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

TIMOTHY DAVID REYNOLDS and
FAITH DANIELLE REYNOLDS,

CASE NO. CV F 10-1388 LJO

Appellants,

**ORDER TO DISMISS ACTION FOR
FAILURE TO PROSECUTE**

v.

FORD MOTOR CREDIT COMPANY,
LLC, and MICHAEL MEYER, CHAPTER
13 TRUSTEE,

Appellees.

INTRODUCTION

Appellants David Reynolds and Faith Danielle Reynolds (“appellants”) have failed to prosecute this action against appellees Ford Motor Credit Company, LLC, and Michael Meyer, Chapter 13 Trustee (“appellees”) since its inception. 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 **DISMISSES** this action without prejudice.

BACKGROUND

On September 15, 2010, this Court ordered appellants to show cause why this appeal should not be dismissed for failure to prosecute the appeal. At that point, appellants had failed to comply with F.R.B.P. 8006, failed to file within 14 days a designation of record, statement of issues on appeal and a notice regarding the ordering of transcripts with the bankruptcy court, and failed to take any action to proceed in this case.

1 On September 17, 2010, appellants responded to the order to show cause. Appellants explained:
2 (1) the necessary documents were filed on September 16, 2010; (2) they have been attempting to resolve
3 this matter with appellee's counsel since the appeal was filed; (3) this Court will be bound by a decision
4 of the Ninth Circuit court of Appeals which has a pending petition for rehearing en banc; and (4) there
5 has been no prejudice to appellee for the delay because payments are being made by the Chapter 13
6 Trustee to Appellee pending this appeal.

7 Although appellants took the required actions after the order to show cause issued, appellants
8 failed to explain why they took no action prior to this Court's order. Appellants failed to demonstrate
9 good cause why they failed to comply with the Federal Rules of Bankruptcy Procedure, rules that are
10 necessary to perfect the appeal. Accordingly, this Court admonished appellants that "further failure to
11 comply with federal rules, local rules, or a court order **shall** result in sanctions, which may include
12 monetary sanctions and/or dismissal." Order to Admonish Appellants, p. 2 (emphasis in original).

13 On September 21, 2010, the certificate of record issued, but that order was disregarded on
14 September 24, 2010. The bankruptcy court later certified the record. Incredibly, appellants failed to
15 advise the district court of the certification. Rather, the clerk of this court communicated with the clerk
16 of the bankruptcy court to determine whether the action had been certified, and filed the certification of
17 record on its own. Thus, appellants again failed to take action to prosecute this appeal despite this
18 Court's admonition.

19 On October 15, 2010, this Court set a briefing schedule in this action. This Court noted that the
20 "bankruptcy court re-issued its certification of record on October 8, 2010" but that "neither party advised
21 the court of the certification of the record." The Court directed the clerk of court to file the certification,
22 and set a briefing schedule. According to that order, appellants' opening brief was to be filed and served
23 no later than November 1, 2010.

24 As of this date, appellants have failed to file an opening brief with this Court.

25 DISCUSSION

26 A district court has the power to dismiss an action for want of prosecution on its own motion.
27 *Alexander v. Pacific Maritime Ass'n*, 434 F.2d 281 (9th Cir. 1970). A dismissal for failure to prosecute
28 "must be supported by a showing of unreasonable delay." *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084

1 (9th Cir. 2010). In addition, this Court weighs the following five factors: (1) the public’s interest in
2 expeditious resolution of litigation; (2) the Court’s need to manage its docket; (3) the risk to defendants
3 from delay; (4) the public policy favoring disposition of cases on their merits; and (5) the availability
4 of less drastic sanctions. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *Citizens Utilities*
5 *Co. v. American Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir.), *cert. denied*, 444 U.S. 931 (1979). The
6 Court considers each factor below.

7 **Unreasonable Delay**

8 Appellants have failed to prosecute this bankruptcy appeal without offering an excuse for the
9 delay. This action was initiated on August 4, 2010. Thereafter, appellants took no steps to certify the
10 record, and made no effort to prosecute the action. In response to this Court’s September 15, 2010 order
11 to show cause, appellants failed to demonstrate good cause for the failure to abide by the Court’s local
12 rules, order, and the Federal Rules of Bankruptcy Procedure. Rather, appellants simply took the required
13 actions. Thereafter, appellants have failed to re-file the certification, and failed to file its opening brief.
14 Appellants’ opening brief was due on November 1, 2010. As of this date, no brief was been filed, and
15 no reasons for the failure to file the brief have been set for to the Court. Accordingly, the facts support
16 a finding that the delay has been unreasonable.

17 **Expeditious Resolution of Litigation and Court’s Need to Manage its Docket**

18 By failing to take action in this case, appellants delayed the resolution of this case and interfered
19 with this Court’s orderly management of its docket. Thus, the Court finds that the first two factors
20 support an order of dismissal. *See Malone v. United States Postal Serv.*, 833 F.2d 128, 131 (9th Cir.
21 1987), *cert. denied*, 488 U.S. 819 (1988).

22 **Prejudice to Defendant**

23 Where, as here, there has been an unreasonable delay, “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.* Moreover, to show prejudice, a defendant must
27 show that the plaintiff’s actions interfered with the defendant’s ability to proceed to trial. *Malone*, 833
28 F.2d at 131. Here, appellants actions prejudiced appellees by interfering with their ability to designate

1 certain documents in the record. After this Court intervened to have the record de-certified, to allow
2 appellees an opportunity to designate documents, appellants continued to fail to prosecute the action.
3 Based on these considerations, this Court finds that this factor weighs in favor of dismissal.

4 **Public Policy Favoring Disposition On Merits**

5 The public policy favoring the disposition of cases on their merits weighs against dismissal. The
6 Court notes, however, appellants' role in frustrating this public policy. "Although there is indeed a
7 public policy favoring disposition on the merits, it is the responsibility of the moving party to move
8 towards that disposition at a reasonable pace." *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th
9 Cir. 1991). Thus, a plaintiff's dilatoriness will not defeat an involuntary dismissal based on this factor
10 alone. *See id.* *See also, In re Phenylpropanolamine Products Liability Litigation*, 460 F.3d 1217, 1240
11 (9th Cir. 2006) ("The public policy favoring disposition on the merits is not compelling when it is
12 thwarted by the plaintiff's failure to move their cases along.").

13 **Consideration of Alternatives**

14 In determining whether to dismiss an action for failure to prosecute, this Court considers whether
15 less drastic sanctions are feasible and adequate. *See Malone*, 833 F.2d at 132. In its discretion, the
16 Court may satisfy this element by warning the plaintiff of the possibility of dismissal. *Id.* *See also, In*
17 *re Phenylpropanolamine Products Liability Litigation*, 460 F.3d at 1240 (a district court meets the
18 "consideration of alternatives" requirement for dismissing an action by issuing a warning that a party's
19 failure to obey a court order will result in dismissal). The Court admonished appellants clearly in its
20 September 27, 2010 Order to Admonish Appellants that "further failure to comply with federal rules,
21 local rules, or a court order **shall** result in sanctions, which may include monetary sanctions and/or
22 dismissal." (emphasis in original). Appellants ignored that admonition, and repeatedly failed to
23 prosecute this action after the admonishment. First, appellants failed to advise the clerk of this Court
24 that the bankruptcy court had re-certified the record. Second, without excuse, appellants failed to file
25 its opening brief on or before November 1, 2010. Because of appellants' repeated violations of this
26 Court's orders, failure to take action to prosecute this action, and choice to ignore this Court's
27 admonishments that this action would be dismissed for failure to prosecute, this Court finds no
28 alternative sanction to be satisfactory.

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CONCLUSION and ORDER

For the foregoing reasons, this Court DISMISSES without prejudice this action and DIRECTS the clerk of court to close this action.

IT IS SO ORDERED.

Dated: November 12, 2010

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE