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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Donnie Ray Matthews,
10 Plaintiff,

11 v.

12 Charles L Ryan, et al.,
13 Defendants.
14

No. CV-18-03740-PHX-MTL (MHB)

ORDER

15 Plaintiff Donnie Ray Matthews filed a pro se civil rights Second Amended
16 Complaint pursuant to 42 U.S.C. § 1983 (Doc. 9). In its screening order, the Court
17 ordered Defendants Ryan and Corizon to answer the Second Amended Complaint, and
18 dismissed the remaining claims and Defendants without prejudice. The Court also stated
19 that “[w]ithin 120 days from the filing date of this Order, Plaintiff must file a ‘Notice of
20 Substitution,’ substituting actual names of members of Defendant Utilization
21 Management Team. The Court may dismiss without prejudice Defendant Utilization
22 Management Team if Plaintiff fails to timely file a notice of substitution, unless Plaintiff
23 seeks and is granted an extension of time.”

24 Plaintiff has not moved for an extension of time, and to date, Plaintiff has not filed
25 a notice of substitution – and the time for doing so has expired.

26 Plaintiff has the general duty to prosecute this case. See Fidelity Philadelphia
27 Trust Co. v. Pioche Mines Consolidated, Inc., 587 F.2d 27, 29 (9th Cir. 1978). Rule 41(b)
28 of the Federal Rules of Civil Procedure provides that “[f]or failure of the plaintiff to

1 prosecute or to comply with these rules or any order of court, a defendant may move for
2 dismissal of an action.” In Link v. Wabash Railroad Co., 370 U.S. 626, 629-31 (1962),
3 the Supreme Court recognized that a federal district court has the inherent power to
4 dismiss a case *sua sponte* for failure to prosecute, even though the language of Rule 41(b)
5 of the Federal Rules of Civil Procedure appears to require a motion from a party.
6 Moreover, in appropriate circumstances, the Court may dismiss a complaint for failure to
7 prosecute even without notice or hearing. See id. at 633.

8 In determining whether Plaintiff’s failure to prosecute warrants dismissal, the
9 Court must weigh the following five factors: “(1) the public’s interest in expeditious
10 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice
11 to the defendants; (4) the public policy favoring disposition of cases on their merits; and
12 (5) the availability of less drastic sanctions.” Carey v. King, 856 F.2d 1439, 1440 (9th
13 Cir. 1988) (quoting Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)). “The
14 first two of these factors favor the imposition of sanctions in most cases, while the fourth
15 factor cuts against a default or dismissal sanction. Thus the key factors are prejudice and
16 availability of lesser sanctions.” Wanderer v. Johnson, 910 F.2d 652, 656 (9th Cir.
17 1990).

18 Here, the first, second, and third factors favor dismissal. Plaintiff’s failure to
19 comply with Court Orders, file a notice of substitution, and ultimately serve the members
20 of Defendant Utilization Management Team, prevents the case against them from
21 proceeding in the foreseeable future. The fourth factor, as always, weighs against
22 dismissal. The fifth factor requires the Court to consider whether a less drastic alternative
23 is available. The Court has already made reasonable efforts to provide Plaintiff with the
24 time needed to file a notice of substitution.

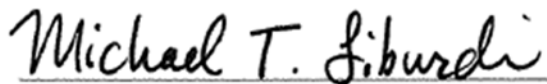
25 The Court finds that only one less drastic sanction is realistically available. Rule
26 41(b) provides that a dismissal for failure to prosecute operates as an adjudication upon
27 the merits “[u]nless the court in its order for dismissal otherwise specifies.” In the instant
28 case, the Court finds that a dismissal with prejudice would be unnecessarily harsh.

1 Plaintiff's claims against the members of Defendant Utilization Management Team will
2 therefore be dismissed without prejudice pursuant to Rule 41(b) of the Federal Rules of
3 Civil Procedure.

4 IT IS THEREFORE ORDERED that pursuant to Rule 41(b) of the Federal Rules
5 of Civil Procedure Plaintiff's claims against the members of Defendant Utilization
6 Management Team are dismissed without prejudice.

7 Dated this 7th day of October, 2019.

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Michael T. Liburdi
United States District Judge