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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 AARON SMART,

12 Plaintiff,

13 vs.

14 GEORGRY, et al.,

15 Defendants.  
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**1:21-cv-00457-GSA-PC**

**ORDER FOR THE CLERK OF COURT  
TO RANDOMLY ASSIGN A UNITED  
STATES DISTRICT JUDGE TO THIS  
ACTION**

**FINDINGS AND RECOMMENDATIONS  
TO DISMISS CASE FOR FAILURE TO  
OBEY COURT ORDER  
(ECF No. 3.)**

**OBJECTIONS, IF ANY, DUE IN  
FOURTEEN (14) DAYS**

22 Aaron Smart ("Plaintiff") is a state prisoner proceeding *pro se* with this civil rights action  
23 filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on  
24 March 18, 2021. (ECF No. 1.)

25 On March 25, 2021, the court issued an order requiring Plaintiff to either submit an  
26 application to proceed *in forma pauperis* or pay the \$402.00 filing fee for this action, within 45  
27 days. (ECF No. 3.) The 45-day time period has now expired and Plaintiff has not paid the filing  
28 fee, submitted an application to proceed *in forma pauperis*, or otherwise responded to the court's

1 order. Therefore, it will be recommended that this case be dismissed for Plaintiff's failure to  
2 comply with the court's order. The Clerk shall be directed to randomly assign a United States  
3 District Judge to this action.

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

10 "The public's interest in expeditious resolution of litigation always favors dismissal,"  
11 id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the  
12 action has been pending since March 18, 2021. Plaintiff's failure to respond to the Court's order  
13 may reflect Plaintiff's disinterest in prosecuting this case. In such an instance, the Court cannot  
14 continue to expend its scarce resources assisting a litigant who will not respond to court orders  
15 or resolve payment of the filing fee for his lawsuit. Thus, both the first and second factors weigh  
16 in favor of dismissal.

17 Turning to the risk of prejudice, "pendency of a lawsuit is not sufficiently prejudicial in  
18 and of itself to warrant dismissal." Id. (citing Yourish at 991). However, "delay inherently  
19 increases the risk that witnesses' memories will fade and evidence will become stale," id., and it  
20 is Plaintiff's failure to resolve payment of the filing fee for this case that is causing delay.  
21 Therefore, the third factor weighs in favor of dismissal.

22 As for the availability of lesser sanctions, at this stage in the proceedings there is little  
23 available to the Court which would constitute a satisfactory lesser sanction while protecting the  
24 Court from further unnecessary expenditure of its scarce resources. Monetary sanctions in this  
25 circumstance are of little use, and given the early stage of these proceedings, the preclusion of  
26 evidence or witnesses is not available. However, inasmuch as the dismissal being considered in  
27 this case is without prejudice, the Court is stopping short of issuing the harshest possible sanction  
28 of dismissal with prejudice.

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

3 Accordingly, **IT IS HEREBY ORDERED** that:

4 1. The Clerk of Court shall randomly assign a United States District Judge to this  
5 action; and

6 2. The Court **HEREBY RECOMMENDS** that this action be dismissed based on  
7 Plaintiff's failure to obey the Court's order issued on March 25, 2021.

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

16  
17 IT IS SO ORDERED.

18 Dated: **June 3, 2021**

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