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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
SEATTLE DIVISION

MARK SMITH, an individual

Plaintiff,

Case 2:18-cv-00701-JLR

v.

EVERGREEN TREATMENT SERVICES,

Defendant.

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ORDER GRANTING ON DEFENDANT'S UNOPPOSED  
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Before the court is Defendant Evergreen Treatment Services' Motion to Dismiss Plaintiff's Complaint. Pro Se Plaintiff, Mark Smith, was served with the Motion via U.S. Mail on or about September 13, 2019 (Dkt. #33). The motion is unopposed. The court has reviewed the motion (Dkt #32), the Certification and Declaration of Theresa E. Pruett in Support of Defendant's Motion to Dismiss (Dkt. # 32-1), the court's August 14, 2019 Minute Entry (Dkt. #31), related submissions of the parties, the relevant portions of the record, and the applicable law.

ORDER GRANTING DEFENDANT'S  
UNOPPOSED MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT

Page 1 of 4

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1 Pursuant to Fed. R. Civ. P. 37(b)--(d), and 41(b), the court may dismiss an action with  
2 prejudice for plaintiff's unreasonable failure to cooperate during discovery or failure to comply  
3 with a court order. To justify dismissal as a sanction, the court must also make a finding of  
4 "willfulness, bad faith, or fault of the party." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585,  
5 599 (9th Cir. (1983)). In addition to a finding of willfulness, the court must also consider five  
6 additional factors ("Eisen Factors"): (1) the public's interest in expeditious resolution of litigation,  
7 (2) the court's need to manage its docket, (3) the risk of prejudice to the defendants, (4) the public  
8 policy favoring the disposition of cases on their merits, and (5) the availability of less drastic  
9 sanctions. *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994); *SW. Marine Inc. v. Danzig*, 217 F.3d  
10 1128, 1138 (9th Cir. 2000). Dismissal is appropriate when at least four factors favor dismissal or  
11 where at least three factors "strongly" favor dismissal. *Hernandez v. City of El Monte*, 138 F.3d  
12 393, 399 (9th Cir. 1998).

13 <sup>Although</sup> ~~Because~~ the motion is unopposed, the court <sup>has carefully reviewed</sup> ~~accepts as true~~ the allegations stated in the  
14 motion and supported by declaration. <sup>and finds they warrant dismissal with prejudice</sup> For almost a year, Mr. Smith has failed to respond to discover  
15 and failed to comply with relevant discovery rules. He has also failed to comply with the Court's  
16 August 14, 2019 Minute Entry (Dkt. #31). Mr. Smith has not answered Defendant's November 29,  
17 2019 First Set of Interrogatories and Requests for Production to Plaintiff. Mr. Smith also failed to  
18 respond to defense counsel's numerous requests for a discovery conference via email, U.S. Mail,  
19 certified U.S. Mail, and phone. On August 14, 2019, the court ordered Mr. Smith to provide  
20 "complete responses to Defendant's interrogatories and requests for production no later than  
21 Friday, 8/30/19." (Dkt. #31). The court also warned Mr. Smith that his failure to "timely comply  
22 with this order to produce discovery may result in the court's entry of sanctions against him,  
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*PK*  
in this case.

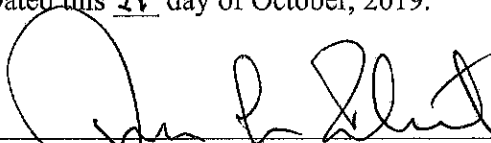
1 including the dismissal of his case for lack of prosecution or participation.” *Id.* Mr. Smith has not  
2 provided the required discovery response.

3 Dismissal with prejudice of Plaintiff’s Complaint for failure to prosecute is appropriate in  
4 this matter because: (1) the substantial passage of time from the discovery due date, (2) the  
5 significant prejudice to Defendant, (3) the upcoming discovery deadlines, (4) Mr. Smith’s three  
6 previous extensions on other court deadlines, (5) Mr. Smith’s violation of the Court’s August 14,  
7 2019 Minute Order, (6) Mr. Smith’s failure to communicate with ETS counsel (ignoring ETS  
8 counsel’s numerous requests to “meet and confer”), and (7) Mr. Smith’s failure to pick up ETS  
9 counsel’s certified letter from the post office (Dkt. #30). Mr. Smith’s failure to prosecute is,  
10 therefore, unreasonable and willful.  
11

12 The *Eisen* factors strongly in favor of dismissal with prejudice. The delay caused by Mr.  
13 Smith’s willful conduct negatively affects the public’s interest in expeditious resolution of  
14 litigation and the court’s need to manage the docket. The risk of prejudice is significant as  
15 discovery and motion deadlines are looming and defendant is without basic information and  
16 documents from Mr. Smith. Less drastic sanctions have been attempted, including a teleconference  
17 with the Court on August 14, 2019, issuing a warning to Mr. Smith regarding the possibility of  
18 dismissal, and the August 14, 2019 Minute Entry extending Mr. Smith’s deadline to respond to  
19 August 30, 2019. While public policy favors the disposition of actions on their merits, this factor  
20 is outweighed by the four other factors supporting dismissal with prejudice.  
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1 Having considered all of the forgoing, the court GRANTS the Defendant's motion and  
2 dismisses with prejudice the Plaintiff's Complaint.

3 Dated this <sup>st</sup> 21 day of October, 2019.

4  
5   
6 UNITED STATES DISTRICT JUDGE  
7 ROBERT ROBART

8  
9  
10 Presented by:

11 REED PRUETT WALTERS LARSEN, PLLC

12 s/ Theresa E. Pruett

13 Theresa E. Pruett WSBA No. 26063

14 Attorneys for Defendant Evergreen Treatment Services

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25 ORDER GRANTING DEFENDANT'S  
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Page 4 of 4

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