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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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10 TRAYVONE SMITH,

11 Plaintiff,

12 v.

13 EMMANUEL J. FANTONE and
JASWANT KHOKHAR,

14 Defendants.
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Case No. 1:16-cv-01179-LJO-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE,
BECAUSE OF PLAINTIFF'S FAILURE
TO COMPLY WITH COURT ORDERS

(ECF NOS. 30, 49, & 50)

OBJECTIONS, IF ANY, DUE WITHIN
TWENTY-ONE DAYS

17 Trayvone Smith ("Plaintiff") is a former state prisoner proceeding *pro se* and *in forma*
18 *pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983.

19 On October 26, 2017, the Court issued an Order Requiring Initial Disclosures and
20 Setting an Initial Scheduling Conference. (ECF No. 30). The order required the parties to
21 exchange initial disclosures and file scheduling conference statements. Plaintiff did not file a
22 scheduling conference statement or serve Defendants with his initial disclosures (ECF No. 45,
23 p. 3; ECF No. 50).

24 On March 19, 2018, the Court directed Plaintiff to serve his initial disclosures on
25 Defendants by April 6, 2018. (ECF No. 50, p. 2). On April 19, 2018, Defense Counsel filed a
26 declaration stating that he had not received any initial disclosures from Plaintiff. (ECF No. 55,
27 p. 2, ¶ 6).

28 While Plaintiff filed some documents that may have been intended to be his initial

1 disclosures (ECF No. 54), Plaintiff did not comply with the Court's order. Plaintiff was
2 supposed to serve the documents on Defendants, not file them with the Court. (ECF No. 50, p.
3 2).

4 But more importantly, Plaintiff did not provide all of the disclosures he was ordered to
5 provide. While Plaintiff did file documents, the Court also directed Plaintiff to provide
6 Defendants with "[t]he name and, if known, the address and telephone number of each
7 individual likely to have discoverable information—along with the subjects of that
8 information—that [Plaintiff] may use to support [his] claims or defenses, unless the use would
9 be solely for impeachment." (ECF No. 50, p. 2) (quoting ECF No. 30, p. 2). Plaintiff did not
10 provide this list, or any indication that he has no such names to provide.

11 Additionally, Plaintiff failed to respond to defendant Fantone's motion to dismiss, even
12 though he was ordered to do by the Court. On January 2, 2018, defendant Fantone filed a
13 motion to dismiss. (ECF No. 36). Plaintiff failed to respond, so the Court directed him to
14 respond by April 13, 2018. (ECF No. 49). The deadline has passed, and Plaintiff did not file a
15 response.

16 As Plaintiff has repeatedly failed to comply with this Court's orders, the Court will
17 recommend that this case be dismissed, without prejudice, for Plaintiff's failure to comply with
18 court orders.

19 "In determining whether to dismiss a[n] [action] for failure to prosecute or failure to
20 comply with a court order, the Court must weigh the following factors: (1) the public's interest
21 in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
22 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
23 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d
24 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

25 "The public's interest in expeditious resolution of litigation always favors dismissal."
26 Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly,
27 this factor weighs in favor of dismissal.

28 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in

1 and of itself to warrant dismissal.” Id. at 642 (citing Yourish, 191 F.3d at 991). However,
2 “delay inherently increases the risk that witnesses’ memories will fade and evidence will
3 become stale,” id. at 643, and it is Plaintiff’s repeated failure to obey this Court’s orders that is
4 causing delay. Therefore, the third factor weighs in favor of dismissal.

5 As for the availability of lesser sanctions, at this stage in the proceedings there is little
6 available to the Court which would constitute a satisfactory lesser sanction while protecting the
7 Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff’s *in*
8 *forma pauperis* status, monetary sanctions are of little use, and given the stage of these
9 proceedings, the preclusion of evidence or witnesses is not available. Additionally, because the
10 dismissal being considered in this case is without prejudice, the Court is stopping short of using
11 the harshest possible sanction of dismissal with prejudice.

12 Finally, because public policy favors disposition on the merits, this factor weighs
13 against dismissal. Id.

14 After weighing the factors, including the Court’s need to manage its docket, the Court
15 finds that dismissal without prejudice is appropriate. Accordingly, the Court HEREBY
16 RECOMMENDS that:

- 17 1. This action be dismissed, without prejudice, because of Plaintiff's failure to
18 comply with court orders; and
- 19 2. The Clerk of Court be directed to close this case.

20 These findings and recommendations are submitted to the United States district judge
21 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within twenty-**
22 **one (21) days** after being served with these findings and recommendations, any party may file
23 written objections with the court. Such a document should be captioned “Objections to
24 Magistrate Judge's Findings and Recommendations.” Any reply to the objections shall be
25 served and filed within seven days after service of the objections.

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