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

HARRIS FRESH, LLC,  
Plaintiff,

CASE NO. CV F 08-0126 LJO SMS

**ORDER TO SHOW CAUSE WHY ACTION  
SHOULD NOT BE DISMISSED FOR  
FAILURE TO PROSECUTE**

vs.

WILLIAMS AG COMMODITIES  
BROKERAGE, INC.,  
Defendant.

**INTRODUCTION**

Plaintiff Harris Fresh, LLC (“Harris Fresh”) has failed to prosecute this action against defendant Williams Ag Commodities Brokerage, Inc. (“Williams Ag”) since April 2008. The Court considers five factors to determine whether to dismiss *sua sponte* this action for failure to prosecute. Having considered the appropriate factors, this Court issues the following order to show cause.

**BACKGROUND**

Harris Fresh initiated this Perishable Agricultural Commodities Act action against Williams Ag on January 25, 2008. On February 29, 2009, Harris Fresh requested entry of default as to Williams Ag, which the Clerk entered on March 3, 2008. Thereafter, Harris Fresh did nothing until this Court followed up, vacated the scheduling conference, and directed Harris Fresh to file a motion for default judgment (Doc. 9, April 2, 2008).

Harris Fresh then filed an "application" for default judgment on April 16, 2008. United States Magistrate Judge Sandra M. Snyder (“Judge Snyder”) issued an order to disregard and terminate Harris Fresh's application for default judgment without prejudice. In her order, Judge Snyder pointed out defects in the application, including Harris Fresh's failure to set a hearing date. Judge Snyder suggested Harris Fresh to re-file the motion for default judgement in accordance with her order. They did nothing in response. There has been no activity in this action since April 22, 2008.

1 This Court's chambers contacted Harris Fresh for a status update on this action. Counsel for  
2 Harris Fresh indicated that the delay in filing the motion for default judgment was caused by the fact that  
3 Williams Ag filed for bankruptcy. Counsel for Harris Fresh further indicated that there was no intention  
4 to re-file the motion for default judgment, or to otherwise continue prosecution of this action.

## 5 6 DISCUSSION

7 A district court has the power to dismiss an action for want of prosecution on its own motion.  
8 *Alexander v. Pacific Maritime Ass'n*, 434 F.2d 281 (9th Cir. 1970). Before dismissing a case for failure  
9 to prosecute, this Court weighs the following five factors: (1) the public's interest in expeditious  
10 resolution of litigation; (2) the Court's need to manage its docket; (3) the risk to defendants from delay;  
11 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic  
12 sanctions. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *Citizens Utilities Co. v. American*  
13 *Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir.), *cert. denied*, 444 U.S. 931 (1979). The Court considers  
14 each factor below.

### 15 **Expeditious Resolution of Litigation and Court's Need to Manage its Docket**

16 By failing to take action in this case for nearly ten months, Harris Fresh delayed the resolution  
17 of this case and interfered with this Court's orderly management of its docket. Thus, the first two factors  
18 support an order of dismissal. *See Malone v. United States Postal Serv.*, 833 F.2d 128, 131 (9th Cir.  
19 1987), *cert. denied*, 488 U.S. 819 (1988).

### 20 **Prejudice to Defendant**

21 Ordinarily, to show prejudice, a defendant must show that the plaintiff's actions interfered with  
22 the defendant's ability to proceed to trial. *See id.* Here, the defendant has not filed an answer. Thus,  
23 no showing of prejudice has been made by the defendants. However, "the law presumes injury from  
24 unreasonable delay." *Anderson v. Air West, Inc.*, 542 F.2d 522 (9th Cir. 1976). Thus, "the failure to  
25 prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of  
26 actual prejudice to the defendant from the failure." *Id.* Therefore, this factor weighs does not weight  
27 against dismissal.

### 28 **Public Policy Favoring Disposition On Merits**

