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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 DALE OWEN DUSTIN,

12 Plaintiff,

13 v.

14 C. GIPSON, et al.,

15 Defendants.  
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1:14-cv-01405-LJO-EPG (PC)

FINDINGS AND RECOMMENDATIONS  
TO DISMISS CASE, WITHOUT  
PREJUDICE, FOR PLAINTIFF'S  
FAILURE TO COMPLY WITH A COURT  
ORDER AND FAILURE TO PROSECUTE  
(ECF NO. 19)

OBJECTIONS, IF ANY, DUE IN THIRTY  
DAYS

21 Dale Dustin ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* in  
22 this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing  
23 this action on June 25, 2014. (ECF No. 1). On May 18, 2015, the Court<sup>1</sup> directed Plaintiff to  
24 file an amended complaint. (ECF No. 19). The Court also notified Plaintiff that failure to file  
25 an amended complaint in compliance with the order would result in a recommendation that this  
26 action be dismissed for Plaintiff's failure to prosecute. (*Id.* at p. 4). Plaintiff was granted  
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28 <sup>1</sup> Magistrate Judge Gary S. Austin was the presiding magistrate judge on this case until  
September 13, 2015. (ECF No. 29).

1 numerous extensions of time to file an amended complaint (ECF Nos. 23, 31, 37, and 40), so on  
2 September 6, 2016, the Court entered an order granting Plaintiff a final thirty day extension  
3 (ECF No. 43). The time period has expired, and Plaintiff has not filed an amended complaint.  
4 Therefore, the Court recommends that this action be dismissed, without prejudice, for failure to  
5 prosecute and failure to comply with a court order.<sup>2</sup>

6 “In determining whether to dismiss a[n] [action] for failure to prosecute or failure to  
7 comply with a court order, the Court must weigh the following factors: (1) the public’s interest  
8 in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of  
9 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the  
10 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d  
11 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

12 “The public’s interest in expeditious resolution of litigation always favors dismissal,”  
13 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the  
14 action has been pending for over two years, since June of 2014. Additionally, Plaintiff was  
15 initially given thirty days from May 18, 2015, to file an amended complaint. (ECF No. 19). It  
16 is now October of 2016, and the amended complaint still has not been filed. While Plaintiff did  
17 request (and was granted) numerous extensions, his final extension has now expired. (ECF No.  
18 43).

19 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in  
20 and of itself to warrant dismissal.” Pagtalunan 291 F.3d at 642 (citing Yourish at 991).  
21 However, “delay inherently increases the risk that witnesses’ memories will fade and evidence  
22 will become stale,” id., and it is Plaintiff’s failure to file an amended complaint that is causing  
23 delay. The case is now over two years old, and there has not been an operative complaint for  
24 almost a year and a half. Therefore, the third factor weighs in favor of dismissal.

25 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
26 available to the Court which would constitute a satisfactory lesser sanction while protecting the

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28 <sup>2</sup> The Court notes that on October 9, 2015, it issued a similar Findings and Recommendations  
(ECF No. 28), but later vacated the Findings and Recommendations based on Plaintiff’s objection (ECF No. 31).

1 Court from further unnecessary expenditure of its scarce resources. Monetary sanctions are of  
2 little use, considering Plaintiff's incarceration and *in forma pauperis* status, and given the stage  
3 of these proceedings, the preclusion of evidence or witnesses is not available. Additionally,  
4 because the dismissal being considered in this case is without prejudice, the Court is stopping  
5 short of using the harshest possible sanction of dismissal with prejudice.

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

8 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed  
9 without prejudice, based on Plaintiff's failure to prosecute the case and failure obey the Court's  
10 order of May 18, 2015.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty  
13 days after being served with these findings and recommendations, Plaintiff may file written  
14 objections with the court. Such a document should be captioned "Objections to Magistrate  
15 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections  
16 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*  
17 *Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 IT IS SO ORDERED.  
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20 Dated: October 13, 2016

21 /s/ Eric P. Grogan  
22 UNITED STATES MAGISTRATE JUDGE  
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