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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF CALIFORNIA  
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10 RYAN DAVID FREITAG,  
11 Plaintiff,  
12 v.  
13 MARGARET MIMS, et al.,  
14 Defendants.  
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Case No. 1:18-cv-01180-EPG (PC)

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT THIS CASE BE  
DISMISSED, WITHOUT PREJUDICE,  
BECAUSE OF PLAINTIFF’S FAILURE  
TO PROSECUTE

OBJECTIONS, IF ANY, DUE WITHIN  
FOURTEEN DAYS

ORDER DIRECTING CLERK TO ASSIGN  
DISTRICT JUDGE

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17 Ryan Freitag (“Plaintiff”) is a prisoner proceeding *pro se* and *in forma pauperis* in this  
18 civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the complaint commencing this  
19 action on August 31, 2018. (ECF No. 1). On January 24, 2019, the Court screened Plaintiff’s  
20 complaint. (ECF No. 8). The Court gave Plaintiff thirty days to either file a first amended  
21 complaint, or “[n]otify the Court that he wishes to stand on the complaint, subject to this Court  
22 issuing findings and recommendations to the assigned district judge consistent with this order.”  
23 (Id. at 11).

24 The order was returned as undeliverable on February 21, 2019. Plaintiff has not  
25 responded to the Court’s order or filed a notice of change of address.<sup>1</sup> Accordingly, the Court  
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28 <sup>1</sup> “A party appearing in propria persona shall keep the Court and opposing parties advised as to his or her  
current address. If mail directed to a plaintiff in propria persona by the Clerk is returned by the U.S. Postal  
Service, and if such plaintiff fails to notify the Court and opposing parties within sixty-three (63) days thereafter of  
a current address, the Court may dismiss the action without prejudice for failure to prosecute.” Local Rule 183(b).

1 will recommend that Plaintiff's case be dismissed, without prejudice, for failure to prosecute.

2 "In determining whether to dismiss a[n] [action] for failure to prosecute or failure to  
3 comply with a court order, the Court must weigh the following factors: (1) the public's interest  
4 in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of  
5 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the  
6 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d  
7 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

8 "The public's interest in expeditious resolution of litigation always favors dismissal."  
9 Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly,  
10 this factor weighs in favor of dismissal.

11 As to the Court's need to manage its docket, "[t]he trial judge is in the best position to  
12 determine whether the delay in a particular case interferes with docket management and the  
13 public interest.... It is incumbent upon the Court to manage its docket without being subject to  
14 routine noncompliance of litigants...." Pagtalunan, 291 at 639. As described above, Plaintiff  
15 has failed to respond to a court order and has failed to update his address. These failures are  
16 delaying this case and interfering with docket management. Therefore, the second factor  
17 weighs in favor of dismissal.

18 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in  
19 and of itself to warrant dismissal." Id. at 642 (citing Yourish, 191 F.3d at 991). However,  
20 "delay inherently increases the risk that witnesses' memories will fade and evidence will  
21 become stale," id. at 643, and it is Plaintiff's failure to respond to a court order and to comply  
22 with the Local Rule requiring him to keep the parties and the Court apprised of his current  
23 address that is causing delay. Therefore, the third factor weighs in favor of dismissal.

24 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
25 available to the Court which would constitute a satisfactory lesser sanction while protecting the  
26 Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff's *in*  
27 *forma pauperis* status, monetary sanctions are of little use, and given the stage of these  
28 proceedings, the preclusion of evidence or witnesses is not available. Additionally, because the

1 dismissal being considered in this case is without prejudice, the Court is stopping short of using  
2 the harshest possible sanction of dismissal with prejudice.

3 Finally, because public policy favors disposition on the merits, this factor weighs  
4 against dismissal. Id.

5 After weighing the factors, the Court finds that dismissal without prejudice is  
6 appropriate. Accordingly, the Court HEREBY RECOMMENDS that:

- 7 1. This action be dismissed, without prejudice, based on Plaintiff's failure to  
8 prosecute this case; and
- 9 2. The Clerk of Court be directed to close this case.

10 These findings and recommendations will be submitted to the United States district  
11 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
12 fourteen (14) days after being served with these findings and recommendations, Plaintiff may  
13 file written objections with the Court. The document should be captioned "Objections to  
14 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file  
15 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.  
16 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394  
17 (9th Cir. 1991)).

18 Additionally, IT IS ORDERED that the Clerk of Court is directed to assign a district  
19 judge to this case.

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21 IT IS SO ORDERED.

22 Dated: August 30, 2019

23 /s/ Eric P. Gray  
24 UNITED STATES MAGISTRATE JUDGE  
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