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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

TIMOTHY S. LEATHERBY,)	Case No. CV 09-6877-PA (MLG)
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	DISMISSING COMPLAINT FOR FAILURE
v.)	TO SERVE AND PROSECUTE
)	
CALIFORNIA DEPARTMENT OF)	
CORRECTIONS, et al.,)	
)	
Defendants.)	

18 On September 22, 2009, Plaintiff Timothy S. Leatherby filed this
 19 *pro se* complaint pursuant to 42 U.S.C. § 1983. The complaint made
 20 conclusory allegations against various state officials involving,
 21 among other things, the falsifying of parole documents, indifference
 22 to medical care, slander, unlawful arrest, fraud and conspiracy. On
 23 January 27, 2010, the Court issued an order directing Plaintiff to
 24 show cause why the action should not be dismissed for failure to
 25 serve the defendants. Plaintiff filed a response and on February 11,
 26 2010, the Court determined that the complaint failed to allege facts
 27 demonstrating subject matter jurisdiction, and an order was entered
 28 dismissing the complaint, but granting Plaintiff leave to file a

1 first amended complaint. The Order to Show Cause, a request to
2 extend the time in which to serve the complaint, and a request for
3 service by the United States Marshal, were dismissed as moot.
4 Plaintiff was specifically directed to serve the defendants within
5 30 days of filing of the amended complaint. (Docket Entries 6, 9.)

6 On March 2, 2010, Plaintiff filed the first amended complaint.
7 However, service was not made upon any of the defendants within the
8 30-day time period. On April 15, 2010, Magistrate Judge Marc L.
9 Goldman issued an order directing Plaintiff to show cause why the
10 action should not be dismissed for failure to effect service within
11 the time ordered by the Court. Plaintiff did not respond to the order
12 in the time allowed.¹

13 "If service of the summons and complaint is not made upon a
14 defendant within 120 days after the filing of the complaint, the
15 court, upon motion or on its own initiative after notice to the
16 plaintiff, shall dismiss the action without prejudice as to that
17 defendant or direct that service be effected within a specified
18 time." Fed.R.Civ.P. 4(m); *see Boudette v. Barnette*, 923 F.2d 754, 757
19 (9th Cir. 1991) (affirming dismissal of complaint for failure to
20 timely serve the summons and complaint); *Townsel v. County of Contra*
21 *Costa*, 820 F.2d 319, 320 (9th Cir. 1987) (same). The 120-day period
22 may be extended by the Court upon a showing of good cause. *See*
23 Fed.R.Civ.P. 4(m).

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26 ¹ On April 29, 2010, Plaintiff re-filed the motion seeking an order
27 directing service by the United States Marshal. On the same date,
28 Magistrate Judge Goldman denied the motion because Plaintiff had failed
to demonstrate entitlement to service of process without prepayment of
fees. 28 U.S.C. § 1915.

1 Here, Plaintiff has not effected service on any of the named
2 defendants. While the court is mindful that Plaintiff is proceeding
3 *pro se*, he nonetheless has a responsibility to follow the Rules of
4 Civil Procedure and this Court's order regarding service. Plaintiff
5 has failed effect service despite being twice specifically informed
6 of this requirement and being given two opportunities to do so. The
7 failure to effect service warrants dismissal of this action by reason
8 of Rule 4(m).

9 In addition, Courts possess the discretionary authority to
10 dismiss an action based on a plaintiff's failure to diligently
11 prosecute or comply with a court order. Fed.R.Civ.P. 41(b); Local
12 Rule 12.1. See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-630 (1962).
13 "Dismissal is a harsh penalty and is to be imposed only in extreme
14 circumstances." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.
15 1986). The Court is required to weigh the following factors in
16 determining whether to dismiss a case for lack of prosecution: "(1)
17 the public's interest in expeditious resolution of litigation; (2)
18 the court's need to manage its docket; (3) the risk of prejudice to
19 the defendants; (4) the public policy favoring disposition of cases
20 on their merits; and (5) the availability of less drastic sanctions."
21 *Omstead v. Dell, Inc*, 594 F.3d 1081, 1084 (9th Cir. 2010); *In re*
22 *Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994) (citing *Henderson*, 779 F.2d
23 at 1423).

24 In weighing these factors, the court concludes that dismissal
25 is appropriate in this case. The case has been pending for eight
26 months. Plaintiff has twice been warned that his failure to effect
27 service would result in dismissal of this action. The interest of the
28 public and the court in bringing cases to resolution weighs in favor

1 of dismissal. There are no other sanctions available when a party has
2 failed to prosecute or effect service.

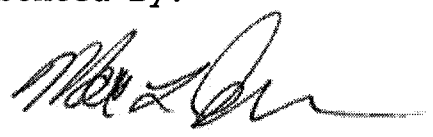
3 Accordingly, it is ORDERED that this action be dismissed without
4 prejudice for failure to effect service and failure to prosecute.

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6 Dated: May 3, 2010



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10 Percy Anderson
United States District Judge

11 Presented By:



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14 Marc L. Goldman
United States Magistrate Judge