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

ALEXANDER PRESNIAKOV,

No. C 04-00831 JSW

Plaintiff,

**ORDER OF DISMISSAL FOR
FAILURE TO PROSECUTE**

v.

RETAIL DISTRIBUTORS, LLC, et al.,

Defendants.

INTRODUCTION

On February 8, 2010, this Court issued an Order to Show Cause requiring the Plaintiff, Alexander Presniakov (“Presniakov”), to show cause as to why this matter should not be dismissed for failure to prosecute and why sanctions should not be imposed. Presniakov filed a timely response to the Order to Show Cause, and Defendants submitted responses to the materials Presniakov submitted.¹ For the reasons set forth in the remainder of this Order, the Court HEREBY DISMISSES this action.

BACKGROUND

Presniakov filed this lawsuit on February 27, 2004. Thereafter, Presniakov, through counsel, filed a request to continue the case management conference on the basis that the lawsuit had been filed to protect the statute of limitations and that, before serving the complaint, “we wanted to complete our investigation, and also have Mr. Presniakov complete his obligations pursuant to our retainer agreement.” (Docket No. 3 (Request to Continue, ¶ 3).)

¹ The Court also has granted, in a separate order, Presniakov’s application to submit a supplemental declaration in response to the Order to Show Cause.

1 After Presniakov served the complaint, Defendants, Retail Distributors, LLC and Ray
2 Wysocki (the “Retail Distributors defendants”), filed motions to dismiss or, in the alternative, to
3 compel arbitration. On March 29, 2005, Judge Jenkins, to whom the case was then assigned,
4 granted the Retail Distributors defendants’ motion to compel arbitration and stayed the
5 litigation pending arbitration. Judge Jenkins also stayed the litigation against co-defendant Tara
6 Productions, Inc., which was not a signatory to the arbitration agreement. (*See* Docket No. 35.)

7 In December 2007, the parties submitted a joint status report, in which they advised the
8 Court that the arbitration had not gone forward, because Presniakov had not paid the arbitration
9 fees. Presniakov stated that he had not paid the fees, because he could not afford them. (*See*
10 Docket No. 37 (Joint Status Report at 2:3-3:3).)

11 On February 15, 2008, the litigation was reassigned to this Court. On February 21,
12 2008, having considered the parties’ joint status report, the Court advised the parties that if
13 either party wished to lift the stay or to dismiss the action, they would be required to file a
14 properly noticed motion seeking such relief. Because neither party filed such a motion, the
15 Court set the matter down for a status conference. (Docket No. 40.) Presniakov did not appear
16 for that status conference. (Docket No. 41.) Therefore, on October 6, 2008, the Court issued an
17 Order to Show Cause requiring Presniakov to show cause why the case should not be dismissed
18 for failure to prosecute. (Docket No. 42.)

19 Based on Presniakov’s response, which suggested that he either would file a motion to
20 lift the stay or would proceed with arbitration, the Court discharged the order to show cause.
21 However, the Court ordered that if Presniakov did not pursue the arbitration, he would be
22 required to file a motion to lift the stay by no later than October 31, 2008. The Court also
23 advised Presniakov that failure to comply with that deadline would result in dismissal of his
24 claims. (*See* Docket Nos. 43, 44.) Thereafter, because Presniakov did not file a motion to lift
25 the stay and because none of the Defendants moved to dismiss, the Court presumed the parties
26 were proceeding with arbitration and issued an order requiring the parties to submit joint status
27 reports to the Court regarding the status of arbitration. (Docket No. 45.)
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1 On December 5, 2008, the parties filed status reports regarding the arbitration
2 proceedings. According to the Retail Distributors defendants, Presniakov had not taken steps
3 to reinstate the arbitration proceedings. (*See* Docket No. 46.) In his status report, Presniakov
4 stated that he had attempted to reinstate the arbitration proceedings. (*See* Docket No. 47.) On
5 December 11, 2008, the Court issued an order setting a further status conference. (Docket No.
6 49.) Pursuant to the parties' stipulation, the Court continued the status conference, and it
7 ordered that Presniakov and Mr. Wycoski both appear at that conference in person. (Docket
8 No. 52.)

9 On February 6, 2009, the Court held the status conference. During that hearing, the
10 Court advised Presniakov that he had "not prosecuted this case diligently." (Docket No. 56
11 (Feb. 6, 2009 Transcript ("Tr.") at 18:25).) In addition, the Court warned Presniakov that
12 further delays would not be tolerated:

13 Mr. Presniakov, you're the plaintiff. You brought the case. You're
14 seeking relief from the relevant tribunal, whether or not it's the [American
15 Arbitration Association] or the Court. You have an obligation to move the
16 case along.

17 It's four years old now.² It's a delinquent case on this Court's
18 calendar. It's an albatross on the Court's docket. ... You still have an
19 obligation to move this case along expeditiously. And if you don't, the case
20 is going to be dismissed. And it may yet be dismissed because of what has
21 happened.

22 I make no judgment on that because there is nothing before me³, but
23 all I'm saying to you is[] this may be the first day of the rest of the life of this
24 case, if it lives, and you better treat it like it was ... job number one for you.
25 Otherwise, you're going to be thrown out of this court.

26 (Tr. at 20:4-19.)

27 Although Presniakov did attempt to proceed with arbitration, he once again has failed to
28 pay fees necessary to move the arbitration forward. Accordingly, the Court issued the February
29 8, 2010 Order to Show Cause. (*See, e.g.*, Docket Nos. 79, 82, 83.)

26 ² At that point, the case had been pending just under five years.

27 ³ The Court advised the Retail Distributors defendants that, if there was any
28 delay attributable to Presniakov regarding the arbitration, and they believed a motion to
dismiss was warranted, they could file a such a motion with the Court. (Tr. at 13:1-18;
Docket No. 55.)

1 ANALYSIS

2 “The district court has inherent power sua sponte to dismiss a case for lack of
3 prosecution.” *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). However, because
4 dismissal is such a severe penalty, it should be imposed “only in extreme circumstances.” *Id.*
5 The Court must weigh the following factors in order to determine whether dismissal is
6 appropriate: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need
7 to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring
8 disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Id.* In
9 addition, “[a] dismissal for lack of prosecution must be supported by a showing of unreasonable
10 delay.” *Id.*

11 This case has been pending for over six years. Given that history, the Court concludes
12 that public interest in the expeditious resolution of litigation has not been served. In addition,
13 this Court has hundreds of other cases that also require its attention. However, it has expended
14 a great deal of time on this particular case since it inherited this matter. At this juncture, it is
15 time to remove the albatross that this case has become from the Court’s docket. Accordingly,
16 the first two factors weigh in favor of dismissal.

17 The Court also finds that Presniakov’s lack of diligence in pursuing arbitration has
18 become unreasonable. “Unreasonable delay creates a presumption of injury to the defendant.”
19 *Id.* (citing *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984)). Presniakov initially was ordered
20 to proceed with arbitration in 2005, but he failed to take the necessary steps to enable that
21 arbitration to proceed and the matter was stalled for two years. This Court then gave
22 Presniakov another chance to proceed with arbitration in the face of the Retail Distributor
23 defendants’ informal requests to dismiss this action. Once again, Presniakov did not pay the
24 necessary arbitration fees in a timely fashion. Although he now has paid those fees, Presniakov
25 did so only in the face of the Court’s most recent order to show cause. With respect to the
26 Retail Distributors defendants, Presniakov’s eleventh hour efforts come too late. Moreover, the
27 delay in pursuing arbitration against the Retail Distributors defendants has precluded the parties
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1 from reaching the claims against Tara Productions. Therefore, the Court finds that the risk of
2 prejudice to each of the Defendants weighs in favor of dismissal.

3 The Court acknowledges the public policy favoring disposition of cases on their merits.
4 However, in this case, after six years the parties have not yet begun to reach the merits of
5 Presniakov's claims. Indeed, although the arbitrator permitted discovery, Presniakov did not
6 engage and does not intend to engage in discovery. (*See* Docket No. 87 (Retail Distributors
7 Defendants' Opp. to Plaintiff's Response to OSC at 2:17-20); Docket No. 91-1 (March 4, 2010
8 Supplemental Downing Declaration ¶ 4).) As such, the Court finds that this factor also weighs
9 in favor of dismissal.

10 Finally, the Court has attempted less drastic sanctions in an effort to communicate to
11 Presniakov, as well as his counsel, the need to pursue this case with diligence. Presniakov has
12 not heeded those warnings. The Court recognizes that dismissal is a harsh remedy to be
13 reserved for extreme circumstances, and it concludes that this case embodies those extreme
14 circumstances. For the foregoing reasons, pursuant to Federal Rule of Civil Procedure 41(b),
15 the Court HEREBY DISMISSES this action as to all Defendants as a result of Presniakov's
16 failure to diligently prosecute this matter. If Defendants intend to pursue a motion for
17 attorneys' fees and costs, they must file properly noticed motions with the Court.

18 **CONCLUSION**

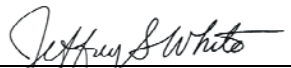
19 For the foregoing reasons, this matter is HEREBY DISMISSED. A separate judgment
20 shall issue, and the Clerk shall close the file.

21 **IT IS SO ORDERED.**

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23 Dated: March 8, 2010

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JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

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