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

CHARLES BERNARD FAULTRY,

1:12-cv-01619-LJO-GSA (PC)

Plaintiff,

FINDINGS AND RECOMMENDATION TO
DISMISS CASE FOR FAILURE TO OBEY A
COURT ORDER

vs.

PEREZ,

OBJECTIONS, IF ANY, DUE IN 30 DAYS

Defendant.

_____ /

On October 4, 2012, the court issued an order requiring Plaintiff to submit an application to proceed in forma pauperis or pay the \$350.00 filing fee for this action, within forty-five (45) days. (Doc. 3.) The forty-five day period has now expired, and plaintiff has not submitted an application to proceed in forma pauperis, paid the filing fee, 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)).

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 October 3, 2012. Plaintiff’s failure to respond to the Court’s order may reflect
4 Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court cannot continue to expend
5 its scarce resources assisting a litigant who will not help himself by resolving payment of the filing fee
6 to enable his case to proceed. Thus, both the first and second factors weigh in favor of dismissal.

7 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of
8 itself to warrant dismissal.” *Id.* (citing *Yourish* at 991). However, “delay inherently increases the risk
9 that witnesses’ memories will fade and evidence will become stale,” *id.*, and it is Plaintiff’s failure to pay
10 the filing fee for his lawsuit or submit an application to proceed in forma pauperis in the first instance
11 and to respond to the Court’s order in the second instance that is causing delay. Therefore, the third
12 factor weighs in favor of dismissal.

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

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

22 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed based on
23 plaintiff’s failure to obey the court’s order of October 4, 2012.

24 These findings and recommendations are submitted to the United States District Judge assigned
25 to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being
26 served with these findings and recommendations, plaintiff may file written objections with the court.
27 Such a document should be captioned "Objections to Magistrate Judge's Findings and
28

1 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
2 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: December 6, 2012

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE