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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 SHEILA ELLIS,

11 Plaintiff,

12 v.

13 CHECKMATE STAFFING, INC. dba  
14 CHECKMATE, CHECKMATE STAFFING,  
15 and CHECKMATE STAFFING  
16 SOLUTIONS; CHECKMATE STAFFING  
17 NATIONAL, INC., dba CHECKMATE,  
18 CHECKMATE STAFFING, and  
19 CHECKMATE STAFFING SOLUTIONS;  
20 CHECKMATE STAFFING WEST, INC.,  
21 dba CHECKMATE, CHECKMATE  
22 STAFFING, and CHECKMATE STAFFING  
23 SOLUTIONS; CHECKMATE STAFFING  
24 EAST, INC., dba CHECKMATE,  
25 CHECKMATE STAFFING, and  
26 CHECKMATE STAFFING SOLUTIONS;  
27 STAFFAIDE, INC., dba CHECKMATE,  
28 CHECKMATE STAFFING, AND  
CHECKMATE STAFFING SOLUTIONS,  
LOU E. PEREZ, individually and  
collectively doing business as  
CHECKMATE STAFFING NATIONAL,  
INC., dba CHECKMATE STAFFING  
WEST, INC., CHECKMATE STAFFING  
EAST, INC., CHECKMATE STAFFING  
INC., STAFFAIDE, INC.,  
CHECKMATE, CHECKMATE STAFFING,  
and CHECKMATE STAFFING  
SOLUTIONS,

Defendants.

No. 2:02-cv-00129 JAM-CKD

**ORDER DISMISSING ALL CLAIMS  
FOR FAILURE TO PROSECUTE**

1        This case arises from discrimination allegedly suffered by  
2 Plaintiff Sheila Ellis ("Plaintiff") during her short-lived  
3 employment with Checkmate Staffing and Lou Perez (collectively,  
4 "Defendants"). Originally filed in January 2002, the case has  
5 been dormant for most of the past decade. For the reasons stated  
6 below, the Court dismisses this action for failure to prosecute.

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8            I.    FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

9        Plaintiff worked for Defendant for a single month in 2001.  
10 In 2002, she filed suit claiming that her employer discriminated  
11 against her by preferring Hispanic workers to Caucasians like  
12 Plaintiff. See Doc. #64. The case proceeded to denial of  
13 summary judgment in 2003. See Doc. #95. Soon thereafter, all  
14 "Checkmate Staffing" Defendants entered bankruptcy and a stay  
15 issued. See Doc. #99. The Court noted that "[t]he parties agree  
16 that the claims against [Defendant] Perez are subject to the  
17 automatic stay[,] " and ordered that "[o]nce the stay is lifted, a  
18 document shall be filed notifying this Court within ten days."  
19 Doc. #100.

20        The bankruptcy case finally resolved in 2008 and the  
21 bankruptcy court issued a Notice of Dismissal. Defendants'  
22 Response (Doc. #119) Exh. A. But this case progressed no  
23 further.

24        In October 2014, the Court issued an order to show cause why  
25 the matter should not be dismissed for lack of prosecution. See  
26 Doc. #113. The parties responded in writing and the Court  
27 ordered a hearing on the matter. See Doc. ##114-117.

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1       At the January 14, 2015 hearing, Plaintiff's attorney failed  
2 to appear. Instead, a different lawyer made a special  
3 appearance, representing that she worked with a third lawyer who  
4 was at that time in trial in a different matter with Plaintiff's  
5 counsel. The Court cautioned the parties that it was inclined to  
6 dismiss the case for lack of prosecution based on the protracted  
7 history of the case and the written responses to the order to  
8 show cause. But the Court gave the parties one final chance to  
9 respond, ordering the parties to submit "briefing of no more than  
10 10 pages due on or before 1/21/2015 relative to the Court's  
11 ability to dismiss this action for lack of prosecution." Doc.  
12 #118.

13       Defendants complied with the Court's order by filing  
14 briefing arguing that the Court should dismiss the action. See  
15 Doc. #119. Plaintiff filed nothing.

## 17                                   II.    OPINION

### 18       A.   Legal Standard

19       A court may dismiss an action if "the plaintiff fails to  
20 prosecute or to comply with . . . a court order." Fed. R. Civ.  
21 P. 41(b); Hernandez v. City of El Monte, 138 F.3d 393, 400 (9th  
22 Cir. 1998). The court weighs five factors to determine if  
23 dismissal is warranted: "(1) the public's interest in  
24 expeditious resolution of the litigation; (2) the court's need  
25 to manage its docket; (3) the risk of prejudice to the  
26 defendants; (4) the public policy favoring the disposition of  
27 cases on their merits; and (5) the availability of less drastic  
28 sanctions." In re Eisen, 31 F.3d 1447, 1451 (9th Cir. 1994)

(citations omitted).

B. Discussion

1. Expeditious Resolution of Litigation

This factor always weighs in favor of dismissal. Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citation omitted). It is especially strong here where Plaintiff's case has been inactive for over a decade.

2. Docket Management

This district has one of the busiest dockets in the country. Mead v. Multi-Chem Grp., LLC, 2013 WL 6198940, at \*2 (E.D. Cal. Nov. 27, 2013) (recommending dismissal for failure to prosecute in part because "the Eastern District of California is one of the busiest federal jurisdictions in the United States and its District Judges carry the heaviest caseloads in the nation"). The need to manage this Court's docket therefore supports dismissal.

3. Risk of Prejudice to Defendants

Delay alone creates a presumption of prejudice. Nealey v. Transportation Maritima Mexicana, S.A., 662 F.2d 1275, 1280 (9th Cir. 1980). But "where a plaintiff has come forth with an excuse for his delay that is anything but frivolous, the burden shifts to the defendant to show at least some actual prejudice. Id.

Here, Plaintiff's only excuse - an excuse dating back to 2010 - is that her lawyer failed to realize the resolution of bankruptcy and other related litigation due to an "oversight." See Plaintiff's July 2010 Response to Order to Show Cause (Doc. #114) ¶ 10; see also id. ("I[,] [Plaintiff's attorney,] should

1 have been more proactive in following up . . . ."). This excuse  
2 is insufficient. See In re Eisen, 31 F.3d at 1451-52 (declining  
3 to credit plaintiff's excuse for delay that he had "insufficient  
4 funds to proceed with discovery" and his attorney was "unable or  
5 unwilling to advance the costs of such discovery"). By failing  
6 to comply with the Court's January 14, 2015 order to submit  
7 briefing, Plaintiff has declined to offer any further excuse.

8 Even if Plaintiff's excuse were valid, Defendants have  
9 demonstrated actual prejudice by loss of evidence. See  
10 Defendants' Response at 3. In particular, the relevant events  
11 in this action took place over thirteen years ago, so witnesses'  
12 memories have faded. "Many, if not most [] witnesses were never  
13 deposed." Id. at 3:27. Defendants have been out of business  
14 for years so they do not "have control of [their] former  
15 employees" - many of whom appear on the parties' witness lists,  
16 see id. Exh. B at 8-10 - "who could be anywhere." Id. at 3:24-  
17 25. This factor therefore favors dismissal.

18 4. Public Policy Favoring Resolution on the Merits

19 In assessing this factor, the Court may consider  
20 Plaintiff's showing, if any, that the case is "likely to be  
21 resolved in [her] favor." In re Eisen, 31 F.3d at 1454. Here,  
22 Plaintiff has declined to make any such showing by failing to  
23 submit briefing. Therefore, despite the general policy favoring  
24 resolution on the merits, this factor does not weigh heavily in  
25 this case.

26 5. Availability of Less Drastic Sanctions

27 The Court has repeatedly warned the parties of the  
28 possibility of dismissal for failure to prosecute. The Court can

1 envision no less drastic yet effective sanction after so many  
2 warnings and so much unwarranted delay. The parties have offered  
3 no suggestions, and Plaintiff has even failed to comply with the  
4 Court's order to submit briefing on the matter. See Valencia v.  
5 Sharp Electronics Corp., 561 F. App'x 591, 595 (9th Cir. Mar. 6,  
6 2014) ("[G]iven the complete failure of Valencia's attorney to  
7 respond to the court's directions, there were no less drastic  
8 measures available."). This factor therefore tends towards  
9 dismissal.

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11 III. ORDER

12 Because the above described five factors favor dismissal,  
13 the Court dismisses this action with prejudice due to Plaintiff's  
14 failure to diligently prosecute. The Court directs the clerk to  
15 close this action.

16 IT IS SO ORDERED.

17 Dated: January 23, 2015

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20 JOHN A. MENDEZ,  
21 UNITED STATES DISTRICT JUDGE  
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