

1 deemed submitted for decision. L.R. 230(l).

2 **BACKGROUND**

3 Findings and recommendations issued on November 27, 2012, finding plaintiff's
4 allegations in the Second Amended Complaint (Doc. No. 22) against Dr. Benyamin, Dr. Ferro,
5 and Nurse Dishman in Claims 18, 19, & 21 to state cognizable claims. (Doc. No. 28.) A number
6 of plaintiff's other claims against other defendants, were also found to be cognizable. (*Id.*) Those
7 findings and recommendations were adopted and service on the defendants against whom
8 cognizable claims had been alleged was ordered in March of 2013. (Docs. No. 30, 33.)
9 Thereafter, a few executed waivers of service were filed as well as an answer on behalf of a
10 number of defendants. (*See* Doc. No. 35, Def. Tucker; Doc. No. 39, Def. Reeves; Doc. No. 42,
11 Answer by Brown, Franco, Hall, Herrera, Lee, McBride, Redding, Reeves, Singleton, Trimble,
12 Tucker.)

13 In May of 2014, unexecuted summonses were filed by the U.S. Marshal as to defendants
14 Dr. Benyamin, Dr. Ferro, and Nurse Dishman.¹ (Docs. No. 74, 76.) Plaintiff was ordered by the
15 court to provide additional information to effectuate service on those defendants. (Doc. No. 80.)
16 Plaintiff requested and received a three-month extension of time to provide the additional
17 information, but failed to do so. (Docs. No. 86, 90.)

18 On October 10, 2014, an order issued requiring plaintiff to show cause as to why the three
19 defendants should not be dismissed pursuant to Rule 4(m). (Doc. No. 93.) Plaintiff filed a
20 response in which he asserted that the U.S. Marshal's efforts to locate the three defendants by
21 contacting the CDCR's Office of Legal Affairs and the State Attorney General were inadequate
22 because, according to plaintiff, those state agencies were biased and could not be relied on to
23 provide information in aid of service. Plaintiff requested that the U.S. Marshal be required to
24 search the internet, Google, change of address information via the U.S. Postal Service, to conduct
25 a public records search, and to perform any tasks necessary to locate those three defendants as
26 they would to locate fugitives. (Doc. No. 94.)

27 ¹ An unexecuted waiver was also filed as to deceased defendant W.R. Williams, for whom
28 plaintiff did not substitute a successor in interest.

1 On April 22, 2015, findings and recommendations issued recommending that the three
2 defendants to be dismissed, noting that plaintiff had not provided the U.S. Marshal with accurate
3 and sufficient information to effect service, despite the fact that this action had then been pending
4 for over five years. (Doc. No. 99.) Plaintiff did not file any objections to those findings and
5 recommendations. The findings and recommendations were adopted in full and Dr. Benyamin,
6 Dr. Ferro, and Nurse Dishman were dismissed without prejudice. (Doc. No. 108.)

7 Plaintiff now belatedly seeks an order reinstating his Claims 18, 19, and 20 and directing
8 the U.S. Marshal to serve Dr. Benyamin and Dr. Ferro at their addresses listed on defendant's
9 Designation of Expert Witnesses, which he has attached as an exhibit to his motion, and for the
10 U.S. Marshal to be ordered to conduct research as he previously requested to ascertain the
11 location of and thereafter serve Nurse Dishman. (Doc. No. 147.) Plaintiff argues that defense
12 counsel had the ability to provide the addresses for Dr. Benyamin, Dr. Ferro, and Nurse Dishman
13 to the U.S. Marshal when service was initially attempted, but instead "concealed them." (*Id.* at
14 2.)

15 Defendants' opposition to plaintiff's motion indicates that the U.S. Marshal did not
16 contact defense counsel personally in an attempt to locate Dr. Benyamin and Dr. Ferro. (Doc.
17 No. 152.) Defendants oppose plaintiff's motion by arguing that plaintiff has not shown what
18 efforts he made to provide the U.S. Marshal with accurate information in order to locate and serve
19 Dr. Benyamin, Dr. Ferro, and Nurse Dishman. (*Id.*) Defendants point out that plaintiff did not
20 inquire about the status of service on those three defendants until March of 2014 (Doc. No. 62),
21 when he requested that the U.S. Marshal be ordered to locate them for service of process, and that
22 despite receiving extension of the discovery deadline, plaintiff never propounded any discovery
23 requests concerning the whereabouts of Dr. Benyamin, Dr. Ferro, or Nurse Dishman in order to
24 assist in effectuating service on them. (Doc. No. 152.)

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1 “In making extension decisions under Rule 4(m) a district court may consider factors ‘like
2 a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual
3 service.’” *Efaw* , 473 F.3d at 1041 (quoting *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d 381, 383
4 (7th Cir.1998)). In *Efaw*, the Ninth Circuit found that dismissal should have been granted where
5 the plaintiff failed to explain his seven year delay in serving the defendant and failed to present
6 evidence that the defendant knew about the action notwithstanding plaintiff’s failure to effect
7 proper service, coupled with the obvious prejudice caused by the delay. *Id.*

8 **II. Discussion**

9 Here, plaintiff contends that because the U.S. Marshal contacted the Attorney General’s
10 Office when service was first attempted on Dr. Benyamin and Dr. Ferro, and the Deputy Attorney
11 General representing the remaining defendants subsequently located both of the doctors and
12 disclosed them as potential expert witnesses, the Attorney General’s Office had the ability to
13 provide addresses for Dr. Benyamin and Dr. Ferro to the U.S. Marshal, but instead “concealed
14 them.” (Doc. No. 147 at 2.) Plaintiff argues that as a matter of law this is an evasion of service
15 of process which was beyond his control and warrants the granting of his request for an order
16 directing that these defendants now be served. (*Id.*) (citing *Gambino v. Village*, 164 F.R.D. 271,
17 274 (M.D. Fla. 1995) and *Coleman v. Milwaukee Bd. Of Sch. Dirs.*, 290 F.3d 932, 934 (7th Cir.
18 2002)).

19 The undersigned notes that in *Gambino* the court merely found good cause for service
20 after the 120 day deadline then set under Rule 4 because the parties were engaged in settlement
21 negotiations which proved unfruitful and plaintiff had provided law enforcement service
22 documents which properly named and identified the defendants within that deadline. In *Coleman*
23 case the court noted that a defendant’s evasion could provide good cause for service beyond Rule
24 4’s deadline. *See* 209 F.3d at 934 (citing *Geiger v. Allen*, 850 F.2d 330, 333 (7th Cir. 1988);
25 *Petrucelli v. Bohringer & Ratzinger, GMBH*, 46 F.3d 1298, 1305–06 (3d Cir. 1995); and
26 *Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 (6th Cir. 1991)). However, the court
27 explicitly found in *Coleman* that there had been no evasion of service and the providing of
28 additional time for delayed service was not warranted.

1 The circumstances here parallel those confronted by the Ninth Circuit in *Efaw*. Notably,
2 both in this case and in *Efaw* there was an “extraordinary” seven year lapse from the filing of the
3 action to the plaintiff’s request for service of process. Just as in *Efaw*, plaintiff here offers no
4 reasonable explanation for his seven year failure to provide *any* information beyond the surnames
5 of Dr. Benyamin, Dr. Ferro, and Nurse Dishman upon which the U.S. Marshall might have re-
6 attempted service.

7 As defendants correctly point out, an answer to plaintiff’s Second Amended Complaint
8 was filed on July 5, 2013. (Doc. No. 42.) However, no answer was filed on behalf of the three
9 defendants at issue here. A few days later, the Discovery and Scheduling Order issued which
10 opened discovery and set December 9, 2013 as the deadline for the completion of discovery,
11 including the filing of any motions to compel. (Doc. No. 43.) That order specifically stated that
12 **“discovery requests must be served at least forty-five (45) days before the discovery**
13 **deadline.”** (*Id.* at 1:23-24) (emphasis added). It also stated, **“[a] request for an extension of a**
14 **deadline set in this order must be filed on or before the expiration of the deadline in**
15 **question.”** (*Id.* at 2:18-19) (emphasis in original).

16 Plaintiff’s motion for a 90-day extension of all deadlines set by the scheduling order in
17 this case, including discovery, was granted. (Doc. Nos. 51, 52, 53.) At his request, the deadline
18 for the completion of discovery was extended from December 9, 2013 to March 9, 2014. (Doc.
19 53.) Nonetheless, plaintiff failed to propound any discovery to ascertain the whereabouts of Dr.
20 Benyamin, Dr. Ferro, and Nurse Dishman.³ Plaintiff did nothing to pursue service on Dr.
21 Benyamin, Dr. Ferro, and Nurse Dishman until March 21, 2014 when he filed a motion
22 requesting an order directing the USM to produce proofs of service. (Doc. No. 62.) While his
23 motion in that regard was denied (Doc. No. 79), a separate order also issued noting that the U.S.
24 Marshal reported that the facility had been contacted and reported no record of any of those three
25 defendants and that CDCR’s legal department also had no information regarding them. (Doc. No.
26 80). Therefore, on May 21, 2014, plaintiff was given 30-days to provide additional information

27 ³ Indeed, plaintiff waited until April of 2014 to file a motion to compel with respect to the
28 discovery that he propounded, which motion was denied as untimely. (Doc. Nos. 67, 78.)

1 to assist service efforts as to these three defendants with the suggestion that he include
2 “information such as the place, date, and time that he saw any of these defendants and all
3 identifying attributes that he can recall about them such as their gender, hair color, height, weight,
4 and the like.” (Doc. No. 80.) Plaintiff requested and received a three month extension of time, up
5 to September 12, 2014, to submit the requested information to assist in locating the three
6 defendants for purposes of service. (Doc. Nos. 86, 90.)

7 Approximately one month beyond the extended deadline, plaintiff had still not filed any
8 identifying information. Accordingly, the court issued an order requiring plaintiff to show cause
9 why defendants Dr. Benyamin, Dr. Ferro, and Nurse Dishman should not be dismissed from this
10 action pursuant to Rule 4(m). (Doc. No. 93.) In his response to the order to show cause, plaintiff
11 raised many of the same arguments he now asserts in his current motion, to wit: that the state
12 agencies which the U.S. Marshal contacted to locate these three defendants would be “protective
13 of state employees” such that “there should be no reasonable expectation that these agencies
14 would cooperate” by providing information for service; and that the U.S. Marshal should be
15 required to search the internet, state and federal public records, as well as request change of
16 address information via the U.S. Postal Service to ascertain the location of the three named
17 defendants in order to effectuate service. (Doc. No. 94.) Notably, plaintiff once again failed to
18 provide the simple identifying information requested by the court in its May 21, 2014 order,
19 which should have been in his possession. (*Id.*)

20 Because plaintiff failed to provide any additional information to assist in effectuating
21 service, findings and recommendations issued on April 22, 2015, recommending that defendants
22 Dr. Benyamin, Dr. Ferro, and Nurse Dishman be dismissed from this action, noting that the time
23 for serving them had been extended well beyond the 120 days from filing of the operative
24 pleading (over three years) and finding that good cause did not exist to further extend the time for
25 service. (Doc. No. 99.) The findings and recommendation also observed that it was plaintiff’s
26 duty to provide information necessary to identify and locate a defendant for service of process
27 and that the U.S. Marshal was not required to engage in the types of efforts that plaintiff
28 apparently desired be taken. (*Id.*) Plaintiff was provided 30 days from the date the findings and

1 recommendation were issued to file objections thereto, but did not do so. (*Id.*) Thus, on July 10,
2 2015, the then-assigned district judge issued an order adopting the findings and recommendations
3 and Dr. Benyamin, Dr. Ferro, and Nurse Dishman were dismissed from this action pursuant to
4 Rule 4. (Doc. 108.)

5 The record is clear that plaintiff has never provided *any* information beyond the surnames
6 of Dr. Benyamin, Dr. Ferro, and Nurse Dishman, upon which to attempt service, despite multiple
7 and extended opportunity to do so. While mere surnames frequently suffice, in this case, they
8 were not sufficient for purposes of effectuating service. Because plaintiff failed to provide the
9 U.S. Marshal with accurate and sufficient information to effect service of the summons and
10 complaint, the Court's *sua sponte* dismissal of the unserved defendant was appropriate. *Walker*,
11 14 F.3d at 1421-22 (district court did not abuse its discretion in dismissing a defendant for failure
12 to serve process within the time provided by Rule 4 because plaintiff did not prove that he
13 provided the marshal with sufficient information to effectuate service).

14 At the time Dr. Benyamin, Dr. Ferro, and Nurse Dishman were dismissed from this action,
15 the case had been pending for over five years and the dispositive motion filing deadline was less
16 than a month away under the scheduling order that had already been extended at plaintiff's
17 request. (Doc. No. 99 at 3.) This action is now over seven years old and trial with respect to the
18 sole remaining claim has commenced. As a *pro se* prisoner, plaintiff was required to have
19 "furnished the information necessary to identify the defendant." *Walker*, 14 F.3d at 1422. Here,
20 even after being ordered to submit additional information to assist is service, plaintiff remained
21 silent and did nothing to attempt to remedy apparent defects. *See Rochon*, 828 F.2d at 1110 ("[A]
22 plaintiff may not remain silent and do nothing to effectuate such service. At a minimum, a
23 plaintiff should request service upon the appropriate defendant and attempt to remedy any
24 apparent service defects of which a plaintiff has knowledge."). The fact that counsel for the
25 remaining defendants proceeding to trial listed Dr. Benyamin and Dr. Ferro on their designation
26 of experts does not excuse plaintiff's lack of efforts to comply with this Court's orders to assist
27 with locating those defendants for purposes of service in this action years ago.

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1 Moreover, consideration of the applicable factors in making decisions regarding the
2 extension of time under Rule 4(m) do not now dictate a different result. *See Efav* , 473 F.3d at
3 1041 (noting factors to be considered). Though the applicable statute of limitations would bar
4 any new action against Dr. Benyamin, Dr. Ferro, and Nurse Dishman by plaintiff, the prejudice to
5 those three defendants if service upon them was authorized at this late date is apparent. If
6 plaintiff were allowed to resurrect his claims and serve Dr. Benyamin, Dr. Ferro, and Nurse
7 Dishman in this action, discovery would necessarily have to be reopened and an already dated
8 action would linger even longer on this Court’s docket. The three defendants would be
9 prejudiced as they would be required to engage in and defend discovery with respect to claims
10 relating to events that allegedly occurred a decade ago or longer.⁴ If plaintiff’s motion were to be
11 is granted, this 2010 action, involving events which allegedly occurred in 2006-07, would start
12 anew for all practical purposes,.

13 Further, plaintiff has submitted no evidence showing that Dr. Benyamin, Dr. Ferro, and
14 Nurse Dishman have actual notice of this action, beyond defense counsel’s recent contact with the
15 two physicians in connection with designating them as possible expert witnesses. That is an
16 insufficient basis upon which to order service at this late stage. *See Straub v. AP Green, Inc.*, 38
17 F.3d 448, 454 (9th Cir. 1994) (finding that even where a defendant’s attorney contacted the court
18 about the status of the action it was insufficient to establish that defendant had actual notice).

19 Plaintiff argues that the Ninth Circuit should “clearly carve out . . . a new rule” requiring
20 district courts to order the U.S. Marshal to access the internet and public records to locate
21 defendants who no longer work for the CDCR for purposes of service. (Doc. No. 147 at 3.)
22 Plaintiff has failed to come forward with any legal precedent for imposing such requirements on
23 the U.S. Marshal and the court has found none. In addition, given the number of incarcerated
24 plaintiffs who proceed *pro se* in this district, the court declines to impose such an overwhelming
25 and additional burden on the U.S. Marshal.

26 ⁴ It cannot be assumed that the same defense counsel representing the defendants who proceeded
27 to trial would also represent Dr. Benyamin, Dr. Ferro, and Nurse Dishman were they now to
28 appear in this action. It is not unusual for each medical practitioner to have independent defense
counsel in cases such as this one.

1 formed after an inquiry reasonable under the circumstances: . . . (1) it is not being presented for
2 any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost
3 of litigation.” When evaluating the imposition of sanctions, Rule 11 requires the Court to
4 consider not whether the party demonstrated subjective good faith in filing the document, but
5 whether the party acted objectively reasonably in doing so. *G.C. & K.B. Investments v. Wilson*,
6 326 F.3d 1096, 1109 (9th Cir. 2003).

7 Plaintiff presents no evidence upon which this court could find that defendants’ counsel
8 presented or is advocating a pleading, written motion, or other paper in bad faith or for an
9 improper purpose. Though it would perhaps have been ideal if the U.S. Marshal had listed the
10 individuals with whom they spoke on the unexecuted proofs of service filed with the court (*see*
11 Docs. No. 74-76), no such notations were made and, indeed, none are customary. The only
12 evidence plaintiff points to in support of his assertion that defense counsel “concealed” the
13 locations of Dr. Benyamin, Dr. Ferro, and Nurse Dishman so as to avoid service is a generic note
14 by the U.S. Marshal that they contacted the legal office in 2013 which resulted in a response of
15 “no info” and that defense counsel listed addresses for Dr. Benyamin and Dr. Ferro in the
16 defendants’ expert disclosures in 2017. There is no evidence that defense counsel was contacted
17 by the U.S. Marshal when they were attempting to locate those three defendants and certainly no
18 evidence that would justify imposing sanctions under Rule 11.

19 **II. Federal Rule of Civil Procedure 41(b)**

20 This Court also has the authority to sanction litigants who fail to comply with its orders.
21 Specifically, Rule 41(b) authorizes courts to dismiss an action for failure to comply with its
22 orders. Fed. R. Civ. P. 41(b). Although that rule appears to contemplate that dismissal will be
23 precipitated by a motion from the opposing party, a court may act *sua sponte* under Rule 41(b).
24 *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962); *Pagtalunan v. Galaza*, 291 F.3d 639, 640-43
25 (9th Cir. 2002) (affirming district court’s *sua sponte* dismissal of habeas petition with prejudice
26 “for failure to prosecute and failure to comply with a court order”).

27 In addition, pursuant to the Court’s Local Rules, this Court has the authority to impose
28 any appropriate sanction to curtail abusive litigation tactics. *See* E.D. Cal. L.R. 110 (“Failure of

1 counsel, or of a party to comply with these Rules or with any order of the Court may be grounds
2 for imposition by the Court of any and all sanctions authorized by statute or Rule or within the
3 inherent power of the Court.”); *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (“Failure to
4 follow a district court’s local rules is a proper ground for dismissal”); *Delange v. Dutra Constr.*
5 *Co., Inc.*, 183 F.3d 916, 919 n. 2 (9th Cir. 1999) (district courts enjoy “broad discretion in
6 interpreting and applying their local rules”).

7 Again, there is absolutely no evidence upon which to find that defense counsel was
8 contacted by the U.S. Marshal and failed to provide then available information regarding the
9 whereabouts of the three individuals. Absent such evidence, imposition of sanctions under Rule
10 41 is clearly unwarranted.

11 **III. Inherent Power**

12 “It has long been understood that certain implied powers must necessarily result to our
13 Courts of justice from the nature of their institution, powers which ... are necessary to the
14 exercise of all others.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotation
15 marks and citation omitted). “For this reason, Courts of justice are universally acknowledged to
16 be vested, by their very creation, with power to impose silence, respect, and decorum, in their
17 presence and submission to their lawful mandates.” *Chambers*, 501 U.S. at 43 (internal quotation
18 marks and citation omitted). Inherent powers are properly exercised to “protect[] the due and
19 orderly administration of justice and maintain[] the authority and dignity of the court.” *Primus*
20 *Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir.1997) (internal quotation marks
21 omitted). However, because of their very potency, inherent powers must be exercised with
22 restraint and discretion. *Chambers*, 501 U.S. at 44. As previously stated, there is no evidence
23 before this court upon which to find that defense counsel was contacted by the U.S. Marshal and
24 failed to provide then available information on the whereabouts of the three individuals. No basis
25 for the imposition of sanctions under the court’s inherent powers exists.

26 Accordingly, plaintiff’s request for the imposition of sanctions will be denied.

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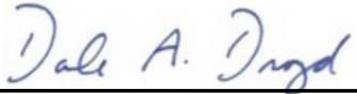
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CONCLUSION

For the foregoing reasons, plaintiff's motion, filed on March 2, 2017 (Doc. 147), to order service pursuant to Rule 4(m) or, in the alternative, to enter final judgment as to fewer than all claims and parties pursuant to Rule 54(b), and for sanctions, is DENIED in its entirety.

IT IS SO ORDERED.

Dated: May 4, 2017


UNITED STATES DISTRICT JUDGE