

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 MICHELLE BERTSCH,)
4)
5 Plaintiff,)
6 vs.)
7 DISCOVER FINANCIAL SERVICES, et al.,)
8 Defendants.)

Case No.: 2:18-cv-00290-GMN-EJY

ORDER

9 Pending before the Court is the case of *Michelle Bertsch v. Discover Financial Services,*
10 *et al.* (2:18-cv-00290-GMN-EJY). On March 11, 2020, the Court issued an Order dismissing
11 Plaintiff Michelle Bertsch’s (“Plaintiff”) Amended Complaint. (Order, ECF No. 79). In that
12 Order, the Court granted leave for Plaintiff to file a second amended complaint on or before
13 April 1, 2020, to correct deficiencies in her claims. (*See id.* at 10–11). However, Plaintiff has
14 since failed to file a second amended complaint or request an extension of time to do so. For
15 the reasons set forth below, the Court will dismiss Plaintiff’s claims with prejudice.

16 **I. DISCUSSION**

17 In its March 11, 2020 Order, the Court ruled that Plaintiff failed to state a claim upon
18 which relief could be granted as to each of Plaintiff’s eight claims. (*See id.* at 49). Despite the
19 Court granting leave for Plaintiff to support seven of her claims with additional factual
20 allegations in order to establish valid causes of action, Plaintiff has failed to take any action
21 whatsoever in this case.

22 The Court is at a loss in cases, such as this one, in which a plaintiff fails to participate in
23 the judicial process and does not pursue her claims or even request an extension. However, the
24 Court has an obligation to promote justice by allocating judicial resources to cases with
25 ongoing disputes and active parties.

1 Federal Rule of Civil Procedure 41(b) allows for the dismissal of an action based on a
2 party's failure to obey an order of the Court.¹ The Ninth Circuit has specifically held that this
3 rule may be applied when a plaintiff fails to file an amended complaint pursuant to a court-
4 ordered deadline. *See, e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). "In
5 determining whether to dismiss a case for failure to comply with a court order the district court
6 must weigh five factors including: (1) the public's interest in expeditious resolution of
7 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants;
8 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
9 drastic alternatives." *Id.* at 1260–61; *see also Thompson v. Housing Auth. of City of Los*
10 *Angeles*, 782 F.2d 829, 831 (9th Cir. 1986); *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th
11 Cir. 1986). The Court will consider each of these factors in turn.

12 **1. Public Interest**

13 The Ninth Circuit has consistently held that "the public's interest in expeditious
14 resolution of litigation always favors dismissal." *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th
15 Cir. 2002) (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). In this
16 case, Plaintiff has not only failed to file a second amended complaint pursuant to the Court's
17 explicit deadline, but has also failed to request an extension or explain her failure to the Court.
18 Therefore, this factor weighs in favor of dismissal.

19 **2. The Court's Need to Manage its Docket**

20 The delays caused by Plaintiff's failure to amend her claims have already consumed
21 time and resources that the Court could have devoted to other cases. The Court's resources are
22 best allocated to actions with active parties seeking to resolve their claims under the law. Thus,
23 this factor also weighs in favor of dismissal.

24
25 ¹ Although Rule 41(b) refers to a defendant's motion for dismissal, the U.S. Supreme Court has long held that district courts have the power to dismiss actions *sua sponte* based on a plaintiff's failure to comply with a court order. *See, e.g., Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962).

1 **3. Risk of Prejudice to Defendant**

2 The Ninth Circuit recognizes that the risk of prejudice must be considered with reference
3 to “the plaintiff’s reason for defaulting.” *Pagtalunan*, 291 F.3d at 642. However, in this matter,
4 Plaintiff has not offered any explanation for her failure to comply with the Court’s Order.

5 In its prior Order, the Court clearly identified numerous deficiencies in Plaintiff’s claims
6 that she could attempt to correct in a second amended complaint. Rather than simply revise her
7 Amended Complaint to correct these deficiencies, Plaintiff has taken no action in this case
8 whatsoever.

9 “Unnecessary delay inherently increases the risk that witnesses’ memories will fade and
10 evidence will become stale.” *Pagtalunan*, 291 F.3d at 643. Considering Plaintiff’s ongoing
11 failure to file a second amended complaint without offering an explanation, the Court finds that
12 the delay in this matter is unreasonable, and therefore this factor weighs in favor of dismissal.

13 **4. Public Policy Favoring Disposition on the Merits**

14 Public policy and the preferences of this Court hold that legal claims should be resolved
15 on their merits whenever possible. This factor weighs against dismissal.

16 **5. Availability of Less Drastic Alternatives**

17 In an attempt to avoid dismissal with prejudice, the Court granted Plaintiff twenty-one
18 (21) days in which to file a second amended complaint, but warned that failure to file prior to
19 this deadline would result in dismissal of Plaintiff’s claims with prejudice. (Order at 11, ECF
20 No. 79). Additionally, in the time that elapsed since the Court issued its Order, Plaintiff could
21 have requested an extension or otherwise clarified her position with the Court. Despite the
22 Court’s admonishment, Plaintiff has not filed a second amended complaint or taken any other
23 action in this matter. Therefore, the Court has exercised less drastic alternatives without
24 success, and this factor weighs in favor of dismissal.

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