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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 FREDERICK McKENZIE,

12 Plaintiff,

13 vs.

14 CRAIG APKER,

15 Defendant.
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1:15-cv-00221-LJO-GSA-PC

FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR FAILURE TO
OBEY COURT ORDERS
(Docs. 2, 7.)

OBJECTIONS, IF ANY, DUE IN THIRTY
(30) DAYS

17 On February 10, 2015 and March 30, 2015, the Court issued orders requiring Plaintiff to
18 complete and submit the Court's form indicating whether he will consent to the jurisdiction of a
19 Magistrate Judge in this case under 28 U.S.C. § 636(c), within thirty days. (Docs. 2, 7.) The
20 thirty-day deadlines have now passed, and Plaintiff has not submitted the Court's form or
21 otherwise responded to the Court's orders.¹

22 In determining whether to dismiss this action for failure to comply with the directives
23 set forth in its order, "the Court must weigh the following factors: (1) the public's interest in
24 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
25 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
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27 ¹ The Court's first order was not returned to the court by mail. However, the United States Postal Service
28 returned the second order on April 13, 2015, as undeliverable, with a notation on the envelope indicating that the
mail was "Refused." (Court Record.)

1 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d
2 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

3 “The public’s interest in expeditious resolution of litigation always favors dismissal,”
4 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
5 action has been pending since February 9, 2015. Plaintiff’s failure to respond to the Court’s
6 order may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court
7 cannot continue to expend its scarce resources assisting a litigant who will not help himself by
8 litigating his lawsuit. Thus, both the 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
10 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently
11 increases the risk that witnesses’ memories will fade and evidence will become stale,” id., and it
12 is Plaintiff’s failure to respond to the Court’s orders that is causing delay. Therefore, the third
13 factor weighs in favor of dismissal.

14 As for the availability of lesser sanctions, at this stage in the proceedings there is little
15 available to the Court which would constitute a satisfactory lesser sanction while protecting the
16 Court from further unnecessary expenditure of its scarce resources. Plaintiff is proceeding in
17 forma pauperis in this action, making monetary sanctions of little use, and given the early stage
18 of these proceedings, the preclusion of evidence or witnesses is not available. However,
19 inasmuch as the dismissal being considered in this case is without prejudice, the Court is
20 stopping short of issuing the harshest possible sanction of dismissal with 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 based
24 on Plaintiff’s failure to obey the Court’s orders of February 10, 2015 and March 30, 2015.
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 (30) days
27 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 result in the waiver of rights on appeal. Wilkerson v. Wheeler,
3 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
4 1991)).

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6 IT IS SO ORDERED.

7 Dated: June 11, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE