

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Damien Lee Toliver,

10 Plaintiff,

11 v.

12 Unknown De La Fuente, *et al.*,

13 Defendants.
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No. CV-14-00335-PHX-JJT

ORDER

15 At issue is United States Magistrate Judge James F. Metcalf's Report and
16 Recommendation (Doc. 79) ("R&R") that the Court dismiss Plaintiff's claims in this
17 matter as against Defendants Parnell and Salcido only, without prejudice. The time for
18 Plaintiff to file a response or objection to the R&R expired on December 15, 2015, and
19 Plaintiff has filed no response or objection by that date or since. As Judge Metcalf
20 warned in the R&R, a failure to timely file objections to any findings or
21 recommendations of the Magistrate Judge is considered a waiver of a party's right to *de*
22 *novo* consideration of the issues. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
23 Cir. 2003) (en banc). Nonetheless, the District Court reviews the issues, the legal
24 reasoning and factual basis of Judge Metcalf's R&R. Upon such review, the Court
25 concludes the R&R is sound in all respects, and the Court will follow its
26 recommendations.

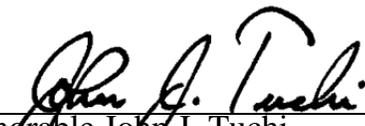
27 As set forth in detail in the R&R, the Court extended the time for service of
28 Defendants Parnell and Salcido to the maximum date to effect service pursuant to

1 LRCiv. 16.2(b), and then extended the date nearly four more months beyond that
2 deadline. Plaintiff has been unable to effect service by the deadline or thereafter, and, as
3 the R&R concludes correctly, has not shown good cause or excusable neglect for that
4 failure to serve. The Court finds that there is a danger of prejudice to the unserved
5 Defendants as this matter has proceeded beyond the filing of dispositive motions, and
6 forcing defendants to join the matter now would make it nearly impossible for them to
7 participate meaningfully in defense of the claims. The length and impact of delay also
8 militates against a finding of excusable neglect. The case is now over two years old, and
9 service on both Defendants Parnell and Salcido was returned unexecuted more than seven
10 months ago, with no subsequent action. There appears no reason for the failure in service
11 other than simple neglect. And while the Court agrees with Judge Metcalf's conclusion
12 that there is no indication of bad faith on Plaintiff's part, on balance, the factors still
13 militate against a finding of excusable neglect.

14 **IT IS ORDERED** adopting the Report and Recommendation (Doc. 79) in whole.

15 **IT IS FURTHER ORDERED** dismissing this matter without prejudice as to
16 Defendants Parnell and Salcido only. The matter shall proceed against the remaining
17 Defendants.

18 Dated this 3rd day of May, 2016.

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22 Honorable John J. Tuchi
23 United States District Judge
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