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

FRANCISCO JOSE PRUETT,

Plaintiff,

No. 2:11-cv-00195 FCD KJN

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

FINDINGS & RECOMMENDATIONS

Previously, in an order dated January 26, 2011, the undersigned granted plaintiff Francisco Jose Pruet's application to proceed in forma pauperis and ordered the service of plaintiffs' complaint on defendant Commissioner of Social Security (the "defendant"). (Dkt. No. 3.)¹ That order directed the Clerk of Court to send certain materials to Mr. Pruet (the "plaintiff") in relation to service of his complaint, and the Clerk of Court did so on January 27, 2011. (Dkt. No. 5.) The court's order also provided that: "Within fourteen days from the date of this order, plaintiff shall submit to the United States Marshal an original and five copies of the completed summons, five copies of the complaint, five copies of the scheduling order and a completed USM-285 form, and shall file a statement with the court that such documents have

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(15).

1 *been submitted to the United States Marshal.”* (Dkt. No. 3.)

2 Plaintiff did not comply with the court’s order regarding service and apparently
3 has taken no steps to effectuate service of his complaint upon defendants. Indeed, the docket
4 reveals no activity in this case by plaintiff since January 21, 2011, when plaintiff filed his
5 complaint. (Dkt. No. 1.)

6 Because of plaintiff’s failure to act in this matter, the undersigned entered, on
7 March 10, 2011, an Order to Show Cause (“OSC”). (OSC, Dkt. No. 6.) That OSC gave plaintiff
8 a deadline of March 31, 2011, to file a written statement showing good cause why his lawsuit
9 should not be dismissed for failure to prosecute and failure to comply with the court’s prior
10 order, and (2) informed plaintiff that his failure to comply with the order may result in the
11 imposition of sanctions, including a recommendation that his action be dismissed for lack of
12 prosecution. (*Id.*) That OSC also notified plaintiff that

13 a failure to comply with the court’s order and prosecute his
14 lawsuit are grounds for dismissal. *See* Fed. R. Civ. P. 41(b);
15 Local Rules 110 (“Failure of counsel or of a party to comply with
16 these Rules or with any order of the Court may be grounds for
17 imposition by the Court of any and all sanctions authorized by
18 statute or Rule or within the inherent power of the Court.”),
19 183(a) (providing that a party proceeding without counsel is “is
20 bound by the Federal Rules of Civil or Criminal Procedure, these
21 Rules, and all other applicable law,” and that failure to comply
22 with these authorities “may be ground for dismissal, judgment by
23 default, or any other sanction appropriate under these Rules”); *see*
Hells Canyon Preservation Council v. U.S. Forest Serv., 403 F.3d
683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an
action pursuant to Federal Rule of Civil Procedure 41(b) *sua*
sponte for a plaintiff’s failure to prosecute or comply with the
rules of civil procedure or the court’s orders); *Ghazali v. Moran*,
46 F.3d 52, 53 (9th Cir. 1995) (per curiam) (“Failure to follow a
district court’s local rules is a proper ground for dismissal.”);
King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se
litigants must follow the same rules of procedure that govern other
litigants.”).

24 (Dkt. No. 6 at 2.)

25 The court’s docket reveals that, to date, plaintiff: (1) still has not filed the required
26 statement notifying the court that he timely submitted the required service documents to the

1 United States Marshal, and (2) failed to respond to the OSC. It readily appears to the
2 undersigned that plaintiff has abandoned his case. Accordingly, the undersigned recommends
3 that this action be dismissed without prejudice.

4 II. DISCUSSION

5 As the undersigned's order of March 10, 2011, already informed plaintiff (Dkt.
6 No. 6), a failure to comply with the court's order and prosecute his lawsuit are grounds for
7 dismissal. See Fed. R. Civ. P. 41(b); Local Rules 110. The court has given plaintiff very clear
8 warnings that his case would be dismissed for failure to prosecute his action, as well as his
9 failure to comply with the Federal Rules of Civil Procedure, the court's orders, or the court's
10 Local Rules. The court's docket reveals that plaintiff has again failed to file any written
11 statement of compliance with the court's orders despite the extended March 31, 2011 deadline
12 set in the order dated March 10, 2011. Plaintiff failed to file any documents despite being given
13 an additional opportunity to do so and explicit warnings that the failure to file a written statement
14 would result in the dismissal of his lawsuit. Despite the clear directions within the court's
15 orders, plaintiff filed no written statement of compliance nor any other document. Plaintiff's
16 repeated failure to file such a document is grounds for dismissal of his suit.

17 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an
18 action for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure,
19 failure to comply with the court's local rules, or failure to comply with the court's orders.² See,
20 e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court "may act *sua*
21 *sponte* to dismiss a suit for failure to prosecute"); Hells Canyon Preservation Council v. U.S.
22 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action
23 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff's failure to prosecute
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25 ² Rule 41(b) provides, in part: "**(b) Involuntary Dismissal; Effect.** If the plaintiff fails
26 to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the
action or any claim against it." Fed. R. Civ. P. 41(b).

1 or comply with the rules of civil procedure or the court's orders); Ferdik v. Bonzelet, 963 F.2d
2 1258, 1260 (9th Cir. 1992) ("Pursuant to Federal Rule of Civil Procedure 41(b), the district court
3 may dismiss an action for failure to comply with any order of the court."); Pagtalunan v. Galaza,
4 291 F.3d 639, 642-43 (9th Cir. 2002) (affirming district court's dismissal of case for failure to
5 prosecute when habeas petitioner failed to file a first amended petition). This court's Local
6 Rules are in accord. See E.D. Local Rule 110 ("Failure of counsel or of a party to comply with
7 these Rules or with any order of the Court may be grounds for imposition by the Court of any and
8 all sanctions authorized by statute or Rule or within the inherent power of the Court."); E.D.
9 Local Rule 183(a) (providing that a pro se party's failure to comply with the Federal Rules of
10 Civil Procedure, the court's Local Rules, and other applicable law may support, among other
11 things, dismissal of that party's action).

12 A court must weigh five factors in determining whether to dismiss a case for
13 failure to prosecute, failure to comply with a court order, or failure to comply with a district
14 court's local rules. See, e.g., Ferdik, 963 F.2d at 1260. Specifically, the court must consider:

- 15 (1) the public's interest in expeditious resolution of litigation;
16 (2) the court's need to manage its docket; (3) the risk of prejudice
17 to the defendants; (4) the public policy favoring disposition of
cases on their merits; and (5) the availability of less drastic
alternatives.

18 Id. at 1260-61; accord Pagtalunan, 291 F.3d at 642-43; Ghazali v. Moran, 46 F.3d 52, 53 (9th
19 Cir. 1995). The Ninth Circuit Court of Appeals has stated that "[t]hese factors are not a series of
20 conditions precedent before the judge can do anything, but a way for a district judge to think
21 about what to do." In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226
22 (9th Cir. 2006).

23 Although involuntary dismissal can be a harsh remedy, the five relevant factors
24 weigh in favor of dismissal of this action. The first two factors strongly support dismissal of this
25 action. Plaintiff's failure to assist the United States Marshal's office in serving the complaint and
26 failure to communicate with the court despite two orders directing him to do so strongly suggests

1 that plaintiff has abandoned this action or is not interested in seriously prosecuting it. See, e.g.,
2 Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) (“The public’s interest in
3 expeditious resolution of litigation always favors dismissal.”). Plaintiff’s failure to respond to
4 the court’s order directing service and the OSC, despite clear warnings that the case would be
5 dismissed for failure to respond, further supports the conclusion that plaintiff has abandoned this
6 action. Any further time spent by the court on this case, which plaintiff has demonstrated a lack
7 of any serious intention to pursue, will consume scarce judicial resources and take away from
8 other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district courts have inherent
9 power to manage their dockets without being subject to noncompliant litigants).

10 In addition, the third factor, which considers prejudice to a defendant as a result of
11 plaintiff’s failure to prosecute his action and comply with the court’s orders should be given
12 some weight. See Ferdik, 963 F.2d at 1262. The defendant has been subject to service of
13 plaintiffs’ complaint since January 27, 2011, but plaintiff has taken no steps to advise defendant
14 of this fact or effectuate service. Although it is difficult to quantify the prejudice suffered by
15 defendant here, it is enough that defendant has been named in a lawsuit that plaintiff has
16 effectively abandoned. At a minimum, defendant has been prevented from attempting to resolve
17 this case on the merits by plaintiff’s unreasonable delay in prosecuting this action. Unreasonable
18 delay is presumed to be prejudicial. See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab.
19 Litig., 460 F.3d at 1227.

20 The fifth factor, which considers the availability of less drastic measures, also
21 supports dismissal of this action. As noted above, the court has actually pursued remedies that
22 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d
23 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court
24 actually tries alternatives before employing the ultimate sanction of dismissal.”). The court
25 entered the OSC and required plaintiff to respond to the OSC in an effort to ascertain whether
26 plaintiff still had any interest in pursuing his lawsuit. (Dkt. No. 6.) Furthermore, the court

1 repeatedly advised plaintiff that he was required to comply with the court's orders, including its
2 order regarding service of the complaint. It also warned plaintiff in clear terms that failure to
3 comply with the court's orders could result in a recommendation of dismissal. Warning a
4 plaintiff that failure to take steps towards resolution of his or her action on the merits will result
5 in dismissal satisfies the requirement that the court consider the alternatives. See, e.g., Ferdik,
6 963 F.2d at 1262 (“[O]ur decisions also suggest that a district court’s warning to a party that his
7 failure to obey the court’s order will result in dismissal can satisfy the ‘consideration of
8 alternatives’ requirement.”) (citing Malone, 833 F.2d at 132-33). At this juncture, the court finds
9 no suitable alternative to a recommendation for dismissal of this action.

10 The court also recognizes the importance of giving due weight to the fourth factor,
11 which addresses the public policy favoring disposition of cases on the merits. However, for the
12 reasons set forth above, factors one, two, three, and five strongly support a recommendation for
13 dismissal of this action, and factor four does not materially counsel otherwise. Dismissal is
14 proper “where at least four factors support dismissal or where at least three factors ‘strongly’
15 support dismissal.” Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
16 and quotation marks omitted). Under the circumstances of this case, the other relevant factors
17 outweigh the general public policy favoring disposition of actions on their merits. See Ferdik,
18 963 F.2d at 1263.

19 In light of the foregoing IT IS HEREBY RECOMMENDED that:

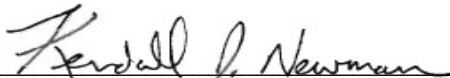
- 20 1. Plaintiff’s case be dismissed without prejudice as to all defendants
21 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.
- 22 2. The Clerk of Court be directed to close this case and vacate all future dates
23 in this case.

24 These findings and recommendations are submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
26 days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Id.; see also E.D. Local Rule 304(b).
2 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
3 Recommendations.” Any response to the objections shall be filed with the court and served on
4 all parties within fourteen days after service of the objections. E.D. Local Rule 304(d). Failure
5 to file objections within the specified time may waive the right to appeal the District Court’s
6 order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153,
7 1156-57 (9th Cir. 1991).

8 **IT IS SO RECOMMENDED.**

9 DATED: April 5, 2011

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12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE
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