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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FEDERICO J. GEMPESAW,

Plaintiff,

No. 2:11-cv-00811 LKK KJN PS

v.

RECONTRUST COMPANY, N.A., et al.,

Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

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Presently before the court <sup>1</sup> is an amended motion to dismiss plaintiff’s complaint filed by defendants ReconTrust Company, N.A., Countrywide Home Loans, Inc., and BAC Home Loans Servicing, LP.<sup>2</sup> Defendants filed their amended motion on April 20, 2011. Plaintiff has filed no written opposition, statement of non-opposition, or other response to the pending motion despite being given multiple opportunities to do so and clear warnings from the court that failure to do so would lead to the involuntary dismissal of his lawsuit with prejudice. For the reasons that follow, the undersigned recommends that plaintiff’s action be dismissed with

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<sup>1</sup> This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

<sup>2</sup> Defendant BAC Home Loans Servicing, LP asserts that it was erroneously sued as “Bank of America Home Loans.”

1 prejudice pursuant to Federal Rule of Civil Procedure 41(b).

2 I. BACKGROUND

3 Plaintiff filed this action on March 25, 2011. (Compl., Dkt. No. 1.) On April 20,  
4 2011, defendants filed an amended motion to dismiss plaintiff's complaint pursuant to Federal  
5 Rules of Civil Procedure 12(b)(6) and noticed that motion for a hearing to take place on June 9,  
6 2011. (Dkt. No. 10.) Pursuant to this court's Local Rules, plaintiff was obligated to file and  
7 serve a written opposition or statement of non-opposition to defendants' motion at least fourteen  
8 days prior to the hearing date, or May 26, 2011. See E. Dist. Local Rule 230(c).<sup>3</sup> Plaintiff failed  
9 to file any response to the motion.

10 On June 2, 2011, and in response to plaintiff's failure to file a response to  
11 defendants' motion, the undersigned entered an order that: (1) continued the hearing on the  
12 motion to dismiss until July 7, 2011; and (2) required plaintiff to file a written opposition or  
13 statement of non-opposition to the pending motion on or before June 9, 2011. (Order, June 2,  
14 2011, Dkt. No. 13.) That order stated, in part:

15 Eastern District Local Rule 110 provides that "[f]ailure of counsel  
16 or of a party to comply with these Rules or with any order of the Court  
17 may be grounds for imposition by the Court of any and all sanctions  
18 authorized by statute or Rule or within the inherent power of the Court."  
19 Moreover, Eastern District Local Rule 183(a) provides, in part:

18 Any individual representing himself or herself without an  
19 attorney is bound by the Federal Rules of Civil or Criminal  
20 Procedure, these Rules, and all other applicable law. All  
21 obligations placed on "counsel" by these Rules apply to  
22 individuals appearing in propria persona. Failure to comply

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21 <sup>3</sup> Eastern District Local Rule 230(c) provides:

22 **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of  
23 the motion shall be in writing and shall be filed and served not less than  
24 fourteen (14) days preceding the noticed (or continued) hearing date. A  
25 responding party who has no opposition to the granting of the motion shall  
26 serve and file a statement to that effect, specifically designating the motion  
in question. No party will be entitled to be heard in opposition to a motion  
at oral arguments if opposition to the motion has not been timely filed by that  
party. . . .

1 therewith may be ground for dismissal . . . or any other  
2 sanction appropriate under these Rules.

3 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se  
4 litigants must follow the same rules of procedure that govern other  
5 litigants.”). Case law is in accord that a district court may impose  
6 sanctions, *including involuntary dismissal of a plaintiff’s case* pursuant to  
7 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to  
8 prosecute his or her case or fails to comply with the court’s orders, the  
9 Federal Rules of Civil Procedure, or the court’s local rules. See Chambers  
10 v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act  
11 *sua sponte* to dismiss a suit for failure to prosecute”); Hells Canyon  
12 Preservation Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir.  
13 2005) (stating that courts may dismiss an action pursuant to Federal Rule  
14 of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute or  
15 comply with the rules of civil procedure or the court’s orders); Ghazali v.  
16 Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) (“Failure to follow a  
17 district court’s local rules is a proper ground for dismissal.”), cert. denied,  
18 516 U.S. 838 (1995); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.  
19 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district  
20 court may dismiss an action for failure to comply with any order of the  
21 court.”), cert. denied, 506 U.S. 915 (1992); Thompson v. Housing Auth. of  
22 City of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam) (stating that  
23 district courts have inherent power to control their dockets and may  
24 impose sanctions including dismissal), cert. denied, 479 U.S. 829 (1986).

14 (Id. at 2-3 (emphasis in original, footnote omitted).)<sup>4</sup> Later in that order, the court again warned  
15 plaintiff that: “*Plaintiff’s failure to file a written opposition will be deemed a statement of*  
16 *non-opposition to the pending motion and consent to the granting of the motion to dismiss, and*  
17 *shall constitute an additional ground for the imposition of appropriate sanctions, including a*  
18 *recommendation that plaintiff’s case be involuntarily dismissed with prejudice pursuant to*  
19 *Federal Rule of Civil Procedure 41(b).*” (Id. at 3 (emphasis in original).) Thus, the court gave  
20 plaintiff very clear warnings that his case would be dismissed for failure to prosecute his action  
21 or his failure to comply with the Federal Rules of Civil Procedure, the court’s orders, or the  
22 court’s Local Rules.

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24 <sup>4</sup> The order also included the following footnote, which is omitted in the above-quoted text:  
25 “The Ninth Circuit Court of Appeals had held that under certain circumstances a district court does  
26 not abuse its discretion by dismissing a plaintiff’s case pursuant to Federal Rule of Civil Procedure  
41(b) for failing to file an opposition to a motion to dismiss. See, e.g., Trice v. Clark County Sch.  
Dist., 376 Fed. Appx. 789, 790 (9th Cir. 2010), cert. denied, 131 S. Ct. 422 (2010).” (Order, June 2,  
2011, at 2 n.4.)

1           The court’s docket reveals that plaintiff again failed to file a written opposition or  
2 statement of non-opposition to defendants’ motion to dismiss. Plaintiff failed to do so despite  
3 being given an additional opportunity to respond to the motion and express warnings that the  
4 failure to file a written opposition or statement of non-opposition would result in the dismissal of  
5 his lawsuit with prejudice.

6 II.     DISCUSSION

7           Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an  
8 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,  
9 failure to comply with the court’s local rules, or failure to comply with the court’s orders.<sup>5</sup> See,  
10 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*  
11 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.  
12 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action  
13 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute  
14 or comply with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d  
15 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court  
16 may dismiss an action for failure to comply with any order of the court.”), cert. denied, 506 U.S.  
17 915 (1992); Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district  
18 court’s dismissal of case for failure to prosecute when habeas petitioner failed to file a first  
19 amended petition), cert. denied, 538 U.S. 909 (2003). This court’s Local Rules are in accord.  
20 See E. Dist. Local Rule 110 (“Failure of counsel or of a party to comply with these Rules or with  
21 any order of the Court may be grounds for imposition by the Court of any and all sanctions  
22 authorized by statute or Rule or within the inherent power of the Court.”); E. Dist. Local  
23 Rule 183(a) (providing that a pro se party’s failure to comply with the Federal Rules of Civil  
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25           <sup>5</sup> Rule 41(b) provides, in part: “**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to  
26 prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action  
or any claim against it.” Fed. R. Civ. P. 41(b).

1 Procedure, the court's Local Rules, and other applicable law may support, among other things,  
2 dismissal of that party's action).

3 A court must weigh five factors in determining whether to dismiss a case for  
4 failure to prosecute, failure to comply with a court order, or failure to comply with a district  
5 court's local rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

- 6 (1) the public's interest in expeditious resolution of litigation;  
7 (2) the court's need to manage its docket; (3) the risk of prejudice  
8 to the defendants; (4) the public policy favoring disposition of  
cases on their merits; and (5) the availability of less drastic  
alternatives.

9 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th  
10 Cir. 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of Appeals has stated that  
11 "[t]hese factors are not a series of conditions precedent before the judge can do anything, but a  
12 way for a district judge to think about what to do." In re Phenylpropanolamine (PPA) Prods.  
13 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

14 Although involuntary dismissal can be a harsh remedy, the five relevant factors  
15 weigh in favor of dismissal of this action. The first two factors strongly support dismissal of this  
16 action. Plaintiff's failure to file an opposition or statement of non-opposition to defendants'  
17 motion to dismiss in the first instance, and his failure to do so a second time despite clear  
18 warnings of the consequences for such failures, strongly suggests that plaintiff has abandoned  
19 this action or is not interested in seriously prosecuting it. See, e.g., Yourish v. Cal. Amplifier,  
20 191 F.3d 983, 990 (9th Cir. 1999) ("The public's interest in expeditious resolution of litigation  
21 always favors dismissal."). Moreover, although plaintiff had notice of the continued hearing date  
22 and his potentially final opportunity to respond to defendants' motion on or before June 9, 2011,  
23 plaintiff took no action. Any further time spent by the court on this case, which plaintiff has  
24 demonstrated a lack of any serious intention to pursue, will consume scarce judicial resources  
25 and take away from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district  
26 courts have inherent power to manage their dockets without being subject to noncompliant

1 litigants).

2 In addition, the third factor, which considers prejudice to a defendant as a result of  
3 plaintiff's failure to timely oppose a motion to dismiss, should be given some weight. See  
4 Ferdik, 963 F.2d at 1262. A motion to dismiss is an aid to simplifying the issues and dismissing  
5 improper claims or parties before discovery ensues. Plaintiff's failure to oppose the motion to  
6 dismiss after being given two opportunities to do so, and plaintiff's failure to communicate with  
7 the court or explain his non-participation in this litigation, raises the real possibility that the  
8 defendants in this action might be forced to unnecessarily engage in further litigation against  
9 claims that plaintiff does not appear to value enough to pursue in a serious manner. Defendants  
10 have been diligently pursuing their motion, and plaintiff stalled this matter and prevented the  
11 efficient resolution of this lawsuit. Moreover, unreasonable delay is presumed to be prejudicial.  
12 See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

13 The fifth factor, which considers the availability of less drastic measures, also  
14 supports dismissal of this action. As noted above, the court has actually pursued remedies that  
15 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d  
16 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court  
17 actually tries alternatives before employing the ultimate sanction of dismissal.”), cert. denied,  
18 Malone v. Frank, 488 U.S. 819 (1988). The court excused plaintiff's initial failure to oppose the  
19 potentially dispositive motion, granted plaintiff additional time to file an opposition or statement  
20 of non-opposition, and continued the hearing on the motion. Moreover, the court advised  
21 plaintiff of the requirement of opposing the motion to dismiss and informed him of the  
22 requirements of the Local Rules. Furthermore, the court advised plaintiff that he was required to  
23 comply with the court's Local Rules and the Federal Rules of Civil Procedure even though he is  
24 proceeding without counsel. It also warned plaintiff in clear terms that failure to comply with the  
25 court's orders would result in a recommendation of dismissal with prejudice. Warning a plaintiff  
26 that failure to take steps towards resolution of his or her action on the merits will result in

1 dismissal satisfies the requirement that the court consider the alternatives. See, e.g., Ferdik, 963  
2 F.2d at 1262 (“[O]ur decisions also suggest that a district court’s warning to a party that his  
3 failure to obey the court’s order will result in dismissal can satisfy the ‘consideration of  
4 alternatives’ requirement.”) (citing Malone, 833 F.2d at 132-33). At this juncture, the court finds  
5 no suitable alternative to a recommendation for dismissal of this action. This finding is  
6 supported by the fact that plaintiff’s complaint, which alleges that plaintiff’s home is in  
7 foreclosure (see Compl. ¶¶ 10-16), suggests that plaintiff would very likely be unable to pay any  
8 monetary sanction imposed in lieu of dismissal.

9           The court also recognizes the importance of giving due weight to the fourth factor,  
10 which addresses the public policy favoring disposition of cases on the merits. However, for the  
11 reasons set forth above, factors one, two, three, and five strongly support a recommendation of  
12 dismissal of this action, and factor four does not materially counsel otherwise. Dismissal is  
13 proper “where at least four factors support dismissal or where at least three factors ‘strongly’  
14 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations  
15 and quotation marks omitted). Under the circumstances of this case, the other relevant factors  
16 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,  
17 963 F.2d at 1263.

### 18 III. CONCLUSION

19           In light of the foregoing, IT IS HEREBY ORDERED that the hearing on  
20 defendants’ amended motion to dismiss (Dkt. No. 10), presently scheduled for July 7, 2011, is  
21 vacated.

22           It is FURTHER RECOMMENDED that:

- 23           1. Plaintiff’s case be dismissed with prejudice as to all defendants pursuant to  
24 Federal Rule of Civil Procedure Rule 41(b) and Local Rules 110 and 183(a).
- 25           2. The Clerk of Court be directed to close this case and vacate all future dates  
26 in this case.

