

1 required to effect service in his own action. Thus, both the first and second factors weigh in favor of
2 dismissal.

3 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of
4 itself to warrant dismissal.” *Id.* (citing *Yourish* at 991). However, “delay inherently increases the risk
5 that witnesses’ memories will fade and evidence will become stale,” *id.*, and it is Plaintiff’s failure to
6 complete and return service documents that is causing delay. Therefore, the third factor weighs in favor
7 of dismissal.

8 As for the availability of lesser sanctions, at this stage in the proceedings there is little available
9 to the Court which would constitute a satisfactory lesser sanction while protecting the Court from further
10 unnecessary expenditure of its scarce resources. Plaintiff is proceeding in forma pauperis in this action,
11 making monetary sanctions of little use, and given the early stage of these proceedings, the preclusion
12 of evidence or witnesses is not available. However, inasmuch as the dismissal being considered in this
13 case is without prejudice, the Court is stopping short of issuing the harshest possible sanction of
14 dismissal with prejudice.

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

17 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed based on
18 plaintiff’s failure to obey the court’s order of September 3, 2009.

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

25
26 IT IS SO ORDERED.

27 **Dated: October 29, 2009**

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE

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