

1 because Plaintiff was no longer in custody. (Doc. No. 44.) On November 14, 2008, the
2 Court forwarded a copy of the Court’s docket and its most recent Orders to Plaintiff at an
3 address that Plaintiff listed on his response to Defendant’s partial Motion for Summary
4 Judgment. On January 15, 2009, Defendant filed the pending Motion, seeking dismissal on
5 the ground that Plaintiff had failed to prosecute the pending action. (Doc. No. 45.)

6 **ANALYSIS**

7 The Court advised Plaintiff in a previous Order that failure to comply with every
8 provision of the Court’s Orders would result in dismissal pursuant to Rule 41(b) of the
9 Federal Rules of Civil Procedure. (Doc. No. 14.) The Court also advised Plaintiff that he
10 “must file and serve a notice of change of address in accordance with Rule 83.3(d) of the
11 Local Rules of Civil Procedure” and that “failure to comply may result in dismissal of this
12 action.” (*Id.*) Both the Court and Defendant have attempted to locate Plaintiff without
13 success. The Court forwarded its most recent orders to an address provided by Plaintiff in
14 a previous filing. Defendant states in the pending Motion that defense counsel has
15 undertaken a good faith and reasonable search to try and identify a current address or
16 whereabouts of Plaintiff without success. Neither the Court nor Defendant has received any
17 communication from Plaintiff since July, 2008.

18 Plaintiff has the general duty to prosecute this case. *Fidelity Philadelphia Trust Co.*
19 *v. Pioche Mines Consolidated, Inc.*, 587 F.2d 27, 29 (9th Cir. 1978). In this regard, it is the
20 duty of a plaintiff who has filed a *pro se* action to keep the Court apprised of his or her
21 current address, and to comply with the Court’s orders in a timely fashion. The Court does
22 not have an affirmative obligation to locate Plaintiff. “A party, not the district court, bears
23 the burden of keeping the court apprised of any changes in his mailing address.” *Carey v.*
24 *King*, 856 F.2d 1439, 1441 (9th Cir. 1988). Plaintiff’s failure to keep the Court informed of
25 his new address constitutes failure to prosecute.

26 A federal district court has the inherent power to dismiss a case *sua sponte* for failure
27 to prosecute. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-31 (1962). In appropriate
28

1 circumstances, the Court may dismiss a complaint for failure to prosecute even without
2 notice or hearing. *Id.* at 633.

3 In determining whether Plaintiff's failure to prosecute warrants dismissal of the case,
4 the Court must weigh the following five factors: "(1) the public's interest in expeditious
5 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to
6 the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the
7 availability of less drastic sanctions." *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988)
8 (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). "The first two of these
9 factors favor the imposition of sanctions in most cases, while the fourth factor cuts against
10 a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser
11 sanctions." *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).

12 Here, the first, second, and third factors favor dismissal of this case. Plaintiff's failure
13 to keep the Court informed of his address or actively participate in this case prevents the case
14 from proceeding in the foreseeable future. The fourth factor, as always, weighs against
15 dismissal. The fifth factor requires the Court to consider whether a less drastic alternative
16 is available.

17 The Court finds that only one less drastic sanction is realistically available. Rule
18 41(b) provides that a dismissal for failure to prosecute operates as an adjudication upon the
19 merits "[u]nless the court in its order for dismissal otherwise specifies." In the instant case,
20 a dismissal with prejudice would be unnecessarily harsh as the Complaint and this action can
21 be dismissed without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil
22 Procedure.

23 **RECOMMENDATION**

24 Based on the foregoing and pursuant to 28 U.S.C. § 636(b) and Local Rule 1.17(d)(2),
25 Rules of Practice of the United States District Court, District of Arizona, the Magistrate
26 Judge recommends that Plaintiff's Amended Complaint (Doc. No. 11) and this action be
27 **DISMISSED WITHOUT PREJUDICE** pursuant to Rule 41(b) of the Federal Rules of Civil
28 Procedure for failure to prosecute.

1 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within
2 10 days after being served with a copy of this Report and Recommendation. If objections
3 are not timely filed, they may be deemed waived. The parties are advised that any objections
4 filed are to be identified with the following case number: **CV-07-1456-PHX-SMM.**

5 DATED this 18th day of February, 2009.

6
7
8
9
10
11 
12 Jennifer C. Guerin
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28