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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT ALAN KEMP,)	No. CV 08-384-TUC-FRZ (BPV)
Plaintiff,)	
vs.)	REPORT AND
DMI- AVIATION, INC., et al.,)	RECOMMENDATION
Defendants.)	

Presently pending before the Court is Plaintiff’s untimely motion for extension of time to Respond to this Court’s Order to Show Cause (Doc. No. 61), Plaintiff’s untimely response to this Court’s Order to Show Cause (Doc. No. 64), an opposition to Plaintiff’s motion for extension, and a motion to dismiss with prejudice by Defendant Morgan (Doc. No. 62), a motion to dismiss the case, with prejudice, for failure to comply with the Court’s order of May 21, 2009, and the Order to Show cause issued by this Court on June 26, 2009 by Defendants Hammeroff, (Doc. No. 63), the Plaintiff’s untimely motion for extension of time to file a reply and response to Defendants’ motions (Doc. No. 66), and Plaintiff’s untimely reply and response (Doc. No. 67.)

This action was filed on July 3, 2008. On November 7, 2008, the Magistrate Judge issued a Report and Recommendation recommending dismissal of the complaint. On May 21, 2009, the District Court issued an order addressing the Report

1 and Recommendation, as well as 21 other pending motions, 15 of which were filed
2 by Plaintiff. (Doc. No. 59.)

3 The District Court ordered that the First Amended Complaint be dismissed for
4 failure to meet the pleading requirements of Rule 8 and 9, and further for failure to
5 state a claim pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. (Doc.
6 No. 59.) Plaintiff was granted 30 days from the filing date of the order to file a
7 second amended complaint that complies with the Federal Rules of Civil Procedure,
8 the Local Rules of Practice and the orders of the Court. (*Id*) Defendant's motions to
9 dismiss were partially granted, and all other pending matters were denied as moot.
10 (*Id*) The District Court referred the matter back to the Magistrate Judge for report and
11 recommendation. (*Id*)

12 More than thirty days passed and Plaintiff failed to file a second amended
13 complaint. On June 29, 2009, the Magistrate Judge issued an Order to Show Cause
14 why the case should not be dismissed for failure to comply by filing a writing with the
15 Court on July 13, 2009. (Doc. No. 60.) The order admonished Plaintiff that if he did
16 not comply with the order the case would be dismissed.

17 On July 16, 2009, Plaintiff filed an untimely Motion for Extension of time to
18 File Motion for Clarification and to Toll Time to File Second Amended Complaint
19 and Motion for Clarification and to Toll Time to File Second Amended Complaint
20 and Notice of Intent to File Supplemental Evidence. (Doc. No. 61.) Plaintiff asserted
21 that an additional 75 days were needed to obtain a clarification of the Court's Order
22 entered by the Court on May 21, 2009, and to file papers in actions pending in another
23 "directly related case" currently on appeal in the Ninth Circuit (09-70576). Plaintiff
24 also asserted that he was relocating back to the State of Nevada in time to file his
25 second amended complaint as a diverse party in this action. (Doc. No. 61, at 3.)
26 Petitioner asserted that it was critical that he obtain a decision by the Ninth Circuit as
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1 it would directly bear on both the jurisdictional and legal basis of the charges brought
2 by Plaintiff within his second amended complaint.

3 On July 28, 2009, Defendant Kent Morgan filed an opposition to Plaintiff's
4 motion for extension, and a motion to dismiss with prejudice. (Doc. No. 62.) On
5 August 4, 2009, Defendants Hammeroff filed a motion to dismiss the case, with
6 prejudice, for failure to comply with the Court's order of May 21, 2009, and the Order
7 to Show cause issued by this Court on June 26, 2009. (Doc. No. 63.)

8 On August 18, 2009, Plaintiff filed an "Interim Supplemental Supporting
9 Evidence and Preliminary Official Letter Communication [July 27, 2009] To: Ms.
10 Candice M. Will, FBI - Assistant Director, ("OPR") ..." (Doc. No. 64.) This paper
11 contained 27 pages of rambling, incoherent factual and legal theories proposed by
12 Plaintiff to be the basis for his second amended complaint, and an 80 page document
13 consisting of a caption and table of contents for a second amended complaint, along
14 with numerous exhibits, but no body of the complaint. (Doc No. 64, at 29-108.) On
15 August 26, 2009, Plaintiff submitted a Plaintiff Submission of [Evidence], consisting
16 of three paragraphs and an attached affidavit. (Doc. No. 65.)

17 On August 31, 2009, Plaintiff submitted a Motion for Extension of Time to
18 File Plaintiff's Reply to Defendant Kent D. Morgan's' [Opposition to Plaintiff's
19 Motion for Extension of Time to File Second Amended Complaint, - Opposition to
20 Plaintiff's Motion for Extension of Time to File Motion for Clarification, - Opposition
21 to Plaintiff's Motion to Toll Time to File Second Amended Complaint, - Motion to
22 Dismiss with Prejudice]. (Doc. No. 66.) Plaintiff noted that he believed that his reply
23 was already late, but that Defendant's had, from the inception of the action, filed
24 "virtually No Coherent Opposition nor Substantiated Objections, to ANY Evidence
25 Submitted by Plaintiff, only procedural Opposition based on FORM and or
26 PROCEDURE." (*Id*, at 2-3.) Plaintiff asserted several factual arguments regarding
27 the evidence he has submitted, and again argued that "In order to comply with the
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1 Court's Order entered May 21st., 2009, Plaintiff has No Alternative but to Re-Locate
2 to another Federal Jurisdiction, and therefore as a result, Plaintiff is Re-Locating on
3 September 4th., 2009, to Las Vegas, Nevada. This will enable Plaintiff to maintain
4 Diversity Jurisdiction as necessary to enable Plaintiff to now lawfully name
5 Attorney(s): WALKER, WOODS, and BREEN, as Defendant-Person(s), within the
6 instant proceeding within Plaintiff's: SECOND AMENDED COMPLAINT to be filed
7 on September 4th., 2009." (*Id*, at 4.) Plaintiff filed his reply and response the same
8 date. (Doc No. 67.)

9 **DISCUSSION**

10 Rule 41(b) of the Federal Rules of Civil Procedure provides that "[i]f the
11 plaintiff fails to prosecute or to comply with these rules or a court order, a defendant
12 may move to dismiss the action or any claim against it." In *Link v. Wabash Railroad*
13 *Co.*, 370 U.S. 626, 629-31 (1962), the Supreme Court recognized that a federal district
14 court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even
15 though the language of Rule 41(b) of the Federal Rules of Civil Procedure appears to
16 require a motion from a party. Moreover, in appropriate circumstances, the Court
17 may dismiss a complaint for failure to prosecute even without notice or hearing. *Id*
18 at 633.

19 Plaintiff failed to file his second amended complaint within the 30 day deadline
20 ordered by the District Judge in the case, and, when given the opportunity to explain
21 why he failed to do so, filed an untimely motion for an extension of time to file his
22 second amended complaint. The Court notes that, again, Kemp did not make his
23 request prior to the expiration of the court imposed deadline for service. Where a
24 request for additional time is made after the expiration of a specified deadline, the
25 Court may grant an extension where the failure to act is the result of excusable
26 neglect. Rule 6(b), Fed.R.Civ.P.

1 devoted to other major and serious criminal and civil cases on its docket. The district
2 court must have the ability to preserve its power to manage its dockets without being
3 subject to the endless vexatious noncompliance of litigants. *See Ferdick*, 963 F.2d
4 1261. Plaintiff has demonstrated that he is unable to timely comply with the deadlines
5 imposed by the rules of court or by order of the court. This has necessitated much
6 time spent by this Court and the District Court to manage a case in which Plaintiff has
7 demonstrated no intent or good faith effort to comply with proper procedure.

8 As to prejudice, the Court previously noted, “Prolix, confusing complaints ...
9 impose unfair burdens on litigants and judges.” *Mchenry v. Renne*, 84 F.3d 1172,
10 1179 (9th cir. 1996). A court may consider “[t]he burden imposed by plaintiff on
11 defendants in related litigation” and the amount of time and money spent in defending
12 against poorly drafted proceeding sin present and related actions. *Id* (citing *Nevijel*
13 *v. North Coast Life Ins. Co.*, 651 F.2d 671, 674-75 (9th Cir. 1981). The District Court
14 reviewed the docket in previously filed actions, and found that they indicated that
15 Plaintiff Kemp and/or Aviation Technologies LTD have failed to procedurally
16 prosecute the actions and include numerous requests for extensions. This Court
17 previously recommended dismissal in the instant case for failure to prosecute.

18 Defendant Morgan asserts that this case has been in existence now for many
19 months without the filing of a coherent Complaint. Morgan argues that there is
20 prejudice to Defendant since Plaintiff has filed fraud and racketeering charges against
21 him which have been outstanding for a considerable period of time, and that the
22 stigma of operating within the business community with such outstanding charges
23 carries a heavy toll on any businessperson in the form of disclosing information
24 regarding pending lawsuits when filling out business questionnaires and financial
25 affidavits when applying for loans, and that Defendant Morgan has suffered this
26 stigma now for a considerable period of time.

1 Defendants Hammeroff argue that they have “waited for Plaintiff to state his
2 claims in clear enough language for a person of ordinary intelligence to understand
3 what relief he seeks and his theory of liability. No such writing has been forthcoming.
4 Instead, Plaintiff files one voluminous document after another seeking further
5 extensions of time to make claims arising out of a decade old transaction.” This Court
6 agrees.

7 Here, the first, second, and third factors favor dismissal of this case. Plaintiff’s
8 failure to comply with the rules of court and Court orders in this case prevents the
9 case from proceeding in the foreseeable future. The fourth factor, as always, weighs
10 against dismissal. The fifth factor requires the Court to consider whether a less drastic
11 alternative is available.

12 Rule 41(b) provides that a dismissal for failure to prosecute operates as an
13 adjudication upon the merits “[u]nless the court in its order for dismissal otherwise
14 specifies.” In the instant case, upon consideration of the risk of prejudice to
15 Defendants, Plaintiff’s blatant disregard for court procedure, the numerous
16 opportunities the Court has provided Plaintiff to comply with proper procedure and
17 the specific direction the Court has provided to Plaintiff to assist in his compliance,
18 the numerous the Court finds that a dismissal with prejudice is appropriate. The
19 Complaint and this action should therefore be dismissed with prejudice pursuant to
20 Rule 41(b) of the Federal Rules of Civil Procedure.

21 **RECOMMENDATION**

22 Based on the foregoing and pursuant to 28 U.S.C. § 636(b), the Magistrate
23 Judge recommends that the Complaint (Doc. No. 1) and this action be **DISMISSED**
24 **WITH PREJUDICE** pursuant to Rule 41(b) of the Federal Rules of Civil Procedure
25 for failure to prosecute and for failure to comply with an order of the court.
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1 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections
2 within 10 days after being served with a copy of this Report and Recommendation.
3 A party may respond to another party's objections within ten days after being served
4 with a copy thereof. Fed.R.Civ.P. 72(b). If objections are not timely filed they may
5 be deemed waived. The parties are advised that any objections filed are to be
6 identified with the following case number: **CV 08-0384-TUC-FRZ.**

7 DATED this 2nd day of September, 2009.

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11 Bernardo P. Velasco
12 United States Magistrate Judge
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