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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN PAUL FRANK
SCHOWACHERT,

Plaintiff,

v.

BILL POLLEY and ALL OFFICERS ON
DUTY ON JANUARY 13, 2017,

Defendants.

Case No. 1:21-CV-01107-HBK (PC)

ORDER TO ASSIGN A DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION WITHOUT PREJUDICE
FOR PLAINTIFF’S FAILURE TO
PROSECUTE¹

FOURTEEN-DAY DEADLINE

Plaintiff John Paul Frank Schowachert, a prisoner, is proceeding pro se and *in forma pauperis* in this civil rights action. For the reasons set forth below, the undersigned recommends that the District Court dismiss this action for Plaintiff’s failure to comply with a court order and prosecute this action.

BACKGROUND

Plaintiff John Paul Frank Schowachert, a prisoner, initiated this action on June 16, 2021, by filing a civil rights complaint under 42 U.S.C. § 1983. (Doc. No. 1, “Complaint”). Plaintiff initiated this action in the Sacramento Division of the Eastern District of California, and it was transferred to this Court. (Doc. Nos. 1, 6). The Complaint identifies as Defendants: (1) Jail Commander Bill Polley, and (2) “all officers on duty on 1-13-2017.” (*Id.* at 1-2). The Complaint

¹ This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Ca. 2022).

1 is disjointed, difficult to discern, and contains rambling and unrelated sentences pertaining to
2 Plaintiff's family. (*Id.* at 3). Plaintiff alleges on January 13, 2017, all corrections officers on duty
3 at the Tuolumne County Jail conspired to murder him. (*Id.* at 3). As a result, Plaintiff lost his
4 wife, his house, suffered a traumatic brain injury, and experiences seizures. (*Id.*). As relief
5 Plaintiff seeks \$10,000,000.00 in damages. (*Id.* at 6).

6 On August 4, 2023, the undersigned issued an order to show cause directing Plaintiff to
7 show cause why this action should not be dismissed because his claim is barred by the statute of
8 limitations and because the Complaint is otherwise frivolous. (Doc. No. 10, "Order to Show
9 Cause"). Plaintiff was directed to deliver his response to the show cause order to correctional
10 officials for mailing no later than September 5, 2023. (*Id.* at 5 ¶ 1). The Court advised Plaintiff
11 that he could alternatively file a notice of voluntary dismissal under Rule 41 of the Federal Rules
12 of Civil Procedure to avoid a strike. (*Id.*). Finally, Plaintiff was advised that his failure to timely
13 respond to the Order to Show Cause would result in the undersigned recommending the district
14 court dismiss "this case as a sanction for Plaintiff's failure to comply with a court order and for
15 failing to prosecute this action after its determination that the complaint is frivolous[.]" (*Id.* at 5).
16 As of the date of these Findings and Recommendations, Plaintiff has not filed a response to the
17 Order to Show Cause and the time to do so has lapsed.²

18 **APPLICABLE LAW AND ANALYSIS**

19 **A. Legal Standard**

20 Federal Rule of Civil Procedure 41(b) permits the court to involuntarily dismiss an action
21 when a litigant fails to prosecute an action or fails to comply with other Rules or with a court
22 order. *See* Fed. R. Civ. P. 41(b); *see Applied Underwriters v. Lichtenegger*, 913 F.3d 884, 889
23 (9th Cir. 2019) (citations omitted). Similarly, this Court's Local Rules, which correspond with
24 Federal Rule of Civil Procedure 11, provide, "[f]ailure of counsel or of a party to comply with ...
25 any order of the Court may be grounds for the imposition by the Court of any and all sanctions ...
26 within the inherent power of the Court." E.D. Cal. L.R. 110. "District courts have inherent power

27 _____
28 ² As of the date of these Findings and Recommendations, 13 days have lapsed since the September 5, 2023
deadline, providing sufficient time for mailing.

1 to control their dockets” and, in exercising that power, may impose sanctions, including dismissal
2 of an action. *Thompson v. Housing Auth., City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986).
3 A court may dismiss an action based on a party’s failure to prosecute an action, obey a court
4 order, or comply with local rules. *See, e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir.
5 1992) (dismissal for failure to comply with a court order to amend a complaint); *Malone v. U.S.*
6 *Postal Service*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure to comply with a court
7 order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure to
8 prosecute and to comply with local rules). In determining whether to dismiss an action, the Court
9 must consider the following factors: (1) the public’s interest in expeditious resolution of
10 litigation; (2) the Court’s need to manage its docket; (3) the risk of prejudice to the defendants;
11 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
12 drastic sanctions. *Henderson*, 779 F.2d at 1423; *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir.
13 1988).

14 **B. Analysis**

15 After considering each of the above-stated factors, the undersigned concludes dismissal
16 without prejudice is warranted in this case. As to the first factor, the expeditious resolution of
17 litigation is deemed to be in the public interest, satisfying the first factor. *Yourish v. California*
18 *Amplifier*, 191 F.3d 983, 990-91 (9th Cir. 1999).

19 Turning to the second factor, this Court’s need to efficiently manage its docket cannot be
20 overstated. This Court has “one of the heaviest caseloads in the nation,” and due to the delay in
21 filling judicial vacancies, which was further exacerbated by the Covid-19 pandemic, operates
22 under a declared judicial emergency. *See Amended Standing Order in Light of Ongoing Judicial*
23 *Emergency in the Eastern District of California*. This Court’s time is better spent on its other
24 matters than needlessly consumed managing a case with a recalcitrant litigant. The Court cannot
25 effectively manage its docket when a litigant ceases to litigate his/her case or respond to a court
26 order. Thus, the Court finds that the second factor weighs in favor of dismissal.

27 Delays inevitably have the inherent risk that evidence will become stale or witnesses’
28 memories will fade or be unavailable and can prejudice a defendant, thereby satisfying the third

1 factor. *See Sibron v. New York*, 392 U.S. 40, 57 (1968). Thus, the third factor—risk of prejudice
2 to defendant—weighs in favor of dismissal since a presumption of injury arises from the
3 unreasonable delay in prosecuting an action. *Anderson v. Air W.*, 542 F.2d 522, 524 (9th Cir.
4 1976). Because Plaintiff’s inaction amounts to an unreasonable delay in prosecuting this action,
5 the third factor weighs in favor of dismissal.

6 The fourth factor usually weighs against dismissal because public policy favors the
7 disposition of cases on the merits. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002).
8 However, “this factor lends little support to a party whose responsibility it is to move a case
9 toward disposition on the merits but whose conduct impedes progress in that direction,” which is
10 the case here. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217,
11 1228 (9th Cir. 2006) (citation omitted). Indeed, “trial courts do not have time to waste on
12 multiple failures by aspiring litigants to follow the rules and requirements of our courts.”
13 *Pagtalunan v. Galaza*, 291 F.3d 639, 644 (9th Cir. 2002) (Trott, J., concurring in affirmance of
14 district court’s involuntary dismissal with prejudice of habeas petition where petitioner failed to
15 timely respond to court order and noting “the weight of the docket-managing factor depends upon
16 the size and load of the docket, and those in the best position to know what that is are our
17 beleaguered trial judges.”). Further, the Court’s August 4, 2023 Order to Show Cause found the
18 Complaint failed to state any cognizable claim because it was factually and legally frivolous.
19 (*See* Doc. No. 10).

20 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
21 dismissal satisfies the “considerations of the alternatives” requirement. *Ferdik*, 963 F.2d at 1262;
22 *Malone*, 833 F.2d at 132-33; *Henderson*, 779 F.2d at 1424. The Court’s August 4, 2023 Order to
23 Show Cause expressly warned Plaintiff that his failure to comply with the Court’s order would
24 result in the undersigned recommending the district court to dismiss this action for Plaintiff’s
25 failure to comply with a court order and prosecute this case. (*See* Doc. No. 10 at 5,
26 6 ¶ 2). Thus, Plaintiff had adequate warning that dismissal could result from his noncompliance.
27 And the instant dismissal is a dismissal *without* prejudice, which is a lesser sanction than a
28 dismissal with prejudice, thereby addressing the fifth factor.

1 After considering the factors set forth *supra* and binding case law, the undersigned
2 recommends dismissal, without prejudice, under Fed. R. Civ. P. 41(b) and Local Rule 110.

3 Accordingly, it is **ORDERED**:

4 The Clerk of the Court randomly assign this case to a District Judge.

5 It is further **RECOMMENDED**:

6 This action be **DISMISSED** without prejudice for Plaintiff's failure to obey court orders
7 and failure to prosecute. Because the dismissal for failure to prosecute and obey a court order is
8 after the Court screened the complaint and directed Plaintiff to file an amended complaint, this
9 dismissal shall qualify as a strike for purposes of 28 U.S.C. § 1915. *Harris v. Mangum*, 863 F.3d
10 1133, 1143 (9th Cir. 2017).

11 **NOTICE**

12 These Findings and Recommendations will be submitted to the United States District
13 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **Within 14 days**
14 **of the date of service** of these Findings and Recommendations, a party may file written
15 objections with the Court. The document should be captioned, "Objections to Magistrate Judge's
16 Findings and Recommendations." A party's failure to file objections within the specified time
17 may result in waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
18 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

19
20 Dated: September 18, 2023


HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE