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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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JUDY MIKOVITS,)
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Plaintiff,)
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vs.)
)
)
THE WHITTEMORE PETERSON)
INSTITUTE,)
)
)
Defendant.)

3:15-cv-00409-RCJ-WGC

ORDER

Plaintiff alleges that Defendant submitted false claims to the United States and retaliated against her for reporting this conduct. She raises one *qui tam* count under the Federal False Claims Act (FFCA) as relator for the United States and another count for retaliation. Because the United States shows a legitimate purpose rationally related to dismissal, the Court dismisses the *qui tam* cause of action with prejudice as to the Plaintiff. Additionally, Plaintiff has failed to file proof of service in violation of Federal Rule of Civil Procedure 4(m) and this Court’s Order (ECF No. 34), so the Court dismisses the retaliation claim without prejudice and closes the case.

BACKGROUND

Plaintiff raised one claim under the FFCA based on Defendant allegedly submitting false claims to the United States and one claim based on Defendant allegedly retaliating against her for reporting this conduct. She alleged that Defendant submitted false claims to the United States,

1 based in part on Plaintiff's research, to acquire federal grants. She further contends that she
2 informed the people in charge of the institution, but Defendant terminated her employment and
3 falsely accused her of theft resulting in government searches and imprisonment. The Court stayed
4 the case for Plaintiff to ask the United States to intervene in this action, but the Government
5 declined.¹

6 Subsequently, the Court ordered the case unsealed and directed Plaintiff to file proof of
7 service. (ECF No. 28.) Plaintiff asked for a clarification of that order, specifically when the
8 deadline was to file service, since the Court did not explicitly provide one. (ECF No. 29.) The
9 Court stated that it intended the default deadline under Federal Rule of Civil Procedure 4(m), which
10 allows for ninety days. (ECF No. 30.) The service of that Order was returned undeliverable. (ECF
11 No. 31.) Then, the Government moved for dismissal and the Court issued a new Order directing
12 Plaintiff to file proof of service by November 25, 2019 and to respond to the Government motion.
13 (ECF No. 34.) There the Court noted that this was the "final opportunity" to provide proof of
14 service and threatened Plaintiff with dismissal for failure to comply. (*Id.* at 2:7-8.) Plaintiff
15 confirmed receipt of this Order (ECF No. 34) by responding to the Government's motion, but she
16 still has not filed proof of service. (ECF No. 37.)

17 MOTION TO DISMISS

18 Turning first to the *qui tam* claim, the Court finds that the Government has a legitimate
19 purpose rationally related to dismissal. Thus, the Court dismisses this claim.
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22 ¹ Plaintiff later filed a "Criminal Complaint" alleging that Defendant is criminally liable for the
23 same conduct. In a civil case, when a plaintiff files a new complaint "[t]he amended complaint
24 supersedes the original, the latter being treated thereafter as non-existent." *Lacey v. Maricopa Cty.*,
693 F.3d 896, 925 (9th Cir. 2012) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)). Plaintiff
does not have authority to relate criminal cases, so, for the Plaintiff's benefit, the Court will not
interpret the criminal complaint as an amendment that replaces the operative complaint.

1 **A. Legal Standard**

2 The FFCA allows for the United States to move for dismissal of a *qui tam* case over the
3 objections of the relator if the court allows the relator to be heard on the motion. 28 U.S.C.
4 § 3730(c)(2)(A). A court conducts a burden-shifting analysis to determine if dismissal is proper
5 under Section 3730: first the Government must show “(1) identification of a valid government
6 purpose; and (2) a rational relation between dismissal and accomplishment of the purpose.” *U.S.*
7 *ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)
8 (quoting *U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341
9 (E.D. Cal. 1995)). If the Government satisfies this burden, then the relator must show that the
10 dismissal would be “fraudulent, arbitrary and capricious, or illegal.” *Id.*

11 **B. Analysis**

12 The Government satisfied its initial burden. Plaintiff is *pro se* and has failed to file proof
13 of service in violation of the rules and the Court’s orders. Both of these facts independently merit
14 dismissal of the claim. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1127 (9th
15 Cir. 2007) (holding that a plaintiff cannot prosecute a *qui tam* action *pro se*); *Yourish v. California*
16 *Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (holding that a court may *sua sponte* dismiss a case
17 under Federal Rule of Civil Procedure 41(b) for failure to comply with a court order). The
18 Government expresses concerns that allowing Plaintiff to proceed under these circumstances could
19 create a binding ruling against any meritorious claims that the Government may have. The Court
20 agrees—this is a legitimate government purpose rationally related to dismissal.

21 Plaintiff fails to meet her burden against dismissal. In her response, Plaintiff makes no
22 allegation that the dismissal would be fraudulent, arbitrary and capricious, or illegal, instead, she
23 makes two points that are irrelevant. First, Plaintiff complains that she did not initially receive
24 service of prior orders and the motion to dismiss. The Court noticed this problem and fixed it on

1 its own accord by ordering service to Plaintiff. This issue has no bearing on dismissal. Second, she
2 contends that she adequately pled the causes of action and that the Attorney's General's Office has
3 "mounds of evidence" to prove her claims. Again, this claim is not relevant. Accordingly, the
4 Court grants the Government's motion.

5 When a court grants dismissal against a relator under 28 U.S.C. § 3730(c)(2)(A), the
6 appropriate procedure is to grant dismissal with prejudice as to the relator and dismissal without
7 prejudice as to the Government. *See* 28 U.S.C. § 3730(c)(1) ("[The Government] . . . shall not be
8 bound by an act of the person bringing the action."). Accordingly, the Court dismisses the *qui tam*
9 claim with prejudice to the Plaintiff and without prejudice to Government.

10 **FAILURE TO FILE PROOF OF SERVICE**

11 Turning next to the retaliation claim, the Court dismisses this claim without prejudice for
12 failing to file proof of service in violation of Federal Rule of Civil Procedure 4(m) and the Court's
13 Order (ECF No. 30).

14 **A. Legal Standard**

15 If a plaintiff fails to file proof of service after ninety days of filing a complaint, then a court
16 must dismiss his case without prejudice unless he can show good cause. Fed. R. Civ. P. 4(m). A
17 court analyzing good cause looks to whether the defendant had actual knowledge and whether
18 either party would suffer prejudice. *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001).

19 **B. Analysis**

20 In August 2018, the Court ordered Plaintiff to serve Defendant. (ECF No. 28.) Plaintiff
21 confirmed receipt of this order by requesting clarification of it the following October. (ECF No.
22 29.) A year later, the Court ordered Plaintiff to file proof of service by November 25 and respond
23 to the Government's motion or face dismissal of the case. Plaintiff confirmed receipt of this order

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1 by responding to the Government's motion. (ECF No. 37.) In spite of these orders, Plaintiff has
2 never filed proof of service. Thus, dismissal is proper unless Plaintiff demonstrates good cause.

3 Plaintiff has not filed anything in response to the Court's latest mandate for service.
4 Therefore, she has not shown how the factors would favor a finding of good cause. There is nothing
5 in the record to suggest that Defendant is aware of this case or that dismissal would prejudice
6 Defendant. Plaintiff does not argue that dismissal would severely prejudice her; however, since
7 the case arises from events that occurred before this case started in 2014 her claims may be time-
8 barred. Nonetheless, Plaintiff has failed to meet her burden for good cause. The Court dismisses
9 her claim for retaliation and closed the case.

10 **CONCLUSION**

11 IT IS HEREBY ORDERED that Motion to Dismiss (ECF No. 33) is GRANTED.

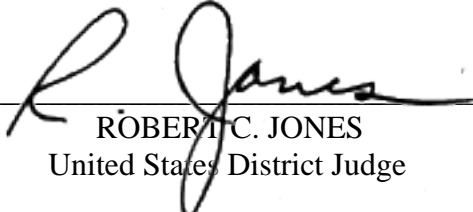
12 IT IS FURTHER ORDERED that the *qui tam* claim brought on behalf of the United States
13 is DISMISSED WITH PREJUDICE as to Plaintiff and DISMISSED WITHOUT PREJUDICE as
14 to the United States.

15 IT IS FURTHER ORDERED that the claim for retaliation is DISMISSED WITHOUT
16 PREJUDICE.

17 IT IS FURTHER ORDERED that the Clerk of the Court shall close this case.

18 IT IS SO ORDERED.

19 Dated March 2, 2020.

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21 _____
22 ROBERT C. JONES
23 United States District Judge
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