

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

1 Khari Varner,

2 Case No. 2:24-cv-02105-CDS-EJY

3 Plaintiff

4 Order Adopting Magistrate Judge's
5 Report and Recommendation

6 v.

7 Kristian Ohm,

8 [ECF No. 10]

9 Defendant

10 In November 2024, pro se plaintiff Khari Varner's complaint against defendant

11 University Medical Center of Southern Nevada was screened by United States Magistrate Judge
12 Elayna J. Youshah. Order, ECF No. 6. At that time, Judge Youshah dismissed Varner's complaint
13 without prejudice and with leave to amend; and Varner timely filed his first amended complaint
14 on December 3, 2024. FAC, ECF No. 7. Judge Youshah screened the amended complaint and
15 again dismissed it for failure to state a claim. Order, ECF No. 9. She granted Varner one final
16 opportunity to amend his complaint to plead facts sufficient for his claims to survive. *Id.* at 5.
17 The deadline to file the second amended complaint was February 3, 2025. *Id.* at 6. That deadline
18 passed without an amended complaint, or any communication from Varner, therefore Judge
19 Youshah issued a report and recommendation (R&R) that this matter be dismissed without
20 prejudice but without leave to amend. R&R, ECF No. 10. Varner had until February 27, 2025, to
21 file any specific, written objections to the R&R. *Id.* (citing Local Rule IB 3-2 (stating that parties
22 wishing to object to an R&R must file specific written objections within fourteen days)); *see also*
23 28 U.S.C. § 636(b)(1) (same). To date, no objection, nor request seeking more time, is filed.24 Although "no review is required of a magistrate judge's report and recommendation
25 unless objections are filed,"¹ the Ninth Circuit has instructed courts to consider the following26

¹ *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

1 factors in determining whether to dismiss an action for failure to comply with the court's order:
2 "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its
3 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
4 cases on their merits, and (5) the availability of less drastic sanctions." *Thompson v. Hous. Auth. of*
5 *City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986).

6 The first two factors, the public's interest in expeditious resolution of litigation as well
7 as the court's need to manage its docket, weigh in favor of dismissal. "The public's interest in
8 expeditious resolution of litigation always favors dismissal." *Yourish v. Cal. Amplifier*, 191 F.3d 983,
9 990 (9th Cir. 1999). The court cannot expeditiously resolve a case if the plaintiff fails to fulfill his
10 obligations in prosecuting an action. That is why it has long been recognized that the court's
11 inherent power to control its docket includes the ability to issue sanctions of dismissal where
12 appropriate. *Thompson*, 782 F.2d at 831.

13 The third factor for consideration, the risk of prejudice to the defendants, also weighs in
14 favor of dismissal. Varner has not offered any excuse for his failure to comply with the court's
15 order to file a second amended complaint, which has caused an unexplained and unreasonable
16 delay; and "a presumption of prejudice arises from a plaintiff's unexplained failure to prosecute."
17 *Laurino v. Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002) (recognizing that "a presumption of
18 prejudice arises from a plaintiff's unexplained failure to prosecute," but finding that the plaintiff
19 provided a non-frivolous explanation for his lack of diligence).

20 The fourth factor, the public policy favoring disposition of cases on their merits, always
21 weighs against dismissal. But this case cannot move toward resolution, on the merits or
22 otherwise, due to Varner's failure to amend his complaint. As the plaintiff in this action, it is
23 Varner's responsibility to move the case toward disposition on the merits. *Morris v. Morgan Stanley*
24 *Co.*, 942 F.2d 648, 652 (9th Cir. 1991) (observing that it is the responsibility of the moving party
25 to move toward disposition on the merits). Thus, "this factor lends little support to a party
26 whose responsibility it is to move a case toward disposition on the merits but whose conduct

1 impedes progress in that direction." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006). I therefore find that the fourth factor is greatly outweighed by the factors 3 favoring dismissal.

4 The fifth factor, the availability of less drastic sanctions, also weighs in favor of dismissal.
5 A court's warning to a party that their failure to obey the court's order will result in dismissal
6 satisfies the "consideration of alternatives" requirement. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262
7 (9th Cir. 1992). Although courts "need not exhaust every sanction short of dismissal before
8 finally dismissing a case, but must explore possible and meaningful alternatives," *Henderson v.*
9 *Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986), this litigation cannot move forward without an
10 operative complaint or Varner's participation. Varner was provided adequate warning that
11 dismissal would result from his failure to comply with the court's orders. ECF No. 6 at 3; ECF
12 No. 9 at 6. His failure to do so, despite multiple warnings of the consequences, leaves the court
13 with two alternatives: dismiss the action or leave it pending indefinitely without an operative
14 complaint. There is thus no lesser alternative to dismissal available here.

15 Because Varner has failed to comply, and four of the five factors weigh in favor of
16 dismissal, I adopt Judge Youchah's R&R and dismiss this matter without prejudice but without
17 leave to amend.

18 **Conclusion**

19 IT IS HEREBY ORDERED that the magistrate judge's report and recommendation [ECF
20 No. 10] is adopted in full, and this case is dismissed without prejudice but without leave to
21 amend.

22 The Clerk of Court is kindly directed to enter judgment accordingly and to close this
23 case.

24 Dated: March 6, 2025

25
26 Cristina D. Silva
United States District Judge