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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Bartlett Elliott,

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No. CV-10-8097-PCT-LOA

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Plaintiff,

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**ORDER**

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vs.

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Wal-Mart Stores, Inc.

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Defendant.

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This matter is before the Court on Defendant’s Motion to Dismiss, doc. 11,

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pursuant to Fed.R.Civ.P. 12(b)(6). Both parties have consented in writing to magistrate judge

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jurisdiction in this case pursuant to 28 U.S.C. § 636. (Docs. 7, 13) For the reasons set forth

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below, the Court will grant this Motion and will dismiss this action with prejudice.

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**I. Background**

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Plaintiff, proceeding *pro se*, commenced this action June 9, 2010 against Defendant

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Wal-Mart Stores, Inc. (“Wal-Mart”).<sup>1</sup> (Doc. 1) Defendant Wal-Mart subsequently waived

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service of process and filed a Motion to Dismiss for failure to state a claim under Fed.R.

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Civ.P. 12(b)(6). (Doc. 11) The Court ordered Plaintiff to file a response to the Motion to

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Dismiss on or before September 13, 2010. (Doc. 16) Although the September 13, 2010

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deadline passed, Plaintiff neither responded to the motion to dismiss nor otherwise commu-

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<sup>1</sup> The Court uses the full correct name of Wal-mart, rather than its incorrect name.

1 nicated with the Court. In view of Plaintiff's failure to respond to the Motion to Dismiss, on  
2 September 17, 2010, the Court ordered Plaintiff to show cause on or before September 24,  
3 2010 why his Complaint should not be dismissed for failure to comply with Court orders.  
4 (Doc. 18) On September 24, 2010, the Order to Show Cause was returned to the Court as  
5 "undeliverable," marked "unable to forward." (Doc. 19) Plaintiff has not notified the Court  
6 of his current address in violation of Local Rule of Civil Procedure 83.3(d). In view of  
7 Plaintiff's failure to respond to the Motion to Dismiss and failure to notify the Court of his  
8 current address, the Court will consider whether to dismiss this action.

## 9 **II. Motion to Dismiss/ Failure to Comply with Court Orders**

10 Local Rule of Civil Procedure 7.2(i), Rules of Practice of the U.S. District Court  
11 for the District of Arizona, provides that "if the unrepresented party or counsel does not  
12 serve and file the required answering memoranda [to a motion] . . . , such non-compliance  
13 may be deemed a consent to the . . . granting of the motion and the Court may dispose of the  
14 matter summarily." L.R.Civ. 7.2(i). In view of Local Rule 7.2(i), the Court deems Plaintiff's  
15 failure to respond to Defendant's Motion to Dismiss as his consent to granting that Motion.

16 Additionally, Plaintiff's failure to notify the Court of his current address supports  
17 dismissal of this action pursuant to Fed.R.Civ.P. 41(b). Rule 41(b) of the Federal Rules of  
18 Civil Procedure provides that "[i]f the plaintiff fails to prosecute or to comply with these  
19 rules or a court order, a defendant may move to dismiss the action. . . ." In *Link v. Wabash*  
20 *Railroad Co.*, 370 U.S. 626, 629-31 (1962), the Supreme Court recognized that a federal  
21 district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute,  
22 even though the language of Rule 41(b) of the Federal Rules of Civil Procedure appears to  
23 require a motion from a party. Moreover, in appropriate circumstances, the Court may  
24 dismiss a complaint for failure to prosecute even without notice or hearing. *Id.* at 633.

25 In determining whether Plaintiff's failure to prosecute warrants dismissal of the  
26 case, the Court must weigh the following five factors: "(1) the public's interest in  
27 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of  
28 prejudice to the defendants; (4) the public policy favoring disposition of cases on their

1 merits; and (5) the availability of less drastic sanctions.” *Carey v. King*, 856 F.2d 1439,  
2 1440 (9<sup>th</sup> Cir. 1988) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9<sup>th</sup> Cir. 1986)).  
3 “The first two of these factors favor the imposition of sanctions in most cases, while the  
4 fourth factor cuts against a default or dismissal sanction. Thus the key factors are prejudice  
5 and availability of lesser sanctions.” *Wanderer v. Johnson*, 910 F.2d 652, 656 (9<sup>th</sup> Cir.  
6 1990); *see also Ferdik v. Bonzelet*, 963 F.2d 1259, 1261 (9<sup>th</sup> Cir. 1992) (stating that the first  
7 two dismissal factors favor dismissal and noting that “it is incumbent upon [the Ninth  
8 Circuit] to preserve the district courts’ power to manage their dockets without being subject  
9 to endless vexatious noncompliance of litigants. . .”).

10 Here, the first, second, and third factors favor dismissal of this case. Plaintiff’s  
11 failure to comply with Court orders prevents the case from proceeding in the foreseeable  
12 future. The fourth factor, as always, weighs against dismissal. The fifth factor requires the  
13 Court to consider whether a less drastic alternative is available. The Court has already  
14 ordered Plaintiff to show cause why this matter should not be dismissed and warned him that  
15 this matter could be dismissed if Plaintiff failed to comply with Court orders. The Ninth  
16 Circuit recognizes that “a district court’s warning to a party that his failure to obey the  
17 court’s order will result in dismissal can satisfy the ‘consideration of alternatives’ require-  
18 ment.” *Ferdik*, 963 F.2d at 1262 (citing *Malone v. United States Postal Service*, 833 F.2d  
19 128, 132-33 (9<sup>th</sup> Cir. 1987)). Moreover, because Plaintiff has failed to notify the Court of  
20 his current address, further orders to show cause would be fruitless.

21 Rule 41(b) provides that a dismissal for failure to prosecute or failure to comply  
22 with court orders operates as an adjudication upon the merits, “[u]nless the dismissal order  
23 states otherwise.” The Court finds that dismissal with prejudice is appropriate in this case in  
24 view of Plaintiff’s failure to respond to the Motion to Dismiss which, pursuant to LRCiv  
25 7.2(i), is deemed as consent to granting that motion.

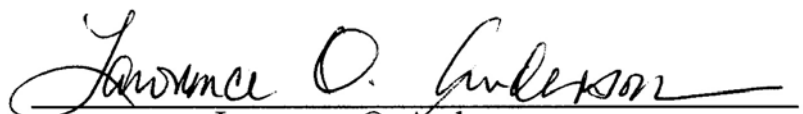
26 The Court has also considered the substantive merits of the Motion. Even if the  
27 Court were to allow Plaintiff to amend his Complaint to comply with Rule 8(a)(2), *Bell*  
28 *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), it

1 appears as though Plaintiff is alleging a Title 42 U.S.C. § 1983 action. Of course, Wal-Mart  
2 cannot be held liable for alleged violations of Plaintiff's constitutional rights because  
3 Wal-Mart is not a state actor. Section 1983 allows individuals to recover damages and other  
4 relief for deprivations of constitutional rights that occur under color of state law. *Parratt v.*  
5 *Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474  
6 U.S. 327, 330-31 (1986). To state a claim under § 1983, a plaintiff must allege a violation  
7 of rights secured by the Constitution or laws of the United States and must show that the  
8 alleged deprivation was committed by a person acting under the color of state law. *West v.*  
9 *Atkins*, 487 U.S. 42 (1988). Clearly, Wal-Mart is a non-governmental corporation, is not a  
10 state actor and was not acting "under the color of state law" at all times alleged in the  
11 Complaint. Because amendment of the Complaint to allege a § 1983 action would be futile,  
12 the Court's dismissal will be with prejudice.

13 Accordingly,

14 **IT IS ORDERED** that Defendant's Motion to Dismiss (Doc. 11) is **GRANTED**  
15 and that Plaintiff's Complaint is hereby **DISMISSED** with prejudice. The Clerk of Court  
16 shall enter judgment accordingly.

17 DATED this 28<sup>th</sup> day of September, 2010.

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20 Lawrence O. Anderson  
21 United States Magistrate Judge  
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