

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

T. DUNCAN,

No. 2:14-cv-00340-TLN-AC

Plaintiff,

V.

## FINDINGS & RECOMMENDATIONS

BANK OF AMERICA, N.A., et al.,

## Defendants.

17 Plaintiff is proceeding in this action in pro per. On February 3, 2014, plaintiff filed a  
18 complaint against Defendants Bank of America, N.A., Bank of America Corp. and Recon Trust,  
19 MERS, MERSCORP, and Does 1–100. ECF No. 1. Plaintiff’s complaint includes claims for  
20 violation of the California False Claims Act (“CFCA”), Cal. Gov’t Code § 12650. Id. On  
21 February 17, 2015, the court ordered plaintiff to show cause within 28 days why this action  
22 should not be dismissed for lack of subject matter jurisdiction. Id. The court explained that the  
23 complaint appeared to state claims arising exclusively under state law. Id. at 2. Plaintiff has yet  
24 to respond to the court’s order.

25 Pursuant to Federal Rule of Civil Procedure 41(b), a district court may dismiss an action  
26 for failure to prosecute, failure to comply with the Federal Rules of Civil Procedure, failure to  
27 comply with the court's local rules, or failure to comply with the court's orders. See, e.g.,  
28 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (recognizing that a court "may act sua sponte

1 to dismiss a suit for failure to prosecute"); Hells Canyon Preservation Council v. U.S. Forest  
2 Serv., 403 F.3d 683, 689 (9th Cir. 2005) (recognizing that courts may dismiss an action pursuant  
3 to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's failure to prosecute or comply  
4 with the rules of civil procedure or the court's orders); Ferdik v. Bonzelet, 963 F.2d 1258, 1260  
5 (9th Cir. 1992) ("Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss  
6 an action for failure to comply with any order of the court."); Pagtalunan v. Galaza, 291 F.3d 639,  
7 642–43 (9th Cir. 2002) (affirming district court's dismissal of case for failure to prosecute when  
8 habeas petitioner failed to file a first amended petition). This court's Local Rules are in accord.  
9 See E.D. Local Rule 110 ("Failure of counsel or of a party to comply with these Rules or with any  
10 order of the Court may be grounds for imposition by the Court of any and all sanctions authorized  
11 by statute or Rule or within the inherent power of the Court."); E.D. Local Rule 183(a) (providing  
12 that a pro se party's failure to comply with the Federal Rules of Civil Procedure, the court's Local  
13 Rules, and other applicable law may support, among other things, dismissal of that party's  
14 action).

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

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

21 Id. at 1260–61; accord Pagtalunan, 291 F.3d at 642–43; Ghazali v. Moran, 46 F.3d 52, 53 (9th  
22 Cir. 1995), cert. denied, 516 U.S. 838 (1995). The Ninth Circuit Court of Appeals has stated that  
23 "[t]hese factors are not a series of conditions precedent before the judge can do anything, but a  
24 way for a district judge to think about what to do." In re Phenylpropanolamine (PPA) Prods.  
25 Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006).

26 Although involuntary dismissal can be a harsh remedy, on balance the five relevant  
27 factors weigh in favor of dismissal of this action. The first two factors strongly support dismissal  
28 of this action. Plaintiff's failure to respond to the court's order to show cause strongly suggests

1 that he 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.”). Any further time spent by the  
4 court on this case, which plaintiff has demonstrated a lack of any serious intention to pursue, will  
5 consume scarce judicial resources and take away from other active cases. See Ferdik, 963 F.2d at  
6 1261 (recognizing that district courts have inherent power to manage their dockets without being  
7 subject to noncompliant litigants).

8 In addition, the third factor, which considers prejudice to a defendant, should be given  
9 some weight. See Ferdik, 963 F.2d at 1262. Although the court’s docket does not reflect that a  
10 complaint has been served upon defendants, defendants remain named in a lawsuit. It is difficult  
11 to quantify the prejudice suffered by defendants here; however, it is enough that defendants have  
12 been named in a lawsuit that plaintiff has effectively abandoned. At a minimum, defendants have  
13 been prevented from attempting to resolve this case on the merits by plaintiff’s unreasonable  
14 delay in prosecuting this action. Unreasonable delay is presumed to be prejudicial. See, e.g., In  
15 re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d at 1227.

16 The fifth factor, which considers the availability of less drastic measures, also supports  
17 dismissal of this action. The court has already pursued remedies that are less drastic than a  
18 recommendation of dismissal, including providing plaintiff with the opportunity to respond to the  
19 court’s apparent lack of jurisdiction. See Malone v. U.S. Postal Serv., 833 F.2d 128, 132 (9th Cir.  
20 1987) (“[E]xplicit discussion of alternatives is unnecessary if the district court actually tries  
21 alternatives before employing the ultimate sanction of dismissal.”), cert. denied, 488 U.S. 819  
22 (1988). Having failed to receive a response from plaintiff, the court finds no suitable alternative  
23 to a recommendation for dismissal of this action.

24 The court also recognizes the importance of giving due weight to the fourth factor, which  
25 addresses the public policy favoring disposition of cases on the merits. However, for the reasons  
26 set forth above, factors one, two, three, and five strongly support a recommendation of dismissal  
27 of this action, and factor four does not materially counsel otherwise. Dismissal is proper “where  
28 at least four factors support dismissal or where at least three factors ‘strongly’ support dismissal.”

1 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations and quotation marks  
2 omitted). Under the circumstances of this case, the other relevant factors outweigh the general  
3 public policy favoring disposition of actions on their merits. See Ferdik, 963 F.2d at 1263.

4        Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed with  
5        prejudice pursuant to Federal Rule of Civil Procedure 41(b) and 4(m) and Local Rules 110 and  
6        183(a).

7 These findings and recommendations are submitted to the United States District Judge  
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
9 days after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. 28 U.S.C. § 636(b)(1); see also E.D.  
11 Local Rule 304(b). Such a document should be captioned “Objections to Magistrate Judge’s  
12 Findings and Recommendations.” Any response to the objections shall be filed with the court  
13 and served on all parties within fourteen days after service of the objections. E.D. Local Rule  
14 304(d). Failure to file objections within the specified time may waive the right to appeal the  
15 District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst,  
16 951 F.2d 1153, 1156–57 (9th Cir. 1991).

17 || DATED: April 8, 2015

Allison Claire  
ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE