

1 whereabouts of this defendant, without success.

2 On November 6, 2012, the first amended complaint was ordered served upon defendants
3 including Boughn. See Order at ECF No. 17. Thereafter, a waiver of summons upon defendant
4 Boughn was erroneously docketed by clerical staff as executed on August 7, 2013. ECF No. 44.
5 Upon the court's review, it was evident that service by mail and personal service upon Boughn
6 had proved unsuccessful. Accordingly, the docket entry was corrected and, by order filed on
7 January 3, 2014, defendants' counsel was directed to query the California Department of
8 Corrections and Rehabilitation (CDCR) in order to determine the whereabouts of defendant
9 Boughn. ECF No. 79. In a timely response filed on January 9, 2014, defendants' counsel
10 informed the court that defendant Boughn had never been employed by CDCR but had, during
11 the relevant period, worked for a registry service which had a contract with CDCR to provide
12 inmate medical services. ECF No. 80. Counsel also provided the last known business address for
13 Boughn at the registry. Id.

14 On January 17, 2014, the court directed the U.S. Marshal to serve defendant Boughn at the
15 address provided by CDCR. ECF No. 83 (Order filed on January 21, 2014). On June 17, 2014,
16 the summons was returned unexecuted. ECF No. 105. The summons indicates that after mailing
17 was unsuccessful, a further effort to obtain an accurate address was made, upon which both
18 service by mail and personal service were attempted, equally without success. Id.; see also ECF
19 No. 107. By order filed on June 30, 2014, this court then directed plaintiff to show cause why
20 defendant Boughn should not be dismissed pursuant to Federal Rule of Civil Procedure 4(m).
21 ECF No. 107. Plaintiff's response to the show cause order was signed on July 24, 2014. ECF
22 No. 113.

23 II. Standards

24 Rule 4(m) of the Federal Rules of Civil Procedure sets forth:

25 If a defendant is not served within 120 days after the complaint is
26 filed, the court--on motion or on its own after notice to the plaintiff--
27 must dismiss the action without prejudice against that defendant or
28 order that service be made within a specified time. But if the
plaintiff shows good cause for the failure, the court must extend the
time for service for an appropriate period. This subdivision (m)
does not apply to service in a foreign country under Rule 4(f) or

1 4(j)(1).

2 “Rule 4(m), as amended in 1993, *requires* a district court to grant an extension of time
3 when the plaintiff shows good cause for the delay.” Efaw v. Williams, 473 F.3d 1038, 1040 (9th
4 Cir. 2007) (emphasis in original) (citing Mann v. American Airlines, 324 F.3d 1088, 1091 n. 2);
5 In re Sheehan, 253 F.3d 507, 512 (9th Cir.2001). The burden to show good cause is on “the party
6 on whose behalf service was required.” Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir.
7 1985). Evasion of service would obviously constitute good cause for a delay in service. Wei.
8 763 F.2d at 371; Intrade Industries, Inc. v. Foreign Cargo Mgmt. Corp., No. 1:07-cv11893 AWI
9 GSA, 2008 WL 5397495, at *1 (E.D. Cal. Dec.24, 2008) (citing Hendry v. Schneider, 116 F.3d
10 446, 449 (10th Cir.1997)). Plaintiff may also show good cause where service has been attempted
11 but not yet completed upon a defendant, where plaintiff was confused about the requirements for
12 service of process, or where service was prevented because of events outside of his control. Id.
13 (applying the good cause standard in Rule 4(j) [replaced, as noted above, by Rule 4(m) in 1993]);
14 Mateo v. M/S KISO, 805 F.Supp. 792, 795 (N.D.Cal.1992) (abrogated on other grounds by
15 Brockmeyer v. May, 361 F.3d 1222 (9th Cir. 2004) (in turn superseded by Brockmeyer v. May,
16 383 F.3d 798 (9th Cir. 2004)). Whether good cause exists is determined on a case by case basis.
17 In re Sheehan, 253 F.3d at 512.

18 III. Discussion

19 In plaintiff’s response to the show cause order, he explains that he thought defendant
20 Boughn would be served after the court directed the U.S. Marshal to serve defendant Boughn at
21 the address provided by defendants’ counsel upon inquiry with CDCR. ECF No. 113. Plaintiff
22 maintains that, since having learned five months later that service of the summons and complaint
23 had not been completed, he has not had sufficient time to pursue “other legal alternatives to
24 effectuate service upon defendant R. Boughn.” Id. at 3. Plaintiff does not specify what
25 alternatives he contemplates.

26 In support of his request for more time to serve defendant Boughn, plaintiff cites two out-
27 of-circuit cases, Robinson v. America’s Best Contacts and Eyeglasses, 876 F.2d 596 (7th Cir.
28 1989), and Caterbone v. Lancaster County Prison, 293 Fed. Appx. 867 (3rd Cir. 2008)

1 (unpublished). ECF No. 113 at 3. These cases are not on point. The court in Robinson found
2 that the district court had abused its discretion by dismissing a pro se complaint for failure to
3 serve the summons and complaint within the applicable 120-day period. The ruling turned on
4 calculation of the 120 period where in forma pauperis status was denied and a new time fixed for
5 the payment of filing fees. That issue has no bearing on the present case. Here there can be no
6 dispute that Boughn was not served within 120 days under any calculation of the deadline.

7 In Caterbone, the court found that plaintiff's case had improperly dismissed for having
8 failed to serve process because an in forma pauperis litigant is not responsible for service of
9 process. "Once Caterbone filed his amended complaint, the District Court was obligated to
10 appoint a United States marshal to effect service. Fed.R.Civ.P. 4(c)(3)." 293 F. Appx. at 871. In
11 this case, the court did not fail to direct service by the U.S. Marshal. The problem here that the
12 U.S. Marshal has been unsuccessful in serving Boughn because neither plaintiff nor defendants
13 have been able to provide an accurate address.

14 On September 21, 2012, the first amended complaint was found appropriate for service
15 upon defendant Boughn (as well as twelve other defendants).² ECF No. 15. Despite the orders of
16 the court and repeated attempts at service by the U.S. Marshal, Boughn remains unserved nearly
17 two years later. Although plaintiff states that he needs more time to locate this defendant, he has
18 provided no information as to how he intends to uncover an accurate address for service.
19 Plaintiff's request for a subpoena to the Warden of his institution does not support good cause
20 under Rule 4(m), because there is no reason to suspect that the Warden has information about the
21 present location of an individual who was never a CDCR employee. Moreover, it appears that all
22 information known to CDCR has been exhausted without Boughn's current location being
23 determined. Accordingly, there is good cause neither for issuance of the subpoena nor for an
24 extension of the time to serve Boughn.

25 Even absent a showing of good cause, courts have discretion under Rule 4(m) to extend
26 the time for service. In re Sheehan, 253 F.3d at 513. There is no specific test that a court must

27 ² By separate order, also filed on September 21, 2012, three defendants were dismissed. ECF No.
28 14.

1 apply in deciding whether to exercise this discretion . Id. The court may extend the time for
2 service for “excusable neglect.” Id. at 514. In this instance, however, the delay in service is not
3 attributable to the plaintiff’s neglect, excusable or otherwise. On the record before the court, the
4 undersigned finds that an extension of time for service would be futile, and the equally futile
5 proposed subpoena does not change that fact. Accordingly, there is no basis for a discretionary
6 extension of time.

7 Accordingly, IT IS ORDERED that plaintiff’s motion for an order granting service of a
8 subpoena duces tecum by the U.S. Marshal upon a non-party (ECF No. 82) is DENIED;

9 IT IS RECOMMENDED that defendant Boughn be DISMISSED from this action
10 pursuant to Federal Rule of Civil Procedure 4(m).

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
16 objections shall be filed and served within fourteen days after service of the objections. The
17 parties are advised that failure to file objections within the specified time may waive the right to
18 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: September 11, 2014

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21 ALLISON CLAIRE
22 UNITED STATES MAGISTRATE JUDGE
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