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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 DEMEKA EUGENE MOORE,

12 Plaintiff,

13 v.

14 JOEL MARTINEZ,

15 Defendants.
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Case No. 1:17-cv-01249-JDP

FINDINGS AND RECOMMENDATIONS
THAT THE COURT DISMISS THE CASE
FOR PLAINTIFF'S FAILURES TO
PROSECUTE, TO STATE A CLAIM, AND
TO COMPLY WITH COURT ORDERS

ORDER TO ASSIGN CASE TO DISTRICT
COURT JUDGE

FOURTEEN-DAY DEADLINE

20 Demeka Eugene Moore ("plaintiff") is a former state prisoner proceeding without counsel
21 in this civil rights action brought under 42 U.S.C. § 1983. On February 26, 2018, the court
22 screened the complaint and concluded that plaintiff had stated no cognizable claim. ECF No. 11.
23 The court required plaintiff, within thirty days, to file a first amended complaint curing the
24 deficiencies identified by the court, a notice of voluntary dismissal, or a notice of election to stand
25 on the complaint. *Id.* Plaintiff did not respond within the prescribed period, thereby disobeying
26 the court's order.

27 On April 9, 2018, the court issued an order to plaintiff to show cause why the case should
28 not be dismissed for failure to state a claim, failure to obey a court order, and failure to prosecute.

1 ECF No. 13. On April 23, 2018, plaintiff responded by filing a motion for an extension of time to
2 amend his complaint, ECF No. 14, and the court granted this request, allowing plaintiff until July
3 20, 2018, ECF No. 16. Plaintiff failed to respond within the deadline, again disobeying the
4 court's order. Nonetheless, considering plaintiff's pro se status and in the interests of justice, the
5 court gave plaintiff a final chance to explain why the court should not dismiss the case for his
6 failure to prosecute. ECF No. 17. The court ordered plaintiff to show cause why this action
7 should not be dismissed for failure to comply with a court order. *Id.* Plaintiff once again failed to
8 respond.

9 The court may dismiss a case brought by a prisoner seeking relief against a governmental
10 entity or officer or employee of a governmental entity for plaintiff's failure to state a claim. *See* 28
11 U.S.C. § 1915A(a). Here, the court found that plaintiff failed to state a claim, ECF No. 11, so the
12 case may be dismissed on this basis.

13 The court may also dismiss a case for plaintiff's failure to prosecute or failure to comply
14 with a court order. *See* Fed. R. Civ. P. 41(b); *Hells Canyon Pres. Council v. U.S. Forest Serv.*,
15 403 F.3d 683, 689 (9th Cir. 2005). Involuntary dismissal is a harsh penalty, but a district court
16 has duties to resolve disputes expeditiously and to avoid needless burden for the parties. *See*
17 Fed. R. Civ. P. 1; *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002).

18 In considering whether to dismiss the case for failure to prosecute, a court ordinarily
19 considers five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the
20 court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy
21 favoring disposition of cases on their merits and (5) the availability of less drastic sanctions."
22 *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (quoting *Henderson v. Duncan*, 779
23 F.2d 1421, 1423 (9th Cir.1986)). These heuristic factors merely guide the court's inquiry; they
24 are not conditions precedent for dismissal. *See In re Phenylpropanolamine (PPA) Products*
25 *Liability Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006).

26 "The public's interest in expeditious resolution of litigation always favors dismissal."
27 *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (quoting *Yourish v. California*

1 *Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this factor weighs in favor of
2 dismissal.

3 Turning to the risk of prejudice, pendency of a lawsuit, on its own, is not sufficiently
4 prejudicial to warrant dismissal. *Id.* (citing *Yourish*, 191 F.3d at 991). However, delay inherently
5 increases the risk that witnesses' memories will fade and evidence will become stale, *id.* at 643,
6 and it is plaintiff's failure to prosecute this case that is causing delay. Therefore, the third factor
7 weighs in favor of dismissal.

8 As for the availability of lesser sanctions, at this stage in the proceedings there is little
9 available to the court that would constitute a satisfactory lesser sanction while protecting the court
10 from further unnecessary expenditure of its scarce resources. Monetary sanctions are of little use,
11 considering plaintiff's incarceration and *in forma pauperis* status, and—given the stage of these
12 proceedings—the preclusion of evidence or witnesses is not available. While dismissal is a harsh
13 sanction, the court has already found that plaintiff's complaint failed to state a claim.

14 Finally, because public policy favors disposition on the merits, this factor weighs against
15 dismissal. *Id.*

16 After weighing the factors, including the court's need to manage its docket, the court finds
17 that dismissal is appropriate. The court will recommend dismissal without prejudice.

18 **Order**

19 The clerk of court is directed to assign this case to a district judge who will review the
20 findings and recommendations.

21 **Findings and Recommendations**

22 The court recommends that the case be dismissed without prejudice for plaintiff's failures
23 to state a claim, to prosecute, and to comply with court orders.

24 The undersigned submits these findings and recommendations to the U.S. district judge
25 presiding over the case under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within 14 days of
26 the service of the findings and recommendations, the parties may file written objections to the
27 findings and recommendations with the court and serve a copy on all parties. The document
28 containing the objections must be captioned "Objections to Magistrate Judge's Findings and

1 Recommendations.” The presiding district judge will then review the findings and
2 recommendations under 28 U.S.C. § 636(b)(1)(C). The parties’ failure to file objections within
3 the specified time may waive their rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839
4 (9th Cir. 2014).

5
6 IT IS SO ORDERED.

7 Dated: November 1, 2018


UNITED STATES MAGISTRATE JUDGE