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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH DANIEL NEVIS,  
Plaintiff,  
v.  
RIDEOUT MEMORIAL HOSPITAL, et  
al,  
Defendants.

No. 2:17-cv-02295-JAM-AC

ORDER

This matter is before the court on defendants National Railroad Passenger Corporation and Union Pacific Railroad Company’s motion for terminating sanctions or, alternatively, sanctions in the form of adverse inferences due to evidence spoliation. ECF No. 111. This discovery motion was referred to the undersigned pursuant to E.D. Cal. R. 302(c)(1). The matter was taken under submission without hearing. For the reasons stated below, the motion is DENIED.

**I. Relevant Background**

Plaintiff alleges that in April 2016, he checked himself into a rehabilitation center called “Buddy’s House.” ECF No. 1 at 2. On December 23, 2016, plaintiff at some point consumed alcohol, but knows nothing else of what happened that day. Id. In the early hours of December 24, plaintiff was found by local law enforcement in the street, and believing plaintiff to be “too

1 drunk for jail,” the officers drove him to Rideout Memorial Hospital around 1:26 a.m. Id. After  
2 being seen by an emergency room physician, plaintiff was discharged at 1:56 a.m. Id. After  
3 being released, plaintiff alleges he walked down a pedestrian path and tripped over mainline  
4 railroad tracks, ending up on his back on the side of the tracks. Id. at 3. At approximately 2:30  
5 a.m., a passenger train approached and struck the plaintiff, amputating his left leg above the knee  
6 and his right leg below the knee. Id. Plaintiff filed suit on November 1, 2017. ECF No. 1.  
7 When this case was filed, plaintiff was represented by attorney Daniel Ellsworth Wilcoxon. Id.  
8 Current counsel Raymond McElfish was substituted in on April 3, 2019. ECF No. 26.

9         The parties have been engaging in discovery. On January 11, 2017, eighteen days after  
10 the incident occurred, counsel for Amtrak and Union Pacific sent a letter to plaintiff’s counsel,  
11 who at the time was Mr. Brian W. Plummer at Wilcoxon Callahan LLP, which stated in part  
12 “please ensure he preserves and does not alter all documents and other tangible documents related  
13 to the accident. This specifically includes . . . Mr. Nevis’ mobile phone with its SIM card.” ECF  
14 No. 111-3 at 2. Defendant Hector Lopez, M.D. served plaintiff with a request for production that  
15 sought all records of sent and received phone calls by plaintiff, and screen shots of any text  
16 messages sent or received, in December of 2016. ECF No. 111-1 at 6.

17         Plaintiff produced responses to these requests on September 24, 2018, which stated that  
18 his phone records only went back three months and he could not provide records from his carrier  
19 (Boost Mobile), but he did still have his phone. ECF No. 111-5 at 4 (stating, “I do have my  
20 phone, it is cracked, but I have two pictures attached.”) Plaintiff produced three screen shots.  
21 The first shows a partial phone number with a “916” area code (Id. at 11); the second shows a  
22 partial phone number with a “530” area code and a “BROTHA THOM” name attached (Id. at 12);  
23 the third shows two text message notifications from December 25, 2016, one from “RICK” and  
24 one from “STEVE BUDDY’S HOUSE.” (Id. at 13). Numbers appear above the dates listed for  
25 the text message notifications, indicating that the texts are part of larger conversations. Id. at 13.  
26 At plaintiff’s deposition on May 15, 2019, plaintiff testified that he had his phone with him at the  
27 time of the accident but at some time in the night his phone battery died. ECF No. 111-6 at 10.  
28 Plaintiff testified that he left his cell phone at the scene of the accident, but his brother went to

1 retrieve it and gave it back to him. Id. at 11-12. Plaintiff responded to the question “do you still  
2 have that phone?” with “I do.” Id. at 12. Counsel for Amtrak and Union Pacific admonished  
3 plaintiff to preserve evidence, stating “I ask that you preserve those text messages and don’t  
4 delete them.” Id.

5 On October 1, 2019, counsel for Amtrak and Union Pacific served plaintiff with requests  
6 for production which sought “A digital download, in readable format, of all the data on YOUR  
7 cell phone and SIM card from the day of the incident.” ECF No. 111-8 at 10. Plaintiff responded  
8 late, on November 25, 2019, stating that he made a “diligent search and reasonable inquiry” but  
9 cannot comply with the request because he no longer had possession of the cell phone. Id. at 10-  
10 11. On December 17, 2019, plaintiff’s counsel e-mailed defense counsel acknowledging  
11 defendant’s intention to file a motion for terminating sanctions, and stating that they were again  
12 looking for the phone and/or SIM card. ECF No. 111-9 at 2. On January 8, 2020, plaintiff’s  
13 counsel notified defense counsel that the phone had been found, but that the phone would not be  
14 delivered to defense counsel because the phone itself was never properly requested. ECF No.  
15 111-9 at 9.

16 The current deadline for completion of discovery in this case passed on November 4,  
17 2019. ECF No. 31. The court’s initial pre-trial scheduling order clarified the meaning of the  
18 discovery deadline: “In this context, ‘completed’ means that all discovery shall have been  
19 conducted so that all depositions have been taken and any disputes relative to discovery shall  
20 have been resolved by appropriate order if necessary and, where discovery has been ordered, the  
21 order has been complied with.” ECF No. 11 at 3. The discovery completion date in this case has  
22 been extended several times. The moving defendants acknowledge that the operative completion  
23 date is November 4, 2019. ECF No. 111-1 at 7. Plaintiff moved for an extension of the discovery  
24 deadline (ECF No. 35), the moving defendants opposed the motion (ECF No. 57), and the District  
25 Judge denied the motion (ECF No. 71).

## 26 II. Motion

27 Defendants ask the court to impose sanctions pursuant to Fed. R. Civ. P. 37(e) for  
28 spoliation of evidence, arguing that plaintiff intentionally misrepresented the status of his cell

1 phone and purposefully destroyed evidence. ECF No. 111-1. Defendants seek terminating  
2 sanctions or, in the alternative, an order that the jury be given an instruction of adverse inference.

### 3 **III. Analysis**

4 The rules of discovery in federal cases permit the district court, in its discretion, to enter a  
5 default judgment against a party who fails to comply with an order compelling discovery. Fed. R.  
6 Civ. P. 37(b)(2)(A)(v); see also Henry v. Gill Indus., Inc., 983 F.2d 943, 946–49 (9th Cir. 1993)  
7 (upholding a district court’s dismissal of an action as a discovery sanction). “A terminating  
8 sanction, whether default judgment against a defendant or dismissal of a plaintiff’s action, is very  
9 severe...[o]nly willfulness, bad faith, and fault justify terminating sanctions.” Connecticut Gen.  
10 Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007) (internal  
11 citations omitted).

12 The Ninth Circuit has “constructed a five-part test, with three subparts to the fifth part, to  
13 determine whether a case-dispositive sanction under Rule 37(b)(2) is just: “(1) the public’s  
14 interest in expeditious resolution of litigation; (2) the court’s need to manage its dockets; (3) the  
15 risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases  
16 on their merits; and (5) the availability of less drastic sanctions. The sub-parts of the fifth factor  
17 are whether the court has considered lesser sanctions, whether it tried them, and whether it  
18 warned the recalcitrant party about the possibility of case-dispositive sanctions.” Id. (internal  
19 citations omitted). The district court need not find each factor favors dismissal as a condition  
20 precedent to terminating sanctions; instead, these factors provide a framework for the court’s  
21 analysis. Id. “The most critical factor to be considered in case-dispositive sanctions is whether a  
22 party’s discovery violations make it impossible for a court to be confident that the parties will  
23 ever have access to the true facts.” Id. (internal citations omitted).

24 Here, none of the factors weigh clearly in favor of sanctions. While plaintiff’s conduct  
25 regarding production of the cell phone is certainly questionable, defendants did not serve the  
26 request for production at issue until just over one month prior to the discovery completion  
27 deadline. Defendants never made a motion to compel on this topic, and they could not have done  
28 so because of the late date that they served their RFPs. Thus, the court has never addressed the

