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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MARGARET EVE-LYNNE MIYASAKI,  
Plaintiff,  
v.  
KYNA TREACY, et al.,  
Defendants.

Case No. [5:12-cv-04427 EJD](#)

**ORDER GRANTING  
ADMINISTRATIVE MOTION TO FILE  
UNDER SEAL; ADOPTING REPORT  
AND RECOMMENDATION;  
DISMISSING CASE**

Re: Dkt. Nos. 28, 41

Plaintiff Margaret Eve-Lynne Miyasaki (“Plaintiff”) filed a Complaint for copyright infringement on August 22, 2012, against individual defendant Kyna Treacy (“Treacy”) and three websites allegedly owned and operated by Treacy: kinibikini.com, kinibikini.com and shopkinibikini.com. See Compl., Docket Item No. 1. The action was originally assigned to Magistrate Judge Maria-Elena James. When Plaintiff failed to serve Treacy with the Summons and Complaint and then failed to respond to a third Order to Show Cause, Judge James ordered this case reassigned to a district judge and issued a recommendation that this action be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(b). See Docket Item No. 28. Plaintiff filed a response and objection. See Docket Item No. 41.<sup>1</sup>

Having carefully reviewed this action and considered Judge James’ recommendation along with Plaintiff’s objection, the court finds, concludes and orders as follows:

1. Plaintiff’s arguments based on the rules and procedures applicable to magistrate judge jurisdiction are misplaced for two reasons. First, nothing out of the ordinary occurred here. This action was assigned to Judge James at initiation pursuant to Section E of General Order No.

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<sup>1</sup> Plaintiff’s Motion to Seal (Docket Item No. 41) is GRANTED.

1 44. As this court sees it, that assignment constituted a referral under 28 U.S.C. § 636(b) unless  
2 and until all parties consented to Judge James, as was necessary for her to preside for all purposes  
3 according to § 636(c). That consent was never obtained. Under these circumstances, Judge James  
4 then did exactly what was required by § 636(b)(1)(B) and Tripati v. Rison, 847 F.2d 548 (1988),  
5 when she ultimately recommended an involuntary dismissal: since she could not enter such an  
6 order, she issued a report and recommendation and had the case reassigned to a district judge. The  
7 undersigned received the recommendation, to which Plaintiff timely objected under Federal Rule  
8 of Civil Procedure 72(b).

9 2. Second and in any event, the manner or reason for reassignment is really of no  
10 moment. A district judge's ability to issue orders in this case cannot be questioned. And just like  
11 any case that is transferred between courts or between judges, the undersigned takes over where  
12 the predecessor left off. Here, taking over this case means resolving the Order to Show Cause  
13 issued on October 22, 2014, which has not yet been discharged. There is no prejudice to Plaintiff  
14 in considering Judge James' recommendation when doing so because Plaintiff was given the  
15 opportunity to respond to it. The court will not order the case referred back to Judge James based  
16 on Plaintiff's recently-filed consent because Plaintiff experienced no prejudice from the  
17 reassignment.

18 3. As to the recommendation, it is neither erroneous nor does it constitute an abuse of  
19 discretion. Indeed, Judge James properly identified Rule 41(b) as authority to order dismissal and  
20 then thoughtfully considered this case in light of the factors delineated by Henderson v. Duncan,  
21 779 F.2d 1421 (9th Cir. 1986). Four of the five Henderson factors favored dismissal, and Judge  
22 James determined the dismissal should be without prejudice to preserve Plaintiff's ability to re-file  
23 her claims.<sup>2</sup> Such a result is entirely consistent with the law and falls within the scope of  
24 acceptable outcomes.

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26 \_\_\_\_\_  
27 <sup>2</sup> For this reason, the court does not share Plaintiff's characterization of the recommendation as the  
28 equivalent of terminating sanctions.

