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

LYNDON B. MILLER,

CASE NO. 10-cv-882 GSA LJO

Plaintiff,

FINDINGS AND RECOMMENDATIONS TO
DISMISS CASE AND IMPOSE
MONETARY SANCTIONS

vs.

SEARS HOLDING CORPORATION,

Defendant.

BACKGROUND

This case was removed from the Tuolumne County Superior Court by Defendant Sears Holding Corporation (“Defendant”) on May 14, 2010. (Doc. 1). On May 17, 2010, a Clerk’s notice was issued directing David Axelrod to submit a Petition to Practice in the Eastern District of California.¹ On May 17, 2010, this Court also issued a Scheduling Conference Order and set a Scheduling Conference for August 24, 2010. (Doc. 4-1).² The Scheduling Conference Order required Plaintiff’s appearance at the

¹ Mr. Axelrod did not submit an application as required by the Clerk’s notice.

² The Court notes that after the case was removed to this Court, all notices and orders have been served on Plaintiff’s counsel, David Axelrod electronically at sierralaw2@yahoo.com and sierralaw@gmail.com. As of October 14, 2010, David Axelrod’s e-mail address was listed with the state bar as sierralaw@gmail.com. See, http://members.calbar.ca.gov/search/member_detail.aspx?x=138790. Additionally, after the scheduling conference on August 24, 2010 was held, the Court received a phone call from Mr. Axelrod’s office indicating that Defense counsel’s declaration was not accurate. The Court indicated that Mr. Axelrod would have an opportunity to respond at the Order to Show Cause hearing. Mr. Axelrod did not appear.

1 scheduling conference and submission of a joint scheduling conference report one week prior to the
2 hearing. (Doc. 4-1 at pg. 2). The Scheduling Conference Order specifically indicated that if counsel or
3 a party failed to appear at the mandatory scheduling conference, or failed to comply with the directions
4 in the scheduling conference order, and ex parte hearing may be held and judgment of dismissal, default,
5 or other appropriate judgment may be entered, including sanctions and contempt of court. (Doc. 4-1 at
6 pg. 8 lines 17-21).

7 On August 17, 2010, Defendant submitted a scheduling report. (Doc. 6). In an attached
8 declaration, Defendant's counsel, Kelley Suzanne Elkins, Esq., indicated that she had spoken to
9 Plaintiff's counsel, David Axelrod, regarding the preparation of the joint scheduling conference report.
10 (Doc. 6-1 at pg. 1-2). Pursuant to their conversation, she alleges she faxed Mr. Axelrod a draft of the
11 joint report so that he could make revisions, but did not receive any feedback from him despite numerous
12 attempts to contact him. *Id.* On August 24, 2010, a scheduling conference was held. (Doc. 7).
13 Plaintiff's counsel did not appear for the conference, nor did he submit a scheduling conference report.

14 On August 31, 2010, this Court issued an order requiring Plaintiff's attorney to personally appear
15 on September 16, 2010, and show cause why sanctions, including dismissal of this action, should not
16 be imposed for failure to comply with this Court's Scheduling Conference Order and to prosecute this
17 action. (Doc. 8). The order specifically informed Plaintiff's counsel that, "[f]ailure to respond to this
18 Order to Show Cause will result in dismissal of this action." (Doc. 8 at pg. 2). Plaintiff's counsel failed
19 to respond to this Order to Show Cause ("OSC") and did not appear at the hearing held on September
20 16, 2010. (Doc. 9).

21 DISCUSSION

22 *A. Dismissal*

23 Local Rule 110 provides that "a failure of counsel or of a party to comply with these Local
24 Rules or with any order of the Court may be grounds for the imposition by the Court of any and all
25 sanctions . . . within the inherent power of the Court." District courts have the inherent power to
26 control their dockets and "in the exercise of that power, they may impose sanctions including, where
27 appropriate . . . dismissal of a case." Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir.
28 1986). A court may dismiss an action, with prejudice, based on a party's failure to prosecute an

1 action, failure to obey a court order, or failure to comply with local rules. See, e.g., Ghazali v.
2 Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v.
3 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order
4 requiring amendment of complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988)
5 (dismissal for failure to comply with local rule requiring pro se plaintiffs to keep court apprized of
6 address); Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to
7 comply with court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for
8 lack of prosecution and failure to comply with local rules). In determining whether to dismiss an
9 action for lack of prosecution, failure to obey a court order, or failure to comply with local rules, the
10 court must consider several factors: (1) the public’s interest in expeditious resolution of litigation;
11 (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
12 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
13 alternatives. Ghazali, 46 F.3d at 53; Ferdik, 963 F.2d at 1260-61; Malone, 833 F.2d at 130;
14 Thompson, 782 F.2d at 831; Henderson, 779 F.2d at 1423-24.

15 In the instant case, the Court finds that the first and second factors, the public’s interest in
16 expeditiously resolving this litigation and the Court’s interest in managing the docket, weigh in favor
17 of dismissal because there is no indication that the Plaintiff intends to prosecute this action. The
18 third factor, risk of prejudice to defendants, also weighs in favor of dismissal because a presumption
19 of injury arises from any unreasonable delay in prosecuting an action. Anderson v. Air West, 542
20 F.2d 522, 524 (9th Cir. 1976). The fourth factor, public policy favoring disposition of cases on their
21 merits, is greatly outweighed by the factors in favor of dismissal. Finally, a court’s warning to a
22 party that failure to obey the court’s order will result in dismissal satisfies the “consideration of
23 alternatives” requirement. Ferdik, 963 F.2d at 1262; Malone, 833 at 132-33; Henderson, 779 F.2d at
24 1424.

25 Furthermore, Rule 16(f) provides in pertinent part that “[o]n motion or on its own, the court
26 may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its
27 attorney: (A) fails to appear at a scheduling or other pretrial conference or (C) fails to obey a
28 scheduling or other pretrial order.” Fed.R.Civ.P. 16(f). Rule 37(b)(2)(A)(ii)-(vii), which is referenced

1 in Rule 16(f), permits the following sanctions:

- 2 (ii) prohibiting the disobedient party from supporting or opposing designated claims or
- 3 defenses, or from introducing designated matters in evidence;
- 4 (iii) striking pleadings in whole or in part;
- 5 (iv) staying further proceedings until the order is obeyed;
- 6 **(v) dismissing the action or proceeding in whole or in part;**
- 7 (vi) rendering a default judgment against the disobedient party; or
- 8 (vii) treating as contempt of court the failure to obey any order except an order to submit to a
- 9 physical or mental examination.

10 Fed.R.Civ.P. 37(b)(2)(A)(ii)-(vii) (emphasis added). Here, the Court's scheduling conference
11 order clearly informed Plaintiff that a joint scheduling report and attendance at the scheduling
12 conference was mandatory and that failure to comply with the order would result in sanctions
13 including dismissal of the case. (Doc. 4). Additionally, the Order to Show Cause issued by this
14 Court on August 13, 2010, was clear that dismissal would result if Plaintiff's counsel did not
15 respond.

16 This district has a numerous cases and the ability to efficiently manage its docket in large part
17 is dependent upon attorneys fulfilling their professional obligations and responsibilities. When
18 attorneys do not appear as required, the Court's time is wasted. This Court would simply be hard-
19 pressed to manage its current caseload without the cooperation of the attorneys who practice before
20 it. Therefore, harsh consequences are required to offset the drain on judicial resources at the hands of
21 attorneys who fail to make required appearances. In this instance, Plaintiff's attorney was adequately
22 advised of the consequences of failing to obey the Court's order, yet did not appear when given the
23 opportunity to explain his non-appearance at an Order to Show Cause hearing. Thus, dismissal of
24 this action is appropriate. See, Nascimento v. Dummer, 508 F. 3d 905 (9th Cir. 2007) (District Court
25 did not abuse its discretion when dismissing case without prejudice for Plaintiff's failure and
26 Plaintiff's attorney's failure to appear at a schedule pretrial conference or otherwise prepare for trial).

27 *B. Monetary Sanctions*

28 Finally, Rule 16(f)(2) provides that "[i]nstead of or in addition to any other sanction, the
court *must* order the party, its attorney, or both to pay the reasonable expenses-including attorney's
fees-incurred because of any noncompliance with this rule, unless the noncompliance was
substantially justified or other circumstances make an aware of expenses unjust." Fed.R.Civ.P.

1 16(f)(2). Plaintiff's counsel not only abused the Court's judicial resources but also caused
2 unnecessary time and expense to be expended by opposing counsel. Mr. Axelrod has not submitted
3 any evidence that the noncompliance was substantially justified or other circumstances make an
4 award of expenses unjust. Accordingly, Defendant is entitled to reasonable attorney fees for the
5 preparation and appearance at the scheduling conference. Within ten days of the District Court's
6 adoption of these Findings and Recommendations Defendant shall submit proof of the expenses
7 incurred as a result of Plaintiff's non-appearance. Failure to timely submit the requisite evidence
8 may be a waiver of the right to fees.

9 CONCLUSION AND RECOMMENDATIONS

10 Accordingly, the Court HEREBY RECOMMENDS that this action be DISMISSED
11 WITHOUT PREJUDICE for Plaintiff's failure to comply with a court order and Plaintiff's failure to
12 prosecute.³ Moreover, this Court recommends that Mr. Axelrod, Plaintiff's attorney, pay Defendant
13 reasonable attorney fees according to proof.

14 This Findings and Recommendation is submitted to the Honorable Lawrence J. O'Neill,
15 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B).
16 Within **fifteen (15)** days after being served with a copy, Plaintiff may file written objections with the
17 Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and
18 Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C.
19 § 636(b)(1)(C). Plaintiff is advised that failure to file objections within the specified time may waive
20 the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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³ The Court elects not to dismiss this action with prejudice because Plaintiff, Mr. Lyndon Miller, should not be unduly prejudiced for the actions of his attorney.

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IT IS SO ORDERED.

Dated: October 20, 2010

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE