

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6 ROBERT AMATRONE, et al.,

7 Plaintiffs,

8 v.

9 RANDY CHAMPION, et al.,

10 Defendants.

Case No. 15-cv-01356-JST

**ORDER DISMISSING WITHOUT  
PREJUDICE DEFENDANTS FOR  
FAILURE TO EFFECT SERVICE**

Re: ECF Nos. 119, 123

11  
12 Before the Court is Plaintiffs' Response, ECF No. 123, to an Order to Show Cause as to  
13 why several defendants in this case should not be dismissed from the case due to Plaintiffs' failure  
14 to serve them pursuant to Fed. R. Civ. P. 4(m), ECF No. 119.<sup>1</sup>

15 The Order to Show Cause explained that Plaintiffs' operative Second Amended Complaint  
16 was filed on October 11, 2015, and therefore under Federal Rule of Civil Procedure 4(m), all  
17 defendants were required to be served by February 8, 2016. ECF No. 119 at 1. The Order to  
18 Show Cause, which was issued on February 12, 2016, asked Plaintiffs to file a response as to why  
19 the remaining defendants who had not yet been served should not be dismissed from the case. Id.

20 The Court has reviewed Plaintiffs' Response, filed February 21, 2016, as well as various  
21 other documents on the docket related to service. See ECF Nos. 123, 121, 117, 114. Plaintiffs

22  
23 <sup>1</sup> The Court notes that Plaintiffs have filed a Notice of Appeal, ECF No. 124, regarding the  
24 Court's prior Order Granting Motions to Dismiss, ECF No. 122. While the filing of a Notice of  
25 Appeal ordinarily divests the district court of jurisdiction, it does not do so if the Notice of Appeal  
26 is defective because it refers to a non-appealable order. Nascimento v. Dummer, 508 F.3d 905,  
27 908 (9th Cir. 2007) (citation omitted); Ruby v. Sec'y of U.S. Navy, 365 F.3d 385, 389 (9th Cir.  
28 1966) (en banc). Because "[a]n order which dismisses a complaint without expressly dismissing  
the action is not, except under special circumstances, an appealable order," Ruby, 365 F.2d at 387,  
Plaintiffs' Notice of Appeal does not divest this court of jurisdiction. In any event, the substance  
of the present order does not appear to affect the order from which Plaintiffs filed their Notice of  
Appeal. See Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) ("In  
general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the  
district court of control over those aspects of the case involved in the appeal." (emphasis added)).

1 assert that defendants Jerry Moore, Officer C. Smith, Rob Marshall, Vic Massenkoff, and Don  
2 Hendershot “all have ducked direct service, and or disallowed attorneys of record to accept  
3 substituted service.” ECF No. 123 at 1.

4 In their supporting affidavit, however, Plaintiffs state that they have attempted to serve the  
5 above defendants by delivering copies to attorneys for various other parties or other unrelated  
6 entites. Such actions are not proper attempts at service, and Plaintiffs do not explain why they  
7 should be considered as such. For example, Plaintiffs assert that that they attempted to serve Mr.  
8 Marshall by delivering a copy of the complaint to Kevin Osterberg, who is counsel for the San  
9 Ramon Valley Fire District, a party that has already been dismissed from the case. ECF No. 123  
10 at 5. Likewise, Plaintiffs state that they attempted to serve Mr. Massenkoff and Mr. Hendershot  
11 through delivery to Todd Boley, who is counsel for Contra Costa County and other defendants in  
12 the case. ECF No. 123 at 6. They did so even after receiving e-mail correspondence, which was  
13 submitted to the Court, in which Mr. Boley indicated he was not authorized to accept service on  
14 behalf of the additional defendants. ECF No. 117-1. Plaintiffs also assert that they attempted  
15 “substitute service” on Mr. Massenkoff and Mr. Hendershot by delivering copies to the Contra  
16 Costa County District Attorney’s Office on December 29, 2015. ECF No. 123 at 6. However, the  
17 Plaintiffs’ prior February 8, 2016 filing indicates that this attempted delivery by courier on  
18 December 29 was in fact refused. See ECF No. 114. Lastly, Plaintiffs contend they attempted  
19 service on Officer C. Smith through delivery to an employee of the Antitrust Department of the  
20 Office of the U.S. Attorney General. See ECF No. 123 at 5, ECF No. 114 at 4.

21 Under Rule 4(m), this Court is required to dismiss defendants who have not been timely  
22 served unless good cause has been shown for the delay. See Fed. R. Civ. P. 4(m) (“If a defendant  
23 is not served within 90 days after the complaint, the court . . . must dismiss the action without  
24 prejudice against that defendant.” (emphasis added); see also Wei v. State of Hawaii, 763 F.2d  
25 370, 372 (9th Cir. 1985) (“By providing that district courts ‘shall’ dismiss a complaint served over  
26 120 days after its filing unless service took place in a foreign country or good cause for untimely  
27 service has been shown, Congress mandated dismissal in the circumstances of this case.”).  
28 Having reviewed the materials filed by Plaintiffs, the Court concludes that Plaintiffs have not

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

shown good cause. Accordingly, defendants Jerry Moore, Officer C. Smith, Rob Marshall, Vic Massenkoff, and Don Hendershot are dismissed from this case without prejudice.<sup>2</sup>

IT IS SO ORDERED.

Dated: February 26, 2016

  
\_\_\_\_\_  
JON S. TIGAR  
United States District Judge

---

<sup>2</sup> Plaintiffs also assert that they “forsee [sic] an additional 9 defendants when discovery determines identiy [sic] and an additional amended complaint.” ECF No. 123 at 3. Plaintiffs are reminded that they may amend their pleadings only with the opposing parties’ written consent or the Court’s leave. Fed. R. Civ. P. 15(a)(2).