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

TERRYLYN MCCAIN,

Plaintiff,

No. 2:11-cv-01265 KJM KJN PS

v.

CALIFORNIA HIGHWAY PATROL,
et al.,

Defendants.

ORDER

On June 2, 2011, defendant California Highway Patrol filed a motion to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and noticed that motion for a hearing before the undersigned to take place on July 7, 2011.¹ (See Notice of Mot. & Mot. to Dismiss, Dkt. No. 4.) Pursuant to the court's Local Rules, plaintiff was obligated to file and serve a written opposition or statement of non-opposition to the California Highway Patrol's motion at least fourteen days prior to the hearing date, or June 23, 2011. See E. Dist. Local Rule 230(c).² The court's docket reveals that plaintiff, who is proceeding without counsel,

¹ This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

² Eastern District Local Rule 230(c) provides:

1 failed to file a written opposition or statement of non-opposition to the California Highway
2 Patrol's motion.

3 Eastern District Local Rule 110 provides that “[f]ailure of counsel or of a party to
4 comply with these Rules or with any order of the Court may be grounds for imposition by the
5 Court of any and all sanctions authorized by statute or Rule or within the inherent power of the
6 Court.” Moreover, Eastern District Local Rule 183(a) provides, in part:

7 Any individual representing himself or herself without an attorney is
8 bound by the Federal Rules of Civil or Criminal Procedure, these Rules,
9 and all other applicable law. All obligations placed on “counsel” by these
10 Rules apply to individuals appearing in propria persona. Failure to comply
11 therewith may be ground for dismissal . . . or any other sanction
12 appropriate under these Rules.

13 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the
14 same rules of procedure that govern other litigants.”). Case law is in accord that a district court
15 may impose sanctions, *including involuntary dismissal of a plaintiff's case* pursuant to Federal
16 Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his or her case or fails to
17 comply with the court's orders, the Federal Rules of Civil Procedure, or the court's local rules.³

18 See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court “may act *sua*
19 *sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation Council v. U.S.
20 Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss an action

21 **(c) Opposition and Non-Opposition.** Opposition, if any, to the granting of
22 the motion shall be in writing and shall be filed and served not less than
23 fourteen (14) days preceding the noticed (or continued) hearing date. A
24 responding party who has no opposition to the granting of the motion shall
25 serve and file a statement to that effect, specifically designating the motion
26 in question. No party will be entitled to be heard in opposition to a motion
at oral arguments if opposition to the motion has not been timely filed by that
party. . . .

³ The Ninth Circuit Court of Appeals had held that under certain circumstances a district court does not abuse its discretion by dismissing a plaintiff's case pursuant to Federal Rule of Civil Procedure 41(b) for failing to file an opposition to a motion to dismiss. See, e.g., Trice v. Clark County Sch. Dist., 376 Fed. Appx. 789, 790 (9th Cir. 2010), cert. denied, 131 S. Ct. 422 (2010).

1 pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff's failure to prosecute
2 or comply with the rules of civil procedure or the court's orders); Ghazali v. Moran, 46 F.3d 52,
3 53 (9th Cir. 1995) (per curiam) ("Failure to follow a district court's local rules is a proper ground
4 for dismissal."), cert. denied, 516 U.S. 838 (1995); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th
5 Cir. 1992) ("Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
6 action for failure to comply with any order of the court."), cert. denied, 506 U.S. 915 (1992);
7 Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam)
8 (stating that district courts have inherent power to control their dockets and may impose
9 sanctions including dismissal), cert. denied, 479 U.S. 829 (1986).⁴ In light of plaintiff's failure to
10 file a written opposition or statement of non-opposition to the California Highway Patrol's
11 motion to dismiss, the undersigned continues the July 7, 2011 hearing and provides plaintiff with
12 a final opportunity to oppose the motion.

13 On June 22, 2011, plaintiff filed two motions to strike the California Highway
14 Patrol's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(f), both of which do
15 not substantively oppose the motion to dismiss. (Dkt. Nos. 19, 20.) As an initial matter, plaintiff
16 did not properly notice these motions pursuant to Local Rule 230. In any event, plaintiff's
17 motions are summarily denied because Federal Rule of Civil Procedure 12(f) is inapplicable here.
18 Rule 12(f) may be used to strike "pleadings," and a motion is not a "pleading" See Fed. R. Civ.
19 P. 12(f) ("The court may strike from a *pleading* an insufficient defense or any redundant,
20 immaterial, impertinent, or scandalous matter.") (emphasis added); see Fed. R. Civ. P. 7(a)
21 (defining a "pleading" as a complaint, an answer to a complaint, an answer to a counterclaim, an
22 answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and a reply
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25 ⁴ The court previously warned plaintiff in another action of the consequences for failing to
26 file an opposition to a motion to dismiss. (See Order, Aug. 13, 2010, Dkt. No. 31, McCain v. Bank
of Am., No. CIV S-10-1266 JAM KJM PS (E.D. Cal.).)

1 to an answer.) Accordingly, plaintiff may not use Rule 12(f) to strike a motion.⁵

2 In light of the foregoing, IT IS HEREBY ORDERED that:

3 1. The hearing on defendant California Highway Patrol's motion to dismiss
4 (Dkt. No. 4), which is presently set for July 7, 2011, is continued until August 11, 2011.

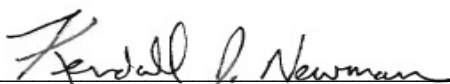
5 2. Plaintiff shall file a written opposition to the motion to dismiss, or a
6 statement of non-opposition thereto, on or before July 7, 2011. *Plaintiff's failure to file a written*
7 *opposition will be deemed a statement of non-opposition to the pending motion and consent to*
8 *the granting of the motion to dismiss, and shall constitute an additional ground for the*
9 *imposition of appropriate sanctions, including a recommendation that all or part of plaintiff's*
10 *case be involuntarily dismissed with prejudice pursuant to Federal Rule of Civil*
11 *Procedure 41(b).*

12 3. Defendant California Highway Patrol may file a written reply to plaintiff's
13 opposition, if any, on or before July 28, 2011.

14 4. Plaintiff's motions to strike (Dkt. Nos. 19, 20) are denied.

15 IT IS SO ORDERED.

16 DATED: June 28, 2011

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19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE
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25 ⁵ To the extent that the California Highway Patrol erroneously listed "Bank of America" as
26 a defendant in the caption of its motion to dismiss (Dkt. No. 4), such error effectuated no prejudice to plaintiff or any other party and, accordingly, is disregarded. The California Highway Patrol should take care to list the correct parties in any future filings.