IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

League of United Latin American Citizens; Anna Ochoa O'Leary; Cordelia Chavez Candelaria Beveridge; Magdalena Schwartz; Jose David Sandoval; Jane Doe, named as Jane C.H.P. Doe; Jane Doe, named as Jane E.C.-J. Doe; Jane Doe, named as Jane E.O. Doe; John and Jane Does 1-5, Plaintiffs, vs. State of Arizona; Janice K. Brewer, Governor of Arizona; William G. Montgomery; Joseph M. Arpaio; Barbara Lawall; Clarence W. Dupnik; Robert Halliday; Maricopa County; Pima County, Defendants.	No. CV 10-1453-PHX-SRB **ORDER**

Before the Court is Defendant Governor Janice K. Brewer's Motion to Dismiss for Failure to Comply with Discovery Order ("MTD") (Doc. 78) [1] and Defendant Janice K. Brewer's Motion to Consolidate Actions ("Mot. to Consolidate) (Doc. 74.)[2]

[1] Defendants Joseph Arpaio and William G. Montgomery joined Defendant Brewer's Motion to Dismiss. (*See* Doc. 81, Maricopa Defs.' Joinder in MTD.)

[2] The same Motion was also filed in *Friendly House v. Whiting* by Intervenor Defendants Janice K. Brewer and the State of Arizona. (*See* CV 10-1453-PHX-SRB, Doc. 593.)

I. RELEVANT PROCEDURAL BACKGROUND

Plaintiff League of United Latin American Citizens ("LULAC") and other Plaintiffs filed their original Complaint for Declaratory and Injunctive Relief ("Complaint") on July 9, 2010. (Doc. 1, Compl. at 23.) On December 15, 2010, the Court dismissed Plaintiffs' claims against the State of Arizona with prejudice and dismissed Plaintiffs' claims against Defendant Brewer without prejudice based on lack of standing. (Doc. 34, Dec. 15, 2010, Order at 11.) The Court directed Plaintiffs "to file any amendments to their pleading within 30 calendar days." (*Id.*) On January 18, 2011, after more than 30 days had passed, Plaintiffs filed an Unopposed Application for an Extension of Time to File a First Amended Complaint, which the Court granted. (Doc. 35, Unopposed Application for an Extension of Time to File a 1st Am. Compl. ("Mot. to Extend"); Doc. 36, Order.) Plaintiffs filed an Amended Complaint on January 24, 2011, portions of which survived a motion to dismiss. (*See* Doc. 37, 1st Am Compl. for Declaratory and Injunctive Relief; Doc. 40, Def. Janice K. Brewer's Mot. to Dismiss or, Alternatively, Stay Pls.'1st Am. Compl.; Doc. 56, Aug. 26, 2011, Order.)

On September 27, 2011, the Court issued an Order setting a scheduling conference for November 28, 2011, and ordered that counsel "shall jointly file their Proposed Case Management Plan . . . **not less than SEVEN (7) DAYS** before the Pretrial Scheduling Conference." (Doc. 57, Order Setting Rule 16 Scheduling Conference ("Rule 16 Sched. Order") at 1, 7-8.) The Order specified that "[n]o extensions of time will be granted" and "that it is the responsibility of counsel for the Plaintiff(s) to initiate the communications necessary to prepare the joint Proposed Case Management Plan." (*Id.* at 8.) The Court also explicitly warned that "**FAILURE TO COMPLY WITH EVERY PROVISION OF THIS ORDER MAY LEAD TO SANCTIONS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 16(F)**." (*Id.* at 9.)

On November 21, 2011, seven days before the scheduled Pretrial Scheduling Conference, Defendants Brewer, Montgomery, and Arpaio filed a Proposed Case Management Plan and stated that "[c]ounsel for Governor Brewer attempted to confer with

Plaintiffs so the parties could submit a joint proposal, but Plaintiffs' counsel did not return the telephone call or otherwise reach out to Governor Brewer to meet and confer." (Doc. 60, Proposed Case Management Plan of Defs. Brewer, Montgomery, and Arpaio at 1 n.1, 11.) On November 22, 2011, the Court vacated the Scheduling Conference set for November 28, 2011, and ordered Plaintiffs' counsel to "show cause in writing within 7 days . . . why this case should not be dismissed for Plaintiffs[']failure to comply with this Court's September 27, 2011 Order." (Doc. 61, Nov. 22, 2011, Order at 1-2.) On November 28, 2011, Plaintiff LULAC filed a Response to Order to Show Cause, stating that "through mistake and inadvertence [P]laintiff's counsel did not timely schedule a Rule 26 conference with [D]efendants' counsel." (Doc. 62, Pl.'s Resp. to Order to Show Cause at 3.[3]) Two days later, counsel for LULAC stated, "LULAC['s]counsel takes responsibility for his inadvertence or mistake and understands that sanctions may be imposed pursuant to the terms of the Scheduling Order." (Doc. 65, Pl.'s Reply to Def. Brewer's Resp. Re Order to Show Cause at 5.) The Court found that "Plaintiffs' counsel'sfailure to timely file a Joint Proposed Case Management Plan d[id] not justify dismissal" and rescheduled the Rule 16 Scheduling Conference. (Doc. 66, Dec. 7, 2011, Order.)

At the scheduling conference the Court ordered that the parties exchange initial disclosures no later than February 13, 2012, that they terminate discovery by April 27, 2012, and that they file dispositive motions no later than June 22, 2012, related to issues of standing. (*See* Doc. 68, Minute Entry.) Plaintiff LULAC failed to meet the February 13

---

[3] Plaintiff LULAC's counsel also submitted a Declaration with the Response to Order to Show Cause stating, "Through inadvertence and mistake, contributed to by illness and severe pain caused by diverticulitis, and my daughter undergoing decanulation of a tracheostomy and other serious medical issues, I failed to become aware of the Court's September 27, 2011, Order." (Doc. 62-1, Decl. of Peter Schey ¶ 4.) LULAC's counsel also stated he was unaware that Defendants' counsel had attempted to contact himand that a new employee assigned to the position of tracking, calendaring, and reminding legal staff about deadlines was unaware of the Court's September 27, 2011, Order because that employee had not yet made the arrangements necessary to receive electronic case filing notices in this case. (*Id.* ¶¶ 4-5.)

deadline. After three emails from Defendant Brewer's counsel inquiring about the status of LULAC's initial disclosures, LULAC's counsel, Mr. Schey, responded on February 16, 2012, "I'm out of town but will look into this and get back to you. I hope it was sent out already." (MTD, Ex. A.) On the same day LULAC filed a notice of service of its initial disclosure statement regarding standing, which counsel for Defendant Brewer reportedly received on February 22, 2012. (*See* MTD at 3; Doc. 77, Pls.' Notice of Service of Discovery.) In its initial disclosure statement, Plaintiff LULAC stated, "Plaintiff is in the process of identifying individuals likely to possess discoverable information and will provide such documentation as obtained from LULAC's Councils in Arizona and in response to [D]efendant's interrogatories." (MTD, Ex. B, Pl.'s Rule 26 Initial Disclosure Statement Re: Standing Issues at 3.) Likewise, LULAC did not identify any specific documents used to support its claim of standing, but rather stated, "Plaintiff is in the process of gathering documentation relevant to its standing and will provide such documentation as obtained from LULAC's Councils in Arizona and in response to [D]efendant's request for production of documents." (*Id.*)

On February 23, 2012, counsel for Defendant Brewer emailed all attorneys of record for LULAC regarding the initial disclosure statement and requested that LULAC provide a substantive initial disclosure statement no later than February 28, 2012. (MTD at 4; *id.*, Ex. C (email asking that LULAC provide a substantive initial disclosure statement by Monday, February 27 and indicating that Defendants might seek dismissal or a stay if LULAC failed to do so).) In response to Defendant Brewer's Motion to Dismiss, LULAC stated, "Plaintiff's initial disclosure statement was sent to [D]efendants February 16, 2012, because [P]laintiff LULAC does not have paid staff employed in Arizona, has several hundred members, and determining who possessed the type of information required by the initial disclosures was difficult." (Doc. 80, Pl.'s Opp'n to MTD ("Resp.") at 3.) Along with LULAC's Response, which was filed on March 19, 2012, LULAC filed and served a supplemental Rule 26 initial disclosure statement identifying three officers or members of LULAC likely to have discoverable information and referring Defendants to the documents provided in response

to Defendant Brewer's request for production of documents. (*Id.* at 4; *id.*, Ex. 3, Pl.'s Supplemental Rule 26 Initial Disclosure Statement at 3-5.) Plaintiff LULAC also admitted being late in responding to Defendant Brewer's interrogatories and request for documents. (Resp. at 3.)[4]

II. LEGAL STANDARDS AND ANALYSIS

Defendant Brewer seeks dismissal under Rule 37(b) based on Plaintiff LULAC failing to exchange initial disclosures by February 13, 2012, repeatedly missing deadlines, not complying with scheduling and discovery orders, and not taking "action to prosecute a case that makes the same substantive claims and allegations that are being made in other S.B. 1070 lawsuits pending before this Court." (MTD at 1-2.)[5] In the alternative, Defendant Brewer argues that the Court should stay the proceedings in this case pending resolution of the claims in the other pending S.B. 1070 lawsuits, prohibit LULAC from introducing

---

[4] Plaintiff LULAC had a deadline of March 14, 2012, to respond to Governor Brewer's written discovery requests. (*See* Doc. 75 (Def. Governor Janice K. Brewer's Notice of Service of Discovery (stating that she served her first set of interrogatories and first set of requests for production of documents on February 13, 2012)); Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A) (providing that parties must respond to interrogatories and requests for production within thirty days after being served); *see also* Resp. at 3; Reply at 2 (stating that the deadline was March 16, 2012).) Plaintiff LULAC submitted its responses along with its Response to Defendant Brewer's Motion to Dismiss on March 19, 2012, and filed a corrected version of its Responses to Defendant Brewer's Requests for Documents on April 6, 2012. (*See* Resp. at 4; *id.*, Exs. 1-2; Doc. 84, Pl.'s Notice of Filing of Exs. 4-7 in Opp'n to MTD, Ex. 4; *see also* Doc. 82, Governor Janice K. Brewer's Reply in Supp. of MTD ("Reply") at 7 n.7; Pl.'s Notice of Filing of Exs. 4-7 in Opp'n to MTD at 3.) Plaintiff LULAC dedicated about half of its Response to Defendant Brewer's Motion to Dismiss explaining why it was late in responding to Defendant Brewer's interrogatories and requests for production, though this was not the basis of Defendant Brewer's Motion; Plaintiff LULAC attributed its additional late responses to health problems of Mr. Schey's daughter and co-counsel Carlos Holguin being abroad on annual leave. (Resp. at 3-4; *see also* Reply at 3.)

[5] Several lawsuits have been filed in this Court challenging a set of statutes and statutory amendments enacted by the Arizona Legislature in the form of Senate Bill 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," 2010 Arizona Session Laws, Chapter 113, which Governor Brewer signed into law on April 23, 2010. The Court refers to Senate Bill 1070 and House Bill 2162 collectively as "S.B. 1070" to describe the April 23, 2010, enactment as modified by amendments passed on April 30, 2010.

evidence regarding standing issues, or "order LULAC to serve a definitive and final list of witnesses and exhibits within a certain, expedited time period . . . , extend the period for Governor Brewer to conduct discovery regarding standing issues, and order LULAC to reimburse Governor Brewer for attorneys' fees and costs associated with this issue." (MTD at 8-9.)

A. Standard for Dismissal Under Rule 37(b)

Federal Rule of Procedure 37(b) provides that if a party "fails to obey an order to provide or permit discovery, including an order under Rule 26(f)," a court "may issue further just orders," which may include "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence," "staying further proceedings until the order is obeyed," and "dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(ii), (iv), (v). If dismissal is imposed, the district court must find that the losing party's noncompliance resulted from its "willfulness, fault, or bad faith." *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997) (quotation omitted). "Disobedient conduct not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault." *Hyde & Drath v. Baker*, 24 F.3d 1162, 1167 (9th Cir. 1994); *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1233 (9th Cir. 2006).

In determining whether dismissal under Rule 37(b)(2) is appropriate, courts weigh the following five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the [party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998) (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987)). Where a court order has been violated, normally the first and second factors support sanctions, while the fourth factor weighs against dismissal; therefore, prejudice to the party seeking sanctions and the availability of less drastic sanctions are typically determinative. *Id.*; *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). "A defendant suffers prejudice if the

plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case." *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). In considering the availability of less drastic sanctions, reviewing courts consider whether the district court "explicitly discussed alternative sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of dismissal." *Valley Eng'rs Inc.*, 158 F.3d at 1057.

B. Analysis

Here, it is clear that Plaintiff LULAC disobeyed direct orders from this Court and that sanctions under Rule 37(b)(2) are warranted. LULAC failed to comply with both this Court's Rule 16 Scheduling Order and the deadlines set during the rescheduled scheduling conference. (*See* Rule 16 Sched. Order at 7-8; Doc. 68, Minute Entry.) In addition, Plaintiffs were late in filing their Amended Complaint and in responding to Defendant Brewer's written discovery requests. (*See* Mot. to Extend; Resp. at 3.) The Court finds that Plaintiffs' violations were not outside their control and therefore that dismissal is an available sanction. *See In re PPA*, 460 F.3d at 1233; *see also W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1523 (9th Cir. 1990) ("the faults and defaults of the attorney may be imputed to, and their consequences visited upon, his or her client").

Turning to the five factors used to weigh whether dismissal is appropriate, as in most cases, the public's interest in the expeditious resolution of litigation and the court's need to manage its docket point in favor of dismissal. *See Valley Eng'rs Inc.*, 158 F.3d at 1057. In terms of prejudice, Defendant Brewer argues that "LULAC's delay is causing prejudice . . . given that the parties were ordered to complete all discovery regarding standing issues within ten weeks of . . . February 13, 2012 . . . . Three weeks into this ten-week discovery period, LULAC has yet to identify a single witness or exhibit pertinent to its own standing allegations . . . ." (MTD at 4.) Even though LULAC subsequently provided Defendants with three names and some documents, the Court finds that Defendants have been prejudiced by LULAC continually failing to meet deadlines, shortening the time period in which Defendants must conduct relevant discovery, and increasing Defendants' costs by obligating

them to expend resources in seeking to enforce the deadlines already set by this Court. *Cf. Thoeren*, 913 F.2d at 1412 (finding that prejudice was established where party repeatedly failed to appear at scheduled depositions and continually refused to comply with court-ordered production of documents); *see also In re PPA*, 460 F.3d at 1236 ("Failure to produce documents as ordered is sufficient prejudice, whether or not there is belated compliance."); *Payne*, 121 F.3d at 508 ("Belated compliance with discovery orders does not preclude the imposition of sanctions. Last-minute tender of documents does not cure the prejudice to opponents nor does it restore to other litigants on a crowded docket the opportunity to use the courts." (quotation omitted)); *Henderson v. Duncan*, 779 F.2d 1421, 1425 (9th Cir. 1986) ("a lack of prejudice to defendants is [not] determinative" where "counsel continues to disregard deadlines, warnings, and schedules set by the district court").[6]

In addition, "[w]hether prejudice is sufficient to support an order of dismissal is in part judged with reference to the strength of the plaintiff's excuse for the default." *Malone*, 833 F.2d at 131; *see also In re PPA*, 460 F.3d at 1237 ("a plaintiff's excuse for default or delay is relevant"). Here, while LULAC failed to comply with various deadlines, Defendant Brewer based her Motion to Dismiss mainly on LULAC's failure to exchange initial disclosures by February 13, 2012. (*See* MTD at 1-2; Reply at 1-2.) LULAC's proffered excuse for being late in sending its initial disclosures was that "LULAC does not have paid staff employed in Arizona, has several hundred members, and determining who possessed the type of information required by the initial disclosures was difficult." (Resp. at 3.) The Court finds this excuse woefully inadequate. Plaintiff LULAC knew of these circumstances when the Court set the disclosure and discovery deadlines, yet it never voiced any concerns or asked for a timely extension. In addition, LULAC was able to come up with only three names of persons with discoverable information and fifty-five documents by March 19. (*See*

[6] While *Henderson* and some other cases deal with dismissal under Rule 41(b) for failure to prosecute, essentially the same factors are applied when considering dismissal under Rule 41(b) and Rule 37(b). *See Henderson*, 779 F.2d at 1423 (listing same five factors in Rule 41(b) case); *see also Malone*, 833 F.2d at 130 ("The standards governing dismissal for failure to obey a court order are basically the same under either of these rules.").

Resp. at 4; 80-2, 80-3, 84-1, 84-2, 84-3.) The fact that complying with disclosure and discovery obligations may be "difficult" does not give any party a right not to comply. Furthermore, in respect to other deadlines missed by Plaintiffs, while the Court sincerely regrets any health problems experienced by Mr. Schey or his daughter, there are five attorneys of record for Plaintiffs in this case, and the fact that one may be dealing with illness or family issues does not excuse the others from complying with their obligations in this lawsuit. LULAC's failure to produce any substantive initial disclosures until March 19–over a month after the deadline set by the Court–as well as LULAC's failure to comply with other deadlines in this case and to communicate with Defendants' counsel as to the status of its disclosures all support a finding of prejudice weighing in favor of dismissal.

Turning to the fourth factor, while the policy favoring disposition of cases on their merits normally weighs against dismissal, the Court notes that this case is unique in that there are other actions challenging S.B. 1070 on similar grounds. The legal challenges are not identical, but the Court finds that this factor does not weigh heavily against dismissal in this case because challenges to S.B. 1070 will be addressed on the merits, whether in this particular suit or another.

Finally, the Court considers the availability of less drastic sanctions. Defendant Brewer has suggested, as alternatives to dismissal, (i) a stay until the resolution of the other S.B. 1070 lawsuits, (ii) prohibiting LULAC from introducing evidence regarding standing issues, and (iii) ordering LULAC to serve a definitive list of witnesses and exhibits within an expedited time period, extend the period for Defendant Brewer to conduct discovery regarding standing issues, and order Plaintiffs to reimburse Defendant Brewer for attorneys' fees and costs associated with Plaintiffs' non-compliance. (MTD at 8-9.) While the Court has warned Plaintiffs of the possibility of dismissal, it has not tried implementing any of the less drastic sanctions suggested by Defendants. (*See* Rule 16 Sched. Order at 9 (**"FAILURE TO COMPLY WITH EVERY PROVISION OF THIS ORDER MAY LEAD TO**

SANCTIONS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 16(F));[7] *see also* Nov. 22, 2011, Order at 2 (ordering Plaintiffs' counsel to " show cause in writing within 7 days of the date of this Order why this case should not be dismissed for Plaintiffs[']failure to comply with this Court's September 27, 2011 Order")); *Valley Eng'rs Inc.*, 158 F.3d at 1056-57 ("[E]veryone has notice from the text of Rule 37(b)(2) that dismissal is a possible sanction for failure to obey discovery orders."). The Court finds that while LULAC has been warned of possible dismissal, both the policy favoring deciding cases on the merits and the desirability of finding a less drastic sanction weigh in favor of staying this case rather than dismissing it. This case will be stayed until the other pending S.B. 1070 cases are resolved, and then, if "there is still some claim or issue asserted by LULAC that merits adjudication by this Court, LULAC can adjudicate that claim and issue then." (*See* MTD at 8.)

III. CONCLUSION

The Court finds that Plaintiff LULAC has repeatedly failed to meet deadlines and comply with this Court's orders regarding discovery. LULAC's failure to actively prosecute this case and comply with the Court's deadlines is causing prejudice to Defendants and wasting judicial resources. Given the harshness of dismissal as a sanction as well as the policy favoring deciding a case on the merits, the Court orders that this case be stayed rather than dismissed. It will be stayed until this Court issues final rulings in *Friendly House v. Whiting*, Case No. CV 10-1061-PHX-SRB, and *United States v. Arizona*, Case No. CV 10-1413-PHX-SRB. In light of the Court's decision to stay this case, it denies as moot the Motion to Consolidate.

IT IS ORDERED granting in part Defendant Governor Janice K. Brewer's Motion to Dismiss for Failure to Comply with Discovery Order (Doc. 78). The Court grants Defendant Brewer's alternative request to stay this case until the Court issues final rulings

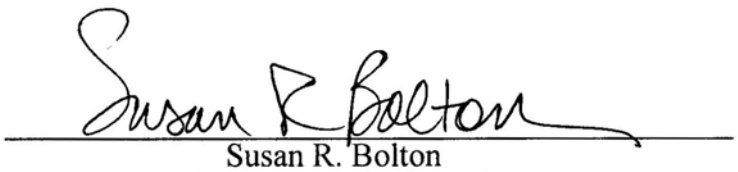
---

[7] Rule 16(f) provides inter alia that if a party fails to obey a scheduling or other pretrial order, "the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii)." Fed. R. Civ. P. 16(f)(1)(C).

in *Friendly House v. Whiting* , Case No. CV 10-1061-PHX-SRB, and *United States v. Arizona*, Case No. CV 10-1413-PHX-SRB.

IT IS FURTHER ORDERED denying as moot Defendant Janice K. Brewer's Motion to Consolidate Actions (Doc. 74).

DATED this 31st day of May, 2012.



Susan R. Bolton
United States District Judge