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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONI MARSHBANKS, et al.,  
Plaintiffs,  
v.  
CITY OF STOCKTON, et al.,  
Defendants.

No. 2:13-cv-2400-MCE-KJN-PS

FINDINGS AND RECOMMENDATIONS

Through these findings and recommendations, the undersigned recommends that plaintiffs' case be dismissed with prejudice. Plaintiffs twice failed to file an amended pleading despite receiving extra time to do so and despite having been warned of the consequences. For the reasons described below, the undersigned recommends that plaintiffs' case be dismissed pursuant to Federal Rule of Civil Procedure 41(b).

I. BACKGROUND

Plaintiffs Toni Marshbanks and Dorothe Marshbanks (collectively "plaintiffs") are proceeding without counsel in this action.<sup>1</sup>

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

1 On April 9, 2014, the undersigned granted plaintiffs’ application to proceed in forma  
2 pauperis, dismissed their complaint without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B), and  
3 gave them leave to file an amended pleading within 45 days. (ECF No. 6.) The order concluded,  
4 “[f]ailure to timely file an amended complaint that complies with this order and the Federal Rules  
5 of Civil Procedure may result in a recommendation that the action be dismissed with prejudice  
6 pursuant to Federal Rule of Civil Procedure 41(b).” (*Id.* at 13.)

7 Plaintiffs failed to file an amended pleading by the 45-day deadline, and the court issued  
8 an Order to Show Cause (“OSC”). (OSC, ECF No. 7.) The OSC gave plaintiffs an extended  
9 deadline of June 27, 2014, in which to file (1) an amended pleading and (2) a writing explaining  
10 why the case should not be dismissed given plaintiff’s delay in meeting the court’s deadline. (*Id.*)  
11 The undersigned warned plaintiffs that their “*failure to file the required writing and amended*  
12 *complaint shall constitute an additional ground for, and plaintiffs’ consent to, the imposition*  
13 *of appropriate sanctions, including a recommendation that plaintiffs’ case be involuntarily*  
14 *dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) and Local Rules*  
15 *110 and 183(a).*” (*Id.* at 3 (emphasis in original).)

16 The deadline of June 27, 2014, has come and gone. Once again, plaintiffs have not filed  
17 an amended pleading.

## 18 II. LEGAL STANDARD

19 A court must weigh five factors in determining whether to dismiss a case for failure to  
20 prosecute, failure to comply with a court order, or failure to comply with a district court’s local  
21 rules. *See, e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). Specifically, the court  
22 must consider:

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

26 *Id.* at 1260-61; *accord Pagtalunan v. Galaza*, 291 F.3d 639, 642-43 (9th Cir. 2002); *Ghazali v.*  
27 *Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The Ninth Circuit Court of Appeals has stated that  
28 “[t]hese factors are not a series of conditions precedent before the judge can do anything, but a

1 way for a district judge to think about what to do.” In re Phenylpropanolamine (PPA) Prods.  
2 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

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

6 Moreover, Eastern District Local Rule 183(a) provides, in part:

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

11 See also King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the  
12 same rules of procedure that govern other litigants”) (overruled on other grounds). Case law is in  
13 accord that a district court may impose sanctions, including involuntary dismissal of a plaintiff’s  
14 case pursuant to Federal Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his  
15 or her case or fails to comply with the court’s orders, the Federal Rules of Civil Procedure, or the  
16 court’s local rules. See Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a  
17 court “may act *sua sponte* to dismiss a suit for failure to prosecute”); Hells Canyon Preservation  
18 Council v. U.S. Forest Serv., 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss  
19 an action pursuant to Federal Rule of Civil Procedure 41(b) *sua sponte* for a plaintiff’s failure to  
20 prosecute or comply with the rules of civil procedure or the court’s orders); Ghazali, 46 F.3d at 53  
21 (“Failure to follow a district court’s local rules is a proper ground for dismissal”); Ferdik, 963  
22 F.2d at 1260 (“Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss  
23 an action for failure to comply with any order of the court”); Thompson v. Housing Auth. of City  
24 of L.A., 782 F.2d 829, 831 (9th Cir. 1986) (per curiam) (stating that district courts have inherent  
25 power to control their dockets and may impose sanctions including dismissal or default).

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1           III.     DISCUSSION

2           Although involuntary dismissal can be a harsh remedy, on balance the five relevant Ferdik  
3 factors weigh in favor of dismissal of this action. See Ferdik, 963 F.2d at 1260. The first two  
4 Ferdik factors strongly support dismissal here. Plaintiffs' failures to timely file an amended  
5 pleading, despite clear warnings of the consequences (ECF Nos. 6 at 13; 7 at 3) strongly suggest  
6 that plaintiffs are not interested in seriously prosecuting this case, or at least, do not take their  
7 obligations to the court and other parties seriously. See, e.g., Yourish v. Cal. Amplifier, 191 F.3d  
8 983, 990 (9th Cir. 1999) ("The public's interest in expeditious resolution of litigation always  
9 favors dismissal"). Any further time spent by the court on this case, which plaintiffs have  
10 demonstrated a lack of any serious intention to pursue, will consume scarce judicial resources and  
11 take away from other active cases. See Ferdik, 963 F.2d at 1261 (recognizing that district courts  
12 have inherent power to manage their dockets without being subject to noncompliant litigants).

13           Further, this is not plaintiffs' first failure to comply with a court order. When plaintiffs  
14 initially failed to file an amended pleading after the court's order of April 9, 2014, the court  
15 extended plaintiffs' deadline to complete such filing and warned plaintiffs that another failure to  
16 meet the extended deadline would result in a recommendation of dismissal. (ECF No. 6.) Yet  
17 plaintiffs failed to file an amended pleading by the extended deadline and in no way attempted to  
18 explain their failure to file an amended pleading. Despite receiving warnings and multiple  
19 chances, plaintiffs' failures to comply with court orders demonstrate plaintiffs' lack of any  
20 serious intention to pursue this case. See Ferdik, 963 F.2d at 1261.

21           The third Ferdik factor, prejudice to a defendant, also favors dismissal. Due to the defects  
22 within plaintiffs' pleading, service of process upon the defendants has not been ordered.  
23 Nevertheless, defendants remain named in a lawsuit. It is difficult to quantify the prejudice  
24 suffered by defendants here; however, it is enough that defendants have been named in litigation  
25 that plaintiffs have effectively abandoned. At a minimum, plaintiffs' unreasonable delay in  
26 prosecuting this action has prevented defendants from attempting to resolve this case on the  
27 merits. Unreasonable delay is presumed to be prejudicial. See, e.g., In re Phenylpropanolamine  
28 (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

1           The fifth Ferdik factor, which considers the availability of less drastic measures, also  
2 supports dismissal of this action. As noted above, the court has actually pursued remedies that  
3 are less drastic than a recommendation of dismissal. See Malone v. U.S. Postal Serv., 833 F.2d  
4 128, 132 (9th Cir. 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court  
5 actually tries alternatives before employing the ultimate sanction of dismissal”). For instance, the  
6 court gave plaintiffs multiple opportunities to amend their defective pleading. (ECF Nos. 6, 7.)  
7 The court also advised plaintiffs that they were required to actively prosecute this action and  
8 follow the court’s orders. (ECF Nos. 6, 7.) It also repeatedly warned plaintiffs in plain terms that  
9 failure to comply with court orders and failure to file an amended pleading would result in a  
10 recommendation of dismissal. (ECF Nos. 6 at 13; 7 at 3.) Warning a plaintiff that failure to take  
11 steps towards resolution of his or her action will cause the action to be dismissed satisfies the  
12 requirement that the court consider alternative measures. See, e.g., Ferdik, 963 F.2d at 1262  
13 (“[O]ur decisions also suggest that a district court’s warning to a party that his failure to obey the  
14 court’s order will result in dismissal can satisfy the ‘consideration of alternatives’ requirement”)  
15 (citing Malone, 833 F.2d at 132-33).

16           At this juncture, the court finds no suitable alternative to a recommendation that this  
17 action be dismissed. Plaintiffs failed to file an amended pleading despite having multiple chances  
18 to do so (ECF Nos. 6, 7), and in light of plaintiffs’ in forma pauperis status, the court has little  
19 confidence that plaintiffs would pay monetary sanctions if they were imposed in lieu of dismissal.  
20 Plaintiffs disregarded the court’s orders to file an amended pleading even though those orders  
21 explicitly warned them that failing to do so would result in a recommendation that this case be  
22 dismissed. (ECF Nos. 6 at 13; 7 at 3.)

23           The court also recognizes the importance of giving due weight to the fourth Ferdik factor,  
24 which addresses the public policy favoring disposition of cases on the merits. However, for the  
25 reasons set forth above, factors one, two, three, and five support a recommendation of dismissal  
26 of this action, and factor four does not materially counsel otherwise. Dismissal is proper “where  
27 at least four factors support dismissal or where at least three factors ‘strongly’ support dismissal.”  
28 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations and quotation marks

1 omitted). Under the circumstances of this case, the other relevant factors outweigh the general  
2 public policy favoring disposition of actions on their merits. See Ferdik, 963 F.2d at 1263. If  
3 anything, a disposition on the merits has been hindered by plaintiffs' repeated failures to comply  
4 with the court's orders and the rules of litigation procedure.

5 In sum, the court endeavors to give pro se litigants who are unfamiliar with court  
6 procedures a fair opportunity to present their cases. As such, the court has given plaintiffs several  
7 opportunities to amend their defective pleading. Yet plaintiffs did not seize upon these  
8 opportunities. The court has also provided plaintiffs with cautionary instructions and afforded  
9 plaintiffs some leniency with respect to the litigation. However, at some point, leniency must  
10 give way to considerations of limited court resources and fairness to the other compliant litigants.

11 IV. CONCLUSION

12 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:


13 1. This action be dismissed with prejudice pursuant to Federal Rule of Civil  
14 Procedure 41(b).

15 2. The Clerk of Court be directed to close this case and vacate all dates.

16 These findings and recommendations are submitted to the United States District Judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
18 days after being served with these findings and recommendations, any party may file written  
19 objections with the court and serve a copy on all parties. Such a document should be captioned  
20 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
21 shall be served on all parties and filed with the court within fourteen (14) days after service of the  
22 objections. The parties are advised that failure to file objections within the specified time may  
23 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th  
24 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

25 IT IS SO RECOMMENDED.

26 Dated: July 2, 2014

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28 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE