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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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10 ROBERT MCDANIEL,
11 Plaintiff,
12 v.
13 FRANK X. CHAVEZ, et al,
14 Defendants.

Case No. 1:10-cv-01077-LJO-EPG (PC)
FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE,
BECAUSE OF PLAINTIFF’S FAILURE
TO PROSECUTE AND FAILURE TO
COMPLY WITH A COURT ORDER
(ECF NO. 74)
OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

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17 Robert McDaniel (“Plaintiff”) is a former state prisoner proceeding *pro se* and *in forma*
18 *pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983.

19 On January 24, 2018, the Court held a telephonic scheduling conference. As discussed
20 on the record at the conference, the Court converted Defendants’ motion to dismiss into a
21 motion for summary judgment. (ECF No. 74). The Court provided Plaintiff with the Rand
22 warning, and gave Plaintiff until April 30, 2018, to respond to the motion for summary
23 judgment. (Id. at 2-3).

24 The deadline for Plaintiff to respond has passed, and Plaintiff failed to file an opposition
25 to the motion, or a statement of non-opposition. Accordingly, the Court will recommend that
26 this case be dismissed, without prejudice, because of Plaintiff’s failure to prosecute and failure
27 to comply with a Court order.

28 “In determining whether to dismiss a[n] [action] for failure to prosecute or failure to

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

6 "The public's interest in expeditious resolution of litigation always favors dismissal."
7 Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly,
8 this factor weighs in favor of dismissal.

9 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
10 and of itself to warrant dismissal." Id. at 642 (citing Yourish, 191 F.3d at 991). However,
11 "delay inherently increases the risk that witnesses' memories will fade and evidence will
12 become stale," id. at 643, and it is Plaintiff's failure to file a Court-ordered response that is
13 causing delay. Therefore, the third factor weighs in favor of dismissal.

14 As for the availability of lesser sanctions, at this stage in the proceedings there is little
15 available to the Court which would constitute a satisfactory lesser sanction while protecting the
16 Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff's *in*
17 *forma pauperis* status, monetary sanctions are of little use, and given the posture of the case,
18 the preclusion of evidence or witnesses is not available. Additionally, because the dismissal
19 being considered in this case is without prejudice, the Court is stopping short of using the
20 harshest possible sanction of dismissal with prejudice.

21 Finally, because public policy favors disposition on the merits, this factor weighs
22 against dismissal. Id.

23 After weighing the factors, including the Court's need to manage its docket, the Court
24 finds that dismissal without prejudice is appropriate. Accordingly, the Court HEREBY
25 RECOMMENDS that:

- 26 1. This action be dismissed, without prejudice, because of Plaintiff's failure to
27 prosecute and failure to comply with a Court order; and
- 28 2. The Clerk of Court be directed to close this case.

1 These findings and recommendations are submitted to the United States district judge
2 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within twenty-**
3 **one (21) days** after being served with these findings and recommendations, any party may file
4 written objections with the court. Such a document should be captioned “Objections to
5 Magistrate Judge's Findings and Recommendations.” Any reply to the objections shall be
6 served and filed within seven days after service of the objections.

7 The parties are advised that failure to file objections within the specified time may
8 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
9 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10 IT IS SO ORDERED.

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12 Dated: May 7, 2018

13 /s/ Eric P. Groj
14 UNITED STATES MAGISTRATE JUDGE
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