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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

MICHAEL J. SULLIVAN,  
Plaintiff,  
v.  
CHEN, *et al.*  
Defendants.

**Case No. 1:12-cv-01662-AWI-EPG (PC)  
FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSAL OF  
CASE FOR FAILURE TO PROSECUTE**

Plaintiff Michael J. Sullivan is a prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff initially filed his complaint on June 28, 2012. (ECF No. 1.) The case is currently proceeding on Plaintiff's second amended complaint. On January 3, 2017, the Court set an initial scheduling conference in this case for May 1, 2017. (ECF No. 78.) The parties were informed that appearances at the scheduling conference were mandatory and the parties were instructed to file a scheduling conference statement at least one week before the scheduling conference. The parties were also directed to serve initial disclosures within 30 days.

Plaintiff did not appear at the initial scheduling conference. Defendants noted that Plaintiff also had yet to serve initial disclosures and had not responded to any discovery requests. Plaintiff did not file a scheduling conference statement. The Court issued an Order to Show Cause why sanctions should not issue and set a hearing for May 15, 2017. (ECF No. 87.)

1 Plaintiff was warned that a failure to respond to the Order to Show Cause could lead to  
2 dismissal of his case.<sup>1</sup>

3 Plaintiff did not appear at the hearing on the Order to Show Cause on May 15, 2017,  
4 nor did he otherwise respond to the Order to Show Cause.

5 Local Rule 110 provides that “[f]ailure of counsel or of a party to comply with these  
6 Rules or with any order of the Court may be grounds for the imposition by the Court of any  
7 and all sanctions . . . within the inherent power of the Court.” District courts have the inherent  
8 power to control their dockets and “in the exercise of that power, they may impose sanctions  
9 including, where appropriate . . . dismissal.” *Thompson v. Housing Auth.*, 782 F.2d 829, 831  
10 (9th Cir. 1986). A court may dismiss an action based on a party’s failure to prosecute an action,  
11 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*,  
12 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v.*  
13 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order  
14 requiring amendment of complaint); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir.  
15 1986) (dismissal for lack of prosecution and failure to comply with local rules).  
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17 <sup>1</sup> This was not the first time the Court had issued an Order to Show Cause against Plaintiff; he was previously  
18 warned after he failed to submit service documents to the Court as ordered:

19 The Court notes that this case has been pending since June 28, 2012 and that much of the delay  
20 appears to stem from Plaintiff’s actions. After his first amended complaint was dismissed with  
21 leave to amend, for example, Plaintiff filed no less than six separate requests for extension of time  
22 to prepare the Second Amended Complaint. (ECF Nos. 32, 34, 38, 49, 53, 55.) After the Court  
23 issued Findings and Recommendations recommending that the action proceed only against  
24 defendants Chen, Patel, and Marchiano, Plaintiff requested three separate extensions of time to file  
objections. (ECF Nos. 61, 63, 64.) And even after those extensions, Plaintiff required an additional  
extension of time because he failed to file objections that conformed to the Court’s Local Rules.  
(ECF No. 67.) The case was further delayed after Plaintiff filed an interlocutory appeal of several  
of the Court’s orders, resulting in an order from the Ninth Circuit Court of Appeals summarily  
affirming the Court’s decision. (ECF No. 50.)

25 While the Court will provide Plaintiff another opportunity to submit the required service  
26 documents, Plaintiff is advised that any further attempts to delay this action will be viewed with  
27 great disfavor and may result in sanctions, up to and including the dismissal of his case. Plaintiff is  
28 further warned that he must review all Court orders carefully; even if Plaintiff is *pro se*, he is not  
excused from any deadlines or instructions merely because he inadvertently failed to read an  
order.

(ECF No. 73.)

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

7 “The public’s interest in expeditious resolution of litigation always favors dismissal,”  
8 *id.*, quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999), and here, the  
9 action has been pending since June 28, 2012. Plaintiff has been instructed to serve initial  
10 disclosures and appear to schedule his case, but has not done so. This reflects Plaintiff’s lack of  
11 interest in prosecuting this case. The Court cannot continue to expend resources on a case that  
12 Plaintiff has no interest in litigating. Thus, both the first and second factors weigh in favor of  
13 dismissal.

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15 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in  
16 and of itself to warrant dismissal.” *Id.*, citing *Yourish*, 191 F.3d at 991. However, “delay  
17 inherently increases the risk that witnesses’ memories will fade and evidence will become  
18 stale,” *id.*, and it is Plaintiff’s failure to participate in this litigation that is causing the delay.  
19 Therefore, the third factor weighs in favor of dismissal.

20 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
21 available to the Court that would constitute a satisfactory lesser sanction while protecting the  
22 Court from further unnecessary expenditure of its scarce resources. Monetary sanctions are of  
23 little use because of Plaintiff’s *in forma pauperis* status, and given the early stage of these  
24 proceedings, the preclusion of evidence or witnesses is not available. Thus, they would not  
25 induce compliance. Plaintiff has also previously been warned that a failure to obey court orders  
26 will result in dismissal, satisfying the requirement that the Court consider alternatives. *Ferdik*,  
27 963 F.2d at 1262.

