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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

**Michael James Rich,**  
**Plaintiff,**  
**v.**  
**Wexford Health Sources, Inc.,**  
**Dr. Stonecipher,**  
**Ronald Williams,**  
**Defendants.**

)  
) CIV 10-08178 PCT JWS MEA  
)  
) REPORT AND RECOMMENDATION  
) FOR DISMISSAL  
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**TO THE HONORABLE JOHN W. SEDWICK:**

Plaintiff, who was then pro se, filed his complaint on September 17, 2010, while incarcerated at the Arizona State Prison Complex in Buckeye, Arizona. On January 7, 2011, the Court ordered Plaintiff to complete and return a service packet for Defendant Wexford Health Sources to the Court. That order warned Plaintiff that his failure to timely comply with the provisions of the order would result in the dismissal of the complaint pursuant to Rule 41(b), Federal Rules of Civil Procedure. Plaintiff later identified as defendants and effected service on Defendant Stonecipher and Defendant Williams.

1 The Court's service order at Doc. 8 warned Plaintiff:

2 Plaintiff must pay the unpaid balance of the  
3 filing fee within 120 days of his release.  
4 Also, within 30 days of his release, he must  
5 either (1) notify the Court that he intends  
6 to pay the balance or (2) show good cause, in  
7 writing, why he cannot. Failure to comply may  
8 result in dismissal of this action.

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6 Plaintiff must file and serve a notice of a  
7 change of address in accordance with Rule  
8 83.3(d) of the Local Rules of Civil  
9 Procedure. Plaintiff must not include a  
10 motion for other relief with a notice of  
11 change of address. Failure to comply may  
12 result in dismissal of this action.

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10 If Plaintiff fails to timely comply with  
11 every provision of this Order, including  
12 these warnings, the Court may dismiss this  
13 action without further notice. See Ferdik v.  
14 Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir.  
1992) (a district court may dismiss an action  
for failure to comply with any order of the  
Court).

15 On December 19, 2011, Defendants filed a motion to  
16 dismiss, which was denied on May 2, 2012. On May 4, 2012, the  
17 Court issued a scheduling order requiring discovery be completed  
18 by October 12, 2012, and that dispositive motions be filed by  
19 December 21, 2012. Defendants Wilkinson and Payne were added as  
20 defendants and these defendants answered the complaint on August  
21 21, 2012.

22 Plaintiff noticed a change of address, indicating he  
23 was released from prison, on September 12, 2012, and counsel for  
24 Plaintiff entered an appearance on September 19, 2012, and on  
25 October 2, 2012. The remainder of the filing fee was paid on  
26 July 20, 2012. See Doc. 31.

27 On October 12, 2012, Plaintiff sought an extension of  
28 the time to complete discovery and file dispositive motions, and

1 on November 30, 2012, the Court allowed the parties until  
2 September 1, 2013, to complete discovery and until September 15,  
3 2013, to file dispositive motions.

4 On November 19, 2012, Defendants filed a motion for  
5 summary judgment. On March 21, 2012, the Court granted in part  
6 and denied in part Defendants' motion for summary judgment. The  
7 Court dismissed Count I with prejudice, regarding Plaintiff's  
8 treatment to his left big toe, and denied the motion with regard  
9 to Count II, regarding treatment for his right foot.

10 On April 12, 2013, the Court granted Attorney Richard  
11 D. Lyons' motion to withdraw as counsel of record for Plaintiff,  
12 based on the fact that Mr. Lyons was no longer employed by  
13 Gillespie, Shields & Durrant. Mr. Lyons stated in his motion to  
14 withdraw: "Gillespie, Shields & Durrant has expressed a desire  
15 to continue representing Plaintiffs as co-counsel with other  
16 attorneys and is actively seeking co-counsel in that regard."  
17 Doc. 53.

18 In the order granting the motion to withdraw the Court  
19 ordered that Plaintiff inform the Court as to whether Gillespie,  
20 Shields & Durrant would continue to represent Plaintiff or if he  
21 wished to proceed pro se. That order was mailed to Plaintiff at  
22 his last known address:

23 Mr. Michael Rich  
24 4210 North Longview Avenue  
25 Phoenix, Arizona 85014

26 The order mailed to Plaintiff was returned as  
27 undeliverable. See Doc. 55.

28 Accordingly, on August 8, 2013, the Magistrate Judge  
issued an order directed to Dan Durrant of the law firm

1 Gillespie, Shields & Durrant, pursuant to his appearance as  
2 counsel of record for Plaintiff at Doc. 37. The Court gave Mr.  
3 Durrant until August 23, 2013, to notify the Court whether he  
4 continues to represent Plaintiff or to move the Court to  
5 withdraw as counsel of record for Plaintiff. Mr. Durrant did  
6 not respond to the order and the copy of the order sent to  
7 Plaintiff was returned as undeliverable.

8           Rule 3.4, Local Rules of Civil Procedure for the United  
9 States District Court for the District of Arizona requires  
10 prisoner-litigants to comply with instructions attached to the  
11 Court-approved complaint form for use in section 1983 actions.  
12 Those instructions provide: "You must immediately notify the  
13 clerk ... in writing of any change in your mailing address.  
14 Failure to notify the court of any change in your mailing  
15 address may result in the dismissal of your case."

16           Plaintiff has a general duty to prosecute this case.  
17 Fidelity Phila. Trust Co. v. Pioche Mines Consol., Inc., 587  
18 F.2d 27, 29 (9th Cir. 1978). In this regard, it is the duty of  
19 a plaintiff who has filed a *pro se* action to keep the Court  
20 apprised of his current address and to comply with the Court's  
21 orders in a timely fashion. This Court does not have an  
22 affirmative obligation to locate Plaintiff. "A party, not the  
23 district court, bears the burden of keeping the court apprised  
24 of any changes in his mailing address." Carey v. King, 856 F.2d  
25 1439, 1441 (9th Cir. 1988). Plaintiff's failure to keep the  
26 Court informed of his new address constitutes failure to  
27 prosecute.

28

1           Rule 41(b) of the Federal Rules of Civil Procedure  
2 provides that "[f]or failure of the plaintiff to prosecute or to  
3 comply with these rules or any order of court, a defendant may  
4 move for dismissal of an action." In Link v. Wabash Railroad  
5 Co., 370 U.S. 626, 629-31 (1962), the Supreme Court recognized  
6 that a federal district court has the inherent power to dismiss  
7 a case *sua sponte* for failure to prosecute, even though the  
8 language of Rule 41(b) of the Federal Rules of Civil Procedure  
9 appears to require a motion from a party. Moreover, in  
10 appropriate circumstances, the Court may dismiss a complaint for  
11 failure to prosecute even without notice or hearing. Id. at  
12 633.

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

27           Here, the first, second, and third factors favor  
28 dismissal of this case. Plaintiff's failure to keep the Court

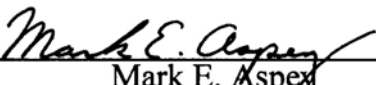
1 informed of his address prevents the case from proceeding in the  
2 foreseeable future. The fourth factor, as always, weighs  
3 against dismissal. The fifth factor requires the Court to  
4 consider whether a less drastic alternative is available.  
5 Without Plaintiff's current address, however, certain  
6 alternatives are bound to be futile. Here, as in Carey, "[a]n  
7 order to show cause why dismissal is not warranted or an order  
8 imposing sanctions would only find itself taking a round trip  
9 tour through the United States mail." 856 F.2d at 1441.

10 The Court finds that only one less drastic sanction is  
11 realistically available. Rule 41(b) provides that a dismissal  
12 for failure to prosecute operates as an adjudication upon the  
13 merits "[u]nless the court in its order for dismissal otherwise  
14 specifies." In the instant case, the Court concludes that a  
15 dismissal with prejudice would be unnecessarily harsh.

16 **IT IS THEREFORE RECOMMENDED** that, pursuant to Rule  
17 41(b), Federal Rules of Civil Procedure, this action be  
18 dismissed without prejudice.

19 DATED this 4<sup>th</sup> day of September, 2013.

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Mark E. Aspey  
United States Magistrate Judge