

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

BARRY L. BROOKINS,

1:18-cv-00645-DAD-GSA-PC

Plaintiff,

**FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT THIS CASE BE  
DISMISSED, WITHOUT PREJUDICE, FOR  
FAILURE TO COMPLY WITH COURT ORDER  
(ECF No. 1.)**

RAJENDRA DWIVEDI,

Defendant.

## **OBJECTIONS, IF ANY, DUE WITHIN FOURTEEN DAYS**

Barry L. Brookins (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. On May 10, 2018, Plaintiff filed the Complaint commencing this action. (ECF No. 1.)

On June 4, 2018, the court screened the Complaint and issued an order to show cause, requiring Plaintiff to respond within thirty days showing cause why this case should not be dismissed as barred by the applicable statute of limitations. (ECF No. 8.) The thirty-day deadline has passed, and Plaintiff has not filed any response to the order to show cause.

In determining whether to dismiss this action for failure to comply with the directives set forth in its order, “the Court must weigh the following factors: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the

1 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d  
2 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

3 ““The public’s interest in expeditious resolution of litigation always favors dismissal,””  
4 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the  
5 action has been pending since May 10, 2018. Plaintiff’s failure to respond to the Court’s order  
6 may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court cannot  
7 continue to expend its scarce resources assisting a litigant who will not respond to the court’s  
8 orders. Thus, both the first and second factors weigh in favor of dismissal.

9 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in  
10 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently  
11 increases the risk that witnesses’ memories will fade and evidence will become stale,” id., and  
12 it is Plaintiff’s failure to respond to the Court’s order to show cause that is causing delay.  
13 Therefore, the third factor weighs in favor of dismissal.

14 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
15 available to the Court which would constitute a satisfactory lesser sanction while protecting the  
16 Court from further unnecessary expenditure of its scarce resources. Given that Plaintiff is a  
17 prisoner proceeding *in forma pauperis* in this action, the Court finds monetary sanctions of  
18 little use, and given the early stage of these proceedings, the preclusion of evidence or  
19 witnesses is not available. However, inasmuch as the dismissal being considered in this case is  
20 without prejudice, the Court is stopping short of issuing the harshest possible sanction of  
21 dismissal with prejudice.

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

24 Accordingly, the Court **HEREBY RECOMMENDS** that this action be dismissed  
25 based on Plaintiff’s failure to obey the Court’s order of June 4, 2018. These findings and  
26 recommendations are submitted to the United States District Judge assigned to the case,  
27 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being  
28 served with these findings and recommendations, Plaintiff may file written objections with the

1 Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
2 Recommendations.” Plaintiff is advised that failure to file objections within the specified time  
3 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th  
4 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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6 IT IS SO ORDERED.  
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8 Dated: July 25, 2018

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10 /s/ Gary S. Austin

11 UNITED STATES MAGISTRATE JUDGE  
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