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

FRANKIE WASHINGTON,  
Plaintiff,  
vs.  
D. OGLETREE, et al.,  
Defendants.

1:12-cv-01473-AWI-GSA (PC)  
FINDINGS AND RECOMMENDATION TO  
DISMISS CASE FOR FAILURE TO OBEY A  
COURT ORDER  
OBJECTIONS, IF ANY, DUE IN 30 DAYS

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On January 3, 2013, the court issued an order requiring Plaintiff to complete and return the court's form indicating whether he consents to, or declines, Magistrate Judge jurisdiction in this case pursuant to 28 U.S.C. § 636(c), within thirty days. (Doc. 5.) The thirty-day period has now expired, and plaintiff has not returned the form 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)).

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1           “‘The public’s interest in expeditious resolution of litigation always favors dismissal,’” *id.*  
2 (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action has  
3 been pending since September 10, 2012. This is the second order the court has issued in this case  
4 requesting plaintiff to complete and return the court's form, and plaintiff has not responded to either of  
5 the orders. Plaintiff's failure to respond to the court's orders may reflect Plaintiff's disinterest in  
6 prosecuting this case. In such an instance, the court cannot continue to expend its scarce resources  
7 assisting a litigant who will not participate in his lawsuit by responding to court orders. Thus, both the  
8 first and second factors weigh in favor of dismissal.

9           Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of  
10 itself to warrant dismissal.” *Id.* (citing *Yourish* at 991). However, “delay inherently increases the risk  
11 that witnesses’ memories will fade and evidence will become stale,” *id.*, and it is Plaintiff’s failure to  
12 respond to the Court's order that is causing delay. Therefore, the third factor weighs in favor of  
13 dismissal.

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

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

23           Accordingly, the court HEREBY RECOMMENDS that this action be dismissed based on  
24 plaintiff's failure to obey the court’s order of January 3, 2013.

25           These findings and recommendations are submitted to the United States District Judge assigned  
26 to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being  
27 served with these findings and recommendations, plaintiff may file written objections with the court.

1 Such a document should be captioned "Objections to Magistrate Judge's Findings and  
2 Recommendations." Plaintiff is advised that failure to file objections within the specified time may  
3 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: February 21, 2013**

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE