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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

AUSTIN THOMAS,

 Plaintiff,

 v.

I. LOZANO, et al.,

 Defendants.

Case No. 1:17-cv-01068-AWI-BAM (PC)

FINDINGS AND RECOMMENDATION
REGARDING DISMISSAL OF ACTION,
WITHOUT PREJUDICE, FOR FAILURE TO
OBEY A COURT ORDER AND FAILURE
TO PROSECUTE

(ECF No. 11)

FOURTEEN (14) DAY DEADLINE

I. Background

Plaintiff Austin Thomas is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On April 8, 2019, the Court issued a screening order finding that Plaintiff had stated cognizable claims for excessive force in violation of the Eighth Amendment against Defendant Lozano and for failure to intervene in violation of the Eighth Amendment against Defendant Shirk, but failed to state any other claims against any other defendants. (ECF No. 11.) The Court ordered Plaintiff to either, within thirty days, file a second amended complaint or notify the Court in writing that he does not wish to file a second amended complaint and is willing to proceed only on the claims against Defendants Lozano and Shirk that the Court identified as cognizable. (Id. at 9.) The

1 time for Plaintiff to either file a second amended complaint or a written notice of his willingness to
2 proceed only on the claims found cognizable by the Court has expired, and Plaintiff has failed to
3 either file a second amended complaint, a written notice, or otherwise communicate with the Court
4 regarding this action.

5 **II. Failure to Prosecute and Failure to Obey a Court Order**

6 **A. Legal Standard**

7 Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with
8 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
9 within the inherent power of the Court.” District courts have the inherent power to control their
10 dockets and “[i]n the exercise of that power they may impose sanctions including, where
11 appropriate, . . . dismissal.” Thompson v. Hous. Auth., 782 F.2d 829, 831 (9th Cir. 1986). A court
12 may dismiss an action based on a party’s failure to prosecute an action, failure to obey a court order,
13 or failure to comply with local rules. See, e.g., Ghazali v. Moran, 46 F.3d 52, 53–54 (9th Cir. 1995)
14 (dismissal for noncompliance with local rule); Ferdik v. Bonzelet, 963 F.2d 1258, 1260–61 (9th
15 Cir. 1992) (dismissal for failure to comply with an order requiring amendment of complaint);
16 Malone v. U.S. Postal Serv., 833 F.2d 128, 130–33 (9th Cir. 1987) (dismissal for failure to comply
17 with court order).

18 In determining whether to dismiss an action, the Court must consider several factors:
19 “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its
20 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases
21 on their merits[;] and (5) the availability of less drastic sanctions.” Henderson v. Duncan, 779 F.2d
22 1421, 1423 (9th Cir. 1986); see Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988).

23 **B. Discussion**

24 In this case, Plaintiff has failed to comply with the Court’s April 8, 2019 screening order
25 and either file a second amended complaint or a written notice that he is willing to proceed only on
26 the cognizable claims identified by the Court. Further, Plaintiff has not requested an extension of
27 time to comply with the Court’s April 8, 2019 screening order, or otherwise communicated with
28 the Court regarding this action in any manner. Plaintiff’s failure to continue prosecuting this action

1 by obeying the Court’s April 8, 2019 order is hindering this litigation from being resolved
2 expeditiously and preventing the Court from effectively managing its docket. Therefore, the Court
3 finds that both the first and second factors weigh in favor of dismissal.

4 The third factor, risk of prejudice to defendants, also weighs in favor of dismissal, since a
5 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
6 Anderson v. Air W., 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs against
7 dismissal because public policy favors disposition on the merits. Pagtalunan v. Galaza, 291 F.3d
8 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose responsibility
9 it is to move a case toward disposition on the merits but whose conduct impedes progress in that
10 direction[,]” which is the case here. In re Phenylpropanolamine (PPA) Products Liability
11 Litigation, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation and internal quotation marks omitted).
12 Thus, in this case, the fourth factor weighs in favor of dismissal.

13 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
14 dismissal satisfies the “considerations of the alternatives” requirement. Ferdik, 963 F.2d at 1262;
15 Malone, 833 at 132–33; Henderson, 779 F.2d at 1424. The Court’s April 8, 2019 screening order
16 expressly warned Plaintiff that his failure to comply with the Court’s order would result in a
17 recommendation of dismissal of this action, without prejudice, for failure to obey a court order and
18 for failure to prosecute. (ECF No. 11, at 10.) Thus, Plaintiff had adequate warning that dismissal
19 could result from his noncompliance.

20 Additionally, at this stage in the proceedings there is little available to the Court that would
21 constitute a satisfactory lesser sanction while protecting the Court from further unnecessary
22 expenditure of its scarce resources. Plaintiff is proceeding *in forma pauperis* in this action, making
23 monetary sanctions of little use, and the preclusion of evidence or witnesses is likely to have no
24 effect given that Plaintiff has ceased litigating this case. Therefore, the fifth factor also weighs in
25 favor of dismissal.

26 **III. Conclusion and Recommendation**

27 Accordingly, the Court finds that dismissal is the appropriate sanction and HEREBY
28 RECOMMENDS that this action be dismissed, without prejudice, for Plaintiff’s failure to obey a

1 court order and for Plaintiff's failure to prosecute this action.

2 These Findings and Recommendation will be submitted to the United States District Judge
3 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**
4 **days** after being served with these Findings and Recommendation, Plaintiff may file written
5 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
6 Findings and Recommendation." Plaintiff is advised that failure to file objections within the
7 specified time may result in the waiver of the "right to challenge the magistrate's factual findings"
8 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
9 F.2d 1391, 1394 (9th Cir. 1991)).

10
11 IT IS SO ORDERED.

12 Dated: May 31, 2019

/s/ Barbara A. McAuliffe
13 UNITED STATES MAGISTRATE JUDGE

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