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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCINE MCDERMOTT,)
)
Plaintiff,)
)
v.)
)
PALO VERDE SCHOOL)
DISTRICT,)
)
Defendant.)
_____)

Case No. EDCV 12-01112-
VAP(OPx)

**ORDER DISMISSING PLAINTIFF'S
COMPLAINT WITHOUT PREJUDICE**

I. BACKGROUND

Plaintiff Francine McDermott ("Plaintiff") filed a
Complaint on July 5, 2012 (Doc. No. 1), alleging
violations of her civil rights under the Rehabilitation
Act, the Americans With Disabilities Act, and
California's Fair Employment and Housing Act. (Compl.
¶ 1.) On October 29, 2012, Defendant Palo Verde School
District ("Defendant") filed an Answer (Doc. No. 7). On
August 26, 2013, Plaintiff filed a First Amended

1 Complaint ("FAC") (Doc. No. 28), asserting the same
2 violations alleged in the Complaint. Defendant answered
3 the FAC on September 12, 2013 (Doc. No. 34).

4
5 On February 4, 2013, the Court held a Scheduling
6 Conference and issued a Scheduling Order (Doc. No. 12)
7 after consulting with counsel, setting the case for jury
8 trial on August 6, 2013, with a pretrial conference on
9 July 15, 2013. Pursuant to the Scheduling Order and
10 Local Rule 16, the parties were required to submit
11 pretrial filings, not later than twenty-one days before
12 the pretrial conference, including memoranda of
13 contentions of fact and law, witness lists, a joint
14 exhibit list, and any motions in limine. The parties
15 were also required to submit a proposed final pretrial
16 conference order, proposed jury instructions, and a joint
17 statement of the case, not later than seven days before
18 the pretrial conference.

19
20 On June 24, 2013, twenty-one days before the pretrial
21 conference date, Defendant timely filed a memorandum of
22 contentions of fact and law and a witness list (Doc. Nos.
23 20, 21), but a joint exhibit list was not filed.
24 Plaintiff did not file any of the required pretrial
25 documents.

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1 On June 26, 2013, Defendant filed an ex parte
2 application for continuance of trial and related dates.
3 On June 28, 2013, the Court continued the discovery cut-
4 off date to July 29, 2013, the pretrial conference date
5 to August 26, 2013, and the trial date to September 10,
6 2013 (Doc. No. 23).

7
8 On August 13, 2013, after Plaintiff filed an ex parte
9 application for continuance of the trial date to November
10 12, 2013, and Defendant stipulated to the requests, the
11 Court again continued the deadlines, this time, to
12 September 3, 2013 for discovery cut-off, to October 1,
13 2013 for the pretrial conference, and to October 8, 2013
14 for the trial. Nevertheless, the Court noted that
15 "Plaintiff ha[d] not demonstrated good cause for a
16 continuance of the trial date . . ." (Doc. No. 26). The
17 Court then cautioned the parties that it would "not
18 entertain any further requests for continuances."

19
20 Based on the pretrial conference date of October 1,
21 2013, the parties were required to submit pretrial
22 filings by September 10, 2013. Defendant submitted its
23 memorandum of contentions of fact and law, witness list,
24 and exhibit list on September 10, 2013. (See Doc. Nos.
25 29-31). Plaintiff, however, failed to file any of the
26 required pretrial documents. Two days after the deadline
27 for the pretrial filings, on September 12, 2013, the

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1 parties filed a joint stipulation to continue the trial
2 date to November 12, 2013 (Doc. No. 33). On September
3 23, 2013, Defendant filed three motions in limine (Doc.
4 Nos. 41-43), thirteen days after they were due on
5 September 10, 2013.

6
7 On September 25, 2013, the Court denied Defendant's
8 three motions in limine as untimely and denied the
9 parties' request to continue the trial date, but
10 continued the pretrial conference date to October 7,
11 2013, as counsel for both parties had represented they
12 would be in trial on September 30, 2013 (Doc. No. 48).

13
14 Also on September 25, 2013, noting that Plaintiff had
15 not submitted any of the required pretrial filings due on
16 September 10, 2013, the Court ordered Plaintiff to show
17 cause as to why the case should not be dismissed for
18 failure to prosecute (Doc. No. 47). In this Order, the
19 Court permitted Plaintiff to submit the required pretrial
20 filings not later than September 30, 2013 but warned that
21 the Court would dismiss the action if Plaintiff failed to
22 comply with the Order.

23
24 In a filing dated September 25, 2013, the parties
25 renewed their request for continuance of the trial date
26 to November 12, 2013, asserting that discovery was not
27 complete and Defendant's counsel will be in another trial

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1 on October 8, 2013 (Doc. No. 46).

2
3 On September 30, 2013, in response to the Court's
4 Order to Show Cause, Plaintiff filed a witness list and
5 an exhibit list (Doc. Nos. 55, 56), but failed to file a
6 memorandum of contentions of fact and law. Nor did
7 Plaintiff file a proposed final pretrial conference
8 order, proposed jury instructions, or a statement of the
9 case.

10
11 In a declaration filed on September 30, 2013,
12 Defendant's counsel states that Plaintiff's counsel has
13 not provided Defendant with a draft of the final pretrial
14 conference order despite multiple requests, preventing
15 Defendant from timely submitting the order. (Declaration
16 of Aaron C. Hanes (Doc. No. 52) ("Hanes Decl.") ¶¶ 4-5.)
17 Defendant's counsel also declares that he provided
18 proposed jury instructions to Plaintiff's counsel, but he
19 had not received Plaintiff's proposed jury instructions.
20 (Id. ¶ 9.) Given the prejudice Defendant has suffered,
21 Defendant's counsel requests the Court dismiss the action
22 without prejudice or, in the alternative, to continue the
23 trial to permit Defendant to prepare competently the
24 remaining required pretrial filings. (Id. at ¶¶ 10-11.)

25
26 In response to Defendant's counsel's declaration,
27 Plaintiff's counsel filed a declaration on September 30,
28

1 2013, asserting that she "did not prepare pretrial docs
2 because [she] believed that the pretrial conference and
3 trial would be continued to November 2013" as both
4 parties had requested between July and September.
5 (Declaration of Patricia J. Barry (Doc. No. 58) ("Barry
6 Decl.") ¶¶ 3-5.) Plaintiff's counsel does not dispute
7 Defendant's counsel's assertions that she never provided
8 pretrial filings that require joint submission, despite
9 having been provided with Defendant's documents.
10 Instead, Plaintiff's counsel declares that Plaintiff was
11 prejudiced by Defendant's belated production of 819 pages
12 of documents on September 5, 2013 and 569 pages of new
13 documents on September 30, 2013. (Id. ¶¶ 3-5.) She
14 further cites the demands of her work in a different case
15 as contributing to the delay in submitting pretrial
16 filings. (Id. ¶¶ 12-13.)

17
18 On October 1, 2013, Plaintiff filed another ex parte
19 application to continue the trial and pretrial conference
20 dates to "the second and fourth week in November 2013."
21 (Pl.'s October 1, 2013 Ex Parte Application (Doc. No. 61)
22 ("Pl.'s 10/1/13 Mot.") at 1.) In an attached
23 declaration, Plaintiff's counsel reiterates that the 569
24 pages of new documents she received from Defendant on
25 September 30, 2013 prevents her from compiling a complete
26 exhibit list and from preparing for the trial. (Id. at
27 6.) Counsel, however, declares that she erred by

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1 claiming in her September 30, 2013 declaration that she
2 received 819 pages of new documents on September 5, 2013,
3 as those documents had previously been produced to
4 Plaintiff in July 2013. (Id. at 4.)
5

6 On October 2, 2013, Plaintiff's counsel filed another
7 declaration, indicating that she seeks continuance of the
8 trial and pretrial conference dates also because she has
9 hearings in California state courts on October 7, 2013
10 and October 11, 2013 (Doc. No. 62).
11

12 As of the date of this Order, Plaintiff has failed to
13 file the required pretrial filings, except for the
14 witness list and exhibit list, but requests continuance
15 of the trial and pretrial conference dates to November
16 2013, despite the Court's admonition that no further
17 continuances will be considered. The Court thus finds it
18 appropriate to dismiss this case for failure to
19 prosecute.
20

21 **II. LEGAL STANDARD**

22 "District courts have inherent power to control their
23 dockets and may impose sanctions, including dismissal, in
24 the exercise of that discretion. Because dismissal is a
25 harsh penalty, it should be imposed as a sanction only in
26 extreme circumstances." Oliva v. Sullivan, 958 F.2d 272,
27 273-74 (9th Cir. 1992) (citations omitted).
28

1 Federal Rule of Civil Procedure 41(b) states that a
2 Court may dismiss a case for a plaintiff's failure to
3 prosecute.¹ Dismissal for failure to prosecute requires
4 the Court to consider the following five factors: (1) the
5 public's interest in expeditious resolution of
6 litigation; (2) the court's need to manage its docket;
7 (3) the risk of prejudice to the defendants; (4) the
8 public policy favoring the disposition of cases on their
9 merits; and (5) the availability of less drastic
10 sanctions. Henderson v. Duncan, 779 F.2d 1421, 1423 (9th
11 Cir. 1986). Factors one and two generally favor
12 dismissal, while factor four typically weighs against it.
13 See Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir.
14 1990). The Wanderer court wrote that the "key" factors
15 are prejudice and the availability of lesser sanctions.
16 Id.

17
18 Moreover, Federal Rule of Civil Procedure 16(f)
19 permits a court to make such orders as are just when a
20 party is substantially unprepared to participate in a
21 pretrial conference. A sanction authorized by Rule
22 16(f), by referring to Rule 37, is dismissal of the case.
23 Malone v. U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir.
24

25 ¹ While Rule 41(b) states that a court may do this
26 upon a motion by defendant, the Supreme Court has stated
27 that the Court also may dismiss an action for failure to
28 prosecute without such a motion. Link v. Wabash R. Co.,
370 U.S. 626, 630 (1962).

1 1987); Callip v. Harris Cnty. Child Welfare Dept., 757
2 F.2d 1513, 1518 (5th Cir. 1985).

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4 The standards for dismissal of a case for failure to
5 follow a court order are essentially the same under both
6 Federal Rules of Civil Procedure 16(f) and 41(b).
7 Malone, 833 F.2d at 130.

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III. DISCUSSION

10 **A. The Public's Interest in the Expeditious Resolution**
11 **of Litigation and the Court's Need to Manage Its**
12 **Docket**

13 When a court order is violated, the public's interest
14 in the expeditious resolution of litigation and the
15 Court's need to manage its docket clearly weigh in favor
16 of dismissal. Wanderer, 910 F.2d at 656. Nevertheless,
17 a brief discussion of these factors is required here.

18

19 Practice in federal court is governed by numerous
20 rules concerning how to proceed throughout a case. Each
21 rule serves a function for the efficient use of the
22 justice system and its resources; these rules are
23 developed to ensure that our adversarial justice system
24 is fair. See United States v. First Nat'l Bank of
25 Circle, 652 F.2d 882, 886 (9th Cir. 1981) ("Disregard of
26 [pretrial orders] would bring back the days of trial by

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1 ambush and discourage timely preparation by the parties
2 for trial.")

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4 One of the most important periods in the life of a
5 case is the time just prior to trial. See id. It is
6 during this time that the case is shaped: The parties
7 (1) designate the witnesses and exhibits they will rely
8 on, (2) craft jury instructions, voir dire, and the
9 pretrial conference order for the Court's approval, and
10 (3) bring motions in limine to exclude evidence. To
11 ensure these tasks are completed in an efficient and
12 effective manner, the Federal Rules of Civil Procedure,
13 the Local Rules, and the Court's Standing Order set forth
14 explicit deadlines for the completion of each task.
15 Plaintiff has the ultimate responsibility to ensure that
16 these pretrial documents are filed and that the case is
17 ready for trial on the date set by the Court.

18

19 Here, Plaintiff's counsel failed to file and serve
20 all the required pretrial disclosures timely. Plaintiff's
21 counsel filed none of the pretrial documents by the
22 initial deadline of June 24, 2013. She again failed to
23 complete the filing requirement by the September 10, 2013
24 deadline. Although Defendant's counsel repeatedly asked
25 Plaintiff's counsel to provide drafts of the final
26 pretrial conference order and jury instructions,

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1 Plaintiff's counsel failed to do so. (Hanes Decl. ¶¶ 4-
2 9.) Even after the Court issued the Order to Show Cause
3 and provided her with yet another opportunity by
4 extending the deadline to September 30, 2013, Plaintiff's
5 counsel did not comply with the Court's Order fully. The
6 exhibit list Plaintiff submitted on that date is a
7 threadbare catalog of documents (the majority identified
8 only as an exhibit to a deposition) that does not comply
9 with Local Rule 16-6.1 and Federal Rule of Civil
10 Procedure 26(a)(3)(A)(iii), which requires that the
11 exhibit list contain "an identification of each document
12 or other exhibit, including summaries of other evidence -
13 separately identifying those items the party expects to
14 offer and those it may offer if the need arises."
15

16 Plaintiff's counsel complains that defense counsel's
17 late disclosure of requested documents on September 30,
18 2013 caused her to be delinquent with pretrial filings.
19 (See Pl.'s 10/1/13 Mot. at 4.) Nevertheless, she never
20 took available measures, such as filing motions to compel
21 or exclude with the Court, to address any prejudice
22 caused by the delay. Instead, she merely relied on her
23 belief that the trial date would be continued, despite
24 the Court's admonition on August 13, 2013 that it would
25 not entertain additional requests for continuances. (See
26 Barry Decl. ¶¶ 3-5.) Delay in Defendant's production of
27 discovery is not an adequate explanation as to why
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1 Plaintiff's counsel could not timely file a memorandum of
2 contentions of fact and law, a proposed final pretrial
3 conference order, proposed jury instructions, and a
4 statement of the case.

5
6 Owing to this case's seniority over many other civil
7 cases on the Court's docket, it receives priority. By
8 her failure to fulfill the pretrial filing requirement on
9 September 10, 2013 and again on September 30, 2013,
10 Plaintiff's counsel has interfered with the Court's
11 efforts to manage its trial calendars effectively.

12
13 Clearly, Plaintiff is not ready to go to trial, and
14 given Plaintiff's record of delinquencies in filing, the
15 Court is not confident that Plaintiff would be ready for
16 trial even if another continuance is given. Permitting
17 Plaintiff to go to trial in the current unprepared state
18 will be wasteful of the court's resources and will not
19 promote the public's interest in expeditious resolution.

20
21 Plaintiff's failure to file pretrial filings not only
22 impeded a timely resolution of this case, but affected
23 the Court's ability to manage its trial schedule. Thus,
24 these two factors weigh in favor of dismissing
25 Plaintiff's action.

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1 **B. The Risk of Prejudice to Defendant**

2 To determine whether a defendant has been prejudiced,
3 a Court examines whether the plaintiff's conduct impaired
4 the defendant's "ability to go to trial or threaten[ed]
5 to interfere with the rightful decision of the case."
6 Malone, 833 F.2d at 131.

7
8 Here, Defendant has been prejudiced by Plaintiff's
9 counsel's non-compliance with the Local Rules and the
10 Court's Standing Order. On account of Plaintiff's
11 counsel's failure to submit pretrial filings timely,
12 Defendant could not adequately prepare for trial.
13 Without a proposed pretrial conference order, Defendant
14 could not have known what theories Plaintiff was going to
15 assert to succeed on her claims and what evidence she
16 intended to adduce at trial.

17
18 Defendant was further prejudiced because Plaintiff's
19 counsel's non-compliance with the Court's deadlines
20 forced Defendant to file its three motions in limine
21 untimely, without the benefit of examining Plaintiff's
22 witness and exhibit lists and without any idea as to what
23 evidence Plaintiff would seek to introduce at trial.
24 (See Hanes Decl. ¶ 7.) Defendant was thus prejudiced
25 when the Court denied the three motions for untimeliness.

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1 More critically, Plaintiff had Defendant's pretrial
2 filings, disclosing the exhibits, witnesses, and defenses
3 three weeks before trial. This asymmetrical disclosure
4 is exactly what the rules are designed to prevent. Cf.
5 First Nat'l Bank of Circle, 652 F.2d at 886.

6
7 Thus, Defendant was prejudiced by Plaintiff's failure
8 to comply with the deadlines imposed by the Court.

9
10 **C. Public Policy Favoring Resolution of Cases**
11 **on Their Merits**

12 This factor weighs against the dismissal of
13 Plaintiff's action because of the importance of cases
14 involving a citizen's civil rights. Nevertheless, this
15 factor may not weigh heavily in favor of Plaintiff here.
16 By her own admission, Plaintiff's counsel hastily drafted
17 the exhibit and witness lists on September 30, 2013 and
18 remains unprepared for the trial and the pretrial
19 conference. (See Pl.'s 10/1/13 Mot. at 6-7.)

20
21 Moreover, that this is a civil rights case should not
22 be regarded as a general dispensation to disregard the
23 Federal Rules of Civil Procedure, the Local Rules, and
24 the Court's Standing Order, which apply in cases of all
25 size and nature alike.

1 **D. Consideration of Lesser Sanctions**

2 This factor presents the closest question. Until
3 September 30, 2013, the final deadline the Court extended
4 to Plaintiff, the Court was not fully aware of
5 Plaintiff's counsel's failure to comply with her
6 professional obligations. That day, defense counsel
7 filed a declaration, outlining the problems he faced in
8 working with Plaintiff's counsel in meeting the Court's
9 pretrial deadlines. (See Hanes Decl. ¶¶ 3-9.) That this
10 failure to comply with her professional obligations in
11 preparing a case for trial escaped the Court's
12 contemporaneous notice does not diminish the seriousness
13 of Plaintiff's counsel's conduct.

14
15 Plaintiff's counsel not only failed to submit the
16 required pretrial filings in September 2013, but she also
17 failed to meet the first deadline to submit the filings
18 on June 24, 2013, though that failure was "saved" by
19 Defendant's ex parte application for and the Court's
20 grant of a continuance. Since that initial continuance,
21 Plaintiff's counsel has had several opportunities to
22 comply with the deadlines and has neglected to do so.

23
24 The Court is troubled by Plaintiff's counsel's
25 explanations for failing to abide by the Court's
26 deadlines concerning the filing of pretrial documents.
27 In her declarations, she admits she merely relied on her
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1 belief that the Court would grant yet another continuance
2 of the trial date. Counsel also asserts that she was
3 consumed with "demanding" cases (though she concedes she
4 does "not have a heavy caseload"), but her actions
5 indicate that she failed to give adequate attention to
6 the deadlines for this case. (See generally Barry Decl.;
7 Pl.'s 10/1/13 Mot.) For example, on September 16, 2013,
8 Plaintiff's counsel represented to the Court that she
9 would be in trial in state court on September 30, 2013,
10 which was a factor in the Court's September 25, 2013
11 decision (despite previous admonitions to the parties
12 that no further continuances would be granted) to
13 continue the pretrial conference date from October 1,
14 2013 to October 7, 2013. (See Pl.'s Supplement to
15 Stipulation to Continue (Doc. No. 36) ¶ 6.) She,
16 however, did not reveal that on September 18, 2013, her
17 state court trial was continued to November 12, 2013,
18 until she submitted a declaration to this Court on
19 September 30, 2013, indicating, inter alia, that she was
20 finally drafting an exhibit list for this case in the
21 afternoon that day. (Barry Decl. ¶¶ 3, 12-13.) The
22 Court is concerned not only with counsel's failure to
23 notify the Court of changes to her state court trial
24 date, but more importantly her failure to give sufficient
25 care to the prosecution of this case. The explanations
26 Plaintiff's counsel have submitted for the delay in
27 filing pretrial documents are specious, at best.

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1 Plaintiff's counsel also suggests that delay in
2 Defendant's disclosure of certain documents was the
3 reason for her failure to submit all pretrial filings.
4 (See generally Barry Decl.; Pl.'s 10/1/13 Mot.) As
5 discussed above, this is also an inadequate explanation
6 for her failure to comply with the Court's orders and
7 deadlines, though the Court recognizes that Defendant's
8 failure to produce required documents, if true, may
9 require a judicial remedy. That Plaintiff faced problems
10 in discovery does not justify ignoring a series of
11 deadlines set by the Court or relying on an unfounded
12 personal belief that continuances would be granted.

13
14 Moreover, as discussed above, Defendant's counsel
15 made several attempts to coordinate the preparation of
16 the pretrial documents and served the defense's pretrial
17 documents on June 24, 2013 and on September 10, 2013.
18 Defendant's counsel repeatedly inquired with Plaintiff's
19 counsel regarding drafts of a proposed final pretrial
20 conference order and proposed jury instructions. (See
21 Hanes Decl. ¶¶ 4-5, 9.) These actions should have
22 alerted Plaintiff's counsel of the impending and overdue
23 deadlines.

24
25 When Plaintiff finally filed some - but not all - of
26 her pretrial documents on September 30, 2013, just under
27 three weeks late, Plaintiff's counsel included no
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1 acceptable explanation for her delay in filing documents.

2

3 The only lesser sanction the Court could impose here
4 is monetary sanctions. It is doubtful, however, that
5 monetary sanctions would be effective. If Plaintiff's
6 counsel only faced a monetary sanction for failing to
7 comply with the Court's orders, using a pure cost-benefit
8 analysis, a monetary sanction would be ineffective unless
9 it was large enough to offset the gain she would receive
10 by focusing on other cases, a major reason she provides
11 for the delay in submitting pretrial filings. The Court
12 fears a monetary sanction would also be ineffective
13 against what appears to be Plaintiff's counsel's willful
14 substitution of the Court's orders with her own unfounded
15 judgment.

16

17 Alternatively, the Court could require Plaintiff's
18 counsel to pay the defense's attorney's fees, but such a
19 penalty does not correlate to the prejudice suffered by
20 Defendant, including the disadvantage of the non-
21 simultaneous exchange of pretrial information.
22 Furthermore, it does not address the prejudice caused to
23 the Court's calendar and other litigants awaiting their
24 own opportunity for trial.

25

26 While drastic, dismissal of this action is the most
27 feasible sanction. The Supreme Court long ago held that

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1 dismissal of a plaintiff's action for the failure of the
2 attorney is not an unjust result. Plaintiff has freely
3 chosen her attorney as her representative, and cannot now
4 disclaim the failures of her agent. See Link v. Wabash
5 R. Co., 370 U.S. 626, 633 (1962).

6
7 The Ninth Circuit has affirmed the dismissal of
8 actions for failure to follow pretrial deadlines and
9 orders. See Nascimento v. Dummer, 508 F.3d 905, 910 (9th
10 Cir. 2007) (affirming a dismissal in response to
11 plaintiff's attorney's failure to prepare for trial);
12 Thompson v. Housing Auth. of L.A., 782 F.2d 829, 832 (9th
13 Cir. 1986) (affirming the district court's dismissal of
14 the case after the pretrial conference was continued
15 three times and Plaintiff's counsel failed to comply with
16 the court's deadlines); Buss v. W. Airlines, Inc., 738
17 F.2d 1053, 1054 (9th Cir. 1984) (affirming the district
18 court's dismissal of an action for failure to draft the
19 pretrial order properly); Transamerica Corp. v.
20 Transamerica Bancgrowth Corp., 627 F.2d 963, 965-66
21 (1980) (affirming the district court's dismissal for
22 failure to prepare the pretrial documents with opposing
23 counsel); Kung v. FOM Inv. Corp., 563 F.3d 1316, 1318
24 (9th Cir. 1977) (per curiam) (affirming the district
25 court's dismissal where the court continued the trial
26 twice and "made it clear that dismissal would result if
27 [plaintiff] was not ready for the pre-trial conference at
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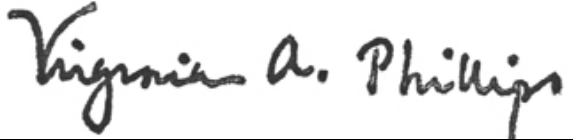
1 the end of the last continuance"). Consideration of
2 lesser sanctions - as well as an examination of the Ninth
3 Circuit authority on this question - also weighs in favor
4 of dismissing Plaintiff's action.

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IV. CONCLUSION

After balancing the five factors, the Court concludes that dismissal is appropriate. Accordingly, the Court ORDERS the case dismissed without prejudice.

Dated: October 4, 2013



VIRGINIA A. PHILLIPS
United States District Judge