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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 LAMONT SHEPARD,

11 Plaintiff,

12 v.

13 DR. COHEN,

14 Defendant.

Case No. 1:11-cv-00535-DAD-EPG (PC)

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT DEFENDANT
DR. COHEN BE DISMISSED FROM THIS
ACTION, WITHOUT PREJUDICE, AND
THAT THE CASE BE CLOSED

(ECF NOS. 128 & 132)

TWENTY-ONE DAY DEADLINE

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18 **I. RELEVANT PROCEDURAL HISTORY**

19 Lamont Shepard (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma*
20 *pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This case is currently
21 proceeding on Plaintiff’s Second Amended Complaint. (ECF No. 41). The Court¹ found
22 cognizable claims in the Second Amended Complaint, and ordered it served on defendants Dr.
23 Cohen and Vera-Brown. (ECF No. 48).

24 Defendants Sgt. J. Lopez, Correctional Officer (“C/O”) Z. Dean, and C/O J. Campbell
25 were previously served, and the case against them has now been resolved. (ECF No. 117). A
26 settlement conference was held as to the claims against defendants Sgt. J. Lopez, C/O Z. Dean,

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28 ¹ Magistrate Judge Gary S. Austin was the presiding magistrate judge in this case until October
13, 2015. (ECF No. 87).

1 and C/O J. Campbell on May 20, 2016. (ECF No. 97). The case did not settle. (Id.). Because
2 the claims against defendants Sgt. J. Lopez, C/O Z. Dean, and C/O J. Campbell were not
3 settled, a trial was held on August 2, 2016. (ECF No. 115). At the trial, the Court allowed the
4 parties to engage in settlement negotiations, and the case settled. (Id.). As to the claims against
5 defendant Vera-Brown, summary judgment was entered in her favor on all of the claims against
6 her. (ECF No. 85).

7 As to defendant Dr. Cohen, on May 26, 2015, the summons was returned unexecuted
8 because the United States Marshal Service (“the Marshal”) was unable to locate defendant Dr.
9 Cohen. (ECF No. 78). Accordingly, the Court issued an order for Plaintiff to show cause why
10 defendant Dr. Cohen should not be dismissed from the case. (ECF No. 80). Plaintiff filed a
11 response, stating that he did not know defendant Dr. Cohen’s address, but that the California
12 Department of Corrections and Rehabilitation (“CDCR”) should have that information. (ECF
13 No. 82). The Court then ordered the Marshal to initiate re-service by contacting the Legal
14 Affairs Division of the CDCR for assistance in locating and effecting service on defendant Dr.
15 Cohen. (ECF No. 83).

16 On December 3, 2015, the summons was once again returned unexecuted. (ECF No.
17 88). According to the Marshal, it contacted the CDCR Special Investigator for the CDCR
18 Legal Division, but the address given to the Marshal was not valid and the CDCR did not have
19 another address. (Id.).

20 On December 21, 2015, District Judge Dale A. Drozd dismissed defendant Dr. Cohen
21 from the case without prejudice. (ECF No. 90). On August 8, 2016, Plaintiff asked for leave to
22 effect service on several parties. (ECF No. 116). The Court granted the motion as to defendant
23 Dr. Cohen. (ECF No. 118). Plaintiff submitted the service documents (ECF No. 120), and the
24 Marshal was once again directed to serve defendant Dr. Cohen (ECF No. 121).

25 On January 26, 2017, the summons was returned unexecuted. (ECF No. 124). The
26 Marshal stated that the waiver of service was returned to sender, and that the return enveloped
27 stated that defendant Dr. Cohen was deceased. (Id.).

28 Accordingly, the Court issued another order to show cause, directing Plaintiff to show

1 cause why defendant Dr. Cohen should not be dismissed from the action without prejudice
2 because of Plaintiff's failure to provide the Marshal with accurate and sufficient information to
3 effect service of the summons and complaint on defendant Dr. Cohen. (ECF No. 125).
4 Plaintiff filed a response that provided an address for defendant Dr. Cohen. (ECF No. 126).
5 Because Plaintiff provided a potential service address, the Court discharged the order to show
6 cause (ECF No. 128), and once Plaintiff provided the appropriate service documents (ECF No.
7 129), ordered the Marshal to serve defendant Dr. Cohen (ECF No. 130). The Court also told
8 Plaintiff that it was giving him "**one more opportunity** to have defendant Dr. Cohen served,"
9 and that if service of process failed again, the Court would issue findings and recommendations
10 recommending that defendant Dr. Cohen be dismissed from this case without prejudice and that
11 the case be closed. (ECF No. 128).

12 On June 14, 2017, the summons was once again returned unexecuted. (ECF No. 132).

13 **II. SERVICE BY UNITED STATES MARSHAL**

14 Pursuant to Federal Rule of Civil Procedure 4(m),

15 If a defendant is not served within 90 days after the complaint is filed, the court
16 – on motion or on its own after notice to the plaintiff – must dismiss the action
17 without prejudice against that defendant or order that service be made within a
18 specified time. But if the plaintiff shows good cause for the failure, the court
19 must extend the time for service for an appropriate period.

20 Fed. R. Civ. P. 4(m).²

21 In cases involving a plaintiff proceeding *in forma pauperis*, the Marshal, upon order of
22 the Court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(3). “[A]n
23 incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal
24 for service of the summons and complaint and ... should not be penalized by having his action
25 dismissed for failure to effect service where the U.S. Marshal or the court clerk has failed to
26 perform his duties....” Walker v. Sumner, 14 F.3d 1415, 1422 (9th Cir. 1994) (quoting Puett
v. Blandford, 912 F.2d 270, 275 (9th Cir. 1990) (alterations in original)), overruled on other

27 ² Fed. R. Civ. P. 4(m) was amended in 2015 to reduce the time for serving a defendant from 120
28 days to 90 days. However, the time period to serve defendant Dr. Cohen has expired under both the pre-
amendment version of the rule and the current version rule.

1 grounds by Sandin v. Connor, 515 U.S. 472 (1995). “So long as the prisoner has furnished the
2 information necessary to identify the defendant, the marshal’s failure to effect service is
3 ‘automatically good cause....’” Walker, 14 F.3d at 1422 (quoting Sellers v. United States, 902
4 F.2d 598, 603 (7th Cir.1990)). However, where a *pro se* plaintiff fails to provide the Marshal
5 with accurate and sufficient information to effect service of the summons and complaint,
6 dismissal of the unserved defendant is appropriate. Walker, 14 F.3d at 1421-22.

7 **III. ANALYSIS**

8 The return of service filed by the Marshal on June 14, 2017, indicates that the Marshal
9 attempted to serve defendant Dr. Cohen on several occasions. (ECF No. 132). There is no
10 indication on the return of service that the Marshal received a response from defendant Dr.
11 Cohen. (Id.). The Marshal certified that he or she was unable to locate defendant Dr. Cohen.
12 (Id.).

13 Plaintiff has failed to provide the Marshal with accurate and sufficient information to
14 effect service of the summons and complaint on defendant Dr. Cohen, and has failed to serve
15 defendant Dr. Cohen within the time period required by Federal Rule of Civil Procedure 4(m).
16 As detailed above, Plaintiff has had several opportunities to provide the Marshal with accurate
17 and sufficient information to effect service of the summons and complaint on defendant Dr.
18 Cohen, but has failed to do so. Accordingly, the Court will recommend that defendant Dr.
19 Cohen be dismissed from this action, without prejudice, and that the case be closed.

20 **IV. CONCLUSION AND RECOMMENDATION**

21 Based on the foregoing, the Court HEREBY RECOMMENDS that:

- 22 1. Defendant Dr. Cohen be dismissed from this action because of Plaintiff’s failure
23 to provide the Marshal with accurate and sufficient information to effect service
24 of the summons and complaint on defendant Dr. Cohen within the time period
25 prescribed by Federal Rule of Civil Procedure 4(m); and
- 26 2. The Clerk of Court be directed to close this case.

27 These findings and recommendations will be submitted to the United States District
28 Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1).

1 Within **twenty-one (21) days** after being served with a copy of these findings and
2 recommendations, any party may file written objections with the court and serve a copy on all
3 parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and
4 Recommendations.” Any reply to the objections shall be served and filed within **seven (7)**
5 **days** after service of the objections. The parties are advised that failure to file objections
6 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler,
7 772 F.3d 834, 839 (9th Cir. 2014) (quoting Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
8 1991)).

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10 IT IS SO ORDERED.

11 Dated: **June 15, 2017**

12 */s/ Eric P. Grogan*
13 UNITED STATES MAGISTRATE JUDGE
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