1		
2		
3		
4		
5		
6		
7		
8	IN THE UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
10		
11	VINCENT SIPE,	Case No. 1:09-cv-00798 JLT
12	Plaintiff,	ORDER DISMISSING DEFENDANT
13	v.	FINANCIAL ADVANTAGE, INC.
14	COUNTRY WIDE BANK, et al.,	WITHOUT PREJUDICE
1.5		
15	Defendants.	
15 16	Defendants.	
		ed a Clerk's entry of default against Defendant
16		
16 17	On November 1, 2010, Plaintiff requests	. On November 2, 2010, the Clerk declined to
16 17 18	On November 1, 2010, Plaintiff requesters Financial Advantage, Inc. and others. (Doc. 61)	. On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been
16 17 18 19	On November 1, 2010, Plaintiff requesters Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc.	. On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been
16 17 18 19 20	On November 1, 2010, Plaintiff requested Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issued	On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64).
16 17 18 19 20 21	On November 1, 2010, Plaintiff requested Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issued	. On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64). d an Order After Scheduling Conference. (Doc. intended to dismiss the matter against Defendants
16 17 18 19 20 21 22	On November 1, 2010, Plaintiff requested Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issue 67). In this order, the Court noted that Plaintiff	. On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64). d an Order After Scheduling Conference. (Doc. intended to dismiss the matter against Defendants gainst only Defendant Sierra Pacific Mortgage
16 17 18 19 20 21 22 23	On November 1, 2010, Plaintiff requesters Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issued 67). In this order, the Court noted that Plaintiff DeSilva and Norberg and to pursue the matter and the court is the court of the court of the court is the court of the court of the court of the court is the court of the c	. On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64). d an Order After Scheduling Conference. (Doc. intended to dismiss the matter against Defendants gainst only Defendant Sierra Pacific Mortgage
16 17 18 19 20 21 22 23 24	On November 1, 2010, Plaintiff requesters Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issue 67). In this order, the Court noted that Plaintiff DeSilva and Norberg and to pursue the matter at ("SPM"). (Id. at 2.) Defendant Financial Advantage.	. On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64). d an Order After Scheduling Conference. (Doc. intended to dismiss the matter against Defendants gainst only Defendant Sierra Pacific Mortgage
16 17 18 19 20 21 22 23 24 25	On November 1, 2010, Plaintiff requesters Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issue 67). In this order, the Court noted that Plaintiff DeSilva and Norberg and to pursue the matter at ("SPM"). (Id. at 2.) Defendant Financial Advantage.	On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64). d an Order After Scheduling Conference. (Doc. intended to dismiss the matter against Defendants gainst only Defendant Sierra Pacific Mortgage ntage, Inc. (the employer for DeSilva and default package to the Court. (Doc. 75).
16 17 18 19 20 21 22 23 24 25 26	On November 1, 2010, Plaintiff requested Financial Advantage, Inc. and others. (Doc. 61) enter default because Plaintiff had failed to file served with the summons and complaint. (Doc. On November 23, 2010, the Court issued 67). In this order, the Court noted that Plaintiff DeSilva and Norberg and to pursue the matter a ("SPM"). (Id. at 2.) Defendant Financial Adva Norberg) is not mentioned in the order. (Id.) On August 1, 2011, Plaintiff submitted a However, it only requested the Court enter defa	On November 2, 2010, the Clerk declined to proof that Financial Advantage, Inc. had been 64). d an Order After Scheduling Conference. (Doc. intended to dismiss the matter against Defendants gainst only Defendant Sierra Pacific Mortgage ntage, Inc. (the employer for DeSilva and default package to the Court. (Doc. 75).

sought against "Defendants" in part because Plaintiff had never filed proof that Defendant DeSilva was served and there was no substantive evidence against Norberg. (Doc. 76 at 2). The Court later learned that SPM had been previously been dismissed from the case. (<u>Id.</u>)

On November 17, 2011, the Court issued to Plaintiff an Order to Show Cause why the matter should not be dismissed based upon his failure to prosecute the action. (Doc. 79) In that order, the Court recited the details set forth above and made clear that Plaintiff had not filed proof of service as to Defendant DeSilva. Based thereon, the Court concluded that Defendant DeSilva has never been served with the summons and complaint. (Id.)

Despite this, on January 10, 2012, Plaintiff filed another motion for default judgment without filing a proof of service as to Defendant DeSilva and without having first obtained the clerk's entry of default. (Doc. 83). As a result, on January 11, 2012, the Court issued Plaintiff another order to show cause why the matter should not be dismissed against Defendant DeSilva due to his failure to serve the summons and complaint in a timely fashion. (Doc. 84).

On January 17, 2012, Plaintiff's counsel responded to the order to show cause regarding Defendant Silva and admitted that he has never served Defendant DeSilva. (Doc. 85). In its order dismissing Defendant DeSilva, the Court noted that it was disturbed by counsel's incredible explanation that he just realized that no proof of service was ever filed as to Defendant DeSilva. (Id. at 1; Doc. 86). Counsel urged that this "mistake" should not be held against his client. (Doc. 86 at 2).

On April 17, 2012, the Court issued another Order to Show Cause to Plaintiff regarding Defendant Financial Advantage, Inc. (Doc. 89). The Court ordered Plaintiff to show cause why, after the issues he has had with service of other defendants, the matter should not be dismissed for his failure to serve Defendant Financial Advantage, Inc. with the operative summons and complaint or take any action with regard to this Defendant since November 2010. (Id.)

Plaintiff's counsel responded to the Court's April 17, 2012 order to show cause the same day. (Doc. 90). His response is nearly identical to the response he filed in January 2012 regarding the prior order to show cause; specifically, he asserts that his process server informed him that the Defendant had been served. (Doc. 85 and 90). Counsel claims that after he received

7 8

9

6

10 11

13

12

14 15

> 16 17

18

19 20

21

22 23

24

25

26

27 28 ///

///

the Court's order, he checked the file and realized service on Defendant Financial Advantage, Inc. was defective. (Id. at 1). As before, Plaintiff fails to address why he did not heed the prior admonishment from this Court in 2010 that Defendant Financial Advantage, Inc. had not been served or why he has failed to initiate any action against Defendant Financial Advantage, Inc. since 2010.

Counsel urged, as he did in his prior response to the Court's order to show cause, that this "mistake" should not be held against his client. (Doc. 86 at 2). Plaintiff's position would have carried more weight had counsel made any cogent explanation why he did not accomplish service on Defendant Financial Advantage, Inc., given his awareness of the service issues in this case and the issues he had with the process server for this case. Despite counsel's characterization, this circumstance is not an "oversight" but a purposeful refusal to comply with the orders of this Court. Moreover, counsel's explanation is inconsistent with Plaintiff's positions taken in this case. As noted above, when first confronted with his failure to serve Defendant Financial Advantage, Inc. in November 2010, Plaintiff-through counsel--reported that he only intended to proceed against Defendant SPM. (Doc. 67 at 2)

Though counsel hopes that he'll accomplish service on Defendant Financial Advantage, Inc. by May 2, 2012, he fails to explain why he thinks this is likely to occur given that he has only "attempted to locate" Defendant Financial Advantage, Inc. (Doc. 90 at 2). Additionally, he makes no showing whatsoever why Defendant Financial Advantage, Inc. has not been prejudiced by the delay in service of nearly three years. Counsel's failure to make these explanations is particularly egregious in light of the Court's warning issued to Plaintiff in its April 17, 2012 order that, "unless he demonstrates good cause for his failure to show proof of service to Defendant Financial Advantage, Inc. that the Court, on its own motion, shall dismiss the matter as to this Defendant." (Doc. 89 at 3)

ORDER

Therefore, on its own motion, the Court **ORDERS**,

1	1. The complaint as to Defendant Financial Advantage, Inc. is DISMISSED
2	WITHOUT PREJUDICE.
3	
4	
5	IT IS SO ORDERED.
6	Dated: April 18, 2012 /s/ Jennifer L. Thurston UNITED STATES MAGISTRATE JUDGE
7	UNITED STATES MAGISTRATE JUDGE
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	