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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARSHA BRANDON,)	NO. CV 13-7613-PSG(E)
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
LOS ANGELES COUNTY SHERIFF)	OF UNITED STATES MAGISTRATE JUDGE
DEPARTMENT "DEPUTY MORALES,")	
)	
)	
Defendants.)	
)	

This Report and Recommendation is submitted to the Honorable Phillip S. Gutierrez, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

Plaintiff, a state prisoner, filed a "1st Amended . . . Civil Rights Complaint" ("First Amended Complaint") on November 26, 2013. The First Amended Complaint names "Deputy Morales" as the sole Defendant.

1 On December 2, 2013, the Court ordered the United States Marshals
2 Service to serve the First Amended Complaint on Defendant "Deputy
3 Morales." After the Marshals Service advised the Court that Plaintiff
4 had failed to provide information or documentation necessary to effect
5 service, and after Plaintiff stated in a declaration that she had no
6 additional contact information for "Deputy Morales," the Court
7 dismissed the action without prejudice by Judgment entered July 14,
8 2014.

9
10 On November 27, 2015, the United States Court of Appeals for the
11 Ninth Circuit filed a Memorandum remanding the action to this Court
12 for further proceedings. The Ninth Circuit stated that the record
13 showed that Plaintiff had provided the United States Marshals Service
14 with the last name and place of employment of "Deputy Morales" and the
15 date, time and location of the alleged incident giving rise to
16 Plaintiff's claims. The Ninth Circuit observed that the record did
17 not indicate why the United States Marshals Service or the Los Angeles
18 Sheriff's Department had been unable to effectuate service. The Ninth
19 Circuit vacated and remanded the case for further proceedings,
20 "including, if necessary, a determination of the U.S. Marshal's or
21 Sheriff's Department's efforts to identify or locate Deputy Morales."

22
23 Initially, this Court was unable to proceed further in the action
24 because Plaintiff had failed to keep the Court apprised of her current
25 address. Mail directed to Plaintiff's address of record was returned
26 to the Court undelivered. Accordingly, the Court entered Judgment on
27 February 4, 2016, again dismissing the action without prejudice.

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1 On February 5, 2016, Plaintiff belatedly filed a new address of
2 record. On February 22, 2016, the Court received from Plaintiff an
3 "Objection . . . Motion for Reconsideration" seeking to proceed in the
4 action.

5
6 On February 25, 2016, the Court issued an "Order Vacating
7 Judgment and Extending Time to Effect Service of Process." The Court
8 thereby vacated the judgment pursuant to Rule 60(b) of the Federal
9 Rules of Civil Procedure, ordered the United States Marshal to renew
10 efforts to serve the Summons and First Amended Complaint on Defendant
11 "Deputy Morales," and extended the time to complete such service to
12 ninety (90) days from the date of the Order. See Fed. R. Civ. P.
13 4(m). The Court also ordered Plaintiff forthwith to provide to the
14 United States Marshals Service all information and documentation
15 Plaintiff then possessed that might assist in the renewed efforts to
16 serve Defendant "Deputy Morales." The Court further ordered that, in
17 the event the United States Marshals Service again proved unable to
18 effect service of process on Defendant "Deputy Morales," the United
19 States Marshals Service should file with the Court a document
20 detailing all efforts to identify, locate and serve Defendant "Deputy
21 Morales."¹

22
23 On March 14, 2016, Plaintiff's service copy of the Court's
24 February 25, 2016 Order was returned to the Court undelivered, with
25 the handwritten notation "advised at 1430 & 2000 Hrs. refused to pick-

26
27 ¹ The Court did not direct any service-related order to
28 non-party Los Angeles Sheriff's Department for lack of jurisdiction
to do so.

1 up" and the stamped notation "return to sender not deliverable as
2 addressed unable to forward."
3

4 On April 8, 2016, Plaintiff filed a "Statement of Fact" stating
5 in full: "Petitioner states no new information on defendant[.] All
6 information Petitioner have [sic] access to is on file with the
7 Court[.] At this time Petitioner awaits MARSHALL service processing
8 [sic]."
9

10 The United States Marshals Service did not file any return of
11 service indicating successful service of process on Deputy Morales
12 within the 90 day extended deadline, and did not timely comply with
13 the Court's February 25, 2016 Order to detail all of the Marshal's
14 efforts to identify, locate and serve Defendant "Deputy Morales." On
15 June 3, 2016, after further inquiry by the Court, the Marshals Service
16 advised the Court that the Marshals Service could not attempt to serve
17 "Deputy Morales" because Plaintiff had not submitted a "new complete
18 service packet" to the Marshals Service. On June 7, 2016, the
19 Marshals Service advised the Court by email that the Los Angeles
20 County Sheriff's Department had reported that it was unable to
21 identify the correct employee. However, a document attached to the
22 email suggested that the Sheriff's Department might have information
23 sufficient to determine whether any deputy having the last name
24 "Morales" was on duty at the identified location on the date and time
25 of the alleged occurrence. It also appeared to the Court that the
26 United States Marshals Service might be able to perform an
27 investigation sufficient to locate and identify Defendant "Deputy
28 Morales," with or without the cooperation of the Sheriff's Department.

1 On June 15, 2016, the Court issued an "Order re Service of
2 Process," directing the Courtroom Deputy Clerk to prepare the service
3 packet Plaintiff was supposed to have prepared. The Court ordered the
4 Marshals Service, upon receipt of the service packet from the
5 Courtroom Deputy Clerk, to attempt to identify, locate and serve
6 "Deputy Morales." The Court extended the time within which Plaintiff
7 was required to effect service of process to ninety (90) days from the
8 date of the Order.

9
10 On July 1, 2016, a "Process Receipt and Return" was filed
11 purporting to show service of process on "Deputy Morales." On
12 July 13, 2016, Defendant Jesus Morales filed an Answer to the
13 November 26, 2013 First Amended Complaint. Also on July 13, 2016, the
14 Court issued an Order setting a discovery cut-off date of November 14,
15 2016, and a December 14, 2016 deadline for the filing of summary
16 judgment motions.

17
18 On October 14, 2016, Defendant filed a Motion to Compel
19 Plaintiff's Responses to Interrogatories and Request for Production of
20 Documents, etc." ("Motion to Compel"). In a supporting Declaration,
21 Defendant's counsel stated that Plaintiff had failed to respond at all
22 to Defendant's interrogatories and requests for production, had failed
23 to respond at all to a letter from Defendant's counsel pursuant to the
24 Court's "meet and confer" requirements and had failed to submit
25 Plaintiff's portion of the Joint Stipulation as requested by
26 Defendant's counsel.

27 ///

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1 On October 14, 2016, the Court issued a Minute Order ordering
2 Plaintiff to file a response to the Motion to Compel within twenty
3 (20) days of the date of the Minute Order. Plaintiff failed to do
4 so.²

5
6 On November 18, 2016, the Court issued an "Order Granting
7 Defendant's Motion to Compel, etc." The Court ordered Plaintiff to
8 respond to the subject discovery requests on or before December 9,
9 2016. The Court also cautioned Plaintiff that failure to comply with
10 the Order could result in the dismissal of the action for failure to
11 prosecute pursuant to Rule 41 of the Federal Rules of Civil Procedure
12 and/or a motion for sanctions including issue and evidence preclusion
13 sanctions or terminating sanctions.³

14
15 By Minute Order filed December 21, 2016, the Court sua sponte
16 extended the deadline for filing summary judgment motions to
17 January 17, 2017.

18
19 On January 6, 2017, Defendant filed "Defendant Deputy Jesus
20 Morales' Notice of Motion and Motion for Involuntary Dismissal, etc."
21 Defendant seeks: (1) an order for involuntary dismissal for failure to
22 prosecute pursuant to Rule 41(b) of the Federal Rules of Civil
23 Procedure or alternatively for terminating sanctions pursuant to Rule

24
25 ² On November 15, 2016, Plaintiff belatedly filed a motion
26 to "set aside" the Motion to Compel and a request for the
27 appointment of counsel.

28 ³ Also on November 18, 2016, the Court denied Plaintiff's
request for appointment of counsel.

1 37(b) (2) (C) [sic] of the Federal Rules of Civil Procedure;
2 (2) alternatively, issue and/or evidence preclusion sanctions pursuant
3 to Rule 37(b) (2) (A) (ii) of the Federal Rules of Civil Procedure
4 ("Motion"). On January 11, 2017, the Court ordered Plaintiff to file
5 opposition to the Motion within thirty (30) days of January 11, 2017.
6 The Court warned Plaintiff that "[f]ailure to file timely opposition
7 to the Motion may result in the dismissal of the action."
8 Nevertheless, Plaintiff failed to file timely opposition to the
9 Motion.

10
11 On February 21, 2017, Plaintiff belatedly filed "Plaintiff
12 Opposition, etc." This document, which is unsigned, says almost
13 nothing about the Motion or the discovery requests with which the
14 Court previously ordered Plaintiff to comply. The document states in
15 conclusory fashion that Plaintiff supposedly has made "every effort"
16 to respond to Defendant and to the Court. The document also states
17 that Plaintiff is being "held in a restricted AREA as P.O.W. Prisoner
18 of War."⁴ The document further states that Plaintiff recently was
19 ordered released from the "Restricted Area" but remains there pending
20 a 'new Housing assignment or Transport which is yet to be
21 determine[d]." The document asks the Court not to dismiss the case,
22 stating in conclusory fashion that Plaintiff "has done or continue[s]
23 to do everything in her powers to prosecute" the case.

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28 ⁴ Plaintiff's address of record is the California
Institution for Women.

1 **DISCUSSION**

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3 A District Court may dismiss an action for failure to prosecute

4 and failure to obey a court order. See Link v. Wabash R.R., 370 U.S.

5 626, 629-30 (1952) (court has inherent power to achieve the orderly

6 and expeditious disposition of cases by dismissing actions for failure

7 to prosecute); Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir.),

8 cert. denied, 506 U.S. 915 (1992) (court may dismiss action for

9 failure to comply with a court order, after the court considers the

10 appropriate factors); see also Fed. R. Civ. P. 41(b). Furthermore,

11 Rule 37(b) (2) (A) (v) of the Federal Rules of Civil Procedure authorizes

12 a court to dismiss an action in whole or in part for failure to obey

13 an order compelling discovery responses.

14

15 In determining whether to dismiss, the Court weighs the following

16 factors: "(1) the public's interest in expeditious resolution of

17 litigation; (2) the court's need to manage its docket; (3) the risk of

18 prejudice to defendants/respondents; (4) the availability of less

19 drastic alternatives; and (5) the public policy favoring disposition

20 of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642

21 (9th Cir. 2002), cert. denied, 538 U.S. 909 (2003) (citation omitted).

22

23 "The public's interest in expeditious resolution always favors

24 dismissal." Pagtalunan v. Galaza, 291 F.3d at 642 (citation omitted);

25 see also In re Phenylpropanolamine (PPA) Products Liability

26 Litigation, 460 F.3d 1217, 1227 (9th Cir. 2006) ("Orderly and

27 expeditious resolution of disputes is of great importance to the rule

28 of law."). The events allegedly giving rise to Plaintiff's claims

1 occurred in 2010. This action has been pending over three years. No
2 discovery has taken place. It is true that some of the delay in this
3 case may have been caused by the United States Marshals Service.
4 However, Plaintiff's dilatory conduct in meeting her obligations to
5 facilitate the timely service of process, to keep the Court apprised
6 of her current address, to heed deadlines, to respond timely to
7 discovery requests and to comply with a court order compelling
8 discovery responses has caused excessive delay. In addition, the need
9 to deal with Plaintiff's repeated failures "has consumed some of the
10 court's time that could have been devoted to other cases on the
11 docket." Pagtalunan v. Galaza, 291 F.3d at 642 (citation omitted).
12 "It is incumbent upon the Court to manage its docket without being
13 subject to routine noncompliance of litigants such as [Plaintiff]."
14 Id. (citation omitted). The first two factors weigh in favor of
15 dismissal.

16
17 The law presumes prejudice from unreasonable delay. In re
18 Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d at
19 1229. "A defendant suffers prejudice if the plaintiff's actions
20 impair the defendant's ability to go to trial or threaten to interfere
21 with the rightful decision of the case." Adriana Int'l Corp. v.
22 Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990), cert. denied, 498 U.S.
23 1109 (1991). Failure to produce discovery or to comply with an order
24 compelling discovery responses is sufficient prejudice to warrant
25 dismissal. Goulatte v. County of Riverside, 587 Fed. App'x 374, 375
26 (9th Cir. 2014); In re Phenylpropanolamine (PPA) Products Liability
27 Litigation, 460 F.3d at 1227 ("Failing to produce documents as ordered
28 is considered sufficient prejudice") (citation omitted). Here,

1 Defendant's discovery requests, many of which concerned Plaintiff's
2 contentions and Plaintiff's alleged damages, went to the heart of
3 Plaintiff's case (see Motion, Exs. B, C). The discovery cut-off and
4 deadline for filing summary judgment motions have long since elapsed.
5 Plaintiff's failure to respond to the discovery requests and failure
6 to comply with the Court's order compelling discovery responses have
7 deprived Defendant of any factual information concerning Plaintiff's
8 claims or Plaintiff's alleged damages.

9
10 In weighing the risk of prejudice, the Court may also consider a
11 party's reasons, if any, for failing to comply with a court order.
12 Pagtalunan v. Galaza, 291 F.3d at 642-43. Plaintiff contends that she
13 is confined in restrictive housing, but does not indicate why such
14 confinement rendered Plaintiff unable to respond to discovery requests
15 propounded in October of 2016 or to comply with a Court order issued
16 in November of 2016 (see Motion, Exs. B, C). This factor weighs in
17 favor of dismissal.

18
19 With respect to the consideration of less drastic alternatives,
20 the Court expressly advised Plaintiff in the November 18, 2016 Order
21 that failure to comply with the terms of the Order could result in the
22 dismissal of the action. "Warning that failure to obey a court order
23 will result in dismissal can itself meet the 'consideration of
24 alternatives' requirement." In re Phenylpropanolamine (PPA) Products
25 Liability Litigation, 460 F.3d at 1229. Despite being warned of the
26 possible consequences of a failure to comply with the November 18,
27 2016 Order, Plaintiff has done nothing toward compliance with that
28 order and has offered no persuasive excuse for her noncompliance.

1 Given Plaintiff's indigency and her history of consistently refusing
2 to heed deadlines, court orders or discovery obligations, the
3 imposition of any sanction less drastic than dismissal would be an
4 idle act and would leave undressed the manifest prejudice to
5 Defendant.

6
7 Finally, the factor that public policy favors disposition of
8 cases on their merits ordinarily weighs against dismissal. See
9 Pagtalunan v. Galaza, 291 F.3d at 643. However, "this factor lends
10 little support to a party whose responsibility it is to move a case
11 toward disposition on the merits but whose conduct impedes progress in
12 that direction." In re Phenylpropanolamine (PPA) Products Liability
13 Litigation, 460 F.3d at 1228 (citation and internal quotations
14 omitted); see In re Exxon Valdez, 102 F.3d 429, 433 (9th Cir. 1996)
15 (policy favoring disposition on the merits entitled to little weight
16 in light of plaintiff's "total refusal to provide discovery").

17
18 In sum, after consideration of all of the relevant factors, the
19 Court concludes that dismissal of this action without prejudice is
20 appropriate.

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1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.

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