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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MERCHSOURCE, LLC,

Plaintiff,

v.

HSM INTERNATIONAL, *et al.*,

Defendants.

Case No. 13-cv-01945-BAS(DHB)
**ORDER DISMISSING ACTION
WITHOUT PREJUDICE**

This case is a copyright and trademark infringement action in which the only remaining Defendant—HSM International, a Hong Kong Company (“HSM”)—has been in default since April 1, 2015. Plaintiff filed two motions for default judgment against HSM, but the Court denied Plaintiff’s motions without prejudice. (ECF Nos. 34, 38.) The Court provided Plaintiff with a third opportunity to move for default judgment and warned Plaintiff that a failure to file an amended motion would result in this action being dismissed. (ECF No. 38.) An amended motion was not filed. Accordingly, for the reasons discussed below, the Court exercises its inherent authority to **DISMISS WITHOUT PREJUDICE** Plaintiff’s action.

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1 **I. BACKGROUND**

2 On August 20, 2013, Plaintiff Merchsource, LLC commenced this action
3 seeking damages and other appropriate relief for copyright infringement, trademark
4 infringement, and related claims. (ECF No. 1.) On July 28, 2014, the Court granted
5 Plaintiff's request to appoint a Special Process Server to allow Plaintiff to effect
6 service on HSM in Hong Kong. (ECF No. 22.) On August 28, 2014, Plaintiff filed
7 an affidavit of service demonstrating that HSM had been delivered a package
8 containing the summons for this matter and related items at its address in Hong Kong.
9 (ECF No. 25.) After HSM failed to appear or otherwise answer the Complaint,
10 Plaintiff moved for an entry of default against HSM. (ECF No. 29.) The Clerk of the
11 Court entered default against HSM on April 1, 2015. (ECF No. 30.)

12 On May 1, 2015, Plaintiff moved for default judgment against HSM. (ECF No.
13 32.) The Court denied Plaintiff's request after hearing oral argument on the motion.
14 (ECF No. 34.) In doing so, the Court permitted Plaintiff the opportunity to file an
15 amended motion for default judgment but directed that any future motion would need
16 to contain the following: (1) specifics, including any necessary affidavits,
17 demonstrating that the Court has personal jurisdiction over HSM; (2) a summary of
18 law for each claim for which Plaintiff is requesting a default judgment, including
19 both the elements that need to be proved and where those elements can be found in
20 the Complaint; and (3) legal authority demonstrating that Hong Kong permits service
21 by mail. (*See* ECF Nos. 34, 36.) On November 18, 2015, Plaintiff filed a supplement
22 to its initial motion for default judgment. (ECF No. 35.)

23 On January 12, 2016, the Court issued an order noting that there was no motion
24 for default judgment pending before the Court because Plaintiff did not file a new or
25 amended motion. (ECF No. 36 at 2.) The Court also noted that Plaintiff's supplement
26 to its initial motion did not contain the additional information requested by the Court.
27 (*Id.*) The Court ultimately provided Plaintiff with a February 8, 2016, deadline to file
28 an amended motion for default judgment containing the requested additional

1 information. (*Id.* at 3.)

2 On February 3, 2016, Plaintiff filed an amended motion for default judgment.
3 (ECF No. 37.) The Court denied Plaintiff’s amended motion because it again did not
4 contain the requested specifics, including any necessary evidence, establishing that
5 the Court has personal jurisdiction over HSM. (ECF No. 38.) The Court also denied
6 the motion because it similarly did not address the sufficiency of the Complaint. (*Id.*)
7 The Court provided Plaintiff with one final opportunity to adequately move for
8 default judgment by May 12, 2016, and cautioned Plaintiff that a failure to do so
9 would result in a dismissal without prejudice. (*Id.*) Plaintiff did not renew its motion
10 for default judgment.

11 12 **II. DISCUSSION**

13 “District courts have the inherent power to control their dockets and, ‘[i]n the
14 exercise of that power they may impose sanctions including, where appropriate, . . .
15 dismissal of a case.’” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992)
16 (quoting *Thompson v. Hous. Auth. of L.A.*, 782 F.2d 829, 831 (9th Cir. 1986)); *accord*
17 *Link v. Wabash R.R.*, 370 U.S. 626, 630–31 (1962) (holding courts are vested with
18 an inherent power “to manage their own affairs so as to achieve the orderly and
19 expeditious disposition of cases”). This inherent power exists independently of a
20 district court’s authority to dismiss an action under Federal Rule of Civil Procedure
21 41(b). *Link*, 370 U.S. at 630–32. “Despite this authority, dismissal is a harsh penalty
22 and, therefore, it should only be imposed in extreme circumstances.” *Ferdik*, 963
23 F.2d at 1260.

24 The circumstances in which a court may exercise its inherent power to dismiss
25 an action include where a plaintiff has failed to prosecute the case, failed to comply
26 with a court order, or engaged in judge shopping. *Link*, 370 U.S. at 630; *Yourish v.*
27 *Cal. Amplifier*, 191 F.3d 983, 989–90 (9th Cir. 1999); *Hernandez v. City of El Monte*,
28 138 F.3d 393, 399 (9th Cir. 1998). In determining whether to exercise this power,

1 “the district court must weigh five factors including: (1) the public’s interest in
2 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the
3 risk of prejudice to the defendants; (4) the public policy favoring disposition of cases
4 on their merits; and (5) the availability of less drastic alternatives.” *Ferdik*, 963 F.2d
5 at 1260–61 (quoting *Henderson*, 779 F.2d at 1424, and *Thompson*, 782 F.2d 829 at
6 831) (internal quotation marks omitted). Although it is preferred, the district court is
7 not required to “make explicit findings in order to show that it has considered these
8 factors.” *Ferdik*, 963 F.3d at 1261.

9 Here, the procedural history summarized above demonstrates that Plaintiff has
10 failed to advance this case. Plaintiff was provided multiple opportunities to secure a
11 default judgment against the only remaining Defendant, but it has not done so. The
12 Court warned Plaintiff that if it did not file an amended motion for default judgment
13 by May 12, 2016, the Court would dismiss this action without prejudice. No motion
14 was filed. Accordingly, the Court turns to considering whether it is appropriate to
15 exercise its inherent authority to dismiss Plaintiff’s action based on the five factors
16 enumerated above.

17
18 **A. Public’s Interest in Expeditious Resolution of Litigation**

19 “[T]he public’s interest in expeditious resolution of litigation always favors
20 dismissal.” *Yourish*, 191 F.3d at 990. Here, this case has been pending for almost
21 three years, and Plaintiff has failed to secure a default judgment against HSM, despite
22 that HSM has been in default for over a year. Thus, the Court finds that this factor
23 weighs in favor of dismissal.

24
25 **B. Court’s Need to Manage Its Docket**

26 A district court “is in the best position to determine whether the delay in a
27 particular case interferes with docket management and the public interest.” *Ash v.*
28 *Cvetkov*, 739 F.2d 493, 496 (9th Cir.1984). In this case, Plaintiff’s unsuccessful

1 motions for default judgment consumed the Court's time and resources "that could
2 have been devoted to other cases on the docket." *See Pagtalunan*, 291 F.3d at 642.
3 That Plaintiff has not filed an amended motion for default judgment by the deadline
4 specified by the Court demonstrates that Plaintiff does not intend to prosecute this
5 action and "that its continued presence on the court's docket will waste valuable
6 resources." *See Curtis v. Bank of Am., N.A.*, No. CV 12-09158 MMM MANX, 2013
7 WL 1561475, at *2 (C.D. Cal. Apr. 12, 2013). Consequently, this factor also weighs
8 in favor of dismissal.

9
10 **C. Risk of Prejudice to Defendants**

11 "To prove prejudice, a defendant must establish that plaintiff's actions
12 impaired defendant's ability to proceed to trial or threatened to interfere with the
13 rightful decision of the case." *Pagtalunan*, 291 F.3d at 642 (citing *Malone v. U.S.*
14 *Postal Serv.*, 833 F.2d 128, 131 (9th Cir.1987)). "[T]he pendency of the lawsuit is
15 not sufficiently prejudicial itself to warrant dismissal." *Yourish*, 191 F.3d at 991;
16 *accord Ash*, 739 F.2d at 496. However, "even in the absence of a showing of actual
17 prejudice to the defendant," prejudice is presumed from unreasonable delay. *In re*
18 *Eisen*, 31 F.3d 1447, 1452–53 (9th Cir. 1994). Here, it is challenging to discern actual
19 prejudice to HSM, given that HSM is in default and there is no indication that HSM
20 intends to move to set aside the default and appear or otherwise defend itself in this
21 action. That said, the Court finds that Plaintiff's delay in securing a default judgment
22 against HSM and Plaintiff's decision not to file an amended motion for default
23 judgment have unreasonably delayed the resolution of this matter. Thus, prejudice is
24 presumed, and this factor weighs in favor of dismissal.

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1 **D. Public Policy Favoring Disposition of Cases on Their Merits**

2 Public policy favors disposition of cases on the merits. *Pagtalunan*, 291 F.3d
3 at 643. Accordingly, this factor weighs against dismissal. *See id.*; *Hernandez*, 138
4 F.3d at 399.

5
6 **E. Availability of Less Drastic Alternatives**

7 This factor examines whether less drastic alternatives to dismissal are feasible
8 given the circumstances of the case. *In re Eisen*, 31 F.3d at 1455. “[A] district court’s
9 warning to a party that [its] failure to obey the court’s order will result in dismissal
10 can satisfy the ‘consideration of alternatives’ requirement.” *Ferdik*, 963 F.2d at 1262.

11 Here, because the remaining Defendant, HSM, is in default, this case may only
12 proceed by either HSM moving to set aside the default or by Plaintiff obtaining a
13 default judgment against HSM. As default was entered against HSM on April 1,
14 2015, there is no indication that HSM intends to set aside the default. Therefore, this
15 case cannot be resolved unless Plaintiff secures a default judgment against HSM.

16 With this is mind, the Court provided Plaintiff multiple opportunities to obtain
17 a default judgment against HSM, but Plaintiff was unsuccessful in doing so. The
18 Court also cautioned Plaintiff that a failure to file an amended motion for default
19 judgment with the necessary supporting information would result in a dismissal
20 without prejudice. Plaintiff elected not to file an amended motion. The Court
21 consequently finds that less drastic alternatives to dismissal are not available in these
22 circumstances. *See Curtis*, 2013 WL 1561475, at *2 (finding the plaintiffs’ “failure
23 to amend [their complaint] in accordance with the court’s order granting the motion
24 with leave to amend indicates that there are no less drastic alternatives that are
25 realistically available”). As a result, this factor weighs in favor of dismissal.


26 On balance, four out of five factors weigh in favor of dismissal. Accordingly,
27 the Court exercises its inherent authority to dismiss Plaintiff’s complaint without
28 prejudice. *See Pagtalunan*, 291 F.3d at 643.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court **DISMISSES WITHOUT PREJUDICE**
3 Plaintiff's action.

4 **IT IS SO ORDERED.**

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6 **DATED: May 26, 2016**


7 **Hon. Cynthia Bashant**
8 **United States District Judge**
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