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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT McCULLOCK,
Plaintiff,
v.
WARDEN D. SAMUEL, et al.,
Defendants.

Case No. 2:23-cv-03322-JFW (GJS)

**ORDER DISMISSING ACTION
WITHOUT PREJUDICE**

On May 2, 2023, Plaintiff filed a pro se civil rights complaint. [Dkt. 1, “Complaint.”] On March 25, 2024, United States Magistrate Judge Gail J. Standish issued a Report and Recommendation, which found that the Complaint was defective as a whole and should be dismissed, with leave to amend to be granted only in two specified respects. [Dkt. 17, “Report.”] Plaintiff did not file Objections to the Report. On May 17, 2024, the Court issued an Order accepting the Report and dismissing the Complaint without leave to amend except as to two claims, which Plaintiff was granted leave to attempt to replead. [Dkt. 19, “May 17 Order.”] The May 17 Order advised Plaintiff that if he wanted to have this case proceed, he must file a First Amended Complaint within 30 days.

The First Amended Complaint was required to be filed by no later than June

1 16, 2024, but this has not happened. It is now past Plaintiff's deadline for
2 complying with the May 17 Order, and he has not done so, nor has he requested an
3 extension of time to do so or otherwise communicated with the Court.

4 Rule 41(b) of the Federal Rules of Civil Procedure grants federal district
5 courts the authority to *sua sponte* dismiss actions for failure to prosecute. *Link v.*
6 *Wabash R. Co.*, 370 U.S. 626, 629-30 (1962). In determining whether dismissal for
7 lack of prosecution is proper, a court must weigh several factors, including: (1) the
8 public's interest in expeditious resolution of litigation; (2) the court's need to
9 manage its docket; (3) the risk of prejudice to defendants; (4) the availability of less
10 drastic sanctions; and (5) the public policy favoring the disposition of cases on their
11 merits. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1226
12 (9th Cir. 2006).

13 In this case, the fifth factor, the general policy favoring resolution of cases on
14 the merits, cannot be said to favor retention of this action on the Court's docket. As
15 explained in the Report, the Complaint was defective in its entirety. While the
16 Report recommended that leave to amend be granted in two respects, the Magistrate
17 Judge expressed substantial doubt that the defects identified could be rectified with
18 amendment. The Court agrees that it is unlikely Plaintiff could state a viable claim
19 for the reasons identified in the Report, and apparently Plaintiff concurs given his
20 failure to attempt amendment. *See In re PPA Prods. Liab. Litig.*, 460 F.3d at 1228
21 ("this factor lends little support to a party whose responsibility it is to move a case
22 toward disposition on the merits but whose conduct impedes progress in that
23 direction").

24 Plaintiff's noncompliance with the May 17 Order necessarily implicates both
25 the public interest in the expeditious resolution of litigation and the Court's need to
26 manage its docket efficiently, the first and second factors. *See In re PPA Prods.*
27 *Liab. Litig.*, 460 F.3d at 1227; *see also Yourish v. California Amplifier*, 191 F.3d
28 983, 990-91 (9th Cir. 1999) ("the public's interest in expeditious resolution of

1 litigation always favors dismissal”). There is no extant operative complaint in this
2 action due to Plaintiff’s inaction, and thus, the case is stalled and unable to proceed.

3 The third factor – possible prejudice to the opposing party – is, at best, neutral
4 to Plaintiff. While there is no evidence that Plaintiff’s actions have resulted in any
5 actual prejudice to Defendants as yet, “[t]he law ... presumes prejudice from
6 unreasonable delay.” *In re PPA Prods. Liab. Litig.*, 460 F.3d at 1227.

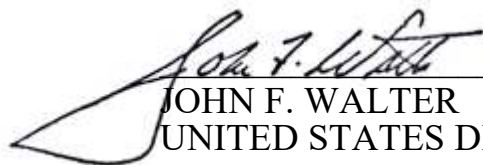
7 In addition, the fourth factor favors dismissal. Plaintiff has been told what he
8 needs to do to allow this case to survive, but he appears to lack any interest in
9 pursuing this case anymore. Under these circumstances, dismissal is appropriate.

10 A balancing of these factors thus leads to the conclusion that dismissal
11 without prejudice, pursuant to Rule 41(b), is warranted. *See Ferdik v. Bonzelet*, 963
12 F.2d 1258, 1263 (9th Cir. 1992) (dismissal appropriate when strongly supported by
13 three factors); *Malone v. United States Postal Serv.*, 833 F.2d 128, 133 n.2 (9th Cir.
14 1987) (dismissal appropriate when supported by four factors).

15 Accordingly, for the foregoing reasons, IT IS ORDERED that this case is
16 dismissed without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil
17 Procedure.

18 **IT IS SO ORDERED.**

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20 DATED: July 3, 2024



JOHN F. WALTER
UNITED STATES DISTRICT JUDGE

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24 Presented by:

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27 GAIL J. STANDISH
28 UNITED STATES MAGISTRATE JUDGE