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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MAURICE JOHNSON,  
Plaintiff,  
v.  
FELKER, et al.,  
Defendants.

No. 2:12-cv-2719 GEB KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding pro se, with a civil rights action pursuant to 42 U.S.C. § 1983. By order filed November 23, 2015, plaintiff was ordered to show cause why this action should not be dismissed based on his failure to file a notice attesting to his compliance with the court’s October 15, 2015 order. On December 17, 2015, plaintiff filed a one page response, enclosing 47 exhibits. After review of plaintiff’s response and the record in this case, the undersigned recommends that this action be dismissed. Fed. R. Civ. P. 41(b).

II. Background

On February 26, 2014, the parties were informed that “[t]he failure of any party to comply with this order, the Federal Rules of Civil Procedure, or the Local Rules of Court, may result in the imposition of sanctions including, but not limited to, dismissal of the action or entry of default. See Fed. R. Civ. P. 41(b).” (ECF No. 26 at 5.)

1 In the May 19, 2014 discovery and scheduling order, the parties were informed that  
2 discovery requests and responses are not to be filed with the court, except as required by court  
3 order, and that such filing may result in an order of sanctions, including, but not limited to a  
4 recommendation that the action be dismissed. (ECF No. 33 at 4-5.)

5 On August 18, 2014, defendants filed their motion for summary judgment for failure to  
6 exhaust administrative remedies. On March 18, 2015, all of plaintiff's claims were dismissed  
7 without prejudice except for plaintiff's due process claim against defendant Statti, based on  
8 events that took place in 2008. (ECF No. 53.)

9 On March 18, 2015, the parties were granted sixty days in which to conduct discovery  
10 concerning plaintiff's efforts to exhaust his administrative remedies while housed in  
11 administrative segregation on August 7, 2008. (ECF No. 53.) Defendant Statti propounded  
12 discovery requests on April 1, 2015. Plaintiff failed to respond. Defendant Statti filed a motion  
13 to compel, and plaintiff was ordered to file an opposition within 21 days from the June 19, 2015  
14 order. (ECF No. 55.)

15 On July 23, 2015, plaintiff filed a motion for 45 day extension of time to obtain  
16 documents responsive to the discovery request.<sup>1</sup> (ECF No. 56.) Plaintiff did not indicate that he  
17 needed to conduct further discovery in order to respond to the discovery requests. (Id.) On  
18 August 6, 2015, plaintiff's motion was granted, and plaintiff was granted 45 days to file an  
19 opposition to defendant Statti's motion to compel. However, plaintiff was reminded of his  
20 obligation to cooperate in discovery, and cautioned that his failure to do so may result in a  
21 recommendation that this action be dismissed. The undersigned noted that plaintiff had over four  
22 months to prepare his discovery responses, and that given the limited nature of the discovery,  
23 some of the facts sought in the interrogatories should be within plaintiff's own knowledge, rather  
24 than requiring legal research. (ECF No. 57 at 1-2.) Plaintiff was admonished that no further  
25 extensions of time would be granted.

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28 <sup>1</sup> His proof of service states that he presented the request to prison officials for mailing on July 9,  
2015. (ECF No. 56 at 7.)

1 On September 28, 2015, defendants filed a reply noting that plaintiff failed to file an  
2 opposition to the motion to compel, and failed to serve any discovery responses. (ECF No. 58.)

3 On October 15, 2015, defendant Statti's motion to compel discovery was granted, and  
4 plaintiff was directed to provide, within fourteen days, his responses to defendant Statti's April 1,  
5 2015 discovery requests without objection, and to file a notice with the court attesting to his  
6 compliance with the order. (ECF No. 59 at 2.) Plaintiff was cautioned that failure to comply with  
7 the order would result in dismissal of this action. (Id.)

8 Plaintiff did not file a response to the October 15, 2015 order, and did not seek further  
9 extensions of time or other court assistance. On November 23, 2015, plaintiff was directed to  
10 show cause, within fourteen days, why this action should not be dismissed based on his failure to  
11 comply with court orders.

12 In his December 17, 2015 response, plaintiff claims that he was unlawfully housed in  
13 administrative segregation on October 12, 2015, and deprived of his personal property due to a  
14 "major disturbance." (ECF No. 61 at 1.) Prior thereto, plaintiff alleges that he had "extreme  
15 difficulties" in obtaining the documents as well as accessing the law library to obtain copies.  
16 Plaintiff states that he is "not purposefully not complying with the orders." (Id.) Plaintiff  
17 provides a copy of the October 12, 2015 incident report concerning a riot at High Desert State  
18 Prison involving about 100 inmates. (ECF No. 61 at 3-10.) Plaintiff provided copies of  
19 responses to interrogatories submitted in the instant case. (ECF No. 61 at 11-20.) Plaintiff also  
20 provided additional documents responsive to defendants' discovery requests. (ECF No. 61 at 22-  
21 49.)

### 22 III. Discussion

23 Initially, the court notes that plaintiff's certificate of service attests to service on the court,  
24 not on counsel for defendants. (ECF No. 61 at 50.) However, because defendants receive such  
25 filings through CM/ECF, defendants received plaintiff's filing.

26 Plaintiff now claims that he could not respond to the discovery requests earlier due to his  
27 placement in administrative segregation on October 12, 2015. However, plaintiff did not notify  
28 the court at that time and seek assistance in complying with the court order. Moreover, there are

1 procedures in place for inmates to access their legal materials while housed in administrative  
2 segregation. Plaintiff fails to demonstrate that he availed himself of such procedures after  
3 October 12, 2015. He fails to explain why he did not respond to the court's October 15, 2015  
4 order.

5 But more importantly, plaintiff fails to demonstrate his diligence prior to October 12,  
6 2015. The discovery requests were propounded on April 1, 2015, yet plaintiff did not provide his  
7 responses until December 8, 2015, when he presented his responses to prison officials for mailing  
8 to the court rather than to counsel for defendant. (ECF No. 61 at 50.) Thus, plaintiff had about  
9 six months in which to provide responses to limited discovery requests prior to his placement in  
10 administrative segregation. Although plaintiff states that he experienced "extreme difficulties" in  
11 obtaining and copying documents, he does not provide specific details as to what efforts he took  
12 to obtain such documents or copies.

13 Moreover, review of the responses provided demonstrate that plaintiff was not diligent  
14 and has not adequately responded to the requests. First, plaintiff's discovery responses are not  
15 dated, signed, or verified by plaintiff. (ECF No. 61 at 16, 20.) Second, plaintiff's responses to  
16 the interrogatories are incomplete. In response to interrogatory no. 3, asking plaintiff to state all  
17 facts supporting his contention that he did not have access to his appeal concerning defendant  
18 Statti, plaintiff states that he was not provided with his legal property until he was released from  
19 administrative segregation, and that "[d]iscovery is necessary to ascertain additional facts." (ECF  
20 No. 61 at 12.) As noted above, there are procedures in place for an inmate to access his legal  
21 materials while housed in administrative segregation, and plaintiff provided no facts concerning  
22 such efforts if, in fact, he took such efforts. In response to interrogatory no. 5, in which plaintiff  
23 was asked to describe all steps he took to gain access to the appeal, including the date and  
24 identification of individuals contacted to gain access, and written requests submitted for access,  
25 plaintiff states only that he completed and submitted an HDSP authorized ASU personal property  
26 form and inmate request for interview to the ASU property officer, but that "[d]iscovery is needed  
27 to ascertain the exact date requested." (ECF No. 61 at 13.) Plaintiff did not recount what efforts  
28 he made to obtain a copy of such requests. In response to interrogatory no. 6, in which plaintiff

1 was asked to identify by name and address each and every person plaintiff identified in  
2 interrogatory no. 5, plaintiff again states discovery is needed to identify such persons. (ECF No.  
3 61 at 13.) In response to interrogatory no. 8, in which plaintiff was asked to identify each person  
4 by name and address who plaintiff contends has knowledge of any fact supporting his contention  
5 that he submitted the appeal concerning defendant Statti for third level review immediately  
6 following plaintiff's release from administrative segregation, plaintiff responded, "requires  
7 discovery." (ECF No. 61 at 14.) Plaintiff's response to interrogatory no. 10 also states that  
8 "[r]equires discovery from the Inmate Appeals Branch." (ECF No. 61 at 15.)

9 Plaintiff's responses to defendant's request for production of documents are also  
10 insufficient because he responded to request nos. 2, 3, 4, and 5, by claiming that a response  
11 "requires discovery." (ECF No. 61 at 17-19.)

12 On March 18, 2015, the district court ordered the parties to conduct discovery within sixty  
13 days. If plaintiff needed to seek discovery in order to respond to defendant's requests, he should  
14 have propounded such discovery in April of 2015, but in any event no later than May 18, 2015.  
15 Plaintiff was under an obligation to obtain the documents and information responsive to the  
16 discovery requests. Plaintiff's responses that he now needs to conduct discovery in order to  
17 respond is not an appropriate response at this late date. Rather, plaintiff was required to diligently  
18 seek the documents and information responsive to the discovery requests and, if he was unable,  
19 after reasonable efforts, to obtain a particular document or piece of information, he could provide  
20 that information in a specific response, or seek court assistance. Plaintiff has been provided an  
21 unusually large amount of time to respond to these limited discovery requests yet has failed to  
22 demonstrate his diligence in responding. His halfhearted effort supports this court's conclusion  
23 that further court orders addressing the issue of such discovery would be futile.

24 Plaintiff violated the May 19, 2014 discovery and scheduling order by filing his discovery  
25 responses and documents in response to defendant Statti's request for production of documents  
26 rather than serving them on defendant's counsel. Plaintiff failed to comply with the August 6,  
27 2015 order. Plaintiff failed to comply with the October 15, 2015 order. Review of plaintiff's  
28 December 17, 2015 filing reflects that plaintiff failed to comply with the October 23, 2015 order

1 by failing to demonstrate compliance with the October 15, 2015 order. Thus, the undersigned  
2 finds it appropriate to recommend the dismissal of plaintiff's case as a sanction for his failure to  
3 comply with court orders. Plaintiff's repeated failures to comply or respond to court orders  
4 demonstrate that a lesser sanction would be ineffective.

5 The Court has the inherent power to achieve the orderly and expeditious disposition of  
6 cases by dismissing actions pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for  
7 failure to prosecute and failure to comply with a court order. See Link v. Wabash R.R. Co., 370  
8 U.S. 626, 629-30, 82 S. Ct. 1386 (1962); see also Pagtalunan v. Galaza, 291 F.3d 639, 640 (9th  
9 Cir. 2002). "In determining whether to dismiss a case for failure to comply with a court order the  
10 district court must weigh five factors including: '(1) the public's interest in expeditious  
11 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the  
12 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the  
13 availability of less drastic alternatives.'" Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir.  
14 1992) (quoting Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali  
15 v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).

16 In determining to recommend that this action be dismissed, the court has considered the  
17 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly support dismissal  
18 of this action. "[T]he public's interest in expeditious resolution of litigation always favors  
19 dismissal." Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999). This action has  
20 been pending for over three years. On May 19, 2014, the court issued a scheduling order for  
21 resolution of discovery and dispositive motions. (ECF No. 33.) Although discovery was stayed  
22 on July 18, 2014, pending resolution of defendants' motion for summary judgment, the parties  
23 were granted leave to conduct discovery on the issue of exhaustion as to defendant Statti on  
24 March 18, 2015. (ECF No. 53.) Plaintiff's claim that he now needs to pursue discovery to  
25 address the issue of exhaustion of administrative remedies, when he failed to propound such  
26 discovery when first granted the opportunity in March, demonstrates that he is not diligently  
27 prosecuting this action. "It is incumbent upon the Court to manage its docket without being  
28 subject to routine noncompliance of litigants. . . ." Pagtalunan, 291 F.3d at 642. Plaintiff's

1 failure to comply with the Local Rules and the court's orders suggests that further time spent by  
2 the court thereon will consume scarce judicial resources in addressing litigation which plaintiff  
3 demonstrates no intention to pursue diligently or reasonably.

4 Under the circumstances of this case, the third factor, prejudice to defendants from  
5 plaintiff's failure to comply with these court orders, also favors dismissal. Where a party offers a  
6 poor excuse for failing to comply with a court's order, the prejudice to the opposing parties is  
7 sufficient to favor dismissal. See Yourish, 191 F.3d at 991-92. Plaintiff's generic reasons for his  
8 failure to comply with court orders, without specific factual support, are insufficient to  
9 demonstrate his diligence over the last eight months. In some cases, "[t]he failure to prosecute  
10 diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual  
11 prejudice to the defendant [or respondent]." In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994)  
12 (quoting Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976)); see also Morris v.  
13 Morgan Stanleys Co., 942 F.2d 648, 651-52 (9th Cir. 1991). In addition, plaintiff's failure to  
14 timely respond to the limited discovery prevents defendants from renewing their motion for  
15 summary judgment on exhaustion grounds, and further delays resolution of this action, thereby  
16 causing defendants to incur additional time and expense.

17 The fifth factor also favors dismissal. The court has advised plaintiff of the requirements  
18 under the Local Rules and granted ample additional time to comply with the court's orders, all to  
19 no avail. The court finds no suitable alternative to dismissal of this action.

20 The fourth factor, public policy favoring disposition of cases on their merits, weighs  
21 against dismissal of this action as a sanction. However, for the reasons set forth *supra*, the first,  
22 second, third, and fifth factors strongly support dismissal. Under the circumstances of this case,  
23 those factors outweigh the general public policy favoring disposition of cases on their merits. See  
24 Ferdik, 963 F.2d at 1263.

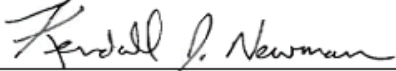
#### 25 IV. Conclusion

26 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be  
27 dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(b).

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1           These findings and recommendations are submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
3 after being served with these findings and recommendations, any party may file written  
4 objections with the court and serve a copy on all parties. Such a document should be captioned  
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
6 objections shall be filed and served within fourteen days after service of the objections. The  
7 parties are advised that failure to file objections within the specified time may waive the right to  
8 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 Dated: January 13, 2016

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12 KENDALL J. NEWMAN  
13 UNITED STATES MAGISTRATE JUDGE

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