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

CELIE DUENAS, et al., Plaintiffs, v. NATIONSTAR MORTGAGE HOLDINGS, INC., et al., Defendants.

Case No.: 16-CV-2824 W (RBB)

**ORDER GRANTING EX PARTE
APPLICATION FOR DISMISSAL
WITH PREJUDICE AS TO
DEFENDANT ANTOINE CANNON
[DOC. 8]**

Pending before the Court is an ex parte application filed by Defendant Antoine Cannon seeking the entry of an order of dismissal of the case against him with prejudice. (*Ex Parte Application* [Doc. 8].) Despite the lapsing of two weeks since the filing of the ex parte application, Plaintiffs have not filed an opposition, nor have they requested additional time to do so.

Federal Rule of Civil Procedure 41(b) provides that “[i]f the plaintiff fails . . . to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.” “A Rule 41(b) dismissal ‘must be supported by a showing of unreasonable delay.’ ” Omstead v. Dell, Inc., 594

1 F.3d 1081, 1084 (9th Cir. 2010) (Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir.
2 1986)). The Court should consider the following factors:

- 3 (1) the public's interest in expeditious resolution of litigation;
- 4 (2) the court's need to manage its docket;
- 5 (3) the risk of prejudice to the defendants;
- 6 (4) the public policy favoring disposition of cases on their merits[;] and
- 7 (5) the availability of less drastic sanctions.

8 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986) (formatting altered from
9 original).

10 On January 11, 2017, Defendant Cannon filed a motion to dismiss. (*Def.'s Mot. to*
11 *Dismiss* [Doc. 6].) Despite the lapsing of the February 20, 2017 hearing date, Plaintiff
12 did not oppose that motion. The Court granted the motion on April 24, 2017, dismissing
13 the Complaint as to Defendant Cannon. (*April 24, 2017 Order* [Doc. 7].) The Court set a
14 deadline of Monday, May 8, 2017 for Plaintiffs to file an amended complaint. (*Id.*) To
15 date, Plaintiff have not filed an amended complaint—nor have they requested additional
16 time in which to do so. They have simply ceased to prosecute this matter as to Defendant
17 Cannon. This is an unreasonable delay. See Omstead, 594 F.3d at 1084.

18 Four of the five Henderson factors favor a dismissal of Defendant Cannon from
19 this action with prejudice. See 779 F.2d at 1423.

20 The risk of prejudice to Cannon, the public's interest in expeditious resolution of
21 litigation, and the Court's need to manage its docket all favor dismissal with prejudice.
22 As noted, Cannon filed his motion to dismiss in January of this year, with a hearing date
23 in February. Plaintiffs did not oppose. They then allowed the Court's deadline to amend
24 the complaint to lapse. When Cannon filed an ex parte application seeking dismissal
25 with prejudice, Plaintiffs did not respond to that either. It is now mid-June. Evidence
26 indicates that repeated attempts on the part of Defendant Cannon's attorney to contact
27 Plaintiff's counsel—by email, fax, and phone—have yielded no response. (*See Salas*
28 *Decl.* [Doc. 8-3].) Forcing Cannon to remain a defendant in a lawsuit with Plaintiffs who
will not respond or participate would prejudice his interests. And it would be neither just

1 nor efficient for members of the public to have to wait to have their motions heard while
2 Plaintiffs repeatedly miss deadlines and decline to prosecute the case.

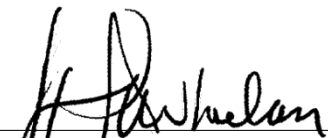
3 Moreover, there would appear to be no less-drastic alternative available. As the
4 Complaint has already been dismissed with leave to amend as to Defendant Cannon upon
5 Plaintiffs' February failure to respond (*See April 24, 2017 Order* [Doc. 7]), there are no
6 claims left pending against him. A dismissal with prejudice pursuant to Rule 41(b) is the
7 only avenue left available. Though public policy favors disposition of cases on their
8 merits, that policy is difficult to implement when the plaintiff declines to participate in
9 litigation.

10 The Court **GRANTS** Defendant's ex parte application. [Doc. 8.]

11 Defendant Cannon is **DISMISSED WITH PREJUDICE**.

12
13 **IT IS SO ORDERED.**

14
15 Dated: June 21, 2017

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18 Hon. Thomas J. Whelan
United States District Judge