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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

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5 SEIKO EPSON CORPORATION, et al.,
6 Plaintiffs,
7 v.
8 INKSYSTEM LLC, et al.,
9 Defendants.

Case No. 3:16-cv-0524-RCJ-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

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11 This Report and Recommendation is made to the Honorable Robert C. Jones, United States
12 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
13 § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiffs' Seiko Epson Corporation and Epson
14 America, Inc., ("plaintiffs") renewed motion to compel and for terminating sanctions (ECF No.
15 91), regarding defendants ART LLC, AF LLC, Inkredible LLC LLC, Andriy Kravchuk, Artem
16 Koshkalda, Igor Bielov, and Vitalii Maliuk (collectively, "defendants")¹. Defendants opposed
17 (ECF No. 94) and plaintiffs replied (ECF No. 98). The court has thoroughly reviewed the record
18 and recommends that plaintiffs' motion be granted.
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20 **I. PROCEDURAL HISTORY**

21 On May 26, 2017, plaintiffs filed an emergency motion to compel and for sanctions. (ECF
22 No. 80.) Plaintiffs motion was based on "defendants' continued and unexcused discovery
23 failures," such as ignoring court orders, failing to appear in court, missing discovery deadlines,
24 failing to provide even basic discovery, and generally abusing the discovery process. (Id. at 1-5.)
25 On June 8, 2017, this court held a hearing on the emergency motion for sanctions. (ECF No. 84.)
26 The motion was granted in part and denied in part, and defendants were ordered to provide various
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¹ Defendants Inksystem LLC and Lucky Print LLC are not subject of this motion.

1 discovery responses and pay \$5,554.79 in attorney's fees and costs to plaintiffs. (ECF No. 84.)

2 On June 16, 2017 plaintiff filed another motion to compel and for sanctions (ECF No. 85).
3 Plaintiffs' motion related to depositions of defendant Kravchuk and defendants' continued, willful
4 noncompliance with court orders and discovery obligations. (ECF No. 85.) Plaintiffs argued that
5 defendants are "willfully withholding relevant evidence which clearly prejudices plaintiffs and
6 supports the relief requested," and defendants are "simply abusing the discovery process to delay
7 a final adjudication." (Id. at 6.) This court granted the motion and ordered that: 1) defendants pay
8 \$16,146.50 to plaintiffs; 2) defendants be precluded from seeking any offset as to damages using
9 documents or information not disclosed or produced; 3) a factual finding of willfulness is entered
10 against defendants as to plaintiffs' trademark claims; 4) Andrey Ushakov is to be produced for
11 deposition in the United States on shortened notice; and 5) if defendants fail to comply with the
12 court's order, the court will issue a report and recommendation that all of defendants' answers be
13 stricken and their defaults entered. (ECF No. 88.) On June 28, 2017, plaintiffs filed a renewed
14 motion to compel and for terminating sanctions due to defendants' continued failure to comply
15 with this court's prior orders. (ECF No. 91.)

16 Plaintiffs have accurately recounted the history of defendants' litigation tactics (See ECF
17 Nos. 80, 85, 91). Defendants have repeatedly disobeyed court orders, applicable rules, and
18 plaintiffs' properly propounded discovery requests. Defendants continue to withhold evidence
19 directly related to the issues of this case and have repeatedly shown their intention to continue to
20 violate court orders and ignore discovery obligations. Plaintiffs now seek case-terminating
21 sanctions against defendants for their continued bad faith in the face of court orders, admonitions,
22 and sanctions.

23 **II. DISCUSSION AND ANALYSIS**

24 Plaintiffs seek case terminating sanctions based upon two alternative grounds:
25 (1) Fed.R.Civ.P. 37(b)(2)(A)(iii)-(vi) and Local Rule IA 11-8; and (2) the court's inherent power
26 to enter a default judgment to ensure the orderly administration of justice and the integrity of its
27 orders. Having heard oral argument and having reviewed all documents in the record, the court
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1 finds such terminating sanctions appropriate.

2 **A. Fed.R.Civ.P. 37(b) and Local Rule IA 11-8**

3 Fed.R.Civ.P. 37(b) and Local Rule IA 11-8 provides for sanctions where a party fails to
4 comply with a court order. FRCP 37(b)(2)(A)(iii)-(vi) states that if a party disobeys a discovery
5 order the court may issue an order striking pleadings, staying proceedings, dismissing the action,
6 or rendering a default judgment against the disobedient party. LR IA 11-8(d) states that the court
7 may impose any and all appropriate sanctions on a party who fails to comply with any order of
8 this court.

9 Plaintiffs argue that due to defendants' willful violation of numerous court orders, such as
10 their failure to appear in person for hearings and failure to produce complete discovery responses
11 and requests, the Federal and Local Rules allow the Court to enter terminating sanctions. (ECF
12 No. 91 at 7.) The court agrees that terminating sanctions are appropriate at this time. Defendants
13 were specifically admonished in this court's June 19, 2017 order, that if they again failed to
14 comply, this court would issue a report and recommendation that all of defendants' answers be
15 stricken and their defaults entered. (See ECF No. 88.) Due to defendants' repeated disobedience
16 and failure to comply with this court's orders, it is appropriate to strike defendants' answers and
17 enter default judgments against them.

18 **B. The Court's Inherent Power to Sanction**

19 Further, pursuant to the court's inherent power to sanction, dismissal is an available
20 sanction when "a party has engaged deliberately in deceptive practices that undermine the integrity
21 of judicial proceedings" or "has willfully deceived the court and engaged in conduct utterly
22 inconsistent with the orderly administration of justice." *Leon v. IDX Systems Corp.*, 464 F.3d 951,
23 968 (9th Cir. 2006), citing *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348
24 (9th Cir. 1995). The district court is required to consider the following factors before imposing
25 the "harsh sanction" of dismissal: "(1) the public's interest in the expeditious resolution of
26 litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the other party; (4)
27 the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic
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1 sanctions.” Hester v. Vision Airlines, Inc., 687 F.3d 1162, 1169 (9th Cir. 2012) (quotation omitted).

2 **1. The public's interest in the expeditious resolution of litigation**

3 “Orderly and expeditious resolution of disputes is of great importance to the rule of law ...
4 [and b]y the same token, delay in reaching the merits ... is costly in money, memory,
5 manageability, and confidence in the process.” Allen v. Bayer Corp. (In re: Phenylpropanolamine
6 (PPA) Prods. Liab. Litig.), 460 F.3d 1217, 1227 (9th Cir. 2006). Here, defendants’ behavior and
7 continued failure to comply with several court orders have greatly delayed this matter and their
8 behavior is inconsistent with the purpose of the Federal Rules of Civil Procedure to provide a “just,
9 speedy, and inexpensive determination” of this action. Fed.R.Civ.P. 1. This factor favors
10 dismissal.

11 **2. The court's need to manage its docket**

12 “Where a court order is violated, the first and second factors will favor sanctions and the
13 fourth will cut against them.” Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th
14 Cir. 2004) citing Payne v. Exxon Corp., 121 F.3d 503, 507 (9th Cir. 1997). The court agrees with
15 plaintiffs’ recitation of the myriad case management problems the court has experienced in this
16 proceeding, most importantly here are defendants’ numerous failures to obey court orders,
17 including failure to appear for court hearings. This factor favors dismissal.

18 **3. The risk of prejudice to the opposing party**

19 Here, plaintiffs argue that defendants are not prejudiced as they have been given numerous
20 opportunities to comply with this court’s orders and continually fail to do so. Defendants actions
21 have substantially and unreasonably delayed this case, such that if this case continues on the way
22 it has, plaintiffs will be prejudiced and continue to incur substantial costs. Any prejudice to
23 defendants is far outweighed by prejudice to plaintiffs. This factor favors dismissal.

24 **4. The public policy favoring disposition of cases on their merits**

25 “Public policy favoring disposition of cases on their merits strongly counsels against
26 dismissal.” Allen, 460 F.3d at 1128. While plaintiffs acknowledge this, they also argue that the
27 impact of this factor should be lessened because “this case began with an ex parte seizure order
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1 where the District Court already found that plaintiffs were likely to succeed on the merits.” (ECF
2 No. 91 at 10.) Further, a preliminary injunction, and thus a finding of likelihood of success on the
3 merits, has already issued in this case. (ECF No. 33.) This factor favors dismissal.

4 **5. The availability of less drastic sanctions**

5 When considering this factor, the court must compare the impact of dismissing the case to
6 the adequacy of a less drastic sanction. *Malone v. U.S. Postal Service*, 833 F.2d 128, 131-32 (9th
7 Cir. 1987). The Ninth Circuit has outlined three factors to help facilitate this analysis, which are
8 whether the court: “(1) explicitly discussed the alternative of lesser sanctions and explained why
9 it would be inappropriate; (2) implemented lesser sanctions before ordering the case dismissed;
10 and (3) warned the offending party of the possibility of dismissal.” *Computer Task Group*, 364
11 F.3d at 1116 citing *Anheuser-Busch*, 69 F.3d at 352.

12 The court has imposed increasingly more serious sanctions against defendants over the
13 course of this proceeding, and defendants have continued to engage in improper conduct. Given
14 defendants failure to comply with past orders, the court has no reason to believe it will comply
15 with future orders. Defendants were warned that their failure to comply with this court’s orders
16 would result in a recommendation to the District Court that sanctions be entered against them.
17 This factor favors dismissal.

18 Given that all of the factors weigh in favor of terminating sanctions, the court finds that
19 defendants’ answers should be stricken as a sanction for their failure to comply with this court’s
20 orders.

21 **III. CONCLUSION**

22 The court concludes that the severe sanction of dismissal is warranted in this case, as
23 outlined herein.

24 The parties are advised:

25 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
26 the parties may file specific written objections to this Report and Recommendation within fourteen
27 days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and
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1 Recommendation” and should be accompanied by points and authorities for consideration by the
2 District Court.

3 2. This Report and Recommendation is not an appealable order and any notice of
4 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s
5 judgment.

6 **IV. RECOMMENDATION**

7 **IT IS THEREFORE RECOMMENDED** that plaintiffs’ motion for case terminating
8 sanctions (ECF No. 91) be **GRANTED**.

9 **IT IS FURTHER RECOMMENDED** that defendants ART LLC, AF LLC,
10 INKREDIBLE LLC LLC, Andriy Kravchuk, Artem Koshkalda, Igor Bielov, and Vitalii Maliuk’s
11 answers (ECF Nos. 41, 49) be **STRICKEN** and their defaults entered.

12 **DATED:** August 3, 2017.

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15 UNITED STATES MAGISTRATE JUDGE