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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Melinda Gabriella Valenzuela,

10 Plaintiff,

11 v.

12 Corizon Health Incorporated, et al.,

13 Defendants.  
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No. CV-19-05167-PHX-MTL (MHB)

**ORDER**

15 Plaintiff has filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983. In  
16 its screening order, the Court ordered Defendants Schmidt and Fallhoe to answer Count  
17 Two of the Complaint, and dismissed the remaining claims and Defendants without  
18 prejudice. The Court also stated, if Plaintiff does not either obtain a waiver of service of  
19 the summons or complete service of the Summons and Complaint on a Defendant within  
20 90 days of the filing of the Complaint or within 60 days of the filing of the screening order,  
21 whichever is later, the action may be dismissed as to each Defendant not served.

22 The record revealing that Defendants Schmidt and Fallhoe had not been served, the  
23 Court ordered Plaintiff to show cause why this matter should not be dismissed for failure  
24 to serve pursuant to Fed.R.Civ.P. 4(m). Thereafter, Plaintiff filed a request for service  
25 assistance.

26 In an effort to move this matter forward, the Court required Corizon Health, Inc., to  
27 advise the Court and Plaintiff regarding this matter. The Court stated, “[i]f Defendants  
28 Schmidt and Fallhoe are still employed with Corizon Health, Inc., it shall provide Plaintiff

1 with their current work locations. If said Defendants are no longer employed with Corizon  
2 Health, Inc., it shall provide their last known home addresses to the Court UNDER SEAL.”

3 Corizon complied with the Court’s Order and Defendant Schmidt was served on  
4 September 11, 2020. However, the record reflects that service was returned unexecuted as  
5 to Defendant Fallhoe.

6 Therefore, it appearing that reasonable efforts have been made to provide Plaintiff  
7 with the opportunity to effect service; Defendant Fallhoe has not been served; and the time  
8 for completing service has expired, the Court will determine whether dismissal of this  
9 matter as to Defendants Fallhoe is appropriate.

10 Plaintiff has the general duty to prosecute this case. See Fidelity Philadelphia Trust  
11 Co. v. Pioche Mines Consolidated, Inc., 587 F.2d 27, 29 (9<sup>th</sup> Cir. 1978). Rule 41(b) of the  
12 Federal Rules of Civil Procedure provides that “[f]or failure of the plaintiff to prosecute or  
13 to comply with these rules or any order of court, a defendant may move for dismissal of an  
14 action.” In Link v. Wabash Railroad Co., 370 U.S. 626, 629-31 (1962), the Supreme Court  
15 recognized that a federal district court has the inherent power to dismiss a case *sua sponte*  
16 for failure to prosecute, even though the language of Rule 41(b) of the Federal Rules of  
17 Civil Procedure appears to require a motion from a party. Moreover, in appropriate  
18 circumstances, the Court may dismiss a complaint for failure to prosecute even without  
19 notice or hearing. See id. at 633.

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


1 Here, the first, second, and third factors favor dismissal. Plaintiff's failure to serve  
2 Defendant Fallhoe prevents the case against him from proceeding in the foreseeable future.  
3 The fourth factor, as always, weighs against dismissal. The fifth factor requires the Court  
4 to consider whether a less drastic alternative is available. The Court has already made  
5 reasonable efforts to provide Plaintiff with the opportunity to effect service.

6 The Court finds that only one less drastic sanction is realistically available. Rule  
7 41(b) provides that a dismissal for failure to prosecute operates as an adjudication upon the  
8 merits "[u]nless the court in its order for dismissal otherwise specifies." In the instant case,  
9 the Court finds that a dismissal with prejudice would be unnecessarily harsh. Plaintiff's  
10 claims against Defendant Fallhoe will therefore be dismissed without prejudice pursuant  
11 to Rule 41(b) of the Federal Rules of Civil Procedure.

12 **IT IS THEREFORE ORDERED** that pursuant to Rule 41(b) of the Federal Rules  
13 of Civil Procedure Plaintiff's claims against Defendant Fallhoe are dismissed without  
14 prejudice.

15 **IT IS FURTHER ORDERED** directing the Clerk of Court to strike from the  
16 docket, Doc. 40.

17 Dated this 13th day of October, 2020.

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21 Michael T. Liburdi  
22 United States District Judge  
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