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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 ERIK ABELINO MARCELENO,

12 Plaintiff,

13 vs.

14 CALIFORNIA DEPARTMENT OF
15 CORRECTIONS AND
REHABILITATION, et al.,

16 Defendants.
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1:17-cv-01136-JLT-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITHOUT PREJUDICE FOR
PLAINTIFF'S FAILURE TO COMPLY
WITH COURT ORDERS
(ECF Nos. 45, 53.)**

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS**

19 **I. BACKGROUND**

20 Erik Abelino Marceleno ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma*
21 *pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. On August 23, 2017, Plaintiff
22 filed the Complaint commencing this action. (ECF No. 1.) This case now proceeds with
23 Plaintiff's First Amended Complaint filed on July 30, 2019, against defendant Sergeant Mora for
24 use of excessive force in violation of the Eighth Amendment and related state claims for assault
25 and battery, for money damages only. (ECF No. 19.)

26 This case is scheduled for a trial confirmation hearing on October 28, 2022, at 1:30 p.m.
27 before District Judge Jennifer L. Thurston. On March 3, 2021, the court issued the Second
28 Scheduling Order which required Plaintiff to file a pretrial statement on or before July 29, 2022.

1 (ECF No. 45.) Plaintiff failed to file his pretrial statement in compliance with the Second
2 Scheduling Order. On August 4, 2022, the Court issued an order requiring Plaintiff to show
3 cause, within twenty-one days, why this case should not be dismissed for his failure to comply
4 with the Second Scheduling Order's directive. (ECF No. 53.) The twenty-one-day deadline has
5 now expired and Plaintiff has not responded to the Court's order to show cause. Therefore, it
6 will be recommended that this case be dismissed for Plaintiff's failure to comply with the court's
7 orders.

8 **II. DISMISSAL FOR FAILURE TO COMPLY WITH COURT ORDERS**

9 In determining whether to dismiss this action for failure to comply with the directives set
10 forth in its orders, "the Court must weigh the following factors: (1) the public's interest in
11 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
12 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
13 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639,
14 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

15 "The public's interest in expeditious resolution of litigation always favors dismissal,"
16 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
17 action has been pending since August 23, 2017. Plaintiff's failure to respond to the Court's
18 orders may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the Court
19 cannot continue to expend its scarce resources assisting a litigant who will not prepare for his
20 own trial. Thus, both the first and second factors weigh in favor of dismissal.

21 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
22 and of itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently
23 increases the risk that witnesses' memories will fade and evidence will become stale," id., and it
24 is Plaintiff's failure to file his pretrial statement that is causing delay. Therefore, the third factor
25 weighs in favor of dismissal.

26 As for the availability of lesser sanctions, at this stage in the proceedings there is little
27 available to the Court which would constitute a satisfactory lesser sanction while protecting the
28 Court from further unnecessary expenditure of its scarce resources. Monetary sanctions in this

1 circumstance are of little use. However, inasmuch as the dismissal being considered in this case
2 is without prejudice, the Court is stopping short of issuing the harshest possible sanction of
3 dismissal with prejudice.

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

6 **III. CONCLUSION AND RECOMMENDATIONS**

7 Accordingly, the court **HEREBY RECOMMENDS** that:

- 8 1. This case be dismissed without prejudice, based on Plaintiff's failure to obey the
9 court's orders issued on March 3, 2021 and August 4, 2022; and
- 10 2. The Clerk be directed to close this case.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
13 days after the date of service of these findings and recommendations, any party may file written
14 objections with the court. Such a document should be captioned "Objections to Magistrate
15 Judge's Findings and Recommendations." The parties are advised that failure to file objections
16 within the specified time may waive the right to appeal the District Court's order. Martinez v.
17 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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19 IT IS SO ORDERED.

20 Dated: September 10, 2022

/s/ Gary S. Austin
21 UNITED STATES MAGISTRATE JUDGE
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