*, 364 F.3d at 1115.

15 Plaintiff seeks the following sanction order against Defendant Michael based on his failure to
16 appear for two scheduled depositions:

17 (1) ordering facts as established that Defendant Michael did not have
18 funds sufficient to cover the credit advances that he requested and
19 received from Caesars on September 20-21, 2014, the detail of such
20 facts which constitute fraud upon Caesars;

21 (2) prohibiting Defendant Michael from supporting his defenses to or
22 opposing Caesars’ fraud claim or from introducing any evidence to
23 oppose Caesars’ fraud claim; and

24 (3) awarding Caesars’ its reasonable expenses (including attorneys’
25 fees) for two depositions where Defendant Michael failed to appear, as
26 well as the need to file two (2) discovery motions related to such
27 failures.

28 *Motion* (ECF No. 124), at 3:9-17. Defendant argues that these essentially dispositive sanctions are
not warranted. Specifically, Defendant argues that at the time of the October 20, 2017 deposition he
had filed an appeal of the District Court’s Order (ECF No. 77), which acted as a stay of this case even
though the appeal was later dismissed for want of jurisdiction. *Opposition* (ECF No. 132), 3.
Defendant also argues that such sanctions are inappropriate because any prejudice to Plaintiff has

1 been minimal and because less drastic monetary sanctions are available at this time, which would
2 avoid “rushing to judgment.”

3 Upon balancing the five factors discussed above, the Court finds that the evidentiary and
4 monetary sanctions requested by Plaintiff are warranted. Over the course of what is becoming very
5 protracted litigation, Defendant Michael has consistently failed to abide by Court orders and
6 participate in discovery.¹ Defendant failed to appear for or object to a duly noticed deposition in
7 December 2016; has failed to comply with the District Court’s order directing him to specifically
8 perform under the Credit Agreement and execute a credit instrument; and failed to appear for the duly
9 noticed deposition on October 20, 2017 despite the Court’s order to do so. Because of Defendant’s
10 continued dilatory and what can only be defined as bad faith conduct,² Plaintiff has been prejudiced in
11 its ability to proceed with the merits of this litigation and has frustrated the Court’s management of
12 the docket. Given Defendant’s conduct, it is also obvious to the Court that less drastic sanctions
13 (monetary or otherwise) would be fruitless. In sum, despite the general public policy of deciding
14 cases on the merits, Defendant’s conduct justifies an order awarding Plaintiff’s requested evidentiary
15 and monetary sanctions. But because the evidentiary sanctions are effectively dispositive, the Court
16 will make that aspect of this order a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B)
17 and LR IB 1-4 of the Local Rules of Practice. Accordingly,

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24 ¹ The Court again rejects Defendant’s “stay” argument. As discussed during the October 16, 2017 hearing on
25 Defendant’s motion for protective order, no stay was in place at the time of the deposition(s); nor is there currently a stay
26 given Defendant’s Petition for Writ of Mandamus.

27 ² Defendant has argued that his physical or medical conditions have hindered his ability to participate in this case.
28 However, Defendant has failed to produce any evidence to support his claims of such a disabling conditions that would
preclude him from actively participating in this case. Without evidence, the Court will not consider Defendant’s alleged
conditions as an excuse for his conduct.

- b. September 12-14, 2014;
- c. September 20-22, 2014;
- d. June 22, 2017;
- e. June 28, 2017; and
- f. July 10, 2017.

2. Defendant Michael knew that he did not have sufficient funds to pay or satisfy a \$3,000,000 credit obligation on each of the afore-mentioned dates.

3. Despite this knowledge that he did not have sufficient funds to satisfy a \$3,000,000 credit obligation, Defendant Michael induced Caesars to act by advancing him credit up to and including the sum of \$3,000,000 based upon his history of gambling with Caesars and the express provisions of the credit application.

4. Defendant Michael expressly promised that “Before drawing on my line of credit, if granted, I agree to sign credit instruments (i.e., checks) in the amount of the draw” and “If I receive an advance before I execute a credit instrument, I promptly will sign a credit instrument in the amount of the advance.”

5. Defendant Michael had no intention to sign a credit instrument or to repay the advance when he accepted the \$3,000,000 credit advance in September 2014.

6. Nevertheless and despite this lack of promissory intent, Defendant Michael did, in fact, induce Caesars to act by advancing credit in the sum of the \$3,000,000 to Defendant Michael.

B) Defendant Michael should be prohibited from supporting his defenses to or opposing Caesars’ fraud claim or from introducing any evidence to oppose Caesars’ fraud claim.

DATED this 11th day of January, 2018.



GEORGE FOLEY, JR.
United States Magistrate Judge

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NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).