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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Joseph Gerald Eldridge,

10 Plaintiff,

11 v.

12 JD Schroeder,

13 Defendant.  
14

No. CV-14-01325-PHX-DGC (ESW)

**REPORT AND  
RECOMMENDATION  
AND ORDER**

15  
16 Pending before the Court are Plaintiff's "Motion for Permission and Court  
17 Ordered to Service by Ad in 'USA Today'" (Doc. 54), Request of the Court (Doc. 57),  
18 and "Objection to Document 50" (Doc. 56). The Court has considered the motions and  
19 sets forth its rulings herein.

20 In addition, the undersigned has considered Plaintiff's "Complaint for Negligence"  
21 (Doc. 21). For the reasons discussed in Sections II(A) and III(A) below, the undersigned  
22 recommends that the Court dismiss the "Complaint for Negligence."<sup>1</sup>

23 **I. PROCEDURAL HISTORY**

24 Plaintiff is incarcerated at the Arizona State Prison Complex-Lewis in Buckeye,  
25 Arizona. He has filed a pro se Complaint (Doc. 21) alleging a violation of his civil rights

26  
27 <sup>1</sup> As the undersigned's screening of the "Complaint for Negligence" is dispositive  
28 of claims raised in Plaintiff's attempt to amend his complaint as a matter of right, the  
undersigned makes the following recommendation pursuant to Rule 72 (b), Fed. R. Civ.  
P., and 28 U.S.C. § 636(b)(1)(B).

1 pursuant to 42 U.S.C. § 1983. Plaintiff alleges one count of excessive force in violation  
2 of the Eighth Amendment perpetrated against him by Defendant Schroeder. The Court  
3 screened Plaintiff's Complaint pursuant to 28 U.S.C. § 1915A(a). Defendant Schroeder  
4 was required to answer.

5 On February 20, 2015, Plaintiff filed "Complaint for Negligence." (Doc.21). On  
6 February 25, 2015, service was returned unexecuted as to Defendant Schroeder. (Doc.  
7 22). Defendant Schroeder has been terminated from the employ of the Arizona  
8 Department of Corrections ("ADC"). (*Id.*). The Attorney General thereafter filed under  
9 seal Defendant Schroeder's last known home address (Doc. 26). The U.S. Marshals  
10 Service ("USMS") was unable to serve Defendant Schroeder at his last known home  
11 address. (Doc. 33). The home was vacant and had been sold as confirmed by USMS.  
12 (*Id.*).

13 The Court authorized the issuance of subpoenas duces tecum to permit Plaintiff to  
14 conduct limited discovery for purposes of serving Defendant Schroeder (Doc. 37).  
15 Plaintiff has issued subpoenas to the ADC and Governor Ducey seeking "[a]ll of J.D.  
16 Schroeder employment records. Any and all documents that has J.D. Schroeder name on  
17 the document and has anything to do with J.D. Schroeder in any way on or in the form or  
18 document or material in any form." The Court quashed the subpoena duces tecum to the  
19 Governor. (Doc. 50 at 4). The Court again required the ADC to search personnel records  
20 and disclose to the Court under seal any document reflecting the current location of  
21 Defendant J.D. Schroeder for purposes of service of process by USMS. (Doc. 50 at 4).  
22 The Attorney General filed a "Notice of Compliance with the Court's December 4, 2015  
23 Order (Doc. 50)" on December 10, 2015, indicating that "[o]n December 9, 2015, the  
24 ADC Central Office and ADC Human Resources conducted another thorough search in  
25 attempt to locate any document reflecting an updated address for J.D. Schroeder." (Doc.  
26 53 at 1). Counsel stated that the last known address of Defendant Schroeder previously  
27 filed under seal is the only information regarding Defendant Schroeder's location in the  
28 possession of the ADC.

1 USMS served a subpoena duces tecum upon the United States Postal Service  
2 (“USPS”) on December 8, 2015, requesting “any and all knowed [sic] address’s [sic] for  
3 one J.D. Schroeder and any member of the J.D. Schroeder family.” (Doc. 51). USMS  
4 also served a subpoena duces tecum upon the Federal Bureau of Investigations (“FBI”).  
5 (Doc. 49). The docket reflects that FBI Assistant General Counsel posted an email to the  
6 U.S. District Court, District of Arizona’s website, stating that a search of FBI records  
7 cannot be accomplished without a numerical identifier and “it is highly unlikely that the  
8 FBI would have any record of Mr. Schroeder’s current address. . . .” (Doc. 52).

9 Plaintiff now seeks permission to serve Defendant Schroeder by running “an ad in  
10 USA Today Newspaper [sic] or in the Media Networks.” (Doc. 54 at 1). Plaintiff further  
11 asks the Clerk of Court to send to the “U.S. Department of Justice FBI” Defendant  
12 Schroeder’s numerical identifier that Defendant Schroeder used at the ADC “(DOB, SS#,  
13 etc.)” in order for a “record search of NCIC” to be done. (Doc. 57 at 1). Plaintiff  
14 objects to the Court’s Order issued on December 4, 2015. (Doc. 50). Plaintiff also has  
15 filed “Complaint for Negligence” which the Court considers to be an amended complaint.  
16 (Doc. 21).

## 17 **II. LEGAL STANDARDS**

### 18 **A. Amendment as a Matter of Course**

19 Rule 15(a)(1), Fed. R. Civ. P., allows a party to amend a pleading once as a matter  
20 of course within twenty one days after serving it. LRCiv 15.1(b) requires a party who  
21 files an amended pleading as a matter of course to file a separate notice of the filing of  
22 the amended pleading. “The notice must attach a copy of the amended pleading that  
23 indicates in what respect it differs from the pleading which it amends, by bracketing or  
24 striking through the text that was deleted and underlining the text that was added.” *Id.*  
25 LRCiv 3.4 requires all complaints filed by incarcerated persons to be “signed and legibly  
26 written or typewritten on forms approved by the Court” unless the Court finds that the  
27 complaint is understandable and conforms to applicable requirements.  
28

1 A district court's local rules are not petty requirements, but have "the force of  
2 law." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010) (citation omitted). The District  
3 Court of Arizona routinely denies motions for leave to amend for failure to comply with  
4 LRCiv 15.1(a). *See, e.g., Bivins v. Ryan*, 2013 WL 321847, at \*4 (D. Ariz. Jan. 28,  
5 2013); *J-Hanna v. Tucson Dodge Inc.*, 2012 WL 1957832, at \*1 (D. Ariz. May 31, 2012);  
6 *Huminski v. Heretia*, 2011 WL 2910536, at \*1 (D. Ariz. July 18, 2011).

### 7 **B. Alternate Methods of Service**

8 "Before a federal court may exercise personal jurisdiction over a defendant, the  
9 procedural requirement of service of summons must be satisfied." *Omni Capital Intern.,*  
10 *Ltd. V. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987), *superseded by statute on other*  
11 *grounds; SEC v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007). "A federal court is without  
12 personal jurisdiction over a defendant unless the defendant has been served in accordance  
13 with Fed. R. Civ. P. 4." *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986).

14 Rule 4(e)(1)(2), Fed. R. Civ. P., provides in relevant part that "[u]nless federal law  
15 provides otherwise, an individual . . . may be served in a judicial district of the United  
16 States by: (1) following state law for serving a summons in an action brought in courts of  
17 general jurisdiction in the state where the district court is located or where service is  
18 made; or (2) doing any of the following: (A) delivering a copy of the summons and of  
19 the complaint to the individual personally. . . ." Under Rule 4.1(k), Ariz. R. Civ. P., if  
20 personal service becomes impracticable, then the court may direct that service be  
21 accomplished by alternate means. *See BMO Harris Bank, N.A., v. D.R.C. Investments,*  
22 *L.L.C.*, No. CV-13-1692-PHX-LOA, 2013 WL 4804482, at \*4 (D. Ariz. Sept. 9, 2013)  
23 (personal service found to be impracticable where five attempts made to serve and  
24 defendants were evading service of process); *see also Blair v. Burgener*, 245 P. 3d 898,  
25 903-04 (Ariz. Ct. App. 2010) (interpreting "impracticable" to mean difficult or  
26 inconvenient, not impossible).

27 If the court allows an alternate or substitute form of service, "reasonable efforts  
28 shall be undertaken by the party making service to assure that actual notice of the

1 commencement of the action is provided to the person to be served . . . .” Rule 4.1(k),  
2 Ariz. R. Civ. P. “[A]lternative method[s] of service must comport with constitutional  
3 notions of due process.” *BMO Harris Bank, N.A. v. Guthmiller*, No. CV-14-00275-PHX-  
4 JAT, 2014 WL 2600362, at \*2 (D. Ariz. June 10, 2014). The method must be  
5 “reasonably calculated under all the circumstances, to apprise the interested parties of the  
6 pendency of the action and afford them an opportunity to present their objections.”  
7 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

### 8 III. DISCUSSION

#### 9 A. Recommendation that the Court Dismiss Plaintiff’s “Complaint of 10 Negligence” (Doc. 21)

11 The undersigned finds that Plaintiff has failed to comply with LRCiv 15.1(b) and  
12 LRCiv 3.4 in filing his “Complaint for Negligence.” (Doc. 21). Plaintiff has not  
13 presented the document on the proper form. Plaintiff is aware of the proper form because  
14 he used it when filing his Complaint. Nor has Plaintiff filed a separate notice that he is  
15 filing an amended complaint as a matter of course. There is no attachment to the required  
16 notice that indicates by strike out, underlining, or bracketing in what way the “Complaint  
17 for Negligence” (Doc. 21) differs from the Complaint (Doc. 1). Because the “Complaint  
18 for Negligence” does not comply with the Rules of Practice of the U.S. District Court for  
19 the District of Arizona, the undersigned will recommend that the “Complaint for  
20 Negligence” be dismissed without prejudice.

#### 21 B. Plaintiff’s “Objection to Document 50” (Doc. 56)

22 Plaintiff has filed “Objection to Document 50,” which the undersigned construes  
23 as a timely filed objection directed to District Judge Campbell, seeking review of the  
24 Magistrate Judge’s Order filed on December 4, 2015. (Doc. 50). Pursuant to Rule 72(a),  
25 Fed. R. Civ. P., Plaintiff may file an objection to a Magistrate Judge’s nondispositive  
26 pretrial order within fourteen days after being served with a copy. The undersigned  
27 refers “Objection to Document 50” (Doc. 56) to District Judge Campbell for further  
28 action deemed appropriate.

1                   **C. Plaintiff’s “Motion for Permission and Court Ordered to Service by Ad in**  
2                   **‘USA Today’” (Doc. 54)**

3                   This case was originally filed on June 13, 2014. (Doc. 1). The Court granted  
4                   Plaintiff’s fourth Application to Proceed in Forma Pauperis, screened Plaintiff’s  
5                   Complaint pursuant to 28 U.S.C. § 1915 A(a), and required Defendant Schroeder to  
6                   answer. (Doc. 14 at 2-4). The Court thereafter granted Plaintiff three extensions of time  
7                   within which to serve Defendant Schroeder. (Docs. 17, 25, 37). The Court allowed the  
8                   issuance of subpoenas duces tecum to “permit the Plaintiff to conduct reasonable  
9                   discovery limited to ascertaining the requisite service information for Defendant  
10                  Schroeder, specifically Defendant Schroeder’s current address.” (Doc. 37 at 2). Plaintiff  
11                  has attempted to secure a current address for Defendant Schroeder through the use of the  
12                  provided subpoenas duces tecum. However, despite the efforts Plaintiff has made to  
13                  locate Defendant Schroeder, Defendant Schroeder has not been served. The last  
14                  extension of time to serve expired on December 14, 2015. (*Id.*) The Court has ordered  
15                  Plaintiff to show cause why his Complaint should not be dismissed without prejudice for  
16                  failure to timely serve pursuant to Rule 4(m), Fed. R. Civ. P. (Doc 50). Plaintiff has filed  
17                  an objection to the Court’s Order. (Doc. 56). Plaintiff has also responded to the order to  
18                  show cause. (Doc. 55). Because Plaintiff has objected to the Court’s Order (Doc. 50)  
19                  requiring Plaintiff to show cause why his Complaint should not be dismissed, the  
20                  undersigned does not address Plaintiff’s response (Doc. 55) to the order to show cause at  
21                  this time.

22                  Plaintiff’s attempts to locate Defendant Schroeder have been unsuccessful to date.  
23                  Plaintiff now requests that the Court approve an alternate means of service. Plaintiff  
24                  seeks permission to serve Defendant Schroeder by having USMS place an ad in the USA  
25                  Today newspaper or “the Media Networks.” (Doc. 54 at 1). However, in order to  
26                  approve an alternate method of service of process, the Court must find, and Plaintiff must  
27                  show, that personal service is “impracticable.” Rule 4.1(k), Ariz. R. Civ. P. The Court  
28                  finds that Plaintiff has not done so. Defendant Schroeder has left the employ of the ADC

1 and moved. No evidence has been presented to suggest that Defendant Schroeder is  
2 evading service of process or that service of process is so difficult and inconvenient that  
3 an alternate method of service is necessary. If USMS had a current address for the  
4 Defendant, the Court has no reason to believe USMS would be unable to effectuate  
5 personal service.

6 Even if the Court were to find that personal service of Defendant Schroeder is  
7 impracticable, the alternate methods of service of process sought by Plaintiff do not  
8 comport with constitutional notions of due process. An ad in USA Today or Media  
9 Networks is not a reasonable alternative method of service that would assure actual  
10 notice of the lawsuit to Defendant Schroeder. Therefore, the Court will deny “Motion for  
11 Permission and Court Ordered to Service by Ad in ‘USA Today.’” (Doc. 54).

12 **D. “Request of the Court” (Doc. 57)**

13 Plaintiff has also filed a “Request of the Court.” (Doc. 57). Plaintiff’s document  
14 is not a proper motion. Plaintiff cannot request relief from the Court through the filing of  
15 a “Request” directed to the Clerk of Court. *See* Rule 7(b)(1), Fed. R. Civ. P. (“A request  
16 for a court order must be made by motion.”). In addition, the Clerk of Court is not in  
17 possession of the information Plaintiff wishes to provide to the USMS. Nor is the Court.  
18 The Court will deny Plaintiff’s “Request of the Court.”

19 **CONCLUSION**

20 For the reasons set forth above,

21 **IT IS ORDERED** denying “Motion for Permission and Court Ordered to Service  
22 by Ad in ‘USA Today.’” (Doc. 54).

23 **IT IS FURTHER ORDERED** denying “Request of the Court.” (Doc. 57).

24 **IT IS RECOMMENDED** that the Court dismiss without prejudice “Complaint  
25 for Negligence.” (Doc. 21).

26 **Effect of Recommendation**

27 This recommendation is not an order that is immediately appealable to the Ninth  
28 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules  
of Appellate Procedure, should not be filed until entry of the district court’s judgment.

1 However, pursuant to Rule 72(b), Fed. R. Civ. P., the parties shall have fourteen days  
2 from the date of service of a copy of this recommendation within which to file specific  
3 written objections with the Court. Thereafter, the parties have fourteen days within  
4 which to file a response to the objections. Failure to file timely objections to any factual  
5 determinations of the Magistrate Judge may be considered a waiver of a party's right to  
6 appellate review of the findings of fact in an order or judgment entered pursuant to the  
7 Magistrate Judge's recommendation. See *United States v. Reyna-Tapia*, 328 F.3d 1114,  
8 1121 (9th Cir. 2003); *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

9  
10 Dated this 28th day of January, 2016.

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15 Eileen S. Willett  
16 United States Magistrate Judge  
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