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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 KELLY MORGAN,

12 Plaintiff,

13 vs.

14 JAMES TILTON, et al.,

15 Defendants.
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1:08-cv-00233-LJO-GSA-PC

FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR PLAINTIFF'S
FAILURE TO COMPLY WITH COURT
ORDERS
(Docs. 81, 84, 86.)

OBJECTIONS, IF ANY, DUE IN THIRTY
DAYS

18 **I. BACKGROUND**

19 Kelly Morgan ("Plaintiff") is a state prisoner proceeding pro se with this civil rights
20 action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on February 15, 2008. (Doc. 1.)

21 The case now proceeds on Plaintiff's Third Amended Complaint, filed on July 28, 2011, against
22 defendant Correctional Officer (C/O) M. Hernandez ("Defendant") for retaliation and
23 obstruction of mail, in violation of the First Amendment.¹ (Doc. 45.)

24 On October 26, 2012, the court issued a scheduling order establishing pretrial deadlines
25 for the parties, including a discovery deadline of June 26, 2013 and a dispositive motions
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28 ¹All remaining claims and defendants were dismissed from this action by the Court on October 17, 2011,
based on Plaintiff's failure to state a claim. (Doc. 52.)

1 deadline of September 5, 2013.² (Doc. 71.) On March 18, 2013, Defendant filed a motion to
2 compel Plaintiff to respond to Defendant’s First Set of Interrogatories. (Doc. 75.) Plaintiff did
3 not file an opposition to the motion. (Court Docket.) On September 25, 2013, the court
4 granted Defendant’s motion to compel, ordering Plaintiff to respond to Defendant’s First Set of
5 Interrogatories within twenty days. (Doc. 81.) In the court’s order, Plaintiff was forewarned
6 that his “failure to comply with this order shall result in a recommendation that this action be
7 dismissed.” (Id. at 4 ¶4.)

8 On October 30, 2013, Defendant filed a motion for the court to dismiss this action based
9 on Plaintiff’s failure to comply with the September 25, 2013 order, or in the alternative, to
10 modify the scheduling order. (Doc. 82.) Plaintiff did not file an opposition to the motion.³
11 (Court Docket.)

12 On December 6, 2013, the court issued an order requiring Plaintiff to file an opposition
13 or statement of non-opposition to Defendant Hernandez’ motion to dismiss, within thirty days.
14 (Doc. 84.) Plaintiff was advised in the order that if he failed to comply with the court’s order,
15 the court would deem the failure to respond as a waiver, and recommend that Defendant’s
16 motion to dismiss be granted on that basis. (Id. at 2 ¶2.) On December 19, 2013, Plaintiff filed
17 objections to the court’s order, explaining that he is unable to litigate this lawsuit because he is
18 presently housed in a psychiatric unit at the prison and does not have access to his legal
19 materials. (Doc. 85.) Plaintiff simply requested the court to resolve this case in his favor. (Id.)
20 On December 31, 2013, the court issued an order addressing Plaintiff’s objections and granting
21 him a thirty-day extension of time to comply with the court’s order of December 6, 2013, by
22 either filing an opposition or a statement of non-opposition to Defendant’s motion to dismiss.
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24 ² On September 3, 2013, the court granted Defendant’s motion to modify the scheduling order, extending
25 the dispositive motions deadline to November 4, 2013. (Doc. 80.) To date, no other extensions of the deadlines
26 have been granted.

27 ³ Under Local Rule 230(*l*), which governs motions in prisoner actions such as Plaintiff’s, “[o]pposition, if
28 any, to the granting of the motion shall be served and filed by the responding party not more than twenty-one (21)
days after the date of service of the motion. A responding party who has no opposition to the granting of the
motion shall serve and file a statement to that effect, specifically designating the motion in question. Failure of the
responding party to file an opposition or to file a statement of no opposition may be deemed a waiver of any
opposition to the granting of the motion and may result in the imposition of sanctions.” L. R. 230(*l*).

1 (Doc. 86.) Plaintiff was advised in the order that if he required another extension of time, he
2 should file a motion for extension of time before the thirty day deadline expired. (Id. at 2:10-
3 11.) To date, Plaintiff has not filed an opposition or statement of non-opposition, or otherwise
4 responded to the court's order.

5 **II. DISMISSAL FOR FAILURE TO COMPLY WITH COURT'S ORDERS**

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

12 "The public's interest in expeditious resolution of litigation always favors dismissal,"
13 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
14 action has been pending for more than five years, since February 15, 2008. Plaintiff asserts that
15 he is unable to prosecute the action. However, Plaintiff has shown that he is capable of filing
16 objections to the court's orders, and therefore has the ability to file a motion for extension of
17 time if needed. In such an instance, the Court cannot continue to expend its scarce resources
18 assisting a litigant who will not help himself by requesting an extension of time to comply with
19 the court's orders. Thus, both the first and second factors weigh in favor of dismissal.

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

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

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

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

7 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed
8 without prejudice, based on Plaintiff's failure to obey the court's orders of September 25, 2013,
9 December 6, 2013, and December 31, 2013.

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

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20 IT IS SO ORDERED.

21 Dated: February 13, 2014

/s/ Gary S. Austin
22 UNITED STATES MAGISTRATE JUDGE
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