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

MICHAEL LENOIR SMITH,)	1:10-cv-00348-LJO-GSA-PC
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS CASE FOR FAILURE TO OBEY A
vs.)	COURT ORDER
)	(Doc. 3.)
LUBKEN, et al.,)	
)	OBJECTIONS, IF ANY, DUE IN THIRTY
Defendants.)	DAYS
)	

On March 2, 2010, the court issued an order requiring plaintiff to submit an application to proceed in forma pauperis, or in the alternative, to pay the \$350.00 filing fee for this action, within forty-five days. The forty-five day period has now expired, and plaintiff has not paid the filing fee, submitted an application, or otherwise responded to the court's order.

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

“The public’s interest in expeditious resolution of litigation always favors dismissal,” id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action has been pending since February 26, 2010. Plaintiff’s failure to respond to the Court's order may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the Court cannot continue to expend

1 its scarce resources assisting a litigant who will not help himself by either submitting an application or
2 paying the filing fee for his case. Thus, both the first and second factors weigh in favor of 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 submit an application or pay the filing fee in the first instance and to respond to the Court’s order in the
7 second instance that is causing delay. Therefore, the third factor weighs in favor 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’s failure to pay the filing fee at the
11 commencement of this action may indicate that plaintiff is indigent, making monetary sanctions of little
12 use, and given the early stage of these proceedings, the preclusion of evidence or witnesses is not
13 available. However, inasmuch as the dismissal being considered in this case is without prejudice, the
14 Court is stopping short of issuing the harshest possible sanction of 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 March 2, 2010.

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: May 4, 2010**

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE

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