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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JUNG HYUN CHO, et al.,

12 Plaintiffs,

13 v.

14 SELECT PORTFOLIO SERVICING,
15 INC., et al.,

16 Defendants.

No. 2:17-cv-01073-KJM-CKD (PS)

ORDER AND FINDINGS AND
RECOMMENDATIONS

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18 On January 16, 2018, United States District Court Judge Kimberly J. Mueller adopted the
19 September 6, 2017 findings and recommendations (ECF No 84) and granted defendants' motions
20 to dismiss. (ECF No. 91.) At the same time, plaintiffs were afforded limited leave to amend, and
21 were directed that any amended complaint was to be filed within 14 days. (*Id.*) Plaintiffs failed
22 to file an amended complaint. Instead, on February 8, 2018, plaintiffs filed an interlocutory
23 appeal of the court's January 16, 2018 order. (*See* ECF Nos. 93, 94.)

24 Based on plaintiffs' failure to comply with the court's January 16, 2018 order, the court
25 considered whether the action should be dismissed. Nevertheless, in light of plaintiffs' *pro se*
26 status and the court's general preference to resolve actions on their merits, the court first
27 attempted lesser measures. More specifically, on February 22, 2018, the court advised plaintiffs
28 that their interlocutory appeal did not automatically stay the proceedings in this matter, and

1 plaintiffs were afforded one final 14-day extension to file an amended complaint, consistent with
2 the court's January 16, 2018 order, or to dismiss the matter. (ECF No. 96 at 1–2.) Plaintiffs were
3 explicitly advised that failure to file an amended complaint “may result in monetary sanctions, or
4 a recommendation to dismiss this action for failure to prosecute.” (*Id.* at 2.)

5 Although the applicable deadline has now passed, plaintiffs have failed to file an amended
6 complaint or to dismiss this matter. Furthermore, plaintiffs have not attempted to stay this matter,
7 pending the interlocutory appeal, nor have they requested additional time to file an amended
8 complaint. Therefore, the court recommends dismissal at this juncture.

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

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

17 See also *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the
18 same rules of procedure that govern other litigants”) (overruled on other grounds). A district
19 court may impose sanctions, including involuntary dismissal of a plaintiff's case pursuant to
20 Federal Rule of Civil Procedure 41(b), where that plaintiff fails to prosecute his or her case or
21 fails to comply with the court's orders, the Federal Rules of Civil Procedure, or the court's local
22 rules. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (recognizing that a court “may act
23 sua sponte to dismiss a suit for failure to prosecute”); *Hells Canyon Preservation Council v. U.S.*
24 *Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005) (stating that courts may dismiss an action
25 pursuant to Federal Rule of Civil Procedure 41(b) sua sponte for a plaintiff's failure to prosecute
26 or comply with the rules of civil procedure or the court's orders); *Ghazali v. Moran*, 46 F.3d 52,
27 53 (9th Cir. 1995) (per curiam) (“Failure to follow a district court's local rules is a proper ground
28 for dismissal”); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (“Pursuant to Federal

1 Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with
2 any order of the court”); Thompson v. Housing Auth. of City of L.A., 782 F.2d 829, 831 (9th Cir.
3 1986) (per curiam) (stating that district courts have inherent power to control their dockets and
4 may impose sanctions including dismissal or default).

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

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

11 Id. at 1260-61; accord Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002); Ghazali, 46
12 F.3d at 53. The Ninth Circuit Court of Appeals has stated that “[t]hese factors are not a series of
13 conditions precedent before the judge can do anything, but a way for a district judge to think
14 about what to do.” In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1226
15 (9th Cir. 2006).

16 Although involuntary dismissal can be a harsh remedy, on balance the five relevant
17 factors weigh in favor of dismissal here. The first two Ferdik factors strongly support dismissal,
18 given that plaintiffs’ failure to comply with the court’s orders and failure to prosecute their case
19 have unreasonably delayed the progress of this litigation. The third Ferdik factor also favors
20 dismissal. Defendants have already appeared in this matter and expended energy and resources,
21 filing motions to dismiss and oppositions to plaintiffs’ motions. (ECF Nos. 17, 19, 23, 28, 30, 32,
22 52–60.) Plaintiff’s failure to prosecute the case has hampered defendants’ ability to move this
23 case forward towards resolution.

24 Additionally, the fifth Ferdik factor, which considers the availability of less drastic
25 measures, also supports dismissal. As noted above, the court has already attempted less drastic
26 measures prior to recommending dismissal. However, plaintiff has failed to respond to the
27 court’s January 16, 2018 order or its subsequent February 22, 2018 order. Furthermore, the court
28 finds no suitable alternative to dismissal at this juncture. Given plaintiff’s complete failure to

1 respond to the court's prior orders and instructions, the imposition of monetary sanctions would
2 be futile, and the court is unable to frame any meaningful issue or evidentiary sanctions based on
3 the limited record before it.

4 Finally, the court finds that the fourth Ferdik factor, which addresses the public policy
5 favoring disposition of cases on the merits, does not materially counsel against dismissal. If
6 anything, a disposition on the merits has been hindered by plaintiffs' failure to comply with the
7 court's orders and to prosecute their case. In any event, the court finds that the fourth Ferdik
8 factor is outweighed by the other Ferdik factors.

9 Consequently, dismissal is appropriate.

10 Accordingly, IT IS HEREBY RECOMMENDED that:

- 11 1. The action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure
12 41(b).
- 13 2. The Clerk of Court be directed to vacate all dates and close this case.

14 In light of these recommendations, IT IS ALSO HEREBY ORDERED that all pleading,
15 discovery, and motion practice in this action are STAYED pending resolution of the findings and
16 recommendations. With the exception of objections to the findings and recommendations and any
17 non-frivolous motions for emergency relief, the court will not entertain or respond to any motions
18 and other filings until the findings and recommendations are resolved.

19 These findings and recommendations are submitted to the United States District Judge
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
21 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
24 shall be served on all parties and filed with the court within fourteen (14) days after service of the

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1 objections. The parties are advised that failure to file objections within the specified time may
2 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th
3 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

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5 Dated: April 5, 2018


CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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