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

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| BENITO ROJAS, |) | Case No. CV 16-9439 FMO (SSx) |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | ORDER DISMISSING ACTION WITHOUT |
| |) | PREJUDICE |
| PORTFOLIO RECOVERY ASSOCIATES |) | |
| LLC, <u>et al.</u> , |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

Pursuant to the Court’s Order of June 7, 2017 (Dkt. 26), the court granted defendant Steven D. Frederickson’s motion to dismiss, and plaintiff was “granted until June 21, 2017, to file a first amended complaint[.]” (See id. at 4). Plaintiff did not file anything on or before the deadline, and on July 5, 2017, the court gave plaintiff one final opportunity to file an amended complaint. (See Dkt. 28, Court’s Order of July 5, 2017, at 1). The court cautioned plaintiff that “failure to timely file a First Amended Complaint may result in this action being dismissed without prejudice for failure to prosecute and/or failure to comply with a court order.” (Id.). As of the filing date of this Order, plaintiff has not filed a first amended complaint or otherwise responded to the Court’s Orders of June 7, 2017, or July 5, 2017.¹ (See, generally, Dkt.).

¹ Moreover, although it appears that the parties agreed to mediate their disputes before a mediator on July 21, 2017, (see Dkt. 27, Notice of Mediation Date), plaintiff or plaintiff’s representative did not appear. (See Dkt. 29, Mediation Report).

1 A district court's authority to dismiss a litigant's claims for failure to prosecute or to comply
2 with court orders is well-established. See Fed. R. Civ. P. 41(b);² Link v. Wabash R.R. Co., 370
3 U.S. 626, 629-30, 82 S.Ct. 1386, 1388 (1962) ("The authority of a federal trial court to dismiss a
4 plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted.");
5 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.), cert. denied, 506 U.S. 915 (1992). "The power
6 to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending
7 cases and to avoid congestion in the calendars of the District Courts." Link, 370 U.S. at 629-30,
8 82 S.Ct at 1388.

9 A district court may dismiss a plaintiff's complaint pursuant to Rule 41(b) when plaintiff fails
10 to amend the complaint or file a notice of intent not to amend the complaint.³ See Edwards v.
11 Marin Park, Inc., 356 F.3d 1058, 1065 (9th Cir. 2004) (reversing dismissal of action when plaintiff
12 timely filed a notice of intent not to amend); Yourish v. California Amplifier, 191 F.3d 983, 989 (9th
13 Cir. 1999) (affirming dismissal for failure to file an amended complaint or notice of intent); Ferdik,
14 963 F.2d at 1261 (same). In other words, "[t]he failure of the plaintiff eventually to respond to the
15 court's ultimatum – either by amending the complaint or by indicating to the court that it will not
16 do so – is properly met with the sanction of a Rule 41(b) dismissal."⁴ Edwards, 356 F.3d at 1065
17 ("a threatened Rule 12(b)(6) dismissal [] ferment[s] into a Rule 41(b) dismissal only upon a
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19 ² All "Rule" citations refer to the Federal Rules of Civil Procedure.

20 ³ In addition, a litigant's "[f]ailure to follow a district court's local rules is a proper ground for
21 dismissal" for failure to prosecute. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir.) (per curiam), cert.
22 denied, 516 U.S. 838 (1995) (holding that where the plaintiff failed to file an opposition to a motion
23 to dismiss, the district court did not abuse its discretion in dismissing the action pursuant to a local
rule stating that a party's failure to file an opposition "shall constitute a consent to the granting of
the motion").

24 ⁴ The requirement that plaintiff amend the complaint or file a notice of intent is not "merely
25 formal." Edwards, 356 F.3d at 1065. Absent the filing of a notice of intent not to amend, the
26 appellate court lacks jurisdiction to hear the appeal. See WMX Techs., Inc. v. Miller, 104 F.3d
27 1133, 1135 (9th Cir. 1997) (en banc) ("Unless a plaintiff files in writing a notice of intent not to file
28 an amended complaint, such dismissal order is not an appealable final decision."). Further, the
Ninth Circuit "review[s] a Rule 41(b) dismissal only for abuse of discretion in applying the five
factors [] which pertain to the propriety of the sanction, not to the merits of the underlying question
(such as whether a complaint states a claim)." Edwards, 356 F.3d at 1065.

1 plaintiff's inaction") (emphasis in original). Here, plaintiff has neither filed an amended complaint
2 nor a notice of intent not to amend the complaint. (See, generally, Dkt.).

3 In determining whether to dismiss plaintiff's Complaint pursuant to Rule 41(b), the court
4 considers the following five factors: "(1) the public's interest in expeditious resolution of litigation;
5 (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4)
6 the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases
7 on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002), cert. denied, 538 U.S.
8 909 (2003). "Although it is preferred, it is not required that the district court make explicit findings
9 in order to show that it has considered these factors and [the Ninth Circuit] may review the record
10 independently to determine if the district court has abused its discretion." Ferdik, 963 F.2d at
11 1261.

12 The first factor, the public's interest in the expeditious resolution of litigation, "always favors
13 dismissal." Pagtalunan, 291 F.3d at 642; see Yourish, 191 F.3d at 990 ("Given the district court's
14 superior position in evaluating the public interest in expeditious resolution of a particular case, []
15 this factor strongly favors dismissal."); see also In re Phenylpropanolamine (PPA) Prods. Liab.
16 Litig., 460 F.3d 1217, 1234 (9th Cir. 2006) ("[D]ismissal serves the public interest in expeditious
17 resolution of litigation as well as the court's need to manage the docket when a plaintiff's
18 noncompliance has caused the action to come to a halt, thereby allowing the plaintiff, rather than
19 the court, to control the pace of the docket.").

20 The second factor, the court's need to manage its docket, also favors dismissal. See
21 Pagtalunan, 291 F.3d at 642 (holding that this factor weighed in favor of dismissal where the
22 petition "consumed some of the court's time that could have been devoted to other cases on the
23 docket"); Edwards, 356 F.3d at 1065 (noting that where a plaintiff does not act, "resources
24 continue to be consumed by a case sitting idly on the court's docket"). Here, plaintiff's "failure to
25 amend ha[s] caused the action to come to a complete halt and ha[s] allowed the Plaintiff[] to
26 control the pace of the docket rather than the Court." Yourish, 191 F.3d at 990 (internal quotation
27 marks omitted).

28 The third factor, prejudice to defendants, also favors dismissal. In the absence of a

1 showing to the contrary, prejudice to a defendant is presumed from unreasonable delay. See In
2 re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994) (“This rebuttable presumption of prejudice refutes
3 . . . [the] contention that delay alone, regardless of actual prejudice, does not necessitate a
4 dismissal for failure to prosecute.”) (internal quotation marks omitted); Henderson v. Duncan, 779
5 F.2d 1421, 1425 (9th Cir. 1986) (“[A]lthough no specific showing of prejudice to defendants is
6 made, the integrity of the district court is involved.”). Here, the court granted plaintiff leave to file
7 an amended complaint, (see Dkt. 26, Court’s Order of June 7, 2017, at 4), and recently gave
8 plaintiff one more opportunity to file an amended complaint. (See Dkt. 28, Court’s Order of July
9 5, 2017). Despite these accommodations, plaintiff failed to file a first amended complaint or notice
10 of intent not to amend, (see, generally, Dkt.), which has prevented the court from moving the case
11 forward.

12 The fourth factor, the availability of less drastic sanctions, also favors dismissal. “[A] district
13 court’s warning to a party that his failure to obey the court’s order will result in dismissal can satisfy
14 the consideration of alternatives requirement.” Ferdik, 963 F.2d at 1262 (internal quotation marks
15 omitted). Here, considering the multiple opportunities the court provided plaintiff to enable him to
16 prosecute the action, (see Dkt. 26, Court’s Order of June 7, 2017, at 4; Dkt. 28, Court’s Order of
17 July 5, 2017), and given that the case has been at a standstill, the court is persuaded that
18 dismissing the action is the most appropriate sanction. See Anderson v. Air West, Inc., 542 F.2d
19 522, 525 (9th Cir. 1976) (“There is no requirement that every single alternate remedy be examined
20 by the court before the sanction of dismissal is appropriate. The reasonable exploration of
21 possible and meaningful alternatives is all that is required.”).

22 The fifth factor, the public policy favoring disposition of claims on their merits, weighs
23 against dismissal. See Pagtalunan, 291 F.3d at 643. However, despite the policy favoring
24 disposition on the merits, it remains plaintiff’s responsibility to prosecute and move the case
25 towards a final disposition. See In re Eisen, 31 F.3d at 1454 (litigant has a responsibility “to move
26 towards that disposition at a reasonable pace, and to refrain from dilatory and evasive tactics.”).
27 Plaintiff has not fulfilled that responsibility here.

28 The five-factor test for dismissal under Rule 41(b) is a disjunctive balancing test, so not all

1 five factors must support dismissal for the court to grant defendants' Motion. See Valley Eng'rs
2 Inc. v. Elec. Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998), cert. denied, 526 U.S. 1064 (1999)
3 (noting that the five-factor test "amounts to a way for a district judge to think about what to do, not
4 a series of conditions precedent" to dismissal); Hernandez v. City of El Monte, 138 F.3d 393, 399
5 (9th Cir. 1998) (the Ninth Circuit "may affirm a dismissal where at least four factors support
6 dismissal, or where at least three factors strongly support dismissal.") (internal quotation marks
7 and citations omitted). Here, four of the five factors support dismissal of action. Thus, the
8 remaining question is whether the dismissal should be with or without prejudice. See Fed. R. Civ.
9 P. 41(b); Al-Torki v. Kaempfen, 78 F.3d 1381, 1385 (9th Cir. 1996); Yourish, 191 F.3d at 992
10 ("allowing the plaintiff to replead is [] a less drastic alternative to dismissal [with prejudice] once
11 [plaintiff] has [] disobeyed a court order"). Under the circumstances, the court finds that plaintiff's
12 claims should be dismissed without prejudice.

13 Finally, even assuming plaintiff's action was not being dismissed pursuant to Rule 41(b),
14 the court, having evaluated the arguments set forth in the briefing, is persuaded that the Motion
15 should be granted on the merits. As set forth in the Court's Order of June 7, 2017, at 3 (Dkt. 26),
16 the court found that plaintiff failed to allege sufficient facts to assert personal jurisdiction over at
17 least some of the defendants in this action. (See id.).

18 Based on the foregoing, IT IS ORDERED THAT the above-captioned case is dismissed
19 without prejudice. Judgment shall be entered accordingly.

20 Dated this 26th day of July, 2017.

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22 /s/

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Fernando M. Olguin
United States District Judge
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