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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KYLE DAVID MILTON,

Plaintiff,

v.

B.M. TRATE, et al.,

Defendants.

Case No. 1:22-cv-00988-ADA-EPG (PC)

FINDINGS AND RECOMMENDATIONS  
TO DISMISS THIS ACTION WITHOUT  
PREJUDICE FOR FAILURE TO  
PROSECUTE AND FAILURE TO  
COMPLY WITH A COURT ORDER

OBJECTIONS, IF ANY, DUE IN 14 DAYS

Kyle David Milton is an inmate in custody of federal Bureau of Prisons and is proceeding *pro se* and *in forma pauperis* in this civil rights action. For reasons stated below, the Court recommends that this be dismissed without prejudice for failure to prosecute and failure to comply with Court’s orders.

**I. BACKGROUND**

Defendants Trate and Grasley<sup>1</sup> filed a motion to dismiss and for summary judgment on April 25, 2023. (ECF No. 25). Their motion included a written warning about failure to respond as required by *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) and included a summary of Local Rule 230, warning that failure to respond may result in imposition of sanctions. (ECF No. 25 at 2–3). Defendant Paltenghi joined their pending motions on May 26,

<sup>1</sup> On the Court’s docket, Dr. Grasley’s name appears as “Grassley” because it was spelled that way in the Plaintiff’s complaint. Defendants’ Motion to Dismiss (ECF No. 25 at 2, n.1), states that the correct spelling is “Grasley.”

1 2023. (ECF No. 30). Thus, all three Defendants remaining after the Court’s screening order (ECF  
2 No. 11) joined in the motion to dismiss and for summary judgment. Plaintiff asked for additional  
3 60 days to respond (ECF No. 28) and the Court granted him the extension. (ECF No. 29).  
4 Plaintiff had until July 18, 2023 to respond to the motion to dismiss and for summary judgment,  
5 but no response was filed by that date. On August 2, 2023, Defendants filed a Response in  
6 support of their unopposed motion, urging the Court to grant it. (ECF No. 32).

7 The Court then issued an order on August 8, 2023, sua sponte giving Plaintiff another  
8 twenty-one days to file an opposition or statement of non-opposition to Defendants’ motion to  
9 dismiss and for summary judgment. (ECF No. 33). In that order, the Court warned Plaintiff that if  
10 he “fails to file his opposition within this period, the Court may deem the failure to oppose the  
11 motion to dismiss as a waiver of any opposition to that motion, and may recommend that the  
12 motion be granted on that basis. Alternatively, the Court may recommend that this action be  
13 dismissed for failure to prosecute and failure to comply with a court order.” (*Id.* at 2).

14 The twenty-one-day period has expired, and Plaintiff has not filed an opposition to  
15 Defendants’ motion or otherwise responded to the Court’s order. It appears that Plaintiff is  
16 unlikely to do so, for it was returned to the Court on August 22, 2023 as undeliverable and  
17 Plaintiff has failed to update his address with the clerk of court in the subsequent three months.

## 18 **II. LEGAL STANDARDS**

19 Under Federal Rule of Civil Procedure 41(b), a court may dismiss an action for failure to  
20 comply with court orders and to prosecute. In determining whether to dismiss an action under  
21 Rule 41(b) for failure to prosecute or failure to comply with a Court order, “the Court must weigh  
22 the following factors: (1) the public’s interest in expeditious resolution of litigation; (2) the  
23 court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the  
24 availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on  
25 their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*,  
26 963 F.2d 1258, 1260–61 (9th Cir. 1992)).

## 27 **III. ANALYSIS**

28 Despite the Court’s order for Plaintiff to file an opposition or statement of non-opposition  
to Defendants’ motion to dismiss and for summary judgment within twenty-one days, after more

1 than three months, Plaintiff failed to file any response. Moreover, Plaintiff has failed to keep his  
2 address current with the clerk of court, as required by Eastern District of California Local Rule  
3 182(f) (“Each . . . pro se party is under a continuing duty to notify the Clerk and all other parties  
4 of any change of address . . . Absent such notice, service of documents at the prior address  
5 . . . shall be fully effective.”). Plaintiff was also required to keep his address current by the  
6 Court’s order. (ECF No. 3 at 5). The Court issued multiple orders warning Plaintiff that failure to  
7 comply with Local Rules may result in dismissal of his case (ECF No. 3 at 1) and that failure to  
8 file an opposition to Defendants’ motion or statement of non-opposition may result in  
9 recommendation that “this action be dismissed for failure to prosecute and failure to comply with  
10 a court order.” (ECF No. 33 at 2). Despite these warnings, Plaintiff has failed to prosecute this  
11 action and to follow Court’s orders.

12 In applying the *Pagtalunan* factors to this case, the first factor weighs in favor of  
13 dismissal, because “[t]he public’s interest in expeditious resolution of litigation always favors  
14 dismissal.” *Id.* (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)  
(internal quotation marks omitted).

15 As to the second factor, the Court’s need to manage its docket, “[t]he trial judge is in the  
16 best position to determine whether the delay in a particular case interferes with docket  
17 management and the public interest. . . . It is incumbent upon the Court to manage its docket  
18 without being subject to routine noncompliance of litigants . . .” *Pagtalunan*, 291 F.3d at 639.  
19 Despite being given ample opportunity to do so, Plaintiff has failed to respond to the Defendants’  
20 motion filed seven months ago and the Court’s order filed three months ago. Plaintiff also failed  
21 to update his address for the past three months. This failure to respond and to keep the Court and  
22 the Defendants informed as to the address to which pleadings and discovery may be sent is  
23 inexcusably delaying the case and interfering with docket management. Therefore, the second  
24 factor weighs in favor of dismissal.

25 Turning to the third *Pagtalunan* factor, risk of prejudice to Defendants, “pendency of a  
26 lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal.” *Id.* at 642 (citing  
27 *Yourish*, 191 F.3d at 991). However, “delay inherently increases the risk that witnesses’ memories  
28 will fade and evidence will become stale,” *id.* at 643, and it is Plaintiff’s failure to prosecute this

1 case that is causing delay. Moreover, Defendants are urging the Court to dismiss the case. (ECF  
2 Nos. 25, 32). Therefore, the third factor weighs in favor of dismissal.

3 As for the availability of lesser sanctions, the fourth *Pagtalunan* factor, at this stage in the  
4 proceedings there is little available to the Court which would constitute a satisfactory lesser  
5 sanction while protecting the Court from further unnecessary expenditure of its scarce resources.  
6 Considering Plaintiff's incarceration and *in forma pauperis* status, monetary sanctions are of little  
7 use. And, given the stage of these proceedings, the preclusion of evidence or witnesses is not  
8 available. Moreover, dismissal *without prejudice* is the lesser sanction available to the Court.  
9 Under Federal Rule of Civil Procedure 41(b), a court may dismiss an action *with prejudice* for  
10 failure to comply with court orders and to prosecute. Fed. R. Civ. P. (41)(b); *see also Link v.*  
11 *Wabash R. Co.*, 370 U.S. 626, 630–31 (1962) (holding that Rule 41(b) allows sua sponte  
12 dismissal by the Court because “[t]he authority of a court to dismiss sua sponte for lack of  
13 prosecution has generally been considered an ‘inherent power,’ governed not by rule or statute  
14 but by the control necessarily vested in courts to manage their own affairs so as to achieve the  
15 orderly and expeditious disposition of cases.”) Therefore, the fourth factor also weighs in favor of  
16 dismissal.

17 Finally, public policy favors disposition on the merits. *Pagtalunan*, 291 F.3d at 643.  
18 Because the dismissal is without prejudice, and thus, does not operate as an adjudication on the  
19 merits, this factor weighs against dismissal.

#### 20 **IV. CONCLUSION AND RECOMMENDATIONS**

21 After weighing the *Pagtalunan* factors, the Court finds that dismissal without prejudice is  
22 appropriate. Accordingly, the Court HEREBY RECOMMENDS that:

- 23 1. This action be dismissed without prejudice under Federal Rule of Civil Procedure  
24 41(b) for failure to prosecute and failure to follow Court's orders;
- 25 2. Defendants' Motion to Dismiss, ECF No. 25, be denied as moot; and
- 26 3. The Clerk of Court be directed to close this case.

27 These findings and recommendations will be submitted to the United States district judge  
28 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen  
(14) days after being served with these findings and recommendations, Plaintiff may file written

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

5 IT IS SO ORDERED.

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Dated: November 27, 2023

/s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE