

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

CRAIG CUNNINGHAM)	
Plaintiff,)	
)	
v.)	Civil No. 3:16-cv-222
)	Judge Trauger
SHOUTPOINT, INC., et al.)	Magistrate Judge Frensley
Defendants.)	

REPORT AND RECOMMENDATION

Pending before the court is Defendant Amy Montes’s Motion to Dismiss and Motion to Strike Plaintiff’s Third Amended Complaint (Docket No. 120) and supporting memorandum of law (Docket No. 121); Defendant Michael Montes’s Motion to Dismiss Third Amended Complaint (Docket No. 123) and supporting memorandum of law (Docket No. 124); Defendants and Tollfreezone.com, Inc.’s, Michael Montes and Amy Montes Motion for Summary Judgment (Docket No. 129) and supporting memorandum (Docket No. 130). While the Plaintiff has not responded to these dispositive motions, also pending is the Plaintiff’s Motion to Dismiss with Prejudice all claims against Michael Montes, Amy Montes and Tollfreezone.com, Inc. Docket No. 134. For the reasons set forth herein, the undersigned recommends that the court grant the Plaintiff’s Motion to Dismiss Defendants Michael Montes, Amy Montes and Tollfreezone.com, Inc. with prejudice and deny the Motions to Dismiss and Motion for Summary Judgment as moot. The undersigned further recommends that the court dismiss the remaining Defendants, Jeff Brian Zink, Mydataguys.com, LLC, PODmusicgear.com, Inc. and emailmyvmail.com, Inc. for failure to prosecute.

Plaintiff filed his initial Complaint in this matter on February 16, 2016. Docket No. 1. That Complaint named Defendants, Michael Montes, Tollfreezone.com, Inc. and Jeff Brian Zink as Defendants, among others. *Id.* On August 15, 2016, Plaintiff filed his First Amended Complaint adding as Defendants, Mydataguys.com, LLC, PODmusicgear.com, Inc. and emailmyvmail.com, Inc. Docket No. 43.


On October 23, 2017, Plaintiff filed another Amended Complaint striking several previously dismissed Defendants and adding Amy Louise Montes as a Defendant. Docket No. 113. Defendants Amy Montes, Michael Montes and Tollfreezone.com, Inc. filed the pending Motions to Dismiss and Motion for Summary Judgment. Docket Nos. 120 and 129. While those motions were pending, the Plaintiff filed the instant Motion to Dismiss those Defendants with prejudice. Docket No. 134.

The undersigned recommends that the Plaintiff's Motion to Dismiss with prejudice as to Defendants Michael Montes, Amy Montes and Tollfreezone.com, Inc. (Docket No. 134) should be GRANTED. As a result of the recommendation that the Motion to Dismiss with prejudice be GRANTED, the undersigned further recommends that the Motions to Dismiss (Docket No. 120, 123) as well as the Motion for Summary Judgment (Docket No. 129) filed by these Defendants be DENIED as moot.

This matter is set for bench trial on July 17, 2018. Docket No. 109. Defendant Jeff Brian Zink was named in the original Complaint in this matter filed on February 16, 2016. Docket No. 1. Plaintiff sought entry of default as to Defendant Zink which was denied by the clerk on October 31, 2016. Docket No. 64. In the denial of the entry of default the clerk found that Plaintiff had failed to perfect service on Mr. Zink. *Id.* Despite this finding, it does not appear that Plaintiff ever effectuated service on Mr. Zink. Defendants Mydataguys.com, LLC,

PODmusicgear.com, Inc. and emailmyvmail.com, Inc. were named in the Amended Complaint filed on August 15, 2016. Docket No. 43. It does not appear that Plaintiff has effected service as to these Defendants either. Plaintiff is not an unsophisticated litigant and is aware of the necessity of securing service on Defendants. Nonetheless, he has failed to do so in the time required pursuant to Federal Rules of Civil Procedure 4(m). For these reasons, the undersigned recommends that the remaining Defendants in this action who have not previously been dismissed and for whom Plaintiff has not obtained service despite having named them in his Complaint almost two years ago should be dismissed for failure to prosecute.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has fourteen (14) days after service of this Report and Recommendation in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have fourteen (14) days after service of any objections filed to this Report in which to file any response to said objections. Failure to file specific objections within fourteen (14) days of service of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *See Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed. 2d 435 (1985), *reh'g denied*, 474 U.S. 1111 (1986); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.


JEFFERY S. FRENSLEY
U. S. Magistrate Judge