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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10 TONYA D. ENGELBRECHT,

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12 Plaintiff,

13 v.

14 KELLY RIPA,

15 Defendant.

Case No. 1:17-cv-01339-LJO-EPG

**FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE, FOR
PLAINTIFF'S FAILURE TO COMPLY WITH
A COURT ORDER AND FAILURE TO
PROSECUTE**

(ECF No. 11)

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS**

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20 Tonya D. Engelbrecht ("Plaintiff") is proceeding *pro se* and *in forma pauperis* in this
21 action. On October 5, 2017, Plaintiff commenced this action by filing a Complaint alleging
22 claims of torture, defamation, breach of contract, and violations of the California Welfare and
23 Institution Code against Kelly Ripa ("Defendant"), owner of Milojo Productions. (ECF No. 1).
24 This action now proceeds on Plaintiff's claim of breach of contract as alleged in her First
25 Amended Complaint ("FAC"). (ECF Nos. 8, 10).

26 On August 21, 2018, the Court found service of the FAC appropriate, and directed
27 Plaintiff to complete and return service documents within thirty days. (ECF No. 11). The thirty-
28 day deadline has expired, and Plaintiff has not completed and returned the service documents.

1 Plaintiff has, thus, failed to comply with a court order, and has failed to otherwise prosecute this
2 action.

3 A court may dismiss an action based on a party's failure to prosecute an action, failure to
4 obey a court order, or failure to comply with local rules. *See* Fed. R. Civ. P. 41(b); L.R. 110;
5 *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (citing *United States v. Warren*, 601 F.2d 471,
6 474 (9th Cir. 1979)) (dismissal for noncompliance with local rule); *Malone v. United States*
7 *Postal Serv.*, 833 F.2d 128, 134 (9th Cir. 1987) (dismissal for failure to comply with court order).
8 "In determining whether to dismiss a[n] [action] for failure to prosecute or failure to comply with
9 a court order, the Court must weigh the following factors: (1) the public's interest in expeditious
10 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to
11 defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy
12 favoring disposition of cases on their merits." *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir.
13 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

14 The public's interest in expeditious resolution of litigation and the court's need to manage
15 its docket always favor dismissal. *Id.* (quoting *Yourish v. California Amplifier*, 191 F.3d 983,
16 990 (9th Cir. 1999)). Thus, these factors weigh in favor of dismissal.

17 The public policy favoring disposition on the merits always weighs against dismissal. *Id.*
18 Thus, this factor weighs against dismissal.

19 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
20 and of itself to warrant dismissal." *Id.* at 642 (citing *Yourish*, 191 F.3d at 991). However, "delay
21 inherently increases the risk that witnesses' memories will fade and evidence will become stale,"
22 *id.* at 643, and it is Plaintiff's failure to complete and return the service documents that is causing
23 delay. The case is now stalled until Plaintiff completes and returns the service documents.
24 Therefore, the third factor weighs in favor of dismissal.

25 As for the availability of lesser sanctions, at this stage in the proceedings there is little
26 available to the Court which would constitute a satisfactory lesser sanction while protecting the
27 Court from further unnecessary expenditure of its scarce resources. Monetary sanctions are of
28 little use, considering Plaintiff's *in forma pauperis* status, and given the stage of these

1 proceedings, the preclusion of evidence or witnesses is not available. Additionally, because the
2 dismissal being considered in this case is without prejudice, the Court is stopping short of using
3 the harshest possible sanction of dismissal with prejudice.

4 After weighing the factors, including the Court's need to manage its docket, the Court
5 finds that dismissal without prejudice is appropriate.

6 Accordingly, the Court HEREBY RECOMMENDS that:

- 7 1. This action be dismissed without prejudice, based on Plaintiff's failure to
8 prosecute this case and failure to comply with the Court's order dated August 21,
9 2018, (ECF No. 11); and
- 10 2. The Clerk of Court be directed to close this case.

11 These findings and recommendations are submitted to the district judge assigned to the
12 case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served
13 with these findings and recommendations, Plaintiff may file written objections with the court.
14 Such a document should be captioned "Objections to Magistrate Judge's Findings and
15 Recommendations." Plaintiff is advised that failure to file objections within the specified time
16 may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
17 2014) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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19 IT IS SO ORDERED.

20 Dated: October 9, 2018

21 /s/ Eric P. Grogan
22 UNITED STATES MAGISTRATE JUDGE
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