

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCT 23 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

CHARLES T. KIRVIN,

Plaintiff-Appellant,

v.

L. GRANT, Legal Correctional Officer, in  
individual and official capacity; et al.,

Defendants-Appellees.

No. 19-55857

D.C. No.  
2:18-cv-07998-AG-SS

Central District of California,  
Los Angeles

ORDER

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

A review of the record and appellant's response to the August 22, 2019 order to show cause demonstrates that this court lacks jurisdiction over this appeal because the notice of appeal, served on July 16, 2019 and filed on July 22, 2019, was not filed or delivered to prison officials within 30 days after the district court's judgment entered on March 1, 2019. *See* 28 U.S.C. § 2107(a); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional); *Bowles v. Russell*, 551 U.S. 205 (2007) (court lacks authority to create equitable exceptions to jurisdictional requirement of timely notice of appeal); *see also* Fed. R. App. P. 4(a)(6) (motion to reopen time to appeal must be filed within 180 days after entry of judgment or within 14 days after receiving

notice of entry of judgment, whichever is earlier). Consequently, this appeal is dismissed for lack of jurisdiction.

**DISMISSED.**

**Additional material  
from this filing is  
available in the  
Clerk's Office.**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHARLES T. KIRVIN, Case No. CV 18-7998 AG (SS)  
Plaintiff,  
v.  
L. GRANT, et al., Defendants.

**REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

**I.**

**INTRODUCTION**

On September 14, 2018, Plaintiff Charles T. Kirvin, a California prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. ("Complaint," Dkt. No. 1). On December 3, 2018, the Court dismissed the Complaint with

1 leave to amend due to various pleading deficiencies.<sup>1</sup> (See Dkt.  
2 No. 6). In the Order, the Court admonished Plaintiff that "failure  
3 to timely file a First Amended Complaint ["FAC"] or failure to  
4 correct the deficiencies described above will result in a  
5 recommendation that this action be dismissed with prejudice for  
6 failure to prosecute and obey court orders pursuant to Federal Rule  
7 of Civil Procedure 41(b)." (*Id.* at 12).

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9 Pursuant to the Order, the First Amended Complaint was due by  
10 January 2, 2019. (*Id.* at 11). That deadline has lapsed. As of  
11 today, Plaintiff still has not filed a FAC or requested an extension  
12 of time in which to do so. Plaintiff has evidently lost interest  
13 in this matter. Accordingly, for the reasons discussed below, it  
14 is recommended that this action be DISMISSED with prejudice for

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<sup>1</sup> A magistrate judge may dismiss a complaint with leave to amend without the approval of a district judge. *See McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991) ("[T]he dismissal of a complaint with leave to amend is a non-dispositive matter."). Pursuant to Federal Rule of Civil Procedure 72, a plaintiff who disagrees with a magistrate judge's order dismissing a pleading with leave to amend may file an objection with the district judge. *See Bastidas v. Chappell*, 791 F.3d 1155, 1162 (9th Cir. 2015); *see also Hunt v. Pliler*, 384 F.3d 1118, 1124 (9th Cir. 2004) ("District court review of even these nondispositive matters . . . can be compelled upon objection of the party against whom the magistrate has ruled.") (quoting *McKeever*, 932 F.2d at 798). Here, Plaintiff has not challenged the dismissal of any of his pleadings with the district judge.

1 failure to prosecute and obey Court orders pursuant to Federal Rule  
2 of Civil Procedure 41(b).<sup>2</sup>

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4 **II.**

5 **DISCUSSION**

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7       Federal Rule of Civil Procedure 41(b) grants district courts  
8 the authority to dismiss actions sua sponte for failure to  
9 prosecute or failure to comply with court orders. See Link v.  
10 Wabash R.R., 370 U.S. 626, 629-31 (1962) ("The power to invoke this  
11 sanction is necessary in order to prevent undue delays in the  
12 disposition of pending cases and to avoid congestion in the  
13 calendars of the District Courts."). Dismissal, however, is a  
14 harsh penalty and is to be imposed only in extreme circumstances.  
15 See Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

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17       In considering whether to dismiss an action for failure to  
18 prosecute, the Court must weigh five factors: "(1) the public's  
19 interest in expeditious resolution of litigation; (2) the court's  
20 need to manage its docket; (3) the risk of prejudice to  
21 defendants/respondents; (4) the availability of less drastic  
22 alternatives; and (5) the public policy favoring disposition of  
23 cases on their merits." Pagtalunan v. Galaza, 291 F.3d 639, 642  
24 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61  
25 (9th Cir. 1992)). The Ninth Circuit will "affirm a dismissal where

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26       <sup>2</sup> If Plaintiff wishes to contest this Report and Recommendation,  
27 he may do so by choosing one of the options described below. (See  
28 infra Part II.B).

1 at least four factors support dismissal, or where at least three  
2 factors strongly support dismissal." Dreith v. Nu Image, Inc.,  
3 648 F.3d 779, 788 (9th Cir. 2011) (quoting Yourish v. Cal.  
4 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)).

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6 **A. The Five Factors Support Dismissal**

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8 **1. Expeditious Resolution And The Court's Need To Manage  
9 Its Docket**

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11 In the instant action, the first two factors -- the public's  
12 interest in expeditious resolution of litigation and the Court's  
13 need to manage its docket -- strongly favor dismissal. Pursuant  
14 to the Court's deadline, Plaintiff was required to file a FAC by  
15 January 2, 2019 if he wished to pursue this action. (Dkt. No. 6  
16 at 11). Despite the Court's warning that the failure to file a  
17 FAC would result in a recommendation of dismissal with prejudice,  
18 Plaintiff has failed to file a FAC or to request an extension of  
19 time in which to do so. Plaintiff's conduct hinders the Court's  
20 ability to move this case toward disposition and indicates that  
21 Plaintiff does not intend to litigate this action diligently. As  
22 a result, the first two factors favor dismissal here. See Ash v.  
23 Cvetkov, 739 F.2d 493, 496-97 (9th Cir. 1984) (affirming dismissal  
24 of action for failure to prosecute where plaintiff's failure to  
25 respond to a court order resulted in a month-long delay).

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1                   **2. The Risk Of Prejudice To Defendants**

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3                   The third factor -- prejudice to Defendants -- also favors  
4 dismissal. "Unreasonable delay is the foundation upon which a  
5 court may presume prejudice." Southwest Marine Inc. v. Danzig,  
6 217 F.3d 1128, 1138 (9th Cir. 2000); see also Pagtalunan, 291 F.3d  
7 at 643 (unnecessary delay caused by plaintiff's inaction  
8 "inherently increases the risk that witnesses' memories will fade  
9 and evidence will become stale"). The risk of prejudice to a  
10 defendant is related to the plaintiff's reason for failure to  
11 prosecute an action. See id. at 642. Where a party offers a poor  
12 excuse for failing to comply with a court's order, the prejudice  
13 to the opposing party is sufficient to favor dismissal. See  
14 Yourish, 191 F.3d at 991-92.

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16                  Here, Plaintiff has not offered any excuse for his failure to  
17 file a FAC by the Court's deadline. Accordingly, the risk of  
18 prejudice to Defendants favors dismissal.

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20                   **3. Less Drastic Alternatives**

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22                  The fourth factor -- the availability of less drastic  
23 alternatives -- also favors dismissal. The Court attempted to  
24 avoid outright dismissal of this action by granting Plaintiff an  
25 opportunity to file a First Amended Complaint and by extending the  
26 deadline for him to do so. (Dkt. No. 6 at 11). The Court expressly  
27 warned Plaintiff that the failure to comply would result in a  
28 recommendation that this action be dismissed with prejudice

1 pursuant to Federal Rule of Civil Procedure 41(b). (Id. at 12);  
2 see also Henderson, 779 F.2d at 1424 ("The district court need not  
3 exhaust every sanction short of dismissal before finally dismissing  
4 a case, but must explore possible and meaningful alternatives.").  
5 Nonetheless, Plaintiff failed to comply with the Court's order.  
6 Alternatives to dismissal do not appear to be appropriate given  
7 Plaintiff's failure to participate in his own litigation.

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9 **4. Public Policy Favoring Disposition On The Merits**

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11 The fifth factor -- the public policy favoring the disposition  
12 of cases on their merits -- ordinarily weighs against dismissal.  
13 See Dreith, 648 F.3d at 788. However, it is the responsibility of  
14 the moving party to prosecute the action at a reasonable pace, and  
15 to refrain from dilatory and evasive tactics. See Morris v. Morgan  
16 Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991). Here, despite  
17 the Court's express warnings about the possibility of dismissal,  
18 Plaintiff has failed to discharge his responsibility to prosecute  
19 this action. Under these circumstances, the public policy favoring  
20 the resolution of disputes on the merits does not outweigh  
21 Plaintiff's failure to file a FAC.

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23 **B. Dismissal Of This Action Is Appropriate**

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25 For the above-stated reasons, the Court concludes that  
26 dismissal of this action is warranted under Rule 41(b), which  
27 states:

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1 [A] dismissal under this subdivision (b) and any  
2 dismissal not under this rule -- except one for lack of  
3 jurisdiction, improper venue, or failure to join a party  
4 under Rule 19 -- operates as an adjudication on the  
5 merits.

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7 Fed. R. Civ. P. 41(b).

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9 The Court recommends dismissal of this action due to  
10 Plaintiff's failure to prosecute and obey Court orders. As this  
11 ground for dismissal does not fall into one of the three exceptions  
12 noted above, the dismissal will operate as an adjudication on the  
13 merits. The dismissal will thus be with prejudice to Plaintiff's  
14 refiling a new action in federal court based on the same  
15 allegations. See Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th  
16 Cir. 2002) (dismissal interpreted as an adjudication on the merits  
17 unless one of the Rule 41(b) exceptions applies). As noted,  
18 Plaintiff was expressly warned about the possibility of dismissal  
19 with prejudice if he failed to comply with the Court's orders.  
20 (See Dkt. No. 6 at 11).

21

22 **If Plaintiff wishes to contest the dismissal of this action,**  
23 **Plaintiff is ORDERED to file one of the following within thirty**  
24 **(30) days of the date of this Report and Recommendation:**

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26 (1) Objections to this Report and Recommendation,  
27 pursuant to Federal Rule of Civil Procedure 72(b) and  
28 Local Rule 72-3.4;

1 (2) a First Amended Complaint in accordance with the  
2 directives set forth in the Court's December 3, 2018  
3 Order (Dkt. No. 6); **or**

5 (3) a Notice advising the Court of Plaintiff's intention  
6 to stand on his initial Complaint, notwithstanding the  
7 deficiencies addressed in the Court's December 3, 2018  
8 Order (Dkt. No. 6).

10 If Plaintiff fails to comply with this deadline by filing one  
11 of the documents described above within **thirty (30) days** of the  
12 date of this Report and Recommendation, the Court may dismiss this  
13 action for failure to prosecute and obey court orders, pursuant to  
14 Federal Rule of Civil Procedure 41(b). See Applied Underwriters,  
15 Inc. v. Lichtenegger, \_\_ F.3d \_\_, 2019 WL 190129, at \*3 (9th Cir.  
16 Jan. 15, 2019) ("'The failure of the plaintiff eventually to respond  
17 to the court's ultimatum -- either by amending the complaint or by  
18 indicating to the court that it will not do so -- is properly met  
19 with the sanction of a Rule 41(b) dismissal.'") (quoting Edwards  
20 v. Marin Park, Inc., 356 F.3d 1058, 1065 (9th Cir. 2004); emphasis  
21 omitted).

III.

## RECOMMENDATION

26 IT IS RECOMMENDED that the District Court issue an Order:  
27 (1) accepting and adopting this Report and Recommendation

1 and (2) directing that Judgment be entered dismissing this action  
2 with prejudice for failure to prosecute and obey court orders.

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4 DATED: January 28, 2019

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/S/

6 SUZANNE H. SEGAL  
7 UNITED STATES MAGISTRATE JUDGE

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**NOTICE**

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10 Reports and Recommendations are not appealable to the Court  
11 of Appeals, but may be subject to the right of any party to file  
12 objections as provided in the Local Rules Governing the Duties of  
13 Magistrate Judges and review by the District Judge whose initials  
14 appear in the docket number. No notice of appeal pursuant to the  
15 Federal Rules of Appellate Procedure should be filed until entry  
16 of the judgment of the District Court.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHARLES T. KIRVIN,  
Plaintiff,  
v.  
L. GRANT, et al.,  
Defendants.

Case No. CV 18-7998 AG (SS)  
**ORDER ACCEPTING FINDINGS,  
CONCLUSIONS AND RECOMMENDATIONS  
OF UNITED STATES MAGISTRATE  
JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint, all the records and files herein and the Report and Recommendation of the United States Magistrate Judge. The time for filing Objections to the Report and Recommendation has passed and no Objections have been received. Accordingly, the Court accepts and adopts the findings, conclusions and recommendations of the Magistrate Judge.

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1           IT IS ORDERED that Judgment shall be entered dismissing this  
2 action with prejudice.

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4           IT IS FURTHER ORDERED that the Clerk serve copies of this  
5 Order and the Judgment herein on Plaintiff at his current address  
6 of record.

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8           LET JUDGMENT BE ENTERED ACCORDINGLY.

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10          DATED:     February 28, 2019

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13          ANDREW J. GUILFORD  
14          UNITED STATES DISTRICT JUDGE

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