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

JUAN CARDENAS,

Plaintiff,

No. 2:11-cv-03477 LKK KJN PS

v.

RECONTRUST CO, N.A.,
et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Through these proposed findings and recommendations, the undersigned recommends that plaintiff’s case be dismissed with prejudice and that this case be closed.¹

Although plaintiff was granted leave to amend his complaint, plaintiff twice failed to do so.

I. BACKGROUND

Plaintiff, who is proceeding without counsel and in forma pauperis, filed his complaint on December 30, 2011. (Compl., Dkt. No. 1.) On September 24, 2012, the undersigned entered an order dismissing this case pursuant to 28 U.S.C. § 1915(e)(2)(B) and Federal Rule of Civil Procedure 12(h) for lack of subject matter jurisdiction. (Order, Dkt. No. 3.) However, such dismissal was without prejudice. Given plaintiff’s pro se status, the undersigned

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

1 gave plaintiff the opportunity to amend his pleading in order to state a proper basis for this
2 court's jurisdiction.

3 Plaintiff was granted 30 days from September 24, 2012, to file an amended
4 complaint that was complete in itself and that addressed the deficiencies described in the
5 undersigned's order. Plaintiff failed to file any amended pleading. After more than 30 days
6 passed, the undersigned issued another order giving plaintiff yet another opportunity to file an
7 amended pleading. (Order, Nov. 2, 2012, Dkt. No. 4.) The undersigned warned plaintiff that if
8 he failed to file an amended pleading by November 24, 2012, the undersigned would recommend
9 that this case be dismissed.² (*Id.*)

10 The undersigned's prior order specifically informed plaintiff that:

11
12 A district court may impose sanctions, including involuntary
13 dismissal of a plaintiff's case pursuant to Federal Rule of
14 Civil Procedure 41(b), where that plaintiff fails to prosecute
15 his or her case or fails to comply with the court's orders, the
16 Federal Rules of Civil Procedure, or the court's local rules.
17 See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991)
18 (recognizing that a court "may act *sua sponte* to dismiss a suit
19 for failure to prosecute"); Hells Canyon Preservation Council
20 v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005)
21 (stating that courts may dismiss an action pursuant to Federal
22 Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff's
23 failure to prosecute or comply with the rules of civil
24 procedure or the court's orders); Ghazali v. Moran, 46 F.3d
25 52, 53 (9th Cir. 1995) (per curiam) ("Failure to follow a
26 district court's local rules is a proper ground for dismissal.");
Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992)
("Pursuant to Federal Rule of Civil Procedure 41(b), the
district court may dismiss an action for failure to comply with
any order of the court."); Thompson v. Housing Auth. of City
of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam)
(stating that district courts have inherent power to control
their dockets and may impose sanctions including dismissal).

(Order, Nov. 2, 2012, Dkt. No. 4 at 2-3.) The undersigned's prior order also informed plaintiff

² The undersigned's prior order stated, with italicized emphasis, that plaintiff's "[f]ailure to timely file an amended complaint in accordance with this order and the court's order of September 24, 2012 will result in a recommendation that this action be dismissed" (*Id.*)

1 that Eastern District Local Rule 183(a) provides, in part:

2
3 Any individual representing himself or herself without an attorney is
4 bound by the Federal Rules of Civil or Criminal Procedure, these Rules,
5 and all other applicable law. All obligations placed on “counsel” by these
6 Rules apply to individuals appearing in propria persona. Failure to comply
7 therewith may be ground for dismissal . . . or any other sanction
8 appropriate under these Rules.

9 (Id.)

10 To date, plaintiff has had ample time to file an amended pleading and has not
11 done so, despite having been warned of the consequences. Moreover, given plaintiff’s pro se
12 status, the undersigned gave plaintiff additional opportunities to amend his pleading to correct
13 the deficiencies described in the undersigned’s order of September 24, 2012. (Id.)

14 Notwithstanding those opportunities, plaintiff has not filed any amended pleading to date.

15 II. DISCUSSION

16 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an
17 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,
18 failure to comply with the court’s local rules, or failure to comply with the court’s orders.³ See,
19 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*
20 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
21 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action
22 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute
23 or comply with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d
24 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court
25 may dismiss an action for failure to comply with any order of the court.”), cert. denied, 506 U.S.
26 915 (1992); Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district

³ Rule 41(b) provides, in part: “(b) **Involuntary Dismissal; Effect.** If the plaintiff fails to 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 court's dismissal of case for failure to prosecute when habeas petitioner failed to file a first
2 amended petition), cert. denied, 538 U.S. 909 (2003). This court's Local Rules are in accord.
3 See E. Dist. Local Rule 110 ("Failure of counsel or of a party to comply with these Rules or with
4 any order of the Court may be grounds for imposition by the Court of any and all sanctions
5 authorized by statute or Rule or within the inherent power of the Court."); E. Dist. Local
6 Rule 183(a) (providing that a pro se party's failure to comply with the Federal Rules of Civil
7 Procedure, the court's Local Rules, and other applicable law may support, among other things,
8 dismissal of that party's action).

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

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

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

20 Although involuntary dismissal can be a harsh remedy, on balance the five
21 relevant factors weigh in favor of dismissal of this action. The first two factors strongly support
22 dismissal of this action. Plaintiff's failure to file an amended complaint in response to two court
23 orders despite clear warnings of the consequences for such failures, strongly suggests that
24 plaintiff has abandoned this action or is not interested in seriously prosecuting it. See, e.g.,
25 Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("The public's interest in
26 expeditious resolution of litigation always favors dismissal."). Any further time spent by the

1 court on this case, which plaintiff has demonstrated a lack of any serious intention to pursue, will
2 consume scarce judicial resources and take away from other active cases. See Ferdik, 963 F.2d at
3 1261 (recognizing that district courts have inherent power to manage their dockets without being
4 subject to noncompliant litigants).

5 In addition, the third factor, which considers prejudice to a defendant, should be
6 given some weight. See Ferdik, 963 F.2d at 1262. Although the court has not ordered that
7 plaintiff's operative complaint be served on defendants, defendants remain named in a lawsuit. It
8 is difficult to quantify the prejudice suffered by defendants here; however, it is enough that
9 defendants have been named in a lawsuit that plaintiff has effectively abandoned. At a
10 minimum, defendants have been prevented from attempting to resolve this case on the merits by
11 plaintiff's unreasonable delay in prosecuting this action. Unreasonable delay is presumed to be
12 prejudicial. 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 file an
19 amended complaint and provided plaintiff with additional time to file an amended complaint.
20 Moreover, the court advised plaintiff that he was required to actively prosecute his action and
21 follow the court's orders. It also warned plaintiff in clear terms that failure to file an amended
22 complaint would result in a recommendation of dismissal with prejudice, based in part on
23 plaintiff's consent to such a dismissal. Warning a plaintiff that failure to take steps towards
24 resolution of his or her action on the merits will result in dismissal satisfies the requirement that
25 the court consider the alternatives. See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur decisions also
26 suggest that a district court's warning to a party that his failure to obey the court's order will

1 result in dismissal can satisfy the ‘consideration of alternatives’ requirement.”) (citing Malone,
2 833 F.2d at 132-33). At this juncture, the court finds no suitable alternative to a recommendation
3 for dismissal of this action. This finding is supported by the fact that plaintiff is proceeding in
4 forma pauperis and thus would very likely be unable to pay any monetary sanction imposed in
5 lieu of dismissal.

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

15 III. CONCLUSION

16 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

17 1. Plaintiff’s action be dismissed with prejudice pursuant to Federal Rule of
18 Civil Procedure 41(b) and Local Rules 110 and 183(a).


19 2. The Clerk of Court be directed to close this case and vacate all dates.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
22 days after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. 28 U.S.C. § 636(b)(1); see also E. Dist.
24 Local Rule 304(b). Such a document should be captioned “Objections to Magistrate Judge’s
25 Findings and Recommendations.” Any response to the objections shall be filed with the court
26 and served on all parties within fourteen days after service of the objections. E. Dist. Local Rule

1 304(d). Failure to file objections within the specified time may waive the right to appeal the
2 District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst,
3 951 F.2d 1153, 1156-57 (9th Cir. 1991).

4 IT IS SO RECOMMENDED.

5 DATED: December 20, 2012

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8 KENDALL J. NEWMAN
9 UNITED STATES MAGISTRATE JUDGE
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