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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

SCOTT HERD,) Case No.: 1:12-cv-01674-DAD-BAM (PC)
)
Plaintiff,) FINDINGS AND RECOMMENDATIONS
) RECOMMENDING DISMISSAL OF
v.) DEFENDANTS WITHOUT PREJUDICE FOR
) FAILURE TO SERVE
JAMES D. HARTLEY, et al.,)
) (ECF No. 42)
Defendants.)
) **TWENTY (20) DAY DEADLINE**
)
)
)
)

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff Scott Herd (“Plaintiff”) is a prisoner proceeding in forma pauperis and pro se in this civil rights action pursuant to 42 U.S.C. § 1983. On December 10, 2015, the Court issued an order to show cause. (ECF No. 42.) Plaintiff was ordered to either provide completed summonses, USM-285 forms, and copies of the first amended complaint to the clerk of the court so that service could be attempted upon Defendants Bryant, Cates, and Hartley, or to show cause in writing why those Defendants should not be dismissed from this action. (ECF No. 42.) Plaintiff was further ordered to comply within thirty (30) days of service of the order. (Id. at 2.) He was also expressly warned that

1 failure to comply with the order would result in the dismissal of Defendants Bryant, Cates, and Hartley
2 from this action. (Id.) Over sixty (60) days have passed since the order was issued, and Plaintiff has
3 neither complied with the order nor otherwise communicated with the Court.

4 **II. Legal Standard**

5 Federal Rule of Civil Procedure 4(m) provides as follows:

6 If a defendant is not served within 120 days after the complaint is filed,
7 the court—on motion or on its own after notice to the plaintiff—must
8 dismiss the action without prejudice against that defendant or order that
9 service be made within a specified time. But if the plaintiff shows good
10 cause for the failure, the court must extend the time for service for an
11 appropriate period.

12 Fed.R.Civ.P. 4(m). In cases involving a plaintiff proceeding in forma pauperis, the Marshal, upon
13 order of the court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(3). “[A]n
14 incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for
15 service of the summons and complaint, and . . . should not be penalized by having his or her action
16 dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to perform
17 the duties required of each of them” Puett v. Blandford, 912 F.2d 270, 275 (9th Cir. 1990). “So
18 long as the prisoner has furnished the information necessary to identify the defendant, the marshal’s
19 failure to effect service is ‘automatically good cause’” Walker v. Sumner, 14 F.3d 1415, 1422
20 (9th Cir. 1994), abrogated on other grounds by Sandin v. Connor, 515 U.S. 472, 115 S.Ct. 2293, 132
21 L.Ed.2d 418 (1995). However, where a pro se plaintiff fails to provide the Marshal with accurate and
22 sufficient information to effect service of the summons and complaint, the Court’s sua sponte
23 dismissal of the unserved defendant is appropriate. Walker, 14 F.3d at 1421-22.

24 **III. Discussion**

25 Plaintiff filed the first amended complaint on February 3, 2014. (ECF No. 17.) On October 30,
26 2015, the Court issued an order to Plaintiff directing him to submit service documents so that the first
27 amended complaint could be served on all Defendants. On November 23, 2015, Plaintiff only partially
28 complied, and submitted sufficient documents for service to be attempted on Defendants Garcia and
Flores only. (ECF No. 40.) Plaintiff was given additional time to submit the necessary documents and
information to serve the remaining Defendants or to explain why he could not do so, and was warned

1 about the consequences of not complying. (ECF No. 42.) Nevertheless, over 130 days since the Court
2 issued its order directing Plaintiff to submit service documents, he still has not complied with that
3 order. In light of the foregoing, the undersigned recommends that Defendants Bryant, Cates, and
4 Hartley should be dismissed without prejudice based on Plaintiff's failure to serve process on those
5 Defendants.

6 **IV. Conclusion and Recommendation**

7 Accordingly, it is HEREBY RECOMMENDED that Defendants S.A. Bryant, Mathew Cates,
8 and James D. Hartley be dismissed from this action, without prejudice, for failure to serve process
9 under Rule 4(m).

10 These findings and recommendations will be submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **twenty (20)**
12 days after being served with these findings and recommendations, Plaintiff may file written objections
13 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
14 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
15 result in the waiver of the "right to challenge the magistrate's factual findings" on appeal. Wilkerson
16 v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
17 1991)).

18
19 IT IS SO ORDERED.

20 Dated: March 2, 2016

/s/ Barbara A. McAuliffe
21 UNITED STATES MAGISTRATE JUDGE