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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 CLEVELAND JAMES SMITH, JR.,

12 Plaintiff,

13 vs.

14 FRESNO COUNTY, et al.,

15 Defendants.
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1:14-cv-00845-LJO-GSA-PC

FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR PLAINTIFF'S
FAILURE TO COMPLY WITH COURT
ORDER
(Doc. 5.)

OBJECTIONS, IF ANY, DUE IN THIRTY
DAYS

19 On June 5, 2014, the court issued an order requiring Plaintiff to submit an application to
20 proceed in forma pauperis or pay the \$400.00 filing fee for this action, within forty-five days.
21 (Doc. 5.) The forty-five-day deadline has expired, and Plaintiff has not filed an application,
22 paid the filing fee, or otherwise responded to the court's order.

23 In determining whether to dismiss this action for failure to comply with the directives
24 set forth in its order, "the Court must weigh the following factors: (1) the public's interest in
25 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
26 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
27 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d
28 639, 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,”
2 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
3 action has been pending since May 29, 2014. Plaintiff’s failure to respond to the Court’s order
4 may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court cannot
5 continue to expend its scarce resources assisting a litigant who will not help himself by
6 resolving the payment of the filing fee for his lawsuit. Thus, both the first and second factors
7 weigh in favor of dismissal.

8 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
9 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently
10 increases the risk that witnesses’ memories will fade and evidence will become stale,” id., and it
11 is Plaintiff’s failure to respond to the Court’s order 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
14 available to the Court which would constitute a satisfactory lesser sanction while protecting the
15 Court from further unnecessary expenditure of its scarce resources. Plaintiff has not paid the
16 filing fee for this action, making it likely that he is indigent and monetary sanctions are of little
17 use, and given the early stage of these proceedings, the preclusion of evidence or witnesses is
18 not available. However, inasmuch as the dismissal being considered in this case is without
19 prejudice, the Court is stopping short of issuing the harshest possible sanction of dismissal with
20 prejudice.

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

23 Accordingly, the court **HEREBY RECOMMENDS** that this action be dismissed
24 without prejudice, based on Plaintiff’s failure to obey the court’s order of June 5, 2014.

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

1 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections
2 within the specified time may waive the right to appeal the District Court's order. Martinez v.
3 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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5 IT IS SO ORDERED.

6 Dated: August 7, 2014

/s/ Gary S. Austin
7 UNITED STATES MAGISTRATE JUDGE
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