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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,)	1:06-mc-0010 AWI GSA
)	
Plaintiff,)	ORDER DISMISSING ACTION
v.)	FOR LACK OF PROSECUTION
)	
NEW VISTA CAPITAL FUND, LP,)	
et al.,)	
)	
Defendant.)	

BACKGROUND

On December 5, 2010 Plaintiff filed a complaint against New Vista Capital Fund, LP, along with a request to appoint SBA as Receiver of Defendant. On March 22, 2006, the Magistrate Judge determined that this action should be reassigned from a civil case to a miscellaneous case. The Magistrate Judge noted that the case was currently pending before the United States District Court, Northern District of California, San Jose Division as Case Number CV-05-4187 JF-PVT. The complaint was filed in this District for the purpose of facilitating the receiver’s duties. However, since the complaint was filed, no further document has ever been filed in this action.

On December 7, 2010, the Clerk of the Court issued a minute order that placed this matter on the court’s January 3, 2011 calendar for a hearing on dismissal for lack of prosecution. The minute order stated that any opposition to dismissal was to be filed by December 20, 2010.

1 Plaintiff did not file any opposition to dismissal for lack of prosecution and did not contact the
2 court in any way.

3 On January 3, 2011, the court held a hearing concerning dismissal of this action for lack
4 of prosecution. Plaintiff was not present when the case was called. Noting that nothing had
5 occurred in this action since it was filed and Plaintiff's absence at the hearing, the court
6 dismissed this action.

7 LEGAL STANDARD

8 A court may dismiss an action, with prejudice, based on a party's failure to prosecute an
9 action or failure to obey a court order. Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir.
10 1992). In determining whether to dismiss an action for lack of prosecution the court must
11 consider several factors, including: "(1) the public's interest in expeditious resolution of
12 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendant; (4) the
13 availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on
14 their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet,
15 963 F.2d 1258, 1260-61 (9th Cir. 1992)); Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).
16 "These factors are 'not a series of conditions precedent before the judge can do anything,' but a
17 'way for a district judge to think about what to do.'" In re Phenylpropanolamine (PPA) Products
18 Liability Litigation, 460 F.3d 1217, 1226 (9th Cir. 2006) (quoting Valley Eng'rs Inc. v. Elec.
19 Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998).

20 DISCUSSION

21 The court finds that dismissal for Plaintiff's failure to prosecute is appropriate. The
22 public's interest in expeditiously resolving this litigation and the court's interest in managing the
23 docket weigh in favor of dismissal. "The public's interest in expeditious resolution of litigation
24 always favors dismissal." Pagtalunan, 291 F.3d at 642; Yourish v. California Amplifier, 191 F.3d
25 983, 990 (9th Cir. 1999). This action has been pending for five years. Since the complaint was
26 filed, Plaintiff has taken no action in this case. The court cannot manage its docket if it

1 maintains cases in which a plaintiff has failed to litigate his case. The public's interest in the
2 expeditious resolution of litigation weighs heavily in favor of dismissal of such cases so that the
3 court's limited resources may be spent on cases in which the litigant is actually proceeding.
4 Thus, both the first and second factors weigh in favor of dismissal.

5 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
6 and of itself to warrant dismissal." Pagtalunan, 291 F.3d at 642; Yourish 191 F.3d at 991.
7 However, delay inherently increases the risk that witnesses' memories will fade and evidence
8 will become stale. Pagtalunan, 291 F.3d at 642. Defendant has never made an appearance in
9 this action. As such, any risk of prejudice to Defendant also weighs in favor of dismissal.

10 As for the availability of lesser sanctions, at this stage in the proceedings there is little
11 available to the court which would constitute a satisfactory lesser sanction while protecting the
12 court from further unnecessary expenditure of its scarce resources. Factors that indicate whether
13 a district court has considered alternatives include: (1) Discussing of the feasibility of less drastic
14 sanctions and explanation why alternative sanctions would be inadequate (2) Implementing
15 alternative methods of sanctioning before ordering dismissal (3) Warning to the plaintiff of the
16 possibility of dismissal before actually ordering dismissal. In re PPA, 460 F.3d at 1228-29.

17 "Warning that failure to obey a court order will result in dismissal can itself meet the
18 'consideration of alternatives' requirement." In re PPA, 460 F.3d at 1229; Estrada v. Speno &
19 Cohen, 244 F.3d 1050, 1057 (9th Cir. 2001). In this case, Plaintiff has not responded to the
20 court's order requesting Plaintiff to show cause why dismissal for lack of prosecution is not
21 warranted. Plaintiff has also not contacted the court. Thus, the court has no effective sanction
22 but to close the case.

23 Finally, because public policy favors disposition on the merits, this factor normally
24 weighs against dismissal. Pagtalunan, 291 F.3d at 643. "At the same time, a case that is stalled
25 or unreasonably delayed by a party's failure to comply with deadlines and discovery obligations
26 cannot move forward toward resolution on the merits. Thus, [the Ninth Circuit has] also

1 recognized that this factor ‘lends little support’ to a party whose responsibility it is to move a
2 case toward disposition on the merits but whose conduct impedes progress in that direction.”
3 In re PPA, 460 F.3d at 1228. The court finds this factor has little weight in actions where the
4 Plaintiff has not proceeded with an action since filing the complaint.

5 Thus, all factors tip toward a finding that dismissal is warranted.

6 **ORDER**

7 Accordingly, the court ORDERS that:

- 8 1. This action is DISMISSED for Plaintiff’s failure to prosecute; and
- 9 2. The Clerk of the Court is DIRECTED to close the case.

10 IT IS SO ORDERED.

11 Dated: January 3, 2011

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14 CHIEF UNITED STATES DISTRICT JUDGE
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