

1 effectuated on defendants. The Court also advised counsel that the failure to comply with the
2 Court’s order may result in the imposition of sanctions. (Doc. No. 5.)

3 Plaintiff’s counsel failed to file a status report or proofs of service in compliance with the
4 Court’s order. Accordingly, on August 10, 2018, the Court issued an order for Plaintiff to show
5 cause why the Court should not impose sanctions, which could include a recommendation for
6 dismissal, based on the failure to comply with court orders and the failure to prosecute this action.
7 The Court directed Plaintiff to file a response to the show cause order in writing no later than
8 August 20, 2018. Plaintiff again was warned that the failure to comply with the order would
9 result in the imposition of sanctions. (Doc. No. 6.)

10 The deadline for Plaintiff to respond to the Court’s order to show cause has passed, and
11 Plaintiff has neither complied with the order or otherwise responded to the Court. Plaintiff also
12 has failed to comply with Federal Rule of Civil Procedure 4, which requires service on defendants
13 within 90 days after the complaint is filed, even after the Court allowed for additional time to
14 complete service. Fed. R. Civ. P. 4(m) (“If a defendant is not served within 90 days after the
15 complaint is filed, the court –on motion or on its own after notice to the plaintiff—must dismiss
16 the action without prejudice against that defendant or order that service be made within a
17 specified time.”)

18 **II. Discussion**

19 Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with
20 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
21 within the inherent power of the Court.” District courts have the inherent power to control their
22 dockets and “[i]n the exercise of that power they may impose sanctions including, where
23 appropriate, . . . dismissal.” *Thompson v. Housing Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A
24 court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,
25 failure to obey a court order, or failure to comply with local rules. *See, e.g., Ghazali v. Moran*, 46
26 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); *Ferdik v. Bonzelet*,
27 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
28 amendment of complaint); *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130–33 (9th Cir. 1987)

1 (dismissal for failure to comply with court order).

2 In determining whether to dismiss an action, the Court must consider several factors:

3 (1) the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
4 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
5 cases on their merits; and (5) the availability of less drastic sanctions. *Henderson v. Duncan*, 779
6 F.2d 1421, 1423 (9th Cir. 1986); *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988).

7 Here, this action has been pending since March 2018, and service on the defendants is
8 overdue. The Court cannot hold this case in abeyance awaiting compliance with the Court’s
9 orders by Plaintiff, and compliance with the Federal Rules of Civil Procedure regarding service.
10 Thus, the Court finds that both the first and second factors weigh in favor of dismissal.

11 The third factor, risk of prejudice to defendant, also weighs in favor of dismissal, since a
12 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
13 *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs
14 against dismissal because public policy favors disposition on the merits. *Pagtalunan v. Galaza*,
15 291 F.3d 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose
16 responsibility it is to move a case toward disposition on the merits but whose conduct impedes
17 progress in that direction,” which is the case here. *In re Phenylpropanolamine (PPA) Prods.*
18 *Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

19 Finally, a court’s warning to a party that failure to obey the court’s order will result in
20 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;
21 *Malone*, 833 at 132–33; *Henderson*, 779 F.2d at 1424. The Court’s order of June 5, 2018
22 expressly warned Plaintiff that the failure to comply with that order might result in sanctions.
23 (Doc. No. 5.) Further, the Court’s August 10, 2018 order to show cause expressly warned
24 Plaintiff that failure to comply with that order would result in the imposition of sanctions, which
25 may include a recommendation to dismiss this action. (Doc. No. 6 at 2.) Thus, Plaintiff had
26 adequate warning that dismissal could result from noncompliance.

27 Additionally, at this stage in the proceedings there is little available to the Court which
28 would constitute a satisfactory lesser sanction while protecting the Court from further

1 unnecessary expenditure of its scarce resources. The Court believes that monetary sanctions
2 against counsel, the preclusion of evidence or witnesses, or any lesser sanction would be of little
3 use and likely to have no effect given that counsel has ceased litigating this case and has stopped
4 responding to the Court's orders. Although the fault here appears to lie solely with counsel,
5 Plaintiff may not be excused from his lawyer's dilatory conduct or deficient lawyering. *See, e.g.,*
6 *Varnado v. ABM Industries, Inc.*, No. C-07-00804 CRB, 2007 WL 2915027, at *3 (N. D. Cal.
7 Oct. 5, 2007) (finding plaintiff's complaint subject to dismissal based on conduct of her attorney
8 in prior action; noting plaintiff's remedy may lie in malpractice action against her lawyer).

9 **III. Conclusion and Recommendation**

10 Accordingly, for the reasons explained above, it is HEREBY RECOMMENDED that this
11 action be dismissed for the failure to obey a court order and the failure to prosecute.

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

20
21 IT IS SO ORDERED.

22 Dated: August 23, 2018

23 /s/ Barbara A. McAuliffe
24 UNITED STATES MAGISTRATE JUDGE
25
26
27
28