

1 I. Relevant Legal Standards

2 Pursuant to Rule 41(b), a district court has discretion to dismiss an action if the plaintiff
3 fails to prosecute his action or to comply with Rules or court orders. Fed. R. Civ. P. 41(b); *See*
4 *also* E.D. Cal. Local Rules 110, 183(a). A district court must “weigh five factors to determine
5 whether to dismiss a case for lack of prosecution: (1) the public’s interest in expeditious
6 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
7 defendants; (4) the public policy favoring the disposition of cases on their merits; and (5) the
8 availability of less drastic sanctions.” *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994); *accord*,
9 *Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1138 (9th Cir. 2000). Warning a plaintiff that
10 his failure to obey a court order may result in dismissal is considered to be a less drastic
11 alternative sanction. *Malone v. United States Postal Service*, 833 F.2d 128, 132-33 & n.1 (9th
12 Cir. Cal. 1987).

13 Furthermore, a party’s failure to comply with any order or with the Local Rules “may be
14 grounds for imposition by the Court of any and all sanctions authorized by statute or Rule or
15 within the inherent power of the Court.” E.D. Cal. Local Rule 110. The court may dismiss a case
16 with or without prejudice, as appropriate, if a party disobeys an order or the Local Rules. *See*
17 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1263 (9th Cir. 1992) (district court did not abuse discretion in
18 dismissing pro se plaintiff’s complaint for failing to obey an order to re-file an amended
19 complaint to comply with Federal Rules of Civil Procedure); *Carey v. King*, 856 F.2d 1439,
20 1440-41 (9th Cir. 1988) (dismissal for pro se plaintiff’s failure to comply with local rule
21 regarding notice of change of address affirmed).

22 II. Discussion

23 The court’s scheduling order directed plaintiff to file his motion for summary judgment by
24 no later than April 3, 2017. ECF No. 5. He failed to do so and was ordered to show cause why
25 sanctions should not be imposed for violation of that order. However, the court sua sponte
26 granted plaintiff a further opportunity to present his motion. He was directed to file his motion by
27 December 20, 2017. ECF No. 17. He was cautioned that his failure to timely file his motion

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1 could result in dismissal of this action for lack of prosecution and/or failure to comply with court
2 orders. *Id.*

3 Thereafter, plaintiff requested appointment of counsel and a further extension of time to
4 file his motion for summary judgment. ECF No. 18. His request for an appointment of counsel
5 was denied, but his request for additional time was granted. He was granted until January 29,
6 2018 to file his motion for summary judgment. ECF No. 19. Days prior to that date, plaintiff
7 filed another request for appointment of counsel. ECF No. 20. He did not, however, file a
8 motion for summary judgment. Plaintiff's second request for appointment of counsel was also
9 denied, but given his pro se status, he was granted until February 15, 2018 to file his motion for
10 summary judgment. ECF No. 21. That order observed that more than a year had passed since
11 plaintiff had been served a copy of the administrative record, but he had still not yet filed his
12 motion. *Id.* Accordingly, plaintiff was specifically warned that failure to file his motion by
13 February 15, 2018 would result in dismissal for failure to prosecute. Again, plaintiff failed to
14 comply with the order.

15 Instead of filing a motion for summary judgment as ordered, two days before his motion
16 was due plaintiff filed another request for an extension of time. ECF No. 23. He claims he "had
17 an issue with the mail and didn't receive the court documents on time."² *Id.* He also claims that
18 there have been "issues finding someone to help [him] with the paperwork," but that he currently
19 has appointments scheduled to local attorneys.³ *Id.* Alternatively, plaintiff requests appointment
20 of counsel but, like his prior request, he fails to provide any basis for appointment. *Id.*

21 Although plaintiff has had more than a year to prepare his motion for summary judgment,
22 he has not shown any diligence in attempting to complete his motion. Rather, he has filed
23 multiple requests for extensions of time and/or for appointment of counsel, with each request

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25 ² As already noted, plaintiff has had all documents necessary to prepare his motion for
26 more than a year as defendant served him with a copy of the administrative record on February
27 17, 2017. *See* ECF No. 14. Accordingly, whatever recent issues plaintiff is experiencing with his
28 mail service are irrelevant to his failure to file his motion.

³ Plaintiff was apparently unsuccessful in obtaining counsel, as nearly six weeks have
passed since he filed his request and no attorney has made an appearance on his behalf.

1 typically filed just days before the deadline for him to file his motion. The result is that this
2 action has been seriously delayed. Furthermore, the court's order denying plaintiff's last request
3 for appointment of counsel made clear that plaintiff was being granted "a final extension" of time
4 to file his motion.⁴ ECF No. 21. That order further admonished plaintiff "that should he fail to
5 file his motion for summary judgment by February 15, 2018, this action will be dismissed for
6 failure to prosecute and/or follow court orders." *Id.* Plaintiff disregarded that admonishment and
7 instead sought another extension of time. ECF No. 23.

8 Plaintiff's instant request indicates that he has put little effort into preparing his motion in
9 spite of several months that were available for him to do so. Thus, it appears unlikely that
10 plaintiff's motion for summary judgment will be forthcoming. This in turn prejudices defendant,
11 who cannot prepare her cross-motion for summary judgment until after plaintiff files his motion.
12 *See* ECF No. 5 (scheduling order). Accordingly, the first three factors weigh in favor of
13 dismissal. *See Adriana Intl. Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990) ("Where
14 a court order is violated, the first two factors support sanctions"); *Yourish v. California Amplifier*,
15 191 F.3d 983, 990 (9th Cir. 1999) ("[T]he public's interest in expeditious resolution of litigation
16 always favors dismissal."); *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) ("It is
17 incumbent upon the Court to manage its docket without being subject to routine noncompliance
18 of litigants"). The fifth factor also weighs in favor of dismissal, given the absence of available
19 less drastic sanctions. On balance of the applicable factors, dismissal is appropriate.

20 Accordingly, it is hereby ORDERED that:

21 1. Plaintiff's motion for an extension of time or, alternatively, appointment of counsel
22 (ECF No. 23) is denied.

23 2. This action is dismissed for failure to prosecute and comply with court orders. *See*
24 Fed. R. Civ. P. 41(b); E.D. Cal. Local Rule 110.

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28 ⁴ This action has been pending for well over a year. Plaintiff has had more than ample
time to retain counsel.

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3. The Clerk is directed to close the case.

DATED: March 29, 2018.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE