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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tyrone Nolan,
10
11 Plaintiff,
12 v.
13 Corizon Health, *et al.*,
14 Defendants.

No. CV-17-00476-PHX-JJT (BSB)

ORDER**AND ORDER TO SHOW CAUSE**

15 Plaintiff Tyrone Nolan, who is currently confined in the Arizona State Prison
16 Complex Bachman Unit in Buckeye, Arizona, filed this civil rights case pursuant to
17 42 U.S.C. § 1983. (Doc. 1.) Before the Court is the Report and Recommendation (R&R)
18 of Magistrate Judge Bridget S. Bade recommending that the Court dismiss Plaintiff's
19 claims against Defendant Barnett without prejudice for failure to serve. (Doc. 28.)
20 Plaintiff has filed objections to the R&R. (Doc. 29.) Also before the Court is Plaintiff's
21 Motion for a Court Order (Doc. 13) and Defendant Malachinski's Amended Motion to
22 Dismiss (Doc. 19).

23 The Court will adopt the R&R and dismiss Defendant Barnett from the action
24 without prejudice. Plaintiff's Motion for a Court Order is denied, and Plaintiff must show
25 cause why Defendant Malachinski should not be dismissed from this action for failure to
26 serve.

I. Background

27 Upon screening the Complaint pursuant to 28 U.S.C. § 1915A(a), the Court
28 determined that Plaintiff stated Eighth Amendment medical claims against Defendants

1 Drs. Malachinski and Barnett in Count One and ordered them to answer. (Doc. 7.) The
2 Court dismissed the remaining claim and Defendants. (*Id.*)

3 **II. Report and Recommendation**

4 This Court “may accept, reject, or modify, in whole or in part, the findings or
5 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that
6 the district judge must review the magistrate judge’s findings and recommendations de
7 novo *if objection is made*, but not otherwise.” *United States v. Reyna–Tapia*, 328 F.3d
8 1114, 1121 (9th Cir. 2003) (en banc); *accord Schmidt v. Johnstone*, 263 F. Supp. 2d
9 1219, 1226 (D. Ariz. 2003) (“Following *Reyna–Tapia*, this Court concludes that *de*
10 *novo* review of factual and legal issues is required if objections are made, ‘but not
11 otherwise.’”); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d
12 1027, 1032 (9th Cir. 2009) (the district court “must review de novo the portions of the
13 [magistrate judge’s] recommendations to which the parties object.”). District courts are
14 not required to conduct “any review at all . . . of *any issue* that is not the subject of
15 an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28
16 U.S.C. § 636(b)(1) (“A judge of the court shall make a de novo determination of those
17 portions of the [R & R] to which objection is made.”).

18 On December 6, 2017, the Magistrate Judge recommended dismissing Defendant
19 Barnett from the action without prejudice for failure to serve. (Doc. 28.) Plaintiff filed his
20 Objection to the R&R on December 12, 2017. (Doc. 29.) Thus, the Court will review the
21 R&R de novo.

22 In the R&R, the Magistrate noted the following facts. On August 1, 2017, service
23 on Defendant Barnett was returned unexecuted. (Doc. 28 at 1; *see* Doc. 11.) Plaintiff
24 thereafter suggested that service could be made on Defendant Barnett by having the U.S.
25 Marshals contact attorney Scott Conlon, who is representing Defendant Barnett in
26 another action before this Court. (Doc. 12.) The service deadline eventually expired, and
27 Defendant Barnett had still not been served. (*See* Doc. 26.) The Court ordered Plaintiff to
28 show cause why Defendant Barnett should not be dismissed, and Plaintiff again stated

1 that the U.S. Marshals should be directed to contact attorney Scott Conlon, who has not
2 appeared as counsel for Defendant Barnett in the instant case, in order to serve Defendant
3 Barnett. (*Id.*; Doc. 27.)

4 In the R&R, the Magistrate Judge noted that “there is no evidence that Conlon is
5 authorized to receive service of process for Defendant Barnett in this matter.” (Doc. 28 at
6 2.) Accordingly, the Magistrate Judge recommended dismissing Defendant Barnett
7 without prejudice. In his Objection, Plaintiff rehashes the same argument that Defendant
8 Barnett’s attorney in a separate case should be contacted so that service could be made in
9 the instant case. Plaintiff has already been informed that this argument is without merit
10 and that he “is responsible for providing the proper address for Defendant Barnett to
11 effectuate service.” (Doc. 28 at 1; Doc. 26 at 1.)

12 **III. Defendant Malachinski’s Amended Motion to Dismiss**

13 Defendant Malachinski, appearing for the limited purpose of contesting service of
14 process, moves the Court to dismiss him from this action because Plaintiff failed to
15 properly serve him. (Doc. 19.)

16 Rule 4(e) of the Federal Rules of Civil Procedure provides that an individual may
17 be served by (1) “delivering a copy of the summons and of the compliant to the
18 individual personally”; (2) “leaving a copy of each at the individual’s dwelling or usual
19 place of abode . . .”; or (3) “delivering a copy of each to an agent authorized by
20 appointment or by law to receive service of process.”

21 Federal Rule of Civil Procedure 4(m) provides that if a summons and complaint
22 are not served upon a defendant within 90 days after filing, the court shall, after notice to
23 the plaintiff, either dismiss the action or, if the plaintiff shows good cause for the failure,
24 direct that service be effected within a specified time. The Ninth Circuit has explained
25 that Rule 4(m) “requires a district court to grant an extension of time when the plaintiff
26 shows good cause for the delay. A plaintiff may demonstrate good cause by showing that
27 he made a reasonable and diligent effort to effect service. *See Electrical Specialty Co. v.*
28 *Road & Ranch Supply, Inc.*, 967 F.2d 309, 312 (9th Cir. 1992). “Additionally, the rule

1 permits the district court to grant an extension even in the absence of good cause.” *Efaw*
2 *v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007) (internal citations omitted) (emphasis in
3 original). Courts should give the Rule 4 provisions a liberal and flexible construction. *See*
4 *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984). When determining whether an
5 extension for service is warranted, a district court should consider factors such as
6 prejudice to the defendant, actual notice of a lawsuit, and eventual service. *Efaw*, 473
7 F.3d at 1041; *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ ship*, 507 U.S. 380,
8 395 (1993) (factors to consider in excusable-neglect determined include danger of
9 prejudice, length of delay, reason for delay, and whether party acted in good faith).

10 In his sworn affidavit Defendant Malachinski attests to the following: he ended his
11 employment at Corizon on October 2, 2017; he did not designate Corizon Health or its
12 agents as his authorized agent to accept service on his behalf; he never received a
13 Summons or Complaint in this action in person or by mail; he never received a Request
14 for Waiver of Service in this matter, and he does not waive service. (*Id.* at 8-9.)

15 According to the sworn declaration of Drystal Lavender, a Corizon Professional
16 Liability Claims Analyst, Corizon does not accept service of process for former
17 employees. (Doc. 19 at 10-11.) On October 18, 2017, the U.S. Marshals left a Summons
18 and Complaint for Defendant Malachinski at the Corizon complex in Phoenix, Arizona.
19 (*Id.* at 11.) Defendant Malachinski was not employed by Corizon at this time, and
20 Lavender mistakenly accepted service on his behalf because she was not aware that
21 Defendant Malachinski’s employment had recently ended. (*Id.*) Defendant Malachinski
22 never designated Lavender or Corizon Health, Inc. as his authorized agent for service of
23 process. (*Id.*)

24 Based on the foregoing facts, Defendant Malachinski moves the Court to dismiss
25 him from the action based on insufficient service of process. (*Id.* at 1-7.) Plaintiff was
26 initially given until November 22, 2017 to respond to Defendant Malachinski’s motion
27 (Doc. 21) and was subsequently given an additional 20 days to respond. (Doc. 24.) To
28 date, Plaintiff has not responded to Defendant Malachinski’s motion. Therefore, the

1 Court will order Plaintiff to show cause why Defendant Malachinski should not be
2 dismissed from this action for failure to serve.

3 After reviewing the Magistrate Judge's findings de novo and considering
4 Plaintiff's Objections, the Court agrees with the Magistrate Judge's reasoning in the R&R
5 and will dismiss Defendant Barnett from the action without prejudice for failure to serve.

6 **IV. Plaintiff's Motion for a Court Order**

7 In his motion, Plaintiff seeks a Court Order ordering "Corizon Health to supply
8 him with the proper CPAP mask that he can use." (Doc. 13 at 2.) The Court construed
9 this motion as a motion for injunctive relief. (Doc. 18.)

10 A court may issue an injunction against a non-party only where the non-party acts
11 in active concert or participation with the parties or their agents or employees. Fed. R.
12 Civ. P. 65(d)(2) (a preliminary injunction only binds those who receive actual notice of it
13 by personal service or are parties, their officers, agents, servants, employees, and
14 attorneys, and persons in active concert); *see Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir.
15 1984) ("A federal court may issue an injunction if it has personal jurisdiction over the
16 parties and subject matter jurisdiction over the claim; it may not attempt to determine the
17 rights of persons not before the court."); *see also Zenith Radio Corp. v. Hazeltine*
18 *Research, Inc.*, 395 U.S. 100, 110 (1969).

19 Defendant Corizon was dismissed from this action on July 14, 2017. (Doc. 7.) The
20 Magistrate Judge's recommendation has been adopted, and Defendant Barnett will be
21 dismissed from the action for failure to serve. Thus, Defendant Malachinski is the sole
22 remaining Defendant in this action. However, he is no longer employed by Corizon, and
23 therefore not authorized to provide the requested relief. (*See* Doc. 19 at 8.) Accordingly,
24 Plaintiff's Motion for Court Order will be denied.

25 **IT IS ORDERED:**

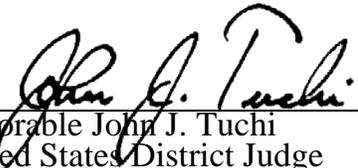
26 (1) The Report and Recommendation of Magistrate Judge Bade (Doc. 28) is
27 **adopted**, and Defendant Barnett is **dismissed** from the action **without prejudice** for
28 failure to serve.

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(2) The reference to the Magistrate Judge is **withdrawn** as to Plaintiff's Motion for a Court Order (Doc. 13), and the motion is **denied**.

(3) Within **fourteen (14) days** of this Order, Plaintiff must show cause why Defendant Malachinski should not be dismissed from the action for failure to serve.

Dated this 10th day of January, 2018.



Honorable John J. Tuchi
United States District Judge