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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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Aug 02, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GREGORY R. BUTCHER, husband,
and SHARON L. BRYANT-
BUTCHER, wife,

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Plaintiffs,

v.

STEPHEN H. WARD, husband, and
MARIA WARD, wife,

Defendants.

No. 2:22-cv-00023-MKD

ORDER DISMISSING CASE WITH
PREJUDICE AND IMPOSING
SANCTIONS AGAINST
PLAINTIFFS' COUNSEL

On July 21, 2022, the Court conducted a third scheduling conference by video. ECF No. 24. Paul S. Stewart, counsel for Defendants Stephen H. Ward and Maria Ward, (jointly "Wards"), appeared by video. Plaintiffs' counsel, John A. Bardelli, did not appear despite the Court's warning that failure to attend the scheduling conference may result in dismissal for lack of prosecution. ECF No. 22 at 5. *See* ECF No. 24.

ORDER - 1

1 Plaintiffs' counsel's absence at the third scheduling conference is in
2 conformance with his history of disobeying this Court's orders and the
3 Federal/Local Rules of Civil Procedure. Since this matter was removed to the
4 Eastern District of Washington on February 14, 2022, Plaintiffs' counsel has failed
5 to meet and confer with opposing counsel on two occasions, failed to participate in
6 drafting two of three joint status reports, failed to respond to a motion for summary
7 judgment, failed to appear at two of three scheduling conferences, and failed to
8 respond to two of three of the Court's Orders to Show Cause. *See* ECF Nos. 9, 10,
9 16, 18, 19, 20, 21, 23, 24.

10 Plaintiffs' counsel has demonstrated an unwillingness to comply with this
11 Court's orders and the Federal/Local Rules of Civil Procedure, and the Court
12 concludes the appropriate remedy is to dismiss the action with prejudice pursuant
13 to Federal Rule of Civil Procedure 41(b). The Court also, pursuant to its inherent
14 power, imposes sanctions on Plaintiffs' counsel for his numerous failures to
15 participate in proceedings, failure to abide by this Court's orders, and failure to
16 comply with the Federal/Local Rules of Civil Procedure.

17 **FACTUAL BACKGROUND**

18 On February 19, 2018, Defendant Stephen H. Ward entered into a rental car
19 agreement with Hertz, a car rental company in Spokane, Washington. ECF No. 7
20 at 3; ECF No. 7-1 at 4. Former Defendant Overland West Inc. ("Overland") owns

1 and operates the Hertz car rental center where Mr. Ward leased the motor vehicle.
2 ECF No. 7 at 3. On March 2, 2018, Mr. Ward was in a motor vehicle collision
3 with Plaintiff Sharon L. Bryant-Butcher in Spokane, Washington. ECF No. 1-1 at
4 6. Mr. Ward was driving the motor vehicle he leased from Overland when the
5 collision occurred. *Id.*

6 On March 1, 2021, Plaintiffs Gregory R. Butcher and Sharon L. Bryant-
7 Butcher (jointly “Plaintiffs”), filed a complaint for damages against the Wards and
8 Overland in Spokane County Superior Court. *Id.* at 4. Plaintiffs’ Complaint
9 alleged Mr. Ward was negligent in the operation of the motor vehicle he leased
10 from Overland, and that Mr. Ward’s negligence was “imputed” to Overland. *Id.* 1
11 at 7. On May 27, 2021, Overland was served with Plaintiffs’ Summons and
12 Complaint. *Id.* at 11. The Wards were served seven months later on January 15,
13 2022. ECF No. 1 at 2. On February 14, 2022, the Wards removed the matter to
14 the Eastern District of Washington pursuant to 28 U.S.C. § 1446, diversity
15 jurisdiction. *See* ECF No. 1.

16 A Notice Setting Scheduling Conference (“Notice”) was filed on March 7,
17 2022. ECF No. 6. The Notice ordered the parties to meet and confer at least 14
18 days in advance of a scheduling conference that was set for April 26, 2022. *Id.* at
19 2. The Notice also ordered the parties to file a joint status report by April 19,
20 2022, reflecting the results of their conference and the parties’ position with

1 respect to each subject outlined in the Notice. *Id.* at 4. Shortly thereafter, on April
2 6, 2022, Overland filed a Motion for Summary Judgment asserting it is immune
3 from liability based on the Graves Amendment, 49 U.S.C. § 30106. ECF No. 7 at
4 1.

5 In response to the Court’s Notice, the Wards filed a status report on April
6 19, 2022. ECF No. 8. The Wards’ Status Report indicated that despite “multiple
7 emails by Wards’ counsel to Plaintiffs’ counsel and counsel for Defendant
8 Overland West, counsel did not confer to discuss the subjects required by the
9 Court. ECF No. 8 at 2. Plaintiff did not file a status report. Thereafter, a video
10 scheduling conference was held on April 26, 2022. *See* ECF No. 9. Counsel for
11 the Wards and Overland appeared by video on behalf of their respective clients.
12 *See* ECF No. 9. Plaintiffs’ counsel did not appear or notify the Court that he would
13 not be appearing. *See* ECF No. 9.

14 Following the scheduling conference, on April 26, 2022, the Court issued a
15 Notice Setting Second Scheduling Conference (“Second Notice”) which required
16 the parties to meet and confer and file a joint status report by May 10, 2022. ECF
17 No. 11 at 4. The Court also issued an Order to Show Cause on April 26, 2022,
18 ordering Plaintiffs to show why sanctions should not be imposed for: (1) failing to
19 meet and confer with opposing counsel prior to the scheduling conference; (2)
20 failing to file a joint status report; and (3) failing to appear at the scheduling

1 conference, as required by the Court's Notice. *See* ECF No. 10. The Court
2 provided Plaintiffs with seven days to respond to the Court's Order to Show Cause.
3 *Id.* at 3. Plaintiffs did not respond.

4 Prior to the first scheduling conference, Overland filed a Motion for
5 Summary Judgment on April 6, 2022, asserting it is immune from liability based
6 on the Graves Amendment, 49 U.S.C. § 30106. ECF No. 7 at 1. Pursuant to Local
7 Civil Rule 7(c)(2)(B), Plaintiffs had 21 days to respond to Overland's Motion.
8 Accordingly, the deadline for Plaintiffs to respond was April 27, 2022. Plaintiffs
9 did not respond on April 27, 2022, or anytime thereafter. On May 4, 2022,
10 Overland filed its Reply in Support of Summary Judgment, which noted Plaintiffs'
11 failure to respond. *See* ECF No. 15.

12 Due to Plaintiffs' failure to respond to Overland's Motion for Summary
13 Judgment, on May 5, 2022, the Court issued a second order to show cause
14 requiring Plaintiffs to show why all facts within Overland's Motion should not be
15 deemed undisputed. ECF No. 16 at 3. The Court provided Plaintiffs with seven
16 days to respond to the Court's second Order to Show Cause. *Id.* Once again,
17 Plaintiffs did not file a response or contact the Court.

18 On May 9, 2022, the Wards and Overland filed a joint status report. ECF
19 No. 17. The Joint Status Report stated that the Wards and Overland met and
20 conferred on May 9, 2022, as directed by the Court's Second Notice, however

1 Plaintiffs' counsel did not attend or participate in the parties' conference. *Id.* at 1.
2 On May 17, 2022, the Court held a second video scheduling conference. *See* ECF
3 No. 18. At the second scheduling conference, Plaintiffs' counsel appeared by
4 telephone. *See id.*

5 At the May 17, 2022, the scheduling conference, Plaintiffs' counsel asserted
6 he had not complied with either of the Court's Notices, participated in drafting
7 joint status reports with opposing counsel, or responded to the Court's two prior
8 orders to show cause because he was in the process of being evicted from his office
9 space. As stated on the record, the Court found Plaintiffs' counsel's explanation
10 insufficient and explained that despite the process of eviction, Plaintiffs' counsel
11 presumably had access to his work e-mail account (an "AOL" account which is
12 accessible by any internet connection), to which he would have received the
13 Court's notices and orders. The Court further advised Plaintiffs' counsel that he
14 could have contacted opposing counsel or the Court to explain the circumstances
15 and seek relief from the Court's deadlines.

16 The Court advised Plaintiffs' counsel that his failure to do so required
17 significant expenditure of resources by opposing counsel and wasted Court
18 resources. Due to Plaintiffs' counsel's failure to meet and confer and participate in
19 drafting the Joint Status Report, the Court postponed the scheduling conference for
20 a second time. *See* ECF No. 18.

1 On May 19, 2022, the Court issued a third order requiring Plaintiffs to show
2 cause: (1) why the matter should not be dismissed for Plaintiffs' failure to comply
3 with the Court's Orders and Plaintiffs' failure to prosecute; (2) why sanctions
4 should not be imposed for Plaintiffs' counsel's failure to meet and confer on two
5 occasions, failure to file the two ordered joint status reports, and his absence during
6 the first scheduling conference; and (3) why all facts in Overland's Motion for
7 Summary Judgment should not be deemed admitted. ECF No. 19 at 8. The Court
8 provided Plaintiffs with 14 days to respond to its third Order to Show Cause and
9 warned:

10 If Plaintiffs do not file a response, or a response with sufficient
11 explanation and documentation, before June 2, 2022, the case will be
12 dismissed with prejudice and/or sanctions will be imposed.

13 ECF No. 19 at 8.

14 In its third Order to Show Cause, the Court identified that Plaintiffs'
15 counsel's behavior in this matter is strikingly similar to his behavior in previous
16 cases, as well as another matter in the Eastern District of Washington, *Mescher et*
17 *al. v. Lowes Companies Inc et al.*, 2:17-cv-00299-RMP (failing to respond to
18 motions to dismiss and failing to respond to an order to show cause). ECF No. 19
19 at 5, 6.

20 The Court explained that in *Mescher*, like the matter at hand, the case was
initially filed by Plaintiffs' counsel in state court and subsequently removed to

1 federal court based on diversity jurisdiction. *Id.* at 6. The Court also noted that
2 Plaintiffs' counsel in *Mescher* did not file responses to two motions to dismiss.
3 *Id.* at 6 (citing 2:17-cv-00299-RMP, at ECF No. 12 at 1). Plaintiffs' counsel in
4 *Mescher* also failed to respond to an order to show cause. *Id.* Ultimately, the
5 *Mescher* court granted the motions to dismiss in part because Plaintiffs' counsel
6 did not respond to the motions or participate in litigation after the matter was
7 removed. *Id.*

8 Also, within the Court's third Order to Show Cause, the Court noted that in
9 2011, the Washington State Bar temporarily suspended Plaintiffs' counsel in part
10 because he failed to file a responsive pleading to a motion for summary judgment.
11 ECF No. 19 at 6.¹ Plaintiffs' counsel then sought a continuance of the summary
12 judgment hearing contending he was ill. *Id.* After the hearing, the court denied
13 Plaintiffs' counsel's motion for a continuance, granted the defendant's motion, and
14 dismissed the case. *Id.* Plaintiffs' counsel then failed to notify his clients of the
15 dismissal of their suit and appealed the dismissal without his client's knowledge or
16 permission. *Id.* at 7.

17

18 ¹Citing:

19 <https://www.mywsba.org/PersonifyEbusiness/DisciplineNoticeDirectory/Disciplin>
20 eNoticeDetail.aspx?dID=1607.

1 On June 3, 2022, one day *after* the 14-day deadline, Plaintiffs filed a
2 response to the Court's third Order to Show Cause. *See* ECF No. 20.² In the
3 Response, Plaintiffs' counsel asserted that his office was in the process of eviction
4 proceedings. *Id.* at 2. Plaintiffs' counsel explained that his failure to respond to
5 the Court's previous Orders to Show cause was due to the eviction proceedings.
6 *Id.* at 2-3. Plaintiffs' counsel also asserted that he was without the use of
7 computers and electronic equipment from approximately March 15, 2022, to April
8 1, 2022, which additionally contributed to his failure to respond to the Court's
9 Orders to Show Cause. *Id.*

10 Plaintiffs' Response to the third Order to Show Cause, however, did not
11 provide reasoning why the Court should not deem all facts in Overland's Motion
12 for Summary Judgment as undisputed, as required by the Court's third Order to
13 Show Cause. *See id.*; ECF No. 19 at 8. Accordingly, on June 21, 2022, due to
14 Plaintiffs' counsel failure to respond and lack of participation in the litigation, the
15 Court accepted all facts in Overland's motion as undisputed and granted
16 Overland's Motion for Summary Judgment. ECF No. 21 at 2.

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18 _____
19 ² Plaintiffs' counsel left a voicemail for the Court on June 2, 2022, where he
20 asserted he attempted to file the Response on the June 2, 2022 deadline, but
encountered difficulties with the Court's electronic filing system.

1 On June 24, 2022, the Court issued a Third Notice Setting Scheduling
2 Conference to be held on July 21, 2022. ECF No. 22. In bold print the Court
3 instructed and warned:

4 **If Plaintiffs' counsel fails to participate in the conference with
5 opposing counsel, fails to file a Joint Status Report, or fails to
6 attend the scheduling conference, he shall risk the matter being
7 dismissed for lack of prosecution.**

8 ECF No. 22 at 5.

9 Plaintiffs complied with the first requirement and conferred with opposing
10 counsel to draft a joint status report which was filed on July 5, 2022. *See* ECF No.
11 22. However, despite the Court's explicit warning against failing to attend the
12 scheduling conference, Plaintiffs' counsel failed to appear or provide notice of an
13 inability to appear at the July 21, 2022, conference. *See* ECF No. 24. At the
14 hearing, the Court waited approximately ten minutes for Plaintiffs' counsel to
15 appear and attempted to reach Plaintiffs' counsel by telephone two times. Each
16 time the Court called Plaintiffs' counsel's phone, it rang without answer and there
17 was not an option to leave a voicemail. Plaintiffs' counsel did not respond to the
18 Court's telephone calls or contact the Court in any manner after the July 21, 2022
19 scheduling conference.

20 After attempting to reach Plaintiffs' counsel, the Court directed the Wards'
21 counsel to file a declaration detailing the costs the Wards have incurred for their
22 counsel's preparation for and attendance at the three scheduling conferences. Per

1 the Court's instruction, the Wards' counsel, Paul S. Stewart, submitted a
2 declaration, ECF No. 25, stating his hourly rate and an itemized list detailing the
3 time he has spent on this matter. Mr. Stewart asserts that the total fees his client
4 has paid him to prepare for and attend the Court's scheduling conferences and to
5 prepare his declaration equals \$770.00 (4.4 hours at an hourly rate of \$175). ECF
6 No. 25 at 3, 4.

7 As of the filing of this Order, Plaintiffs' counsel has not contacted the Court
8 to provide an explanation for his absence at the July 21, 2022, scheduling
9 conference.

10 **LEGAL STANDARDS**

11 **A. Dismissal With Prejudice**

12 Federal Rule of Civil Procedure 41(b) permits dismissal of an action for the
13 failure to prosecute or comply with rules or a court order. Fed. R. Civ. P. 41(b).
14 Under Rule 41(b), a court may dismiss an action *sua sponte* for failure to prosecute
15 or to comply with a court order. Fed. R. Civ. P. 41(b). *See Chambers v. NASCO,*
16 *Inc.*, 501 U.S. 32, 44 (1991) (recognizing that a court "may act *sua sponte* to
17 dismiss a suit for failure to prosecute"); *Hells Canyon Pres. Council v. U.S. Forest
18 Serv.*, 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that a court may *sua sponte*
19 dismiss an action for a plaintiff's failure to prosecute or comply with the rules of
20 civil procedure or the court's orders pursuant to Rule 41(b)); *Ghazali v. Moran*, 46

1 F.3d 52, 53 (9th Cir.1995) (failure to follow a district court's local rules is a proper
2 ground for dismissal); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.1992)
3 ("[p]ursuant to Federal Rule of Civil Procedure 41(b), the district court may
4 dismiss an action for failure to comply with any order of the court"); *Thompson v.*
5 *Housing Auth. of City of L.A.*, 782 F.2d 829, 831 (9th Cir.1986) (stating that
6 district courts have inherent power to control their dockets and may impose
7 sanctions including dismissal or default).

8 In determining whether a Rule 41(b) dismissal is appropriate, a court must
9 weigh the following factors: "(1) the public's interest in expeditious resolution of
10 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the
11 defendants; (4) the public policy favoring disposition of cases on their merits and
12 (5) the availability of less drastic sanctions." *Omstead v. Dell, Inc.*, 594 F.3d 1081,
13 1084 (9th Cir. 2010) (quotations omitted). Dismissal is appropriate "where at least
14 four factors support dismissal . . . or where at least three factors strongly support
15 dismissal." *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998)
16 (citation and quotation marks omitted). Dismissal under Rule 41(b) operates as an
17 adjudication on the merits. Fed. R. Civ. P. 41(b).

18 *1. Expeditious Resolution of Litigation*

19 "As the first of the Federal Rules of Civil Procedure reflects, the public has
20 an overriding interest in securing 'the just, speedy, and inexpensive determination

1 of every action.”” *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d
2 1217, 1227 (9th Cir. 2006) (quoting Fed. R. Civ. P. 1). “Orderly and expeditious
3 resolution of disputes is of great importance to the rule of law. By the same token,
4 delay in reaching the merits, whether by way of settlement or adjudication, is
5 costly in money, memory, manageability, and confidence in the process.”
6 *Phenylpropanolamine*, 460 F.3d. at 1227. Non-compliance with procedural rules
7 and a court’s orders wastes “valuable time that [the court] could have devoted to
8 other... criminal and civil cases on its docket.” *Ferdik*, 963 F.2d at 1261.

9 As a result of Plaintiffs’ failures to abide by this Court’s orders and the
10 Federal/Local Rules of Civil Procedure, this Court has: (1) held three status
11 conferences; (2) issued three orders to show cause; and (3) reset scheduling
12 conferences on two occasions. Each time the Court undertakes one of these
13 activities, valuable and limited Court resources are expended. Because of the
14 continued exhaustion of valuable Court resources, the Court finds the first factor
15 weighs heavily in favor of dismissal.

16 *2. Docket Management*

17 District judges are best situated to decide when delay in a particular case
18 interferes with docket management and the public interest. *Ash v. Cvetkov*, 739
19 F.2d 493, 496 (9th Cir. 1984). The pressing caseload in most district courts
20 requires the cooperation of litigants in moving forward so that judicial resources

1 are available to others. *Id.*; see *Phenylpropanolamine*, 460 F.3d at 1234 (affirming
2 a dismissal sanction where the district court had “observed that many of the cases
3 subject to its dismissal order had been pending for close to, or over, a year without
4 forward movement, and that such lack of diligence does not serve the public
5 interest in expeditious resolution of litigation”).

6 It has been 17 months since this matter was originally filed in Spokane
7 County Superior Court and six months since the matter was removed to the Eastern
8 District of Washington. Due to Plaintiffs’ continued failure to follow this Court’s
9 orders and participate in scheduling conferences, this Court has not yet been able
10 to issue a scheduling order. This has prevented the Court from setting case
11 management deadlines and a trial date. Given the size of this Court’s criminal and
12 civil dockets, this type of delay creates scheduling problems for many other
13 matters. As such, the Court finds the second factor also weighs strongly in favor of
14 dismissal.

15 *3. Prejudice to Defendants*

16 The Ninth Circuit has held that the pendency of a lawsuit, cannot by itself be
17 considered as prejudicial enough to warrant dismissal. *Ash*, 739 F.2d 493, 496 (9th
18 Cir. 1984). “Otherwise a delay of even one day would be justifiable grounds for
19 dismissal for lack of prosecution. Limited delays and the prejudice to a defendant

20

1 from the pendency of a lawsuit are realities of the system that have to be accepted,
2 provided the prejudice is not compounded by ‘unreasonable’ delays.” *Id.*

3 Here, the Court finds that Plaintiffs have caused unreasonable delays by
4 failing to respond to the Court’s orders and failing to attend Court mandated
5 conferences. At a minimum, the Wards have been prejudiced by Plaintiffs’ failure
6 to diligently prosecute the case and move it forward towards a resolution on the
7 merits. It has been over four years since the underlying incident occurred and as
8 time goes by, evidence is lost and witnesses’ memories fade, making it more
9 difficult to defend this case. The Wards have also suffered prejudice in attorney
10 fees and costs in the amount of \$770.00 for the time their counsel prepared for and
11 appeared at the Court’s three scheduling conferences. ECF No. 25 at 3. The Court
12 finds Plaintiffs’ dilatory manner in prosecuting this matter has prejudiced the
13 Wards and therefore the third factor weighs in favor of dismissal.

14 *4. Dispositions on the Merits*

15 “Public policy favoring disposition of cases on their merits strongly counsels
16 against dismissal.” *Phenylpropanolamine*, 460 F.3d at 1227 (citation omitted).
17 But a case that “is stalled or unreasonably delayed by a party’s failure to
18 [prosecute] cannot move forward toward resolution on the merits.” *Id.* This factor
19 “lends little support” to Plaintiffs – “whose responsibility it is to move [their cases]

1 toward disposition on the merits but whose conduct impedes progress in that
2 direction.” *Id.*

3 This Court recognizes the importance of disposition of cases on their merits,
4 however, the Court finds this factor is outweighed by the previously discussed
5 factors. Further, Plaintiffs’ numerous and unnecessary delays have precluded and
6 limited the possibility of this case being decided on its merits. Accordingly, while
7 disposition of cases on their merits is preferred, here there is no indication that
8 Plaintiffs’ continued inaction and disobedience will be cured allowing the matter to
9 be decided on its merits.

10 5. *Availability of Less Drastic Sanctions*

11 District courts have a range of options at their disposal, in addition to
12 imposing a terminating sanction, such as a dismissal, they can impose less-drastic
13 sanctions that include “a warning, a formal reprimand, placing the case at the
14 bottom of the calendar, a fine, the imposition of costs or attorney fees, the
15 temporary suspension of the culpable counsel from practice before the court, ...
16 dismissal of the suit unless new counsel is secured ... preclusion of claims or
17 defenses, or the imposition of fees and costs upon plaintiff’s counsel.” *Malone v.*
18 *U.S. Postal Service*, 833 F.2d at 132, fn. 1 (citations omitted). The district court
19 need not exhaust every sanction short of dismissal before finally dismissing a case
20

1 but must explore possible and meaningful alternatives. *Nevijel v. North Coast Life*
2 *Insurance Co.*, 651 F.2d 671, 674 (9th Cir. 1981).

3 As detailed above, the Court has previously pursued remedies that are less
4 drastic than dismissal by issuing three orders to show cause and clearly warning
5 Plaintiffs of the consequences of failing to comply with the Court's orders.
6 However, with such efforts having now been exhausted, the Court finds no suitable
7 alternative to dismissal of the action.

8 The Court recognizes that most if not all, of the fault is a result of Plaintiffs'
9 counsel's failure to abide by this Court's orders and failure to obey the
10 Federal/Local Rules of Civil Procedure. For that very reason, the Court took
11 multiple measures to avoid the harsh sanction of dismissal and attempted to
12 generate compliance through less severe measures. The Court has endeavored to
13 provide Plaintiffs a fair opportunity to move their case forward and has been
14 exceptionally lenient in providing Plaintiffs with instructions and warnings.
15 Ultimately, this leniency has expended limited Court resources and the Wards have
16 incurred duplicative attorney fees and costs.

17 In light of the foregoing, it is clear Plaintiffs' counsel is unwilling to comply
18 with this Court's orders and the Federal/Local Rules of Civil Procedure, leaving
19 the Court with no choice but to dismiss the action with prejudice pursuant to
20 Federal Rule of Civil Procedure 41(b).

1 **B. Monetary Sanctions Against Plaintiffs' Counsel**

2 "It has long been understood that '[c]ertain implied powers must necessarily
3 result to our Courts of justice from the nature of their institution,' powers 'which
4 cannot be dispensed with in a Court, because they are necessary to the exercise of
5 all others.'" *Chambers*, 501 U.S. at 43 (citations omitted). "These powers are
6 'governed not by rule or statute but by the control necessarily vested in courts to
7 manage their own affairs so as to achieve the orderly and expeditious disposition of
8 cases.'" *Chambers*, 501 U.S. at 43 (quoting *Link v. Wabash R.*, 370 U.S. 626, 630-
9 31 (1962)).

10 The inherent power of the federal courts includes the power "to discipline
11 attorneys who appear before it," however, the Supreme Court has cautioned "this
12 power 'ought to be exercised with great caution.'" *Chambers*, 501 U.S. at 43
13 (citations omitted). Because of the potency of inherent powers, a court must
14 exercise its inherent powers with restraint and discretion, and a primary aspect of
15 that discretion is the ability to fashion an appropriate sanction. *See Chambers*, 501
16 U.S. at 44-45. Further, in invoking its inherent power, a court "must comply with
17 the mandates of due process." *Id.* at 50. Accordingly, before a district court may
18 impose sanctions, the attorney or party must receive notice that sanctions against
19 them are being considered and have an opportunity to be heard. *See Id.* at 56-57.

20 Notice and an opportunity to be heard are "essential in view of the

1 heightened potential for abuse posed by the contempt power, and the provision of
2 these procedural protections accords with our historic notions of elementary
3 fairness.” *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir. 2005) (citations
4 omitted). These minimal procedural requirements give an attorney an opportunity
5 to argue that his actions were an acceptable means of representing his client, to
6 present mitigating circumstances, or to apologize to the court for his conduct. *Id.*
7 However, district courts are not required to conduct a formal hearing before
8 imposing monetary sanctions against an attorney where the attorney was given
9 opportunity to respond in writing to allegations lodged against him. *See Pacific*
10 *Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.
11 2000).

12 Here, as discussed in great length and detail above, the Court has provided
13 Plaintiffs’ counsel with multiple opportunities to explain his continued failure to
14 abide by this Court’s orders. Plaintiffs’ counsel responded to only one of the
15 Court’s three orders to show cause and, as noted above, his response was
16 insufficient. Further, Plaintiffs’ counsel only partially and minimally complied
17 with this Court’s three scheduling conference notices. Accordingly, the Court
18 finds it has offered Plaintiffs’ counsel sufficient notice and opportunity to be heard
19 and that Plaintiffs’ counsel has failed to take advantage of these opportunities. The
20 Court further finds that a formal hearing is not necessary and would not be

1 productive given Plaintiffs' counsel's absences at previous hearings.

2 The next inquiry is whether Plaintiffs' counsel's behavior warrants monetary
3 sanctions. A district judge has broad authority to impose monetary sanctions
4 "upon its own initiative" when an attorney fails to obey a scheduling order or
5 appear at a scheduling conference. *In re Yagman*, 796 F.2d 1165, 1187, as
6 amended, 803 F.2d 1085 (1986), cert. denied, 484 U.S. 963 (1987); *see also*
7 *Tamura v. F.A.A.*, 908 F.2d 977, *2 (9th Cir. 1990) (unpublished). The Court may
8 order a party's attorney "to pay the reasonable expenses—including attorney's
9 fees—incurred because of any noncompliance" with Rule 16(f). Fed. R. Civ. P.
10 16(f)(2); *see also Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990).

11 Under its "inherent powers," a district court may award sanctions in the form
12 of attorneys' fees against a party or counsel who acts "in bad faith, vexatiously,
13 wantonly, or for oppressive reasons." *Primus Auto. Fin. Servs., Inc. v. Batarse*,
14 115 F.3d 644, 648 (9th Cir. 1997). The most common utilization of inherent
15 powers is a contempt sanction levied to "protect[] the due and orderly
16 administration of justice" and "maintain[] the authority and dignity of the court."
17 *Id.* (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)). Courts have
18 found bad faith in a variety of conduct stemming from "a full range of litigation
19 abuses." *Chambers*, 501 U.S. at 47. For instance, bad faith has been found by a

1 party for “delaying or disrupting the litigation.” *Primus Auto. Fin. Servs.*, 115 F.3d
2 at 648.

3 In addition, sanctions have been found proper in instances where the parties
4 were not necessarily acting in bad faith. For example, in *Lucas Automotive*
5 *Engineering, Inc. v. Bridgestone/Firestone, Inc.*, the Ninth Circuit ruled that the
6 district court’s imposition of sanctions was appropriate when a party member
7 unintentionally failed to attend a mediation session due to an incapacitating
8 headache. *See Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*,
9 275 F.3d 762, 769 (9th Cir. 2001). Similarly, in *Ayers v. City of Richmond*, the
10 Ninth Circuit affirmed sanctions awarding attorney’s fees and costs to opposing
11 counsel when counsel failed to attend only one pretrial conference because it
12 “slipped by him.” *Ayers* 895 F.2d at 1269.

13 Here, Plaintiffs’ counsel’s continued disregard for this Court’s orders has
14 without doubt delayed the litigation process. As stated above it has been six
15 months since this matter was removed and the Court has not been able to issue a
16 scheduling order due to Plaintiffs’ counsel’s continued failure to participate in this
17 litigation. The Court has been overly lenient in giving Plaintiffs’ counsel ample
18 opportunity to alter his behavior to accord with the Court’s orders, and Plaintiffs’
19 counsel has disregarded nearly every opportunity to comply. Plaintiffs’ counsel’s
20 repeated absence has prevented the orderly and expeditious disposition of this

1 matter, frustrated the judicial process, and strained judicial resources.

2 Accordingly, the Court finds Plaintiffs' counsel has acted in bad faith and that a
3 monetary sanction is appropriate.

4 Monetary sanctions, under the Court's inherent authority, are "limited to the
5 fees the innocent party incurred solely because of the misconduct—or put another
6 way, to the fees that party would not have incurred but for the bad faith."

7 *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1184, (2017). This is a
8 "but-for" test by which a party may recover only the portion of its fees that it
9 would not have paid but for the misconduct. *Id.* at 1187. Here, the Wards would
10 not have incurred \$770.00 in attorney's fees had Plaintiffs' counsel abided by this
11 Court's orders.

12 When issuing attorney fees as a sanction, Federal Rule of Civil Procedure
13 16(f)(2) provides that "the court must order the party, its attorney, or both to pay
14 the *reasonable* expenses—including attorney's fees—incurred because of any
15 noncompliance with this rule, unless the noncompliance was substantially justified
16 or other circumstances make an aware of expenses unjust." Fed. R. Civ. P. 16(f)
17 (2) (emphasis added). As discussed above, Plaintiffs' counsel has failed to
18 demonstrate that his noncompliance was substantially justified. Accordingly, the
19 next course of inquiry for this Court is whether the Wards' attorney fees are
20 reasonable.

1 A district court must calculate attorney fee awards using the “lodestar
2 method.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).
3 The lodestar method requires “multiplying the number of hours the prevailing
4 party reasonably expended on the litigation by a reasonable hourly rate.” *Id.* The
5 resulting lodestar figure is a presumptively reasonable fee award. *Camacho*, 523
6 F.3d at 977. District courts “[have] a great deal of discretion in determining the
7 reasonableness of the fee.” *Id.*

8 Here, the Wards’ counsel, Paul S. Stewart, has been practicing law for over
9 seven years at the law firm Paine Hamblen, LLP, in Spokane, Washington. ECF
10 No. 25 at 2. Prior to joining Paine Hamblen, Mr. Stewart was a Washington State
11 Supreme Court clerk, a clerk for the Honorable Wm. Fremming Nielsen in the U.S.
12 District Court for Eastern Washington, and a magistrate clerk for the Honorable
13 John T. Rogers, also in the Eastern District of Washington. *Id.* Mr. Stewart’s civil
14 litigation practice encompasses real estate litigation, employment litigation,
15 insurance litigation, and insured defense. *Id.* Mr. Stewart’s hourly rate is \$175.00
16 and his declaration states he has spent 4.4 hours preparing for the three scheduling
17 conferences held by the Court. *Id.* at 3, 4.

18 Given Mr. Stewart’s experience and background, the Court finds his hourly
19 rate of \$175.00 to be reasonable and further finds that the 4.4 hours Mr. Stewart
20 expended preparing for the three scheduling conferences is reasonable.

1 Accordingly, the Court finds that a reasonable monetary sanction against Plaintiffs'
2 counsel is the \$770.00 the Wards incurred as a result of the three scheduling
3 conferences.

4 **IT IS ORDERED:**

5 1. This action shall be **DISMISSED with prejudice** pursuant to Federal Rule
6 of Civil Procedure 41(b).

7 2. The Court hereby **SANCTIONS John A. Bardelli** personally in the amount
8 of **\$770.00**, payable to Paine Hamblen LLP's IOLTA account, to compensate the
9 Wards for their counsel's time.

10 3. John A. Bardelli shall comply with this sanctions order and submit payment
11 by **August 17, 2022, at 5:00 p.m.** Counsel shall file a notice with the Court
12 indicating compliance with this order.

13 **IT IS SO ORDERED.** The District Court Executive is directed to file this
14 Order, provide copies to the parties, and set a case management deadline for
15 August 17, 2022.

16 DATED August 2, 2022.

17 *s/Mary K. Dimke*
18 MARY K. DIMKE
19 UNITED STATES DISTRICT JUDGE
20