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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN E. FIELDS,)	1:06-cv-00407-AWI-GSA-PC
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS CASE FOR FAILURE TO OBEY A
vs.)	COURT ORDER
)	(Doc. 82.)
P. ROBERTS, et al.,)	
)	OBJECTIONS, IF ANY, DUE IN THIRTY
Defendants.)	DAYS
_____)	

Kevin E. Fields ("Plaintiff") is a state prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on April 10, 2006. (Doc. 1.) This action now proceeds with the Fifth Amended Complaint filed by Plaintiff on June 24, 2010, against Defendant Jeff Neubarth for deliberate indifference.¹ (Doc. 51.)

On June 5, 2012, the Clerk of Court entered default against defendant Neubarth for failure to respond to the complaint. (Doc. 77.) On June 13, 2012, Plaintiff filed a motion for default judgment against defendant Neubarth, pursuant to Rule 55(b). (Doc. 79.) On August 23, 2012, the Court issued an order requiring Plaintiff to supply further information in support of the motion, within forty-five days. (Doc. 80.) On September 7, 2012, Plaintiff filed a motion for leave to file an amended motion for

¹The Court dismissed Defendant P. Roberts from this action on March 12, 2012, based on Plaintiff's failure to effect service. (Doc. 75.) Therefore, Jeff Neubarth is the only Defendant remaining in this action.

1 default judgment against Defendant Neubarth, containing further information as required by the Court.
2 (Doc. 81.) On September 10, 2012, the Court granted Plaintiff's motion for leave to file an amended
3 motion, within thirty (30) days. (Doc. 82.) On September 26, 2012, Plaintiff filed a declaration in
4 support of an amended motion for default judgment, declaring that defendant Neubarth is not in the
5 military service. (Doc. 83.) However, Plaintiff has not filed an amended motion for default judgment
6 or otherwise responded to the court's orders.

7 In determining whether to dismiss this action for failure to comply with the directives set forth
8 in its order, "the Court must weigh the following factors: (1) the public's interest in expeditious
9 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to
10 defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring
11 disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citing
12 Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

13 "The public's interest in expeditious resolution of litigation always favors dismissal," id.
14 (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action has
15 been pending for more than six years. Plaintiff's failure to respond to the Court's order may reflect
16 Plaintiff's disinterest in prosecuting this case. In such an instance, the Court cannot continue to expend
17 its scarce resources assisting a litigant who will not help himself by submitting information needed by
18 the court to determine whether default judgment should be entered in this case. Thus, both the first and
19 second factors weigh in favor of dismissal.

20 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in and of
21 itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently increases the risk
22 that witnesses' memories will fade and evidence will become stale," id., and it is Plaintiff's failure to
23 argue his motion for default judgment that is causing delay. Therefore, the third factor weighs in favor
24 of dismissal.

25 As for the availability of lesser sanctions, at this stage in the proceedings there is little available
26 to the Court which would constitute a satisfactory lesser sanction while protecting the Court from further
27 unnecessary expenditure of its scarce resources. Plaintiff is proceeding in forma pauperis in this action,
28

1 making monetary sanctions of little use, and given the circumstances of this case, the preclusion of
2 evidence or witnesses at trial is not available. However, inasmuch as the dismissal being considered in
3 this case is without prejudice, the Court is stopping short of issuing the harshest possible sanction of
4 dismissal with prejudice.

5 Finally, because public policy favors disposition on the merits, this factor will always weigh
6 against dismissal. Id. at 643.

7 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed based on
8 Plaintiff's failure to obey the court's order of August 23, 2012.

9 These findings and recommendations are submitted to the United States District Judge assigned
10 to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being
11 served with these findings and recommendations, plaintiff may file written objections with the court.
12 Such a document should be captioned "Objections to Magistrate Judge's Findings and
13 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
14 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: November 30, 2012

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE