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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 JOSE REYES,

12 Plaintiff,

13 v.

14 VALLEY STATE PRISON, et al.,

15 Defendants.
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1:20-cv-00023-ADA-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE
BE DISMISSED FOR PLAINTIFF'S
FAILURE TO COMPLY WITH COURT
ORDERS**

(ECF Nos. 44, 47.)

**OBJECTIONS, IF ANY, DUE BY AUGUST
10, 2023**

19 **I. BACKGROUND**

20 Jose Reyes ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* with
21 this civil rights action pursuant to 42 U.S.C. § 1983. This case now proceeds with the Fourth
22 Amended Complaint filed by Plaintiff on November 9, 2022, against Defendant Moosbauer and
23 Fisher. (ECF Nos. 34 & 36.)

24 On May 3, 2023, the Court issued an order requiring Plaintiff to either: (1) serve responses
25 to Defendant Moosebaur's first set of interrogatories, or (2) file with the court a statement of
26 opposition or non-opposition to Defendants' motion to compel on or before May 30, 2023. (ECF
27 No. 44.) The May 30, 2023 deadline expired and Plaintiff did not file a statement of opposition
28 or non-opposition to the motion to compel. Moreover, on June 15, 2023, Defendants filed a

1 motion to dismiss this case in which they assert that Plaintiff failed to comply with the Court's
2 May 3, 2023 order requiring him to serve responses to Defendant Moosebaur's first set of
3 interrogatories. (ECF No. 46 at 14 ¶ 12.)

4 On June 21, 2023, the Court issued an order for Plaintiff to show cause by July 20, 2023,
5 why this case should not be dismissed for Plaintiff's failure to comply with a court order. (ECF
6 No. 47.) The July 20, 2023 deadline has expired and Plaintiff has not filed a response to the order
7 to show cause.

8 **II. DISMISSAL FOR FAILURE TO COMPLY WITH COURT'S ORDERS**

9 In determining whether to dismiss this action for failure to comply with the directives set
10 forth in its order, "the Court must weigh the following factors: (1) the public's interest in
11 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
12 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
13 public policy favoring disposition of cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639,
14 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

15 "The public's interest in expeditious resolution of litigation always favors dismissal,"
16 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the
17 action has been pending since January 7, 2020. Plaintiff's failure to respond to the Court's order
18 may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the Court cannot
19 continue to expend its scarce resources assisting a litigant who will not respond to the Court's
20 orders. Thus, both the first and second factors weigh in favor of dismissal.

21 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in
22 and of itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently
23 increases the risk that witnesses' memories will fade and evidence will become stale," id., and it
24 is Plaintiff's failure to respond to court orders that is causing delay. Therefore, the third factor
25 weighs in favor of dismissal.

26 As for the availability of lesser sanctions, at this stage in the proceedings there is little
27 available to the Court that would constitute a satisfactory lesser sanction while protecting the
28 Court from further unnecessary expenditure of its scarce resources. Given that Plaintiff is a

1 prisoner proceeding *pro se* and *in forma pauperis* for this action, the Court finds monetary
2 sanctions of little use, and given the early stage of these proceedings, the preclusion of evidence
3 or witnesses is not available. However, inasmuch as the dismissal being considered in this case
4 is without prejudice, the Court is stopping short of issuing the harshest possible sanction of
5 dismissal with prejudice.

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

8 **III. RECOMMENDATIONS AND CONCLUSION**

9 Accordingly, the Court **HEREBY RECOMMENDS** that this case be dismissed based
10 on Plaintiff's failure to comply with the Court's orders issued on May 3, 2023 and June 21, 2023.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **On or before**
13 **August 10, 2023**, Plaintiff may file written objections with the Court. Such a document should
14 be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is
15 advised that failure to file objections within the specified time may result in the waiver of rights
16 on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*,
17 923 F.2d 1391, 1394 (9th Cir. 1991)).

18 IT IS SO ORDERED.
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20 Dated: July 21, 2023

/s/ Gary S. Austin
21 UNITED STATES MAGISTRATE JUDGE
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