

1 and Plaintiff did not comply with the Court’s order or otherwise communicate with the Court.

2 On December 27, 2018, the Court issued an order directing Plaintiff to, within fourteen
3 (14) days from the date of service of the order, either file a motion for leave to amend his
4 pleading to substitute the identify of Officer Doe # 3, file a request to obtain the information
5 necessary to identify Officer Doe # 3, or show cause in writing why Officer Doe # 3 should not
6 be dismissed from the action. (ECF No. 32.) After Plaintiff failed to comply with the Court’s
7 order, on January 23, 2019, the Court issued findings and recommendations recommending that
8 Officer Doe # 3 be dismissed, without prejudice, for the failure to serve with process pursuant to
9 Federal Rule of Civil Procedure 4(m). (ECF No. 33.) On February 19, 2019, Plaintiff filed
10 objections to the January 23, 2019 findings and recommendations and a motion for leave to file
11 late objections for good cause. (Doc. Nos. 37, 38.)

12 On July 2, 2019, the Court issued an order denying as moot Plaintiff’s leave to file late
13 objections, vacating the January 23, 2019 findings and recommendations, and denying, without
14 prejudice, Plaintiff’s request for a Federal Rule of Civil Procedure 45 subpoena. (ECF No. 51.)
15 The Court ordered Plaintiff to file, within forty-five days from the date of service of the order,
16 either a motion for leave to amend his second amended complaint to substitute the identity of
17 Officer Doe # 3 or a renewed motion for a Rule 45 subpoena to obtain the information necessary
18 to identify Officer Doe # 3. (Id. at 8.) Finally, Plaintiff was expressly warned that his failure to
19 comply with the Court’s order would result in a recommendation to the District Judge to dismiss
20 Officer Doe # 3 from this action. (Id.)

21 More than forty-five days have passed since the Court’s July 2, 2019 order was served,
22 and Plaintiff has not complied with the Court’s order or otherwise communicated with the Court.

23 **II. Discussion**

24 Pursuant to Federal Rule of Civil Procedure 4(m):

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

1 Fed. R. Civ. P. 4(m). In cases involving a plaintiff proceeding *in forma pauperis*, a United States
2 Marshal, upon order of the court, shall serve the summons and the complaint. Fed. R. Civ. P.
3 4(c)(3). “[A] prisoner ‘is entitled to rely on the U.S. Marshal for service’ . . . as long as he or she
4 ‘provide[s] the necessary information to help effectuate service’ a prisoner ‘should not be
5 penalized by having his or her action dismissed . . . where the U.S. Marshal . . . has failed to
6 perform the duties required of . . . them[.]’” Schrubb v. Lopez, 617 F. App’x 832, 832 (9th Cir.
7 2015) (quoting Puett v. Blandford, 912 F.2d 270, 275 (9th Cir. 1990), abrogated on other grounds
8 by Sandin v. Connor, 515 U.S. 472 (1995)). However, where a *pro se* plaintiff fails to provide
9 the Marshal with accurate and sufficient information to effect service of the summons and
10 complaint, the Court’s *sua sponte* dismissal of the unserved defendants is appropriate. Walker v.
11 Summer, 14 F.3d 1415, 1421–22 (9th Cir. 1994), overruled on other grounds by Sandin, 515 U.S.
12 at 483-84.

13 Although a claim against a Doe defendant may be sufficient to survive screening, the Doe
14 defendant must be identified and served with a summons and complaint in order for an action to
15 proceed against that party. This cannot be done without Plaintiff’s cooperation. Here, Plaintiff
16 has been granted multiple opportunities to provide sufficient information to identify Defendant
17 Officer Doe # 3, so that the United States Marshal may serve the summons and complaint on
18 them. However, Plaintiff has failed to identify Defendant Officer Doe # 3 or file a motion for a
19 Rule 45 subpoena so that he can obtain the information necessary to identify Officer Doe # 3,
20 despite repeated warnings that failure to do so would result in the dismissal of Officer Doe # 3.
21 In addition, Plaintiff has failed to set forth any explanation demonstrating good cause for his
22 failure to identify Defendant Officer Doe # 3.

23 **III. Recommendation**

24 Accordingly, the Court HEREBY RECOMMENDS that Defendant Officer Doe # 3 be
25 dismissed for the failure to serve with process, without prejudice, pursuant to Federal Rule of
26 Civil Procedure 4(m).

27 These findings and recommendation will be submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**

1 (14) days after being served with these findings and recommendation, Plaintiff may file written
2 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
3 Findings and Recommendation.” Plaintiff is advised that failure to file objections within the
4 specified time may result in the waiver of the “right to challenge the magistrate’s factual
5 findings” on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
6 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: September 13, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE