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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JACINTO ROMERO, an individual; and
RAMIRO CERDA, an individual d/b/a Yo No
Fui Clothing,

Plaintiffs,

v.

ALESSIA GIACOBINO, and individual; and
DOES 1-10, inclusive,

Defendants.

Case No. 1:13-cv-02046-DAD-SKO

**FINDINGS AND RECOMMENDATION
THAT PLAINTIFFS’ MOTION FOR
DEFAULT JUDGMENT BE DENIED**

**FINDINGS AND RECOMMENDATION
THAT PLAINTIFFS’ COMPLAINT
SHOULD BE DISMISSED WITH
PREJUDICE FOR FAILURE TO
PROSECUTE**

OBJECTIONS DUE: 14 DAYS

(Doc. 26)

I. INTRODUCTION

Plaintiffs Jacinto Romero and Ramiro Cerda (“Plaintiffs”) filed a Complaint on December 16, 2013, for trademark infringement, unfair competition, and false designation of origin. (Doc. 1.) Defendant Alessia Giacobino was served with a copy of the complaint on March 26, 2014, with an answer to the complaint due April 16, 2014. (Doc. 5.) The clerk entered default against Defendant on August 29, 2014 (Doc. 11), and Plaintiffs filed their first Motion for Default Judgment on November 13, 2014 (Doc. 15).

Because Plaintiffs’ Motion for Default Judgment was set for submission without a hearing, Plaintiffs requested a hearing to determine damages pursuant to Fed. R. Civ. Proc. 55(b)(2), which was set for January 14, 2015. (Docs. 16; 17.) As Defendant resides in Italy, Plaintiffs were unable to serve Defendant with notice of the hearing and Plaintiffs requested the hearing be rescheduled to allow them sufficient time to effect service. (Doc. 18.) The hearing was vacated

1 and reset to June 17, 2015 -- a five-month extension of time. (Doc. 19.) Plaintiffs initiated service
2 on the Defendant in Italy on April 27, 2015, and requested a further continuance of the hearing to
3 determine damages. (Doc. 20.) The hearing was reset to August 12, 2015. (Doc. 21.)

4 On June 3, 2015, Plaintiffs filed their “Notice Regarding International Service of Process,”
5 confirming that international service had commenced upon Defendant of the notice of the August
6 12, 2015, hearing to determine damages. (Doc. 22.) On July 22, 2015, Plaintiffs filed a “Notice
7 Regarding International Service of Process and Request to Reschedule Hearing to Determine
8 Damages,” requesting the hearing be reset for some time in November 2015. (Doc. 15.) Plaintiffs
9 explained that Defendant has moved to a new Italian city, and “[u]pon notice of a rescheduled
10 hearing date, Plaintiffs will take necessary steps to locate and serve the [D]efendant.” (Doc. 15.)

11 On July 29, 2015, after twice rescheduling the Hearing to Determine Damages (Docs. 19;
12 21), the Court denied Plaintiffs’ third request to reschedule the hearing to determine damages and
13 denied without prejudice Plaintiff’s Motion for Default Judgment (Doc. 24.) On February 2,
14 2016, Plaintiffs refiled their Motion for Default Judgment, and represented to the Court they were
15 now in possession of Defendant’s current address and able to accomplish international service of
16 upon Defendant. (Doc. 26.) After again requesting a continuance to accomplish international
17 service complying with requirements imposed by the Hague Convention (Docs. 28; 29), a Hearing
18 to Determine Damages was set for July 27, 2016, and Plaintiffs were ordered to serve Defendant
19 with Notice of the hearing on damages and the Motion for Default Judgment by no later than June
20 29, 2016. (Doc. 30.)

21 Plaintiffs were further ordered to file their proof of service with this Court by no later than
22 July 8, 2016, and cautioned that should Plaintiffs fail to file proof of service by the deadlines set
23 by the Court, the motion would be denied and the case would be recommended for dismissal for
24 failure to prosecute. (Doc. 30.) No proof of service was filed on July 8, 2016. (*See* Docket.)

25 II. DISCUSSION

26 Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with these Rules
27 or with any order of the Court may be grounds for the imposition by the Court of any and all
28 sanctions . . . within the inherent power of the Court.” District courts have the inherent power to

1 control their dockets and “[i]n the exercise of that power they may impose sanctions, including,
2 where appropriate . . . dismissal.” *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986).
3 A court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,
4 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*,
5 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v.*
6 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order
7 requiring amendment of complaint); *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir.1988)
8 (dismissal for failure to comply with local rule requiring pro se plaintiff to keep court apprised of
9 address); *Malone v. U.S. Postal Service*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for
10 failure to comply with court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986)
11 (dismissal for failure to prosecute and failure to comply with local rules).

12 In determining whether to dismiss an action for lack of prosecution, failure to obey a court
13 order, or failure to comply with local rules, the court must consider several factors: (1) the public’s
14 interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the
15 risk of prejudice to the defendant; (4) the public policy favoring disposition of cases on their
16 merits; and (5) the availability of less drastic alternatives. *Pagtalunan v. Galaza*, 291 F.3d 639,
17 642 (9th Cir. 2002) (citing *Ferdik*, 963 F.2d at 1260-61; *Thompson*, 782 F.2d at 831); *Henderson*,
18 779 F.2d at 1423-24; *Malone*, 833 F.2d at 130; *Ferdik*, 963 F.2d at 1260-61; *Ghazali*, 46 F.3d at
19 53. “The public’s interest in expeditious resolution of litigation always favors dismissal.”
20 *Pagtalunan*, 291 F.3d at 642 (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir.
21 1999)).

22 Here, the Court finds that the public’s interest in expeditiously resolving this litigation and
23 the Court’s interest in managing the docket weigh in favor of dismissal. The third factor, risk of
24 prejudice to defendants, also weighs in favor of dismissal, since a presumption of injury arises
25 from the occurrence of unreasonable delay in prosecuting an action. *Anderson v. Air West*, 542
26 F.2d 522, 524 (9th Cir. 1976). The fourth factor -- public policy favoring disposition of cases on
27 their merits -- is greatly outweighed by the factors in favor of dismissal discussed herein. Finally,
28 a court’s warning to a party that his failure to obey the court’s order will result in dismissal

1 satisfies the “consideration of alternatives” requirement. *Ferdik*, 963 F.2d at 1262; *Malone*, 833
2 F.2d at 132-33; *Henderson*, 779 F.2d at 1424. The Court’s March 9, 2016, minute order expressly
3 ordered Plaintiffs to file proof of service by July 8, 2016, and warned that failure to file such proof
4 of service would result in denial of the motion and recommendation to the district judge that the
5 case be dismissed for failure to prosecute. (Doc. 30.) Thus, Plaintiffs had adequate warning that
6 sanctions, up to and including dismissal of the case, would result from their noncompliance with
7 the Court’s March 9, 2016, order.

8 Because Plaintiffs have not filed any proof of service, the Court has no information
9 whether Defendant has been served. Despite the Court’s repeated admonitions (Docs. 24; 30),
10 Plaintiffs have demonstrated they are unable or unwilling to proceed with prosecuting their case.
11 Pursuant to Local Rule 110 and the Court’s inherent power to sanction, the undersigned
12 RECOMMENDS that this case be DISMISSED with prejudice.

13 III. CONCLUSION AND RECOMMENDATION

14 Accordingly, IT IS HEREBY RECOMMENDED that Plaintiffs’ Motion for Default
15 Judgment (Doc. 26) be DENIED and this case be DISMISSED with prejudice for failing to
16 comply with the Court’s March 9, 2016, order.

17 These findings and recommendations are submitted to the district judge assigned to this
18 action, pursuant to 28 U.S.C. § 636(b)(1) (B) and this Court’s Local Rule 304. Within fourteen
19 (14) days of service of this recommendation, any party may file written objections to these
20 findings and recommendations with the Court and serve a copy on all parties. Such a document
21 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The
22 district judge will review the magistrate judge’s findings and recommendations pursuant to
23 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the
24 specified time may waive the right to appeal the district judge’s order. *Wilkerson v. Wheeler*, 772
25 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

26 IT IS SO ORDERED.

27 Dated: July 13, 2016

28 /s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE