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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Rolly White,

No. CV-12-02415-PHX-RCB

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Plaintiff,

ORDER

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v.

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Arizona, State of, et al.,

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Defendants.

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The Report and Recommendation (“R & R”) of United States Magistrate Judge James F. Metcalf recommends dismissal of this action without prejudice as to “Defendants Patten [sic],¹ Unknown Osborn, and Unknown Parties” pursuant to Fed.R.Civ.P. 4(m) for failure to effect timely service. R & R (Doc. 78) at 3:1. Pending before the court are the plaintiffs’ timely objections (Doc. 80) to the R & R.

The plaintiff objects to the R & R, but only to the extent that it recommends dismissal of this action as to the Patton defendants. Objection (Doc. 80) at 4:1-2. The plaintiff expressly acquiesces in dismissal as to defendant Osborn and the unknown Doe defendants 1-40. Id. at 1, n. 1. Dismissal is not proper as to the Patton defendants, the plaintiff argues, because they have answered the complaint and participated in discovery. Based upon the foregoing, the plaintiff further argues that the Patton defendants have

¹ The R & R uses two different spellings -- “Patten” and “Patton[.]” See, e.g., R & R (Doc. 78) at 1:12; and 1:18. Regardless, clearly the R & R is referring to the same defendants. To be accurate and consistent, this order will employ the spelling of the defendants themselves, *i.e.*, Patton. See, e.g., Resp. (Doc. 90) at 1:17-18.

1 waived any defense regarding defects in the service of process.

2 The defendants State of Arizona, Charles S. Ryan and Jane Doe Ryan, Robert C.
3 Patton and Jane Doe Patton, Tara Diaz and John Doe Diaz, Madeline Perkins and John
4 Doe Perkins, Sergeant Putnam and Jane Doe Putnam, Officer Doreen Neu and Charles
5 Neu, Officer Jennifer Repp and John Doe Repp, Officer Jose Buendia and Jane Doe
6 Buendia, (collectively “the State defendants”) filed a timely response to plaintiff’s
7 objections (Doc. 90). While the State defendants “agree that the Patton Defendants
8 should not be dismissed from this case,” their reasoning differs from the plaintiff. Resp.
9 (Doc. 90) at 1:24-25. Dismissal is not appropriate, the State defendants argue, because
10 defendant Robert Patton “was actually served[.]” with the complaint prior to the removal
11 of this action to federal court. Id. at 2:6.

12 It would have been preferable for the Patton defendants to have provided proof of
13 such service.² Nonetheless, the court has no reason to doubt that in keeping with his
14 obligation under Fed.R.Civ.P. 11, there is evidentiary support for defense counsel’s
15 assertion that the Patton defendants were served with the complaint in this case prior to
16 removal. This is all the more so considering that the Patton defendants, along with the
17 other State defendants, have filed an answer to the complaint. See Answer (Doc. 7).
18 Surely they would not have done so absent service of process. Service upon the Patton
19 defendants renders moot the plaintiff’s argument that the complaint should not be
20 dismissed as against that those defendants because they have made a general appearance
21 and participated in discovery.

22 Accordingly, **IT IS ORDERED** that:

23 (1) the Report and Recommendation (Doc. 78) is **ADOPTED** to the extent it
24 recommends dismissal **without prejudice** as to defendant Osborn and the unknown Doe

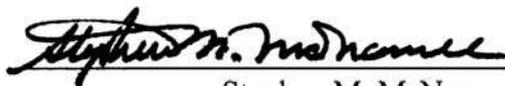
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26 ² The docket from the Superior Court of the State of Arizona, Maricopa County, attached
27 to the Notice of Removal, indicates the filing of an affidavit of service as to Robert C. Patton on October
28 25, 2012. See Notice of Removal, exh. B thereto (Doc. 1-1) at 3. Without more, however, it cannot be
ascertained with certainty whether that affidavit pertains to service of the summons and complaint upon
defendant Patton.

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defendants; but

(2) the court will **not** adopt that portion of the Report and Recommendation (Doc. 78) recommending dismissal without prejudice as to Robert C. and Jane Doe Patton for failure to effect service upon those two defendants. The plaintiff shall be allowed to proceed with his claims against the Patton defendants and others.

Dated this 22nd day of May, 2014.



Stephen M. McNamee
Senior United States District Judge