

1 “charged with violations of California Vehicle Code § 2800.4 (evading a peace officer by driving in the
2 opposite of traffic), California Vehicle Code § 2800.4 (driving recklessly while evading a peace
3 officer), California Penal Code § 30305(a)(1) (possession of ammunition by a person prohibited from
4 owning or possessing a firearm), and California Penal Code § 69 (obstruction or resistance of an officer
5 through the use of threat or violence).” (Doc. 3 at 2-3) Plaintiff pleaded *nolo contendere* to each of the
6 charges. (*Id.* at 3)

7 In light of these facts, the Court issued an order on September 29, 2017, directing Plaintiff to
8 “show cause in writing, within fourteen days of the date of service of this Order, why the action should
9 not be dismissed as barred” under *Heck v. Humphrey*, 512 U.S. 477, 486 n.6 (1994). (Doc. 3 at 3) On
10 October 6, 2017, Plaintiff requested an extension of time to respond (Doc. 4), which was granted by
11 the Court (Doc. 5). Accordingly, Plaintiff was ordered to “respond to the order to show cause no later
12 than **December 1, 2017.**” (Doc. 5 at 1, emphasis in original) To date, Plaintiff has not filed his
13 response, or taken any additional action to prosecute the matter.

14 **II. Failure to Prosecute and Obey the Court’s Orders**

15 The Local Rules, corresponding with Fed. R. Civ. P. 11, provide: “Failure of counsel or of a
16 party to comply with . . . any order of the Court may be grounds for the imposition by the Court of any
17 and all sanctions . . . within the inherent power of the Court.” LR 110. “District courts have inherent
18 power to control their dockets,” and in exercising that power, a court may impose sanctions including
19 dismissal of an action. *Thompson v. Housing Authority of Los Angeles*, 782 F.2d 829, 831 (9th Cir.
20 1986). A court may dismiss an action with prejudice, based on a party’s failure to prosecute an action
21 or failure to obey a court order, or failure to comply with local rules. *See, e.g. Ferdik v. Bonzelet*, 963
22 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order); *Malone v. U.S.*
23 *Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with a court order);
24 *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to prosecute and to
25 comply with local rules).

26 **III. Discussion and Analysis**

27 To determine whether to dismiss an action for failure to prosecute and failure to obey a Court
28 order, the Court must consider several factors, including: “(1) the public’s interest in expeditious

1 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
2 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability
3 of less drastic sanctions.” *Henderson*, 779 F.2d at 1423-24; *see also Ferdik*, 963 F.2d at 1260-61;
4 *Thomson*, 782 F.2d at 831.

5 **A. Public interest and the Court’s docket**

6 In the case at hand, the public’s interest in expeditiously resolving this litigation and the
7 Court’s interest in managing the docket weigh in favor of dismissal. *See Yourish v. Cal. Amplifier*,
8 191 F.3d 983, 990 (9th Cir. 1999) (“The public’s interest in expeditious resolution of litigation always
9 favors dismissal”); *Ferdik*, 963 F.2d at 1261 (recognizing that district courts have inherent interest in
10 managing their dockets without being subject to noncompliant litigants). This Court cannot, and will
11 not hold, this case in abeyance based upon Plaintiff’s failure to comply with the Court’s orders and
12 failure to take action to continue prosecution in a timely manner. *See Morris v. Morgan Stanley &*
13 *Co.*, 942 F.2d 648, 652 (9th Cir. 1991) (explaining a plaintiff has the burden “to move toward...
14 disposition at a reasonable pace, and to refrain from dilatory and evasive tactics”). Accordingly, these
15 factors weigh in favor of dismissal of the action.

16 **B. Prejudice to Defendant**

17 To determine whether the defendant suffers prejudice, the Court must “examine whether the
18 plaintiff’s actions impair the ... ability to go to trial or threaten to interfere with the rightful decision of
19 the case.” *Malone*, 833 F.2d at 131 (citing *Rubin v. Belo Broadcasting Corp.*, 769 F.2d 611, 618 (9th
20 Cir. 1985)). Significantly, a presumption of prejudiced arises when a plaintiff unreasonably delays the
21 prosecution of an action. *See Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). Here, Plaintiff
22 has not taken any action to further prosecuting the action—including responding to the order to show
23 cause to demonstrate his claim is not barred —despite being ordered by the Court to do so. Therefore,
24 this factor weighs in favor of dismissal.

25 **C. Consideration of less drastic sanctions**

26 The Court “abuses its discretion if it imposes a sanction of dismissal without first considering
27 the impact of the sanction and the adequacy of less drastic sanctions.” *United States v. Nat’l Medical*
28 *Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986). However, the Ninth Circuit has determined that a

1 court's warning to a party that his failure to obey could result in dismissal satisfies the "consideration
2 of alternatives" requirement. *See Malone*, 833 F.2d at 133; *Ferdik*, 963 F.2d at 1262. As the Ninth
3 Circuit explained, "a plaintiff can hardly be surprised" by a sanction of dismissal "in response to
4 willful violation of a pretrial order." *Malone*, 833 F.2d at 133.

5 Here, the Court warned Plaintiff in the order to show cause that "**his failure to comply with**
6 **this order will result in a recommendation that the case be dismissed.**" (Doc. 3 at 3, emphasis in
7 original) Significantly, the Court need only warn a party once that the matter could be dismissed for
8 failure to comply to satisfy the requirements of Rule 41. *Ferdik*, 963 F.2d at 1262; *see also Titus v.*
9 *Mercedes Benz of North America*, 695 F.2d 746, 749 n.6 (3rd Cir. 1982) (identifying a "warning" as
10 an alternative sanction). Accordingly, the warnings to Plaintiff satisfied the requirement that the Court
11 consider lesser sanctions, and this factor weighs in favor of dismissal of the action. *See Ferdik*, 963
12 F.2d at 1262; *Henderson*, 779 F.2d at 1424; *Titus*, 695 F.2d at 749 n.6.

13 **D. Public policy**

14 Given Plaintiff's failure to prosecute the action and failure to comply with the Court's orders,
15 the policy favoring disposition of cases on their merits is outweighed by the factors in favor of
16 dismissal. *See Malone*, 833 F.2d at 133, n.2 (explaining that although "the public policy favoring
17 disposition of cases on their merits . . . weighs against dismissal, it is not sufficient to outweigh the
18 other four factors").

19 **IV. Findings and Recommendations**

20 Plaintiff failed to comply with the Court's order to show cause why the action should not be
21 dismissed, despite receiving warnings that failure to comply could result in the action be dismissed. In
22 doing so, Plaintiff has also failed to take any action to prosecute this action.

23 Based upon the foregoing, the Court **RECOMMENDS**:

- 24 1. This action be **DISMISSED** without prejudice;
- 25 2. The motion to proceed *in forma pauperis* (Doc. 2) be terminated as **MOOT**; and
- 26 3. The Clerk of Court be **DIRECTED** to close the action.

27 These Findings and Recommendations are submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local

1 Rules of Practice for the United States District Court, Eastern District of California. Within fourteen
2 days after being served with these Findings and Recommendations, any party may file written
3 objections with the court. Such a document should be captioned “Objections to Magistrate Judge’s
4 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified
5 time may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
6 1991); *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

7
8 IT IS SO ORDERED.

9 Dated: December 10, 2017

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE