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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF CALIFORNIA
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6 KRZYSZTOF WOLINSKI,

7 Plaintiff,

8 vs.

9 N. ACOSTA, et al.,

10 Defendants.
11

1:15-cv-00519-LJO-GSA-PC

FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR FAILURE TO
OBEY COURT ORDER
(ECF No. 7.)

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

12 On June 16, 2015, the court issued an order requiring Plaintiff to file a First Amended
13 Complaint within thirty days. (ECF No. 7.) The thirty day period has now expired, and
14 Plaintiff has not filed a First Amended Complaint or otherwise responded to the court's order.

15 In determining whether to dismiss this action for failure to comply with the directives
16 set forth in its order, “the Court must weigh the following factors: (1) the public’s interest in
17 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
18 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
19 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d
20 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

21 “The public’s interest in expeditious resolution of litigation always favors dismissal,”
22 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
23 action has been pending since April 3, 2015. Plaintiff’s failure to respond to the court’s order
24 may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the court cannot
25 continue to expend its scarce resources assisting a litigant who will not help himself by
26 litigating his lawsuit. Thus, both the first and second factors weigh in favor of dismissal.

27 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
28 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently

1 increases the risk that witnesses' memories will fade and evidence will become stale," *id.*, and it
2 is Plaintiff's failure to file the First Amended Complaint that is causing delay. Therefore, the
3 third factor weighs in favor of dismissal.

4 As for the availability of lesser sanctions, at this stage in the proceedings there is little
5 available to the court which would constitute a satisfactory lesser sanction while protecting the
6 court from further unnecessary expenditure of its scarce resources. Plaintiff is proceeding in
7 forma pauperis in this action, making monetary sanctions of little use, and given the early stage
8 of these proceedings, the preclusion of evidence or witnesses is not available. However,
9 inasmuch as the dismissal being considered in this case is without prejudice, the court is
10 stopping short of issuing the harshest possible sanction of dismissal with prejudice.

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

13 Accordingly, the court HEREBY RECOMMENDS that this action be dismissed based
14 on Plaintiff's failure to obey the court's order of June 16, 2015. These findings and
15 recommendations are submitted to the United States District Judge assigned to the case,
16 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after being
17 served with these findings and recommendations, Plaintiff may file written objections with the
18 court. Such a document should be captioned "Objections to Magistrate Judge's Findings and
19 Recommendations." Plaintiff is advised that failure to file objections within the specified time
20 may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th
21 Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22
23 IT IS SO ORDERED.

24 Dated: August 6, 2015

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE