

1 WO
2
3
4
5

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

9 Seth W Sebert, et al.,

10 Plaintiffs,

11 v.

12 Arizona Department of Corrections, et al.,

13 Defendants.
14

No. CV-16-00354-PHX-ROS (ESW)

**REPORT AND
RECOMMENDATION**

15
16 Pending before the Court is the Court's Order (Doc. 94) and Putative Defendants
17 Moody and O'Neil's Motion to Quash Service (Doc. 95). The parties have responded to
18 the Court's order to show cause, and Putative Defendants' Motion to Quash Service is
19 fully briefed and deemed submitted for decision. The determination of the undersigned is
20 dispositive of some of Plaintiff's claims. Accordingly, the undersigned makes the
21 following Report and Recommendation pursuant to Rule 72(b), Federal Rules of Civil
22 Procedure and 28 U.S.C. § 636(b)(1)(B) and (C).

23 **I. DISCUSSION**

24 On September 30, 2016, the Court issued an Order (Doc. 94) requiring the
25 Plaintiff to show cause (i) why the Court should not dismiss Defendants Moody and
26 O'Neil from the action for Plaintiff's failure to prosecute pursuant to Rule 41(b), Fed. R.
27 Civ. P., and (2) why the Court should not dismiss Defendant's Corizon, LLC and Corizon
28 Health of New Jersey, LLC from the action for Plaintiff's failure to serve pursuant to

1 Rule 4(m), Fed. R. Civ. P. and Rule 16.2(b)(2)(B)(ii) of the Local Rules of Civil
2 Procedure. Plaintiff responded (Doc. 97) and State Defendants and Putative Defendants
3 Moody and O’Neil replied and objected (Doc. 98).

4 Plaintiff agrees that Defendants Corizon LLC and Corizon Health of New Jersey,
5 LLC should be dismissed from this action without prejudice. The Magistrate Judge will
6 recommend dismissal of Defendants Corizon LLC and Corizon Health of New Jersey,
7 LLC from this action without prejudice.

8 The Plaintiff objects to dismissal of all claims regarding Defendants Moody and
9 O’Neil because Plaintiff believes these Defendants were properly served and have
10 appeared as “State Defendants” in the Motion to Dismiss (Doc. 13). As the Motion to
11 Dismiss has been fully briefed, the Plaintiff asserts that she has prosecuted her case as to
12 Defendants Moody and O’Neil. However, putative Defendants Moody and O’Neil have
13 filed a Motion to Quash Service (Doc. 95), which asserts that Defendants Moody and
14 O’Neil were never properly served. In addition, putative Defendants argue that
15 Plaintiff’s belief that Defendants Moody and O’Neil have appeared through State
16 Defendants’ Motion to Dismiss (Doc. 13) is incorrect and unsupported by the record.
17 The Magistrate Judge agrees.

18 In State Defendants’ Motion to Dismiss (Doc. 13 at 1), defense counsel clearly
19 defines “State Defendants” as “[t]he Arizona Department of Corrections (‘ADC’), State
20 of Arizona, and ADC Director Charles Ryan (collectively the ‘State Defendants’)”
21 Defendants Moody and O’Neil are not mentioned in the Motion. Furthermore, the
22 Magistrate Judge notes that Defendant Villavicencio filed his own Motion to Dismiss and
23 Joinder with the State Defendants’ Motion to Dismiss. (Doc. 14). Defendants Moody and
24 O’Neil did not appear as a State Defendant, nor did they file their own motion to dismiss.
25 Plaintiff’s erroneous belief that they were included in State Defendants’ Motion to
26 Dismiss is not supported by the record.

27 Putative Defendants Moody and O’Neil further argue in their Motion to Quash
28 Service (Doc. 95 at 2-4) that they were not properly served with Plaintiff’s Second

1 Amended Complaint. A review of the docket reflects that Affidavits of Service by a
2 Private Process Server (Docs. 80-81) were filed reflecting that service of process as to
3 Defendants Moody and O’Neil was effectuated on May 16, 2016 by delivering the
4 summons and Second Amended Complaint to a female adult working in the Attorney
5 General’s office located at 1275 W. Washington Street, Phoenix, AZ. Defendants
6 Moody and O’Neil are alleged to be employees of the Arizona Department of Corrections
7 (the “ADC”), not the Office of the Attorney General. Though the Attorney General
8 represents the ADC, no waiver of service was filed as to either Defendant Moody or
9 O’Neil by counsel for the ADC. Therefore, personal service upon Defendants Moody
10 and O’Neil is required pursuant to Rule 4(e), Fed. R. Civ. P. The Magistrate Judge finds
11 that Plaintiff has not effectuated service of process as to Defendants Moody and O’Neil
12 in substantial compliance with Rule 4(e), Fed. R. Civ. P. and Rule 4.1(d), Ariz. R. Civ. P.
13 Defendants Moody and O’Neil were never served with the original Complaint or
14 Amended Complaint, therefore service on defense counsel of the Second Amended
15 Complaint pursuant to Rule 5(b), Fed. R. Civ. P., is not appropriate as urged by Plaintiff.
16 Nor does service on ADC as an entity constitute personal service on Defendants Moody
17 and O’Neil as individuals. The Magistrate Judge will recommend that the Motion to
18 Quash (Doc. 95) be granted.

19 The Magistrate Judge further finds that the time within which service was required
20 to occur has expired. *See* Rule 4(m), Fed. R. Civ. P.; Order (Doc. 12). “Rule 4(m) . . .
21 *requires* a district court to grant an extension of time when the plaintiff shows good cause
22 for the delay. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007) (citing *Mann v. Am.*
23 *Airlines*, 324 F.3d 1088, 1090 n.2 (9th Cir. 2003)). In the absence of good cause, the
24 Court in its discretion may grant an extension of time for service; “[h]owever, no court
25 has ruled that the discretion is limitless.” *Id.* at 1041. The Court may consider such
26 factors as “a statute of limitations bar, prejudice to the defendant, actual notice of a
27 lawsuit, and eventual service.” *Id.* (quoting *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d
28 381, 383 (7th Cir. 1998)).

1 Plaintiff urges the Court to accept service of process upon the Attorney General's
2 office for Defendants Moody and O'Neil on the basis of an email dated May 12, 2016
3 from defense counsel which states in pertinent part: "First, I appreciate that your office
4 respects the security implications at stake when it comes to service of process on law
5 enforcement officials. I am thankful that you chose to list only the Attorney General
6 address for most of these officials, for example [P]lease do not have any process
7 server look up and show up to an ADC official's personal residence. That step would
8 require disclosing the address to a private process server. Unlike federal marshalls [sic]
9 and county sheriff employees, private process servers are not always vetted for security."
10 (Doc. 99-2 at 2). Read in context with filings appearing on the docket, the Magistrate
11 Judge notes each summons for Defendants Moody and O'Neil listed for an address the
12 Attorney General's Office. (Docs. 69-70). From the above email, Plaintiff concluded
13 that defense counsel accepted service of process for Defendants Moody and O'Neil at the
14 Office of the Attorney General. However, this conclusion is directly contradicted by
15 Plaintiff's acknowledgment that, although requested, "[a]cceptances and waivers were
16 not given." (Doc. 99 at 3). Plaintiff alternatively moves for an order granting an
17 enlargement of time for service should the Motion to Quash be granted. However,
18 Plaintiff has not set forth good cause for an extension of time to serve Defendants Moody
19 and O'Neil pursuant to Rule 4(m), Fed. R. Civ. P.

20 The Magistrate Judge next considers whether in its discretion such an extension of
21 time should nevertheless be granted. Here, actual notice of the lawsuit has been given.
22 In addition, there is no indication in the record that Defendants Moody and O'Neil are no
23 longer employed by ADC. Service therefore could be accomplished at their place of
24 employment, if not their residences. A Rule 16 Scheduling Conference has not been set
25 due to the filing of dispositive motions by the Defendants who have appeared. Therefore,
26 prejudice to Defendants Moody and O'Neil for this six month delay in service is not
27 great. Plaintiff's counsel's confusion over service of process as explained is sincere. The
28 Magistrate Judge will recommend that the Court, in its discretion, grant Plaintiff an

1 extension of time of sixty (60) days from the filing of this Order to effectuate service of
2 process upon Defendants Moody and O’Neil.

3 Even assuming *arguendo* that Plaintiff properly served Defendants Moody and
4 O’Neil on May 16, 2016, Plaintiff has not shown good cause for failing to prosecute her
5 case against them. Defendants Moody and O’Neil did not answer or otherwise respond
6 to Plaintiff’s Second Amended Complaint. The time to do so has long since passed.
7 Plaintiff did nothing to move her case against Defendants Moody and O’Neil forward to
8 conclusion.

9 A federal district court has the inherent power to dismiss a case *sua sponte* for
10 failure to prosecute. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-31 (1962); *Ghazali*
11 *v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995). In appropriate circumstances, the Court
12 may dismiss a complaint for failure to prosecute even without notice or hearing. *Id.* at
13 633. In determining whether Plaintiff’s failure to prosecute warrants dismissal of the
14 case against Defendants Moody and O’Neil, the Court must weigh the following five
15 factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
16 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public
17 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
18 sanctions.” *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988) (quoting *Henderson v.*
19 *Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). “The first two of these factors favor the
20 imposition of sanctions in most cases, while the fourth factor cuts against a default or
21 dismissal sanction. Thus the key factors are prejudice and availability of lesser
22 sanctions.” *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).

23 **A. Factors One and Two: Public’s Interest in Expeditious Resolution of**
24 **Litigation and the Court’s Need to Manage its Docket**

25 “[T]he public’s interest in expeditious resolution of litigation always favors
26 dismissal.” *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). Plaintiff
27 originally filed her Complaint and Demand for Jury Trial (Doc. 1-5 at 5) on November 9,
28 2015 in the Maricopa County Superior Court. After Plaintiff filed her Amended

1 Complaint (Doc. 1-4 at 2) on January 5, 2016, Defendant ADC filed a Notice of
2 Removal Under 28 U.S.C. § 1441(b) (Doc. 1), initiating proceedings before the U.S.
3 District Court. Plaintiff thereafter filed a Second Amended Complaint (Doc. 6), naming
4 Defendants Moody and O’Neil on February 19, 2016. The Court ordered that Plaintiff
5 serve the Second Amended Complaint within 90 days of the filing of the Second
6 Amended Complaint or 60 days of the filing of the Order, whichever was later. (Doc. 12
7 at 2). Defendants ADC, State of Arizona, Ryan, and Villavicencio have filed Motions to
8 Dismiss (Docs. 13-14). Defendants Wexford Health Sources Inc. and Caron Grant-Ellis
9 have filed a Motion for Judgment on the Pleadings (Doc. 17). Defendants Corizon
10 Health, Inc. and Corizon Inc. have filed a Motion for More Definite Statement Per
11 F.R.C.P. 12(e) (Doc. 74). The motions are fully briefed. The case has now been
12 pending for a year. Plaintiff has failed to move the case forward as to Defendants Moody
13 and O’Neil. Plaintiff’s conduct has adversely affected the Court and public’s interest in
14 judicial efficiency and the prompt resolution of cases. Further, the Court’s interest in
15 controlling its docket supports the dismissal of this action that Plaintiff effectively
16 abandoned as to Defendants Moody and O’Neil. *See Ferdik v. Bonzelet*, 963 F.2d 1258,
17 1261 (9th Cir. 1992) (recognizing the “district courts’ power to manage their dockets
18 without being subject to the endless vexatious noncompliance of litigants . . .”). For
19 these reasons, factors one and two weigh in favor of dismissing this case as to Defendants
20 Moody and O’Neil.

21 **B. Factor Three: The Risk of Prejudice to Defendants**

22 “To prove prejudice, a defendant must establish that plaintiff’s actions impaired
23 defendant’s ability to proceed to trial or threatened to interfere with the rightful decision
24 of the case.” *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (citing *Malone v.*
25 *United States Postal Serv.*, 833 F.2d 128, 131 (9th Cir. 1987)). Plaintiff alleges that she
26 has sustained significant physical and emotional injuries arising from Defendants’
27 actions. Plaintiff’s delay negatively impacts Defendants Moody and O’Neil’s ability to
28 conduct timely discovery and prepare a defense. “[T]he law presumes injury from

1 unreasonable delay.” *States Steamship Co. v. Philippine Air Lines*, 426 F.2d 803, 804
2 (9th Cir. 1970). “Delay in serving a complaint is a particularly serious failure to
3 prosecute because it affects all the defendant[s’] preparations.” *Anderson v. Air West,*
4 *Inc.*, 542 F.2d 522, 525 (9th Cir. 1976) (citing *Pearson v. Dennison*, 353 F.2d 24, 28 (9th
5 Cir. 1965)). Plaintiff rebuts this presumption by asserting that Defendants Moody and
6 O’Neil have notice of the lawsuit and defense counsel. The Magistrate Judge further
7 notes that discovery has not yet begun due to pending dispositive motions. The
8 Magistrate Judge finds that the risk of prejudice to Defendants is not great if this case is
9 not dismissed for Plaintiff’s failure to prosecute and obey the Court’s orders. Factor
10 three weighs in favor of allowing the case against Defendants Moody and O’Neil to
11 proceed.

12 **C. Factor Four: Public Policy Favoring Disposition of Cases on their Merits**

13 Public policy favors disposition of cases on their merits. Though Plaintiff’s delay
14 in prosecuting her case against Defendants Moody and O’Neil defeats this goal, the delay
15 has not been great. Plaintiff has failed to timely serve Defendants Moody and O’Neil.
16 Even assuming proper service of process, Plaintiff failed to move for default judgment
17 when Defendants failed to appear by responsive pleading. No good cause has been
18 shown for Plaintiff’s failure to prosecute the case with reasonable diligence. *See id.* at
19 524-25 (one year delay in service of process resulted in prejudice to defendants where
20 death of litigants prevented significant contribution to defense planning). Plaintiff’s
21 conduct in this case, however, does not overcome the public policy that weighs against
22 dismissal. Factor four weighs in favor of not dismissing the case as to Defendants
23 Moody and O’Neil.

24 **D. Factor Five: The Availability of Less Drastic Sanctions**

25 The Court may pursue remedies that are less drastic than dismissal of Plaintiff’s
26 suit. *See Malone*, 833 F.2d at 131-32 (9th Cir. 1987) (before dismissing a case as a
27 sanction, a district court must first consider the impact of the sanction and the adequacy
28 of less drastic sanctions). Plaintiff was explicitly warned that the Court may dismiss this

1 action if Plaintiff failed to timely serve Defendants. *See Estrada v. Speno & Cohen*, 244
2 F.3d 1050, 1057 (9th Cir. 2001) (stating that a court’s warning to a party that the failure
3 to obey a court order will result in dismissal can meet the requirement that the court
4 considered alternatives). Despite the Court’s warning, Plaintiff failed to timely serve her
5 Second Amended Complaint on Defendants Moody and O’Neil. Plaintiff was
6 represented by counsel during the time period for service and responsive pleading
7 imposed by the Court and Federal Rules of Civil Procedure. Plaintiff’s belief that
8 Defendants Moody and O’Neil were included in the “State Defendants” who appeared to
9 in the Motion to Dismiss was not reasonable under the circumstances. Nevertheless,
10 service of process is readily possible, and the Defendants are aware of the litigation. Less
11 drastic sanctions than dismissal of the lawsuit are available. Factor five weighs in favor
12 of not dismissing the lawsuit as to Defendants Moody and O’Neil.

13 Having weighed all the factors, the undersigned finds that Plaintiff’s failure to
14 prosecute does not warrant dismissal of Defendants Moody and O’Neil from this action.
15 In addition, because the Court issued its Order to show cause on the Court’s own motion,
16 an award of attorney’s fees is not required. Plaintiff is now unrepresented. The
17 Magistrate Judge will recommend that the Court in its discretion issue no sanctions for
18 Plaintiff’s failure to prosecute the case as to Defendants Moody and O’Neil.

19 **II.CONCLUSION**

20 For the reasons set forth herein,

21 **IT IS RECOMMENDED** that the Court grant Putative Defendants’ Moody and
22 O’Neil’s Motion to Quash Service (Doc. 95).

23 **IT IS FURTHER RECOMMENDED** that the Court direct the Clerk of Court to
24 mail Plaintiff a copy of this Order and service packets for Defendants Moody and O’Neil.

25 **IT IS FURTHER RECOMMENDED** that the Court order Plaintiff to complete
26 and return the service packets to the Clerk of Court within ten (10) days of the date of
27 filing of the Court’s Order. The United States Marshal will not provide service of
28 process if Plaintiff fails to comply with the Court’s Order.

1 **IT IS FURTHER RECOMMENDED** that the Court grant Plaintiff an additional
2 sixty (60) days from the date of the filing of its Order to complete service of the
3 summons and Second Amended Complaint on Defendants Moody and O’Neil. If
4 Plaintiff fails to complete service of the summons and Second Amended Complaint on
5 Defendants Moody and O’Neil within the time ordered, the action may be dismissed as to
6 each Defendant not served. Defendants must answer the Second Amended Complaint
7 (Doc. 6) or otherwise respond by appropriate motion within the time provided by the
8 applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

9 **IT IS FURTHER RECOMMENDED** that the Court find that Plaintiff has
10 responded to the Order to show cause (Doc. 94) and that the Court in its discretion not
11 dismiss the action as to Defendants Moody and O’Neil for Plaintiff’s failure to prosecute.

12 **IT IS FURTHER RECOMMENDED** that the Court dismiss without prejudice
13 Defendants Corizon LLC and Corizon Health of New Jersey, LLC from this action.

14 **IT IS FURTHER RECOMMENDED** that the Court make the following orders:

15 1. The United States Marshal shall retain the Summons, a copy of the Second
16 Amended Complaint, and a copy of this Order for future use.

17 2. The United States Marshal shall notify Defendants Moody and O’Neil of the
18 commencement of this action and request waiver of service of the summons pursuant to
19 Rule 4(d) of the Federal Rules of Civil Procedure. The notice to Defendants shall include
20 a copy of this Order. The Marshal shall file waivers of service of the summons or
21 requests for waivers that were returned as undeliverable as soon as they are received. If a
22 waiver of service of summons is returned as undeliverable or is not returned by
23 Defendants within twenty days from the date the request for waiver was sent by the
24 Marshal, the Marshal shall:

25 (a) Personally serve copies of the Summons, Second Amended Complaint,
26 and this Order upon Defendants pursuant to Rule 4(e)(2) of the Federal Rules of Civil
27 Procedure; and

28 (b) Within ten days after personal service is effected, file the return of

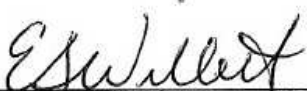
1 service for Defendants, along with evidence of the attempt to secure a waiver of service
2 of the summons and of the costs subsequently incurred in effecting service upon
3 Defendants. The costs of service shall be enumerated on the return of service form
4 (USM-285) and shall include the costs incurred by the Marshal for photocopying
5 additional copies of the Summons, Second Amended Complaint, or this Order and for
6 preparing new process receipt and return forms (USM-285), if required. Costs of service
7 will be taxed against the personally served Defendants pursuant to Rule 4(d)(2) of the
8 Federal Rules of Civil Procedure, unless otherwise ordered by the Court.

9 3. If Defendants agree to waive service of the Summons and Second Amended
10 Complaint, he or she shall **return the signed waiver forms to the United States**
11 **Marshal, not the Plaintiff.**

12 **EFFECT OF RECOMMENDATION**

13 This recommendation is not an order that is immediately appealable to the Ninth
14 Circuit Court of Appeals. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should
15 not be filed until entry of the District Court's judgment. The parties shall have fourteen
16 days from the date of service of a copy of this recommendation within which to file
17 specific written objections with the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6,
18 72. Thereafter, the parties have fourteen days within which to file a response to the
19 objections. Failure to file timely objections to the Magistrate Judge's Report and
20 Recommendation may result in the acceptance of the Report and Recommendation by the
21 District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
22 1121 (9th Cir. 2003). Failure to file timely objections to any factual determinations of the
23 Magistrate Judge may be considered a waiver of a party's right to appellate review of the
24 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's
25 recommendation. *See Robbins v. Carey*, 481 F.3d 1143,1146-47 (9th Cir. 2007).

26 Dated this 15th day of November, 2016.

27 
28 _____
Eileen S. Willett
United States Magistrate Judge