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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DESIREE MERCADO,

Plaintiff,

v.

COUNTY OF MERCED, et al.,

Defendants.

Case No. 1:20-cv-00161-NONE-SAB

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING GRANTING  
DEFENDANT’S MOTION TO DISMISS  
AND DISMISSING ACTION DUE TO  
PLAINTIFF MERCADO’S FAILURE TO  
COMPLY AND FAILURE TO PROSECUTE

(ECF No. 52)

OBJECTIONS DUE WITHIN FOURTEEN  
DAYS

Currently before the Court is Defendant Sparks’ motion to dismiss, filed November 30, 2020. (ECF No. 52.) For the reasons discussed herein, the Court recommends that the motion to dismiss be granted and that this action be dismissed in its entirety for Plaintiff Mercado’s failure to comply and failure prosecute.

**I.**

**RELEVANT BACKGROUND**

On January 30, 2020, Plaintiffs Miguel Rodriguez Cortez and Desiree Mercado filed this civil rights action pursuant to 42 U.S.C. § 1983 against Defendants County of Merced, Merced County Sheriff’s Office, and Vernon Warnke (“County Defendants”). (ECF No. 1.) On March 18, 2020, Plaintiffs filed a first amended complaint adding Damian Sparks, Joseph Royel, Julio

1 Ibarra Perez, and Nasir Wali as defendants. (ECF No. 10.) On April 6, 2020, a stipulation to  
2 stay this action pending early settlement discussions was filed. (ECF No. 12.) On April 7, 2020,  
3 all dates were vacated and the matter was stayed for the parties to complete alternate dispute  
4 resolution. (ECF No. 13.)

5 A settlement conference was held in this matter before Magistrate Judge Kendall J.  
6 Newman on September 4, 2020. (ECF No. 26.) Plaintiff Desiree Mercado did not appear at the  
7 September 4, 2020 settlement conference. Plaintiff Cortez reached a settlement agreement with  
8 the defendants and was dismissed from this action at the stipulation of the parties on September  
9 16, 2020. (ECF Nos. 32, 35.)

10 On September 9, 2020, Plaintiff Mercado's counsel filed a motion to withdraw due to  
11 lack of communication with Plaintiff Mercado. (ECF No. 32.) On September 10, 2020, an order  
12 issued requiring Plaintiff Mercado to appear telephonically at the hearing on the motion to  
13 withdraw. (ECF No. 33.) The order was served on Plaintiff Mercado at the last known address  
14 provided by defense counsel in the motion. (Id.) On September 25, 2020, the order was returned  
15 by the United States Postal Service as undeliverable.

16 A hearing on the motion to withdraw was held on October 7, 2020, and Plaintiff Mercado  
17 did not appear for the hearing. (ECF No. 38.) On October 8, 2020, an order issued granting  
18 counsel's request to withdraw; Plaintiff Mercado was ordered to file a change of address within  
19 thirty days; and a mandatory scheduling conference was set for November 12, 2020, as amended  
20 on October 9, 2020. (ECF Nos. 39, 40.) Due to the return of prior mail, the Court had the order  
21 served to the address of record and to Plaintiff's email address. (ECF No. 39.) On October 21,  
22 2020, the October 8, 2020 and October 9, 2020 orders were returned as undeliverable by the  
23 United States Postal Service.

24 On November 4, 2020, a joint scheduling report was filed. (ECF No. 41.) The  
25 mandatory scheduling conference was held on November 12, 2020. (ECF No. 45.) Counsel  
26 Janine Highiet-Ivicevic appeared for the County Defendants and Alison Berry-Wilkinson  
27 appeared for Defendant Sparks. (ECF No. 45.) Plaintiff Mercado did not appear. (Id.) On this  
28 same day, an order issued lifting the stay of this matter, requiring Defendants to file a responsive

1 pleading, finding that it appeared that Plaintiff was no longer prosecuting this action, and  
2 requiring Plaintiff to file proof of service on Defendants Royel, Perez and Wali or show cause  
3 why Defendants Royel, Perez, and Wali should not be dismissed from this action for failure to  
4 serve. (ECF No. 46.)

5 On November 25, 2020, the County Defendants filed an answer to the first amended  
6 complaint and Defendant Sparks filed a motion to dismiss. (ECF Nos. 50, 52.) On November  
7 30, 2020, the motion to dismiss was referred to the undersigned for preparation of findings and  
8 recommendations. (ECF No. 53.) An order issued setting a hearing on the motion before the  
9 undersigned on January 6, 2021. (ECF No. 54.) On December 22, 2020, the November 30, 2020  
10 minute order and order setting the hearing on the motion to dismiss were returned as  
11 undeliverable. On December 29, 2020, an order was filed advising Plaintiff Mercado that her  
12 failure to appear at the January 6, 2021 hearing would be construed as an indication that she was  
13 no longer prosecuting this action. (ECF No. 55.) She was also advised that she had been  
14 ordered to contact the Courtroom Deputy within forty eight hours of the hearing to obtain the  
15 information on how to appear. (Id.) Plaintiff did not contact the Courtroom Deputy prior to the  
16 hearing and the Courtroom Deputy emailed Plaintiff Mercado the information on how to appear  
17 at the January 6, 2021 hearing.

18 A hearing on the motion was held on January 6, 2021. Counsel Alison Berry-Wilkinson  
19 appeared by video for Defendant Sparks and counsel Alison Janine Highiet-Ivicevic appeared by  
20 video for the County Defendants.. Plaintiff Mercado did not appear.

## 21 II.

### 22 DISCUSSION

23 Defendant Sparks moves to dismiss the first amended complaint based on 1) failure to  
24 serve in compliance with Rule 4(m) of the Federal Rules of Civil Procedure; 2) defects in service  
25 of process pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure; 3) failure to comply  
26 with the Court's orders and rules pursuant to Rule 16(f) of the Federal Rules of Civil Procedure;  
27 and 4) failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

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1           **A.     Failure to Serve**

2           Defendant Sparks moves to dismiss the first amended complaint based on Plaintiff's  
3 failure to serve the summons and complaint.

4           Rule 4(m) of the Federal Rules of Civil Procedure addresses the time requirements for  
5 service of the complaint in civil cases. Rule 4(m) provides:

6           If a defendant is not served within 90 days after the complaint is filed, the court--  
7 on motion or on its own after notice to the plaintiff--must dismiss the action  
8 without prejudice against that defendant or order that service be made within a  
9 specified time. But if the plaintiff shows good cause for the failure, the court must  
10 extend the time for service for an appropriate period.

11           Here, an order setting the mandatory scheduling conference issued on January 31, 2020,  
12 and informed Plaintiff to "diligently pursue service of the summons and complaint" and  
13 "promptly file proofs of the service." (ECF No. 3 at 1-2.) Plaintiff was referred to Rule 4 of the  
14 Federal Rules of Civil Procedure regarding the requirement of timely service of the complaint.  
15 (Id.) Further, Plaintiff was advised that "[f]ailure to comply may result in the imposition of  
16 sanctions, including dismissal of unserved Defendants." (Id.) On February 19, 2020, Plaintiff  
17 filed proofs of service for Defendants County of Merced, Merced County Sheriff's Office, and  
18 Vernon H. Warnke. (ECF Nos. 5, 6, 7.) The County Defendants filed an answer on February  
19 27, 2020. (ECF No. 9.)

20           On March 18, 2020, Plaintiffs filed a first amended complaint which added Defendants  
21 Damian Sparks, Joseph Royel, Julio Ibarra Perez, and Nasir Wali. (ECF No. 10.) Summonses  
22 issued on March 19, 2020. (ECF No. 11.) On April 6, 2020, a stipulation was filed to stay this  
23 action while the parties participated in alternative dispute resolution. (ECF No. 12.) The  
24 stipulation provided that service of process was stayed and the time limits to serve Defendant  
25 Sparks, Royel, Perez, and Wali was tolled until the conclusion of early alternative dispute  
26 resolution. (Id. at 2.) Plaintiff had ninety days following the completion of alternative dispute  
27 resolution to complete service of process on the unserved defendants. (Id. at 3.)

28           On August 21, 2020, a settlement conference was held and Defendant Cortez settled his  
claims in this action. However, Defendant Mercado did not appear at the settlement conference  
and her attorney indicated that he had been unable to reach her to get her to participate. (ECF

1 No. 26.) Counsel indicated that he intended to file a motion to withdraw because Plaintiff  
2 Mercado was no longer communicating with counsel. (Reporter's Transcript of Proceedings 6:9-  
3 12, ECF No. 28.)

4 Alternate dispute resolution was completed on August 21, 2020, but Magistrate Judge  
5 Newman continued the stay of all pending dates as to Plaintiff Mercado. (ECF No. 26.) Since  
6 Plaintiff is proceeding pro se in this action, there may be good cause to extend the deadline for  
7 service on Defendant Sparks.

8 However, on November 12, 2020, an order issued requiring Plaintiff Mercado to either  
9 file proof of service on Defendants Royel, Perez, and Wali or show cause why they should not be  
10 dismissed from this action for failure to serve within thirty days. (ECF No. 46.) Plaintiff  
11 Mercado has not demonstrated that Defendants Royel, Perez, and Wali have been served or  
12 otherwise responded to the November 12, 2020 order, nor has Plaintiff filed proof that Defendant  
13 Sparks has been served with the summons and complaint in this action. Based on Plaintiff's  
14 failure to appear and failure to comply with the orders of this Court, it has previously been found  
15 that it appears that Plaintiff Mercado is no longer prosecuting this action. Therefore, it would be  
16 futile to grant further time for Plaintiff to effect service on any defendant in this action.

17 Accordingly, the Court recommends that Defendant Sparks' motion to dismiss be granted  
18 and Defendants Sparks, Royel, Perez, and Wali be dismissed from this action for failure to serve  
19 in compliance with Rule 4(m) of the Federal Rules of Civil Procedure.

20 **B. Failure to Comply and Failure to Prosecute**

21 Defendant Sparks moves to dismiss the first amended complaint due to Plaintiff  
22 Mercado's repeated failure to comply with the Court's orders. Defendant Sparks argues that  
23 Plaintiff was unresponsive to her counsel and failed to participate in the early settlement  
24 conference. Plaintiff was ordered to appear at the hearing on the motion to withdraw and she  
25 was not present. Defense counsel asserts that they were able to contact Plaintiff Mercado and  
26 informed her of how to attend the scheduling conference, but again Plaintiff Mercado failed to  
27 comply with the order that she be present.

28 At the January 6, 2021 hearing, Counsel for the County Defendants indicated that they

1 were also intending to file a motion to dismiss for failure to comply with the Court’s orders.

2 Rule 41 of the Federal Rules of Civil Procedure allows a court to involuntarily dismiss an  
3 action if the plaintiff fails to prosecute the action or fails to comply with a court order. Fed. R.  
4 Civ. P. 41(b). Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with  
5 these Rules or with any order of the Court may be grounds for imposition by the Court of any  
6 and all sanctions . . . within the inherent power of the Court.” The Court has the inherent power  
7 to control its docket and may, in the exercise of that power, impose sanctions where appropriate,  
8 including dismissal of the action. Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir.  
9 2000).

10 In this action, Defendant Mercado has demonstrated a repeated failure to comply with  
11 orders of the Court. Although Plaintiff Mercado acknowledged an email in May 2020 that she  
12 needed to attend, Plaintiff did not appear at the settlement conference on August 21, 2020.  
13 (Decl. of Mark. E. Merin in Support of Motion to Withdraw as Counsel (Merin Decl.) ¶ 5, ECF  
14 No. 30-2; Supplemental Decl. of Mark E. Merin (“Merin Suppl. Decl.”) ¶ 9, ECF No. 34.)  
15 Counsel stated in the motion to withdraw that he had been unable to contact her since April  
16 2020. (Merin Decl. ¶ 5.) At the settlement conference on August 21, 2020, counsel indicated  
17 that were unsuccessful in reaching Plaintiff Mercado to have her participate. (Minutes of August  
18 21, 2020 Settlement Conference, ECF No. 26.) Counsel emailed a copy of the motion to  
19 withdraw to Plaintiff Mercado and she contacted counsel on August 26, 2020 by email  
20 apologizing for her failure to contact counsel and requested a status of her case. (Merin Suppl.  
21 Decl. ¶ 16.)

22 Plaintiff was ordered to be present for the hearing on counsel’s motion to withdraw as  
23 counsel and the order was served on Plaintiff at her last known address. (ECF No. 33.) The  
24 order was returned on September 25, 2020 due to an insufficient address. On September 9, 2020,  
25 counsel emailed Plaintiff a copy of the order requiring her attendance at the hearing on the  
26 motion to withdraw. (Merin Suppl. Decl. ¶ 19.) Plaintiff did not attend the October 7, 2020  
27 hearing. (ECF No. 38.)

28 On October 8, 2020, an order issued granting the motion to withdraw and Plaintiff was

1 ordered to file a change of address within thirty days based on the notice of returned mail. (ECF  
2 No. 39.) The October 8, 2020 order also informed Plaintiff of the mandatory scheduling  
3 conference and that the failure to file a change of address would result in the recommendation  
4 that this action be dismissed for failure to comply with a court order. (Id. at 8.) The order was  
5 served on the address of record and to Plaintiff’s email address. (Id.) On October 21, 2020, the  
6 order was returned by the United States Postal Service for insufficient address.

7 Plaintiff did participate in the joint scheduling report that was filed on November 4, 2020,  
8 and defense counsel informed her that she was required to appear at the scheduling conference or  
9 could suffer consequences for her failure to appear. (ECF Nos. 41, 46.) The Court also emailed  
10 Plaintiff the information on how to appear by video at the scheduling conference. (See  
11 November 9, 2020 email, ECF No. 52-1 at 74.) The January 31, 2020 order setting the  
12 mandatory scheduling conference states, **“Should counsel or a party appearing pro se fail to  
13 appear at the Mandatory Scheduling Conference, or fail to comply with the directions as  
14 set forth above, an ex parte hearing may be held and contempt sanctions, including  
15 monetary sanctions, dismissal, default, or other appropriate judgment, may be imposed  
16 and/or ordered.”** (ECF No. 3 at 7 (emphasis in original)). However, Plaintiff did not appear at  
17 the November 12, 2020 scheduling conference. (ECF No. 45.)

18 On November 12, 2020, the scheduling order issued in this action and initial disclosures  
19 were to be exchanged by December 3, 2020. (ECF No. 47.) At the January 6, 2021 hearing,  
20 counsel indicated that Plaintiff Mercado had not served her initial disclosures.

21 On November 12, 2020, an order was filed lifting the stay of the action and requiring  
22 Plaintiff to file proof of service was served at Plaintiff’s address of record and at an address that  
23 included an apartment number that had been identified by counsel. (ECF No. 46.) In the order,  
24 the Court found that it appeared that Plaintiff Mercado has decided not to prosecute this action.  
25 (Id. at 3.) She was ordered to respond to the order within thirty days. (Id. at 4.) Plaintiff has not  
26 responded to the November 12, 2020 order.

27 Defendants’ motion to dismiss was served on Plaintiff on by mail and at her email  
28 address. (ECF No. 52 at 11.) At the January 6, 2021 hearing, defense counsel indicated that the

1 motion was served on Defendant and was signed for at the address of record. Plaintiff did not  
2 file an opposition to the motion or appear at the January 6, 2021 hearing on the motion.

3 On December 29, 2020, Plaintiff was served with the order advising her that failure to  
4 appear at the January 6, 2021 hearing would be construed as an indication that she was no longer  
5 prosecuting this action. (ECF No. 55.) She was again advised that she had been ordered to  
6 contact the Court forty-eight hours prior to the hearing to obtain the information on how to  
7 appear and did not do so. The Courtroom Deputy emailed her the information on how to appear  
8 and Plaintiff Mercado was not present at the January 6, 2021 hearing.

9 A court may dismiss an action based on a party's failure to prosecute an action, failure to  
10 obey a court order, or failure to comply with local rules. See, e.g. Ghazali v. Moran, 46 F.3d 52,  
11 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet, 963 F.2d  
12 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order to file an amended  
13 complaint); Carey v. King, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (dismissal for failure to  
14 comply with local rule requiring pro se plaintiffs to keep court apprised of address); Malone v.  
15 United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply  
16 with court order); Henderson v. Duncan, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack  
17 of prosecution and failure to comply with local rules).

18 Defendant Sparks seeks to have this action dismissed with prejudice as a sanction for  
19 Plaintiff's failure to comply. In determining whether to dismiss an action for failure to comply  
20 with a pretrial order, the Court must weigh "(1) the public's interest in expeditious resolution of  
21 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants;  
22 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less  
23 drastic sanctions." In re Phenylpropanolamine (PPA) Products Liability Litigation, 460 F.3d  
24 1217, 1226 (9th Cir. 2006) (internal quotations and citations omitted). These factors guide a  
25 court in deciding what to do, and are not conditions that must be met in order for a court to take  
26 action. Id. (citation omitted). Defendant argues that these factors all weigh in favor of dismissal  
27 with prejudice.

28 Defendant argues that the public interest is not served in this action because Plaintiff's



1 failure to comply has caused delays in this matter being timely adjudicated. Here, the Court  
2 finds that the public's interest in expeditious resolution of the litigation and the Court's need to  
3 manage its docket weigh in favor of dismissal. Id. Plaintiff was ordered to file a change of  
4 address within thirty days of November 12, 2020 and has failed to do so. Further, Plaintiff was  
5 required to appear at the August 21, 2020 settlement conference and despite attempts to contact  
6 her by mail, email, and phone, she did not respond to her then counsel. Plaintiff was ordered to  
7 appear at the October 7, 2020 hearing on counsel's motion to withdraw and at the November 12,  
8 2020 scheduling conference and failed to appear at either hearing. On November 12, 2020, the  
9 Court found that it appears that Plaintiff has decided not to prosecute this action and she was  
10 ordered to serve Defendants Royel, Perez, or Wali or show cause for the failure to do so within  
11 thirty days. Plaintiff has not responded to the Court's order. Plaintiff was ordered to appear at  
12 the January 6, 2021 hearing and was provided with the information on how to make an  
13 appearance. She did not appear.

14 In this instance, Plaintiff's counsel, defense counsel, and the Court have made numerous  
15 attempts to gain Plaintiff's cooperation in moving this action forward. However, Plaintiff has  
16 continually demonstrated that she will not comply with the Court's order and her failure to  
17 comply hinders the Court's ability to move this action towards disposition, and indicates that  
18 Plaintiff does not intend to diligently litigate this action. The Court has spent a significant  
19 amount of time attempting to gain Plaintiff Mercado's cooperation to move this action forward  
20 and her failure to comply has led the Court to find that she has stopped prosecuting this action.  
21 Plaintiff has not objected to that finding nor has she shown any attempt to move this action  
22 forward since the finding was made. Plaintiff did not comply with the order to serve the  
23 unserved defendants or the scheduling order requiring her to provide initial disclosures. Further,  
24 Plaintiff was advised that her failure to appear at the January 6, 2021 hearing would be construed  
25 as an indication that she was no longer interested in prosecuting this action. The Court can come  
26 to no conclusion except that Plaintiff is no longer prosecuting this action.

27 Further, as Defendant argues, Plaintiff's failure to comply with the Court's orders and  
28 appear at hearings in this matter has unnecessarily required the Court to devote time and

1 resources on this action which could have been devoted to other cases on the Court's docket.  
2 Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002).

3 Defendant argues that the risk of prejudice that arises from Plaintiff's unexplained failure  
4 to prosecute weighs in favor of dismissal with prejudice. Where it is found that the plaintiff does  
5 not intend to litigate the action diligently there arises a rebuttable presumption of prejudice to the  
6 defendants in this action. In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994); Laurino v. Syringa  
7 Gen. Hosp., 279 F.3d 750, 758 (9th Cir. 2002) (dissenting opinion). Here, Plaintiff Mercado  
8 failed to respond to the attempts of her attorney to get her to attend the settlement conference.  
9 She has failed to attend the hearing on the motion to withdraw, the mandatory scheduling  
10 conference, and now the instant motion to dismiss. It is apparent that Plaintiff in not diligently  
11 prosecuting this action. Plaintiff has not offered any explanation for the delay to rebut the  
12 presumption of prejudice. In re Eisen, 31 F.3d at 1453. The risk of prejudice to the defendants  
13 also weighs in favor of dismissal.

14 Defendant argues that the public policy in favor of deciding cases on the merits also  
15 weighs in favor of dismissal because Plaintiff has been provided with multiple opportunities to  
16 move this action forward but has failed to do so despite being warned that her lack of  
17 participation could result in dismissal of this action. The Court finds that the public policy in  
18 favor of deciding cases on their merits is greatly outweighed by the factors in favor of dismissal.  
19 While it is Plaintiff's responsibility to move this action forward, she has not served four of the  
20 named defendants. She did participate in preparing the joint scheduling report and stated, "I  
21 honestly just wanted my phone back with my daughters pictures since then I have got a new  
22 phone I have tried to contact Mark with then he told me he was no longer my attorney and from  
23 there I kind of left everything alone because idk what to do next. Or even the status of the case."  
24 (Joint Scheduling Report 2, ECF No. 46.)

25 Despite the Court's efforts to attempt to get Plaintiff to participate in this action, she has  
26 consistently failed to comply or otherwise respond. The Court has served orders at Plaintiff's  
27 address of record, an address identified by counsel as potentially belonging to Plaintiff, and by  
28 email. It is apparent from the exhibits attached to the motion that Plaintiff has received notice of

1 the motions and orders filed in this action but continually fails to respond or comply. This action  
2 can proceed no further without Plaintiff's cooperation and compliance with the Federal Rules  
3 and the orders of the court. In this instance, the fourth factor does not outweigh Plaintiff's  
4 failure to comply with the Court's orders.

5 Finally, a court's warning to a party that their failure to obey the court's order will result  
6 in dismissal satisfies the "consideration of alternatives" requirement. Ferdik, 963 F.2d at 1262;  
7 Malone, 833 F.2d at 132-33; Henderson, 779 F.2d at 1424. The Court has repeatedly advised  
8 Plaintiff that her continued failure to comply will result in the dismissal of this action. The  
9 September 10, 2020 order requiring Plaintiff to appear telephonically at the October 7, 2020  
10 hearing advised her that **"the failure to appear at the October 7, 2020 hearing in compliance  
11 with this order may result in the issuance of sanctions, up to and including dismissal of this  
12 action[.]"** (ECF No. 33 at 2 (emphasis in original)).

13 The October 8, 2020 order advised Plaintiff that "the failure to file a change of address in  
14 compliance with this order will result in the recommendation that this action be dismissed for  
15 failure to comply with a court order[.]" (ECF No. 39 at 8 (emphasis in original)).

16 On December 29, 2021, an order issued informing Plaintiff that **"if she again fails to  
17 appear at the January 6, 2021 hearing, the Court will construe her non-appearance as a  
18 statement that she is no longer interested in prosecuting this action, and it will be  
19 recommended that the entire action be dismissed with prejudice."** (ECF No. 55.)

20 Here, the Court has considered whether there are other sanctions available that would  
21 address the failure to comply, but due to Plaintiff's complete failure to obey the orders of the  
22 Court which indicates that she is no longer prosecuting this action, the Court finds that the  
23 imposition of alternate sanctions would be futile to gain Plaintiff's compliance to move this  
24 action forward.

25 The factors to be considered in determining whether this action should be dismissed all  
26 weigh in favor of granting the motion and dismissing this entire action for failure to comply with  
27 the Federal Rules of Procedure and court orders.

28 The district court has the authority to dismiss a plaintiff's action with prejudice due to her

1 failure to prosecute. Link v. Wabash R. Co., 370 U.S. 626, 629 (1962); Al-Torki v. Kaempfen,  
2 78 F.3d 1381, 1385 (9th Cir. 1996). In determining whether to dismiss the action with prejudice,  
3 the court considers if the delay and prejudice to the defendants is sufficient to justify dismissal  
4 with prejudice. Mir v. Fosburg, 706 F.2d 916, 918 (9th Cir. 1983). Here, Defendant has not  
5 specifically addressed any prejudice that has resulted from the delay in this action but relies on  
6 the presumption of prejudice that arises from the failure to prosecute.

7         The underlying incident in this action occurred approximately fourteen months ago on  
8 November 15, 2019. (FAC ¶ 15, ECF No. 10.) Plaintiff filed the complaint on January 20,  
9 2020. (ECF No. 1.) Since May 2020, Plaintiff has only had contact with her attorney in August  
10 2020, and did respond to defense counsel’s request for her to participate in the joint scheduling  
11 report. The actual delay in this action that can be attributed to Plaintiff Mercado would begin in  
12 August 2020 when she failed to attend the settlement conference. Although there has been some  
13 delay in the action that can be attributed to Plaintiff Mercado, this case has been pending less  
14 than a year and was stayed from April 7, 2020 to August 21, 2020, for the parties to participate in  
15 alternate dispute resolution. Defendant has not identified any prejudice due to the delay since  
16 August 21, 2020.

17         To prove prejudice, a defendant must establish that plaintiff’s actions impaired  
18 defendant’s ability to proceed to trial or threatened to interfere with the rightful decision of the  
19 case. Pagtalunan, 291 F.3d at 642. Although Plaintiff Mercado did not appear at the scheduling  
20 conference, a scheduling order did issue. “Limited delays and the prejudice to a defendant from  
21 the pendency of a lawsuit are realities of the system that have to be accepted, provided the  
22 prejudice is not compounded by ‘unreasonable’ delays.” Id. at 642 (quoting Yourish v.  
23 California Amplifier, 191 F.3d 983, 991 (9th Cir. 1999)). The Court finds that, based on the  
24 limited delay in this action that can be attributed to Plaintiff Mercado, Defendant has not  
25 established sufficient prejudice to justify the severe sanction of dismissal with prejudice.  
26 Accordingly, the Court recommends that this action be dismissed without prejudice.

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1 **III.**

2 **RECOMMENDATION**

3 Based on the foregoing, the Court finds that Plaintiff Mercado has stopped prosecuting  
4 this action and therefore dismissal of the action in its entirety is appropriate.

5 Accordingly, IT IS HEREBY RECOMMENDED that:

- 6 1. Defendant Sparks motion to dismiss, filed November 25, 2020, be GRANTED;  
7 and  
8 2. This action be dismissed without prejudice, in its entirety, for Plaintiff's failure to  
9 comply with the Federal Rules of Civil Procedure and the orders of this Court.

10 This findings and recommendations is submitted to the district judge assigned to this  
11 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within **fourteen**  
12 **(14) days** of service of this recommendation, any party may file written objections to this  
13 findings and recommendations with the court and serve a copy on all parties. Such a document  
14 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The  
15 district judge will review the magistrate judge's findings and recommendations pursuant to 28  
16 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified  
17 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th  
18 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

19 IT IS SO ORDERED.

20 Dated: January 6, 2021

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23 UNITED STATES MAGISTRATE JUDGE  
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