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6 UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA
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9 MICHAEL JACOBSEN,

10 Plaintiff,

11 v.

12 OFFICER MALDINADO, *et al.*,

13 Defendants.
14

Case No. 1:16-cv-01050-LJO-JDP

FINDINGS AND RECOMMENDATIONS
THAT THE COURT DISMISS THE CASE
FOR PLAINTIFF'S FAILURES TO
PROSECUTE AND TO COMPLY WITH
COURT ORDERS

FOURTEEN-DAY DEADLINE

15 Plaintiff is a state prisoner proceeding without counsel in this civil rights action brought
16 under 42 U.S.C. § 1983. On October 26, 2018, defendant Gonzalez moved for summary
17 judgment. ECF No. 90. Plaintiff had twenty-one (21) days to oppose defendant's motion
18 under Local Rule 230(1), but he failed to do so. *See* ECF No. 91.

19 On December 12, 2018, the court ordered plaintiff to respond to defendant's motion
20 within twenty-one days. ECF No. 92. The court warned plaintiff that failure to respond could
21 result in dismissal of the case. *Id.* Nonetheless, plaintiff again failed to respond to defendant's
22 motion for summary judgment, thereby disobeying the court's order.

23 The court may dismiss a case for plaintiff's failure to prosecute or failure to comply
24 with a court order. *See* Fed. R. Civ. P. 41(b); *Hells Canyon Pres. Council v. U.S. Forest Serv.*,
25 403 F.3d 683, 689 (9th Cir. 2005). Involuntary dismissal is a harsh penalty, but a district court
26 has duties to resolve disputes expeditiously and to avoid needless burden for the parties. *See*
27 Fed. R. Civ. P. 1; *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).
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1 In considering whether to dismiss a case for failure to prosecute, a court ordinarily
2 considers five factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the
3 court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
4 policy favoring disposition of cases on their merits and (5) the availability of less drastic
5 sanctions.” *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting *Henderson v.*
6 *Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986)). These heuristic factors merely guide the court’s
7 inquiry; they are not conditions precedent for dismissal. *See In re Phenylpropanolamine (PPA)*
8 *Products Liability Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006).

9 “The public’s interest in expeditious resolution of litigation always favors dismissal.”
10 *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (quoting *Yourish v. California*
11 *Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this factor weighs in favor of
12 dismissal.

13 Turning to the risk of prejudice, pendency of a lawsuit, on its own, is not sufficiently
14 prejudicial to warrant dismissal. *Id.* (citing *Yourish*, 191 F.3d at 991). However, delay
15 inherently increases the risk that witnesses’ memories will fade and evidence will become stale,
16 *id.* at 643, and it is plaintiff’s failure to prosecute this case that is causing delay. Therefore, the
17 third factor weighs in favor of dismissal.

18 As for the availability of lesser sanctions, at this stage in the proceedings there is little
19 available to the court that would constitute a satisfactory lesser sanction while protecting the
20 court from further unnecessary expenditure of its scarce resources. Monetary sanctions are of
21 little use, considering plaintiff’s incarceration and apparent inability to pay the filing fee, and—
22 given the stage of these proceedings—the preclusion of evidence or witnesses is not available.
23 Accordingly, the fourth factor also weighs in favor of dismissal.

24 Finally, because public policy favors disposition on the merits, this factor weighs
25 against dismissal. *Id.*

26 After weighing the factors, including the court’s need to manage its docket, the court
27 finds that dismissal is appropriate. The court recommends dismissal without prejudice.

1 **FINDINGS AND RECOMMENDATIONS**

2 The court recommends that the case be dismissed for plaintiff’s failures to prosecute or
3 comply with court orders.

4 The undersigned submits these findings and recommendations to the U.S. district judge
5 presiding over the case under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within fourteen
6 days of the service of the findings and recommendations, the parties may file written objections
7 to the findings and recommendations with the court and serve a copy on all parties. The
8 document containing the objections must be captioned “Objections to Magistrate Judge’s
9 Findings and Recommendations.” The presiding district judge will then review the findings
10 and recommendations under 28 U.S.C. § 636(b)(1)(C). The parties’ failure to file objections
11 within the specified time may waive their rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d
12 834, 839 (9th Cir. 2014).

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14 IT IS SO ORDERED.

15 Dated: March 14, 2019

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18 UNITED STATES MAGISTRATE JUDGE

19 No. 203
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