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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF CALIFORNIA

5 DINO DE LUCA,

6 Plaintiff,

7 v.

8 FRANCISCO MORENO,

9 Defendant.

Case No. 1:16-cv-01887-DAD-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE,
FOR PLAINTIFF'S FAILURE TO
COMPLY WITH A COURT ORDER AND
FAILURE TO PROSECUTE
(ECF NOS. 5 & 12)

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11 OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS
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14 At the time Dino De Luca ("Plaintiff") filed his complaint, he was a person detained by
15 the State of California under civil process. He is proceeding *pro se* and *in forma pauperis* in
16 this civil rights action pursuant to 42 U.S.C. § 1983. On December 19, 2016, Plaintiff filed his
17 complaint. (ECF No. 1). On January 12, 2017, the Court screened Plaintiff's complaint and
18 found that Plaintiff stated a cognizable claim against Defendant Francisco Moreno for
19 excessive force in violation of the Fourteenth Amendment. (ECF No. 5). The Court also found
20 service of the complaint appropriate, and sent Plaintiff service documents that Plaintiff was to
21 complete and return within thirty days from the date of service of the screening order. (Id.).

22 Because a notice the Court sent to Plaintiff on February 17, 2017, was returned as
23 undeliverable, the Court resent the screening order to Plaintiff on March 1, 2017.

24 The time period for Plaintiff to complete and return the service documents expired, and
25 Plaintiff did not complete and return the service documents. Additionally, Plaintiff failed to
26 keep the Court informed of his current address, as required by Local Rule 183(b) and the First
27 Informational Order in Prisoner/Civil Detainee Civil Rights Case (ECF No. 3, p. 5).

28 Accordingly, on May 12, 2017, the Court issued findings and recommendations,

1 recommending that Plaintiff's case be dismissed for failure to comply with a court order and
2 failure to prosecute. (ECF No. 9). The findings and recommendations served on Plaintiff were
3 returned as undeliverable.

4 On June 23, 2017, Plaintiff filed a notice of change of address. (ECF No. 11). Because
5 Plaintiff provided an updated address, on June 26, 2017, the Court vacated its findings and
6 recommendations, directed the Clerk of Court to send Plaintiff a copy of the screening order
7 and service documents, and gave Plaintiff thirty days from the date of service of the order to
8 complete and return the service documents. (ECF No. 12). Plaintiff was warned that if he
9 failed to timely complete and return the service documents, the Court would issue findings and
10 recommendations, recommending that this case be dismissed without prejudice for failure to
11 prosecute and failure to comply with a Court order. (Id.).

12 The time period expired, and Plaintiff has once again failed to complete and return the
13 service documents. Accordingly, the Court will once again recommend that Plaintiff's case be
14 dismissed for failure to comply with a court order and failure to prosecute.

15 "In determining whether to dismiss a[n] [action] for failure to prosecute or failure to
16 comply with a court order, the Court must weigh the following factors: (1) the public's interest
17 in 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)). Accordingly,
23 this factor weighs in favor of dismissal.

24 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
25 and of itself to warrant dismissal." Id. at 642 (citing Yourish, 191 F.3d at 991). However,
26 "delay inherently increases the risk that witnesses' memories will fade and evidence will
27 become stale," id. at 643, and it is Plaintiff's failure to complete and return the service
28 documents that is causing delay. It has been over seven months since the Court first directed

1 Plaintiff to complete and return the service documents, and the case is stalled until Plaintiff
2 completes and returns those documents. Therefore, the third factor weighs in favor of
3 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. Considering Plaintiff's
7 detention and *in forma pauperis* status, monetary sanctions are of little use, and given the stage
8 of these proceedings, the preclusion of evidence or witnesses is not available. Additionally,
9 because the dismissal being considered in this case is without prejudice, the Court is stopping
10 short of using the harshest possible sanction of dismissal with prejudice.

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

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

- 16 1. This action be dismissed, without prejudice, based on Plaintiff's failure to
17 prosecute this case and failure to comply with the Court's orders entered on
18 January 12, 2017 (ECF No. 5), and June 26, 2017 (ECF No. 12); and
- 19 2. The Clerk of Court be directed to close this case.

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