

1 June 3, 2019, plaintiff was released from prison and filed a notice of change of address. (Doc.
2 No. 13). The findings and recommendations were fully adopted on August 13, 2019. (Doc. No.
3 14). On August 20, 2019, the court ordered plaintiff to complete service forms within thirty (30)
4 days so the court direct the United States Marshal to effectuate service upon the defendant. (Doc.
5 No. 15). The order cautioned plaintiff that his failure to timely comply could result in a
6 dismissal of this action. (*Id.* at ¶ 5). On June 12, 2020, after plaintiff failed to timely return
7 completed service forms, the court issued an order to show cause “why this case should not be
8 dismissed for his failure to prosecute and failure to comply with a court order.” (Doc. No. 17).
9 The court’s show cause order was returned as undeliverable on July 9, 2020. The court’s order
10 reassigning this case to the undersigned was also returned as undeliverable on December 14,
11 2020. On December 4, 2020, the court redirected the clerk to re-serve the August 20, 2019 show
12 cause order and order reassigning this case to the undersigned. (*See* docket entry dated December
13 4, 2020). As of the date of these findings and recommendations, plaintiff has not returned
14 completed service forms and has not responded to the order to show cause, despite it being resent
15 on December 4, 2020 and not returned as undeliverable.

16 II. APPLICABLE LAW

17 If a defendant is not served within ninety (90) days after a complaint is filed, the court
18 *must*, after notice to the plaintiff, dismiss the action without prejudice. Fed. R. Civ. P. 4(m)
19 (emphasis added). Similarly, Rule 41(b) permits the court to involuntarily dismiss an action
20 when a litigant fails to prosecute an action or fails to comply with other Rules or with a court
21 order. *See* Fed. R. Civ. P. 41(b); *see Applied Underwriters v. Lichtenegger*, 913 F.3d 884, 889
22 (9th Cir. 2019) (citations omitted); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d
23 683, 689 (9th Cir. 2005) (“[T]he consensus among our sister circuits, with which we agree, is that
24 courts may dismiss under Rule 41(b) *sua sponte*, at least under certain circumstances.”). Local
25 Rule 110 also permits the court to impose sanctions on a party who fails to comply with the
26 court’s Rules or any order of court.

27 Although involuntary dismissal is a harsh penalty, it “is incumbent upon the Court to
28 manage its docket without being subject to routine noncompliance of litigants.” *Pagtalunan v.*

1 *Galaza*, 291 F.3d 639, 642 (9th Cir. 2002). Before dismissing an action under Fed. R. Civ. P. 41,
2 the court *must* consider: (1) the public interest in expeditious resolution of litigation; (2) the
3 court’s need to manage a docket; (3) the risk of prejudice to defendant; (4) public policy favoring
4 disposition on the merits; (5) the availability of less drastic sanctions. *See Applied Underwriters*,
5 913 F.3d at 889 (noting court that these five factors “must” be analyzed before a Rule 41
6 involuntarily dismissal) (emphasis added); *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th
7 Cir. 1987) (reviewing five factors and independently reviewing the record because district court
8 did not make finding as to each); *but see Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th
9 Cir. 2000) (listing the same, but noting the court *need not* make explicit findings as to each)
10 (emphasis added); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (affirming dismissal of
11 *pro se* 1983 action when plaintiff did not amend caption to remove “*et al*” as the court directed
12 and reiterating that an explicit finding of each factor is not required by the district court).

13 III. ANALYSIS

14 Plaintiff failed to comply with the Court’s August 20, 2019 order directing him to return
15 completed service so that service could be effectuated in a timely fashion as mandated by Fed. R.
16 Civ. P. 4. After the court’s order to show cause was returned as undeliverable on July 9, 2020,
17 the court directed the clerk to re-serve the court’s June 12, 2020 show cause order on plaintiff on
18 December 4, 2020 and reset the deadline for thirty (30) days. (*See* docket entry dated December
19 4, 2020). Thus, plaintiff had a second opportunity to comply to show cause why the case should
20 not be dismissed under Fed. R. Civ. P. Rule 4(m) but failed to respond. Thus, the undersigned
21 finds the case subject to dismissal under Fed. R. Civ. P. 4(m).

22 Alternatively, the undersigned considers each of the above-stated factors and concludes
23 dismissal is warranted in this case under Fed. R. Civ. P. 4(b). The expeditious resolution of
24 litigation is deemed to be in the public interest, satisfying the first factor. *Yourish v. California*
25 *Amplifier*, 191 F.3d 983, 990–91 (9th Cir. 1999). Turning to the second factor, the court’s need to
26 efficiently manage its docket cannot be overstated. This court has “one of the heaviest caseloads
27 in the nation,” and due to unfilled judicial vacancies, which is further exacerbated by the Covid-
28 19 pandemic, operates under a declared judicial emergency. *See* Amended Standing Order in

1 Light of Ongoing Judicial Emergency in the Eastern District of California. The court's time is
2 better spent on its other matters than needlessly consumed managing a case with a recalcitrant
3 litigant. Indeed, "trial courts do not have time to waste on multiple failures by aspiring litigants
4 to follow the rules and requirements of our courts." *Pagtalunan*, 291 F.3d at 644 (Trott, J.,
5 concurring in affirmance of district court's involuntary dismissal with prejudice of habeas petition
6 where petitioner failed to timely respond to court order and noting "the weight of the docket-
7 managing factor depends upon the size and load of the docket, and those in the best position to
8 know what that is are our beleaguered trial judges."). Delays inevitably have the inherent risk
9 that evidence will become stale or witnesses' memories will fade or be unavailable and can
10 prejudice a defendant, thereby satisfying the third factor. *See Sibron v. New York*, 392 U.S. 40,
11 57 (1968). The court has already attempted a less drastic option by issuing a second order to
12 show cause, to which plaintiff failed to respond. Additionally, the instant dismissal is a dismissal
13 *without* prejudice, which is a lesser sanction than a dismissal with prejudice, thereby addressing
14 the fifth factor.

15 Plaintiff failed to comply with the court's August 20, 2019 order to return the completed
16 service. (Doc. No. 15). Plaintiff has not served defendant despite having over 18 months to do so
17 and being warned that failure to do would be cause for dismissal. After considering the factors
18 set forth *supra* and binding case law, the undersigned alternatively recommends dismissal,
19 without prejudice, under Fed. R. Civ. P. 41(b) and Local Rule 110.

20 Accordingly, it is **RECOMMENDED**:

21 This case be dismissed without prejudice under Fed. R. Civ. P. 4(m) and/or Fed. R. Civ. P.
22 41(b) and/or Local Rule 110.


23 NOTICE TO PARTIES

24 These findings and recommendations will be submitted to the United States district judge
25 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
26 (14) days after being served with these findings and recommendations, a party may file written
27 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
28 Findings and Recommendations." Parties are advised that failure to file objections within the

1 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
2 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

3
4 IT IS SO ORDERED.

5 Dated: April 28, 2021


6 HELENA M. BARCH-KUCHTA
7 UNITED STATES MAGISTRATE JUDGE

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