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

EDWARD SOMERVILLE,

Plaintiff,

No. 2:12-cv-1143 JAM KJN PS

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Through these findings and recommendations, the undersigned recommends that plaintiff's case be dismissed with prejudice and that this case be closed.<sup>1</sup> Plaintiff failed to complete service of process, failed to file a required status report prior to the scheduled status (pre-trial scheduling) conference, failed to appear at the status conference, and failed to respond to the court's order to show cause.

I. BACKGROUND

Plaintiff is proceeding without counsel. On April 30, 2012, plaintiff filed his complaint and paid the filing fee. (Dkt. No. 1.) That same day, the court issued an order setting a status (pre-trial scheduling) conference for October 4, 2012, at 10:00 a.m., in Courtroom No. 25

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<sup>1</sup> This case proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 before the undersigned. (Dkt. No. 3 at 2.) The order stated that “[a]ll parties shall appear by  
2 counsel or in person if acting without counsel” and required the parties to file status reports  
3 addressing specified issues not later than seven (7) days prior to the status conference. (Id.) On  
4 May 18, 2012, due to the court’s own unavailability, the court continued the status conference to  
5 October 25, 2012, by minute order, which was served on plaintiff. (Dkt. No. 4.)

6           The court’s April 30, 2012 order setting status conference also directed plaintiff to  
7 complete service of process on the named defendants within 120 days and cautioned plaintiff that  
8 the action may be dismissed if service of process is not accomplished within that period. (Dkt.  
9 No. 3 at 1); see Fed. R. Civ. P. 4(m). Furthermore, the order cautioned that “[f]ailing to obey  
10 federal or local rules, or [an] order of this court, may result in dismissal of this action. This court  
11 will construe pro se pleadings liberally, but pro se litigants must comply with the procedural  
12 rules.” (Dkt. No. 3 at 3.) Finally, the order notified the parties that “Local Rule 110 provides  
13 that failure to comply with the Local Rules may be grounds for imposition of any and all  
14 sanctions authorized by statute or Rule or within the inherent power of the Court.” (Id.)

15           No party appeared at the October 25, 2012 status conference and no status reports  
16 were filed. Furthermore, there has been no docket activity by any party since the case was  
17 initially filed in April 2012. This strongly suggests that plaintiff has not effectuated service of  
18 process on the named defendants.

19           As a result of plaintiff’s failures, the undersigned entered an order to show cause  
20 (“OSC”) on October 26, 2012, which required plaintiff, within fourteen (14) days of the date of  
21 service of that order, to “show cause in writing why this case should not be dismissed with  
22 prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for plaintiff’s failure to  
23 prosecute the action and failure to follow the court’s orders, the Local Rules, and the Federal  
24 Rules of Civil Procedure. (Dkt. No. 6 at 2-3.) In ordering plaintiff to show cause, the  
25 undersigned warned plaintiff: “Plaintiff’s failure to respond to this order, or plaintiff’s failure to  
26 show good cause for his non-compliance with the court’s orders and procedural rules, shall

1 constitute an additional ground for the imposition of appropriate sanctions, including a  
2 recommendation that plaintiff's case be involuntarily dismissed with prejudice pursuant to  
3 Federal Rule of Civil Procedure 41(b) and Local Rules 110 and 183(a)." (Id. at 3.) The OSC  
4 also advised plaintiff as follows:

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

25 (Id. at 2.) The court's docket reveals that plaintiff failed to file a response to the OSC in  
26 accordance with the court's order.<sup>2</sup>

## 18 II. DISCUSSION

19 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an  
20 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,  
21 failure to comply with the court's local rules, or failure to comply with the court's orders. See,

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23 <sup>2</sup> The undersigned further notes that the court's orders have not been returned to the court  
24 as undeliverable. Nevertheless, even if they had been, it is plaintiff's duty to keep the court informed  
25 of his current address, and service of the court's orders at the address on record was effective absent  
26 the filing of a notice of change of address. In relevant part, Local Rule 182(f) provides: "Each  
appearing attorney and pro se party is under a continuing duty to notify the Clerk and all other parties  
of any change of address or telephone number of the attorney or the pro se party. Absent such notice,  
service of documents at the prior address of the attorney or pro se party shall be fully effective."

1 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*  
2 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.  
3 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action  
4 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to prosecute  
5 or comply with the rules of civil procedure or the court’s orders); Ferdik v. Bonzelet, 963 F.2d  
6 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court  
7 may dismiss an action for failure to comply with any order of the court”); Pagtalunan v. Galaza,  
8 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district court’s dismissal of case for failure to  
9 prosecute when habeas petitioner failed to file a first amended petition). This court’s Local  
10 Rules are in accord. See E.D. Cal. L.R. 110 (“Failure of counsel or of a party to comply with  
11 these Rules or with any order of the Court may be grounds for imposition by the Court of any and  
12 all sanctions authorized by statute or Rule or within the inherent power of the Court.”); E.D. Cal.  
13 L.R. 183(a) (providing that a pro se party’s failure to comply with the Federal Rules of Civil  
14 Procedure, the court’s Local Rules, and other applicable law may support, among other things,  
15 dismissal of that party’s action).

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

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

22 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th  
23 Cir. 1995). The Ninth Circuit Court of Appeals has stated that “[t]hese factors are not a series of  
24 conditions precedent before the judge can do anything, but a way for a district judge to think  
25 about what to do.” In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226  
26 (9th Cir. 2006).

1           Although involuntary dismissal can be a harsh remedy, on balance the five  
2 relevant factors weigh in favor of dismissal of this action. The first two factors strongly support  
3 dismissal of this action. Plaintiff's failure to complete service of process, file a status report,  
4 attend the status conference, and file a response to the OSC, despite clear warnings of the  
5 consequences for such failures, strongly suggests that plaintiff has abandoned this action or is not  
6 interested in seriously prosecuting it. See, e.g., Yourish v. Cal. Amplifier, 191 F.3d 983, 990  
7 (9th Cir. 1999) ("The public's interest in expeditious resolution of litigation always favors  
8 dismissal"). Any further time spent by the court on this case, which plaintiff has demonstrated a  
9 lack of any serious intention to pursue, will consume scarce judicial resources and take away  
10 from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district courts have  
11 inherent power to manage their dockets without being subject to noncompliant litigants).

12           In addition, the third factor, which considers prejudice to a defendant, should be  
13 given some weight. See Ferdik, 963 F.2d at 1262. Although it does not appear that defendants  
14 have actually been served with process, defendants remain named in a lawsuit. It is difficult to  
15 quantify the prejudice suffered by defendants here; however, it is enough that defendants have  
16 been named in a lawsuit that plaintiff has effectively abandoned. At a minimum, defendants  
17 have been prevented from attempting to resolve this case on the merits by plaintiff's  
18 unreasonable delay in prosecuting this action. Unreasonable delay is presumed to be prejudicial.  
19 See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

20           The fifth factor, which considers the availability of less drastic measures, also  
21 supports dismissal of this action. As noted above, the court has actually pursued remedies that  
22 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d  
23 128, 132 (9th Cir. 1987) ("[E]xplicit discussion of alternatives is unnecessary if the district court  
24 actually tries alternatives before employing the ultimate sanction of dismissal"). Before  
25 recommending dismissal, the court issued an OSC and granted plaintiff an opportunity to provide  
26 an explanation for his failures to date. Moreover, the court advised plaintiff that he was required

1 to actively prosecute his action and follow the court's orders. It also warned plaintiff in clear  
2 terms that failure to file a response to the OSC would result in a recommendation of dismissal  
3 with prejudice. Warning a plaintiff that failure to take steps towards resolution of his or her  
4 action on the merits will result in dismissal satisfies the requirement that the court consider the  
5 alternatives. See, e.g., Ferdik, 963 F.2d at 1262 (“[O]ur decisions also suggest that a district  
6 court’s warning to a party that his failure to obey the court’s order will result in dismissal can  
7 satisfy the ‘consideration of alternatives’ requirement”) (citing Malone, 833 F.2d at 132-33). At  
8 this juncture, the court finds no suitable alternative to a recommendation for dismissal of this  
9 action. Because plaintiff has not even responded to the court’s OSC, the court has little  
10 confidence that plaintiff would pay monetary sanctions if they were to be imposed in lieu of  
11 dismissing the case.

12           The court also recognizes the importance of giving due weight to the fourth factor,  
13 which addresses the public policy favoring disposition of cases on the merits. However, for the  
14 reasons set forth above, factors one, two, three, and five strongly support a recommendation of  
15 dismissal of this action, and factor four does not materially counsel otherwise. Dismissal is  
16 proper “where at least four factors support dismissal or where at least three factors ‘strongly’  
17 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations  
18 and quotation marks omitted). Under the circumstances of this case, the other relevant factors  
19 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,  
20 963 F.2d at 1263. If anything, a disposition on the merits has been hindered by plaintiff’s own  
21 failure to prosecute the case.

### 22 III. CONCLUSION

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


24           1. Plaintiff’s action be DISMISSED WITH PREJUDICE pursuant to Federal  
25 Rule of Civil Procedure 41(b) for failure to prosecute the action and failure to follow the court’s  
26 orders.

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

2            These findings and recommendations are submitted to the United States District  
3 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
4 (14) days after being served with these findings and recommendations, any party may file written  
5 objections with the court and serve a copy on all parties. Such a document should be captioned  
6 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
7 shall be served on all parties and filed with the court within fourteen (14) days after service of the  
8 objections. The parties are advised that failure to file objections within the specified time may  
9 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th  
10 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

11            IT IS SO RECOMMENDED.

12 DATED: November 19, 2012

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15 KENDALL J. NEWMAN  
16 UNITED STATES MAGISTRATE JUDGE  
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